

# The Politics of Race, Rights, and Needs—and the Perils of a Democratic Victory in Post-Welfare America: Some Reflections on the Work of Felicia Kornbluh

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Our first black or first woman President might well help reinvigorate the centuries-old category of the “undeserving poor”<sup>1</sup> and help refasten it on poor women of color. That is a likely, though unintended, consequence of the kinds of social policies both Hillary Clinton and Barack Obama promise to pursue in the “post-welfare” world of early twenty-first century America. The work of Felicia Kornbluh provides an invaluable lens through which to ponder it. She chronicles the strategies and fortunes, insights and blindness of the welfare rights movement of the 1960s, which are germane in trying to imagine what might push a Democratic administration toward more pro-poor policies in the dramatically different world of the 2010s.

Social rights are the vulnerable stepchildren of the rights family, and nowhere more so, among the world’s wealthy democracies, than in the United States. Consider the recent jurisprudence of the U.S. Supreme Court. It frequently declares that our Constitution confers no “affirmative” rights<sup>2</sup>: no right to welfare, housing, or education. Outside the courts, in political discourse, “social rights” also sound like a foreign currency. “Welfare” is seen as a source of disrespect, a threat to citizenship and equal standing, not a means to their realization. But Americans forget. Franklin Roosevelt and the New Deal Democrats in Congress declared social rights to be “self-evident” truths

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1. See, e.g., MICHAEL B. KATZ, *THE UNDESERVING POOR: FROM THE WAR ON POVERTY TO THE WAR ON WELFARE* 5 (1989).

2. See, e.g., *DeShaney v. Winnebago County Dept. of Soc. Serv.*, 489 U.S. 189, 195 (1989) (“[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State’s power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without ‘due process of law,’ but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means.”). See generally David P. Currie, *Positive and Negative Constitutional Liberties*, 53 U. CHI. L. REV. 864 (1986) (comparing German and American constitutional jurisprudence on the duties of government).

for the twentieth century.<sup>3</sup> Alongside the “old, sacred” civil and political rights, Roosevelt declared that a “new economic constitutional order” must guarantee rights to “adequate food, clothing and recreation;” “a good education;” “a decent home;” “adequate medical care;” and “adequate protection from the economic fears of old age, sickness, accident, and unemployment.”<sup>4</sup> Such social rights talk was a U.S. export in the post-World War II world, dispatched from America to influence post-war international charters and constitutions,<sup>5</sup> and in the 1960s and 1970s, U.S. courts pioneered the judicial elaboration and enforcement of social rights.<sup>6</sup> Thus, while today’s Supreme Court would have you think that social rights and the solicitude for them in many of the world’s great constitutional courts are foreign to the American constitutional experience, the Court’s position is misleading. Many state courts to this day have adjudicated social rights claims and produced remedial schemes comparable to what’s under construction abroad.<sup>7</sup> Nonetheless, the Supreme Court’s increasingly open hostility toward “affirmative” or “welfare” rights does reflect a broader disillusionment with the New Deal and the “welfare state,” as these came to be understood in late twentieth-century America.<sup>8</sup> It

3. Democratic Party Platform of 1936 (June 23, 1936), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29596>.

4. Franklin Delano Roosevelt, “Unless There Is Security Here at Home, There Cannot Be Lasting Peace in the World”: Address to Congress on the State of the Union (Jan. 11, 1944), in 13 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 32, 41 (Samuel I. Rosenman ed., 1950).

5. See, e.g., Maria Foscarinis, *Advocating for the Human Right to Housing: Notes from the United States*, 30 N.Y.U. REV. L. & SOC. CHANGE 447, 458-59 (2006) (“[The Universal Declaration of Human Rights] was adopted by the U.N. in 1948, with the advocacy of Eleanor Roosevelt, the American member of the U.N. Commission on Human Rights. The Declaration includes a right to housing as part of its broader assertion that ‘[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.’” (quoting Universal Declaration of Human Rights, G.A. Res. 217A, art. 25, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948), available at <http://www.un.org/Overview/rights.html>)) (citation omitted). But see Dieter Grimm, *The Protective Function of the State*, in EUROPEAN AND U.S. CONSTITUTIONALISM 137 (Georg Nolte ed., 2005) (distinguishing social rights and affirmative rights and arguing that the latter are of European origin).

6. See, e.g., Currie, *supra* note 2, at 872-890 (reviewing cases where American courts may be said to have interpreted constitutional provisions to afford positive rights, but concluding that the relative success of the social welfare state in both Germany and United States has come from legislative and executive action).

7. See, e.g., Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661, 665-66 (N.Y. 1995) (“We recognized . . . that the Education Article imposes a duty on the Legislature to ensure the availability of a sound basic education to all the children of the State. . . . The State must assure that some essentials are provided. Children are entitled to minimally adequate physical facilities . . . . Children are also entitled to minimally adequate teaching of reasonably up-to-date basic curricula . . . .”); see also Susan Haigh, *Yale Students To Argue Schools Case Before State High Court*, NEWSDAY, Apr. 21, 2008, available at <http://www.newsday.com/news/local/wire/connecticut/ny-bc-ct--educationlawsuit0421apr21,0,1975448.story> (“Courts in 18 states including New York, Massachusetts, New Hampshire and New Jersey have ruled their constitutions guarantee an adequate education to all students.”).

8. See, e.g., *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 195 (1989); *Bowen v. Gilliard*, 483 U.S. 587, 604-05 (1987) (“Congress is not, by virtue of having instituted a social welfare program, bound to continue it at all, much less at the same benefit level. . . . It would be quite strange indeed if, by virtue of an offer to provide benefits to needy families through the entirely

was, after all, the last Democratic President of the twentieth century who signed into law the Personal Responsibility and Work Opportunity Reconciliation Act of 1996,<sup>9</sup> repealing the nation's sole federal guarantee of a minimum subsistence for the poorest Americans, while declaring an "end [to] welfare as we know it."<sup>10</sup>

Social rights may be coming back, however. For the first time in a generation, we find the leading presidential contenders championing a universal right to health care and to decent education.<sup>11</sup> Their rhetoric often sounds in the classic key of social citizenship<sup>12</sup>: certain basic social goods must be available to each and every member of the national community; the market must not govern who enjoys them. No one can justly be excluded. Every American is *entitled* to a decent education. Every American has a *right* to health care.<sup>13</sup>

And what about the rest of the bundle of basic goods and opportunities, the lack of which puts millions of Americans at constant risk of physical and social debilitation? What kind of "War on Poverty" might one expect from a Democratic White House and Congress in 2009? What answer to the predicament of tens of millions of Americans afflicted by chronic joblessness, underemployment and the lack of decently-paid work? What response to the conditions of poor women of color and their families—the kind of Americans who formed the rank and file of the welfare rights movement in the 1960s and

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voluntary AFDC program, Congress or the States were deemed to have *taken* some of those very family members' property."); *Dandridge v. Williams*, 397 U.S. 471, 897 (1970) ("The Constitution may impose certain procedural safeguards upon systems of welfare administration . . . . But the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.") (citation omitted).

9. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub.L. No. 104-193, 110 Stat. 2105 (codified in scattered sections of 42 U.S.C. & 8 U.S.C.).

10. See JOEL F. HANDLER, *SOCIAL CITIZENSHIP AND WORKFARE IN THE UNITED STATES AND WESTERN EUROPE: THE PARADOX OF INCLUSION I* (2004) (quoting President Bill Clinton); *but see* Eric Pianin, *It's Not the End of 'Welfare As We Know It': Clinton Reform Would Leave Many Recipients Unaffected by New Work Requirement*, WASH. POST, June 11, 1994, at A4 ("President Clinton promised during the campaign to 'end welfare as we know it,' yet the comprehensive plan he will submit to Congress next week would leave a vast number of welfare recipients in the old system for years to come.").

11. See, e.g., Hillary for President, Providing Affordable and Accessible Healthcare, <http://www.hillaryclinton.com/issues/healthcare/> (last visited Apr. 30, 2008) ("If you're one of the tens of million Americans without coverage or if you don't like the coverage you have, you will have a choice of plans to pick from and that coverage will be affordable."); On the Issues: Every Political Leader on Every Issue, Hillary Clinton in Take Back America 2007 Conference, [http://www.ontheissues.org/Archive/TBA\\_2007\\_Hillary\\_Clinton.htm](http://www.ontheissues.org/Archive/TBA_2007_Hillary_Clinton.htm) (last visited Apr. 30, 2008) ("Let's recommit ourselves to the idea that every young person in America has the right to a high-quality education, from pre-school all the way through college."); Sen. Barack Obama, Cutting Costs and Covering America: A 21st Century Health Care System (May 29, 2007), available at [http://www.barackobama.com/2007/05/29/cutting\\_costs\\_and\\_covering\\_ame.php](http://www.barackobama.com/2007/05/29/cutting_costs_and_covering_ame.php) ("I also believe that every American has the right to affordable health care.").

12. See, e.g., William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1 (1999).

13. See sources cited *supra* note 11.

1970s, which Felicia Kornbluh's *The Battle for Welfare Rights*<sup>14</sup> has analyzed and chronicled in brilliant detail?

The welfare rights movement dubbed the right for which it struggled a right to the fulfillment of "basic needs."<sup>15</sup> The struggle revolved around the provisions of Aid to Families with Dependent Children (AFDC), the same federal statutory program the White House and Congress repealed in 1996.<sup>16</sup> It was this decentralized and deeply gendered and caste-ridden benefits program, stamped with many of the centuries-old degradations of poor relief, that welfare rights activists and advocates sought to transform into a dignifying right to a guaranteed income.<sup>17</sup>

It is worth pausing for a moment to ask why a "battle for welfare rights" was the central form that grass-roots and legal activism took with respect to urban poverty in the 1960s. Why was welfare the terrain on which so many 1960s community activists, federal policy-makers, and progressive lawyers came to wage their War on Poverty? The answer begins with the constraints and opportunities created by inherited statutory, institutional, and ideological frameworks—the results of the victories and defeats of earlier efforts to forge a more substantive and social array of citizenship rights. The way that New Deal social reforms had been tailored in the 1930s and 1940s to propitiate the rulers of the Jim Crow South went a long way toward depriving 1960s advocates of larger reform possibilities (like the kind of massive public investments in the inner cities sought by Martin Luther King's 1968 Poor People's March on Washington) and of broader legal channels along which to try to nudge the Warren Court in its concern for the poor.

During the 1930s and 1940s, the New Deal White House and Northern New Dealers in Congress envisioned a broad and encompassing program of social insurance, full employment, and national labor standards and union protections. But mass disenfranchisement in the South (not only blacks, but also the majority of poor and working-class white southerners lost the vote by dint of devices like the poll tax) meant that an astonishingly small proportion of the region's adult population was entitled to vote.<sup>18</sup> The "Solid South" was

14. FELICIA KORNBLOUH, *THE BATTLE FOR WELFARE RIGHTS: POLITICS AND POVERTY IN MODERN AMERICA* (2007).

15. For the language of "basic needs," see Felicia Kornbluh, *Redistribution, Recognition, and Good China: Administrative Justice for Women Welfare Recipients Before Goldberg v. Kelly*, 20 *YALE J.L. & FEMINISM* 165, 177 n.40 (2008) (citing N.A., *June 30th Nationwide Welfare Demonstrations Roundup*, NOW! NAT'L WELFARE LEADERS NEWSLETTER, July 3-10, 1967, at 2; George Wiley, Executive Director, NWRO, *Letter to Welfare Rights Leaders and Organizers*, NOW!, May 2, 1967, at 2; *Untitled Article*, NOW!, Aug. 7, 1967, at 9).

16. Title IV of the Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620 created the ADC program, which was changed to AFDC in 1962. Pub. L. No. 87-543, 76 Stat. 172. See LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE 1890-1935*, at 1 (1994).

17. See generally KORNBLOUH, *supra* note 14 (discussing welfare rights activists' efforts to establish a guaranteed income).

18. William A. Forbath, *The New Deal Constitution in Exile*, 51 *DUKE L.J.* 165, 208-09 (2001).

ruled by an old planter and new industrial oligarchy.<sup>19</sup> That oligarchy chose the bulk of the South's congressional delegation, and those Dixiecrat Congressmen, in turn, insisted that New Deal social provision and labor standards rest on decentralized state administration and demanded that key bills exclude the main categories of southern labor, else Congress would fall guilty of ruining "the splendid gifts of God to the South."<sup>20</sup> So it went with each core reform: All were stripped of any design or provision that threatened the separate southern labor market and its distinctive meld of class and caste relations, its racial segmentation, and its low wages.<sup>21</sup> More encompassing and inclusive bills, bills with national rather than local standards and administration, enjoyed solid support from the Northern Democrats (and broad but bootless support from disenfranchised southern blacks and poor whites); but the Southern "Dixiecrats" exacted a price. By the late 1930s, Southern Democrats openly joined ranks with conservative members of the minority-party Republicans, who also had no use for a broad social rights agenda. This conservative coalition thwarted Roosevelt's efforts to enact national health insurance, to remedy the many gaps and exclusions in the Social Security Act, and to create a federal commitment to full employment.<sup>22</sup>

Social citizenship aspirations did not vanish, however, or rest content with their partial public enactment. Instead, they flowed into private channels. By the mid-1940s, the new industrial unions emerged as the only powerful, organized constituency for social and economic rights. Blocked at every legislative crossroads, the unions gradually abandoned efforts to "complet[e] the New Deal,"<sup>23</sup> and during the 1940s to 1960s fashioned a robust *private* welfare state by bargaining for private entitlements to job security, pensions, and health insurance for their members.<sup>24</sup> Beyond the unionized sectors of the economy, industrial prosperity, liberal tax incentives, and the hope of thwarting unionization prompted large firms to adopt the main features of this generous publicly subsidized, private welfare system.<sup>25</sup> So social and economic rights talk fell into disuse, and the rigid consensus politics of the Cold War eclipsed New Deal liberalism.<sup>26</sup>

19. *Id.* at 170.

20. JAMES C. COBB, *THE SELLING OF THE SOUTH: THE SOUTHERN CRUSADE FOR INDUSTRIAL DEVELOPMENT 1936-1980*, at 100 (1982) (quoting Sen. Ellison Smith).

21. Forbath, *supra* note 18, at 205-07; see also GORDON, *supra* note 16, at 5.

22. Forbath, *supra* note 18, at 205-09.

23. William E. Forbath, *Caste, Class, and Equal Citizenship*, in *MORAL PROBLEMS IN AMERICAN LIFE: NEW PERSPECTIVES ON CULTURAL HISTORY* 167, 192 n.96 (Karen Halttunen & Lewis Perry eds., 1998) (citing RICHARD BENSEL, *SECTIONALISM AND AMERICAN POLITICAL DEVELOPMENT 1880-1980*, at 152-68 (1984)); see also MARION CLAWSON, *NEW DEAL PLANNING: THE NATIONAL RESOURCES PLANNING BOARD*, at 283-332 (1981); Ira Katznelson, Kim Geiger & Daniel Kryder, *Limiting Liberalism: The Southern Veto in Congress, 1933-1950*, 108 *POL. SCI. Q.* 283, 289 (1993).

24. See, e.g., JENNIFER KLEIN, *FOR ALL THESE RIGHTS: BUSINESS, LABOR, AND THE SHAPING OF AMERICA'S PUBLIC-PRIVATE WELFARE STATE* 204-57 (2003).

25. See *id.*

26. *Id.* at 254.

When the vocabulary of social rights was revived in the 1960s, its shape and constituency had changed. Both the generous new private welfare state and the segmented and caste-ridden system of public social insurance bequeathed by the New Deal excluded most African-Americans, whose anger exploded in all the large cities of the North, where millions of Southern blacks had moved over the preceding decades to escape Jim Crow and rural unemployment. For them, public assistance stood as the sole federal protection against poverty, and because of this many of the new social programs of the 1960s were targeted at minorities.

Many African-American leaders, like Dr. King, Bayard Rustin, A. Phillip Randolph, and others, assailed the inadequacies of the 1960s programs, decrying job training without jobs. They presciently pointed out the "displacement of lesser and unskilled workers" in the nation's "high-wage heavy industries into which Negroes have moved since World War I" and the disappearance of decently paid unskilled work in the nation's cities, and declared to Congress that "fair employment" without "full employment" was building on sand.<sup>27</sup> King and the others tried to craft a broad new social rights agenda, insisting that "our full citizenship" demanded more than civil rights and calling for a "contemporary social and economic Bill of Rights," that echoed Roosevelt's "[S]econd Bill."<sup>28</sup> King's "Freedom Budget for all Americans" envisioned an ambitious constellation of social rights, centered, like Roosevelt's, around decent incomes, housing, and full employment; it called for "a multi-billion dollar social investment to destroy the racial ghettos of America, decently house both the black and white poor, and to create full and fair employment in the process."<sup>29</sup> As Randolph put it, it would be black America's "New Deal thirty years late."<sup>30</sup>

Progressive white labor leaders supported the idea, and so did old New Dealers in the Johnson administration.<sup>31</sup> But the idea got nowhere. Most AFL-CIO leaders and most of organized labor's rank and file cared about the decent wages, pensions, and job security measures in their own union contracts, not about raising hell until government provided these things for everyone.<sup>32</sup> Thus, the mass constituencies and organizational support for King's ambitious "poor people's" agenda were not there. The gulf between the contract unionism of organized labor and the public social citizenship envisioned by King and the old New Dealers was too great.

What Congress and the Johnson administration's War on Poverty supplied instead were community action programs, attorneys, social workers, and

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27. Forbath, *supra* note 12, at 86-87 (quoting Rustin).

28. Roosevelt, *supra* note 4, at 41.

29. Forbath, *supra* note 12, at 87.

30. *Id.*

31. *Id.* at 88.

32. *Id.* at 88-89.

community resident-activists, often veterans of civil rights activism.<sup>33</sup> They set about getting poor people to apply for welfare and attacking the social and legal barriers to their obtaining it. Centuries-old restrictions were broken down by a combination of civic unrest and federally funded organizing and litigation. By combining education, mobilization, and organized grass-roots challenges (including the “fair hearing” campaign described in Kornbluh’s article)<sup>34</sup> with hundreds of suits brought to broaden eligibility standards and challenge local regulations on AFDC benefits, the welfare rights movement went a remarkable distance toward transforming a grant to the states, administered as meanly as local officialdom saw fit, into a no-strings and no-stigmas national right to welfare.<sup>35</sup>

Kornbluh’s superb new book demonstrates that the welfare rights movement was unique in the annals of American reform.<sup>36</sup> Never before had poor African-American women formed the rank and file of a nationally organized social movement. The movement assailed and disrupted public welfare offices and programs;<sup>37</sup> yet the federal government paid for its community organizers and legal advocates.<sup>38</sup> The movement’s rights talk and conception of equal citizenship broke sharply with those of past movements for social and economic justice. Earlier movements had forged links between work and citizenship: “wage slavery” destroyed the workingman’s liberty and the integrity of his ballot;<sup>39</sup> the eight-hour day and the right to unionize were essential to republican citizenship;<sup>40</sup> “a fair day’s pay for a fair day’s work;”<sup>41</sup> and equal pay for equal work.<sup>42</sup> Like these earlier movements, the welfare rights movement claimed decent income as a right. Unlike them, it did not tie this right to waged work.<sup>43</sup>

From the early nineteenth century through the New Deal, generations of reformers had constructed their ideals of economic justice for the poor and working classes in a gendered fashion, around the workingman-citizen: Decent income and social provision belonged, as of right, to (presumptively white male) waged workers, and to their economic “dependents.” Poor black women,

33. See KORNBLUH, *supra* note 14, at 9; see generally *id.* at 14-38 (describing the beginnings of the welfare rights movement).

34. Kornbluh, *supra* note 15.

35. See generally KORNBLUH, *supra* note 14 (chronicling political and legal efforts of the welfare rights movement).

36. *Id.*

37. See, e.g., *id.* at 1.

38. See, e.g., *id.* at 33-34 (community organizers); *id.* at 69 (legal advocates).

39. William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767, 806-12.

40. *Id.*

41. WILLIAM CAHN, *A PICTORIAL HISTORY OF AMERICAN LABOR* 139 (1972) (American Federation of Labor motto).

42. ALICE KESSLER-HARRIS, *OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES* 155 (1982).

43. See, e.g., KORNBLUH, *supra* note 14, at 3, 143.

Kornbluh points out, always had toiled outside their homes, but they never had been welcomed into the producers' republic of earlier reformers.<sup>44</sup> By the 1960s, she shows us, poor black women had enough experience in urban labor markets to know that decent jobs were hard to find, and enough experience with workfare programs to think them coercive and demeaning.<sup>45</sup>

Instead, the new welfare rights movement directed itself at a consumers' republic. "Give us Credit for being American" was one proposed slogan for the National Welfare Rights Organization's (NWRO) campaign demanding Sears credit cards for welfare recipients.<sup>46</sup> For them a guaranteed adequate income was an unconditional citizenship right, essential to equal respect and an appropriate touchstone of equality in affluent post-World War II America. As Kornbluh puts it, "To be unable to shop, unable to make one's own choices in the market, or simply to lack goods that were considered basic necessities, was to lack a critical dimension of social personhood or citizenship in postwar America."<sup>47</sup>

This rupture with the reform vocabulary of movements past was both a strength and a limitation of the NWRO. It highlighted the coercive and gendered aspects of older employment-based ideals of economic and distributive justice. Gaining welfare or "basic needs" as a matter of right would have relieved unwarranted suffering and indignity. But even had the movement and its friends on the bench gotten that far before the political and judicial tides turned against them, gaining welfare as a matter of right would not do enough, by itself, to help poor African-Americans, and other similarly situated and racialized poor people, make their way into a shared social destiny of work and opportunity. "Welfare rights" risked simply modernizing the badges of racial and economic subordination instead of abolishing them. Likewise, building a social movement around AFDC beneficiaries, who were overwhelmingly women with young children, led to the absence of poor men in a movement that claimed to represent the nation's poor and their needs. It led to a rights rhetoric that downplayed what King and other male civil rights leaders highlighted: the disappearance of decently paid unskilled industrial jobs from the nation's old industrial regions and center cities. "Welfare rights" risked saddling poor African Americans with a new variant of the old racist imagery of blacks as idle and dependent.

But, as Kornbluh points out, the NWRO played the hand it was dealt. Probably only by building on AFDC's provisions could a social movement of the poorest, most powerless Americans have been forged. By making AFDC-eligible women the movement's constituents, welfare rights organizers had

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44. *See id.* at 98-100.

45. *See id.*

46. *See* Felicia Kornbluh, *To Fulfill Their "Rightly Needs": Consumerism and the National Welfare Rights Movement*, 69 *RADICAL HIST. REV.* 76, 91 (1997).

47. Kornbluh, *supra* note 15, at 179.

something to offer the rank and file, and the rank and file developed a sense of efficacy and entitlement by gaining their demands from the local welfare departments. Kornbluh suggests that the 1960s-1970s battle for welfare rights, and the “fair hearings” campaign she chronicles and analyzes here,<sup>48</sup> have much to teach us. Although she is right, to me it is the gulf between organized labor and the poor people’s movements and the gender divisions in both those worlds that seem most poignant and germane as we think about today’s landscape and its very different prospects and perils.

#### WHAT KIND OF WAR ON POVERTY FROM DEMOCRATS IN 2009?

Let’s return to the question with which we started. What kind of war on poverty might one expect from a Democratic White House and Congress in 2009? It seems wildly improbable that we will see a renewal of the ideal of a guaranteed basic income, as popular as that idea was among social policy mavens of the left, right, and center in the 1960s and early 1970s, and as influential as it remains abroad.<sup>49</sup> From the middle of the 1970s onward, the racialized cast of welfare recipients, the changing cast of the Supreme Court and Congress, and the massive entry of white working- and middle-class women into the full-time paid labor force had left AFDC and the NWRO’s bold ideal of a right to a dignifying minimum bundle of basic needs vulnerable and exposed.

“Personal responsibility” and “work opportunity”—the title and catch phrases of the Clinton era “welfare reform”<sup>50</sup>—will remain the watch words of liberal social policy under a second President Clinton or a President Obama.<sup>51</sup> We can hope to see delivery on promised public investments and subsidies for various kinds of industrial and service sector employment. Along with that, what may be on offer are expanded commitments to job training, daycare, and

48. Kornbluh, *supra* note 15.

49. *See, e.g.*, HANDLER, *supra* note 10, at 236 (“Southern Europe is moving towards a guaranteed minimum income. . . .”); KORNBLUH, *supra* note 14, at 48-51 (discussing intellectual origins of guaranteed basic income).

50. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

51. One never hears Obama say “No American should live in poverty,” but instead, “If you’re working forty hours a week, you shouldn’t be living in poverty.” Sen. Barack Obama, A Politics of Conscience (June 23, 2007), *available at* [http://www.barackobama.com/2007/06/23/a\\_politics\\_of\\_conscience\\_1.php](http://www.barackobama.com/2007/06/23/a_politics_of_conscience_1.php); *see also* Sen. Barack Obama, Announcement for President (Feb. 10, 2007), *available at* [http://www.barackobama.com/2007/02/10/remarks\\_of\\_senator\\_barack\\_obam\\_11.php](http://www.barackobama.com/2007/02/10/remarks_of_senator_barack_obam_11.php) (“Every single person willing to work should be able to get job training that leads to a job, and earn a living wage that can pay the bills, and afford child care so their kids have a safe place to go when they work.”); Sen. Barack Obama, Changing the Odds for Urban America (July 18, 2007), *available at* [http://www.barackobama.com/2007/07/18/remarks\\_of\\_senator\\_barack\\_obam\\_19.php?loc=interstitialskip](http://www.barackobama.com/2007/07/18/remarks_of_senator_barack_obam_19.php?loc=interstitialskip) (“[W]hat we can do as a nation is to ensure that every American who wants to work is prepared to work, able to find a job, and able to stay out of poverty.”); Obama ’08, Barack Obama’s Plan, <http://www.barackobama.com/issues/family/> (last visited Apr. 7, 2008) (“Barack Obama believes that people who work full time should not live in poverty.”).

early childhood education and somewhat more generous forms of social support for poor Americans struggling to find labor market footholds to raise them out of poverty. All of these “pro-work” measures seem essential. They also seem certain to fall short. As Kornbluh, I’m sure, would point out, they also seem likely to reinforce the equation of full-time waged work and value as a citizen—or rather the absence of the former signifying lack of the latter. This equation is always invidiously applied to women, and to poor black women above all. If the White House and Congress are undertaking a whole new raft of programs to “mak[e] work pay”<sup>52</sup> for poor Americans, and you’re not working (that is, you’re looking after your infirm mother or your whacked-out sister or your kid, who was asked to leave the one daycare center within ten miles of your mother’s apartment, or you’ve been fired from your job because you couldn’t get along with your supervisor): Well, whose fault is that? Plainly, it’s your fault.

So, as I suggested earlier, our first woman or first black President may well help resurrect the category of the “undeserving poor”<sup>53</sup> and refasten it on poor women of color, by dint of the way her or his White House seems certain to embrace a chastened neoliberal (everyone is the entrepreneur of her own life, everyone must take responsibility for herself and her family), labor-market-based style of pro-poor social policy. The policy thinkers around Obama and Clinton like to say that the “end of welfare” turned the “undeserving poor” into the “working poor.”<sup>54</sup> And as “working Americans”—so this entirely plausible but also perilous and blinkered line of policy thinking goes—they have been freed from the stigma of “welfare” and made morally eligible for all kinds of “universal” social benefits in common with the rest of “working America.” Programs only for the poor tend to be poor programs, and programs for “everyone” tend to be better, more generous and more durable.<sup>55</sup> What’s more, the argument goes, the majority of working Americans are—with respect to many essential social goods—no longer much more secure than the “working poor.” So, the road is open for revamping Social Security and bringing our most popular “universal” program of social provision into the twenty-first century, making it into a shared system of social rights and social support for all working families, across classes and generations, and providing new protections to citizens who are serving the nation as workers and parents.<sup>56</sup> In

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52. AM. PROSPECT, MAKING WORK PAY: AMERICA AFTER WELFARE (Robert Kuttner ed., 2002).

53. See, e.g., KATZ, *supra* note 1, at 5.

54. See, e.g., Robert B. Reich, *Introduction: Working Principles: From Ending Welfare to Rewarding Work*, in MAKING WORK PAY, *supra* note 52, at vii, xi (“The one clearly positive consequence of welfare reform has been to move several million people from being considered ‘undeserving poor’ because they don’t work to being viewed as ‘deserving’ poor because they do.”).

55. See generally THEDA SKOCPOL, *THE MISSING MIDDLE: WORKING FAMILIES AND THE FUTURE OF AMERICAN SOCIAL POLICY* (2000) (arguing that the successful social programs in American history have been inclusive in their coverage, rather than focused on particular constituencies).

56. See, e.g., *id.* at 140-71.

addition to providing pensions for the elderly and meeting (some truncated portion of) the needs of Americans between jobs, a revamped Social Security System could underwrite periods of training and retraining as well as periods of part-time work or time off for working parents with small children.

The “universalists” are half-right.<sup>57</sup> Economic insecurity is burgeoning. The supply of secure and stable, decently paid semi- and unskilled jobs continues to dwindle.<sup>58</sup> The generous private welfare state constructed in the post-World War II decades has been dismantled.<sup>59</sup> Many well-educated Americans are thriving in the fast-changing, volatile, and uncertain competitive climate of today’s economy.<sup>60</sup> But while work and livelihoods are getting better in thousands of little Silicon Valleys, they are getting worse elsewhere. Seniority systems and long-term job security and job ladders are fast disappearing, and temporary and contingent work is growing.<sup>61</sup> Yet as work has become more unstable, unemployment insurance has been cut back.<sup>62</sup> More generally, since the 1980s, business leaders and lawmakers have been chipping away at the public and private social benefits forged during the New Deal and expansive postwar decades. Corporate executives have put constant pressure on wages and benefits and enlisted lawmakers in a crusade against corporate and governmental responsibility for individual welfare.<sup>63</sup> Far beyond any plausible claim of economic necessity, this crusade has swept like a grim reaper through pension plans, health insurance, and labor standards, cutting the bonds of social solidarity and shifting the burdens and responsibilities for economic risk from government and corporations to workers and their families. The nation is past due for a revival and reconstruction of social insurance.

But the “universalists” are also half-wrong. They are wrong that greater public commitments to education, training, and retraining—as much as these are needed—will do as much as they claim to expand the supply of decent jobs in twenty-first century America. They are wrong to claim that such “universal”

57. See NEIL GILBERT, *TRANSFORMATION OF THE WELFARE STATE: THE SILENT SURRENDER OF PUBLIC RESPONSIBILITY* 136 (2002).

58. See, e.g., Stephen Franklin, *For Unskilled, Best Hope Is To Find Their Abilities*, CHI. TRIB., Jan. 6, 1991, (Employment Outlook), at 23.

59. See KLEIN, *supra* note 24, at 258-75.

60. See, e.g., Greg J. Duncan, Timothy M. Smeeding & Willard Rodgers, *U.S. Middle Class Has Been Shrinking for Last 25 Years*, S.D. UNION-TRIB., June 14, 1992, at C-1 (“Only college-educated adults had a significantly higher-than-average chance of rising into the middle class. . . . [L]ate 20th-century America has offered abundant opportunity for the upper-middle class.”).

61. See, e.g., Carolyn Shaw Bell, *Tight Job Market Allows Alternatives to Full-Time Work: The Rise of ‘Contingent Labor,’* BOSTON GLOBE, June 29, 1999, at D4; Carol Kleiman, *Seniority Losing Its Ranking Among Employers*, CHI. TRIB., Dec. 6, 1987, (Jobs), at 1; Bill Montague, *How To Protect Yourself as Job Security Fades*, USA TODAY, Feb. 21, 1996, at 2B; Kim Norris, *Temp Jobs Here Today—and To Stay*, ST. PETERSBURG TIMES, Oct. 17, 1994, at 12.

62. See Daniel P. McMurrer & Amy B. Chasanov, *Trends in Unemployment Insurance Benefits*, MONTHLY LAB. REV., Sept. 1995, at 30, 35 (“[N]umerous state laws were changed [during the 1980s] to restrict eligibility and reduce benefit levels, partly in response to Federal policies that encouraged States to adopt more restrictive legislation for regular state unemployment programs.”).

63. See KLEIN, *supra* note 24, at 258-75.

programs as their proposals for a revamped Social Security System will do as much of the job as they claim of ushering the “working poor” of the shattered inner cities into the “middle class” nation. And they risk repeating, in a new and well-intentioned fashion, no longer de jure but de facto, the exclusions wrought by the first architects of Social Security and American social citizenship.<sup>64</sup>

Assume that something like the universalists’ reform project were to get underway. And assume that indeed, it does fall substantially short of providing access to and the wherewithal to take advantage of decently paid work and the attendant new and revamped social insurance for “all Americans.” Finally, let’s imagine what seems likely: that the shortfall falls mainly on poor people of color. On one hand, there will be jobs on offer: construction jobs, healthcare jobs, and “green collar” jobs.<sup>65</sup> The problem of “the disappearance of work” won’t be ignored, as it was in the 1960s. But the very fact that “job creation,” “labor market participation,” and “making work pay” will be the order of the day will create enormous pressure and a seeming moral warrant for what the nineteenth century inventors of modern welfare provision called “less eligibility”: making the conditions of not working and surviving on public assistance as bleak as possible—notwithstanding the actual shortfall of decently paid work.<sup>66</sup> The statutory landscape will be different from the 1960s as well, since, of course, AFDC is gone and the Personal Responsibility and Work Opportunity Act left the availability and extent of public assistance in the discretion of states, save for federally mandated limits.<sup>67</sup> What’s more, that statute contains language informed by the welfare rights experience, declaring that the Act creates no legally enforceable entitlements—not to assistance nor to work opportunities.<sup>68</sup>

#### IMAGINING A POOR PEOPLE’S MOVEMENT IN THE 2010S

Still, if a Democratic White House and Congress are elected and they open the doors to reform once more, a poor people’s movement will re-emerge. Other statutory and state constitutional footholds will present themselves, and exigent questions of vision, strategy, and tactics will arise. Kornbluh’s work will be an important resource for pondering them. Will the movement and its

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64. See GORDON, *supra* note 16, at 5.

65. See, e.g., Raquel Pinderhughes, *Green Collar Jobs*, RACE, POVERTY & THE ENVIRONMENT: A JOURNAL FOR SOCIAL & ENVIRONMENTAL JUSTICE, available at <http://urbanhabitat.org/node/528> (“I define [green collar jobs] as blue-collar work force opportunities created by firms and organizations whose mission is to improve environmental quality. . .”).

66. See DAVID ENGLANDER, POVERTY AND POOR LAW REFORM IN BRITAIN: FROM CHADWICK TO BOOTH, 1834-1914, at 11-12 (1998).

67. 42 U.S.C. § 603, § 604(a), § 607 (2008).

68. 42 U.S.C. § 601(b) (2008) (“This part shall not be interpreted to entitle any individual or family to assistance under any State program funded under this part.”).

allies find ways to push back against the neoliberal tide in favor of an unconditional right to basic needs or a basic income? Or will they instead focus on pressing government at all levels to make good on the promise of decent, dignifying work for all, emphasizing the constellation of enabling rights and conditions that make such work possible? Will they reframe the basic needs/basic income versus right-to-employment debate, contending that not all socially valuable work is or should be mediated through the market, valorizing “care work” and “community work” as compensable via a “citizen’s income” (as in European social policy debates)?<sup>69</sup> And will they find more durable footholds and make more durable gains than the welfare rights movement, avoiding the latter’s swift, unmitigated defeats in the polity, Congress, and the courts?

Since LBJ’s “War on Poverty,” almost two generations of poor African Americans have been subjected to the “War on Crime,” in which policing and mass incarceration have replaced anti-poverty measures as the primary governmental response to the conditions of the black poor.<sup>70</sup> Ghetto unrest amidst industrial prosperity was the circumstance that prompted the 1960s “War on Poverty” and its particular array of “minority-targeted” programs.<sup>71</sup> Now that industrial prosperity has vanished for such a broad swathe of white America, progressive policymakers highlight “universal” social and economic programs and their promise for all. The risk, I’ve suggested, is that broad social programs like these will leave unaddressed the almost inevitable shortfall of decent work combined with the deep social deficits and cultural damage that have attended the anti-policy of the “War on Crime.”

#### NEW COALITIONS FOR PRO-POOR POLICIES

What footholds and alliances conceivably might enable the poor and excluded to lay claim to social rights in this perilous moment? Suppose, for example, that a revamped Social Security system were to begin providing income support for periods of full- or part-time child or elder care in working people’s lives. How might one imagine overcoming the concatenation of ethnic, racial, gender, and class mistrust and scorn that would greet efforts to extend such support to poor inner-city African-Americans and Hispanics

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69. See, e.g., HANDLER, *supra* note 10, at 272-78; José Antonio Noguera, *Citizens or Workers? Basic Income v. Welfare-to-Work Policies*, 2 RUTGERS J. L. & URB. POL’Y 103 (2005); Guy Standing, *Why Basic Income Is Needed for a Right to Work*, 2 RUTGERS J. L. & URB. POL’Y 91 (2005).

70. See generally JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2007) (chronicling the history and effects of American criminal policy since the Nixon administration inaugurated the “war” on crime).

71. William E. Forbath, *Lincoln, the Declaration, and the “Grisly, Undying Corpse of States’ Rights”*: *History, Memory, and Imagination in the Constitution of a Southern Liberal*, 92 GEO. L.J. 709, 763 (2004).

ineligible because they don't meet the minimum contribution requirement of the revamped system? While the NWRO found no allies or common ground with the labor movement, the wide gulf that separated organized labor from poor people of color has narrowed.<sup>72</sup> The most innovative and fast-growing provinces of the labor movement today are those populated by low-wage, service-sector black and Hispanic women living in inner cities.<sup>73</sup> There, one finds local and state-wide unions riveted on turning demeaning, dead-end, poverty-wage jobs into decent ones. Alive to the straits that lead constituents to cling to such jobs *and* to why they often can't hold on to them, these unions would have many good reasons to champion federal support for "care" work among the inner-city poor. Such support for work outside the labor market would strengthen the bargaining power of individual poor workers and their unions inside the labor market. At the same time, union leaders and activists in a coalition laying claim to this kind of social right would assail the moral division of poor Americans into the deserving and undeserving based on who is doing full-time waged work; they'd speak for the dignity and moral deserts of poor people doing different kinds and combinations of waged and unwaged work at different moments in their own lives and in the vicissitudes and development of cities' and regions' labor markets. Such a coalition for poor Americans could build on one of the most striking progressive developments of the past couple decades: organized labor's sharp reversal of century-old anti-immigrant politics and its increasingly firm embrace of racial inclusion.<sup>74</sup>

Imagine a President Clinton or Obama forced, like Roosevelt, to make good on the promise to help organized labor with pro-union legislation, reducing the extraordinary risks and costs of union organizing today.<sup>75</sup> Such a climate-changing development might release the great pent-up demand for unions among low-wage workers. An upsurge in militancy and mobilization in those quarters could enable a pro-poor progressive coalition to push a President Obama or Clinton some distance away from some of her or his neoliberal

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72. See, e.g., Bryan O'Keefe, *The Changing Union Label*, THE AMERICAN, Feb. 28, 2008, available at <http://www.american.com/archive/2008/february-02-08/the-changing-union-label> ("Union membership was previously defined by a key demographic: male, white, and blue-collar. Today's unions hardly fit that mold. According to the latest data from the Bureau of Labor Statistics, 14.3 percent of African-American workers are members of a labor union . . . Unions have also made inroads among Hispanic workers, with nearly 10 percent of them now belonging to organized labor.").

73. See, e.g., Silja J.A. Talvi, *Labor's New Front Lines*, CHRISTIAN SCI. MONITOR, Jan. 29, 2001, at 11 ("In the past two years, many unions have devoted an increasing amount of attention to service-sector workers—a group that has not traditionally been well represented in the labor movement. . . . But key union victories in the past two years with low-paid janitors and home healthcare workers have validated the conviction of organizers that unionization is possible.").

74. See, e.g., *id.* ("In 1999, [AFL-CIO] members voted to support general amnesty for undocumented workers for the first time in the federation's history.").

75. See, e.g., DAVID M. KENNEDY, *FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929-1945*, at 296 (1999) ("Labor organizers knew the power of the Roosevelt magic and exploited it shamelessly. John L. Lewis shrewdly invoked the Roosevelt mystique in his organizing drive among coal minders in 1933, when he trumpeted that 'the President wants you to join a union.'").

inclinations in the direction of more robust and inclusive redistributive reforms, much as Roosevelt was pushed beyond some of his classical liberal instincts by the unbidden support of the CIO.

#### SOCIAL RIGHTS FOR THE MOST DESPISED

Next consider the most demonized and despised of the nation's poor, the 2.3 million mostly black and brown poor Americans warehoused in our burgeoning prisons<sup>76</sup>: a poverty policy without counterparts anywhere. The imprisoned are disproportionately in ill health. Despite being in state custody, they go without access to the most rudimentary care and suffer and die untreated. This particular scandal has helped spur a revival of federal judicial involvement in overseeing state prisons. California's vast prison network, for example, has come under federal receivership with an injunction to provide the health care currently lacking.<sup>77</sup> Coming in the context of an emergent "universal right to health care," the allocation of billions of state dollars for clinics and other capital costs of providing decent health care in prisons increasingly may seem out of kilter. Already in the California litigation, space has opened for institutionalizing early parole and mandatory access to clinics and health care in the community, instead of the prison. This kind of social right will come with disciplinary strings attached. Parolees receiving health care will be accountable to case workers and health care officials to share responsibility for their own care and self-improvement in exchange for the health and social services they'll receive.

That seems a bargain worth striking—both for the individuals under sentence of social (and often physical)<sup>78</sup> death and for any movement aimed against the War on Crime's profoundly regressive mode of governing the nation's poor. In this light, the old twentieth-century liberal social policy regime of "rehabilitation" for criminals and case workers and social assistance for the unemployed and dysfunctional was something better, all its normalizing disciplines notwithstanding. In any case, this is a legal and political space where the regime of criminalizing and warehousing poor young men of color has begun to unravel. Here one can imagine social rights to decent health care

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76. Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations'*, N.Y. TIMES, Apr. 23, 2008, available at <http://www.nytimes.com/2008/04/23/us/23prison.html>.

77. *Plata v. Schwarzenegger*, No. C01-1351, 2005 WL 2932253, at \*1 (N.D. Cal. Oct. 3, 2005); see generally *California Prison Receivership Corp.*, California Prison Receivership Corp., <http://www.cprinc.org/about.htm> (last visited May 8, 2008) (describing the California Prison Receivership and the circumstances leading to its institution).

78. *Plata*, 2005 WL 2932253, at \*1 ("It is clear to the Court that this unconscionable degree of suffering and death is sure to continue if the system is not dramatically overhauled. Decades of neglecting medical care while vastly expanding the size of the prison system has led to a state of institutional paralysis. The prison system is unable to function effectively and suffers a lack of will with respect to prisoner medical care.").

and then other forms of social provision being claimed; perhaps because there will be responsibilities attached, these dignifying claims on behalf of the most feared and despised poor Americans might take root, even in the hard neoliberal ground of the early twenty-first century.

#### CONCLUSION: LESSONS FROM THE LAST WAR?

Those are quick sketches of the difficult terrain on which poor people's movements for social rights might re-emerge in the reform climate produced by an Obama or Clinton presidency. I've tried to highlight historical and practical differences from the NWRO and insights one might glean from its experience.

The NWRO, as we've seen, emerged at a moment when the private economy seemed to be producing decent jobs for working-class Americans. Today is different in some ways that might aid pro-poor advocacy. As noted, a Clinton or Obama presidency would bring highly-touted public job creation and, we can hope, new provisions for "working families" to draw a decent income from social security during set periods of child or elder care. Against this backdrop, pro-poor advocates could make a different case from NWRO's, demanding the simple justice of extending to the poorest Americans new social rights enjoyed by everyone else. They could highlight the promised decent jobs that had yet to materialize, the long hours for poverty wages, the vicissitudes of casual employment, and the need to look after family. And, in sharp contrast to NWRO, they readily could build a coalition with support from the most dynamic sector of a labor movement transformed since the 1960s.

At the same time, the kind of social right envisioned here, while also aimed at basic needs, is subtly different from NWRO's guaranteed income. This one probably would remain linked to waged work. The movement claiming it, I imagine, would demand not the abolition but a sharp diminution of the minimum contribution requirement, to bring it within realistic reach of poor inner-city dwellers and their stints in the low-wage labor market. This kind of measure, however, looks for more than Obama's and Clinton's assurances that no one working forty hours or more a week in the labor market should live in poverty. It would keep out of poverty those doing the gendered toil of care, including those unable for significant periods to combine that toil with working for wages, and it would value the care work of the racialized poor, bringing them into the fold of a social citizenship poor people had pushed toward a modestly greater, more realistic universality.

Even on the most hopeful assumptions, however, poor people's access to many basic kinds of social provision over the next decade will remain conditional—on some measure of waged work, on keeping one's commitments to a rehabilitative regime, and so on. Thus questions about bureaucratic discretion, formality and informality, participation and the "right to be heard,"

will remain salient, and the debates of welfare scholars, which Kornbluh addresses here,<sup>79</sup> will be revisited. Kornbluh urges us to think hard about the instrumental and dignitary values that formal hearings can serve. Building on the seminal article by Nancy Fraser,<sup>80</sup> Kornbluh argues convincingly that hearings and opportunities to be heard are one site where the often antagonistic progressive-reform goals of “recognition” and “redistribution” can meet, and their seeming opposition be overcome.<sup>81</sup> They have something, therefore, to teach us about movement-building.

“Recognition” here means treating degraded identities with dignity and respect; “redistribution” means redistribution. In the micro-political context of advocacy for individual welfare clients, they can accomplish something of both, as they surely did for thousands of individuals like the ones whose smart and passionate voices Kornbluh has rescued from the archives. Trying to use the procedural right to a “fair hearing” as a strategic vehicle for securing a substantive right to social provision failed, however. True, the NWRO succeeded briefly in overloading the system in places like New York, but the crises had no happy outcomes for the movement, in New York or elsewhere.<sup>82</sup> It was not wrong to press through mass hearing campaigns and litigation for more generous and more categorical grants. But these proved no substitute for finding ways to make movement gains durable through institutional reform, strategic allies, or coalitions.

While Kornbluh is persuasive that fair hearings should be made to yield all they can at the micro-political level, it’s uncertain how much their individualized capacity for melding recognition and redistribution can be translated to the macro-level of movement-building strategy, where the challenge of melding those goals is more daunting, and where, I’ve tried to show, Kornbluh’s work in all its facets has much to offer.

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79. Kornbluh, *supra* note 15, at 169-73.

80. NANCY FRASER, *From Redistribution to Recognition? Dilemmas of Justice in a “Postsocialist” Age*, in JUSTICE INTERRUPTUS: CRITICAL REFLECTIONS ON THE “POSTSOCIALIST” CONDITION 11 (1997).

81. Kornbluh, *supra* note 15, at 193-94.

82. See KORNBLUH, *supra* note 14; see also William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 FORDHAM L. REV. 1821, 1858 (2001).

