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# Interdependence and Choice in Distributive Justice: The Welfare Conundrum

Lee Anne Fennell

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# ARTICLES

## INTERDEPENDENCE AND CHOICE IN DISTRIBUTIVE JUSTICE: THE WELFARE CONUNDRUM

LEE ANNE FENNELL\*

This Article presents a theoretical model for analyzing welfare policy choices, a model that seeks both to explain the puzzling persistence of welfare in the face of widespread dissatisfaction with it, and to provide a reasoned basis for making more satisfactory policy choices. Drawing on game theory, the author postulates that the poor and the nonpoor are faced with a strategic dilemma as a result of their shared stake in the alleviation of poverty. The author's analysis of this dilemma suggests that the nonpoor react rationally by providing assistance to the poor, but that they are dissatisfied with this outcome insofar as it imposes costs on them. Indeed, the author contends that some of the most troubling of these costs result from decisions made by the poor in reaction to the nonpoor's decision to provide assistance.

Having identified the strategic dilemma or "game" that results in society's grudging provision of welfare, the author then explores ways in which society can reduce the costs associated with welfare by changing the way the game is perceived by the poor, the nonpoor, or both. The impact of rhetoric and program design on these perceptions is examined in the context of past, present, and proposed policy alternatives. The author concludes by outlining a possible poverty alleviation strategy which, by taking the poor and the nonpoor outside the present strategic dilemma, would eliminate some of the most problematic features of welfare policy.

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## I. INTRODUCTION

Welfare is a longstanding feature of our social and political landscape,<sup>1</sup> yet it remains a uniquely puzzling piece of social policy. Society grudgingly spends money to transfer holdings from the more well-off to the less well-off,<sup>2</sup> yet it is not clear why, at a philosophical level, these transfers are made.<sup>3</sup> Far from embodying any coherent theory of distributive justice, the welfare system represents an uneasy compromise, acceptable to almost no one,<sup>4</sup> forged between clashing and utterly incompatible intuitive ideas of justice and rights.<sup>5</sup> Nor have policymakers articulated with clarity what results are expected or desired

1. See, e.g., MICHAEL B. KATZ, *IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA*, at ix (1986) ("American welfare practice has been constructed in layers deposited during the last two centuries."); Jacobus tenBroek & Richard B. Wilson, *Public Assistance and Social Insurance—A Normative Evaluation*, 1 *UCLA L. REV.* 237, 297 (1954) ("Public responsibility for disadvantaged persons and groups may properly be said to have begun with the Elizabethan Poor Laws in the Sixteenth Century.").

In this Article, I use the term "welfare" to mean programs such as Aid to Families with Dependent Children (AFDC), which are directed at able-bodied, working-age adults and their dependents. Other programs, such as Social Security, which are consciously redistributive but are not commonly thought of as "welfare," are not encompassed within my usage of the term. See, e.g., DAVID T. ELLWOOD, *POOR SUPPORT: POVERTY IN THE AMERICAN FAMILY* 5 (1988) ("Welfare, as the public uses that term . . . means cash, food, or housing assistance to healthy nonaged persons with low incomes.").

2. In this Article, the terms "more well-off" and "less well-off" are used interchangeably with the terms "nonpoor" and "poor," respectively. These terms are used to designate relative levels of material well-being, with "less well-off" or "poor" individuals falling below the level of material well-being that is generally necessary for subsistence and meaningful participation in our society.

3. See, e.g., ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 232 (1974) ("The legitimacy of altering social institutions to achieve greater equality of material condition is, though often assumed, rarely argued for."), quoted in CHARLES MURRAY, *LOSING GROUND: AMERICAN SOCIAL POLICY 1950-1980*, at 196 (1984).

4. See, e.g., ELLWOOD, *supra* note 1, at 4 ("Everyone hates welfare. Conservatives hate it because they see welfare as a narcotic that destroys the energy and determination of people who already are suffering from a shortage of such qualities . . . . Liberals hate it because of the way it treats people."); KATZ, *supra* note 1, at ix.

5. See, e.g., ELLWOOD, *supra* note 1, at 19 ("[P]overty policy must always be an awkward compromise among competing values and perspectives."); JOEL F. HANDLER & YEHESKEL HASENELD, *THE MORAL CONSTRUCTION OF POVERTY: WELFARE REFORM IN AMERICA* 30 (1991) (noting the "[c]ontending ideologies embedded in welfare policy"); Robert P. Burns, *Rawls and the Principles of Welfare Law*, 83 *NW. U. L. REV.* 184, 237 (1989) (noting that welfare "is a political compromise among conflicting notions of justice").

from welfare expenditures.<sup>6</sup> As a result, there is no obvious way of measuring how well, or even if, a program is working.<sup>7</sup>

Despite the lack of articulated rationales or goals, the welfare system has been widely disparaged as a failure, or worse, as actually counterproductive.<sup>8</sup> The current unpopularity and perceived futility of the present welfare system have touched off a re-evaluation of welfare policy and have spawned renewed efforts at welfare reform.<sup>9</sup> Meanwhile, both inequality of income and absolute poverty have continued to climb,<sup>10</sup> with childhood poverty becoming increasingly prevalent.<sup>11</sup>

6. See, e.g., ELLWOOD, *supra* note 1, at 44 (“[W]elfare programs like AFDC cannot decide what their goals should be.”); THEODORE R. MARMOR ET AL., *AMERICA’S MISUNDERSTOOD WELFARE STATE: PERSISTENT MYTHS, ENDURING REALITIES* 43 (1990) (“Social welfare programs are enormously complex amalgams of goals and techniques . . .”).

7. See, e.g., CHRISTOPHER JENCKS, *RETHINKING SOCIAL POLICY: RACE, POVERTY, AND THE UNDERCLASS* 70-87 (1992). Jencks contests Charles Murray’s assertions in *Losing Ground*, *supra* note 3, that the poor have been made worse off by welfare, but observes that a distinction must be drawn “between the material condition of the poor and their social, cultural, and moral condition.” JENCKS, *supra*, at 71. See also MARMOR ET AL., *supra* note 6, at 222 (criticizing those who label social welfare programs “failures” based on the “mistaken assumption that social welfare programs are designed to pursue a single purpose”).

8. See, e.g., Nicholas Lemann, *In Quest of a Great Society*, WASH. POST, May 10, 1992, at C1 (“In policy-making circles in Washington, the word ‘failed’ has become permanently grafted onto the War on Poverty and the Great Society. The general mental picture is one of a stupendous concatenation of wacky liberal ideas that were launched for years, one after another, with unlimited funding, and that not only didn’t work, but actually made things worse by creating today’s inner-city ghetto class.”).

9. For example, President Clinton has proposed a two-year limit on welfare benefits, with the requirement that recipients find a job (or be provided one by the government) after that period has elapsed. See Ruth Marcus, *President Pledges to Reform Welfare: Jobs Would Be Required After 2 Years*, WASH. POST, Feb. 3, 1993, at A1. Wisconsin has received approval to begin experimenting with a program that is similarly based on a two-year welfare benefit limit. Spencer Rich, *Clinton Gives Wisconsin Go-Ahead on Two-Year Welfare Limit*, WASH. POST, Nov. 2, 1993, at A6. Other states have also been active in adopting various welfare reform measures. See, e.g., Will Marshall & Elaine C. Kamarck, *Replacing Welfare With Work*, in *MANDATE FOR CHANGE* 217, 226-28 (Will Marshall & Martin Schram eds., 1993) (discussing state programs).

10. See, e.g., MICKEY KAUS, *THE END OF EQUALITY* 29 (1992) (describing trend of increasing income inequality); *Ranks of Poverty Swell by 2 Million*, WASH. POST, Sept. 4, 1992, at A1 (reporting Census Bureau figures). The income distribution in the United States is more unequal “than in most other Western nations, both before and after taxes.” ROBERT KUTTNER, *THE ECONOMIC ILLUSION: FALSE CHOICES BETWEEN PROSPERITY AND SOCIAL JUSTICE* 261 (1984).

11. According to 1990 U.S. Census Bureau data, one-fifth of all children live below the poverty line, with children under age 18 constituting 40% of the poor. U.S. BUREAU OF THE CENSUS, *POVERTY IN THE UNITED STATES: 1990*, at 60 (1991), cited in

Welfare policy reform cannot coherently respond to perceived shortcomings in the welfare system unless it begins with a principled understanding of the nature and purpose of society's redistributive efforts and the tensions that attend those efforts. A theoretic approach capable of unraveling those tensions is necessary to arrive at such an understanding, but none of the major theories of distributive justice meaningfully address the full spectrum of interests underpinning our society's troubled yet tenacious attachment to welfare.<sup>12</sup>

What is needed is a richer model for understanding the interests and concerns which underlie the widespread disapproval of welfare, as well as those interests that explain welfare's longstanding persistence in the face of such opprobrium.<sup>13</sup> In this Article, I suggest that game theory,<sup>14</sup> by capturing the interdependence of decisions made by policymakers and welfare recipients, offers a useful starting point.<sup>15</sup> I

Julie DaVanzo, *Families, Children, Poverty, Policy*, in *URBAN AMERICA: POLICY CHOICES FOR LOS ANGELES AND THE NATION* 83, 83 (James B. Steinberg et al. eds., 1992). The situation appears only to be worsening. See *Child Poverty Hits 25-Year High, Growing By Nearly 1 Million Children in 1991*, CDF REP. (Children's Defense Fund, Washington, D.C.), Oct. 1992, at 1-3 (citing data released by the Census Bureau in September 1992).

12. A theory's failure to address the intuitive judgments which are embedded in a society's attitudes towards poverty is a quite serious shortcoming if, as John Rawls contends, "one may regard a theory of justice as *describing* our sense of justice." JOHN RAWLS, *A THEORY OF JUSTICE* 46 (1971) (emphasis added).

13. The centrality of such questions has been recognized. See, e.g., KATZ, *supra* note 1, at ix ("How are we to understand the persistence of a welfare system so thoroughly disliked and so often and authoritatively criticized?").

14. "Game theory" is a term of art which refers to a particular mode of formal analysis which stresses the interdependence of actors. See, e.g., THOMAS C. SCHELLING, *CHOICE AND CONSEQUENCE* 215 (1984) (defining game theory as "the formal study of the rational, consistent expectations that participants can have about each other's choices"). Regrettably, the name has "frivolous connotations." *Id.* at 240. My use of it is in no way meant to trivialize or make light of the serious human issues involved in poverty policy.

15. The relevance of game theory to distributive issues has been recognized. For example, James M. Buchanan's analysis of a strategic game played between a "samaritan" and a "parasite," while quite different from my model in its assumptions and prescriptions, presents decision matrices applicable to questions of redistribution which resemble the ones formulated in this Article. See James M. Buchanan, *The Samaritan's Dilemma*, in *ALTRUISM, MORALITY, AND ECONOMIC THEORY* 71 (Edmund S. Phelps ed., 1975) [hereinafter *ALTRUISM*]. See also RAWLS, *supra* note 12, at 269 & n.9 (discussing prisoner's dilemma in analyzing the need for collective agreements for the provision of public goods); AMARTYA SEN, *ON ECONOMIC INEQUALITY* 96-99 (1973) (applying game theory to the problem of work motivation); Mark I. Lichbach, *Will Rational People Rebel Against Inequality? Samson's Choice*, 34 *AM. J. POL. SCI.* 1049 (1990) (using game theory to analyze interaction between the "Haves" and "Have-Nots" to determine the likelihood the latter group will rebel); Perry G. Mehrling, *A Classical Model of the Class*

begin by identifying a strategic dilemma which, while necessarily simplified, strikes at the heart of the public's discontented tolerance of welfare.

The welfare dilemma grows out of the fact that poverty is extremely costly to *all* of society, including the nonpoor. Because of the costs that poverty imposes on all of society, the nonpoor would be willing to pay to have it alleviated.<sup>16</sup> Yet because the alleviation of poverty is very costly (although less so than poverty itself), the nonpoor would prefer that the dependent poor<sup>17</sup> engage in self-help to lift themselves out of poverty rather than "free-ride" on the nonpoor's transfers.<sup>18</sup> To the extent the poor can be convinced to do this, however, the nonpoor can free-ride off the poverty-reduction efforts of the poor, enjoying the benefits of reduced poverty at no cost to themselves.

Thus, with respect to those among the dependent poor who have the ability to alleviate their own poverty,<sup>19</sup> society's dilemma can be styled as a strategic game which pits the nonpoor against each such impoverished family. If *neither* provides for that family, disaster results for both. Yet each would prefer that the other capitulated and bore the cost of supporting the family.<sup>20</sup> The manner in which this basic dilemma plays out, including the way in which the presence of

*Struggle: A Game Theoretic Approach*, 94 J. POL. ECON. 1280 (1986).

16. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 463 (4th ed. 1992); RAWLS, *supra* note 12, at 267-68.

17. I use the term "dependent poor" to refer to those poor persons receiving public assistance and to distinguish them from another group, the working poor, who are already engaged in alleviating their own poverty.

18. As my later discussion will make clear, the "nonpoor" to whom I refer act not on their own, but collectively through government. See *infra* part V.A (discussing the "free rider" dilemma which requires collective societal action). For purposes of this Article, I make the simplifying assumption that the nonpoor are collectively in control of the policymaking apparatus.

19. Of course, many of the dependent poor may be unable single-handedly to effect the alleviation of their own poverty (through work or resort to friends and family) even if they would otherwise prefer to do so. Nevertheless, there is a widespread perception that some subset of the poor presently receiving public assistance could, through effort, alleviate their own poverty. See, e.g., William H. Simon, *Rights and Redistribution in the Welfare System*, 38 STAN. L. REV. 1431, 1509 (1986) (discussing the "widespread sense" that many welfare claimants "could be self-supporting but for a failure of will or integrity").

20. This is not to say, of course, that all of the poor prefer public assistance to self-help. The working poor, who shun public assistance to work long hours at low-paying jobs, obviously prefer self-help. In addition, there is no way to assess the preferences of those among the poor who are *unable* to alleviate their own poverty; many of them might prefer to help themselves, if only they were able. The dilemma I identify here applies only to those poor persons who have chosen to receive public assistance but who *could*, through personal effort, engage in self-help.

impoverished children influences the strategic decisionmaking process, is explored in highly stylized settings to lay the groundwork for a more rigorous examination of underlying costs and strategic possibilities.<sup>21</sup>

In elaborating on the analysis underlying the strategic game, I argue that the stake which the nonpoor have in the game's outcome accounts for the historical persistence of welfare in the face of the hostility and discomfort it has always elicited. Vast material inequality impedes the operation of real equality of opportunity and thereby creates inefficiencies in the use of human capital which harm society as a whole.<sup>22</sup> Poverty and inequality also produce externalities which all of society (including the more well-off) find extremely costly, such as social unrest manifested in crime and rioting, and the aesthetic and economic problems that result from visible evidence of people living in squalor.<sup>23</sup> The existence of poverty may also represent a costly economic risk to people who are not presently poor, but who fear that they might become poor at some point in the future.<sup>24</sup>

For these reasons and others (such as feelings of compassion, particularly for the children of the poor), the utility functions of the nonpoor are intertwined with the utility functions of the poor. A person who is well-off suffers disutility from the plight of a poor family, and derives utility from the fact that a poor family is made less poor.<sup>25</sup> Viewed in this manner, welfare is comprehensible as a societal response to the tremendous costs which poverty and inequality inflict on all of society.

Yet the costliness of the public alleviation of poverty, coupled with the perception that the poor should be bearing the burden of poverty alleviation themselves, explains society's dissatisfaction with providing for the poor. To understand better the strategic dilemma this presents, I turn to a discussion of the costs of the public alleviation of poverty. I take the position that the most troublesome cost of alleviating poverty is the impact that such efforts have on decisions made by the poor. Not only do some of the poor who might otherwise decide to alleviate their own poverty fail to do so, but people who might not otherwise be poor may also be led to make decisions which land them in poverty or lengthen their stay in that

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21. See *infra* parts III.B-C (exploring strategic options in a two-adult society, both with and without the presence of children).

22. See *infra* part IV.A (discussing costs which result when inequality of resources blocks the operation of fair equality of opportunity).

23. See *infra* parts IV.B-C (discussing crime and aesthetic costs associated with poverty and inequality).

24. See *infra* part IV.D (discussing self-insurance against the risk of poverty).

25. See *infra* part IV.E (discussing the interdependence of utility functions).

condition.<sup>26</sup> Put into the game theory context, this means that society's "move" in providing for the poor may cause many of the poor to react rationally by failing to engage in self-help. Society's provision of welfare also removes the risk which might otherwise be associated with falling into poverty or, once poor, changing one's position so that self-help is no longer a viable option.

Complicating matters further is the possibility that the receipt of public assistance could effect a socially costly change in those recipients who lack the present ability to engage in self-help, but who would otherwise prefer to do so. For example, one could argue that a person who has been subsisting on welfare for an extended period has "become" a different person in the sense that his or her behavioral and consumption preferences have shifted in certain identifiable ways.<sup>27</sup> This could, in turn, change her dominant strategy so as to make dependence preferred over self-help, if and when self-help became possible for her.

These "decision costs" make resolution of the poverty problem a complex, interactive process. A policy which seeks to alleviate poverty may trigger decisions that tend to increase the intensity or incidence of poverty, offsetting in some measure the gains in poverty alleviation attained through that same policy. I will examine the extent to which these "decision costs" turn on the specifics of particular redistributive programs and consider the effectiveness of efforts to reduce these costs.

A second type of poverty alleviation cost stems not from choices made by the poor, but is inherent in the transfer of funds from the more well-off to the less well-off.<sup>28</sup> The existence and magnitude of several such costs—reduced work incentives for the nonpoor, decreased liberty, deleterious changes in savings, production, and investment patterns—have been the subject of much debate.<sup>29</sup> I contend, however, that the most significant cost of this type stems from the perceived unfairness of transferring holdings from the more well-off to the less well-off.<sup>30</sup> The costs associated with the resulting intrusion on the property rights of the more well-off fall under this rubric.

The balance of the Article explores the options available to society, given that the nonpoor and the poor are embroiled in a strategic game. One way of reducing costs is to try to change the terms of the game, so

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26. See *infra* part V.B (discussing costs associated with decisions made by the poor).

27. See *infra* part VI.A.2 (discussing shifting preferences).

28. Of course, the choices made by the poor can affect the *magnitude* of this second group of costs; nevertheless, these types of costs would be present even if welfare policy did not trigger changes in decisionmaking by the poor.

29. See *infra* part V.C.2.

30. See *infra* part V.C.1 (discussing "unfairness costs").

as to alter the payoff structure facing the dependent poor and shift them to a dominant strategy that is less costly to society. Traditionally, efforts to accomplish this have focused on making welfare unattractive by stigmatizing welfare, attaching behavioral conditions to it, constructing administrative hurdles, and the like. These strategies impose heavy costs of their own. Another possibility is to convince the poor that self-help is actually the preferred strategy by emphasizing the importance of work or providing programs that might cause the poor to recognize suppressed or under-developed aspects of their utility functions that would place greater value on self-reliance.

To the extent the dependent poor's perception of the game changes so that a dominant strategy of self-help emerges, costs associated with the societal alleviation of poverty are avoided. Put differently, such individuals will no longer be players in the problematic strategic game described earlier, since their dominant strategy coincides with that of the nonpoor. Other things being equal, society would want to maximize the number of dependent poor who shift to a self-help strategy. Yet society must also be concerned with how a particular welfare policy affects those who are still in the game (i.e., individuals who retain dependence as a preferred strategy), as well as those recipients who are not yet formally "in the game" because they lack the present ability to lift themselves out of poverty.

Another possibility for reducing the costs associated with the strategic game involves adopting policy choices that make the public alleviation of poverty less costly to the nonpoor (in nonmonetary ways, perhaps) than it is presently. At one extreme, the entire game structure could largely be avoided by creating policies which do not act upon "the poor" as an identifiable group, but which instead provide broad-based benefits to poor and nonpoor alike based on other characteristics.<sup>31</sup>

I then explore the implications of the foregoing strategic analysis for three real-world policy choices: the choice between cash and in-kind benefits, the choice between unconditional benefits and benefits conditioned on certain behaviors (such as work), and the choice between universal and means-tested programs.<sup>32</sup> Finally, I propose a policy direction suggested by the previous analysis.<sup>33</sup> My purpose in doing so is primarily illustrative. I seek to offer a mechanism for capturing the relevant tradeoffs and asking the right questions in formulating welfare policy, rather than a definitive statement of the right answers.

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31. Of course, such a shift in policy focus might create a new game with costs of its own. See, e.g., *infra* part VII.C (discussing incentive effects of policies providing benefits to all families with children).

32. See *infra* part VII.

33. See *infra* part VIII.

## II. THE NEED FOR A MORE COMPLETE FRAMEWORK FOR ANALYZING DISTRIBUTIVE JUSTICE QUESTIONS

In analyzing society's intuitive judgments as to what is "just" or "fair" in the distributive realm, a number of conflicting themes can be identified, each of which has been tremendously influential and persistent in shaping welfare policy.<sup>34</sup> The intuitive idea that it is unacceptable as a matter of justice for some individuals to have insufficient means to obtain adequate food and shelter while others have means available to indulge every whim represents one such theme.<sup>35</sup> The idea that it is unfair for people to be deprived of opportunities which might enable them to compete effectively is another such theme.<sup>36</sup> Acting as a counterweight to these intuitive notions is the idea that money belongs to those who "make" it, and that individual effort expended in productive and important pursuits must be rewarded. A related theme centers on the unfairness of giving money to those who have not worked for it, but could have.<sup>37</sup>

A theory of justice which ignores any of these important threads of thought is of limited descriptive or prescriptive value. Because any such theory minimizes or overlooks significant aspects of what people mean when they speak of "justice" in the economic realm, it cannot generate a useful vision of how "justice" can be furthered.<sup>38</sup>

The theories of justice proposed by John Rawls<sup>39</sup> and Robert Nozick<sup>40</sup> are both premised on the absolute primacy of certain

34. The idea that justice is multifaceted and can simultaneously tend in opposing directions is well recognized and has been emphasized by such writers as John Stuart Mill. See JOHN S. MILL, *Utilitarianism*, in *UTILITARIANISM AND OTHER ESSAYS* 272, 328 (Alan Ryan ed., 1987) ("[I]n the mind of one and the same individual, justice is not some one rule, principle, or maxim, but many, which do not always coincide in their dictates . . .").

35. See, e.g., KAUS, *supra* note 10, at 15 (contending that notions of fairness extend to "the availability of some basic minimum necessary to allow a person to participate in society").

36. See *infra* part IV.A (discussing the unfairness of inequality in opportunity).

37. See *infra* part V.C.1 (discussing the perceived unfairness of transfers).

38. As Robert H. Frank has noted, where, as here, there are opposing views on an issue, "[h]aving provided safeguards for fundamental constitutional liberties, a system that attempts to sift through the preferences of the opposing camps in such disputes will generally outperform one that chooses aimlessly between conflicting moral platitudes." ROBERT H. FRANK, *CHOOSING THE RIGHT POND* 269 (1985).

39. RAWLS, *supra* note 12, at 75 (describing the "difference principle" which requires an equal distribution of resources except to the extent that inequalities improves the lot of the "least advantaged members of society").

40. NOZICK, *supra* note 3, at 150-51 (discussing "entitlement theory," which generally forbids society from forcibly redistributing money).

individuals' interests, although they diverge widely as to whose interests are worthy of such unassailable protection. In an effort to avoid tradeoffs that would encroach on these favored interests, Rawls and Nozick suppress or ignore those interests which are inconsistent with the organizing principle of their respective theories. As a result, each arrives at a narrow and incomplete view of justice.<sup>41</sup>

For Rawls, justice demands that the well-being of the least well-off be maximized.<sup>42</sup> Yet by monitoring the well-being of only the least well-off, Rawls' theory ignores not only the interests of the upper classes, but also those of the next-to-lowest classes, who could, under his theory, end up bearing the burden of improving the lot of the least well-off.<sup>43</sup>

In contrast, the rights which Nozick recognizes as worthy of absolute protection are the entitlements of possessors of holdings (e.g., money and property) to maintain those holdings undisturbed, as long as the holdings were acquired or transferred in accordance with a principle of justice in acquisition or a principle of justice in transfer.<sup>44</sup> But while Nozick's argument against redistribution depends upon the underlying "justice" of people's past acquisitions and transfers, he does little to establish the validity of this premise.<sup>45</sup> Indeed, his recognition that redistribution

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41. The problem presented by such incomplete views of justice has long been recognized. See MILL, *supra* note 34, at 329 ("No one of them [holding particular views of justice] can carry out his own notion of justice without trampling upon another equally binding.").

42. Rawls arrives at this theory of justice by means of a thought experiment in which a social contract is struck behind a "veil of ignorance" by which one's individual characteristics and place in society are unknown. According to Rawls, rational parties contracting in this "original position" would agree to a theory of justice only if it guaranteed that the position of the least favored would be maximized. RAWLS, *supra* note 12, at 150-61.

43. Rawls' theory permits inequalities which serve to better the position of the least favored, but it does not place any additional constraints on the shape that inequality takes. Hence, the gains of the least well-off could be financed under Rawls' scheme by burdening those in the next-to-lowest classes, rather than by taxing the most well-off. Cf. NOZICK, *supra* note 3, at 209 & n.\* (noting that Rawls' theory could create conflicts of interest between the least well-off and those in the middle).

44. NOZICK, *supra* note 3, at 151-52.

45. Nozick's arguments concerning the justice of holdings, and his allegations that redistribution would be "on a par with forced labor," see *id.* at 169, hinge on the unstated assumption that present holdings correlate closely with one's effort and productivity. Yet Nozick himself emphasizes that no such correlation exists, since people come into possession of holdings through a vast array of interactions, only some subset of which involves an exchange for value or could be tied to an individual's own efforts or productivity. See *id.* at 156-57; see also KENNETH J. ARROW, SOCIAL CHOICE AND JUSTICE 180 (1983) (noting that "the rhetorical value of Nozick's [forced labor] example requires a differentiation of the two sources of income [property income and labor income] which, in general, he is loath to make").

might be necessary to rectify past violations of the principles of justice in acquisition and transfer would, if taken seriously, completely swallow his theory.<sup>46</sup>

Neither of these theories of justice represents a workable policy framework, since each embodies an incomplete view of what—and whose—interests justice encompasses. Such divergent views of justice have too often caused those who fundamentally disagree about distributional questions to talk past each other, rather than engage in a meaningful dialogue.<sup>47</sup>

A social utility framework, which has the capacity to balance competing pluralistic preferences and interests, avoids (at least in theory) the polarity embodied in both Rawls' and Nozick's approaches.<sup>48</sup> Nevertheless, while "utilitarian" or "economic" approaches are capable of capturing more of the relevant reality, they fail to tell the full story.<sup>49</sup> While the benefit of a social utility model resides in its ability to add a level of precision and order to the analysis so that balancing and tradeoffs can be assessed,<sup>50</sup> a failure to "count" all of the interests which society intuitively cares about can lead to false dilemmas and distorted prescriptions.

46. NOZICK, *supra* note 3, at 152 (discussing principle of rectification). The long history of widespread violations of principles of justice in acquisition and transfer makes the very notion of an "entitlement" to present holdings suspect. See MICHAEL B. KATZ, *THE UNDESERVING POOR* 150 (1989) (noting that, using Nozick's principles, "few historians would have difficulty reaching a conclusion opposite to that which he implies—namely, the entitlement of contemporary Americans to the undisturbed enjoyment of all their wealth"). Because the principle of rectification is fundamentally at odds with the rest of Nozick's theory, those making use of Nozick's theory in the policy realm seem to have simply ignored it, focusing instead on his arguments against redistribution. See *id.* ("However Nozick intended his arguments to be used, they lent themselves easily to the retrenchment of social benefits and the exaltation of greed fashionable in the early 1980's.").

47. See generally Philip E. Tetlock & Gregory Mitchell, *Liberal and Conservative Approaches to Justice: Conflicting Psychological Portraits*, in *PSYCHOLOGICAL PERSPECTIVES ON JUSTICE* 234 (Barbara A. Mellers & Jonathan Baron eds., 1993) (discussing divergent psychological assumptions of liberals and conservatives that lead to conflicting visions of justice).

48. See, e.g., MILL, *supra* note 34, at 298.

49. Of course, analytic approaches based on utility maximization or cost-benefit analysis are numerous and diverse, making categorical statements about the shortcomings of this type of approach impossible. Nevertheless, it is worthwhile to point out some of the inadequacies often associated with such methods.

50. For example, social utility theory consciously sets out to do what intuitive notions of justice have ignored or glossed over in the realm of redistribution: decide how much is enough. See KAUS, *supra* note 10, at 12 ("Liberal rhetoric is filled with the impulse to redistribute income from rich to poor. It's like a nervous tic. But there is no impulse that tells us when the redistribution ought to stop.").

However, the real problem with relying solely on a social utility approach to the welfare problem lies not in the fact that such an approach may fail to include all of the necessary variables—such a shortcoming is not endemic to the method and could be fixed by expanding the range of interests incorporated into the analysis—but in the fact that utilitarianism holds little practical value for distributive policy. The controversy surrounding interpersonal utility comparisons, which are the keystone of utilitarian prescriptions in the distributive arena, illustrates why this is so.

Where distributive questions are involved, the maximization of society's overall utility necessarily requires interpersonal comparisons—judgments as to how much utility different people get out of money. The primary utilitarian justification for egalitarianism has historically been based on an assumption that different people have similar or identical utility functions as to money.<sup>51</sup> This assumption, coupled with the diminishing marginal utility of money,<sup>52</sup> leads to the conclusion that, in the absence of other factors affecting utility,<sup>53</sup> transfers from the more well-off to the less well-off will increase total utility.<sup>54</sup> This concept fits with the intuition that an additional thousand dollars means less to a millionaire than to a person with an annual income of ten thousand dollars.<sup>55</sup>

But making such interpersonal comparisons is problematic, since there is no way to really know what value different people actually assign

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51. See SEN, *supra* note 15, at 16 (discussing the source of utilitarianism's "reputation of being an egalitarian criterion").

52. The diminishing marginal utility of money refers to the fact that each additional increment of money is of increasingly less marginal value. For any given individual, the marginal benefit obtained from money can be depicted as a downward-sloping curve which represents that individual's marginal utility function. See, e.g., EDWIN G. DOLAN, BASIC ECONOMICS 414-15 (3d ed. 1983) (explaining the principle of diminishing marginal utility).

53. See POSNER, *supra* note 16, at 460 (noting that "the costs of redistributing income . . . could swamp the gains in total utility from the redistribution") (footnote omitted).

54. See, e.g., AMARTYA K. SEN, INEQUALITY REEXAMINED 24, 95-96 (1992) (discussing the "Dalton principle of transfers," which holds that transfers toward equality are efficient, based on the diminishing marginal utility of income) (citing Hugh Dalton, *The Measurement of the Inequality of Incomes*, ECON. J. 30 (1920)); RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 80 (1981); Peter Singer, *The Right to Be Rich or Poor*, in READING NOZICK: ESSAYS ON ANARCHY, STATE, AND UTOPIA (Jeffrey Paul ed., 1981).

55. See, e.g., KUTTNER, *supra* note 10, at 19 ("In traditional welfare economics, the justification for some redistribution is that there are many people whose need for an additional thousand dollars of income—by almost any standard—is plainly greater than the millionaire's 'need' for an extra thousand.").

to marginal increments of money.<sup>56</sup> Who can say with certainty that Abigail derives any less utility from her millionth dollar than Bernard does from his thousandth dollar?<sup>57</sup> Although there are principled ways of dealing with these difficulties,<sup>58</sup> the controversy over interpersonal comparisons points to a deeper problem with using utilitarianism to address distributive issues: society will never be in a position to act upon such comparisons, even if they could somehow be made. There is no disinterested entity capable of placing dollars in the hands of the persons who would derive the most value from them. Instead, the poor and the nonpoor occupy conflicting positions with respect to distributive issues; it is the manner in which that conflict plays out that holds real interest for policy development.

In addition, the flat, one-dimensional view of human rationality that dominates utilitarian thought fails to recognize the interdependence of individuals in society and the important complexities within individuals.<sup>59</sup> This purely instrumental view of rationality fails to appreciate the fact that individual preferences upon which choices are based are dynamic, shifting and sometimes self-contradictory, rather than

56. See Lionel Robbins, *Interpersonal Comparisons of Utility: A Comment*, 48 *ECON. J.* 635, 636-37 (1938) (noting difficulties in assessing levels of satisfaction experienced by different individuals), cited in SEN, *supra* note 15, at 81. This is another way of saying that the height and shape of different individuals' utility curves may vary. See *supra* note 52; POSNER, *supra* note 16, at 460; Bertrand De Jouvenel, *The Ethics of Redistribution*, in *INEQUALITY AND POVERTY* 6-7 (Edward C. Budd ed., 1967). Amartya Sen concluded, based in part upon these difficulties, that "[a]s a framework of judging inequality, utilitarianism is indeed a non-starter . . ." SEN, *supra* note 15, at 18.

57. Indeed, Richard Posner has suggested that a positive correlation might plausibly exist between one's income level and the height of one's marginal utility curve, asking whether it might be the case that "the people who work hard to make money and succeed in making it are, on average, those who value money the most, having given up other things such as leisure to get it." POSNER, *supra* note 16, at 460.

58. Abba Lerner introduced the idea of a probabilistic analysis which looks to expected marginal utility, rather than to each person's actual (and unknowable) marginal utility. See SEN, *supra* note 15, at 83-85 (giving a formal presentation of Lerner's result). See also LESTER THUROW, *GENERATING INEQUALITY* 34-35 (1975) ("[I]f individuals have different utility functions but you do not know what individual has what function, a completely equal distribution of income is necessary to maximize the expected value of social welfare.").

59. See, e.g., SHAUN H. HEAP, *RATIONALITY IN ECONOMICS* 3 (1989) (Figure 1.1) (identifying consequentialist prescriptive theories such as utilitarianism with an instrumental view of rationality); *id.* at 91-115 (discussing interdependence and preference changes as aspects of human rationality which a purely instrumental view of rationality fails to capture). See generally MARK A. LUTZ & KENNETH LUX, *HUMANISTIC ECONOMICS* (1988); Amartya K. Sen, *Rational Fools: A Critique of the Behavioural Foundations of Economic Theory*, in *CHOICE, WELFARE AND MEASUREMENT* 84 (First MIT Press 1982).

static.<sup>60</sup> Moreover, it does not take account of the fact that choices made by different individuals are interdependent, with choices made by one actor affecting the preferences (and hence the choices) of the others.<sup>61</sup> Because the shifting of preferences and the interdependence of decisionmaking are centrally implicated in welfare policy, a theory that does not accommodate these complexities cannot meaningfully describe reality or provide a framework for improving upon it.<sup>62</sup>

### III. A GAME THEORETIC LOOK AT DISTRIBUTIVE DILEMMAS

Game theory,<sup>63</sup> by focusing on the interdependence of decisions made by the poor and the nonpoor, provides a useful starting point for understanding the complex and conflicting interests at play in welfare policy. Viewing welfare policy as a strategic game is admittedly troubling, because it highlights the socially divisive nature of distributive questions.<sup>64</sup> My decision to use game theory to sharpen this unsettling picture of societal conflict arises not from a desire to perpetuate division or to "take sides," but from a desire to illuminate the forces underpinning the division that already exists and to draw out the conflicting interests responsible for the palpable undercurrents of hostility already present in welfare policy debate.<sup>65</sup> Because game theory provides a way of better

60. See W.M. Gorman, *Tastes, Habits and Choices*, 8 INT'L ECON. REV. 218, 218 (1967) ("[I]t is commonplace that choices depend on tastes and tastes on past choices."), *quoted in* JON ELSTER, *SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY* 112 (1983); ELSTER, *supra*, at 109; HEAP, *supra* note 59, at 103-12; Sen, *supra* note 59, at 99. See also *infra* part VI.A (discussing preference shifts and their impact upon choices).

61. See Amartya K. Sen, *Behaviour and the Concept of Preference*, in *CHOICE, WELFARE AND MEASUREMENT*, *supra* note 59, at 72 ("[I]nterdependence of different people's choices . . . discredits individualistic rational calculus.").

62. The usefulness of a theory turns on its capacity to accommodate these complexities. See HEAP, *supra* note 59, at 10 ("[T]he capacity for a theory to generate public policy insights is not marginal—it is absolutely crucial.") (footnote omitted).

63. See *supra* note 14 (defining game theory).

64. Indeed, game theory could be presented in a manner that would reinforce exactly the same "us versus them" mentality that has plagued welfare reform efforts for centuries. The game which James Buchanan constructs between a "samaritan" and a "parasite" could be interpreted this way (although Buchanan indicates that his work may have other, more important applications aside from welfare reform). See Buchanan, *supra* note 15, at 74. For a thoughtful critique of Buchanan's work, including an analysis of the highly questionable assumptions implicit in the morally charged labels Buchanan places on the players, see Edward F. McClennn, *Comment*, in *ALTRUISM*, *supra* note 15, at 133.

65. The idea of focusing on societal conflict as a way of understanding welfare is, of course, not new. See, e.g., FRANCES F. PIVEN & RICHARD A. CLOWARD, *REGULATING THE POOR* 424-27 (2d ed. 1993) (discussing theories which posit class

understanding the complicated, interactive reality involved in distributive policy, it is a helpful starting point for assessing policy alternatives.<sup>66</sup> Put differently, until we understand the game we are playing, we cannot usefully look for ways to change the terms of the game, decrease the costs associated with playing it, or find ways to stop playing it altogether.

*A. Strategic Behavior in the Elimination of Poverty:  
Defining the Game*

With respect to poverty alleviation, the interests of the nonpoor and the poor are at least partially in alignment: both the poor and the nonpoor would like for the poor—and the children of the poor—to be more well-off.<sup>67</sup> This is true because poverty imposes costs on both the poor and the nonpoor.<sup>68</sup> To the extent these poverty costs are spread among persons whose activities did not “cause” the poverty to occur, poverty resembles an externality.<sup>69</sup>

The economist’s answer to a negative externality is to arrange affairs so that the costs of the externality are internalized by the persons engaging in the activity which generates that externality.<sup>70</sup> For example, if a certain manufacturing process generates pollution, the appropriate response is to place the costs of pollution on those engaging in that manufacturing process, rather than have those costs spread throughout the

conflict as the catalyst for welfare programs).

66. For a discussion of the purposes and uses of game theory, see generally Robert J. Aumann, *What is Game Theory Trying to Accomplish?*, in *FRONTIERS OF ECONOMICS* 28 (Kenneth J. Arrow & Seppo Honkapohja eds., 1985).

67. See, e.g., Goran Therborn, *Welfare States and Capitalist Markets*, in *WELFARE LAW* 93, 97 (Peter Robson ed., 1992) (discussing benefits which the upper classes derive from alleviating the poverty of the lower classes).

68. See *infra* part IV (detailing the costs of poverty and inequality).

69. See, e.g., CHARLES J. GOETZ, *CASES AND MATERIALS ON LAW AND ECONOMICS* 18-19 (1984) (describing externalities as effects of an act that are not felt by the actor but by a third party); Therborn, *supra* note 67, at 97-98 (theorizing that the welfare state is largely concerned with “coping with externalities”). Cf. Sen, *supra* note 59, at 92-93 (characterizing sympathy, defined as any instance in which “a person’s sense of well-being is psychologically dependent on someone else’s welfare,” as an externality).

70. See, e.g., GOETZ, *supra* note 69, at 314-15 (discussing the need to adjust liability rules so that actors will make decisions based on all the costs of their actions, including those imposed on third parties). Facilitating such internalization of externalities has been described as a “primary function of property rights.” Harold Demsetz, *Toward a Theory of Property Rights*, in *THE ECONOMICS OF LEGAL RELATIONSHIPS: READINGS IN THE THEORY OF PROPERTY RIGHTS* 23, 24 (Henry G. Manne ed., 1975); see also RAWLS, *supra* note 12, at 268 (“One essential task of law and government is to institute the necessary corrections” for externalities.).

population.<sup>71</sup> But while poverty may look like an externality, it is far from self-evident what—and whose—activity “caused” it.

Some contend that poverty is a necessary and inevitable byproduct of our political economy, that the wealth of our nation is made possible by the abject poverty of some of its members.<sup>72</sup> Under the most extreme form of this view, capitalism could be caricatured as a kind of factory spewing out cash (in varying amounts) to most of society’s citizens while emitting noxious poverty fumes which randomly overtake some percentage of unlucky persons. If this is an accurate and complete characterization, it would make sense to place the costs of alleviating poverty on the capitalist system itself, or on those who reap the largest surpluses from it. The “cost of doing business” would go up, but that would only reflect the internalization of the “true” cost of doing business—including the poverty costs which are generated through capitalist activity.

Others steadfastly maintain that capitalism does not “cause” poverty at all, that poverty is instead caused by the personal behavior and life choices of the poor themselves.<sup>73</sup> Under this view, the poor can be thought of as willful poverty generators (or, more benignly, as poverty magnets) whose activity—“living a life of poverty”—not only brings misery upon themselves, but also creates excess misery which seeps out to the surrounding population. If this is an accurate picture, the burden of poverty alleviation should properly be placed on the poor (assuming, for the moment, that the poor would be capable of effecting such alleviation). This second view has historically held sway in our culture.<sup>74</sup> It is not surprising, then, that society has long assumed that

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71. This is the premise for market-oriented approaches to pollution abatement. See, e.g., PAUL HEYNE, *THE ECONOMIC WAY OF THINKING* 300 (5th ed. 1987) (“If the tax per unit of pollutant can somehow be set equal to the spillover cost per unit, the creator and presumed beneficiary of the costs is made to bear them.”).

72. See, e.g., Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 *YALE L.J.* 1245, 1255 (1965) (“[T]oday we see poverty as the consequence of large impersonal forces in a complex industrial society . . . [W]e are so organized as virtually to compel this sacrifice by a segment of the population.”); KATZ, *supra* note 46, at 237 (“Poverty is not an unfortunate accident, a residue, an indication that the great American mobility machine missed a minority of the people. On the contrary, always it has been a necessary result of America’s distinctive political economy.”); Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 *HASTINGS L.J.* 1, 43 (1987) (“[T]he entire economic structure of American society and a series of specific governmental policy decisions over time have contributed to the existence, scope, depth, and perpetuation of poverty.”).

73. See, e.g., LAWRENCE M. MEAD, *THE NEW POLITICS OF POVERTY* 49 (1992) (attributing poverty to “nonwork” rather than to “nameless social forces”).

74. See, e.g., KATZ, *supra* note 46, at 7-8.

the costs of poverty alleviation should fall on the poor themselves, if they are able-bodied.<sup>75</sup>

It appears more likely, however, that the "cause" of poverty is hopelessly mixed-up. It would be problematic to determine the role played by luck, economic conditions, and personal attributes in "causing" any given individual's poverty.<sup>76</sup> By and large, society cannot wholly attribute poverty to the personal traits of the poor, nor can the poor, by and large, wholly blame their poverty on impersonal capitalistic forces. Yet the fact that neither party is *solely* responsible for poverty does not necessarily absolve either of all responsibility for the cost of alleviating it.<sup>77</sup>

Another way of approaching the question of who should bear the costs of alleviating poverty is to consider who is in a better position to do so (or put differently, who can do so at the lowest cost). The answer to this question depends, in turn, on what assumptions are made about the ability of the poor to alleviate their own poverty.

If we make the simplistic assumption that all of the poor are utterly unable to alleviate their own poverty, then the nonpoor<sup>78</sup> are in the better position to alleviate poverty. The cost to the poor of alleviating their own poverty under such a state of affairs is literally prohibitive. The poor, unable to alleviate their poverty, would, in such a state of affairs, continue to incur poverty costs and those poverty costs would continue to be spread throughout society. In such a situation, society makes the efficient choice by simply alleviating the poverty. Indeed, society has been quite willing to provide support to certain groups, such as the

75. See, e.g., *id.* at 12 (discussing Elizabethan poor laws, which "attempted to separate the genuinely needy from rogues, vagabonds, and sturdy beggars," a distinction which "translated over time into the restriction of aid to the impotent and the exclusion of the able-bodied").

76. See, e.g., ELLWOOD, *supra* note 1, at 8 (noting the difficulty in determining the "true" reason for a family's poverty).

77. Commentators have rightly identified one side of this truth. See CHARLES LOCKHART, *GAINING GROUND 2* (1989) ("But [Charles] Murray strikes home when he argues that the notion that people are not responsible for all that happens to them can be subtly transformed into the proposition that the poor are to be relieved from the arduous tasks involved in alleviating their conditions.") (citing MURRAY, *supra* note 3). The other side of this truth, of course, is that the fact that society is not solely responsible for poverty conditions does not as a matter of fairness or efficiency absolve it from assisting in alleviating those conditions.

78. The use of the term "nonpoor" in this discussion refers not to nonpoor individuals acting on their own, but to the nonpoor acting through the mechanism of government to provide public assistance. See *infra* part V.A (discussing free-rider problem); *supra* note 18.

disabled and the elderly, based on such assumptions about their incapacity.<sup>79</sup>

At the other extreme, one could assume that every able-bodied poor person has the ability to lift himself or herself out of poverty through hard work, thrift, and the elimination of costly vices. If this were the state of the world, it would be more efficient to place the burden of poverty alleviation on the poor, since they could alleviate their own poverty at a lower total cost than could society as a whole. There would be no costs associated with moving money, no infringement of the property rights of the more well-off, and no costs associated with eroded incentives or inefficient decisions.<sup>80</sup>

This second picture of the world—that the poor are able to help themselves—is the dominant one in our culture, at least with respect to able-bodied, working age adults.<sup>81</sup> This view accounts for the hostility and bitterness that many Americans feel towards such recipients of welfare, but it does not explain why society “agrees” to bear the costs of alleviating their poverty in the first place.

If we begin with the (intentionally oversimplified) assumption just outlined—that the poor are fully capable of escaping poverty on their own—the problem appears as one of a strategic dilemma or game. On one side is an impoverished individual who has the ability to bring herself and her children out of poverty, and on the other side are the nonpoor, who, acting collectively through government, also have the ability to alleviate the poverty of that poor individual and her children. Both parties will benefit when the poor family is made better off, regardless of who bears the cost of poverty alleviation. The poor family (we will assume for now) would prefer that those costs be borne by the nonpoor,<sup>82</sup> while the nonpoor would prefer that the poor family incurred the costs involved in alleviating its own poverty. If neither party bears the costs of alleviating poverty, the result is disastrous for both. Hence, both sides are locked into a game very much like “chicken.”

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79. See *infra* note 98; see also *infra* notes 264-65 and accompanying text (discussing distinctions drawn between “deserving” and “undeserving” poor).

80. See *infra* part V (detailing these costs of the public alleviation of poverty).

81. See *supra* notes 73-75 and accompanying text.

82. This assumption is made for purposes of illustrating a particular dilemma that would be presented under the specified conditions, and obviously does not describe all poor families. On the contrary, many poor families *do* prefer to attempt to alleviate their own poverty, even when the nonpoor express their willingness to assist them through a welfare program.

The game of "chicken" is a dangerous highway game reputedly played by foolhardy teenagers.<sup>83</sup> In highway chicken, two drivers start their cars at opposite ends of a straight stretch of road and proceed towards each other at high speeds. In order to avoid a head-on collision, one driver or the other (or both) must swerve before the cars reach each other. The driver who swerves first is called "chicken" and loses the game.<sup>84</sup>

Supporting the poor individual's family is here analogous to "swerving" in highway chicken. The best outcome for either party is for the other party to "swerve" by providing the needed support. If neither the poor individual nor the government provides support, disaster for both ensues. As in a game of highway chicken, each party's preferred strategy depends on what the other party can be expected to do.

The payoffs for the nonpoor (acting through the government) (N) and for the poor individual (P) are shown in Matrix 1, below.

<b>MATRIX 1 PAYOFFS FOR (P, N)</b>		
	<b>N Supports P's Family</b>	<b>N Does Not Support</b>
<b>P Supports Family</b>	N/A	50, 100
<b>P Does Not Support</b>	100, 50	0, 0

N (the nonpoor) must choose between the left column (in which it supports P's family) and the right column (in which it provides no support), while P (the poor individual) must choose between the top row (in which she supports her own family) and the bottom row (in which she does not support her own family). The intersection of the two players' choices yields the payoffs for each; the first of the two numbers represents P's payoff, while the second number represents N's. The numbers which appear in the decision matrix are meaningless in themselves, but serve only to provide a rank ordering of preferred options

83. See, e.g., WILLIAM POUNDSTONE, PRISONER'S DILEMMA 197-98 (1992) (citing BERTRAND RUSSELL, COMMON SENSE AND NUCLEAR WARFARE (1959)).

84. *Id.* This basic "chicken" framework has been used to illustrate problems concerning the allocation of societal burdens. See, e.g., Hugh Ward, *Three Men in a Boat, Two Must Row: An Analysis of a Three-Person Chicken Pregame*, 34 J. CONFLICT RESOL. 371, 371-75 (1990).

for each actor. For simplicity, I have (counterfactually) made the costs and payoffs symmetrical for each party.<sup>85</sup>

I have also assumed, for purposes of the present analysis, that the upper left cell does not represent a possible outcome for the parties. Since the nonpoor's interest is in providing subsistence level assistance only, we will assume that they would not provide assistance in the event the poor individual attained subsistence on his or her own.<sup>86</sup> Welfare policy has, in fact, historically borne out this assumption.<sup>87</sup>

As the matrix illustrates, the best result for P (payoff of 100) is found in the lower left cell, in which the government agrees to support her family and she does not have to provide such support. The second-best outcome for P (payoff of fifty) is found in the upper right cell, in which the government refuses to support her family, but she supports the family herself. The difference between these two outcomes (from P's perspective) represents the disutility P would experience in supporting a family, such as foregone leisure and poor working conditions. The worst outcome for P occurs if neither she nor the government supports her family (lower right cell, with a payoff of zero).

For the nonpoor, acting through the government, the best outcome is found in the upper right cell, in which P supports herself and the government does not. The payoff of 100 found in that cell represents the value to N of having P's family supported, without expending its own

85. For example, the poor family would suffer more from the lack of a subsistence income than would the nonpoor (even when their preferences were aggregated); yet I have indicated a payoff of zero for each player for this "worst case" scenario. Similarly, later discussion of the costs associated with redistributing income suggests that it may cost the nonpoor more to provide assistance to the poor than it would cost the poor to engage in self-help in those instances where self-help is a viable option. Again, for simplicity, I have assumed that the cost to each player of providing subsistence level income for the poor family is 50. These simplifying assumptions do not alter the basic structure of the game; I have made them so that the basic dilemma can be presented with a minimum of complexity.

86. Another simplifying assumption implicit in the decision matrix is that a "subsistence level income" represents a discrete, indivisible block of assistance which is either provided or withheld. In reality, of course, it would be possible for the burden of providing this subsistence level income to be shared between the poor family and the nonpoor. Policy design has historically made such sharing very difficult, since reducing the grant level by the amount earned by the poor family results in a taxation level of 100%. See *infra* part V.B.2.b (discussing the work disincentive effects of welfare).

87. See *infra* part VII.B. In this respect, the strategic game attending redistributive efforts differs from highway chicken. Decisions are not made simultaneously by the parties, so adjustments based on the actions of the other party are possible. In other words, the nonpoor are in a position to determine whether the poor have, in fact, achieved subsistence on their own before deciding whether to assist them. This is precisely what means-testing is all about.

resources to obtain that result. The second-best outcome for N is found in the lower left cell, in which N supports P. Again, this outcome is not as favorable for N as the previous one, since it requires N to incur costs associated with alleviating P's poverty. The lower left cell gives N a payoff of only fifty, which represents the value N gains in having P's family supported, less the cost of supplying that support. The worst outcome for N is the scenario in which neither the government nor P supports P's family; N's payoff is zero in that instance.

One possible strategy in highway chicken is to commit in advance to the noncooperative strategy—driving straight ahead. If this commitment is believably communicated to the other party before he or she has a chance to make a similar commitment, the other party can be expected to swerve. For example, it has been noted that a player in highway chicken might commit by throwing the steering wheel out the car window as he reaches maximum speed.<sup>88</sup> An opponent observing that commitment could be expected to swerve.<sup>89</sup> Conversely, if one knew that the other player had adopted a uniform policy of swerving, one could drive straight ahead and win the game.

The parallels in the redistributive realm are striking. If the nonpoor commit in advance to providing subsistence level assistance to poor families, those families need not incur the costs required to alleviate their poverty (by, for example, working long hours at a dismal job). Knowing that the nonpoor will "swerve" before disaster strikes, poor individuals can pursue a strategy which does not involve providing for their families. The nonpoor, who have thus set themselves up to repeatedly "lose" a game of chicken against every able-bodied poor individual in society, are bothered by what they perceive as the apparent unfairness of this result.<sup>90</sup>

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88. HERMAN KAHN, *ON ESCALATION* 11 (1965), *quoted in* POUNDSTONE, *supra* note 83, at 212. *See also* Ward, *supra* note 84, at 371 (Where two of three men in a boat must row in order to make sufficient progress, "the rational thing to do would be to commit yourself to not rowing by grabbing the stern seat first, loudly announcing that you are a bad oarsman, feigning blisters on your hands, or pretending that you do not care if the boat stays still."); Avinash Dixit & Barry Nalebuff, *Making Strategies Credible, in* STRATEGY AND CHOICE 162, 162-81 (Richard J. Zeckhauser ed., 1991) (discussing various methods of making strategic threats credible).

89. Of course, if the opponent doesn't see the steering wheel fly out of the window, the party who discarded the wheel "has a problem." KAHN, *supra* note 88, at 11, *quoted in* POUNDSTONE, *supra* note 83, at 212.

90. Note, however, that the basic structure of the game is morally ambiguous and does not itself suggest which of the two equilibria points in the game should prevail. *See generally* SCHELLING, *supra* note 14, at 198-99 (Strategic analysis "is usually about the situation, not the individuals—about the structure of incentives, of information and communication, the choices available, and the tactics that can be employed. There is little

In response, some have suggested that the government simply withdraw all aid to poor families—in other words, commit in advance to the equivalent of “driving straight ahead,” by throwing welfare out the window, so to speak.<sup>91</sup> When the poor see that the government has discarded its means of delivering aid to their families, the argument runs, they will avert disaster by providing for their own families.<sup>92</sup> If *all* poor families “swerved” as expected, the outcome would be the best possible one for the nonpoor. The nonpoor would reap the benefits of reduced poverty without having to bear any of the costs of alleviating it.

Despite the obvious appeal of this strategy, serious risks are associated with it. As with tearing out the steering wheel in highway chicken, the success of the strategy depends upon the correctness of one’s assumptions about the other party’s ability to react in an appropriate and timely manner.<sup>93</sup> Thus far, we have been proceeding on the assumption that the poor are capable of alleviating their own poverty. This is undoubtedly true in some subset of cases. Yet there is reason to believe that in some other nontrivial subset of cases, the poor individual would be literally unable to engage in self-help.<sup>94</sup> Between these two extremes,

about the abstract situation that tells the analyst which side he ought to be on.”). Not surprisingly, though, “[i]n the inevitable struggle to capture a larger share of whatever social surplus does exist, it is natural to expect each side to claim the moral high ground.” FRANK, *supra* note 38, at 128. Of course, if one assumes that it costs society more to alleviate the family’s poverty than it does for the family, this provides a neutral, utility-based reason for preferring the self-help solution, from a societal standpoint.

91. See, e.g., MURRAY, *supra* note 3, at 227-28; Buchanan, *supra* note 15, at 76. At a broader, theoretical level, James Buchanan has characterized modern society’s reluctance to rigidly abide by the noncooperative strategy in a number of settings as a failure of “strategic courage” which will work to the long-term detriment of society. *Id.* at 81, 84.

92. For example, Charles Murray predicts that some proportion of welfare recipients would change their behavior and no longer require assistance if welfare were dismantled. MURRAY, *supra* note 3, at 228-29. Cf. Buchanan, *supra* note 15, at 77.

93. Cf. Hugh Ward, *The Risks of a Reputation for Toughness: Strategy in Public Goods Provision Problems Modelled by Chicken Supergames*, 17 BRIT. J. POL. SCI. 23, 27-28 (1987) (“The essence of Chicken is that, in making commitments and sticking to them, players take the risk that others will do the same and that it will be impossible for any player to back down fast enough to ensure that catastrophe is averted.”).

94. See, e.g., NATHAN GLAZER, *THE LIMITS OF SOCIAL POLICY* 8 (1988) (noting that, even after provision is made for people with identifiable needs, such as the disabled, “there will remain, in any modern society, people who still require special supports, either temporarily or for longer periods of time”); MURRAY, *supra* note 3, at 229 (considering those who would be “pauperized by the withdrawal of government supports and unable to make alternative arrangements”); Peter B. Edelman, *Toward a Comprehensive Antipoverty Strategy: Getting Beyond the Silver Bullet*, 81 GEO. L.J. 1697, 1751 (1993) (“[T]here are an unquantifiable, but far from trivial, number of people on the welfare rolls who are not very good candidates for work.”).

it is reasonable to assume that poor individuals occupy the entire spectrum with respect to capacity for self-help: some are able to engage in some degree of self-help; others are able to formulate a long-term strategy for escaping poverty but require short-term assistance in order to implement that strategy; and others might be capable of self-help during certain seasons or under certain economic conditions but would be helpless at other times.

If the government cut off all assistance, it is beyond question that at least some subset of the able-bodied poor would be unable to find a suitable job in time to avert personal disaster for themselves and their children. Given that our economic system has consistently left some segment of the population unemployed, it is unrealistic to think that every person presently on welfare could, through sheer effort, find a full-time position.<sup>95</sup> A poor individual who falls into this category does not have the capacity to support his or her family; instead, he or she is like the participant in a game of chicken who is trapped in a car without any steering mechanism. Because such a person cannot choose to "swerve," the nonpoor's bluff can have no impact on his or her course of action. If the nonpoor follow through with their commitment not to provide assistance (which they must do if they want their threats to that effect to be believed in the future),<sup>96</sup> the result is highly undesirable for both parties—the equivalent of a destructive crash.

It is as if the nonpoor face a series of cars coming toward them. Some of the approaching cars have steering mechanisms which are in good working order; others have no steering wheels at all.<sup>97</sup> There is no way to tell which cars have steering wheels and which ones do not.<sup>98</sup>

95. I do not here include the possibility of government-created jobs specifically designed to employ welfare recipients, since such jobs do not represent a true shifting of costs for poverty alleviation to the poor. As will be discussed in Part VII.B, the monetary cost to society of providing such jobs to the poor far exceeds the cost of simply providing financial assistance to the poor.

96. See Buchanan, *supra* note 15, at 78 ("Having once adopted a rule, the samaritan *should not* be responsive to the particulars of situations that might arise.") (emphasis in original); *id.* at 76 ("Vague threats or promises to cut off [the samaritan's] charity in the absence of work on the part of the recipient parasite will remain empty unless there is demonstrated willingness to carry out such threats," including a willingness to suffer by "watching the parasite starve himself while refusing work.").

97. Of course, the absence of a steering wheel at a given point in time may be due to the poor person's own prior action of making certain decisions which place self-help out of reach. This does not, however, change the analysis of how the other party should react to an oncoming car with no steering wheel.

98. To the extent that it is possible to ascertain that particular groups lack the ability to provide for themselves, society willingly and uncomplainingly does so. The lack of controversy surrounding assistance to the disabled and the elderly illustrates this point. Such groups are spoken of as the "deserving poor." These groups are not suspected of

To make matters worse, all the approaching cars contain infants and children as passengers.

For society to hold firm to a policy of "not swerving" is indefensible in such a situation. Granted, society would "win" all (or most) of the games of chicken against poor individuals capable of alleviating their own poverty (that is, all or most of the cars possessing steering wheels would swerve). However, there would be disastrous results with respect to those poor families which, it turns out, could not support themselves after all. The resulting "collision" would entail very high costs not only for the families involved, but also for society as a whole.<sup>99</sup>

In addition, certain individuals who theoretically *could* alleviate their own poverty might nevertheless fail to do so because they misread signals from the government or misinterpreted their own position. By denying assistance, society would suffer the worst possible outcome with respect to this group as well. The fact that a miscalculation on the part of the poor individual contributed to the outcome would do little to justify this disastrous result, especially given the effects on children, who were not responsible for the miscalculation.

Of course, if the government stated its intention to get out of the poverty alleviation business, some of the more catastrophic effects doubtless would be avoided by the intervention of private charity or local assistance.<sup>100</sup> To the extent such private charity substituted for public welfare, the government's avowed threat to withhold all aid would not be expected to induce self-help by the impoverished.<sup>101</sup> To the extent private charity provided partial or inadequate coverage, some self-help might be induced, but the risks associated with the failure to provide for

making a strategic choice to shift costs of poverty alleviation from themselves to society, since it is assumed that they would be unable to alleviate their own poverty. Although children also fit the classic model of the "deserving poor," their situation is distinguishable since their fate is tied to the fate of adults who are often deemed less than deserving. See *infra* notes 264-65 and accompanying text (discussing distinctions drawn between the "deserving" and "undeserving" poor).

99. See *infra* part IV (discussing costs of poverty).

100. See, e.g., MURRAY, *supra* note 3, at 229-33.

101. Recognizing the ability of individual charitable action to supplant a collective choice to pursue the noncooperative strategy, James Buchanan has made the drastic suggestion that society impose "uniform behavioral rules on all potential samaritans." Buchanan, *supra* note 15, at 82. These rules would apparently forbid individuals from providing charity, so that a larger social good—a modification in "the response patterns of potential parasites"—could be effected. *Id.* Buchanan himself recognizes the tremendous liberty cost of setting such rules. *Id.* at 81-82. The fact that many among the poor are incapable of self-help would make this a profoundly unsuccessful strategy for the reasons discussed above.

those incapable of self-help would be present in equal measure.<sup>102</sup> If private charity presented greater confusion and uncertainty as to what benefits would be provided, as seems likely, the chance of miscalculation by the poor as to the preferred strategy would be heightened, creating greater risk of disaster for those persons and their children. In addition, private charity would entail well-recognized “free-rider” inefficiencies.<sup>103</sup>

The foregoing analysis indicates that the institution of welfare is explicable, despite its unpopularity, when it is thought of as society’s rational reaction to a repeated game. Shaun Hargreaves Heap has explained that repeated reactions to a game will, over time, result in the formation of institutions: “[A]gents who repeatedly interact in similar circumstances will come to learn efficient ways of handling that interaction. They will develop rules of thumb concerning how best to act in such settings and these rules of thumb become ‘institutions.’ The interaction is formally handled as a repeated game.”<sup>104</sup>

By choosing the cooperative strategy of providing for the poor, society avoids the worst outcomes—those which would result if *nobody* provided for the poor. Although this strategy is the most rational one to adopt when one does not know what the other party—here, the poor individual—will do, it does entail costs. Indeed, some of the most troubling costs from a societal standpoint are the costs associated with decisions made by the poor in light of society’s announced strategy of providing for them.<sup>105</sup>

### *B. Exploring Strategic Options in a Two-Person Society*

As the previous discussion indicates, society is torn between its desire to reduce the costs of poverty (which detrimentally affect the nonpoor as well as the poor) and its desire to have the poor bear the costs of that reduction.<sup>106</sup> Put simply, the nonpoor want the poor to stop being poor, at their own expense.

To illustrate the manner in which these interests play out, imagine a two-person society populated solely by Ellen, who is more well-off, and

102. This assumes that private charities would be no more adept than the government at distinguishing between those among the poor who would be capable of self-help and those who would not be capable of such self-help.

103. See *infra* part V.A (discussing free-rider problem).

104. HEAP, *supra* note 59, at 72.

105. See *infra* part V.B (detailing these “decision costs”).

106. David Ellwood terms this conflict “the security-work conundrum.” ELLWOOD, *supra* note 1, at 19 (“When you give people money, food or housing, you reduce the pressure on them to work and care for themselves.”).

Fran, who is less well-off, both of whom are stranded on the proverbial desert island. Although Ellen has ample goods available for her own happiness, she is troubled by the fact that Fran is starving to death. Ellen's total utility would be increased by transferring some—say one-third—of her holdings to Fran, because the costs associated with the transfer are outweighed by the benefit she would get from knowing that Fran has been made more well-off. Therefore, Ellen transfers one-third of her holdings to Fran.

After doing so, however, Ellen cannot help noticing that every day while she is industriously digging for clams, Fran is lying idly on the beach reading a pulp novel and letting the surf wash over her toes. It is evident to Ellen that the holdings she transferred to Fran will soon be consumed without being replenished by Fran. Ellen can foresee that she will soon have to make another transfer of her own holdings (which have been steadily accumulating as a result of her continuous efforts at clam-digging) or Fran will once again be starving.

Ellen thinks that if Fran applied herself to digging for clams, Fran could support herself. This, of course, would make Ellen better off. Since Fran's well-being is part of Ellen's own utility function, Ellen wants Fran to have some minimum standard of living. To the extent Ellen could convince Fran to dig clams herself, Fran would be able (we will assume) to attain that standard of living on her own, without any need for Ellen to transfer Ellen's own holdings. This would be the best possible situation from Ellen's point of view. Yet Ellen also knows that even if Fran refuses to work, she will not be able to let Fran starve. Ellen's own utility function is so intertwined with Fran's that the worst possible outcome would be Fran's starvation. Ellen would rather continue to transfer her own holdings than allow such a result to occur.

From Fran's point of view, the best possible situation is the one in which she can consume unlimited leisure, avoid the dull, unpleasant task of clam-digging, and still avoid starvation. She knows that even if she dug for clams on a nonstop basis, her clam-digging skills are such that she could only just barely subsist. Hence there is nothing to be gained from expending that effort, provided Ellen is willing to transfer sufficient clams to her so that she does not starve. Ellen, as we already know, is willing to do so, although she would greatly prefer it if Fran engaged in clam-digging herself.

Matrix 2 below depicts the payoff schedules of Fran and Ellen in this state of affairs:<sup>107</sup>

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107. This matrix is identical in its basic structure to Matrix 1, contained in the previous section's discussion of "chicken." See *supra* notes 83-89 and accompanying text.

<b>MATRIX 2 PAYOFFS FOR (FRAN, ELLEN)</b>		
	<b>Ellen Transfers</b>	<b>No Transfer From Ellen</b>
<b>Fran Digs Clams</b>	N/A	50, 100
<b>Fran Digs No Clams</b>	100, 50	0, 0

As the payoff schedules indicate, each person's dominant strategy depends on how the other player is going to behave. If Fran is not going to dig clams, Ellen will be better off making a transfer; if Fran will dig clams, she will not have to make a transfer. If Ellen does not make a transfer, Fran is better off digging for clams; however, Fran is better off not digging for clams if Ellen will make a transfer.

How can Ellen convince Fran to dig for clams and thus increase Ellen's own utility? Ellen could conceal her preferences and pretend as if she did not care whether Fran starved to attempt to bluff Fran into clam-digging, or make more conditional threats about cutting off her transfers (for example, by placing a time limit on how long Ellen will continue to support Fran with Ellen's own clams). This strategy would only succeed to the extent Ellen's false threats appeared believable to Fran. Because Ellen has already saved Fran from starvation once, Fran has some insight into Ellen's utility function and may well discern that when it came down to it, Ellen would again save Fran regardless of Fran's failure to dig for clams. As long as Ellen is harvesting enough clams to support herself and also to support Fran, her threats may not be credible.

Ellen could attempt to commit in advance to letting Fran starve by only digging enough clams for her own use each day and spending the rest of her day in a leisurely manner. Fran, observing this behavior, might well begin to dig for clams herself, perceiving that Ellen would have no clams to spare. Yet this strategy also has disadvantages for Ellen. If Ellen has misjudged Fran's (as yet untested) clam-digging capacities, Fran might actually starve. Ellen then would suffer great disutility and be unable to help her.

Better still would be the strategy of pretending to commit to letting Fran starve by openly harvesting only the number of clams Ellen needs for her own use, while secretly (perhaps under the cover of night) building a stockpile. Yet the success of this strategy would probably be short-lived. Either Fran would find out about Ellen's clandestine behavior, or eventually some emergency would arise, forcing Ellen to

make use of her stockpile. Once Fran learned about the stockpile, Ellen's threats to let her starve would lose all credibility.

Another possibility for Ellen would be to make her transfer of clams so demeaning and unpleasant for Fran that it would alter Fran's payoff schedule to make clam-digging the dominant strategy. For example, Ellen could make Fran grovel at her feet while she hurled demeaning insults at her. Or, she could dole out the clams on a meal-by-meal basis and constantly monitor Fran's activities.

Yet this strategy has some disadvantages also. First, by treating Fran in a demeaning manner, Ellen would suffer disutility. Aside from the psychic distastefulness of treating any person in such a manner and the wasted effort she would expend in doing so, Ellen would be cutting off the possibility of community between them—a thing of great value in a two-person society. Second, the pattern of insults and supervision might be counterproductive to Ellen's goal of having Fran engage in clam-digging. To the extent Fran internalized Ellen's negative statements concerning her character and abilities, she might come to believe herself incapable of supporting herself and settle into a sort of despondency. If this occurred, Ellen would be worse off than if she simply gave Fran some of her holdings in a gracious manner.

On the other hand, Ellen could attempt to give Fran an incentive to dig clams by continuing her transfer to Fran whether or not Fran also digs clams. If we assume that Fran, although less adept at clam-digging than Ellen, is nevertheless able to dig about as many clams on her own as she receives from Ellen, Fran's "income" of clams would roughly double if she worked under such a regime. Even after subtracting the disutility Fran experiences in digging clams,<sup>108</sup> the added income might well convince Fran to work rather than consume leisure. A new payoff schedule (Matrix 3) includes the outcome when Fran digs for clams *and* Ellen makes a transfer and can be depicted in this manner:

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108. Although Fran is able to obtain twice as many clams by choosing this option rather than remaining idle, her dislike of work reduces the utility of this choice.

<b>MATRIX 3</b>		
<b>PAYOFFS FOR (FRAN, ELLEN)</b>		
	<b>Ellen Transfers</b>	<b>No Transfer From Ellen</b>
<b>Fran Digs Clams</b>	150, 75	50, 100
<b>Fran Digs No Clams</b>	100, 50	0, 0

In this payoff matrix, Fran's best strategy is to dig clams;<sup>109</sup> the best outcome for Fran is found in the upper left cell, which yields a payoff of 150. If Ellen's goal is to get Fran to work, it could be accomplished under these assumptions if Ellen committed to making a transfer whether or not Fran also digs clams.

But this scenario, in which Ellen makes a transfer and Fran also digs clams, does not yield the best outcome for Ellen. While the fact that Fran is working may take away some of Ellen's disutility in making a transfer, Ellen still incurs some costs in transferring clams to Fran. The payoff of seventy-five which I have assigned to Ellen for this outcome represents the fact that Ellen is somewhat happier making a transfer when Fran is working than when Fran is idle (lower left cell, payoff of fifty), but that Ellen would be happier still (upper right cell, payoff of one hundred) if Fran dug clams and Ellen did not make a transfer.

In other words, since Ellen was motivated to transfer clams in the first place by the specter of Fran starving, she might find that the utility that she, Ellen, would gain from the transfer is not worth the cost to her, if Fran were to support herself and avoid starvation without any help from Ellen. Once Fran demonstrates her ability to support herself through clam-digging, Ellen could be expected to react by withdrawing her own transfers.<sup>110</sup> And when Fran sees that Ellen will no longer make transfers while Fran is supporting herself, the decision matrix shifts back to the earlier "chicken" situation.<sup>111</sup> Knowing that Ellen will provide her with a subsistence living, Fran might quit working.

What options are left for Ellen? Must she simply resign herself to supporting Fran for the rest of her life? The only viable alternative would be for Ellen to convince Fran that she would be better off digging her

109. Notice that clam-digging remains Fran's best strategy in this matrix, regardless of what option Ellen actually selects.

110. A similar withdrawal of assistance has historically followed the institution of "works" programs. See *infra* note 348.

111. See *supra* note 107 and accompanying text.

own clams than sponging off Ellen. Ellen would have to convince Fran that Fran's payoff schedule is faulty and that, in fact, there are intangible benefits to clam-digging that are of greater value to Fran than the leisure she would otherwise consume.<sup>112</sup> For example, Ellen could try to convince Fran that clam-digging would bring a sense of pride, that it would allow Fran to develop important skills that could save Fran's life in the event something happened to Ellen, that it would improve Fran's physical condition, that it would allow Fran to sleep more soundly at night, and the like. In other words, Ellen would be attempting to get Fran to accept her self-interested, revisionist view of Fran's payoff schedule and to adopt the dominant strategy contained therein:

<b>MATRIX 4</b>		
<b>ELLEN'S REVISIONIST VIEW OF FRAN'S PAYOFF SCHEDULE</b>		
	<b>Ellen Transfers</b>	<b>No Transfer from Ellen</b>
<b>Fran Digs Clams</b>	N/A	150
<b>Fran Digs No Clams</b>	100	0

Alternatively (or in combination with the foregoing strategy), Ellen could offer to teach Fran her superior clam-digging technique, so that Fran could harvest a larger number of clams than she would receive via Ellen's transfer. While there would be some up-front costs to Ellen (she would be slowed down in her daily clam-digging by having to perform demonstrations for Fran), it would be well worth it to her if Fran's development of clam-digging prowess altered Fran's payoff schedule to make digging clams Fran's dominant strategy. Not only would Ellen benefit, in order to preclude her starvation, but Fran too would presumably be building up a stockpile which could benefit Ellen in the case of a catastrophe.

From Fran's point of view, the training would be costly in terms of giving up leisure time; however, if the expected payoff represented a

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112. See POSNER, *supra* note 54, at 52 (noting that utilitarianism "does not exclude the possibility that A may know B's true preferences better than B does—the possibility, that is, of paternalism"). The question of what constitutes one's "true" preferences is itself difficult to answer, however, given that preferences can shift based on external factors like advertising and propaganda. See *infra* part IV.A.2 (discussing shifts in preferences).

large enough increase over what she could expect to receive in a transfer payment from Ellen, she would be willing to undertake it. Of course, if the training failed and she found herself unable to master the quicker clam-digging technique, both she and Ellen would be "out" some costs and would be back in the initial state of affairs in which Fran must decide whether to work very hard just to subsist. Hence the training would be offered—and undertaken—only if it appeared likely to succeed.

### *C. The Impact of Children on Strategic Decisions*

An elaboration of the "Fran and Ellen" example illustrates the role that children play in redistributive interactions. Assume that our miniature society includes not only Ellen and Fran, but also Fran's daughter Gina, who is an infant and far too young to dig for clams. In this example, Ellen is completely intolerant of any adult who does not work and would not voluntarily share any of her clams to save Fran's life. Yet, Ellen cannot countenance the thought of little Gina going hungry. In other words, even though Fran's well-being does not appear in Ellen's utility function, Gina's well-being does.

Gina is too young to digest clams; she is still nursing and therefore all her sustenance must be obtained from her mother, Fran. Thus there is no way for Ellen to ensure the well-being of Gina without also ensuring the well-being of Fran. Nevertheless, Ellen strongly believes that Fran should be able to dig enough clams to support herself and her daughter without any help from Ellen. Ellen does not in any way wish to encourage Fran to live a life of leisure, because this will result in greater costs to herself, though they are costs Ellen will willingly incur to avoid the worst outcome—the starvation of Gina.

From Fran's standpoint, the starvation of Gina would be disastrous. However, the task of caring for Gina while attempting to dig sufficient clams to subsist is daunting to her; focusing solely on childcare tasks seems like a much more manageable way to pass the day. As long as Fran perceives that Ellen will ensure the survival of Gina, she is made better off by not undertaking to do so herself. Significantly, as long as Ellen is unwilling to let Gina starve, Fran's survival is also protected, regardless of how disapproving Ellen may be of Fran's daily activities.

In this scenario, it is unlikely that Ellen can believably bluff Fran into working. Even though Ellen's attitude toward nonworking adults is significantly less tolerant than in the last example, the presence of innocent children makes that difference irrelevant. Any attempt to create a disincentive for Fran's perceived laziness translates into the punishment

of an innocent human being, a result that is intolerable for Ellen.<sup>113</sup> Although Ellen may detest Fran for her lax work habits, she can do little to force Fran to improve her productivity, aside from the options discussed in the earlier example.

#### IV. SOCIETY'S STAKE IN THE GAME: THE COSTS OF POVERTY AND INEQUALITY

One of the principal intuitions underlying the game theoretic analysis presented in the preceding Part is that the nonpoor find the alleviation of poverty to be in their own interest, so much so that it creates a strategic dilemma for them. This is true because poverty imposes heavy costs on all segments of society. Although the idea that society as a whole has a great deal to lose if poverty is not relieved seems self-evident and uncontroversial, this important reality has too often been suppressed in economic analyses that emphasize the costs of transferring income to the less well-off.

##### *A. The Inefficiency of Inequality in Opportunity*

Gross inequalities of income and wealth impair the operation of true equality of opportunity,<sup>114</sup> creating costly inefficiencies in the development and use of human resources.<sup>115</sup> While the removal of formal barriers to opportunity (such as discrimination based on race or sex) furthers equality of opportunity and leads to greater efficiency in the use of human resources, inefficiencies associated with unequal material resources remain. Because these inefficiencies keep individuals in society from putting their abilities to their highest and best use, all of society suffers.

113. See *infra* notes 362-64 and accompanying text (discussing the impact on policy design of this reality).

114. See, e.g., GARY S. BECKER, *HUMAN CAPITAL* 121 (3d ed. 1993) ("Generally, the most important cause of differences in opportunities is differences in the availability of funds.") (footnote omitted); RAWLS, *supra* note 12, at 278 (inequality of wealth beyond "a certain limit" places the equality of opportunity "in jeopardy"); Michael Rosenfeld, *Substantive Equality and Equal Opportunity: A Jurisprudential Appraisal*, 74 CAL. L. REV. 1687, 1707-08 (1986); R.H. Tawney, *Equality*, in *INEQUALITY AND POVERTY*, *supra* note 56, at 27, 35.

115. See ARTHUR OKUN, *EQUALITY AND EFFICIENCY: THE BIG TRADEOFF* 80-81 (1975) (characterizing "the inadequate development of the human resources of the children of poor families" as "one of the most serious inefficiencies in the American economy today"); see also Lynn A. Stout, *Some Thoughts on Poverty and Failure in the Market for Children's Human Capital*, 81 GEO. L.J. 1945 (1993).

Since the scarce goods and services which make economic success likely are sold to the highest bidders, or distributed to those with the greatest economic resources, inequality of result (i.e., income or wealth) itself impedes equality of opportunity, even in the absence of formal barriers to opportunity. As long as the private market rations factors that facilitate economic success on the basis of ability to pay, equality of opportunity will in large measure remain a function of equality of result.<sup>116</sup>

At the most basic level, it is evident that subsistence-level food and housing is necessary before one can take advantage of the "opportunities" that might theoretically be available.<sup>117</sup> Other goods which are instrumental to success, such as education,<sup>118</sup> health care, and legal services<sup>119</sup> can be purchased in greater quality and quantity by the more well-off, thus enhancing their life chances. Other factors relevant to success are positively correlated with a higher income, even though they are not purchased at all. For example, an individual born into a wealthy family is more likely to have family members and family friends in positions of importance and influence, and hence is likely to reap greater benefits by virtue of personal connections than is a person born into poverty.<sup>120</sup>

116. Nevertheless, an artificial dividing line between "equality of opportunity" and "equality of result" has been central to thought about equal opportunity. *See, e.g.*, LOCKHART, *supra* note 77, at 56 ("We may usefully distinguish between equality of results, which has not achieved considerable support in theory or in practice among Americans, and equality of opportunity, which in limited senses, at least, has become a core American value."); MURRAY, *supra* note 3, at 233 ("Billions for equal opportunity, not one cent for equal outcome . . .").

117. Lack of these resources can inflict significant and lasting damage to one's ability to succeed. For example, a recent study indicates that persistent poverty during early childhood is responsible for lower IQs. Spencer Rich, *Poverty is Blamed For 9-Point Deficit in 5-Year-Olds' IQs*, WASH. POST, Mar. 27, 1993, at A3 (citing a study conducted by Greg J. Duncan of the University of Michigan).

118. While a high school education is publicly available to all, people with sufficient economic resources can purchase an arguably better private school education. JAMES S. FISHKIN, *JUSTICE, EQUAL OPPORTUNITY, AND THE FAMILY* 69 (1983). Moreover, post-secondary education, which can vastly increase earning potential, *see, e.g.*, BECKER, *supra* note 114, at 17, must usually be purchased.

119. Although certain medical and legal services are available for the less well-off, a more well-off person can purchase more, and better quality, medical and legal services. *See, e.g.*, WILLIAM RYAN, *BLAMING THE VICTIM* 159 (1971) ("The poor are less healthy for the same reason they have less of everything else: they can't afford to buy health."); *id.* at 203 ("[T]he judicial process does not seem to sort out the innocent from the guilty, so much as the well-to-do from the poor.").

120. *See, e.g.*, FRANK, *supra* note 38, at 188 (discussing criticism that "differences in access" to "favored networks of contacts" is partially responsible for resulting gaps in income distribution). Others also contend that more well-off children

Thus, inequalities in income and wealth drive a wedge between merit and one's position in society, creating costly inefficiencies for all of society in the form of suboptimal use of human resources.<sup>121</sup> Moreover, given society's commitment to the ideal of equal opportunity, the fact that inequality in one's economic starting position in life precludes the fair operation of equal opportunity could be expected to generate disutility associated with the resulting unfairness of economic results.

### *B. Aesthetic Disutility*

When some members of society have insufficient means to subsist in a manner consistent with human dignity, there is a utility loss for all who come into contact with this human suffering.<sup>122</sup> Even such an opponent of redistribution as Charles Murray has observed that "[f]or the sake of my own quality of life, I do not want to live in a Calcutta with people sleeping in the streets in front of my house."<sup>123</sup> Mickey Kaus has similarly observed that "[i]n many of our major cities, the latter groups [criminals and the homeless] have all but ruined the enjoyment of communal facilities for the rest of society."<sup>124</sup>

The aesthetic disutility resulting from contact with the poor is more than merely psychological; it results in real economic loss for the affected communities. Other things being equal, people who have the option to avoid contact with areas in which the symptoms of poverty are pervasive will tend to do so.<sup>125</sup> Similarly, market transactions will be performed

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are given "differential developmental opportunities," including "culture in the home," "a secure home environment," and "successful role models" which are not available to less well-off children. *E.g.*, FISHKIN, *supra* note 118, at 51.

121. If the poor could borrow money through lending markets to purchase goods and services instrumental to success, many of these inefficiencies would disappear. BECKER, *supra* note 114, at 144 (listing "improved capital markets" as among the factors that would "generally improve the allocation of the total investment in human capital"). It has been noted, however, that such lending markets are not generally available to the poor. *See, e.g.*, Stout, *supra* note 115, at 1948 & n.15 and sources cited therein. *See also infra* part VIII (proposing use of a family loan program).

122. This disutility results from direct contact with the poor, not from the abstract knowledge that poverty exists (although such knowledge is distressing to many in its own right). *See infra* part IV.E (discussing preferences for a more equal pattern of distribution).

123. MURRAY, *supra* note 3, at 202.

124. KAUS, *supra* note 10, at 55.

125. *See, e.g., id.* at 56 (describing how this phenomenon negatively affects the use of public spaces); BARBARA EHRENREICH, *FEAR OF FALLING* 249 (1989) (discussing the "perverse, self-perpetuating dynamic" which undermines public institutions and facilities).

outside blighted communities rather than within them whenever possible. Tourism falls, businesses fold, and people seek housing in different areas, making the community in question even less desirable than before.<sup>126</sup>

### C. Crime and Rioting

Another kind of disutility resulting from poverty stems from the possibility that vast disparities in wealth and income create conditions conducive to crime and rioting.<sup>127</sup> By decreasing disparities, the relatively poor have less of an incentive to risk punishment by resorting to crime and violence. This decrease in incentive would seem to result chiefly from the increased income of the relatively poor, since the needs which might motivate a poor person to resort to crime would be alleviated. Perhaps more important, an individual with a minimally adequate income (and the accompanying dignity and social status) has "more to lose" from resorting to crime and violence.

It is also possible that a reduction in ostentatious displays of wealth, which might occur if overall inequality were reduced, would reduce the sense of outrage and injustice that may motivate some social unrest. In a larger, societal sense, the poor may indeed have "more to gain" by breaking the law when inequalities are vast, if those inequalities bear little relation to natural ability.<sup>128</sup>

Francis Fox Piven and Richard A. Cloward have theorized that poverty programs have historically been driven by a need to control the behavior of the poor—a need that grew more pressing when traditional methods of controlling behavior, such as employment, broke down.<sup>129</sup> Under this theory, it is not surprising that the 1991 riots in Los Angeles triggered a reassessment of welfare policies.<sup>130</sup> Although President

126. Fear of crime associated with the underclass makes these effects especially severe. See, e.g., KAUS, *supra* note 10, at 107.

127. See, e.g., POSNER, *supra* note 16, at 463-64; THURLOW, *supra* note 58, at 38-39. See also FRANK, *supra* note 38, at 127 ("If the rich refuse to compensate the poor as part of a distributional contract, it is by no means clear that they can then count on having a climate of peaceful interaction."). But see Lichbach, *supra* note 15 (using a game theoretic model to question the relationship between inequality and social conflict).

128. See James M. Buchanan, *Before Public Choice*, in *THE ECONOMICS OF LEGAL RELATIONSHIPS*, *supra* note 70, at 67, 75-76 (positing, based on game theoretic analysis, that when distribution fails to correlate with human capital, law-abiding behavior can be expected to break down).

129. Piven and Cloward, who first set forth this theory in 1975 in their book, *Regulating the Poor*, have recently reaffirmed their conclusions, with minor clarifications. See PIVEN & CLOWARD, *supra* note 65, at 222-46, 456-66.

130. See, e.g., Lemann, *supra* note 8, at C1 ("Within hours of the outbreak of disorder in Los Angeles, the riots began to be blamed on the Great Society.") See

stated he would no longer “dump largesse” on urban areas,<sup>131</sup> the social unrest had the effect of focusing attention, at least momentarily, on the underclass. The consensus was that *something* should be done, even if the content of the specific policy to be pursued was unclear.<sup>132</sup>

The social costs of crime and rioting extend, of course, far beyond their immediate victims. Law enforcement costs are involved in quelling violence and catching criminals, as well as social costs in the punishment of criminals.<sup>133</sup> In addition, the insecurity which such violence elicits exacts both financial and nonfinancial costs on those in the area.<sup>134</sup> Indeed, one cost of crime may be the perpetuation of poverty, since crime in an impoverished area will tend to discourage the very investment that might improve economic conditions for residents.<sup>135</sup>

#### *D. Risk of Falling*

Another reason why individuals who are not themselves presently poor might wish to alleviate at least the most egregious extremes of want is self-insurance. To the extent nonpoor individuals can imagine themselves falling from their present standard of living into poverty, risk aversion may lead them to place a limit on how far their fortunes may fall.<sup>136</sup>

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generally URBAN AMERICA, *supra* note 11.

131. See Lemann, *supra* note 8, at C1.

132. See, e.g., HANDLER & HASENFELD, *supra* note 5, at 29 (“Overt, collective protest by the poor produces public response, but whether that response is liberal or repressive is not predictable by the fact of protest alone. The most that can be said is that from time to time, welfare policy does respond to quell social disorder.”).

133. See, e.g., Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 179-81 (1968) (noting that punishment of crime, as well as crime itself, is costly to society).

134. See Edelman, *supra* note 94, at 1749 & n.244 (noting that violence causes high levels of anxiety and fear among children); see generally John J. Dilulio, Jr., *The Impact of Inner-City Crime*, PUB. INTEREST, Summer 1989, at 28.

135. PETER REUTER ET AL., MONEY FROM CRIME 86 (1990) (citing Dilulio, *supra* note 134).

136. See, e.g., POSNER, *supra* note 16, at 465 (“An affluent person who is risk averse will want to insure against the possibility of becoming poor sometime in the future, because of business reverses, poor health, changes in the labor market, or other misfortunes.”); THUROW, *supra* note 58, at 39 (“[P]ublic income redistribution schemes may be a form of insurance—minimum-income insurance.”). For a game theoretic analysis of this self-insuring aspect of altruism, see Peter Hammond, *Charity: Altruism or Cooperative Egoism*, in ALTRUISM, *supra* note 15, at 115.

Social Security, a massive redistributive program,<sup>137</sup> has been accepted as a necessary component of American social policy based on precisely such reasoning. The rhetoric surrounding Social Security, which presented it as an insurance program rather than a redistributive plan, has been viewed as largely responsible for its public acceptance.<sup>138</sup> Also critical to its success was the universality of the condition triggering payment—old age. Americans had little trouble imagining the financial difficulties that might greet them (or their parents) upon reaching retirement age. The virtual inevitability of the “insured-against” event made the extraction of “premiums” from each paycheck remarkably palatable to the average American, even though many of those at the higher end of the pay scale would never recover anything approximating the moneys put in, and even though many at the lower end of the pay scale would reap benefits in great excess of contributions.<sup>139</sup>

The insurance model for public assistance is a compelling and philosophically important one.<sup>140</sup> John Rawls' *Theory of Justice* is, at bottom, an exercise in self-insurance. The participants behind the Rawlsian veil of ignorance are paying premiums of expected future utility to insure against the effects of being born without marketable skills or at the low end of the social stratum.<sup>141</sup> Ronald Dworkin has advanced a theory of justice that similarly relies on an insurance model, albeit an insurance model in which premiums and terms are negotiated with somewhat more self-knowledge on the part of the participants than Rawls'

137. See, e.g., Simon, *supra* note 19, at 1454-55 (discussing growth of Social Security and its redistributive aspects).

138. See, e.g., HANDLER & HASENFELD, *supra* note 5, at 19 (“Despite the fact that its insurance features are attenuated and the program has strong redistributive effects, it has always been sold on the basis of ‘insurance’ and ‘contributions.’”); GILBERT Y. STEINER, *THE STATE OF WELFARE* 3 (1971) (“[D]espite major modifications made as early as 1939 in the principle of individual equity in social security, three decades later the system continues to benefit politically from its insurance mythology.”).

139. See, e.g., Simon, *supra* note 19, at 1454-59 (discussing the manner in which Social Security policy became attenuated from the private insurance model); tenBroek & Wilson, *supra* note 1, at 247 (discussing “disproportion . . . between benefits and premiums, between premiums and wages, and between wages and work,” such that “the property of one person is taken for the use and benefit of another in the manner of all taxes”).

140. See, e.g., MARMOR ET AL., *supra* note 6, at 31 (characterizing welfare state as an “insurance/opportunity state”); Simon, *supra* note 19, at 1441-44.

141. Rawls' theory thus assumes that people are “fantastically risk averse.” POSNER, *supra* note 16, at 461. See also OKUN, *supra* note 115, at 92 and sources cited therein (“[D]ifference principle would appeal only to people who hate to take any risk whatsoever.”).

veil of ignorance permits.<sup>142</sup>

### *E. Costs Arising From the Interdependence of Utility Functions*

Without question, individuals in society can derive benefit not only from their own holdings, but also from the holdings of others.<sup>143</sup> This is true not only because of the specific costs which have been identified in the preceding sections, but also for intangible reasons relating to "justice" or "fairness."<sup>144</sup> Nonpoor persons may prefer a society in which the poor have sufficient holdings to subsist in a manner befitting a human being.<sup>145</sup> They may further derive utility (or disutility) from the overall shape of the distribution curve for income or wealth.<sup>146</sup> Thus, "people not only derive utility from their own incomes but can also derive utility from (i) the income of others or (ii) the shape of the overall income distribution curve."<sup>147</sup> Other things being equal, a person might prefer to live in a society in which incomes did not vary widely, for intangible reasons relating to the perceived justice, fairness, or opportunity for community associated with that relative equality.<sup>148</sup>

142. Ronald Dworkin, *What is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283, 315 (1981) ("We may capitalize on the similarities between handicaps and relative lack of skill to propose that the level of compensation for the latter be fixed, in principle, by asking how much insurance someone would have bought, in an insurance sub-auction with initially equal resources, against the possibility of not having a particular level of some skill."); *id.* at 344-45 (describing the level of self-knowledge at the time of the sub-auction, which is greater than that in the Rawlsian model). See also Milton Friedman, *The Distribution of Income*, in INEQUALITY AND POVERTY, *supra* note 56, at 38, 40.

143. See, e.g., THURLOW, *supra* note 58, at 38; Sen, *supra* note 59, at 92 (describing "sympathy" as the benefit one derives from an improvement in the condition of another).

144. See, e.g., Guillermina Jasso, *Self-Interest, Distributive Justice, and the Income Distribution: A Theoretical Fragment Based on St. Anselm's Postulate*, 3 SOC. JUST. RES. 251 (1989) (presenting a formal analysis of the postulate that individuals seek not only their own advantage, but also seek justice).

145. See, e.g., THURLOW, *supra* note 58, at 38 ("I may be happier if my neighbors are well-off and not in poverty.").

146. *Id.* at 39 ("[T]he distribution of income may itself appear in my utility function. I want to live in a society with a certain kind of economic lottery, and I am willing to contribute some of my own income in order to get the right structure of prizes.") (footnote omitted).

147. Wil Arts & Peter van Wijck, *Share and Share Alike? Social Constraints on Income Equalization*, 3 SOC. JUST. RES. 233, 235 (1989).

148. See, e.g., Arthur M. Okun, *Further Thoughts on Equality and Efficiency*, in INCOME REDISTRIBUTION 13, 14-16 (Colin D. Campbell ed., 1977) (discussing society's preference for equality); W.S. Vickery, *An Exchange of Questions Between Economics and Philosophy*, in ECONOMIC JUSTICE 35, 47 (Edmund S. Phelps ed., 1973) (postulating

preference is obviously not a universal one; some people derive utility from the very fact that other people are not as well-off as themselves,<sup>149</sup> while others may value the wider range of economic outcomes for the possibilities and risks it offers.<sup>150</sup> Therefore, the type of intangible social "cost" of poverty and inequality which I am describing exists only to the extent the disutility suffered from the present structure outweighs the intangible utility this arrangement brings.

Although the direction and intensity of these preferences is largely indeterminate, in at least one area the interdependence of utility functions appears to be quite significant—the case of children in poverty. Whether the disutility associated with children in poverty is described as simple compassion or as a disutility arising from the unfairness of poverty inflicted on one who did nothing to deserve it, it seems to be nearly universally true that the personal well-being of individuals in society is caught up, to at least some extent, with the well-being of society's poorest children.

## V. THE COSTLY PUBLIC ALLEVIATION OF POVERTY

### A. *Why Public Alleviation?*

The discussion in the preceding Parts indicates why all of society, including the nonpoor, find poverty very costly. Because poverty is costly to the nonpoor, the nonpoor have always been willing to spend money to alleviate it. In this sense, poverty alleviation is a valuable public good<sup>151</sup> which the nonpoor would willingly purchase in order to increase their own utility. The question remains, however, as to who should bear the cost of alleviating poverty.

It is sometimes suggested that the costs of poverty should be alleviated through private charities rather than through the governmental apparatus.<sup>152</sup> The appeal of private charities over public welfare is obvious: because private charities are completely voluntary, the coercive power of government is not involved and hence one could not complain

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that there may be "social" satisfactions associated with equality).

149. See, e.g., MICHAEL LEWIS, *THE CULTURE OF INEQUALITY* 44 (1978).

150. See, e.g., OKUN, *supra* note 115, at 48-49 ("The possibility of 'making it big' seems to motivate many Americans, including some who have not made it at all.").

151. See Arts & van Wijck, *supra* note 147, at 235 (characterizing income distribution as a public good).

152. Charles Murray, for one, has proposed that the entire public welfare system be dismantled, yet he does not oppose redistributive efforts carried out by private charities. See MURRAY, *supra* note 3, at 227, 233. See also NOZICK, *supra* note 3, at 265.

that one's property or liberty rights were being violated, or that one was being compelled to perform "forced labor."<sup>153</sup> Yet it is well recognized that private provision of assistance presents a free-rider problem which results in provision of a sub-optimal level of redistribution.<sup>154</sup>

This is true because individuals benefit when poverty is relieved, whether or not they personally assist in its alleviation.<sup>155</sup> Each person acting in his or her own interest would seek to "free-ride" off the redistributive efforts of others. While each person might independently be willing to pay a particular share towards the alleviation of poverty, be or she has an incentive to conceal or misrepresent that willingness in an effort to reap benefits entirely funded by others.

Because the free-rider problem typically results in suboptimal provision of the public good in question, society as a whole (but especially the putative recipient) suffers. For this reason, "voluntarism never was and never will be able to meet the needs of poor and dependent Americans."<sup>156</sup> In addition, altruists may end up paying for more than their "fair share" (and getting the benefit of only a suboptimal result) as a result of other people's attempts to free-ride.<sup>157</sup> Or, altruists may no longer feel it is "worth it" to contribute, without the assurance that everyone else will contribute as well.<sup>158</sup> They may be willing to chip in to purchase a comprehensive poverty alleviation program, the argument runs, but unwilling to make a "drop in the bucket" contribution which would make no discernible difference in the overall poverty condition.<sup>159</sup> Taken together, these "free-rider" considerations make a compelling case for the government provision of welfare.<sup>160</sup>

Given the foregoing, one might think that the public provision of welfare would solve the free-rider problem. Yet one of the most difficult and troubling dilemmas in welfare policy can be conceptualized as an even more basic "free-rider" problem—with the poor and the nonpoor

153. See *supra* note 45 (quoting NOZICK, *supra* note 3). It is also possible that differences in administrative costs between public and private assistance could be identified, especially if public assistance is accomplished through the mechanism of the state. See KUTTNER, *supra* note 10, at 22-23.

154. See, e.g., RAWLS, *supra* note 12, at 267-68; POSNER, *supra* note 16, at 464-65; Arts & van Wijck, *supra* note 147, at 237-38 (expressing the free-rider problem as it pertains to redistribution of income).

155. See, e.g., POSNER, *supra* note 16, at 464; Arts & van Wijck, *supra* note 147, at 235.

156. KATZ, *supra* note 1, at 291.

157. See, e.g., POSNER, *supra* note 16, at 464 ("[T]he major cost of poverty, however, is the disutility it imposes on affluent altruists.").

158. See NOZICK, *supra* note 3, at 265-68; RAWLS, *supra* note 12, at 267.

159. See NOZICK, *supra* note 3, at 265-68.

160. See, e.g., RAWLS, *supra* note 12, at 267-68.

each seeking to reap the benefits of poverty alleviation without incurring the costs necessary to bring it about. The game theoretic model presented in Part III above demonstrates how this free-rider dilemma plays out.

If that analysis is correct, society chooses to adopt a policy of alleviating poverty because it is "worth it" to avoid the costs of poverty associated with a complete failure to provide for the poor. At the same time, society is somewhat dissatisfied and uneasy with that strategy because it could reap even greater benefits if the poor alleviated their own poverty, relieving society of incurring those alleviation costs. Not surprisingly, criticisms of welfare policy tend to focus on these costs of public poverty alleviation, rather than on the costs of failing to alleviate the poverty which created the strategic dilemma in the first place. In order to better understand society's position in the game, it is necessary to examine these costs in some detail. They fall into two major categories.

First, the public provision of welfare is costly because it may encourage decisionmaking on the part of the poor which will generate additional costs for society. Second, even aside from the effects on decisionmaking, the public provision of welfare is inherently costly to society in that it involves the movement of resources from one group to another.<sup>161</sup> I focus primarily on one cost in this category that I feel to be most significantly implicated in welfare policy: the perceived unfairness of moving funds belonging to the more well-off into the hands of the less well-off.

### *B. Costs Associated With the Decisions of the Poor*

As the game theoretic analysis presented in Part III suggests, what makes the societal alleviation of poverty so problematic is the fact that the actual and potential recipients of welfare are not merely acted upon; they make decisions and interact with the policy structure in a manner that can raise or lower the costs of redistribution, including nonmonetary costs. This may have the effect of eliciting reactions which trigger further changes in costs. Only by tracing through all the impacts on decisionmaking can the true cost associated with a given level and method of redistribution be assessed. Coase's admonition in another context is equally apt here: "[I]n choosing between social arrangements within the context of which individual decisions are made, we have to bear in mind

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161. Of course, the *magnitude* of this second group of costs is affected by the decisionmaking of the poor. If more people decide to opt for public assistance rather than self-help, more money will have to be moved. Nevertheless, the basic categories of these costs would exist even if the existence of welfare had no effect on decisions made by the poor.

that a change in the existing system which will lead to an improvement in some decisions may well lead to a worsening of others."<sup>162</sup>

Because of the interdependent relationship between the costs and benefits of redistribution and various decisions made by recipients of transfer payments, it is possible that, as an empirical matter, beyond some point additional expenditures on welfare actually lead to a decrease in total benefits obtained. This possibility—that added expenditures might have a negative marginal value and actually “make things worse”—has had widespread intuitive appeal. But it is widely misunderstood. The fact that a particular welfare policy causes people to make decisions which are costly does not necessarily mean that the policy causes net harm or yields a net increase in poverty. A welfare policy reduces poverty costs by transferring money to the poor; when that same policy causes some persons to make socially costly decisions, those “decision costs” simply represent an offset against the gains achieved through the policy. Only if the decision costs were to increase poverty to such an extent as to completely offset all the gains realized under anti-poverty programs would it be accurate to say that the welfare policy was actually making things worse.

In other words, decisions triggered by welfare policy may well cause poverty to be greater under a particular welfare policy than would be the case in the absence of such decisions, *holding welfare policy constant*. Whether poverty costs in such a situation are worse, in absolute terms, than they would have been *in the absence of that policy* is a separate question.<sup>163</sup>

### 1. THE COMPLEX RATIONALITY OF THE POOR

In assessing the costs associated with decisions made by the poor, I begin with the assumption that the poor are rational actors who seek to

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162. R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 44 (1960). See also Robert Jervis, *Systems Effects*, in STRATEGY AND CHOICE 107, 107 (Richard J. Zeckhauser ed., 1991) (“When you pick up one piece of this planet, you find that, one way or another, it’s attached to everything else—if you jiggle over here, something is going to wiggle over there . . .”) (quoting Dr. Sylvia Earle, a leading marine biologist and ecologist).

163. For example, a welfare policy providing food to 50 women and their children would decrease the total costs associated with poverty even if that same policy were responsible for 10 of those women making decisions leading to prolonged dependency. In that case, the decrease in poverty costs associated with providing nutrition to 40 women and their children who would otherwise starve (let us assume) is somewhat offset by the costs of 10 women and their children becoming more dependent. Yet poverty costs still go down in absolute terms, when compared to a world with no welfare policy.

maximize their own well-being and that of their families.<sup>164</sup> However, some unique aspects of that rationality should be recognized.

First, unlike more well-off individuals, poor individuals' rationality is bounded by the pressure of subsistence-level needs.<sup>165</sup> Because needs *must* be fulfilled in a short time frame to avoid loss of health or life, a rational actor will pay virtually any price to fulfill them. A longer range plan of action which would lead to a more efficient meeting of those needs is useless to a person under the immediate pressure of hunger, unless that plan also permits those immediate needs to be satisfied.<sup>166</sup> To borrow an example from literature, if Robinson Crusoe can barely dig enough clams each day to keep himself from starving, he cannot (without borrowing clams) save up enough clams to buy a shovel, even though a shovel would increase his daily clam-digging capacity.<sup>167</sup>

Second, the rationality of any person is keyed to his or her own preferences and goals, which may change over time.<sup>168</sup> What is rational for a person on welfare, therefore, may be different from what is rational for a more well-off person.<sup>169</sup>

164. See, e.g., MARIAN W. EDELMAN, *FAMILIES IN PERIL: AN AGENDA FOR SOCIAL CHANGE* 75 (1987) ("[T]he work behavior of the poor shows that the poor, including those who rely upon welfare benefits to meet their needs, overwhelmingly respond to the same choices and motivations as the rest of us."); Alejandro Portes, *Rationality in the Slum: An Essay on Interpretive Sociology*, 14 *COMP. STUD. SOC'Y & HIST.* 268, 286 (1972) (concluding, based on his study of a Chilean slum, that "individuals [in the slum] continuously look for the most efficient way of improving their positions within the limits and the barriers created by the existing social and economic organization").

165. LUTZ & LUX, *supra* note 59, at 23-26. There are difficulties, however, in distinguishing "needs" from mere "wants." See, e.g., PAUL HEYNE, *THE ECONOMIC WAY OF THINKING* 16 (4th ed. 1983) ("[N]eeds turn out to be mere wants when we inspect them closely."), *quoted in* LUTZ & LUX, *supra* note 59, at 23. See also *infra* notes 292-94 and accompanying text (discussing the distinction between needs and wants). Despite these conceptual difficulties, I will assume for present purposes that some things can be usefully thought of as basic human "needs" in our society, without which one would suffer a loss of health, life, or human dignity.

166. Charles Murray seems to be referring to this aspect of the rationality of the poor when he says that the poor "play with fewer chips and cannot wait as long for results." MURRAY, *supra* note 3, at 155 (footnote omitted). See also OKUN, *supra* note 115, at 80 ("[M]any of the poor act like there's no tomorrow because their main problem is surviving today. Saving and investment are hardly rational at the cost of survival.").

167. LUTZ & LUX, *supra* note 59, at 24 (discussing an example from HEYNE, *supra* note 165).

168. See, e.g., HEAP, *supra* note 59, at 103-15 (discussing preference shifts); Vickery, *supra* note 148, at 43-44 (discussing changes in preferences, as well as efforts specifically directed at effecting same); *infra* part VI.A.2.

169. Society can, however, attempt to change preferences that it believes are objectively inferior through education, changes in the law, or other forms of social

Third, decisionmaking by the poor does not occur in a vacuum, but instead interacts with decisionmaking by the nonpoor, which also has an effect on their well-being. This means that the choices made by the poor may make sense only in the context of decisionmaking by other actors; the poor might make different choices if their well-being depended solely upon their own actions.<sup>170</sup>

Finally, it is important to remember that welfare policy is but one factor affecting an impoverished person's decisions, and by no means is it always the most important one.<sup>171</sup> Social and cultural forces, as well as interactions with family and friends, also contribute to the context in which decisions are made, and necessarily affect the content of those decisions.<sup>172</sup> The poor do react rationally to changes in welfare policy, but they are also simultaneously reacting to other forces in their lives.<sup>173</sup> Welfare policy is not the sole determinant of the behavior of the poor.

This unexceptional observation, which merely recognizes the complexity of all human decisionmaking,<sup>174</sup> should not, however, lead one to abandon all analysis which examines the incentive effects of particular welfare policy features. Ignoring the incentive effects of such policies makes no more sense than ignoring the disincentive effects of taxation on the work effort of the more well-off, simply because other, nonmonetary factors are also involved in the choice between work and leisure at the margin. The marginal effect of welfare policy on behavior remains an area of legitimate concern, tempered by the recognition that other forces may counterbalance or intensify that effect.

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conditioning. See, e.g., Jack Wiseman & S.C. Littlechild, *The Political Economy of Restriction of Choice*, in JACK WISEMAN, *COST, CHOICE & POLITICAL ECONOMY* 186, 189-90 (1989) (discussing societal attempts to change preferences for such activities as drinking, smoking, and using drugs). See also *infra* Part V.B.2.b (discussing efforts to change preferences for work).

170. The strategic dilemma outlined in Part III, *supra*, illustrates the interdependence of decisions made by the poor and the nonpoor.

171. See, e.g., MARMOR ET AL., *supra* note 6, at 219-20.

172. For example, it has been pointed out that shifts in societal factors, such as "the perception of out-of-wedlock births or of single parenting" could "dwarf the effects of the economic incentives [incorporated in welfare policy]." *Id.* at 220.

173. For this reason "the multiple pressures and diffuse expectations created by economic forces are much harder to sort out." *Id.*

174. See ROBERT NOZICK, *THE NATURE OF RATIONALITY* 125 (1993) ("Like a large jigsaw puzzle, where each piece fits only in the space left by all of the other pieces, each person's actions are performed within the space of constraints and incentives left open by the actions of all the others.").

## 2. WORK DISINCENTIVES CREATED BY WELFARE

*a. Choosing between welfare and work*

The existence of welfare, which provides qualifying individuals with subsistence-level benefits, provides an alternative to whatever work that same individual might be able to obtain. As David Ellwood has pointed out, assistance inevitably “reduce[s] the pressure” on the individual to support herself and her family.<sup>175</sup> When welfare benefits (including in-kind benefits like Medicaid) equal or exceed the full-time wages available at an entry-level minimum wage job, it is unsurprising that many facing that choice would opt for welfare.

This is the basic premise underlying Charles Murray’s “Harold and Phyllis” example.<sup>176</sup> According to Murray, the package of leisure and benefits attending welfare (which can be supplemented by the income of a live-in nonspouse) may be perceived as more attractive than relying on a dull, low-end job as the primary source of income.<sup>177</sup> The higher the benefits provided under welfare and the fewer behavioral and consumption restrictions upon which its receipt is conditioned, the better it will look to a potential recipient when compared to other prospects.<sup>178</sup>

The troubling result is that, in society’s efforts to assist the poor, it unwittingly “cheapen[s] the efforts of those who are struggling hard just to get by.”<sup>179</sup> This results in palpable unfairness to the working poor, who often are unable to attain the poverty level.<sup>180</sup> One apparent

175. ELLWOOD, *supra* note 1, at 19 (referring to the “[s]ecurity-[w]ork [c]onundrum”); *see also* HANDLER & HASENFELD, *supra* note 5, at 37 (“The relief of misery is contradicted by the need to uphold the work ethic.”). The reduction of pressure to survive that accompanies transfer payments has long been recognized. *See* KATZ, *supra* note 1, at 17 (To many nineteenth century observers, “private charity and outdoor relief encouraged idleness by undermining the relation between work and survival.”).

176. *See* MURRAY, *supra* note 3, at 156-64.

177. *See id.* at 160-62.

178. Interestingly, efforts to reduce perverse incentives for those *already* on welfare, such as permitting welfare recipients to keep some percentage of their earnings without suffering a corresponding reduction in benefits, increases the attractiveness of the total welfare “package” and, on balance, would be expected to induce more potential recipients to select it. MURRAY, *supra* note 3, at 163-64 (citing Frank Levy, *The Labor Supply of Female Household Heads, or AFDC Work Incentives Don’t Work Too Well*, 14 J. HUM. RESOURCES 76 (1979)).

179. ELLWOOD, *supra* note 1, at 6.

180. *See* JOHN E. SCHWARZ & THOMAS J. VOLGY, *THE FORGOTTEN AMERICANS* 130-31 (1992) (“[O]ur present policies to assist the poor create another grave injustice that ought not be ignored—namely, that Americans who work full-time the whole year frequently end up with incomes at or beneath the level that public assistance grants to many welfare recipients who are employed intermittently or not at all.”).

solution would be to reduce welfare benefits to the point that entry level work becomes the preferred strategy. Yet the gap between welfare benefits and the wages one could earn at an entry-level job is caused not by overly generous welfare benefits (in most cases, benefits do not even bring a recipient halfway to the poverty line);<sup>181</sup> it is caused by the inadequacy of full-time entry level wages (which are virtually never accompanied by benefits such as health insurance).<sup>182</sup>

Nevertheless, cutting welfare benefits would doubtless cause some potential welfare recipients to choose work over welfare, since it would alter the relative attractiveness of the two choices. At the limit, the elimination of all welfare benefits would make work virtually the only option for the poor.<sup>183</sup> However, the extent to which the poor would be able to exercise their "option" to work depends on whether unemployment among welfare recipients is voluntary or involuntary. The fact that millions of working families are unable to escape poverty even when a family member works full-time strongly suggests that there are simply not enough "steady, decent-paying, full-time jobs to go around."<sup>184</sup>

The magnitude of welfare's effect upon decisions between work and welfare depends on the relative size of two groups among the poor—those who "could" support themselves but would prefer not to, and those who "could not" support themselves.<sup>185</sup> Making welfare benefits more

181. See DaVanzo, *supra* note 11, at 103 ("[T]wo-thirds of the states in the United States had AFDC grant levels that were less than 50 percent of the poverty line."). See also JENCKS, *supra* note 7, at 205-08 (citing study of Chicago welfare mothers conducted by Kathryn Edin, which showed that welfare recipients must somehow supplement their AFDC payments—through off-the-books jobs, vice, or support from friends—in order to meet basic living expenses).

182. See EDELMAN, *supra* note 164, at 74 ("The trend toward earnings inadequate to support children and families is shocking."). These low earnings push many American workers and their families below the poverty line. See SCHWARZ & VOLGY, *supra* note 180, at 61 ("During 1989, 56 million Americans—22.8 percent of the American population—resided in households with incomes that could not realistically provide for basic necessities.") (footnote omitted).

183. This assumes that the poor would be unable to obtain assistance from other sources, such as family members or private charities, and that work would yield greater net benefits than panhandling or criminal activity, all of which are empirically uncertain.

184. SCHWARZ & VOLGY, *supra* note 180, at 106.

185. Whether welfare recipients "can" find employment also may depend upon what assumptions one makes about the mobility and adaptability of the recipients. Some have argued that the availability of welfare blocks the natural adaptive process that recipients would otherwise follow by, for example, migrating to places where jobs could be found and creating stable, two-parent homes which would increase the chances of success for their offspring. See, e.g., KAUS, *supra* note 10, at 119-20 (citing John D. Kasarda, *Urban Change and Minority Opportunities*, in *THE NEW URBAN REALITY* 59-60,

stingy would affect the behavior of the first group only; to the extent individuals in this group were induced to take jobs rather than go on welfare, society's costs would be reduced. The price for this cost reduction, however, is increased poverty among the second group—those who would be unable to react to reduced benefits by finding a job.<sup>186</sup>

*b. Incentive structures for welfare recipients*

Once on welfare, recipients are given little incentive to work by the present benefit structure.<sup>187</sup> Even during a family's first few months on AFDC, when the first thirty dollars of earned income and one-third of income earned thereafter are disregarded in determining eligibility and benefit levels,<sup>188</sup> the effective marginal tax rate for welfare recipients is high. When these disregards become inapplicable, welfare recipients face an even steeper marginal tax rate on earned income.<sup>189</sup> The result is a "poverty wall" which discourages exit from the welfare program.<sup>190</sup> A welfare recipient would have to find an entry-level job that paid significantly more than available welfare benefits in order to make worthwhile the effort of getting and keeping the job, as well as the necessary expenditures for transportation, appropriate clothing, and childcare.<sup>191</sup>

66 (Paul E. Peterson ed., 1985)); *see also* Irving Kristol, *Thoughts on Equality and Egalitarianism*, in *INCOME REDISTRIBUTION*, *supra* note 148, at 38 (citing the "Okies," who fled the dustbowl during the Depression to seek work in California).

186. *Cf. infra* notes 281-91 and accompanying text (discussing costs associated with efforts to deter welfare participation through stigma).

187. *See, e.g.*, MARTIN ANDERSON, *WELFARE: THE POLITICAL ECONOMY OF WELFARE REFORM IN THE UNITED STATES* 43 (1978) (alleging that "[t]he virtual elimination of poverty in the United States" has been obtained at the price of "the almost complete destruction of work incentives for the poor on welfare").

188. The exclusion of one-third of earned income becomes inapplicable after it has been applied for four consecutive months, and the \$30 exclusion is inapplicable after it has been applied for 12 consecutive months. 42 U.S.C. § 602(a)(8)(B)(ii)(I)(a) (1988). Once these provisions become inapplicable, they may not be invoked again until 12 months have expired without the receipt of assistance under the program. *Id.* § 602(a)(8)(B)(ii)(I)(b). Moreover, even during the time limitations, the "income disregard" provisions are inapplicable in a variety of circumstances, such as when a person has refused or terminated employment. *Id.* § 602(a)(8)(B)(i)(I)-(III).

189. While other income disregards may remain applicable, such as flat disregard amounts for child care expenses and child support received, *see id.* § 602(a)(8)(A), these do not serve to lower the *marginal* tax rate faced by a welfare recipient once she exceeds these flat disregard amounts in a given month.

190. *See, e.g.*, ANDERSON, *supra* note 187, at 50; POSNER, *supra* note 16, at 467-68 (discussing disincentive effects of high marginal tax rates on welfare recipients' earnings).

191. *See, e.g.*, JENCKS, *supra* note 7, at 223-26.

One way to induce people to leave the welfare rolls is to design a program so that one can be made better-off by engaging in the kinds of behavior (such as work) that would, at least in theory, lead to eventual independence from public assistance. For example, the effective tax rate on earnings received while on welfare could be reduced by allowing welfare recipients to keep some greater proportion of their earnings without an offset in benefits. Yet attempts to lower the marginal tax rate applicable to welfare recipients face formidable political barriers. As Martin Anderson has noted, to reduce the marginal tax rate without lowering the present welfare "floor" would "increase the cost of welfare to taxpayers by such phenomenal sums" that it would be a political impossibility.<sup>192</sup>

The resulting dilemma has been termed an "iron triangle," defined as "the triangle created by the inherent conflicts among the income guarantee level, the work incentive (how much of an imputed 'tax' on earnings), and total costs."<sup>193</sup> In other words, to reap the benefits associated with lowered marginal tax rates on recipients (i.e., stronger work incentives causing more welfare recipients to work, thus reducing costs from perceived unfairness, dependency costs, and the like), society must do one of two things. On the one hand, society can incur increased program costs, as where the floor remains stable with welfare recipients retaining a greater percentage of outside earnings. Alternatively, society can lower the floor and incur increased costs as a result of the dire poverty of those who do not (or cannot) find work to supplement their benefit checks.<sup>194</sup>

Another way of accomplishing the same thing would be to leave the effective tax on work unchanged but make work attractive enough that welfare recipients would find it worth their while to hurdle the "poverty wall." For example, the minimum wage could be increased, or wages at entry-level jobs could be supplemented by the government either in cash

192. ANDERSON, *supra* note 187, at 49.

193. GLAZER, *supra* note 94, at 28 (citing Sheldon K. Danziger, *Budget Cuts as Welfare Reform*, AM. ECON. REV., May 1983, at 65, 73 n.2). Danziger referred to the "iron triangle" in the context of efforts to pass the Family Assistance Plan; however, the concept applies equally to efforts to insert work incentives into AFDC or similar benefit programs.

194. Work requirements, school requirements, and other conditions of transfer pose a variant of this "iron triangle" problem. Either welfare participants who meet the behavioral requirements are rewarded with higher benefit levels (which raises monetary costs), or the welfare participants who fail to meet the requirements are penalized with lowered benefit levels (which entails higher nonmonetary costs). See *infra* part VII.B (discussing behavioral conditions placed on welfare).

or in benefits.<sup>195</sup> Specifically, it has been suggested that a health benefits package equal to the benefits available through Medicaid to welfare recipients be appended to all jobs, including entry-level work.<sup>196</sup>

All these solutions involve costs of their own, however. Raising the minimum wage "would make low-paid jobs more attractive, but it would also make employers less willing to hire the unskilled, and it would risk greater export of jobs to countries with cheaper labor."<sup>197</sup> Government wage subsidies, embraced by some commentators as an externality-free way to encourage work and reward workers,<sup>198</sup> would be very costly, as they would extend benefits to those who are now ineligible to receive them. Moreover, any benefit cutoff point that is selected will create its own disincentive effects. If wage supplements are cut off for a certain-sized family when its income (without the benefit) reaches a certain level, there is a strong incentive to avoid reaching that level, since arriving at the cutoff point would entail a net loss in income.

This benefit cutoff problem was recognized as one of the reasons for the failure of President Nixon's proposed Family Assistance Plan ("FAP") which, much like plans proposed today, sought to provide a grant to all low-income families.<sup>199</sup> Similar effects at the benefit cutoff

195. See, e.g., GLAZER, *supra* note 94, at 13-14 (suggesting that society "attach to low-income jobs the same kind of fringe benefits—health insurance, social security, vacations with pay—that now make higher paying jobs available," given that these benefits "paradoxically are now available in some form to those on welfare") (footnote omitted).

196. See JENCKS, *supra* note 7, at 234. President Clinton's proposed health care plan would similarly universalize health insurance coverage. See generally WHITE HOUSE DOMESTIC POLICY COUNCIL, HEALTH SECURITY: THE PRESIDENT'S REPORT TO THE AMERICAN PEOPLE (1993).

197. LAWRENCE M. MEAD, BEYOND ENTITLEMENT 84 (1986).

198. See, e.g., KAUS, *supra* note 10, at 125 (suggesting that the government create public jobs and then "supplement the wages of all low-wage jobs, both public and private, to ensure that every American who works full-time has enough money to raise a normal-sized family with dignity, out of poverty"); JENCKS, *supra* note 7, at 233-34.

199. See DANIEL P. MOYNIHAN, THE POLITICS OF A GUARANTEED INCOME 474-81 (1973) (discussing tables constructed to illustrate benefits that hypothetical families in four cities would receive at various income levels). Moynihan recounts the following colloquy concerning the net benefit reductions that were built into the FAP bill as income levels increased:

SENATOR WILLIAMS: . . . If they increase their earnings from \$720 to \$5,560 under this bill, they have a spondable income of \$6,109, or \$19 less than if they sit in a rocking chair earning only \$720. Is that not correct?

MR. PATRICELLI: That is correct. . . .

SENATOR WILLIAMS: They are penalized \$19 because they go out and earn \$5,500. Is that correct?

MR. PATRICELLI: That is correct. . . .

SENATOR WILLIAMS: What possible logic is there to it?

MR. PATRICELLI: There is none, Senator.

point have been observed with respect to the Earned Income Tax Credit.<sup>200</sup> A second problem with wage subsidies is the risk that employers would reduce wages accordingly. In a labor market in which many people are seeking jobs, one would expect the total wage (including the subsidy) to be bid down to present levels.<sup>201</sup>

The present welfare system also keys eligibility to the absence of savings, hence discouraging saving.<sup>202</sup> Under the present statutory scheme, accumulating assets in excess of \$1,000 defeats a family's eligibility for benefits.<sup>203</sup> By permitting welfare recipients to accumulate savings, good financial habits are fostered and money is amassed for use in escaping poverty (through, for example, college or investment in a new business). But such a policy choice is also costly. Since society's primary goal is elimination of severe want, the dispensing of benefits sufficient to permit accumulation by recipients will not only cost more money, it will also entail costs linked to the perceived unfairness of such a system.

The difficulties involved in removing perverse incentives from welfare programs have caused some commentators to reject the idea of incentives in favor of bureaucratically enforced norms,<sup>204</sup> expulsion of the able-bodied from the welfare rolls,<sup>205</sup> or complete dismantlement of the welfare system.<sup>206</sup> While such solutions might reduce perverse incentives, they would entail increased poverty costs.<sup>207</sup>

*Id.* at 481.

200. See Guy Gugliotta, *How to Aid 'Working Poor'?*, WASH. POST, Apr. 15, 1993, at A1, A8 ("There are indications that some Americans deliberately work hard enough to obtain maximum EITC benefits—but no harder.").

201. The minimum wage would, of course, provide a limit on such wage-cutting behavior. Nevertheless, one would expect many jobs which currently pay at a somewhat higher rate to be bid down accordingly. *But see* SCHWARZ & VOLGY, *supra* note 180, at 171-72 (contending that there is little evidence to suggest that such supplements actually result in the lowering of wages, and noting that an employer would not be able to easily adjust wages to offset the supplement because the employer would not have access to information concerning which employees were receiving supplements, or the amount of such supplements).

202. See, e.g., Thomas Sancton, *How to Get America Off the Dole*, TIME, May 25, 1992, at 44, 45 (relating a story of a welfare family subject to reimbursement order for AFDC benefits received, because one child saved part-time earnings for college in excess of the statutory limit).

203. See 42 U.S.C. § 602(7)(B) (1988).

204. MEAD, *supra* note 197, at 178.

205. See, e.g., ANDERSON, *supra* note 187, at 162.

206. See generally MURRAY, *supra* note 3.

207. See *supra* part III (discussing the "crash" outcome in the "chicken" game).

### 3. COSTS ASSOCIATED WITH "DEPENDENCY" PATTERNS

Much current thinking about welfare stresses the need to end patterns of dependency into which some welfare recipients have allegedly slipped.<sup>208</sup> It is worth considering with some specificity what perceived costs underlie such statements. The work disincentive costs of welfare discussed above are certainly part of the picture—the word “dependency” would be meaningless if applied to a working person—but the concept of dependency goes beyond the mere failure to work. Costs attach to long-term (possibly intergenerational) welfare dependence, above and beyond the costs attributable to those individuals’ failure to work.

The emphasis which opponents of redistribution place on the length of time some individuals spend on welfare underscores the importance of this factor. If the failure of the poor to support themselves were the only relevant cost, one would expect a rational society to be indifferent as between supporting the same five million persons for ten consecutive years versus supporting a different set of five million people in each of those ten years.<sup>209</sup> Yet the first situation is more troubling for intangible reasons relating to the development of a relatively permanent “underclass.”<sup>210</sup>

Some have alleged that the formation of an underclass of the chronically dependent was made possible by (if not completely caused by) the availability of welfare.<sup>211</sup> It is certainly true that some percentage

208. See, e.g., MEAD, *supra* note 73, at 2 (describing a “new agenda” in which “[i]ssues of dependency and dysfunction” are dominant); PIVEN & CLOWARD, *supra* note 65, at 397 (citing a number of authorities who have focused on dependency issues); Marshall & Kamarck, *supra* note 9, at 218 (advocating new presidential policies “to empower the poor and help them liberate themselves not only from poverty, but also from a debilitating dependence on welfare”).

209. Indeed, if administrative costs were considered, it would be cheaper to provide assistance to the same set of five million for all ten years, since the costs of registering new recipients and clearing old ones from the rolls would be eliminated.

210. The term “underclass” is used variously to connote a number of collateral societal problems aside from, and in addition to, lack of material resources. Christopher Jencks has identified four dimensions upon which the classification of a poor person as a member of the “underclass” may be based: (1) “income level”; (2) “income sources”; (3) “cultural skills”; or (4) failure to adopt certain “moral norms” regarding work, reproduction, or violence. JENCKS, *supra* note 7, at 144. Linked in this manner to behavioral patterns, the term “underclass” corresponds to earlier designations of “the undeserving poor.” *Id.* at 149-50.

211. See, e.g., KAUS, *supra* note 10, at 121 (“Welfare may not have been a sufficient condition for the growth of the underclass, but it’s hard to see how contemporary liberals can deny that it was a necessary condition.”); Robert K. Fullinwider, *Citizenship and Welfare*, in *DEMOCRACY AND THE WELFARE STATE* 261, 271 (Amy Gutmann ed., 1988) (“Contemporary critics of Federal welfare programs charge

of those on welfare stay on welfare for an extended period of time,<sup>212</sup> perhaps bearing children who grow up on public assistance and continue to receive welfare when they reach adulthood.<sup>213</sup> To the extent that these same individuals would be leading independent lives but for the public provision of welfare—a proposition that is by no means certain<sup>214</sup>—the resulting dependency represents a cost of welfare.

There are a number of salient dimensions to “dependency.” First, there is a disutility associated with the same persons being on welfare for an extended period of time. Second, a disutility is associated with decisions by welfare recipients which increase the length of time they will remain on welfare and therefore increase the total number of persons who will be on welfare.<sup>215</sup> Third, there is a disutility associated with the perception that a “culture” has arisen in which decisions which tend to increase the length of time and increase the number of persons on welfare are valued over decisions which would decrease those numbers.<sup>216</sup>

that they erode this sense of citizenship [based on ability to support oneself] and create long-term, habituated welfare dependency.”)

212. See, e.g., EDELMAN, *supra* note 164, at 73 (“[D]etailed studies of the AFDC caseload suggest that roughly half of all recipients move off the rolls within two years. The remainder rely upon AFDC benefits for a much longer period of time—most at least six years, and a third for eight years or more.”). Studies done by Mary Jo Bane and David Ellwood have identified differences between groups of welfare recipients as to length of time on welfare: for example, “non-white unmarried mothers who dropped out of high school will average 10 years on welfare.” *Id.* (quoting Mary Jo Bane & David Ellwood, *The Dynamics of Dependence: The Routes to Self Sufficiency* 30 (June 1983) (unpublished manuscript)). See also KAUS, *supra* note 10, at 118 (“[T]he average welfare stay, for those on the rolls at any given moment, is 11.6 years.”) (footnote omitted).

213. Studies have indicated such intergenerational effects, showing a significant correlation between a woman’s participation in the welfare system and her mother’s participation. See, e.g., *Welfare Dependency: Hearings Before the Subcomm. on Social Security and Family Policy of the Senate Comm. on Finance*, 102d Cong., 1st Sess. 130-33 (1991) (statement of Janet L. Norwood, Commissioner, Bureau of Labor Statistics) and sources cited therein.

214. This returns us to the question of whether unemployment is voluntary or involuntary. See *supra* text accompanying note 184. To the extent the individuals in question would be unable to obtain work in any event, the public provision of welfare could not be said to “cause” their dependency. If welfare were not present, those same individuals would nonetheless be either dependent—on private charity, family members, or on society as a whole through a life of crime—or dead.

215. See *supra* part V.B.2 (work disincentive costs); *infra* part V.B.4 (family structure costs).

216. For example, Lawrence Mead has emphasized the importance of parents as role models: “If the parents signal by their withdrawal that life is futile, no program is likely to teach the children otherwise.” MEAD, *supra* note 73, at 164.

Specifically, the poor are criticized for "deciding" to consume leisure rather than spending time working or learning,<sup>217</sup> and for deciding to procreate rather than forestalling procreation until they have sufficient means to care for their offspring.<sup>218</sup> This "culture" of deviant decisionmaking is allegedly passed on from generation to generation, in an unending cycle of dependency.<sup>219</sup>

#### 4. FAMILY STRUCTURE COSTS

As the previous discussion on dependency indicated, one area in which welfare is alleged to create deleterious incentives is in the area of decisionmaking about family size and configuration.<sup>220</sup> Specifically, welfare is blamed for creating perverse incentives in favor of childbearing and in favor of single parenthood.<sup>221</sup> The presence of welfare also allegedly discourages men from providing for their families.<sup>222</sup> While the substantial literature in this field strongly suggests that factors other than welfare programs, such as male joblessness, are primarily responsible for structural changes in families,<sup>223</sup> the possibility remains

217. It is questionable whether sufficient appropriate employment and/or affordable educational opportunities exist. If no jobs are available which a particular person can perform, the "decision" to stay home and consume leisure is no decision at all.

218. See, e.g., JENCKS, *supra* note 7, at 189-90 (discussing American "norms" regarding childbearing which the "reproductive underclass" violates).

219. The existence and significance of such a so-called "culture of poverty" has been the subject of controversy for decades, and has been embraced at various times by both liberals and conservatives. See, e.g., KATZ, *supra* note 46, at 16-23 (discussing the political history of the "culture of poverty" formulation).

220. See, e.g., ELLWOOD, *supra* note 1, at 20 ("No issue in poverty policy engenders more controversy than does the charge that the welfare system may be inducing changes in the family."); see also Edward M. Gramlich, *Economists' View of the Welfare System*, 79 AM. ECON. REV. [Papers and Proceedings, 101st Meeting of the Am. Econ. Ass'n] 191, 192 (1989) (identifying the "growth in single-parent families" as one of two "poverty-inducing trends" which may (or may not) be caused by changes in welfare programs).

221. See, e.g., KAUS, *supra* note 10, at 117-20 (contending that welfare played an "enabling" role in the development of the underclass, permitting more poor, single women to bear children).

222. See, e.g., GEORGE GILDER, *WEALTH AND POVERTY* 115 (1981) ("The man has the gradually sinking feeling that his role as provider, the definitive male activity from the primal days of the hunt through the industrial revolution and on into modern life, has been largely seized from him; he has been cuckolded by the compassionate state.")

223. See, e.g., WILLIAM J. WILSON, *THE TRULY DISADVANTAGED* 90-92 (1987). Even if joblessness, rather than welfare per se, is to blame for changes in family structure, the question of what causes joblessness remains. Some would argue that joblessness is itself linked to the welfare program. See *supra* part V.B.2 (discussing work incentive structures).

that welfare programs may make marginal differences in family structure choices. To the extent welfare encourages (or fails to discourage) costly family structure choices, costs are incurred.

Since the presence of a child in the home is a threshold requirement for AFDC eligibility, it has been contended that poor young women are not sufficiently discouraged from bearing children. While it is hard to make the case that women affirmatively choose to become pregnant simply to receive AFDC's meager benefits, the presence of AFDC does protect women who bear children from the full impact of their decision. Since AFDC buffers the costs that might otherwise deter pregnancy and childbearing, one would expect higher rates of childbearing among poor young women than would exist in a world without welfare.<sup>224</sup> As Mickey Kaus puts it, "[w]ith AFDC in place, young girls look around them and recognize, perhaps unconsciously, that other girls in their neighborhood who have had babies on their own are surviving, however uncomfortably."<sup>225</sup> Conversely, if women knew that having a baby would spell certain disaster for themselves and their child, they would be willing to incur greater costs to avoid childbearing. Mickey Kaus has suggested that, to maximize this deterrence effect, young women be given no benefits except "in-kind nutritional assistance to avoid health problems" even during the period immediately following childbirth.<sup>226</sup>

It has been noted that the contention that welfare encourages excessive childbearing is based more on hyperbole and myth than on fact. Bearing additional children while on welfare is not exactly a profit-generating activity; in most cases "the additional grant [for an additional child] is so small that it cannot support that child, much less improve the mother's standard of living."<sup>227</sup> In fact, welfare families are no bigger than other families, and welfare mothers actually bear fewer children while on welfare than do women not on welfare.<sup>228</sup>

224. It was previously contended that AFDC rules permitting teenage mothers to set up a separate household and receive benefits gave young women an additional incentive to become pregnant—independence from their parents. A 1988 amendment to the statutory scheme now allows states to condition the availability of benefits to mothers under the age of 18 on those women remaining in the household of their parents or other relatives, thus removing any such incentive. 42 U.S.C. § 602(a)(43) (1988); see Marshall & Kamarek, *supra* note 9, at 227.

225. KAUS, *supra* note 10, at 117.

226. *Id.* at 130. It is interesting that Kaus concedes the need to give mothers food "to avoid health problems" but urges that the government give them no cash benefits. *Id.* Such cash benefits would allow them to obtain shelter, the lack of which, in cold weather or in crime-riddled cities, could quickly cause more than mere "health problems" for mothers and their babies.

227. EDELMAN, *supra* note 164, at 70.

228. *Id.* at 70-71.

Although these facts explode the myth that welfare makes childbearing profitable, they do not establish that women on welfare are making socially efficient choices about childbearing.<sup>229</sup> It cannot be disputed that increased benefits for additional children, like the availability of benefits for a first child, shield a welfare recipient from the full impact of her reproductive choice.<sup>230</sup> Each additional child born to a welfare mother makes her climb from poverty more difficult and is likely to lengthen her family's stay on welfare. Society incurs costs as a result, both the monetary costs associated with supporting the family, and the nonmonetary costs associated with long-term welfare dependency.<sup>231</sup>

A controversial New Jersey law has tried to alter this incentive structure by freezing benefits at a certain level, regardless of family size.<sup>232</sup> Opponents point out that the freeze unfairly punishes children for the perceived errors of their parents.<sup>233</sup> This is but one species of a central dilemma in welfare policy formulation—the incidental impact on

229. The fact that a given welfare family has no more children than a more well-off family does not answer this concern, since inefficiency stems not from the absolute number of children born to a family, but from the number of children born relative to the family's ability to support those children. Unless society wishes to foster population growth for independent reasons, or decides to recognize a "right" to bear and raise children at state expense, society incurs costs when children are born to families who cannot afford to support them.

230. A comparison of the number of out-of-wedlock births to poor women in various states has been cited as an indication AFDC is not responsible for higher levels of childbirth to poor women. *See, e.g.,* Edelman, *supra* note 72, at 16 ("If young women are having children with the intent or at least the expectation of continuing to be dependent, one would think they would do so at least somewhat more frequently in states with higher welfare payments. They do not.").

The lack of empirical support for finely calibrated reactions to differences in benefit levels does not rule out the possibility that welfare benefits could have behavioral impacts. Even in a state with very low cash AFDC benefits, a woman is still shielded from many of the costs of childbearing by a number of supplemental benefits, such as Medicaid and food stamps. While women's childbearing choices may not be sensitive to marginal changes in this package of benefits (perhaps because of lack of full information about how their state's benefits stack up to the cost of raising a child in that state), it is still possible that the complete absence of any benefits at all would yield lower levels of such childbearing. *See, e.g.,* WILSON, *supra* note 223, at 77-78 ("Because all states have AFDC and food stamp programs, there can be no true test of the effects of welfare on family structure. There is no control population that has not been exposed to these welfare programs.").

231. *See supra* part V.B.3 (discussing costs associated with welfare dependency).

232. Marshall & Kamarck, *supra* note 9, at 226. The New Jersey law does, however, permit families bearing additional children to keep more of their outside earnings, which reduces the actual effect of the "freeze." *Id.* California is also considering a law which would limit benefits for additional children. *Id.* at 227.

233. *See* Lucia Mouat, *Controversial Welfare Law Takes Effect in New Jersey*, CHRISTIAN SCI. MONITOR, Oct. 2, 1992, at 2.

children of attempts to dictate the behavior of their parents.<sup>234</sup> If the bluff works and women are successfully deterred from having children, society unquestionably saves money and no children suffer as a result. But if the bluff *doesn't* work (because, for example, women have inadequate information about or access to effective birth control), society suffers increased costs from the poverty of children, and the intangible costs associated with the unfairness of childhood poverty.

In addition to affecting the number of children born, welfare is also said to discourage marriage and encourage the formation of families headed only by the mother. Although AFDC now requires all states to make intact, two-parent families eligible for benefits,<sup>235</sup> states can limit benefits to such families to six out of each twelve months.<sup>236</sup> A welfare program that makes single parenthood a condition of receiving full benefits would, of course, be expected to lead to lower levels of marriage and higher levels of divorce.<sup>237</sup>

Even a program which is neutral as between family types (as where benefits are provided on an equal basis to single-parent and two-parent families with children) can be expected to lead to higher levels of family dissolution than would no program at all. Simply by providing benefits, women have the financial ability to establish their own households if they otherwise would prefer to do so.<sup>238</sup> The same effect would occur if the same women had an income from a job.<sup>239</sup> Because single-parent

234. See *supra* part III.C (Fran and Ellen example); *infra* part VII.B (discussing this dilemma in the workfare context).

235. See 42 U.S.C. § 607 (1988 & Supp. 1991). The 1988 Family Support Act, Pub. L. No. 100-485, 102 Stat. 2343 (1988), added this requirement to the AFDC statutory structure. Prior to passage of the 1988 Act, states could choose whether or not to provide benefits to intact families in which the primary wage-earner was unemployed and, as of 1988, 23 states had declined to provide such benefits. S. REP. NO. 377, 100th Cong., 2d Sess. 46 (1988), reprinted in 1988 U.S.C.C.A.N. 2776, 2823.

236. See 42 U.S.C. § 607(b)(2)(B)(ii)(II) (1988 & Supp. 1991).

237. See EDELMAN, *supra* note 164, at 72 ("Data from states that have eliminated welfare for two-parent families show a dramatic increase in the percentage of families that then join the regular AFDC rolls as single-parent families."). But see ELLWOOD, *supra* note 1, at 22 (citing studies showing little relationship between structure of welfare programs and family structure).

238. See EDELMAN, *supra* note 164, at 72 ("[W]elfare—meaning the existence of a bare subsistence grant independent of the man's income—may make women less likely to enter into bad marriages, or more apt to leave ones that have turned bad.").

239. See *id.*; MEAD, *supra* note 197, at 64 ("The role of AFDC in [family] breakup is mainly to provide an independent income to the mother, freeing her to leave or oust the father. Earnings from a job, if the mother has one, have much the same effect."). There is also a countervailing "income effect," whereby higher family income increases the comfort of life and leads to a decrease in breakup, but it appears that this "income effect" may be overwhelmed by the "independence effect." See, e.g., GLAZER,

families tend to be economically less successful than two-parent families,<sup>240</sup> society is torn between its desire to assist such families, and the unintended effect of facilitating and encouraging their existence. David Ellwood captures this difficulty, which he terms "the assistance-family structure conundrum," by stating: "the economic insecurity of single-parent families leads to a natural desire to provide some level of support through welfare, yet such aid creates a potential incentive for the formation and perpetuation of single-parent families."<sup>241</sup>

A closer look at the reasons families separate reveals the true moral ambiguity of any concerted effort to force parents to marry or stay together. As Ellwood points out, "[s]urely a system that allows children and their mothers to escape an unhappy, destructive, or even dangerous family environment can be beneficial to society."<sup>242</sup> While a stable, nurturing two-parent family might provide intangible benefits to children that would be unavailable in a single-parent household,<sup>243</sup> the mere fact that a household has two parents rather than one does not, in itself, make it a better family environment. Regardless of the abstract merits of two-parent families generally, "it is not apparent that children who currently live in single-parent families would be better off if *their families* were two-parent families."<sup>244</sup>

Of course, the primary economic problem with single-parent families stems not from the fact that the parents live separately; it stems from the fact that one potential breadwinner must also double as the nurturer of the children.<sup>245</sup> The failure of the absent parent (virtually always the father)

*supra* note 94, at 31.

240. It is undisputed that children raised in mother-only households are more likely to be poor. *See, e.g.,* DaVanzo, *supra* note 11, at 85-87; Barbara D. Whitehead, *Dan Quayle Was Right*, ATLANTIC MONTHLY, Apr. 1993, at 47, 62 ("Half the single mothers in the United States live below the poverty line.").

241. ELLWOOD, *supra* note 1, at 21.

242. *Id.* at 22.

243. *See* DaVanzo, *supra* note 11, at 93 (noting "adverse consequences of growing up in a single-parent family, regardless of income"). According to DaVanzo, these negative consequences include a greater likelihood of involvement with crime, drugs and alcohol. *Id.* *See also* Whitehead, *supra* note 240, at 47 (discussing negative effects of disrupted families on children, including a higher likelihood of emotional and behavioral problems, including a greater chance of dropping out of high school, becoming pregnant, abusing drugs and running afoul of the law).

244. DaVanzo, *supra* note 11, at 101 (emphasis added) (citing studies indicating "that marital discord has a stronger relationship with delinquency and aggression than parental absence").

245. *See* ELLWOOD, *supra* note 1, at 21 (discussing the dual role of nurturer and breadwinner which a single parent must fill); ROBERT H. HAVEMAN, STARTING EVEN 73 (1988); DaVanzo, *supra* note 11, at 90 ("Why are children in female-headed households more likely to be poor? The income difference is, not surprisingly, primarily due to the

to provide for his children is largely responsible for economic troubles in female-headed households; the fact that the parents are unmarried only affects the incentive of the father to provide voluntarily for his children—it does not alter his legal or moral responsibility.

Granted, administrative costs are avoided if the family is intact. If the father is present in the house, the state generally need not intervene to force him to fulfill the obligations of parenthood. Yet one must consider whether the administrative and social costs required to entice parents who would otherwise wish to live separately into marrying or staying married<sup>246</sup> outweigh the administrative costs of simply forcing fathers to provide for their children.<sup>247</sup> In sum, what is most troubling from an economic standpoint is not the family structure per se, but the failure to enforce appropriately the financial responsibility of fathers.<sup>248</sup>

### C. Costs of Transferring Money to the Poor

#### 1. INFRINGEMENT OF PROPERTY INTERESTS AND DISUTILITY ASSOCIATED WITH PERCEIVED UNFAIRNESS IN TRANSFERS

A major cost of welfare is the fact that money distributed to the less well-off must necessarily come from the more well-off. Assuming (counterfactually) that the transfer of holdings is completely costless—that no money is lost in the process of moving it from the more well-off to the less well-off<sup>249</sup>—the operation would still be socially costly insofar as it involves the expropriation of holdings which “belong to” particular individuals.

The problem with collecting money from the more well-off for redistribution to the less well-off is often couched in terms of interference

loss of economic support from absent fathers, who generally earn more than mothers.”).

246. Programs proposed in Wisconsin, known as “Bridefare” or “Wedfare” offer financial incentives designed to induce marriage, by allowing married couples to keep a greater proportion of their earnings while on welfare. See Marshall & Kamarck, *supra* note 9, at 227.

247. But see GILDER, *supra* note 222, at 115 (suggesting that efforts to force fathers to pay child support are doomed to fail).

248. Not surprisingly, numerous commentators support the idea that absent fathers should be forced to provide support for their children. See, e.g., ELLWOOD, *supra* note 1, at 78; IRWIN GARFINKEL, ASSURING CHILD SUPPORT: AN EXTENSION OF SOCIAL SECURITY (1992); JENCKS, *supra* note 7, at 231; KAUS, *supra* note 10, at 131; MEAD, *supra* note 73, at 180.

249. In fact, the transfer of holdings involves a number of costs. See generally part V. As Okun put it, we can only carry money from the rich to the poor in a “leaky bucket.” OKUN, *supra* note 115, at 91-92.

with property rights.<sup>250</sup> But property is a plastic concept shaped by rules governing exchanges, not an absolute right over all that one can obtain.<sup>251</sup> In fact, a large number of laws circumscribe the manner in which a lawful property interest arises.<sup>252</sup> Pollution laws, antitrust laws, child labor laws, minimum wage laws, and the like place restraints on how one may translate effort and investment into profit.<sup>253</sup> Indeed, the very structure of property rights assumes that certain abilities and capacities to obtain property will not be recognized:

[Opponents of measures tending to increase equality] do not complain that persons endowed by nature with unusual qualities of strength, audacity or cunning are artificially prevented from breaking into houses, or terrorizing their neighbors, or forging cheques. . . . On the contrary, they deprive certain kinds of achievement of their fruits, in order to encourage the pursuit of others more compatible with the improvement of individual character and more conducive to the good of society.<sup>254</sup>

Thus, the fact that government takes holdings away from individuals (or otherwise limits their ability to obtain or use holdings) does not in itself establish the violation of a cognizable property right. Even Nozick

250. See, e.g., NOZICK, *supra* note 3, at 168 (noting that under entitlement theory "redistribution is a serious matter indeed, involving, as it does, the violation of people's rights"); POSNER, *supra* note 16, at 461 (describing involuntary redistribution as "a form of theft") (footnote omitted).

251. See, e.g., ARROW, *supra* note 45, at 186-87 ("The property system is in fact a social construct . . ."); NOZICK, *supra* note 3, at 171 (noting that "constraints . . . set by other principles or laws operating in the society" limit the "acceptable options" encompassed within one's property rights); Dworkin, *supra* note 142, at 283 ("Private ownership . . . is not a single, unique relationship between a person and a material resource, but an open-textured relationship many aspects of which must be fixed politically."). Arrow goes on to note that externalities are a manifestation of the "incompleteness of property rights." ARROW, *supra* note 45, at 187; see *supra* notes 69-71 and accompanying text (discussing poverty as an externality).

252. For example, some things, such as constitutional rights, cannot lawfully be purchased with money. MICHAEL WALZER, SPHERES OF JUSTICE 100-03 (1983) (citing OKUN, *supra* note 115, at 19-22).

253. See, e.g., THOMAS NAGEL, EQUALITY AND PARTIALITY 122-23 (1991) (discussing regulatory laws); Harry W. Jones, *The Rule of Law and the Welfare State*, 58 COLUM. L. REV. 143, 154 (1958) (citing minimum wage laws as an example of a limitation placed by government on free exchange).

254. Tawney, *supra* note 114, at 34; see also OKUN, *supra* note 115, at 35 ("My right to pick my job is restricted in many ways. I cannot sell heroin, pornography that lacks redeeming social value, letter-delivery or telephone services, nor, given my particular training, legal or medical services.").

concedes as much, allowing government to collect the funds necessary to administer a "night-watchman" state.<sup>255</sup>

The compulsory collection of funds through the taxing mechanism always places a limitation upon the property interests of individuals, whether the money is collected for national defense, for schools, for highways, or for welfare. Yet the interference with property rights *for the purpose of redistribution* seems to involve a uniquely troubling element which makes the diminution of property rights all the more unpalatable and painful for the more well-off. This added element of distaste relates to the perceived unfairness of confiscating money—money by and large earned through work—for the purpose of providing an income to able-bodied, working-aged persons who have failed to earn their own living through work. It is a short step to the assertion that the more well-off are being forced to work for the benefit of others (and rather undeserving others, at that), at which point analogies to "forced labor" spring readily to mind.<sup>256</sup>

When analyzed in this way, the real affront to property rights is not so much the fact that money is taxed away from the more well-off, as the fact that the money is put to a purpose which is itself at odds with the idea of accumulating private property through one's own efforts. It is the perceived unfairness of the use of the money, not the fact that the government has taken it away, which triggers such impassioned defenses of property rights. It is not surprising that Nozick, in seeking to show that the "night-watchman" state is the maximum defensible state, chose to focus on money taken for purely redistributive purposes rather than, say, money taken for the purpose of constructing national monuments or administering national parks.<sup>257</sup>

Because the sense of unfairness associated with taxation for the purpose of welfare amplifies the psychic cost associated with the interference with property rights, it is worthwhile to examine the theoretical underpinnings of this perception. Critical to the perception that the transfer of holdings from the more well-off to the less well-off is inherently unfair is the belief that the results generated by the market

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255. See NOZICK, *supra* note 3, at 27 ("[T]he night-watchman state appears redistributive to the extent that it compels some people to pay for the protection of others . . ."). However, Nozick attempts to distinguish the night-watchman function from other forms of redistribution on the grounds that it is supported by "compelling nondistributive reasons." *Id.*

256. See *id.* at 169. See also AYN RAND, *CAPITALISM: THE UNKNOWN IDEAL* 324-25 (1967) (characterizing redistribution as "slave labor").

257. See NOZICK, *supra* note 3, at 149-231.

correspond closely to the merit of individuals.<sup>258</sup> This belief draws on two assumptions, both of which are empirically suspect: first, that the more well-off obtained their holdings through their own efforts; second, that the less well-off are poor because of the lack of such effort.

Though the strongest justification for the inviolability of private property turns on its supposed relationship to individual effort and productivity,<sup>259</sup> individual merit and contribution often have very little bearing on the holdings of individuals in society.<sup>260</sup> The distribution of material resources is instead determined by a great many factors, many of which are wholly unrelated to personal merit or effort.<sup>261</sup> Indeed, one need not look very deeply into American history to see that many holdings are based upon nothing more meritorious than the exploitation of human beings and sheer forcible theft, whether of land or of labor.<sup>262</sup> In what sense does a person own (or deserve to own) money obtained through inheritance or gift, derived from the exploitation of the labor of others, earned in a setting which did not embody fair equality of opportunity, or earned in a setting in which competition did not operate so as to limit the surplus gleaned from particular transactions?

The other side of the "unfairness" equation is the presumption that the poor would not be poor unless they were deficient in some important way.<sup>263</sup> A limited exception has historically been recognized where

258. See, e.g., JAMES R. KLUEGEL & ELIOT R. SMITH, BELIEFS ABOUT INEQUALITY 37 (1986); LEWIS, *supra* note 149, at 130 ("All of these people [interviewed in a study], whatever their differences, perceive success and failure and therefore inequalities as functions of individual characteristics.").

259. See *supra* note 45 and accompanying text (discussing Nozick's implicit dependence on such a relationship in condemning redistribution).

260. See, e.g., WALZER, *supra* note 252, at 108; Okun, *supra* note 148, at 29 & n.25 (noting that few economists would contend that market rewards fairly reflect the personal contributions of the recipients); see also NOZICK, *supra* note 3, at 157 (emphasizing that the distribution of holdings is "non-patterned," meaning that it does not correlate with any single factor such as effort, intelligence or marginal product).

261. See, e.g., JOHN A. BRITAIN, INHERITANCE AND THE INEQUALITY OF MATERIAL WEALTH 9 (1978) ("An intergenerational transfer is due to forces over which the recipient has little control and is rarely a reward for productive effort."); *id.* at 9-10 ("[I]ndependent first-generation accumulation—even out of wages or salaries—is often aided by a favorable start in life or even by sheer luck."); KUTTNER, *supra* note 10, at 16 ("In practice, a good deal of the outcomes produced by the market reflect nothing more than luck—good or bad.").

262. See, e.g., KATZ, *supra* note 46, at 150 (noting that "evidence of fraud, collusion, violence and the violation of individual rights abounds in America's past").

263. See, e.g., FAY L. COOK, WHO SHOULD BE HELPED: PUBLIC SUPPORT FOR SOCIAL SERVICES 170 (1979) ("[The study result showing] lower support for poor adults under 65 is quite strongly linked to the fact that they are seen to be responsible for their plight."); HENRY GEORGE, PROGRESS AND POVERTY 303-04 (50th Anniversary ed., Robert Schalkenbach Found. 1948) (1879) ("There is, and always has been, a widespread

identifiable factors beyond the control of the individual poor person, such as mental or physical disability or old age, hindered him or her from competing economically. Such persons were (and are) regarded as "the deserving poor"<sup>264</sup> and have been set apart from "the undeserving poor" both in policy measures and in popular opinion.<sup>265</sup> The lack of correlation between personal merit and market outcomes and the absence of fair equality of opportunity<sup>266</sup> calls the appellation "undeserving" into serious doubt.

All of this makes the complaints of the nonpoor as to the unfairness of the transfers somewhat suspect. Yet no matter how distorted the perception of unfairness may be, it cannot simply be dismissed. The disutility which accompanies transfer payments to those who are thought to be undeserving must be taken seriously because of its practical importance for the political feasibility of any such option.<sup>267</sup>

Attempts have consistently been made, both historically and recently, to place behavioral conditions upon the receipt of welfare.<sup>268</sup> These conditions, to the extent they can be enforced, would serve to alleviate the disutility from perceived unfairness by requiring the recipient to exhibit characteristics that would make him or her more deserving.<sup>269</sup> However, placing behavioral conditions on the receipt of welfare (such as

belief among the more comfortable classes that the poverty and suffering of the masses are due to their lack of industry, frugality and intelligence.").

264. Children are also widely regarded as being among the deserving poor. See, e.g., MURRAY, *supra* note 3, at 223 ("There is no such thing as an undeserving five-year-old."). However, the fact that such children are often in the charge of able-bodied "undeserving" persons has hindered delivery of benefits to them. See COOK, *supra* note 263, at 161-62 (hypothesizing from study showing low levels of public support for programs to help poor children that this is the case "not because of traits ascribed to them, but because they are perceived to have easily available alternative sources of aid—parents or other caretakers who should take responsibility for them").

265. See generally KATZ, *supra* note 46, at 9-35. For an analysis of the psychological underpinnings for such distinctions, see generally Linda J. Skitka & Philip E. Tetlock, *Of Ants and Grasshoppers: The Political Psychology of Allocating Public Assistance*, in PSYCHOLOGICAL PERSPECTIVES ON JUSTICE 205 (Barbara A. Mellers & Jonathan Baron eds., 1993).

266. See *supra* part IV.A (discussing the inefficiency of inequality in opportunity).

267. Studies show "locus of causality of plight is a very powerful determinant of [public] support . . ." COOK, *supra* note 263, at 169.

268. See *infra* part VII.B (discussing attempts to place behavioral constraints on welfare recipients).

269. Of course, to the extent the behavior patterns tend to reduce dependence on welfare, the requirement of compliance with them could have other benefits in terms of reducing the length of time on the welfare rolls.

a work requirement) can result in much higher monetary costs, at least in the short run.<sup>270</sup>

## 2. OTHER COSTS OF THE PUBLIC PROVISION OF WELFARE

A number of other well-known costs of the public provision of welfare must also be taken into account in assessing welfare programs. One of the most familiar economic arguments against redistribution is the alleged damage it inflicts on individuals' incentives to work,<sup>271</sup> damage which, it is argued, threatens the economic health and productivity of the nation.<sup>272</sup> While some economists have questioned whether and to what extent such disincentive effects actually result,<sup>273</sup> to the extent those effects exist and inflict net harm, costs are incurred.

Other possible costs of redistribution which have been noted include distortions in savings, consumption or production patterns,<sup>274</sup> and liberty costs associated with increased governmental control over money.<sup>275</sup> Not surprisingly, there is a great deal of disagreement as to these points

270. See *infra* notes 350, 352-70 and accompanying text (discussing costs of welfare programs).

271. Here, I am referring only to the work disincentive effects on the nonpoor. See *supra* part V.B.2 (discussing the effects of welfare on the work incentives of the poor (i.e., welfare recipients and potential recipients)).

272. Some interesting challenges have been raised to the assumption that work disincentives are bad for the economy. See FRANK, *supra* note 38, at 248-49 (arguing that taxation removes a distortion in work effort that would otherwise be present, based on the fact that people undervalue leisure and overvalue consumption goods in their competition for relative status); see also Fred Block, *Rethinking the Political Economy of the Welfare State*, in THE MEAN SEASON 109, 133-34 (Fred Block et al. eds., 1987) ("[W]e have succeeded so well in attaching status to work that the need now is for correctives in the opposite direction to prevent overcrowding in the labor market with all of its negative human and economic consequences . . . . The point is that we need more disincentives to work, not fewer."); Richard H. McAdams, *Relative Preferences*, 102 YALE L.J. 1, 90-91 (1992).

273. See, e.g., THUROW, *supra* note 58, at 49 (citing empirical studies indicating "that high taxes either did not affect work effort or might even increase work effort among executives and professionals").

274. See, e.g., Walter J. Blum, *The Uneasy Case for Progressive Taxation in 1976*, in INCOME REDISTRIBUTION, *supra* note 148, at 152 (arguing that redistribution would result in lower levels of savings); De Jouvenel, *supra* note 56, at 9-10 (arguing that at certain levels of redistribution, "[t]he production of all first-quality goods would cease," since "[t]he skill they demand would be lost and the taste they shape would be coarsened").

275. See, e.g., SAR A. LEVITAN & CLIFFORD M. JOHNSON, BEYOND THE SAFETY NET 93 (1984) ("A nation that decreases its economic freedom *must* be less politically free.") (quoting former Treasury Secretary William E. Simon); Kristol, *supra* note 185, at 42 ("The passion for equality is always dangerous to liberty . . . .").

as well.<sup>276</sup> Finally, it is uncontested that the public provision of welfare entails some administrative costs.<sup>277</sup> These costs, however, will vary greatly depending on the design of the welfare program selected.

#### VI. FINDING THE OPTIMAL STRATEGY: TECHNIQUES FOR IMPROVING SOCIETY'S GAME

Given that society is faced with a strategic dilemma in which it values the alleviation of poverty, but incurs costs by undertaking such alleviation, what should it do to minimize its costs? My analysis in this Article has assumed that society stands to gain more from alleviating poverty than it stands to lose; if it were really better off ignoring the poverty problem, there would be no "game" presented at all and no public assistance would be provided. Further, I assume that the benefits of "bluffing" some segment of the poor into self-help by withdrawing assistance are outweighed by the costs society would incur in connection with the "unbluffable" segment.<sup>278</sup>

If these assumptions are accepted, then society must try to improve its position within the framework of the strategic game or to change the terms of the game. First, it can try to change the way the poor view the game by altering the relative attractiveness of welfare and self-help (either by making welfare less attractive or making self-help more attractive). If the self-help alternative is more attractive than the welfare alternative, then a strategic game is no longer presented—the poor do exactly what the nonpoor want them to do by opting for self-help.<sup>279</sup> Second, efforts can

276. See, e.g., JOHN K. GALBRAITH, *THE AFFLUENT SOCIETY* 71 (2d ed. rev., Houghton Mifflin Co. 1969) (1958) (noting that empirical evidence is inconclusive as to the effect of redistribution on capital formation); KUTTNER, *supra* note 10, at 57 (noting that "many forms of collective savings (pension funds, national budget surpluses) . . . do not depend on income inequality at all"); LESTER C. THURLOW, *THE ZERO-SUM SOCIETY: DISTRIBUTION AND THE POSSIBILITIES FOR ECONOMIC CHANGE 194-95* (1981) (suggesting that present demand for goods and services may be distorted "[i]f income and wealth are not distributed in accordance with equity," since "individual preferences are weighted by incomes before being communicated to the market"); Okun, *supra* note 148, at 20 (Society can "twist some . . . dials" to get "the saving-and-investment rate it wants with more or less inequality of income."); *id.* at 30 (postulating that there would be no loss of liberty if equalizing measures were restricted to redistribution of income and did not involve further state ownership of the means of production).

277. See generally STAFF OF JOINT COMM., SUBCOMM. ON FISCAL POLICY, 92D CONG., 2D SESS., *ISSUES IN WELFARE ADMINISTRATION: WELFARE—AN ADMINISTRATIVE NIGHTMARE* (Comm. Print 1972).

278. See *supra* part III.A.

279. Formally, this means that both the poor and the nonpoor would select the same cell in the decision matrix—the one in which the nonpoor do not provide for the poor family and the poor family provides for itself. See *supra* part III.A.

be made to reduce the costs which the nonpoor incur in providing assistance by altering the policy design to make welfare less painful, in some way or another. The goal of these techniques is to minimize the costs of poverty and its alleviation.

### *A. Changing the Terms of the Game for the Poor*

Through welfare policy, society can seek to change the way the poor view the game by altering the relative attractiveness of welfare and self-help. There are many ways to try to do this, both by making welfare look worse or making self-help look better,<sup>280</sup> but the true test is the overall impact on costs among all groups: actual and potential welfare recipients, the working poor, and the nonpoor. As the following discussion indicates, the historical method of attempting to deter resort to welfare through stigma or other means entails high costs that may have often gone unrecognized. Other means of changing the terms of the game, such as encouraging socially useful preference shifts among welfare recipients, are far more promising and less costly.

#### I. THE HISTORICAL FOCUS ON DETERRENCE: THE IMPACT OF STIGMA ON DECISIONMAKING BY THE POOR

A well-recognized way to influence would-be welfare recipients to opt for work rather than welfare is to raise the effective cost of welfare by making its receipt more complicated, difficult, or demeaning. It is beyond question that the way welfare is perceived affects the number of persons who will partake of it. It is not surprising that much consideration has been given to the question of whether welfare is an entitlement, which one takes as a matter of right, with neither shame nor gratitude, or a gratuity which is granted at the pleasure of one's donors and may be revoked if one fails to adopt the required behaviors.<sup>281</sup>

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280. See, e.g., HANDLER & HASENFELD, *supra* note 5, at 132-33 (contrasting "historic approach" of denying aid with the "incentive strategy" of reducing "the effective marginal tax rate on [welfare recipients'] earnings").

281. See, e.g., STUART BUTLER & ANNA KONDRATAS, *OUT OF THE POVERTY TRAP: A CONSERVATIVE STRATEGY FOR WELFARE REFORM* 14 (1987) ("As welfare has been transformed from a privilege into a right, it has become less acceptable for the providers of welfare to pass judgment on the conduct of those receiving help . . ."); Reich, *supra* note 72, at 1256 ("[S]ociety has obligations to provide support, and the individual is entitled to that support as of right."). See also *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970) (holding that due process rights attach to welfare benefits); Charles A. Reich, *The New Property*, 73 *YALE L.J.* 733, 787 (1964) (arguing that government entitlements such as welfare are forms of property).

The expansion of welfare rolls that occurred in the 1960s has been attributed in part to welfare rights litigation and the provision of public information about the availability of welfare, factors which increased the acceptability of welfare in the eyes of those eligible to receive it.<sup>282</sup> As Mickey Kaus explains, “[q]uite simply, at some point in the mid-sixties it seems to have become much more acceptable to go on welfare.”<sup>283</sup>

To the extent the acceptability of welfare expedited the transfer of dollars into the hands of those in need of them, it represented an efficient development. In other words, given that society had decided to redistribute money to people possessing certain income and familial characteristics, having would-be recipients come forward and identify themselves decreased the administrative costs of transferring funds to them.

On the other hand, as the Ellen and Fran example illustrated, society would like people to support themselves rather than perceive welfare as a viable option. By making the receipt of welfare sufficiently unpleasant, many persons who might otherwise qualify for welfare would find the mix of benefits and humiliation to be inferior to the mix of money and foregone leisure available through employment and would choose the latter. Hence, a lower level of welfare utilization would be expected where the experience of receiving welfare is difficult and demeaning.<sup>284</sup>

Simply by constructing bureaucratic hurdles such as exhaustive paperwork and documentation requirements, a welfare department can reduce the number of people on its rolls.<sup>285</sup> Closing or understaffing offices has much the same effect, since it forces recipients to travel farther or endure long waits.<sup>286</sup> All these tactics, coupled with public disapproval of welfare, tend to raise the actual cost of welfare to a recipient, making it less likely to be the dominant strategy.<sup>287</sup> Piven and Cloward elaborate on this theme:

[T]he degraded social status of the welfare recipient, a degradation rooted in welfare procedures and investigations,

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282. See PIVEN & CLOWARD, *supra* note 65, at 330-31 (discussing impact of the welfare rights movement of the 1960s on welfare rolls).

283. KAUS, *supra* note 10, at 115.

284. See, e.g., JENCKS, *supra* note 7, at 227 (“As New York City discovered during its financial crisis in the mid-1970s, a welfare department can cut its rolls substantially by hassling recipients.”).

285. *Id.*

286. *Id.*

287. See James Coleman, *Income Testing and Social Cohesion*, in INCOME-TESTED TRANSFER PROGRAMS 67, 72 (Irwin Garfinkel ed., 1982) (“Stigma can be seen as the price that nonrecipients exact from recipients to make receipt of the benefit costly, and thus it induces avoidance of the stigma-and-benefit whenever possible.”).

also deters utilization. So too do the circuitous, exhausting, and humiliating procedures associated with establishing eligibility for means-tested programs drive people away. . . . What is wrong—and Murray's discussion of Phyllis and Harold provides one example of the error—is the assumption that the calculus of dollars is the only calculus . . . .<sup>288</sup>

Conversely, when welfare is perceived as a right or an entitlement (and the consciously demeaning features of a welfare program are removed), the welfare "package" becomes more desirable and may constitute the preferred strategy for some who would choose a different strategy under a more demeaning welfare regime.<sup>289</sup> Okun has made the broader argument that decreasing the stigma associated with welfare will generally weaken the work ethic in a society, thus increasing the work disincentive effects resulting from a welfare program.<sup>290</sup> For this reason, Okun has postulated that "welfare checks delivered with a smile may be a dangerous product."<sup>291</sup>

However, attempts to discourage welfare participation through the use of stigmatizing, humiliating, or unpleasant procedures are extremely costly. The effort spent by welfare providers in implementing demeaning procedures is itself a social cost. Those welfare recipients who decide to endure the humiliation suffer needless disutility from the humiliating delivery of funds.

Importantly, the deterrence rationale only carries weight to the extent the "demand" for welfare is elastic. If welfare were like most other goods, one would expect demand for it to go down when its "price" is

288. Frances F. Piven & Richard A. Cloward, *The Contemporary Relief Debate*, in *THE MEAN SEASON*, *supra* note 272, at 85-86.

289. See BUTLER & KONDATRAS, *supra* note 281, at 14 ("When everyone tells you it is your right to be on welfare and that there is nothing to be ashamed of, is it any surprise that people should be less inclined to leave the welfare system?"). However, even when welfare is perceived as a right, stigma remains associated with it. See J. Donald Moon, *The Moral Basis of the Democratic Welfare State*, in *DEMOCRACY AND THE WELFARE STATE*, *supra* note 211, at 32 ("[P]roviding relief to those in need, even when they have a right to it, may nevertheless still cause them to lose status and self-respect.").

290. Okun, *supra* note 148, at 29-30. Indeed, nineteenth-century poorhouses, which delivered a particularly demeaning brand of assistance, have been described as "the ultimate defense against the erosion of the work ethic in early industrial America." KATZ, *supra* note 1, at 3. The societal importance of attitudes toward work has been emphasized by Sen, who maintains that "[e]very economic system has . . . tended to rely on the existence of attitudes towards work which supersede the calculation of net gain from each unit of exertion." Sen, *supra* note 59, at 97.

291. Okun, *supra* note 148, at 30.

raised through the addition of humiliating procedures. Yet welfare differs from the ordinary good in one very important respect: it is "purchased" to address minimum needs necessary to sustain life. As Lutz and Lux have noted, mainstream economic theory is inept at addressing "needs" as distinct from mere "wants."<sup>292</sup> When needs are involved, market exchanges to meet those needs do not improve one's condition; rather, they are entered into so that one does not become worse off (through dehydration, malnutrition, disease, or death).<sup>293</sup> Put into economic terms, an individual's demand for something which is truly needed to sustain life is inelastic: no matter how high the price is raised, the individual is willing to pay it.<sup>294</sup>

Thus, those who truly "need" welfare (in the sense that there is no other available means to meet their basic needs) would not be deterred from collecting it for themselves and their families simply because collection is made more humiliating. It is, of course, difficult as an empirical matter to determine what proportion of welfare recipients fall into this "undeterrable" category. However, to the extent poverty and unemployment are deemed to be inevitable byproducts of our political economy,<sup>295</sup> such that some relatively predictable percentage of persons will at any given time be eligible for welfare, some persons will always "need" to be on welfare at any given time.

292. LUTZ & LUX, *supra* note 59, at 21-28. Of course, what does and does not constitute a "need" is open to some interpretation. See HEYNE, *supra* note 165, at 16, cited in LUTZ & LUX, *supra* note 59, at 23.

293. LUTZ & LUX, *supra* note 59, at 26. Simply viewing needs as those things which one must have to avoid becoming worse off has its limitations, however; expenditures for many "inessential" goods and services—routine maintenance on a Jaguar, or preventative veterinary care for a string of polo ponies, for example—are made to avoid becoming worse off. Nonetheless, it is still possible to define needs as those things required to avoid becoming worse off through the loss of health, life or basic human dignity.

294. Of course, there are exceptions to this rule. Many individuals would starve before committing acts they felt were morally repugnant. If the commission of such acts were the "price" of needed food or water, the price would be judged too high and demand would go down accordingly. For purposes of this Article, however, I am assuming that the protection of individual rights in our society would preclude it from "pricing" welfare in any such range. Indeed, such overpricing of welfare, such that starvation ensued, would result in great costs to society, see generally *supra* part IV (discussing costs of poverty). I am assuming society only wants to deter people from going on welfare if some other alternative to starvation (e.g., work or reliance on family members) exists. Cf. KAUS, *supra* note 10, at 126 (explaining that under his proposed "Work Ethic State," no one would be allowed to starve); MURRAY, *supra* note 3, at 227-33 (detailing alternative means of support for the poor if the welfare system were dismantled).

295. See *supra* note 72 and accompanying text.

Although humiliating procedures may deter some would-be recipients from going on welfare at all, those who do endure the humiliation of welfare may be less likely to emerge from the humiliation quickly, given the greater psychological impact of collecting welfare in the first place under such a regime.<sup>296</sup> A welfare recipient, by the mere act of accepting welfare, is necessarily required to make some psychological adjustments to reconcile her world-view with such receipt. The more humiliating the experience of welfare becomes, the greater these adjustments must necessarily be. When welfare is made more humiliating, relatively greater changes might be required in the recipient's attitudes toward intangible sources of utility such as self-esteem and pride in supporting one's own family. If these adjustments were extreme, the recipient might eventually stop counting those elements in calculating her preferred strategy.

Finally, and perhaps most importantly, society incurs intangible costs in implementing such demeaning procedures. Treating other human beings in a demeaning manner destroys the potential for community between recipients and non-recipients. Costs are also associated with the unfairness of such treatment: to the extent market rewards are not correlated with effort, and to the extent our political economy makes poverty for some proportion of society inevitable,<sup>297</sup> treating those who were the least fortunate in obtaining rewards in a demeaning manner would be unfair. Moreover, engaging in demeaning treatment of welfare recipients would commit society to the principle (however untrue it might in fact be) that welfare recipients are inferior in important ways. The cultivation of such notions of separateness and superiority divides society and fosters socially costly traits, such as inhumanity and resentment. Moreover, by branding welfare recipients as morally unworthy, society sets the stage for wholesale discrimination against recipients (e.g., in employment, housing, and educational opportunities), which makes their climb from poverty even more difficult and unlikely.

At best, measures aimed at deterring people from being on welfare would limit the population of welfare recipients to that proportion of the population which will inevitably be unemployed and impoverished in any event (in other words, those that truly "need" to be on welfare). The negative effects visited on this "undeterrable" segment<sup>298</sup> would tend to

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296. In this respect, welfare may be likened to other institutions such as prison. Although harsh conditions may deter entry, the dehumanization of those who do enter may make their reassimilation into larger society more difficult and unlikely.

297. See *supra* note 72 and accompanying text.

298. Significantly, this segment would include those people who were only temporarily "undeterrable." If resort to welfare is unavoidable at any time, one must endure the humiliating procedures and suffer the concomitant negative consequences.

reduce turnover on welfare rolls, leaving the same persons (and their descendants) on welfare interminably. Less demeaning procedures, while perhaps lowering the barrier to going on welfare in the first place, also entail a lower psychological barrier to leaving welfare. In other words, less damage is done to portions of an individual's preference schedule involving intangibles such as pride and self-respect, making it more likely that those will be "counted" in assessing alternatives which may ultimately become available. Under such a welfare program, the absolute number of persons on welfare would be expected to be greater (since the welfare rolls would include some deterrable persons as well as the undeterrable), but the turnover of recipients would be expected to be greater, decreasing the disutilities associated with long-term dependency.<sup>299</sup>

## 2. FACILITATING THE DEVELOPMENT OF PREFERENCES FOR SELF-HELP

Welfare has sometimes been analogized to a "narcotic" which distorts the decisionmaking capabilities of the recipient.<sup>300</sup> Under this model, a person who is on welfare (or at least who has become "hooked" on welfare) has a distorted payoff schedule which does not produce the proper dominant strategy. Although the welfare recipient behaves "rationally" in accordance with the perceived payoff schedule, the course pursued is objectively wrong. The idea is that once the "narcotic" effect of welfare is removed, the welfare recipient's eyes will be opened to a "true" payoff schedule in which the dominant strategy is, among other things, to get off welfare. The assertion is frequently made that those who are caught in the cycle of dependency would be happier, more fulfilled, and simply better off if they were no longer dependent on transfer payments.<sup>301</sup>

For this to be true, it must be the case that welfare recipients are voluntarily choosing a course (accepting payments in lieu of earnings) which is not in their own best interest. Since we are assuming that welfare recipients are rational,<sup>302</sup> the only explanation for such behavior would be that the recipients do not possess sufficient information about the "true" payoff associated with each cell in the decision matrix they are facing. The remaining possibility is that recipients are actually doing the

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299. See *supra* part V.B.3 (discussing costs associated with welfare dependency).

300. See ELLWOOD, *supra* note 1, at 4 (asserting that conservatives "see welfare as a narcotic"); *Welfare and Work: Putting the Poor to Work*, *ECONOMIST*, Nov. 26, 1988, at 19, reprinted in 16 *CURRENT MUNICIPAL PROBLEMS* 65 (1989-1990) (stating that the poor "get hooked on government help").

301. See, e.g., MURRAY, *supra* note 3, at 229.

302. See *supra* part V.B.1.

well-informed, perfectly rational thing, and that they really would not be any "better off" without welfare, given their current set of preferences.<sup>303</sup>

If receiving welfare is actually an enlightened choice which maximizes personal well-being, the simplest way to alter that preferred course is to make welfare less attractive or make the alternatives more attractive.<sup>304</sup> Alternatively, society can actually seek to alter the preferences of the poor, by, for example, fostering a stronger "work ethic."<sup>305</sup> Moreover, to the extent decisions are made based on a faulty decision matrix which does not incorporate all the relevant costs and benefits, provision of added information could, in theory, lead the poor to select a different path.

Relatedly, society could try to get the poor to recognize and "count" some of the intangible benefits of work and self-sufficiency that may have been suppressed—that it would bring an intangible sense of pride, or that it would provide an example for their children which would lead them to avoid a life of dependency. In such an instance, society would be appealing to the welfare recipient's "higher self," attempting to convince the recipient to recognize the preference schedule of his or her own better nature.<sup>306</sup> This requires a recognition that the preferences of individuals are not immutable, and that a particular person can have different sets of preferences that operate under different circumstances.<sup>307</sup> Indeed, as Lutz and Lux have noted, our system of language reveals that differing preferences are at war within us in everyday life.<sup>308</sup>

303. As discussed above, for that subset of welfare recipients who could not support themselves in any event (because, for example, no work is available) there is no "choice" to be made at all. See *supra* part III.A.1.

304. See *supra* note 281 and accompanying text.

305. See, e.g., Sen, *supra* note 59, at 97-98 (discussing the crucial role that "[s]ocial conditioning" plays in fostering the "existence of attitudes towards work which supersede the calculation of net gain from each unit of exertion"; such attitudes have been important to "[e]very economic system").

306. See LUTZ & LUX, *supra* note 59, at 110-11 (discussing Harry G. Frankfurt's theory of first order and second order desires, with the second order desires corresponding to "the higher self"); cf. Sen, *supra* note 59, at 99 (discussing John Harsanyi's "distinction between a person's 'ethical' preferences and his 'subjective' preferences"; the former refers to the preference one would have if societal considerations were taken into account, while the latter relates to actual, individualistic preferences).

307. See LUTZ & LUX, *supra* note 59, at 111 (citing William James' notion of a "divided self"); *id.* at 110-21 (developing idea of a "dual self," in which one "self" strives for higher values while the other "self" seeks simply to gratify lower wants); see also SCHELLING, *supra* note 14, at 58, 62, 93-94 (discussing idea of "dual selves"); HEAP, *supra* note 59, at 103-15.

308. For example, Lutz and Lux point out that the statement "I wish I could give up hamburgers," reflects two levels of preferences—two "Is." One "I" obviously prefers

The idea of “dual selves” with differing preferences has intuitive appeal in the welfare context. Could, for example, welfare itself trigger a shift to a different set of preferences among some welfare recipients who initially go on welfare with the idea of “getting back on their feet” as soon as possible? Despite the removal of some of the more demeaning aspects of public assistance,<sup>309</sup> going on welfare remains an extremely humiliating experience for most recipients.<sup>310</sup> It seems likely that certain aspects of one’s psyche, such as pride, and certain sources of personal value, such as the ability to provide for one’s family, are suppressed in order to permit one psychologically to accept welfare and the concomitant change in personal status.<sup>311</sup> In other words, one could not exist on welfare without adopting a world view in which welfare, while perhaps not desirable, is an acceptable part of one’s life rather than a shameful sign of moral failing.<sup>312</sup>

These psychic adjustments are not a sign of moral weakness; they are psychologically necessary for survival on public assistance in a world which equates personal worth with earning power. It is not constructive for a person already on welfare to regard being on welfare as the most terrible and demeaning fate imaginable and to continually berate herself for her status as a welfare recipient. However, it is possible that these

hamburgers, while the other “1” would prefer that no hamburgers were eaten. LUTZ & LUX, *supra* note 59, at 111.

309. For example, the Supreme Court’s 1968 decision in *King v. Smith*, 392 U.S. 309 (1968), struck down the “man-in-the-house” provision, which had previously been responsible for humiliating and intrusive nighttime enforcement raids. *See, e.g.*, Reich, *supra* note 72, at 1248 (discussing “widespread practice of conducting ‘midnight raids’ on homes receiving aid to dependent children, to see if there is a ‘man in the house’ . . .”).

310. *See, e.g.*, Fullinwider, *supra* note 211, at 270-71 (“‘Welfare’ . . . is shaming. Part of the shame may derive from reformable features of welfare policy, but part inheres in the condition of disabling poverty itself.”); Moon, *supra* note 289, at 27, 34 (“It is certainly true that the way welfare is administered can worsen the stigma associated with receiving it; but as long as people are expected to support themselves, that stigma is inevitable.”).

311. Similarly, Charles Murray has suggested that acceptance of welfare may represent the crossing of a psychologically significant “natural boundary.” MURRAY, *supra* note 3, at 184.

312. *See* Jon Elster, *Is There (or Should There Be) a Right to Work?*, in *DEMOCRACY AND THE WELFARE STATE*, *supra* note 211, at 53, 69 (“[P]eople often rationalize defeat by adapting their preferences to the feasible set (sour grapes).”); ELSTER, *supra* note 60, at 109-40 (discussing “adaptive preferences”). *See also* HEAP, *supra* note 59, at 219 (explaining that when a person’s “self-image confronts the experience of failure . . . [t]wo possibilities for reconciliation are present: either the individuals lower their own estimate of their worth, i.e. self-esteem drops; or they find an external explanation for their failure in the form of faulty competition rules, and the disaffection attaches to these arrangements”).

adjustments alter a recipient's world-view sufficiently to change his or her dominant strategy. Having suppressed the intangible benefits associated with earning one's own way, choices are made based only on the mix of benefits, money, and leisure they provide. If a decision matrix containing only these elements yields a dominant strategy of staying on welfare, a welfare recipient might choose that strategy even though a matrix which fully accounted for other intangibles such as personal productivity and self-actualization (i.e., that matrix which the same individual might have confronted prior to going on welfare) would yield a different strategy.<sup>313</sup>

Similarly, the consumption of "leisure"<sup>314</sup> while on welfare could prove demoralizing in itself and, over time, could alter the preferences of individuals in ways that would make the climb from poverty less likely.<sup>315</sup> As the memory of work (or learning) recedes into the past, intangible benefits associated with those experiences (such as a feeling of competence or pride in the mastery of certain skills)<sup>316</sup> also fade and stop being counted in the decision matrix. For an individual who cannot find employment, affirmative suppression of those intangible benefits may be psychologically necessary. Again, it does no good for a person to pin her entire self-worth on her employment if no employment is available. When and if employment eventually becomes available (or, by learning new skills or moving to a new area, work could be found), the suppression of the intangible benefits associated with working would be costly to society insofar as it leads the welfare recipient to make decisions against productive activity based on an incomplete decision matrix.

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313. Such a theory would make sense out of Charles Murray's insistence that the poor are better-off without welfare, while simultaneously demonstrating through his elaborate "Harold and Phyllis" example that the dominant strategy for poor persons themselves is to get and stay on welfare. See MURRAY, *supra* note 3, at 186. It would also explain Irving Kristol's observation of those "who prefer[red] to work hard at low-paying jobs, earning less than if they had gone on welfare." Kristel, *supra* note 185, at 42.

314. It is questionable whether the term "leisure," which has pleasant connotations implying a break from regular productive activity, is an appropriate descriptive term for the chronic inactivity of an unemployed person. See Elster, *supra* note 312, at 64 ("[B]eing unemployed is not like being on holiday. It is an open-ended mode of existence that is difficult to fill even at the best of times . . .").

315. The possibility that long spells of unemployment can fundamentally change people has long been recognized. See *id.* at 67-69. In 1886, one employer asserted that "we have always found, as to the artisan, that if he happens to be out of work for 3 months, he is never the same again." *Id.* at 68 (quoting PETER KELVIN & JOANNA JARRETT, UNEMPLOYMENT: ITS SOCIAL PSYCHOLOGICAL EFFECTS 35 (1985)). Moreover, "[i]f unemployment induces changes in people, it would not be surprising to find that some of the changes make it more difficult for them to find new employment." *Id.* at 67.

316. See *id.* at 62-67 (discussing nonpecuniary benefits of work).

The effect of altered preferences resulting from long-term subsistence on welfare while not working is typically described with phrases such as "a weakening of character."<sup>317</sup> Such descriptions reinforce notions of "the undeserving poor" and are of little value in setting policy. It is more helpful to think of the poor as rational actors faced with an altered decision matrix which yields preferred strategies which others might find objectively sub-optimal. The challenge then is to set policy such that the decision matrix more fully reflects all long-term costs and benefits of different strategies.

### *B. Changing the Way the Nonpoor View the Game*

Influencing the choices of the poor so that they choose self-help rather than welfare is only one way of escaping from the strategic dilemma presented by distributive issues. Changing the way the nonpoor view the provision of assistance to the poor could also provide a way out of the strategic conflict described in this Article. In other words, it is conceivable that (at least in some cases) the poor and the nonpoor could both pursue as a dominant strategy the equilibrium point in which the nonpoor provide for the poor.<sup>318</sup>

If such an idea seems preposterous, consider the case of Social Security benefits for the aged. No one would dispute that one effect of these benefits is to provide for the support of some retirement-aged persons who would otherwise be poor. While some of those potentially poor persons could perhaps be bluffed or cajoled into self-support during their retirement years (through work, advance savings for retirement, or reliance on family members), society has made the judgment that for this group of people, public support is preferable to self-help. The reasons for that judgment are complexly linked to policy design (which is universal, rather than means-tested) and rhetoric (which stresses the connection with work and the analogy to private insurance). Put simply, the design of the program does not place the nonpoor and the poor in strategic conflict; by making criteria other than wealth determinative, the nonpoor and the poor find themselves on the same side.

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317. See, e.g., EDWARD C. BANFIELD, *THE UNHEAVENLY CITY* 123 (1970).

318. See *supra* part III.A (describing the decision matrix for the strategic game). The elimination of the strategic dilemma would by no means eliminate all of the costs associated with redistribution. Nevertheless, the existence of the strategic conflict is responsible for much of the "unfairness" costs discussed in part V.C.1. Costs would still be associated with transferring money to the less well-off, however, and to the extent a particular policy continued to trigger costly decisions by the poor, decision costs would remain.

## VII. IMPLICATIONS FOR WELFARE POLICY

## A. Cash Versus In-Kind Transfers

Once a society has decided to shift some of the holdings of the more well-off to the less well-off, it must decide what form those transfers will take. The most administratively simple and inexpensive way to transfer holdings from the more well-off to the less well-off is through a cash grant to eligible persons (also known as "the negative income tax").<sup>319</sup> The size of the grant can be tailored to effect the desired change in income distribution and thus society can literally "buy" a more equal distribution curve.

It is likely, however, that society cares less about the actual income distribution than it does about the satisfaction of certain subsistence-level needs of the poor.<sup>320</sup> Nevertheless, to the extent the utility functions of the poor yield decisions which are also utility-maximizing from society's viewpoint, a cash grant would do the trick. In-kind transfers are needed to increase the utility of society only if they constitute forced consumption decisions which diverge from those the poor would make on their own.<sup>321</sup>

In-kind transfers are predicated on an assumption that welfare recipients' preferences differ significantly from those of society as a whole.<sup>322</sup> A sort of *res ipsa loquitur* argument may be used to support this negative perception. As Richard Posner puts it, "[s]ome people are

319. Milton Friedman was an early proponent of this idea. See, e.g., KATZ, *supra* note 46, at 103.

320. See, e.g., POSNER, *supra* note 16, at 467 ("[T]he affluent may not be concerned with the subjective utility of the poor but rather with the consumption pattern of the poor.").

321. One form of in-kind transfer that has recently gained popularity based on skepticism regarding the consumption choices of the poor is the distribution to panhandlers of "vouchers" which can be redeemed for food but not for liquor. See Lourdes L. Valeriano, *Business Bulletin*, WALL ST. J., Aug. 26, 1993, at A1; *Award for Program Excellence—Programs for the Disadvantaged*, PUB. MGMT., Oct. 1993, app. at A-12 (International City/County Management Awards) (discussing the Berkeley Cares Voucher & Donation Program). The suggestion that money not be permitted to govern the allocation of certain kinds of goods and services, such as basic health care, is another way of recommending in-kind transfers of those specific goods and services to the poor. See generally WALZER, *supra* note 252; James Tobin, *On Limiting the Domain of Inequality*, 13 J.L. & ECON 263 (1970).

322. Making such assumptions about individuals is, of course, considered paternalistic. See Wiseman & Littlechild, *supra* note 169, at 189 (discussing the "paternalist framework" which posits that certain groups "are insufficiently well informed or competent to make adequate judgments about the consumption of certain goods or services").

poor because they are incompetent at managing money; if so, unrestricted cash grants may be squandered without alleviating poverty."<sup>323</sup> Therefore, he argues, "[t]he affluent may hope that if the poor can be forced to buy some things rather than others, poverty will be reduced in the long run."<sup>324</sup>

For example, assume that society would prefer that Heidi, a welfare recipient with an infant son, engaged in consumption pattern X (which includes, we will assume, certain levels of such items as nutritious food, milk, warm clothing, shelter, and adequate medical care—and may specifically exclude items such as alcohol, tobacco, and lottery tickets). If Heidi's own preferences correspond to this consumption pattern, there is no need to incur additional administrative costs to provide her with these benefits "in-kind"; she will procure them on her own with the money provided in a cash grant. If, however, Heidi's own personal utility (as she perceives it) is maximized through a different consumption pattern (pattern Y), her expenditures will not be utility-maximizing for the rest of society.

Providing Heidi with in-kind benefits also generates costs. First, in-kind benefits entail administrative costs and inefficiencies.<sup>325</sup> Second, when benefits are provided in-kind, Heidi is unable to communicate the strength of her preferences for particular goods or services.<sup>326</sup> Related to this point is the phenomenon of over-utilization of certain in-kind health benefits such as medical services.<sup>327</sup> Each additional doctor visit, for example, entails no marginal cost other than the cost of leisure (free if she is unemployed) and the cost involved in getting to the care provider. With in-kind benefits, Heidi would be expected to consume medical services right up to the point at which she obtains no benefit from them.<sup>328</sup>

323. POSNER, *supra* note 16, at 467.

324. *Id.*

325. For example, client nonparticipation has been a problem with the food stamp program, indicating that in-kind benefits may not be able to deliver assistance in the most efficient manner. See STEINER, *supra* note 138, at 213-20. See also KATZ, *supra* note 46, at 104 (discussing Heineman Commission's contention that market system can distribute goods and services more effectively than can the government).

326. See, e.g., POSNER, *supra* note 16, at 468.

327. *Id.* at 442, 448.

328. See *id.* at 474 ("[I]n the case of health, only the sky sets a potential limit on expenditures."). Although at first blush one might think this is the appropriate amount of health care to consume, where resources are limited each marginal dollar spent on health care (whether by an individual, an insurance company or the government) should be spent on the individual who can gain the most from it. When money no longer serves as a mode of expressing how much a particular service is valued, there is no way to know whether providing that service to a given individual represents the most efficient use of

The decision as to whether benefits should be provided in cash or in-kind depends on whether the societal disutility (including any disutility to Heidi's son) associated with Heidi's choosing consumption pattern Y over consumption pattern X outweighs the disutility to Heidi in not being able to realize her preferences,<sup>329</sup> the increased administrative costs associated with such transfers, liberty costs associated with increased government control of allocation decisions, and the costs resulting from distortion of preferences and overutilization of services.

### *B. Work Requirements and Other Conditional Transfers*

The idea of conditioning welfare benefits on work or other behavioral requirements is far from new,<sup>330</sup> but it has enjoyed a recent resurgence of popularity.<sup>331</sup> The reasons such programs appear attractive are straightforward. By conditioning the disbursement of welfare benefits on certain behavioral patterns such as work, society seeks to both decrease the absolute level of such expenditures and increase the utility derived from the transfers that are made.

If a work requirement were feasible and could be enforced, it would arguably deter some people who might otherwise do so from going on welfare by making the mix of leisure and benefits associated with welfare less attractive.<sup>332</sup> This has been an age-old motivation for work

limited resources.

329. This disutility may, however, be viewed favorably by the nonpoor, insofar as they are attempting in the context of a strategic game to make welfare appear less favorable than self-help. *See supra* part VI.A. By restricting the freedom of choice a welfare recipient has in consumption decisions, the value of the welfare option to her is decreased.

330. For example, during the nineteenth century, relief was conditioned on entering an almshouse in which the poor were overseen by a "poorhouse superintendent who made them work and watched their behavior . . ." KATZ, *supra* note 1, at 23. *See also* PIVEN & CLOWARD, *supra* note 65, at 396 ("Monitoring and excoriating the behavior of the poor, and conditioning access to benefits on changes in behavior, are as old as relief arrangements.").

331. *See, e.g.,* Marshall & Kamarck, *supra* note 9, at 226 (discussing increasingly widespread consensus "that welfare and other social benefits be conditioned on changes in the recipients' behavior"); *id.* at 226-28 (discussing recent state welfare reform initiatives requiring certain behaviors); KAUS, *supra* note 10, at 125; MEAD, *supra* note 197, at 68 ("[G]overnment must couple benefits with functioning requirements.").

332. This assumes that people suffer disutility from working (at least at the types of jobs that would be available for those fulfilling a welfare work requirement). To the extent the poor view work as utility-generating, however, adding a work component to a welfare program would theoretically increase rather than decrease its attractiveness and have the unintended effect of increasing program costs by attracting, rather than deterring, those at the margin who are deciding whether to opt for welfare or some other

requirements, dating from nineteenth century "poorhouses."<sup>333</sup> The more stringent and unforgiving the work requirement (again, assuming it could be enforced), the greater the disincentive effect would be. Moreover, by making welfare less attractive, behavior patterns that necessitate resort to welfare, such as childbearing by unwed teenagers, would also be deterred.<sup>334</sup>

In addition, society potentially gleans increased utility from the transfers that are made where work requirements are enforced. This increased utility takes at least two forms. First, and most importantly, costs associated with perceived unfairness are reduced. Assuming work requirements could be enforced and meaningful work could, in fact, be found or "made," people will feel better about welfare expenditures. Simply knowing that the welfare recipients are putting in an honest day's work, day after day, takes some of the sting out of redistributive efforts aimed at alleviating their want.<sup>335</sup> Mead has similarly asserted that work is one of the "common obligations that Americans expect of one another."<sup>336</sup>

The imposition of a work requirement, coupled with the provision of guaranteed jobs, serves to remove the best excuse of the nonworking—that one is unable to find work.<sup>337</sup> At least in theory, it provides a litmus test of deservedness, separating those who are willing

arrangement. See *infra* note 347 and accompanying text (noting the conflict between the deterrence rationale for work programs and the idea that such programs can foster a preference for work).

333. See KATZ, *supra* note 1, at 22-23.

334. See *supra* notes 224-26 and accompanying text (discussing deterrence of childbearing).

335. See, e.g., FRANK, *supra* note 38, at 258 ("Even if the transfer recipient's task were to dig a hole and then fill it back up, many taxpayers would surely feel less resentful than if their tax payments had simply been given away."); see also GILDER, *supra* note 222, at 168 ("Make-work, despite the claims of altruism by its advocates, is more often selfish. It is done to satisfy the donor rather than the donee."). Christopher Jencks asserts it is politically necessary for welfare to be dispensed only as a "reward[] for work," contending that "[i]n America, social-welfare policy cannot afford to be seen as offering the indolent something for nothing." JENCKS, *supra* note 7, at 234.

336. MEAD, *supra* note 197, at 241. It seems far from clear, however, that all Americans are truly expected to work. Any disutility arising from the perceived unfairness of the idleness of the independently wealthy pales in comparison with the public indictment of the perceived idleness of welfare recipients even though some members of the former group may be, by any objective measure, more indolent. The critical difference, of course, is that the latter group is receiving public funds—money which, in popular opinion, should be "earned."

337. See, e.g., *id.* at 125 ("[B]ecause jobs are guaranteed, [welfare recipients] cannot escape by claiming work is unavailable."); KAUS, *supra* note 10, at 141 (characterizing work test as only a way of ascertaining whether people who are not presently working could be working).

to work from those who simply refuse to do so, by artificially removing the external factor of job scarcity, a factor which clouds the relationship between un-deservedness and poverty.<sup>338</sup>

Second, and far less certain, is the possibility that by requiring welfare recipients to work, the preferences of those recipients will shift in ways that will ultimately benefit both themselves and the rest of society.<sup>339</sup> In other words, some hope that the experience of working will make welfare recipients and their children value the experience of working.<sup>340</sup> The premise for this line of reasoning is the idea that lack of work is inherently demoralizing. Hegel recognized this problematic aspect of providing public assistance to the poor. In his view, the support of the poor "without the mediation of work" runs "contrary to the principle of civil society and the feeling of self-sufficiency and honor among its individual members."<sup>341</sup> If, therefore, certain aspects of welfare recipients' utility functions (such as taking pride in one's work) have been suppressed through lack of work (or were never fully developed), it could be argued that the work experience would stimulate the integration of such factors into their utility functions. Once such intangible factors are recognized and "counted," work becomes more attractive relative to the passive receipt of welfare.<sup>342</sup>

338. In practice, works programs do not always provide such clear-cut results. See MEAD, *supra* note 197, at 140-41 (noting that discretion to excuse recipients from work requirements for "good cause" is often construed broadly by staff persons seeking to avoid "onerous procedures and paperwork" involved in sanctioning recalcitrant recipients).

339. This motivation for requiring work also has a long history. See KATZ, *supra* note 1, at 23 (explaining that nineteenth-century poorhouses were designed not only to deter poor from seeking relief, but were also "supposed to transform the behavior and character of their inmates"). Nevertheless, there is "overwhelming historical evidence that [work policies] have generally failed to reduce the welfare rolls in any appreciable way or to improve the economic self-sufficiency of the poor." HANDLER & HASENFELD, *supra* note 5, at 196-97.

340. See MEAD, *supra* note 73, at 164 ("[W]ithout requiring the parents to do something to improve their own lives, particularly to work, children probably will not learn to identify with a life of self-reliance."); Elster, *supra* note 312, at 69 (discussing view that "exposure to work develops a taste for work").

341. G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT § 245, at 267 (Allen W. Wood ed. & H.B. Nishet trans., Cambridge Univ. Press 1991) (1821); see Moon, *supra* note 289, at 28-30 (discussing Hegel's observations on this point).

342. The argument could also be made that the mere presence of a work program generally reinforces societal norms regarding work, facilitating the formation and development of preferences for work across all segments of society. See, e.g., HANDLER & HASENFELD, *supra* note 5, at 40 (stating that the "key purpose" of work requirements is "to reaffirm the work ethic").

Of course, it is unknown to what extent a work program would be capable of effecting such a change in preferences. Some would contend that the very guaranteed nature of the job prevents it from constituting a realistic work experience. Because there is no risk of being fired, there is no incentive to expend more than minimal effort.<sup>343</sup> The superfluous nature of the work itself may also keep participants from obtaining a meaningful work experience, since the supervisor "knows that it makes no difference whether the jobs are done or not."<sup>344</sup> For these reasons, forcing welfare recipients to perform an obviously worthless job may be unlikely to enhance self-esteem or effect socially useful shifts in their preference schedules.<sup>345</sup> Despite these defects, however, some remain optimistic about the potential effect of works programs on participants. As Fullinwider explains, even the "pseudoexperience" of make-work "may be enough to diminish welfare dependency and accomplish a transition to self-support."<sup>346</sup>

Even assuming the preferences of welfare recipients could be altered by providing them with the experience of working, the net effect of such shifts in preferences remains uncertain. If welfare recipients come to value and enjoy work, so that they assign it a positive utility value (as society apparently wishes they would), the "workfare" experience would, in theory, become even more attractive to them. If work comes to be a highly valued and sought-after experience, what welfare recipient would willingly forego the guaranteed work provided under a public works program for the uncertainty of the private sector where work is notoriously difficult to find and difficult to keep, especially in times of high unemployment?<sup>347</sup> Hence, it is possible that fostering a work ethic in welfare recipients would not have the intended effect of getting people off welfare; rather, it would place the government in the position of

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343. See GILDER, *supra* note 222, at 200 ("Crucial to a real job is the risk of being fired if the work is not performed.").

344. *Id.* at 189.

345. See Elster, *supra* note 312, at 67 ("Self-esteem is undermined by the belief that one is parasitic on others. If true, this claim implies that highly and visibly subsidized work or make-believe work, like digging ditches and filling them up again, is not a source of self-esteem.").

346. Fullinwider, *supra* note 211, at 272.

347. One could contend, of course, that the work experience would motivate the welfare recipient to get off welfare and find a private sector job. However, one of the rationales for workfare is that it is somehow less shameful and more respectable than simply being "on the dole." To the extent this sense of respectability is internalized by the workfare recipient, it would undercut the argument that such experience would motivate one to leave the rolls as soon as possible.

carrying a significant sector of society on its "payroll" in perpetuity.<sup>348</sup> This is especially true if, as some commentators have asserted, capitalism inevitably results in some segment of the population being unemployed at any given time. In short, if workfare "works" to change preferences, we would be fostering a more widespread and ingrained preference for something that our society simply cannot supply enough of on its own.<sup>349</sup>

One might reasonably ask whether, assuming some segment of the population will need public assistance at any given time, it would be better to have that segment working at public jobs rather than simply "on the dole." As previous analysis indicates, such a move would decrease "unfairness" costs to society and would theoretically increase the utility of the recipients during their time on welfare (as well as increase the utility to them and to others when and if they leave the welfare rolls). Moreover, the recipients would, in theory, be doing productive work and generating value through their efforts.

Balanced against these considerable benefits is the simple, empirically demonstrated fact upon which proponents and opponents of work requirements agree: any public work program will always cost far more than would a simple transfer of funds.<sup>350</sup> Of course, the fact that the public provision of work costs money does not necessarily mean that it should not be provided. As Michael Walzer has stated, "[w]ork itself is one of the things men and women need, and that the community must

348. It is unlikely as a practical matter that the government would maintain such a program for any amount of time approaching perpetuity. For example, Piven and Cloward have observed that "work-enforcing . . . reforms" have historically "presaged the eventual expulsion of large numbers of people from the rolls, leaving them to fend for themselves in a labor market where there was too little work and thus subjecting them once again to severe economic exploitation." PIVEN & CLOWARD, *supra* note 65, at 343-44.

349. See *supra* note 272 (quoting Block's assertion that we need fewer incentives to work, not more).

350. See, e.g., BUTLER & KONDRATAS, *supra* note 281, at 145 (noting that workfare would not result in short term budget cuts); KAUS, *supra* note 10, at 135 (citing "best estimate" of "between \$43 and \$59 billion a year more than we're spending now"); MEAD, *supra* note 197, at 126 ("[W]orkfare costs more per client than just paying assistance, because of supervision and other expenses.") (footnote omitted).

That providing work is more expensive than providing money is true not only presently, but historically as well. See, e.g., KATZ, *supra* note 1, at 30 ("Writing in 1894, Amos Warner pointed out how much more it usually cost to 'set the inmates of an almshouse to work than their work is worth.' They could be supported 'more cheaply in idleness,' he said."); PIVEN & CLOWARD, *supra* note 65, at 82 (Work relief "was far more expensive than direct relief: the wages paid exceeded the levels of direct relief grants, and substantial expenditures for administration and materials were required to put people to work.").

help provide whenever they are unable to provide it for themselves and one another."<sup>351</sup> However, those considerable costs must be balanced against the utility gains society expects to receive from the work program.

The costs of a public works program do not stop with the dollars it takes to generate and supervise jobs, provide childcare and transportation, and train workers. Works programs can potentially create disutility for private businesses by competing against them for workers<sup>352</sup> or for the provision of goods and services.<sup>353</sup> The massive cost of a guaranteed job program would greatly intensify any negative economic effects currently associated with welfare. For example, some suggest that the cost burden of such a program would fall on small and mid-sized firms who would otherwise be able to employ people themselves.<sup>354</sup>

Additionally, a public works program "requires centralized planning and administration and invites the interventions of planners and administrators."<sup>355</sup> Increased government intervention increases liberty costs associated with redistribution. Even Lester Thurow, a proponent of guaranteed full employment, cautions that "[n]o one should attempt to deny that a real, open-ended guaranteed job program would constitute a major restructuring of our economy."<sup>356</sup>

Additional costs stem from the waste involved in "creating" jobs.<sup>357</sup> Such make-work jobs are by definition not demanded by the market; moreover, to avoid displacing government contractors, the projects would need to be ones that the government has heretofore been

351. WALZER, *supra* note 252, at 92. See also THUROW, *supra* note 276, at 204 ("[W]e have a moral responsibility to guarantee full employment. Not to do so is like locking the church doors and then saying that people are not virtuous if they do not go to church.").

352. Making public works jobs pay less than the minimum or prevailing wage is a recognized way to avoid conflicts with the private sector. See PIVEN & CLOWARD, *supra* note 65, at 95 (noting that WPA workers were paid at a rate below the prevailing wage to avoid competing with private employers); KAUS, *supra* note 10, at 125 (proposing that guaranteed jobs pay "a wage slightly below the minimum wage for private sector work") (footnote omitted). However, if, as commentators contend, public works jobs are far less demanding than private sector work, workers might be willing to accept a somewhat lower wage.

353. See PIVEN & CLOWARD, *supra* note 65, at 82 ("[W]ork relief raised the specter of government activity in areas hitherto reserved for private enterprise.").

354. GILDER, *supra* note 222, at 193.

355. WALZER, *supra* note 252, at 92.

356. THUROW, *supra* note 276, at 204.

357. GILDER, *supra* note 222, at 192 ("As a general principle all public-sector work that is created to 'develop jobs' rather than to accomplish a needed end may be assumed to represent waste.").

unwilling to pay for.<sup>358</sup> Such jobs are (and always have been) difficult to invent.<sup>359</sup> It is also questionable whether such jobs would produce any value which would offset the cost of creating and administering them.<sup>360</sup>

The most devastating criticism of works programs is the inability of society to enforce the work requirement without causing harm to children.<sup>361</sup> Any welfare program that depends upon recipients behaving in certain ways or making certain desired decisions raises the question of what happens if the recipient refuses to cooperate. No matter how well-designed any conditional transfer program is (including time-restricted programs), it must be assumed that some proportion of recipients will refuse to meet the condition for receiving the transfer. What happens to those people? And what happens to their young children?

To maximize the incentive to meet the requirement, a very strict benefit cut-off rule must be applied. But this puts society to very hard choices when a welfare recipient tests this cut-off rule by failing to meet a particular requirement. Society might be willing to cut off benefits to an adult recipient who failed to meet the requirement and let that person live in whatever diminished manner he or she could, on the assumption that the pain of hunger and homelessness would eventually alter the person's attitudes toward the requirement in question. But where young children are involved (and we can assume that any large-scale benefit program will be premised upon the existence of children), letting this scenario play itself out has very severe costs. While an adult might be

358. See Edelman, *supra* note 94, at 1752 (“[W]hen we talk about public job ‘creation,’ though, we generally mean jobs that we would not otherwise pay anyone to do.”).

359. See KATZ, *supra* note 1, at 30 (noting the difficulties with finding adequate work for inmates of nineteenth-century poorhouses). However, the involvement of local government in identifying needed work may be a promising method of alleviating some of the “job invention” costs. See, e.g., Judith Burrell & Eugene T. Lowe, *Althaus Releases New Transportation and Community Development Projects ‘Ready to Go’ for 1993*, U.S. MAYOR, Feb. 22, 1993, at 1, 3 (citing survey report identifying almost 4,400 “ready to go” city construction and urban transportation projects which would create an estimated 200,000 jobs).

360. See GILDER, *supra* note 222, at 192-93 (citing CETA jobs which, according to GAO figures, cost more than \$20,000 each; if the job makes no net contribution to the economy, the cost to maintain them “can be registered as a loss”). But see THUROW, *supra* note 276, at 205 (“If care is shown in project selection, there is no reason why the projects could not generate substantial net benefits.”).

361. This is only one of many enforcement problems inherent in “workfare,” see generally MEAD, *supra* note 197, at 135-41, but it is perhaps the one least susceptible of resolution through changes in program design or the manner in which workfare is administered.

able to survive for some time on an inadequate diet and with inadequate shelter, children subjected to such conditions much more quickly succumb to disease and death. The loss associated with the needless suffering of a child is very costly in both human and economic terms.<sup>362</sup> Moreover, all of society incurs justice costs when a child (who, after all, was not the one who failed to perform the required task) is needlessly and cruelly punished through withdrawal of support.

The dilemma is straightforward. Children, who represent the "deserving poor," might be in the charge of poor adults who do not appear "deserving" of assistance.<sup>363</sup> Attempts to persuade or coerce impoverished adults into prescribed behavioral patterns must ultimately founder where children are involved, since any reduction in benefit levels aimed at "punishing" an adult welfare recipient who is perceived as lazy or undeserving will have the effect of punishing the child.<sup>364</sup>

The only way to avoid the "tie-in" of deserving children and undeserving parents<sup>365</sup> is to separate children from parents who show themselves to be "undeserving" (by, for example, failing to fulfill a work requirement) and have the children raised by others.<sup>366</sup> For example, Mickey Kaus has proposed that the state withdraw assistance from parents who fail to fulfill a work requirement, and that it then remove children from these "unfit" homes if "squalor and filth" results from this withdrawal of support.<sup>367</sup> Aside from the potential legal and

362. See *supra* part III.C (discussing impact of children on strategic dilemma); part IV.E (noting that society's utility is inextricably linked with the utility of its children).

363. See *supra* notes 264-65 and accompanying text.

364. See Edelman, *supra* note 94, at 1751 n.253 ("The punishment of an AFDC parent's recalcitrance ultimately falls on the children, the most vulnerable and blameless AFDC recipients."); OKUN, *supra* note 115, at 111 ("Generous aid removes important economic incentives that discourage women from getting into dependent positions, and that discourage their men from putting them there. But stingy aid denies the right to survival to the children of these broken families. The disincentive to the parents and the diet for the children are a tie-in sale; and that creates a particularly nasty tradeoff.").

365. OKUN, *supra* note 115, at 111.

366. The disruption of impoverished families is not unprecedented. See generally KATZ, *supra* note 1, at 103-09 (Although entire families were initially moved into poorhouses together, reformers thought it better to remove children from the poorhouses—and from their parents.). By the last quarter of the nineteenth century, the removal of children from their parents was desired by reformers who thought this measure was necessary "so that pauper parents could not pass on their lax morality and distaste for work to their children." *Id.* at 103.

367. See KAUS, *supra* note 10, at 126-27. Kaus does not supply details concerning the manner in which such monitoring for "squalor and filth" would transpire. Aside from the liberty intrusions inherent in such monitoring of families (who, remember, are no longer even receiving any government assistance), it seems quite likely that such extreme conditions of grinding, unalleviated poverty would often destroy the health or take the

constitutional difficulties with any such approach,<sup>368</sup> it seems that it would entirely miss the point. Does it really make sense to remove a newborn baby from its mother simply because she refuses to leave the baby at a government day-care facility all day to toil at a job that nobody needs her to do? By separating children from their families, the children are still being punished for their parents' perceived sins (albeit in a psychologically rather than physically damaging manner).<sup>369</sup> Nor would this plan operate to reduce the monetary costs of alleviating poverty; on the contrary, it would be exceedingly expensive.<sup>370</sup>

### C. *Universal Versus Means-Tested Transfers*

A perennial controversy in welfare policy formulation is the extent to which benefits should be narrowly targeted at the poor, rather than spread across a larger segment of society.<sup>371</sup> Gilbert Steiner contrasts "crude" means-tested relief efforts which "limit[] benefits to those who can establish need" with the more "subtle" universal efforts, which "spread[] benefits across a broad spectrum of the population, subsidizing many without need as well as those in need."<sup>372</sup>

Traditional redistributive measures are means-tested; benefits go only to those who can establish a certain level of neediness. AFDC, food stamps, Medicaid, and other "poverty" programs fall into this category.<sup>373</sup> Social Security is a broad-based universal program; everyone with a work history (or a spouse with a work history) is eligible

lives of innocent children before state officials arrived to declare their home "unfit."

368. The Supreme Court has given parental rights great deference, indicating that they may be dissolved only where a "powerful countervailing interest" is present. See *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 27 (1981) ("[A] parent's desire for and right to 'the companionship, care, custody and management of his or her children' is an important interest that 'undeniably warrants deference, and absent a powerful countervailing interest, protection.'") (citation omitted).

369. See, e.g., Elaine C. Kamarck & William A. Galston, *A Progressive Family Policy for the 1990s*, in *MANDATE FOR CHANGE*, *supra* note 9, at 153, 175 (citing "the confusing and ultimately damaging world of foster care" in which a child removed from the home "goes from one set of bad circumstances to another"). Although foster care may be the best available alternative where conditions of violence and abuse compel the removal of a child from the home, it makes little sense to subject children from loving homes to this system simply so that an impoverished welfare mother can be punished for failing to comply with behavioral requirements.

370. Aside from the cost of providing foster care to a child, one would expect high administrative costs to be associated with the removal of a child from the home.

371. See, e.g., GLAZER, *supra* note 94, at 86-97.

372. STEINER, *supra* note 138, at 2.

373. *Id.* at 3; GLAZER, *supra* note 94, at 86.

for benefits.<sup>374</sup> Other programs which benefit the middle class as well as the poor, such as federal college and housing loans, also fall in the latter category.<sup>375</sup>

So-called "universal" programs are not really universally available; they merely distribute benefits on the basis of some criterion or criteria other than income and wealth.<sup>376</sup> In so doing, they avoid the administrative cost of determining whose holdings and income are below a certain level and the cost of seeking to enforce that eligibility requirement (including costs of monitoring to ensure that welfare recipients are neither working nor saving in violation of the eligibility requirements).<sup>377</sup> New administrative costs are presented, however—those associated with determining who is eligible based on the new criteria (for example, whether a person is employed, or whether a person is a parent).<sup>378</sup>

On the other hand, costs for universal programs are increased by the fact that such programs necessarily assist some who are more well-off, as well as those who are less well-off. If the goal is redistribution to the less well-off, spreading benefits across both the well-off and the less well-off would seem to be a quite inefficient way of achieving it.<sup>379</sup> As Kuttner notes, "the welfare state is a kind of sand castle. As the benefits are piled higher, it continuously erodes. As the welfare state becomes larger and more universal, it also becomes less redistributive."<sup>380</sup> Or, as Christopher Jencks has observed, "If we want to redistribute income, the most effective strategy is probably still to redistribute income."<sup>381</sup> But the analysis in this Article suggests that mere redistribution is not society's true goal. Society is interested in effecting a more complex change not only in the utility of the less well-off, but also in their

374. See STEINER, *supra* note 138, at 2-3.

375. See *id.*

376. An exception may have been the "demogrant" proposed by George McGovern in his 1972 presidential campaign. Although details concerning the plan were sparse, the basic idea was that "[e]ach person would get a minimal sum from the government for maintenance. It would be returned by way of taxation if that person earned enough from work not to need it." GLAZER, *supra* note 94, at 86.

377. *Id.*

378. Even a universal health care program would require a determination as to whether one was sick and in need of health care products or services.

379. See KUTTNER, *supra* note 10, at 40-41 ("Clearly means tested programs would target more income to the genuinely needy and therefore accomplish more redistribution in the literal sense."); GLAZER, *supra* note 94, at 92 (noting low "target efficiency" of universal "children's allowances").

380. KUTTNER, *supra* note 10, at 231.

381. *Id.* at 40-41 (quoting Christopher Jencks).

preferences.<sup>382</sup> Hence, a more detailed analysis is required to determine whether this more complex goal is more efficiently met through a universal program.

It has also been argued that, given limited resources, “[r]eliance upon universality would have the effect of condemning many people to much lower levels of well-being than would be the case under a selective program that concentrated help on those most in need.”<sup>383</sup> That contention assumes that the amount of money available for poverty-alleviation programs is fixed and static, regardless of program design. This country’s experience with Social Security vividly illustrates that this is simply not the case. The amount of money available, while not exactly unlimited, expands and contracts based upon the political attractiveness of the particular package involved. Because a more universal program provides benefits to more people in society, one of its chief advantages has always been its political palatability.<sup>384</sup> Put simply, a universal program may cost more money, but it will also be capable of drawing in more money. The net effect on the lot of the poor of universalizing assistance is therefore indeterminate.

One advantage of a redistributive program which is not means-tested is the avoidance of perverse incentives to get and stay below some arbitrary level of income and holdings.<sup>385</sup> There will, however, be an incentive to bring oneself within the category of persons eligible for benefits. It has been suggested, for example, that all families (or, in some variations, all *working* families) with children be eligible for some type of family allowance.<sup>386</sup> While this would not discourage work (at least as long as the grant amount was held constant across all income levels), it would encourage the bearing of children. Moreover, if the grant amount varied with family size, as is usually suggested,<sup>387</sup> the bearing of additional children would not be discouraged.

These “childbearing” effects would, in a universal program, be felt across all of society rather than be limited to the poor. For example, a middle class family which is reticent about having an additional child for

382. As Irving Kristol has aptly noted, if poverty is defined as having an income of less than a certain amount, the government could “abolish poverty” by simply transferring the shortfall to those who fit this definition; however, “this statistical achievement is quite meaningless, in human terms.” Kristol, *supra* note 185, at 36.

383. Moon, *supra* note 289, at 50.

384. See *infra* note 396 and accompanying text.

385. See GLAZER, *supra* note 94, at 86 (“They [means-tested programs] can have perverse effects: people may restrict their income so as to become or remain eligible.”).

386. See *id.* at 92; JENCKS, *supra* note 7, at 233-34; WILSON, *supra* note 223, at 152.

387. See, e.g., JENCKS, *supra* note 7, at 233-34.

money reasons might find that the family assistance grant made just enough of a difference to allow them to have that child. If these effects were significant, costs of the program would obviously go even higher. Society would, in effect, be encouraging *all* families to produce more children than they can afford to care for, a policy which makes little sense unless society, for independent reasons, wishes to stimulate population growth.

Universal programs, by making married women with working husbands eligible (as well as those women who are unmarried and those who have unemployed husbands), would not create the disincentives to marriage that allegedly currently exist.<sup>388</sup> Yet a series of studies conducted in connection with the Nixon administration's proposed Family Assistance Plan (FAP) revealed that guaranteed income programs increased family breakups.<sup>389</sup> The apparent reason for this phenomenon was simply the increase in money which gave women the financial freedom to extricate themselves from unpleasant relationships; without the money, they were dependent on their husbands' income and unable to leave.<sup>390</sup> This is, of course, the same phenomenon one would expect if those same women were able to obtain jobs and earn their own income.<sup>391</sup>

By using a universal program to redistribute wealth, costs associated with demeaning means-testing procedures are avoided. Moreover, because rich and poor alike are eligible, no stigma is attached to receipt of benefits.<sup>392</sup> Thus, preference adjustments that may attach to "going on welfare"—adjustments which in theory hinder one from leaving welfare—are avoided.<sup>393</sup> By removing distinctions between those who

388. See *supra* part V.B.4 (discussing family structure costs).

389. See generally MOYNIHAN, *supra* note 199.

390. See *supra* notes 238-39 and accompanying text.

391. *Id.*

392. See ELLWOOD, *supra* note 1, at 23-25 (discussing the "Targeting-Isolation Conundrum"); GLAZER, *supra* note 94, at 86; KUTTNER, *supra* note 10, at 231 ("Targeting aid to the 'truly needy' tends to isolate the poor in separate programs and erodes the political constituency for equality. It creates a welfare-state culture that is not just means-tested, but mean-spirited. But the more equitable solution—broad citizen-entitlement programs—is expensive and in some respects inefficient."); Moon, *supra* note 289, at 32 ("What is demeaning about receiving welfare is in part the invidious distinction that the receipt of welfare itself makes between those who receive it and those who do not.").

393. See *supra* part VI.A.1. See also Lee Rainwater, *Stigma in Income-Tested Programs*, in INCOME-TESTED TRANSFER PROGRAMS, *supra* note 287, at 19, 39-40 ("[A]t least for some significant minority of 'charity cases' long-term effects can be quite negative in shaping a self-definition that suggests they are in some way permanently impaired and failed."); *id.* at 39 ("[I]t should be obvious that the cost of warding off stigmatization is lower with some kinds of programs, such as universal payments, than

are on welfare and those who are not, universal social programs "can help create a common society and a common nation."<sup>394</sup> But the absence of stigma can also cut the other way by removing the deterrent effect of shame.<sup>395</sup>

Probably the most important advantage of universal programs is their political attractiveness.<sup>396</sup> The success of Social Security largely inheres in the fact that it provides something for virtually everyone. Not only does every taxpayer have the assurance of benefits in old age, but a great many of them observe first-hand the significance of Social Security payments in the lives of their own parents, including the lessening or elimination of a financial burden which would otherwise fall on them. Similarly, the fact that a universal family grant would, by definition, help all families adds greatly to its political palatability.

The model of universality provided by Social Security is certainly compelling,<sup>397</sup> yet the massive costs of implementing a universal family assistance program are daunting. Moreover, an administrative loss would be associated with such a program, since most of the disbursements made

with others.").

394. GLAZER, *supra* note 94, at 95. In fact, the ability of universal programs to draw together different socio-economic groups may be somewhat limited. Even where benefits are provided on a universal basis, the poor may still find themselves treated less well by benefit administrators than their more well-off counterparts. See Moon, *supra* note 289, at 50-51 (citing NEIL GILBERT, *CAPITALISM AND THE WELFARE STATE: DILEMMAS OF SOCIAL BENEVOLENCE* 71 (1983)). James Coleman has also found that the evidence is inconclusive as to whether universal programs really increase social cohesion, rather than merely altering the nature of social division. Coleman, *supra* note 287, at 67, 88.

395. See Coleman, *supra* note 287, at 67, 72 ("In response to the argument that income-tested programs produce stigma, the argument for income-testing would assert such stigma is valuable and necessary."); *supra* part VI.A.1 (discussing deterrence and work-ethic effects of stigmatizing public assistance).

396. See KUTTNER, *supra* note 10, at 40 ("To win broad popular support, social programs must be of high quality and must serve the middle class as well as the poor."). According to Kuttner, the resulting "leak" of benefits to the nonpoor" is not only "socially desirable; it is politically indispensable." *Id.* See also Hugh Heclo, *The Political Foundations of Antipoverty Policy*, in *FIGHTING POVERTY* 313, 330 (Sheldon H. Danziger & Daniel H. Weinberg eds., 1986) (Studies have consistently shown that "the truly popular programs" are "mass-based" programs such as "pensions, health care [and] education," while "considerable unpopularity is attached to programs that are most directly relevant to the poor: public assistance, food stamps, social services, and the like.") (citations omitted). Indeed, William Julius Wilson has suggested that more targeted programs be packaged with the universal ones so that the former will be accepted. See WILSON, *supra* note 223, at 154-55.

397. See LOCKHART, *supra* note 77, at 4 (suggesting that the politically attractive "design features of social security could be adapted for the development of social merging programs directed at reducing poverty").

under such a program would then inevitably be recaptured from the more well-off through taxation, with money leaking out throughout the process.<sup>398</sup>

#### VIII. TOWARD THE OPTIMAL WELFARE PROGRAM: PRELIMINARY THOUGHTS

One way of capturing the benefits of universality without requiring the government to engage in wholesale cutting of benefit checks for every family in the country would be some sort of universal family loan fund.<sup>399</sup> Loans are critical to the basic workings of economic life for a majority of citizens, yet the poor, by virtue of their low beginning position, are not given the same opportunity as other Americans to better their overall position by borrowing against future earnings.<sup>400</sup> Unlike the Crusoe character described in Heyne's textbook example, the poor must struggle for a meager subsistence income (or accept it from others), since they cannot purchase the means for bettering their condition on credit.<sup>401</sup> As Arthur Okun has recognized, the blocked access of the poor to capital results in significant inefficiency, even as it increases inequality.<sup>402</sup>

While the details of such a loan program would have to be painstakingly hammered out, a basic design is easy to imagine. Like Social Security, "contributions" to the family loan fund could be withheld from paychecks<sup>403</sup> (although a work history would not be a necessary

398. See GLAZER, *supra* note 94, at 88-89 ("[Universal subsidy payment] involves mailing out checks to 200 million people in order to help 20 or 40 million, and then having 160 or 180 million mail back checks.") (quoting Kesselman and Garfinkel, in turn quoting Milton Friedman).

399. The idea of loaning government funds to the poor has been endorsed by President Clinton. Clinton proposed that a \$382 million government fund be established to make credit available in impoverished areas which would be modeled after a successful bank established in Bangladesh to make loan money available to poor village women. Kenneth H. Bacon, *Clinton Looks to a Bank in Bangladesh for Model to Help U.S. Poor Get Loans*, WALL ST. J., Aug. 27, 1993, at A2. About 40 loan funds based on the Bangladesh model have already been established in the United States, mostly by foundations. *Id.* Default rates for these funds range between 0% and 3%, no higher than the default rates for commercial banks. *Id.*

400. See, e.g., Okun, *supra* note 148, at 23 (Because of "the disadvantage low-income citizens suffer in access to capital, . . . investments in human capital by the poor" are discouraged.) (footnote omitted).

401. See *supra* text accompanying note 167.

402. See Okun, *supra* note 148, at 23.

403. Cf. Simon, *supra* note 19, at 1485 (noting that in Social Security context "special purpose fund financing" has been "traditionally considered essential to the private law analogy").

precondition to drawing on the reserve fund). The fund could be accessed upon proof that one was responsible for the support of a dependent child or children, and the amount available for withdrawal would be a monthly disbursement based on family size, much as AFDC is now.

Unlike AFDC, however, disbursements would be styled as loans from the fund rather than grants, and would not be means-tested. Full account information would accompany each month's disbursement (including a running total of the amount borrowed). The amount borrowed, or some prorated amount of it in the case of low-income borrowers, would be repaid with interest in future months or years based on a repayment plan keyed to the recipient's income level. For example, the repayment plan could feature grace periods during which no interest would accrue, and no repayment would be required for low income or unemployed borrowers. An explicit work reward could also be built into the system by, for example, providing loan forgiveness for those working in low-paying jobs.<sup>404</sup> By adjusting repayment terms and interest rates (perhaps by applying progressively higher interest rates to those in higher income brackets), the more well-off could be discouraged from resorting to the fund, except when absolutely necessary.

In order to control costs, caps would need to be put on how many consecutive and total months of disbursements would be available in a given time period.<sup>405</sup> When the allotted number of disbursements is close to being exhausted, intensive job training and placement services would become mandatory for unemployed borrowers.<sup>406</sup> If this proved unsuccessful, and the allotted disbursements were ultimately exhausted, the individual would stop receiving checks out of the family loan fund and would have to rely on other sources of funding.<sup>407</sup> By working for some period of time, however, an individual could regain eligibility for access to the fund.

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404. Care would have to be taken to avoid creating perverse incentives against attaining higher income levels. Any benefits of a lower income job, such as loan forgiveness or better interest rates, would have to be phased out gradually as income increases to avoid creating sharp "notches" that would discourage work effort. *See supra* note 199 and accompanying text (discussing this problem in the context of the Family Assistance Plan).

405. This limitation would also create an incentive for those in short-term straits to get back to work as quickly as possible, so as to "save" remaining months of assistance. *Cf. ELLWOOD, supra* note 1, at 123 (positing that "transitional assistance" would create "a strong incentive to go back to work quickly so as to save as much of your transitional assistance as possible for other periods of hardship").

406. Employed borrowers would simply go on "repayment status" at the exhaustion of the allotted disbursements. No further checks would be sent out, and a repayment plan would kick in (perhaps after a grace period had elapsed).

407. *See infra* text accompanying note 411 (discussing "second tier" of benefits).

What impact would such a plan have upon those who now receive AFDC payments? First, it would remove the stigma of means-tested welfare, reducing the costs associated with the suppression of socially valuable preferences. Second, loans are better than grants at avoiding perverse incentives. Loans would remove the tremendous disincentives to work which now exist. Granted, a person who remained unemployed and in poverty would never have to repay his or her disbursements. But since working would not disqualify one from continuing to receive disbursements (although it might expose one to the withholding tax), one could be made better off by working than by not working. And, while making grants available to people with children may have the tendency to increase the number of people giving birth to children they can't afford to support,<sup>408</sup> making loans available during the childbearing years simply shifts the time of payment for child-related expenses without changing the total cost a potential parent must consider.

The "unfairness" costs of the present welfare system would be reduced greatly: low-income or unemployed parents would be drawing on the same fund as their more well-off counterparts. Ability to draw on the fund would be viewed as a short-term prerogative of parenthood. Indeed, parenthood would simply be treated as a cash-flow crunch, much like college. In this manner, the strategic dilemma between the poor and the nonpoor could be sidestepped, since both poor and nonpoor persons would benefit from the program.

The fact that the disbursements are loans which must be repaid has several positive psychological effects. First, it does not have the appearance of a handout, either to the recipient or to the rest of society. Second, it implicitly communicates that the borrower is expected to succeed in the future and have the wherewithal to pay society back what he or she borrowed from it during a difficult time. Hence such a program would be unlikely to trigger destructive preference shifts that could lead to greater dependency; on the contrary, it would be likely to foster a sense of autonomy and competence.<sup>409</sup> Nor is it merely a

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408. See *supra* part VII.C (discussing the incentive impacts of a universal family assistance program).

409. This would represent one way of extending to poor families some measure of the same choices about family configuration and work that nonpoor families have. As Handler and Hasenfeld have argued, extending such choices to poor families plays an important role in welfare reform. See HANDLER & HASENFELD, *supra* note 5, at 232 (emphasizing the need for "a program of *inclusion*—poor mothers and their children would be treated the same as the nonpoor. They would be given the same choices that other mothers have—full- or part-time paid labor or homemaking and child rearing. Like the nonpoor, they could choose independent life or marriage"). A loan program, it is important to recognize, would not (at least in theory) be extending poor families a *greater* measure of choice about such matters as reproduction and work than is available to other

fiction to characterize the disbursements as loans rather than grants because the government will be able to reduce program costs greatly by getting funds back from those who are ultimately able to repay.

In sum, such a program would have the benefit of ameliorating poverty costs without creating high levels of decision costs. To be sure, some increases in "provision costs" would be expected—more money would be moved, and into more hands than is presently the case. Yet the loan paradigm of the program would temper these increases, since some percentage of the money would ultimately be recaptured.

Although a family loan fund would be the centerpiece of welfare reform directed at minimizing costs, it could not stand alone. The weakest link in such a loan program is the necessity for limitations as to how long one may draw funds. Once the idea of a cutoff is incorporated into the program, however, the inevitable question arises as to what happens to those who do not end up supporting themselves by the time their "draw" runs out.<sup>410</sup> At that point, recipients would enter a second tier of support which would, by definition, possess many of the flaws which the loan program sought to avoid. It would, of course, be targeted only at the very poor and premised upon there being no (or insufficient) income, creating the same perverse incentives AFDC does today. The more generous and flexible the "first tier" loan program is, the fewer people will fall within the purview of this less desirable and more socially costly second tier. Overall, the potential for some improvement over the present situation exists, simply by reducing the size of this second group.<sup>411</sup>

## IX. CONCLUSION

The poverty problem cannot be easily solved, either in theory or in practice. The foregoing ideas merely represent starting points for discussion and analysis in the remarkably complex realm of redistributive policy. Nevertheless, the construction of a framework which draws out the complex and subtle interactions in poverty policy helps by asking the right questions of proposed programs.

A principled understanding of the conflicts implicit in welfare policy, as well as the opposing interests and competing visions of fairness and

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families—like the more well-off, the poor would have to consider the cost of their choices.

410. This is, of course, the same problem that the Clinton administration must face in attempting to institute time-limited welfare. See, e.g., Mickey Kaus, *Welfare Waffle*, NEW REPUBLIC, Oct. 12, 1992, at 11.

411. Cf. Edelman, *supra* note 94, at 1733 ("The aim of any good antipoverty strategy should be to maximize the number of people who are self-sufficient, and to minimize the number of people for whom all policies other than income support fail.")

justice which underlie them, is an important first step in understanding and moving beyond the strategic dilemma which poverty policy presents. By understanding more fully what costs are involved in alleviating poverty—and what we as a society stand to gain from poverty alleviation—dialogue concerning the appropriate policy measures may be furthered.

