

# The Public Interest in The Private Law of the Poor

Anne Fleming\*

*This Article begins to explore the uncharted connections between private law and poverty law, revealing a striking pattern that is only visible when these two bodies of law are viewed in the same frame. Many poverty law scholars have focused on the rules that regulate government assistance to the poor. They have left largely unexamined the private law of the poor—meaning, laws that govern the private economic relationships of those living in poverty or in danger of falling into destitution. At the same time, the study of private law is flourishing among scholars who seek to understand the law’s vision of justice in relations between private individuals. But these scholars often seek that vision within the law’s doctrinal structures, which betray little overt concern with poverty.*

*Revealing the connections between the two fields, this Article shows how concerns about public spending on poor relief have shaped debates over the private law of the poor for over a century. It traces the recurrence of one rationale for regulation, the prevention of “pauperism,” that explicitly linked private law rules with poverty alleviation. Proponents of the anti-pauperism argument claimed that private law, if properly structured, could help prevent dependence on poor relief and thereby reduce the burden on the public fisc of caring for poor households. Thus, they imagined the private law of the poor as one component of a larger system of rules designed to keep families self-supporting and off the poor relief rolls.*

*Drawing on original research across a range of source materials, this Article traces the history of the anti-pauperism argument and offers several explanations for its enduring appeal. It then describes the implications of this history for law and economics scholars, for present-day fights against economic inequality and in favor of regulatory reform, and for breaking down the silos between private law and poverty law.*

INTRODUCTION . . . . .	160
I. THE ANTI-PAUPERISM ARGUMENT FOR REGULATION . . . . .	164
A. <i>A Shared Goal Through Different Means</i> . . . . .	164
B. <i>The Old Poor Laws: Excluding and Privatizing Dependence</i> . . . . .	166
1. <i>Migration Rules</i> . . . . .	166
2. <i>Familial Support Rules</i> . . . . .	170
C. <i>The New Poor Laws: Ensuring Worker Independence</i> . . . . .	172
1. <i>Employment Rules</i> . . . . .	172
2. <i>Lending and Debt Collection Rules</i> . . . . .	175
3. <i>Savings Rules</i> . . . . .	179
D. <i>Change over Time</i> . . . . .	180

---

\* Professor of Law, Georgetown University Law Center; Ph.D. (History), University of Pennsylvania, J.D., Harvard Law School. For insightful comments and questions on the ideas presented here, my thanks to Daniel Ernst, Anna Gelpert, Michele Goodwin, Troy McKenzie, Ezra Rosser, David Super, Robert Tsai, Rory Van Loo, and Jay Westbrook, as well as to all those who participated in the American Bankruptcy Institute (ABI)’s 2017 Junior Bankruptcy Scholars workshop, the 2017 workshop on consumer financial protection law hosted by Rutgers Law School’s Center for Corporate Law and Governance, the 2018 annual meeting of the Business History Conference, and faculty workshops at American University Washington College of Law, Cardozo School of Law, and University of Virginia School of Law. I also thank the editors of the *Harvard Law and Policy Review* for their engagement with my ideas and thoughtful suggestions for revision.

II.	THE APPEAL OF THE ARGUMENT . . . . .	182
	A. <i>The Sway of Liberal Individualism over Time</i> . . . . .	183
	B. <i>Variation with Audience</i> . . . . .	184
	1. <i>Politicians Building a Coalition</i> . . . . .	185
	2. <i>Judges Defining the Scope of the Police Power</i> . . . . .	187
	3. <i>Judges and Scholars Explaining Policy Purposes</i> . . . . .	190
	C. <i>Avoiding Contested Values Questions</i> . . . . .	191
III.	IMPLICATIONS . . . . .	194
	A. <i>For Economists: The Allure of Private Law over Taxes &amp; Transfers</i> . . . . .	194
	B. <i>For Modern Law Reform Movements</i> . . . . .	196
	1. <i>Should Advocates for Reducing Inequality Embrace Private Law?</i> . . . . .	196
	2. <i>Should Advocates for Regulation Embrace Anti-Pauperism?</i> . . . . .	199
	C. <i>The Public Interest in the Private Law of the Poor</i> . . . . .	201
	CONCLUSION . . . . .	203

## INTRODUCTION

“Poverty law” usually means the rules that regulate government assistance to the poor. Many scholars have examined this strand of public law, reconstructing the growth of the American welfare state and the lived experience of those who have received cash assistance or other forms of relief.<sup>1</sup> But there is another type of poverty law that has been left largely unexamined: the laws that govern private economic exchanges involving those living in poverty or in danger of falling into destitution, which this Article calls “the private law of the poor.” At the same time, the study of private law has recently enjoyed a resurgence of interest among scholars who seek to understand the law’s vision of justice in relations between private individuals.<sup>2</sup> But

<sup>1</sup> See, e.g., KAREN M. TANI, *STATES OF DEPENDENCY: WELFARE, RIGHTS, AND AMERICAN GOVERNANCE, 1935-1972* (2016); FELICIA ANN KORNBLOH, *THE BATTLE FOR WELFARE RIGHTS: POLITICS AND POVERTY IN MODERN AMERICA* (2007); ANNELISE ORLECK, *STORMING CAESARS PALACE: HOW BLACK MOTHERS FOUGHT THEIR OWN WAR ON POVERTY* (2005); LISA LEVENSTEIN, *A MOVEMENT WITHOUT MARCHES: AFRICAN AMERICAN WOMEN AND THE POLITICS OF POVERTY IN POSTWAR PHILADELPHIA* (2009); MICHAEL B. KATZ, *THE PRICE OF CITIZENSHIP: REDEFINING THE AMERICAN WELFARE STATE* (1st ed. 2001).

<sup>2</sup> On the “new private law” (NPL) and the definition of private law, see John C. P. Goldberg, *Pragmatism and Private Law*, 125 HARV. L. REV. 1640, 1640 (2012). A common insight among NPL theorists is that doctrine matters and must be taken seriously in order to understand private law. See Henry E. Smith, *Intellectual Property and the New Private Law*, 30 HARV. J. L. & TECH. 1, 6 (2016) (“New Private Law [‘NPL’] is a family of approaches united by the commitment to take the structure of private law seriously.”); Jeffrey A. Pojanowski, *Private Law in the Gaps*, 82 FORDHAM L. REV. 1689, 1712 (2014) (noting that recently “a number of legal theorists have sought to defend afresh private law’s distinctiveness from public law” based on the “basic premise that a coherent account of private law on its own conceptual terms is not only possible, but is a superior approach for understanding that body of law”). But NPL has multiple strands and, for some, taking doctrine seriously means understanding doc-

the “new private law” generally seeks that vision within the law’s doctrinal structures, which betray little overt concern with poverty.

This Article begins to explore the uncharted connections between private law and poverty law, revealing a striking pattern that is only visible when these two bodies of law are viewed in the same frame. Drawing on original research across a range of source materials, it shows how the public desire to curb spending on poor relief has regularly served to justify greater state oversight of the private economic exchanges of those living in poverty or in danger of becoming destitute. There has always been a strong public interest in the private law of the poor because a bad bargain in the private marketplace may cause a financially fragile household to fall back on public assistance.<sup>3</sup> Thus, for over a century, concerns about preventing “pauperism” have permeated debates over the structure of private law.

Perhaps because private law and poverty law are rarely viewed through the same lens, legal scholars have not yet examined the “prevention of pauperism” argument as it recurs over a wide expanse of time and across doctrinal categories. Legal historian Charles McCurdy has offered the most extensive discussion of the argument to date, in studies focused on the nineteenth and early twentieth centuries.<sup>4</sup> This Article builds on his work to document the argument’s regular reappearance, beginning in the nineteenth century and continuing into the present day, as a justification for the adoption of minimum wage laws and other rules regulating private economic relationships. It presents evidence that judges, lawyers, reformers, and legal scholars have repeatedly argued in favor of greater state involvement in the commercial relationships and employment contracts of those living in poverty or in danger of becoming destitute, as a means to keep such families independent of state support. Like Albert Hirschman’s *The Rhetoric of Reaction*, which traced reactionary arguments against progressive policies across time in order to show common patterns, this Article similarly tracks the

---

trine as an expression of the law’s value judgments or ideals. See Hanoch Dagan & Avihay Dorfman, *Just Relationships*, 116 COLUM. L. REV. 1395, 1410 (2016) (arguing that private law’s “irreducible value” lies in its articulation of an “ideal of just relationships” between private individuals); Shyamkrishna Balganesh, *The Obligatory Structure of Copyright Law: Unbundling the Wrong of Copying Symposium: The New Private Law*, 125 HARV. L. REV. 1664, 1664 (2011) (arguing that “taking copyright’s legal architecture seriously reveals a matrix of core private law concepts and ideas that are in turn a rich and underappreciated source of normativity for the institution”).

<sup>3</sup> On the meaning and history of the “law of the poor,” see Anne Fleming, *The Rise and Fall of Unconscionability as the “Law of the Poor”*, 102 GEO. L. J. 1383, 1385–86 (2014).

<sup>4</sup> Charles W. McCurdy, *The “Liberty of Contract” Regime in American Law*, in THE STATE AND FREEDOM OF CONTRACT 161, 186–87 (Harry N. Scheiber ed., 1998) [hereinafter McCurdy, *Liberty of Contract*]; CHARLES W. MCCURDY, THE ANTI-RENT ERA IN NEW YORK LAW AND POLITICS, 1839-1865 66, 186 (2001) [hereinafter MCCURDY, THE ANTI-RENT ERA]. This Article builds on McCurdy’s observations of the argument’s appearance in several court decisions and legislative debates, but covers a much broader time period and range of doctrinal areas.

rationales offered for various private law rules to document the recurrence of a single rationale for regulation: the prevention of pauperism.<sup>5</sup>

The Supreme Court's famous decision in *West Coast Hotel Co. v. Parrish*,<sup>6</sup> upholding a state minimum wage law against constitutional challenge, illustrates the anti-pauperism argument at work.<sup>7</sup> As Chief Justice Hughes explained in the majority opinion, the Court upheld the minimum wage law in part because it found that the law advanced the state's interest in reducing the burden on taxpayers, who would otherwise subsidize low-wage employment through poor relief. "The exploitation of a class of workers who are in an unequal position with respect to bargaining power . . . is not only detrimental to their health and wellbeing, but casts a direct burden for their support upon the community," Hughes wrote.<sup>8</sup> "The community is not bound to provide what is, in effect, a subsidy for unconscionable employers."<sup>9</sup> Writing during the Great Depression, Hughes took "judicial notice of the unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent despite the degree of economic recovery which has been achieved."<sup>10</sup> Thus, the state successfully justified its regulation of one subset of private contracts—employment agreements for low-wage workers—on the ground that additional state oversight of these exchanges would limit the burden placed on the state to care for the less fortunate.

This Article proceeds in three parts. Part I surveys the arguments that have been made in favor of regulating the movement, resources, and economic lives of financially fragile households, in order to prevent pauperism and thereby reduce spending on public welfare as well as private charity. It argues that these "anti-pauperism" arguments for regulation fall into two broad groups.<sup>11</sup> The first group comprises arguments made in favor of immigration, migration, and family support rules that aim to exclude or privatize dependency in order to reduce the cost to the public of the poor relief system. The second group comprises arguments made in favor of employment, lending, and savings regulations that seek to ensure workers remain "self-supporting" and do not require public assistance to provide for their families. The first set of rules straddles the boundary between public and private law, while the second rests firmly within the bounds of private law. This Part emphasizes continuity, rather than change over time, in documenting the recurrence of the anti-pauperism argument between the nineteenth century and the present. It concludes, however, with a brief overview of change over

---

<sup>5</sup> See generally ALBERT O. HIRSCHMAN, *THE RHETORIC OF REACTION: PERVERSITY, FUTILITY, JEOPARDY* (1991).

<sup>6</sup> 300 U.S. 379 (1937).

<sup>7</sup> See *id.* at 398–99.

<sup>8</sup> *Id.* at 399 (emphasis added).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> See *infra* Part I.A presenting a typology of anti-pauperism arguments.

time in the intellectual, social, and economic context in which the argument has recurred, as well as in prevailing ideas about poverty, race, and gender.

Part II then offers several explanations for the enduring appeal of the anti-pauperism argument.<sup>12</sup> It concludes that the argument has persisted across American legal and political discourse for a few reasons. First, the argument has recurred at moments of economic upheaval. In these moments, it has offered a compelling justification for stricter regulation of some private exchanges—those involving parties with the least bargaining power and most limited property entitlements—without simultaneously threatening to sweep together all private dealings and place them under greater state oversight. Second, the argument’s appeal has also varied with the proponent’s audience; for example, it resonated with *Lochner*-era judges and with elected politicians for different reasons. Third, the argument has recurred across time because it has provided policy advocates with a rationale for their support that rests on taxpayers’ shared economic self-interest, rather than on other, more hotly contested values.

Finally, Part III explores the broader implications of these findings for scholars of law and economics, for those seeking to fight inequality and advance regulatory reform in the present, and for scholars of poverty law and private law. Along the way, it makes contributions to three bodies of legal scholarship. First, for law and economics scholars, the history of anti-pauperism justifications for various legal rules helps to deepen and contextualize the long-running debate within the field over whether it is better to redistribute resources within society through changes to legal rules or through taxes and transfers.<sup>13</sup> This debate has focused on identifying the most efficient method of redistribution. But, as others have noted, a thorough analysis of the efficiency question must consider the political action costs of each strategy.<sup>14</sup> The history of the anti-pauperism argument suggests one political barrier to tax-and-transfer strategies: the enduring allure of using private law rules, rather than welfare spending, to combat poverty.

Second, the anti-pauperism argument also implicates the broader search for solutions to rising economic inequality, which has engaged politicians as

---

<sup>12</sup> This Article does not attempt to determine how the arguments described in Part I directly shaped the course of policy development on the ground. For example, it is impossible to ascertain if, in the absence of arguments applauding regulation as an alternative to increased spending on poor relief, the New York State legislature would have nonetheless adopted tougher wage assignment rules in 1930s. See *infra* Part II.

<sup>13</sup> For this debate, see, e.g., Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667 (1994); David Blankfein-Tabachnick & Kevin Kordana, *Kaplow and Shavell and the Priority of Income Taxation and Transfer*, 69 HASTINGS L.J. 1 (2017).

<sup>14</sup> On the importance of economists acknowledging not only transaction costs but also “political action costs,” see Lee Anne Fennell & Richard H. McAdams, *The Distributive Deficit in Law and Economics*, 100 MINN. L. REV. 1051, 1053 (2016) (arguing that “[t]aking political action costs into account upends the now-conventional assumption that tax-and-transfer will always trump redistribution through other means”). This Article identifies one reason why the political action costs of taxes are higher than for legal rules.

well as leaders of the world's largest companies.<sup>15</sup> For them, this history shows that the strategy of changing private law rules may offer a more politically palatable mechanism for reallocation of income and wealth, but that this approach has drawbacks as well. Likewise, for those seeking to reform the private law of the poor in the present, relying on the anti-pauperism argument may serve their agenda, but at a significant cost: advancing an understanding of the causes of poverty that may be detrimental to the poor.

Third and finally, for scholars of private law and poverty law, the history of the anti-pauperism argument shows that anxiety about poverty has consistently muddled the boundary between public law fields, such as taxation and social welfare law, and private law subjects, such as contracts and property. For poverty law scholars, it establishes that judges, lawyers, reformers, and legal scholars have often imagined private law as one component of a larger anti-poverty legal regime. Likewise, for scholars of private law, it reveals how concerns about poverty have shaped the discourse surrounding one area of private law—the private law of the poor.<sup>16</sup> Across time, debates over the structure of private law have regularly treated those living in poverty, or in danger of falling into destitution, as raising special public policy concerns because their private contracts may ultimately increase public welfare spending. This Article concludes that poverty and poor relief are essential to better understanding the fractures within the field of private law, as well as its public dimensions.

## I. THE ANTI-PAUPERISM ARGUMENT FOR REGULATION

### A. *A Shared Goal Through Different Means*

Across many areas of law, judges, reformers, legal scholars, and lawmakers have invoked the communal obligation to care for the poor as a rationale for greater state oversight of households living in or near poverty. In each field, they have argued that a goal of regulation should be to shift the burden of caring for the least fortunate from the public fisc onto other communities, nations, household members, employers, and businesses. In other words, the law should aim to make “them,” other people and institutions,

---

<sup>15</sup> E.g., Bill Gates, *Why Inequality Matters*, GATES NOTES, Oct. 13, 2014, <https://www.gatesnotes.com/Books/Why-Inequality-Matters-Capital-in-21st-Century-Review> [<https://perma.cc/5PQ7-68UU>]; Bart van Ark, *At Davos, CEOs Must Address Income Inequality*, CNBC (Jan. 23, 2018, 1:45 PM), <https://www.cnbc.com/2018/01/23/at-davos-ceos-must-address-income-inequality-commentary.html> [<https://perma.cc/5F25-XYGB>] (noting that in 2018, “CEOs expressed heightened concern over the potential impact of income inequality on social and business environments”).

<sup>16</sup> The “new private law” scholarship generally critiques the claim that “all law is public law” and the view that private law is really just an alternative “mechanism for public regulation.” Nathan B. Oman & Jason M. Solomon, *The Supreme Court's Theory of Private Law*, 62 DUKE L.J. 1109, 1117 (2013). This Article does not contend that “all law is public law.” Rather, it attempts to disaggregate “private law” to consider how the discourse surrounding one category of private law, the private law of the poor, has been shaped by the public interest in curtailing the expansion of the public welfare system.

responsible for supporting the poor, rather than place this responsibility on “us,” the taxpayers. Anxiety about the burden of poverty and public assistance has shaped the discourse surrounding the regulation of immigration and domestic migration, family support, employment, lending, and savings.

But the persons who are the objects of regulation and the means of shifting the cost of their support have been different in each field. In the areas of law that are most deeply rooted in the old seventeenth-century English “poor laws”—the rules governing immigration, migration, and familial support—anxiety about public spending on welfare has justified rules targeting those who are deemed to be incapable of self-support. These laws have either sought to exclude poor people from the community or nation, or attempted to privatize their dependency by requiring poor families to support their own indigent members. In contrast, in the areas of law farther removed from the old poor laws—the rules governing employment, lending, and savings—fear of overburdening the welfare system has justified a different type of regulation: added protections for households or their breadwinners, designed to help them to maintain their independence of state support. Thus, in one context the anti-pauperism argument rationalizes laws that have the effect of punishing the poor, while in the other it justifies protective rules designed to shield financially fragile households from overreaching by employers and other businesses.

These two distinct modes of governing also map onto different images of the persons subject to regulation in each of these two legal contexts. In the context of migration and family support laws, the imagined poor in need of support have often been women and children.<sup>17</sup> Especially in the immigration context, they have also often been imagined as “others,” by race or by culture.<sup>18</sup> In contrast, in debates over employment, lending, and savings regulations, the persons subject to regulation have usually been imagined as able-bodied, male heads of households supporting dependent wives and children.<sup>19</sup> The anti-pauperism argument has justified a legal framework that works to exclude and privatize the dependency of the former group of imagined poor. At the same time, it has also justified sheltering the latter group from exploitation by employers and businesses.

---

<sup>17</sup> E.g., MARTHA GARDNER, *THE QUALITIES OF A CITIZEN: WOMEN, IMMIGRATION, AND CITIZENSHIP, 1870-1965* 87–99 (2005); Deirdre M. Moloney, *Women, Sexual Morality, and Economic Dependency in Early U.S. Deportation Policy*, 18 J. WOMEN'S HIST. 95, 97–98 (2006); Felice Batlan, *Déjà Vu and the Gendered Origins of the Practice of Immigration Law: The Immigrants' Protective League, 1907-40*, 36 LAW & HIST. REV. 713, 742–48 (2018).

<sup>18</sup> On race and immigration, see, e.g., Sherally Munshi, *Race, Geography, and Mobility*, 30 GEO. IMMIGR. L.J. 245, 268–70 (2016); Hidetaka Hirota, *Exclusion on the Ground: Racism, Official Discretion, and the Quotidian Enforcement of General Immigration Law in the Pacific Northwest Borderland*, 69 AM. Q. 347, 354 (2017); Cybelle Fox, *THREE WORLDS OF RELIEF: RACE, IMMIGRATION, AND THE AMERICAN WELFARE STATE FROM THE PROGRESSIVE ERA TO THE NEW DEAL* 83–84 (2012).

<sup>19</sup> E.g., Alison D. Morantz, *There's No Place like Home: Homestead Exemption and Judicial Constructions of Family in Nineteenth-Century America*, 24 LAW & HIST. REV. 245, 293 (2006); William T. Vukowich, *Debtors' Exemption Rights*, 62 GEO. L.J. 779, 784 (1974).

## B. *The Old Poor Laws: Excluding and Privatizing Dependence*

### 1. *Migration Rules*

The anti-pauperism argument first appears in the discussion of laws governing immigration and migration, which are generally understood as a species of public law. Although this Article focuses on the argument's subsequent reappearance in private law debates, it begins at its point of origin. Moreover, although migration rules fall within the category of public law, these rules carry significant implications for the private labor market and relations between workers and employers. Migration rules control which workers can enter the country, or move between communities within it. Accordingly, they significantly impact the size of the labor market and the relationship between employers and employees that is regulated by private law.<sup>20</sup>

The desire to regulate the movement of the poor, in order to limit public spending on poor relief, reaches back centuries and across the Atlantic to the England and the 1601 Statute of Elizabeth, entitled "An Act for the Relief of the Poor."<sup>21</sup> Under the English rules, as revised in 1662, an applicant for poor relief needed to have obtained a "settlement" in the community where relief was sought, meaning that he or she had resided there for the required duration of time, in order to be eligible for aid.<sup>22</sup> Those without a settlement in their current residence therefore had to return to their place of settlement to receive relief.<sup>23</sup> The law also allowed local relief administrators, who administered relief funds and determined eligibility for support, to remove applicants to their place of settlement and to prevent those deemed likely to be in need of relief in the future from acquiring a settlement.<sup>24</sup> Thus, rather than increase local funding for relief, the English rules allowed communities to exclude those deemed dependent or likely to become dependent, by limiting the migration of the poor and empowering local officials to relocate relief applicants.

Americans likewise adopted rules limiting the domestic migration of the poor by granting state and local officials the power to exclude and remove those deemed "likely to become a public charge," meaning those expected to make a claim on state or local poor relief funds.<sup>25</sup> Like their

<sup>20</sup> See *infra* Part I.C.1.

<sup>21</sup> Daniel R. Mandelker, *Exclusion and Removal Legislation*, 1956 WIS. L. REV. 57, 58 (1956).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1847-49, 1852-53, 1857-59 (1993). On "likely to become a public charge" as a screen in federal immigration law, see sources cited *infra* note 41. States likewise limited the movement of poor people, as well as others who could be deemed "out of place," through laws criminalizing vagrancy. These laws originated in sixteenth century England, migrated to the American colonies, and remained in force until a slew of legal challenges in the 1960s undermined them. The Supreme Court issued the final blow in *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). On the campaign against vagrancy laws in the 1960s, see



English antecedents, these rules attempted to shift the burden of caring for the poor from one community onto another. As legal scholar Ernst Freund explained in 1904, “liberty of settlement cannot be claimed by those who cannot support themselves, for their taking up a residence in a district means the imposition of a pecuniary burden upon the community.”<sup>26</sup> Accordingly, those receiving poor relief “may be compelled to remain where they have their domicile and may be removed to it.”<sup>27</sup> Another twentieth-century legal observer, A. Delafield Smith, similarly noted that the purpose of laws limiting the movement of the poor was “to protect the interests of the rest of society.”<sup>28</sup>

Up until the late 1960s, a number of states retained residency requirements for eligibility for poor relief. Connecticut’s one-year residency requirement, for example, was designed to “protect its fisc by discouraging entry of those who come needing relief.”<sup>29</sup> This practice only ended in 1969, when the United States Supreme Court declared in *Shapiro v. Thompson* that such rules improperly infringed on the constitutional right of indigent travelers to move between states.<sup>30</sup>

In addition to restrictions on internal migration of the poor, American states also adopted rules to bar the entry of foreign migrants deemed likely to be in need of relief, so as to limit public spending on assistance to the poor. In the mid-seventeenth century, during the colonial period, Massachusetts barred the admission of indigent immigrants.<sup>31</sup> In the nineteenth century, New York and Massachusetts then extended their colonial-era laws governing the migration of poor people in order to prevent those deemed likely to become “public charges” from landing within their territories.<sup>32</sup> Massachusetts went even further by allowing for the deportation of “foreign paupers already resident in the state back to Ireland or to Britain, Canada, or other American states.”<sup>33</sup> As legal historian Hidetaka Hirota has carefully documented, “American deportation policy operated as part of a broader legal culture of excluding nonproducing members from societies in the north Atlantic world.”<sup>34</sup>

---

RISA GOLUBOFF, *VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S* (2016).

<sup>26</sup> ERNST FREUND, *THE POLICE POWER, PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* 530 (1904).

<sup>27</sup> *Id.*

<sup>28</sup> A. Delafield Smith, *Public Assistance as a Social Obligation*, 63 HARV. L. REV. 266, 269 (1949).

<sup>29</sup> *Shapiro v. Thompson*, 394 U.S. 618, 623 (1969).

<sup>30</sup> *Id.* at 629. On the history of the *Shapiro* decision, see Elisa Minoff, *Legal Services Attorneys and Migrant Advocates Join Forces: Shapiro v. Thompson (1969)*, in *THE POVERTY LAW CANON: EXPLORING THE MAJOR CASES* 72, 80–84 (Marie A. Failing & Ezra Rosser eds., 2016).

<sup>31</sup> E. P. HUTCHINSON, *LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY, 1798–1965* 390 (1981).

<sup>32</sup> *Id.* at 397–98.

<sup>33</sup> HIDETAKA HIROTA, *EXPPELLING THE POOR: ATLANTIC SEABOARD STATES AND THE NINETEENTH-CENTURY ORIGINS OF AMERICAN IMMIGRATION POLICY* 2 (2017).

<sup>34</sup> *Id.* at 13.

In the middle and late nineteenth century, the United States Supreme Court affirmed the constitutionality of state laws that prevented the migration of paupers, both domestic or those arriving from abroad, so as to protect against the “spread of . . . pauperism” or other “social evils.”<sup>35</sup> In 1837, the Court upheld New York’s 1824 migration law against constitutional challenge, finding the law to be a proper exercise of the state’s police power. It explained that the law, which required shipmasters to report on the background and “last legal settlement” of any arriving passengers, was designed “to prevent New York from being burdened by an influx of persons brought thither in ships, either from foreign countries, or from any other of the states.”<sup>36</sup> The state legislature passed the law for the benefit of “the people of New York, for whose protection and welfare the legislature of that state are authorized and in duty bound to provide.”<sup>37</sup>

In another case decided over a decade later, in 1849, Justice McLean observed that states could “prohibit the introduction of foreigners brought to this country” in order to “guard its citizens against diseases and paupers.”<sup>38</sup> Justice Wayne concurred in the decision, which concerned state authority to impose a tax on passengers arriving in state ports, writing that the states “have the right to turn off paupers, vagabonds, and fugitives from justice” and “may meet such persons upon their arrival in port, and may put them under all proper restraints,” as well “prevent them from entering their territories,” and “carry them out or drive them off.”<sup>39</sup> Nearly three decades later, in 1877, the Court reiterated: “a State may legislate to prevent the spread of crime, or pauperism, or disturbance of the peace. It may exclude from its limits convicts, paupers, idiots, and lunatics, and persons likely to become a public charge, as well as persons afflicted by contagious or infectious diseases.”<sup>40</sup>

When Congress began exercising greater federal oversight of foreign immigration in the late nineteenth century, it adopted similar prohibitions on the entry of “paupers or persons likely to become a public charge.”<sup>41</sup> Calls for federal control had intensified after 1875, when the U.S. Supreme Court invalidated two state-level immigration laws as infringements on the federal

<sup>35</sup> *Hannibal & St. J.R. Co. v. Husen*, 95 U.S. 465, 471 (1877).

<sup>36</sup> *Mayor of the City of New York v. Miln*, 36 U.S. 102, 133 (1837).

<sup>37</sup> *Id.*

<sup>38</sup> *The Passenger Cases*, 48 U.S. 283, 406 (1849) (McLean, J.). See also Bert C. Buzan & George M. Dery III, *California’s Resurrection of the Poor Laws: Proposition 187, Preemption, and the Peeling Back of the Hollow Onion of Immigration Law*, 10 GEO. IMMIGR. L.J. 141, 145 (1996).

<sup>39</sup> *The Passenger Cases*, 48 U.S. at 426 (Wayne, J., concurring). See also WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* 211 (1996) (observing that the Supreme Court treated state entry laws as a species of quarantine regulation).

<sup>40</sup> *Hannibal*, 95 U.S. at 471.

<sup>41</sup> On “likely to become a public charge” as a screen in immigration law, see, e.g., ERIKA LEE, *AT AMERICA’S GATES: CHINESE IMMIGRATION DURING THE EXCLUSION ERA, 1882-1943* 97 (2003); MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 79–80 (2004); GARDNER, *supra* note 17, at 87–99.

power to regulate commerce.<sup>42</sup> As the Supreme Court later observed, the initial 1882 federal legislation was “similar, in its essential features, to many statutes enacted by states of the Union for the protection of their own citizens, and for the good of the immigrants who land at sea-ports within their borders.”<sup>43</sup> The similarity is unsurprising, given that boards of charities from several states advocated in favor of federal regulation and presented model bills to Congress for adoption.<sup>44</sup> After 1882, amendments to federal law further authorized federal officials to seize and deport any immigrant who fell within the excluded classes of migrants within one year of his or her entry into the country.<sup>45</sup> Thereafter, the period of deportability for becoming a “public charge” lengthened from one to three years, and then to five years.<sup>46</sup>

Congressman John Van Voorhis of New York, one of the principal House sponsors of the 1882 Act,<sup>47</sup> argued that the legal restriction was necessary to protect America from caring for Europe’s poor. “Thousands of paupers, idiots, lunatics, criminals, and accused persons are being sent to this country . . . for the sole purpose of shifting onto this country the expense of support them,” he claimed.<sup>48</sup> Since each “nation owes certain duties to its citizens or subjects, one of which is to take care of them when they are unable to take care of themselves,” the nations of Europe were eager to foist their paupers onto America, Van Voorhis argued.<sup>49</sup> He then cited a New York Board of Charities report that described how the state removed seventy-five “alien paupers” from the state back to Europe in 1880 and 1881, at a cost of less than \$2,000. The report estimated the public expense for their care over the rest of their lives would have totaled \$146,250. Van Voorhis touted the savings to the public of \$145,183.15.<sup>50</sup> He also quoted an opinion issued by lawyer John Norton Pomeroy, which reiterated that the United States had the absolute authority to “prohibit the entry within its territory of any and all foreigners who would tend to disturb the public quiet and securities, or to become a charge upon the public and a burden to be supported at the public expense.”<sup>51</sup>

For Van Voorhis, as for generations of Americans before him, legal rules restricting the movement of the poor and barring their entry offered a means to lessen the burden on the public fisc and shift responsibility for poor

<sup>42</sup> HUTCHINSON, *supra* note 31, at 412 (noting that the “immediate occasion” for the 1882 federal law was “that the Supreme Court had recently and conclusively struck down the states’ efforts to control immigration” and this had “brought forth a number of petitions to Congress for protective legislation”). *See also* Henderson v. Mayor of the City of New York, 92 U.S. 259, 275 (1875) (invalidating state head tax laws as unconstitutional regulation of commerce with foreign nations).

<sup>43</sup> Edye v. Robertson, 112 U.S. 580, 590 (1884).

<sup>44</sup> Matthew J. Lindsay, *Preserving the Exceptional Republic: Political Economy, Race, and the Federalization of American Immigration Law*, 17 YALE J.L. & HUMAN. 181, 217 (2005).

<sup>45</sup> Japanese Immigrant Case, 189 U.S. 86, 96 (1903). HUTCHINSON, *supra* note 31, at 449.

<sup>46</sup> HUTCHINSON, *supra* note 31, at 450.

<sup>47</sup> Lindsay, *supra* note 44, at 217.

<sup>48</sup> 13 CONG. REC. 5108 (1882).

<sup>49</sup> *Id.*

<sup>50</sup> 13 CONG. REC. 5110 (1882).

<sup>51</sup> 13 CONG. REC. 5112 (1882).

households back onto other communities or countries. The exclusion of those found likely to become dependent on public assistance remains enshrined in current American immigration law, which deems an individual seeking admission to the United States to be inadmissible if he or she is “likely at any time to become a public charge.”<sup>52</sup> Thus, anxiety about preventing pauperism continues to shape American immigration law.

## 2. *Familial Support Rules*

The American laws governing familial support have also reflected a desire to police poor households so as to lessen the burden on the public fisc of caring for the least fortunate. These rules require family members to support the poor and disabled within their own households, rather than require the public to support them at taxpayer expense.<sup>53</sup> Like immigration and migration laws,<sup>54</sup> family support rules straddle the line between public and private law. Some state laws impose criminal penalties on family members who do not support their indigent relatives, while others merely impose civil liability or allow the state to seek reimbursement for expenses paid.<sup>55</sup>

Like the migration laws discussed in the previous section, the origins of American family support laws can also be traced back to the old English poor laws.<sup>56</sup> Under the seventeenth-century English rules, a poor person could seek poor relief from the state only if his or her relatives were unable to provide support. The 1601 Statute of Elizabeth specified that “the father and grandfather, and the mother and grandmother, and the children of every poor, old, blind, lame, and impotent person, or other poor person not able to work, being of sufficient ability, shall at their own charges relieve and maintain every such person.”<sup>57</sup>

American states adopted similar laws, which remained on the books into the twentieth century. In 1975, one American commentator observed

<sup>52</sup> 8 U.S.C. § 1182(a)(4)(A) (2012). This was originally adopted in 1952 as Section 212(a)(4) of the Immigration and Nationality Act. A 2012 study of the burden imposed on taxpayers by immigrants found that the costs of providing social services to immigrants are more than offset by their contributions to the system. Daniel T. Griswold, *Immigration and the Welfare State*, 32 CATO J. 159 (2012).

<sup>53</sup> On marriage as means of privatizing female dependency, see Ariela R. Dubler, *In Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 YALE L.J. 1641, 1714–15 (2003). On family support as a means of reducing the burden on the welfare state, see Laura W. Morgan, *Supervising and Administering the Family*, *Family Law at 2000: Private and Public Support of the Family: From Welfare State to Poor Law*, 33 FAM. L.Q. 705, 705–07 (1999).

<sup>54</sup> See *supra* Part I.B.1.

<sup>55</sup> E.g., UTAH CODE ANN. § 17-14-2 (LexisNexis 2018), OR. REV. STAT. § 109.010 (2019), MASS. GEN. LAWS. ANN. Ch. 273 § 20 (West 2019) (criminal liability), 23 PA. CONS. STAT. § 4604 (2019) (authorizing suit by person or public agency against family member).

<sup>56</sup> Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status: Part I*, 16 STAN. L. REV. 257, 283 (1964).

<sup>57</sup> Stefan A. Riesenfeld, *The Formative Era of American Public Assistance Law*, 43 CAL. L. REV. 175, 199 (1955).

that the familial support laws “in a majority of American states are essentially identical to the ‘responsible relatives’ statute found in the seventeenth century Elizabethan Poor Law.”<sup>58</sup> Social worker Helen I. Clarke, writing in the 1950s, likewise observed that “[e]arly legislation in the United States concerning the support of illegitimate children was largely concerned with saving the community from the burden of supporting the child. This legislation was closely associated with poor-relief laws.”<sup>59</sup> Clarke noted that modern state laws were “still designed primarily to protect the community” as evidenced by “provisions empowering public-assistance authorities to make the complaint against the father, or requiring a bond, or authorizing a justice of the peace to force the mother to give the father’s name or to imprison her if she fails to do this.”<sup>60</sup>

State court decisions interpreting familial support statutes provided a similar account of their purpose: limiting the burden on the public fisc. The Wisconsin Supreme Court declared that a purpose of its “bastardy act,” which compelled a father to pay for the support of his child, was to “indemnify and save the town harmless from all expense for the maintenance of such child, or any charges incurred by the town for the lying in and support of the mother during her sickness.”<sup>61</sup> Alabama enacted a similar statute, which authorized a “proceeding” to determine paternity and “to ascertain what amount the putative father shall be required to pay for the support of the child during its early infancy.”<sup>62</sup> According to the Supreme Court of Alabama, the law was designed to benefit the child and also “to protect the good of society by preventing such children from becoming a public charge.”<sup>63</sup>

---

<sup>58</sup> James L. Lopes, *Filial Support and Family Solidarity*, 6 PAC. L.J. 508, 508 (1975).

<sup>59</sup> HELEN I. CLARKE, *SOCIAL LEGISLATION* 360 (2d ed. 1957). See also Sidney Entman, *The Origins and Development of a Family Court: Domestic Relations Court—Family Division—New York City*, 21 SOCIAL FORCES 58, 58 (1942) (“The legal concept of support of dependents first appears in systematic form in the so-called Poor Laws of English Parliament (1575-1600). The Elizabethan Poor Laws not only were the source of our modern Family Court Law, but laid the ground work of our present day social legislation. To this day, the archaic wording of the Elizabethan ‘Poor Laws’ lives on in the welfare statutes of many states.”); Drew D. Hansen, *The American Invention of Child Support: Dependency and Punishment in Early American Child Support Law*, 108 YALE L.J. 1123, 1145 (1999) (“In the 1870s and 1880s, many states passed desertion and nonsupport statutes that criminalized refusal to support one’s children. These statutes added the punitive power of the criminal law to the dependency focus of the civil child support obligation, punishing those fathers who caused single mothers and children to become dependent on state aid. The statutes also showcased the fiscally conservative aspect of child support in the nineteenth century: They were intended primarily as a way to save public resources, not as measures intended to enhance child welfare.”).

<sup>60</sup> CLARKE, *supra* note 59, at 360. See also George L. Blum, Annotation, *Right of Illegitimate Child to Maintain Action to Determine Paternity*, 86 A.L.R.5th 637 (2001) (“Filiation statutes are generally considered to represent an exercise of the police power of the state, for the primary purposes of securing the support and education of an illegitimate child and of protecting society by preventing such a child from becoming a public charge.”)

<sup>61</sup> *State v. Jager*, 19 Wis. 235, 236 (1865).

<sup>62</sup> *Coan v. State*, 141 So. 236, 236 (Ala. 1932).

<sup>63</sup> *Id.* See also *People v. Elliott*, 525 P.2d 457, 459 (Colo. 1974) (noting that state “non-support statute,” requiring father to support his child, included “penal sanctions” that were

Thus, just as in the development of American migration and immigration law, state rules governing family support and domestic relations have been shaped by a desire to prevent pauperism and thereby reduce the burden on the public of supporting the poor.

### C. *The New Poor Laws: Ensuring Worker Independence*

#### 1. *Employment Rules*

Unlike laws governing migration and familiar support, the legal rules governing the relationship between employers and workers in the United States are not deeply rooted in the old English poor relief laws. Rather, these rules, including worker's compensation and minimum wage laws, changed and developed over the late nineteenth and early twentieth centuries.<sup>64</sup> But, just as in the areas of law surveyed in the preceding sections,<sup>65</sup> advocates for employment rules likewise have justified them using anti-pauperism arguments. Moreover, when opponents challenged the rules in court on constitutional grounds, judges generally upheld the laws as proper exercises of the state's police powers because they protected the public interest in keeping households off poor relief.

In 1887, the Supreme Court of Arkansas issued one of the first judicial opinions to justify a legal rule governing employment contracts as means to lessen state spending on public assistance to the poor. The case concerned the validity of a contract between a railroad worker and his employer, in which the worker agreed to release the railroad from all liability for injuries he might sustain on the job even if the railroad was at fault.<sup>66</sup> The worker later died as a result of the railroad's negligence.<sup>67</sup> The court held that the release was unenforceable, on the grounds that failing to adopt this rule would place an undue burden on the public fisc. It explained that, if such releases were permitted, every employer would require its employees to release all claims for injuries and the "final outcome would be to fill the country with disabled men and paupers, whose support would become a charge upon the counties or upon public charity."<sup>68</sup> Accordingly, in order to safeguard "the welfare of society," the court adopted the common law rule that employers of "laborers for hire" are not permitted through contract to "abdicate their duties" to their workers.<sup>69</sup>

---

"imposed under the police power of the state in the interest of the general welfare and specifically to protect the child's well-being and to prevent his becoming a public charge.")

<sup>64</sup> On the development of worker's compensation, see JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* (2004).

<sup>65</sup> See *supra* Part I.B.

<sup>66</sup> *Little Rock & Ft. S. Ry. Co. v. Eubanks*, 3 S.W. 808, 809 (Ark. 1887).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 810–11.

<sup>69</sup> *Id.*

The prevention of pauperism rationale for legislation reappeared years later in a series of cases upholding state employment legislation.<sup>70</sup> In *New York Central Railroad Co. v. White* (1917), the U.S. Supreme Court upheld a state worker's compensation law against constitutional challenge on the grounds that the law served the public interest—namely, the interest in the “prevention of pauperism, with its concomitants of vice and crime.”<sup>71</sup> Nearly two decades later, the Court invoked the same interest in upholding the application of California's workers' compensation scheme to an out-of-state resident who entered into an employment contract in California for work in Alaska. In *Alaska Packers Association v. Industrial Accident Commission* (1935), the Court found that California had an interest in the application of its laws to the dispute, on the grounds that the injured employees might otherwise “be remediless” and therefore “might become public charges.”<sup>72</sup>

The U.S. Supreme Court initially took a more hostile view of another form of state employment legislation: minimum wage laws. It found that such rules placed an unfair burden on employers to support those who would otherwise fall back on public poor relief. Writing for the majority in *Adkins v. Children's Hospital* (1923), Justice Sutherland opined that requiring an employer to pay more than the “fair value of the services rendered” by the employee “amounts to a compulsory exaction from the employer for the support of a partially indigent person, for whose condition there rests upon him no peculiar responsibility, and therefore, in effect, arbitrarily shifts to his shoulders a burden which, if it belongs to anybody, belongs to society as a whole.”<sup>73</sup> In other words, in 1923, Sutherland refused to uphold legal rules that placed the burden on employers to ensure that low-wage workers could support themselves and their families. Caring for the least fortunate was a job for the public poor relief system, in Sutherland's opinion.

The majority of the justices adopted a different view, however, after some turnover in the membership of the Court over the ensuing decade.<sup>74</sup> In *West Coast Hotel*, decided in 1937, the Court upheld a minimum wage law by a vote of 4-5, flipping the reasoning in *Adkins* and overruling it.<sup>75</sup> Chief Justice Hughes, writing for the majority, characterized the employer's pay-

---

<sup>70</sup> McCurdy, *Liberty of Contract*, *supra* note 4, at 193–94.

<sup>71</sup> 243 U.S. 188, 207 (1917); *see also* McCurdy, *Liberty of Contract*, *supra* note 4, at 186–87.

<sup>72</sup> 294 U.S. 532, 542 (1935).

<sup>73</sup> *Adkins v. Children's Hosp.*, 261 U.S. 525, 557–58 (1923), *overruled in part by* *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). *See also* Claudio J. Katz, *Protective Labor Legislation in the Courts: Substantive Due Process and Fairness in the Progressive Era*, 31 *LAW & HIST. REV.* 275, 315 (2013).

<sup>74</sup> Justice Brandeis did not take part in the *Adkins* decision and Justices William Howard Taft, Oliver Wendell Holmes, Jr., and Edward T. Sanford dissented. In *West Coast Hotel*, 300 U.S. 379, decided in March 1937, Chief Justice Hughes wrote the majority opinion, which was joined by Justices Brandeis, Cardozo, Stone, and Roberts.

<sup>75</sup> Notably, in *Tipaldo* decided in June 1936, the Court invalidated a state minimum wage law that was quite similar to the law that it later upheld in *West Coast Hotel* in March 1937. *Morehead v. New York Ex Rel. Tipaldo*, 298 U.S. 587 (1936). For a summary of the debate over why the Court changed course in 1937, *see* Laura Kalman, *The Constitution, the Supreme Court, and the New Deal*, 110 *AM. HIST. REV.* 1052 (2005).

ment of low wages as “exploitation” that burdened not only to the employee’s “health and well being,” but also “the community,” who would be responsible for the employee’s support. “What these workers lose in wages the taxpayers are called upon to pay,” Hughes explained. He concluded that the “community is not bound to provide what is in effect a subsidy for unconscionable employers.”<sup>76</sup> In other words, the majority applauded the state’s adoption of a legal rule that would shift the burden of caring for low-wage households from the taxpayer-funded welfare system onto private employers. As historian Charles McCurdy observed, “here the ‘prevention of pauperism’ justification for legislation pioneered in *White v. New York Central R.R.* finally became decisive.”<sup>77</sup>

In more recent years, proponents of increasing the minimum wage have advanced similar arguments for their reform proposals. In 2013, Senator Tom Harkin (D-Iowa) argued in favor of caring for low-income households through minimum wage and labor laws, rather than through the welfare system. He explained that “multi-billion dollar companies that pay poverty wages” were a “major” reason for the high cost of federal anti-poverty programs like food stamps and Medicaid. “Underpaying workers affects us all,” he argued. He proposed that “highly-profitable companies paying poverty wages should raise wages and listen to their workers’ demands to form a union.” Otherwise, “taxpayers” would continue “to pick up the slack, to the tune of a quarter of a trillion dollars every year in the form of public assistance to working families.”<sup>78</sup> Others, however, have argued against a minimum wage increase on the grounds that this would actually increase the burden on taxpayer-funded relief. If the law mandates higher wages, they have claimed, companies would then “hire fewer workers, leaving still more people dependent on government programs.”<sup>79</sup> Yet, in the debate over where

---

<sup>76</sup> *West Coast Hotel*, 300 U.S. at 399. See also BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* 78 (1998) (noting that advocates for minimum wage legislation “articulated two public interests protected” by such laws: “ensuring workers a living wage protected public health and morals” and “requiring employers to pay the cost of sustaining their labor force prevented them from externalizing that cost to the public through poor relief”).

<sup>77</sup> McCurdy, *Liberty of Contract*, *supra* note 4, at 194.

<sup>78</sup> Clare O’Connor, *Reports: Fast Food Companies Outsource \$7 Billion In Annual Labor Costs To Taxpayers*, FORBES (Oct. 6, 2013, 4:30 PM), <https://www.forbes.com/sites/clareoconnor/2013/10/16/reports-fast-food-companies-outsources-7-billion-in-annual-labor-costs-to-taxpayers/> [<https://perma.cc/M4UR-SZ5S>]. See also Ken Jacobs et al., *The High Public Cost of Low Wages* (2015), <http://laborcenter.berkeley.edu/the-high-public-cost-of-low-wages/> [<https://perma.cc/5BY9-33L4>]; Thomas P. Conroy, *Firm’s business model takes toll — on taxpayers*, THE BOSTON GLOBE, August 7, 2013, at A.14 (letter to editor); Michael A. Fletcher, *Low fast-food wages come at high public cost, reports say*, WASH. POST (Oct. 15, 2013), [https://www.washingtonpost.com/business/economy/low-fast-food-wages-come-at-high-public-cost-report-say/2013/10/15/3fc5a608-34e7-11e3-80c6-7e6dd8d22d8f\\_story.html?utm\\_term=.45b255b7bd5c](https://www.washingtonpost.com/business/economy/low-fast-food-wages-come-at-high-public-cost-report-say/2013/10/15/3fc5a608-34e7-11e3-80c6-7e6dd8d22d8f_story.html?utm_term=.45b255b7bd5c) [<https://perma.cc/Y4VV-PCN9>]; Laura A. Bischoff, *Many Ohio workers still need assistance?; Report: Employees of big companies fill the state’s Medicaid, food stamp rolls.*, DAYTON DAILY NEWS, September 30, 2009, at A4.

<sup>79</sup> *Myth Busted: Taxpayers Are Not Subsidizing Wal-Mart’s Low Wages*, INVESTOR’S BUSINESS DAILY (Apr. 13, 2017), <https://www.investors.com/politics/editorials/myth-busted-taxpayers-are-not-subsidizing-wal-marts-low-wages/> [<https://perma.cc/AT6F-J3JR>].



to set the minimum wage, both factions have agreed that laws governing workers' wages should be designed to lessen the burden on taxpayer-funded welfare spending. Each side has mustered a different version of the anti-pauperism argument in support of its preferred policy.

## 2. *Lending and Debt Collection Rules*

In debates over the legal rules governing lending and debt collection, scholars, advocates, and judges have likewise justified existing laws and law reform proposals as a means to care for the least fortunate, without increasing the burden on the public welfare system. In discussing the shape and purpose of property exemption rules, wage assignment regulations, and laws governing rates of charge for small loans, judges and advocates have repeatedly stressed the state's interest in adopting rules that will prevent "pauperism" and limit the number of households that might become dependent on poor relief.

Commentators have generally agreed that a principal purpose of state property exemption rules, which place specified items of a debtor's property beyond the reach of some creditors, is to prevent debtors and their families from becoming destitute and no longer "self-supporting," meaning reliant on public assistance or private charity. According to historian James Ely, the "principal goal of the homestead exemption was to enhance the security of the family," so as "to shield the debtor's family from destitution in a volatile market economy."<sup>80</sup> Other scholars have reached similar conclusions. In 1950, law professor George L. Haskins concluded that "[t]he principal objective of the homestead laws is generally regarded as the security of the family, which in turn benefits the community to the extent that such security prevents pauperism and provides the members of the family with some measure of stability and independence."<sup>81</sup> Another law professor, Frank R. Kennedy, likewise opined that exemptions served to protect the "financial security of the family unit," which in turn "serves such public welfare objectives as relieving the community of the burden of supporting paupers and preserving the social values of family life."<sup>82</sup>

---

<sup>80</sup> James W. Ely, Jr., *Homestead Exemption and Southern Legal Culture*, in SIGNPOSTS: NEW DIRECTIONS IN SOUTHERN LEGAL HISTORY 289, 292 (Sally E. Hadden and Patricia Hagler Minter eds., 2013).

<sup>81</sup> George L. Haskins, *Homestead Exemptions*, 63 HARV. L. REV. 1289, 1289 (1950). See also William T. Plumb Jr., *Federal Liens and Priorities—Agenda for the Next Decade II*, 77 YALE L.J. 605, 605 (1968) ("In order to protect debtors and their families from pauperism and to encourage the rehabilitation of the debtors, state laws universally provide for the exemption of certain property, or a certain value of property, from seizure for general debts."); Paul Goodman, *The Emergence of Homestead Exemption in the United States: Accommodation and Resistance to the Market Revolution, 1840–1880*, 80 J. AM. HIST. 470, 471 (1993) ("Homestead exemption promised to shield at least homes so that families no longer need worry that the breadwinner's bad luck or incompetence would plunge an entire household into destitution.").

<sup>82</sup> Frank R. Kennedy, *Limitation of Exemptions in Bankruptcy*, 45 IOWA L. REV. 445–87, 447 n.11 (1959). See also Jean McGreevy, *Proposed Reforms in Iowa Bankruptcy Exemption Laws: A Solution to the Fraudulent Conveyance Dilemma Note*, 74 IOWA L. REV. 1219–42, 1230

Similarly, in the 1970s, when bankruptcy scholar Alan Resnick listed the five “social policies” promoted by exemptions, he included the following: “To shift the burden of providing the debtor and his family with minimal financial support from society to the debtor’s creditors.”<sup>83</sup> As he explained, “if state and federal governments did not grant any exemptions, society would have to support debtors in the form of welfare payments.”<sup>84</sup> Several scholars have also highlighted the gendered assumptions behind state homestead exemption rules, which judges apply as a means to “safeguard[ ] the link between property ownership, manhood, and citizenship.”<sup>85</sup>

Legislators and judges have invoked the same reasoning. As historian Charles McCurdy recounts, New York legislators offered multiple rationales for broadening the scope of the state’s debtor exemption law in the 1840s. Among these were the need to keep workers out of “extreme poverty,” which “represses the manly ambition of the willing debtor to apply his labor to the payment of his debts and the bettering of his condition.”<sup>86</sup> In 1884, the Supreme Court of Florida stated that the “object of exemption laws is to protect people of limited means and their families in the enjoyment of so much property as may be necessary to prevent absolute pauperism and want.”<sup>87</sup> The court feared that “illiterate and unsophisticated people” would otherwise risk losing their entire livelihoods and therefore “ought everywhere to be the wards of the State and to be protected accordingly.”<sup>88</sup> The following century, an Illinois appeals court offered a similar list of rationales for state exemptions laws: “(1) insuring of a means of livelihood and subsistence to the debtor; (2) protection and welfare of his family; [and] (3) the prevention of any possibility that the debtor or his family might become a public charge upon the state.”<sup>89</sup>

---

(1988) (“Historically, the legislative purpose underlying exemption law was to protect debtors and their dependents from impoverishment, as well as to eliminate their dependence on welfare and other public programs following bankruptcy.”).

<sup>83</sup> Alan N. Resnick, *Prudent Planning or Fraudulent Transfer? The Use of Nonexempt Assets to Purchase or Improve Exempt Property on the Eve of Bankruptcy*, 31 RUTGERS L. REV. 615, 621 (1978).

<sup>84</sup> *Id.* at 626. Cf. *Bankruptcy Exemptions: Critique and Suggestions*, 68 YALE L.J. 1459, 1497–1502 (1959) (exploring welfare programs as an alternative to property exemptions).

<sup>85</sup> Morantz, *supra* note 19, at 293. See also Vukowich, *supra* note 19, at 784.

<sup>86</sup> MCCURDY, *THE ANTI-RENT ERA*, *supra* note 4, at 66 (quoting Mark Sibley). Sibley’s 1841 bill ultimately failed, but a similar 1842 measure passed with the support of a different rationale. The stated purpose of the 1842 bill was to equalize the law’s treatment of debtors with different occupations and correspondingly different types of property necessary to earn their livelihoods. *Id.* at 88 (quoting statements of 1842 bill’s sponsor on purpose of exemption changes).

<sup>87</sup> *Carter’s Adm’rs v. Carter*, 20 Fla. 558, 569 (1884).

<sup>88</sup> *Id.* at 569–70 (1884). See also *Slatcoff v. Dezen*, 76 So. 2d 792, 794 (Fla. 1954) (noting “the interest of the State in its exemption laws, to the end that owners of exempt property and their families shall not be reduced to absolute destitution, thus becoming a charge upon the public”).

<sup>89</sup> *General Finance Corp. v. Rainer*, 155 N.E.2d 833, 835 (Ill. App. 1st Dist. 1959). See also *Sw. State Bank v. Quinn*, 424 P.2d 620,624 (Kan. 1967) (“The whole purpose and policy of our exemption laws has been to secure to an unfortunate debtor the means to support himself and his family, to keep them from being reduced to absolute destitution and thereby public charges.”); *Wilcox v. Hawley*, 31 N.Y. 648, 657 (1864) (“The exemption provided for

Discussions about the legal rules governing particular tools of debt collection have also evidenced a desire to prevent debtors from becoming “public charges,” dependent on state support. For example, in the first three decades of the twentieth century, creditors often required debtors to execute a “wage assignment” as a condition of receiving a loan. If the debtor defaulted, the wage assignment allowed the creditor to bypass the courts and instead to collect the amount owed directly from the debtor’s wages via a request to the debtor’s employer. Reformers soon recognized the potential for creditors to abuse wage assignments, thereby depriving a debtor of all his or her income, and urged legislators to enact laws limiting their use. Illinois, New York, and Massachusetts all adopted wage assignment regulations, which were promptly challenged in court as an infringement on workers’ constitutional freedom of contract.<sup>90</sup>

Courts generally upheld these state laws governing wage assignments on the grounds that they advanced the state interest in the “prevention of pauperism.”<sup>91</sup> In upholding the Massachusetts law, the U.S. Supreme Court explained that the law’s purpose was to prevent an improvident wage earner from depriving his family of support and becoming “a public charge.”<sup>92</sup> The Illinois Supreme Court likewise found that the state could restrict the contractual liberty of “wage-earners” to protect them from the consequences of their “poverty” and “improvidence.”<sup>93</sup> Other state courts upheld state regulations of wage assignments in the 1910s and 1920s on similar grounds.<sup>94</sup>

New calls for the regulation of wage assignments then arose in the 1930s, during the Great Depression, when public poor relief funds were stretched thin. In New York State, support for regulating the “wage shark racket” came from a variety of organizations, including the New York Central Railroad, local charities, and the commissioner of the state Department of Public Welfare.<sup>95</sup> Under then-existing law, a merchant-creditor could seize all of the borrower’s wages through an assignment and thereby force the worker’s household to “become the object of charity,” local social service

---

by it, is not exclusively for the benefit of the owner of the [property]. It is mainly that the family for which he provides may not be stripped of all means of support, and cast as paupers on the community.”)

<sup>90</sup> ANNE FLEMING, *CITY OF DEBTORS: A CENTURY OF FRINGE FINANCE* 44 (2018).

<sup>91</sup> See *infra*, notes 93–95 and accompanying text.

<sup>92</sup> *Mut. Loan Co. v. Martell*, 222 U.S. 225, 233 (1911).

<sup>93</sup> *Massie v. Cessna*, 88 N.E. 152 (Ill. 1909). The court ultimately concluded that the law, as written, was unconstitutional to the extent it restricted the rights of salaried workers. The state could restrict the contractual freedom of wage workers, who “are the proper objects of legislation which would tend to protect them from the evil which this statute is designed to obviate.” *Id.* at 154. The state could not, however, restrict “the right of persons earning the higher salaries to assign or transfer their salaries in such manner as they see fit; there being nothing in the public policy of the state requiring or warranting such abridgment of their right.” *Id.* at 154.

<sup>94</sup> *Fay v. Bankers Sur. Co.*, 146 N.W. 359, 361 (Minn. 1914); *West v. Jefferson Woolen Mills*, 245 S.W. 542 (Tenn. 1922).

<sup>95</sup> FLEMING, *supra* note 90, at 121–22.

agencies explained.<sup>96</sup> The New York Legal Aid Society lamented how, under current law, a wage earner could be “thrown with his family on charity.”<sup>97</sup>

These groups accordingly urged the state legislature to adopt new rules extending the state’s wage assignment restrictions to cover merchants selling goods on credit, so as to prevent poor borrowers from “becoming public charges through seizure of the entire family income by the creditor.”<sup>98</sup> In other words, the campaign argued that a better-crafted wage assignment law could ensure that wage earners remained self-supporting, rather than allow the burden for their support to fall on the public welfare system or private charity. When the reformers finally succeeded, after a few rounds of legislative struggle, the New York governor echoed their logic in explaining his support for the law, noting the impact on relief funds from lenders’ abuse of wage assignments. Governor Lehman stated that such abuse “is particularly harmful to the poor, uneducated wage-earner who is so often unknowingly induced to barter away his future earnings.” “His family then finds itself in distress; it is obliged to resort to public and private welfare agencies for relief.”<sup>99</sup>

In a similar vein, reformers have also urged lawmakers to redesign the legal rules that govern other aspects of small-sum lending, in order to lighten the burden on the welfare system. In Wisconsin in the early 1930s, one social welfare organization claimed that small loans, as then regulated, increased the burden on public assistance programs by diverting welfare funds to repay the debts of low-income households.<sup>100</sup> A treatise on the regulation of pawnbrokers similarly justified their regulation as a means to lessen the state’s burden to care for the poor. State oversight of pawnbrokers’ rates of charge ensured that these transactions would not overburden the poor or “the remaining members of the community, who are obliged to maintain the necessary institutions for relief.”<sup>101</sup>

More recently, a number of legal scholars have raised similar arguments in support of consumer lending regulation. Amy J. Schmitz has argued that policymakers must regulate payday loans and other high-cost credit in part because “the community bears burdens derived from short-term fringe lending,” citing research showing that “high-cost credit has ‘spillover’ effects” on taxpayers, among others, who bear the cost for borrowers’ increased reliance on food stamps and other government assistance programs.<sup>102</sup> Eric Posner has likewise defended the existence of the contract law doctrine of unconscionability, which allows courts to refuse to enforce one-sided contracts, on

<sup>96</sup> *Id.* at 121.

<sup>97</sup> *Id.* at 121–22.

<sup>98</sup> *Id.* at 109.

<sup>99</sup> *Id.* at 122–23.

<sup>100</sup> *Id.* at 82. See also Marvin Holz, *The Regulation of Consumer Credit*, 1943 WIS. L. REV. 449, 473 (1943).

<sup>101</sup> FLEMING, *supra* note 90, at 22.

<sup>102</sup> Amy J. Schmitz, *Females on the Fringe: Considering Gender in Payday Lending Policy*, 89 CHI.-KENT L. REV. 65, 101–02 (2014) (citing Brian T. Melzer, *Spillovers From Costly Credit*, 2013 U.S. CENSUS BUREAU CTR. FOR ECON. STUD. No. CES-WP-11).

the grounds that such doctrines deter “credit risks,” which in turn “drive up the cost of the welfare system and undermine its goal of poverty reduction.”<sup>103</sup> Finally, Ronald Mann and Jim Hawkins have summarized the arguments made by opponents of payday lending in favor of banning or restricting access to these loans. In their view, the “best case against payday lending is that the market is plagued by cognitive failures, unlikely to be well policed by competitive forces, and likely to generate external costs borne by the rest of society,” which include an increase in the “burden on the social safety net.”<sup>104</sup>

### 3. *Savings Rules*

Concerns about maintaining wage workers’ independence from public assistance have also informed the regulation of savings institutions and their use by poor families. As historian Daniel Wadhvani has explained, the earliest savings banks were formed and regulated with working-class households in mind, as a means to “foster habits of thrift and foresight among working people and to discourage dependence on public relief.”<sup>105</sup> Much like lending institutions, nineteenth-century savings banks offered poor households a way to buffer themselves against economic downturns and financial misfortune. In recognition of the “quasi-public” purposes that savings banks advanced, legislators therefore “subjected savings banks to special regulations” designed to protect borrowers and limit managers’ conflicts of interest.<sup>106</sup> For example, states limited the types of transactions that savings banks could perform, and imposed heightened duties and liability standards on bank trustees.<sup>107</sup>

In a two-volume work on the history of savings banks written in the 1870s, scholar Emerson Keyes provided a similar account of the banks’ purposes and regulation. He explained that the idea behind the state-sanctioned formation of savings banks was to provide to “the laboring classes” a means “whereby the possible surplus earned during the period of active employment, may be saved and applied toward independent support during the periods of stagnation in the labor market.”<sup>108</sup> The goal was to prevent “from falling into destitution that large class of the poor who are ever hovering

<sup>103</sup> Eric A. Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to Contract*, 24 J. LEGAL STUD. 283, 285 (1995).

<sup>104</sup> Ronald J. Mann & Jim Hawkins, *Just until Payday*, 54 UCLA L. REV. 855, 884 (2007). See also Diane Hellwig, *Exposing the Loansharks in Sheep’s Clothing: Why Re-Regulating the Consumer Credit Market Makes Economic Sense*, 80 NOTRE DAME L. REV. 1567, 1580 (2005); Jessie Lundberg, *Big Interest Rates Under the Big Sky: The Case for Payday and Title Lending Reform in Montana Comment*, 68 MONT. L. REV. 181, 200–01 (2007).

<sup>105</sup> Rohit Daniel Wadhvani, *Banking from the Bottom up: The Case of Migrant Savers at the Philadelphia Saving Fund Society During the Late Nineteenth Century*, 9 FIN. HIST. REV. 41, 43 (2002).

<sup>106</sup> *Id.* at 44.

<sup>107</sup> R. Daniel Wadhvani, *The Institutional Foundations of Personal Finance: Innovation in U.S. Savings Banks, 1880s–1920s*, 85 BUS. HIST. REV. 499, 516 (2011).

<sup>108</sup> EMERSON W. KEYES, A HISTORY OF SAVINGS BANKS IN THE UNITED STATES 11 (1876).

upon the brink of pauperism, ready, upon the first adverse condition in the labor market, to recruit its ranks.”<sup>109</sup> In other words, nineteenth-century Americans like Keyes believed that they could decrease spending on public poor relief by adopting laws that enabled the formation of savings institutions and ensured proper oversight of their relationships with poor borrowers.

More recently, the non-profit organization AARP has urged states to adopt better legal rules to help workers save for retirement, applying a similar logic. In support of this campaign, both AARP and the adopting states have argued that the new regulations will lighten the burden on the welfare state. The alternative is that workers who “do not save enough for retirement [will] risk becoming dependent on social safety net programs down the line.”<sup>110</sup> The preamble to New Jersey’s legislation, for example, explains the purpose behind the bill. The first paragraph states: “employees who are unable to effectively build their retirement savings risk living on low incomes in their elderly years and are more likely to become dependent on State services.”<sup>111</sup> Thus, just as in the regulation of small-sum lending and low-wage employment, reformers have repeatedly invoked lessening the burden on the welfare system as a rationale for greater state oversight of private saving programs for wage workers.

#### D. Change over Time

In documenting the recurrence of the anti-pauperism argument, the preceding analysis has emphasized continuity in rhetoric, rather than change over time. But the image of the poor in the popular imagination, as well as the design of the American welfare state, did shift over the course of the nineteenth and twentieth centuries. Accordingly, this section briefly describes some of the ways that the institutional and ideological context surrounding the anti-pauperism argument has changed over time.

In the popular imagination, images of those living in or near poverty morphed over the twentieth century, most rapidly in the 1960s. For most of the century, media portrayals of the poor largely ignored poor black house-

---

<sup>109</sup> *Id.* at 11.

<sup>110</sup> David Walker, *Let states help people save for retirement*, USA TODAY (Mar. 23, 2017), <https://www.usatoday.com/story/opinion/2017/03/23/let-states-help-americans-save-for-retirement-david-walker-column/99468740/> [<https://perma.cc/4ZB5-RY7H>] (author is an AARP board member); Hank Greenberg, *Congress threatens programs to help workers save for retirement*, BALT. SUN (Mar. 9, 2017), <https://www.baltimoresun.com/news/opinion/reader-respond/bs-ed-retirement-letter-20170309-story.html> [<https://perma.cc/3BZH-J5WA>] (author is AARP Maryland State Director).

<sup>111</sup> N.J. STAT. ANN. § 43:23-2 (West 2016). *See also* WASH. REV. CODE ANN. § 43.330.730 (West 2015) (“Employees who are unable to effectively build their retirement savings risk living on low incomes in their elderly years and are more likely to become dependent on state services.”).

holds.<sup>112</sup> (The welfare state that took shape during the 1930s reflected a similar indifference towards the suffering of nonwhite families, offering support to white male breadwinners and their widows in the form of social programs and labor market supports).<sup>113</sup> But the popular image of poverty began to change in the 1960s as the number of black welfare recipients gradually rose and coverage of federal antipoverty programs took on a more negative tone.<sup>114</sup> Although there was no significant change in the overall number of poor black households at this time, in the mainstream media, the faces of the poor quickly shifted from white to black in the mid-1960s.<sup>115</sup>

The nature of the American welfare state, including the sources and forms of poor relief, also changed over time. Prior to the New Deal in the 1930s, the federal government had little involvement in poor relief. States and local governments, as well as private charities, provided support for the least fortunate in the form of “outdoor relief” as well as in institutional settings such as poorhouses and workhouses.<sup>116</sup> Thus, when nineteenth-century politicians, judges or reformers offered the anti-pauperism argument, they imagined the burden of poor relief as falling on local communities and knew that relief included a mixture of local, state, and private charitable spending.

In the 1930s, however, the federal government created a range of federal relief programs to help the elderly, the poor, and the blind.<sup>117</sup> These programs included Aid to Dependent Children (ADC), commonly called “welfare,” which was administered by the states and partially funded by the federal government.<sup>118</sup> Although ADC promised to rationalize the administration of relief through federal oversight, nonwhite households struggled to

<sup>112</sup> Martin Gilens, *How the Poor Became Black: The Racialization of American Poverty in the Mass Media*, in RACE AND THE POLITICS OF WELFARE REFORM 101, 103 (Sanford F. Schram, Joe Soss, & Richard C. Fording eds., 2003).

<sup>113</sup> Rhonda Y. Williams, *Women, Gender, Race, and the Welfare State*, in THE OXFORD HANDBOOK OF AMERICAN WOMEN'S AND GENDER HISTORY 463, 465–69 (Ellen Hartigan-O'Connor & Lisa G. Materson, eds., 2018).

<sup>114</sup> “Welfare” commonly connotes ADC and AFDC, now known as TANF. On race and public opinion about poverty and welfare, see KHIARA M. BRIDGES, REPRODUCING RACE: AN ETHNOGRAPHY OF PREGNANCY AS A SITE OF RACIALIZATION 212–16 (2011). On the percentage of black welfare recipients from the 1930s through the 1960s, see Gilens, *supra* note 112, at 105.

<sup>115</sup> Gilens, *supra* note 112, at 113.

<sup>116</sup> On poor relief prior to the New Deal, see MICHAEL B. KATZ, IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA 1–60 (1986). On the origins of the modern welfare state, see also MICHELE LANDIS DAUBER, THE SYMPATHETIC STATE: DISASTER RELIEF AND THE ORIGINS OF THE AMERICAN WELFARE STATE (2013); LINDA GORDON, PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE, 1890–1935 (1994); THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES (1992).

<sup>117</sup> Social Security Act, Pub. L. No. 74-271, 49 Stat. 620. See also EDWARD D. BERKOWITZ, AMERICA'S WELFARE STATE: FROM ROOSEVELT TO REAGAN (1991) (describing the development of these programs).

<sup>118</sup> Social Security Act, Pub. L. No. 74-271, tit. IV, 49 Stat. 627-29 (grants to states for aid to dependent children).

gain access to its benefits even when formally eligible to receive them.<sup>119</sup> In the 1930s, Congress also enacted legislation setting minimum wages and maximum hours for some workers, but did not extend the law's protections to domestic and agricultural laborers, who were disproportionately nonwhite. The resulting welfare state, administered at both the federal and state levels, left out or granted less generous protections to many nonwhite workers and families.<sup>120</sup>

Thus, although Americans have commonly invoked the communal obligation to care for the poor as a rationale for regulation across a range of legal domains, the images of the poor and working-class households that these arguments conjure have varied over time, along with the forms of government relief available and their accessibility across divides of race and gender.

## II. THE APPEAL OF THE ARGUMENT

The preceding analysis documents the recurrence of the anti-pauperism argument across time and in different regulatory contexts, but does not explain why the argument has regularly reappeared.<sup>121</sup> This Part considers why proponents of the argument believed it would resonate with some audience in need of persuasion at specific moments in time. Determining why the argument has recurred is essential for understanding the argument's implications for legal scholars in the present, which are explored in Part III. If, for example, the argument has resonated only within particular political contexts or among certain audiences, then modern proponents of law reform must be aware of those limitations when attempting to deploy this rationale for regulation.

This Part does not attempt to ascertain how much weight the argument has ultimately carried in policymaking, given the impossibility of isolating its influence from other factors at work. Rather than speculate on the argument's direct causal impact on policymaking, it infers from the pervasiveness of the argument that it has carried some weight with some portion of stakeholders and seeks to explain why.

This Part offers three reasons for the argument's recurrence over time, which are each examined in the sections that follow. First, the argument has regularly reappeared in moments of economic upheaval when the discourse of liberal individualism has lost its sway over American politics.<sup>122</sup> Second, the argument has been directed to a variety of audiences at different moments in time and its appeal has varied with the intended audience and its

---

<sup>119</sup> On the exclusion of American Indians from access to benefits, see Karen M. Tani, *States' Rights, Welfare Rights, and the Indian Problem: Negotiating Citizenship and Sovereignty, 1935-1954*, 33 L. & HIST. REV. 1, 1-40 (2015).

<sup>120</sup> Williams, *supra* note 113, at 465-69.

<sup>121</sup> See *supra* Part I.

<sup>122</sup> See *infra* Part II.A.



foremost concerns.<sup>123</sup> Finally, the argument has recurred across time because it offers proponents a justification for their policy preferences that appeals to broadly shared values and that does not require them to delve into debates over more divisive questions such as what society owes to the least fortunate among us.<sup>124</sup>

### A. *The Sway of Liberal Individualism over Time*

Even though, in practice, the state has always played a significant role in the American marketplace, the discourse of liberal individualism has permeated debates over political economy in the United States since the nineteenth century.<sup>125</sup> Although American states and cities extensively regulated economic exchange throughout that century,<sup>126</sup> Americans liked to imagine their economy as subject to limited government intervention, especially in the realm of transactions between private individuals.<sup>127</sup> After the Civil War, the idea of limited government intervention in the marketplace, or *laissez-faire*, continued to enjoy a rhetorical appeal even as government oversight of and involvement in the economy expanded.<sup>128</sup>

Yet, despite the appeal of liberal individualism, anti-pauperism justifications for greater state oversight of private economic exchange have recurred over time. Why? Timing is part of the answer. The anti-pauperism argument has resurfaced at moments of economic upheaval when the discourse of liberal individualism has weakened its hold on American politics: in the 1840s and 50s; at the turn of the twentieth century; amidst the Great Depression in the 1930s; and again in the 2010s, in the wake of the financial crisis.<sup>129</sup> These tumultuous moments have created openings for private law reform and have also weakened the hold of liberal individualism on American politics. In these moments, the anti-pauperism argument has offered a

<sup>123</sup> See *infra* Part II.B.

<sup>124</sup> See *infra* Part II.C.

<sup>125</sup> Historians have debated the question of when liberal individualism took hold in the United States. See, e.g., James Henretta, *The Slow Triumph of Liberal Individualism: Law and Politics in New York, 1780-1860*, in *AMERICAN CHAMELEON: INDIVIDUALISM IN TRANSNATIONAL CONTEXT* 87 (Richard Orr Curry & Lawrence B. Goodheart eds., 1991). I use liberal individualism to mean a philosophy of governance that prioritizes individual autonomy and that views the role of the state as preserving the individual's right to pursuit of the good, however personally defined, and limiting social interference with the exercise of personal freedom of action.

<sup>126</sup> NOVAK, *supra* note 39. During the "Market Revolution" of the nineteenth century, a growing number of households began producing goods and produce for sale to buyers in distant locations, connected through expanding transportation and communication networks that created a national marketplace.

<sup>127</sup> Morton Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1424-26 (1982).

<sup>128</sup> MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 33 (1992).

<sup>129</sup> On the timing of the argument, see *supra* Parts I.B.1 and I.B.2. On the connection between homestead exemptions and broader economic changes in the 1840s and 50s, see Goodman, *supra* note 81, at 470-71.

way to justify stricter state oversight of a limited set of private exchanges, without threatening to sweep together all private dealings and place them under greater state control.

Moreover, the argument has still jibed with liberal individualism and support for limited government by justifying one type of government economic intervention as a means to avoid the expansion of others—namely, taxes and poor relief. In this way, the argument has not opposed the discourse of liberal individualism and laissez-faire, even as it has served to justify plainly interventionist measures like minimum wage laws and lending regulations. It has not worked towards deconstructing the myth of laissez-faire.

In this way, the anti-pauperism argument differs from more expansive justifications for government economic intervention that have been offered in the past, such as by economist and legal realist Robert Hale in the 1930s.<sup>130</sup> Hale argued that economic coercion was widespread and that the coercive power of private individuals derived in part from the state's enforcement of rules governing contract and property rights.<sup>131</sup> In arguing for additional forms of state intervention in the marketplace, Hale attempted to reframe these interventions as a means of redistributing coercive power among private parties, rather than as introducing coercion into those relationships.<sup>132</sup> In Hale's telling, all private economic relations rested on a foundation of state-created legal rules. A legal regime of laissez-faire had never existed in the real world.<sup>133</sup>

In contrast, the anti-pauperism argument for regulation of private exchanges did not call into question the longstanding distinction between the public and private spheres. Rather, it singled out a small corner of private law—the private law of the poor—for reform, cracking open the door to regulation without threatening to topple the barrier dividing the realms of the public and the private.<sup>134</sup>

### B. *Variation with Audience*

While the preceding section focuses on variation in the anti-pauperism argument's appeal over time, the following analysis considers how the reasons for the argument's appeal have also varied by the intended audience and its foremost concerns. Using the evidence set out in Part I, it separates the argument's proponents into three groups: politicians seeking to build a policymaking coalition, judges explaining the scope of the police powers to liti-

---

<sup>130</sup> BARBARA FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* (1998).

<sup>131</sup> Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603, 628 (1943).

<sup>132</sup> FRIED, *supra* note 130, at 18.

<sup>133</sup> Hale, *supra* note 131, at 628.

<sup>134</sup> On how the anti-pauperism argument avoids debate about broader values questions, *see infra* Part II.C.

gants and lawmakers, and finally courts and legal scholars providing supportive rationales for existing or proposed regulations. It then describes how the argument has worked differently in each context.

### 1. *Politicians Building a Coalition*

For politicians, the anti-pauperism argument for regulation has provided a means to justify deploying of the power of the state in new ways.<sup>135</sup> But the historical record also shows that politicians have usually coupled the anti-pauperism argument with other policy justifications, indicating their belief that the anti-pauperism argument has held limited appeal for some listeners in need of persuasion. Successful legislative campaigns for other forms of regulation have exhibited similar patterns of converging justifications offered to rally those with divergent worldviews.<sup>136</sup>

When U.S. Representative John Van Voorhis delivered remarks in Congress in favor of federal immigration regulation in 1882, he presented two rationales for the proposed exclusion of those likely to become “public charges”: saving scarce state resources and safeguarding the character of the nation. By framing the case for regulation in this way, Van Voorhis attempted to build a coalition that combined those concerned about the drain on public relief resources and those anxious about economic dependency and the spread of “pauperism” from Europe.

As legal historian Matthew Lindsay describes, public anxiety about foreign pauperism increased during the depression of the 1870s, when “desperation and dependency in the nation’s cities invoked for urban observers images of the dreaded pauper hordes that plagued European capitals.”<sup>137</sup> In advocating for immigration legislation in 1882, Congressman Van Voorhis accordingly stressed the “system of hereditary pauperism that exists in Europe” that, in his view, threatened to spread to the United States if left unchecked.<sup>138</sup>

Meanwhile, Van Voorhis and the other representatives from New York State, where the majority of immigrants made entry to the United States, were more directly concerned about the migrants’ drain on the state’s poor relief funds. After the Supreme Court invalidated New York’s head tax on immigrants, New York and other states petitioned Congress for legislative action. The congressional delegation from New York was at the forefront of the push for heightened federal immigration control.<sup>139</sup>

---

<sup>135</sup> For a summary of the literature on public justification, see Simone Chambers, *Theories of Political Justification*, 5 PHIL. COMPASS 893 (2010).

<sup>136</sup> Christopher J. Eberle, *Religious Reasons in Public: Let a Thousand Flowers Bloom, but Be Prepared to Prune*, 22 ST. JOHN’S J. LEGAL COMMENT. 431, 435 (2007) (describing the converging justifications for adoption of the Trafficking Victims Protection Act). For a normative defense of the legitimacy of “convergence justifications,” see Paul Billingham, *Convergence Justifications Within Political Liberalism: A Defence*, 22 RES PUBLICA 135 (2016).

<sup>137</sup> Lindsay, *supra* note 44, at 204.

<sup>138</sup> *Id.* at 218 (quoting Van Voorhis, 13 CONG. REC. 5108 (1882)).

<sup>139</sup> HUTCHINSON, *supra* note 31, at 79.

Likewise, legislative justifications for debtors' exemption laws have invoked a range of rationales. When a New York State legislator sought to offer more generous property exemptions for debtors in the 1840s, he offered two different justifications for his legislation. He stressed the importance of keeping workers out of "extreme poverty," but also noted the unfairness of the existing rules that favored certain types of property over others.<sup>140</sup> Other legislators similarly justified their proposed changes to the exemption rules on the second basis, equal protection, stressing the need to ensure that similar debtors with different types of property had similar protections against creditors.<sup>141</sup>

Politicians in the modern era have likewise advocated for regulation as a means to avoid additional spending on the welfare system, while also offering other reasons for adopting their proposed rules. Senator Tom Harkin and his colleagues, in advocating for an increase in the federal minimum wage in 2014, offered two reasons for others to lend their support. First, they described the issue as a moral one, noting that the federal minimum wage of \$7.25 per hour was "unconscionably low" and represented "an affront to our values." Second, they observed that many low-wage workers rely on public assistance and that increasing the minimum wage "would allow up to 3.6 million people to come off the food stamp rolls." As a result, "American taxpayers would no longer have to pony up billions of dollars to subsidize the large companies that build wealth for shareholders on the backs of their workers."<sup>142</sup> In 2014, the latter argument meshed well with an ascendant critique of economic inequality and of taxpayer-funded bailouts of private corporations during and after the Great Recession.<sup>143</sup>

At the local level, legislators have likewise invoked a range of arguments for raising the minimum wage. When Los Angeles adopted a higher minimum wage for employees of some city contractors in 1997, it justified the law on several grounds, including the need to conserve scarce public resources. "It is unacceptable that contracting decisions involving the expenditure of City funds should foster conditions placing a burden on limited social services," the law stated. It concluded that the city, "as a principal provider of social support services, has an interest in promoting an employment environment that protects such limited resources."<sup>144</sup> But when the City then imposed a "living wage" on private hotels near the Los Angeles airport (LAX)

<sup>140</sup> McCURDY, *THE ANTI-RENT ERA*, *supra* note 4, at 65–66 (quoting Mark Sibley).

<sup>141</sup> *Id.* at 65–66, 87–88.

<sup>142</sup> Tom Harkin, Tom Perez & George Miller, *Raise minimum wage; working people should not live in poverty*, CNN (Oct. 10, 2014), <http://www.cnn.com/2014/10/10/opinion/perez-harkin-miller-minimum-wage/index.html> [<https://perma.cc/75BH-QRPA>].

<sup>143</sup> See, e.g., THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (2014); Mark A. Calabria, *An End to Bailouts*, NATIONAL REVIEW (Jan. 10, 2013, 4:00AM), <https://www.nationalreview.com/magazine/2013/01/28/end-bailouts/> [<https://perma.cc/X85G-TVAK>]; Matt Taibbi, *Secrets and Lies of the Bailout*, ROLLING STONE (Jan. 23, 2013, 9:25PM), <https://www.rollingstone.com/politics/politics-news/secret-and-lies-of-the-bailout-113270/> [<https://perma.cc/FTK3-MPJ5>].

<sup>144</sup> L.A., CAL., Admin. Code, DIV. 10, CH. 1, ART. 11 (1998).

in 2008, it invoked a slightly different rationale: the city could mandate higher wages for hotel employees based on the benefits that hotel employers reaped from city's municipal services and investment in the airport area.<sup>145</sup>

Similarly, AARP offered multiple reasons in 2017 for legislators to support state legislation enabling businesses to offer "Work and Save" plans. In one editorial, an AARP board member first noted the need to protect workers, writing that the "lack of employer-sponsored savings opportunities has a direct impact on the retirement security of American worker." He then also observed that enabling legislation would save taxpayer dollars by reducing "reliance on the government safety nets," yielding a potential savings to taxpayers of "as much as \$4.8 billion in the next 10 years."<sup>146</sup>

The New York State Governor offered a similar, two-pronged explanation for his support of state wage assignment regulations in the late 1930s. State legislation would curb lenders' abuse of assignments, he explained, benefitting both the "poor, uneducated wage-earner who is so often unknowingly induced to barter away his future earnings" and the "public and private welfare agencies" that would otherwise need to support the borrower's family.<sup>147</sup> Thus, the recurrence of the anti-pauperism argument suggests that politicians have understood this justification as one likely to persuade some, but not necessarily all, of their colleagues and constituents.

## 2. *Judges Defining the Scope of the Police Power*

The anti-pauperism argument also appears in a number of judicial decisions, beginning as early as the 1830s. In decisions like *Mayor of City of New York v. Miln*, judges reviewed state-level rules to determine if they were proper exercises of the state's "police powers" or instead represented an unconstitutional infringement by the state on federal power or individual liberty.<sup>148</sup> In these cases, the anti-pauperism argument offered a way for the state to explain its interest in adopting the law at issue and thereby defend the law's constitutionality.

In *Miln*, decided in 1837, the Court reviewed the constitutionality of a New York State immigration law. The law at issue compelled shipmasters to post a bond in order to "indemnify" New York City for the cost of providing poor relief to any passenger who became a public charge within two years after arrival and that also compelled shipmasters to remove those passengers deemed to be public charges upon their arrival. New York, in defense of its law, argued that the law was a "police regulation" and that the state's power was like that of "[f]athers of families, officers of colleges, and the authorities

---

<sup>145</sup> See L.A., CAL., Admin. Code, Mun. Code, ch. X, art. 4 (2013). On the living wage laws in Los Angeles and other cities, see RICHARD SCHRAGGER, CITY POWER: URBAN GOVERNANCE IN A GLOBAL AGE 139–49 (2016).

<sup>146</sup> Walker, *supra* note 110.

<sup>147</sup> FLEMING, *supra* note 90, at 122–23.

<sup>148</sup> *Mayor of the City of New York v. Miln*, 36 U.S. 102 (1837). On the origins of the "police power," see Markus Dirk Dubber, "The Power to Govern Men and Things": Patriarchal Origins of the Police Power in American Law, 52 BUFF. L. REV. 1277 (2004).

of walled cities” to determine “how and when strangers are to be admitted.”<sup>149</sup> The Court agreed, ruling that the state properly exercised its “power to regulate internal police” by adopting rules designed “to prevent her citizens from being oppressed by the support of multitudes of poor persons.”<sup>150</sup>

The Court found that the law was indeed “a regulation, not of commerce, but police” because its goal was to secure the protection and welfare of the people of New York by conserving scarce public poor relief resources—“to prevent New York from being burdened by an influx of persons brought thither in ships” who might become “chargeable as paupers.”<sup>151</sup> “New York, from her particular situation, is, perhaps, more than any other city in the Union, exposed to the evil of thousands of foreign emigrants arriving there,” the Court explained, and so faced “the consequent danger of her citizens being subjected to a heavy charge in the maintenance of those who are poor.”<sup>152</sup>

In subsequent cases, the Court invalidated other state migration regulations as unconstitutional infringements on the federal power to regulate commerce, but reiterated that the state police power included the right to exclude those likely to become public charges.<sup>153</sup> Those defending a Massachusetts tax on immigrants, for example, urged the justices to treat the law as a proper exercise of the police power because it was “designed to mitigate, in some degree, the burdens attempted to be thrown upon us in subjecting us to support the alien poor.”<sup>154</sup> In 1849, a slim majority of the justices rejected this claim, by a 5-4 margin with numerous opinions that each failed to garner a majority. But Justices McLean and Wayne both noted that states could adopt rules barring the entry of foreign paupers.<sup>155</sup> Indeed, by invalidating state statutes that imposed a tax on arriving passengers, the Court encouraged states to adopt rules that restricted legal entry outright, rather than allow them to increase taxes to fund public assistance for those admitted.

Courts again had to determine the breadth of the state’s police powers in the early twentieth century, a period that later became known as the *Lochner* era (roughly, 1905 to 1937). In a number of cases, litigants claimed that state laws regulating employment and lending unconstitutionally infringed on the constitutional right to individual “freedom of contract” protected by the due process clause of the Fourteenth Amendment. Those defending the laws accordingly needed to articulate the public interest of the state in regulating private economic exchanges, for the purpose of proving that these laws

<sup>149</sup> *Miln*, 36 U.S. at 110.

<sup>150</sup> *Id.* at 141.

<sup>151</sup> *Id.* at 132–33.

<sup>152</sup> *Id.* at 141.

<sup>153</sup> See, e.g., *The Passenger Cases*, 48 U.S. 283 (1849), *Hannibal & St. J.R. Co. v. Husen*, 95 U.S. 465, 471 (1877).

<sup>154</sup> *The Passenger Cases*, 48 U.S. at 316.

<sup>155</sup> See *id.* at 406 (McLean, J.); *id.* at 426 (Wayne, J., concurring). See also *Hannibal*, 95 U.S. at 471 (noting that a state “may exclude from its limits convicts, paupers, idiots, and lunatics, and persons likely to become a public charge, as well as persons afflicted by contagious or infectious diseases”).

were proper exercises of state police powers. The state interest in the “prevention of pauperism” offered them a promising argument.

Aside from early challenges to minimum wage legislation and other legislation directly regulating labor conditions, the Court generally upheld state regulations of economic activity when proponents presented these legal rules as an alternative to states expanding their welfare rolls.<sup>156</sup> For example, courts upheld state regulations of wage assignments on the grounds that they advanced the state interest in the “prevention of pauperism.”<sup>157</sup> The U.S. Supreme Court upheld a state worker’s compensation law on similar grounds.<sup>158</sup> But this logic failed to convince the Court in some early cases involving state minimum wage laws. Unlike in the immigration “head tax” cases, where the Court’s decisions encouraged states to adopt entry restrictions rather than levy additional taxes, in the early minimum wage cases in the 1920s, the Court urged states to increase their welfare spending rather than manipulate the private law of the poor.<sup>159</sup>

By the late 1930s, however, the reconstituted Court adopted a more favorable view of state attempts to use minimum wage laws to avoid overburdening their welfare systems. The state’s “interest in avoiding public charges” once again provided the Court with a means of connecting economic regulation to the state’s interest in the general welfare of the public.<sup>160</sup> In 1937, the Court upheld a minimum wage law in *West Coast Hotel*, finding that states could set floors for minimum wages because they would otherwise need to care for poor households through taxpayer-funded welfare programs. The decision has accordingly also come to mark the end of the *Lochner* era and its line of cases striking down economic regulations on liberty of contract grounds.

The flow of police powers cases quickly dried up the following year, in 1938, when the Court adopted a more lenient standard of review for economic regulations more generally.<sup>161</sup> In *Carolene Products*, the Court announced that it would henceforth subject “regulatory legislation affecting ordinary commercial transactions” to a more lenient level of scrutiny. This form of scrutiny was later deemed “rational basis” review.<sup>162</sup> Under this standard, states no longer needed to justify their laws as necessary for the preven-

<sup>156</sup> Katz, *supra* note 73, at 277–81. McCurdy, *Liberty of Contract*, *supra* note 4, at 186–87. See also LAWRENCE MEIR FRIEDMAN, *AMERICAN LAW IN THE 20TH CENTURY* 22 (2002).

<sup>157</sup> See *Mutual Loan Co. v. Martell*, 222 U.S. 225, 233 (1911). See also *Massie v. Cessna*, 88 N.E. 152 (Ill. 1909); *Fay v. Bankers Sur. Co.*, 146 N.W. 359, 361 (Minn. 1914); *West v. Jefferson Woolen Mills*, 245 S.W. 542 (Tenn. 1922).

<sup>158</sup> See *New York Cent. R. Co. v. White*, 243 U.S. 188, 207 (1917).

<sup>159</sup> See *supra* Part I.C.1.

<sup>160</sup> See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399 (1937). See also CUSHMAN, *supra* note 76, at 78 (noting that advocates for minimum wage legislation “articulated two public interests protected” by such laws: “ensuring workers a living wage protected public health and morals” and “requiring employers to pay the cost of sustaining their labor force prevented them from externalizing that cost to the public through poor relief.”).

<sup>161</sup> See *United States v. Carolene Products*, 304 U.S. 144, 152 (1938) (upholding the constitutionality of a federal law barring the interstate transportation of filled milk).

<sup>162</sup> *Id.*

tion of pauperism. Thus, after 1938, there was no reason for advocates involved in constitutional challenges to economic regulations to raise the anti-pauperism argument in court.

### 3. *Judges and Scholars Explaining Policy Purposes*

State employment and lending laws were unusual in that they elicited close judicial scrutiny in the early twentieth century. Courts opined on the propriety of states adopting these rules only because they raised potential constitutional concerns in connection with the scope of federal power and individual rights. But states also enacted other changes to private law that provoked no legal challenges. Instead, they elicited praise from jurists and scholars. Property exemption laws, for example, provoked no constitutional disputes. As one judge explained in 1884, the purpose of exemption laws was to “protect people of limited means” by preventing the “absolute pauperism and want” that would result if their creditors seized all of the debtors’ belongings.<sup>163</sup> (Later generations of judges and scholars echoed this explanation for state exemption statutes.)<sup>164</sup>

Judges did not object if states elected to care for the poor by manipulating private law rules, rather than expanding poor relief, so long as they did not infringe on the federal commerce power or individual liberties. Indeed, the language of many court decisions painted this purpose as a noble one, suggesting that it was far better for states to adopt such rules than to have debtors “cast as paupers on the community” to become “a charge upon the public.”<sup>165</sup> Exemptions protected society from the burden of pauper households, but also protected family members, especially wives, from the improvident financial decisions of the head of household that could push the family into “destitution.”<sup>166</sup> Scholars then repeated these judicial explanations when describing the purpose behind state property exemption laws.<sup>167</sup> Congress

<sup>163</sup> *Carter’s Adm’rs v. Carter*, 20 Fla. 558, 569 (1884). *See also* *Wilcox v. Hawley*, 31 N.Y. 648, 657 (1864).

<sup>164</sup> *See, e.g.,* *Slatcoff v. Dezen*, 76 So. 2d 792, 794 (Fla. 1954); *General Finance Corp. v. Rainer*, 20 Ill. App. 2d 192, 195 (Ill. App. Ct. 1959) (listing the reasons for exemption laws, including “the prevention of any possibility that the debtor or his family might become a public charge upon the state”); *Sw. State Bank v. Quinn*, 198 Kan. 359, 363 (1967) (“The whole purpose and policy of our exemption laws has been to secure to an unfortunate debtor the means to support himself and his family, to keep them from being reduced to absolute destitution and thereby public charges.”).

<sup>165</sup> *Slatcoff*, 76 So. 2d at 794 (noting “the interest of the State in its exemption laws, to the end that owners of exempt property and their families shall not be reduced to absolute destitution, thus becoming a charge upon the public”); *Wilcox*, 31 N.Y. at 657 (“The exemption provided for by it, is not exclusively for the benefit of the owner of the [property]. It is mainly that the family for which he provides may not be stripped of all means of support, and cast as paupers on the community.”).

<sup>166</sup> *Morantz*, *supra* note 19, at 262–63 (quoting *Morris v. Ward*, 5 Kan. 239 (1869)).

<sup>167</sup> *E.g.* *Haskins*, *supra* note 81, at 1289 (observing that “[t]he principal objective of the homestead laws is generally regarded as the security of the family, which in turn benefits the community to the extent that such security prevents pauperism and provides the members of the family with some measure of stability and independence.”); *McGreevy*, *supra* note 82, at 1230 (“Historically, the legislative purpose underlying exemption law was to protect debtors



did as well, when it enacted the federal Bankruptcy Code, including federal property exemptions, in 1977.<sup>168</sup>

Judges wrote similar opinions extolling other rules, such as family support laws, that purported to relieve the public of the burden of caring for the poor. The Wisconsin Supreme Court favorably described the purpose of its parental support law as saving the community from “all expense” for the “maintenance” of poor children and pregnant mothers.<sup>169</sup> The Supreme Court of Alabama likewise praised its parental support law for preventing poor children “from becoming a public charge” and thereby protecting “the good of society.”<sup>170</sup> In 1887, Arkansas’s Supreme Court similarly lauded its own judge-made rule which invalidated a worker’s contractual waiver of negligence claims against his employer so as to prevent scores of disabled workers from becoming “a charge upon the counties or upon public charity.”<sup>171</sup> Academics have also offered their own praise of legal rules aimed at lessening the burden of poor households on the public welfare system.<sup>172</sup>

Unlike the *Lochner*-era judges described in the preceding section,<sup>173</sup> the legal scholars and judges surveyed here did not raise the anti-pauperism argument in order to conform to a particular era’s mode of legal reasoning. Rather, like politicians attempting to build a policy coalition,<sup>174</sup> they have invoked the argument when engaging in public defenses of policy choices, albeit not to political constituents or fellow legislators. This Article has already identified one reason for invoking this reason: it is likely to persuade some listeners of the value of the policy. In addition, as explained below, offering this justification for a policy choice also allows policy proponents to avoid relying entirely on other, more contested reasons.<sup>175</sup>

### C. *Avoiding Contested Values Questions*

The appeal of the anti-pauperism argument is explained in part by the specific conjunctions of factors that have existed at particular moments in

and their dependents from impoverishment, as well as to eliminate their dependence on welfare and other public programs following bankruptcy.”).

<sup>168</sup> H.R. REP. NO. 95-595, at 126 (1977) (“The historical purpose of these exemption laws has been to protect a debtor from his creditors, to provide him with the basic necessities of life so that even if his creditors levy on all of his nonexempt property, the debtor will not be left destitute and a public charge.”).

<sup>169</sup> *State v. Jager*, 19 Wis. 235, 236 (1865).

<sup>170</sup> *Coan v. State*, 224 Ala. 584, 585 (1932). *See also* *People v. Elliott*, 186 Colo. 65, 69 (1974) (noting that state “non-support statute,” requiring father to support his child, included “penal sanctions” that were “imposed under the police power of the state in the interest of the general welfare and specifically to protect the child’s well-being and to prevent his becoming a public charge.”)

<sup>171</sup> *Little Rock & Ft. S. Ry. Co. v. Eubanks*, 3 S.W. 808, 810-11 (Ark. 1887).

<sup>172</sup> *See, e.g.,* Posner, *supra* note 103, at 285; Schmitz, *supra* note 102, at 101-02. *See also* Hellwig, *supra* note 104, at 1580; Lundberg, *supra* note 104, at 200-01.

<sup>173</sup> *See supra* Part II.B.2.

<sup>174</sup> *See supra* Part II.B.1.

<sup>175</sup> *See supra* Part II.C.

time.<sup>176</sup> The argument's allure has waxed and waned depending on the shifting tides of economic forces, public anxiety about poverty and poor relief, political factions, and currents in legal thought. But its appeal also transcends chronological boundaries and the specific political, legal, social, and economic forces at work in any one era. It rests, in part, on a desire to avoid debate over divisive values questions.

Justifications for laws and policies may appeal to a range of values and entail value judgments. For example, one might argue in favor of price controls for credit as a means to protect vulnerable borrowers from overreaching by lenders. On the other hand, one might argue against price controls on the grounds that they limit access to credit for those who pose the greatest risk of non-payment, ultimately harming consumers to whom lenders will not extend credit at the low legal rate of charge. Choosing whether to enact price controls entails a value judgment: should we reduce access to credit for some consumers in order to protect others from higher prices? What is the right balance between security and liberty, between protection and autonomy?

One way to make this judgment is to weigh the costs of a policy against its benefits, with the goal of maximizing overall social welfare. As legal scholar Joseph Singer has observed, such utilitarian justifications do entail value judgments—namely, that the goal of law is to maximize social welfare. But, as Singer explained, utilitarianism is “normatively thin in the sense that it bases normative argument on widely shared and noncontroversial values and proceeds through a form of reasoning that is either self-evident or definitionally rational.”<sup>177</sup> In the field of criminal law, legal scholar Dan Kahan has argued that deterrence-based justifications play a similar role in discussions about punishment: they allow policy debates to proceed while avoiding “expressive conflict” over more hotly contested values.<sup>178</sup> Like maximization of social welfare, promoting deterrence is not a value-neutral objective. But saving lives (the result of deterring lethal violence) is a goal that is widely shared and fits “within essentially all recognizable cultural and ideological commitments.”<sup>179</sup>

Likewise, the goal advanced by the anti-pauperism argument—reducing government spending—is not a value-neutral aim, but it is normatively thin and widely supported. Saving taxpayer money is not controversial. Arguing that a particular rule should be adopted (or retained) because it will reduce welfare spending is unlikely to repel supporters. It can only persuade holdouts, or provide those who already in favor of the rule with further justification for their support.<sup>180</sup>

---

<sup>176</sup> See *supra* Parts II.A and II.B.

<sup>177</sup> Joseph William Singer, *Normative Methods for Lawyers*, 56 UCLA L. Rev. 899, 915 (2008).

<sup>178</sup> Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 445–46 (1999).

<sup>179</sup> *Id.* at 446.

<sup>180</sup> On politicians' use of this argument, see *supra* Part II.B.1.

Furthermore, reducing the burden on taxpayers is an even less controversial policy justification when its pursuit does not entail abandoning the goal of caring for the poor. Those who advocate for private law rules as the best means of caring for the poor frame the policy question as one of *how* society should care for the less fortunate, not whether it should.<sup>181</sup> In this way, the anti-pauperism argument for economic regulation appeals to the moral value of care. It also appeals to the moral value of liberty for those who oppose welfare payments as liberty-reducing on the grounds that they make the recipient dependent on outside aid for support.<sup>182</sup>

Thus, the anti-pauperism rationale justifies economic regulation based on an appeal to taxpayer self-interest, rather than based on other, more contested ideals. Minimum wage laws, for example, might otherwise be justified as a means of “ensuring that workers are free from domination” by their employers, of protecting the dignity of labor, and of preserving social equality.<sup>183</sup> But the anti-pauperism justification enables policy advocates to argue for their preferred policies while skirting these more controversial arguments concerning the nature of a fair and just economy. As legal scholar Cass Sunstein has described, legislative decisions are often based on “incompletely theorized agreements.”<sup>184</sup> And, in practice, legislators regularly adopt legal rules without agreeing on which abstract theories about the nature of good governance or morality serve to justify these rules.<sup>185</sup> Accordingly, the anti-pauperism argument can aid policy proponents in building a coalition of supporters with disparate reasons for backing the regulation at issue, by helping them to recruit supporters who are not swayed by arguments that appeal to more contested values.<sup>186</sup>

---

<sup>181</sup> The argument thereby elides the threshold question of whether society should care for the poor at all.

<sup>182</sup> Scholars of moral psychology, such as Jonathan Haidt, identify care as one of six foundational moral values that humans use to make judgments (the others are fairness, liberty, loyalty, authority, and sanctity). See, e.g., JONATHAN HAIDT, *THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION* (2012).

<sup>183</sup> Brishen Rogers, *Employment Rights in the Platform Economy: Getting Back to Basics*, 10 HARV. L. & POL'Y REV. 479, 483 (2016) (arguing that minimum wage laws and other basic employment regulations offer “a crucial means of ensuring that workers are free from domination,” “deter economic and social practices that undermine workers’ individual dignity and equal social standing,” and encourage “a more egalitarian and democratic political economy”); Brishen Rogers, *Justice at Work: Minimum Wage Laws and Social Equality*, 92 TEX. L. REV. 1543, 1548–49 (2013) (arguing that minimum wage laws ensure “social equality”).

<sup>184</sup> Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995). As Sunstein notes, “incompletely theorized agreements” are closely related to the idea of “overlapping consensus” in the philosophy of John Rawls. *Id.* at 1735 n.8. Sunstein’s article focuses on how judges are able to decide particular cases without agreeing on which abstract principles dictate that outcome.

<sup>185</sup> *Id.* at 1741.

<sup>186</sup> On the costs and benefits of this approach, see *infra* Part III.B.2.

## III. IMPLICATIONS

The long history of the anti-pauperism argument, in favor of reshaping the private law of the poor so as to prevent increased reliance on public assistance, offers three insights for legal scholars and contemporary policymakers.

First, for law and economics scholars, this history helps to explain the political difficulties inherent in using taxes and transfers, rather than legal rules, to redistribute resources within society. Economists generally agree that policymakers should adopt the most efficient tool for redistribution—either legal rules or taxes and transfers. But a singular focus on the efficiency of the tools themselves ignores the political action costs associated with implementing each option. This Article suggests that the enduring appeal of redistributive legal rules creates a political barrier to the deployment of tax and transfer strategies to rectify economic inequality.<sup>187</sup>

Second, this history also raises two questions for modern law reform movements. First, for those seeking to promote redistribution in the present, should they embrace legal rules, rather than taxes and transfers, as a more politically palatable mechanism for the reallocation of income and wealth within American society?<sup>188</sup> Second, for those who support various forms of economic regulation, like raising the minimum wage, should they use the anti-pauperism argument to justify their preferred policies?<sup>189</sup> The second section considers both questions.

Finally, for scholars of poverty law and private law, these findings also implicate our understanding of private law's concern with poverty and of poverty law's scope.<sup>190</sup>

*A. For Economists: The Allure of Private Law over Taxes & Transfers*

For nearly four decades, since the early 1980s, law and economics scholars have debated how policymakers can best use law to combat economic inequality.<sup>191</sup> As they have shown, policymakers have two sets of tools for redistributing income and wealth in the economy: they can either increase taxes and transfer payments to low-income earners or manipulate the legal rules that govern economic activities to shift the flow of resources.

<sup>187</sup> See *infra* Part III.A.

<sup>188</sup> See *infra* Part III.B.1.

<sup>189</sup> See *infra* Part III.B.2.

<sup>190</sup> See *infra* Part III.C.

<sup>191</sup> See, e.g., Kaplow & Shavell, *supra* note 13, at 677; Chris William Sanchirico, *Taxes Versus Legal Rules as Instruments for Equity: A More Equitable View*, 29 J. LEGAL STUD. 797, 820 (2000); Brian D. Galle, *Is Local Consumer Protection Law a Better Redistributive Mechanism Than the Tax System?*, 65 N.Y.U. ANN. SURV. AM. L. 525, 529 (2010); Zachary Liscow, *Counter-Cyclical Bankruptcy Law: An Efficiency Argument for Employment-Preserving Bankruptcy Rules*, 116 COLUM. L. REV. 1461, 1466–67 (2016); Matthew Dimick, *Better than Basic Income? Liberty, Equality, and the Regulation of Working Time*, 50 IND. L. REV. 473, 476 (2017); Blankfein-Tabachnick & Kordana, *supra* note 13, at 1.

Lawmakers could, for example, raise taxes to fund an increase in public benefits paid to low-wage workers, or they could enact stricter wage and hour regulations. The debate over which tool to deploy has largely proceeded on the terrain of economics, among academics trained in how to analyze the efficiency of various legal regimes.

This Article contributes to this debate in two ways. First, it shows that the choice between taxation and legal rules has a longer and more complicated backstory that predates the rise of law and economics in the 1980s. By situating the debate among economists within the longer sweep of American policy history, it illustrates that the choice between these two sets of redistributive tools—taxpayer-funded transfer payments and legal rules—has bedeviled Americans for more than a century.

Second, the persistence of the anti-pauperism argument across time suggests deep-seated support for reallocating resources by manipulating the private law of the poor, rather than by increasing funding for welfare. For over a century, judges, politicians, and policy advocates have regularly defended existing legal rules and reform proposals on the grounds that they offer a means to avoid increasing taxes and transfer payments to the poor. In the United States, redistribution through private law rules has an enduring allure, even though this approach contravenes the advice of most modern economists.<sup>192</sup>

Although economists may agree that the choice of legal tool should depend on which is most efficient, history shows that this concern has not channeled the course of the debate on this question in the political and legal spheres for most of the past century.<sup>193</sup> Rather, Americans have repeatedly justified manipulating private law rules as a way to prevent “pauperism” and to curb social welfare spending. The argument for private law rules has not been grounded in claims about the relative efficiency of legal rules over taxes and transfers. Instead, the crux of the argument for private law has been about its potential to redistribute the cost, rather than to minimize the overall cost, of caring for the poor.<sup>194</sup> Proponents have touted private law as tool for shifting the burden of caring for the poor from the public fisc onto private employers, household members, and financial institutions.

To be sure, efficiency-based arguments for and against redistribution through legal rules are now also part of the discussion among judges, scholars, and politicians.<sup>195</sup> Indeed, the past four decades of law and economics

---

<sup>192</sup> *But see* Liscow, *supra* note 191, at 1471–83.

<sup>193</sup> *But see* Fennell and McAdams, *supra* note 14 (arguing that economists must consider not only efficiency, but also political action costs).

<sup>194</sup> In debates over debt collection laws, for example, anti-pauperism rhetoric has not suggested that legal rules will deter borrowers from excessive use of credit. Rather, the focus has been on the need to prevent borrowers from being left without any resources to support themselves if they enter into unaffordable loans and then default. *See supra* Part I.C.

<sup>195</sup> Modern scholars have made arguments for redistributive rules that are grounded in efficiency concerns. *See, e.g.,* Liscow, *supra* note 191, at 1471–83. This Article does not dispute whether economic efficiency should be the touchstone for policymakers selecting among legal tools to redistribute wealth and income.

scholarship has shown a fundamental flaw in the argument for redistribution through private law. Redistributive private law rules are appealing because they promise to shift the burden of caring for the poor from taxpayers onto employers and other businesses. But, as legal economists have shown, when government regulates business, business can often pass the costs along to consumers by raising prices. Ultimately, it may still be “us” that bears the burden of caring for the least fortunate, even if private law rules are directed at “them.”<sup>196</sup> But arguments in favor of adopting redistributive rules, grounded in concerns other than efficiency, persist.<sup>197</sup> The recurrence of these arguments into the twenty-first century suggests that the triumph of efficiency is far from complete.

What should economists make of the anti-pauperism argument for legal rules? This Article does not contend that law and economics scholars should cease debate over whether legal rules or taxes and transfers are more efficient. Rather, it suggests that incorporating anti-pauperism concerns into the efficiency analysis could yield a more accurate assessment of the true costs of each method of redistribution. By tracking the recurrence of the anti-pauperism argument, it offers new insight into some of the political action costs that pose a barrier to the use of taxes and transfers to achieve redistribution. Factoring in these costs both complicates and deepens the analysis of which regime is ultimately more efficient.<sup>198</sup>

### B. For Modern Law Reform Movements

#### 1. Should Advocates for Reducing Inequality Embrace Private Law?

Should activists and policymakers who want to address economic inequality push for changes to private law as the more politically palatable mechanism for reallocation of income and wealth within American society? For example, should advocates focus on strengthening minimum wage laws rather than pushing for some form of Universal Basic Income (UBI), meaning a program that would pay every American a fixed dollar amount regardless of need or other individual circumstances?<sup>199</sup> Although advocates could do both, energy and resources are limited. Moreover, each proposal expresses a different view as to how societal resources should be distributed and whether work should be necessary to human flourishing.

---

<sup>196</sup> E.g., Emek Basker & Muhammad Taimur Khan, *Does the Minimum Wage Bite into Fast-Food Prices?*, 37 J. LAB. RES. 129 (2016) (finding that fast-food restaurants “pass through” the cost of minimum wage increases to customers by raising prices).

<sup>197</sup> See arguments surveyed in *supra* Part I from the last twenty years.

<sup>198</sup> On the importance of political action costs, see Fennell and McAdams, *supra* note 14, at 1053.

<sup>199</sup> On UBI, see, e.g., ANNIE LOWREY, *GIVE PEOPLE MONEY: HOW A UNIVERSAL BASIC INCOME WOULD END POVERTY, REVOLUTIONIZE WORK, AND REMAKE THE WORLD* (2018); ANDREW YANG, *THE WAR ON NORMAL PEOPLE: THE TRUTH ABOUT AMERICA'S DISAPPEARING JOBS AND WHY UNIVERSAL BASIC INCOME IS OUR FUTURE* (2018).

Economic inequality is a growing problem in the United States. The income gap between rich and poor in America has widened significantly over the past four decades.<sup>200</sup> Although inequality has risen globally, income inequality in the United States is “among the highest of rich countries,” according to a 2018 report.<sup>201</sup> In America, the share of national income that goes to the top 1% of earners rose from 11% in the late 1960s to over 20% in 2014, while the share going to the bottom 50% declined from 21% to 12.5% in the same time period.<sup>202</sup>

In tackling the problem of rising inequality, legal rules do enjoy some political advantages over the alternative of taxation and welfare spending. First, rules allow advocates for redistribution to more easily elide divisive values questions, such as “how much redistribution?” and “from whom?” Redistribution through taxes and transfers requires lawmakers to decide how much to spend on transfers and who will pay for this spending through taxes. They must determine the size of the tax and of the transfer, as well who will be taxed and who will receive the benefit. Both determinations are likely to provoke conflict and disagreement.<sup>203</sup> In contrast, lawmakers need not allocate a set amount of funds when adopting redistributive legal rules. They merely enact the rules and hope that they have the intended distributive effects.

Second, legal rules are appealing because they tap into a communal desire to make someone other than ordinary taxpayers bear the burden of caring for the poor. Private law rules hold out the (perhaps false) promise that they will relieve ordinary taxpayers of the burden of caring for the poor and instead shift it to employers, lenders, and others who do business with low-income households. These rules can be framed as facilitating a direct transfer from businesses to low-income households, with no government intermediation or commingling of aid with other public funds.<sup>204</sup> Thus, redistribution through private law appears to involve less government spending than taxes and transfers. As economist Richard Kornhauser observed when explaining the appeal of redistribution through legal rules in 1981, when the government redistributes through regulation, it appears not to spend but merely to “oversee[ ] the turnstiles as resources and benefits flow from one group of

---

<sup>200</sup> Thomas Piketty et al., *Distributional National Accounts: Methods and Estimates for the United States*, 133 Q.J. ECON. 553, 557 (2018).

<sup>201</sup> Facundo Alvaredo et al., WORLD INEQUALITY LAB, WORLD INEQUALITY REPORT 2018 78 (2018), <https://wir2018.wid.world/files/download/wir2018-full-report-english.pdf> [<https://perma.cc/GR8H-ENED>].

<sup>202</sup> Piketty et al., *supra* note 200, at 581, 586.

<sup>203</sup> Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s*, 139 U. PA. L. REV. 1, 44 (1990) (explaining the political science theory that redistributive public policymaking is “more conflictive and ideological in style” than regulatory policymaking).

<sup>204</sup> Taxes might be selectively deployed in the same way, if imposed only on these same groups. But any tax dollars so raised go into a pool where they mix with revenues from other sources, including the general public. Because money is fungible, it is impossible to say whether the funds used for transfer payments came from a business or an ordinary taxpayer.

affected individuals to another.<sup>205</sup> For those who fear the growth of government bureaucracy, private law rules accordingly offer a significant advantage over taxes and transfers.

Yet, there are a few reasons that the movement against economic inequality might wish to resist the siren song of legal rules. First, the argument for legal rules frames the problem of widespread financial fragility and economic inequality as one that can be solved through tinkering with private contractual relationships—those between employers and employees, borrowers and lenders, savers and bankers. In this way, the argument shifts attention from broader structural sources of inequality, such as how race and familial wealth determine an individual's access to quality education, employment, and housing.<sup>206</sup> And it appeals to an ungenerous instinct: the desire to shift the burden of caring for the least fortunate from the general public of taxpayers to a subset of employers and businesses. Thus, this rationale is unlikely to nurture and grow a long-term movement for a more equitable economy.

Second, it's not clear whether the argument rests on a sound empirical foundation. Those who support legal rules over tax and transfer strategies would do well to provide more data in support of the claim that legal rules can in fact redistribute income in a manner that reduces reliance on government programs. Furthermore, if there is support for the claimed link, proponents should also ponder how those who oppose both economic regulation and a generous welfare state might use this data in service of their own cause.<sup>207</sup>

Finally, to the extent that the relative appeal of taxes and transfers varies depending on time, place, and the surrounding political and economic context, the present moment may present a window of opportunity for the tax and transfer approach, in the form of a UBI. The number of advocates for this approach to redistribution is growing all across the political spectrum.<sup>208</sup> If the ultimate goal of advocates is to tackle economic inequality, the political momentum may now be on the side of a UBI rather than in favor of tinkering with private law rules.

---

<sup>205</sup> RICHARD ZECKHAUSER, U.S. CHAMBER OF COMMERCE, USING THE WRONG TOOL: THE PURSUIT OF REDISTRIBUTION THROUGH REGULATION 6 (1981).

<sup>206</sup> On race, wealth, and inequality, see RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017); MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* (10th anniversary ed. 2006); DALTON CONLEY, *BEING BLACK, LIVING IN THE RED: RACE, WEALTH, AND SOCIAL POLICY IN AMERICA* (1st ed. 1999).

<sup>207</sup> Data showing a link between regulation and welfare spending could also be used to argue for curtailment of welfare spending. Taxpayers do not need to worry about the impact of economic regulation on welfare spending if taxpayers do not fund a generous welfare state.

<sup>208</sup> E.g., LOWREY, *supra* note 199; YANG, *supra* note 199; Annie Nova, *Universal basic income: U.S. support grows as Finland ends its trial*, CNBC (May 1, 2018, 2:06 p.m.) <https://www.cnn.com/2018/05/01/nearly-half-of-americans-believe-a-universal-basic-income-could-be-the-answer-to-automation-.html> [<https://perma.cc/YCK3-UYXK>]; Miranda Perry Fleischer & Daniel Hemel, *Atlas Nods: The Libertarian Case for a Basic Income*, 2017 WIS. L. REV. 1189 (2017).



## 2. *Should Advocates for Regulation Embrace Anti-Pauperism?*

For those who wish to enhance legal protections for poor workers and consumers, the preceding analysis suggests one way of framing support for such regulations: as a means to reduce the reliance of low-income households on welfare programs. So, should those who want more protective private law rules frame their proposals as a means to avoid increased welfare spending?

One threshold question is whether the anti-pauperism argument resonated in the past for reasons that still apply today. The answer is mixed: some of the reasons for its appeal no longer apply, while others still hold. As previously described, the enduring allure of arguments for redistribution through legal rules is explained, in part, by the argument's appeal to specific audiences at particular moments in time.<sup>209</sup> For example, in the early twentieth century, courts determined the constitutionality of economic regulations based on whether the legislation represented a proper exercise of the state's police powers.<sup>210</sup> Accordingly, judges regularly discussed the state's interest in the "prevention of pauperism" as a rationale for upholding legislation against constitutional challenge. But, under the modern standard of rationale basis review, judges no longer have cause to consider the scope and depth of this state interest in evaluating the constitutionality of run-of-the-mill economic regulations.

Other reasons for the appeal of redistributive rules still apply today, however. Politicians still need to build coalitions for legislation and they may often prefer to garner support by appeal to taxpayer self-interest while avoiding protracted debate about divisive values questions.<sup>211</sup> The nature of a just and fair economy remains in dispute, but saving taxpayer money is not so hotly contested. Justifying protective economic regulation in the language of taxpayer self-interest may better serve the cause of reform than appeals to more contested values, by allowing reformers to avoid debate over fundamental value questions that they cannot hope to win and that may actually diminish support for their cause.<sup>212</sup>

Furthermore, deploying the anti-pauperism argument in support of regulatory interventions also implicates shared notions of the causes and consequences of poverty in a few ways. First, in advancing a descriptive claim about the link between regulation and demand for poverty relief, the anti-pauperism argument presents a hopeful (and perhaps overly optimistic) view of the causes of poverty. It promises that better regulation of employers, lenders, and savings institutions will allow more financially fragile house-

---

<sup>209</sup> See *supra* Part II.B.

<sup>210</sup> See *supra* Part II.B.2.

<sup>211</sup> See *supra* Parts II.B.1 and II.C.

<sup>212</sup> As legal scholar Dan Kahan describes in his work on deterrence in criminal law, avoidance of contested values questions may further progressive causes in some contexts, such as when reformers seek to upend policies founded on deeply-entrenched values that are unlikely to change. Kahan, *supra* note 178, at 493–95.

holds to remain self-supporting. In other words, it suggests that the working poor and those in danger of falling into poverty will be able to avoid dependence on public assistance if their commercial and employment transactions are subject to greater state oversight.

This view of the causes of poverty contrasts with that offered by political conservatives like Charles Murray, who view culture and genetics as key determinants of poverty.<sup>213</sup> In this way, the argument may do useful work for political progressives in advancing a view of the causes of poverty that is better aligned with Great Depression-era thinking—namely, that any household could slide into and out of poverty, depending on its ability to borrow, save, and support itself through wage work.

But there are also costs to attempting to garner support for regulation based on the claim that private law rules can reduce reliance on welfare spending. First, the anti-pauperism argument may advance an understanding of the causes of poverty that is ultimately detrimental to the poor. It acknowledges the importance of private law in determining which households are able to remain self-supporting. It also assumes, however, that if the “right” private law rules are in place, then individuals can avoid reliance on welfare. The corollary is that, with these structures in place, those who do fall into deep poverty have only themselves to blame for their misfortune. As noted above, the anti-pauperism rationale for private law rules shifts attention away from the broader structural sources of inequality that limit the ability of households to move up the income ladder.<sup>214</sup> By ignoring these structural causes of poverty and casting blame on the poor for their circumstances, the anti-pauperism argument may ultimately yield a more punitive and less generous welfare system for those who remain dependent on state support after the “right” private law rules are adopted.

Furthermore, to the extent that the anti-pauperism argument obscures advocates’ real motives for seeking legal change, it deprives the reform campaign of an opportunity to build their case for change on a deeper foundation. As noted above, the argument elides fundamental value disputes over questions such as how to protect individual autonomy, the importance of work and self-reliance, and the scope of communal and societal duties of care.<sup>215</sup> Justifying reform in terms of fundamental values makes those values apparent, rather than obscuring the real motivations for change.<sup>216</sup> For reformers, policy arguments grounded in a vision for a more just society may strike a deeper emotional chord with voters and also establish a more distinct social movement identity. Such arguments may therefore be more effective

---

<sup>213</sup> RICHARD J. HERRNSTEIN & CHARLES A. MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1994); CHARLES A. MURRAY, *COMING APART: THE STATE OF WHITE AMERICA, 1960-2010* (2012).

<sup>214</sup> See *supra* Part III.B.1.

<sup>215</sup> See *supra* Part II.C.

<sup>216</sup> For a similar point on deterrence and criminal law, see Kahan, *supra* note 178, at 477–85, 491.

in mobilizing and energizing a political coalition than policy arguments based on saving taxpayer dollars.<sup>217</sup>

### C. *The Public Interest in the Private Law of the Poor*

Finally, the history of the anti-pauperism argument shows that the politics of poverty and poor relief have consistently muddled the lines dividing public law fields from private law subjects.<sup>218</sup> To be sure, many scholars have questioned whether the public/private distinction breeds more confusion than clarity.<sup>219</sup> But others have reinforced this divide in the ways that they carve up the legal universe. New Private Law scholars, for example, have embraced these labels as they search for the normative commitments that distinguish private law from public law.<sup>220</sup> Meanwhile, although poverty law scholars have cared less about reinforcing the public/private distinction, their work has tended to equate poverty law with the rules governing direct government assistance to needy households.<sup>221</sup> In this way, poverty law has become synonymous with social welfare law, which sits on the public law side of the divide. Debtor exemption laws and minimum wage laws, meanwhile, fall under the heading of private law.

For poverty law and private law scholars, the history of the anti-pauperism argument compels a reconsideration of the relationship between these two fields—both in terms of how we define “poverty law” as well as in how we understand the relationship between private law and public welfare law. As this Article shows, concerns about poverty and poor relief have echoed well beyond the domain of public welfare law, spilling over into the realm of private law. Proponents of the anti-pauperism argument imagined the rules that govern public assistance to the poor as just one part of a larger legal regime designed to manage poverty. They argued that the public has an interest in configuring private law rules so as to keep households self-support-

---

<sup>217</sup> On the role of emotions and group identity in political participation, see Martijn van Zomeren, *Building a Tower of Babel? Integrating Core Motivations and Features of Social Structure into the Political Psychology of Political Action*, 37 POL. PSYCHOL. 87, 91, 95, 107 (2016).

<sup>218</sup> Academics broadly categorize areas of study as belonging to either “private” or “public” law. See, e.g., Project on the Foundations of Private Law, *About*, HARVARD LAW SCH., <https://blogs.harvard.edu/privatelaw> [<https://perma.cc/PZE3-L4DD>]. This distinction endures, even though commentators have periodically questioned it. See Randy E. Barnett, *Foreword: Four Senses of the Public Law-Private Law Distinction*, 9 HARV. J. L. & PUB. POL’Y 267, 267 (1986) (explaining that there are actually “four different ways to distinguish between public law and private law”).

<sup>219</sup> E.g., Melissa Jacoby, *Corporate Bankruptcy Hybridity*, 166 U. PA. L. REV. 1715 (2018).

<sup>220</sup> Goldberg, *supra* note 2, at 1662 (“private law is normatively distinct precisely in its commitment to arming individuals with a legal power to demand and hold others accountable to them”).

<sup>221</sup> E.g., TANI, *supra* note 1; KORNBLUH, *supra* note 1; ORLECK, *supra* note 1; KATZ, *supra* note 1. The Sargent Shriver National Center on Poverty Law lists “Economic Justice” as one of its one main advocacy areas. Five of the six policy goals concern government assistance programs and public tax policies. *Economic Justice*, SARGENT SHRIVER NATIONAL CENTER ON POVERTY LAW, <http://www.povertylaw.org/economicjustice> [<https://perma.cc/8S6Q-X6XE>] (last visited Aug. 6, 2018).

ing and to prevent financially fragile households from falling back on state support as the result of a bad bargain. The history of the anti-pauperism argument thus shows how concerns rooted in public law, about limiting the growth of the public welfare state, have shaped debates over the private law of the poor.

At the same time, the anti-pauperism argument itself has also served to reinforce an understanding of public law and private law as two distinct modes of governance, while favoring the private law approach to poverty alleviation. Proponents of the argument urge policymakers to limit the growth of the public welfare state and instead adopt a less visible network of private law rules to support the poor. The argument envisions that the law will provide a safety net for financially fragile households that will be largely hidden from view because it will take the form of legal limits on the behavior of private actors in the marketplace, rather than of direct government-funded payments to households.

Scholars in law and political science have described a “hidden” or “submerged” welfare state, which delivers benefits through tax expenditures and government subsidies to private organizations.<sup>222</sup> Proponents of the anti-pauperism argument advocate for an even more well-hidden welfare state that is comprised of private law rules designed to keep households out of poverty – what we might imagine as the “private law welfare state.” But, by tracking the anti-pauperism argument over time, this Article seeks to render more visible the links between private law and public poverty law, and to surface this hidden welfare state.

This Article also aims to speak to scholars of private law. The study of private law has recently enjoyed a resurgence of interest among scholars who seek to understand the law’s vision of justice in relations between private individuals. But these scholars generally seek that vision within the law’s doctrinal structures, which betray little concern for combatting poverty. Some conclude that private law’s “irreducible value” lies in its articulation of an “ideal of just relationships” between private individuals.<sup>223</sup> In contrast to public law, they find, private law attends to “our interpersonal relationships as private individuals rather than as citizens of a democracy or patients of the welfare state’s regulatory scheme.”<sup>224</sup>

---

<sup>222</sup> See, e.g., CHRISTOPHER HOWARD, *THE HIDDEN WELFARE STATE: TAX EXPENDITURES AND SOCIAL POLICY IN THE UNITED STATES* (1997); SUZANNE METTLER, *THE SUBMERGED STATE: HOW INVISIBLE GOVERNMENT POLICIES UNDERMINE AMERICAN DEMOCRACY* (2011). Scholars have also observed how the government supports the private provision of social benefits, an arrangement dubbed the “divided welfare state” or the “public-private welfare state,” as well as how it provides benefits directly to service members and their families through the “military welfare state.” See, e.g., JENNIFER KLEIN, *FOR ALL THESE RIGHTS: BUSINESS, LABOR, AND THE SHAPING OF AMERICA’S PUBLIC-PRIVATE WELFARE STATE* (2003); JACOB S HACKER, *THE DIVIDED WELFARE STATE: THE BATTLE OVER PUBLIC AND PRIVATE SOCIAL BENEFITS IN THE UNITED STATES* (2002); JENNIFER MITTELSTADT, *THE RISE OF THE MILITARY WELFARE STATE* (1st ed. 2015).

<sup>223</sup> Dagan & Dorfman, *supra* note 2, at 1410.

<sup>224</sup> *Id.* at 1410. See also Hanoah Dagan, *Defending Legal Realism: A Response to Four Criticisms*, 1 *CRITICAL ANALYSIS L.* 254, 264 (2014).

Analysis of the doctrinal structure of private law might yield an appealing ideal of justice in individual relationships. But, looking across time, the justifications that have been offered for these rules also reflect societal concerns about the burden imposed on the public when private relationships leave one party without the means of self-support. The history of the anti-pauperism argument suggests that legal ideals of relational justice are not uniform across economic status. They change when one of the private parties is poor, or in danger of falling into poverty. Such individuals have often been understood as patients (or potential patients) of the welfare state, even in their private dealings.

#### CONCLUSION

As this Article shows, concerns about the public costs of caring for the poor have lurked at the edges of the discourse surrounding private law for over a century. Repeatedly, the public's interest in curbing welfare spending has offered a ready justification for reconfiguring the private law of the poor, so as to prevent financially fragile households from needing to fall back on government assistance. Thus, the public obligation to provide poor relief is essential for understanding the field of private law and the fractures running through it, as well for the larger project of mapping the shifting boundary between the public and the private in American legal approaches to managing poverty across time.

