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Afterword

HOW CAN WE SAVE THE SAFETY NET?

*Frank Munger**

I. INTRODUCTION

In today's affluent society, Americans are being encouraged to be still more skeptical of claims of poverty, even while many experience firsthand the inability of the labor market to provide economic security or stability. Tragically, welfare programs that should protect citizens from the ravages of the market increasingly link economic security and relief from poverty exclusively to successful employment. Aggressive, pro-market reforms mean that the new safety net protecting the vast majority of economically insecure and poor Americans from the ravages of the labor market will be the labor market itself. But the adequacy of such a market-friendly safety net depends on universal access to employment that provides a living wage, economic security, and benefits, including security from unemployment. For an increasing number of citizens, the labor market fails to do this.

Welfare recipients are the poorest of the working poor. Contrary to triumphant interpretations of the sharp decline in the number of welfare recipients since federal welfare reform in 1996, forcing welfare recipients into the labor market has failed to result in sustained employment, let alone reduced poverty.¹

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¹ See ANNETTE BERNHARDT ET AL., *DIVERGENT PATHS: ECONOMIC MOBILITY*

Prescribing employment as the solution to poverty has failed. Even conservatives are concerned about the dismal failure of reform to address the needs of those who have become destitute after being denied welfare and forced into the labor market, namely the significant number of women whose poverty deepens when they leave welfare.² The fate of other “leavers” is not well documented – really we have just guesses about their long-term well-being.³ Even the best case scenario, even with all the Earned Income Tax Credit and other benefits we have to offer (when the barriers to getting them have been overcome), new welfare-to-workers have only increased the vast numbers of working poor who subsist on incomes at about the poverty line.⁴ These new workfare poor, who are, as one scholar has said, “working without a job,” are like the many millions of Americans who have always earned less than fifty percent of the median income and who are economically insecure without an adequate safety net.⁵

Moreover, the rollback of the affirmative welfare state in America has also jeopardized many middle-class Americans. The least secure of these workers – middle class according to their income when they are employed – lack access to secure jobs with benefits. Women in particular bear the burdens of

IN THE NEW AMERICAN LABOR MARKET 150 (2001). See also text accompanying *infra* note 46.

² See Ron Haskins, *Effects of Welfare Reform on Family Income and Poverty*, in THE NEW WORLD OF WELFARE 103, 128 (Rebecca M. Blank & Ron Haskins eds., 2001).

³ See, e.g., Haskins, *supra* note 2, at 109-12; SANFORD F. SCHRAM, PRAXIS FOR THE POOR: PIVEN AND CLOWARD AND THE FUTURE OF SOCIAL SCIENCE IN SOCIAL WELFARE 194-99 (2002).

⁴ In 2000, 6.4 million full-time workers (those working 27 weeks or more) earned incomes below the poverty level. See U.S. Department of Labor: Bureau of Labor Statistics, *A Profile of the Working Poor*, available at <http://www.bls.gov/cps/cpswp2000.htm> (last modified Aug. 14, 2002). For welfare leavers, the most optimistic estimate of the average income of those who are employed – and many are not – is \$17,000, just above the poverty line for a family of three, and they are still likely to experience substantial spells of poverty without employment. Pamela J. Loprest, *Making the Transition from Welfare to Work: Successes but Continuing Concerns*, in WELFARE REFORM: THE NEXT ACT 17, 20 (Alan Weil & Kenneth Finegold eds., 2002). Other estimates of their income have been far lower. See SCHRAM, *supra* note 3, at 198-99.

⁵ For a description of trends in low-wage work, see LAWRENCE MISHEL ET AL., ECONOMIC POLICY INSTITUTE, THE STATE OF WORKING AMERICA, 2000-2001, at 322-27. See also Gary Burtless & Timothy M. Smeeding, *The Level, Trend and Composition of Poverty*, in UNDERSTANDING POVERTY 27 (Sheldon H. Danziger & Robert H. Haveman eds., 2001).

economic insecurity, especially women who are single parents,⁶ but there are many other vulnerable groups. Put simply, the circumstances of the poorest unemployed and welfare dependent are not so different from those of the working poor and vulnerable segments of the working- and middle-classes who are already working in poverty or who may be a paycheck away from poverty.⁷

In response, some recent prescriptions for strengthening the safety net call for massive restoration of more generous federal programs, such as welfare and unemployment benefits, or the creation of new universal benefits guaranteeing a child allowance or a minimum income.⁸ Unfortunately, the call to turn back the clock to the New Deal or to create a more egalitarian welfare state appears to many to be unrealistic in an era politically dominated by an ideology of deregulation, devolution, privatization of government, and individual responsibility for economic risk.⁹ This is especially true now that the federal government faces the prospect of massive deficits for the foreseeable future.¹⁰

What can be done? Some progressive scholars have turned from advocating revitalization of New Deal programs to a different approach: creating an enhanced welfare state at the local level by using the present ideological climate to the advantage of grassroots organizing.¹¹ Privatization, decentralized regulation, and devolution of governance now guides much progressive thinking, and many scholars of poverty programs have accepted these premises of

⁶ See HARRELL R. RODGERS, JR., *AMERICAN POVERTY IN A NEW ERA OF REFORM* 29-31 (2000).

⁷ See Sam Dillon, *Report Finds Deep Poverty Is on the Rise*, N.Y. TIMES, Apr. 30, 2003, at A18; Monica Davey & David Leonhardt, *Jobless and Hopeless: Many Quit the Labor Force*, N.Y. TIMES, Apr. 27, 2003, at § 1, at 1.

⁸ See, e.g., WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* (1987); WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* (1996) [hereinafter WILSON, *WHEN WORK DISAPPEARS*].

⁹ This is the premise, sometimes unspoken, of the turn to the market, privatization, and local politics among scholars and activists that I describe in Part IV. For an explicit acknowledgement of the impossibility of redistribution, and the importance of placing welfare reform within the context of a dominant ideology emphasizing work, see JOEL HANDLER & YEHEZKEL HASENFELD, *WE THE POOR PEOPLE: WORK, POVERTY, & WELFARE* 215-18 (1997).

¹⁰ Mark Gongloff, CNN, *The \$44 Trillion Dollar Hole?*, May 29, 2003, at http://money.cnn.com/2003/05/29/news/economy/social_security_pain/ (last visited Feb. 3, 2004).

¹¹ See *infra* Part IV.

contemporary welfare state changes. But what do advocates seek at the local level? What qualities do they believe a local welfare state might possess that would contribute to an adequate safety net? One answer is that economically insecure citizens have overlooked opportunities for collective self-help in today's deregulated, low-wage labor market. A second answer is that the present ideological climate will support expanding the safety net through community-based *private* groups using public resources to help the insecure worker, the poor mother, and other economically vulnerable citizens. A third possibility is building an enhanced welfare state through deeper democracy at the local level.

Whatever the ultimate design of these models, increasingly we hear of using the capacity of the local state to address the economic needs of the poor and economically insecure. To a degree, this rhetoric has replaced the emphasis of a previous generation of advocates on affording the poor more rights.¹² We have learned hard lessons about rights. Rights, and rights in conjunction with the proper kind of social capital, may be critical to forming a more egalitarian society. But rights are ambiguous resources, often failing as a means of social transformation; rights may isolate individuals, polarize communities, or foreclose discussion of issues that should be contested in the political arena and considered in view of a broader vision of democratic change.¹³ If our goal is to enhance the provision of welfare, it may make sense to build better programs from the bottom where participants themselves can offer guidance about the benefits and costs. But how can such "bottom up" solutions be built and what is the role of "top down" governance and rights?

In this brief Afterword I join a growing number of scholars and advocates who argue that we must be concerned about governance itself.¹⁴ As advocates for more sustainable, egalitarian, and culturally diverse social policies, we must understand the limits of devolution in its present forms and

¹² See MARTHA F. DAVIS, *BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960-1973* (1993).

¹³ The classic statement of the critique of rights is contained in STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* (1974). A contemporary, nuanced, and highly relevant discussion of the critique of rights appears in Jennifer Gordon, *New Governance Models, New Roles of Rights: Lessons from the Underground Economy*, N.Y.U. REV. L. & SOC. CHANGE (forthcoming 2004).

¹⁴ See *infra* notes 85-124 and accompanying text.

develop new forms that better address the priorities we seek. We must find ways to re-socialize governance to make it responsive to broader and more diverse interests. To sustain such a change, the local welfare state must generate more than traditional rights or market-friendly social capital. Rather, governance itself must become interdependent with sustaining egalitarian and culturally diverse social relations. This is an immense political task, but a few scholars, among them some who spoke at this symposium, are already considering what such a society might look like and how it might be achieved.

Part II of the Afterword describes the moral politics of security in the modern American welfare state and the language in which security is debated. I draw attention to the way political choices behind the contemporary assault on safety net programs are disguised by the technical language of marketplace economics. Part III examines some of the changes in the safety net wrought by such politics and in particular the unraveling of programs intended to provide security for two vulnerable groups – low-wage workers and poor, mother-only families. Part IV considers some of the newest strategies for reversing safety net erosion. In contrast to “third way” programs advocated by mainstream liberals, the creation of new legal entitlements, or proposals to build the social capital of the poor, the three approaches I discuss all emphasize local politics and local markets: collective self-help in the private labor market, extending the state through privatization, and creating a local, more egalitarian welfare state. All three have been applied successfully to achieve practical benefits for economically insecure citizens, but they do not work equally well to enhance the safety net under all conditions. In a brief conclusion, I review the main lessons to be learned from these experiments by summarizing their most promising and problematic features as solutions for the vanishing safety net.

II. THE OLD POLITICS OF SECURITY IN THE NEW WELFARE STATE

As America enters the twenty-first century, there is continuing pressure to adapt the welfare state to the “new realities” of a competitive global economy. But elements of this new reality have been shaped by the struggles over values and ideologies that influence expectations. The challenge of globalization includes increasing pressure by investors to deliver higher returns, spawning a dominant pro-market

ideology that links economic growth and stability to deregulation and “flexible” labor, and a conservative fiscal policy that favors downsizing federal government through devolution to the states and privatizing many services.¹⁵

The labor market has indeed changed. Employers have responded to the pressures of the new economy by shifting more risks of employment to employees themselves.¹⁶ Shifting more risk to employees, consumers, or those who can least afford economic insecurity is a particularly ironic adaptation of the welfare state – an institution that evolved in all developed western societies to secure citizens from the ravages of the unregulated market.¹⁷ T.H. Marshall describes this evolution in terms of the emergent rights associated with “social citizenship,” including a right to a minimum level of economic well-being and stability that enables one to effectively participate as a worker and citizen.¹⁸ Nonetheless, America’s safety net is being rapidly altered to shift more responsibility for coping with economic insecurity and poverty to the least secure and poorest members of society. Although proponents claim that downsizing the safety net is needed to make markets more efficient and to stimulate growth, available research suggests otherwise: Low-wage and flexible labor policies seem to bear little relationship to unemployment levels or growth.¹⁹ If so, what explains the unique response in America to the increasing economic insecurity?

Welfare policies that support the needs of the labor market are rooted deeply in Anglo-American history. As early as the Elizabethan Statute of Laborers, English welfare law distinguished between the deserving poor who were incapable of work or excused from work and the “sturdy beggar,” the

¹⁵ MICHAEL B. KATZ, *THE PRICE OF CITIZENSHIP: REDEFINING THE AMERICAN WELFARE STATE* 26-32 (2001).

¹⁶ See *supra* note 1 and accompanying text..

¹⁷ T.H. Marshall, *Citizenship and Social Class*, in T.H. MARSHALL & TOM BOTTOMORE, *CITIZENSHIP AND SOCIAL CLASS* (1992). See also GØSTA ESPING-ANDERSEN, *THE THREE WORLDS OF WELFARE CAPITALISM* (1990).

¹⁸ Marshall, *supra* note 16.

¹⁹ The “low-road” strategy, which emphasizes low-wages and flexibility, has not been validated by research. Unemployment rates are not strongly associated with welfare state support for wages. See Joel F. Handler, *The “Third Way” or the Old Way*, 48 U. KAN. L. REV. 765, 799 (2000). Nor are flexible labor policies uniformly associated with economic growth. See Rebecca Blank, *Does a Larger Social Safety Net Mean Less Economic Flexibility?* in *WORKING UNDER DIFFERENT RULES* 157-58 (Richard B. Freeman ed., 1994). For the best and most complex analysis, see David R. Howell, *Increasing Earnings Inequality and Unemployment in Developed Countries: Markets, Institutions, and the ‘Unified Theory,’* 30 POL. & SOC’Y 193 (2002).

needy but able-bodied person who was condemned for not working. Professor Joel Handler quotes the famous English Royal Poor Law Commission Report of 1834: "While relief should not be denied the poor, life should be made so miserable for them that they would rather work than accept public aid."²⁰ The principle of "less eligibility" – that the poor should receive no more than the lowest paid laborer in the labor market – remains the foundation of relief for the "undeserving" poor. Embodied in the workhouses and poor law of the nineteenth century, the principle of less eligibility also underlies much of the American New Deal's construction of a national welfare state. For example, even as widespread failure of the labor market established a new theme in American politics – the politics of security – work programs for relief of widespread unemployment rejected support for a living wage (e.g., the short-lived Civilian Conservation Corps) in favor of a program, the Works Progress Administration, that deliberately paid less than the labor market.²¹

The centerpiece of the New Deal's welfare, the Social Security Act, also embodied the principle of less eligibility by creating separate programs for meeting the needs of elderly, but previously fully employed, wage workers, who received guaranteed old age "insurance,"²² and unemployed women with dependent children and other unemployed persons, who were provided short-term, means-tested benefits that were contingent on appropriate behavior.²³ Thus, the two-track structure of the Social Security Act fully incorporated the distinction between the needs of those who were deemed morally "deserving" and those who were deemed morally "undeserving." Among the latter were three important groups. First, unemployed, able-bodied workers could receive unemployment insurance, but the program was administered at the state level where employers had an opportunity to make

²⁰ Handler, *supra* note 19, at 779.

²¹ MICHAEL B. KATZ, *IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA* (10th anniversary ed. 1996). See also JOEL F. HANDLER & YEHESKEL HASENFELD, *THE MORAL CONSTRUCTION OF POVERTY: WELFARE REFORM IN AMERICA* (1991).

²² Although described as "insurance," the benefits of social security are not funded by the earnings of the beneficiary but rather through assessments on the wages of those currently working. Neither funding nor benefits depend upon payments made by beneficiaries in the manner of true insurance. See Katherine A. Kost & Frank W. Munger, *Fooling All of the People Some of the Time: 1990's Welfare Reform and the Exploitation of American Values*, 4 VA. J. SOC. POL'Y & L. 3, 19 & n.54 (1996).

²³ See HANDLER & HASENFELD, *supra* note 21, at 103-05.

sure that the terms on which compensation was received did not interfere with work discipline.²⁴ Second, southern senators made sure that black agricultural workers were excluded from old age insurance so that tenant farmers would remain bound to land owners.²⁵ Third, Aid to Dependent Children (ADC) provided support for “suitable” parents and their children.²⁶

Like unemployment compensation insurance, administration of the ADC program was decentralized.²⁷ Parochial judgments about “suitability” meant in practice that a few white widows were granted benefits while the majority of unmarried, divorced, or immigrant women with children were denied benefits and forced into the labor market.²⁸ Thus, the Social Security Act created a two-track public welfare state: a federally administered, relatively generous and no-hassle track for successful workers (and their spouses), and a second, state or locally administered track with means-tested benefits that reflected moral judgments about men who were unemployed, women who worked, and the exclusion of African-Americans and immigrants from the mainstream. Since the New Deal, the boundaries of “deserving” and “undeserving” have been contested, but the moral politics of the welfare state have continued to reflect conflict over the role of women, racial stereotypes, and the dominant ideology of the wage labor market.²⁹

The New Deal left a further legacy by creating a “politics of security.”³⁰ The public welfare state created by the Social Security Act and related statutes was complimented by the expansion of private welfare based on a welfare capitalism model.³¹ While proclaiming a “second New Deal” to free citizens from want, President Franklin Roosevelt refused to support universal health care or similar benefits for workers. In turn, newly enfranchised unions, discouraged from pursuing wage

²⁴ *Id.* at 91-97.

²⁵ JILL QUADAGNO, *THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY* 20 (1994).

²⁶ LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE, 1890-1935*, at 45-46 (1994).

²⁷ HANDLER & HASENFELD, *supra* note 21, at 103.

²⁸ GORDON, *supra* note 26.

²⁹ HANDLER & HASENFELD, *supra* note 9, at 3-11.

³⁰ JENNIFER KLEIN, *FOR ALL THESE RIGHTS: BUSINESS, LABOR, AND THE SHAPING OF AMERICA'S PUBLIC-PRIVATE WELFARE STATE* 3 (2003).

³¹ *Id.* at 78-116. See also STUART D. BRANDES, *AMERICAN WELFARE CAPITALISM, 1880-1940* (1976).

demands during World War II, made expansion of fringe benefits a major goal. The growth of employment-related health insurance and pension plans was soon supported by a federal regulatory structure and became the most important source of welfare for most workers. The enormous investment by the working class in employment-related benefits altered the politics of security by dividing the interests of the regularly employed working class from those of the working class who were forced to take low-wage, unstable, or part-time jobs. Those who were privately “taxed” for their employment-related benefits resisted expanding public welfare programs as double taxation for welfare. White males dominated the primary labor market while most women and minorities were excluded from this market and did not receive private welfare, so the division between the private and public welfare systems was ripe for a symbolic politics of security that reinforced gender and racial stereotypes.

Today, struggles over welfare state programs still deploy the discourse of the market by focusing on economic efficiency, devolution, and privatization. While the rhetoric is new, there is a striking continuity with the past. Denying welfare – whether poverty relief, workers’ compensation, unemployment compensation, or bankruptcy relief – on the theory that to grant benefits would unjustly reward idleness is an old strategy. There is nothing new about arguments that current beneficiaries receive undeserved benefits or lack moral character. What is new is that benefits for working and middle class citizens have been targeted as well as those for the poor or unemployed. Although the language of market efficiency suggests that decisions to cut back the welfare state have been grounded in value-neutral science, in fact such decisions typically reflect symbolic politics as usual about matters such as whether regulated behavior constitutes a “moral hazard” or a wasteful “transaction cost,” rather than morally appropriate reliance on a benefit.³²

³² The current Darwinist approach towards welfare, which is clothed in market terminology, creates a hostile and brutal environment for the poor. The idea of earning one’s citizenship by being a productive member and not being a “transaction cost” reinforces the notion that the poor have failed themselves and society, thus deserving the minimal amount of aid. Combined with the pop-psychology idea of “enabling” creeping into the rhetoric of judging the poor, an unforgiving attitude towards the poor arises. This attitude is evident in recent court cases as well as legislative acts. See *Brukhman v. Guiliani*, 94 N.Y.2d 387, 727 N.E.2d 116 (2000); *Jobs and Growth Tax Relief Reconciliation Act of 2003*, Pub. L. No. 108-27, 117 Stat. 752

Moral claims are by no means limited to stigmatizing the dependent poor, but also characterize the rollback of welfare state programs that affect a much larger segment of the working and middle classes. The assault on programs for the poor employs the most exposed and unselfconscious rhetoric of moral citizenship. However, the same moral arguments are being made to justify the rollback of both the private and the public welfare state.³³

For example, pending proposals for bankruptcy reform are predicated on the assumption that members of the middle class have regularly abused the bankruptcy laws to relieve themselves of avoidable debt incurred through decisions to live beyond their means.³⁴ With this assumption in mind, reformers propose to limit access to discharge of debt through bankruptcy by adopting a means test that would force bankruptcy petitioners whose incomes exceed a statutory threshold to accept discharge conditioned on devoting a large proportion of their future income to paying off debt.³⁵ As discussed below, studies conducted by Professor Elizabeth Warren and her colleagues have cast considerable doubt on the assumptions about the moral hazard created by the existing bankruptcy law,³⁶ conclusions that strongly suggest that moral stereotyping has influenced the proposal to roll back protections for debtors.

Workers compensation has been similarly targeted. In response to sharply rising medical costs, employers have pressured state legislatures for several decades to limit their liability, seeking to shift more risk and financial responsibility for injury to their employees. While soaring medical costs are problematic, the reforms sought have threatened drastic reductions in benefits to achieve modest savings in employers' premiums, transferring the resulting uninsured medical costs to workers and to the public. As Professor Martha McCluskey

(refusing to extend child tax credit to the poor because they do not earn enough to qualify); Robert Pear, *Subsidies to Poor Pose a Hurdle to Compromise on Medicare Bill*, N.Y. TIMES, July 21, 2003, at A1 (discussing the Senate's revised bill to deny prescription drug benefits to people who are eligible for both Medicare and Medicaid).

³³ See generally KATZ, *supra* note 15 (containing exhaustive documentation of the down-sizing of the public and private safety net).

³⁴ For a discussion on the background and purposes of the proposed reforms, see Ann Morales Olazabal & Andrew J. Foti, *Consumer Bankruptcy Reform and 11 U.S.C. §707(b): A Case-Based Analysis*, 12 B.U. PUB. INT. L.J. 317 (2003).

³⁵ See H.R. 975, Bankruptcy Abuse Prevention and Consumer Protection Act of 2003, 108th Cong. § 102 (2003).

³⁶ THERESA A. SULLIVAN, ELIZABETH WARREN, & JAY LAWRENCE WESTBROOK, *THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT* (2000).

describes, the reforms have frequently been clothed in the language of neo-liberal economics – “moral hazard,” “transaction cost,” and “efficiency” – allowing business advocates to characterize them as merely technical amendments to existing law.³⁷

The scope of safety net protections is always political: Employers argue that compensation is too costly while employees argue the reverse. How much cost is “too much” or “too little” cannot be determined by economics, but is rather a focus of moral politics. Thus, the use of the language of economics merely disguises a political choice made in the heat of political exchange by making it appear to be logical, natural, scientific, and “efficient.”

In view of the conflicting claims about these safety net reforms, how have the needy fared? Contributors to this symposium have much to say about the consequences of these new policies. In the next section, I describe the quality of the safety net with particular emphasis on two important groups – low-wage workers in the flexible-labor market and poor, mother-only families.

III. THE SAFETY NET AND THE NEW LABOR MARKET

Most remarkable about the recent changes in American welfare policies is the degree of consensus on the fundamental strategy – more work for the poor and conditional benefits for the employed to increase the “efficiency” of their work. Law downsizing the most important poverty relief programs for poor families was enacted with the signature of a Democratic president, and the formula guiding reforms – time limits and quick entry into the labor market – has been widely supported by both liberals and conservatives even when there is disagreement about details. Many other welfare state reforms – bankruptcy, unemployment compensation, workers compensation, Medicare and Medicaid reform – have reflected similar agreement in principle even when there is sharp disagreement over details.³⁸

³⁷ Martha T. McCluskey, *The Illusion of Efficiency in Workers' Compensation Reform*, 50 *RUTGERS L. REV.* 657 (1998).

³⁸ As Handler noted many years ago in his perceptive analysis of evolving welfare policy, liberals have shifted their position over time from opposing work for women on welfare to supporting work. The shift has been explained, he notes, as a response to the growing numbers of non-poor and working poor women with children in the labor market. See Joel F. Handler, *“Constructing the Political Spectacle”: The*

President Clinton claimed that reforming social provision in America represents something new, a so-called "third way" – a market-friendly safety net that creates security for working Americans and the needy. His third way rested on three "cornerstones": "promot[ing] equal opportunity," an "ethic of mutual responsibility," and "a new approach to governing that empowers citizens to act for themselves."³⁹ The third cornerstone is the most important and the most controversial. Clinton and Great Britain Prime Minister Tony Blair argue that the market-friendly social programs evolving in their countries reduces poverty and economic insecurity by meeting the needs of those whose needs are not being met by the labor market. Robert Reich, formerly Clinton's Secretary of Labor, commented that what distinguishes the "third way" from a return to Reaganism and Thatcherism – the "old" way – is its promise to meet the needs of "the economically displaced."⁴⁰ Half a loaf won't do. The third-wayers must hold to their commitment that "if people are willing to work hard they should have a job that pays enough for them to live on."⁴¹ To deliver on this commitment, workers must be educated or trained, and if that is insufficient, says Reich, "their job should be subsidized."⁴² The problem the third way faces, according to Reich, is funding.⁴³ Adequate support for workers and the working poor together with job subsidies is costly, and neither lenders nor taxpayers have been willing to support such policies.⁴⁴ Half a loaf is what Clinton achieved.

Interpretation of Entitlements, Legalization, and Obligations in Social Welfare History, 56 BROOK. L. REV. 899 (1990). In many cases, work by women, still the primary family caretakers, has not been voluntary and, therefore, provides little support for the argument that destitute women with children should be required to do the same. Poor women have always been required to work, because so few have received adequate support from other sources, including welfare. A forceful argument might be made that welfare, an updated minimum wage, greater child support or a child allowance would benefit all working poor women in place of the present strategy that reduces all to the same low common denominator of low-wage labor and family insecurity.

³⁹ Democratic Leadership Council, New Democrats Online, *About the Third Way*, June 1, 1998, available at http://www.ndol.org/ndol_ci.cfm?kaid=128&subid=187&contentid=895. The third way philosophy rejects the "politics of social abandonment" that shifts too much market risk to employees, consumers, and other citizens, and the "politics of entitlement" that reduces flexibility required by a competitive market. *Id.*

⁴⁰ Robert B. Reich, *We Are All Third Wayers Now*, AMERICAN PROSPECT, Mar./Apr. 1999, at 46.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

Historian Michael Katz offers a less favorable assessment of these changes in the welfare state. He claims that citizenship is being altered, reducing the protection from insecurity for individuals in order to guarantee flexibility and "efficiency" for businesses and employers. Citizenship, in his words, has become "marketized."⁴⁵ Katz argues that new social policies reflect retrenchment, a return to the pre-New Deal meaning of welfare that forced most of the poor and economically insecure into the labor market.⁴⁶ Clinton's claim to a "third way" is suspect from the outset, because many of its specific policies emphasizing work and self-reliance derive from the centuries-old philosophy of public welfare that relied on the labor market and left most poor persons without an adequate safety net.

A critical element of third way social provision is its promotion of "active labor market" policies.⁴⁷ Active labor market strategies help individual workers adapt to the labor market. They include assistance for workers to help them adjust to the increasingly flexible conditions of labor, and training for the unemployed to help them gain access to the labor market. What kind of assistance is offered, over what period of time, and on what conditions, depends on assumptions about the causes of job loss or unemployment, the work ethic (moral deservingness) of the beneficiaries, and the benefit to society from public support for a particular quality of social citizenship. In the United States, where the poor, the unemployed, the bankrupt, or the injured worker is typically portrayed by the dominant conservative view as potentially dependent, unmotivated, and undeserving, policies incorporate

⁴⁵ KATZ, *supra* note 15, 341-59.

⁴⁶ *Id.* at 9-32. Katz describes the steady rise of pro-market policies, devolution, and privatization ideology over many decades, deviating further and further from the meaning of "welfare" that prevailed during the New Deal and encompassed security for all citizens. Rollbacks in federal spending, supported by the emerging rhetoric of devolution and downsizing, began under Democratic President Carter and accelerated under subsequent Republican Presidents whose explicit moral politics targeted welfare state entitlements and promoted fiscal conservatism. Calculated strategies of research, public debate, and ideologically focused politics by conservatives coalesced in successful presidential campaigns, and they eventually drew Democrats toward a more conservative social agenda. Others have detailed the failure of labor unions to mobilize potential opposition and the role that race has played in dividing potential economic allies in the working class. *See, e.g.,* THOMAS FERGUSON & JOEL ROGERS, *RIGHT TURN: THE DECLINE OF THE DEMOCRATS AND THE FUTURE OF AMERICAN POLITICS* (1986); THOMAS BYRNE EDSALL & MARY D. EDSALL, *CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS* (1991).

⁴⁷ *See* Handler, *supra* note 19, at 770.

discipline in the form of conditions to limit "overuse" of benefits. Overall they are far less generous than in most European societies.⁴⁸

Gaps in the safety net have become increasingly apparent as dramatic changes in the labor market have reduced the availability and adequacy of private welfare in the form of secure income, a prospect of rising wages over the length of a career, and fringe benefits, especially for low-wage workers.⁴⁹ Two radically distinct tiers are emerging in the labor market, one tier enjoying relatively stable employment, an expectation of rising wages, and adequate benefits.⁵⁰ The other, low-wage tier not only earns much lower entry-level wages but experiences other disadvantages as well, such as the lack of benefits or job security.⁵¹ Most importantly, as Annette Bernhardt and her colleagues have shown, many low-wage jobs are no longer the bottom rung of a career ladder that will lead to higher wages and greater security later in life.⁵² Those who begin in many lower-tier jobs will experience little career mobility. These jobs constitute a growing proportion of the labor market, and they are prevalent in service industries such as retail trade, personal services, entertainment and recreation, and in lower-level business and repair services. Growth of low-wage careers has not been limited to traditionally low-wage service sector jobs. They are increasingly the reality in deunionized manufacturing industries and among workers with some college experience.⁵³

Instability in wages and jobs is the reality in the new, flexible labor market. Contingent labor is one source of instability, but only a small factor when compared with the effects of restructured workplaces. Many of the causes are evident, among them subcontracting and outsourcing production or services once performed as part of an integrated

⁴⁸ See POVERTY, INEQUALITY AND INCOME DISTRIBUTION IN COMPARATIVE PERSPECTIVE: THE LUXEMBOURG INCOME STUDY (Timothy M. Smeeding et al. eds., 1990); PIERRE ROSANVALLON, THE NEW SOCIAL QUESTION: RETHINKING THE WELFARE STATE (Barbara Harshav trans., 2000).

⁴⁹ See BERNHARDT ET AL., *supra* note 1, at 184-87. See also WILLIAM J. BAUMOL ET AL., DOWNSIZING IN AMERICA: REALITY, CAUSES, AND CONSEQUENCES 258-61 (2003); WORKING IN RESTRUCTURED WORKPLACES: CHALLENGES AND NEW DIRECTIONS FOR THE SOCIOLOGY OF WORK (Daniel B. Cornfield et al. eds., 2001).

⁵⁰ BERNHARDT, ET AL., *supra* note 1, at 1-5.

⁵¹ *Id.* at 1-6.

⁵² *Id.* at 154-55.

⁵³ *Id.* at 171.

business.⁵⁴ The outsourced work is often nonunion, contingent upon the particular short-term subcontract, and narrowly specialized and isolated from other parts of the business – all of which limit the mobility of employees.⁵⁵ Within firms, the same process of separation and isolation is taking place so that, for example, corporate headquarters and the call center associated with customer service may be in different states. The call center itself may be subdivided by client type, and cross training of workers limited. Team production, popular in many industries, may isolate groups of workers, potentially limiting mobility to higher-level jobs. Such forms of segmentation may increase efficiency but they have a cost for workers because they limit their mobility and increase the likelihood of job loss when the particular function or service is altered or eliminated.⁵⁶

The American welfare state has responded by offering some new training and education programs,⁵⁷ but funding has never been adequate for these programs. The emphasis on supply-side welfare to cure employment insecurity (with rare exceptions such as the Family and Medical Leave Act⁵⁸ and the modest increases in the minimum wage in the 1990s⁵⁹) is consistent with the “third way” philosophy of helping workers to adapt while leaving the labor market itself relatively unregulated.

Bernhardt argues that a supply-side approach leaves enormous gaps in the safety net that can only be closed by addressing both the demand for low-wage workers and the employment relationship.⁶⁰ Only demand-side policies can recreate jobs that will eventually lead to higher wages and greater employment stability. Additional skills alone do not guarantee wage or job stability or an upward career. Thus the goal must be to create “external” career ladders – secure mobility outside the firm – and for this, a change in job market structure will be required to create the possibility of advancement and portability of benefits while moving between

⁵⁴ *Id.* at 188-92.

⁵⁵ BERNHARDT, ET AL., *supra* note 1, at 188-92.

⁵⁶ *Id.*

⁵⁷ *See, e.g.*, Workforce Investment Act, 29 U.S.C. §§ 2801-2945 (2000).

⁵⁸ 29 U.S.C. §§ 2601-2654 (2000).

⁵⁹ CNN, *Clinton Signs Minimum Wage Increase*, Aug. 20, 1996, at <http://www.cnn.com/US/9608/20/minimum.wage.sign/> (last visited Feb. 16, 2004).

⁶⁰ BERNHARDT, ET AL., *supra* note 1, at 191-98.

firms.⁶¹ Flexibility permits rapid change, but matching workers and jobs will continue to be a problem unless mobility and movement of workers from one job to the next is coordinated. Low-wage employment within a single firm is increasingly a dead end. Offering additional education to workers does not address the problem created by the segmentation of the low-wage labor market because there can be no upward career within a firm when there is no career ladder. Finally, because the work performed in low-wage jobs is valuable, the goal should not be to give every worker a college education or lifetime job tenure, but to make low-wage and "flexible" employment a viable career option.

Solutions to these problems call in part for legislative solutions that address the need for external career ladders, but also will require reforming the employment relationship to create new career possibilities within firms whose low-wage jobs have the disadvantages of the lower tier. Bernhardt says that reforming the employment relationship will require "sectoral" solutions, that is, an agreement among traditional competitors in a business sector to adopt high-road employment practices.⁶² Under such an agreement, no employer bears the cost alone and all employers reap the productivity gains of creating a reliable supply of labor. Such sectoral agreements will require the resources of unions, local government, educational institutions, and other supporting actors to supply expertise in education or management, regulatory flexibility, tax breaks or other subsidies, union support, and untapped sources of trainable workers (such as underemployed low-wage workers or welfare-to-work recipients) needed for long term, self-sustaining increases in productivity.⁶³

Safety net policies are moving the opposite direction from the reforms needed under Bernhardt's analysis. As described earlier, workers' compensation coverage has been reduced in an ongoing struggle between employers, unions, and community advocates. Unemployment compensation, also a state-administered program, has been downsized over the same time period. Between 1981 and 1987, Katz reports, "forty-four states raised work and earnings requirements for

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

unemployment insurance and added criteria for disqualification."⁶⁴ For example, many states expanded the definition of "voluntary quit" and most barred all benefits to workers involved in lockouts or strikes.⁶⁵ Katz concludes that "[a]s in other parts of the welfare state, policy became more punitive – its instrument for shaping behavior the stick, not the carrot."⁶⁶

Similarly, Professor Elizabeth Warren and her collaborators have reached conclusions about the claims for bankruptcy reforms that resemble the labor market reforms emphasizing educating, retraining, and disciplining workers. According to her research, the source of rising numbers of bankruptcies is not a lack of discipline or the expensive tastes of American consumers, but the increasing vulnerability of typical households to sudden changes in income or debt – the increasing number of bread winners who lose a job, the growing number of divorced women, and the growing number of individuals with overwhelming, uninsured medical expenses.⁶⁷ Another vulnerable group are those lured to borrow beyond their means through aggressive, federally-underwritten, high-risk lending practices.⁶⁸

The federal welfare reform law passed in 1996, Temporary Assistance for Needy Families,⁶⁹ replaced the New Deal-inspired Aid to Families with Dependent Children with a block grant program and freed the states from many of their obligations under the prior law to provide benefits to poor mothers and their families. The new law incorporates conditions intended to move welfare recipients quickly into work to encourage an end to dependency.⁷⁰ The stereotype is that welfare recipients lack a work ethic. To counter this, the reformers placed a lifetime limit on welfare to discourage backsliding into dependency and to promote employment in

⁶⁴ KATZ, *supra* note 15, at 225.

⁶⁵ *Id.* at 226.

⁶⁶ *Id.*

⁶⁷ ELIZABETH WARREN & AMELIA WARREN TYAGI, THE TWO-INCOME TRAP: WHY MIDDLE-CLASS MOTHERS AND FATHERS ARE GOING BROKE (2003); *see also* Elizabeth Warren, *The Growing Threat to Middle Class Families*, 69 BROOK. L. REV. 401 (2004).

⁶⁸ KATZ, *supra* note 15, at 315-16.

⁶⁹ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended at 42 U.S.C. § 601-619 (2000)).

⁷⁰ *See* Kost & Munger, *supra* note 22, at 79-85.

any available job – however poorly paid or insecure – on the theory that it will be the first rung on a career ladder leading to self-sufficiency for the properly motivated worker.⁷¹ States have been left free to adopt still more stringent time limits as well as conditions requiring job seeking, marriage promotion, and limitation of child bearing.⁷²

The conditions built into welfare by the architects of reform emerged from moral politics legitimated by the myth of the poor, black, teenage welfare mother with many children who remains on welfare for many years.⁷³ This image of the typical welfare recipient is a myth in every respect. Fewer than one in ten recipients are teenagers.⁷⁴ A typical welfare family has fewer than two children.⁷⁵ Most recipients receive welfare for relatively short periods of time, many of them cycling between welfare and work that is short term,⁷⁶ and without either benefits or security.⁷⁷

Equally flawed is the assumption of welfare reformers that the low-wage job market will sustain anyone who seeks a job. The jobs available to welfare recipients are almost exclusively in low-wage service industries, and, as we have seen, these “low-road” jobs lead nowhere. As the economy generally expanded in the 1990s, the competition for work in many low-wage sectors remained high, and the wages have not

⁷¹ See § 101, 110 Stat. at 2110 (congressional findings).

⁷² Consider, for example, the differences among state programs that implement the most important family requirements of the federal welfare reform – child support enforcement, domestic violence exceptions, and encouragement of family formation. Anna Marie Smith, *The Sexual Regulation Dimension of Contemporary Welfare Law: A Fifty State Overview*, 8 MICH. J. GENDER & L. 121 (2002).

⁷³ HANDLER & HASENFELD, *supra* note 9, at 3-11; RACE AND THE POLITICS OF WELFARE REFORM 323-25 (Sanford F. Schram et al. eds., 2003); ANNE MARIE CAMMISA, FROM RHETORIC TO REFORM?: WELFARE POLICY IN AMERICAN POLITICS (1998).

⁷⁴ HANDLER & HASENFELD, *supra* note 9, at 45.

⁷⁵ *Id.*

⁷⁶ *Id.* at 46.

⁷⁷ Unemployment compensation programs treat many of the reasons that force low-wage workers to leave employment, such as the health of a child or childcare problems and other family-related reasons, as a “voluntary quit” for which no benefits are paid. Short-term employees may be disqualified on other grounds as well. See Handler, *supra* note 19, at 789. In recent years, unemployment compensation programs have provided benefits to about one-third of all workers who lost jobs. See KATZ, *supra* note 15, at 226 n.77. For the poorest working women with families and no spouse to rely on, welfare becomes the only available form of unemployment compensation. See Diana Pearce, *Welfare is Not for Women: Why the War on Poverty Cannot Conquer the Feminization of Poverty*, in WOMEN, THE STATE AND WELFARE 265, 271 (Linda Gordon ed., 1990).

risen in proportion to the growth in the economy.⁷⁸ As Bernhardt describes, most of the available low-wage jobs in food preparation, cleaning, and maintenance offer no benefits, are short term, and do not place incumbents on a career ladder.⁷⁹ These are the jobs available to welfare recipients who are required to work as a condition of receiving welfare. Further complicating their job search, many recipients have multiple barriers to employment such as limited education, lack of transportation and child care, and health problems. The latest reports on “leavers” by the Urban Institute show that a significant proportion who leave welfare for work eventually return to welfare – as always – because the available jobs will not support them.⁸⁰

If the job market is so flawed, why have welfare rolls declined precipitously, allowing the architects of reform to declare their policies a success?⁸¹ Welfare rolls have declined not only because individuals leave the rolls, but also because individuals who need assistance and may be eligible have been discouraged from applying by aggressive diversion programs.⁸² It does not take long for word to spread that applicants are hassled and discouraged from applying. Long after the policy has changed, needy applicants may continue to seek other alternatives such as private charities, soup kitchens, relatives, or underground (and illegal) economic pursuits. Thus, if welfare was intended to help poor families avoid the harmful consequences of raising children under such stress, it has

⁷⁸ Indeed, until the late 1990s, real wages for the lowest paid workers had fallen over two decades. See Burtless & Smeeding, *supra* note 5, at 41.

⁷⁹ BERNHARDT, ET AL., *supra* note 1, at 164-72.

⁸⁰ Pamela Loprest, *How are Families that Left Welfare Doing: A Comparison of Early and Recent Welfare Leavers*, NEW FEDERALISM: NATIONAL SURVEY OF AMERICA'S FAMILIES, Apr. 2001 (Urban Institute, No. B-36); see also Leslie Kaufman, *Are Those Leaving Welfare Better Off Now? Yes and No*, N.Y. TIMES, Oct. 20, 2003, at B1.

⁸¹ Many former recipients who left welfare lost benefits for failure to comply with the rules. Some of these recipients may find work, but lack the transitional benefits afforded recipients and, thus, have poorer chances of remaining at a job. Recipients must provide documentation, appear for interviews, contact job training or job supervision centers, and report to welfare administrators regularly, while often coping with problematic transportation, child care, and medical coverage at the same time. Failure to follow the rules can result in sanctions and, potentially, termination of welfare. The most recent studies suggest that about one-third of those who left the welfare rolls did so because they were sanctioned. See Ladonna Pavetti & Dan Bloom, *State Sanctions and Time Limits*, in *THE NEW WORLD OF WELFARE* 245 (Rebecca M. Blank & Ronald Haskins eds., 2001).

⁸² SCHRAM, *supra* note 3, at 196. See also Reynolds v. Guiliani, 35 F. Supp. 2d 331 (S.D.N.Y. 1999).

become counterproductive. Indeed, Professor Joel Handler concludes that the "third way" has in practice returned to the "old way."⁸³ He argues that the third way leads ineluctably to familiar patterns of intermittent employment, inadequate income, and bureaucratic disenfranchisement, as it always has, because the welfare reforms are ultimately driven by their mischaracterization of "undeserving" welfare recipients and mistaken assumptions about dependency.⁸⁴

To sum up, the inadequacies of the public-private welfare state are becoming more severe. A low-wage, dead-end, lower tier in the job market is growing – including not only welfare recipients but also working- and middle-class wage-earners who have lost secure employment. In response, the pro-market reformers of the welfare state argue that greater flexibility is required, and that workers must adapt to the changing labor market. Although third way policies promise to close the gaps left by the job market, they have failed to address the lack of decent work that offers an opportunity for self-sufficiency – and no relief is in sight. The gaps in the safety net have become truly enormous. The risks faced by the lowest paid workers and the poor are large and have devastating consequences.

Conservatives respond that the effects do not matter because the new, restrictive, market-friendly policies are just. To fully understand changes in American welfare, we must recognize that the moral politics of welfare reflect sexism, racism, and class conflict that underlie the continuing struggle between economic actors. New Deal programs struck a balance between employers who wanted maximum control over labor, southern white politicians who wanted black agricultural workers excluded from pension and welfare programs, and the emerging movement for greater, universal economic security to protect citizens from the ravages of the labor market. Today, changes in the safety net to meet the demands of the global economy, indeed the characterization of the reasons for change as demands of the market rather than demands of particular

⁸³ Handler, *supra* note 19, at 765.

⁸⁴ See Handler, *supra* note 19, at 787-92; Evelyn Z. Brodtkin, *Inside the Welfare Contract: Discretion and Accountability in State Welfare Administration*, 71 SOC. SERVICE REV. 1 (1997). See also SHARON HAYS, *FLAT BROKE WITH CHILDREN: WOMEN IN THE AGE OF WELFARE REFORM* ch.4 (2003) (showing initial enthusiasm among caseworkers for welfare reform goals was replaced by discouragement and indifference after encountering insuperable barriers to implementation).

economic actors, result from a new set of struggles between multinational corporations, domestic entrepreneurs, and conservative ideologues on one hand, and on the other hand, advocates of labor and the poor, among others, who seek greater security and equity in times of rapid change and economic instability.

IV. BEYOND THE THIRD WAY: RIGHTS, SELF-HELP, AND "DEEPER DEMOCRACY"

If America's safety net is failing, what could reverse the damage done by the welfare state's decline? Rights have been one historical remedy for economic inequities. Professor Shep Melnick has described the highly successful movement to expand welfare rights through litigation in which courts stripped away state qualifications on welfare.⁸⁵ A strongly universalistic meaning of welfare moved the courts in the 1960s and 1970s to see federal statutory law as a mandate for broader social provision. Courts viewed many conditions placed on welfare by the states as rooted in bigotry and intolerance.⁸⁶ That tide of judicial interpretation has now turned. In the view of many contemporary courts, the ideology of moral responsibility and the market legitimates reinscribing limits on welfare based upon personal character. Moreover, the courts have ignored the racial loading of many of these conditions.⁸⁷

For several decades, conservatives at the federal level have successfully pushed to eliminate federal entitlements in order to give state and local governments a freer hand. Block grants created under Presidents Nixon and Reagan reduced the rights of beneficiaries to claim entitlements.⁸⁸ Elimination of the New Deal program of relief for poor families in 1996 explicitly targeted welfare entitlements.⁸⁹ Conservatives continue to seek ways to give employers and businesses greater flexibility, necessarily reducing the mandates protecting

⁸⁵ R. SHEP MELNICK, *BETWEEN THE LINES: INTERPRETING WELFARE RIGHTS* (1994).

⁸⁶ *Id.*

⁸⁷ DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* (1997).

⁸⁸ Nancy Morawetz, *A Due Process Primer: Litigating Government Benefits Cases in the Block Grant Era*, *CLEARINGHOUSE REV.*, June 1996, at 97, 97-104.

⁸⁹ Michele Estrin Gilman, *Legal Accountability in an Era of Privatized Welfare*, 89 CAL. L. REV. 569 (2001).

employees and consumers.⁹⁰ The Supreme Court, dominated by conservative Justices, has given full effect to this trend.⁹¹

Yet rights have continued to play an important role even as the welfare state shrinks. The architects of a reduced welfare state are learning that scaling down rights is not the same as scaling up for several reasons: rights advocates are in place; ending federal entitlements does not end state entitlements (states vary widely in this respect); and recipients of state welfare benefits are mobilized to defend their rights as citizens. In New York, for example, lawyers for the poor have successfully protected some of the remaining federal entitlements for welfare recipients and immigrants, and similarly continue to hold officials accountable for rights under state law.⁹² Lawyers elsewhere have also continued to win enforcement of rights to state welfare benefits.⁹³

We can hope for continuing support for some extremely important programs, such as the Earned Income Tax Credit (EITC). With rare exceptions, the EITC has gained bipartisan support.⁹⁴ It has been the most important anti-poverty and low-wage support program in recent years, though not well known among members of the public, and its very political invisibility may be an asset. Support should remain strong unless the EITC becomes a target of conservative rhetoric following the recent denial of the child tax credit for low-wage workers – essentially an increase in their EITC – who were stigmatized as non-taxpayers. If such rhetoric gains support, the EITC could be jeopardized. Although the minimum wage was modestly increased under President Clinton, few further increases are likely in the foreseeable future.

Bernhardt and her colleagues concluded that low-wage, unstable employment would be tolerable only if institutions were created to support “external” career ladders and job replacement – if institutions supplied benefits and income, and

⁹⁰ See KATZ, *supra* note 15, at 195-231, 257-92, 348.

⁹¹ See also THE REHNQUIST COURT: JUDICIAL ACTIVISM ON THE RIGHT (Herman Schwartz ed., 2002).

⁹² See *Reynolds v. Guiliani*, 35 F. Supp. 2d 331 (S.D.N.Y. 1999); *Aliessa ex rel. Fayad v. Novello*, 96 N.Y.2d 418, 754 N.E.2d 1085, 730 N.Y.S.2d 1 (2001). But for notable defeats that reflect the successful weakening of entitlements, see *Bruhman v. Guiliani*, 94 N.Y.2d 387, 727 N.E.2d 116 (2000); *Capers v. Guiliani*, 677 253 A.D.2d 630, N.Y.S.2d 353 (App. Div. 1st Dept. 2001).

⁹³ See, e.g., *Saenz v. Roe*, 526 U.S. 489 (1999); *Weston v. Cassata*, 37 P.3d 469 (Colo. Ct. App. 2001).

⁹⁴ See Christopher Howard, *Protean Lure for the Working Poor: Party Competition and the Earned Income Tax Credit*, 9 STUD. AM. POL. DEV. 404 (1995).

if the employment relationship changed in “low track” jobs to become sustainable through better wages and expanded opportunities to improve economically. Handler and Hasenfeld’s exhaustive review of the most effective innovations for the lowest wage and welfare workers led them to conclude, like Bernhardt, that at least two major policy changes are needed to deliver on President Clinton’s promise to “make work pay:” first, a commitment to full employment, namely a job for everyone who wants one, and second, universal, adequate health and unemployment insurance. In addition, the services already promised to families and workers under so-called third way policies, such as training, education, day care, and child support, must be sustained and effective – not the “myth and ceremony” typical of social provision by many state programs.⁹⁵

These recommendations are sensible conclusions from well-established experience with welfare and low-wage benefits innovations, and they represent a return to at least one feature of the welfare state seemingly rejected by the consensus “third way,” namely entitlements. Some of these benefits will not be means tested (universal health care, child allowances, “external” career supports) or will have no conditions except low current income (EITC, minimum wage, child care). Benefits will require federal standards for services, and ideally such standards will be benchmarked – ratcheted upwards as knowledge of better means of service delivery increases (worker support centers, quality child care, intensive support for the young or hard to employ).

New entitlements are not likely to be created without the emergence of a strong national political base.⁹⁶ At the national level, there is some support for sustained federal funding and adjustment of the services/obligations balance, but the ongoing struggle is not moving in the direction of a better safety net for welfare recipients, low-wage workers, or the increasingly insecure middle class.

Some have argued that even if new entitlements are created, their promise is inevitably contradictory. Rights are

⁹⁵ HANDLER & HASENFELD, *supra* note 9, at 213-25.

⁹⁶ Francis Piven and Richard Cloward suggest as much, but for all the reasons that they have been writing about for years, this base is unlikely to emerge soon. See FRANCIS FOX PIVEN & RICHARD A. CLOWARD, *POOR PEOPLE’S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL* 196 (1979). See also, SCHRAM, *supra* note 3; CHARLES NOBLE, *WELFARE AS WE KNEW IT: A POLITICAL HISTORY OF THE AMERICAN WELFARE STATE* (1997); MARTIN GILENS, *WHY AMERICANS HATE WELFARE: RACE, MEDIA, AND THE POLITICS OF ANTIPOVERTY POLICY* (1999).

incapacitating because they are presumed, unrealistically, to be final.⁹⁷ Thus, they undercut political participation. Rights are expensive, diverting resources from benefits and services. Formal mobilization of rights may be difficult for the poor, economically stressed, or those with limited education. Yet, even in the absence of formal mobilization, rights can transform individual's lives – people behave and relate in different ways in the presence of rights, sometimes to their great benefit.⁹⁸

For these reasons, activists, organizers, and scholars have focused increasing attention and energy on the importance of enduring local economic and political alliances that will rebuild or replace the safety net. Proposals fall into three overlapping groups: collective self-help in the private labor market, extending the state through privatization, and creating a local, more egalitarian welfare state. Each is examined in turn.

A. *Getting It Together: Collective Self-help*

The number of workers and poor who are vulnerable in the new economy is so large that one solution seems obvious: collective action to meet the needs that the labor, consumer, housing, medical care, and other private markets have failed to provide. Current conditions have stimulated numerous projects to obtain collectively what the safety net and the job market do not offer to individuals – better wages, needed benefits, and greater security. The projects extend a long tradition of organizing on behalf of those at the economic margins, but, as William Simon observes in his examination of the community economic development movement, grassroots organizing has flourished for the past twenty-five years since conservatives

⁹⁷ Mark Tushnet, *The Critique of Rights*, 47 SMU L. REV. 23 (1993). See also PIVEN & CLOWARD, *supra* note 98.

⁹⁸ Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, in FEMINIST LEGAL THEORY: FOUNDATIONS 507 (D. Kelly Weisberg ed., 1993); DAVID M. ENGEL & FRANK W. MUNGER, *RIGHTS OF INCLUSION: LAW AND IDENTITY IN THE LIFE STORIES OF AMERICANS WITH DISABILITIES* (2003) (demonstrating that rights interact in beneficial ways with identity); MICHAEL W. MCCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* (1994) (showing that the effects of rights depends on context).

targeted further growth in the welfare state and began to dismantle existing programs.⁹⁹

Speakers at this symposium highlighted extraordinary successes in transforming low-wage and insecure work by supplementing the wages and benefits provided by jobs.¹⁰⁰ Working Today, the organization founded in New York by one of the symposium speakers, Sara Horowitz, innovates creative strategies to improve employment for members of the one-third of the labor force comprised of “freelancers, consultants, independent contractors, temps, part-timers, contingent employees, and the self-employed.”¹⁰¹ Members are drawn from the New York area nonprofit, finance, technology, media and advertising, and arts and entertainment sectors, hardly the public’s image of the needy or impoverished “dependent” poor. Yet these members of the labor force are among those described by Bernhardt and others as economically insecure because of the contingent or transient relationship to employers. Through a subsidiary, the Freelancer’s Union, members gain access to health and disability insurance and pension plans, benefits their jobs cannot provide them. Adopting one of the strategies recommended by Bernhardt, the Freelancer’s Union provides an “external” structure that sustains employees notwithstanding the insecurities created by their flexible employment relationships.

Working Partnerships, USA, a California not-for-profit, has created an even more ambitious project to provide job and benefit continuity for both low-wage and highly-paid temporary workers in California’s Silicon Valley. Established as a “high-road temporary staffing firm,” the Working Partnerships Membership Association guarantees access to health benefits, provides training, and operates well-supported job placement services.¹⁰² Established by the South Bay Labor Council, Working Partnerships draws on the resources of its members, but also benefits from additional support from labor unions and

⁹⁹ WILLIAM H. SIMON, *THE COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT: LAW, BUSINESS, AND THE NEW SOCIAL POLICY* (2001). See also PAUL OSTERMAN, *SECURING PROSPERITY: THE AMERICAN LABOR MARKET: HOW IT HAS CHANGED AND WHAT TO DO ABOUT IT* (1999).

¹⁰⁰ These speakers included Sara Horowitz, Founder and Executive Director of Working Today, and Professor Jennifer Gordon, Fordham University School of Law.

¹⁰¹ See Working Today, Inc., *About Us*, at <http://www.workingtoday.org/about/> (last visited Feb. 17, 2004).

¹⁰² See Working Partnerships Membership Association, *Who We Are*, at <http://www.wpmembers.org/who/> (last visited Feb. 17, 2004).

large foundations, such as Ford, Hewlett, and the Campaign for Human Development.

Among the most successful and extraordinary examples of self-help organizing is Make the Road By Walking, an organization of immigrant day-workers on Long Island, New York created through the brilliant leadership of another symposium speaker, Professor Jennifer Gordon. By working to establish fair treatment of day workers, the organization meets the needs of low-wage and often undocumented workers whom local businesses and homeowners often exploit. At the same time, the organization meets a growing need for low-wage labor in affluent communities, work for which there is no reliable, indigenous supply of workers. By leveraging mutual interest in a reliable labor supply and by astute political organizing, Gordon's organization was able to gain community support for the workers' goals and, in particular, to obtain passage of legislation that protected the workers' right to wages.¹⁰³

Successful projects like Working Today, Working Partnerships, USA, and Make the Road By Walking have similar characteristics, namely long-term commitment to members, concern for the larger picture of economic security rather than provision of a particular service, and, often, though not always, resources beyond the means of the individual members. Working Today represents the interests of skilled workers who earn substantial wages when employed. In contrast, the Working Partnerships Membership Association's union and foundation affiliations were key in starting up and sustaining an organization that serves low-wage workers. The more limited the resources of individual members and their families, the less likely the organization is to become self-sustaining through their contributions alone, even when members are stably employed. At the extreme, viable programs for employment of welfare-to-work recipients are virtually all externally supported by unions, foundations, or government funding.¹⁰⁴

¹⁰³ Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, The Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L.L. REV. 407 (1995).

¹⁰⁴ Two of the most successful programs for employment of welfare-to-work, the Consortium for Worker Education and Seedco, are established with union support and quite similar to the groups described in the texts. See Steven Greenhouse, *Job Training that Works, and It's Free*, N.Y. TIMES, Aug. 10, 2003, § 10, at 1; Seedco, *About Us*, available at <http://www.seedco.org/about/overview/> (last visited Feb. 17, 2004).

Similar potential – with similar limitations – is apparent from the record of the community economic development movement that grew and declined with the local participation requirements of urban redevelopment programs of the 1940s and the Office of Economic Opportunity's Community Action Program in the 1960s. The movement focuses on creating self-sustaining and democratically governed corporate service entities to provide services or capital development to low-income and working poor communities. These services include such initiatives as affordable housing, employment training and benefits, or banking and financial services.¹⁰⁵

Overall, some of these projects have achieved stunning successes. In spite of the successes, many fail and vast areas of need remain. Careful assessment reveals substantial barriers to organizing private self-help for the most vulnerable in the new economy and, thus, the limited capacity of such projects to supplement the welfare state's safety net.¹⁰⁶

First, projects like Working Today rely opportunistically on collective self-help in the labor market. Community economic development (CED) organizations, similarly, rely on networks of connection in relatively stable communities that create a sense of shared identity and interest as well as the capacity to support an organization that, in some cases, capitalizes quite substantial projects. The key is having the social capital to get organized and to give the group market power, a capital not always available.

Even more striking are the limitations on the collective capacity of the poorest and most insecure, namely welfare recipients. Although many grassroots organizations of welfare recipients and former recipients provide mutual support and facilitate sharing information and connections, few are able to expand the safety net for poor persons. Such grassroots organizations often simply lack the resources to provide jobs or benefits essential to support work. Ironically, they replicate the dilemma of the poor person who is forced to turn to welfare because the labor market does not offer adequate child care or other resources to help them adapt to insecure, low-wage work. Indeed, as Diana Pearce maintains, welfare *is* their

¹⁰⁵ SIMON, *supra* note 99, at 7-13.

¹⁰⁶ *Id.* at 219-27.

unemployment compensation.¹⁰⁷ Fortunately, initial levels of income or social capital, by themselves, do not determine whether collective action is effective. Gordon's Make the Road By Walking project is an illustration of the market power of a financially poor group whose social capital was supplemented by the presence of an inspired organizer who tapped the workers' own potential and drew in unlikely allies on the basis of economic self-interest. But welfare recipients seldom have the right kind of social capital for such a movement – indeed, they depend upon welfare not only because they are economically poor, but also because they lack social capital that many other poor families can rely upon.¹⁰⁸ Plenty of grass-roots poverty organizations exist, but they yield mutual aid rather than market power, and many depend on external funding and organization. Even with the assistance of private foundations and charities, such organizations meet only a fraction of the need for a safety net.

Second, the projects have the potential weaknesses of all organizations whose mission is representing the interests of a membership – flagging member support, especially after initial successes are followed by difficult battles to sustain external support or to defend ground won in the legislative, political, or economic arena.¹⁰⁹ In addition, by definition members are relatively poor and susceptible to the temptation to use group victories to leverage individual fortunes rather than return gains on investment of time, energy, or capital to the common pool. Simon argues that there are limits to the altruism we can expect of the members of grassroots economic movements.¹¹⁰ Individuals perceive the purpose of their participation as leveraging up, not giving back.

Third, local economic activism often focuses on too narrow a base to sustain real change. Limiting the organization's focus to what David Rusk calls the "inside game" of local politics, or equivalently, a single employer or small

¹⁰⁷ Pearce, *supra* note 77, at 271.

¹⁰⁸ See generally Julia R. Henly, *Informal Support Networks and the Maintenance of Low-Wage Jobs*, in *LABORING BELOW THE LINE: THE NEW ETHNOGRAPHY OF POVERTY, LOW-WAGE WORK, AND SURVIVAL IN THE GLOBAL ECONOMY* (Frank Munger ed., 2002). See also WILSON, *WHEN WORK DISAPPEARS*, *supra* note 8.

¹⁰⁹ JENNIFER GORDON, *THE CAMPAIGN FOR THE UNPAID WAGES PROHIBITION ACT: LATINO IMMIGRANTS CHANGE NEW YORK WAGE LAW* (Carnegie Endowment for International Peace, Working Paper No.4, Sept. 1999) (illustrating this aspect of the dilemma posed by rights).

¹¹⁰ SIMON, *supra* note 99, at 223-25.

community of employers, may fail as a strategy for significant change.¹¹¹ Local governments and their communities lack the resources and power for meaningful redistribution. Companies are limited by competition within markets that often extend beyond residential, in particular urban, communities. Again, Make the Road By Walking provides a rare example of a grassroots movement that was successful at the “outside game,” that is, in a regional labor market.

Finally, Simon observes that almost all grassroots activism by low-income people, including successful community economic development organizations that have long track records of self-sustaining achievement, depend greatly on external institutional support. The support includes not only laws that foster, protect, and even favor community-based nonprofits, but also includes the redistribution of wealth and credit by banks, foundations, and, most importantly, the state. The federal government has continued to favor not-for-profit organizations that pursue community economic development projects such as affordable housing, and in many policy areas public-private partnerships are gaining favor. Whether these serve unmet safety net needs depends in part on the conditions attached to funding. In addressing the needs of low-wage labor and the poor through the private sector, federal funding has focused on services that prepare individuals for the job market rather than on poverty relief or the job market itself.

B. Extending the State Through Privatization

A common response by those concerned about the rollback of the welfare state has been to decry the privatization of the safety net through the contracting out of safety net services and the devolution of safety net programs to the private market through devices such as “managed competition,” individual social security accounts, or outright withdrawal of the public sector from particular programs, otherwise known as deregulation.¹¹²

Ironically, the vast majority of Americans rely on private welfare in the form of fringe benefits for medical insurance and pensions provided through the private labor

¹¹¹ *Id.* at 225-27.

¹¹² Alfred C. Aman, Jr., *Privatization and the Democracy Problem in Globalization: Making Markets More Accountable Through Administrative Law*, 28 FORDHAM URB. L.J. 1477 (2001).

market. Further, the public-private welfare state has always relied on not-for-profit charities to provide an essential third component in services for poor persons.¹¹³ Significant support for such services comes from private philanthropy, but government has long funded a large proportion of the cost, relying on these organizations to provide services instead of providing them through more costly, or politically vulnerable, public administration. Indeed, the dependence of private providers on government is increasing.¹¹⁴ The attraction of cooperative arrangements is that private providers, particularly not-for-profits, often offer a combination of commitment, experience, and low-cost that government administered programs cannot match.

Privatization has become one of the pillars of new conservatism, and there has been a rush to privatize public welfare. Now, proposals for managed medical care to replace Medicaid entitlements, private social security accounts to replace entitlement to fixed retirement benefits, and contracted-out welfare services and administration to replace that done by the government, promise to harness the power of the private market to meet needs while keeping costs at an efficient level.¹¹⁵ Of course, such proposals mean that the intended beneficiaries will bear the risk of an underperforming market due to market declines, unresponsiveness to consumer preferences, or outright corruption – all the factors that have always disadvantaged consumers and poor consumers in particular.

Private participation in public welfare has been aggressively promoted by the current administration.¹¹⁶ Welfare reform has stimulated expansion of an already vibrant grassroots and nonprofit scene as existing providers have

¹¹³ KATZ, *supra* note 15, at 13 (citing studies that estimate the value of welfare services provided by not-for-profits during the mid-1990s at over \$568 billion).

¹¹⁴ *Id.* at 144-45.

¹¹⁵ *Id.* at 144-47. For a discussion of the justifications for the recent Medicare reforms that mandated experimentation with privatization, see Robert Pear, *A Final Push in Congress: The Overview, Sweeping Medicare Change Wins Approval in Congress: President Claims a Victory*, N.Y. TIMES, Nov. 26, 2003, at A1; Milt Freudenheim, *Medicare Plan for Competition Faces Hurdles*, N.Y. TIMES, Nov. 28, 2003, at A1.

¹¹⁶ See U.S. Department of Health and Human Services: Administration for Children and Family, *The Faith-Based and Community Initiative*, at <http://www.acf.hhs.gov/programs/fbc/index.html> (last visited Feb. 17, 2004); White House, *Charitable Choice: The Facts*, at <http://whitehouse.gov/government/fbc/guidance/charitable.html> (last visited Feb. 17, 2004).

responded to opportunities to expand their role. In addition, a host of first-timers – new for-profit corporations, converted government contractors, as well as newly-minted not-for-profits – have rushed to respond. Many now benefit from large contracts with local welfare administrators anxious to expand their capacity to manage the demands of welfare-to-work.

However, many advocates for the poor view the proposals to privatize welfare with skepticism. Some of the skepticism grows from the fact that services previously provided by public employees are being contracted out to private organizations with little provision for accountability.¹¹⁷ Particularly sharp criticism has been directed at the Bush administration's promotion of "charitable choice," which emphasizes giving an important role to faith-based providers. To opponents, trusting faith-based providers to extend the state's capacity to provide a safety net seems to risk undermining constitutional protection for a woman's right to choose, which some faith-based organizations oppose, and discrimination against service recipients who do not conform to the life-style or religious preferences of a faith-based provider.¹¹⁸

A leading minority-rights advocate has recently made the discussion of privatization more complex by advocating careful reconsideration of public-private cooperation with faith-based organizations to provide basic welfare state benefits and services. Professor Martha Minow¹¹⁹ observes that as a society we have always favored complex public-private solutions to meeting our communal and individual needs for welfare. The expansion of private involvement in poverty programs and other areas expresses the legitimate promise of private providers not only to fill gaps in the safety net but also to provide better quality services. Faith-based providers cannot "fill in the holes of a gouged safety net,"¹²⁰ but they can provide better quality, specifically, "more meaningful public assistance with strong community ties" in contrast to many existing public programs that are "dehumanizing and incompetent."¹²¹

¹¹⁷ Barbara L. Bezdek, *Contractual Welfare: Non-Accountability and Diminished Democracy in Local Government Contracts for Welfare-to-Work Services*, 28 FORD. URB. L.J. 1559 (2001).

¹¹⁸ See *Freedom from Religion Found., Inc. v. McCallum*, 324 F.3d 880 (7th Cir. 2003).

¹¹⁹ MARTHA MINOW, *PARTNERS, NOT RIVALS: PRIVATIZATION AND THE PUBLIC GOOD* (2002).

¹²⁰ *Id.* at 113.

¹²¹ *Id.* at 116.

Moreover, private providers are necessary because “[r]eliance on public support is inadequate, practically, because it will not be enough and because struggles over the scope of public aid to the poor pit competing visions of the good against one another and against individual liberties.”¹²² Thus, she concludes,

We cannot leave the needs of those who cannot pay to the vagaries of politics and to the preferences of those who can command legislative and judicial majorities. We need public and private partnerships to ensure access...to meet unmet needs, to generate innovation, and yes, to challenge inefficiencies.¹²³

Minow’s vision of the public-private welfare state is one that is truly democratic because the poor, among others who receive welfare, will no longer be demonized by those who attempt to validate particular moral views of welfare by imposing those views on public policy. Instead, through public-private collaboration, a wide range of welfare values will be reflected in options available to individuals. In the end, she mistrusts the capacity of both the legislative and judicial branches to reconcile conflicting views by instituting mutual tolerance for private providers representing different communities of faith and morality while respecting essential public values such as tolerance, constitutional norms of liberty, and individual choice. The ultimate answer to meeting the needs of the poorest and most neglected, in her view, would be a “serious, steady, and substantial public commitment – one that may be fulfilled in partnership with private providers....”¹²⁴

Minow’s proposal to enhance the connections between public and private forms of welfare is highly idealistic because it relies on achieving enlightened public commitment. Yet it accurately portrays our future. Privatization has long been a part of the American welfare state, and its role is growing. Expanding the state in the manner in which she describes will not achieve consensus; instead it will require a political solution, coalition building, effective advocacy by those who have been left behind by the recent rise in wealth, and a more effective response to symbolic politics that mischaracterize those who are in need as morally deficient.

¹²² *Id.* at 138.

¹²³ *Id.* at 140.

¹²⁴ MINOW, *supra* note 119, at 138.

C. Becoming the State: Enhancing Local Democracy

The dilemmas created by an increasingly large and complex public-private welfare state may have an old and simple solution according to theory and practice being developed by progressives who advocate “deeper democracy” at the local level. Bypassing the nearly insuperable structural barriers to building national political movements¹²⁵ in favor of a more labor-friendly, poverty-ending, or pro-consumer welfare state, some scholars and activists are promoting and studying coalitions among traditionally competing political interests. These coalitions combine labor and business, welfare-to-work recipients, low-wage workers, and established trades, with public support from local or regional government.

Grassroots organizing for economic development has often had a political component.¹²⁶ In truth, few gains could be maintained without the support of government, at the very least through tax breaks or other benefits afforded not-for-profits, but often also through special benefits or laws intended to lock in opportunistic political gains.¹²⁷ Simon argues that the political focus of low-income communities can often be extremely narrow and self-interested, displaying little of the public-regarding rhetoric associated with broader public interest movements. Their narrow, self-interested political focus, he argues, offsets their economic disadvantages as low-income people.¹²⁸

The model of deepening democracy envisions a broader, mutually cooperative coalition of traditional opponents within a semi-autonomous institutional setting – a sector of the economy, a local government, or a school system – a movement defined by similarity of demography and interest. The rationale is to include enough traditionally competing actors so that when agreement is reached, the agreement itself is an effective instrument of governance that reorganizes relationships among the participants to achieve gains in efficiency, productivity, and communal support – in other words, welfare. As such, each successful coalition replaces existing competitive relations with

¹²⁵ See *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) (defeating the fusion party strategy of the third party movement in Minnesota).

¹²⁶ SIMON, *supra* note 99, at 7.

¹²⁷ See Gordon, *supra* note 109, at 1-2.

¹²⁸ SIMON, *supra* note 99, at 76.

more mutually beneficial cooperative relations, thereby becoming a component of a reorganized welfare state.¹²⁹

Bernhardt¹³⁰ provides an example of a business sector coalition, the Wisconsin Regional Training Partnership (WRTP), that restructured the employment relationship for many low-wage and welfare-to-work employees by creating mutually cooperative arrangements among business competitors who benefited from a reliable supply of skilled workers at a cost born equally among competitors for their services. Professors Archon Fung and Erik O. Wright discuss other local democracy experiments that have achieved at least partial success in a wide range of community settings and policy areas: decentralization in the Chicago school system, participatory budgeting in Porto Alegre, Brazil, village governance in India, and production of Habitat Conservation Plans under the Endangered Species Act.¹³¹ Each experiment successfully created a more inclusive democratic base for political, economic, or administrative decision making that included some previously excluded, relatively powerless members of the community who benefited from a redistribution of public or private welfare. Redistributed benefits included better jobs and fringe benefits, responsive municipal government, environmental amenities, or better education for their children.

The present ideological climate favors the experiments advocated by these scholars. A key structural characteristic of the sector, local government, institution, or other setting in which the experiment can succeed is devolution; together the actors must be able to exercise real power. At the same time, Fung and Wright note that an agreement among the parties will be effective and constitutive of their future relations only if backed by a higher authority, in most cases the state, a condition they term "coordinated decentralization." The higher central authority must agree to respect and enforce the decision reached through deliberation among local actors. It

¹²⁹ ARCHON FUNG & ERIK OLIN WRIGHT, *DEEPENING DEMOCRACY: INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE, THE REAL UTOPIAS PROJECT IV* (2003).

¹³⁰ BERNHARDT, ET AL., *supra* note 1.

¹³¹ FUNG & WRIGHT, *supra* note 129, at 3, 259. See also Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831 (2000).

follows that the agreements are not voluntary, but binding and enforceable in some way by governmental authority.

Fung and Wright's careful assessment of the experiments identifies important preconditions, in particular the deliberative style of decision making undertaken by each group. A deliberative style of decision making is non-adversarial, relies on reasoned argument, and yields compromise as well as commitment to decisions. Of all the preconditions for success, they acknowledge, deliberative decision making and commitment will be the most problematic. Further, power imbalances will be nearly unavoidable among participants in such attempts to reorganize social relations and the local welfare state. Unless an imbalance of power can be checked by opportunistic alliances, conditional rewards for deliberation by a higher level of authority, or threats by such low-wage worker or consumer-friendly groups as unions or local advocacy organizations, truly deliberative decision making may not develop.¹³² While these examples show that the local welfare state may be reformed to achieve progressive welfare state goals, these experiments will not be easy to replicate. Their reliance on unique circumstances, exceptional political coalitions, or high levels of social capital suggests that broader transformation will be difficult to achieve.

Finally, the factors that limit replication of the WRTP or successful Habitat Conservation Plan negotiations by members of the middle and working class are even more problematic for the working poor and dependent poor who seek better safety net provisions. Handler's evaluation of welfare reforms acknowledges the differences in results achieved through widely varying state approaches to public assistance following the devolution of responsibility under TANF.¹³³ Sharp divergence between the benign outcomes for recipients who benefit from public assistance in Utah's program offering intensive support for the hard-to-assist and those who are left destitute and homeless under Florida's rigorous "work first"

¹³² FUNG & WRIGHT, *supra* note 129, at 282-85. See also JOEL F. HANDLER, DOWN FROM BUREAUCRACY: THE AMBIGUITY OF PRIVATIZATION AND EMPOWERMENT 133 (1996). For another critique suggesting that the inherent inequalities among members of the coalition are likely to create serious problems of long-term stability, see Gordon, *supra* note 13. See also SIMON, *supra* note 99. Simon's penetrating appraisal of the Community Economic Development movement also concludes that the instability of low-income communities poses a substantial threat to sustained, effective representation of their interests. *Id.*

¹³³ HANDLER & HASENFELD, *supra* note 9, at 58-93.

program illustrates the range of possibilities. But central to this evaluation is the principle that far higher costs are associated with successful programs. As the national economy has weakened, Utah has cut back its intensive support programs. Without additional federal financial support and federal benchmark standards that reflect what has been learned from successful programs, costly but effective programs will be severely limited. Moreover, a politically weak minority such as the poor, who often have overlapping political disadvantages associated with poverty, gender, and race (and, for a large proportion, disability or health problems), are unlikely to achieve changes in policies at the state or local level on their own. The problems of "street-level" bureaucracy will only be exacerbated by devolution of responsibility for policies to the local level together with "government by objective delegation" of new responsibilities to frontline workers to help recipients with work and time limits.¹³⁴

Because of the acknowledged barriers to political mobilization for mutually beneficial redistribution of benefits and opportunities, the state remains the ultimate provider of entitlements and oversight, especially for those who are unable to meet the demands of the unregulated labor market.

V. CONCLUSION: THE LOCAL WELFARE STATE AND ITS PROSPECTS

The moral politics of public and private welfare in the American welfare state has a profound relationship to the safety net we have created to moderate the risks inherent in our capitalist economy, such as job loss, disability, or abandonment. The safety net inevitably has redistributive effects because the costs of losing a job or having no medical care or being overwhelmed by debt must be placed somewhere. Who will bear the cost is always a political issue. The most cherished provisions of our safety net, including basic health insurance, social security pensions for the poor, elderly, or disabled, and unemployment and workers compensation

¹³⁴ See MICHAEL LIPSKY, *STREET LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES* (1980) (documenting effective control of the implementation of policies by frontline workers). See also Brodtkin, *supra* note 84 (describing the structural limits on caseworker discretion imposed by limited capacity and conflicting goals). See also HANDLER, *supra* note 132 (describing rare instances of empowerment of dependent persons who must rely on politicians, employers, or administrators for access to benefits).

insurance for working age Americans, were considered a birthright by the previous generation of Americans. As contributors to this symposium describe, the contemporary politics of welfare has placed this safety net in jeopardy.

Contributors to the Sparer Symposium have documented the widening gaps in America's safety net. They have also suggested changes in policy that would better serve the needs of those who bear the highest costs of insecurity in a competitive, risk-based economy, and some contributors described experiments that have succeeded in reclaiming parts of the safety net for working Americans. The contributors approach the problems and solutions from divergent perspectives. Professor Elizabeth Warren argues that bankruptcy has been overregulated in favor of creditors and that bankruptcy laws should tolerate greater latitude for market choices by consumers and for their assumption of debt. From a different perspective, Professor Regina Austin raises important questions about the market itself, drawing our attention to the negative effects of privatization and deregulation that exacerbate the virtual exclusion of a large proportion of African-Americans and other poor persons of color from meaningful participation in our consumption-driven society.

In this Afterword I have argued that many advocates for those who have been placed at greatest risk by the vanishing safety net, including many symposium contributors, are adapting their strategies to the contours of deregulated, devolved, and privatized governance. Because the dominant political consensus favors reducing or eliminating the role of federally administered programs to manage the economic risks for the majority of Americans, the proposed new safety net strategies use the power of markets, private initiative, and local politics in creative ways.

At least three broad strategies have attracted the attention of scholars and activists. The first deploys market forces through collective action by or on behalf of the poor, working poor, or insecure middle class to restore fringe benefits and economic stability for contingent and low-wage workers. The second harnesses the resources and motivation of community-oriented charitable organizations. A third strategy uses the regulatory power of the local state to manage and enforce partnerships between workers, employers, and public officials that build "high road" economies for individuals who would otherwise be left on the economic margin. All three

strategies have been used successfully to restore some elements of the safety net for some of those who are least secure.

Yet none of these approaches promises solutions for all of those who are being left behind. Each of the strategies depends on the availability of resources, including external sources of funding, continuing commitment by key participants, and power to enforce important goals of our liberal society, such as inclusion, tolerance for diversity, and accountability – features of the welfare state that are placed in jeopardy when public sponsorship of welfare is lost. These problems become increasingly critical and difficult to resolve for the poorest and most dependent members of our society. It is no coincidence that many of the most successful examples of community-based strategies for restoring the safety net described by contributors to this symposium and others have organized the best educated, most employable members of the working and middle classes rather than the least educated and poorest.

In the absence of market power or private economic and social capital that enables the exercise of greater influence by the needy, more elaborate strategies are required that harness the regulatory power of the state and enhanced or “deepened” participatory decision making. In sum, the inclusionary power of government and law will be needed to guarantee what the most marginal and excluded people acting alone cannot demand. Yet the law has failed to do this in the past. Professor Martha Minow has anticipated the need for a new form of civil rights laws: laws guaranteeing the inclusion of minorities, women, the poor and persons with disabilities, among others, must be based on a “social relations” understanding of the role of law.¹³⁵ A social relations approach, Minow argues, requires laws created and interpreted with a deep knowledge of the way that social relations include or exclude individuals, so that the law might recreate social relations themselves to encourage inclusion.¹³⁶ For poor persons, such a law might require universal benefits that presume all citizens are entitled to health or pension benefits. For low-wage employees, law might restructure job markets or employer-employee relations to eliminate barriers to entry-level jobs or to create career

¹³⁵ MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 111 (1990).

¹³⁶ *Id.*

ladders. Minow concludes that the social relations approach to civil rights requires participation by excluded groups in legislating and interpreting the law.¹³⁷ Only then will law adequately address the needs of those who are persistently disadvantaged by our moral politics and the market. Professor Minow's insight takes us to the threshold of the dilemma faced by today's advocates for a more inclusive safety net – creating deeper participatory democracy for the excluded.

Advocates for a more effective safety net turn back to the state, either in its traditional role of provider of last resort, or, at the leading edge of social experiments, as guarantor of the gains won through deepened democracy from below. Thus, some advocates call for a return to entitlements, arguing that only the federal government's resources and capacity for nation-wide administration will meet the needs of the economically insecure, poor, and dependent. However, a growing number of advocates are considering the opportunities for deepened democracy – a strategy of coalition building that enables those on the economic or social margins to strike an enforceable bargain with better-off economic players. Such bargains exchange the untapped resources and ability of marginal consumers or workers for the means needed to develop their productivity and a safety net that makes sustained participation possible.

To make either strategy successful, the public sector is a necessary element. To be sure, the federal government has the capacity to enable distributive fairness and an adequate safety net. But advocates are demonstrating that there can be an effective alternative to direct regulation by the federal government, namely using the more readily accessible local state as a standard setter and enforcer of deals engendered through deliberative democracy at the local, or even the national level. The future, then, is politics. In this future, where the way ahead is still uncharted and success is still quite uncertain, advocates may discover that their commitment to grassroots politics leads beyond opportunistic self-help or enhanced local democracy toward deeper and broader welfare for all citizens.

¹³⁷ *Id.*

