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Forty Years of Welfare Policy Experimentation: No Acres, No Mule, No Politics, No Rights

Julie A. Nice*

I. INTRODUCTION

¶1 Forty years ago, the tide turned against the War on Poverty, and poor people have never recovered. Many factors contributed to the demise of that historic effort to eliminate poverty. The urgent need to understand these factors has increased today as the nation appears to be facing an economic crisis of historic proportion. Surely one of the most devastating blows against the War on Poverty occurred forty years ago today when, on the cusp of launching his Poor People's Campaign, Martin Luther King, Jr. was assassinated.¹ In the four decades since King's death, poor people have suffered the collapse of their national grassroots movement, the loss of momentum toward achieving constitutional rights, and the elimination of their federal statutory entitlement to welfare benefits. All the while, poor people have endured a stubbornly persistent poverty rate. During these same forty years, the income and wealth of those at the top of the economic pyramid have grown at an unprecedented rate, creating an alarming level of economic inequality between rich and poor. As for the government, it spent these four decades funding massive policy experimentation designed to discover how best to keep poor people off the welfare rolls.

¶2 By any measure, the government's war on welfare has been enormously successful. From 1994 to 2007, the number of recipients receiving welfare has declined more than seventy percent.² It should come as no surprise that welfare does not pay as well as it did forty years ago—apparently that was the point. But the far harsher reality is that work

* Herbst Foundation Professor of Law at the University of San Francisco School of Law. This essay is based on the keynote address delivered for the *Northwestern Journal of Law & Social Policy's* symposium, "Ten Years After Welfare Reform: Making Work Pay," on April 4, 2008. I offer my deepest gratitude to the unsung faculty heroes at Northwestern University School of Law who quietly mentored me and so many other public interest law students, especially Professors Len Rubinowitz, Tom Geraghty, Bob Burns, and John Elson. I also thank my former colleagues at the Legal Assistance Foundation of Chicago, whose dedication remains unparalleled, especially Helen Cropper, Nancy Katz, Lauren Simon as well as two symposium participants, John Bouman and Dory Rand. I also thank symposium editor David King and the other student editors for their excellent work. I am very grateful for the enthusiastic support of my new colleagues and deans at the University of San Francisco, as well as for the prior years of unwavering support from my long-time home base at the University of Denver. Finally, I note that poor people would have far less hope without the unwavering efforts of Peter Edelman and Marian Wright Edelman.

¹ See FELICIA KORNBLUH, *THE BATTLE FOR WELFARE RIGHTS: POLITICS AND POVERTY IN MODERN AMERICA* 100–03 (2007).

² Based on recipients of Aid to Families with Dependent Children (AFDC) and Temporary Assistance for Needy Families (TANF). According to the U.S. Department of Health and Human Services, the average monthly number of total AFDC recipients for 1994 was over 14 million and the average monthly number of total TANF recipients for 1997 was under 4 million. These data and various other statistics regarding AFDC/TANF recipients are available at U.S. Department of Health and Human Services, TANF—Data and Reports, www.acf.hhs.gov/programs/ofa/data-reports (last visited Mar. 17, 2009).

does not pay as well as it did forty years ago. Low-income workers as a group have suffered their own sort of cliff effect. They have been left to fend for themselves in a labor market that simply has failed to provide sufficient jobs or living wages for far too many workers.

¶3 This symposium about Making Work Pay contributes to a growing body of poverty knowledge by reporting important details and offering insightful analysis about extensive ongoing welfare policy experimentation. Drawing on the concise blueprint for eliminating poverty that he spearheaded, Peter Edelman surveys the policy improvements needed to ensure that everyone receives a living income.³ Ron Haskins defends the sticks and carrots of welfare reform and argues that continuing the current course of requiring work and encouraging marriage remains the best strategy.⁴ Felicia Kornbluh reviews the history of proposals for a guaranteed income and concludes that adding such income support is necessary.⁵ John Bouman's team charts how various piecemeal work supports interact and proposes that the next policy step is to coordinate a more comprehensive and holistic strategy.⁶ Greg Duncan and his team emphasize the relative success of the New Hope experiment, which demonstrated that a voluntary "social contract" approach combining guidance from staff with a robust package of work supports (including earnings supplements, subsidized child care and health insurance, and, if necessary, community service jobs) helped to lift more full-time workers out of poverty than the local control group.⁷ Liz Schott argues that various public benefits remain under-utilized primarily due to the hassles of applying, and she encourages further study and more comprehensive use of online application technology.⁸ Richard Caputo assesses the closest facsimile to a guaranteed income, the Earned Income Tax Credit (EITC), and finds it to be well targeted to reach needy families, but underutilized.⁹

¶4 Departing somewhat from the papers that work within the realm of social policy, this introductory essay questions putting nearly all effort into social policy—which has failed to reduce poverty—and calls instead for reinvigorating other tactics and re-imagining the unfinished dream of economic justice. Indeed, what Martin Luther King, Jr. envisioned was an actual war on poverty, not merely the abbreviated, under-funded, and ultimately unsuccessful effort of the 1960s, nor the imposter war on welfare that has dominated our social policy effort since. But our social policy has not only failed to reduce poverty, it failed to focus long-needed attention on poverty and inequality. Nor

³ Peter Edelman, *Changing the Subject: From Welfare to Poverty to a Living Income*, 4 NW. J. L. & SOC. POL'Y 14 (2009), <http://www.law.northwestern.edu/journals/njls/v4/n1/2/>.

⁴ Ron Haskins, *What Works Is Work: Welfare Reform and Poverty Reduction*, 4 NW. J. L. & SOC. POL'Y 30 (2009), <http://www.law.northwestern.edu/journals/njls/v4/n1/3/>.

⁵ Felicia Kornbluh, *Is Work the Only Thing that Pays? The Guaranteed Income and Other Alternative Anti-Poverty Policies in Historical Perspective*, 4 NW. J. L. & SOC. POL'Y 61 (2009), <http://www.law.northwestern.edu/journals/njls/v4/n1/4/>.

⁶ John Bouman, Kinsey Alden Dinan & Nancy K. Cauthen, *Improving Work Supports: Using the Family Resource Simulator to Identify Problems and Test Solutions*, 4 NW. J. L. & SOC. POL'Y 85 (2009), <http://www.law.northwestern.edu/journals/njls/v4/n1/5/>.

⁷ Greg J. Duncan, Hans Bos, Lisa A. Gennetian & Heather Hill, *New Hope: A Thoughtful and Effective Approach to "Make Work Pay,"* 4 NW. J. L. & SOC. POL'Y 101 (2009), <http://www.law.northwestern.edu/journals/njls/v4/n1/6/>.

⁸ Liz Schott, *Applying Online: Using Technology to Enroll Low-wage Workers in Public Benefits*, 4 NW. J. L. & SOC. POL'Y 116 (2009), <http://www.law.northwestern.edu/journals/njls/v4/n1/7/>.

⁹ Richard K. Caputo, *EITC & TANF Participation among Young Adult Low-income Families*, 4 NW. J. L. & SOC. POL'Y 136 (2009), <http://www.law.northwestern.edu/journals/njls/v4/n1/8/>.

has social policy facilitated the political mobilization of poor people or secured their legal rights—two other means for seeking economic justice.

¶15 The question remains how to accomplish putting the economic justice topic on the table at which poor people have no seat. Without leverage provided by legal rights, a political movement, or a start-up investment (such as once represented by forty acres and a mule),¹⁰ social policy alone has left poor people to work for wages that do not provide enough to make ends meet, let alone to get ahead. It is not only time to change the policy topic. It is time to concede that social policy alone has failed to achieve economic justice. It is time to broaden the tactics to include more political mobilizing and more legal leveraging. The historic words of Frederick Douglass continue to ring true: “Power concedes nothing without a demand.”¹¹ In a society where political inclusion and social opportunity are defined in economic terms, surely it is not too much to demand that justice be economic as well.

II. NO ACRES, NO MULE

¶16 For social welfare policy, history never seems to recede. More than a century before Martin Luther King, Jr. led the civil rights movement, impoverished workers, enslaved and indentured on the bottom of the American economic pyramid, were promised forty acres and a mule as reparation for past exploitation of their labor and as a start-up investment toward their future economic independence. The promise was not only one of economic freedom, but also one of economic inclusion.¹² The condition was the newly endowed citizens had to agree to play by the rules—to harness the mule, plow the acres, and thereby secure their self-sufficiency by earning a fair return on their labor. But forty acres and a mule never materialized. Shortly after a very few acres were distributed, federal Reconstruction policy reversed course and the redistributed land was returned to its prior owners. As for the newly freed men and women, they were left to resume their work as low-wage laborers, with neither any restitution for past unpaid labor nor any future guarantee of fair distribution.¹³

¶17 Just as the politics of Reconstruction failed those most impoverished, so did judicial interpretation of the Thirteenth Amendment, which expressly prohibited both slavery and involuntary servitude. The Supreme Court effectively limited the Thirteenth Amendment’s reach to prohibiting specific “badges and incidents” of slavery.¹⁴ Although written as self-executing, the Thirteenth Amendment was judicially shackled and thus insufficient for tackling the task of transforming the political economy of low-wage work. After the Civil War, a system of peonage soon replaced slavery, with landowners paying workers an advance of their wages in exchange for labor over a specified term. When wages were insufficient to support families for as long as the

¹⁰ See *infra* text accompanying notes 12–13.

¹¹ Frederick Douglass, West India Emancipation Speech, Delivered at Canandaigua, New York (Aug. 4, 1857), in 2 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS 437 (Philip S. Foner ed., 1950).

¹² See Akhil Reed Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlements*, 13 HARV. J. L. & PUB. POL’Y 37 (1990) (arguing republican ideals of freedom, inclusion, and democratic participation require a minimum entitlement).

¹³ See Rhonda V. Magee, *The Master’s Tools, From the Bottom Up: Responses to African-American Reparations Theory in Mainstream and Outsider Remedies Discourse*, 79 VA. L. REV. 863, 885–91 (1993).

¹⁴ See *e.g.*, The Civil Rights Cases, 109 U.S. 3, 20 (1883).

contract, workers who broke their labor contracts were convicted of fraud and frequently sentenced to chain gangs.¹⁵ The government thus functioned as enforcer of peonage. The Supreme Court at least put a halt to this practice in a trilogy of decisions during the first half of the twentieth century that invalidated peonage convictions and ultimately declared that states could not “directly or indirectly command involuntary servitude, even if it was voluntarily contracted for.”¹⁶

¶8 Working for less than a living wage has remained a persistent problem at the bottom of the labor market. Regardless of whether the domestic economy has been dominated by agriculture, manufacturing, technology, or service sectors, the persistent reality has been that “disempowered groups have been concentrated in jobs with lower pay, less job security, and more difficult and dangerous working conditions.”¹⁷ Yet the Supreme Court has not been willing to ensure meaningful protection for low-wage workers. Quite to the contrary, the Court recently has seized upon technicalities to deny back wages due to workers. In one example, the Court ruled that the government could not require an employer who unlawfully fired a union organizer to pay back wages because the worker was an undocumented immigrant.¹⁸ The decision in *Hoffman Plastic* not only sparked a flurry of scholarly critique but also helped to inspire the emerging national movement of low-wage workers.¹⁹ In another example, the Court denied back wages to remedy years of sex discrimination because the employee had not discovered and complained within 180 days of receipt of the first discriminatory paycheck.²⁰

¶9 Dissonance between the rhetoric of supporting work and the reality of denying work’s rewards continues to confound. Joel Handler and Yeheskel Hasenfeld provide a comprehensive summary of the situation. In short, most poor people have been “playing by the rules” but not earning enough to make it.²¹ The wages at the bottom of the low-wage labor market have remained stagnant, even during the booming economy of the 1990s.²² Most benefits of the welfare state have gone to those who were better off rather than to those who were poor and near-poor.²³ Most poor people have always worked, but low-wage work has not provided a sufficient income to make ends meet for many.²⁴

¶10 Adding insult to injury, welfare reform has increased surveillance of recipients in the new workfare regime. In John Gilliom’s study of welfare recipients in southeastern Ohio, he summarized the current welfare surveillance system: “Any withholding of information or misrepresentation of facts regarding the makeup, resources, or income of the family is a violation of code, and the information systems for modern welfare are

¹⁵ See Julie A. Nice, *Welfare Servitude*, 1 GEO. J. ON FIGHTING POVERTY 340, 351–52 (1994).

¹⁶ *Id.* at 352 (citing *Pollock v. Williams*, 322 U.S. 4, 24 (1944)).

¹⁷ TERESA L. AMOTT & JULIE A. MATTHAEI, *RACE, GENDER, AND WORK: A MULTI-CULTURAL ECONOMIC HISTORY OF WOMEN IN THE UNITED STATES* 318 (1996).

¹⁸ *Hoffman Plastic v. NLRB*, 535 U.S. 137, 151 (2002).

¹⁹ See Maria L. Ontiveros, *Immigrant Workers’ Rights in a Post-Hoffman World—Organizing Around the Thirteenth Amendment*, 18 GEO. IMMIGR. L.J. 651, 672–78 (2005).

²⁰ See *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007) *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5–7 (2009).

²¹ JOEL F. HANDLER & YEHESELKEL HASENFELD, *BLAME WELFARE, IGNORE POVERTY AND INEQUALITY* 6–7 (2007).

²² *Id.* at 7.

²³ *Id.*

²⁴ *Id.* at 31.

specifically designed to catch the poor in these misrepresentations and petty crimes.”²⁵ In the words of one recipient, the welfare system knows “everything;” “they have you over the barrel;” “you have to watch every step like you are in prison.”²⁶ Yet while the system requires virtually complete transparency on the part of the recipient, it offers little transparency about its own rules and operation.²⁷ Perhaps a deeper irony is that the welfare system prohibits poor people from making money in the informal economy²⁸ in traditional ways, thereby perpetuating the very dependency it claims to decry.²⁹

III. NO POLITICS

¶11 While John Gilliom discovered courageous individual resistance to the intensified surveillance under the welfare reform regime, organized political resistance to the dominance of the welfare regime has not come close to the peak reached in the 1960s. Political mobilization seemed to hold great promise when civil rights leader Martin Luther King, Jr. added his political capital to the welfare rights movement’s call for economic justice. King urged policymakers to end poverty by developing a program for a national guaranteed annual income.³⁰ He based this proposal on his assessment of political economy: “[D]islocations in the market operations of our economy and the prevalence of discrimination thrust people into idleness and bind them in constant or frequent unemployment against their will,” and “no matter how dynamically the economy develops and expands, it does not eliminate all poverty.”³¹ King’s theory radically linked the phenomena of racism, economic exploitation, and war.³² But his prescription was relatively benign. He argued social policy should strive to make poor people consumers through either full employment or minimum incomes and, if necessary, create “new forms of work” that would utilize individual potential and enhance social good.³³

¶12 In his final address, delivered the evening before he was assassinated on April 4, 1968, King not only reflected rather eerily on the many threats against his life, but also issued a dire warning: “[I]n the human rights revolution, if something isn’t done, and in a hurry, to bring the colored peoples of the world out of their long years of poverty, their

²⁵ JOHN GILLIOM, *OVERSEERS OF THE POOR: SURVEILLANCE, RESISTANCE, AND THE LIMITS OF PRIVACY* 44 (2001).

²⁶ *Id.* at 50–51.

²⁷ *Id.* at 87 (“[T]he welfare bureaucracy which demands total disclosure from its clients cloaks itself in the secrecy of massive obfuscation.”).

²⁸ KATHRYN EDIN & LAURA LEIN, *MAKING ENDS MEET: HOW SINGLE MOTHERS SURVIVE WELFARE AND LOW-WAGE WORK* 172–78 (1997).

²⁹ *Id.* at 100.

³⁰ MARTIN LUTHER KING, JR., *I HAVE A DREAM: WRITING AND SPEECHES THAT CHANGED THE WORLD* 173 (James Melvin Washington, ed., 1992) (quoting from King’s presidential address entitled *Where Do We Go From Here?*, delivered to the Southern Christian Leadership Conference on Aug. 16, 1967). Taylor Branch credits former NAACP lawyer and current Children’s Defense Fund President Marian Wright Edelman with inspiring King to focus on poverty. TAYLOR BRANCH, *AT CANANN’S END: AMERICA IN THE KING YEARS 1965–68*, 641 (2006).

³¹ KING, *supra* note 30, at 173.

³² *Id.* at 177.

³³ *Id.* at 173. See also KORNBLUH, *supra* note 1, at 40, 115 (explaining “consumerist demands were constitutive of welfare rights politics” and movement organizers “argued that full citizenship in the postwar United States depended not only on having access to decent schooling for their children, but also on being able to feed and clothe their children decently, on having furniture in their homes, and on owning decent goods”).

long years of hurt and neglect, the whole world is doomed.”³⁴ Considering his tragic death the following day, as well as what has transpired globally in the forty years since, it seems King’s prescience more than matched his powerful prose.

¶13 Far less well known, but perhaps no less critical for poor people, was the untimely death the same year of the great constitutional law scholar, social movement leader, and anti-poverty activist, Jacobus tenBroek. TenBroek, who was blinded at the age of seven, had mobilized a national movement of blind people while earning B.A. and M.A. degrees in political science and L.L.B. and J.S.D. degrees in law, and eventually a professorship—all at Cal Berkeley.³⁵ TenBroek was an early scholarly pioneer in blending interdisciplinary methods to examine constitutional protections of liberty and equality. He wrote an important volume uncovering abuses of civil liberties during World War II and offered insights that remain highly relevant for today’s “war on terror.”³⁶ In 1949, he co-authored an article forecasting the general rise of the equal protection doctrine and the specific development of what he termed “suspect classification” analysis.³⁷ In the 1960s, he published a path-breaking trilogy of articles documenting how dual systems of family law regulated poor families differently and unequally as compared to other families.³⁸ Following these provocative articles, he edited a volume of essays by a group of scholars who debated and examined whether and how law generally and unequally regulated poor people.³⁹ In short, tenBroek’s scholarly work forged a path toward substantive equal protection for poor people.⁴⁰

¶14 Two major Supreme Court decisions protecting poor people closely tracked the course charted by tenBroek. One was the 1968 decision in *King v. Smith*, which invalidated a state’s denial of welfare benefits to children of a mother who cohabited with a “man in the house” that the state presumed to be their “substitute father.”⁴¹ Another was the 1969 decision in *Shapiro v. Thompson*, which invalidated welfare waiting periods for newcomers as infringing the constitutional right to travel that tenBroek had previously envisioned.⁴² But the progress of Poverty Law soon seemed to stop cold in its tracks;⁴³ not long after tenBroek’s untimely death in 1968, the Supreme Court issued a stern rebuke against welfare rights in *Dandridge v. Williams*.⁴⁴

³⁴ KING, *supra* note 30, at 195 (quoting from his final address entitled *I See the Promised Land* delivered at Mason Temple in Memphis on April 3, 1968).

³⁵ See FLOYD MATSON, *BLIND JUSTICE: JACOBUS TENBROEK AND THE VISION OF EQUALITY* 67–68, 75, 98 (2005).

³⁶ See generally JACOBUS TENBROEK, EDWARD N. BARNHART & FLOYD W. MATSON, *PREJUDICE, WAR AND THE CONSTITUTION* (1954).

³⁷ See generally Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949).

³⁸ This trilogy of articles was published as: Jacobus tenBroek, *California’s Dual System of Family Law: Its Origin, Development, and Present Status* (pts 1–3), 16 STAN. L. REV. 257 (1964), 16 STAN. L. REV. 900 (1964), 17 STAN. L. REV. 614 (1965).

³⁹ See *THE LAW OF THE POOR* (Jacobus tenBroek & Cal. Law Review eds., 1966).

⁴⁰ KORNBLUH, *supra* note 1, at 30.

⁴¹ 392 U.S. 309 (1968).

⁴² 394 U.S. 618 (1969). Professor tenBroek had set out the argument for such a constitutional right to travel in a paper presented at the National Conference of Social Work in 1955. See KORNBLUH, *supra* note 1, at 30.

⁴³ See generally ELIZABETH BUSSIERE, *(DIS)ENTITLING THE POOR: THE WARREN COURT, WELFARE RIGHTS, AND THE AMERICAN POLITICAL TRADITION* (1997) (analyzing the role of the judiciary and legal doctrine in the decision to deny constitutional welfare rights within historical and political contexts).

⁴⁴ 397 U.S. 471 (1970).

¶15 As always, the counterfactual confounds. Would King or tenBroek have been successful in elevating the nascent social movement for economic justice? Poor people seemed fully capable of movement mobilization. Historian Felicia Kornbluh’s excellent analysis of the ten-year grassroots welfare rights movement described participants as “energetic, eager to engage in collective action, concerned about their own and their children’s futures, passionate about political affairs, and both strategically and analytically acute.”⁴⁵

¶16 Yet the welfare rights movement never recovered from the series of devastating blows brought by the late 1960s and early 1970s. In addition to the loss of leaders such as King and tenBroek, Kornbluh reveals how the fledgling welfare rights movement faced relentless external pressures, including backlashes against both the war in Vietnam and the civil rights movement, a fiscal crisis spawned by an energy crisis, President Nixon’s abandonment of an ambitious welfare reform plan that partisans had designed in part to solidify a new electoral coalition, the ongoing splintering within the Democratic Party, and, of course, the end of the Warren Court.⁴⁶

¶17 Kornbluh’s recounting of the role of legal leveraging by the welfare rights movement stands as an important counterpoint to the widely held belief that legal rights strategies detract from efforts to mobilize grassroots political participation.⁴⁷ Kornbluh explains instead that welfare rights organizers understood rights as signifying full citizenship.⁴⁸ She documents how they successfully used administrative hearings to enforce statutory “minimum standards” entitlements, thereby obtaining funds for basic needs, such as clothing, furniture, and appliances.⁴⁹ In New York City alone, the number of welfare hearings increased from 188 in 1964 to 4233 in 1967.⁵⁰ Kornbluh concludes that “[l]awyers and legal information were themselves concrete benefits the movement could provide,”⁵¹ and that “activist welfare recipients did not believe that they had to choose between direct action and legal action; they saw the two as mutually supportive.”⁵² However, the window of opportunity for constitutional rights quickly closed.

IV. NO RIGHTS

¶18 In 1970, the Supreme Court’s decision in *Dandridge v. Williams*⁵³ all but extinguished any hope of constitutional rights for poor people. In *Dandridge*, the Court famously announced: “[T]he intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court.”⁵⁴ The Court made clear that it would apply only its most deferential form of

⁴⁵ KORNBLUH, *supra* note 1, at 183.

⁴⁶ *Id.* at 10, 12, 183.

⁴⁷ *See, e.g.*, GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991) (arguing that rights litigation and court decisions have not produced significant social change).

⁴⁸ KORNBLUH, *supra* note 1, at 64.

⁴⁹ *Id.* at 44.

⁵⁰ *Id.* at 73.

⁵¹ *Id.* at 81.

⁵² *Id.* at 86.

⁵³ 397 U.S. 471 (1970).

⁵⁴ *Id.* at 487.

rationality review to welfare regulations and would defer to the government even if its policies were “imperfect,” “unscientific,” and “illogical.”⁵⁵ For nearly forty years, *Dandridge* has functioned as a blanket immunization for welfare policy makers, providing cover for the courts as they routinely fail to scrutinize how welfare regulations affect the lives of the most economically vulnerable people.⁵⁶

¶19 Close examination of Poverty Law decisions by the Supreme Court reveals the extreme extent of the deconstitutionalization of claims brought by poor people. In brief, the Court has circumvented consideration of whether either poor people are a suspect class or poverty is a suspect classification, has applied rationality review in a reflexive manner to uphold governmental regulation, and has reversed the heightened scrutiny normally applied to infringements of fundamental rights when those affected were poor.⁵⁷

¶20 As a result of the categorical immunization of social and economic legislation and the broader deconstitutionalization of Poverty Law, federal legislation reducing welfare and attempting to reform recipients has been able to proceed largely unhindered by litigation claims or court decisions. In 1996, Congress easily ended the statutory entitlement to welfare benefits, placed a five-year lifetime limit on benefits, shifted funding to the block grant model allowing states to exercise considerable policy and administrative discretion, increased work requirements and sanctions, and diverted more funding to promoting marriage. For the most part, this sea change in social welfare policy has not been subjected to judicial scrutiny.

¶21 Without legal rights, problems associated with welfare reform policies largely have escaped not only judicial scrutiny, but also public dialogue. The marriage promotion policy provides a case in point. Congress enshrined its goal of promoting marriage in its overhaul of welfare in 1996, and the Bush Administration later added its own \$1.5 billion initiative to promote marriage.⁵⁸ But when Congress subsequently reauthorized welfare reform in 2005, it inserted a stricter work rate requirement for two-parent families than for other welfare families and also required states to comply with this federal mandate, even for programs funded entirely with state funds.⁵⁹ The government’s stance is not only contradictory, penalizing marriage while simultaneously promoting it, but also ineffective, as most of the government’s marriage promotion efforts have focused on relatively cheaper marketing and educational programs designed to encourage poor people to marry.⁶⁰ This literal promotional campaign is especially odd because a substantial body of research has shown that poor women already put marriage on a pedestal. They avoid marriage because it is too risky overall, not because they need to be persuaded of its value.⁶¹ Such a seemingly irrational policy should be vulnerable to legal or political challenge. It is highly unlikely that such interference with middle-class families would go unchallenged, yet there has been no judicial scrutiny or public dialogue

⁵⁵ *Id.* at 485.

⁵⁶ See Julie A. Nice, *No Scrutiny Whatsoever: Deconstitutionalization of Poverty Law, Dual Rules of Law, & Dialogic Default*, 35 *FORDHAM URB. L. J.* 629, 644 (2008) [hereinafter Nice, *No Scrutiny Whatsoever*].

⁵⁷ *Id.* at 637–55.

⁵⁸ See Julie A. Nice, *Promoting Marriage Experimentation: A Class Act?*, 24 *WASH. U. J. L. & POL’Y* 31, 35 (2007).

⁵⁹ *Id.* at 35–36.

⁶⁰ *Id.* at 37.

⁶¹ *Id.* at 37–38.

regarding this governmental interference with the integrity and autonomy of welfare families—apparently because they are poor.

¶22 To put it bluntly, it is now difficult to imagine rights talk by or on behalf of poor people. As Felicia Kornbluh documented, the short-lived national welfare rights movement collapsed in New York City after the 1960s.⁶² John Gilliom’s interviews with contemporary small-town and rural welfare recipients confirmed that they suffer a similar lack of rights or power:

These are frightened, often lonely, women and children who live on the edge of hunger and homelessness and in fear of their caseworkers and their neighbors. They are, for the most part, isolated from each other and unwilling or unable to talk with others about their experiences on welfare, their coping mechanisms, or their shared plight. They are in Appalachian small towns and rural areas that lack the economic vitality of other regions. They live in a time when the poor are vilified by local and national political leaders. They lack a knowledge of the system of rules and procedures that engulfs them, and a remarkable number of them are unaware of basic guarantees like Fair Hearings or legal counsel. They lack effective political or legal representation and they even lack the formal legal position that might lead to a mobilization of rights. Without the knowledge, the forum, or the resources to wage any sort of battles about what bothers them, they are stuck in a cycle of powerlessness.⁶³

The lack of rights and the absence of rights talk do not portend well for breaking this vicious cycle of powerlessness.

¶23 Within constitutional scholarship circles, most recent theories of interpretation reflect the dialogic role of constitutional law in shaping, and being shaped by, ongoing societal dialogue about the scope of constitutional rights.⁶⁴ Social movement scholars similarly have documented the important role of rights in developing consciousness of inequality, creating a common identity among those affected, organizing and mobilizing to assert rights as remedies, and cultivating a greater sense of inclusion and empowerment.⁶⁵ Poor people seem trapped in a perpetual stalemate: without rights, no politics and without politics, no rights. The result is a dialogic default on the very question of economic justice.⁶⁶

V. FORTY YEARS OF WELFARE POLICY EXPERIMENTATION

¶24 With neither politics nor rights, social policy has remained the dominant template for addressing poverty, especially since the declared demise of constitutional rights for poor people in the Supreme Court’s decision in *Dandridge v. Williams* nearly forty years ago. While the rise of the social policy domain provided hope for a solution to poverty,

⁶² See generally KORNBLUH, *supra* note 1.

⁶³ GILLIOM, *supra* note 25, at 90.

⁶⁴ Nice, *No Scrutiny Whatsoever*, *supra* note 56, at 658.

⁶⁵ *Id.* at 660.

⁶⁶ *Id.* at 657–63.

social policy instead contributed to the problem.⁶⁷ Many multi-disciplinary scholars have documented ways in which welfare policy itself has reflected entrenched political interests and wielded its own political influence. In short, these sobering critiques have demonstrated how welfare policy experimentation has perpetuated the neglect of poor people. A survey of prominent works by scholars in political science, sociology, history, anthropology, and social work who have examined social welfare policy demonstrates a consensus about the failure of social policy to direct attention to reducing poverty.

¶25 Even before Congress and President Clinton ended the federal statutory entitlement to welfare in 1996 and replaced it with time-limited workfare, political scientist Sanford Schram began sounding the alarm about how social policy focused attention on welfare rather than poverty. Schram described welfare policy as “driven by empirical questions about state-centered concerns regarding what incentives at what costs will get persons living in poverty to behave in certain ways.”⁶⁸ Using a postmodern theoretical framework, Schram documented how policy discourse has depoliticized poverty.⁶⁹ Incorporating the findings of scholars as diverse as economist Robert Haveman and historian Michael Katz, Schram emphasized how governmental policy has captured the social science agenda, rather than the other way around.⁷⁰ Schram noted that government-funded experimentation on poor people escaped political opposition by re-encoding poor people as “other.”⁷¹

¶26 Other leading welfare policy scholars have confirmed this phenomenon of what might be called reverse-capture. For example, sociologist Rogers-Dillon has documented how state welfare policy experimentation (via waivers from federal rules) both shaped the national political debate and also transformed the institutional structures of welfare that had previously resisted change.⁷² The welfare waiver process channeled policy experimentation toward a work-first approach, with time-limited benefits, enforced by sanctions.⁷³ The key question for welfare reform was how many families would not be able to find work despite good faith efforts.⁷⁴ Rogers-Dillon revealed how the national shift to a work-first approach was based on Florida’s early pilot program that defined any welfare recipient who had not found a job as noncompliant and therefore not eligible for the program’s job guarantee.⁷⁵ With this “bit of administrative circularity,” the Florida program accomplished success essentially by eliminating anyone who remained unemployed from the study. Nonetheless, the announcement of success was echoed by leading journalists such as Jason DeParle of the *New York Times* who reported in his front-page article that “not one” participant in the Florida program “needed a public job.”⁷⁶ Unfortunately, not even MDRC—the evaluation corporation that contracted with the state to assess its program—pointed out that the state’s administrative practice had

⁶⁷ HANDLER & HASENFELD, *supra* note 21, at 47 (listing social policy as among the factors identified for the persistence of high poverty levels in the United States).

⁶⁸ SANFORD F. SCHRAM, WORDS OF WELFARE: THE POVERTY OF SOCIAL SCIENCE AND THE SOCIAL SCIENCE OF POVERTY, at xxxvi (1995).

⁶⁹ *Id.* at 6.

⁷⁰ *Id.* at 8–9.

⁷¹ *Id.* at 15.

⁷² ROBIN H. ROGERS-DILLON, THE WELFARE EXPERIMENTS: POLITICS AND POLICY EVALUATION 7 (2004).

⁷³ *Id.* at 22.

⁷⁴ *Id.* at 20.

⁷⁵ *Id.* at 90.

⁷⁶ *Id.*

eliminated the job guarantee.⁷⁷ As Rogers-Dillon lamented: “It would be a bitter irony if the form and language of policy experimentation, promoted by academics and intellectuals to make policy choices more rational and transparent, created a back channel through which the American welfare state could be fundamentally altered with little public notice or debate.”⁷⁸

¶27 Social work professor William Epstein issued a more scathing critique, arguing that social scientists had perpetuated the use of welfare policy as a political football on the ideological battleground.⁷⁹ Epstein characterized welfare reform as a political symbol “fashioned to fit the mood of the nation” rather than a result of rigorous science.⁸⁰ In a potential harbinger of today’s economic crisis, Epstein concluded:

The caste-like social attitudes that administer the stigma of deservingness are the greatest barriers to a broad social attack on cultural inequality, reinforcing society’s commitment to social efficiency. A generous policy to address need probably awaits a social disaster, one that inspires that realization that American civic culture is the nation’s most cherished achievement and that it requires the deep sustenance of public welfare—programs in support of family, community, jobs, and so forth.⁸¹

¶28 Anthropologists Judith Goode and Jeff Maskovsky added a collection of studies to the growing body of evidence that poverty research “has contributed, inadvertently or otherwise, to the demonization of the poor” and “that poverty is a direct outgrowth of uneven capitalist development; that the meanings, practices, and identities of those who are impoverished vary across geography, history, and multiple axes of difference; and that poor people engage in a number of collective and individual strategies that are designed not only to survive the conditions of poverty but to change them.”⁸² These studies made clear that poor people desire to alter the political economy that supports extreme economic stratification.

¶29 Historian Alice O’Connor agreed that welfare politics repeatedly has trumped scientific knowledge and that the poverty knowledge community has been complicit in both making welfare dependency the key reform issue and supporting time limits and other punitive measures as the framework for “neoliberal welfare reform.”⁸³ Moving beyond critique toward solutions, O’Connor called for a new poverty knowledge, one that would shift its focus from welfare dependency to political economy, and to open up inquiry “into markets as social and political as well as economic institutions, shaped by the relationships of class, gender, and race as much as by supply and demand; and into the historical, political and institutional origins of late-twentieth-century postindustrial

⁷⁷ *Id.* at 174.

⁷⁸ *Id.* at 180.

⁷⁹ WILLIAM M. EPSTEIN, *WELFARE IN AMERICA: HOW SOCIAL SCIENCE FAILS THE POOR* (1997).

⁸⁰ *Id.* at 230.

⁸¹ *Id.* at 233.

⁸² *THE NEW POVERTY STUDIES: THE ETHNOGRAPHY OF POWER, POLITICS, AND IMPOVERISHED PEOPLE IN THE UNITED STATES* 10, 17 (Judith Goode & Jeff Maskovsky eds., 2001).

⁸³ ALICE O’CONNOR, *POVERTY KNOWLEDGE: SOCIAL SCIENCE, SOCIAL POLICY, AND THE POOR IN TWENTIETH-CENTURY U.S. HISTORY* 286 (2001).

capitalism that have generated such vast, and growing, inequalities of income and wealth.”⁸⁴

¶30 Despite this critical consensus among scholars who have studied the poverty knowledge industry, social policy has continued to focus on individual reform and largely ignored structural political economy.

VI. DEVELOPING HUMAN CAPABILITIES

¶31 How will this tendency to ignore political economy affect global poverty if other nations follow the lead of the United States on welfare reform? Comparing the United States to other developed nations, three stark facts stand out. First, the poverty rate in the United States is the third highest, even though our per capita income is the highest;⁸⁵ second, the child poverty rate in the United States is the highest;⁸⁶ and third, our labor stratification is the widest, with twenty-five percent of workers in the United States receiving low-wages, nearly double the average of other industrialized nations.⁸⁷

¶32 These dire circumstances may well result in the downfall of the American economy. Because an educated workforce is extremely important in a global and technological economy, it is deeply troubling that adult recipients of TANF tend to have below-average schooling.⁸⁸ The economic ramifications have not escaped the notice of a diverse group of thinkers. For example, conservative commentator David Brooks has argued that the United States achieved its productivity and growth through education; that our educational progress diminished around 1970; and that inequality subsequently widened as educational progress lagged behind technological change.⁸⁹ Brooks has concluded: “Boosting educational attainment at the bottom is more promising than trying to reorganize the global economy.”⁹⁰ Similarly, the more liberal commentator, Nicholas Kristof, has agreed, citing data showing that the United States achieved its economic dominance through mass education but has steadily lost ground since the 1970s.⁹¹

¶33 Along with economist Amartya Sen,⁹² legal philosopher Martha Nussbaum also has urged what she calls the “capabilities approach,” that is, for government “to secure for all citizens the prerequisites of a life worthy of human dignity.”⁹³ Nussbaum identified our reluctance to recognize welfare rights as the fact that distinguishes the

⁸⁴ *Id.* at 292.

⁸⁵ HANDLER & HASENFELD, *supra* note 21, at 68.

⁸⁶ *Id.* at 17.

⁸⁷ *Id.* at 30–31.

⁸⁸ *Id.* at 59.

⁸⁹ David Brooks, *The Biggest Issue*, N.Y. TIMES, July 29, 2008, at A19.

⁹⁰ *Id.*

⁹¹ Nicholas D. Kristof, *Our Greatest National Shame*, N.Y. TIMES, February 15, 2009, at WK 11 (“One of last year’s smartest books was ‘The Race Between Education and Technology,’ by Claudia Goldin and Lawrence F. Katz, both Harvard professors. They offer a wealth of evidence to argue that America became the world’s leading nation largely because of its emphasis on mass education at a time when other countries educated only elites (often, only male elites). They show that America’s educational edge created prosperity and equality alike—but that this edge was eclipsed in about the 1970s, and since then one country after another has surpassed us in education. Perhaps we should have fought the ‘war on poverty’ with schools—or . . . with teachers.”).

⁹² AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999).

⁹³ Martha C. Nussbaum, *Foreword: Constitutions and Capabilities: “Perception” Against Lofty Formalism*, 121 HARV. L. REV. 5, 7 (2007).

United States from the developing world.⁹⁴ She conceded a fair distribution would guarantee citizens merely adequate, rather than equal, capabilities.⁹⁵ Contrary to the mainstream constitutional law consensus, Nussbaum has argued that social and economic welfare rights are in fact “deeply embedded in many aspects of our history and our constitutional tradition,”⁹⁶ and that judges have a duty to consider what stands between members of groups subject to historical discrimination and “the opportunity to function as fully equal citizens.”⁹⁷ Nussbaum included social welfare rights as essential to equal citizenship rather than merely as an exchange for work. No doubt the welfare rights organizers four decades ago would have agreed, as they specifically resisted their economic exclusion in a society that has defined inclusion in economic terms. Nussbaum thus has identified a philosophical foundation for welfare rights and economic justice. It is not too hard to conceive of economic justice after all.

VII. CONCLUSION

¶34 The silver lining of our current economic crisis may be the rare opportunity for a more open and meaningful dialogue about our political economy. Martin Luther King, Jr., Jacobus tenBroek, and welfare rights organizers were urging such a conversation forty years ago, but it was cut short by their untimely deaths and by dominant institutions, including the social welfare policy industry, serving entrenched interests. Surely our understanding of political economy has advanced sufficiently to support an actual commitment to reducing poverty and inequality, not merely to reducing welfare costs.

¶35 A changed social policy itself could alleviate much poverty. Joel Handler and Yeheskel Hasenfeld charted a clear course for reducing poverty based on their comprehensive review of the vast literature regarding welfare experimentation. Handler and Hasenfeld propose providing a minimum adequate standard budget for impoverished families (including a universal children’s allowance and child care supports); improving the low-wage labor market (by guaranteeing jobs for all who want to work, raising the minimum wage, raising and improving the EITC, and improving labor conditions); providing government-subsidized health care; improving unemployment insurance and disability insurance; and investing in human capital.⁹⁸ All of this requires political will. Poor people cannot be expected to build the necessary political support alone. They need social policy analysts who will not only guard against their own complicity but also will turn their attention to examining how the structural political economy contributes to the perpetuation of poverty. As with other social movements, the struggle for the advancement of poor people will also need organizers and lawyers. Mobilizing social movements and leveraging legal rights certainly present complex challenges related to assessing and managing the pros and cons of these tactics in various political circumstances. But hope is never hollow when poor people have so little to lose.

⁹⁴ *Id.*

⁹⁵ *Id.* at 13.

⁹⁶ *Id.* at 9.

⁹⁷ *Id.* at 73.

⁹⁸ HANDLER & HASENFELD, *supra* note 21, at 316.