A Truly Good Work: Turning to Restorative Justice for Answers to the Welfare-to-Work Dilemma

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By Marie A. Failinger*

The welfare work debate is a long-standing and seemingly endemic part of any program of public assistance, one of the enduring themes of Western public assistance programs. For its longevity and the fierceness of debate around the subject, it competes only with one other theme in modern welfare history: the exclusion of strangers seeking public aid through various residency restrictions. Indeed, in contemporary America, the requirement that recipients work for welfare has become practically dogma: “the proposition that welfare recipients should be required to work in exchange for their benefits has achieved such widespread support that arguments to the contrary have been relegated to the political fringes.”

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1 See Larry Cata Backer, Los Fingidos Y Vagabundos: On the Origins of Personal Responsibility and the Welfare State in Early Modern Spain and its Implications for Welfare Reform in the United States, 3 LOYOLA POV. L.J. 1 (1997) (noting that “the sixteenth century witnessed a great poverty debate in Imperial Spain very similar to our own today,” with the “traditional religious establishment, advocating little government intrusion into the provision of welfare and advocating strict religious instruction as a means of curbing poverty and deviance, while permitting all who sought it to beg for their keep” and “the big government advocates, insisting that the state ought to have primary responsibility for the administration of relief, that there ought to be a strict separation between the able-bodied and the deserving poor, that the able-bodied ought to be forced to work, and that the state ought to provide training but no jobs.”); but See also Alexia Pappas, Note, Welfare Reform: Child Welfare or the Rhetoric of Responsibility, 45 DUKE L.J. 1301, 1311 (1996) (suggesting that the joining of work to public assistance programs has been in evidence since the early 19th century).


workhouses in the 18th and 19th centuries, or work rules imposed on beggars in medieval Europe, or today’s TANF requirements, work rules, like the poor, we seem to have always with us.

While there has been significant debate over whether work rules are the product of Protestant attempts to align paid employment with moral virtue, or the result of economic cycles which put pressure on public economic actors to provide incentives to the unemployed to seek work rather than public assistance, what is rarely debated is the proposition that work programs do not work very well. From conservative perspectives, they do not work because they do not result in long-term gainful employment for

5 See Cata Backer, supra note ___ at 48-49 (1997) (describing how France and Spain for centuries utilized a regulated system proposed by Cristobal Perez Herrara in the 16th century, in which “the deserving poor would be given written licenses to beg while the undeserving poor would be told by the corregidore to stop begging or be punished. The undeserving were to be given thirty days to find work.”)
7 See Harold Berman, The Spiritualization of Secular Law: The Impact of the Lutheran Reformation, XIV J.L. & RELIG. 313 , 334-35 (1999-2000) (noting that the Reformation, while placing more emphasis on the responsibility of the community to help the needy, “was less tolerant of the sins of sloth and greed that it identified with various forms of poverty, including begging and vagrancy”) Lisa Crooks, The Mythical, Magical “Underclass”: Constructing Poverty in Race and Gender, Making the Public Private and the Private Public, 5 J. GENDER RACE & JUST. 87, 97-98 (2001) (describing De Toqueville’s views that public assistance caused dysfunction among the poor and that public charity allowed workers “to choose not to work without jeopardizing their standard of living.”) But See Cata Backer, supra note 1, at 23-25 passim for a discussion of the similar views of Catholic Spanish theologians like Juan Luis Vives that linked work with virtue.
8 See, e.g., FRANCES FOX PIVEN AND RICHARD CLOWARD, REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE 198-99(1971)(arguing that the expansion of public welfare programs was “a [political] response to the civil disorder caused by rapid economic change. .. “)
virtually all public assistance recipients, i.e., the promise of an end to welfare “as we
know it.”\textsuperscript{10} Such work, conservatives believe, is necessary because under previous
programs that did not require recipients to work, “welfare recipients were mired in the
culture of poverty, unwilling or unable to become self-sufficient.”\textsuperscript{11} From the perspective
of liberals, who “view[] welfare recipients as largely the victims of circumstances who
needed time and support to get their lives together” or whose chief work should be taking
care of their children,\textsuperscript{12} these programs do not work because they focus on the wrong
things. That is, they focus on work incentives and conditioning public benefits on
mandatory work or training, rather than on increased benefits to alleviate need and
improved access to, and simplification of, services. \textsuperscript{13}

At a deeper level of values conflict, one author suggests that the contemporary
debate over welfare work programs:

has unfolded as a “struggle between those who valorize individual autonomy and
those who valorize community” The former group, guided by “[a]n ethic of self-
reliance and competitive excellence . . . believe[s] that social welfare programs undermine self-reliance and dampen initiative. The latter group, guided by “an ethic of care and connectedness,” believe well-designed programs can “nurture potential and lay circuits of civic responsibility.”

What should also be commonly agreed upon, but is not, is that public assistance work programs, like the assistance that they accompany, are often saddled with higher expectations than they can possibly bear. Those who have pushed work requirements often impliedly accord them healing or saving powers vastly beyond any realistic ability of these programs, by themselves, to make a difference in the lives of those whom they touch. Much as the criminal corrections programs of the mid-20th century promising life-altering rehabilitation have been all but shelved because they could not achieve the unrealistic results expected, so too, work programs have tended to promise much more than they can deliver.


15 Larry Cata Backer argues that the public believes that these programs do not work is because there is a “fundamental disjunction between the stated goals of poor relief systems and the capabilities of any such system implemented in the United States,” and noting that since the 1964, government has abandoned existing poor relief systems “in favor of more dynamic universality approaches to the problem of poverty and inequality...by embracing the goal of eradicating poverty and abandoning the goal of mere maintenance of the poor...” Cata Backer, supra note 9, 998-99, 1059. (1993).

16 See Michael Vitellio, Reconsidering Rehabilitation, 65 Tul. L. Rev. 1011, 1012, 1025 (1991)(noting that critics of rehabilitation challenged the assumption that “criminals were sick and in need of treatment” and criticized the indeterminacy of rehabilitative sentencing allowing “incarceration as long as necessary to ‘cure’ the offender” because, in their view, studies of rehabilitation showed that it did not work.) See also Eric Luna, Punishment Theory, Holism and the Procedural Conception of Restorative Justice, 2003 Utah L. Rev. 205, 210-11, 252-254 (noting rehabilitation critics’ citation of studies suggesting that treatment programs are largely ineffective at behavior modification,” which led many of them “to adopt the dour position that “nothing works.” Critics also have argued “that rehabilitation programs not only fail to rehabilitate but frequently exacerbate the offender’s connection to crime” because such labeling may “cement [the offender’s] negative identity and connection to a criminal lifestyle.”)
I would argue, however, that because work rules seem to be an aspect of public assistance that will not likely be dislodged in any foreseeable time in the future, there is a more practical and less morally repugnant way to marry work and welfare if proponents of work as well as their opponents would be willing to give up the unrealistic expectations they have placed on state-run public assistance programs, and define a clear and limited relationship between work and need for economically vulnerable people. My thesis: just as it has offered an alternative to both the pure retributivist and rehabilitation models in the area of criminal corrections, the principles and practices of the restorative justice movement offer a better chance to re-shape the relationship between recipient and the community in work programs in a realistic way. Restorative justice can bring together appropriately confined standards of social morality about work with realistic assessments of the complex lives of the vulnerable poor and more useful public interventions in the crises by which these lives are shaped.

In part I, I will suggest that welfare work rules have been influenced by distorted social dynamics based on hidden assumptions that have undermined any realistic assessment of the relationship between work and need, and that the internal values of the law exacerbate those human dynamics. In part II, I will rehearse three of the paradigms that are visible in work rules, paradigms that utilize these distorted assumptions to falsify the relationship between work and welfare in public assistance work programs. In part

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17 Luna, supra note 16, at 288 (noting that “restorative justice is often envisioned as a substantive alternative to utilitarian or retributive approaches to crime” in part because it “emphasizes “healing (restoration) rather than hurting,” and necessarily rejects the retributive idea of “[r]esponding to the hurt of crime with the hurt of punishment.” Yet, “its corresponding value of proportionality is often envisioned as a substantive alternative to utilitarian or retributive approaches to crime.”) (Id. citing John Braithwaite and Heather Strang, Introduction to Restorative Justice and Civil Society 1 (John Braithwaite & Heather Strang eds., 2001).
III, I will suggest how restorative practices might at least begin to break through these
dynamics toward a more humane system of work that promises what realistically can be
delivered.

I. WORK AND NEED: THE DYNAMICS OF DIFFERENCE, BINARIES,
AND PROGRESS

The history of public assistance programs, and the way in which they have shaped
the notion of the deserving recipient, have been influenced by at least three social
dynamics that make these programs politically acceptable at the cost of undermining the
community’s sense of their success. Each of these dynamics exercises a negative
influence on how welfare and work programs are understood and assessed.

The first dynamic results from what philosopher Hannah Arendt claimed was
“the human condition,” the tendency of human beings to find some means of
differentiating themselves from others as a way of expressing their own humanity. The
positive spin that Arendt put on this human drive to distinguish oneself, to achieve
individuality, largely conceals its negative side—the attempt to norm difference in a
manner that benefits the discriminator, to subordinate otherness in order to secure and
justify the self.

The second key dynamic in welfare work programs is related: it comes from the
human drive to reduce complexity to simple categories. The social need to order and find

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18 See HANNAH ARENDT, THE HUMAN CONDITION 175-181 (1958)
security in a constantly shifting world, and particularly in a world that needs to believe
that social arrangements are just, pushes the public and decision-makers to reduce
complex human experience to static either-or categories that I will call binaries: there are
the poor and the non-poor, the deserving and the un-deserving, those who receive welfare
and those who do not, those who work and those who do not.

The third related dynamic that informs the welfare work debate is founded on
Western Enlightenment understandings of temporality that, unfortunately, are at odds
with most human beings’ experiences of their own lives. In the modern account of time,
personal history, like world history, is dynamic and forward-moving. Using this
understanding of temporality, welfare work programs are judged successful if they can
prove “progress” in the welfare recipient’s work and living situation from one month to
the next, one year to the next

A. The Sin of Distinction: Difference as Subordinating

In attempting to describe the first of these dynamics, the human desire to be
distinct, Hannah Arendt praises, yet unwittingly foreshadows, the paradoxical and tragic
way in which this desire results in isolating and shaming welfare recipients even in
relatively equal societies. She first argues:

Human plurality, the basic condition of both action and speech, has the twofold
character of equality and distinction: if men were not equal, they could neither

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19 See PAUL A. CARTER, THE IDEA OF PROGRESS IN AMERICAN PROTESTANT THOUGHT, 1930-1960 1, 18
(1969) (noting J. B. Bury’s explanation that “‘that civilization has moved, is moving, and will move in a
desirable direction. . . that history shows progress’” and his view that “‘the association of the two ideas of
civilization and progress. . . [were] taken for granted’ by modern man.”)
understand each other and those who came before them. . . .If men were not distinct, each human being distinguished from any other who is, was or will ever be, they would need neither speech nor action to make themselves understood. In man, otherness, which he shares with everything that is, and distinctness, which he shares with everything alive, become uniqueness and human plurality is the paradoxical plurality of unique beings20.

Thus, Arendt reveals the paradox that our individuality is rooted in our common humanity and virtual equality. It was the Reformation’s task to re-emphasize how human beings distort this paradoxical tie between individuality and relative equality: as free but sinful creatures, they seize upon individual difference to engage in self-aggrandizing and exploitative behavior while explaining such behavior as morally and socially justified.21 Arendt, who often seemed to minimize this underbelly of the drive for human distinction, at least once recognized its negative social implications. In attempting to explain why race had become so important in America during the desegregation crisis in Little Rock, she chillingly warned that as material and social differences waned, people would cling all the more fiercely to seemingly irrelevant differences such as race to distinguish themselves.22 The implication of her warning is that human beings will symbolically exaggerate these subtle differences as a means of maintaining the superiority of their position and the inferior situation of the other.

20Arendt, supra note 18, at 175-76.
21 See MICHAEL BAYLOR, ACTION AND PERSON: CONSCIENCE IN LATE SCHOLASTICISM AND THE YOUNG LUTHER 159-60, 180-81 (1977) (describing Luther’s view of humans’ tendency to justify themselves.)
Martha Minow offers a somewhat less pessimistic, but helpfully careful list of the assumptions that undergird individuals’ attempts to subordinate each other as they go about the human task of recognizing and accounting for difference. She notes five unstated assumptions that individuals commonly make when they encounter difference: first, that “differences; are intrinsic, rather than viewing them as expressions of comparisons between people on the basis of particular traits;” and second, that our unstated point for comparing ourselves to others “promotes the interests of some, but not of others; it can remain unstated because those who do not fit have less power to select the norm than those who fit comfortably within the one that prevails.” 23 Third, she notes, “we treat the person doing the seeing or judging as without perspective, rather than inevitably seeing and judging from a particular situated point of view.”24 Fourth, humans who have the power to evaluate “assume that the perspective of those being judged are either irrelevant or are already taken into account through the perspective of the judge.”25 And finally, “there is an assumption that the existing social and economic arrangements are natural and neutral.”26

This dynamic embeds itself in the structure of welfare work expectations, and there are historical evidences of it back many generations. Welfare recipients are not like “you and me,” the dynamic reminds us; and in their difference, they are inferior, morally as well as socially. Those who have the power to set the terms of the program, whether

23 MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW 50-51 (1990)
24 Minow, supra note 23, at 52
25 Id. at 52.
26 Id.
they are members of the general public who clamor for welfare reform or the social workers who carry the programs out, identify and shape the norms that separate them from recipients in ways that exclude themselves from the undeserving. 27 “Our” lives, they cry, are the baseline by which the success of welfare recipients’ lives should be measured. Indeed, welfare recipients themselves engage in recreating hierarchies of worth by describing how they are unlike others on welfare due to some distinguishing factor—an unusual misfortune, a lingering illness, the underwaged job they hold down, their successful children. 28

Making charity public, a responsibility of government, does not necessarily undermine this dynamic, much as reformers may have hoped it would. 29 Besides their

27 See WILLIAM RYAN, BLAMING THE VICTIM 7, 8 (1971)(describing the separation out and stigmatization of social victims who “‘have’ the problem in question,” identification of the “defect, the fatal difference, . . . located within the victim” that permits the humanitarian to “concentrate his charitable interest on the defects of the victim, condemn the vague social and environmental stresses that produced the defect (some time ago). . . .and ignore the continuing effect of victimizing forces (right now).”

28 See, e.g., Frank Munger, Dependency by Law: Poverty, Identity and Welfare Deprivation, 13 IND. J. GLOBAL LEGAL STUD. 391, 406-410 (2006) (describing interviews with low-income health care workers formerly on public assistance, and noting that the welfare stereotype “reinforces their identities as women who do not receive, and do not want to receive, welfare” and “provide[s] a foundation for the identities they prefer, allowing them to distance their identities from welfare.”) Munger quotes one former recipient, “There's, there's [sic] a lot of people that make it look bad for people who are really trying to do something but still need those services. I don't support girls who just lay around having babies and expect to receive food stamps. I would support someone who is in the same position like me, either working and going to school and just somehow just can't afford it or they were already just having kids and they're trying to get their life together now and they still need those services.” Id.

29 See Michelle van Wiggerin, Experimenting with Block Grants and Temporary Assistance: The Attempt to Transform Welfare by Altering Federal-State Relations and Recipients’ Due Process Rights, 64 Emory L.J. 1327, 1352(1997)(noting that welfare reformers of the 1960’s and 1970’s advocated for the recognition of welfare recipients’ personhood through “a constitutional right to minimum subsistence and housing, to child care, education, employment, health insurance, retirement, and to a clean and healthy natural environment.”) A modern example of the impetus to undermine the shame dynamic is President Bill Clinton’s comment after PRWORA was passed in August, 1996: “Today we are ending welfare as we know it, but I hope this day will be remembered not for what it ended, but for what it began: a new day that offers hope, honors responsibility, rewards work and changes the terms of the debate so that no one in America ever feels again the need to criticize people who are poor or on welfare.” Remarks by President Clinton at the Welfare Reform Bill Signing (Aug. 22, 1996) (visited Jan. 17, 1995) <http://
ability to be comprehensive and predictable in offering aid to the needy, one of the advantages that government-run public assistance programs seemed to offer was their ability to remove the dynamic of shame from the receipt of charity. Perhaps welfare reformers thought that government regulation of private benefits would disrupt that moment of charity in which the donor could feel superior to the recipient and shame her by expressing pleasure in her unequal status. Perhaps advocates thought that state aid would prevent private donors from using their power to exact conditions such as gratefulness or other behaviors from the recipient as a condition of the gift. Substituting a professional who underwent significant educational socialization prizing objectivity and respect for the dignity of the individual could perhaps break links in the chain of charitable shaming.30

However, given the hardiness of this human desire to subordinate the other by highlighting her difference, it is little wonder that notions of relative worthiness would creep into government-run programs. Perhaps unexpected, however, is that those programs, structured by law, would reify the very shaming dynamic that they were structured to avoid.31 Countless stories by welfare recipients illustrate that the urge to

30 See Paul Legler, Beyond Legal Rights? The Future of Legal Rights and the Welfare System, 6 B.Y.U. J. PUB. L. 69, 71 (1992) (noting that “the goal of the social worker was purported to be one of rehabilitation of the poor individual,” with the professional acting in “a professional manner with the best interest of the individual in mind.”)

31 See Legler, supra note 3-, at 71 (noting that, “[i]n reality, the social worker was subject to pressure and constraints of budgets, pressures from the bureaucracy above and social, and community pressure. The result was. . . .[individual discretionary decisions based on] budgetary considerations based on the
shame recipients is not tied simply to the fact that the donor is giving his own “largesse” to the recipient. Many welfare bureaucrats have turned out to be even more ruthless than private donors in designing an architecture of relief that plays on recipients’ dependencies and low self-esteem by shaming them either to stay away from the welfare office or embarrassing them or wearing them out as they went through the application process.\(^{32}\)

These behaviors are not simply those of white, middle class social workers who perceived significant differences between their own situation and those of their clients. As just one illustration, when I was a Legal Aid attorney, the local township trustee or “ overseer of the poor” as he was statutorily called----a popularly elected non-professionalized African American official with an African American woman as his chief deputy---organized his second-floor poor relief office so that recipients would have to take the back stairs to apply for poor relief, while all others could enter by the front door.

\(^{32}\) See Lucie White, *No Exit: Rethinking “Welfare Dependency” from a Different Ground*, 81 GEO. L. J. 1961, 1979 (1993) (noting the message to leave welfare that “is reinforced by a culture within the AFDC program--of sub-poverty level benefits, continual surveillance, and ‘hateful’ bureaucrats.”); Susan D. Bennett, “*No Relief But Upon Terms of Coming into the House—Controlled Spaces, Invisible Disentitlements, and Homelessness in an Urban Shelter System*, 104 YALE L.J. 2157, 2159 et seq (1995)(describing “discouragement” practices meant to “deter poor people from applying for public benefits” by making “the process of applying for benefits so war is some and unpleasant that the applicant simply gives up and goes away.”) Bennett notes that most frequently, these offices use “‘verification extremism’, the unnecessary demand for hard-to-obtain proof of eligibility for the benefits as a prerequisite to filing an application,” misinforming or withholding information--about benefits generally, the applicant’s eligibility for a particular benefit, or the status of her application for that benefit--and demanding the physical presence of the would-be applicant during every step of the process.” *Id. See also JODY RAPHAEL, SAVING BERNICE: BATTERED WOMEN, WELFARE, AND POVERTY* 113 (2000) (where Bernice notes that as a welfare recipient, she was part of “an untouchable class. . . . Because they are already suppressed by being on welfare, these women are already there” and noting that this makes such women prime candidates for abusive male behavior); David J. Kennedy, *Due Process in a Privatized Welfare System*, 64 BROOKLYN L. REV. 231, 247 (1998) (noting that in New York’s welfare system, “bureaucratic inconsistency, arbitrariness, and cruelty were rampant. One reporter found an applicant with two contradictory documents, one cutting her benefits off for missing an EVR interview and a second verifying that she had in fact made the interview. AIDS patients who missed their EVR appointments had their benefits canceled even though the only reason they had missed their appointments was because they had been hospitalized.)
Indeed, the legalization of welfare should be expected to exacerbate the dynamic of subordination of difference. While many have leveled detailed critiques of the way in which the law governing the lives of the poor is pervasively and profoundly unjust, the natural expectation of lawmakers, as well as the public that influences them, is to seek to conform the law to the demands of justice. In the contemporary situation where the law either controls or seeps into the interstices of most aspects of social life, the capability of the law to do justice in any meaningful sense will be profoundly challenged, especially if justice is defined broadly to include distributive justice.

If, however, the law cannot be made to do justice to the poor because of economic scarcity or the lack of political will, lawmakers and administrators have a powerful unconscious incentive to eliminate the “cognitive dissonance” (or perhaps more properly, “moral dissonance”) by convincing themselves that the law is just. Lawmakers and administrators may have experienced little difficulty landing jobs in the existing economic system. If their urge to justify and elevate their own situation is as powerful as the Reformers claim, lawmakers and administrators will easily assume that their own personal situation is “natural and neutral,” to use Minow’s language, an objective baseline from which others’ efforts to become workers can be judged rather than the


34 See Minow, supra note 23, at 52.
product of a particular and blessedly easy upbringing. But to complete the logical circle, if the welfare work requirement is just—if recipients can justly be made to find permanent, living wage employment while putting their babies in day care---then the recipient who cannot or will not conform to work rules is herself acting unjustly and is worthy of censure.

The fact that this conclusion is embedded into law makes its pronouncements even more punishing to the welfare recipient. Law sounds a depressingly consistent “no” that charity does not. In a system of largely private charity, such as house-to-house or on-street begging, an impoverished person might encounter judgment and refusal from one person he asks, but at least has the chance to experience compassion and gift from the next, or the next after him.. (This is not to diminish the profound and lingering shame experienced by a truly destitute person who encounters both refusal and judgment by the prospective donor on the street.) However, when it becomes illegal to beg and the poor must turn to public authorities, the rule tying work to subsistence is inescapable for the poor person. Even with the kindest caseworker, the law consistently sends a message of unworthiness to the welfare applicant, a message that is dressed in the neutrality and purported fairness of the law itself. The law itself makes an incessant and consistent demand to produce on the recipient that an individual donor, in a moment of compassion, might relax. And the kindest caseworker herself, over time, is likely to reduce the dissonance she experiences again and again each day in favor of the law and

35 See Cata Backer, supra note 9, at 294-301 (describing ancient, medieval European and early American attempts to regulate begging.)
the regulations, rather than becoming an “outlaw,” attempting to manipulate and even violate the system of laws in favor of a just result for the recipient.

B. The Tyranny of Legal Binaries

Closely related to this first dynamic is the second: the propensity of the law toward simplification of reality and thus toward the creation of binary categories for the provision of public benefits. In their simplest form, these binaries state, if you are X, you are eligible for government assistance; if you are not X, you are not. 36 Eligibility binaries, which are uniformly enforced, are the hallmark of legal systems because they appear to create order and security. They provide generally consistent treatment, permit forecasting of government action, reduce spiteful and arbitrary decisions by government actors, provide an accountability standard, and notify recipients clearly of what is expected.37 Uniform application of clear binary rules for need is thus necessary for the central value of governmental due process, as well as for transparency and a public sense of fairness in the administration of governmental programs.38

However, the uniform application of binary categories of eligibility requires simplification of complex human experience. First, such categories depend on simple explanations of causality—i.e., human vice causes unemployment so benefits will be given only to the virtuous, or the labor market causes unemployment so benefits should be given to those who lose their jobs in market downturns. The reality that many, if not

36 See Simon, supra note 29, at 16-17 (noting the dichotomy between children and insane persons who were granted assistance and other poor people who were not.)
37 See Christine Cimini, Principles of Non-Arbitrariness, Lawlessness in the Administration of Welfare, 57 RUTGERS L. REV. 451, 526-27 (2005) (noting how legal regulation of welfare programs is designed to “protect against irrational discretion and help ensure that agency decisions are not entirely absurd or indiscriminate. . . require[d] an objective basis for enforcement, be fairly and equitably applied,” and “provide for accountability and reviewability of governmental action in accordance with the law.”)
38 Id.
all of these factors are simultaneously operating on individual poor people and the very
diverse community in which they live, with resulting economic security, is lost on legal
models. And, even if lawmakers were politically courageous enough to admit this
complexity and willing to consider it in creating welfare programs, the law itself, which
relies on simple and few categories to direct behavior as well as resources, cannot fully
account for or respond to complex causality. The law cannot really account for situations
in which many forces, some of them out of the recipient’s control and some of them out
of the government’s control, conspire to cause joblessness, without so dramatically
complicating the law itself that it comes to a virtual standstill.

Moreover, legal binaries rest on simple psychologies such as the deterrence or
economic models often utilized to explain criminal behavior. According to the
deterrence models, a welfare recipient will be deterred from slacking off if the sanction,
loss of benefits, is large enough to be threatening.39 Thus, if the “bite” into a recipient’s
welfare benefits for failure to seek work is large enough, she is bound to seek work.
According to the economic model, the government must make the combination of work
and welfare attractive enough to welfare mothers to outweigh the benefits of staying
home and collecting welfare benefits.40 Thus, for example, expanding the earned income

39 A. Mechele Dickerson, American’s Uneasy Relationship with the Working Poor, 51 HASTINGS LAW
JOURNAL 17, 23 (1999) (noting that “[t]o deter welfare opportunism and discourage the needy from
becoming economically dependent on the assistance, early forms of public financial relief provided meager
benefits which were administered in ways designed both to stigmatize the recipients of the relief and to
encourage them to engage in socially desirable behavior, i.e., keep (or get) a job rather than quit (or not
look for) one and apply for public welfare relief.”) For a discussion of the criminal deterrence theory, See
FRANKLIN E. ZIMRING AND GORDON J. HAWKINS, DETERRENCE: THE LEGAL THREAT OF CRIME CONTROL,
98-100, 131-138, 141-149 (1973)
40See Kathryn Lang, Note, Fair Work, Not “Workfare”: Examining the Role of Subsidized Jobs in
Fulfilling States Work Requirements under the Personal Responsibility and Work Reconciliation Act of
tax credit and the provision of day care may just be enough to incentivize a welfare mother to endure the other hassles of working, such as loss of parenting time, stress at juggling numerous responsibilities, and so forth.41

Jody Raphael’s wonderful socio-biographies, Freeing Tammy42 and Saving Bernice,43 are an extended journey into two poor women’s lives that demonstrate the fallacy of the simple causal and psychological pictures pervading welfare programs organized in legal binaries. Tammy’s story is a rollercoaster of ascent and descent into periods of wellbeing and wholeness followed by economic, social and psychological devastation. On one view, Tammy is well-deserving of public support: she fiercely cares for her child, she is unflaggingly loving and loyal to her husband, she helps out her friends in their greatest need, she is indomitable in the face of adversity.44 On another, the view taken by the legal system, she is an incorrigible criminal: lovingly loyal to her husband, an addict, she does favors for drug dealers to get him the drugs he needs; steadfastly faithful to her friend, she stashes the friend’s drugs in a home safe because the friend is afraid that violent dealers will hurt her to steal them.45 Courageous in standing up to her husband by calling the police when he abuses her, she finds her courage rewarded by his blurt ing out that she is holding her friend’s drugs when the police show

41 Id.
42 JODY RAPHAEL, FREEING TAMMY: WOMEN, DRUGS, AND INCARCERATION (2007) (hereinafter “TAMMY”)
43 See Raphael, BERNICE, supra note 32.
44 Raphael, TAMMY, supra note 42, at 12-14
45 Id. at 12-13
up; and her loyalty rewarded by his sale of all of her personal possessions when she is imprisoned on this drug charge.\textsuperscript{46} Worried that there is no one to care for her son, she has him come to court every day to be near her during her criminal hearings, only to be berated and literally punished by the judge who sees him there, calling her a “bad mother” for bringing him to court.\textsuperscript{47} And this is just a brief snapshot of a life that is a much more complex brew of virtue and vice, care and irresponsibility than any legal binary could account for.

In the welfare/work context, legal binaries—eligible/ineligible, ability to work/inability to work, cooperation/non-cooperation in seeking work, indeed the definition of “eligible’ work itself---are not only are unrealistic; they also prove welfare recipients’ undoing. In interpersonal relationships of charity, those who give can consider and negotiate a complex and shifting set of circumstances that may counsel for slightly different approaches to applications for help. For example, the pastor who meets a homeless person at the church door may ask him to sober up and come back if he’s drunk, or may look for a shelter if she’s a domestic victim, or may notice that one person is truly desperate and another seems to be a grifter. But the cost of that discretion is that it comes with the power to shame the desperate so the donor can feel better about himself.

The great strength of legal charity, governed by clear standards and procedures, is that it has the capacity to provide or refuse aid based not on moral character judgments,

\textsuperscript{46} \textit{Id.} at 13-15, 46.
\textsuperscript{47} \textit{Id.} at 18-20.
but on the economic situation of the recipient. (That strength has, of course, not often been utilized in the history of American public assistance programs, which more often than not have devolved into “character improvement programs” with “man in the house” and “suitable home” rules as examples.\(^{48}\)) However, the legalization of public benefits is also the welfare program’s great weakness: applicants are either eligible or not, whether the income of eligible and ineligible is separated by a dollar, whether one is truly hungry with nowhere else to turn and the other has found a way to feed himself. Circumstances that may be relevant to actual need—for example, that a working class family faces an impossible medical bill because their child has bipolar disorder—are ignored by the law unless workers or recipients can mobilize to convince lawmakers to create an across-the-board exception to a general eligibility rule. As just one example, we might remember the lengths it took to convince lawmakers that something might be broken with a Medicaid system that required middle and working-class husbands and wives to “spend down” their income to poverty to keep their spouses in a nursing home, or else get a divorce so their income would not be counted anymore.\(^{49}\) The elimination of discretion that is the hallmark of the modern welfare state is also its undoing, because the law

\(^{48}\) Kennedy, *supra* note 32 at 238 (quoting Piven and Cloward, *supra* note 8, at 166, noting “A central feature of the recipient’s degradation is that she must surrender commonly accepted rights in exchange for *ad*., AFDC mothers, for example, are often forced to answer questions about their sexual behavior (“When did you last menstruate?”), open their closets to inspection (“Whose pants are those?”), and permit their children to be interrogated (“Do any men visit your mother?”). Unannounced raids, usually after midnight and without benefit of warrant, in which a recipient’s home is searched for signs of “immoral” activities, have *also* been part of life on AFDC.”); *see also* Simon, *supra* note 29, at 2.

\(^{49}\) See John A. Miller, *Voluntary Impoverishment to Obtain Government Benefits*, 13 CORNELL J.L. & PUB. POL’Y 81, 86-87 (2003) (noting enactments finally obtained in 1988 and 1996 to “minimally protect the healthy spouse . . . from being impoverished by the long-term care costs of the unhealthy spouse” due to spend-down provisions.)
cannot “see” the particulars that discretionary systems would find meaningful in adjudging need (even “meritorious” need.)

When this need to seek binaries is coupled with the impetus to find justice in existing law, the temptation to separate applicants for aid into deserving and undeserving, with a bright line between the two groups, is irresistible. The problem, of course, is that the binary of deserving/undeserving masks the way in which real human beings slip between those two categories on a daily basis. In the welfare work setting, for example, an otherwise diligent job-seeker may be sanctioned because she refused to accept a job at an employer who treated her rudely and condescendingly in an interview in order to protect her sense of self-worth. Or, a relatively steady worker might lose her welfare benefits because she came to work drunk the day after her husband abused her and was fired for cause. Or, a TANF mother may exhaust her federal five-year benefits limit because nobody realized that her seeming unwillingness to seek work stemmed from severe and undiagnosed depression.

Even circumstances not occasioned by the recipient’s own behavior might result in sanctioning by a law-structured welfare system: for example, any number of welfare recipients have lost their jobs and jeopardized their benefits because their car breaks down and they have no way to work, or their day care falls through and they cannot risk leaving their kids at home unattended. By contrast, middle and upper class workers (or parents) who slip into “unworthy” behavior that affects their work performance are

50 See Lens, supra note 6, at 258.
51 See id. at 264-265 (noting that the most common reasons for non-compliance with work rules are illness or disability, lack of transportation, and child care.)
usually afforded a cushion of forgiveness for their occasional lapses or failures, or have some economic fallback for catastrophic events, such as insurance or sick leave. Those who live on the edge of economic insecurity generally do not. A highly law-structured welfare system cannot cope realistically with the precarious edge between security and insecurity on which poor people teeter.

C. The Hypocrisy of Progress

The third related dynamic that informs work-welfare debates is founded on the deeply held Western view of time as progressive, rather than cyclical or episodic.52 Adopting progress as not only a descriptive but a normative assumption about time, the public and its agents conclude that the value of welfare programs is dependent on whether we can measure “progress” in a welfare recipient’s situation from Time 1 to Time 2. By this standard, the simple act of assuaging a poor child’s hunger pangs or relieving a mother’s emotional insecurity by providing her with a rental payment is an inadequate, if not complete irrelevant, measure of the success of a public assistance program. Rather, lawmakers, bureaucrats and the general public measure the success of public assistance programs based on whether fewer recipients are on the rolls in 2007 than in 2000,53 and on an individual basis, whether Sally Doe has a better, more permanent job in May than she had in January.

52 See Carter, supra note 19, at 14-15 (noting H. G. Wells’ post World War II view that “human history is neither progressive nor providential nor cyclical, but simply meaningless,” and the attempt to trace any progress futile.) Carter describes the post World War II critics of the notion of historical progress, including Toynbee’s view that “if there is ‘progress’ in history it is at the expense of civilizations. . . “ Id. at 18-19..

53 See Matthew Diller, The Welfare Revolution: Rules, Discretion and Entrepreneurial Administration, 75 N.Y.U. L. Rev. 1121, 1123 (2000)(noting that public discourse about PRWORA has been dominated by the tremendous decline in welfare rolls, which has been touted as proving that welfare reform is a “great success.”)
The problem with a welfare system that measures its success, and worthiness, by a “progress” yardstick is that neither social and economic systems nor individual human beings function according to a progress model. Even the most basic biological point can illustrate this: few people would claim that as a specimen of physical and biological health, a 90-year-old man has “progressed” beyond a 21-year-old athlete. Real people in their real lives—all of them (no matter their social or economic wealth)—experience “ups and downs,” in their work, interpersonal relationships, and any other measure of human well-being. Many, if not most, real people would describe their existence as a “plateau” for long periods of their lives; if they were asked whether their economic situation, family relationships, or employment, was “progressing,” the answers would be mixed. Others would point to dramatic or slow-going declines in life situation. As previously suggested, for many poor people, for reasons within and beyond their own control, these “ups and downs,” progressions and reversals, are even more pronounced because the smallest reverses can have the most devastating impacts. A mother who cannot afford to replace the dead battery in her car may be forced into a downward spiral of job loss, loss of paid child care that makes job-seeking possible, loss of her family’s shelter when she can’t pay the rent because of her lost job, loss of her physical and mental health because she and her family are sleeping on the streets, loss of her children because of her illness, and so forth.

Thus, a welfare system whose public measure of success is dependent upon a welfare recipient’s being better off in five years (and thus not as dependent on the government), or on the reduction of welfare rolls over a period of time, is virtually
guaranteed to fail because its design bears no relationship to actual human experience. In such circumstances, those who design welfare programs are faced with two unpleasant options: first, they may acknowledge that the program has failed to “show progress” and attempt to re-engineer it with yet another set of criteria that also are doomed to fail. At a certain point, however, welfare program designers run into the increasing cynicism of a public that fails to see progress, and wants its money back. 54 In these circumstances, welfare program designers must make more and more implausible promises that the increasingly lower percentage of tax dollars the public is willing to put into welfare programs will yield greater and greater “progress” for individual recipients and the welfare population as a whole. Thus, welfare program designers have to promise that not only will these quick-fixes help find recipients stable jobs, they will also reduce crime, increase the educational success of recipients’ children, provide more stable living communities made up of those who now can afford to buy homes, and so forth.

Alternatively, welfare program designers may hide their failure to show progress by “cooking the books,” by taking credit for success that is not attributable to the program’s criteria, or by pretending to a success that has not been achieved. Thus, for example, welfare program designers are quick to take credit for an uptick in welfare recipients’ employment that is probably more likely due to a more robust economy and the sudden need for workers that allows even less-skilled workers to get jobs. 55 Or, they

54 See Diller, supra note 52, at 1171 (noting that welfare trainers instruct caseworkers to emphasize that “‘public sentiment indicates that the majority of people are no longer willing to tolerate having their tax dollars spent on welfare programs that foster lifelong, intergenerational habits of dependency.’”

55 See id. at 1125-1126 (noting that while much of the decline in the welfare roles is due to a strong economy and increasing minimum wage, about 1/3 of the decline has been documented as attributable to changes in welfare programs, most notably procedural conditions that make it more difficult to retain benefits.)
may tout the success of a program that has fewer TANF recipients on its rolls, neglecting to point out that many of these persons were “kicked off” the rolls because they were sanctioned for failure to follow work and other program rules, because they reached the end of their 5-year eligibility, or because they are getting by with the aid of less-visible charities such as food shelves, clothing drives, and hospital emergency room health care.

The increasing disjuncture between real experience and the promises of public welfare programs is, of course, not a given, but it is probably an ineluctable result of welfare programmers who feel obliged to show economic, social and moral “progress” of welfare recipients rather than simply the alleviation of human need and suffering. These three background assumptions—the drive to use difference to subordinate, the impetus to classify needy persons into binary groups, and the temptation to prove the “progress” of welfare programs----feed the paradigms that have infected welfare work debates and models over the years.

II. MODERN PARADIGMS OF THE RELATIONSHIP BETWEEN WORK AND WELFARE

Given that the history of welfare work programs is so lengthy and that it is difficult for lawyers, at least, to be true experts on such a vast history, it is tempting to

56 See Joel Handler, The Third Way or the Old Way? 48 KANS. L. REV. 765, 791-92 (2000)(noting the estimate that “between October 1996 and June 1997, of those who left the rolls, more than a third were the result of sanctions for violating program requirements,” and that a substantial number were terminated under stricter time limits than the 5-year limit required by the federal law.)
want to tell a reductionist story about the development of welfare work rules that suggests a conscious, unified approach to the problem of the poor and work in various historical stages. Any truthful history defeats such an easy theoretical approach because it is at once more contested and multifarious, and at the same time, often more subtle and unconscious, than any theorist would like to make it. Nevertheless, there are a few “story lines” on the relationship between welfare and work that recur, gaining a dominant voice in some historical periods and a somewhat more muted ones in other periods, and then coming to ascendency again. Thus, rather than trivializing any historical period, I will talk about paradigms---coherent voices that I believe one can hear on a recurring basis on these themes---the punitive paradigm, the medical paradigm, the quantum meruit paradigm---and suggest why each of these paradigms has failed to successfully explain the welfare-work conundrum in a way that can undergird a sound welfare work policy. Some welfare models have their parallels in criminal theory, and so as we consider whether a restorative justice approach to welfare and work is plausible, we might at least briefly note the parallels in the argument.

A. Work as Punishment

The first, and possibly most ancient, paradigm that shapes public approaches to work and welfare is the punitive paradigm, or what is called in criminal law the retributive approach to offender behavior. In this paradigm, the welfare recipient whom the public has in its “mind’s eye” as it pushes lawmakers to reform welfare programs has offended community norms. While in some times, the most prominent of these offenses have been sexual—i.e., having babies out of wedlock, living “in sin” with non-legal partners, etc—a common imagined offense is that welfare recipients have chosen not to

57 See Diller, supra note 3 at 19.
hold down a job even though they are perfectly capable of doing so. Thus, this view would hold, the economic vulnerability and social chaos in which welfare recipients live is their “just desert” because they will not work, unlike the rest of “us;” and it is not up to the state to intervene to help them re-stabilize their lives. The state or the community is no more responsible to help than it is to provide “three hots and a cot” (if even that) to an incarcerated criminal offender. In some periods and some circles, this claim has been made in theological terms---in the view of some public officials, such persons have committed an offense against God. More recently, it is perhaps more common to hear a secularized version of this claim that plays off the modern assumption that ignorance and naivete are greater failings than moral dereliction: one might hear the remark, “if she is so stupid as to (stay with an abusive partner, hold drugs for her friend, quit school before she has her degree, etc.), she deserves what she gets.”

Even in those welfare work programs that do not explicitly admit that they are punishing past behavior by failing to extend services, the signals in this direction are clear. In some eras, “workfare” programs have set recipients to work on the most menial of jobs, from cleaning trash from streets and parks, while suggesting that they should not complain about the lack of training for employment that would provide them with meaningful work and self-sufficiency. Other programs have limited, either by

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58 See, e.g., Larry Cata Backer, Los Fingidos Y Vagabundos: On the Origins of Personal Responsibility and the Welfare State in Early Modern Sain and Its Implications for Welfare Reform in the United States, L 3 LoyoLa Pov. L. J. 1, 23 (1997) (noting Cotton Mather’s statement that “for those who Indulge in Idleness [and poverty and idleness were synonymous in this context], the Express Command of God unto us, is, That we should let them starve.”)

59 See id at 30 (noting that New York City’s workfare programs have largely put people in jobs such as “cleaning parks, sweeping streets and performing clerical duties in municipal offices, . . . [though] only a few hundred [of the 35,000 involved] receive any job specific training through the program.); Noah Zatz,
caseworker inaction or by policy, those supportive services provided to recipients who have not demonstrated sufficient “hustle” in seeking work in the past.\textsuperscript{60} Still others have purposely set ceilings on the aspirations of welfare recipients in order to signal to them that they are not deserving of a second chance due to their past history: For example, Indiana’s work rule at one time provided that AFDC recipients who attended college would not be provided transportation assistance, while recipients who attended training schools or found paying jobs could.\textsuperscript{61}

This paradigm, of course, plays off all three of the assumptions I have described: it posits that (a) that welfare recipients are not equally deserving because, unlike you and me, they make poor decisions about relationships, education, and work; (b) that it is possible to clearly separate those who are deserving from those who are undeserving because their stupid or wrongful behavior (poor judgment, laziness, etc.) is different in kind from yours or mine; and (c) that welfare recipients get what they deserve because they have “regressed” from some imagined moment in childhood or youth when they had the opportunity to “move forward” and chose not to do so. In reality, however, the line between the employed “deserving” and the welfare “undeserving” proves to be thin on all three of these assumptions. \textsuperscript{As earlier suggested, even the rich make poor decisions about relationships, education and work, yet they have the wherewithal (often not of their

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\textit{Welfare to What, 35 Hastings L.J. 1131, 1141 (2006) (describing workfare jobs such as “filing papers, sweeping streets, or picking up trash in parks or office buildings.)} \\
\texttt{\textsuperscript{60} See Diller, supra note 53, at 1170 (noting that under PRWORA, supportive services such as training and child care are seen “as a method of eliminating ‘excuses’ for nonwork, rather than a means of meeting legitimate needs. In accord with this view, the welfare worker appears as a kind of coach whose goal is to get the client to ‘kick the habit,’ through a combination of exhortation, assistance, and threats.”)} \\
\texttt{\textsuperscript{61} Mugg v. Stanton, 454 N.E.2d 867, 868 (Ind. App. 1983)}
\end{flushright}
own making) to avoid the “punishment” of economic insecurity and the need to ask others for financial assistance.

Matthew Diller points out the irony of this paradigm when it is applied to welfare recipients who are doing exactly what is expected of them—working;

[T]he larger question is whether mothers who labor in workfare programs will receive the social status traditionally accorded to those who work--will workfare be regarded as the social and moral equivalent of a job? The answer is clearly no. Workfare workers are still stigmatized as welfare recipients, a status perceived as a mark of social failure in society. Moreover, a pay check is not comparable to a welfare check. Welfare recipients receive none of the freedom and control over their lives enjoyed by individuals who receive wages. Instead, the welfare system rigorously monitors and regulates almost all aspects of their lives.  

The difficulties with using a punitive paradigm in welfare work rules are not dissimilar to the problems the paradigm causes in its traditional location, the definition and punishment of crime. To the extent punishment through work requirements is meant to “specifically deter “ recipients from getting into a situation of need again, it is unlikely to work in most cases because decisions about getting up and going to work on any particular day are influenced by a host of complex factors that may be even more

62 Diller, supra note 3, at 28.
63 See Zimrig and Hawkins, supra note 39, at 98-100, 131-138, 141-149 (describing human irrationality with regard to the choice to engage in criminal behavior; the authors describe how impulsive behavior, despair, ignorance about choices and penalties provided for criminal behavior or inability to calculate harms versus benefits make the foundations of deterrence law problematical.)
compelling to the recipient than the prospect of losing her welfare benefits----
unimaginable as that may sound to middle-class ears. For example, for the mother of
small children whose day care has fallen through, the scary prospect that her children, left
alone, might be injured or killed or that the welfare department may find out and take
them away would loom larger than any threat that next month, she will receive a benefit
sanction. Moreover, as Raphael has documented in story after story, the working partners
of abusive spouses may encounter a host of shaming and terrifying tactics by their
partners who are attempting to prevent them from gaining their independence.\textsuperscript{64}

The binary of law contributes to the impetus to separate the worthy worker from the
unworthy non-worker by creating “objective” standards that do not permit explanation
and do not consider critical realities that affect the ability of recipients to comply with
objective rules. As one example, when I practiced law in Indiana, work rules required
recipients to turn in a stated number (often 15 or 20) of affidavits from employers that the
recipient had been there to look for work as a condition of continuing their welfare
benefits. While caseworkers may have looked the other way at times, the original rules
themselves did not spell out any context that would relieve recipients from such
obligations. It did not seem to matter “to the rules” that, for example, a recipient might
not have any means of transportation, or she might not have the means to bathe and dress
herself decently enough to walk into an employer’s office with a shot at a job. Given
these contextual realities, not seen by “objectified” standards, the process of job-seeking
deteriorated into a meaningless exercise of affidavit-seeking by recipients. Finally, given
that they too were imbued with the notion that work means progress, and that progress is

\textsuperscript{64} See Raphael, BERNICE, \textit{supra} note 32, at 31-41.
expected, recipients who are unable to find manageable or meaningful work due to their contextual limitations may lapse into hopelessness or depression because of their failure to “move forward” as expected.

B. Work as Medicine: the Illness of Poverty

A second buried paradigm is the illness paradigm, which presumes that welfare recipients are socially and/or morally infected and weakened by their personal history and family circumstances. In terms of the welfare recipient, this paradigm suggests that it is the job of the state to rehabilitate them into social health. In terms of the effect of the mass of the poor on the body politic, we see fearful images of contagion---these poor will affect our healthy social life---with its implicit message that eradication is the only means we have to defend ourselves. It is not difficult to find references, particularly in immigration literature, to the poor as diseases upon the body politic. For example, immigration scholars have documented how Chinese immigrant communities at the turn of the 20th century were described as “...a serious and imminent moral and physical threat to public health and welfare. ...” and individuals as “...‘moral leper[s]’ whose habits encouraged disease wherever they resided....”

Even today, undocumented workers are accused of spreading TB or HIV, or it is not uncommon to talk about undocumented immigrants from Mexico and Central America in terms of contagion.

65 See Diller, supra note 53, at 1169 (noting that “[t]he [TANF work] materials train workers to be relentlessly upbeat about recipients’ prospects for work. For example, they advise workers to smile rather than frown, and to point out that if the unemployment rate in an area is ten percent, then ninety percent of workers are employed.”)


Even the law is not immune from the effect of these paradigms. We have only to look at the ways in which the destitute have traditionally been treated as plagues upon the social body. For a recent class on Saenz v. Roe, in which the Supreme Court once again reminded states that they could not attempt to fence our welfare recipients by paying them smaller benefits than long-time residents, we discussed the Supreme Court’s reference to the Articles of Confederation as a source for this right to travel. However, a number of students hung their heads in embarrassment when we turned to the actual language of the Articles cited in the Slaughterhouse Cases, which reads, “the better to secure and perpetuate mutual friendship and intercourse among the people of the different States in the Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all the privileges and immunities of free citizens in the several States.” Or we might recall Justice Barbour’s conclusion about New York’s bar to impoverished aliens:

We think it as competent and as necessary for a state to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts; as it is to guard against the physical pestilence, which may arise from unsound and infections articles imported, or from a ship, the crew of which may be laboring under an infectious disease.

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69 The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 75 (1872)(emphasis supplied.). See also Todd Zubler, The Right to Migrate and Welfare Reform: Time for Shapiro v. Thompson to Take a Hike, 31 VAL. U. L. REV. 893, 915 (1997)(arguing that Justice O’Connor’s reliance on the Comity Clause to support a right to travel, based on the Articles of Confederation language, must take the “bitter with the sweet,” i.e., the Articles’ exclusion of “paupers, vagabonds and fugitives” from this freedom.)
70 New York v. Milne, 36 U.S. (11 Pet.) 102, 142 (1837)
The illness paradigm also plays upon the three dynamics I have discussed. First, as Johnson and Lakoff have evidenced, illness metaphors are consistently paired with spatial ones: people who are sick are “down with the flu” and “laid low;” people who are well are “in tip-top shape” and so forth. These conjoined metaphors contain the seeds of valuation of the poor as subordinate to the rest of us. Once the poor are identified as sick or as diseases themselves, and therefore “below” the rest of us, it is an easy step to see the poor as less worthy of the basic services and support we all take for granted that the state will provide if we fall into harm’s way. An example in my own home state was the public reaction to the collapse of the I-35 bridge in Minneapolis. The outpouring of public and private support to the victims was remarkable. Even Congress was able in less than a week to appropriate $250 million for a new bridge. By contrast, the many poor recipients who suffer such calamities each day due to family abuse or gun violence have a relative fraction of these services provided as of right; and the pace at which welfare reform programs proceed in Congress is snail-like.

Once the world is divided up into the sick and the healthy, as the binary of the law requires, it is easy to follow through with the medical model for contagious disease by

71 GEORGE LAKOFF AND MARK JOHNSON, METAPHORS WE LIVE BY 15 ([1980])(noting orientational metaphors for sickness and death such as, “He fell ill. He’s sinking fast. His health is declining. He dropped dead.”)

72 See, e.g., Phyllis Coulter and Julie Gerke, Local Red Cross awaiting call for assistance THE PANTAGRAPH, Bloomington, Ill. (August 2, 2007), available at 2007 WL 14854978 (noting support provided by Red Cross and others to victims)

73 Humberto Sanchez, Legislation: Congress Approves Bill Authorizing $250M for Minneapolis Bridge Repair 361 BOND BUYER 5 (august 7, 2007) available at 2007 WLNR 15093141(noting that Congress had sent the President legislation less than a week after the collapse.)
isolating the poor so that their infection need not spread among us, from zoning.
regulations that limit our contact with them by excluding the housing they can afford
from suburban jurisdictions to public transportation systems that speed commuters
through inner cities without stops in unsafe neighborhoods.

The way in which the disease metaphor precludes low-income workers in turbulent
circumstances is almost frightening. Raphael’s Bernice suffers many of the work
challenges that domestic abuse victims attempting to work encounter---from being held
hostage or kidnapped by boyfriends so that they cannot get to work or job training or
education, to being stalked on their way to and from the workplace, to having their
transportation sabotaged and phones disconnected so that they cannot find work. The
stories are so bizarre as to be unbelievable—such as the boyfriend who “shaved off his
partner’s hair in order to embarrass her.” Bernice’s attempt to go back to school to get
her G.E.D. was sabotaged by her abusive boyfriend’s refusal to take her to work, fighting
with her all of the way to school, even hiding her coat in the winter so she couldn’t get to
school. When she registered for medical assistant training, she made it to the 29th day,
when Billy “grabbed Bernice, tied her up, beat her, and raped her.” Immediately she was
labeled as if she were spreading a social disease at work: “Bernice’s swollen face and
bruises garnered a great deal of attention, and the staff did not want her to be in front of

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74 See Timothy Overton, Note, Empty Laws Make for Empty Stomachs: Hollow Public Housing Laws in
Utah and Other States Force the Nation’s Poor to Choose between Adequate Housing and Life’s Other
Necessities, 21 BYU J. PUB. L. 495, 505 (2007 (citing R. Kempler, Annotation, Exclusionary Zoning, 48
A.L.R.3d 1210 § 1[a] (1973).(describing exclusionary zoning as “a form of economic segregation by
restricting land usage . . . to block, or at least limit, the influx . . . of persons having low or moderate
incomes” into a community “often entailing racial segregation.”)
75 Raphael, BERNICE, supra note 32, at 30-40, 121-123/..
76 Id. at 31.
77 Id. at 30.
the patients.” Bernice’s supervisor not only followed her around and watched her the entire day, but gave her a poor report that not only sealed her fate with jobs at her internship hospital but others as well.\textsuperscript{78}

Indeed, the poor understand this metaphor as well as those who use it to subordinate them; and when they do enter the workplace, they fear the stigma of being labeled as socially or morally contagious so much that they will do anything to hide the different lives that they perceive they are living. When Bernice takes a social service job, she hides from the agency the fact that she is being stalked. As she suggests, she believes that she needs to hide her stalking so that people do not treat her as abnormal and look down on her.\textsuperscript{79} However, her strategy of hiding the stalking and abuse from her co-workers backfires: because she deems it necessary to bottle up her anxiety and anger inside, she instead lashes out in anger at her coworkers in inappropriate situations, such as when she receives mild critiques of her work, thus reinforcing her co-workers’ beliefs that there is something wrong with her.\textsuperscript{80} The behaviors that low-income workers and others in such abusive situations exhibit may result in their termination or failure to progress precisely because they do not know what is expected, much less are able to articulate their feelings or to seek either instruction or counseling on how to behave as professional workers are expected to behave.\textsuperscript{81} Moreover, both she and her co-workers, unaware of what she is suffering, expect her to “improve over time,” utilizing the

\textsuperscript{78} \textit{Id.} at 30-31.
\textsuperscript{79} \textit{Id.} at 66 (where Bernice notes that she is not “allowed to have problems or be a real human being.”
\textsuperscript{80} \textit{Id.} at 76-66.
\textsuperscript{81} \textit{Id.} at 77-79
assumptions of the model of progress, while her boyfriend is pulling her back over and over into a “regressive” situation.

C. Work as Payback: The Rationale from Desert

A third paradigm that is particularly vivid in the work setting for welfare recipients is the quantum meruit paradigm, which is based on the strong modern consensus that mothers who receive welfare have the obligation to reciprocate, at least in part by holding down jobs.\textsuperscript{82} I use the term “quantum meruit” to describe the paradigm because, like the contract doctrine, which posits that consideration is owing for work performed “as much as he has deserved” so that unjust enrichment of the recipient will not occur,\textsuperscript{83} the paradigm relies on unspoken and unagreed to assumptions about what is owing as well as what injustice has occurred in conferring welfare benefits on mothers and their children. Of course, in the case of welfare, the actual order of quantum meruit is reversed: in quantum merit, an employer asks someone to work for him and the law implies a promise from the employer to the worker that he will pay a just wage. In the welfare work system, the state provides a specific grant of money to the indigent person and assumes that the welfare recipient will provide a just return to the state, most currently directly in market economy work.\textsuperscript{84} Of course, such “repayment” may also take other forms such as care for the recipient’s children or cooperation with program requirements such as seeking child support, filling out paperwork and jumping through other hoops.

\textsuperscript{82} See Diller, supra note 3, at 19.
\textsuperscript{83} 42 C.J.S. Implied Contracts § 25
\textsuperscript{84} See Diller, supra note 3, at 19, 27(noting that support for the idea that welfare mothers owe something for their benefits has support “across the political spectrum.”)
This paradigm essentially posits that recipients have received an undeserved benefit from the state that they are responsible for repaying, rather than supportive services for which no payment is expected. Again, the binary of deserving and undeserving is demarcated by the law’s eligibility requirements, this time in service of the close connection between income and work in the market economy. The binary traps the low-income worker in a vise: to be eligible for welfare without working, he or she must admit to being so mentally or physically incapable that the “up-down” metaphor of charity can clearly apply. The law reinforces the beggar model of the ancient and medieval worlds, forcing the blind, disabled, and aged to ask for charitable assistance from the government which is granted on the assumption that such people contribute nothing in return.

The paradigm is especially tempting because non-welfare recipients are accustomed to being paid only when they have contributed labor or services to their employers’ business---no work, no pay. However, by diffusing this paradigm and not overtly calling it what it is—i.e., a government employment program—the state can hide the more unsavory aspects of its work programs. For example, as Matthew Diller and others have shown, in traditional workfare programs in which welfare recipients were assigned to such tasks as cleaning streets or public buildings in exchange for their benefits, not all states wanted to ensure that they would be expected to work only that number of hours which would “pay” them at the minimum wage, as any other public or private employer would be required to do.  

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85 See id. at 85-88.
86 See, e.g., Johns v. Stewart, 57 F.3d 1544 (10th Cir.,1995)(holding that workfare participants are not employees for purposes of the FLSA); See also Diller, supra note 3, at 27 (noting attack on Department of Labor ruling that workfare workers should be paid minimum wage.); Lens, supra note 6, at 1143, 1153
Moreover, it goes without saying, neither the government nor the recipient imagined that it would be possible for welfare workers to unionize and demand either the going market rate for the type of employment they were engaged in, or a living wage for their jobs. 87 Further, while welfare workers were entitled to some benefits, such as Medicaid, that comparable low-wage workers in the private sector probably did not receive, it was conversely true that such programs did not guarantee welfare workers other standard perquisites of employment, such as sick or vacation leaves, unemployment compensation when the government could not find them appropriate work, worker’s compensation for injuries suffered on the job, etc. 88

Perhaps most devastatingly, recipients in these former workfare programs, like recipients in modern-day programs who are expected to obtain private sector jobs on their own, are generally not granted the respect offered to other workers in our economy. Employers who have hired such workers, either through programs providing matching funds to encourage hiring of welfare workers, or simply through welfare work referral

87 See Diller, supra note 3, at 27, 28 (noting that the contested Department of Labor ruling applied to the right to collective bargaining, and that labor leaders who attempted to organize workfare participants have been opposed by those who believe they are not “employees.”)

88 See id. at 27-28 (noting states’ refusal to provide unemployment insurance coverage to workfare workers, and refusal to treat benefits as wages for purposes.), 30 (noting New York’s failure to provide Social Security and EITC benefits to workfare recipients.) See also Noelle Reese, Workfare Participants Deserve Employment Protections Under the Fair Labor Standards Act and Workers’ Compensation Laws, 31 RUTGERS L.J. 873, passim (2000) (describing failure of states to provide FLSA, worker’s compensation and other protections to workfare recipients.)
systems, can treat such employees as “charity cases” for whom the employer is being indulgent instead of contributing workers who are entitled to the material and relational dignity due other workers.  

Or, conversely, employers who hire workers from the welfare rolls can ignore the unique challenges that low-income workers face. Although many welfare recipients are employees temporarily dislocated from the workforce, those who have been the hardest to place in long-term private sector employment have never had any significant contact with the private sector workforce, either through parents or in their own right. Employers may be unaware of how the lack of basic instruction and role-modeling in basic work behavior, such as getting to work on time, addressing colleagues, wearing proper clothing, and so forth.

Thus, employers may refuse to acknowledge any personal history that might have an impact on the worker’s ability to learn or do the job according to objective expectations. Raphael’s Bernice recounts how her boyfriend’s success at isolating her from the work world from an early age has stripped her of basic job skills that most people take for granted—she does not, for example, even know that when she calls another organization, she should give her name and the purpose for her call; and she experiences great anxiety even trying to frame an inquiry to her supervisor about how she

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89 Diller, supra note 3, at 28, 31. Diller notes that many workfare participants are being sent to private employers where they can work for less than traditional wage jobs, id. at 25.
90 See Lens, supra note 6, at 261-62 (noting that welfare recipients sanctioned for failure to follow work rules have had longer periods out of the workforce than non-sanctioned participants, and
91 See, e.g., Raphael, Saving Bernice, supra note 32. at 89-90 (describing battered women’s vocational impairments)
should handle a particular job responsibility. Again, as with Bernice, the working welfare recipient’s pride and fear that her incompetence will be discovered provide an incentive to mask her lack of knowledge, so that her performance may appear deliberately lazy or incompetent to a market worker who assumes that all people have such basic skills.

Given the lack of basic preparation for employment that characterizes many job applicants who have spent a significant amount of time on welfare, and the especial challenges their private lives may pose to their ability to be good employees, it is easy to see why a private employer might instinctively conclude that he or she is providing charity to a needy person rather than hiring an asset to his or her company. Seeing employees who lack very basic professional skills come in the door, employers may unthinkingly assume that workers on welfare are not prospects for long-term employment with their businesses, and so fail to take the time to mentor and train these employees for possible advancement within the company. Unfortunately, those programs that have invested in teaching these skills have been both episodic and geographically limited due to the significant resource investment states need to make in order to provide “wrap-around services” to welfare clients struggling with a host of challenges at the same time.

92 Id. at 74-77.
93 See Diller, supra note 3, at 31 (noting that one major public New York employer had not hired a single workfare worker into a regular job); Craig Briskin and Kimberly Thomas, Note, The Wages of Welfare: All Work and No Pay? 33 HARV. C.R.-C.L. L. REV. 559 (1998) (noting that the likely losers in welfare reform will be “low-skilled persons who are either temporarily receiving welfare or who are, perhaps temporarily, in the low-wage labor market” since “the new regime pits workfareworkers against the working poor” and may “create a nasty game of low-wage musical chairs.”)
Ultimately, then, the quantum meruit paradigm which lurks behind many discussions of welfare reform does not reflect the basic fairness and respect for human autonomy and capacity of market-based employment. Nor does this paradigm honestly acknowledge the challenges that many welfare recipients’ lives pose to a market system that expects children and young adults to be acculturated into the basic skills and behaviors of market-based employment.

These basic paradigms—the punitive, the illness, and the quantum meruit paradigms—thus not only employ perverse assumptions about human experience. They actually subvert every proposed goal of the welfare-to-work system. Not only do they make it difficult, even impossible, for many welfare recipients to actually find meaningful work that will guarantee them self-sufficiency.\(^\text{95}\) They undermine the promise of those programs to restore the dignity of the recipient which is in theory and in practice stripped from them by a public assistance system that is “designed to debase,” that uses “social stigma as a device for discouraging welfare receipt” and sends a “message of social failure” which “is as much a part of welfare policy as any of the written rules.”\(^\text{96}\)

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\(^{95}\) See, e.g., id at 20 (noting promise of the 1988 Family Support Act reforms to provide self-sufficiency to recipients.)

\(^{96}\) Id. at 28.
III. TURNING TO RESTORATIVE JUSTICE FOR A BREATH OF FRESH AIR

A. Restorative Justice—A Story

Before discussing why restorative justice might offer a better approach in welfare-to-work programs than traditional professional service models, we might first imagine the experience of a welfare client with limited work skills who is referred to a restorative justice circle as part of a welfare-to-work program:

Janice, 21 years old and with two young children, enters a large room, only to be greeted and hugged by two of the members of her restorative justice circle. One of the members has brought coffee and cookies to share with the group, and they are laid out on a side table. In the center of the room are six chairs, arranged in a circle, and within the circle, a small basket of painted stones and a talking piece, perhaps a stick of carved wood or a feather, are placed in the center. The stones are each painted with one of the values of the circle: honesty, trust, patience, respect, humility, inclusivity, empathy, courage, forgiveness, and love. Members of the circle who have been catching up with each other begin to sit down. Along with Janice in the circle are her aunt, who sometimes cares for Janice’s children, an older member of the church Janice sometimes attends, her welfare caseworker, and three members of the community that she has never seen before she came to the circle. A member of the circle picks up the talking piece and rehearses what the group talked about the last time they met. She hands the talking piece to another

97 See Kay Pranis, Barry Stuart and Mark Wedge, Peacemaking Circles: From Crime to Community 34-45 (2003) (hereinafter Pranis) (describing core values that animate many restorative circles)
member, who reflects on how she thought about Janice’s current situation over the past week.

The talking piece goes around the room, some members of the circle silent the first time they receive it, even Janice’s aunt who is normally very talkative. Janice then receives the talking piece. She mentions some of the challenges that confronted her on her first week on her new job, the first job she has ever held. One of her children has asthma, and had an attack early in the morning of her second day of work, so she had to call her aunt to come get them and take them to the hospital, and so was late to work. She acknowledges that she spent the day petrified that she was going to be fired for being late, because her worker and her boss had drummed into her how important it was to be on time. Another day she was hung over from celebrating a friend’s birthday, and it was hard for her to concentrate on her job tasks. She also breaks down when talking about how she didn’t know how to use the copy machine when her boss gave her a photocopy assignment, and everyone acted as if she should know how to use it. She spent more than an hour trying to copy one piece of paper until she finally figured it out, because she was too embarrassed to admit she didn’t know what she was doing and ask for help.

A community member receives the talking piece from Janice. She wants to know why Janice was so worried about telling her supervisor she didn’t know how to use the copy machine. She relates a story about her own first week at work, and how she completed a lengthy typing assignment, only to discover that she had put the carbon paper in the wrong way and failed to make a required copy, and had to start the whole thing over.
again. She reminds Janice that the supervisor is there to train her in, and gently reminds her that pride can cause a lot of mistakes and waste a lot of the employer’s time.

Occasionally, as the talking piece is passed, a member of the circle will pick up a stone from the middle, and talk about why it is important to what she wants to say or how she is going to phrase something. Janice’s aunt gets the talking piece next, picks up the “honesty” stone, and challenges Janice on her night spent drinking with her friends. She notes that Janice has been out with her friends a couple of weekday nights each of the last couple of months, and wonders why Janice doesn’t try to schedule these outings on the weekend when she doesn’t have work ahead the next day. She expresses concern that Janice’s children get a good night’s sleep before they have to arise early for day care the next morning. Janice, in response, admits that she needs some diversion from all of the stress she is under, but acknowledges that she should make better choices about when she goes out. As the conversation progresses, members of the circle who are talking may pick up a painted stone and relate their comments to the value painted on the stone; Janice’s aunt stresses the value of responsibility painted on one stone. A member of the circle who gets the talking piece next offers to help find some babysitters for Janice on the weekend so she can go out once a week with her friends.

Another member of the circle asks Janice how she enjoyed her first week, and what she has learned about working in a professional setting. With some quiet questioning, Janice spends several minutes recounting what she learned about herself as a worker---what she is good at and enjoys, what she doesn’t like—and then she asks some questions about
encounters she had with others at work and how she should have handled them. As the
talking piece is passed to them, members of the circle take a moment for silence and
thought, or they offer advice. As it is passed to her, another member offers to meet with
her during the week to “play-act” some job situations Janice is encountering and how she
might respond in those situations. At the end of the meeting, Janice gets some more
hugs and reminders that the meeting time has changed for the next week.⁹⁸

A. The Virtues of a Restorative Justice Approach to Welfare-to-Work Issues

While no welfare reform program offers a panacea to the very difficult life
challenges faced by indigent families in America today, the restorative justice movement
offers some potential cautions and opportunities for any public assistance program
attempting to make a real difference in the lives of low-income people. These
opportunities and limits are not currently embedded in legalized benefit programs with
standardized work rules and other sanctionable compliance mechanisms. Restorative
processes have been successfully employed in criminal sanctioning,⁹⁹ where the personal
and social dynamics that result in an individual’s commission of crime are at least as

⁹⁸ This description of the circle process is modeled after a circle experienced by teachers and instructors in
Hamline University’s Middle East Teacher Training Institute and offered by Washington County,
Minnesota’s district court restorative justice circle presided over by Hon. Gary Shurrer. For a description
of the Washington County circle, see Restorative Justice Online, February 2006 edition,
http://www.restorativejustice.org/editions/2006/feb06/webofmonth, visited on October 11, 2007. See also
Pranis, supra note 95, at 93-103. The authors note that the keeper of the talking piece may, when the
talking piece returns to him again, summarize the comments of other participants, ask questions, ask
specific participants to clarify what they have said, start another round, hold it and open the circle for
anybody to speak, or put it into the center for persons who wish to use it to speak up. Id. at 97.
⁹⁹ See, e.g., Darren Bush, Law and Economics of Restorative Justice: Why Restorative Justice Cannot and
Should Not Be Solely about Restoration, 23 UTAH L. REV. 439, 458 (noting lower recidivism rates with
restorative justice.)
complicated as the welfare recipient’s relationship with traditional paid employment, if not more so.

A first caution that restorative justice has to offer is that public benefit programs cannot be constructed around a simplistic anthropology of the person. In their policy form, American public benefit systems have neglected their recipients’ embeddedness in social systems and relationships. In providing both benefits and services, as well as in creating expectations for behavior, including work behavior of welfare clients, welfare programs, following the assumptions of objective legality, generally pretend that these systems and relationships do not or should not influence the recipient’s behavior. Like a criminal trial, they focus on what the recipient has herself done in the immediate past (the past week, the past month) and take no account of long-term past history or the context of the recipient’s life. They do not inquire about abusive family members, unreliable day care providers, chronically sick children, busses that do not run on time or rides that are unreliable, and all of the factors that conspire against low-income workers’ ability to meet the rigid expectations imposed on those who have low-wage jobs.

The restorative justice movement’s anthropological base is at once optimistic—it assumes that people really make changes in their behavior and pattern of life choices—and realistic—it does not assume that this change is easy or that it is simply a matter of

100 See Pranis, et al, supra note 98, at 12 (2003)(describing the restorative assumption that “all things are connected—we live in an interdependent universe” and that we “are profoundly interrelated.”); HOWARD ZEHR, THE LITTLE BOOK OF RESTORATIVE JUSTICE 19-20 (2002)

education or a simple “will to change.” Kay Pranis and her coauthors note: “[f]ew can recover from trauma, take risks, or develop new behavior patterns without caring, supportive relationships. . . . [D]espairing times are an inevitable part of change. . . . Profound life shifts usually involve moving forward and stepping back many times before a new way settles in. . . .”

Indeed, restorative justice does not assume that human beings respond in a rational economic way, tailoring their behavior to avoid economic sanctions and maximize economic rewards. Rather, restorative processes recognize the complexity of human intention and behavior. Good and evil are both recognized for what they are and as part of every human person’s character. The process respects the interplay of personal history, habit, character, instinct, and desire that affects the individuals’ ability to change.

Moreover, restorative justice offers practical processes that actually account for the complexity in a welfare recipient’s situation, behaviors, and character. The restorative circle provides a process for probing needs, drives and desires in a challenging yet supportive setting of people whom the recipient knows are committed over the long-term to her success and who are willing to invest their own emotions and resources and time to make that success happen. They engage all aspects of the person: physical, mental, spiritual and emotional, in the process of communication as well as accountability.

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102 Pranis, supra note 97, at 170, 206.
103 See, e.g., id. at 48-49 (noting the deep fissures and hurtful strategies that can be caused by conflict.) See also Howard J. Vogel, The Restorative Justice Wager: The Promise and Hope of a Value-Based, Dialogue-Driven Approach to Conflict Resolution for Social Healing, 8 CARDOZO J. CONFL. RES. ___ (forthcoming 2007) (p. 14)
104 See Pranis et al, supra note 97, at 10-14.
105 Id. at 72-74.
Second, criminal restorative justice programs secure the personal autonomy of even the worst criminal offenders by offering themselves, rather than imposing themselves, on both offenders and victims. Restorative justice programs are generally not mandated; both victims and offenders in consultation with their legal representatives have to agree to participate in restorative processes before such circles can be convened, and decisions cannot be unilaterally imposed upon offenders without their consent.\textsuperscript{106} Indeed, some restorative justice sentencing circles offered to offenders as diversions from the traditional sentencing system actually reject offenders whom they believe are not there voluntarily, or who are attempting to “game the system” rather than being sincerely interested in participating and changing.\textsuperscript{107} These programs recognize that the most important change in the lives of those who are in trouble is usually internal, and that internal change can only be driven by a sincere willingness of the person to change, not by external sanctions and threats.\textsuperscript{108}

This realistic and multi-faceted approach to human motivation, need, drives, and relationships anchored in the recipient’s willingness to change is much more likely to succeed with a welfare recipient who is facing the employment market than the threat of loss of benefits. Restorative researchers in the criminal setting have shown sanctioning offenders without bringing them to internal accountability for their own wrongdoing can simply create a victim mentality in the offenders. Rather than accepting what they have done and are doing that causes harm to others, sanctioned offenders come to believe (or

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\textsuperscript{106} Id. at 57-58.  \\
\textsuperscript{107} Conversation with Judge Gary Shurrer and members of the Washington County peacemaking circle, July 26, 2007.  \\
\textsuperscript{108} See Luna, supra note 16, at 293-94 (describing need for remorse).
\end{flushright}
to justify their own pre-existing beliefs) that they are the true victims of “the system,” and that any manipulation or “going around” the system is acceptable. 109 Similarly, punishing welfare recipients for their circumstances, many of which are beyond their control, may reinforce to them that they are the victims of an unjust system and permit them to rationalize (sometimes even justly) behavior that does not cooperate with the demands of the welfare system and even behavior that is not in the best interests of their family. The deep anger felt by recipients who feel that demands are placed upon them for marginal benefits with no genuine care or support from those making the demands may come out in negative ways. They may engage in “side” work to feed their families but not report it as required by welfare rules. They may develop the attitude that they need not do their best on a job they have been forced to take, or become insolent when employers they have not chosen to work for engage with them in what they expect will be a shaming experience, as Bernice did.110

Again, the restorative paradigm offers appropriate processes for the recipient to be accountable in a realistic way, factoring in limitations and modifying goals in a flexible manner, which traditional welfare work programs, with their rigid “objective” criteria and time limitations, cannot possibly achieve. As the circle meets on a regular basis, circle members can help the recipient discover and set her own goals for her family and her work life. The goal of the restorative process is not punishment for bad behavior, nor to provide a convenient excuse for workers who have failed to live up to others’ expectations. Rather, it is to hold the recipient accountable to her own self and goals with

109 Zehr, supra note 98, at 16 (noting that the current criminal system encourages rationalization by offenders.)
110 Raphael, Bernice, supra note 32, at 75-76
appropriate regard for unforeseen obstacles she may have encountered that have thwarted her ability to meet her own expectations.\textsuperscript{111} Members of the restorative circle can help the recipient re-focus her goals by injecting realism about her limitations and situation, so that every setback is not a personal failure that inhibits the recipient from moving forward. Unlike much therapy, it is interventionist and dialogical, but the interventions and dialogue are shaped largely by the desire to repair a harmful situation and not to exert “power over” the recipient to “maintain social order.”\textsuperscript{112} Rather, the work of the circle is to “engage ‘power with’—the power of people and communities to connect positively, to confront harms, to address deepen causes, and to seek transformation.”\textsuperscript{113}

Third, restorative systems put significant weight on the interdependence of the community and the individual in the circle, and the acceptance of responsibility by both for the other.\textsuperscript{114} A criminal offender who wants to participate in a restorative circle will not be allowed to “go forward” unless he or she is truly willing to accept responsibility before the circle for what harm his or her actions have caused others.\textsuperscript{115} Conversely, however, rather than dumping the weight of the criminal situation—which is generally larger and much more complicated than the offense itself—on the offender, the restorative circle acknowledges its responsibility to guide and assist the offender in re-integrating himself into the larger community.\textsuperscript{116}

\textsuperscript{111} Pranis, \textit{supra} note 98, at 165-67.
\textsuperscript{112} Id. at 11.
\textsuperscript{113} Id.
\textsuperscript{114} Id. at 12-13; see also Vogel, \textit{supra} note 100, at 20 (text)
\textsuperscript{115} See Luna, \textit{supra} note 16, at 233, 293-94; Pranis, \textit{supra} note 95, at 221.
\textsuperscript{116} Id. at 12-13.
With welfare recipients who are facing public work, this interdependent acknowledgement of responsibility is critical. As Raphael’s Bernice once again shows us, Bernice’s healing begins with her own self-realization about the ways in which she has allowed her abuser to victimize her and her children, a series of decisions which she owns. At the same time, unlike the assumptions of most welfare work programs, she cannot claim sole ownership of the problems which have brought her to the point that she is unable to hold down a traditional paying job. As I have suggested, many other people, both in her past and her present life, have contributed to the problem, some by aggressive defeatist intervention such as her stalker-husband, others by failing to notice her as a person, to give her the space to tell her story in a dignified way, to see what she does not know and to teach her without shaming her as incompetent.

Restorative processes carry through this recognition that the community is as responsible to the welfare recipient as she is to the community in a practical way. As the hypothetical welfare work circle that I described shows, restorative circles not only challenge participants to acknowledge their small failures and successes, but also take action to meet the needs of the offenders. Restorative planners, for example, recount many cases in which the victim of a juvenile offender offers the juvenile a job to work off the property damage he has caused, or becomes a mentor to the offender to encourage him not to re-offend. Other restorative circles may help offenders find work or transportation needed to hold a job so they are less likely to re-offend, and so they can repay their victims for the economic harm they have caused.

118 Pranis, supra note 97, at 167.
119 For other sentencing options, see id. at 187-88.
At the same time, it is critical to acknowledge that the restorative circle may challenge the most cherished notions of the modern liberal welfare program. An overriding message of welfare reform caselaw is that government officials who are granted the discretion to probe recipients’ lives in the manner described in the restorative circle will use it to intrude into privacy of recipients and use what they discover to shame or punish recipients. “Man-in-the-house” regulations in the late 50’s and early 60’s permitted caseworkers to literally search the homes of welfare recipients without a warrant, based on tips, rumors and suspicions, to see if mothers had allowed a man to sleep over or stay in their homes, and to cut off welfare benefits to any families whose mothers had done so. 120 “Child support enforcement” programs in the 70’s and 80’s permitted welfare officials to ask detailed questions about the most intimate of recipients’ relationships in attempts to establish paternity and seek support for children receiving welfare benefits.121 And these are only two of the many intrusive and demeaning practices of welfare programs that are premised upon recipient accountability to welfare programs for the conduct of their entire lives. Even the theorists of the Progressive movement’s social welfare practices, which were founded on values of client autonomy, interdependence, and respect, worried about the caseworker’s imposition of values and judgments on clients in ways that “encouraged claimant dependence and subverted the development of autonomy,” although they worried equally about the corrosive

120 See note 42 supra.
withdrawal into bureaucratic formality that has become the hallmark of the modern system. ¹²²

There is no guarantee, of course, that restorative justice circles will not deteriorate into nosy fishing expeditions that give community and family members power to demean and coerce recipients. However, there are some features of the process that make it perhaps somewhat less likely that these outcomes might occur than in discretionary social service delivery systems or private charity. First, a restorative welfare work process would uncouple the provision of benefits from the circle process, so that any members of the circle who were inclined to “control” the recipient could exercise only moral suasion, not a threat to her benefits. If the recipient was “non-compliant” in the view of the circle, her case would be returned back to another worker who did not sit on the committee for more traditional process rather than allowing the circle to sanction her monetarily in some way for her failure to live up to their demands.

Second, members of the circle would be likely to be both more and less invested in the recipient’s compliance with their expectations. The potential flaw in the Progressive era system of having individual social workers work with clients with virtually unfettered discretion is that such social workers, embracing the ideology of progress, would have their own professional self-esteem (and possibly their status, reputation and economic rewards) very invested in success by their clients. By contrast, the restorative circle will have a number of people whose professional and personal reputation and well-being does

not depend on whether the recipient is successful in their eyes or not; they will be volunteers.

On the other hand, the presence of some professionals in the circle will ensure that the professional expertise and procedural values that are inculcated in professional education will be available to counter any untoward group pressure that might be leveled against the recipient. Moreover, the presence of family and friends who have participated in the recipient’s life and are dedicated to her lifelong success will ensure that the circle is truly invested in the recipient, and not simply a circle of do-gooders who may be inclined to drop the recipient as soon as the problems prove intractable or the recipient resistant to their offers, as private charity often does.

Finally, the more public nature of the circle---with its checks and balances coming from the open discussion among others who have different reasons for being in the circle, who represent different views of the community’s expectations for the recipient---make it much less likely that a single professional worker can abuse a recipient in the process of the exercise of discretion.

Another virtue of the restorative process for such welfare work cases is that restorative justice does not rely on a simplistic or falsified analysis of what makes human beings successful or unsuccessful, even in the very narrow “economic self-sufficiency” sense. Because restorative processes are focused on past, present and future, the drive toward ensuring that individuals are always “progressing” along a scale to some desired
level of economic, psychological and social self-sufficiency will be muted to a large extent. Restorative justice anticipates a bumpy trajectory that may involve some reverses and some stalls in the recipient's move toward her goals for her family. The circle is there not only to bring the recipient to account for the choices she has made, but also to acknowledge that life brings such reverses for us all, and to intervene in a practical way to see whether the external obstacles that have created such reverses can be tackled by circle members in partnership with the recipient, neither solving her problems for her nor expecting her to solve them by herself.

IV. CONCLUSION

As I have suggested, welfare work programs have not caught on to the fact that simplistic work rules that tie benefits (and thus, a mother’s ability to meet her family’s basic needs) to the failure to be successful in market economy work cannot succeed for the same reasons they do not work in criminal sentencing situations. The foundation of these work programs on paradigms which punish recipients, treat them as diseases upon the body politic, or send forth a multitude of unclear expectations about what a recipient “owes” the public for support are ultimately self-defeating. Their embrace of unrealistic expectations about the trajectory of human life, its roller coaster of successes, stalls and defeats, and the critical need for relational support for change to occur virtually guarantees the defeat of these programs.
Restorative programs, by contrast, offer a realistic alternative that takes into consideration the complexity of reasons that individuals need public assistance and obstacles that make it difficult for them to participate in the market economy. Just as they do with criminal circles, restorative circle participants bring with the core values that we may expect those in the market economy to embrace, and participate with welfare recipients in living out those values.

Restorative circles are not “pie-in-the-sky alternatives. They may seem to be economically inefficient, in pairing several members of the community with one welfare recipient rather than one harried caseworker with dozens of recipients. For that reason, local communities who adopt these circles to surround welfare-to-work recipients may find the need to focus their efforts on that subgroup of welfare recipients who cannot easily transition to mainstream employment because of the manifold barriers they face, from lack of education to domestic abuse to limited work skills and family obligations or health crises. However, the promise of restorative justice is that it involves the community as a whole, mostly volunteers, in the process of healing itself. In the process, such programs may serve the additional valuable purpose of dispelling the many myths about welfare recipients and their families. Most importantly, the countless accounts of the success of restorative programs, particularly in the criminal system, attest that restorative justice largely works. Except for its success in scaring or wearing recipients down as they attempt to secure public benefits, the current welfare-to-work effort cannot say the same.

123 Kennedy, supra note 32, at 241-242 (describing the practice of “churning” to make it difficult for recipients to access benefits); Joel Handler, Welfare-To-Work: Reform or Rhetoric? 50 ADMIN. L. REV.
635, 648-49 (1998) (describing ways in which recipients are threatened into finding work, sanctioned for failing to obey rules and sanctioned even when they do obey rules because of bureaucratic errors.)