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Poverty Unmodified?: Critical Reflections on the Deserving/Undeserving Distinction

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ABSTRACT

According to a familiar and influential analysis, antipoverty programs are structured by distinctions between the deserving and undeserving poor. Through techniques like behavioral conditions on benefit eligibility, these moral distinctions divide the poor and interfere with providing assistance to all those in need. This analytical framework animates much critical scholarship on social welfare policy and guides most welfare rights litigation about benefit eligibility requirements.

This Essay challenges this "deservingness analytic" by questioning its separation of deservingness from need, its imagination of the poor as a preexisting population whose need can be conceptualized and determined apart from the moralistic concerns of deservingness. This supposed divide between deservingness and need is breached from both sides: Seemingly moralistic concerns with personal behavior often can be recast as assessments of economic need, and conventional techniques of measuring economic need inevitably implicate moralistic questions about personal behavior. Both phenomena become apparent once we unpack the conventional idea that the extent of "available" resources necessarily affects whether any needs are unmet.

Dismantling the barrier between deservingness and need facilitates new critical perspectives on both concepts. The implicit moral content of need assessments becomes visible and contestable, not for moralism alone but for moral error. I sketch such an argument with regard to the ubiquitous exclusion of childcare from the needs considered by means-tested benefits. Because behavioral conditions and need assessments are linked, new accounts of need also produce new accounts of conditions. For instance, broadening needs to incorporate childcare leads to broadening what should qualify as "work" under a work requirement, the quintessential behavioral eligibility condition.

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TABLE OF CONTENTS

INTRODUCTION

According to a widely influential account, a basic feature of social welfare policy in the United States is its relentless differentiation between the "deserving" and "undeserving" poor. This familiar observation almost inevitably carries with it a criticism: Something is amiss when "moral" distinctions, such as those related to sexuality or the work ethic, interfere with assisting all those in need. Not only are the poor divided along moral lines, but the very process of division marks even those ultimately deemed deserving, subjecting them to behavioral conditions, administrative discretion, and state surveillance that never would be inflicted on other citizens. The critical deployment of the deserving/undeserving distinction invites us to imagine a world in which we stripped away moral impositions and dealt directly with poverty, unmodified.[1]

This Essay challenges this familiar "deservingness analytic." The deservingness analytic's weakness lies in the notion that the deserving/undeserving distinction is something superimposed on a preexisting population of "the poor," a group that has "needs" that can be conceptualized and determined apart from the moralistic concerns of deservingness. To the contrary, this Essay shows that the supposed divide between deservingness and need is breached from both sides: Seemingly moralistic concerns with personal behavior routinely can be recast as assessments of economic need, and conventional techniques of measuring economic need inevitably implicate similar moral questions about personal behavior.

Perhaps no one has built a richer body of scholarship upon the deserving/undeserving distinction than Joel Handler. He captured its critical spirit succinctly in his remarkably resilient 1972 book *Reforming the Poor*, which closes by embracing a "more radical view of poverty [that] would rid welfare policy of all notions of deserving versus undeserving; the emphasis would be primarily on lack of income."[2] Doing so would "plac[e] all of the poor into the deserving category [and], by removing fault or responsibility as a consideration, make reformation irrelevant as a condition of relief."[3] Thus, as it was then and is today, poverty would be defined by low income, but, contrary to established practice, this condition alone would suffice to command relief with

1. *Cf.* CATHARINE A. MACKINNON, FEMINISM UNMODIFIED (1987).
2. JOEL F. HANDLER, REFORMING THE POOR 140 (1972).
3. *Id.* at 141.

income transfers, without further eligibility restrictions. In Handler's view, neither this definition of the problem nor its solution implicates the moral morass of fault and responsibility associated with nonfinancial, and particularly behavioral, eligibility conditions. Explaining why, in fact, social policy wades into that morass is a task Handler took up in his later work with Yeheskel Hasenfeld, especially their 1991 classic *The Moral Construction of Poverty*.[4]

By separating a core of poverty relief from an overlay of moral distinction between the deserving and undeserving, the deservingness analytic also suggests a straightforward legal strategy: First, characterize income-based transfer payments as the core of antipoverty programs, and then attack additional eligibility restrictions as extraneous moralistic impositions that threaten transfer recipients' equality and liberty. Indeed, that fairly well captures the underlying structure of most welfare rights litigation over substantive eligibility rules. In the 1968 breakthrough victory in *King v. Smith*,[5] the U.S. Supreme Court itself attributed to the Aid to Families with Dependent Children (AFDC) statute an approach "considerably more sophisticated and enlightened than the 'worthy-person' concept of earlier times"[6] and struck down a state policy provision as "unrelated to need, because the actual financial situation of the family is irrelevant."[7] In a rare Supreme Court success of recent decades, *Saenz v. Roe*[8] likewise emphasized the disconnect between a durational residency requirement and recipients' "need for benefits."[9]

One unfortunate consequence of the deservingness analytic is that it channels critical scrutiny away from the mechanisms for identifying the poor and their needs. Thus, while the staples of deservingness analysis—labor market participation, reproduction, and the formation and maintenance of family ties—have received rich, interdisciplinary attention, matters of poverty definition and measurement have been dominated by economists, with precious little engagement between these literatures.[10]

4. JOEL F. HANDLER & YEHESKEL HASENFELD, THE MORAL CONSTRUCTION OF POVERTY (1991).
5. 392 U.S. 309 (1968).
6. *Id.* at 324–25.
7. *Id.* at 320.
8. 526 U.S. 489 (1999).
9. *Id.* at 507.
10. For introductions to the vast literature on poverty measurement and its reform, see MEASURING POVERTY: A NEW APPROACH (Constance F. Citro & Robert T. Michael eds., 1995); Rebecca M. Blank, *Presidential Address: How to Improve Poverty Measurement in the United States*, 27 J. POL'Y ANALYSIS & MGMT. 233 (2008). This literature tends to treat poverty measurement

Handler's own work has provided an important, albeit partial, exception to this neglect of means-testing practices, though this part of his corpus is less well known. His groundbreaking 1971 study with Ellen Hollingsworth, *The "Deserving Poor,"*[11] not only examined the administration of means testing but also briefly questioned the soundness of distinguishing between financial tests of need and behavioral conditions. Within a system where financial eligibility compares needs to resources, "[r]esources can also include the earning potential of the members of the family, that is, anticipated earnings."[12] In other words, the classic basis for undeservingness—failure to work—can be seen as implicating the determination of need formally assigned to financial eligibility standards. In complementary fashion, *Last Resorts*, Handler's 1983 monograph with Michael Sosin on emergency assistance and special needs grants, noted that deciding which needs to recognize was "potentially politically dangerous insofar as [doing so] involve[d] moral decisions about how the poor should live."[13] For instance, whether to treat someone with no money for food as "in need" may require judgments about whether benefits previously granted had been spent or saved appropriately. Thus, Handler's own work invites us to see need animating deservingness distinctions and deservingness animating calculations of need.

This Essay works this seam in Handler's scholarship and tries to imagine an analysis of social welfare policy that does not rely on separating need from normativity. Such an analysis would more tightly integrate financial and behavioral eligibility requirements, and it would see questions of deservingness

primarily as a technical exercise. *See* MEASURING POVERTY, *supra*, at 1 (framing the need to reform poverty measurement in terms of "accura[cy]" and "[i]mproved data, methods, and research knowledge"); *see also* Developing a Supplemental Poverty Measure, 75 Fed. Reg. 29,513 (May 26, 2010) (seeking comments on a proposed supplemental poverty measure with regard to various issues of "methods and data sources"). To be sure, there are occasional references to the moral and political dimensions of poverty measurement, particularly with regard to the choice between absolute and relative approaches to setting poverty thresholds and to the precise level of such thresholds within either approach. *See, e.g.*, MEASURING POVERTY, *supra*, at 6, 23; JOHN ICELAND, POVERTY IN AMERICA 20–37 (2d ed. 2006). But even here, these often are vaguely cabined as matters of "judgment" not subject to further sustained analysis. *See* MEASURING POVERTY, *supra*, at 3. With marginal exceptions occasionally noted below, the poverty measurement literature also appears to mirror the deservingness literature in treating questions of poverty measurement as separable from distinctions of status and behavior. These brief comments aside, this Essay makes no attempt to do justice to the richness of nonlegal poverty measurement scholarship and fully integrate it into the analysis presented here.

11. JOEL F. HANDLER & ELLEN JANE HOLLINGSWORTH, THE "DESERVING POOR" (1971).

12. *Id.* at 78–79.

13. JOEL F. HANDLER & MICHAEL SOSIN, LAST RESORTS 13 (1983).

as inevitable. This is not merely a concession to political reality. Instead, identifying the circumstances that justify transfer payments inevitably enters the contested terrain of distributive justice and calls for allocating responsibility for a person's economic well-being among that individual, the labor market, family or other civic institutions, and the state. These difficult questions cannot be bypassed by focusing on need alone.

Moving in this direction entails giving up a certain mode of criticism, one that casts aspersions on an eligibility requirement simply because it implicates morally fraught issues of deservingness. But I hasten to add that it erects no barriers to a critical project as such. Instead, the terrain shifts from the mere observation of normative content in eligibility requirements to argumentation over what requirements are normatively appropriate, from dismissing requirements as moralistic to rejecting them as moral error.

More important, and what motivates this project, is that breaching the barrier between needs and conditions provides new critical opportunities. Practices previously insulated from scrutiny because they concerned only "need" now can be assessed in terms of their deservingness agenda, and new sources of critical leverage can be found by revisiting familiar problems of deservingness in terms of their relationship to need. For instance, in ongoing work that I will reprise here briefly, I argue that longstanding feminist criticisms of work requirements for neglecting childcare point toward flaws in the formulation of financial eligibility requirements.[14] Moreover, fixing those flaws then leads back toward changes in work requirements precisely because work requirements are not simply a moral overlay external to need but, instead, one component of assessing the need for transfers. The question shifts from whether work requirements can ever be justified to what should satisfy such requirements, and the answers shift from matters of general civic virtue to considerations specific to antipoverty policy.

The Essay proceeds as follows. Part I discusses the standard view that separates deservingness from need, as that view has arisen both in scholarly critiques of behavioral eligibility conditions and in legal attacks on the same. Part II develops an alternative perspective that identifies the attribution of a need for transfers as inevitably normative. I illustrate this point by examining how gender ideologies with respect to employment and caretaking have shaped definitions of need and work. Reversing the arbitrary exclusion of childcare

14. Noah D. Zatz, *Supporting Workers by Accounting for Care*, 5 HARV. L. & POL'Y REV. 45 (2011).

from assessments of need turns out to advance familiar progressive goals with regard to the classic "moral" domains of work requirements and family structure.

I. THE ANALYTICAL SEPARATION OF DESERVINGNESS AND NEED

This Part traces the basic structure of the deservingness analytic and its influence through both liberal critiques of U.S. social welfare policy and litigation efforts to translate such criticism into legal reform. Much of this material will be familiar to those well versed in the field. The essential point of the first Subpart is that characterizing behavioral conditions and status distinctions as indicators of moral deservingness yields analytical and critical leverage only through juxtaposition with an amoral alternative. That amoral foil is the recognition of need, an assessment closely associated with measurement of household income. The second Subpart shows how welfare rights jurisprudence attempted to operationalize this structure by imposing tight judicial scrutiny of eligibility rules implicating deservingness while allowing substantial administrative discretion in assessments of need. This approach came to grief in part because jurisdictions so often attempted to continue doing under the rubric of means-testing what they had been forbidden to do under the rubric of conditionality.

A. Deservingness, the Critique of Conditionality, and the Embrace of Need

Among liberal critics of restrictive welfare policies, behavioral eligibility requirements are understood as moral "conditions" restricting need-based benefits.[15] A classic early article by Jacobus tenBroek and Richard Wilson argued that "associated with the means test is a tendency to add moral and behavioral requirements to the basic qualification of need."[16] These conditions restrict assistance to those among the poor who are deemed morally deserving. "[O]nce judged to be undeserving, poor people are then no longer thought to be deserving of public aid that is financially sufficient and secure enough to help them escape poverty."[17] Moreover, by requiring affirmative demonstration of deservingness, such requirements operate to regulate poor people's lives. In his pioneering article sketching a welfare rights litigation strategy, Charles Reich

15. *See, e.g.*, AMIR PAZ-FUCHS, WELFARE TO WORK (2008).
16. Jacobus tenBroek & Richard B. Wilson, *Public Assistance and Social Insurance—A Normative Evaluation*, 1 UCLA L. REV. 237, 271 (1954).
17. Herbert J. Gans, *Positive Functions of the Undeserving Poor: Uses of the Underclass in America*, 22 POL. & SOC'Y 269, 270 (1994).

argued that "the poor are all too easily regulated" because "[t]hey are an irresistible temptation to moralists, who want not only to assist but to 'improve' by imposing virtue."[18] Indeed, against a baseline expectation of poverty relief, the application of such "moral fitness criteria" often is interpreted as an attempt to "punish" the poor.[19]

This analysis linking behavioral requirements to moral deservingness has been applied to common features of means-tested programs relating to labor market participation, family structure, and reproduction. David Super argues that "work requirements exist primarily as a moral test for recipients."[20] Classic examples of, as Reich put it, "welfare regulation attempt[ing] to impose a standard of moral behavior on beneficiaries" are disqualifications for mothers in nonmarital relationships[21] or who resist turning to noncustodial fathers for child support,[22] as well as those who engage in "'irresponsible' reproduction"[23] by bearing children outside of marriage[24] or while receiving welfare.[25] According to Lucy Williams, "The idea behind all these projects is the same: only those women and children who conform to majoritarian middle-class values deserve government subsistence benefits,"[26] as implemented through what Mimi Abramovitz characterizes as "the use of moral fitness standards rather than financial need to determine eligibility."[27]

A similar analysis of moral deservingness extends beyond the requirements of specific means-tested programs to embrace the broader structure of matching different programs with specific "categories" of needy people: the old, the disabled, the involuntarily unemployed, mothers with minor children, and so on. William Simon describes "the most distinctive feature of 'categorical' public assistance programs [as] . . . that they exclude people who are just as financially deprived as the people they include but who fail to meet the status ('categorical')

18. Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1245–46 (1965).
19. MIMI ABRAMOVITZ, REGULATING THE LIVES OF WOMEN 325 (rev. ed. 1996).
20. David A. Super, Essay, *The New Moralizers: Transforming the Conservative Legal Agenda*, 104 COLUM. L. REV. 2032, 2060 (2004).
21. *See* Reich, *supra* note 18, at 1247.
22. *See* ABRAMOVITZ, *supra* note 19, at 324.
23. Linda C. McClain, *"Irresponsible" Reproduction*, 47 HASTINGS L.J. 339, 340 (1996).
24. *See* Reich, *supra* note 18, at 1247.
25. *See* Lucy A. Williams, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*, 102 YALE L.J. 719, 736–37 (1992).
26. *Id.* at 720–21.
27. ABRAMOVITZ, *supra* note 19, at 323.

eligibility criteria."[28] Handler and Hasenfeld argue that the "core concept" of these categories is "whether or not the category is morally excused from work."[29] Abramovitz demonstrates a similarly prominent role for family structure, noting that the structure of Social Security benefits and its division of labor with AFDC "(1) penalized working women, (2) rewarded full-time homemakers, (3) punished husbandless women, and (4) neglected women once their reproductive and caretaking responsibilities declined."[30]

For those not deemed deserving based on demographic category but still allowed an opportunity to demonstrate deservingness individually, subjection to behavioral conditions has meant vulnerability to the discretionary judgment of caseworkers.[31] These are the officials empowered to decide whether conditions have been satisfied and, if not, whether that failure can be excused. This vulnerability not only is intrinsically subordinating but also opens the door to caseworker judgments shaped by race, gender, and class bias, as well as by programs of "bureaucratic disentitlement" that trim the rolls through the accumulation of case-by-case denials and discouragement.[32]

28. William H. Simon, *Rights and Redistribution in the Welfare System*, 38 STAN. L. REV. 1431, 1494 n.212 (1986).

29. HANDLER & HASENFELD, *supra* note 4, at 20 (emphasis omitted).

30. ABRAMOVITZ, *supra* note 19, at 254.

31. *See* JOEL F. HANDLER, SOCIAL CITIZENSHIP AND WORKFARE IN THE UNITED STATES AND WESTERN EUROPE 245–72 (2004); HANDLER & HASENFELD, *supra* note 4, at 44–50; Evelyn Z. Brodkin, *Inside the Welfare Contract: Discretion and Accountability in State Welfare Administration*, 71 SOC. SERV. REV. 1 (1997).

32. *See* Michael Lipsky, *Bureaucratic Disentitlement in Social Welfare Programs*, 58 SOC. SERV. REV. 3 (1984). Strikingly, the deservingness analytic transcends significant tactical disagreements among liberals over bureaucratic discretion. Reich famously proposed treating welfare benefits as "entitlements" held "as of right," an approach that would subject discretionary decisions to stringent procedural protections associated with property ownership. Reich, *supra* note 18, at 1256; *see also* Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964). Handler has long doubted the efficacy of procedural protections given the underlying power imbalance between caseworker and recipient. *See generally* Joel F. Handler, *Controlling Official Behavior in Welfare Administration*, 54 CALIF. L. REV. 479 (1966); *see also* HANDLER, *supra* note 31, at 248–61. Nonetheless, both endorsed reducing discretionary judgments by utilizing "objectively defined eligibility" standards reflecting "a comprehensive concept of actual need," Reich, *supra* note 18, at 1256, such as "routinized money payments, clear entitlements, [and an] absence of regulatory conditions." HANDLER & HOLLINGSWORTH, *supra* note 11, at 211. Simon later attacked both procedural protections and routinized eligibility requirements for missing how "discretion may be necessary to help people find their way through the legal system or to respond to unexpected contingencies in their lives." William H. Simon, *The Invention and Reinvention of Welfare Rights*, 44 MD. L. REV. 1, 33 (1985). Yet Simon's alternative social work jurisprudence shares liberal lawyers' condemnation of "rules conditioning eligibility on worthiness or 'moral character'" or on "waiver of control over matters conventionally considered private;" he insists instead that "[f]inancial assistance should be conditioned solely on need." *Id.* at 7–8; *see also id.* at 37.

The deservingness analytic implies a gap between actual bases of decision—considerations of moral deservingness—and appropriate ones—considerations of economic need.[33] This disconnect has two faces. First, there is a standard liberal objection to state imposition of specific, even if widely shared, moral conceptions of the good or virtuous life, a violation of state "neutrality" that trenches on fundamental principles of individual autonomy.[34] Second, there is a theory, mostly implicit, of social welfare policy as properly responsive exclusively to need. These positions can coexist only to the extent that ascertaining need is not itself an exercise in moral distinction.

The first problem identified by deservingness analysis is that transfer recipients are subjected to forms of moral regulation that are not and could not ordinarily be imposed on citizens of the liberal state.[35] The moral content of this regulation, however, is generally applicable and not specific to the poor. To the contrary, the undeserving are "defined as those whose behavior did not adhere to middle-class values."[36] Thus, critics of deservingness often portray its enforcement as the exploitation of an opportunity to engage in what Herbert Gans called "norm reinforcement" for society as a whole:

> By violating, or being imagined as violating, a number of mainstream behavioral patterns and values, the undeserving poor help to reaffirm and reinforce the virtues of these patterns—and to do so visibly, since the violations by the undeserving are highly publicized. . . .
> . . . .
> . . . Old work rules that can no longer be enforced in the rest of the economy can be maintained in the regulations for workfare; old-fashioned austerity and thrift are built into the consumption patterns expected of welfare recipients. . . . [W]elfare recipients may be removed from the rolls if they are found to be living with a man—but

33. *See* PAZ-FUCHS, *supra* note 15, at 48.
34. *Cf.* Lawrence v. Texas, 539 U.S. 558, 571 (2003) ("The issue is whether the majority may use the power of the State to enforce these [profound and deep convictions accepted as ethical and moral principles] on the whole society through operation of the criminal law. 'Our obligation is to define the liberty of all, not to mandate our own moral code.'" (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 850 (1992))). For a philosophical discussion and critique of "neutrality," see, for example, Richard J. Arneson, *Liberal Neutrality on the Good: An Autopsy*, *in* PERFECTIONISM AND NEUTRALITY: ESSAYS IN LIBERAL THEORY 191, 191–208 (George Klosko & Steven Wall eds., 2003).
35. *See* Reich, *supra* note 18, at 1245 ("[R]ecipients have been subjected to many forms of procedure and control not imposed on other citizens.").
36. Williams, *supra* note 25, at 725.

> the social worker who removes them has every right to cohabit and not lose his or her job.[37]

Thus, a basic objection to deservingness distinctions is that they produce inequality between ordinary citizens—who are not and could not be forced to conform to this moral code—and the poor, against whom access to benefits is used as a source of leverage. Handler and Hasenfeld, for instance, advocate a system in which "poor mothers and their children would be treated the same as the nonpoor."[38] In so doing, they echo tenBroek's challenge forty years earlier: "If an action is socially important enough to be compelled, it should be legislated separately, dissociated from economic aid. Compulsory school laws are to be preferred to conditioning assistance on school attendance."[39]

This argument against vertical class inequality (that is, between higher and lower economic classes) assumes that being poor—or receiving public assistance—is irrelevant to the justifiability of moral regulation. Thus, Reich associated conditionality with an old "theory that welfare is a 'gratuity' furnished by the state, and thus may be made subject to whatever conditions the state sees fit to impose."[40] For similar reasons, deservingness critics typically marshal evidence that the poor and nonpoor violate conventional morality at similar rates; what differentiates them is vulnerability, not behavior.[41] Consequently, differential moral regulation is not simply a matter of targeting moral discipline where it is "needed" the most, nor does moral difference explain differential economic need. Michael Katz associates deservingness distinctions with a worldview in which "[p]oor people think, feel, and act in ways unlike middle-class Americans. Their poverty is to some degree a matter of personal responsibility, and its alleviation requires personal transformation, such as the acquisition of skills, commitment to the work ethic, or the practice of chastity."[42] And

37. Gans, *supra* note 17, at 275; *see also* HANDLER & HASENFELD, *supra* note 4; Williams, *supra* note 25.
38. HANDLER & HASENFELD, *supra* note 4, at 231–32.
39. tenBroek & Wilson, *supra* note 16, at 271.
40. Reich, *supra* note 18, at 1245. Even those viewing poverty relief in gratuitous terms typically distinguish between the thing done gratuitously (relieving need) and the conditions attached to it. *See* LAWRENCE M. MEAD, BEYOND ENTITLEMENT (1986); Jeffrey S. Lehman & Deborah C. Malamud, *Saying No to Stakeholding*, 98 MICH. L. REV. 1482, 1502–03 (2000).
41. *See* JOEL F. HANDLER & YEHESKEL HASENFELD, WE THE POOR PEOPLE 38–57 (1997); Williams, *supra* note 25, at 732, 737.
42. MICHAEL B. KATZ, THE UNDESERVING POOR 7 (1989); *see also* Reich, *supra* note 18, at 1255 ("Perhaps at one time we could have justified this discrimination by arguing that the poor are to blame for their poverty. But today we see poverty as the consequence of large impersonal forces in

indeed, Lawrence Mead's vastly influential body of conservative welfare scholarship takes just this form.[43]

The second basic objection to deservingness distinctions is that they produce horizontal inequality among the poor, not just between the poor and those above them in the class hierarchy. Such arguments typically fasten on the evident commitment to relieve poverty for some people, the deserving, and then characterize this as a general commitment to relieve poverty, selectively applied. Thus, Katz characterizes eligibility based on deservingness as "defending arbitrary distinctions that discriminate among people none of whom can survive by themselves with comfort and dignity."[44] Handler and Hasenfeld diagnose a basic tension between "[t]he relief of misery" and "the need to uphold the work ethic," the latter impulse leading to deservingness distinctions.[45] Inadequate poverty relief thus can be articulated as an offense against equality when some poor people receive aid but others "equally needy" do not.[46] As Simon pointedly has observed, this line of argument largely avoids direct normative arguments for relieving poverty and substitutes claims for equal access to whatever relief already is being granted.[47]

For the deserving and undeserving poor to be "equally needy," poverty and need must be defined without regard to the moral considerations that constitute deservingness. Yet those employing the deservingness analytic rarely offer much in the way of an affirmative conception of who is "poor" and what constitutes "need." Instead, those categories largely are taken for granted. Handler and Hasenfeld, for instance, title their book *The Moral Construction of Poverty* and deploy a sophisticated account of the social construction of social problems, one in which "[c]onditions become social problems, enter political language, not because they suddenly materialize or change in character . . . . [C]onditions become social problems for ideological purposes."[48] Yet their inquiry does not address the

a complex industrial society—forces like automation, lack of jobs and changing technologies that are beyond the control of individuals.").

43. *See, e.g.*, MEAD, *supra* note 40; LAWRENCE M. MEAD, THE NEW POLITICS OF POVERTY (1992).

44. KATZ, *supra* note 42, at 9.

45. HANDLER & HASENFELD, *supra* note 4, at 37.

46. Simon, *supra* note 28, at 1497.

47. *Id.* at 1498–99; *see also* Simon, *supra* note 32, at 30, 33, 37; Super, *supra* note 20, at 2036, 2047; *cf.* Michael Heise, *State Constitutions, School Finance Litigation, and the 'Third Wave': From Equity to Adequacy*, 68 TEMP. L. REV. 1151 (1995) (discussing the shift from framing the constitutional infirmity of school financing from interdistrict inequity to the absolute inadequacy of education in the worst-off districts).

48. HANDLER & HASENFELD, *supra* note 4, at 15.

question *"who* is poor?", but rather "[w]hy . . . do the poor emerge as a social problem?" in particular social contexts, despite the fact that "[f]or most of human history . . . the poor were considered part of the natural order."[49] The morally problematic nature of poverty, "the moral determination of deservingness,"[50] is what arises through social construction, but simply being poor is brute "condition."[51]

Without much argument, those employing the deservingness analytic typically ground their amoral concept of need in measurements of household income. These standardized techniques of poverty measurement (for demographic analysis) and means testing (for eligibility determinations) were consolidated in United States social policy in the 1960s and early 1970s. "Low income" thus has come to be synonymous with "poor," and sometimes the former term is preferred precisely for shedding the moralistic baggage of the latter term.[52] Writing in 2004, Super notes that means-tested benefit eligibility can be decomposed into "two quite different sets of variables: benefit level (functionality) and eligibility restrictions (conditionality),"[53] with the latter being approached in "moral terms," where "[n]ormative factors govern program rules far more than financial considerations."[54] Abramovitz similarly contrasts "moral fitness" with "financial need."[55]

This financial conception of need often becomes explicit when reforms are offered to counteract deservingness distinctions. Felicia Kornbluh has praised the guaranteed income efforts of the late 1960s and early 1970s as ones in which, "[u]nlike the categorical programs, citizens only needed to demonstrate low monetary income to establish need" and "did not need to prove to caseworkers or local administrators that they were worthy of assistance on account of

49. *Id.*
50. *Id.* at 16.
51. Similarly, Alice O'Connor's subtle history of social scientific knowledge production about poverty argues that "poverty knowledge has been influenced by social institutions and the categories they establish for channeling (or denying) aid to people who are poor." ALICE O'CONNOR, POVERTY KNOWLEDGE 12 (2001). Again, *sub*categorization is the contested political domain that acts upon the underlying "people who are poor." O'Connor's reliance on this formulation is especially striking given that later in the book she provides a sophisticated treatment of the political economic dynamics that shaped the construction and adoption of the federal poverty line in the 1960s. *See id.* at 182–85.
52. *See* Gordon M. Fisher, *The Development and History of the Poverty Thresholds*, 55 SOC. SEC. BULL., Winter 1992, at 3, 9, *available at* http://www.ssa.gov/history/fisheronpoverty.html.
53. David A. Super, *The Political Economy of Entitlement*, 104 COLUM. L. REV. 633, 668 (2004).
54. *Id.* at 671.
55. ABRAMOVITZ, *supra* note 19, at 323.

their behavior."[56] In this way, Handler wrote in 1971, "[c]oercive conditions can be stripped out of a welfare system. Eligibility can be made dependent on a fairly simple income and resources test . . . ."[57] Through the lens of deservingness analysis, financial metrics strip away behavioral conditions and categories pertaining to deservingness and instead focus narrowly on the shortfall of household income that constitutes need. As the next Subpart shows, this opposition between need (financial) and conditions (behavioral) also has been central to reform efforts pursued through welfare rights litigation in the courts.

B. The Deservingness Analytic in Court

Since the late 1960s, legal attempts to broaden eligibility for public benefits largely have replicated the deservingness analytic described above. As this Subpart shows, the crux of this strategy has been to position "need" as the fundamental eligibility criterion and then to attack other eligibility restrictions as moralistic deviations from considerations of need. Initially, the result was a "jurisprudence of need" that vigorously policed the distinction between a recipient's needs and her status or behavior even while having little to say about what those needs were.[58] Yet precisely because status and behaviors disallowed as eligibility conditions could be revived as determinants of need, courts increasingly were pushed either to scrutinize means-testing techniques or to relax their skepticism of status or behavioral distinctions.

The legal framework for public benefits programs often was amenable to this approach, at least before legislative amendments nullified litigation victories. To take three oft-litigated examples, Aid to Families with Dependent Children (AFDC) created a "cooperative federalist" system of financial assistance to families that included a "needy child";[59] section 17000 of the California Welfare and Institutions Code requires localities to "relieve and support all incompetent, poor, indigent persons";[60] and New York's state constitution commands that the legislature provide for the "aid, care and support of the needy."[61] Importantly, each of these sources of law delegated responsibility for developing and

56. Felicia Kornbluh, *Is Work the Only Thing That Pays? The Guaranteed Income and Other Alternative Anti-Poverty Policies in Historical Perspective*, 4 NW. J.L. & SOC. POL'Y 61, 67 (2009).
57. HANDLER & HOLLINGSWORTH, *supra* note 11, at 208; *see also* Reich, *supra* note 18, at 1256.
58. *See* Simon, *supra* note 28, at 1491–92, 1505, 1510. Simon's account emphasizes only the second of these two dimensions.
59. *See* King v. Smith, 392 U.S. 309, 313 (1968).
60. CAL. WELF. & INST. CODE § 17000 (West 2011).
61. N.Y. CONST. art. XVII, § 1.

implementing the scheme of assistance to entities that could not themselves alter the foundational authority. The states were stuck with the federal AFDC statute, California counties with section 17000, and the New York Legislature with Article XVII. This structural situation created an opening for a litigation strategy that enlisted the courts in boiling down the basic eligibility criterion to "need."[62]

The paradigmatic case for the deservingness analytic, indeed the one that fits it best, is the Supreme Court's first major statutory AFDC decision in *King v. Smith*.[63] *King* commonly is understood as a case in which Alabama made chastity a condition of AFDC eligibility for unmarried mothers. The Court framed it this way, characterizing the Alabama regulation as one that "denies AFDC payments to the children of a mother who 'cohabits' in or outside her home with any single or married able-bodied man."[64] Technically, however, the issue was how broadly a state could interpret the AFDC statute's term "parent," as used in its categorical eligibility requirement.[65] That federal requirement limited AFDC eligibility to families that included a "needy child" who also was "deprived of parental support" by a parent's death, incapacity, or absence from the home.[66] Alabama extraordinarily constricted this latter criterion of "dependency"

62. In contrast, programs lacking this division of authority provided less room in which to construct a conflict between need-based principle (identified through judicial gloss of one body of authority) and straying implementation (by a separate, subordinate entity). Relative to federal–state collaborations like AFDC, programs more fully controlled by the federal government were litigated less intensely and with heavier reliance on general constitutional principles not specific to the program. For instance, in *USDA v. Moreno*, the early high-water mark of Food Stamps litigation, the Supreme Court struck down a statutory provision disqualifying any household that included a member unrelated to other members as kin. 413 U.S. 528 (1973). In other contexts, similar provisions might well have been struck down on statutory grounds. *See, e.g.*, Clay v. Tryk, 222 Cal. Rptr. 729, 733 (Ct. App. 1986) (invalidating a policy that denied general assistance to "lodgers" on the ground that "[t]he fact that a general assistance recipient is sharing living space with a person who owns or leases the house or apartment in which they live seems to have no rational relationship to the actual need of the recipient" (quoting Soave v. Milliken, 497 F. Supp. 254, 259 (W.D. Mich. 1980)) (internal quotation marks omitted)). The Food Stamps statute obviously could not conflict with itself, however, and so the Court relied on a constitutional equal protection analysis: "[T]he relationships among persons constituting one economic unit and sharing cooking facilities have nothing to do . . . with their personal nutritional requirements." *Moreno*, 413 U.S. at 534. Here, relieving need again becomes the touchstone, but now as a broad statutory goal that provides the legitimate governmental interest to which a statutory distinction (here, between familial and other households) must be rationally related to survive equal protection scrutiny.

63. 392 U.S. 309; *see also* R. SHEP MELNICK, BETWEEN THE LINES 86 (1994) (quoting plaintiff's attorney as explaining that he had sought "a decision interpreting the Social Security Act as having rejected the concept of a worthy and an unworthy poor").

64. *King*, 392 U.S. at 311.

65. *Id.* at 313 (quoting 42 U.S.C. 606(a) (1964)).

66. *Id.*

by implementing its "substitute father" rule, which treated an unmarried mother's sexual partner as available to provide "parental support" to her children.[67] Such rules were common in AFDC programs at the time, but Alabama extended the concept beyond live-in boyfriends to more casual liaisons unaccompanied by co-residence.

To portray the Alabama rule as an extraneous moral imposition, the *King* Court asserted federal control over the dependency concept and subordinated it to its statutory companion concept of need. The statutory category of "parent" was limited to those with a legal support obligation, sharply constraining state discretion over the scope of dependency.[68] The Court criticized Alabama for asserting the existence of a "substitute father" regardless of "whether he is legally obligated to support the children, and whether he does in fact contribute to their support."[69] This move swept away the entire substitute father concept, not merely Alabama's extension of it. It even implicated, as the Court observed in a footnote, stepfathers whom the mother had married but who had not adopted any of her children,[70] a topic to which the Court would later return.[71] Thus, although application of the substitute father rule to non-cohabiting boyfriends appeared to track moral disapproval of extramarital sexuality, the underlying rule in fact also disqualified couples who complied with conventional morality by marrying, and the Court's technical analysis did not distinguish between the two on the basis of their moral status.[72]

Having left the states little to say about dependency, the Court emphasized their broad authority over determinations of need. In particular, states controlled the "standard of need" (that is, the level of material deprivation that constituted need), the identification of "means" available to the family to meet those needs, and the "level of benefits" the state would provide to satisfy

67. *Id.* at 313–14.
68. *Id.* at 327–32.
69. *Id.* at 314.
70. *Id.* at 316 n.10.
71. *See infra* text accompanying note 122 discussing the case of *Lewis v. Martin*, 397 U.S. 552 (1970).
72. The "deprived of parental support" requirement also disqualified conventionally virtuous behavior when noncustodial fathers provided ongoing, direct support notwithstanding living apart from the mother. *See, e.g.*, Freeman v. Lukhard, 465 F. Supp. 1269 (E.D. Va. 1979) (finding children not deprived of parental support where their absent father visited daily, discussed their care with the mother, and provided them milk and diapers); Hall v. Iowa Dep't of Human Servs., 455 N.W.2d 278 (Iowa Ct. App. 1990) (finding a child not deprived of parental support where the father lived in a small home 120 feet from the daughter and her mother's mobile home and spent time with his daughter).

any unmet needs.[73] Thus, Alabama still could determine that a "child is not in financial need"[74] based on "regular and actual [financial] contributions . . . from the kind of person Alabama calls a substitute father."[75] That was not the state's approach, however. The *King* plaintiffs "meet Alabama's need requirements," and so the Court condemned the rule as "unrelated to need, because the actual financial situation of the family is irrelevant in determining the existence of a substitute father."[76]

Sequestering the substitute father provision from considerations of need allowed the Court to strike it down as an impermissible attempt to use the welfare system as a source of leverage to enforce public morality. A lengthy history lesson explained that the once-ubiquitous concept of privileging the "'worthy' poor"[77] had fallen into such disrepute that it was "inconceivable" that "Alabama is free to discourage immorality and illegitimacy by the device of absolute disqualification of needy children."[78] Alabama retained its "general power to deal with conduct it regards as immoral,"[79] but it could not apply a more stringent standard to AFDC recipients.

King inspired two lines of attack on AFDC eligibility restrictions. The first focused on rules operating outside determinations of financial need; the second focused on the boundary between need and other considerations. As to the first, the most important development came in *Townsend v. Swank*,[80] where the Court again barred states from restricting eligibility through the statutory definition of dependency.[81] This time, the rule in question was far narrower and less charged. It included eighteen- to twenty-year-olds in the program so long as they attended high school or vocational school, but it excluded those attending a four-year college. The Court took *King* to stand for the proposition that "a state eligibility standard that excludes persons eligible

73. *King*, 392 U.S. at 318–19 & n.16.
74. *Id.* at 320.
75. *Id.* at 319.
76. *Id.* at 320.
77. *Id.*
78. *Id.* at 326.
79. *Id.* at 320.
80. 404 U.S. 282 (1971).
81. *See also* Bryant v. Swoap, 121 Cal. Rptr. 867, 875 (Ct. App. 1975) (rejecting application to a divorced child of a rule excluding married children from those eligible based on dependency, and reasoning that her "present position, as a practical matter, is not made substantially different because she was briefly married . . . . [S]he is needy. If she had never been married, there would be good reason to give her AFDC benefits[, and a] parity of reasoning, then . . . requires she receive such aid in her present situation").

for assistance[ ] under federal AFDC standards violates the Social Security Act,"[82] and therefore Illinois could not "discriminate between these needy dependent children solely upon the basis of the type of school attended."[83] Again, eligibility based on need is taken as the basic federal principle, and so distinctions among the needy become fundamentally suspect.[84] Note here that characterizing the non-need-based criterion as a matter of moral deservingness would, implausibly, imply that college attendance (which precluded eligibility) violates middle-class morality while attending vocational school does not.[85]

The attempt to confine eligibility to need-based criteria quickly found success in cases where states imposed behavioral conditions directly, rather than by defining narrowly the federally specified criteria of dependency and need.[86] Perhaps most striking is a body of case law addressing recipients' cooperation with efforts to obtain financial support from absent family members. An expectation of support from such parties—typically, child support from a noncustodial father—satisfied *King*'s focus on legally responsible parties, but the question remained "whether the state can require the mother of an illegitimate child to divulge the name of the child's father as a condition for AFDC eligibility."[87] The plaintiffs in such cases argued that to do so "creates two classes of needy illegitimate children," yet "[a] needy child . . . is no less needy because the state is

82. *Townsend*, 404 U.S. at 286; *accord* Carleson v. Remillard, 406 U.S. 598, 600 (1972).

83. *Townsend*, 404 U.S. at 287.

84. *See* MELNICK, *supra* note 63, at 92 (characterizing the *King* lineage as establishing that "[a]ll eligibility qualifications unrelated to need became suspect"). Indeed, the Court intimated that, had statutory grounds been unavailable, it would have struck down the distinction in question as a violation of constitutional equal protection principles. *Townsend*, 404 U.S. at 291.

85. *See also Carleson*, 406 U.S. 598 (striking down a state AFDC regulation that construed the "deprivation of parental support" requirement narrowly to deny benefits to households in which the father was temporarily absent due to military service).

86. Advocates also attacked federal statutory criteria for dependency for deviations from need-based criteria, but here they were rebuffed. For instance, a household including two married parents and their children could be categorically eligible only if one parent was "unemployed." This federal statutory rule invited the objection that "when aid to other families with dependent children is based on the need of the family, it is . . . arbitrary and capricious . . . to deny aid to otherwise eligible needy children solely because the father works more than a given number of hours." Macias v. Finch, 324 F. Supp. 1252, 1257–58 (N.D. Cal. 1970), *aff'd sub nom.* Macias v. Richardson, 400 U.S. 913 (1970). Here, the courts balked at fully constitutionalizing the primacy of need. *See id.* at 1260–61; *accord* Sweet v. Dep't of Pub. Aid, 361 N.E.2d 1118, 1123 (Ill. 1977) (rejecting an attack portraying hours-based eligibility as "inconsistent with the congressional intent to provide assistance to needy children" because AFDC is offered only "to those who are not only needy as determined under State standards, but who also meet the Federal definition of a 'dependent child'").

87. Doe v. Shapiro, 302 F. Supp. 761, 762 (D. Conn. 1969).

unable to learn the name of his father."[88] This argument carried the day with a series of district courts, and the Supreme Court summarily affirmed several of these decisions soon after its *Townsend* decision barring eligibility criteria beyond need and dependency.[89] Courts often bolstered *Townsend*'s limitation on non-need-based criteria by confining any purported undeservingness to the mother and anchoring need in the child. This maneuver discredited rules by which "an otherwise eligible child is deprived of AFDC funds because of parental misconduct."[90]

Similar appeals to need over deservingness carried the day outside the AFDC context, including cases lacking an innocent child who could present unblemished need notwithstanding an undeserving adult's presence in the household. For instance, the New York Court of Appeals rejected a rule conditioning general assistance to eighteen- to twenty-year-olds on their pursuit of support payments from their parents.[91] It reasoned, in now-familiar fashion, that doing so would "effectively deny public assistance to persons under the age of 21 who are concededly needy" and thereby "ignore the realities of the needy's plight and the State's affirmative obligation to aid all its needy."[92] In a relatively recent decision, a California appellate court in 2001 rejected a county rule denying general assistance to persons convicted of drug-related felonies. Basing eligibility on past crimes was deemed "'inconsistent with and in open conflict with section 17000's mandate to relieve and support' needy residents."[93] Also struck down for an inadequate foundation in need have been exclusions from general assistance of "employable" individuals[94] or those eligible for other public assistance

88. *Id.*

89. Doe v. Swank, 332 F. Supp. 61 (N.D. Ill. 1971), *aff'd sub nom.* Weaver v. Doe, 404 U.S. 987 (1971); Taylor v. Martin, 330 F. Supp. 85 (N.D. Cal. 1971), *aff'd sub nom.* Carleson v. Taylor, 404 U.S. 980 (1971); Meyers v. Juras, 327 F. Supp. 759 (D. Or. 1971), *aff'd*, 404 U.S. 803 (1971); *see also* Doe v. Gillman, 479 F.2d 646 (8th Cir. 1973) (striking down a child support cooperation requirement even when a sanction removed the mother's share of the grant but reserved the needy child's); Woods v. Miller, 318 F. Supp. 510 (W.D. Pa. 1970) (striking down application of a "responsible relative" provision to discontinue benefits based on a mother's failure to seek support from her adult daughter).

90. *Woods*, 318 F. Supp. at 514; *see also infra* notes 157–160 and accompanying text discussing *Cooper v. Laupheimer*, 316 F. Supp. 264 (E.D. Pa. 1970).

91. Tucker v. Toia, 371 N.E.2d 449 (N.Y. 1977).

92. *Id.* at 452.

93. Arenas v. San Diego Cnty. Bd. of Supervisors, 112 Cal. Rptr. 2d 845, 850 (Ct. App. 2001) (quoting Nelson v. Bd. of Supervisors, 235 Cal. Rptr. 305, 309 (Ct. App. 1987)).

94. *See* Mooney v. Pickett, 483 P.2d 1231 (Cal. 1971); Clark Cnty. Soc. Serv. Dep't v. Newkirk, 789 P.2d 227 (Nev. 1990).

programs.[95] In 2001, the New York Court of Appeals held that the state constitution required that legal immigrants be included within the state's medical assistance program, immigration status being "an overly burdensome eligibility condition having nothing to do with need."[96]

The second legacy of *King* was a line of cases that attempted to shore up the distinction between financial determinations of need and rules concerning behavior or status characteristics. These cases arose in the face of state attempts to incorporate criteria associated with judgments of deservingness into the calculation of need. In response to *King*, California's AFDC program began calculating household income using a "deeming" technique that often had the same effect as Alabama's substitute father rule. When determining whether a parent and her child(ren) could meet their designated needs, California deemed available to them the income of a man married to the mother (a stepfather) or, absent marriage, a "man assuming the role of spouse (MARS)." The plaintiffs in *Lewis v. Martin*[97] challenged this rule's disregard for "whether or not [this income] is in fact available or actually used to meet the needs of the dependent children."[98] That feature violated an AFDC regulation limiting countable income to moneys "in fact" or "actually" available to the household;[99] that federal regulation also specifically disapproved state deeming rules like California's, except as applied to stepfathers with a legal support obligation to nonadoptive stepchildren.[100] The Supreme Court struck down the California rule and upheld the federal regulation. Relying on its interpretation of the AFDC statute in *King*, the Court reasoned that "[the federal agency] might reasonably conclude that only he who is as near as a real or adoptive father would be has that consensual relation to the family which makes it reliably certain that his income is actually available for support of the children in the household."[101]

Lewis aspired to define "need" in objective, material terms that would erect a firewall against the importation of moralistic concerns with behavior and status. After all, any factor that could trigger absolute ineligibility also could

95. *See* Medora v. Colautti, 602 F.2d 1149 (3d Cir. 1979); McCormick v. Cnty. of Alameda, 122 Cal. Rptr. 3d 505 (Ct. App. 2011); *see also* Morales v. Minter, 393 F. Supp. 88 (D. Mass. 1975) (striking down a provision restricting general assistance benefits to those under sixty-five and thus not eligible for Old Age Assistance or Supplemental Security Income).
96. Aliessa v. Novello, 754 N.E.2d 1085, 1093 (N.Y. 2001).
97. 397 U.S. 552 (1970).
98. *Id.* at 554.
99. *Id.* at 555–56 & n.6.
100. *Id.* at 556.
101. *Id.* at 558.

trigger a reduction in benefits on the purported basis of lower need. Moreover, *King* had promised states free rein to define need. The next case to reach the Court after *Lewis* illustrated this malleability. In *Van Lare v. Hurley*,[102] New York analyzed male cohabitants as "lodgers" who kept separate finances from the aided family, not "substitute fathers" for categorical eligibility purposes (as in *King*) nor contributors toward meeting household needs (as in *Lewis*).[103] This assumption of separation, however, implied that the lodger paid his own share of housing costs, thereby lowering the mother's share of rent. Because the mother was deemed to have a lower rent payment, her standard of need was lowered; therefore, she received lower benefits (the difference between the standard of need and her income) than if the cohabitant were absent. Reasoning in the shadow of *King*, the Court characterized New York's rule as a behavioral condition, one that reduced the mother's standard of need "because she allowed a person not a recipient of AFDC and who had no legal obligation to support her family to reside in the household."[104] According to the Court, this policy violated the principles laid down in *Lewis* because it was functionally equivalent to the "impermissible assumption that the lodger is contributing income to the family."[105]

The operative conception of need assumed that households of the same size had identical needs, which were operationalized as needs for an identical cash income. For instance, outside the AFDC context, the New Jersey Supreme Court struck down a general assistance rule that subjected "employable" individuals to a lower standard of need,[106] a variant on approaches that excluded them entirely but thereby directly raised concerns about status and behavioral distinctions.[107] The court explained that "no one has come forward with factual data, studies or reports to establish that the unemployed 'employable' suffers less from cold, hunger or sickness, or . . . that his human misery is lessened where joblessness results from economic handicaps rather than mental, emotional or physical impediments."[108] A California court struck a similar note when invalidating a state regulation setting a higher AFDC standard of need for a household with married parents than an otherwise identical one with

102. 421 U.S. 338 (1975).
103. *Id.* at 341–42.
104. *Id.* at 340.
105. *Id.* at 347.
106. Pascucci v. Vagott, 362 A.2d 566 (N.J. 1976).
107. *See supra* note 94 and accompanying text.
108. *Pascucci*, 362 A.2d at 572.

unmarried parents: "The child is no more deprived because his parents are married; the needs of the child and his family are not affected by the marital status of the parents."[109]

In crucial defeats for welfare rights litigation, however, the Supreme Court balked at extending this analysis of need beyond the *King–Lewis–Van Lare* context of cohabitants lacking legal support obligations. In *Jefferson v. Hackney*,[110] the Court upheld a Texas system that nominally set standards of need by household size but, for the purposes of calculating benefits, reduced those thresholds by a percentage designed to meet budgetary caps on welfare spending.[111] The percentage reductions varied among federal–state programs for the elderly, the disabled, and families with dependent children, notwithstanding the same initial standard of need for each. The plaintiffs argued that it was "arbitrary and discriminatory" to translate status differences into different levels of support.[112] Dissenting Justice Marshall agreed, declaring recipients in the different programs to be "identically situated" and "find[ing] nothing in the federal statute to enable a State to favor one group of recipients by satisfying more of its need, while at the same denying an equally great need of another group."[113] The majority, however, retreated from a purely financial account of need. It allowed that "the State may have concluded that the aged and infirm are the least able of the categorical grant recipients to bear the hardships of an inadequate standard of living."[114]

Where *Jefferson* merely suggested that money alone might not capture a richer sense of need, *Dandridge v. Williams*[115] took aim at the firewall between deservingness and need. *Dandridge* concerned Maryland's "maximum grant" provision, which capped the amount any family could receive, regardless of family size. The result was that for a family already at or above the cap, the birth of an additional child yielded no increase in benefits (despite an increase in the nominal standard of need). More generally, smaller families received their

109. Smock v. Carleson, 121 Cal. Rptr. 432, 434 (Ct. App. 1975).
110. 406 U.S. 535 (1972).
111. *Id.*
112. *Id.* at 545.
113. *Id.* at 578–79 (Marshall, J., dissenting).
114. *Id.* at 549 (majority opinion). *But see* Lee v. Smith, 373 N.E.2d 247, 250 (N.Y. 1977) (striking down the exclusion of elderly or disabled Supplemental Security Income (SSI) recipients from the higher-benefit general assistance program because "it is hard to imagine how the State could reasonably conclude that needy persons who are also aged, disabled or blind would have lesser needs than needy persons not suffering from these disabilities").
115. 397 U.S. 471 (1970).

full standard of need while larger ones received only a fraction of it. The Court allowed this practice under the statute, relying heavily on the language in *King* entrusting to state discretion determinations of need and benefit size.[116] Most significantly, a deferential constitutional analysis accepted Maryland's argument that, by setting the maximum grant roughly equal to earnings from full-time work at the minimum wage, its rule promoted employment and avoided unfairness to "the working poor" by avoiding a situation in which receiving welfare was more lucrative than holding down a job.[117] Thus, *Dandridge* allowed need to go beyond considerations of access to goods and services, permitting states to define need so as to encourage socially desired behavior and manage broader distributive concerns. Justice Marshall's dissent, in contrast, relied on the state's "standard of need" as the true measure of "basic subsistence needs," such that the maximum grant rule then operates as a non-need-based restriction: "Some needy families receive full subsistence assistance as calculated by the State; the assistance paid to other families is grossly below their similarly calculated needs."[118] Relative to the asserted baseline of providing the full standard of need, Maryland's policy even could be construed as a behavioral condition implicating basic liberty interests in controlling family size and structure: For some families, access to the full standard of need was conditioned on either not having additional children or breaking up the family by sending any "excess" children to live with relatives.[119] Similar arguments had prevailed before other courts.[120]

II. THE INEVITABLE NORMATIVITY OF NEED

Rules that construct calculations of financial need often can be recharacterized as rules that regulate behavior through financial consequences; that was the lesson of the previous Part's discussion of the *Lewis* "deeming" and *Van Lare* "lodgers" cases. So long as such rules also can be cast as deviations from a pure, nonmoralized analysis of need, this recharacterization merely expands the scope of the deservingness analytic, allowing it to go beyond

116. *Id.* at 478.
117. *Id.* at 483–87.
118. *Id.* at 518 (Marshall, J., dissenting).
119. *Id.* at 513–14; *see also* Sojourner A. v. N.J. Dep't of Human Servs., 828 A.2d 306 (N.J. 2003) (upholding a policy ignoring, for the purpose of the family size component of standard of need, children conceived and born while on welfare).
120. *See, e.g.*, Kaiser v. Montgomery, 319 F. Supp. 329 (N.D. Cal. 1969) (three-judge panel), *vacated*, 397 U.S. 595 (1970); Villa v. Hall, 490 P.2d 1148 (Cal. 1971), *vacated*, 406 U.S. 965 (1972).

categorical eligibility and behavioral conditions and reach into the means test; nonetheless, a core of true need, untouched by deservingness, would remain. The first Subpart below rejects that possibility by showing that the distinction between behavioral regulation and need assessment is inherently unstable.

The great vulnerability of the deservingness analytic is that the boundary between need and conditionality can be breached from either side. Rules nominally constructed as behavioral conditions or categorical limits often can be recharacterized as rules designed to capture the more dynamic aspects of financial need. They may do so badly or well, cruelly or fairly, but passing such judgments requires delving into the particulars; they cannot be discredited, as the deservingness analytic would urge, merely by observing that they do more than take a snapshot of a well-defined household's current finances. Nor does observing their moral nature tell us much of interest, because rules that more directly measure need likewise implicate normative judgments about behavior and status.

Ultimately, then, the deservingness analytic falters because it proves too much. If determinations of need are as moralistic as behavioral conditions, then it becomes impossible to strip away judgments of deservingness and focus simply on relieving poverty. Instead, those engaging in welfare policy design cannot evade engaging the substance of these normative judgments.

Giving up the power (limited though it has proven to be) of an automatic, across-the-board critique of conditionality is not necessarily a retreat from critique. The second Subpart below argues that, to the contrary, precisely because delegitimizing conditionality relied upon sanctifying need, it shielded structurally essential components of social welfare policy from searching scrutiny. Thus, revisiting the deservingness analytic creates an opportunity to place determinations of need under the critical gaze customarily focused on categories and conditions.

A. The Moral Construction of Poverty Measurement

As Handler and Hollingsworth noted in *The "Deserving Poor"*, the basic concept of a means test is that "the extent of need is the difference between public assistance standards and the resources actually available to the applicant."[121] But what does it mean for a resource to be available? In *Lewis*, the Supreme Court refused to allow income from nonadoptive stepparents or "men assuming the role

121. HANDLER & HOLLINGSWORTH, *supra* note 11, at 75.

of a spouse" to be deemed available to the household, reasoning that the attenuated relationship "prevent[s] viewing him as a 'breadwinner' unless the bread is actually set on the table"[122] through proven, not deemed, financial contributions. Yet why stop there? If the question is whether needs actually are being met, perhaps before deeming it available we should make sure the bread is actually in someone's hand, or in their mouth, or that they actually swallow.[123] Or we might reverse direction and treat bread as available even though it is not yet on the table: Perhaps a loaf is in the freezer and must be defrosted first, or it was left with a neighbor to be retrieved. Maybe there is no bread, but all the ingredients and an oven are at hand. Or maybe a relative has a loaf of bread and would willingly hand it over if asked, at least if she knew that her kin would otherwise go hungry. A line must be drawn, but the admonition to consider only resources "actually" or "in fact" available merely serves notice that some chains of contingency are too long or too fragile. It cannot tell us which ones.

The ambiguities of resource availability apply to money as well. You cannot eat, wear, or take shelter in money, so treating cash as satisfying basic household needs relies on the (reasonable) assumption that someone will go shopping and put the bread on the table. In the family wage model upon which AFDC was built, the breadwinner brings home the "dough," but his wife goes out and buys the bread. One might say that conventional means testing makes market forms of consumption a behavioral condition of basic subsistence.[124]

Determining when cash is available also immediately implicates matters of behavior. In a typical formulation, the Wisconsin AFDC program studied by Handler and Hollingsworth adopted the principle that, "[i]n evaluating resources, it is necessary to consider all income which the client is receiving, resources which could be made available to him without undue hardship or less, and goods and services he receives or can receive without cost to him." Furthermore, "the agency shall assist the client in developing potential resources which can be utilized for his support."[125] With a little imagination, one can see in the concept of

122. Lewis v. Martin, 397 U.S. 552, 559 (1970).

123. *See* Schweiker v. Gray Panthers, 453 U.S. 34, 47 (1981) (rejecting the argument that the "availability" requirement forbade all income deeming and required individualized investigation of whether income was "actually in the hands . . . of the institutionalized spouse"); *see also id.* at 51–52 (Stevens, J., dissenting) (agreeing that the "availability" requirement did not bar all "deeming").

124. This point complicates the standard view that cash benefits provide unfettered choice and that in-kind benefits simply reduce that choice.

125. HANDLER & HOLLINGSWORTH, *supra* note 11, at 75.

"developing potential resources" a plausible basis for virtually all the behavioral and status rules conventionally attacked as conditions unrelated to need.

Handler and Hollingsworth noted, but did not dwell on, this connection between the assessment of need and traditional areas of behavioral regulation and surveillance. They briefly ruminated on whether, as a matter of analytical categories, the means test ought to be limited to evaluations of the "client's financial resources and property."[126] Instead, might it embrace existing expectations that applicants or recipients seek support from "responsible relatives," obtain child support from noncustodial fathers, consider marriage, and pursue employment?[127]

> If the purpose of the aid program is to give assistance only when the mother is unable to obtain adequate support from the father, then [a noncustodial father's] potential resources and her efforts to obtain these resources become part of the means test. If she fails to satisfy the requirements, she has an unused resource and may be judged ineligible.[128]

Precisely this logic animated many jurisdictions' formulation or defense of their categorical or behavioral eligibility rules. When *Doe v. Shapiro*[129] struck down a child support cooperation rule as unrelated to need, one member of the three-judge court dissented this way:

> It is fundamental in this statutory scheme, that the sources of all family income be disclosed as a prerequisite to an applicant's qualifying for eligibility benefits. Thus, the mother's disclosure of the known identity of a legally liable putative father is certainly an essential element in correctly evaluating the applicant-mother's support capabilities . . . . Her limited disclosure of actual current income is incomplete, if any of the available sources remain unrevealed.[130]

126. *Id.* at 79.
127. *Id.* at 78–79.
128. *Id.* at 78; *see also id.* at 78–79 ("Resources can also include the earning potential of the members of the family, that is, anticipated earnings. If the purpose of the aid program is to give money to unemployables, then capacity to work becomes part of the means test in that it is part of the applicant's resources.").
129. 302 F. Supp. 761 (D. Conn. 1969).
130. *Id.* at 768–69 (Clarie, J., dissenting). Notably, this judge *accepted* the morality/need distinction but placed child support cooperation on the need side of the line. He characterized *King* as holding that "the federal welfare act could not be used to curb illegitimacy or to discourage the mother's promiscuous conduct" with rules that "were not only unrelated to, but in conflict with the overall purpose of the Federal Act," whereas here "[t]he state is not denying benefits to a dependent child, because of the mother's misconduct or for other moral purposes." *Id.* at 769; *see also* Doe v.

Essentially the same analysis was written into the Pennsylvania "responsible relatives" statute challenged in *Woods v. Miller*.[131] As the court described it, "having determined that a relative exists who is legally obligated and financially able to contribute support to a recipient of AFDC assistance, the theoretical amount of that contribution is treated as income available to the recipient for purposes of determining the 'need' of the recipient."[132] If the recipient fails to take steps to acquire this resource, she is disqualified.[133]

Similar dynamics operate with regard to work requirements. The text of a Virginia rule struck down in 1971 explicitly invoked the general principle that "[a]n applicant for or recipient of assistance is expected to make use of or develop resources available to him in relation to his capacity to do so."[134] It then applied this principle to employment by defining the circumstances in which "a work opportunity is considered available," including when there is a "specific job" on offer.[135] The New York Court of Appeals adopted similar reasoning in *Barie v. Lavine*,[136] ruling that "employable persons . . . may properly be deemed not to be needy when they have wrongfully refused an opportunity for employment,"[137] even when that refusal pertained to a job interview rather than a job offer. The lower court had explained more fully:

> While the objective facts of hunger and a lack of sufficient assets to provide for one's own food, shelter and clothing establish prima facie a 'needy' person, nevertheless, the word 'needy' does not in its ordinary meaning encompass a person who is creating the need by consistently avoiding or refusing to provide for his needs.[138]

Swank, 332 F. Supp. 61, 64 (N.D. Ill. 1971) (Marovitz, J., dissenting), *aff'd sub nom.* Weaver v. Doe, 404 U.S. 987 (1971).

131. 318 F. Supp. 510 (W.D. Pa. 1970).

132. *Id.* at 513 (footnote omitted).

133. *Id.* at 512.

134. Woolfolk v. Brown, 325 F. Supp. 1162, 1164 (E.D. Va. 1971).

135. *Id.* Notably, this approach was considered a *less* restrictive option than simply deeming market wages as income without individualized assessment of actual employment opportunities. *Id.* at 1165–66.

136. 357 N.E.2d 349 (N.Y. 1976).

137. *Id.* at 352.

138. Barie v. Lavine, 367 N.Y.S.2d 587, 590 (App. Div. 1975), *aff'd*, 357 N.E.2d 349; *see* N.Y. State Dep't of Soc. Servs. v. Dublino, 413 U.S. 405, 413 (1973) (crediting New York's justification of its work rules as an attempt "to assure that limited state welfare funds be spent on behalf of those genuinely incapacitated and most in need"); *see also* Mooney v. Pickett, 483 P.2d 1231, 1238 (Cal. 1971) (acknowledging the conceptual plausibility of treating potential earnings as an economic resource, but noting that "[t]o the man who cannot obtain employment his theoretical

New York's state constitutional jurisprudence is particularly interesting, and puzzling, for its simultaneous willingness to construe need broadly to incorporate behavior and its formal commitment to a sharp, self-evident distinction between need and other eligibility considerations. A year after the *Barie* work requirements case, the Court of Appeals in *Tucker v. Toia*[139] confronted a mandate to pursue support from "responsible relatives."[140] That rule was struck down unanimously. *Barie* was distinguished as "concerned with a reasonable legislative determination that such individuals were not needy," whereas *Tucker* addressed whether "the Legislature [could] deny all aid to certain individuals who are admittedly needy solely on the basis of criteria having nothing to do with need."[141] Yet the court offered not a whiff of a theory explaining why present income defined need in the latter case but not in the former, and why, vice versa, behavior that might lead to income helped define need in the former case yet had "nothing to do with need" in the latter.

Defining membership in the household or family whose needs are to be analyzed raises difficulties fundamentally similar to those attending determinations of the income available to those members. Household membership determines household size and thus the household's standard of need. On the income side, membership affects which individuals' income will be deemed available to meet that need.

Because household structure and the economic relationships among household members are influenced by recipient behavior, they potentially raise questions about whether recipients do, and to what extent they should, order their domestic and intimate affairs in ways that limit their economic needs for transfers. For instance, should families be expected to double up or take on lodgers in order to achieve economies of scale,[142] rather than being allowed to seek public assistance based on a more expensive living arrangement? Such questions immediately implicate moral questions about family privacy and autonomy.

A partial obligation for families to double up surfaced in the Food Stamps case *Lyng v. Castillo*.[143] The Supreme Court considered a challenge to the Food

employability is a barren resource; it is inedible; it provides neither shelter nor any other necessity of life[,] [u]ntil he can get a job").

139. 371 N.E.2d 449 (N.Y. 1977).

140. *Id.* at 452.

141. *Id.*

142. *Cf.* Rakesh Kochhar & D'Vera Cohn, *Fighting Poverty in a Tough Economy, Americans Move in With Their Relatives,* PEW RES. CENTER (2011), *available at* http://www.pewsocialtrends.org/files/ 2011/10/Multigenerational-Households-Final1.pdf.

143. 477 U.S. 635 (1986).

Stamps Act's "mandatory filing unit" rule, which assumed joint food purchasing, preparation, and consumption among all co-resident family members related as spouses, siblings, or parents/children.[144] Thus, if an adult (and any children or a spouse) lived together with his parents, all would be treated as a single household for the purpose of determining food purchasing needs, regardless of the household's actual practice. So, too, would two adult siblings and their respective spouses and children. This approach reduced food stamp allotments because the means test incorporated economies of scale: Two two-person households would have received more in food stamps than one household of four.

As in *King* and its AFDC progeny, the *Castillo* majority and dissenting opinions largely treated the policy as raising purely empirical and administrative questions: How likely was it that affected households would, in fact, operate as a single unit with regard to food, and what level of accuracy supported an irrebuttable presumption?[145] Nonetheless, the normative dimension bubbled up. The majority noted that "Congress might have reasoned that it would be somewhat easier for close relatives—again, almost by definition—to accommodate their living habits to a federal policy favoring common meal preparation."[146] In other words, federal policy set a normative baseline of (cheaper) common meal preparation, and if individuals subject to that expectation chose to structure their daily lives differently (for example, meal preparation and consumption in conventional nuclear units), they forfeited access to adequate nutrition as defined by the statute. This normative baseline was sufficiently strong that family members who chose to dine apart were disparaged as "manipulating" the system "simply by changing food purchasing and eating habits" when they "could purchase food jointly."[147]

The household unit rule upheld in *Castillo* thus incorporates a normative view of how households ought to be organized, at least as a condition of having their needs met by the public assistance program. This alone is no cause for criticism. Any household definition rule necessarily incorporates normative content. A broader rule might include in a single unit not just siblings but cousins, or not

144. *Id.*

145. *Cf.* Simon, *supra* note 28, at 1496 ("The objection to presuming support . . . is usually framed as an empirical one: It is not plausible to think that people support each other without a legal obligation. But one also senses a normative dimension to the objection, a notion that people *shouldn't* support each other or feel compelled to do so except in the narrowly confined cases of legal obligation.").

146. *Castillo*, 477 U.S. at 643.

147. *Id.* at 642 n.10.

just relatives but all co-residents. After all, they could eat together if they were sufficiently committed to minimizing costs. Roommates have been known to do so. Perhaps parents and children should dine together if they live on the same block, even if not under the same roof. Or, reversing direction, one might observe that just as adult siblings could have good reasons to dine separately,[148] so too might spouses, as matters of managing intimacy and privacy or of practical coordination.[149] Like the question of when a loaf of bread is available, there simply is no way to draw these lines without incorporating some normative account of the burdens individuals are expected to bear as a condition of receiving means-tested transfers.

At this point, it bears emphasis that a means test's implicit normative structure necessarily incorporates not simply a relationship between the putative transfer recipient and the state (or its taxpayers) but also myriad smaller-scale relationships between the putative recipient and other actors. The cooperation of others is required for much conduct that could bring in an extra dollar or make one go farther. Doubling up requires a willing roommate, and financial contributions require consent, from a lover or grandmother alike.

These points shed light on Simon's important critique of the *King–Lewis–Van Lare* line for seeking to "protect against poor friends who exploit their housemates by refusing to pay their share of expenses, from grandmothers who refuse to help their grandchildren, and from children who expropriate from their siblings."[150] According to Simon, "[b]y preventing programs from taking account of the economies of joint living arrangements, [such rules] give larger benefits to recipients who share living arrangements than to those with identical needs who do not."[151] Drawing the line of income-sharing at general legal responsibility

148. *Cf. id.* at 645 (Marshall, J., dissenting) ("[T]he regulation does not merely affect . . . important privacy interest in family living arrangements . . . , but the even more vital interest in survival. . . . [S]ome separate families live in the same house but cannot prepare meals together because of different work schedules.").

149. *But cf.* Schweiker v. Gray Panthers, 453 U.S. 34, 45 (1981) (upholding a Medicaid rule permitting deeming availability of spousal income based on congressional determination that it was "proper to expect spouses to support each other").

150. Simon, *supra* note 28, at 1497.

151. *Id.* at 1498. Simon conforms to standard deservingness analysis by treating needs as objectively specified and casually asserting that a family of a given size has "identical needs" regardless of living situation. *See id.* at 1497 (criticizing rules on child income that leave some families better off "than equally needy families"). Yet we cannot know who is "poor" without first assuming some set of economic relationships that establish patterns of joint consumption and income sharing. Implicitly, Simon assumes that economies of scale from joint living arrangements ought to be treated as a resource toward meeting household needs.

erects an ideal of an "autarkic individual responsible to, and dependent on, no one with the exception . . . of his spouse and children."[152]

Yet the presumptions Simon attacked do not concern, in any absolute sense, whether a grandparent will let her child and grandchild go hungry. Instead, the question is one of priority and parity. Imagine a grandparent who would not let her child and grandchild go hungry, and yet who likewise would not buy their food so long as they had adequate employment income. This hardly seems like an unusual or obviously repugnant ethical stance. Yet when it comes to public assistance, Simon assumes that support from a grandparent should take priority over support from the state. Aside from the burdens this places on those made dependent on their grandparents,[153] this approach also burdens the grandparents. Compare two grandparents: neither would allow their children and grandchildren to go hungry, nor would either automatically pay for their children and grandchildren's food. The grandparent whose child can support her family in the labor market does not pay for their food. Therefore, this grandparent ends up better off financially than the other grandparent who does pay because her child lacks wage income and also is denied state support based on the grandparent's ability to serve as a private safety net. And if that outcome seems obviously right, then replay the example with a third cousin or a neighbor down the street: Should the state expect the cousin or neighbor to pay (and thus deem their income available) simply because, in fact, they would be so willing? At some point, the state is exploiting their generosity.

As with income measurement, difficulties of household definition might seem amenable to solution by focusing exclusively on actual resources and consumption,[154] thereby jettisoning any need to apply presumptions or incentives tailored to normative behavior. But all the now-familiar problems with specifying available resources reassert themselves. Rather than attempting to demonstrate that such a project is theoretically impossible, I will content myself with showing how quickly the effort becomes unattractive to those initially tempted by it.[155]

152. *Id.*

153. *See* tenBroek & Wilson, *supra* note 16, at 270 ("Relatives' responsibility forces the disabled person, though legal, economic pressures to maintain a dependent relation and often a common dwelling with relatives instead of encouraging him and enabling him to strike out on his own.").

154. *Cf.* MEASURING POVERTY, *supra* note 10, at 301–07 (characterizing choice-of-unit analysis as entirely based on actual practices of shared consumption).

155. Aside from my main point below, note the tremendous administrability problems created if one must trace the actual circulation of money and resources among family and household members. Notwithstanding its application of an "actual" availability standard to those who lacked a legal

A focus on bottom-line outcomes is at war with the virtues of abstraction. Consider the temporal dimension of need assessment. Income and spending tend to be lumpy and not perfectly coordinated. A paycheck may be received biweekly, not doled out hour by hour; bills often are paid monthly; and so on. A fundamental choice in measuring poverty or need is the temporal unit.[156] That choice tends to create a stark divide between units and a homogenization within them. Consider *Cooper v. Laupheimer*,[157] in which a court struck down a rule that reduced prospective AFDC benefits to recoup amounts that a recipient had "mistakenly or fraudulently obtained [as] an extra payment months ago."[158] Doing so was held to be "repugnant to the provisions of the Act in its total disregard of the concept of need."[159] The state's justifications were rejected for "fail[ing] to recognize the reality of public welfare—the necessity of current payments for current needs."[160] But how far can one take the argument? A monthly measurement unit assumes that income received at the beginning of the month is available to satisfy needs at the end of the month. It assumes, in other words, some ability to budget and save. One could say, then, that a monthly budget meets needs conditional on the recipient's engaging in certain kinds of fiscal behaviors—behaviors, moreover, often understood in moralistic terms.

This point about temporality and financial management brings us back to one of Handler's great insights about welfare budgeting in his collaboration with Michael Sosin:

> When the individual or family, in real life, cannot manage on the basic income maintenance grant, emergency or special needs assistance is required. The terms "emergency assistance" and "special

obligation to contribute financially, the Court has not extended that standard to those who might, in actuality, violate their legal obligations. *See* Schweiker v. Gray Panthers, 453 U.S. 34, 47–48 (1981). *But see* N. Coast Coal. v. Woods, 168 Cal. Rptr. 95, 99 (Ct. App. 1980) (striking down a regulation presuming financial contribution by an unmarried cohabitant, notwithstanding that state law required such contributions). Thus, the administrability problems have been finessed by simply assuming complete income and consumption sharing among spouses and between parents and children.

156. *See* MEASURING POVERTY, *supra* note 10, at 85–86; *cf.* Lee Anne Fennell & Kirk J. Stark, *Taxation Over Time*, 59 TAX L. REV. 1 (2005) (analyzing the importance of the time period over which income is measured for tax purposes).

157. 316 F. Supp. 264 (E.D. Pa. 1970).

158. *Id.* at 269.

159. *Id.*

160. *Id.*

> needs" imply a difference from the "usual" needs provided for in the basic grant.
>
> . . . .
>
> . . . Emergency assistance and special needs decisions are potentially politically dangerous insofar as they involve moral decisions about how the poor should live.[161]

And among the most morally fraught of these decisions, they observed, was what to do about recipients who sought "duplicate" payments. These claimants, according to the official budget, had received income sufficient to cover their needs, but they nonetheless came up short before the next payment was received.

A thoroughgoing focus on actual resources would seem to demand a means test that refuses to distinguish among reasons why the money ran out before the end of the month. Additional resources should be provided regardless of whether that month's payment had never arrived, been stolen, been lost, or simply been spent. Disagreement about the particulars notwithstanding, it seems preposterous to think that there is no relevant difference among cash that gets stolen, lost, or burnt for sport. The distinctions among these scenarios will sound all the usual themes of personal responsibility, extenuating circumstances (insecure mailboxes in a rundown building in a high-crime neighborhood, etc.), and allowance for fallibility that are so familiar from the standard examples of behavior judged for deservingness.[162]

Not only penny-pinchers will refuse, at some point, to get into these details and insist instead on sticking with a fixed, standardized budget. For one thing, note how tremendously intrusive these inquiries become, sharply raising the classic worries about administrative surveillance and discretion. But beyond those concerns, standardization cuts both ways. What if there is a little money left over at the end of the month? What if someone manages to spend a little less on rent than the budget called for? A truly individualized emphasis on "actual" need would treat this as a miscalculation in the means test and seize the surplus. One of the functions of cash grants and standardized budgets is to do

161. HANDLER & SOSIN, *supra* note 13, at 8, 13.

162. Similar dynamics arise on the need side of the means test. Consider the household that runs short because an essential household item—food, or a stove, or a heater—becomes unavailable. Replacing the item drives monthly need above what the budget assumed, rather than driving monthly resources below it. Again, the same old issues of deservingness lurk. Was the item stolen? Did it break? Whose fault was it? Were adequate precautions taken? Would a prudent person have set aside some funds for the contingency of life's petty cruelties?

just the opposite, to allow recipients to reorder their consumption priorities and practices, to scrimp in one domain in order to buy a pair of "Sunday shoes."[163]

This observation about the consequences of frugality and self-deprivation returns us to my earlier points about economies of scale. Sharing housing (or food) imposes certain burdens on co-residents, both in terms of reduced space per capita and in terms of coordination and privacy. It also reduces financial costs. One approach would peg financial support to the assumption that transfer recipients accept those burdens in order to realize those savings. Another would assume the opposite, providing the higher benefits necessary to enable separate living but letting a recipient pocket the difference if she takes the more frugal path. When both living patterns coexist, the first choice will create shortfalls (and demand for special supplements to cover excess housing or food costs) that may be interpreted as a sanction against those who are undeserving for lack of sufficient frugality. The second choice will create surpluses that can be saved or spent on items not stipulated as necessary;[164] whether such surpluses will be seen as suspect and potentially fraudulent (as Simon and the *Castillo* Court did) or as rewards for virtuous frugality will depend in great part on a moral assessment of the underlying behavior. Unsurprisingly, economic gains from nonmarital co-residence are treated with great suspicion, while those from child support cooperation or employment are encouraged and endorsed with incentives built into the means test.[165]

B. The Progressive Potential of Revisiting the Morality of Need

In its most familiar form, the deservingness analytic suggests that moral judgments could, in theory, be stripped out of antipoverty programs by unburdening them of behavioral and status requirements and instead making them responsive purely to need: We should aid all the poor without judgments of deservingness. The previous Subpart argued that there is deservingness all the

163. Lucie E. White, *Subordination, Rhetorical Survival Skills and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990).

164. *See* Cooper v. Swoap, 524 P.2d 97 (Cal. 1974) (rejecting on state statutory grounds a state regulation that deemed AFDC recipients to receive "noncash income" from the savings generated when two single mothers shared housing).

165. In order to incentivize child support cooperation and employment, means tests commonly disregard some child support or employment income when subtracting resources from needs, thereby effectively raising the living standards of such recipients above the level at which others are deemed no longer "needy." *Cf.* tenBroek & Wilson, *supra* note 16, at 270 (noting that earnings incentives create "an exact contradiction of the means test and all of its basic implications").

way down, that no amoral core of pure need exists untainted by behavioral expectations. For one committed to the repugnance of deservingness distinctions, this unhappy discovery may prompt a further search for some other foundation for social welfare policy, one secure against the relentless drive of moralism. And, indeed, there is a long tradition disparaging means testing and endorsing alternate bases of redistribution. In the United States, the most common foil is Social Security, often portrayed as "basically value-neutral"[166] and distinguished by its "relatively few judgments about the decisionmaking of claimants," which allows it to focus on "protecting those unable to work from innocent hardship."[167]

In the short space remaining, I want to suggest why there may be benefits to stopping the headlong flight from deservingness,[168] notwithstanding the obvious risks. The argument has two parts, both of which I have developed at greater length elsewhere.[169]

First, by declining to offer up financial need as an amoral foil, those of us critical of deservingness as implemented in contemporary welfare policy can broaden our critique by opening up the black box of need and scrutinizing its contents. I focus below on the reduction of economic need to market consumption, but other targets might include definitions of family and household[170] or assumptions about geography and mobility.

166. Super, *supra* note 20, at 2037 n.9.

167. *Id.* at 2061.

168. As a separate matter, this flight appears futile, as others have shown that social insurance programs' substitution of loss for need as the basis for public support provides no escape from moralism. *See* ABRAMOVITZ, *supra* note 19, at 261–66; DEBORAH STONE, THE DISABLED STATE (1984); Matthew Diller, *Entitlement and Exclusion: The Role of Disability in the Social Welfare System*, 44 UCLA L. REV. 361 (1996); *see also* Califano v. Boles, 443 U.S. 282 (1979); Califano v. Goldfarb, 430 U.S. 199 (1977); HANDLER & HASENFELD, *supra* note 4, at 91–97, 110–13; Michele L. Landis, *Fate, Responsibility, and "Natural" Disaster Relief: Narrating the American Welfare State*, 33 LAW & SOC'Y REV. 257 (1999); Lucy A. Williams, *Unemployment Insurance and Low-Wage Work*, *in* HARD LABOR: WOMEN AND WORK IN THE POST-WELFARE ERA 158 (Joel F. Handler & Lucie White eds., 1999). Nor is there any necessary connection between social insurance and bright-line rules that insulate claimants from individualized scrutiny and bureaucratic discretion. Not only may assessments of inability to work lack such insulation, but means testing is administratively capable of providing such insulation, as negative income tax proponents argued and today's Earned Income Tax Credit bears out.

169. *See, e.g.*, Zatz, *supra* note 14; Noah D. Zatz, *What Welfare Requires From Work*, 54 UCLA L. REV. 373 (2006).

170. *Cf.* Laura A. Rosenbury, *Friends With Benefits?*, 106 MICH. L. REV. 189 (2007) (discussing the potential for extending family law protections to relationships not necessarily structured by sexual intimacy or a shared household); Laura A. Rosenbury & Jennifer E. Rothman, *Sex in and out of Intimacy*, 59 EMORY L.J. 809 (2010) (discussing the potential for disarticulating legal protection for sexuality from its connection to conventional domestic intimacy).

Second, by not attacking behavioral conditions and status requirements simply for being moralistic, we prod ourselves to develop affirmative accounts of the moral goals of social welfare policy that explain the appropriate scope and limitations of such conditions. With respect to work requirements, for example, we would shift from the brute fact of conditionality to critical analysis of what activities ought to count as work, how much discretion recipients should have over what work they do, how much work is enough, and when all or some work should be excused. Existing work requirements may be inappropriate not because they are moralistic but because they are immoral. Other obvious topics include matters of marriage, child support, and reproduction.

Critically scrutinizing means testing and reimagining work requirements go hand in hand. What connects them is the linkage between work and household resources pinpointed by Handler and Hollingsworth forty years ago.[171] Analyzing work as a way to generate resources to meet household needs suggests different questions than those raised by treating work requirements as the superimposition upon poverty relief of a generalized moral commitment to labor market participation. In particular, whether an activity ought to qualify as work becomes principally a function of its contribution to meeting household needs, not whether in some more general sense the activity is virtuous or socially valuable. The former issue directs us back toward the means test; the latter does not.

Having linked work to need, the vexing question of nonmarket work, especially care for minor children, becomes linked to nonmarket consumption. A pure cash accounting assumes that needs are met through consumer purchasing: The household either buys the relevant goods and services with its own resources, or it uses a cash transfer to purchase them. So long as all needs are met only with cash, defining work in terms of income generation makes perfect sense. But if needs can be satisfied without resort to consumer markets, the door opens to recognizing work that satisfies such needs without yielding cash.

To develop this intuition, I examined the status of childcare in federal poverty measurement in the United States and, in particular, in the state statutory and regulatory authorities specifying standards of need in the Temporary Assistance for Needy Families (TANF) program. The striking result is that childcare has, from the early days of formal poverty measurement to today, systematically been excluded from the baskets of household needs used to construct poverty thresholds and standards of need. This fact is closely linked

171. *See* HANDLER & HOLLINGSWORTH, *supra* note 11, at 78–80; *see also supra* text accompanying notes 125–128.

to both the reality and gendered ideology of childcare's relatively frequent provision outside conventional consumer markets.

No state specifies adequate childcare as among a household's basic needs to be met through its cash transfer program for low-income families with children. This absence is not for lack of specificity more generally. Roughly half the states specify particular consumption needs meant to be covered by their programs (Table 1).[172] In almost all of these states, this includes food, clothing, housing, utilities, and some miscellaneous personal or household supplies. A number of states also explicitly include some medical expenses

172. Table 1 is based on my review of the statutes and regulations governing the Temporary Assistance for Needy Families (TANF) programs in all states and the District of Columbia, as of July 2011. Citations are to the most specific statutes or regulations or, if neither addresses the standard of need, the state TANF plan. *See* CAL. WELF. & INST. CODE § 11452(a) (West 2001); CONN. DEP'T OF SOC. SERVS., UNIFORM POLICY MANUAL § 4510.05 (2009); 16-5000-5100 DEL. ADMIN. CODE § 4007 (2011), *available at* http://regulations.delaware.gov/AdminCode/title16/5000/5100/4000/4000%20Financial%20Responsibility-06.shtml#P500_41796; D.C. CODE § 4-205.52(c) (LexisNexis 2009); FLA. ADMIN. CODE ANN. r. 65A-4.220(2) (2011), *available at* https://www.flrules.org/gateway/RuleNo.asp?title=TEMPORARY%20CASH%20ASSISTANCE&ID=65A-4.220; HAWAII CODE R. § 17-678-3.01 (2011), *available at* http://hawaii.gov/dhs/main/har/har_current/Administrative%20Rules%20678.pdf; IOWA ADMIN. CODE r. 441-41.28(2)(a) (2011), *available at* http://www.legis.state.ia.us/aspx/ACODOCS/DOCS/441.41.28.pdf; 921 KY. ADMIN. REGS. 2:016(9)(1) (2011), *available at* http://www.lrc.ky.gov/kar/921/002/016.htm; 106 MASS. CODE REGS. 204.510 (2011), *available at* http://www.lawlib.state.ma.us/source/mass/cmr/cmrtext/106CMR204.pdf; 11-050 MISS. CODE R. § 001 tbl.I (2011); MONT. CODE ANN. § 53-4-602(1) (2011); NEV. DIV. OF WELFARE & SUPPORTIVE SERVS., ELIGIBILITY & PAYMENT MANUAL, C-140 (2011), *available at* https://dwss.nv.gov/index.php?option=com_docman&task=doc_download&gid=313&Itemid=99999999; N.J. STAT. ANN. § 44:10-34 (West Supp. 2011); N.M. CODE R. § 8.102.500.8(D) (2011), *available at* http://www.nmcpr.state.nm.us/nmac/parts/title08/08.102.0500.pdf; N.D. ADMIN. CODE 75-02-01.2-35(2) (2011), *available at* http://www.legis.nd.gov/information/acdata/pdf/75-02-01.2.pdf; OKLA. ADMIN. CODE § 340:10-1-3(10) (2011), *available at* http://www.oar.state.ok.us; OR. REV. STAT. § 411.070(2) (2009); 55 PA. CODE § 175.21(a) (2011), *available at* http://www.pacode.com/secure/data/055/chapter175/055_0175.pdf; TENN. COMP. R. & REGS. 1240-1-4-.23(4) (2011), *available at* http://www.tn.gov/sos/rules/1240/1240-01/1240-01-04.20110228.pdf; 13-170-220 VT. CODE R. §§ 2260, 2261.1 (2011), *available at* http://www.michie.com/vermont/lpext.dll?f=templates&fn=main-h.htm&cp=vtadmin; VA. DEP'T OF SOC. SERVS., TANF GUIDANCE MANUAL § 304.1 (2011), *available at* http://www.dss.state.va.us/files/division/bp/tanf/manual/300.pdf; WASH. REV. CODE ANN. § 74.04.770 (West 2011); WYO. DEP'T OF FAMILY SERVS., PERSONAL OPPORTUNITIES WITH EMPLOYMENT RESPONSIBILITIES, ch. 1, app. A (2008), *available at* http://soswy.state.wy.us/Rules/RULES/7135.pdf. Rhode Island characterizes its TANF program as assisting households with "insufficient income to meet their needs for food, shelter, child care, and medical care" but still utilizes a separate childcare assistance program rather than integrating childcare into its standard of need. R.I. DEP'T OF HUMAN SERVS., RHODE ISLAND WORKS RULES AND REGULATIONS § 1400.15 (2011), *available at* http://sos.ri.gov/documents/archives/regdocs/released/pdf//DHS/6569.pdf.

or transportation, and a few allow for recreation. Connecticut identifies scout uniforms as among a household's basic needs.

TABLE 1. Specified Components of State Standards of Need

	Housing	Clothing	Food	Utilities/ Telephone	Medical	Transportation	Supplies	Other Specified
California	x	x	x	x	x		x	x
Connecticut	x	x	x	x	x	x	x	x
Delaware		x	x	x			x	
Dist. of Columbia	x	x	x			x	x	
Florida	x	x	x				x	
Hawaii	x		x	x		x	x	x
Iowa	x	x	x	x	x	x	x	
Kentucky	x	x	x	x				
Massachusetts	x		x	x				
Mississippi	x	x	x	x			x	
Montana	x	x		x			x	
Nevada	x	x	x	x	x		x	x
New Jersey	x	x	x	x		x	x	
New Mexico	x	x	x	x			x	
North Dakota	x	x	x	x			x	
Oklahoma	x	x	x	x	x		x	
Oregon	x	x	x	x	x			
Pennsylvania	x	x	x	x			x	
Rhode Island	x	x	x		x			
Tennessee	x	x	x	x	x	x	x	
Vermont	x	x	x	x			x	x
Virginia	x	x	x	x			x	x
Washington	x	x	x	x		x	x	
Wyoming	x	x	x	x	x	x	x	x

Childcare's exclusion from the basic definition of household need becomes evident in several other ways as well. New York and North Carolina treat some childcare expenses as a potential "special need" authorizing an individualized increase to the eligibility cutoff or maximum benefit amount.[173] Many other states address childcare through the resource rather than the need side of the means test. These states apply "disregards" that subtract from earned income at least some of the amount spent on childcare. Finally, all states provide separate childcare subsidies to at least some TANF recipients outside the TANF grant calculation as a separate benefit tied to participation in employment or related work activities. All of these policies imply that the basic need standard is expected not to provide an income level sufficient to pay for childcare. Otherwise, there would be no need to address it separately. Moreover, these policies also imply that the exclusion of childcare is not because childcare is deemed to be a luxury rather than a necessity. Otherwise, addressing it separately would be inappropriate.[174]

These policies reflect the construction of means-tested income transfer programs around a family wage model of the household economy. That model assumes a parent (mother) remains outside the labor market in order to care for children while another parent (father) earns cash from employment. The problem of poverty is the unavailability or inadequacy of the breadwinner's wage, which interferes with consumer purchasing. Because childcare is not among the goods and services to be purchased with the family wage, there is no need to include it when calculating the size of government transfer payment needed to substitute for that wage.

This family wage baseline creates two different problems when work requirements are added to a means test. One concerns coverage of childcare costs when no full-time caretaker is available. The other concerns the tradeoff

173. N.Y. COMP. CODES R. & REGS. tit. 18, § 352.1(c) (2011), *available at* http://government.westlaw.com/linkedslice/default.asp?SP=nycrr-1000; 10A N.C. ADMIN. CODE 71W.0409(b) (2011), *available at* http://ncrules.state.nc.us/ncac.asp. This practice appears to have become less common as other means of addressing childcare have grown. *See* HANDLER & SOSIN, *supra* note 13, at 28–29 (reporting three of nineteen respondent states and 24 percent of counties as including childcare as a special need).

174. Similarly, the dominant view in the poverty measurement literature is that childcare expenses should be deducted from income because they are "not really discretionary and hence are not available for consumption of food, housing, and similar items." *See, e.g.*, MEASURING POVERTY, *supra* note 10, at 206–07. Other expenses deemed "discretionary," however, would not be deducted even if, in fact, they lead to reduced consumption of "basic necessities."

between spending time on family caretaking and on market work. Unfortunately, only the first has been analyzed adequately.

As already noted, the standard way to deal with childcare is to treat it as relevant only in households that pay for care. The standard of need may be increased either directly by adding childcare as a special need, or, more commonly, indirectly, by disregarding income spent on childcare, thereby increasing the grant by the same amount. Alternatively, childcare assistance may be provided outside the basic needs grant through in-kind mechanisms like public childcare centers or vouchers. Such policies generally are analyzed as mechanisms to encourage or enable employment, as reflected in the dominance of disregard or in-kind techniques relative to direct augmentation of the standard of need.

Analyzing childcare as a work expense has dramatic consequences for work requirements. When the state commits itself to enabling employment by paying for childcare, it opens up a contradiction at the heart of work requirements. If the rationale for work requirements is understood as intrinsic to the means test, as a technique for reducing need by increasing resources, then employment takes away with one hand what it gives with the other: Increased cash income offsets the needs that must be met through transfer payments, yet employment also creates new needs for childcare that must be met through additional transfers. When childcare expenses equal or exceed earnings (as often can be the case for low-wage workers), the result is that employment fails to reduce, or even increases, the net transfer payments.[175]

This potentially self-defeating aspect of work requirements arises specifically when caretaking and employment trade off against one another. Such tradeoffs do not arise when one adult's work still leaves another adult able to provide care (in a two-parent household with children) or when no care is necessary (in a household without children or with ones in school or able to care for themselves adequately during work hours). Thus, the problem is not so much with requiring work as with how such requirements are implemented.

This flaw emerges from an internal inconsistency in the means test caused by defining needs exclusively in terms of cash expenditure. The difficulty arises whenever there are nonmarket substitutes for cash purchases that meet

175. On the difficulties of escaping this conclusion by invoking longer-term considerations, see Zatz, *supra* note 169, at 405–12. The work expense framework also tends to undermine coverage of these costs. Recipients must request coverage and document that they need it. If they find childcare in some other fashion (like low-cost or free provision from a family member), they do not get the financial benefit of the savings.

consumption needs. Consider the relationship between purchasing all of one's food and purchasing half of it while growing the rest. In the latter case one spends half as much, yet one's food consumption is the same. This differs from a situation in which one simply makes do with less (or cheaper) food, clothing, or housing. The half-time subsistence farmer does not have half the food needs, and someone who grows all her food still needs to eat.

This flaw in means testing can be corrected using an accounting technique that recognizes that equivalent consumption can arise from different levels of market purchasing. By imputing income, a subsistence farmer would be treated as generating income equal to that needed to purchase the food she grows.[176] Such imputations are commonplace in the housing context. Standards of need generally assume housing costs based on recurring rents at market prices. But people often access housing through other mechanisms with lower monthly costs. For instance, in owner-occupied housing (especially if no mortgage remains), the owner's recurring expenses are likely to be below market rents, but not because she needs to (or manages to) consume less. In an early Old Age Assistance case, the Washington Supreme Court approved the agency's imputed income technique for addressing this scenario. Occupying one's own home was deemed to generate income equivalent to the median market rent of other recipients.[177] Consequently, renters and owners would, on average, receive identical benefits, net of housing expenses.[178] More recently, courts largely have upheld the Social Security Administration's income imputation practice for Supplemental Security Income (SSI) recipients paying below-market rents, often while living with family members.[179]

176. *Cf.* 22 VA. ADMIN. CODE § 40-295-50(B)(1) (2011), *available at* http://lis.virginia.gov/cgi-bin/legp604.exe?000+reg+22VAC40-295-50 (characterizing "home produce of the assistance unit utilized for their own consumption" as a source of income, but one to be disregarded). An alternative method of valuing the work—opportunity costs—is inappropriate here because the purpose of measuring income is to determine the extent of resources available to meet designated needs. *See generally* NANCY FOLBRE, VALUING CHILDREN 121–38 (2008) (comparing opportunity costs and replacement costs as valuation techniques).

177. Robinson v. Olzendam, 227 P.2d 732 (Wash. 1951).

178. *See also* MEASURING POVERTY, *supra* note 10, at 245 ("The concept of imputed rent is hardly intuitive or palatable to many people, yet, theoretically, the case is unarguable: owners with low housing costs have more of their income available for consumption of other items (e.g., food) and, hence, not to include imputed rent is to underestimate their income relative to their poverty threshold.").

179. *See, e.g.*, Jackson v. Schweiker, 683 F.2d 1076 (7th Cir. 1982); Nunemaker v. Harris, 679 F.2d 328 (3d Cir. 1982); Buschmann v. Schweiker, 676 F.2d 352 (9th Cir. 1982); *see also* 106 MASS. CODE REGS. 204.510 (2011), *available at* http://www.lawlib.state.ma.us/source/mass/cmr/cmrtext/106CMR204.pdf (providing for deeming income from no-cost shelter or food).

Using imputed income to account for market–nonmarket substitution has important implications for work requirements when nonmarket consumption relies on time-intensive nonmarket production.[180] The subsistence farmer grows her own food, and the caretaker cares for her own children. Therefore, time devoted to earning market income competes with time devoted to nonmarket production. Imputing income accounts for these tradeoffs by treating the withdrawal of time from nonmarket production as a loss of one income source, that loss being potentially offset if the time is reallocated toward generating resources in another way, such as earning cash.

Insofar as work requirements extend the means test by treating recipients' time as potentially convertible into resources, it is arbitrary to distinguish between imputed and market income of the same magnitude. Regardless of whether a farmer grows her own food or earns enough money to buy her own food, her food needs are met and no transfer is necessary. Demanding that a subsistence farmer stop farming and earn money will not reduce her unmet needs if compliance means forfeiting imputed income (or increasing recognized needs) that equals or exceeds potential wages. The same is true for a nonmarket caregiver. This is why it often has turned out to be more expensive to enforce work requirements and provide childcare assistance than to provide income support to caregivers. Earnings from even full-time low-wage work can easily fall below the cost of childcare assistance for two or more children.

This argument breaks new ground in its method, not its punch line. Recipients of means-tested transfers should not be required to substitute low-wage work for family caretaking, at least in a wide range of realistic scenarios. Many others have reached similar conclusions, but through either a general critique of conditionality (one that rejects work requirements altogether) or an analysis of carework in terms of its general social virtues, not its features of self-support.[181]

These differences in method matter. First, my argument here tends to differentiate caretaking from other nonmarket production, rather than lumping together all nonmarket work. Community service and childcare both generate

180. In contrast, when using a means test to determine eligibility and benefit size by subtracting income from needs, there is no difference between augmenting income by imputation and reducing needs by the same amount. Unsurprisingly, many programs take the latter approach, varying the standard of need based on housing costs. *See, e.g.*, ALASKA STAT. § 47.27.025(d) (2010); FLA. STAT. ANN. § 414.095(10) (West 2009); WASH. ADMIN. CODE § 388-478-0020 (2011), *available at* http://apps.leg.wa.gov/wac/default.aspx?cite=388-478-0020. This choice of method is largely inconsequential because occupying below-market housing is not time-intensive.

181. For further discussion and sourcing of the points made in this and the following paragraph, see Zatz, *supra* note 14, at 61–63, 66–67.

broad social benefits, but only the latter reduces a household's need for transfers. Second, linking care-as-work to care-as-need ties my critique of caretaking's exclusion from conventional work requirements to a critique of inadequate childcare assistance to households that pay for care. Third, analyzing caretaking work through the lens of means testing facilitates quantitative judgments about how much work is being done and thus can identify circumstances in which market work might be preferred (fewer children, older children). Fourth, linking work to need suggests why work requirements are peculiarly appropriate to means-tested programs, unlike a general concept of deservingness that would seemingly recommend work tests for all beneficial government action; similarly, it suggests why transfers to low-income caretakers may be justified even if universal subsidies for caretaking are not.

My goal in this Essay is not to fully defend this line of argument about childcare needs, imputed income, and work, nor to flesh out the many conceptual and institutional design challenges it raises. Instead, my point is that rejecting the deservingness analytic need not entail simply accepting the conservative welfare policies against which it traditionally has been deployed. To the contrary, amplifying the connections between the techniques of means testing and behavioral requirements often cleaved off as moralistic can produce new sources of critical leverage and open up new avenues for progressive policy design. Precisely because treating need as an amoral, technical concept always involves suppressing its inevitable normative content, opening up that black box provides opportunities for a more comprehensive critical perspective.

CONCLUSION

There is much to praise in the idea that judgments of deservingness distract from the "brutal need"[182] of poverty. I often agree with the specific ends to which the idea has been deployed. The difficulty is not so much that the deservingness analytic has led us astray as that it often leads us to a dead end. We hit those dead ends both by having nothing more to say when others embrace forthrightly moral arguments and by walling ourselves off from critical engagement with the concept of need itself.

At best, invoking the deserving/undeserving distinction as a pejorative operates as a rhetorical shortcut. It displaces sustained normative argumentation about the scope of personal responsibility and mutual obligation, the

182. Goldberg v. Kelly, 397 U.S. 254, 261 (1970).

allocation of those obligations amongst various social institutions, and the range of burdens that constitute the injustices antipoverty policy seeks to alleviate.

This last point bears amplification, in part by suggesting how a narrow, technocratic account of need cuts off certain lines of critique. As we have seen, the deservingness analytic commonly is deployed to argue that the state uses low-income people's reliance on antipoverty transfers as a regulatory lever to impose behavioral requirements to which other citizens are not subjected. This argument constantly collides with the problem that the same behavior often has different consequences when it implicates the poverty status of someone seeking means-tested transfers.[183] "Ordinary citizens" are not required to pursue child support orders or accept employment, but then again, whether they do so has different systemic consequences than for means-tested transfer recipients.

Escaping this problem requires some substantive account of the burdens that the transfer system is meant to relieve or, affirmatively, what it is meant to achieve. Arguably, social welfare policy aims (or should aim) not merely to assure some minimal level of consumption. Instead, it matters *how* one reaches that level, and social welfare policy mitigates the vulnerability created by having to depend on employers or relatives for economic security,[184] protections most citizens take for granted by virtue of their greater resources, among other things. If social welfare policy has these broader aims, then behavioral requirements sacrifice such protections, thereby deviating from the internal goals of social welfare policy rather than merely importing considerations external to it.

One plausible foundation for such an affirmative account of social welfare policy is the social citizenship tradition tracing back to T.H. Marshall.[185] Marshall imagined a political economy that reconciled the class stratification generated by modern capitalism with a commitment to equality among the citizenry. Such equal citizenship was "not inconsistent with the inequalities which distinguish the various economic levels in the society,"[186] yet it demanded a "modicum of economic welfare and security" sufficient "to share to the full in

183. To be clear, I do not contend that *all* behavioral conditions implicate financial need. When they do not, the deservingness analytic may apply in unreconstructed form. *See, e.g.*, Lebron v. Wilkins, No. 6:11-CV-01473-ORL-35DAB, 2011 WL 5040993 (M.D. Fla. Oct. 24, 2011) (striking down a Florida law requiring drug testing as a condition of TANF eligibility).

184. *Cf.* Ann Shola Orloff, *Gender and the Social Rights of Citizenship: The Comparative Analysis of Gender Relations and Welfare States*, 58 AM. SOC. REV. 303, 317–19 (1993) (analyzing social welfare policy in terms of both "decommodification" and "the capacity to maintain an autonomous household").

185. T.H. MARSHALL, *Citizenship and Social Class*, *in* CITIZENSHIP AND SOCIAL CLASS, AND OTHER ESSAYS 1 (1950).

186. *Id.* at 8.

the social heritage and to live the life of a civilised being according to the standards prevailing in the society."[187]

Crucially, Marshallian social citizenship saw economic inequality and insecurity not as intrinsic wrongs but as barriers to "the life of a civilised being" in a consumer society. Thus, Marshall wrote, perhaps quixotically, "If the manager can get a day off for a football match, why not the workman? Common enjoyment is a common right."[188] The example invites the question of what practices constitute "the life of the civilised," but my point here is merely that this seems like the right question to ask.[189]

More generally, the task is to identify behavioral or status requirements that compromise social citizenship by putting recipients to a choice between two or more components of full membership in society. Although formulated differently, this captures the basic thrust of the deservingness analytic's concern with vertical inequality. Roughly speaking, Justice Stevens did just this with his majority opinion in *Saenz v. Roe*.[190] There, the Court held that a basic element of national citizenship was a "right to be treated equally in [a] new State of residence"[191] and therefore struck down a policy of paying lower benefits to recent arrivals from lower-benefit states. As an application of unconstitutional conditions doctrine, this reasoning quickly leads to notoriously vexing questions about the constitutional status of public benefits.[192] If, however, one already is committed to providing some "modicum of economic welfare and security" as a component of full citizenship, then conditionality necessarily entails trading off one such component against another. That argument would hold even if, notwithstanding the *Saenz* opinion's claims to the contrary, mobility was related to need because the claimant could have minimized her financial needs by staying put in a cheaper jurisdiction.

This general point encourages renewed appreciation of Handler's most recent major solo work, *Social Citizenship and Workfare in the United States and Western Europe: The Paradox of Inclusion*.[193] In it, Handler presses his career-long

187. *Id.* at 11.
188. *Id.* at 82.
189. *See* Zatz, *supra* note 169, at 420–21 (arguing that the link between work and self-support cannot "come at the cost of the standard of living that transfers are meant to protect" and that this explains why work requirements always incorporate hours requirements comparable to full-time work and never expect fifty, sixty, or seventy hours of work per week).
190. 526 U.S. 489 (1999).
191. *Id.* at 505.
192. *See* Simon, *supra* note 32, at 32.
193. HANDLER, *supra* note 31.

focus on bureaucratic power and discretion in the administration of public benefits. He argues brilliantly that "inclusion through workfare obligations is contradictory. Positive acts of inclusion necessarily result in exclusion—those who cannot negotiate the barriers."[194] Such exclusion arises unavoidably because, "[i]n addition to the usual forms of bureaucratic disentitlement—delays, frustrations, unfriendly relationships, errors, and so forth—behavioral tests require officials to interpret, apply, and monitor rules and regulations, benefits and sanctions."[195] For the most part, these formulations conceptualize "exclusion" as the fate of those "who cannot, for whatever reason, comply with the rules" and thus are denied benefits.[196]

The most ambitious part of Handler's book criticizes the operation of bureaucratic power even in those circumstances where the claimant *does* comply.[197] Handler never fully explains how exclusion arises from structures that produce the disempowered, dependent, compliant claimant who successfully qualifies for benefits. One readily could provide that explanation with a sufficiently rich conception of the "civilized life" in which citizens are to be included. Put simply, that life includes access to a modicum of economic security without subjection to others' arbitrary exercise of power. On such a view, even those included in a transfer program may have been excluded from social citizenship if institutionalized subordination were the price of receiving transfers.[198] Not coincidentally, similar critiques of employer and family power have long motivated arguments for a robust welfare state.[199]

This line of thought provides a different way to understand, and perhaps to defend, the cramped, mechanistic conception of need long associated with the deservingness analytic. Stripping down the means test to simple, routinized calculations based on readily available information and formal status may well be a highly questionable technique for ascertaining a normatively attractive conception of need. But rather than seeing all that is stripped out as extraneous,

194. *Id.* at 8.
195. *Id.* at 9.
196. *Id.* at 264.
197. *Id.* at 248–72.
198. *Cf.* Devon Carbado, Catherine Fisk & Mitu Gulati, *After Inclusion*, 4 ANN. REV. L. & SOC. SCI. 83, 84 (2008) ("Much contemporary discrimination theory and empirical work is concerned not simply with forces that keep people out of the labor market but also with forces that push them into hierarchical structures within workplaces and labor markets.").
199. *See* Nancy Fraser & Linda Gordon, *A Genealogy of* Dependency: *Tracing a Keyword of the U.S. Welfare State*, 19 SIGNS 309 (1994); *see also* ABRAMOVITZ, *supra* note 19, at 394; Erik Olin Wright, *Basic Income, Stakeholder Grants, and Class Analysis*, 32 POL. & SOC'Y 79, 83 (2004).

moralistic baggage, we might instead see such a means test as a bulwark against denying social citizenship with one hand while purporting to grant it with the other, an attempt to avoid bureaucratic subordination as the price of economic security.

Such an argument, however, risks proving too much. Handler and others have carried the argument against bureaucratic exclusion to the point of eliminating not just the work test but the means test, too, and embracing a universal basic income instead. Indeed, if I am right that no hard distinction lies between behavioral and financial eligibility requirements, then rigorously rooting out the former will eliminate the latter as well. This brings us to a new paradox. Handler's quest has been to remove social welfare policy from "the shadow of the 'sturdy beggar,'" to abandon its obsession with "separat[ing] the 'deserving' from the 'undeserving' poor."[200] Yet eliminating distinctions of deservingness requires abandoning any policy targeted toward the poor.

Although a universal basic income has much to offer as one component of social welfare policy, it offers no silver bullet precisely because of its insensitivity to differences of need.[201] We cannot escape deservingness. There is no avoiding the fraught and unseemly business of distinguishing among those who ought and ought not receive transfers.

The critical spirit and moral vision that have animated Handler's work can survive acknowledgment of deservingness's inevitability. Indeed, it can thrive on it. The analysis of need, care, and work I sketched above represents one nascent attempt to make good on this promise by reconstructing the means test and integrating it with work requirements, the opposite strategy from insulating need from critical scrutiny and splitting off behavioral requirements as intrinsically suspect. This approach opens a new path toward the old goal of reducing the categorical structure of the welfare state.

Integrating childcare into the means test attacks the newest categorical distinction that separates "welfare" from "work supports" for "the working poor." Moreover, the function of the categorical distinction between families with and without children erodes once general purpose means and work tests incorporate the economic significance of children and child care.[202] These

200. HANDLER, *supra* note 31, at 277.

201. *Compare* Charles Murray, *Guaranteed Income as a Replacement for the Welfare State*, 3 BASIC INCOME STUD., no. 2, art. 6, 2008, *with* Almaz Zelleke, *Review of Charles Murray, In Our Hands: A Plan to Replace the Welfare State*, 3 BASIC INCOME STUD., no. 1, art. 8, 2008.

202. *See* Noah D. Zatz, Accounting for Care in the Age of Work (Sept. 16, 2010) (unpublished manuscript) (on file with author).

features hark back to the hopeful, ambitious days of the negative income tax (NIT) and the Family Assistance Plan (FAP), which in the 1960s and 1970s promised to unify antipoverty policy by focusing eligibility on income alone.[203] For Handler and his cohort, the core virtue of the NIT and FAP lay in the concept of "need, defined in dollar amounts."[204] The Achilles' heel, from left and right, however, was always work.[205]

Controversies over work will never go away because there will always be disagreement over how hard, long, and cheap someone can be expected to work without sacrificing "the life of a civilised being." Handler, however, was too pessimistic when he predicted that the means-tested but noncategorical design of the FAP ultimately would fail because "[t]he measure of non-deviant behavior is the ability to earn one's living, not to earn one's living *partially*."[206] He saw "absolutely no evidence to support the notion that the working poor have deserving-poor status."[207]

By now, however, even in this conservative age, we do have evidence that large-scale, nonstigmatizing income transfers are possible to low-income families for whom "work is not enough,"[208] not merely to those for whom work is deemed impossible. That evidence lies in the massive growth of the Earned Income Tax Credit and childcare assistance aimed at the working poor, and in the similarly striking growth of the Food Stamps program after it was reoriented to include the working poor while maintaining its noncategorical, means-tested structure. This experience suggests that there remains room to maneuver on the field of means testing, at least if one engages issues of work. The intuition driving this Essay is that the way forward requires not setting need and deservingness at loggerheads but instead embracing, critically, their inseparability.

203. *See* Kornbluh, *supra* note 56, at 66–67, 83.
204. HANDLER, *supra* note 2, at 142.
205. *See generally* William E. Forbath, C*onstitutional Welfare Rights: A History, Critique and Reconstruction*, 69 FORDHAM L. REV. 1821 (2001) (criticizing income-based welfare rights strategies for incompatibility with a political tradition linking economic inclusion to work).
206. HANDLER, *supra* note 2, at 152.
207. *Id.*
208. ROBERT P. STOKER & LAURA A. WILSON, WHEN WORK IS NOT ENOUGH (2006); Robert Haveman, *When Work Alone Is Not Enough*, LA FOLLETTE POL'Y REP., Fall–Winter 2002–03, at 1.