May 1966

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Recommended Citation

Link to publisher version (DOI)
https://doi.org/10.15779/Z38877B

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The Disabled and the Law of Welfare

Jacobus tenBroek* and Floyd W. Matson**

Not all who are poor are physically handicapped; not all who are handicapped are poor. But the two conditions—poverty and disability—are historically so intermeshed as to be often indistinguishable. Thus one of the primary meanings of the term “poor,” according to the 1933 edition of the Oxford English Dictionary, is to be “out of health, unwell.” Another is the state of being “in lean or feeble condition from ill feeding.” Not only does poverty breed illness and disability; disability in turn begets poverty.

It has always been so. During the Middle Ages the institution of the “hospital” was in reality an almshouse or poorhouse, caring not just for the sick but for all the destitute. In our day the same juxtaposition—or, rather, the same vicious circle—is apparent. Ferman, Kornbluh, and Haber point out that “United States National Health Survey statistics have shown that the poor get sick more frequently, take longer to recover, seek and receive less medical, dental, and hospital treatment, and suffer far more disabling consequences than persons with higher incomes.”

Throughout history the physically handicapped have been regarded as incompetent to aid themselves and therefore permanently dependent upon

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2 Poverty in America 187 (Ferman, Kornbluh & Haber eds. 1965). Leon Keyserling notes: “Comparing men aged 45-64 who earn less than $2,000 a year with those earning $7,000 or more, the incidence of heart disease in the lower income group is almost three times as high; orthopedic impairments nearly four times as frequent; high blood pressure more than four times as common; arthritis and rheumatism nearly five times as prevalent; and the incidence of mental and nervous conditions and vision impairment more than six times as frequent.” Keyserling, Progress on Poverty 67 (1964). Herman Somers makes the statistics still more meaningful: “On an average day in 1963, more than five million persons, aged 14 to 64, were disabled—unable to work, attend school, keep house, or follow other normal activities... We do not count the millions of others with chronic conditions who were partially limited in the amount of activity they could pursue.” Somers, Poverty and Income Maintenance for the Disabled, in Poverty in America 240 (Gordon ed.) (1965). For earlier figures, see Queen & Gruner, Social Pathology; Obstacles to Social Participation 119 (rev. ed. 1948); Ruse & Taylor, New Hope for the Handicapped (1949); United States Public Health Service, The Prevalence and Causes of Orthopedic Impairments 1 (Bulletin, No. 4, 1935-36).
the charity of others—in short, as indigent beggars. In medieval and early modern times they were in fact the only "legitimate" beggars and were granted a special legal status as such. This assumption of permanent helplessness persists today in the common consignment of the physically disabled to the category of "unemployables." Whatever may be the justice or injustice of this assumption, it remains a fact that only a very small fraction—perhaps five or six per cent at most—of those with serious physical handicaps are gainfully employed in ordinary open occupations, with an additional two or three per cent at work in specially subsidized sheltered employment. In England, where generally comparable conditions prevail, and where an effective system of registering the blind makes possible the collection of employment and other data, 6,146 blind persons out of a total registration figure of 96,472 were occupied in open employment as of the end of 1963; 3,833 were in sheltered and home employment.

The basic point emerges in the comment of an official of the Federal Bureau of Family Services, following a nationwide survey of recipients of Aid to the Permanently and Totally Disabled: "The study shows that these disabled recipients tend to follow the usual pattern of poverty. While their disabilities make them dependent upon public assistance for their livelihoods, lack of education and low job skills play a large part in preventing their rehabilitation to self-support." In sum, the seriously dis-


4 An expert on vocational rehabilitation recalls the depression period: "The U.S. Department of Labor in 1930, the American Federation of Labor, the U.S. Chamber of Commerce, the Brookings Institute and others constantly referred to 'unemployables,' but gave no explanation of what constitutes unemployability. It was assumed that the reduction of the labor market had restricted the opportunity for employment of a group of marginal people who (so the presentation ran) were less well equipped to secure and hold jobs because of physical defects. No attempt was made to analyze this group carefully and to determine the exact cause of their unemployability; nothing was done other than to impose on them the label of social misfits." Kessler, Rehabilitation of the Physically Handicapped 17-18 (1947).

5 Ministry of Health, Register of the Blind, National Statistics 1963, at 2 (1964) (England and Wales). For the American blind, an official survey of the nationwide caseload of Aid to the Blind recipients has reported that under 8% of all recipients were "employed for pay" in 1962, and that of those about one-third were in sheltered work. Mugge, Recipients of Aid to the Blind, Welfare in Review, April 1965, p. 6; U.S. Dep't of Health, Educ. & Welfare, State Letter No. 746, at Table 24 (July 2, 1964). Comparable figures for the State of California indicate that 96.5% of Aid to the Blind recipients between the ages of 20 and 49 are unemployed. Cal. Dep't of Social Welfare, California Social Welfare Programs for the Blind: An Analysis 20 (March 1965).

abled person in our society is characteristically unemployed, underprivileged, unaccepted, and impoverished. In a word, he is poor.

For various reasons, certain groups and categories of the physically disabled are outside the purview of the present article. Among those to be excluded are: persons disabled as a by-product of active ongoing disease, whose disability is principally a matter of medical concern; children whose dependency and physical weakness is a matter of immaturity and presumably will pass; the aged, whose physical handicap is but one factor in a general and irreversible decline of powers; the temporarily disabled, as in the case of intoxication; the alcoholic and the drug addict, whose difficulties are psychosomatic or of emotional-mental origin.

This article is about the lame, the halt, and the blind—the ancient Biblical category broadly embracing those crippled or mutilated by accident or war, the congenitally defective and deformed, and those left paralyzed or impaired by disease that has run its course or has been arrested by medical attention. The forms of physical disability to be dealt with include; for example, the paralytic, those with serious defects, deformities, and amputations, the deaf, and the blind. Our emphasis will be upon the more serious types of disability, those for whom the problems of life and livelihood—and of other men's pride and prejudice—are most severe.

Failure to make necessary distinctions among the varieties of physical disability is common alike to popular and professional thought, with consequences often destructive to the effectiveness of social provisions intended for welfare and rehabilitation. Little more than half a century ago the typical American almshouse was described as embracing indiscriminately all of the following: "[T]he crippled and the sick; the insane; the blind; deaf mutes; feeble-minded and epileptic; people with all kinds of chronic diseases; . . . short term prisoners; thieves, no longer physically capable of crime; worn out prostitutes, etc." The persisting tendency to lump together all those who appear "defective" is graphically exhibited in the following quotation from a current high school civics textbook: "The blind, the deaf, the dumb, the crippled, and the insane and feeble-minded are sometimes known collectively as the defective—people who are lacking some normal faculty or power. Such people often need to be placed in some special institution in order to receive proper attention." Over-inclusive classification of the physically disabled, in public law and programming, results among other things from routine pressures toward administrative simplification and convenience. In 1962, for

7 Johnson, The Almshouse 57 (1911).
8 McClellan, Building Citizenship 244 (1961).
example, a new optional title XVI was added to the public assistance provisions of the Social Security Act,\textsuperscript{9} expressly to supersede the three separate titles governing respectively Old Age Assistance (title I),\textsuperscript{10} Aid to the Blind (title X),\textsuperscript{11} and Aid to the Permanently and Totally Disabled (title XIV).\textsuperscript{12} Under the amendments, the states were invited to scrap these existing titles and the independent programs they governed, and to merge them under the single roof of the new collective category.\textsuperscript{13} The issue raised by this administrative erasure of boundary lines has been whether the specialized services and distinctive character of each of the older titles—the outgrowth of long acquaintance with the peculiar characteristics of each of three clientele groups—would survive the exposure to uniform standards and uniform administration. The evidence to date, in those states which have opted for title XVI, is that more has been lost in program quality and effectiveness than has been gained in convenience and economy.\textsuperscript{14}

Another version of the tendency to overclassify—to emphasize common denominators among disadvantaged groups at the expense of differences between them—is to be seen in the burgeoning subfield of sociology devoted to social pathology, and more specifically to the problem of “deviation” and “deviant groups.” The concept of deviation represents a heuristic device to enable the identification of individuals or groups who depart significantly from “normal” patterns of behavior. Although in technical usage the term “deviant” has only statistical and nonevaluative meaning, most of the groups so identified, that is, criminals, delinquents, prostitutes, religious fanatics, addicts, etc., are also subject to widespread social disapproval and censure.

When a physically disabled group is added to the list of deviants, the tendency is to posit common abnormalities and behavioral (as well as statistical) aberrations. A case in point is Edwin M. Lemert’s \textit{Social Pathology}, published in 1951. Part Two of the book, entitled “Deviation

\begin{itemize}
\item \textsuperscript{13} Moreover, this course once embarked upon was irreversible; there could be no retreat from title XVI in the form of reactivation of the separate categories. Act of July 25, 1962, § 141(b), 76 Stat. 205.
\end{itemize}
and Deviants,” includes the following chapter headings: “Blindness and the Blind,” “Radicalism and Radicals,” “Prostitution and the Prostitute,” “Crime and the Criminal,” “Drunkenness and the Chronic Alcoholic,” and “Mental Disorders.” What is more remarkable even than this curious juxtaposition of unlike groups is the author’s inclination to view the behavior of the blind as not only deviant but devious. Thus his chapter on blindness opens with these words: “Blindness is at once a dramatic and engaging handicap . . . .” \(^{15}\) Subsequently he cites a newspaper report to illustrate “the relative ease with which the public may be manipulated by the blind.” \(^{16}\) His chapter concludes: “As long as the societal reaction toward the blind remains as it is, there will continue to be a sizable number of the blind who make a profession of dependency.” \(^{17}\) Elsewhere, following a summary account of two so-called “militant groups of the blind” in Minnesota, Lemert writes: “All these facts create interesting speculation. While the actions of the two groups may be regarded as the group equivalent of tantrum behaviour, they also raise a question as to what happens when the blind in a collective capacity desert their traditional roles of humility and agitate in an independent way like any other pressure group.” \(^{18}\)

The tendency to lump together all those who display a visible difference, either of appearance or behavior—as in the physical scale of “defectives” or the sociological scale of “deviants”—represents the survival in attenuated form of the cruder prejudices of primitive societies. We shall have more to say concerning the role of prejudicial public attitudes in later pages; here it is pertinent to call attention to the “indivisibility” of such negative reactions toward the disabled. In various earlier societies virtually any form of illness or defect marked its victim as a sinner. Thus no less

\(^{15}\) Lemert, Social Pathology 101 (1951).
\(^{16}\) Id. at 141.
\(^{17}\) Id. at 142.
\(^{18}\) Id. at 107-08. For a different approach to the same phenomenon see the following quotation from Goffman describing the stereotyped adjustment of the “good deviant”: “The nature of a ‘good adjustment’ requires that the stigmatized individual cheerfully and unself-consciously accept himself as essentially the same as normals, while at the same time he voluntarily withholds himself from those situations in which normals find it difficult to give lip service to their similar acceptance of him . . . . It means that the unfairness and pain of having to carry a stigma will never be presented to . . . [normals]; it means that normals will not have to admit to themselves how limited their tactfulness and tolerance are; and it means that normals will remain relatively uncontaminated by intimate contact with the stigmatized, relatively unthreatened in their identity beliefs . . . . The stigmatized individual is asked to act so as to imply neither that his burden is heavy nor that bearing it has made him different from us. At the same time he must keep himself at that remove from us which ensures our painlessly being able to confirm his belief about him . . . . A phantom acceptance is thus allowed to provide the base for a phantom normalcy.” Quoted in Medical v. Rehabilitation Problems, Rehabilitation Record, May-June 1965, p. 2.
than twelve physical blemishes are listed in the Bible as sufficient to disqualify a priest from officiating—among them "a blind man, or a lame, or he that hath a flat nose, or anything superfluous, or a man that is broken-footed, or brokenhanded, or crookbackt, or a dwarf, or that hath a blemish in his eye, or be scurvy, or scabbed, or hath his bones broken ...."

Psychologically, socially, and legally, the disabled throughout history have enjoyed among themselves a peculiar "equality"; they have been equally mistrusted, equally misunderstood, equally mistreated, and equally impoverished.

The legal and constitutional status of the physically disabled—like their status in society and in the economy—is a reflection of underlying attitudes and assumptions concerning disability and of social policies based upon those attitudes. For the most part it is the cultural definition of disability, rather than the scientific or medical definition, which is instrumental in the ascription of capacities and incapacities, roles and rights, status and security. Thus a meaningful distinction may be made between "disability" and "handicap"—that is, between the physical disability, measured in objective scientific terms and the social handicap imposed upon the disabled by the cultural definition of their estate. "A disability is a condition of impairment, physical or mental, having an objective aspect that can usually be described by a physician. . . . A handicap is the cumulative result of the obstacles which disability interposes between the individual and his maximum functional level." 19

Ideally these two concepts should be isomorphic; the "handicap" of being blind, for example, should correspond to the visual and physical limitations of blindness, without the superimposition of additional difficulties. In practice, however, the psychological and socio-economic handicap suffered by disabled persons far outweighs the actual physical restrictions resulting from their impairment. Their dependent and segregated status is not an index merely of their physical condition; to an extent only beginning to be recognized it is the product of cultural definition—an assumptive framework of myths, stereotypes, aversive responses, and outright prejudices, together with more rational and scientific evidence.

Of particular significance is the hypothesis advanced by numerous investigators of the social psychology of physical handicap that negative attitudes and practices toward the disabled resemble those commonly attached to "underprivileged ethnic and religious minority groups." 21

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19 Von Hentig, The Criminal and His Victim 16 n.35 (1948). Wright adds that the later Talmudists extended the list of proscribed defects until it reached a total of 142. Wright, Physical Disability—A Psychological Approach 259 (Murphy ed. 1960).

20 Hamilton, Counseling the Handicapped in the Rehabilitation Process 17 (1950).

21 Wright, op. cit. supra note 19, at 14-15. See also Chevigny & Braverman, The Ad-
study dealing systematically with this hypothesis confirmed that prejudi-
cial attitudes toward blindness were significantly correlated with "anti-
minority, anti-Negro and pro-authoritarian attitudes."\footnote{2}

It is not surprising that such prejudice against the disabled should find
practical expression in discriminatory policies both legal and extralegal
designed to "keep the handicapped in their place." Kessler describes the
social handicap under which the disabled labor in emphatic terms:

These attitudes that have made self-expression and adjustment more
difficult can be expressed by the term psycho-social prejudice. It is an
individual and collective reaction of hostility toward the crippled, the
deformed, and the disabled, who are condemned as unproductive and
useless burdens. This truculent attitude on the part of society is the
greatest hurdle that the disabled person is called upon to surmount.
... The physically handicapped thus bears a double burden, his actual
disability and the social restrictions it incurs .... The unwritten laws
of primitive society that the crippled and disabled were to be sacrificed
for the good of the group were carried over into the written laws of the
ancients and for many centuries determined the treatment of disabled
persons. Though public and private efforts have improved the status
of the physically handicapped, the repugnance and distaste with which
they have been regarded throughout history still prevail.\footnote{23}

However, along with this constellation of negative images surrounding
disability goes another and different set of attitudes of more recent origin,
nurtured alike by medical science and liberal humanitarianism, which
gives emphasis to the normal capacities of the physically disabled and
hence to their potential for full participation as equals in the social and
economic life of the community. These two polar sets of attitudes, both of
which are reflected in varying degree in legal and social provisions for the
handicapped, may be designated respectively as custodialism and integra-
tionism.

\footnote{19661 JUSTMENT OF THE BLIND 191-95 (1950); Dembo, Devaluation of the Physically Handicapped
Person, 1953 (paper presented at American Psychological Association, Cleveland); Fielding,
Attitudes and Aspects of Adjustment of the Orthopedically Handicapped Woman, 1950 (un-
published doctoral dissertation, Columbia University); PSYCHOLOGICAL ASPECTS OF PHYSICAL
DISABILITY 18-32 (Garrett ed. 1952); SOMMERS, THE INFLUENCE OF PARENTAL ATTITUDES
AND SOCIAL ENVIRONMENT ON THE PERSONALITY DEVELOPMENT OF THE ADOLESCENT BLIND
(1944); Barker, The Social Psychology of Physical Disability, J. of Social Issues, Fall 1948,
p. 28; Ladieu, Alder, & Dembo, Studies in Adjustment to Visible Injuries: Social Acceptance
of the Injured, J. of Social Issues, Fall 1948, p. 55; Lewin, Some Characteristics of the Socio-
Psychological Life Space of the Epileptic Patient, 10 HUMAN RELATIONS 249 (1957); Mac-
gregor, Some Psycho-Social Problems Associated With Facial Deformities, 16 AMERICAN
SOCIOLOGICAL REV. 629 (1951); Mussen & Barker, Attitudes Toward Cripples, 39 J. OF
ABNORMAL SOCIAL PSYCHOLOGY 351 (1944); Myerson, Physical Disability as a Social Psy-
chological Problem, J. of Social Issues, Fall 1948, pp. 2, 6-10.

\footnote{22} Cowen, Underberg & Verrillo, The Development and Testing of an Attitude to Blind-

\footnote{23} KESSLER, REHABILITATION OF THE PHYSICALLY HANDICAPPED 18-19 (1947).}
The older custodial attitude is typically expressed in policies of segregation and shelter, of special treatment and separate institutions. The newer integrative approach focuses attention upon the needs of the disabled as those of normal and ordinary people caught at a physical and social disadvantage. The effect of custodialism is to magnify physical differences into qualitative distinctions; the effect of integrationism is to maximize similarity, normality, and equality as between the disabled and the able-bodied. The contrast between the two approaches is brought out in this analysis by an authority on education of the blind:

In reviewing the way society has regarded and treated the blind during the history of the Western world, we can distinguish three phases. The blind were treated as liabilities, as wards, and as members in successive historical stages . . . . [In the Middle Ages] the blind were given the right to live and, beyond that, the right to be protected. The early church considered them as its special wards and throughout the middle ages they, together with children and the aged, were considered preferred receivers of charity. It is interesting to note that these groups are still singled out as special categories in the framework of social legislation in the United States and in other countries . . . .

The third phase, that of the integration of the blind into society, began with the establishment of educational facilities for blind children. Since then many changes have occurred which justify our contention that we live in a period in which the integration of the blind into society is, although gradually, becoming a reality.2

The purpose of the present work is to determine the extent to which the law relating to the physically handicapped, originally formulated and developed on a firm foundation of custodialism, still embodies, implements, and encourages that concept today—or, on the other hand, the extent to which it expresses and reflects and catalyzes the transition now in progress from custodialism to integrationism. Our preliminary conclusion is that in this sphere, as in some others, the law lags seriously behind contemporary developments both in social theory and in growing public awareness of the actual potentialities of the physically disabled for full membership status in society. At the same time it should be recognized that the traditional legal structure no longer presents a solid front; significant cracks and fissures are developing here and there along the wall—portending, perhaps, a massive breakthrough yet to come.

THE SOCIAL SECURITY SYSTEM IN THE UNITED STATES

The two opposing conceptual frameworks regarding disability, which we have designated as custodialism and integrationism, appear to clash.

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like Milton's invisible armies throughout the broad range of legal policy and social custom affecting the physically handicapped. Nowhere is that conflict more acute, or the immediate issue more in doubt, than in the field of public welfare—and particularly in the national system of social security, made up of the federal and state programs of public assistance, social insurance, disability insurance, and unemployment insurance.

Today, a full generation after its enactment, the social security system is an established fact of our national life, a permanent institution all but universally accepted in its basic features and rationale. The program is now sufficiently mature and fixed in character to permit definite answers to inquiries concerning its long-range effects and purposes—specifically, with respect to the legal and institutional status of the physically disabled.

In effect the social security system makes not one but two separate and contradictory answers to such an inquiry. The two answers correspond to the deep cleavage within the system between the concepts embodied on the one hand in the social insurances—old age and survivors' insurance, unemployment compensation, and disability insurance—and on the other hand in the public assistance titles—aid to the aged, aid to the permanently and totally disabled, aid to families with dependent children, and aid to the needy blind. The first of these complexes was designed to embrace the common and recurring needs created by the complexities of our society and the uneven operation of our economic system. The second was intended mainly to fill the remaining gaps—to furnish relief for the uninsured residual groups.

In its entirety the social security system made sweeping changes in nearly every area of welfare, established the principle of national responsibility for the security of all citizens, and created a still-proliferating body of specific programs variously accommodating the needs of the disabled, the aged, and the unemployed—along with others threatened by what Franklin D. Roosevelt called "the misfortunes which cannot be wholly eliminated in this man-made world."²⁵ Three programs were directly aimed at the physically handicapped: the public assistance programs of aid to the permanently and totally disabled (title XIV) and aid to the blind (title X), and the contributory program of disability insurance.²⁶

Both sides of the social security program—contributory insurance and noncontributory assistance—were products of the depression. "We can eliminate many of the factors that cause economic depressions," said President Roosevelt in presenting his proposal to Congress, "and we can

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²⁶ For discussions of disability in relation to workmen's compensation, see Chett, INJURY AND RECOVERY IN THE COURSE OF EMPLOYMENT (1961); OCCUPATIONAL DISABILITY AND PUBLIC POLICY (Chett & Gordon eds. 1963).
provide the means of mitigating their result. This plan for economic
security is at once a measure of prevention and a method of alleviation. 7
However, it was the measure of prevention that was the favorite of the
President and the Congress. The "method of alleviation," relief, was
regarded as a more or less temporary stopgap, something of an embar-
rassment to all concerned, happily soon to be discarded like sackcloth as
all Americans came to be covered by the more decent statutory clothing
of the social insurances.

But after thirty years of existence the temporary method of alleviation
has neither stopped functioning nor stopped the gaps in the social fabric;
where a few such gaps have been filled, others not originally foreseen have
emerged. Public assistance, like the poor whom it serves, it still very much
with us. Whatever defects of character it possesses can no longer be ex-
cused, as in the past they have been, as the built-in obsolescence of a tem-
porary structure scheduled for early slum clearance.

A brief comparison of the basic features of the two opposing faces of
social security reveals the profound differences between them—differences
which add up, in many respects, to the distance between custodialism and
integrationism.

The social insurance part embodied whatever was new and modern
about the social security system. First and most important, the planners
intended its title to reveal its main characteristic: It was to be insurance.
The covered person makes payments into the system on a regular basis
and these are called premiums; when the specified contingency happens—
death, old age, disability—the covered person or his dependents receive
payments on a regular basis and these are called "insurance benefits," not
aid, assistance, or relief. Since the covered person participates through
his premium payments, he can claim the benefits as a matter of right; and
since the premium payments are related to wages and work record, as a
matter of earned right. The system being a system of insurance, based on
premium payments and the right to benefits when the insurable event
occurs, the amount of the benefit is fixed in advance, indeed, in the statute
itself, 28 which in effect contains the terms of the insurance contract; the
amount of the benefit is thereby made certain and predictable, rather than
subject to administrative or social worker discretion and determinable
after the event. Since the beneficiary is entitled to the benefit as a matter of
earned contractual and statutory right upon the occurrence of a con-
tingency, clearly identified in the insurance contract or statute and easily
ascertainable as to its occurrence, it can immediately be seen that certain

factors are completely irrelevant as conditions of eligibility or as determinants of the amount of the benefit: the beneficiary's financial situation or other resources, whether he had savings or other income; proof of need or any proof other than membership in the insured group and the occurrence of the insurable event; the number, degree of consanguinity, or opulence of his relatives; the location anywhere within the country of his residence, the length of time he lived there or elsewhere, the presence of an intention to remain or to move about; his pattern of life, morals, behavior, or general conduct.

True, this picture of the social insurances, created in the beginning and steadily fostered ever since, is not wholly or even largely borne out by the actual provisions. The insurance principle is honored more in the propaganda than in the reality. Half of the premium payment attributable to each wage-earning beneficiary is not paid by the beneficiary at all but by his employer. The benefits do not bear a fixed ratio to the premiums, by whomever paid. They are adjusted in favor of the low income groups covered by the system, of those whose period of coverage for one reason or another is allowed to be shorter than the standard, or those who, such

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as the disabled, are advantaged in various ways. Benefit payments are made to dependents but premiums do not vary in the light of that fact but remain the same whether the primary beneficiary has dependents or not. Benefit payments, moreover, are withheld or reduced if the primary beneficiary continues in substantial gainful employment in old age or after disability. Medical insurance benefits are provided to persons sixty-five years of age not hitherto enrolled "financed from premium payments by enrollees together with contributions from funds appropriated by the Federal Government." As a result of these and other factors, there is only the most casual relationship between the benefits and premiums, premiums and wages, wages and past productive activity or work; and accordingly there is little foundation for the claim of benefits as a matter of earned right. The whole insurance concept thus becomes only a remote analogy rather than an operative reality. Though the earned right features of the social insurances is sharply undercut, still beneficiaries might logically claim benefits as a matter of statutory right based on the declaration "every individual . . . shall be entitled to an . . . insurance benefit" under specified circumstances. Even this notion, however, was struck a rude blow by the United States Supreme Court in Fleming v. Nestor, where an insured person was denied benefits under the Old Age and Survivors' Insurance program to which he had become entitled through

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38 363 U.S. 602 (1960).
age and continuous payroll contributions. Speaking for the Court, which was divided five to four, Justice Harlan explicitly rejected the notion that social insurance benefits have the character of an earned right. "It is hardly profitable," said Justice Harlan, "to engage in conceptualizations regarding 'earned rights' and 'gratuities' . . . . To engraft upon the social security system a concept of 'accrued property rights' would deprive it of the flexibility and boldness in adjustment to ever-changing conditions which it demands." The program instead was described as one "enacted pursuant to Congress' power to 'spend money in aid of the general welfare,'"—one in which, accordingly, the contributions of employed persons were not on the order of premium payments into a trust fund, to be paid back to the insured upon maturity, but rather a tax to be used in public relief of the retired and disabled.

When all is said and done about stripping the social insurances of their supposed insurance attributes, this much remains, however, to be said: The beneficiary does make a financial contribution, whether correctly called a premium or a tax, which is regularly and observably deducted from his wages. From this he gains a feeling of personal involvement, the belief that his contribution is directly traceable to the benefit, and a strong sense that he has a right to it. Whatever may be the strictly logical and legal significance of the contribution, it is a political, social, and psychological fact of the utmost importance, both in terms of the continually increasing benefits and the willingness to pay for them, and in terms of a popular mass demand that the worst features of public assistance be avoided. Sustaining as far as possible the fiction of insurance thus has important consequences in the character of the system. And whether insurance or not, the system does provide a measure of protection to men against social hazards, hazards attendant upon the operation of the economy, hazards of industrial employment and unemployment in urbanized society—hazards beyond the control of the individual no matter how full he might be of all the middle-class virtues of character. Since the applicant's individual needs, merits, and qualities are irrelevant, and the conditions of eligibility are few and specific, administrative machinery and costs can be kept at a minimum.

It is quite otherwise with the theory and administration of the public assistance portions of the social security system. There, the pre-existing relief programs in the various states were caught up by the nation and deliberately incorporated into the new structure and means of financing. That pre-existing system consisted of the Elizabethan poor law as evolved in

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40 Id. at 610.
41 Id. at 609.
Tudor England, transplanted to colonial America, and thereafter adapted and perpetuated. Under this system aid could not be claimed as a right founded in a theory of prior contributions. It was to be made as a matter of governmental largesse and charity based on the need of the individual. Consequently governmental discretion as to the amount, character, and conditions of aid, and governmental machinery and technical apparatus brought to bear upon the assessment of individual need, are prime characteristics of the system of public assistance.

For the movement of countervailing forces in the direction of integrationism to become more than a token, broad recognition will be needed of the persisting residues of the poor law which remain embedded in the categories of public assistance. Specifically, these anachronistic features include: the means test; length-of-residence requirements; responsible relatives provisions; the custodial philosophy of casework; the conception of relief as a matter of charity rather than of right, with accompanying dependence on the police power and the law of crimes; and, cutting across all of these, the use of public welfare as a means of separately and discriminatorily categorizing the poor as a class apart.

II

THE MEANS TEST

If aid is to be granted on the basis of the need of the individual, how is that need to be determined? Is it to be by taking the average need of the members of the group to which the individual belongs and then allowing that as a fixed amount to all the members of the group? Is it to be by a series of presumed minimums or floors to relief for food, clothing, shelter, medical care, and the like? The answer of the Elizabethan poor law is that it is to be by the judgment of an administrator or social worker, acting within over-all budgetary limits and perhaps within major statutory guidelines, after investigating the situation of the individual. The formula describing this process is individual need individually determined. But the public will meet the needs of the individual, individually determined, only to the extent that the individual does not possess means of his own to meet them. The balancing of the individual's means against his needs has come to be called the means test. Traditionally applied in England from the origins of the poor law, utilized as an essential part of that law in the colonies, enacted by the state legislatures and carried out in administration in almost all of the states at the time of the adoption of the Social Security Act, the means test became an essential part of the administration of that

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act, too. To make clear that this was so as against the few states which had established substantial modifications of the test, the federal administration procured an amendment to the Social Security Act in 1939 explicitly imposing a requirement on the states that "in determining need, [they] take into consideration any other income and resources" that the individual applicant for aid might have.

The official explanation of the requirement and of the test was provided by the Social Security administrators in President Truman's Memorandum of Disapproval, issued in 1948, of a provision passed unanimously by both houses of Congress exempting fifty dollars a month of earned income of blind aid recipients from consideration. "The aid to the blind program," said the Memorandum,

in title X of the Social Security Act, like the other public assistance programs provided in that act, was designed and intended to provide financial assistance at a decent minimum of subsistence of those unable to provide for themselves. Necessarily, payments under these programs must be made on the basis of a finding as to the need of each individual for assistance, and for such a finding to be realistic and equitable to all alike it must be based on a consideration of each individual's earnings from employment and of any other resources available to him. To disregard an individual's income in determining the extent of his need for assistance negates the principle of providing assistance on the basis of need.

Well-founded attacks upon the means test have been launched over the years from a variety of standpoints. Among other things, it is a mean test; it is demeaning to the dignity of the person; it withdraws from the recipient the management of his own affairs and invades the principle of the cash payment; it subjects the recipient to harassment and controls which weaken his resources of self-reliance, impede his rehabilitation, destroy his freedom, and perpetuate his dependence; it entails a degree of administrative discretion which opens the way to administrative abuse; it proliferates bureaucratic machinery, creates an army of welfare workers, and skyrockets the costs of administration. Individual determination of need has historically, and irresistibly, carried with it a punitive freight of moral and behavioral tests which reflect the impelling desire of the admin-

45 President Truman, Memorandum of Disapproval, July 2, 1948.
administrators to keep the price down—and doubtless also reflect the ambivalent attitudes of welfare custodians whose quasi-parental relationship toward their dependent clients has been subjected to psychoanalytic scrutiny by Professor Bernard Diamond.\textsuperscript{46} It is indeed possible that in some ideal world of mathematical abstraction, ruled only by Bentham's felicific calculus or Saint-Simon's universal gravity, the imposition of the means test would not carry with it all this pathological baggage; but in the real world of politics, prejudice, and power, the test of means is a symbol of meanness—a graphic exercise in the inhuman use of human beings.

The alternative to the means test within the framework of the existing system of social security is not far to seek logically, however hard it may be to achieve politically. Public assistance payments could be made to an individual as a part of a group. Four such groups exist ready made in the categorical aid programs: the aged, the blind, the permanently and totally disabled, families with dependent children. These are only illustrative. Once it is shown that a given person possesses the traits which make him a member of an aided group, his other individual characteristics are irrelevant. Thus upon proof of the attainment of the requisite age, or blindness, or permanent and total disability, nothing more would be required. All members of the group would then uniformly receive an equal grant, though payments might vary among the groups. The group characteristics would constitute the factor of individual eligibility and the amount of the payment would be fixed in the statute and aid would be received as a matter of statutory right. The amount of the grant should be sufficient to meet common human needs at socially determined standards of living.\textsuperscript{47}

III

RESIDENCE REQUIREMENTS

To prevent the poor from wandering about the countryside, disturbing the peace and becoming rogues and vagabonds, to determine the unit of local government suitable for support of the needy individual and to fix responsibility on it, to keep administration local where knowledge of the individual and of available community resources exist—for all these reasons settlement rules have been established as a condition of eligibility for aid.\textsuperscript{48} Once again this condition of eligibility goes back to Tudor

\textsuperscript{46} Diamond, Children of Leviathan: Psychoanalytic Speculations Concerning Welfare Law and Punitive Sanctions, in this symposium.

\textsuperscript{47} For a fuller discussion of this and other alternatives, see tenBroek & Wilson, Public Assistance and Social Insurance—A Normative Evaluation, 1 U.C.L.A. L. Rev. 237 (1954).

England, accompanies the poor laws to the New World, and, by the time of adoption of the Social Security Act, is embodied in a residence requirement of at least ten years in all but two of thirty states having pension plans for the blind and the aged.\footnote{Social Security Bd., Social Security in America, pt. 11, ch. vii (1937) (published for the Committee on Economic Security).}

Given this all but universal custom and practice, it was natural for the states to seek to preserve their residential prerogatives when the time came to join the new program of public assistance under the Social Security Act. The states did so, in this instance, against the wishes of the Social Security Board, which as agent of the national will had no desire to preserve parochial barriers to national commingling and communion.\footnote{Social Security Bd., Annual Report 26-27 (1936); Social Security Bd., Annual Report 37 (1937); Social Security Bd., Annual Report 107-08 (1938).}


Since the adoption of the Social Security Act, state residence requirements have had a curious history. In the aged and blind programs the requirements were substantially liberalized down to about 1950 and since that time have remained relatively static.\footnote{Thus in 1941 in the aged program there were forty states with residence requirements at the federal maximum (five out of the last nine years), seven states with one year, no states without durational residence requirements. Advisory Council on Public Assistance, Report on Public Assistance, S. Misc. Doc. No. 93, 86th Cong., 2d Sess. (1960). In 1950, twenty-four states were at the federal maximum, twenty-two states required one year, and four states had no durational requirements. Ibid. In 1964, eighteen states were at the federal maximum, twenty-two required one year, and five had no durational requirements. U.S. Dept. of Health, Educ. & Welfare, Characteristics of State Public Assistance Plans Under the Social Security Act (Pub. Ass. Rep. No. 50, 1964). In the blind program: In 1941, thirty-three states were at the federal maximum, seven states required one year, one state had no residence requirement, Advisory Council on Public Assistance, supra; in 1950, fourteen states were at the federal maximum, twenty-two states had a one-year requirement, seven states had no durational requirements, ibid.; in 1964, thirteen states were at the federal maximum, twenty-three required one year, and seven states had no durational requirements. U.S. Dept. of Health, Educ. & Welfare, op. cit. supra.} In the disabled program which began in 1950, the striking feature has been the preponderance of the one year requirement. The 1962 federal survey of the blind and disabled public assistance programs revealed the striking immobility of these
groups: over sixty per cent were born in the state in which they are recipients and over eighty per cent had lived in that state for at least ten years. Following California’s abolition of a durational residence requirement in the blind program in 1963 there has been no increase in the recipient rate except as to the identifiable group of blind persons already resident in the state but hitherto ineligible because of the five out of the last nine years residence requirement. Meanwhile numerous bills to abolish residence requirements in welfare have appeared in Congress with the blessing of the Department of Health, Education and Welfare along with such interested groups as the National Advisory Council on Public Assistance, the National Social Welfare Assembly, the American Legion, and the National Travelers Aid Society. Although Congress has not as yet seen fit to knock down state barriers to free movement on the part of needy persons, such action is a logical and seemingly inescapable corollary to the amendments it passed in 1956 adding self-support and self-care to the list of purposes served by the public assistance programs. The 1956 amendments registered the recognition of Congress that the human need of the disabled or blind individual to find his place as an active and contributing member of society is no less real or important than his animal need for food and shelter. It remains only for the lawmakers to recognize also that the effort to find one’s place in society requires the possibility of moving freely within and throughout that society.

Little argument is needed any longer to affirm in principle the right of free movement for all persons in our society. Though not mentioned explicitly in the Constitution, it underlies and is an integral part of much that the Constitution guarantees and authorizes. It is presupposed by the system of personal rights which the Constitution is designed to protect. It seems particularly to be an aspect of the personal liberty guaranteed by the due process clauses of the fifth and fourteenth amendments. It is sheltered by concepts of the equal protection of the laws implicit in the fifth amendment and explicit in the fourteenth amendment. It is inseparably appurtenant to the ideas of national citizenship and federal union. It is encompassed within the national power of commerce and guaranteed by the idea of national commerce.

54 U.S. DEP'T OF HEALTH, EDUC. & WELFARE, STATE LETTER NO. 746, at Table 25 (July 2, 1964); id., No. 747, at Table 21 July 2, 1964.
56 See, e.g., Hearings on H.R. 10032 Before the House Committee on Ways and Means, 87th Cong., 2d Sess. 437 (1962) (statement by N. H. Cruikshank, Director, Social Security Dep't, AFL-CIO). See also id. at 440 (statement by Dr. E. Winston, past President, APWA; id. at 331 (statement by R. E. Bondy, Director, NSWA).
But whether the "right to go and come at pleasure" is upheld on grounds of the commerce clause, as by the majority in Edwards v. California,\textsuperscript{58} and Heart of Atlanta Motel v. United States,\textsuperscript{59} or whether it is defended on grounds of the guarantees of the fourteenth amendment as by Justices Jackson\textsuperscript{60} and Douglas\textsuperscript{61} in the Edwards case and by Justice Douglas in Heart of Atlanta Motel,\textsuperscript{62} it is seen by the courts as a basic right and given constitutional protection. Justice Goldberg, reviewing the congressional history of the fourteenth amendment in Bell v. Maryland,\textsuperscript{63} pointed out: "The recurrent references to the right 'to go and come at pleasure' as being 'among the natural rights of free men' reflect the common understanding that the concepts of liberty and citizenship embraced the right to freedom of movement, the effective right to travel freely."\textsuperscript{64}

The right of free movement consists of three major elements: the right to remain in and move about in one's home community; the right to leave one's home community unhindered, to travel to some other part of the country for temporary sojourn or for permanent residence; the right as a temporary sojourner or new resident in any community to stand upon an equal footing with the old residents at least as to essential rights and services.

True, the courts have not given equal emphasis to all of these constitutional sources, or all of these elements of the right. In United States v. Guest,\textsuperscript{65} the United States Supreme Court sustained as within the federal jurisdiction an indictment under 18 U.S.C. section 241 alleging that the defendants, private citizens, "conspired to injure, oppress, threaten, and intimidate Negro citizens of the United States in the free exercise and enjoyment of the right to travel freely to and from the State of Georgia and use highway facilities and other instrumentalities of interstate commerce within the State of Georgia.'\textsuperscript{66} The Court held that the "right to travel from one State to another, and necessarily to use the highways and other instrumentalities of interstate commerce in doing so,"\textsuperscript{67} is a "right

\textsuperscript{58} 314 U.S. 160 (1941).
\textsuperscript{59} 379 U.S. 241 (1964).
\textsuperscript{60} Edwards v. California, 379 U.S. 160, 181 (1941) (concurring opinion).
\textsuperscript{61} Id. at 177 (concurring opinion).
\textsuperscript{62} Heart of Atlanta Motel v. United States, 379 U.S. 241, 279 (1964) (concurring opinion).
\textsuperscript{63} 378 U.S. 226 (1964).
\textsuperscript{64} Id. at 293 n.10 (concurring opinion). For more extensive treatment of the residence requirement, see Harvith, The Constitutionality of Residence Tests for General and Categorical Assistance Programs, in this symposium.
\textsuperscript{65} 86 Sup. Ct. 1170 (1966).
\textsuperscript{66} Id. at 4326.
\textsuperscript{67} Ibid.
that the Constitution itself guarantees," 8 occupying "a position fundamental to the concept of our Federal Union." 9 Since the right "finds constitutional protection that is quite independent of the Fourteenth Amendment," 10 it is "secured against interference from any source whatever, whether governmental or private." 11

Length of residence requirements are founded on a notion of locality and community that belongs to an earlier period of history and geography. In the time of Elizabeth I the hedges surrounding residence were the natural, if prejudicial, concomitant of local economy and a parochial society, in which all the salient burdens and responsibilities were concentrated in the locality. To be sure, it was the poor and the disabled who felt that bitter truth and suffered the consequences—and whose lives generally fulfilled the conditions of existence in Hobbes’ state of nature by being “solitary, poor, nasty, brutish, and short.” By contrast the symbols of our present-day society are the freeway, the open door, and the mainstream. With respect to matters which touch upon the lives and interests of people everywhere in the land, the community is the nation itself. Large-scale poverty, economic opportunity in an economically interdependent system, personal liberty, the right of free movement, the privileges and immunities of citizens of the United States, equality of rights and opportunities, the heritage and indispensable conditions of a free people—what matters, if not these, intimately touch the lives and interests of people everywhere in the land. One by one and taken collectively they repudiate discriminatory restraints upon the mobility of the poor, among which must be classed length of residence requirements for public welfare aids and services. These restraints especially suffer the reproaches of the command of the equal protection of the laws. That command cannot detect the difference between the needs of the newcomer and the old-timer for food, clothing, shelter, and other necessities of life. 12

IV

RESPONSIBILITY OF RELATIVES

In balancing the individual’s means against his needs in the classic process of the means test, all resources available to the individual are to be

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8 Id. at 4327 n.17.
9 Id. at 4326.
10 Id. at 4327 n.17.
11 Ibid.
12 "In our society, mobility of population is essential. Individuals should be free to move where jobs are available and if, as a result of illness or other misfortune, they become needy, they should not be denied assistance because they have crossed state or county lines. We believe that residence and settlement provisions are socially unjustifiable." Public Assistance, A Report, S. Doc. No. 204, 80th Cong., 2d Sess. (1948).
counted among his means. From the outset of the poor law one such available resource has been those relatives of the individual able to contribute to his support.\textsuperscript{73} The responsibility imposed by law upon relatives to make such a contribution became in later centuries a general obligation at the common law\textsuperscript{74} and in statutes and codes dealing with family relations,\textsuperscript{75} but it was originally evolved as a device of the poor law system to reduce the cost to the public of relieving the poor.

In the contemporary public assistance programs of aid to the blind and aid to the permanently and totally disabled, as well as in those affecting the aged and dependent minors, the concept that public aid begins when the resources of relatives have been exhausted is still quite generally imposed, although it takes various forms in the statutes and administrative regulations.\textsuperscript{76} In the early years of the Social Security Act, although the determination of relatives' responsibility was legally left to the states, the Federal Social Security Board brought its considerable weight to bear through admonitions that "administration of these aspects of state public assistance programs should not be such as to weaken the sense of family integrity on which children and the aged have always relied."\textsuperscript{77} Still more specifically, it was declared that the need to be determined is that "which remains after legally responsible relatives of an aged [or blind] person have contributed to his support insofar as they are able."\textsuperscript{78} As a result of the Board's pressure, several states which had previously prohibited the use of the resources of an applicant's family in determining his eligibility were forced to amend their laws or be held out of conformity.\textsuperscript{79} In 1948 the federal officials reversed the Social Security Administration, and recommended that the states eliminate their provisions enforcing relatives' responsibility.\textsuperscript{80} But this remnant of the poor law was not so easily dislodged from the statutes and administrative guidelines of the states; today, in one form or another, it is still on the books in most of them.

The relatives who are held responsible are a diverse assemblage of old

\textsuperscript{73} 39 Eliz. 1, c. 3, § vii (1597); 43 Eliz. 1, c. 2, § vi (1601); tenBroek, supra note 45, at 282-89.  
\textsuperscript{74} Id. at 287-91.  
\textsuperscript{79} See, e.g., Mo. Laws 1939, at 739; Wash. Laws 1939, ch. 216, § 17, at 874.  
and young, affluent and overburdened. For those public assistance recipients well along in years, the responsible relatives are their children, now become adults with families of their own. On the other hand, for many of the disabled and blind recipients, still comparatively young themselves, the responsible relatives are parents advanced in years and often facing their own problems of support in old age. In human terms the most onerous aspect of the requirement is the role of the aid recipient. He is confronted with the choice either of incurring family resentment by accurate reporting of contributions or of failing to report the relatives’ reduced contribution and thereby reducing his income. Moreover, the dependent status of the recipient upon other family members is officially reinforced and sanctified rather than constructively attacked; neither the independence of the disabled person nor the interdependence of the family circle is well served by this tightening and policing of the bonds of kinship.81

V

WELFARE AS A SYSTEM OF CONTROL

At the heart of the system of public assistance, as indicated earlier, lies the dogma of individual need individually determined, which finds practical expression in the device of the means test. In effect, under this policy, it is the applicant who is tested and must be found wanting. It is not only his means and resources but his character and background, his family relationships and very style of life, which come under the scrutiny of the welfare agency. Through an interminable succession of investigations beginning with the application interview and culminating, but not ending, in the issuance or withholding of the cash grant, the disabled client finds himself confronted with a presumption not of innocence and eligibility but of guilt and probable fraud. He is deprived from start to finish of what Gordon W. Allport has termed “the right to be believed.”82 His answers are checked; his claims of need tracked down; his resources identified and counted against him; his relatives searched out and queried. Nor is this surveillance a one-time-only procedure; briefly annoying but soon over and done with; it is continuous and recurrent, ceasing only with the client’s death or his transfiguration into a state of self-sufficiency. For the disabled recipient of aid, Big Brother is always watching.

Whatever modest degree of self-control and responsibility the disabled


82 Allport, Personality and Social Encounter 97 (1960).
person may have possessed before entering this web of bureaucracy and paternalism is soon wrested from him by the process of means test aid. It is the agency of welfare, not the recipient, who decides what life goals are to be followed, what ambitions may be entertained, what services are appropriate, what wants are to be recognized, what needs may be budgeted, and what funds allocated to each. In short, the recipient is told what he wants as well as how much he is wanting. In the velvet glove of public aid is an iron hand: If the recipient does not comply and conform, he may be removed from the rolls or have his budget reduced. The alternatives are obedience or starvation. The "concern of assistance with the whole range of income," as Karl de Schweinitz has observed, "always contains a threat to the freedom of the individual. Even when there is no conscious intent to dictate behavior to the beneficiary, the pervasive power of money dispensed under the means test may cause the slightest suggestion to have the effect of compulsion. 'Whose bread I eat, his song I sing.'"

Reinforcing these tendencies of means test aid under public assistance—the chief effect of which is to perpetuate dependency and discourage initiative—is a cluster of attitudes among social workers supporting the professional inclination to "take whole responsibility for the whole client." In part these attitudes reflect nineteenth-century pieties concerning the moral depravity and natural inferiority of the poor; in part they embody ill-digested and outdated psychoanalytic concepts counseling passive adjustment on the part of the client-patient to an immutable social reality. Whatever the sources of these attitudes, their consequences are unambiguous. Welfare clients, including the blind and the disabled, have been categorically judged incompetent to manage their lives and affairs. Uncooperative clients may find themselves labeled as "unstable defectives"; unmarried mothers can be seen as unable if not incapable of making their own independent decisions without casework services. For blind clients, as a psychologist has coolly stated, "the only true answer

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85 "We think it as competent and as necessary for a State to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts, as it is to guard against the physical pestilence which may arise from unsound and infectious articles imported, or from a ship, the crew of which may be laboring under an infectious disease." New York v. Miln, 36 U.S. (11 Pet.) 337, 369 (1837).
86 Matson, supra note 84.
lies in the unfortunate circumstance that the blind share with other neurotics the nonaggressive personality and the inability to participate fully in society.\textsuperscript{89} The common denominator of such judgments is the pervasive if hidden assumption that the needy client of casework services is irrational, irresponsible, abnormal, and incompetent. In terms of policy and practice, the product of this assumption is a distinctive framework of protective shelter and benevolent custody—with no exit. Its name is public welfare.

VI

THE LAW OF CRIMES

Among the images of poverty bequeathed to us by the Statutes of Elizabeth was the invidious stereotype of the poor and disabled as all but invariably the victims of their own vices. The conceptual foundation for this unsentimental perspective on poverty has been well described by Tawney: “That the greatest of evils is idleness, that the poor are the victims, not of circumstances, but of their own 'idle, irregular and wicked courses,' that the truest charity is not to enervate them by relief, but so to reform their characters that relief may be unnecessary—such doctrines turned severity from a sin into a duty, and froze the impulse of natural pity with the assurance that, if indulged, it would perpetuate the suffering which it sought to allay.”\textsuperscript{90}

This concept of the characterological causation of poverty and dependency has not only a venerable history but a contemporary reality, in the context of what may fairly be called the “welfare law of crimes.” For the corollary of the moralistic theory which holds poverty to be the result of personal wickedness and sin—hence a crime—is the punitive conception of welfare which converts it in effect into a law of crimes. In the eyes of that law there are no broad social problems of poverty or injustice to be solved but only individual wrongs to be righted, personal sins of commission to be expiated and corrected. And the proper corrective, in most cases, is some form of punishment.

The law of crimes has penetrated into the law and administration of social security in various ways and at various levels. Congress itself has taken a number of steps to assist this infiltration on both sides of the system. It has decreed, on the side of social insurance, that a person who commits treason may, as added punishment, be denied accrued benefits under the program; that one who has engaged in sedition may be similarly stripped; and so may those who have been deported on any of fourteen

\textsuperscript{89} Cutsforth, \textit{Personality and Social Adjustment Among the Blind}, in \textit{Blindness} 183 (Zahl ed. 1950).

different grounds.\footnote{91 Social Security Act § 202(n), added by 68 Stat. 1083 (1954), as amended, 42 U.S.C. § 402(n) (1964).} Meanwhile, on the side of public assistance, Congress has augmented the influence of the law of crimes by adding to the federal statute a requirement that law enforcement officers must be notified in all cases of aid to needy children where there is an absence of a parent.\footnote{92 Social Security Act § 402(a)(10), 49 Stat. 627 (1935), as amended, 42 U.S.C. § 602(a)(10) (1964).}

At the state and local levels the penetration of the criminal law into public assistance has been seen in the proliferation of rules and practices bringing to bear the methods of the lie detector to determine truth, of the blood test to establish parentage, of the night call upon the homes of recipients to flush suspected partners, of the beating of park bushes and other public places to deter promiscuity—and in general of the formidable repressive weight of criminal investigation and police authority. This is not the place to recount in lurid detail the numerous events and episodes in which these methods of law enforcement have superseded the alternative methods of social case work and welfare administration.\footnote{93 For details see tenBroek, \textit{supra} note 73, at 659-75.} But it is important to emphasize the fundamental contradiction in principle between the purposes of welfare law and those of the law of crimes. The human problems with which the programs of public assistance are most deeply concerned—problems of economic distress; of social pathology, of personal rehabilitation—require for their solution the utmost effort of sympathetic understanding and nonauthoritarian guidance of which skilled counselors and social workers are capable. But the assumptions and objectives of the law of crimes are not these. Its preliminary assumption is that persons in deprived circumstances are there through their own wilful or inherent fault; its objective is to eliminate the problem by suppression and punishment.

\section*{VII}

\textbf{TOWARD INTEGRATION: CONSTRUCTIVE FEATURES IN WELFARE}

Thus far we have focused upon the custodializing features of public welfare programs for the disabled—features which treat them as a minority group permanently apart and permanently dependent: in other words, as "separate and unequal." To the extent that these prejudicial premises remain embedded in welfare law and administration, the legal and constitutional status of the physically handicapped individual resembles that of the American Negro prior to the equalitarian civil rights movement activated by \textit{Brown v. Board of Education}\footnote{94 347 U.S. 483 (1954).} in 1954.

There is no single landmark event in the social history of the disabled.
comparable to the Supreme Court decision in the Brown case. There are, however, a number of episodes and actions in welfare which are similar in portent if not in scope. Doctrinally the most significant occurred in 1956 with the passage of amendments to the Social Security Act, contemplating a substantial revision of the public assistance programs away from poor relief toward social rehabilitation. The specific expression of this new outlook was the addition of self-support and self-care to the list of official purposes to be served by the program.

That change was a long time coming. In the two-score years between the original enactment of social security and the amendments of 1956, although recognition had grown steadily of the need for constructive revision and reform of the aid titles, there had been few overt actions toward that end. In 1950 Congress did succeed, against the opposition of federal administrators who had defeated a similar attempt two years earlier, in passing a provision for the exemption of earned income up to a maximum of fifty dollars a month on the part of blind recipients of aid. The constructive aspect of this liberalization of the means test was articulated in the Senate Finance Committee report accompanying the bill. The means test, said the committee, "stifles incentive and discourages the needy blind from becoming self-supporting and . . . therefore it should be replaced by a requirement that would assist blind individuals in becoming useful and productive members of their communities." When the Social Security Board moved to cut down the full advantage of the fifty dollar exemption provision, Congress roused itself again two years later to pass an amendment providing that the states should not treat the exempt earnings of a blind aid recipient as an available resource to any member of his family seeking federally shared assistance.

Again in 1954, in its "New Look" at welfare, the Eisenhower Administration wrought substantial changes in the nation's official programs of vocational rehabilitation under the Barden-LaFollette Act; but for all its concern with the vocational and social reintegration of the disabled, the New Look scarcely perceived the potential relationship of public assistance to the goals of rehabilitation. Nevertheless by 1956 it was evident that new interpretations of the purposes of public aid were at hand. In presenting the Administration's proposals to the House Ways and

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94 Ibid.
96 Social Security Amendments of 1950, ch. 809, § 341(c) (1), 64 Stat. 553.
97 S. REP. No. 1669, 81st Cong., 2d Sess. 56 (1950).
98 S. REP. No. 1806, 82d Cong., 2d Sess. 7 (1952).
Means Committee in that year, Social Security Commissioner Charles I. Schottland announced that the time had arrived “for emphasis on the constructive aspects” of public assistance. Specifically recommending the addition of provisions for self-support and self-care, he said: “We should make clear to the states that this is a basic purpose of the program and one in which the federal government stands ready to share financially . . .” 102

As approved by Congress, the purpose declaration of the 1956 amendments included this phrase: “to promote the well-being of the Nation by encouraging the States to place greater emphasis on helping to strengthen family life and helping needy families and individuals to attain the maximum economic and personal independence of which they are capable . . .” 103 The purpose clause of each of the public assistance titles was amended to read: “for the purpose of enabling each State to furnish financial assistance, as far as practicable under the conditions in such State, to needy individuals who are disabled [blind, aged] and of encouraging each State, as far as practicable under such conditions, to help such individuals attain” self-support or self-care, in the case of the disabled and blind, and self-care, in the case of the aged. 104

The 1956 amendments thus introduced for each of the aided categories a new purpose defined in terms of the needs of that particular group. For the disabled and the blind, the need was seen to be for self-support and self-care; for these welfare clients; if not for others, the amendments wrought a basic change in principle concerning the extent and character of the needs to be met by public assistance. Previously the only needs recognized were physical and material: the demands of the organism for food, for shelter, for essential clothing, and for the preservation of life and health. Since 1956 the law embodies the clear awareness that, in our modern affluent society, the need for rehabilitation and self-support—for the dignity of independence, the pride of self-reliance, and the sense of personal achievement—is as genuine and almost as vital as the need of physical survival. If the opportunity for restoration to self-supporting independence is not a basic human need in psychological terms, it is today a basic social need. The 1956 amendments not only recognized the reality of that need but made it a responsibility of public welfare. That these high purposes have not been acted upon is not a reflection upon their viability but a revelation of the contradiction between their integrationist goals and the custodialism of means-test aid.

102 Hearings Before the House Committee on Ways and Means, 84th Cong., 2d Sess., 3-10 (1956).
104 Social Security Amendments of 1956, ch. 836, § 311(a), 70 Stat. 848.
VIII
INCENTIVE EXEMPTIONS OF INCOME

The constructive start toward integration and independence made by the 1956 amendments has not been adequately supported by measures of direct action over the subsequent decade. In one respect, however, there has been definite progress: Rehabilitative provisions have emerged in both state and federal laws allowing disabled and other recipients to retain specified amounts of earnings and other resources useful in a plan for self-support. Where successful, these measures help recipients to escape the relief rolls by encouraging rather than penalizing their first tentative and precarious efforts to bring in income.

As stated earlier, the first breakthrough for the principle of exempt income occurred in 1950 when Congress approved the fifty dollars exemption for blind aid recipients. A decade later the maximum was raised to eighty-five dollars per month, plus half of any income earned above that figure along with specified amounts of personal property and resources. Until 1965 these allowable exemptions were mostly limited to the blind; now they have been extended in varying amounts to the other aid categories as well. As a result of the 1965 amendments, recipients of aid to the totally disabled gain an exemption, at the option of the state, of the first twenty dollars a month in earnings and one-half of the next sixty dollars. Of equal or greater importance, any additional income and resources of a disabled person, without limit, can now be exempted where it is part of an approved plan to achieve self-support—another integrating principle which was pioneered earlier for the needy blind.

IX
MOVES TOWARD A FLOOR OF PROTECTION

From various quarters in recent years has come a chorus of voices challenging the device of the means test and its underlying theory of "individual need individually determined." In their place the critics would put the principle of a floor to relief; a minimum grant of assistance to all who are in need, that is, group need socially determined. This principle, long advocated by interested organizations such as the National Federation of the Blind, has lately gained the support of the American Public

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108 Ibid.
Welfare Association.\textsuperscript{109} It has been advanced frequently in bills before Congress proposing reforms in public assistance; it has been notably galvanized by the war on poverty with its fresh approach to the human problems of deprivation; and it has even begun to look conservative alongside the dramatic proposals of such groups as the "\textit{Ad Hoc Committee on the Triple Revolution}," calling for a guaranteed income to all Americans.\textsuperscript{110} The idea of a common floor of protection for the needy is doubtless still far from implementation in the federal law; but it has made its way to the center of public discussion and legislative attention, and is unlikely to withdraw until its mission has been accomplished or accommodated.

Indeed the principle of a minimum floor to relief, below which the need of recipients is presumed and their income may not fall, has long been in effect in two state programs of aid to the blind—those of California and Nevada.\textsuperscript{111}

\section*{CRACKS IN THE POOR LAW}

The old edifice of poor relief, first constructed on the banks of the Thames three and a half centuries ago, then imported and rebuilt brick by brick on American soil, is still standing today. But it is a house divided. On one wall, through barred windows, it looks backward and holds fiercely to the ancestral ways. On the other side it faces present realities and looks to the future. Thus divided against itself, the structure of relief and welfare cannot indefinitely stand. The ancient requirements of residence and relatives' responsibility, in particular, are undergoing an attack which sooner or later must prove to be fatal. Eight states have seen fit to cut the bonds of residence for certain categories of welfare recipients;\textsuperscript{112} all the major welfare agencies, including the Department of Health, Education and Welfare\textsuperscript{113} are on record against them.


\textsuperscript{110} "We urge, therefore, that society, through its appropriate legal and governmental institutions, undertake an unqualified commitment to provide every individual and every family with an adequate income as a matter of right. . . . The unqualified right to an income would take the place of the patchwork of welfare measures—from unemployment insurance to relief—designed to ensure that no citizen or resident of the U.S. actually starves." The Triple Revolution, Memorandum on the \textit{Ad Hoc Committee on the Triple Revolution} 10, April 1964 (printed by the Committee as a public service). A similar proposal for "a floor under the standard of life of every person in the community" is set forth in \textsc{Friedman, Capitalism and Freedom} ch. xii (1962).

\textsuperscript{111} \textsc{Cal. Welfare & Inst'ns Code} §§ 12650, 13100; \textsc{Nev. Rev. Stat.} § 426.420 (1953).


\textsuperscript{113} U.S. \textsc{Dep't of Health, Educ. & Welfare, Report} 59 (1960), recommends reduction
This equalitarian and integrationist philosophy has given rise to another effort to blunt the edge of the poor law: namely, the movement to abolish state provisions regarding responsibility of relatives. California, in the vanguard of this movement, as of others in public welfare, has taken two steps: First, its legislature has abolished responsible-relatives provisions in public assistance for the blind and the disabled; \(^{114}\) second, the state supreme court in *Department of Mental Hygiene v. Kirchner*\(^ {116}\) has extended the protection of the Constitution to those victimized by this residue of the poor law. The court held that care and treatment of the mentally ill in state institutions is a public responsibility, to be borne not by relatives but by the citizenry as a whole through a uniform system of taxation. "A statute," said the court, "obviously violates the equal protection clause if it selects one particular class of persons for a species of taxation and no rational basis supports such a classification. . . . Such a concept for the state's taking of a free man's property manifestly denies him equal protection of the law."\(^ {116}\)

This California Supreme Court decision, while addressed specifically to the responsibility of relatives of the mentally disturbed who are cared for in state institutions, involves a principle of much broader applicability —embracing all welfare recipients and their families. For the responsibility of the public to support mentally ill persons in state hospitals is not different from the responsibility it assumes when physically handicapped, or otherwise needy, persons are given public support in their own homes. Once the public has shouldered the responsibility, it can only be discharged through publicly apportioned taxation and cannot be shifted to private individuals, whether relatives or others. To do that is to impose upon a particular group a forbidden form of taxation—to appropriate their property in violation of the constitutional requirement of equal protection of the laws.

These various actions representing a small beginning of a change in public assistance have their counterpart in the social insurances. As with the social insurances generally, the trend in disability insurance is gradually to widen the scope of coverage and to reduce the barriers which still keep out large numbers of the physically handicapped. Thus the 1965 amendments liberalized eligibility requirements under the disability freeze in two directions: the previous stipulation of twenty quarters of mim-

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116 Id. at 722-23, 388 P.2d at 724, 36 Cal. Rptr. at 492.
mum coverage under the program was reduced to six quarters for younger workers who are blind, and older blind persons were granted eligibility even though they were engaged in some form of substantial gainful activity. These small forward steps represented a compromise of more substantial reforms incorporated in legislation which had passed the Senate only to be cut down in the House-Senate conference committee.

Beyond the social security system, in the wider context of social forces and political tides, there are further hopeful signs. One is implicit in the heralded “revolution in social work,” which seeks to convert welfare clients from passive recipients into active participants in the process, by giving them structural representation in the making and administering of policies. This principle of partnership or “dialogue,” given impetus recently by the community action programs of the Economic Opportunity Act, was first brought to public attention through the militant campaign of federated blind groups in the 1950’s for the right to organize and to be consulted in the administration of programs addressed to their welfare. The dialogical principle also has found support in the “functionalist” school of casework theory which stresses a nondirective, client-centered relationship in the agency setting in contrast to the alleged custodialism of the rival “diagnostic” school.

Another sign of changing attitudes toward welfare arises from what may be called the shock of recognition on the part of the planners and policy-makers, brought about by the unexpected persistence of the public assistance categories and their programs. When the social security system was first adopted thirty years ago, it was assumed that by 1965 old-age assistance would be swallowed up by old-age insurance, with much the same fate in store for the other assistance programs. On this assumption the aid programs were regarded as stopgaps and palliatives, intended to relieve the distress of poverty and disability but scarcely to solve the problem. Public assistance more or less frankly limited itself to dealing with the symptoms and left the causes for others to worry about.

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118 Ibid.
123 See Matson, supra note 84, at 267-71. See also the case for the case worker’s role as that of “advocate” of the client-recipient advanced by Professor Scott Briar. Briar, Welfare From Below: Recipients’ Views of the Welfare System, in this symposium.
But one of the most notable developments in thirty years of public assistance has been the failure of its categories to wither away. Instead, new categories and recipient groups have been added while the old have been strengthened. As the problems of welfare have persisted and grown, so has the concept of public assistance as a permanent long-range system with an independent rationale and a constructive function—serving vital needs which arise from socio-economic, no less than personal, causes and require to be met affirmatively on their own ground. It is this recognition which has found tentative expression in the new goals of self-support and self-care, in the principle of incentive exemptions of income and resources, and in the growing conception of public aid as a right rather than as an alms-taking privilege contingent upon the swearing of a pauper's oath.

But, for the integrative principle in welfare to prevail against the custodialism of old-fashioned poor relief, much more is needed by way of encouragement of the disabled client to make his way back to self-sufficiency and self-reliance. In this effort, public assistance must be directed toward opportunity as well as toward security—geared to employment and self-support as well as to relief. To the extent that public aid and welfare programs become fully committed to the goals of integrationism—that is, of economic opportunity; social equality, and personal dignity—to that extent they will justify the massive investment of funds and faith which the nation has put into them.