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# A STURDY ROGUE

BRUCE K. MILLER\*

## INTRODUCTION

In the reign of Elizabeth I<sup>1</sup> David Oakley would have been classified by the law as “a sturdy rogue,” or perhaps, “an idle vagabond,”<sup>2</sup> and these labels would have fixed Oakley to his social station as assuredly as the “welfare queen”<sup>3</sup> label defines the place of poor, unmarried, unemployed mothers today. Rogues and vagabonds in sixteenth century England were hardly neutral social types. The words themselves, connoting an insouciant, almost smirking, violation of good social order, conveyed an attitude of defiance of work norms that if allowed to spread unchecked might spawn rebellion among the male members of the laboring classes.

The Crown and Parliament’s fear of the deviant behavior of rogues and vagabonds prompted them to adopt the earliest measures in our legal history to classify and stigmatize by statute such behavior.<sup>4</sup> These measures, not at all coincidentally, included the precursors of the parental support statute that brought Oakley to the attention of the Wisconsin Supreme Court.<sup>5</sup> Additionally, that

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\* Bruce K. Miller, Professor of Law, Western New England College School of Law. I would like to thank the Editorial Boards of the *Western New England Law Review* for 2002-03 and 2003-04, and especially Articles Editors Jim Strub and Mike Fellows, for suggesting a symposium on the *Oakley* decision and for tenaciously seeing it through to completion. Thanks also to participants in faculty fora at Drake and Western New England College law schools for helpful comments on this essay, to my colleague Eric Miller for interesting conversations about law’s paternalism, and to Meghan Freed Pelletier, Managing Editor, and her able staff, for expert and understanding editorial assistance.

1. Queen Elizabeth (Tudor) I of England (r. 1558-1603).

2. See JACOBUS TENBROEK, *FAMILY LAW AND THE POOR* 24 (Joel F. Handler, ed., Greenwood Publishing Co. 1964).

3. President Reagan often told the story of the fictitious “Cadillac welfare queen” who used numerous aliases, addresses and Social Security cards to milk the system for over \$150,000. See *The Mendacity Index*, WASH. MONTHLY (Sept. 2003), available at <http://www.washingtonmonthly.com/features/2003/0309.mendacity-index.html> (last visited July 1, 2004).

4. See Elizabethan Poor Laws, 43 Eliz. 1, c. 2 (1601) (Eng.).

5. See *State v. Oakley*, 629 N.W.2d 200, 202 (Wis. 2001). The statute Oakley violated was WIS. STAT. § 948.22(2) (1997-98), which makes it a felony to fail to pay child support for 120 or more consecutive days. *Id.*

court's decision to sanction Oakley's violation of his support obligations by impeding his right to father additional children<sup>6</sup> also has its roots in the Elizabethans' vain efforts to eradicate the sturdy rogue from English society.

### I. PARENTAL SUPPORT OBLIGATIONS AND ELIZABETHAN POOR RELIEF: ORIGINS OF A DUAL SYSTEM

In a series of articles originally prepared for the Stanford Law Review almost forty years ago, the noted equal protection scholar Jacobus tenBroek described the regulation of vagrancy and vagabondage under the relief laws of the Tudor monarchs, regulation which anticipates contemporary federal and state statutes that monitor the behavior of the poor as a condition for their receipt of public aid:

Idleness was thought to be the result of personal choice rather than economic conditions. Based on personal fault it was personally correctable if only the will were instilled. Accordingly the Tudors, like their predecessors, unleashed the furies of the criminal law against combined idleness and poverty. 'Ruffelers, sturdy vagabonds, and valiant beggars' were to be seized, tied naked to the end of a cart and whipped through the nearest market town until bloody, and then returned to the places where they were born or last dwelt, each there to 'put hymselfe to laboure lyke as a trewe man oweth to do.' That no work was to be found in that place did not matter. If 'loitering, wandering and idleness or vagabondage' continued, the punishment was repeated, successively augmented by having the upper gristle of the right ear 'clean cut away' and eventually by death. Other penalties added from time to time were slavery for two years and then for life, assignment to the galleys, and banishment from the realm.<sup>7</sup>

Professor tenBroek reports that these violent penalties failed.<sup>8</sup> The Tudor Monarchy and the Parliament realized, not surprisingly, that it was far easier to eliminate the legal identity of an undesirable class of persons by statute than to change the behavior of the human beings who constituted the offending category. Upon this realization they tried a different approach, the forerunner of the workhouse and, eventually, the poorhouse and poor farm of the

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6. *Id.* at 201-02.

7. TENBROEK, *supra* note 2, at 23-24.

8. *Id.* at 24.

American nineteenth and early twentieth centuries. Again, Professor tenBroek:

The alternative eventually adopted was the institution whose name characterized its function, the house of correction. There the 'sturdy rogue' could be starved, worked, punished and thereby reformed . . . [Lord] Coke thought the proper working of the poor law depended on the houses of correction. When justices of the peace diligently performed their duty in this respect 'there was not a Rogue to be seen in any part of England, but when Justices . . . became . . . *trepidi*, Rogues . . . swarmed againe.'<sup>9</sup>

The laws of the Tudors were thus absolute in their condemnation of idleness among the able-bodied as a character flaw and vehement in their zeal to correct it. And yet, the link between mere sloth and the "thefts, murders, haynous offences and great enormities"<sup>10</sup> thought to follow from it may now seem overdrawn, or even fanciful. How could the specter of "sturdy rogues" swarming the English countryside trigger the fear and hatred conveyed by Lord Coke's admonition to the judges?

The answer lay in no small part in a progressive reform effected by the Tudor monarchs and known to us as the Elizabethan Poor Laws. These laws, enacted piecemeal by Parliament through the sixteenth century, were consolidated by Statute of 43 Elizabeth, enacted in 1601.<sup>11</sup> The 1601 statute provided directly and, as it has turned out in England and America, permanently, for the relief of the poor from the public treasury.<sup>12</sup> Relief was provided not only to "impotent" poor people, those not viewed as employable, but also, significantly, to able-bodied adults who were unemployed.<sup>13</sup> Professor tenBroek credits the Statute of 1601 with having accomplished "the firm establishment of the principle of public responsibility to maintain the destitute."<sup>14</sup> This he counts as a "great achievement,"<sup>15</sup> and so it was. However, with the principle of public responsibility to *maintain* the poor came its corollary, public responsibility to improve their character. This equally essential responsibility could only be discharged by making certain, by any

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9. *Id.*

10. *Id.* (quoting 22 Hen. 8, c. 12 (1530) (Eng.)).

11. Elizabethan Poor Laws, 43 Eliz. 1, c. 2 (1601) (Eng.).

12. *Id.*

13. *Id.*

14. TENBROEK, *supra* note 2, at 9.

15. *Id.*

and all necessary means, that the able-bodied poor lived their lives properly.

The Poor Laws sought to supervise the lives of the able-bodied but destitute in two basic ways, both shaped by the sobering image of the sturdy rogue. The first control measure was the work requirement, a condition on the receipt of public aid which remains a central feature of welfare law and policy to this day. TenBroek reports that, from the beginning, the Tudor relief statutes directed local officials to insist that those with “lymmes stronge ynough to labour be kept in contynual labour,”<sup>16</sup> either for private masters or in sheltered, publicly operated projects. An able-bodied person who refused such work was sent to the house of correction, “there to be straightlye kept, as well in Diet as in Worke, and also punished from tyme to tyme.”<sup>17</sup> In this way, the state could sustain the destitute, and at the same time deter requests for aid, thereby minimizing expenditures, and reform the character of “the miscreant idler”<sup>18</sup> with the temerity to seek it.

The second control measure was a consequence of the Poor Laws’ assumption of direct responsibility for the care of poor children. In the case of children too young to be indentured or apprenticed, forced labor offered neither the possibility of character reform nor the opportunity to reduce the costs of support which were seen then, as now, as a threat to fiscal probity. The solution fashioned by Parliament and the Crown was to establish a distinct system of family law for the poor, the central feature of which was the imposition of legal liability of parents for the support of their children. Hence, the Poor Law of 43 Elizabeth, which provided, *inter alia*, that:

the parents . . . of everie poore . . . person not able to worke, beinge of a sufficient abilitie, shall at their owne Chardges relieve and maintain everie suche poore person, in that manner and accordinge to that rate, as by the Justices of the Peace of that Countie where suche sufficient persons dwell . . . shalbe assessed; upon paine that everie one of them shall forfeite twenty shillings for everie monthe which they shall faile therein.<sup>19</sup>

This statute marks the origin, in English law, of a sanctionable parental obligation to provide for the material sustenance of chil-

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16. *Id.* at 23 (quoting 27 Hen. 8, c. 25 (1535) (Eng.)).

17. *Id.* (quoting 18 Eliz. 1, c. 3, § IV (1575-1576) (Eng.)).

18. *Id.* at 25.

19. 43 Eliz. 1, c. 2, § VI (1601) (Eng.).

dren.<sup>20</sup> Though such an obligation is now both commonplace in common law jurisdictions, and extended, at least formally, to parents of all children, not just poor ones, it was nevertheless a radical departure from the settled law of families in 1601. Family obligations in Elizabethan common law remained feudal, which meant that they were rooted in property, rather than personal, relationships. Thus, as Professor tenBroek describes, “feudal law did not recognize the family as such or assign rights and duties to its members by virtue of membership. Property rights were the only privileges which the king’s courts would enforce between father and son and between husband and wife.”<sup>21</sup> Though tenBroek does not remark upon their absence, mothers and daughters were accorded no legal recognition whatsoever in feudal property law.

Save for the rights of eldest sons as heirs to receive their inheritances, feudal property relations recognized no legally enforceable claims children could make against their parents.<sup>22</sup> Instead, fathers held legal claims to the service in labor of their children without any countervailing obligation to pay wages or to otherwise provide for their material support.<sup>23</sup> Children could remain in their father’s household only at the “complete sufferance of the father,” who could turn any child out as he saw fit.<sup>24</sup> Against this background, the imposition of support obligations on the parents of poor children was remarkable, and justifiable only because it was these poor children, and only these, who would otherwise make claims against the public coffers.<sup>25</sup>

These same fiscal concerns animated the first significant amendment to the 1601 law of parental responsibility for poor children. The amendment directly linked this responsibility to the work requirement on which the parents’ own eligibility for aid depended. A 1609 statute described the problem it proposed to solve as follows:

Many willful people, fynding that they having Children, have some hope to have Reliefe from the Parish wherein they dwell, and being able to Labor, and therebie to releive themselves and their Famylyes, doe nevertheless rune awaie out of their Parishes

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20. TENBROOK, *supra* note 2, at 30.

21. *Id.* at 34.

22. *Id.* at 35.

23. *Id.*

24. *Id.*

25. *Id.* at 37.

and leave their Famylyes upon the Parish.<sup>26</sup>

The statute's solution to this problem, not surprisingly, was to inflict upon these willful people the "paines endured by" that arch-enemy of good social order, "the sturdy rogue": commitment to the house of correction for reform through forced labor, punishment, and, if necessary, starvation.<sup>27</sup> Once again, destitute children could be sustained, but only if their parents were not deterred by the terms of rehabilitation made a condition for such sustenance.

Placing the origin of parental support obligations in the law of welfare rather than that of families has more than historical significance. The Elizabethans' stark divide between the duties of poor parents and those whose material circumstances assured their independence from the system of public aid continues to govern the administration, if not the formal design, of support obligations today. TenBroek's articles go on to contrast the facial expansion in American jurisdictions of the legal duty to support children to all parents with the continuing practice of enforcing that duty only against parents who endure the misfortune of seeking public assistance for themselves or for their children.<sup>28</sup> Focusing primarily on his home state of California, tenBroek labels the consequence of this contrast a "dual system" of family law analogous to the racially dual system of public education enforced *de jure* by the Jim Crow regimes of the South and *de facto* by slightly less formal policies and practices in the rest of the country.<sup>29</sup>

The examples of this *de facto* dual system marshaled by tenBroek are legion, too many and varied to be listed in this brief essay. But one measure may serve to symbolize the basic approach. Beginning in 1952, and extending uninterrupted through the present time, federal welfare law has required public assistance offices operated by city and county governments to inform the chief law enforcement official for their respective jurisdictions that public aid has been granted to a child who has been deserted or abandoned by a parent.<sup>30</sup> With the attention of district attorneys thus focused exclusively on absconding parents of poor children, it is no surprise that the limited prosecutorial resources available for enforcement of nominally universal child support obligations are allocated ac-

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26. 7 Jac. 1, c. 4, § VIII (1609-1610) (Eng.).

27. *Id.*

28. TENBROEK, *supra* note 2, at chs. 3-4.

29. *Id.* at c. 4-5.

30. See Notice to Law Enforcement Officials (NOLEO amendments), 42 U.S.C. § 602(a)(10) (as amended) (2004).

cordingly. The Federal Welfare Reform Act of 1996<sup>31</sup> requires local prosecutors to pursue non-supporting parents of children who seek public assistance and directs the cooperation in such pursuit from jurisdictions into which non-supporting parents might wander or flee. This requirement virtually assures that public child support enforcement efforts will focus exclusively on poor parents. The legislative history of the 1996 Act makes the link between parental support obligations and welfare explicit:

“[o]ne of the most important provisions in this bill is the emphasis on the collection of child support . . . . By taking a tougher stand to establish and then enforce child support orders, some of the families currently tied to the welfare system may be able to get loose.”<sup>32</sup> Since most of these non-supporting absent parents are fathers, it is fair to say the goal of corralling the sturdy rogue remains a pillar of public welfare policy even in the twenty-first century.

## II. DAVID OAKLEY AS A MODERN-DAY STURDY ROGUE

Though this history may not fully explain David Oakley's emergence onto the legal stage in the Wisconsin of the late 1990s, it does offer a context both for understanding his fate and assessing the rhetoric with which that fate is meted out by the narrow majority of the Wisconsin Supreme Court.<sup>33</sup> David Oakley is, of course, the archetype of the sturdy rogue and idle vagabond. By age thirty-four, he fathered nine children by four different women.<sup>34</sup> Though to all appearances he is good physical health, by the time of his prosecution for refusing to support his children, his connection to the respectable world of wage employment is so attenuated that not one of the legal actors who determined his treatment believes that he will ever be able to support these children, regardless of his willingness to try.<sup>35</sup> Still, there is no doubt that Oakley, to borrow the terms of English statutory law of 1609, is “able to labor,” and has “run awaie” from his obligation to “releive [himself and his] family,” a shirking of duty deemed unquestionably “willful.” Though

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31. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified in scattered sections of 42 U.S.C.).

32. 142 CONG. REC. S9387 (1996) (statement of Sen. Cohen).

33. See *State v. Oakley*, 629 N.W.2d 200 (Wis. 2001) (4-3 decision).

34. *Id.* at 202.

35. *Id.* at 207 n.21, 212-13 n.30, 216 (Bradley, J. dissenting), 217-18 n.1 (Bradley, J., dissenting) & 221-22 (Sykes, J., dissenting).



the case record does not reveal whether Oakley left his children “upon the parish” as welfare recipients, the social problem his misconduct symbolizes for the Wisconsin Supreme Court majority is emphatically the same one that motivated the Elizabethans: the economic dependency of poor children.

Justice Wilcox’s opinion for the court makes clear that *poor* children are society’s chief, if not exclusive, concern in imposing and enforcing parental support obligations:

The effects of the nonpayment of child support on our children are particularly troubling. In addition to engendering long-term consequences such as poor health, behavioral problems, delinquency and low educational attainment, inadequate child support is a direct contributor to childhood poverty. And childhood poverty is all too pervasive in our society. Over 12 million or about one out of every six children in our country lives in poverty. In Wisconsin, poverty strikes approximately 200,000 of our children with 437,000 at or below 200% of the poverty level in 1999. Although payment of child support alone may not end childhood poverty, it could reduce current levels and raise childhood standards of living. Child support—when paid—on average amounts to over one-quarter of a poor child’s family income. There is little doubt that the payment of child support benefits poverty-stricken children the most. Enforcing child support orders thus has surfaced as a major policy directive in our society.<sup>36</sup>

Justice Bablitch’s concurring opinion is equally emphatic that Oakley’s shortcomings, like those of the rogues of old, are failings of character, not of circumstance: “Here is a man who has shown himself time and again to be totally and completely irresponsible. He lives only for himself and the moment, with no regard for the consequences of his actions and taking no responsibility for them.”<sup>37</sup>

Plainly Oakley’s deficient character is in need of reform, or as we euphemistically put it today, rehabilitation. And, indeed, Justice Wilcox points to the salutary rehabilitative impact on Oakley of sanctioning his refusal to support his children in part by forbidding him from fathering additional ones:

Moreover, the condition is reasonably related to the goal of rehabilitation . . . Oakley was convicted of intentionally refusing to support his children. . . . As the state argues, the condition essen-

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36. *Id.* at 204 (citations omitted).

37. *Id.* at 214-15 (Bablitch, J., concurring).

tially bans Oakley from violating the law again. Future violations of the law would be detrimental to Oakley's rehabilitation, which necessitates preventing him from continuing to disregard its dictates.<sup>38</sup>

As was the case four hundred years ago, the punishment of sturdy rogues is, we still now tell ourselves, for their own good. What has changed is the form the punishment takes. Thus, we no longer starve non-supporting parents in houses of correction, though we are still prepared, as the *Oakley* case shows, to keep them there for a while.<sup>39</sup> Nor are we tempted to abuse these miscreants physically or to threaten "banishment from the realm." Rather, we deprive them of basic freedoms enjoyed by the rest of us and subject them, as Justice Bablitch's concurrence illustrates, to the public humiliation of character assassination by judicial opinion.<sup>40</sup>

### III. PARENTAL SUPPORT OBLIGATIONS AND THE IRON LAW OF WELFARE

What has not changed, however, is the real audience for the abasement of parents who shirk their duty to keep their children from becoming charges of the state. TenBroek reminds us of the enduring and intimate relationship in western societies between social welfare policy and the more general regulation of the terms and conditions under which employment is offered to poor wage earners:

Any welfare system primarily operates upon and is for the benefit of the working classes of the nation, and must be regarded, in modern times, no less than in the middle ages, as an indispensable part of the overall system of labor legislation. Whatever might be said in welfare terms of the necessity to deal with the particular needs of individuals and families, the unemployed segment of the population stands in an economic and social relationship to the employed segment. How the state regulates that relationship, through what machinery and for what ends . . . [is an] intricate problem of politics and economics no less than of welfare.<sup>41</sup>

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38. *Id.* at 213.

39. *Id.* at 208. For Oakley the consequence of a probation violation is imprisonment for eight years. *Id.*

40. *See supra* note 37 and accompanying text.

41. TENBROEK, *supra* note 2, at 16.

Although this relationship is rarely mentioned in official explanations of welfare policy, its centrality has always been obvious. In the United States, public regulation of this relationship generally has been reducible to a single basic proposition: the terms on which public assistance is provided to able-bodied adults or to their children must always be less attractive or more onerous than the least generous terms on which wage employment is offered to these same able-bodied adults. Frances Fox Piven and Richard Cloward, in their ground-breaking study of the functions of public welfare, *Regulating the Poor*, have demonstrated the capacity of this principle, often called the “iron law of welfare,” to explain the evolution of public welfare policy and law in England and America.<sup>42</sup> They describe the “iron law’s” operation as follows:

Employers have always understood that by shielding working people from some of the hazards of the market, relief reduces the power of employers over workers . . . . [F]or just this reason, the very *idea* of social provision is defined as dangerously subversive of market ideology . . . . [E]mployers press to . . . attach such punitive conditions for the receipt of aid that few people willingly apply for it. Such measures are intended to compel workers generally to sell labor on whatever the market offers.<sup>43</sup>

Thus, they continue, relief is arranged

in order to treat recipients in a manner that is so degrading as to instill in the laboring masses a fear of the fate that awaits them should they relax into beggary and pauperism. To demean and punish those who do not work is to exalt by contrast even the meanest labor at the meanest wages . . . . Degradation [takes the form of] [m]onitoring and excoriating the behavior of the poor. . . . Dramatic allegations that recipients are slothful, shiftless, promiscuous, criminal, and indifferent to the rules others value constitute rituals of public degradation. Conditioning benefits on approved conduct is the traditional remedy.<sup>44</sup>

Piven and Cloward emphasize that since the rise and rapid fall of the welfare rights movement of the 1960s, the focus of this “dramaturgy” of poor relief has been on welfare mothers.

The degraded welfare mother was thus made to serve as a warning to all Americans who were working more and earning less,

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42. FRANCES FOX PIVEN & RICHARD A. CLOWARD, *REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE* (1993).

43. *Id.* at 345.

44. *Id.* at 395-96.

if they were working at all. There is a fate worse, and a status lower, than hard and unrewarding work.<sup>45</sup>

David Oakley's encounter with Wisconsin's enforcement of his legal obligation to support his children offers ample evidence that a similar ritualized degradation is at work to make an example of impoverished fathers who stray from their expected role. Justice Wilcox's emphasis on the adverse public fiscal impact of such parental shirking has already been noted.<sup>46</sup> The concurring opinion of Justice Crooks underscores the law's obligation to "do what it can to minimize the effects of *poverty* on children,"<sup>47</sup> even if extraordinary measures, including the suspension of their parents' constitutional rights, are required.

More revealing, though, is the Justices' unanimous acknowledgment that, regardless of his willingness to work, Oakley will never be able to support his children.<sup>48</sup> In fact, he is not really ever expected to be able to support his children. The circuit judge who initially ordered Oakley not father any more children pointed first to Oakley's own admission that unless he wins the lottery, he will never be able to establish the financial ability to meet his obligations. The circuit judge then added the admission that

[y]ou know and I know you're probably never going to make 75 or 100 thousand dollar [sic] a year. You're going to struggle to make 25 or 30. And by the time you take care of your taxes and your social security, there isn't a whole lot to go around, and then you've got to ship it out to various children.<sup>49</sup>

Justice Bradley's dissent seizes on this candid observation to buttress her conclusion that the condition imposed on Oakley by the majority is impossible to satisfy and therefore amounts to an unconstitutional assertion of unlimited control over his right to procreate.<sup>50</sup> The majority doesn't disagree, save obviously for the judgment of unconstitutionality, noting that its sanction is designed less to ensure the future support of Oakley's children than to punish his obviously insubordinate *intentions*:

Oakley . . . admits . . . that he 'cannot and probably will never have the ability to properly support [his] children'. With this

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45. *Id.* at 396. See also *supra* note 3 and accompanying text.

46. *Supra* note 36 and accompanying text.

47. *State v. Oakley*, 629 N.W.2d 200, 215-16 (Wis. 2001) (emphasis added).

48. *Supra* note 35 and accompanying text.

49. *Oakley*, 629 N.W.2d at 217-18.

50. *Id.* at 216-18 (Bradley, J., dissenting).

statement, Oakley attempt to confuse the financial ability to support his children fully with the intention of making any effort to do so. That is, Oakley violated [his support obligations] because he *intentionally* refused to pay any child support, not because he lacked the financial wherewithal to pay any child support.<sup>51</sup>

That Oakley's past employment has translated into his meeting seventy percent of his support obligations until the single 120 day period for which he was charged and convicted is unavailing: "This case is not at all about a person's inability to pay child support; it is about the intentional refusal to pay support."<sup>52</sup>

Still, given their acknowledgment that even if employed Oakley's "financial wherewithal" has been, is, and will be lacking, the majority must labor to explain how the record presented to them shows that his intentions alone merit withdrawal of his right to father additional children. This is their explanation, offered by Justice Wilcox: "Oakley had promised in the past to support his children, but those promises had *failed* to translate into the needed support. Moreover, . . . Oakley had been employed and had no impediment preventing him from working."<sup>53</sup> That's it. After the rhetoric is done, Oakley's real offense is quite simple. He has failed to support his children, which places them at risk of becoming public charges. Further, he is able to work but, we are to assume between the lines, has repudiated his obligation to do so.

The *Oakley* majority's evident lack of concern for the efficacy of their sanction in bringing about increased child support by Oakley and their emphasis instead on what they take to be Oakley's willful disregard of his obligations directly reflect two key tenets of the Elizabethan construction and condemnation of the "sturdy rogue" as a deviant social type. First, when a father's impoverishment is reflected in his failure to support his children, his actual financial circumstances, no matter how dire, are irrelevant. What matters is the father's willingness, or lack thereof, to work for any wage made available and to devote the wage he earns to child support, however inadequate. Child poverty is deemed to be a function of individual pathology, not social inadequacy. Second, the intended audience for the sanction visited on the sturdy rogue for his deviance is not the rogue himself, even if the sanction is framed in terms of reforming his character or rehabilitating him.

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51. *Id.* at 212 n.30 (emphasis added).

52. *Id.* at 214 (Bablitch, J., concurring).

53. *Id.* at 206 (emphasis added).

The rogue has already fallen so far that he is beyond redemption. Instead, the audience to his fate is the class of low wage-working men from which he has fallen by renouncing the role he is expected to fill.

In turn, these men are to take the lessons of Piven and Cloward's "iron law of welfare" from the rogue's fall.<sup>54</sup> First, regardless of the meagerness of their wage or the onerousness of the terms on which it is provided, they at least enjoy the psychic compensation owed those who stick to their station. They will not be described by a judge purporting to speak for us all as men "who ha[ve] shown [themselves] time and again to be totally and completely irresponsible . . . [to live] only for [themselves] and the moment, with no regard to the consequences of [their] actions and taking no responsibility for them."<sup>55</sup> If this security of social position has no cash value, its contribution to self-respect may be, to quote the ubiquitous credit card commercial, priceless. Second, should these men be tempted to quit, drop out, hit the road, make a play for freedom, however ephemeral—in short, become an idle vagabond, there is a price and it is not small. Just look at David Oakley. To be sure, the state may have helped their mothers raise his children, perhaps better than he could have, at least in the material sense. But, in return, he was criminally prosecuted and labeled by everyone, including even his judicial defenders, as a deadbeat, deprived, probably permanently, of the fundamental constitutional right of parenthood and stripped of the social respect due first class citizens and full members of the community. There is always, please recall, a fate worse than hard and unrewarding work.

#### IV. SOME CONSEQUENCES OF OUR ELIZABETHAN HERITAGE

If the *Oakley* case shows the durability and power of our Elizabethan heritage in shaping a special law of poor families, the very venerability of this heritage suggests that it must play an important social role. Thus, to the extent that the prosecution of poor parents, mainly fathers, makes additional funds available to other poor parents, mainly mothers, for the raising of their children, that result must be counted a positive good. If the image of the sturdy rogue cannot easily be depicted as filling a social role worth emulating, that too is probably a good thing, even if the contrary imagery of much popular music reveals the enduring attraction of the freedom

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54. See *supra* notes 43-45 and accompanying text.

55. *Oakley*, 629 N.W.2d at 215 (Bablitch, J., concurring).

embodied by the idle vagabond as romantic outlaw.<sup>56</sup> Nevertheless, there is a deeply reactionary side to our persistent Elizabethan ideology. When the poverty of children is seen as the fault of their parents, our attention is diverted from seeing the well-being of children as a social, rather than exclusively familial, responsibility. This may at least partly explain why the idea of a universal, non means-tested family or children's allowance, ironically now a staple of British social policy, remains unthinkable in the United States. If, as many liberals profess, we actually believe that full-time work ought to provide a living wage, we must recognize that punishing those who refuse to work for less than such a wage seriously undermines the organizing power of the working poor. An alternative such as a negative income tax, by assuring a stigma-free minimum level of sustenance as an alternative to low wage work, would by itself require employers to abandon their most exploitative compensation policies. The "iron law of welfare" may be universal but it need not be universally oppressive.

To be sure, children's allowances and guaranteed incomes are expensive and, in these cynical times of purposeful massive deficits and global races to the bottom, they are far from politically realistic reforms. But our widely shared Elizabethan attitudes toward poor families, including, most especially, our image of the sturdy rogue as the male equivalent of President Reagan's infamous "welfare queen,"<sup>57</sup> place the time when we might consider such reforms so far away as to be only barely visible. Meanwhile, as Professor ten-Broek observed nearly forty years ago, in marking the statutory demise in California of the punishment of vagrants for their mere vagrancy,

[e]xit, thus, as a straightforward, unalloyed uncomplicated criminal character the sturdy rogue, the idle vagabond, the true vagrant. Through the ages he had known the heavy hand of parliament and kings, the covetous grasp of feudal lords and agricultural employers, the outrage of the righteous and ambitious, the undisguised hatred of overseers of the poor and the taxpayer, the moral opprobrium of the United States Supreme Court and the puritan, the oppression of discriminatory treatment in statute and constitution, the fear of the owner of property and the accumulator of worldly goods, the steady, sometimes brutal pressure of the forces of stability, tranquility, and social order. Whether

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56. See, e.g., ED CRAY, *RAMBLIN' MAN: THE LIFE AND TIMES OF WOODY GUTHRIE* (2004).

57. See *supra* note 3 and accompanying text.

haughty, servile, or indifferent, he has been the victim of every sort of epithet, reviled by judges as a social parasite, and by Harvard historians as “no more than a festering part” of society. He leaves more quietly than he lived, shuffled offstage as in a mere recasting of small sections of a minor statute unnoticed by press and public—his wandering offstage as pointless, idle and without purpose, in the broader social sense, as his services on it. He still remains in the vicinage, however, to play bit parts, and lurk, prowl, and roam about in other statutory crimes.<sup>58</sup>

May David Oakley and the other sturdy rogues among us live to transcend this sour fate.

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58. TENBROEK, *supra* note 2, at 204-05.