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HUNGER IN AMERICA

A HISTORY OF PUBLIC AND PRIVATE RESPONSES

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This paper is submitted in satisfaction of both the course requirement and the third-year written work requirement.

ABSTRACT: This paper surveys the variety of public and private hunger relief programs in America, reviewing the history of these programs in order to enable an informed analysis of their effectiveness in fighting domestic hunger.

Recent headlines indicate that America has a problem with food. Simply put, Americans eat too much. Obesity is on pace to become the leading preventable cause of death in this country.¹ While this is cause for concern, the reality of a serious health risk linked to an abundant food supply overshadows another problem that America has with food. Hunger affected an estimated 9 million Americans in 2001.² Another measurement evaluating food security³ found that 12.1 million American households experienced hunger in 2002. These are startling numbers in a land of plenty. As millions struggle to lose weight, many other millions struggle to find enough to eat.

Hunger in America is also overshadowed by the problem of hunger in other parts of the world. The pangs of hunger in the famine-plagued countries of Africa or impoverished regions of India may seem to be a more serious concern. Yet hunger cannot be measured on a relative scale. Comparing the hunger of an African child facing starvation with the hunger of an American child whose parents may not have money to buy

¹A recent study by the Centers for Disease Control and Prevention found that a combination of poor diet and physical inactivity was the second-leading preventable cause of death in the United States (400,000 deaths in 2000). Tobacco, the number one killer, retained the top spot by a margin of 35,000 more deaths. The gap between these top two preventable causes of death has narrowed since 1990. Mark Sherman, *Government Warns That Being Fat Might Surpass Smoking As A Killer* (Mar. 10, 2004), Associated Press, at <http://www.chronicdisease.org/ObesityOnTheRise.htm>.

²AMERICA'S SECOND HARVEST, CURRENT HUNGER AND POVERTY STATISTICS, at <http://www.secondharvest.org/site.content.asp?s=59> (last visited Apr. 15, 2004).

³*Food security* is defined as "access by all people at all times to enough food for an active, healthy life." It is a concept that is designed to provide a more accurate measurement of hunger in the United States. MARK NORD, ET AL., HOUSEHOLD FOOD SECURITY IN THE UNITED STATES, 2002 iii (U.S. Dep't of Agric. Econ. Res. Service, Food Assistance and Nutrition Research Report No. 35, Oct. 2003), available at <http://www.ers.usda.gov/publications/fanrr35/fanrr35.pdf>. The percentage of American households experiencing food insecurity each year has fluctuated since the government first began tracking these statistics in 1995, but the most recent rate of food insecurity is representative of the average number of American households that do not have enough food at some point during a year. In 2002, the rate of food insecurity was 11.1 percent, a slight increase from the 2001 rate. This means that 12.1 million households experienced food insecurity during 2002. Research shows that the ten percent of American households experiencing some degree of food insecurity each year are concentrated primarily in poor households, in households with children headed by single women, and in minority households.

food at the end of the month implies that hunger in America is nothing to worry about. That comparative perspective further legitimizes the injustice of the social and economic conditions that enable hunger to persist.

Hunger has been a consistent reality throughout human history. The record of efforts to relieve hunger is almost as long. Over the course of time governments have adopted more direct roles in addressing the problem of hunger, often through programs aimed at the root cause of poverty. Most government programs were preceded, and continue to be augmented, by less formal hunger relief efforts within local communities. This overview of domestic hunger will survey the development of public and private hunger relief programs in America. The first section will outline the history of public food assistance programs in America, beginning with the roots of public poverty relief in medieval England. The second section will examine the history of private food assistance programs in America. The third section will analyze recent Congressional activity affecting hunger relief programs. The final section will review the history of gleaning and present that practice as a useful paradigm for the future of hunger relief efforts in America.

SECTION I

The history of public hunger relief is several thousand years old. One early example of public commands to provide for the hungry comes from the laws of the nation of Israel.⁴ Those laws, however, are best seen as instructions to engage in private charity. In the same way, although the rulers of the Roman Empire

⁴*Leviticus* 19:9-10 (New International), available at <http://www.biblegateway.com> (last visited Apr. 15, 2004). “When you reap the harvest of your land, do not reap to the very edges of your field or gather the gleanings of your harvest. Do not go over your vineyard a second time or pick up the grapes that have fallen. Leave them for the poor and the alien.” *Leviticus* 23:22 (New International), available at <http://www.biblegateway.com> (last visited Apr. 15, 2004). “When you reap the harvest of your land, do not reap to the very edges of your field or gather the gleanings of your harvest. Leave them for the poor and the alien.” *Deuteronomy* 24:17-19 (New International), available at <http://www.biblegateway.com> (last visited Apr. 15, 2004). Do not deprive the alien or the fatherless of justice, or take the cloak of the widow as a pledge. Remember that you were slaves in Egypt and the Lord your God redeemed you from there. That is why I command you to do this. When you are harvesting in your field and you overlook a sheaf, do not go back to get it. Leave it for the alien, the fatherless and the widow, so that the Lord your God may bless you in all the work of your hands.”

experimented with programs to provide for the hungry, private charitable institutions operated by the Church and the guilds were the primary channels for hunger relief during the early centuries of the Common Era. Direct government involvement in the fight against hunger and poverty is a more recent development.⁵ The type of direct public hunger relief that eventually led to the aid programs characteristic of the modern welfare state evolved in Europe during the 15th and 16th centuries.

This step in the development of public programs to care for the poor and hungry was the culmination of what scholars characterize as a three-stage process.⁶ During the first stage, from the beginning of the Common Era until late in the Middle Ages, care for the poor and the hungry was left primarily to the Christian Church. Christians were instructed to give alms to the poor in keeping with the commands of Scripture.⁷ During the second stage, from the Middle Ages through the 16th century, governments became increasingly involved in the fight against poverty and hunger because they were concerned about the threat of social instability presented by the growing numbers of poor people. This section will describe the form of direct public relief that began to develop in England during the 15th and 16th centuries and operated from 1600 until 1834. It will then follow the continued development of public hunger relief programs in the United States through the 20th century.

The historical development of public intervention in poverty and hunger relief progressed along a similar path in England as in the rest of Europe. If England varied from the Continental pattern it did so to the extent that the English government became more involved at an earlier point in time. While English institutions generally exhibit a lesser degree of state control than their Continental counterparts, the opposite was true

⁵The following discussion uses the terms “hunger” and “poverty,” as well as “hunger relief” and “poor relief,” interchangeably. Before 1900 most public programs that provided hunger relief were primarily concerned with the broader problem of poverty. Hunger was a concern, but it was most often addressed as a symptom of poverty rather than as a separate issue.

⁶A. Emminghaus, *Introductory Chapter*, in POOR RELIEF IN DIFFERENT PARTS OF EUROPE 1, 2 (A. Emminghaus ed., 1873).

⁷*Isaiah* 58:7; *Ezekiel* 18:7; *Matthew* 25:36; *Luke* 3:11, available at <http://www.biblegateway.com> (last visited Apr. 15, 2004).

in the area of poverty relief during the Middle Ages.⁸ The English government first entered into the business of poverty relief through a law imposed by King Egbert in 827, obliging the bishop of the Church to provide food and clothing for the poor and the infirm.⁹ This initial form of public involvement, however, left the Church in charge of poverty relief even though it was required to engage in that work by an official mandate from the king.

English public authorities first began to intervene in the administration of poverty and hunger relief as the number of poor people in England increased dramatically during the 13th century. One authority on early poor laws links this increase to Church policy. The Church encouraged its followers to disregard their material belongings, to view almsgiving as a spiritual exercise divorced from its earthly effects and begging as a meritorious act. Thus, in order to maximize their spiritual blessings, churchgoers were giving alms without regard to how their gifts were used. The number of beggars may actually have increased as a result.¹⁰ Whether the growing numbers of poor people were attributable to Church policy or to other social and economic factors, there were so many indigents in 13th century England that the Church could not care for them all.

As the increase in poverty and hunger outstripped the capacity of Church resources to provide for the needy, the English government engaged in hunger relief out of fear that the crowds of beggars would disrupt and endanger the lives and property of the citizenry. Laws from the 13th and 14th centuries that addressed poverty were primarily intended to preserve public order and safety. A representative law from 1388 prohibited vagrancy and wandering about the country. “Sturdy vagabonds” and “valiant beggars” were penalized with repressive severity. Subsequent laws produced a version of the modern three-strike policy: the first offense

⁸E.M. LEONARD, *THE EARLY HISTORY OF ENGLISH POOR RELIEF* 1 (1900).

⁹Emminghaus, *supra* note 6, at 6.

¹⁰P.F. ASCHROTT, *THE ENGLISH POOR LAW SYSTEM, PAST AND PRESENT* 1 (1902).

led to a public whipping, the second to the loss of one's ears, and the third to death by hanging.¹¹ Many of these repressive regulations were closely connected with labor statutes designed to put as many able men to work as possible. This became something of a necessity after the Black Death of 1348 devastated the available workforce.¹²

This period of public involvement in the creation and administration of laws relating to poverty and hunger, directed through the police power of the state at controlling the crowds of beggars roaming about the countryside, eventually gave way to more charitable, though paternalistic, assistance to the poor and hungry. As was noted above, the final stage in the development of public poverty and hunger relief programs began in England earlier than it did in other parts of Europe.¹³ In 1538 a law introduced by Henry VIII prohibited individuals from giving alms to beggars on the street. Instead, the alms were to be placed in a common box at the parish church. Private alms to beggars were forbidden by a penalty that would require the almsgiver to pay ten times the amount given to the beggar.¹⁴ The collections from the state-sanctioned church boxes were to be distributed among the poor in each parish. This was the first law of its type to declare not only that the poor should be provided for within their own parish but also that the government would be responsible for the collection and administration of the funds for relief of the poor.¹⁵ The law at this stage, however, was purely permissive. Secular officials were not responsible for collecting or distributing alms if the inhabitants of the parish chose not to donate funds.

Over the next several decades the *poor law* in England changed significantly. The legislation of 1538 was followed by several similar regulations during the reigns of Edward VI and Queen Mary. Once the government decided to engage in poverty and hunger relief it had to find the money needed to fund that relief. One of

¹¹ASCHROTT, *supra* note 10, at 2.

¹²LEONARD, *supra* note 8, at 3.

¹³Emminghaus, *supra* note 6, at 8.

¹⁴ASCHROTT, *supra* note 10, at 4.

¹⁵LEONARD, *supra* note 8, at 55.

the important issues that these laws attempted to resolve was how to raise those funds. The Act of 1555 allowed public officials in parishes that were overburdened with paupers to issue licenses authorizing the poor to beg.¹⁶ Soon thereafter the Act of 1572 revoked the issuance of licenses and renewed the prohibition of private almsgiving authorized by the Act of 1538. The seriousness of the problem of poverty at this time in England was underscored by the renewal of this counterintuitive prohibition. The Church encouraged almsgiving. This law attached a penalty to almsgiving in the hope that such a prohibition would suppress begging. The idea was that if no one could give, no one would beg; unfortunately, this law did not change the reality of increasing poverty in England.

The statute of 1572 also attempted to direct the benevolence of the English people towards the parish relief funds. It soon became clear, however, that the prohibition of private almsgiving would not transfer sufficient funds to the local collection boxes. Church bishops discovered that their appeals to parishioners were not powerful enough to persuade them to contribute to the poor. New laws began to make payments for the poor compulsory. One law from early in the reign of Queen Elizabeth provided that a person refusing to give to the poor after the bishop had strongly exhorted him to do so could be forced to appear before the local authorities. If such an appearance in court were not enough to stimulate charity the authorities were authorized to exact an appropriate sum from the unwilling giver.¹⁷ This was not quite a compulsory poor tax, since voluntary giving was still the norm, but a national tax was on the horizon.

The historical development of English public relief for the poor and hungry culminated in 1601 with the Poor Law of Elizabeth, entitled *An Act for the Relief of the Poor*. After decades of incremental adjustments, spurred by institutional changes (state control of former Church lands in the wake of the Reformation), demographic changes (increasing numbers of poor people) and cultural changes (widespread dislocation as a result of the Industrial Revolution), Parliament passed the statute that formed the basis for poverty relief

¹⁶Emminghaus, *supra* note 6, at 9.

¹⁷LEONARD, *supra* note 8, at 59.

in England until 1834. The law itself, 43 Eliz. c. 2, was actually passed in 1597 and re-enacted in 1601 with minor alterations.¹⁸

The first four of the twenty sections in the 1601 Poor Law set forth the general rules and principles for relief of the poor. The first section required that overseers of the poor be nominated annually within each parish. These overseers had three primary responsibilities. The first was to find work for children whose parents could not maintain them. The second was to give work to people who had no means of support and did nothing to earn a livelihood. The third responsibility of the overseers was to raise funds for supporting the poor through a weekly tax of every parish inhabitant.¹⁹

The amount of the tax was to be sufficient to meet the costs of three objectives. The first objective was to obtain a stock of materials, such as flax and wool, with which the poor could work. The second objective was to provide food and shelter for those parish inhabitants who were unable to work. The lame, the impotent and the blind all fit within this category. The third objective for which the overseers were authorized to levy the poor tax was to find apprenticeships for poor children.²⁰

The second section of the 1601 Poor Law of Elizabeth authorized the overseers, under the supervision of the local justices, to raise funds for poor relief from neighboring parishes if their parish could not afford to care for its own poor. The justices were authorized to imprison anyone who refused to pay the poor tax. Section three of the Poor Law provided further guidelines for the apprenticeship program described in the first section. Poor girls could be bound as apprentices until the age of twenty-one or until they were married. Poor boys might be bound as apprentices until the age of twenty-four. Section four of the Poor Law also elaborated further upon the first section. It empowered the overseers, with the assent of the local landowners, to build homes for parish inhabitants who were unable to work – those in the second category

¹⁸*Id.* at 133.

¹⁹ASCHROTT, *supra* note 10, at 7.

²⁰*Id.*

above – and to charge all expenses to the parish.²¹

The institution of a poor tax was the most notable feature of the 1601 Poor Law. From an historical perspective this tax was the cumulative result of the many gradual changes in the attitude of the English government to the problems of hunger and poverty over the course of the 16th century. While the poor tax was not an unanticipated development, it did mark an important shift in the public approach to poverty. The Poor Law of Elizabeth recognized poverty relief as a significant concern for the government, not simply an issue for private charity alone. As noted above, previous laws were primarily police measures designed to protect citizens from the dangers of a growing mendicant population. A common feature of most laws dealing with poverty in the 15th and 16th centuries had been the harshness of the penalties imposed on beggars. Those penalties were removed in the Poor Law of Elizabeth.²² Although the maintenance of law and order continued to inform government policy with respect to the problem of poverty, relief of the English poor in the era of the 1601 Poor Law began to take on, in some respects, a more charitable nature. Poor relief was less about reigning in the vagrants and more about extending assistance to the needy. The imposition of a national tax was a sign that all people in England were expected to contribute to this new public enterprise of helping the poor and hungry.

In addition to the imposition of a poor tax there are four other features worth noting about the English system of public assistance for the poor and hungry that was established by the 1601 Poor Law. A comparative glance at the history of poor laws in the rest of Europe reveals that England was not the only country that designed laws to assist the needy. Several other countries also imposed varieties of a poor tax and attempted to involve public authorities in caring for poor and hungry people.²³ Yet the results of legislation for poor relief in other countries were generally far less successful.

²¹*Id.*

²²*Id.* at 8.

²³*See generally* Emminghaus, *supra* note 6.

The first feature of the 1601 Poor Law in England that distinguished it from poor laws in other countries had nothing to do with the actual content of the legislation. The English system of poverty relief was effective in practice. It would be inaccurate to link the practical effectiveness of the English system to one particular political, sociological or historical variable, but if there is one reason why poverty relief in England was a success it may be because the poor relief laws in England codified what was already existing practice in many English parishes. In this view the 1601 Poor Law capped the evolution of local poor laws over the course of the 15th and 16th centuries. The 1601 Poor Law was effective because it was more of a descriptive law than a proscriptive act. Different dynamics elsewhere in Europe hindered national legislation from translating as broadly into actual practice at the local level.

This distinctive effectiveness of the English system for poor relief, when compared to similar European efforts during the 16th and 17th centuries, can also be partly attributed to the administrative involvement of local magistrates and law officers. The role of parish magistrates in arbitrating local disputes and reading substantive meaning into poverty relief legislation was also pivotal in ensuring the second distinctive feature of the English system. Poor relief in England was more comprehensive and uniform than similar systems on the Continent.²⁴ These characteristics of the English poor law cannot be separated from the practical effectiveness of that system, since many of the laws for poverty relief in Europe were also intended to be uniform and comprehensive. The English system, which managed to actually apply the law, was comprehensive in the sense that all men and women were eligible for relief. The system was uniformly applied because of the efforts of magistrates and other local officials to ensure minimum standards of relief.²⁵

A third distinctive feature of the English system for public poor relief was also intricately linked to the effective enforcement of the law at the parish level and the uniformity of benefits and burdens stemming

²⁴Peter M. Solar, *Poor Relief and English Economic Development Before the Industrial Revolution*, 48 ECON. HIST. REV. 1, 3 (1995).

²⁵*Id.* at 4.

from the system. The tax levied by the 1601 Poor Law was a local tax on income from property. All owners and occupiers of property within a parish were taxed according to their ability to pay.²⁶ This means of fundraising was a consistent source of income for local poor relief efforts. Property holdings – primarily land and buildings – were one of the more accurate indicia of wealth in agricultural societies. The local nature of the English poor tax created an obvious connection between expenditures for relief of the poor and the tax burden on local landholders.²⁷ Assessing the poor tax locally also meant that the rich and the poor in a parish were inextricably linked. Property owners had a stake in the welfare of the local poor. Whether or not this gave the class of resource-rich citizens an incentive to improve the lot of the needy, it certainly prevented them from ignoring the problem of poverty and hunger or completely distancing themselves from an uncomfortable reality.

Methods for financing poverty relief in the rest of Europe, by contrast, varied from place to place and time to time. Some systems were financed through voluntary donations, others by local or national subsidies, and others through excise taxes or income from capital.²⁸ The relatively haphazard nature of these financing schemes meant that funding for poor relief was generally less reliable. Many of these alternate revenue sources also presented a free-rider problem that worked against the long-term efficiency of the system.

The fourth notable feature of the English poor law was its relative generosity and certainty when compared to poor laws in Europe.²⁹ At one point, annual spending on poverty relief in England under the 1601 Poor Law was seven times higher than expenditures on poverty in France. In the 17th century generous spending on relief of the poor amounted to almost one percent of the English national income.³⁰ The effectiveness, stability and universality of the English system also translated into certainty for English citizens who were

²⁶GEOFFREY W. OXLEY, POOR RELIEF IN ENGLAND AND WALES 47 (1974).

²⁷Solar, *supra* note 25, at 5.

²⁸*Id.*

²⁹*Id.* at 6.

³⁰*Id.* at 7.

assured that the government would provide for them in the variety of situations for which the poor law mandated public relief. Peter Solar argues that the certainty of the English system converted the poor law into a type of insurance free from the classic problems of moral hazard and adverse selection.³¹ Thus the systemic effects of poverty relief in England may have encouraged economic growth in addition to providing support for the poor and hungry.

The English system of public assistance to the poor evolved, in the manner of all good English institutions, from a relatively uncoordinated network of private charity donors supervised by the Christian Church into a thorough, integrated organization of public resource providers funded and administered at the local parish level. The system certainly had its flaws. It may have provided some unintentional insurance benefits, but it also provided Charles Dickens and others with the material for classic works such as *Oliver Twist*. The poorhouses made infamous by Dickens were actually a pervasive reality only at a later stage in the history of the English poor law, after the reforms of 1834, but the system that was codified in 1601 was far from perfect.

The primary goal of that system at the outset, if one can be culled from the long and complicated history that preceded the Poor Law of Elizabeth, was to solve the problem of unemployment by putting the able-bodied poor to work. Hunger relief, care for orphans and widows, and other goals of the system were essentially incident to that main purpose. As the poor law developed in England, however, the peripheral task of creating a system of relief for the elderly, the sick, and other deserving poor people became its main achievement.³² The system established in 1601 was eventually unable to deal effectively with the problem of the able-bodied poor when forced to confront the changes brought about by industrialization and a growing

³¹*Id.* at 8.

³²OXLEY, *supra* note 26, at 102.

population.

Although the system created by the 1601 Poor Law did not withstand the test of time, it represents a pivotal historical transition from private charity to public involvement in, and responsibility for, the relief of the poor and hungry. The variety of public services provided by modern welfare states testifies to the legacy of the Elizabethan system for poverty relief.

That Elizabethan legacy was nowhere more evident than in its impact on the development of poverty law in colonial America. Most American colonies imported the general themes, even the very words, of the Poor Law of Elizabeth.³³ Yet the social and economic factors that influenced the development of poverty law in England were mostly absent in the colonies. English society in the 17th century struggled with persistent unemployment and rapid urbanization. The American colonies faced very different problems, such as economic scarcity and low productivity. These challenges meant that there was little excess wealth available for relief of the poor. The colonial governments thus placed a premium on finding gainful employment for all who were able to work.³⁴ Another important contrast with English society was the defining spirit of intense religious commitment that initially motivated the establishment of the American colonies. The dominant Puritan work ethic generally disparaged poverty as an evil that could be avoided through hard work and right living.³⁵

Early American poverty laws did continue the Elizabethan tradition of public involvement in the relief of the poor and hungry. Because of the social and cultural differences between England and the American colonies, the poverty laws that developed in early America were generally harsh measures that did not look with much fondness upon the poor and hungry. These laws emphasized, as did the Elizabethan poor law, that local communities were responsible for their own poor. Immediate families had initial responsibility; the

³³William P. Quigley, *Reluctant Charity: Poor Laws in the Original Thirteen States*, 31 U. RICH. L. REV. 111, 115 (1997).

³⁴JUNE AXINN & HERMAN LEVIN, *SOCIAL WELFARE: A HISTORY OF THE AMERICAN RESPONSE TO NEED* 11 (1975).

³⁵*Id.* at 12.

parish or town was responsible only if the poor and hungry had no immediate family. As noted, economic productivity was a primary concern of colonial governments, so it was crucial to have as many people at work. For this reason the able-bodied poor were not looked on with favor. Colonial governments also passed settlement laws to keep outsiders and strangers from moving into their communities and qualifying for poor relief.³⁶

Eventually there were signs of a movement towards an increasing level of state responsibility for the poor and hungry. A subcategory of the poor and hungry began to emerge. The *state poor* were exempted from the harsh restrictions of settlement laws. The states, rather than the local communities, had primary responsibility for their care.³⁷ Even as states became more involved in what had been a local problem throughout early American history, the federal government did not become very involved in the affairs of any group of poor people (other than military veterans) until the Great Depression. Then, in the 1930s, the American federal government began to specifically devote resources to combat the problem of domestic hunger.

This initial federal government program for hunger relief was known at the time as the Food Stamp Plan. It succeeded a series of temporary measures introduced during the Great Depression to stabilize prices in the farming community. The instability in the commodities markets following the stock market crash in 1929 led to the unsettling paradox of large food surpluses and widespread hunger. When the Federal Farm Board purchased large supplies of wheat in 1930 in order to prop up the price of grain, the public demand for federal food assistance reached a high point.³⁸ As Congress debated the merits of distributing surplus wheat during the 1930-1931 session, the themes that would become familiar refrains in the context of public food assistance

³⁶ROBERT W. KELSO, THE HISTORY OF PUBLIC POOR RELIEF IN MASSACHUSETTS 1620-1920 35 (Patterson Smith 1969) (1922).

³⁷Quigley, *supra* note 33, at 149.

³⁸JANET POPPENDIECK, BREADLINES KNEE-DEEP IN WHEAT 37 (1986). By October 1930 the Hoover administration had purchased enough wheat to bake more than four billion loaves of bread.

policy debates emerged for the first time. What would be the impact on the agricultural community? What was the extent of the actual need? What did the people think about federal food assistance?³⁹

Congress did eventually pass legislation that sent the surplus wheat to hungry Americans. Similar distributions occurred more regularly throughout the early 1930s after the public outcry when the federal government first announced its intention to plow under one quarter of the standing cotton crop because of an enormous surplus and falling cotton prices, and then announced a plan to slaughter millions of young pigs in order to regulate the low price of pork.⁴⁰ In 1933 the Federal Surplus Relief Corporation (FSRC) began operations in order to “relieve the existing national economic emergency by expansion of markets for . . . agricultural and other commodities and products,” and “to purchase . . . and process surplus agricultural and other commodities . . . so as to relieve the hardship and suffering caused by unemployment and/or to adjust the severe disparity between the prices of agricultural commodities and other commodities and products.”⁴¹

Between 1933 and 1935 the FSRC dealt out surplus commodities to state welfare agencies for distribution to hungry Americans. Because there were few reporting requirements and only minimal monitoring of the distribution process, waste and fraud flourished in this initial surplus commodities program. Some families received more food than they needed, and some were even selling food they had received through the program.⁴² These problems led government officials to discuss alternatives to commodity distribution. The result of these discussions was the first Food Stamp Plan, inaugurated in Rochester, New York, in May 1939.⁴³

This initial Food Stamp Plan had the same primary goals as the commodities distribution program that it succeeded. It was designed to provide food relief to poor Americans and to prop up the market for food

³⁹*Id.* at 52.

⁴⁰*Id.* at 109-10.

⁴¹*Id.* at 131. This quotation comes from the FSRC Certificates of Incorporation.

⁴²REGINA GALER-UNTI, HUNGER AND FOOD ASSISTANCE POLICY IN THE UNITED STATES 21 (1995).

⁴³*Id.*

products deemed to be in surplus by the government. Participants purchased orange food stamps in amounts equal to their normal, unsubsidized level of food expenditure, which was determined by a national average. They then received blue food stamps equal to half the value of the orange stamps. These blue stamps could only be used to purchase food commodities that the Secretary of Agriculture had designated as *surplus foods* in a given month. More than thirty foods were included on these monthly lists of blue-stamp foods at one time or another. In order to receive the blue food stamps, participants had to provide certification from a relief agency to demonstrate that they were already receiving aid.⁴⁴

The Food Stamp Plan grew rapidly in the years after 1939. At its peak in August 1942 the program served approximately four million people. Yet in some ways it was even less effective than the wasteful commodities distribution program, because it was unable to reach as many people as its predecessor.⁴⁵ In 1943 the outbreak of World War II and the resultant rise in employment, along with a shift in national priorities, led to the discontinuation of the Food Stamp Plan.

After the war, farmers were once more struggling with food surpluses and depressed prices, so the government reintroduced a slightly revised commodities distribution program. It expanded rapidly once the Department of Agriculture agreed to pay shipping costs. By 1959, this program was operational in 1,300 counties, and it provided a family of four with set quantities of a limited number of surplus foodstuffs that were certainly better than nothing but provided a diet with no meat and only a limited amount of protein and calories.⁴⁶ Over time this program succumbed to many of the same problems that had diminished the effectiveness of the initial commodities distribution program. In 1959, Congress passed Public Law 341, authorizing a

⁴⁴HAROLD G. HALCROW, *FOOD POLICY FOR AMERICA* 60 (1977).

⁴⁵BETH OSBORNE DAPONTE & SHANNON LEE BADE, *THE EVOLUTION, COST, AND OPERATION OF THE PRIVATE FOOD ASSISTANCE NETWORK* 5 (Inst. for Res. on Poverty, Discussion Paper No. 1211-00, Sept. 2000), *available at* <http://www.ssc.wisc.edu/irp/pubs/dp121100.pdf>.

⁴⁶The foodstuffs provided were flour, corn meal, dried milk, rice, and occasionally butter or cheese. NICK KOTZ, *LET THEM EAT PROMISES: THE POLITICS OF HUNGER IN AMERICA* 48 (1971).

two-year trial period for a new food stamp system. The pilot program was not initiated, however, until President Kennedy revived the idea in his Economic Message to Congress on February 2, 1961.⁴⁷

By 1964 several pilot projects confirmed the need for a permanent food stamp program, and that year Congress passed the first Food Stamp Act. Congressional appropriations for the program increased only slightly during the first five years.⁴⁸ In 1968 a reform movement called the Poor Peoples' Campaign helped to push domestic hunger to the top of the legislative agenda, and Congress acted decisively to support a revived and extended food stamp program. This latest version expanded rapidly over the next several years. Participation increased from one million people in March 1966 to fifteen million people by October 1974.⁴⁹ As the Food Stamp Program (FSP) became an established bureaucracy, growing concerns about the cost, administration and accountability of the program led to the passage of the Food Stamp Act of 1977, an oft-amended statute that continues to govern the FSP to this day. The reforms introduced by the 1977 Act eliminated the food stamp purchase requirement that had presented a barrier to participation for some poor Americans. The reforms also established the standard deduction, restricted eligibility for students and aliens, eliminated the requirement that households have cooking facilities, penalized household heads who voluntarily quit their jobs, and introduced other incentives and penalties designed to minimize fraud.⁵⁰

By the early 1980s the FSP had grown into a large, expensive program. It became a favorite target of both Congress and the White House in the first years of the Reagan presidency. Legislation in 1981 and 1982 placed a temporary freeze on adjustments to deductions, increased some disqualification periods, added additional eligibility tests, and mandated stricter accounting and budgeting controls.⁵¹ Later in the decade,

⁴⁷HALCROW, *supra* note 39, at 61.

⁴⁸*Id.*

⁴⁹FOOD & NUTRITION SERVICE, U.S. DEP'T OF AGRIC., A SHORT HISTORY OF THE FOOD STAMP PROGRAM, *at* <http://www.fns.usda.gov/fsp/rules/Legislation/history.htm> (last visited Apr. 15, 2004).

⁵⁰*Id.*

⁵¹*Id.*

recognition of the severity of domestic hunger led to some improvements to the FSP through changes intended to simplify the program and allow easier access to benefits for those in need. By March 1994 participation reached a new high, as 28 million people received FSP benefits.

The number of Americans participating in the FSP has fluctuated in the years since 1994. Once participation peaked at nearly 28 million people in March 1994, it declined for the next several years until it reached 18.2 million people in 1999.⁵² This decline was linked to several factors, including a growing economy and the significant changes to the federal welfare system that were introduced by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA). The primary factor seems to have been the sustained economic growth during the boom years of the late 1990s. Statistical analysis has shown a correlation between the strength of the American economy, as measured by the unemployment rate, and the number of Americans who participate in the FSP.⁵³ The number of participants in the FSP typically falls during periods of economic growth and then rises again during periods of recession as unemployment and poverty levels increase.⁵⁴ One recent study found that a percentage point increase in the unemployment rate corresponds to a 2.3-percent increase in food stamp caseloads after one year.⁵⁵

Sustained economic growth was not the only reason for the declining numbers of FSP participants in the late 1990s. Welfare reform slashed FSP funds, imposed stricter eligibility requirements and reduced individual benefits. The PRWORA legislation replaced the federal welfare program with a system of block grants distributed to each state. The goal of this reform agenda was to enable states to direct funds to needy

⁵²PARK WILDE, ET. AL., THE DECLINE IN FOOD STAMP PROGRAM PARTICIPATION IN THE 1990's iii (U.S. Dep't of Agric. Econ. Res. Service, Food Assistance and Nutrition Research Report No. 7, June 2000), *available at* <http://www.ers.usda.gov/publications/FANRR7/fanrr7.pdf>.

⁵³*Id.*

⁵⁴*Economic and Social Indicators*, 1 FOOD ASSISTANCE LANDSCAPE 4, (U.S. Dep't of Agric., Econ. Res. Service, 2002), *available at* <http://www.ers.usda.gov/publications/landscape/vol1nu1.pdf>.

⁵⁵James P. Ziliak, et al., *Food Stamp Caseloads Over The Business Cycle*, 69 S. ECON. J. 903, 903-919 (2003).

Americans in a more direct, efficient manner.⁵⁶ As a result, it gave the FSP a larger role in the public social safety net as the sole remaining entitlement program available to most low-income Americans.⁵⁷ One effect of this change, noted in the years since welfare reform, has been an increase in the number of non-welfare families as a percentage of all families receiving food stamps.⁵⁸

In addition to the influences of economic growth and welfare reform, national survey data indicates that part of the significant decline in FSP participation from 1994 to 1998 was attributable to an increase in the number of low-income households that either did not know they were eligible for food stamps, or found it more difficult or less socially acceptable to obtain them. Even though many of these households indicated that they needed more food, they did not participate in the FSP.⁵⁹ Ignorance about eligibility continues to be a significant concern for FSP administrators who are now funding food stamp outreach campaigns to publicize the program to low-income Americans who could qualify for benefits if only they knew more about the program.

Nonetheless, the number of participants in the FSP has been growing again since the end of the 1990s. By 2001, there were 18.2 million participants.⁶⁰ In the 2002 Farm Bill, described below, Congress approved the current structure of the program. The changes introduced in 2002 are likely to remain in place through 2007. Continued simplification, ease of access, and efforts to increase public awareness of the program are the main themes in the latest round of changes to the FSP.

⁵⁶Kenneth Hanson, *What If: Cash Instead of Food Stamps*, AMBERWAVES (U.S. Dep't of Agric. Econ. Res. Service) Feb. 2003, available at <http://www.ers.usda.gov/amberwaves/feb03/Findings/cashnotfoodstamps.htm>.

⁵⁷CRAIG GUNDERSEN, ET AL., THE CHANGING FOOD ASSISTANCE LANDSCAPE: THE FOOD STAMP PROGRAM IN A POST-WELFARE REFORM ENVIRONMENT iii (U.S. Dep't of Agric. Econ. Res. Service, Agricultural Economic Report No. 773, Mar. 1999), available at <http://www.ers.usda.gov/publications/aer773/aer773.pdf>.

⁵⁸PHILIP RICHARDSON, ET AL., FOOD STAMP LEAVERS RESEARCH STUDY (U.S. Dep't of Agric. Econ. Res. Service, E-FAN-03-003, Mar. 2003), available at <http://www.ers.usda.gov/publications/efan03003/efan03003.pdf>.

⁵⁹Mark Nord, *Food Stamp Participation and Food Security*, 24 FOODREVIEW 13 (2001), available at <http://www.ers.usda.gov/publications/FoodReview/Jan2001/FRV24I1c.pdf>.

⁶⁰RANDY ROSSO & MELISSA FAUX, CHARACTERISTICS OF FOOD STAMP HOUSEHOLDS: FISCAL YEAR 2002 9 (U.S. Dep't of Agric. Food & Nutrition Service, Nutrition Assistance Program Rep. Series No. FSP-03-CHAR02, Dec. 2003) available at <http://www.fns.usda.gov/oane/MENU/Published/FSP/FILES/Participation/2002Characteristics.pdf>.

The most recent data available shows that the FSP provided benefits to 22 million Americans per month in 2003, at a total cost of \$23.8 billion, for an average monthly benefit of \$84 per person. By comparison, in 1969 there were 2.8 million FSP participants, and the total cost of the program that year was \$250 million – an average monthly benefit close to \$7 per person.⁶¹ The FSP provides benefits to participants either electronically or through paper coupons. All states but California, which is expected to complete the transfer to the electronic system by September 2004, have moved to distribution networks that are based on an electronic debit card system called the Food Stamp Electronic Benefit Transfer (EBT) System.⁶² This important development in FSP technology has done much to eliminate the problem of food stamp trafficking, a type of fraud that once consumed a significant portion of FSP funding,⁶³ as well as enable improved government oversight of the program.⁶⁴ Once FSP benefits are transferred to program participants, they can be redeemed in over 146,000 authorized stores throughout the nation.⁶⁵

Eligibility rules for the current system of FSP benefits were first established in the Food Stamp Act passed by Congress in 1977, which, as amended, creates uniform national eligibility standards and defines the *household* as the basic unit of FSP participation.⁶⁶ Congress defined that term in a way that allows individuals who live together in the same residential unit to apply as separate household units for purposes of eligibility and benefit determinations if they do not purchase and prepare food together. Whether a household so defined is eligible to receive FSP benefits is calculated primarily on the basis of monthly income once

⁶¹FOOD & NUTRITION SERVICE, U.S. DEP'T OF AGRIC., FOOD STAMP PROGRAM PARTICIPATION AND COSTS, *at* <http://www.fns.usda.gov/fsp/faqs.htm> (last visited Apr. 15, 2004).

⁶²FOOD & NUTRITION SERVICE, U.S. DEP'T OF AGRIC., FOOD STAMP ELECTRONIC BENEFIT TRANSFER SYSTEMS: A REPORT TO CONGRESS 2 (2003), *available at* <http://www.fns.usda.gov/fsp/ebt/pdfs/2003.congress.pdf>.

⁶³FOOD & NUTRITION SERVICE, U.S. DEP'T OF AGRIC., ELECTRONIC BENEFIT TRANSFER FREQUENTLY ASKED QUESTIONS, *at* <http://www.fns.usda.gov/fsp/ebt/FAQ.HTM> (last visited Apr. 15, 2004).

⁶⁴FOOD & NUTRITION SERVICE, U.S. DEP'T OF AGRIC., *supra* note 58, at 17. One current challenge for the EBT system is figuring out how to integrate farmers' markets into the system when most do not have access to the necessary electronic equipment. There are pilot projects underway in several states to test the viability of wireless solutions to this problem, most notably in New York, where point-of-sale equipment has received high approval ratings from the farmers involved.

⁶⁵ROSSO & FAUX, *supra* note 56, at 1.

⁶⁶*Id.* at 3.

several important deductions are applied. The most important of these is the standard deduction, a fixed dollar amount subtracted from household cash income that is designed to compensate for certain essential expenses.⁶⁷

The standard deduction has been the subject of much policy debate in recent years, since research studies have shown that it has a major effect on the average level of food stamp benefits. One of the effects of the PRWORA legislation in 1996 was to fix the deduction in nominal dollar terms, which allowed its real value to decline over time.⁶⁸ However, the changes enacted in the Farm Bill of 2002 have readjusted the standard deduction to account for household size, and in addition the deduction is now indexed to the rate of inflation.⁶⁹

Eligibility calculations are further determined by a limitation on assets. This is another term of art defined by the statute in a way that is intended to reduce the number of obstacles that prevent poor Americans from qualifying for food stamps. In addition to these economic criteria, there are a few non-financial limitations on FSP eligibility. Unauthorized immigrants and legal permanent resident aliens are those most likely to be ineligible for benefits under these criteria, even if they pass the income and asset tests.⁷⁰ The changes instituted in this area by the 2002 Farm Bill will be explored below.

Although the FSP is the largest domestic food assistance program that is funded and administered by the federal government, it is not the only public hunger relief program. The United States Department of Agriculture (USDA) administers a *food safety net* of fifteen food assistance and nutrition programs (FANPs), all designed to alleviate hunger in America. These programs receive a considerable amount of funding. In fiscal year 2001, \$34.1 billion went to fund the family of FANPs.⁷¹ That money reaches a large segment of

⁶⁷The standard deduction in most states is \$134 per household. PARKE WILDE, THE STANDARD DEDUCTION IN THE FOOD STAMP BENEFIT FORMULA 1 (U.S. Dep't of Agric. Econ. Res. Service, Food Assistance and Nutrition Research Rep. No. 26-3, June 2002), available at <http://www.ers.usda.gov/publications/fanrr26/fanrr26-3/fanrr26-3.pdf>.

⁶⁸*Id.* at 2.

⁶⁹FOOD & NUTRITION SERVICE, U.S. DEP'T OF AGRIC., *supra* note 45.

⁷⁰ROSSO & FAUX, *supra* note 56, at 6.

⁷¹CHRISTOPHER LOGAN, ET AL., EFFECTS OF FOOD ASSISTANCE AND NUTRITION PROGRAMS ON NUTRITION AND HEALTH iv

the American population. Each year, about one in five Americans receives food from a federal hunger relief program.⁷²

The Food and Nutrition Service (FNS) branch of the USDA operates the most significant FANPs, and the largest single fraction of its resources is directed to the FSP. The next largest programs are the National School Lunch Program (NSLP), the Special Supplemental Nutrition Program for Women, Children and Infants (WIC), the School Breakfast Program (NSB), and the Child and Adult Care Food Program (CACFP). These five programs account for over 90 percent of all USDA expenditures for food assistance. The fifteen FANPs, taken together, account for about half of all annual USDA outlays.⁷³ The four programs that follow the FSP in size and amount of funding are targeted to varying degrees to the nutritional needs of children. Since the 1960s lawmakers have used specific targeting in hunger relief programs in order to expand food assistance to demographic groups that are considered to be at special risk.⁷⁴ The three FANPs that focus primarily on children are the NSLP, the SBP, and the CACFP.

The largest of these three programs is the NSLP. This federally sponsored meal program currently operates in over 99,800 public and non-profit private schools and residential childcare facilities. It provides free or low-cost lunches to more than 26 million children each day.⁷⁵ Students can participate in the NSLP regardless of their household income, although income and household size are two factors that determine whether student lunches are free or reduced-price. In 2002, the NSLP provided 4.7 billion lunches to schoolchildren, as well

(U.S. Dep't of Agric. Econ. Res. Service, Food Assistance and Nutrition Research Rep. No. 19-2, Sept. 2002), *available at* <http://www.ers.usda.gov/publications/FANRR19-2/fanrr19-2fm.pdf>.

⁷²ECON. RES. SERVICE, U.S. DEP'T OF AGRIC., FOOD AND NUTRITION ASSISTANCE PROGRAMS, *at* <http://www.ers.usda.gov/Topics/View.asp?T=102600> (last visited Apr. 15, 2004).

⁷³ECON. RES. SERVICE, U.S. DEP'T OF AGRIC., FOOD ASSISTANCE AND NUTRITION RESEARCH REP. NO. 28-3, THE FOOD ASSISTANCE LANDSCAPE : SEPTEMBER 2003 2 (2003), *available at* <http://www.ers.usda.gov/publications/fanrr28-3/fanrr28-3.pdf>.

⁷⁴DAPONTE & BADE, *supra* note 40, at 18.

⁷⁵FOOD & NUTRITION SERVICE, U.S. DEP'T OF AGRIC., NATIONAL SCHOOL LUNCH PROGRAM FACT SHEET, *at* <http://www.fns.usda.gov/cnd/Lunch/AboutLunch/NSLPFactSheet.htm> (last visited Apr. 15, 2004).

as 122 million after-school snacks, at a total cost to the USDA of \$6.7 billion.⁷⁶

The history of school food service dates back to the late 18th century, when an American expatriate in Germany established a prototypical welfare program for unemployed adults and their children. Benjamin Thompson, known as Count Rumford, created the Poor People's Institute as a place for children to work, learn, and earn food and clothing.⁷⁷ Rumford's reputation and experience in developing mass feeding programs eventually led him to become involved in similar ventures throughout Europe. At his soup kitchen in London, over 60,000 people were fed each day. By the end of the 19th century, school feeding programs had been established in most European countries. Paris began publicly funded school canteens for the children of those on the Poor Board list in 1877; by 1896 there were 79 cities operating school feeding programs in Germany.⁷⁸

The movement for school food service in the United States, meanwhile, developed along similar lines throughout the 19th century. Private associations underwrote the initial efforts to provide food for poor children during school hours, but although there were numerous programs operating in cities across the country, momentum for a more concerted effort did not build until the appearance of an influential book in 1904. *Poverty*, by Robert Hunter, helped to bring public attention to the plight of poor children in America.⁷⁹ Soon after the turn of the century, most major American cities and many rural towns had developed school feeding programs. A 1918 survey of 86 cities with populations greater than 50,000 found that 76 percent of the cities provided some form of high school lunch service.⁸⁰ Support for these programs, already en-

⁷⁶ECON. RES. SERVICE, U.S. DEP'T OF AGRIC., CHILD NUTRITION PROGRAMS: NATIONAL SCHOOL LUNCH PROGRAM, at <http://www.ers.usda.gov/Briefing/ChildNutrition/lunch.htm> (last visited Apr. 15, 2004).

⁷⁷GORDON W. GUNDERSON, THE NATIONAL SCHOOL LUNCH PROGRAM: BACKGROUND AND DEVELOPMENT, at <http://www.fns.usda.gov/cnd/Lunch/AboutLunch/ProgramHistory.htm> (last visited Apr. 15, 2004).

⁷⁸*Id.*

⁷⁹*Id.*

⁸⁰*Id.*

couraged by a coalition of philanthropic organizations, school associations and concerned individuals, grew even stronger during the Great Depression. The signs of hunger and malnourishment among schoolchildren prompted many states and local governments to pass laws appropriating funds for school lunch programs.⁸¹ These programs developed sporadically throughout the early decades of the 20th century, supplemented by occasional federal forays into the field, particularly in the aftermath of the Great Depression.

Congress first expressed serious interest in school lunch programs after World War II. A government investigation into the health of young men who had been rejected in the wartime draft showed a strong connection between childhood malnutrition and physical deficiencies. In response, Congress passed the 1946 National School Lunch Act as a “measure of national security, to safeguard the health and well-being of the Nation’s children.”⁸² The NSLP began to operate once President Truman signed the bill into law later in 1946, and within one year the program had served 500 million meals to 7.1 million children.⁸³ Since 1946 the NSLP has grown significantly. In 1969, the NSLP provided 2.9 million free lunches per day; ten years later, it provided 10 million free lunches each day; and by 2002 the number of free lunches provided each day had reached 13.3 million, a number comprising over 57 percent of the total number of daily school lunches.⁸⁴

The USDA operates the NSLP by providing per meal cash reimbursements to the foodservice departments of participating public and non-profit private schools for meals served to students. The USDA also offers certain food commodities to those schools. During the 2003-2004 school year, schools were reimbursed \$2.19 for each free lunch served, \$1.79 per reduced-price lunch, and \$.21 for each “paid” lunch. USDA commodity

⁸¹*Id.*

⁸²FOOD RESOURCE & ACTION CENTER, NATIONAL SCHOOL LUNCH PROGRAM, *at* http://www.frac.org/html/federal_food_programs/programs/nslp.html (last visited Apr. 15, 2004).

⁸³AM. SCH. FOOD SERVICE ASS’N, CHILD NUTRITION PROGRAMS: LEGISLATIVE HISTORY HIGHLIGHTS, *at* <http://www.asfsa.org/childnutrition/govtaffairs/leghistory.asp> (last visited Apr. 15, 2004).

⁸⁴FOOD & NUTRITION SERVICE, U.S. DEP’T OF AGRIC., NATIONAL SCHOOL LUNCH PROGRAM: PARTICIPATION AND LUNCHES SERVED, *at* <http://www.fns.usda.gov/pd/slsummar.htm> (last visited Apr. 15, 2004).

foods received by schools were valued at 15.25 cents for each lunch served during the 2002-2003 school year.⁸⁵ To qualify for these funds, schools must offer meals that meet national nutrition requirements⁸⁶ and they must offer lunches to qualifying children for free or at reduced prices. Any child may enroll in the NSLP; only children from families with incomes that are at or below 130 percent of the federal poverty level are eligible for free meals. Children from families with incomes that are between 130 percent and 185 percent of the poverty level are eligible to receive reduced-price meals. Children from families with incomes over 185 percent of the poverty level are required to pay the full price of the meal, though that price is already somewhat subsidized.⁸⁷ For the 2003-2004 school year, 130 percent of the federal poverty level was equivalent to \$19,838 for a family of three; 185 percent was equivalent to \$28,231 for a family of three.⁸⁸

In order to determine which students qualify for free and reduced-price lunches, schools typically process applications from each household interested in receiving free lunches. There are two types of eligibility that can be established through this application process: categorical, or income-based eligibility. Households currently receiving FSP or welfare benefits have categorical eligibility, as do homeless children. Income-based eligibility is determined by the calculation of household income noted earlier. Since 1991, schools have also been able to *directly certify* certain students for free meals based on categorical eligibility. This method is intended to increase the number of qualifying children who receive free lunches by reducing the time and effort needed to obtain certification.⁸⁹

Thus far this survey of public hunger relief programs in the United States has reviewed the central food assistance entitlement program (the FSP) and the largest of the many demographically targeted food assis-

⁸⁵FOOD RESOURCE & ACTION CENTER, CHILD NUTRITION FACT SHEET: NATIONAL SCHOOL LUNCH PROGRAM 2 (2003), available at <http://www.frac.org/pdf/cnslp.PDF>.

⁸⁶For example, lunches must provide one-third of the Recommended Daily Allowance (RDA) of protein, calcium, iron, and vitamins A and C. SACRAMENTO CITY UNIFIED SCH. DISTRICT, HISTORY OF SCHOOL LUNCH PROGRAM, at http://www.scusd.edu/nutrition_education/history_of_school_lunch_program.htm (last visited Apr. 15, 2004).

⁸⁷Victor Oliveira, *Decline in Nutrition Assistance Expenditures Continued in 1999*, 23 FOODREVIEW 35, 38 (2000), available at <http://www.ers.usda.gov/publications/foodreview/may2000/may2000f.pdf>.

⁸⁸FOOD RESOURCE & ACTION CENTER, *supra* note 81.

⁸⁹*Id.*

tance programs (the NSLP). Another major component of the public hunger relief system is the Emergency Food Assistance Program (TEFAP). It began, as did the Food Stamp Program, as a response to both the needs of the agricultural community for price stability and the needs of poor Americans for food.⁹⁰ The history of TEFAP, however, dates back only to 1981.⁹¹ During that year anti-hunger activists, reacting to significant reductions to funding for the Food Stamp Program, demanded that the government release some of its surplus reserves of cheese for distribution to hungry Americans. Their campaign produced results. Although the cheese distribution of 1981 was not originally intended to be a repeat event the government continued to dispense excess commodities after the initial distribution in order to reduce food inventories that built up during the economic recession in the early 1980s.⁹²

The new system of commodities distribution was a success. It pleased two important constituent groups: farmers, who were happy about the price stability that TEFAP offered through government purchases of perishable commodities in a volatile economic climate, and anti-hunger advocates, who were pleased by the emergence of a new government effort to combat hunger alongside the FSP. The distribution of excess commodities was palatable to government officials as well. Federal expenses amounted to only 3.7 cents per dollar of food product distributed.⁹³ In 1983 Congress passed a law officially establishing the Temporary Emergency Food Assistance Program in order to facilitate the continued distribution of cheese and other perishable surplus commodities over the next two years. Between 1981 and 1985 the TEFAP program distributed over 2.1 billion pounds of surplus food. 19 million Americans received assistance from TEFAP each

⁹⁰ *The Private Food Assistance Network*, 21 FOCUS 12 (U. Wis.-Madison Inst. for Res. on Poverty, 2001), available at <http://www.ssc.wisc.edu/irp/focus/foc213.pdf>.

⁹¹ As noted earlier, the initial method of public involvement in hunger relief was a form of commodities distribution that was subsequently replaced by the first Food Stamp Plan. Commodities distribution and Food Stamps are historically linked. The Food Stamp Program was re-established in the 1960s because the distribution program that preceded it was no longer effective, and the TEFAP program re-established commodity distribution because the effectiveness of the Food Stamp Program had been diminished through budget cuts. The current TEFAP program is significantly different from its predecessors in the commodities distribution business, and thus, although the idea for such a program was not invented in 1981, its story here begins in 1981. JEFFERY M. BERRY, *FEEDING HUNGRY PEOPLE: RULEMAKING IN THE FOOD STAMP PROGRAM* 151 (1984).

⁹² FOOD & NUTRITION SERVICE, U.S. DEP'T OF AGRIC., FREQUENTLY ASKED QUESTIONS ABOUT TEFAP, at <http://www.fns.usda.gov/fdd/programs/tefap/tefap-faqs.htm> (last visited Apr. 15, 2004).

⁹³ Michael Lipsky, *Prepared Statement before the Subcommittee on Domestic Marketing, Consumer Relations, and Nutrition of the Committee on Agriculture of the United States House of Representatives*, 99th Cong. 110-115 (1985).

month in the form of dairy products, wheat, flour, honey and cornmeal.⁹⁴

As a result of this success the government decided to expand the TEFAP program in 1987. Congress ordered the USDA, official administrator of the program, to include surplus fruits, vegetables, poultry, fish and meat in TEFAP distributions. Then the 1988 Emergency Hunger Prevention Act authorized the government to set aside funds for purchasing food to be distributed through TEFAP in order to augment the distribution of excess commodities. The name of the program was changed soon thereafter, in the 1990 Farm Bill, to reflect the fact that the program was no longer considered to be a temporary relief measure.⁹⁵

The amount of money provided for the program, and therefore the amount of food distributed, varied drastically over the next decade. Excess commodity distribution ranged from 1,014,088,662 pounds of food in 1987 to only 18,620,478 pounds in 1996. The addition of food purchased with appropriated funds leveled out those differences somewhat; in 1996 TEFAP distributed an additional 40,754,625 pounds of food through purchases made available by Congressional appropriation. At the height of that period, in 1993, TEFAP purchased an additional 288,677,173 pounds of food to supplement the 110,750,630 pounds distributed because of excess commodities that year. The lower numbers in 1996 reflect the fact that Congress did not appropriate any funds to TEFAP for the purchase of food that year. Throughout the decade, however, TEFAP usually received an annual sum of \$120 million for that purpose.⁹⁶

The TEFAP program continues to provide an additional source of food and nutrition assistance to supplement the diets of poor Americans. In 2002 Congress appropriated \$100 million to TEFAP for food purchases. The following year it increased that number to \$140 million. The sustained vitality of the program is an encouraging development for Americans who depend on public assistance for food. The availability of free commodities through TEFAP enables families that rely on the Food Stamp Program to make those funds, often insufficient for larger families, last longer each month. Yet the most important aspect of the TEFAP

⁹⁴DAPONTE & BADE, *supra* note 40, at 26.

⁹⁵FOOD & NUTRITION SERVICE, U.S. DEP'T OF AGRIC., *supra* note 88.

⁹⁶DAPONTE & BADE, *supra* note 40, at 26-27.

program is probably not the food that it provides each year but the mechanism through which it delivers that food to the needy. The creation of TEFAP spurred the development and maturation of the private hunger relief network in the United States. The development of that system of food banks, community kitchens and food rescue programs is the focus of the following section.

SECTION II

The expansion of TEFAP in the 1980s was one of the two driving forces behind the development of the network of food banks, food pantries, community kitchens and food rescue programs that form the core of the Emergency Food Assistance System (EFAS).⁹⁷ There are more than 34,000 food pantries and over 5,000 emergency kitchens in the United States. Most are small, local organizations affiliated with religious groups.⁹⁸ A survey in 2002 measuring the relationship between the public food assistance system and EFAS found that about one-fourth of the households that received benefits from the FSP also received supplies from a food pantry at some time during the year. A considerable number of emergency kitchen users also participated in the FSP.⁹⁹

⁹⁷This acronym is not favored by some food assistance advocates who prefer the word “network” instead of “system” to stress the diversity of approaches and means within the private food assistance community. The four types of organizations listed here have distinct definitions and roles. Food rescue programs generally focus on recovering perishable food from restaurants, grocery stores and private events. They then deliver the recovered food as quickly as possible. They often utilize food pantries and community kitchens, but they may also deliver some perishables directly to consumers. Food banks store surplus food (either purchased or donated) and then distribute that food, much of which is nonperishable, through their own networks of local service agencies – typically food pantries and emergency kitchens. There is an important definitional distinction between food pantries and emergency kitchens (sometimes referred to as soup kitchens). Food pantries distribute unprepared foods for use in homes, while emergency kitchens prepare food to provide to individuals at the site. In 2000, an estimated 32,737 food pantries distributed an average of 239 million pounds of food per month. That same year, an estimated 5,262 kitchens served an average of 474,000 meals per day. Pantries and kitchens may overlap, but they do reach different populations: people without access to cooking equipment, for example, are far more likely to be found in an emergency kitchen. MARK NORD, ET AL., *supra* note 3, at 28, 35.

⁹⁸LAURA TIEHEN, PRIVATE PROVISION OF FOOD AID: THE EMERGENCY FOOD ASSISTANCE SYSTEM 1 (U.S. Dep’t of Agric. Econ. Res. Service, Food Assistance and Nutrition Research Rep. No. 26-5, Aug. 2002), *available at* <http://www.ers.usda.gov/publications/fanrr26/fanrr26-5/fanrr26-5.pdf>.

⁹⁹MARK NORD, ET AL., *supra* note 3. These findings are noteworthy for two reasons. First, many of the people served by emergency kitchens do not have permanent or reliable housing and are therefore far less likely to participate in public food programs. Second, the fact that many emergency kitchen users are homeless or tenuously housed means that they tend to be underrepresented in domestic hunger surveys.

These figures demonstrate that EFAS is a sizable network of private organizations serving a large number of poor Americans in ways that either supplement or replace the hunger relief efforts of public food assistance programs. Many of these organizations predate the creation of TEFAP. The first food pantries were established long before the federal government began to distribute excess cheese in 1981. Yet the growth of TEFAP helped to institutionalize the network of private food assistance organizations. Food pantries in the era before TEFAP relied on the uneven flow of contributions from individuals and businesses for their supplies and financial support.¹⁰⁰ The food assistance that these establishments were able to provide to hungry Americans was therefore cyclical and often unpredictable. TEFAP supplies EFAS organizations with food on a regular basis, it subsidizes some of those organizations for storing and distributing TEFAP commodities, and it ensures them of a reliable stream of administrative funding.¹⁰¹

The mechanism for the distribution of TEFAP commodities reflects the conservative political climate in which the program was created. The central role of non-governmental organizations in TEFAP commodity distribution contrasts with the more direct delivery mechanism used by the primary public food assistance programs. TEFAP authorizes the USDA to make commodity foods available to selected distributing agencies in each state. These state agencies, in turn, provide that food to hunger relief organizations at the local level.¹⁰² These organizations, usually food banks, then distribute the food to selected food pantries and community kitchens. Once the commodities have reached this level they are made available to the public.¹⁰³

The political merits of the decision to distribute commodities in this manner are debatable. Proponents of food stamps and other direct public food assistance criticize TEFAP as a short-term solution that does

¹⁰⁰ *The Private Food Assistance Network*, *supra* note 86, at 13.

¹⁰¹ DAPONTE & BADE, *supra* note 40, at 29.

¹⁰² The federal guidelines for TEFAP commodity distribution explain that the following types of organizations are eligible to receive food: "Public or private nonprofit organizations that provide food and nutrition assistance to the needy through the distribution of food for home use or the preparation of meals. Organizations that distribute food for home use must determine the household's eligibility by applying income standards. Organizations that provide prepared meals are eligible to receive commodities if they can demonstrate that they serve predominately needy persons." FOOD & NUTRITION SERVICE, U.S. DEP'T OF AGRIC., *supra* note 88.

¹⁰³ *Id.*

more harm than good by diverting resources and attention from more effective means of hunger relief.¹⁰⁴ Supporters of indirect government assistance point out that federal support for TEFAP effectively lowered the threshold for access to public food assistance since the household income test for establishing TEFAP eligibility is less demanding than the requirements for FSP eligibility.¹⁰⁵ These and other critiques will surface again in the evaluation of the relative merits of public and private food assistance. For better or worse, however, the decision in 1981 to create a public commodities distribution network implemented primarily by organizations in the private sector led to significant growth in the number and variety of EFAS organizations operating on a continual basis in communities across America. While TEFAP played an important role in stimulating this growth, it was not the only force behind the network of EFAS organizations that emerged in the 1980s.

The creation of the Emergency Food Assistance System would not have been possible without the ingenuity and persistence of those who founded the first food banks and, soon afterwards, began to share the information and resources necessary to establish a national network of private food assistance programs. A businessman named John Van Hengel established the first food bank in America in Arizona in 1967. It was an accident of sorts, not an intentional endeavor, and it is worth noting that other people were creating similar programs at about the same time without any knowledge of what was happening in Phoenix.¹⁰⁶ Van Hengel was volunteering at a local church mission when he began to glean fruits and vegetables from old orchards for use in the mission kitchen. Realizing that he simply could not gather all of the food that was available in the local orchards, many of them located in the backyards of homeowners who were eager to

¹⁰⁴BERRY, *supra* note 87, at 151.

¹⁰⁵DAPONTE & BADE, *supra* note 40, at 32.

¹⁰⁶JANET POPPENDIECK, SWEET CHARITY: EMERGENCY FOOD AND THE END OF ENTITLEMENT 123 (1998). Poppendieck credits the independent emergence of several organizations similar to Van Hengel's "food bank" to the social milieu: "the sixties and early seventies were characterized by a pervasive national concern about poverty, and... a dramatic focus on hunger. ... At the same time, an emerging environmental movement raised the nation's consciousness about waste, and a growing consumer movement raised standards in the grocery industry. Add to the equation the increasing use of 'dumpsters,' to hold grocery store trash in such public locations as the edges of parking lots, and you have the ingredients of food banking."

see someone do something about the obvious waste, Van Hengel elicited the help of others at the mission. These new volunteers soon had more than they could use. The pastor at St. Mary's Church, a local parish, helped Van Hengel find a space where he could store food before distributing it to others in the community. Soon thereafter the St. Mary's Food Bank was open for business.¹⁰⁷ Van Hengel and his colleagues quickly expanded their collection efforts beyond gleanings in local orchards; they began arranging for local grocery stores to divert rejected, excess food to the St. Mary's warehouse.

From such inconspicuous beginnings the food bank movement grew rapidly. By 1975 there were a number of food banks operating in cities across the country. Just as the government played a significant role in encouraging the growth of EFAS organizations through the creation of the TEFAP commodities program, it also played a significant – though often overlooked – role in encouraging the creation of a national network of food banks in 1976. The conditions for growth were optimal that year: Congress had passed the Tax Reform Act of 1976, which increased the financial incentives for corporations to donate their products to charity.¹⁰⁸ Staff at the federal Community Services Administration, after learning about what Van Hengel was doing in Phoenix, offered St. Mary's Food Bank an unsolicited grant to develop food banks in other communities.¹⁰⁹ That initial government grant led to the creation of a national organization called Second Harvest and provided enough money for the organization to raise full funding support through private donations by the end of five years. In 1982 Second Harvest had grown into a nonprofit 501-C3 organization funded by national corporate donations, and it was distributing over fifteen million pounds of food to a network of 44 member food banks.¹¹⁰

The pace of expansion of the food bank network slowed in the mid-1980s once most large cities had organized

¹⁰⁷*Id.* at 112.

¹⁰⁸AMERICA'S SECOND HARVEST, FOOD BANKING, at http://www.secondharvest.org/site_content.asp?s=21 (last visited Apr. 15, 2004).

¹⁰⁹POPPENDIECK, *supra* note 102, at 124.

¹¹⁰*Id.* at 125.

food banks. Second Harvest then shifted its focus to raising the quality standards it required of member banks. One of the chief benefits the association now offers to member affiliates, in addition to the benefits that come with being part of a national network of diverse organizations, essentially amounts to a guarantee that the affiliate is trustworthy on all health and safety issues surrounding the collection and distribution of food.¹¹¹ All affiliates are required to sign on to a set of strict guidelines prepared with the assistance and approval of the FDA and USDA.¹¹² A representative from the national headquarters inspects the facilities of each affiliate once every 18-24 months to ensure compliance with these food-handling standards.¹¹³

The increase in efficiency and professionalism resulting from these membership standards have led to an increased capacity for donations. In 1995 food donations directed through the national office in Chicago reached 285.7 million pounds of food, and that number represented only one third of the 811.3 million pounds distributed in total by all food banks within the network.¹¹⁴ In the decade since 1995 the growth of Second Harvest, renamed America's Second Harvest in 1999, has slowed. The network of affiliated regional food banks and food-rescue programs currently numbers more than 200. Annual donations through the national network now exceed one billion pounds of food.¹¹⁵ In addition to inspecting and certifying the facilities of each member food bank or food-rescue program, America's Second Harvest distributes the food it receives from the federal government (through TEFAP) and the donations it solicits from national corporations among all of its affiliates according to relative need. America's Second Harvest also continues to work through media

¹¹¹“By certifying food banks, Second Harvest assures potential donors that the food and paperwork involved will be handled appropriately, thus giving donors confidence in the act of donating and making the act of donating easy.” DAPONTE & BADE, *supra* note 40, at 35. This article provides more detailed information about the distribution process.

¹¹²These guidelines are available on the Conference for Food Protection website, at <http://www.foodprotect.org>. In order to join the Second Harvest network, each prospective affiliate must sign a 26-page contract prepared by Second Harvest. Among other things, the organization certifies that each affiliate complies with sanitation standards, maintains a determined amount of storage space, keeps adequate finance and inventory records, and employs sufficient staff to ensure full-time operations. DAPONTE & BADE, *supra* note 40, at 35.

¹¹³AMERICA'S SECOND HARVEST, AMERICA'S SECOND HARVEST 2003 ANNUAL REPORT 30, available at http://www.secondharvest.org/more_files/annual.pdf.

¹¹⁴POPPENDIECK, *supra* note 102, at 125.

¹¹⁵AMERICA'S SECOND HARVEST, AMERICA'S SECOND HARVEST FACT SHEET, at http://www.secondharvest.org/site_content.asp?s=316 (last visited Apr. 15, 2004).

outlets and lobbying efforts to keep the public informed about the reality of hunger in America.¹¹⁶

The food bank movement and the revitalized federal commodities distribution program have combined to create, in EFAS, a network of private sector organizations that provides food to more than 23 million Americans each year.¹¹⁷ This network has expanded exponentially since the 1970s. It is a system that relies on the efforts of concerned individuals who volunteer to fight hunger in their communities in ways that public hunger relief programs do not.

For a variety of reasons, a significant percentage of the people who receive aid from the network of private hunger relief organizations do not receive benefits from the FSP or other public food assistance programs. Private organizations are thus providing necessary services. Yet the central role of public assistance in the growth of the EFAS network, exemplified by the history of the TEFAP program and the development of America's Second Harvest, somewhat belies the notion that food banks and food rescue programs represent a truly private hunger relief system. These programs would be neither as established nor as effective as they are today if not for the structural support and the food aid provided by government programs. The TEFAP story demonstrates just how much the structure of public hunger relief programs matters to private hunger relief organizations. The following section will examine the effects of recent federal legislation on the structure of public and private hunger relief programs in America. This analysis may provide some insight into the future of domestic hunger relief.

SECTION III

¹¹⁶AMERICA'S SECOND HARVEST, *supra* note 109.

¹¹⁷AMERICA'S SECOND HARVEST, *supra* note 111. Accurate annual estimates of the number of Americans who receive food assistance from an EFAS organization are elusive. This statistic, 23.3 million, purports to capture the number of Americans serviced by the America's Second Harvest network. While most of the EFAS network is linked to America's Second Harvest, there are many groups within the hunger relief community that are not affiliated with America's Second Harvest. An accurate number, therefore, may be even greater than 23 million.

The first piece of recent legislation worth noting instituted important modifications to the structure of the FSP and other FANPs. The Farm Security and Rural Investment Act of 2002 (the “Farm Bill”), signed into law on May 13, 2002, funded programs and set government policy for conservation, agricultural trade, forestry, energy and rural development. More importantly, it modified the structure of several FANPs and reversed some of the changes initiated by the PRWORA legislation in 1996. The 2002 Farm Bill reauthorized both the FSP and TEFAP for five years, through fiscal year 2007. It implemented several changes to the FSP. One of the most significant changes was the reinstatement of food stamp eligibility for certain classes of immigrants who had been eliminated from the program by PRWORA.¹¹⁸ That law disqualified most resident aliens unless they had been employed in the United States for ten years. The 2002 Farm Bill provides that all legal immigrants continuously residing in the United States for at least five years are eligible to receive food stamps, as are all children of legal immigrants regardless of their entry date. The Farm Bill also grants blanket eligibility to legal immigrants receiving disability benefits.

Title IV of the Farm Bill, the Food Stamp Reauthorization Act of 2002, changes several other FSP rules as well. Most of these changes were designed to enable more Americans to take advantage of food stamp benefits. Section 4103 replaces the fixed standard deduction with a deduction that varies according to household size. Before the Farm Bill became law, the FSP froze the standard deduction at \$134 per household regardless of the number of people in the household. The standard deduction in the Farm Bill adjusts annually for cost-of-living increases, an addition that matches the financial calculations for food stamp eligibility more closely to actual financial conditions. How much milk or bread a needy American can buy for a given number of dollars is no longer permanently fixed into law.

The size of the standard deduction is capped on both ends. No household will receive less than the amount of

¹¹⁸FOOD & NUTRITION SERVICE, U.S. DEP’T OF AGRIC., NEWS AND INFORMATION: 2002 FARM BILL, *at* http://www.fns.usda.gov/cga/2002_Farm_Bill (last visited Apr. 15, 2004).

the current deduction or more than the standard deduction for a household of six.¹¹⁹ Yet larger households do receive a larger deduction under the language of section 4103. The deduction is set at 8.31 percent of the applicable net income limit, based on household size.¹²⁰ This number was a compromise reached by members of the conference committee. The original Senate version of this clause provided for an escalating standard deduction that would increase from 8 percent in fiscal year 2002 to 10 percent in fiscal year 2011 and beyond. The original House version fixed the new standard deduction over time but set the percentage at 9.7 percent of the federal poverty guidelines.¹²¹ The final version is thus not as generous as either the House or the Senate had initially desired, yet it represents an improvement on the standard deduction allowed by federal law since PRWORA.

Another section within Title IV of the Farm Bill changes the availability of transitional food stamp benefits for households exiting the welfare system. PRWORA revamped the welfare system and renamed it the Temporary Assistance to Needy Families Program (TANF). PRWORA limited the length of time that TANF participants could receive cash benefits to five years. Subsequent legislation provided that households losing TANF cash assistance could qualify for three months of transitional food stamp benefits.¹²² Section 4115 of the Farm Bill adjusts the length of time during which a household can receive transitional assistance from three months to five months. This section stipulates that the amount of food stamp benefits a household receives during the transitional period will be equal to the amount received in the last month prior to the termination of TANF cash assistance. It also allows households to re-certify for the FSP during this

¹¹⁹FOOD & NUTRITION SERVICE, U.S. DEP'T OF AGRIC., 2002 FARM BILL: SUMMARY OF PROVISIONS AFFECTING FOOD STAMP PROGRAM, *at* http://www.fns.usda.gov/cga/2002_Farm_Bill/food_stamps.html (last visited Apr. 15, 2004).

¹²⁰Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171 (codified as amended in sections of 7 U.S.C.). *See also* H.R. Conf. Rep. No. 107-2646, at 180, *available at* http://www.usda.gov/farmbill/conference_report/full_report.pdf (provides link to exact language).

¹²¹STAFF OF JOINT COMM. OF CONFERENCE, 107TH CONG., JOINT EXPLANATORY STATEMENT ACCOMPANYING H.R. 2646 102 (2002).

¹²²ECON. RES. SERVICE, U.S. DEP'T OF AGRIC., FARM POLICY: TITLE IV – NUTRITION PROGRAMS, *at* <http://www.ers.usda.gov/Features/FarmBill/Titles/TitleIVNutritionPrograms.htm> (last visited Apr. 15, 2004).

transitional period. The only major change that the conference committee made to the language of this section was a revision to the time limit for transitional assistance. Both the House and the Senate versions initially proposed that the transitional period be extended to six months rather than five.

Several sections of the Farm Bill simplify the application and certification process for current and potential FSP participants. Section 4104 allows states to select a simplified formula for determining the amount of money spent by a household on utilities; section 4105 allows states to use a formula for housing costs to determine the amount of benefits that homeless households should receive. Section 4106 simplifies deductions in the re-certification process; section 4107 gives states more flexibility in determining how many resources FSP applicants have for eligibility purposes.¹²³

A common characteristic of these Farm Bill provisions, including section 4115, is that states have the option to choose whether or not to select them. For example, the Farm Bill does not require states to increase the number of months during which a household can receive transitional benefits; all that the law provides is that states may elect to extend the time limit for transitional benefits if they so choose. This method requires proponents of the FSP in each state to rally the legislative support needed to make these federal options law at the state level. The elective approach also allows state governments some freedom to tailor their public hunger relief programs to the particular needs that they face. This process may be more effective in terms of both cost and results, but it will not be possible to make that judgment for several years. In the interim, hunger relief advocates have their work cut out for them as they try to convince state governments to elect the Farm Bill options.

¹²³Farm Security and Rural Investment Act of 2002, *supra* note 118, at 182.

The cumulative effect of the FSP modifications introduced by the 2002 Farm Bill has been to increase the level of benefits and make access to food stamps easier for needy Americans. The FSP is growing again in terms of funding and participation levels after contracting sharply in the years following the passage of PRWORA. This is a mixed blessing. The good news is that many more needy people are receiving food stamp benefits, but the bad news is that many more people are in need of those benefits. The history of the FSP over the last two decades reveals an inverse connection between federal funding support for the program and the health of the American economy. If this is a reliable trend, the primary public hunger relief programs will continue to provide more food assistance during times of economic crisis. During times of economic expansion, however, the government will tend to reduce funding for public food assistance when concerns about domestic hunger become less prevalent.

The reactive model of support for the FANPs, demonstrated by the recent history of federal funding decisions for the FSP, is sufficient if public hunger relief is truly less necessary during periods of economic growth.¹²⁴ If domestic hunger does not map as neatly to economic indicators, however, this reactive model will tend to ignore, and fail to provide for, at least some needy Americans. Perhaps it is at these times that the EFAS network can fulfill its role as a secondary safety net. Recent Congressional proposals have suggested ways in which the EFAS can be made more effective.

The latest federal legislation addressing private hunger relief efforts began with an important piece of legislation, passed in 1996, which limited the liability of food donors in order to encourage American companies to donate excess food rather than throw it away.¹²⁵ This Good Samaritan food donation law was followed by the Faith-Based Initiative proposed by President Bush in 2000. The central premise of the Initiative is that federal funds should be made available to social service programs administered by religious orga-

¹²⁴Even if domestic hunger decreases in inverse relation to economic growth, this model is not proactive enough to address needs quickly. The FSP changes implemented by the 2002 Farm Bill were responses to a recession that began in 2000-2001. Government responses, by their very nature, will invariably be less than prompt and often less than timely.

¹²⁵David L. Morenoff, *Lost Food and Liability: The Good Samaritan Food Donation Law Story*, 57 FOOD & DRUG L.J. 107 (2002).

nizations. The Initiative addresses the perception that the federal grant-making system is biased against religious organizations doing the same work as their secular counterparts. Supporters of the Initiative claim that government money funding social service programs should be awarded to any organization engaged in such activity regardless of religious affiliation.¹²⁶

Opponents of the Initiative worry that it blurs the line between church and state. Some believe that it may institutionalize a preference for religious organizations. Against this backdrop, the first effort to implement the Faith-Based Initiative began in 2001 with a bill in the House of Representatives that stimulated much debate about the proper role for faith-based organizations in federally funded social service programs. Although a moderate compromise bill was eventually introduced in the Senate, the debate had not been resolved by the end of 2002.

An important part of the stalled legislation involved charitable deductions for food donation, even though this particular issue enjoyed broad support in Congress and in the private sector. Charitable deduction legislation first appeared in the Senate as the Good Samaritan Hunger Relief Tax Incentive Act of 2001, and it was accompanied by a similar measure in the Tax Empowerment and Relief for Farmers and Fishermen Act. This legislation did not make it into law in either 2001 or 2002. In 2003, both houses of Congress finally passed bills advancing this portion of the Faith-Based Initiative.

The Senate moved first on April 9, enacting the Charity, Recovery, and Empowerment Act of 2003 (the CARE Act), which included the substantive points of the Good Samaritan Hunger Relief Tax Incentive Act. Five months later, on September 17, the House followed the Senate by passing the Charitable Giving Act. Notably absent in the 2003 House bill were the controversial program provisions that had stalled the progress

¹²⁶VOLUNTEERS OF AMERICA, ISSUE BRIEF: THE CARE ACTS OF 2003, at http://www.volunteersofamerica.org/xq/CFM/content_item_id.2569/folder_id.10 (last visited Apr. 15, 2004).

of the Faith-Based Initiative in 2002. Despite overwhelming bipartisan support in both houses of Congress, the two bills had not yet gone to conference in April 2004. Nonetheless, there is still hope on Capitol Hill that a law increasing charitable deductions for food donation will emerge by the end of 2004.

The following analysis will discuss the history and the major provisions of the Senate CARE Act, describe the main differences in the House Charitable Giving Act, and then evaluate the effects that this legislation may have on donations to private hunger relief programs.

There are three significant provisions in the central piece of the Senate CARE Act. The first, and the most important from the perspective of private hunger relief programs, is the charitable deduction for contributions of food inventory located in section 103 of the bill. The second key provision allows for tax-free distributions from IRAs for charitable purposes, and the third enables taxpayers who do not itemize their deductions to claim a charitable deduction.¹²⁷

The provision for a new non-itemized deduction would add charitable contributions to the small number of deductions favored by the tax code. Current tax law does not allow taxpayers who take the standard deduction to claim an additional deduction for charitable contributions. The CARE Act provides for a “direct charitable deduction” for such contributions that may be claimed in addition to the standard deduction.¹²⁸

The target audience for this provision seems to be middle-class Americans who give a few hundred dollars a year in tithes to local churches or donations to international relief agencies. Only cash contributions made during the taxable year are eligible, and the deduction may only be claimed for that portion of aggregate contributions from that year that exceed \$250. The individual who claims this deduction is entitled to a maximum \$250 deduction on a dollar-for-dollar basis for contributions above \$250. In other words, an individual must contribute \$500 in aggregate charitable contributions during the tax year in order to claim

¹²⁷S. REP. NO. 108-11, at 5 (2003).

¹²⁸*Id.* at 7.

the maximum \$250 charitable deduction. Contributions over \$500 cannot be deducted. The rate for joint returns is double: \$500 maximum deduction for aggregate contributions during the tax year between \$501 and \$1000.¹²⁹ This provision is intended to spur charitable giving, but because the CARE legislation phases it out after two years it may have a limited effect.

The provision allowing for tax-free IRA distributions would change current law by creating an exception for charitable distributions from IRAs or Roth IRAs. Present law requires individuals using IRA proceeds to make charitable contributions to treat IRA distributions as withdrawals subject to IRA income recognition rules. In certain cases this may mean that individuals will be required to pay tax on an IRA distribution even when the entire distribution goes to charity. The goal of this new provision is to spur charitable giving by allowing taxpayers to make charitable contributions through IRA distributions without recognizing that income for tax purposes.¹³⁰

The language of this provision in section 102 of the CARE Act considerably narrows its potential scope. After defining a qualified charitable distribution as an IRA distribution made directly by the IRA trustee to “an organization to which deductible contributions can be made,”¹³¹ the statute limits eligible direct distributions to those distributions that are made “on or after the date the IRA owner attains age 70 $\frac{1}{2}$.”¹³² This provision is thereby limited to a small pool of potential givers who would otherwise be discouraged from giving by the tax implications of IRA withdrawals. A further limitation provides that if a taxpayer receives a benefit in exchange for a charitable contribution or does not receive adequate substantiation of the contribution, the exclusion in this provision will not be applicable to any part of the IRA distribution.

¹²⁹*Id.*

¹³⁰*Id.* at 9.

¹³¹*Id.*

¹³²S. REP. NO. 108-11, at 9 (2003).

The most important of the provisions in the Senate CARE Act for private hunger relief programs is section 103. This section expands an existing deduction for charitable contributions of food inventory. The current deduction is generally limited to the basis, which is typically the inventory cost of the contribution. An important current exception allows C-corporations to claim an enhanced deduction for certain inventory contributions.

This enhanced deduction is the lesser of two times the basis cost, or basis cost plus one-half of the *fair market value* (FMV) cost in excess of basis.¹³³ To be eligible for this enhanced contribution, C-corporation donations must not exceed ten percent of the corporation's yearly taxable income and they must be directed to a 501C-3 organization that will use the donations consistent with its exempt purpose. The recipient organization cannot transfer the donation in exchange for some other good, and it must provide the donor with a receipt certifying its compliance with these guidelines.¹³⁴

A final requirement for the use of this enhanced donation under current law is one of the significant developments in the CARE Act proposal. Current law requires the taxpayer to establish that the FMV of the donation exceeds basis. The definition of FMV for food inventory has been the subject of an ongoing debate between taxpayers and the IRS, and the CARE Act provides certainty in this area of the law by codifying a particular definition of FMV. This clarification is intended to eliminate a persistent source of disputes with the IRS and allow taxpayers to receive an appropriate deduction for their charitable contributions.¹³⁵

The clarification of FMV in this provision of the CARE Act stems from a 1995 tax court case, *Lucky Stores v. Commissioner*. The plaintiff in that case donated its surplus bread inventory to food banks and claimed charitable contribution deductions based on the full retail price of the bread. The IRS determined that the fair market value of the bread was about fifty percent of the full retail price. The plaintiff delivered fresh

¹³³*Id.* at 11.

¹³⁴*Id.*

¹³⁵*Id.*

bread to its stores several mornings each week, and on the fourth day after delivery it would often provide that bread to charitable organizations. On Sundays, however, the plaintiff regularly sold 4-day-old bread in stores at full retail price.¹³⁶

The IRS argued that the bread donated by Lucky Stores was surplus inventory that could only have been sold at a fifty percent discount, and therefore Lucky Stores could not claim a charitable contribution deduction at full retail price. The court decided the case by turning first to the statutory definition of FMV for donated inventory: “the price which the taxpayer would have received ‘if he had sold the contributed property in the usual market in which he customarily sells,’ in the quantity contributed.”¹³⁷

The court acknowledged the original rule that only allowed taxpayers to deduct for the basis cost of donated inventory rather than the FMV of the inventory. It then distinguished that rule from the circumstances in the *Lucky Stores* case by pointing to strong evidence of legislative intent to prevent taxpayers from donating property to charitable organizations simply in order to place themselves in a better position after taxes than they would have been in if they sold the property.¹³⁸ The court then noted subsequent changes to that original rule, and the specific purpose for which Congress added the special deduction: a desire to provide a greater tax incentive for contributions to be used on behalf of the ill, the needy and infants.¹³⁹ Finding that the bread donations by Lucky Stores were the sort of charitable giving that Congress meant to encourage, the court held that those donations should be valued at full retail price.¹⁴⁰

Section 103 of the CARE Act clarifies the meaning of FMV with reference to this tax court decision. FMV is determined “(i) without regard to internal standards [of the taxpayer] or lack of market and (ii) by taking into account the price at which the same or substantially the same food items (as to both type and quality)

¹³⁶*Lucky Stores v. Commissioner*, 105 T.C. 420, 423 (U.S. Tax Ct. 1995).

¹³⁷*Id.* at 429.

¹³⁸*Id.* at 427.

¹³⁹*Id.* at 428.

¹⁴⁰*Id.* at 435.

are sold by the taxpayer at the time of the contribution (or, if not so sold at such time, in the recent past).”¹⁴¹ This definition decides the FMV issue in favor of the donor by allowing more generous deductions.¹⁴² The CARE Act thus codifies the essence of the *Lucky Stores* ruling: the taxpayer, after substantiating the FMV of a donation, is allowed to determine the value of donated food. The IRS does not determine the value of a donation. Private hunger relief programs see this codification of the *Lucky Stores* principle as an important safeguard for businesses that do not want to risk an IRS audit as a result of their generosity in donating food.¹⁴³

This section of the CARE Act does more than resolve the question of how to determine FMV. It also extends the exception for food inventory donations under section 170(e)(3) of the tax code beyond C-corporations to any taxpayer engaged in a trade or business. This will allow businesses of all sizes to recoup their production costs. Farmers, ranchers, fishermen, restaurateurs and small business owners will all be able to benefit from the tax incentives that, under current law, are only offered to major corporate donors.¹⁴⁴

In addition to expanding the eligibility for this enhanced deduction, the CARE Act adjusts the amount of the deduction in favor of food donors. As noted above, current law limits the enhanced deduction to the lesser of either two times the basis cost, or basis cost plus one-half of the FMV cost in excess of basis. The CARE Act changes the enhanced deduction to the lesser of either two times the basis cost, or FMV.¹⁴⁵ It thus allows businesses that use the “cash method” of accounting to treat the basis of their donated food as

¹⁴¹CARE Act of 2003, S. 476, 108th Cong. (2003).

¹⁴²The deduction applies only to food that qualifies as “apparently wholesome food.” This term of art is defined as “food intended for human consumption that meets all quality and labeling standards imposed by Federal, State and local laws and regulations even though the food may not be readily marketable due to appearance, age, freshness, grade, size, surplus or other conditions.” S. REP. NO. 108-11, at 16 (2003).

¹⁴³*Hearing on Federal Tax Law Changes to Encourage Charitable Giving Before the United States Senate Comm. on Finance*, 107th Cong. (Mar. 14, 2001) (statement of Douglas O’Brien, Director of Public Policy and Research at America’s Second Harvest), available at http://www.secondharvest.org/site_content.asp?s=310 (last visited Apr. 15, 2004). As is the case under present law, the total deduction for such donations in a taxable year cannot exceed ten percent of the taxpayer’s net income for that year from the trade or business providing the donations.

¹⁴⁴AMERICA’S SECOND HARVEST, GOOD SAMARITAN TAX RELIEF, at http://www.secondharvest.org/site_content.asp?s=78 (last visited Apr. 15, 2004).

¹⁴⁵S. REP. NO. 108-11, at 12 (2003).

25 percent of the FMV, enabling them to take a deduction for half of the FMV of their donations.¹⁴⁶ This enhanced deduction will provide incentives for an estimated \$2 billion in new food donations from restaurants, farmers and corporations.¹⁴⁷ America's Second Harvest calculates that this will create the equivalent of 878 million meals for needy Americans over the next ten years.¹⁴⁸

The House of Representatives passed the Charitable Giving Act on September 17, 2003. This companion legislation to the Senate CARE Act is similar in most respects to that bill. Both bills focus primarily on tax law and leave out the disputed Faith-Based Initiative provisions. One important difference is in the cap on corporate charitable contributions. The Senate bill does not change current law, which prevents the total deduction for charitable donations in a taxable year from exceeding ten percent of the taxpayer's modified taxable income for that year from the trade or business providing the donations. The Charitable Giving Act increases the cap on corporate charitable contributions over time. During the first year after the bill is enacted the applicable percentage rises to 11 percent. Over the following four years that number increases by one percentage point each year. After five years the cap on corporate charitable contributions is 15 percent of net income. The cap stays at this level for three more years; then, eight years after the initial increase, the cap rises once more to 20 percent, which is the permanent level established by the Charitable Giving Act.¹⁴⁹

The other notable way in which the House bill differs from the CARE Act on these three main provisions is reflected in the House treatment of food donations. Like the CARE Act, the Charitable Giving Act extends the enhanced deduction for donations of food inventory to any taxpayer engaged in a trade or business. Thus small business owners, farmers, and restaurateurs would all be eligible for the enhanced deduction.

¹⁴⁶CARE Act of 2003, S.476, 108th Cong. § 103(a) (2003).

¹⁴⁷OFFICE OF SENATOR RICK SANTORUM, CARE ACT FACT SHEET, *available at* <http://www.santorum.senate.gov/Care/factsheetupdate.pdf> (last visited Apr. 15, 2004).

¹⁴⁸AMERICA'S SECOND HARVEST, HUNGER RELIEF EFFORTS WOULD GROW WITH NEW TAX-RELIEF LAW, *at* <http://www.secondharvest.org/site.content.asp?s=489> (last visited Apr. 15, 2004).

¹⁴⁹Charitable Giving Act of 2003, House Report H.R. REP. 108-270(I), September 16, 2003, at 6.

The House bill, however, does not alter the existing formula for calculating the enhanced deduction. Where the CARE Act increases the deductible value of food inventory donations, the House bill would retain the current rule that allows a deduction that is equal to either the lesser of either two times basis, or basis plus one-half of FMV in excess of basis. The Charitable Giving Act also preserves some of the ambiguity surrounding the definition of FMV. While the CARE Act codifies the ruling in *Lucky Stores* by allowing the taxpayer rather than the IRS to define the value of a food donation, the Charitable Giving Act is less clear about who decides how much a donation is really worth. The House bill is therefore less appealing to private hunger relief programs because it does not provide as much certainty to potential donors who are concerned about the future tax consequences of their charitable contributions.

The net effect of the CARE Act and Charitable Giving Act provisions would be beneficial to the private hunger relief programs that form the core of the EFAS network. These proposals, along with the portions of the 2002 Farm Bill that affect the FSP and other FANPs, represent the latest legislative developments in the system of public and private domestic hunger relief organizations. Within the framework of this review of the array of domestic food assistance programs, how effective are hunger relief efforts in America?

The many developments in the food assistance network since the 1930s have contributed significantly to the fight against domestic hunger. The hunger relief system is generally successful in providing food for those who are in need of assistance. Yet problems persist, and they should not be simply overlooked because the food assistance system is frequently effective. One persistent problem stems from the way that the current system provides for Americans on the margins of society. These are people who may be struggling to make ends meet, the working poor who are the first to be affected by economic downturns. Their stories reveal a problematic theme. It is a familiar refrain and an inevitable criticism: government programs are slow in responding to economic and social change. To the extent that domestic hunger is tied to fluctuations in the

economy, public programs such as the FSP are generally unable to respond quickly enough to provide for those who need food.

EFAS organizations are intended to fill that gap by providing immediate service during the period of time between the onset of economic hardship and the response from Congress. As noted above, however, the reality is that EFAS organizations are themselves dependent on the support of government programs. Because the private network of hunger relief organizations is unable to rely solely on the support and good will of corporations and private citizens, the ability of the EFAS network to sufficiently complement the public system of hunger relief is compromised by the ponderous pace of the same bureaucratic system that makes the private network necessary in the first place. The histories of the 2002 Farm Bill and the CARE Act legislation are both evidence of this problem, as is the broader history of developments in the public and private hunger relief systems over the past three decades.

The PRWORA legislation was enacted in 1996 at a time when domestic hunger was a minor governmental concern, thanks to a growing economy and the boom in the technology sector. Congress passed PRWORA because most legislators had focused their attention elsewhere. Several years later, when the 2002 Farm Bill was introduced into Congress, federal lawmakers were far more likely to consider expanding the reach of public hunger relief programs because the economy was mired in a recession. By the time that the 2002 Farm Bill became law, the American economy had been in a slump for more than two years.

The CARE Act has a similar history. When the economy was struggling Congress thought it wise to encourage businesses to give more to charity by providing greater tax incentives. Such a measure would help to build the capacity and output of the EFAS network while also stimulating American businesses. Yet by the time that Congress actually voted on the legislation, the economy was already recovering. The impetus for going through the process of providing new tax incentives and increasing the support for the

EFAS network is diminished now that American businesses are growing once again.

This structural problem will remain even if the CARE Act eventually becomes law. Public and private hunger relief programs are tied to a legislative process that deals with crises after, not before, they emerge. This system is unable to effectively provide for Americans on the margins of society who are disproportionately affected by social and economic change. Whether that segment of the population is relatively large or small in relation to the total number of people who benefit from hunger relief programs in America, the absolute number is significant. To the extent that hunger relief programs are unable to sufficiently provide for these people, the domestic food assistance system is inadequate and in need of change.

The approaches to dealing with this problem of bureaucratic inefficiency tend to fall in one of two camps. These approaches primarily address the larger problem of poverty and hunger, which includes the more specific problem of the marginalized people who are disproportionately affected by economic change. Most advocates fighting against domestic hunger support increased funding for public hunger relief programs. They believe that a consistently larger budget for the FSP will mean that the entitlement benefits of that program will be more widely available. If the FSP were more firmly entrenched in the welfare state, economic emergencies would not stress the food assistance system to the same degree. These advocates believe that the private hunger relief system is a temporary solution unable to address the systemic causes of poverty that often lead to hunger. They value a stable welfare system that is available to all who have need.

The other dominant approach to the deficiencies of the food assistance system claims that the problems of poverty and hunger are too entrenched for governments to solve. This camp does not ignore poverty, but it discourages government spending on proposed solutions to poverty. These advocates point to the many failed attempts by welfare states to care for their poor and hungry. Even the Scandinavian governments that were once the prototypical welfare states have struggled to maintain their economic models in the face of

ethnic and economic diversity issues of the sort that America has been dealing with for decades.

The failure of the welfare state to fulfill the promises to care for all people, including the poor and the hungry, fuels the search for alternative solutions. Domestic food assistance programs are unable to adequately provide for a significant number of hungry people during times of crisis. If the public system does not reach enough needy people and the private system facilitates a quick-fix mentality that distracts attention from the pursuit of solutions to the underlying issues of poverty, then what might the future hold for domestic hunger relief programs?

The practice of gleaning, still utilized in some areas of the hunger relief network, may provide a modest solution, a glimmer of a promising conceptual shift. Is there something about the way that food recovery programs operate that might lead to an opportunity for more sustainable progress in the fight against hunger in America? The following section will survey the history of gleaning and offer a moderate suggestion about how that practice might positively affect the efforts of domestic hunger relief programs.

PART IV

Food recovery in America these days is primarily the work of food banks. Although food banks are a modern invention, the history of food storage is almost as old as human civilization. One of the oldest forms of food recovery is known as gleaning, “the act of gathering grain or other produce left by reapers.”¹⁵⁰

Some of the earliest references to gleaning come from the history of the Israeli people. The book of Ruth, written sometime around 1100 B.C.E.,¹⁵¹ conveys one of the most familiar stories about gleaning. Chapter two tells the story of a woman who goes out into the fields to gather the grain left behind by the harvesters in order to feed her mother-in-law and herself.¹⁵² Ruth finds out that the field in which she is working belongs

¹⁵⁰MERRIAM-WEBSTER ONLINE DICTIONARY, at <http://www.m-w.com> (last visited Apr. 15, 2004).

¹⁵¹NEW BIBLE COMMENTARY 287 (G.J. Wenham, et al., eds., 1984).

¹⁵²*Ruth* 2 (New International), available at <http://www.biblegateway.com> (last visited Apr. 15, 2004).

to a man named Boaz. He notices Ruth and asks his harvesters about her; their response and the actions of Boaz reveal much about the way that the practice of gleaning was conducted in that age. Gleaning was not an activity for those who had steady work or access to food. The primary gleaners in Israelite society were poor women, often widows, and foreigners who did not have any other means of support.

Another aspect of gleaning at the time of Ruth was that gleaners in the fields could take away anything that the harvesters did not gather. Boaz had compassion on Ruth and ordered his workers to leave behind more of the grain than they normally would. “Pull out some stalks for her from the bundles and leave them for her to pick up, and don’t rebuke her.”¹⁵³ Thus a kind landlord could, at his discretion, provide more liberally for the poor.

Although Boaz was more generous than he had to be, his response to Ruth was in keeping with the established tradition of gleaning in Israel. The books of Leviticus¹⁵⁴ and Deuteronomy¹⁵⁵ provided rules for the Israelites to follow when harvesting grain. Leviticus chapter 23, verse 22, reveals how Boaz exceeded the command to leave the gleanings behind for the poor and the alien. His responsibility under the law of the Israelites only required him to leave grain at the corners of his fields. Ruth chapter two, verse 15, reveals that Boaz commanded his workers to allow Ruth to “gather among the sheaves.”¹⁵⁶ She was permitted to glean beyond the corners of the fields.

These verses from Leviticus and Deuteronomy established a rudimentary type of welfare program for the poor in that society. The wealthy, who were the farmers and landowners, were commanded to display generosity to those in need. Breaking this law was a punishable offense. The needy, for their part, were required to be

¹⁵³*Id.* at v. 16.

¹⁵⁴*Id.* at v. 15. See also *Leviticus* 19:9-10; *Leviticus* 23:22 (New International), available at <http://www.biblegateway.com> (last visited Apr. 15, 2004).

¹⁵⁵*Deuteronomy* 24:17-19 (New International), available at <http://www.biblegateway.com> (last visited Apr. 15, 2004).

¹⁵⁶*Ruth* 2, *supra* note 149, at v. 15.

active and diligent in order to obtain the fruits of the generosity of their neighbors. This system of gleaning enabled poor Israelites to provide for a measure of their own needs.

The Hebrew word that is translated as *glean* in chapter two of the book of Ruth is *lawkat*, which is also used in the book of Exodus. That book relates the story of how God provided food for the nation of Israel while they wandered in the desert for many years.¹⁵⁷ The book of Ruth thus relates this duty imposed on landowners to the providence of God at a time when their ancestors were in great need. This reminder of their own past was intended to encourage them to be generous to the needy in their own day. The rules about gleaning were therefore more than a duty imposed by the government. Gleaning law institutionalized an important episode in the saga of the Israeli people. For farmers and landowners, leaving grain for the gleaners was an act of remembrance and gratitude for the historical provision of God.

Over time this welfare system became less an act of gratitude and more of a burden. Over one thousand years after the story of Ruth took place, at the time when Jesus lived in Israel, gleaning was still part of the system of provision for the poor and needy under Jewish law, but it had become a command of secondary importance. Poor Jews and foreigners in the land were not permitted to glean the fields on the Sabbath, the Jewish day of rest. The command to do no work on the Sabbath had taken precedence over the command to allow hungry people to glean for food.¹⁵⁸

In the centuries after the life of Jesus the tradition of gleaning continued as a practice in Middle Eastern cultures and in societies across Europe. The practice of gleaning in Europe was detached from its religious roots in Israelite society, but it may have retained some of its spiritual flavor through the influence of the

¹⁵⁷ *Exodus* 16:4-5 (New International), available at <http://www.biblegateway.com> (last visited Apr. 15, 2004). “Then the Lord said to Moses, ‘I will rain down bread from heaven for you. The people are to go out each day and gather [*lawkat*] enough for that day. In this way I will test them and see whether they will follow my instructions. On the sixth day they are to prepare what they bring in, and that is to be twice as much as they gather [*lawkat*] on the other days.”

¹⁵⁸ *Matthew* 12:2 (New International), available at <http://www.biblegateway.com> (last visited Apr. 15, 2004).

Christian Church. The tradition persisted partly because it made sense in agricultural societies to provide some measure of relief for the poor and hungry through a process that maximized the yield from a harvest. Farmers and harvesters working by hand could not reap every last piece of grain or fruit. The gleaners who came behind them could find some nourishment for only the price of their time and effort.

Whether or not the practice of gleaning in the fields endured because of a moral sense of commitment to the poor, it survived and spread throughout most of Europe over the course of the first millennium of the Common Era. Records from medieval England show that gleaning was an established custom that had mixed support from various groups in society. A document written in 1282 declared “the young, the old, and those who are decrepit and unable to work shall glean in autumn after the sheaves have been taken away, but those who are able, if they wish to work for wages, shall not be allowed to glean.”¹⁵⁹ From this and other by-laws of the period it seems that gleaning was not a custom that everyone supported. Yet the custom continued for centuries with a measure of grudging acceptance from landowners, circumscribed by community-imposed boundaries to limit the impact that it would have on profits from the harvest. Able-bodied men and women were not allowed to glean. They were to reap if anyone would hire them, and chances were good that someone would hire them at the time of harvest, since landlords were always eager to maximize their profits from the grain fields in the few weeks of the harvest.

The importance of the harvest in medieval England meant that the conservation of grain was a chief objective of landlords and overseers. The wasteful, unsophisticated methods of harvesting used until the 19th century left much grain in the fields after the reapers had finished their work. Wheat harvested with a sickle was cut halfway up the stalk. The harvester laid the cut grain on the ground, then gathered and bound it before tying it into a shock on the ridge of the field. Even though overseers often ordered workers with rakes to

¹⁵⁹W.O. Ault, *By-Laws of Gleaning and the Problems of Harvest*, 14 ECON. HIST. REV. 210, at 212 (1961).

pass through the fields after the reapers in order to gather up more of the grain lost in the process, what remained in the fields represented a significant portion of the potential harvest.¹⁶⁰ The moral urge to help those in need often conflicted with the desire to increase profits from the harvest.

By-laws in 14th century England went beyond prohibiting men and women from gleaning if they were able to reap and there was a need for reapers. They also prohibited *outsiders* from gleaning.¹⁶¹ These measures were aimed at maximizing the number of peasants who would be available to reap the grain fields at harvest time. Peasants were prohibited from gleaning outside of their manor or village because landlords did not want their work forces to venture off in search of easier work while the fields nearer their homes had not yet been harvested. These rules were also inspired by the fear that men and women from other communities would be more likely to steal grain when no one knew who they were or where they lived.¹⁶² Of course, outsiders coming in from elsewhere were always encouraged to join the laborers in other manors or villages; any additions to the local labor force were welcome.

Exactly who was unable to reap, and just who were the outsiders forbidden from gleaning, were questions left to landowners and local authorities. There was as much variety in these laws as in the other rules and customs regulating gleaning. A document from Basingstoke in the 14th century reveals that the impotent – those who were not able-bodied and thus eligible for gleaning – “passed by view of the bailiff and constables with the assent of two of the tenants.”¹⁶³ Those who were thus approved were allowed to commence gleaning. The actual gleanings of grain were considered to be the property of the owner of the field. Those who were allowed to glean did so with the consent of the owners and in accordance with their terms.¹⁶⁴ Gleaning

¹⁶⁰*Id.*

¹⁶¹*Id.* at 214.

¹⁶²*Id.* at 215.

¹⁶³F.J. BAIGENT & J.E. MILLARD, HISTORY OF BASINGSTOKE 217 (1889).

¹⁶⁴Ault, *supra* note 157, at 215.

in many parts of medieval England was not actually an easy way to gather a few handfuls of grain. A prospective gleaner had to qualify for gleaning and be accepted by the owner of the field.

Those allowed to glean were further restricted by rules that limited the lawful times for gleaning. Some village by-laws required that the fields be cleared of the sheaves before any gleaners could enter.¹⁶⁵ Depending on the weather, several days could pass before the sheaves were removed from the fields, for the sheaves had to dry in shocks before they could be carried off to the threshing floor. After another several days sheep and other animals would often be allowed to enter the field and graze on what remained of the harvested stalks of grain. The amount of time that gleaners had the fields to themselves thus varied from three to seven days.¹⁶⁶ Still, given the fact that the yield of an acre in medieval England was on the average one-third of what it now is, gleaning was a significant resource for those who were allowed to engage in the practice.¹⁶⁷

Gleaning continued to be a significant customary right and an important source of income for many rural families in England through the 19th century. Other customary rights of the poor, such as the right to pasture animals on common land or the right to gather wood, wild fruits and other natural resources, produced valuable income but were not as dependable as the gleanings after the harvest. Gleaning provided a significant proportion of the annual income for many laboring families in England. Several studies on gleaning in the late 18th century indicate that between five and fifteen percent of the annual earnings in a laboring family were derived from gleaning.¹⁶⁸ Variables contributing to the overall value of gleaning in a given year included the effects of seasonal unemployment, the relative abundance of a particular harvest, weather conditions affecting the ability of farmers to reap the fields, and local differences in the arable

¹⁶⁵*Id.* at 216.

¹⁶⁶*Id.* at 217.

¹⁶⁷*Id.* at 215.

¹⁶⁸Peter King, *Customary Rights and Women's Earnings: The Importance of Gleaning to the Rural Labouring Poor, 1750-1850*, 44 *ECON. HIST. REV.* 461, 462.

acreage that could be harvested and gleaned.¹⁶⁹

The variations in local customs regarding gleaning hinder analysis of how the practice changed and developed from the medieval period until the 19th century. The historical trends were discouraging for the poor who relied on gleaning to produce or supplement their earnings, but in some regions of England the laws defining the rights of the poor to glean after the harvest were less restrictive than they were in other regions. In general, gleaning was most significant in the predominantly arable regions of central and eastern England. The northern counties produced far fewer records relating to gleaning, either because their land was mostly pastoral rather than arable or because gleaning was simply not a customary right in those areas.¹⁷⁰ While most communities attempted to restrict gleaning to the groups that were given that right by the local laws and regulations of the medieval period, other communities allowed almost any landless family to glean.¹⁷¹ Even in the regions of England where almost anyone belonging to the household of a landless agricultural laborer was allowed to glean, social and political forces were beginning to alter the set of customary rights and traditions that had sustained gleaning as a viable source of income for poor laboring families. One of the major developments in the 18th and 19th centuries was the enclosure of agricultural land throughout rural England.¹⁷² The social transformation that took place between the time of the Whig Revolution, when England was still primarily a country of commons and open fields, and the time of the Reform Bill, when it was marked primarily by individual plots and large enclosed farms, completely changed the way that landless laboring families lived and worked.¹⁷³

The structure of the English village in the medieval period, before widespread enclosure, is a subject of

¹⁶⁹*Id.* at 465.

¹⁷⁰*Id.* at 469.

¹⁷¹*Id.* at 470.

¹⁷²Enclosure resulted from acts of Parliament initiated through the petitions of local people, often large landowners, describing the defects of the manorial system and the advantages of an enclosed system. After Parliament passed such bills the commissioners named therein would be empowered to distribute the land described in the petition. Later in the 19th century Parliament took up General Enclosure Acts to ease the administrative burden of innumerable small petitions for enclosure. J.L. HAMMOND & BARBARA HAMMOND, *THE VILLAGE LABOURER: 1760-1832, A STUDY IN THE GOVERNMENT OF ENGLAND BEFORE THE REFORM BILL 14 (1920)*, available at <http://www.chemengsoftware.com/huckin/villagelabourer.htm> (Apr. 15, 2004).

¹⁷³*Id.* at 3.

much controversy between scholars who view the primitive manor as a form of social organization imposed by a despotic landowner and those who view the manor system as a structure created by free men who were subsequently dominated by local lords.¹⁷⁴ In any event, rural England before the 18th century was cultivated according to a system that centered around common lands. Arable fields were divided into strips that belonged to different owners. These strips were scattered among the fields and cultivated uniformly. Common meadowland was divided by lot and distributed among the various owners of the arable land. Both the common meadow and the arable fields were turned to pasture after the harvest. The *common* was a common pasture throughout the year.¹⁷⁵

The poor laborer in an unenclosed village gathered income from various sources. He may have owned a small strip of land in the arable fields, along with an animal or two in the pasture. His earnings as a laborer were supplemented by the income from these small means of production.¹⁷⁶ The transformation of the land brought about by enclosure resulted in the loss of these important supplementary earnings for poor laborers, who were reduced to simple wage earners.

The customary right of gleaning in rural England also suffered from the enclosure of arable farmland. As small plots were consolidated and fenced in, large farmers were less willing to allow the local poor access to their fields in order to glean.¹⁷⁷ In many instances gleaners were the wives and children of the reapers who were laboring in the fields. Farmers became increasingly concerned that reapers would ignore a few sheaves or even leave grain intentionally behind for their relatives to glean. Although gleaning in rural England had been accepted in some form or another for centuries, its status as a customary right of the poor came under attack in the era of enclosure.

¹⁷⁴ *Id.* at 4.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 55.

¹⁷⁷ *Id.* at 56.

Supporters of gleaning argued that the historic custom gave legal recognition to the practice. They pointed out that renowned jurist Henry Blackstone had recognized a right to glean.¹⁷⁸ They also argued that the custom helped to keep landless laborers from descending into a degrading reliance on public poor relief.¹⁷⁹ Opponents of gleaning argued that the long custom of gleaning did not convert it into a right because it had never received an explicit legal sanction. They claimed that gleaning was demoralizing to the poor because it required much effort for little result, and that it encouraged theft by tempting the gleaners to steal sheaves from the fields.¹⁸⁰

The mounting tension between the supporters and the opponents of gleaning was evident by 1766, when an English court decided the case of *Rex v. Price*.¹⁸¹ A farmer in the parish of Childery had caused several poor inhabitants of the parish to be jailed for, according to the farmer, stealing “his barley in the straw.” The farmer had forbidden them from taking the barley, but “they took it by handfuls; and . . . he had suffered the loss of about twenty bushels of barley, by their carrying it off, two days together.”¹⁸²

The issue before the court was not whether the gleaners had stolen the barley or if they had a right of access to the farmer’s fields. Instead, the issue framed by the court was whether they should punish the justice of the peace who had jailed the gleaners. These men and women had been imprisoned because the farmer had sworn a felony against them. After they were released on bail a lawyer charged the justice of the peace with a misdemeanor for oppressively sending the gleaners to jail.¹⁸³

The court decided in favor of the justice of the peace. They agreed that he had been obliged to proceed against the gleaners because a felony had been sworn against them. The prosecutor claimed that the justice

¹⁷⁸ “By the common law and custom of England the poor are allowed to enter and glean on another’s ground after harvest without being guilty of trespass.” HENRY BLACKSTONE, COMMENTARY ON THE LAWS OF ENGLAND 212 (1722).

¹⁷⁹ HAMMOND & HAMMOND, *supra* note 170, at 56.

¹⁸⁰ *Id.*

¹⁸¹ *Rex v. Price*, 98 Eng. Rep. 1, 4 Burrow 1925 (1766).

¹⁸² *Id.* at 1926.

¹⁸³ *Id.*

should have known that the gleaners could not have committed a felony. At most, he argued, their action should have been condemned as a trespass, although he also argued that it was neither trespass nor felony because the poor inhabitants of Childery had a right to glean at common law.¹⁸⁴ Rather than address the legal status of the customary right of gleaning in England, which the justices certainly could have done in view of the farmer's accusation, the court sidestepped that issue. According to Lord Mansfield there did not seem to be "any sort of contest between the farmer and the poor about [gleaning]: his only objection, and his forbidding, [was] confined to, the stealing it."¹⁸⁵

By sidestepping the primary charge in this case, the court in *Rex v. Price* revealed how divisive the issue of gleaning was in 18th century England. The farmer who swore a felony against the gleaners believed that they were no better than common thieves. This court, however, upheld the lawfulness of the custom of gleaning. Yet these justices were unwilling to go too far in defense of the practice. Justice Hewitt noted that whether grain recovery should be labeled gleaning or theft depended on the facts of the case. He was not eager to investigate those facts more closely than the case required.

Justice Aston even attempted to ignore the relevance of gleaning to the case. "The right of leasing [gleaning] is no part of the present question. . . . This is no question about the right of leasing or gleaning."¹⁸⁶ Justice Yates was more willing to acknowledge the importance of the issue in his opinion. "As to the right of leasing – it will be time enough to determine that point, when it comes directly in question."¹⁸⁷ *Rex v. Price*, the court determined, was not the context in which to define the right of gleaning. Justice Hewitt gave the only hint of what the law might indicate when the right time came. "The right of leasing [gleaning] does appear in our books: but it must be under proper circumstances and restrictions."¹⁸⁸

¹⁸⁴*Id.*

¹⁸⁵*Id.*

¹⁸⁶*Rex v. Price*, 98 Eng. Rep. 1, 4 Burrow 925 (1766).

¹⁸⁷*Id.*

¹⁸⁸*Id.*

In this setting the English Court of Common Pleas eventually came to a decision on the issue of gleaning in the 1788 case of *Steel v. Houghton*. This case established an important legal precedent that became a standard caselaw reference in a number of 19th century texts. By 1904 it was known as “the great case of gleaning.”¹⁸⁹

The court in *Steel*, unlike the court in *Rex v. Price*, did not shy away from questions about the legality of gleaning. This opinion left no doubt about their view. “No person has, at common law, a right to glean in the harvest field. Neither have the poor of a parish legally settled (as such) any such right.”¹⁹⁰ Lord Loughborough, writing for the court, dismissed the notion that anyone might legitimately claim a right to glean. Neither the *legally settled* poor, who might have a strip of land or some other minimal possessions from which to eke out a living, nor the indigent, who were without any source of income at all, were entitled to such a right.

Loughborough’s view of the relationship between the rights allowed and enforced by government and the obligations or duties imposed by religious belief reflected the view of many at the time. He dismissed the claim that gleaning was a right conferred by Biblical principle. “Although the law of Moses has been cited for a foundation for this claim, the political institutions of the Jews cannot be obligatory on us, since even under the Christian dispensation the relief of the poor is not a legal obligation, but a religious duty.”¹⁹¹

Support for the right to glean from an eminent English judge did not persuade Lord Loughborough any more than the argument from religion. Although Sir Matthew Hale had once written, “the law gives license to the poor to glean,”¹⁹² the *Steel* court dismissed that evidence in favor of gleaning as dictum hastily

¹⁸⁹Peter King, *Legal Change, Customary Right, and Social Conflict in Late Eighteenth-Century England: The Origins of the Great Gleaning Case of 1788*, 10 L. & HIST. REV. 1.

¹⁹⁰*Steel v. Houghton*, 1 H Blackstone 51 (1787).

¹⁹¹*Id.* at 52.

¹⁹²*Id.* at 54.

composed and taken out of the context in which it was written. The dissenting opinion written by Justice Gould, however, relied heavily on this statement. Gould also pointed to the support that Hale's comment subsequently received from Henry Blackstone, but his arguments were unable to sway the majority.

The most intriguing argument that Loughborough marshaled against the recognition of a right to glean was the argument that allowing the poor to glean would ultimately be to their disadvantage. "... This custom being established as a right. . . would be injurious to the poor themselves."¹⁹³ Loughborough referenced the social safety net that the Poor Law of Elizabeth was intended to provide. He saw gleaning within this system as a seasonal supplement to the food assistance provided by the local poor tax, arguing that the grain taken by gleaners would diminish the profits of farmers who would then be unable to contribute as much to the poor tax.

Although this was an important argument for the court in *Steel*, it formed a suspect rationale for the ruling. If gleaners were to benefit from the poor tax in the spring, according to this logic, they must be restrained from gleaning in the fields after the harvest. Otherwise they would go hungry in the spring when the receipts from the poor tax, diminished to the extent that income was lost from the harvest because of the gleaners, would be insufficient to provide for their needs. This argument implied that the court thought it more important for the poor to eat during the spring than during the harvest season.

Lord Loughborough further assumed that the grain taken from the fields by gleaners would, if left in the fields, increase the taxable profits of farmers and landowners. In most cases this assumption was plainly wrong. Gleaning generally had little impact on the profits of farmers and landowners. It took place after the reapers had already passed through the grain fields. If gleaners did not gather the remaining grain, it was usually plowed under or left as feed for the livestock. Most landowners had little use for leftover grain.

¹⁹³*Id.* at 53.

Nonetheless, this argument and the others that accompanied it in the majority opinion won out against the protest of a minority on the court. The best that Justice Gould could do in dissent was to present a familiar argument to explain the lack of statutory authority for a right to glean at common law. On this point he wrote, “I cannot but impute the reason of so few passages in the books of our law recognizing it, to the conviction of its being a right too well established and too notorious to be disputed.”¹⁹⁴ Gould thought of gleaning as a concept in the realm of the self-understood; it was a practice so widely accepted that no one had ever formalized it in written law. This may have been true earlier in the medieval period. By 1788, however, times had changed.

The clear precedent established by *Steel* spelled the beginning of the end for gleaning in rural England. The practice declined significantly during the century following this decision. Yet the impact of this ruling should not be overemphasized, as the distinction between formal law and actual practice in England during the 18th century was significant with respect to at least this particular issue.

The decision in *Steel* established a legal precedent that was not immediately recognized in many rural English parishes. For decades afterwards poor laborers continued to glean in defiance of the farmers who would not grant them permission to enter their fields. The laboring poor were unwilling to concede what they believed was a customary land use right on the basis of a controversial legal ruling. After all, the yields from gleaning were a significant source of income for many of them. An immediate end to gleaning could have been disastrous for poor landless families.

The parishes in East Anglia and Suffolk provide relevant examples of how the laboring poor received the *Steel* verdict. Eight years after the judgment a farmer in West Suffolk caused a riot, not when he tried

¹⁹⁴*Id.* at 54.

to prevent gleaning, but simply when he attempted to postpone the gleaning season.¹⁹⁵ Records from the petty sessions, the courts that dealt with the majority of the cases related to gleaning, indicate that gleaning disputes occurred regularly in the period between 1785 and 1808.¹⁹⁶ The records for 1788 show that most of the cases related to gleaning that year involved charges brought by farmers against gleaners. This was actually a change from the normal pattern in the Essex region.

In the years before and after *Steel* the plaintiffs in gleaning cases were usually the gleaners themselves, bringing charges of assault, or even theft, against the farmers.¹⁹⁷ When farmers did bring accusations against gleaners their cases were often settled immediately. Gleaners, however, managed to win a number of public victories against landowning farmers in the years following the *Steel* decision. Sometimes they were awarded the costs of litigation. Other times the farmers were threatened with punishment more severe than court costs or fines. One of the few cases that went from the petty sessions to the central courts was a criminal indictment that led to a trial for petty larceny when a gleaner accused a farmer of taking away her half-filled sacks of grain.¹⁹⁸

The disjunction between formal law and actual practice, applied to the established custom of gleaning, meant that the tradition continued for many decades after the *Steel* case. In fact, that ruling may not have had much to do with the eventual demise of the practice in England. It came at a time in history when the custom of gleaning had already begun to deteriorate for reasons relating more to social and economic developments than to specific legal changes of the sort introduced by *Steel* and similar decisions.¹⁹⁹ The real impact of the “great case of gleaning” may be the way in which it reified a subtle reorganization of the legal order while simultaneously abstracting relatively new formal distinctions in the law.

¹⁹⁵King, *supra* note 187, at 29.

¹⁹⁶Peter King, *Gleaners, Farmers and the Failure of Legal Sanctions in England 1750-1850*, 125 PAST & PRESENT 116, 121.

¹⁹⁷*Id.* at 123.

¹⁹⁸*Id.* at 124.

¹⁹⁹*Id.* at 118.

In the American colonies across the Atlantic, the developing legal order generally rejected the notion that gleaning was a common law right. The practice of gleaning was certainly never established by custom in the colonies. There is comparatively little information available about gleaning in America during the 18th and 19th centuries. Existing law generally reinforced the absolute property rights of landowners. If gleaning was practiced at all in the colonies, it was only done so to the extent that generous landowners allowed gleaners to have access to their fields. In general, however, gleaning was a minor issue in the American colonies. One of the few legal references to the practice in early America comes from North Carolina, where 19th century laws prohibited at least some types of gleaning. Several cases reference a law that criminalized as larceny the felonious taking and carrying away of a number of items “cultivated for food or market, growing, standing, or remaining ungathered in any field or ground.”²⁰⁰ Yet the records on gleaning in early America are paltry when compared to the wealth of information about the practice of gleaning in medieval England.

Information about gleaning in early America is not as readily available primarily because the colonists generally did not engage in the practice. The conditions that enabled gleaning to flourish for so long in England and the rest of Europe were mostly absent in the colonies. England suffered from too many workers and not enough land; the American colonies suffered from too much land and not enough workers. Colonists who wished to live off the land could do so. The Western frontier beckoned those who were unwilling or unable to live in the type of regimented society that characterized English life. Beyond that, the effect of slavery in the southern colonies had an inestimable impact on the early American economy.

As time passed and the move to urbanization and an industrial economy changed the American landscape, the relatively minor role of gleaning was further diminished. Given the many changes it is not too surprising that gleaning has lived on mostly as a literary term; a remnant of the agricultural past. Where the practice

²⁰⁰See *State v. Ballard*, 1 S.E. 685, 97 N.C. 443 (N.C. 1887); *State v. Bragg*, 86 N.C. 687, 1882 WL 2856 (N.C. 1882); *State v. Foy*, 82 N.C. 679, 1880 WL 3272 (N.C. 1880).

of gleaning continues in modern society, it usually does so in ways that are different from its ancient origins. One of the most prominent examples of gleaning in modern America is a program that is organized by the Oregon Food Bank.²⁰¹ Although this program captures much of the tradition and spirit of the practice of gleaning, over the years even the definition of the practice has changed. The Oregon Hunger Prevention Act of 1988 defines gleaning as collecting “unharvested crops from the field of farmers or [obtaining] agricultural products from farmers, processors or retailers, in order to distribute the products to needy individuals, including unemployed and low-income individuals. The term includes only those situations in which agricultural products and access to facilities are made without charge.”

This Oregon program and other modern gleaning efforts, including the majority of the food rescue programs in the EFAS network, maintain the spirit of gleaning by focusing on the recovery of unharvested or unused food in order to provide for needy individuals. A primary reason for the success of these programs is their ability to connect the desire to reduce waste with an opportunity to provide for the hungry and the poor. This moral bargain, producing two good outcomes for the price of one, has significant appeal. Food that would otherwise go to waste is channeled to those who would otherwise not have enough to eat. Yet while modern gleaning programs resurrect the concept of gleaning, they generally alter one of the important variables in the gleaning equation.

The people who benefited from the practice of gleaning traditionally carried out the actual work of gleaning. Ruth, for example, gleaned in the harvest fields to gather grain for her mother-in-law and herself. The worker was the beneficiary. Modern gleaning and food rescue programs split those two roles apart, often substituting volunteers and charitable institutions as workers for the people who actually need food assistance.

More than most programs, the model for gleaning in Oregon does involve the beneficiaries themselves in food recovery work. Yet the extent to which this program differs from the norm is an exception that proves the

²⁰¹OREGON FOOD BANK, SIGNIFICANT EVENTS IN OREGON’S RICH GLEANING HISTORY, *at* http://www.oregonfoodbank.org/ofb_services/food_programs/gleaning/significant_events.html (last visited Apr. 15, 2004).

rule: as the Oregon Food Bank recognizes, “This organizational model for gleaning is unique to the West. . . . Nowhere else in recent history have so many low-income people worked together so consistently for so long.”²⁰² The distinction between worker and beneficiary seems prevalent in most government-sponsored social service programs as well. Rather than enabling people to help themselves, many public assistance programs have become means of simply helping people with their immediate problems. Political connotations are unfortunately difficult to avoid in discussions about the proper approach to assistance for the poor and the hungry. Yet to the extent that an ancient practice can inform those discussions on its own merits, gleaning is noteworthy in part because it was a practice that encouraged generosity on the part of those who had something to offer to those in need while also requiring active pursuit of those goods on the part of those who needed them.

In considering how to improve the efficacy of the current system of public and private food assistance organizations, the traditional practice of gleaning suggests that one possibility is to involve the poor and the hungry in creating programs that enable them to solve the problems they face. This principle of uniting the worker and the beneficiary might be implemented in any number of different ways. Perhaps some public organizations would focus more intentionally on counseling or providing resources to individuals in need. Both public and private organizations could create new ways for the poor and the hungry to glean by translating the practice from the agricultural context to the information age. This gleaning would not take place in the harvest fields, but in the revenue-producing sectors of the modern economy, where the practice might provide a more sustainable and effective approach to the problems that create hunger. Finding new ways to re-create the potential of gleaning in modern society may present a way forward for the network of public and private organizations that are fighting hunger in America.

²⁰²OREGON FOOD BANK, GOVERNOR DECLARES 30TH ANNIVERSARY OF GLEANING, *at* http://www.oregonfoodbank.org/ofb_services/food_programs/gleaning (last visited Apr. 15, 2004).