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### **A Brief Critique of the Emaciated State and Its Reliance on Non-governmental Organizations to Provide Social Services**

Elena Dana Neacsu

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# A BRIEF CRITIQUE OF THE EMACIATED STATE AND ITS RELIANCE ON NON-GOVERNMENTAL ORGANIZATIONS TO PROVIDE SOCIAL SERVICES

*Dana Neașu\**

*These Americans are the most peculiar people in the world. You'll not believe me when I tell you how they behave. In a local community in their country a citizen may conceive of some need which is not being met. What does he do? He goes across the street, discusses it with his neighbor. And then what happens? A committee comes into existence. And the committee begins functioning in behalf of the need.<sup>1</sup>*

## INTRODUCTION

When, in January 2006, seven-year-old Nixzmary Brown was tortured and beaten to death, allegedly by her stepfather as her mother ignored her cries for help, every New Yorker looked at the city's Administration for Children's Services for answers.<sup>2</sup> Conversely, I do not recall any discussion about the failure of charities to adequately provide for the city's abused children. Charities, like non-governmental organizations (NGOs), are not expected to be responsible for systemic problems.<sup>3</sup> They are a moral and social bonus,<sup>4</sup> which fill the gap in discrete areas where taxpayers' money is not sufficient.<sup>5</sup>

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\* Head of Public Services, Arthur W. Diamond Law Library, Columbia University; Adjunct Professor, Barnard College. Without Sanja Zgonjanin's gentle push, this Article would have never been written. Thanks, Sanja.

<sup>1</sup> Ronald Reagan, President of the United States, Remarks at the Presentation Ceremony for the President's Volunteer Action Awards (May 7, 1984) (quoting ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (J.P. Mayer ed., George Lawrence trans., Harper Perennial Modern Classics 2006) (1835)), available at <http://www.reagan.utexas.edu/archives/speeches/1984/50784e.htm>.

<sup>2</sup> Nicole Gelinas, *After Nixzmary Brown*, N.Y. SUN, Jan. 20–22, 2006, at 1.

<sup>3</sup> Karla W. Simon & Saine Watson, *Not-For-Profit and Non-Governmental Organizations*, 39 INT'L LAW. 639, 639 (2005) ("The tsunami disaster at the end of 2004 illustrated the importance of NGOs, the services they provide, and their capabilities when processes are streamlined and they are incorporated into nations working together.").

<sup>4</sup> Philanthropy is a welcome activity by both the donors and the donees. See, e.g., CARL BAKAL, *CHARITY U.S.A.: AN INVESTIGATION INTO THE HIDDEN WORLD OF THE MULTI-BILLION DOLLAR CHARITY INDUSTRY* 33–49 (1979).

<sup>5</sup> For example, see the New York Times Company Foundation and its programs, such as the New York Times College Scholarship Program. New York Times Company Foundation, <http://www.nytc.com/company/foundation> (last visited Mar. 8, 2006) ("Working with *Times* writers and editors as jurors, the Foundation each year selects

So I may be accused of having a one-track mind, but I cannot seem to escape the following questions: Why do we even talk about providing social services in the twenty-first century? Couldn't we have had this issue resolved by now? Why don't we have a "sophisticated national system of government departments"<sup>6</sup> charged with this task? Most other Western countries have one.<sup>7</sup> Even corporate America would like the government to be in charge of providing social services for its employees.<sup>8</sup>

Instead we find ourselves on the cutting-edge of a newly fashionable neo-liberal government that looks as emaciated as a Hollywood diva and as masculine as a New York City cop. This decade-long transformation comes hand-in-hand with a trend of privatization and an increased reliance on the nonprofit sector, both domestically and internationally.

Charities and NGOs are in vogue. They have come to prominence as class-based politics have been replaced by human rights discourse and as radical discourse has abandoned large social projects in favor of incremental discrete social goals.<sup>9</sup> However, we are still plagued by systemic problems—such as poverty and an increasing gap between the haves and the have-nots<sup>10</sup>—which need systemic solutions. To the extent that we recognize these problems and the need for large social projects, we have delegated them to the private sector or to the police force, which is expected to offer both increased personal security to the haves and social services to the disenfranchised.<sup>11</sup> As a result, we are creating an imminent crisis: Our expectation that private charities should take care of

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20 Times Scholars, students who have overcome exceptional hardship to achieve excellence in New York City public high schools. Each student receives a four-year college scholarship, mentoring and summer employment.”).

<sup>6</sup> KERRY O'HALLORAN, CHARITY LAW 111 (2000).

<sup>7</sup> Even smaller countries like Ireland have a government charged with providing poverty relief services. *Id.*

<sup>8</sup> See generally Clifford J. Levy, *The New Corporate Outsourcing*, N.Y. TIMES, Jan. 29, 2006, § 4, at 1.

<sup>9</sup> See generally Dana Neacsu, *The Wrongful Rejection of Big Theory (Marxism) by Feminism and Queer Theory: A Brief Debate*, 34 CAP. U. L. REV. 125 (2005) [hereinafter Neacsu, *The Wrongful Rejection*].

<sup>10</sup> See e.g., Richard N. Goodwin, *The Class Struggle Is Over—The Wealthy Win*, L.A. TIMES, July 15, 1996, at B5; Scott Finn, *Gap Between Rich, Poor Widening: Poor Families Are Poorest in Mountain State, Study Says*, CHARLESTON GAZETTE, Feb. 7, 2006, at 1C; Wendy Cole, *Rich Ohio but Poor Ohioans*, TIME, Jan. 30, 2006, at 14.

<sup>11</sup> Malcolm Gladwell, *Million-Dollar Murray: Why Problems Like Homelessness May Be Easier to Solve than Manage*, NEW YORKER, Feb. 13 & 20, 2006, at 96–97, available at [http://www.newyorker.com/fact/content/articles/060213fa\\_fact](http://www.newyorker.com/fact/content/articles/060213fa_fact) (“‘It cost us one million dollars not to do something about [homeless ex-marine] Murray [Barr],’ said Officer Patrick O’Bryan of the Reno Police Department.”).

our social services is ludicrous because the private sector—to the extent it wants to in the first place—is ill-equipped to solve such problems. Furthermore, such blind reliance can only hurt America’s democratic social makeup.

Part I of this Article will expose the current denigration of social liberalism while attempting to briefly explain its origins, its major by-product—the welfare state—and the result of its failure: the rise of the neo-liberal state and its reliance on charities. Next, assuming theories greatly impact social constructs, Part II will connect the presence of the neo-liberal state to a lack of classical class-based radicalism. Today, we witness a hegemonic discourse which legitimizes the neo-liberal state and a radical discourse which shyly critiques some of its effects while leaving its legitimacy unquestioned. Finally, Part III will argue in favor of a reconsideration of the role we retain for the state and that which we relegate to charities regarding social services.

## I. CHARITIES AND THE WELFARE STATE

This Section begins with our society’s increased reliance on privatizing previously government-provided social services by the neo-liberal state. As the neo-liberal state loses interest in supporting distributive justice, social services survive only as an undesired component of corrective justice or to the extent charities are willing to pay for them. This Section also notes that, under this new configuration, social and gender minorities are most affected as they are left outside the shrinking benefits provided by public assistance.

### A. *On Charities*

The term “charity” derives from the Latin word *caritas*, meaning dearness, affection. The *Oxford English Dictionary* defines charity as “Christian love,” but ordinarily we view charities as a form of private philanthropy. Legally, a charity is a “nonprofit trust, corporation or unincorporated association operated for the benefit of indefinite persons and devoted to purposes beneficial to the community.”<sup>12</sup>

Charities are not a new socio-economic creation. Looking at their history, one may suggest that their existence is connected to the social division between the economically prosperous and the poor. Economic prosperity allows one to become generous and

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<sup>12</sup> EDITH FISCH ET AL., CHARITIES AND CHARITABLE FOUNDATIONS I (1974).

provide for certain causes of potential public interest or, at times, even take care of (some of) the poor.<sup>13</sup>

Charities have a long history. Some scholars connect them with the Egyptian pharaohs,<sup>14</sup> when charities functioned as a way of promoting care for the pharaoh's tomb. Charities then further developed in the pagan Greek and Roman empire, when they were established for the benefit of the entire community.<sup>15</sup> Later, in the Christian Roman empire, they followed the Judeo-Christian tradition of relief to "the poor and the unfortunate."<sup>16</sup> In the Middle Ages, however, the Christian tradition of charity changed, and the relief of the poor ceased to be an end in and of itself and became instead a means to save a soul (in the Augustinian sense, of expiating a sin).<sup>17</sup>

In England, Christian charities have a long history, too. Very early on, however, ecclesiastical charities encountered functional problems. As a result, in 1601 the Elizabethan Statute of Relief of the Poor was passed.<sup>18</sup> Although the Elizabethan Statute was supposed to cure the inadequacy of private philanthropy by creating the foundation of the British system of state-sponsored social services,<sup>19</sup> private charities have continued to co-exist in Britain.

In the United States, charities had a late start in the social services area because, while destitution was widespread in the Old World, colonial America offered substantial sources of livelihood.<sup>20</sup> Furthermore, charities have often been funded by a mixture of both private and public money.<sup>21</sup> Even "Harvard College was founded in 1636 by a bequest from John Harvard and a credit from the General Court, and was sustained by both private benefactions and public grants."<sup>22</sup>

In the next two centuries, private charities received increased judicial support—often in terms of a reluctance to change the charitable scheme of the donor, as Chief Justice Marshall notes in *Dartmouth College v. Woodward*—mirroring our national theme of a rugged individualism.<sup>23</sup> However, Roscoe Pound denounced this

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<sup>13</sup> DAVID WAGNER, WHAT'S LOVE GOT TO DO WITH IT? 94–97 (2000).

<sup>14</sup> FISCH, *supra* note 12, at 8.

<sup>15</sup> *Id.* at 9.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 15.

<sup>18</sup> *Id.* at 17.

<sup>19</sup> *Id.* at 18.

<sup>20</sup> WALTER I. TRATTNER, FROM POOR LAW TO WELFARE STATE 12 (3d ed. 1984).

<sup>21</sup> BAKAL, *supra* note 4, at 225.

<sup>22</sup> FISCH, *supra* note 12, at 20.

<sup>23</sup> *Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 647 (1819).

trend because there was a new need for a “more even balance between individualism and collectivism”<sup>24</sup> as times changed and new ideas about wealth as a public trust emerged.<sup>25</sup>

To a certain extent, the nonprofit sector and charitable organizations overlap. The nonprofit sector in the United States is defined negatively as the sector that is neither the business (“for-profit”) nor the governmental sector.<sup>26</sup> The term “nonprofit” itself is misleading because the nonprofit organization, like a for-profit one, does make a profit. Certainly, their employees are among the direct beneficiaries of this private sector.<sup>27</sup> Moreover, unlike the business sector, the nonprofit sector is tax-exempt. A charitable bequest qualifies for federal tax deductions,<sup>28</sup> which benefits the donor and his chosen social “purpose,”<sup>29</sup> but penalizes society at large by reducing the amount of collectible taxes.

Charitable organizations, as a segment of the nonprofit sector, represent a subset of tax-exempt organizations.<sup>30</sup> As a result, the Internal Revenue Code fully describes them.<sup>31</sup> There are twelve categories of charitable organizations: (a) relief of poverty; (b) advancement of religion; (c) advancement of education;<sup>32</sup> (d) advancement of science; (e) lessening the burdens of government; (f) community beautification and maintenance; (g) promotion of health; (h) promotion of social welfare; (i) promotion of environmental conservancy; (j) promotion of the arts; (k) certain government instrumentalities; and (l) maintenance of public confidence in the legal system.<sup>33</sup> Thus, there are at least four categories—(a), (c), (g), and (h)—that can be described as promoting social services.

While the twentieth century brought an increased charitable effort—and private philanthropy continuously expanded in the United States—due to historical and cultural reasons, its foray into

<sup>24</sup> Roscoe Pound, *The Spirit of the Common Law*, 18 GREEN BAG 17, 24 (1906).

<sup>25</sup> FISCH, *supra* note 12, at 28 (quoting Andrew Carnegie: “The millionaire will be but a trustee for the poor.”).

<sup>26</sup> See BRUCE HOPKINS, CHARITY, ADVOCACY, AND THE LAW 4–5 (1992).

<sup>27</sup> For an example of employees directly benefiting, see the story behind the charity Boys Town in BAKAL, *supra* note 4, at 222–23.

<sup>28</sup> See BORIS I. BITTKER, CHARITABLE BEQUESTS AND THE FEDERAL ESTATE TAX: PROPOSED RESTRICTIONS ON DEDUCTIBILITY 9–13 (1975) for a historical presentation about the income tax deduction.

<sup>29</sup> FISCH, *supra* note 12, at 1 (talking about charities “devoted to purposes beneficial to the community”).

<sup>30</sup> *Id.* at 656–57.

<sup>31</sup> I.R.C. § 501(c)(3) (2000).

<sup>32</sup> § 170(b)(1)(A)(ii).

<sup>33</sup> § 501(c)(3).

the social services (or human resources) area has consistently been minuscule.<sup>34</sup> Even when faced with—or perhaps because of—a state effort to offer relief to the poor and unfortunate and to promote health,<sup>35</sup> private giving in the area of social services has historically been no more than 10% of total annual U.S. giving.<sup>36</sup>

In 1968, for example, private charity amounted to approximately \$15.8 billion,<sup>37</sup> and only 7% of that amount was allocated for human resources. The largest amount was allocated to the advancement of religions (46.8%), with hospitals and health receiving the second-largest amount (17.3%), and education in third place at 16.7%.<sup>38</sup> Twenty years later in 1987, 49% of the total annual funds received by the nonprofit sector went to health services (primarily hospitals); 21.4% went to education and research; 11.7% went to religion; and 8.9% went to social services.<sup>39</sup> Significantly, each subsector received more funds from the government than from private donations. For example, the health services subsector received \$133 billion from the government and \$10.5 billion in private contributions. Similarly, social services were supported by \$16.1 billion in government payments, but received only \$11.3 billion in private contributions.<sup>40</sup>

Still, if twentieth-century scholars could reason that private giving for social services was slim because public assistance seemed to be increasing,<sup>41</sup> that reasoning is obviously flawed today. While the trend of giving less to the poor continues—and according to *Giving USA*, in 2004 only 8% went to human services<sup>42</sup>—the government has also denounced its previous functions. Though the “social need of governmental and charitable caring for the aged, as well as the importance and necessity for such a benevolent public policy”<sup>43</sup> was clearly recognized in 1968, since then it has been mostly abandoned. Moreover, the poverty rate and the gap between the haves

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> BAKAL, *supra* note 4, at 225.

<sup>37</sup> FISCH, *supra* note 12, at 31 n.50.

<sup>38</sup> *Id.*

<sup>39</sup> VIRGINIA ANN HODGKINSON & MURRAY S. WEITZMAN, DIMENSIONS OF THE INDEPENDENT SECTOR: A STATISTICAL PROFILE 182 (3d ed. 1989).

<sup>40</sup> HOPKINS, *supra* note 26, at 13.

<sup>41</sup> *E.g.*, BAKAL, *supra* note 4, at 225–26.

<sup>42</sup> Stephanie Strom, *What Is Charity? Nonprofits Are Richer than Ever, but the Share to the Poor Continues to Dwindle*, N.Y. TIMES, Nov. 14, 2005, at F1.

<sup>43</sup> *In re Tax Appeal of the United Presbyterian Homes*, 236 A.2d 776, 779 (Pa. 1968); *see also* Strom, *supra* note 42.

and the have-nots has steadily increased,<sup>44</sup> and we are witnessing an era when no one wants to support the poor.

The explanation regarding the attitude about giving for human services is layered in history, demography, and culture, covering both philosophical beliefs and misperceptions. Recently, a journalist surveyed the reasons for the meek donations for the poor: a lack of empathy by the current middle and upper classes with the poor; the fact that older women (the largest category of donors for the poor) are dying out; and mostly the misperception that the government is taking care of the poor—“Why should a philanthropist pay if the government will?”<sup>45</sup>

While Americans are willing to give to charity for temporary relief for natural catastrophes, such as Hurricane Katrina,<sup>46</sup> their culture is not one to replace state-sponsored social services with charities.<sup>47</sup> Middle-class people are those who historically support the burden of taxation and the ones who give to charities. But while many of them distrust the government, looking more favorably toward NGOs,<sup>48</sup> they cannot be too charitable when it comes to social services for the poor. How can the educated middle-class,<sup>49</sup> who know no poor people, be expected to offer steady and reliable help to the poor?<sup>50</sup> Furthermore, while racial stereotyping is no longer permissible, bashing the poor occurs with no restraint on the floor of Congress and other public places.<sup>51</sup>

<sup>44</sup> E. Dana Neacsu, *CLS Stands for Critical Legal Studies, If Anyone Remembers*, 8 J.L. & POL'Y 415, 440–43 (2000).

<sup>45</sup> Strom, *supra* note 42.

<sup>46</sup> For example, private donations and pledges are expected to cover the Red Cross' estimated cost for its response to hurricanes Katrina, Rita, and Wilma, which amounted to an estimated \$2.116 billion as of February 3, 2006. See American Red Cross – Disaster Relief Fund Campaign Donors Help Red Cross Respond, [http://www.redcross.org/sponsors/drf/FY06\\_recognition.html](http://www.redcross.org/sponsors/drf/FY06_recognition.html).

<sup>47</sup> BAKAL, *supra* note 4, at 17. For a survey of public agencies, unions, and private charities which constitute the social service structure of the American society, see generally THE GREENWOOD ENCYCLOPEDIA OF AMERICAN INSTITUTIONS: SOCIAL SERVICE ORGANIZATIONS (Peter Romanofsky ed., 1978).

<sup>48</sup> *Survey Shows Continued Public Mistrust in Governments* EURACTIVE (Jan. 27, 2006), at <http://www.euractiv.com/en/governance/survey-shows-continued-public-mistrust-governments/article-152030>. A global survey confirmed that NGOs are the most trusted institutions—ahead of businesses, governments, and the media—among college-educated people between 35 and 64 years of age with a household income over \$75,000. *Id.*

<sup>49</sup> Bernice Lott & Heather E. Bullock, *Who Are the Poor?*, 57 J. SOC. ISSUES 189, 201 (2001).

<sup>50</sup> See generally John L. Hammond, *Yuppies*, 50 PUB. OPINION Q. 487 (1986); Jo Phelan et al., *Education, Social Liberalism, and Economic Conservatism: Attitudes Toward Homeless People*, 60 AM. SOC. REV. 126 (1995).

<sup>51</sup> Lott & Bullock, *supra* note 49, at 201.



Moreover, the educated America (the middle class) never believed in Pope John XXIII's 1963 encyclical letter, "Pacem in Terris,"<sup>52</sup> in which he laid the foundation of a single global citizenship—which some argued may have implied a right to a guaranteed social income for all<sup>53</sup>—based on our sense of charity and fraternity.<sup>54</sup> Americans have been fed liberal individualism and, as a result, do not seem or cannot afford to believe in the virtues of a welfare system. Their understanding about social citizenship does not extend to a guaranteed social income for all.

### B. *On the Welfare State*

The welfare state is generally viewed as being a twentieth-century phenomenon.<sup>55</sup> It is the result of political class struggle, which has labor and capital as primary actors.<sup>56</sup> It mediates between politically dominant groups and the politically repressed ones.

Theoretically, the welfare state is the result of social liberal, class-based discourse. Unlike classical liberalism, which thrived on the disjunction between the individual and his family on one hand and the broader political community on the other, social liberalism encouraged "overprotection" by the state.<sup>57</sup> The providing "social liberal" state, whether capitalist or not, has often been defined in derogative terms either as a "feminized" state<sup>58</sup> or as a massive, bureaucratic paternalist state<sup>59</sup>—and even as the "patriarchal-pater-

<sup>52</sup> Pope John XXIII, Encyclical Letter *Pacem in Terris* (1963), available at [http://www.vatican.va/holy\\_father/john\\_xxiii/encyclicals/documents/hf\\_j-xxiii\\_enc\\_11041963\\_pacem\\_en.html](http://www.vatican.va/holy_father/john_xxiii/encyclicals/documents/hf_j-xxiii_enc_11041963_pacem_en.html).

<sup>53</sup> Michael Hardt, *Guaranteed Income, or, the Separation of Labor from Income*, 5 HYBRID 21, 28 (2000).

<sup>54</sup> Pope John XXIII, *supra* note 52, ¶ 11 ("Man has the right to live. He has the right to bodily integrity and to the means necessary for the proper development of life, particularly food, clothing, shelter, medical care, rest, and, finally, the necessary social services. In consequence, he has the right to be looked after in the event of ill health; disability stemming from his work; widowhood; old age; enforced unemployment; or whenever through no fault of his own he is deprived of the means of livelihood.")

<sup>55</sup> See generally ABRAM DE SWAAN, *CARE OF THE STATE: HEALTH CARE, EDUCATION AND WELFARE IN EUROPE AND THE USA IN THE MODERN ERA* (1988); FRANÇOIS EWALD, *L'ÉTAT PROVIDENCE* (1986).

<sup>56</sup> Jill Quadagno, *Race, Class, and Gender in the U.S. Welfare State: Nixon's Failed Family Assistance Plan*, 55 AM. SOC. REV. 11, 26 (1990) [hereinafter Quadagno, *Race, Class, and Gender*].

<sup>57</sup> Marian Sawer, *Gender, Metaphor, and the State*, FEMINIST REV., Spring 1996, at 118, 131.

<sup>58</sup> For an interesting argument, see generally Sawer, *supra* note 57.

<sup>59</sup> James A. Henretta, *Charles Evans Hughes and the Strange Death of Liberal America*, 24 LAW & HIST. REV. 115, 115 (2006).

nalist” “Father State.”<sup>60</sup>

Today this social liberal state is under attack. Mocked as the undesired welfare state—as defined above—it stands in contrast with the neo-liberal state, whose functions are very similar to those of the Lassalle’s liberal “night-watchman state.” The latter’s “functions consist solely in preventing robbery and burglary,”<sup>61</sup> as it does not believe in the state’s ethical duty to provide for its citizens.

In fact, there have been three types of capitalist social liberal (welfare) states. Esping-Anderson explained them over a decade ago.<sup>62</sup> One type was personified by the United States, which had always guaranteed only minimal means-tested benefits. Another type is the corporatist welfare state personified by Germany and France—and adopted in a more minimal version by the European Union<sup>63</sup>—where the state’s intervention is meant to alleviate the capitalist cyclical crisis. Until recently, the third type was the social democratic welfare state, which was personified by the Scandinavian countries, where substantive economic equality was sought for all citizens.<sup>64</sup>

The U.S. federal liberal state was a recent short-lived creation because aid to the poor remained a local responsibility well into the twentieth century. It began with a “big bang”<sup>65</sup> reform—the Social Security Act of 1935 (The New Deal), sponsored by the Roosevelt Administration<sup>66</sup>—and arose from the lack of adequate local support for those hit by the Depression in the 1930s.<sup>67</sup> In 1935 alone, the federal government established a comprehensive array of federal aid and insurance programs, and then “it rested.”<sup>68</sup> The federal government did continue to adopt additional programs for a few decades following the major New Deal legislative

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<sup>60</sup> Dorothy J. Rosenberg, *Shock Therapy: GDR Women in Transition from a Socialist Welfare State to a Social Market Economy*, 17 SIGNS: J. WOMEN CULTURE & SOC’Y 129, 147 (1991).

<sup>61</sup> FERDINAND LASSALLE, *Das Arbeiterprogramm*, in 2 GESAMMELTE REDEN UND SCHRIFTEN 195–96 (Eduard Bernstein ed., 1919).

<sup>62</sup> See generally GØSTA ESPING-ANDERSEN, *THE THREE WORLDS OF WELFARE CAPITALISM* (1990).

<sup>63</sup> Gráinne de Búrca, *Towards European Welfare?*, in *EU LAW AND THE WELFARE STATE: IN SEARCH OF SOLIDARITY* 1–10 (Gráinne de Búrca ed., 2005).

<sup>64</sup> ESPING-ANDERSEN, *supra* note 62, at 48–49.

<sup>65</sup> CHRISTOPHER LEMAN, *THE COLLAPSE OF WELFARE REFORM: POLITICAL INSTITUTIONS, POLICY, AND THE POOR IN CANADA AND THE UNITED STATES* 23 (1980).

<sup>66</sup> WILLIAM E. FORBATH, *THE LONG LIFE OF LIBERAL AMERICA: LAW AND STATE-BUILDING IN THE U.S. AND U.K.* 1–3 (2005), available at <http://ssrn.com/abstract=738564>.

<sup>67</sup> LEMAN, *supra* note 65, at 26.

<sup>68</sup> *Id.* at 23.

reforms—including the Social Security Act of 1935<sup>69</sup> and its Aid to Families with Dependent Children (AFDC)<sup>70</sup> and the National Labor Relations Act of 1935—but it never knew the “steady state” of continual growth of the Canadian welfare state, for instance.<sup>71</sup>

The U.S. welfare state was very much shaped in its formative decades. For example, until its replacement, AFDC excluded childless families and many working families.<sup>72</sup> There were some innovative changes like the War on Poverty programs, which tried to create an “equal opportunity” welfare state and thus alleviate the legacy of racial division left by the New Deal benefits.<sup>73</sup> These programs never quite became an integral part of American political institutions. They were always a point of contention between the predominant corrective justice and the less-popular distributive justice approaches to government. Additionally, few of the New Deal programs were considered successes with the exception of the Food Stamp program, which answered the widespread hunger realities of the day as the number of beneficiaries grew from 2 million to almost 18 million from 1968 to 1979.<sup>74</sup>

The U.S. welfare state was the result of a well-contained social liberal belief in the duty of the state to provide for individuals in need. While it has always had a double nature—being a “public-private welfare state,”<sup>75</sup> unlike European welfare which is a matter of state duty, for example<sup>76</sup>—even in this unique character, it did not survive for too long.

Prior to 1980, every administration following Roosevelt’s “statist” and “bureaucratic” measures<sup>77</sup> dabbled in welfare policies. The Johnson-era “War on Poverty” was the most successful of these initiatives, though President Carter’s welfare legislation focused on a

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<sup>69</sup> Pub. L. No. 74-271, Aug. 14, 1935, 49 Stat. 620 (codified as amended at 42 U.S.C. §§ 301–1397 (2000)).

<sup>70</sup> AFDC was U.S. federal social welfare legislation designed to work with similar state programs to provide financial support for dependent children living with relatives. It was authorized under Title IV of the Social Security Act of 1935. See Stephen D. Sugarman, *Reforming Welfare Through Social Security*, 26 U. MICH. J.L. REFORM 817, 823–24 (1993).

<sup>71</sup> LEMAN, *supra* note 65, at 23.

<sup>72</sup> *Id.* at 200.

<sup>73</sup> See JILL QUADAGNO, *THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY 185–97* (1994) [hereinafter QUADAGNO, *THE COLOR OF WELFARE*].

<sup>74</sup> LEMAN, *supra* note 65, at 202.

<sup>75</sup> See Sonya Michel, *A Tale of Two States: Race, Gender, and Public/Private Welfare Provision in Postwar America*, 9 YALE J.L. & FEMINISM 123 (1997) (describing employer-sponsored fringe benefits and government welfare programs).

<sup>76</sup> de Búrca, *supra* note 63, at 5.

<sup>77</sup> FORBATH, *supra* note 66, at 3.

nationally administered system of guarantees.<sup>78</sup> Even Republican administrations tried to improve the process—President Nixon established the Family Assistance Plan,<sup>79</sup> which allocated \$1,600 per year for a family of four<sup>80</sup>—at least until the Republican Reagan Administration. The Reagan Administration and, following that, the Democratic Clinton Administration, both did their best to end the paternalist social liberal state, which, with all its faults, did provide services to the poor. To the extent that the pre-1980s welfare policies passed Congressional and judicial review, all helped promote economic development of low-income communities<sup>81</sup> by addressing the provision of basic needs such as housing, education, food, and access to health care through the Medicaid program.<sup>82</sup>

Those services were not the best—or even adequate—by many standards. Their very own nature made them vulnerable. For example, they covered both social insurance programs and social assistance benefits. The first ones were supposed to be granted as civil rights earned through work participation. But as Jill Quadagno observed, while social insurance programs merely replicated the market inequalities due to their contingency on employment (means-test), social assistance benefits had both a means-test (“a labor control factor”) and a family-status requirement.<sup>83</sup> Because of their attachment to family status (i.e., a child caretaker is eligible because she is unable to work or without a man who can provide support), they offered no guarantee of future income, and when that enabling status changed, those benefits stopped.<sup>84</sup> Consequently, both the left and right criticized the pre-1980s welfare policies. The right argued that they were anti-American<sup>85</sup> because they were the result of raw class-based power politics and represented a form of centralized “redistributive class politics.”<sup>86</sup> The

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<sup>78</sup> *Id.* at 94.

<sup>79</sup> LEMAN, *supra* note 65, at 70–71, 78.

<sup>80</sup> *Id.*

<sup>81</sup> See Hope Lewis, *Women (Under)Development: The Relevance of “The Right to Development” to Poor Women of Color in the United States*, 18 LAW & POL’Y 281, 282–93 (1996).

<sup>82</sup> *Harris v. McRae*, 448 U.S. 297, 301 (1980) (“The Medicaid program was created in 1965, when Congress added Title XIX to the Social Security Act for the purpose of providing federal assistance to States that choose to reimburse certain costs of medical treatment for needy persons.”).

<sup>83</sup> Quadagno, *Race, Class, and Gender*, *supra* note 56, at 14.

<sup>84</sup> *Id.*

<sup>85</sup> See, e.g., LAWRENCE FRIEDMAN, *AMERICAN LAW IN THE 20TH CENTURY* 187 (2002). In 1949, rent control was criticized as “un-American,” “against God and the Bible,” as making “slaves out of owners,” and giving tenants more money to “buy whiskey, to gamble, and to throw to the wind.” *Id.*

<sup>86</sup> FORBATH, *supra* note 66, at 3.

left criticized the pre-1980s welfare policies as stigmatizing and humiliating, coercing women into taking menial jobs and providing benefits that were below the poverty line.<sup>87</sup>

Surprisingly, by the end of the Carter Administration the welfare discourse had become apocalyptic, using the biblical mythology of “after the collapse.”<sup>88</sup> Shortly thereafter, the Reagan Administration ushered in the beginning of the end when “[i]n 1981, deep cuts in federal aid to states and localities reduced funding to 1968 levels.”<sup>89</sup> By the 1990s, welfare opponents were able to mount a successful conservative critique that blamed public assistance for both creating and sustaining poverty.<sup>90</sup> In fact, the early 1990s reignited the “smoldering political obsession”<sup>91</sup> with both the welfare system and “the myth of the welfare mother with a Cadillac.”<sup>92</sup> Its prevalence was so pervasive that Democratic President Clinton became a mere pawn in the destruction of the welfare system. He chose to keep his campaign promise and “end welfare as we know it,” signing into law the Personal Responsibility and Work Opportunity Reconciliation Act (Personal Responsibility Act) in 1996.<sup>93</sup> However, Clinton’s reforms have only worsened the plight of those they were intended to help.

The Personal Responsibility Act includes *inter alia* a mandatory work requirement after two years of receiving aid,<sup>94</sup> as well as a five-year lifetime limit per family.<sup>95</sup> Additionally, it provides for reductions of the Food Stamp program and other structural cuts.<sup>96</sup> Overall, public funding was cut by \$54 billion within the first six years of the program.<sup>97</sup> Nevertheless, empirical data did not reveal a corresponding reduction of poverty. To the contrary, while the War on Poverty reduced the nation’s poverty rate from 18% to 9%

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<sup>87</sup> QUADAGNO, *THE COLOR OF WELFARE*, *supra* note 73, at 117.

<sup>88</sup> LEMAN, *supra* note 65, at 198–227.

<sup>89</sup> QUADAGNO, *THE COLOR OF WELFARE*, *supra* note 73, at 178.

<sup>90</sup> Ann R. Tickamyer, *Public Policy and Private Lives: Social and Spatial Dimensions of Women’s Poverty and Welfare Policy in the United States*, 84 KY. L.J. 721, 725–29 (1995–1996).

<sup>91</sup> Elaine McCrate & Joan Smith, *When Work Doesn’t Work: The Failure of Current Welfare Reform*, 12 GENDER & SOC’Y 61, 61 (1998).

<sup>92</sup> Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 GEO. L.J. 1499, 1507 (1991).

<sup>93</sup> Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (2000) (codified as amended in scattered sections of 42 U.S.C.).

<sup>94</sup> 42 U.S.C. § 602(a)(1)(A)(ii) (2000).

<sup>95</sup> *Id.* § 608(a)(7).

<sup>96</sup> McCrate & Smith, *supra* note 91, at 61.

<sup>97</sup> *Id.*

in 1972,<sup>98</sup> current data demonstrates that poor people are worse off since the passage of the Personal Responsibility Act.<sup>99</sup>

Primary in the 1996 welfare reform was the Charitable Choice provision,<sup>100</sup> which authorized faith-based organizations to compete with secular organizations to provide federally funded welfare, health, and social services.<sup>101</sup> This provision, which President George W. Bush has embraced,<sup>102</sup> allows faith-based organizations to retain their religious character while providing social services, so long as recipients' religious freedom is not diminished.<sup>103</sup> It is already difficult to understand why government would cut short its direct public assistance programs, choosing instead to subsidize religious organizations' social activities. It is even more difficult to understand if one remembers that the amount of funding allocated for this complicated scheme has always been inadequate for any systemic cure of poverty<sup>104</sup> and encompasses less funding than was previously expended for social services.<sup>105</sup>

While the nation's welfare caseload dropped from 7.2 million in 1993 to 6.9 million in 1999, poverty has not only continued but increased<sup>106</sup> as people received less assistance.<sup>107</sup> Thus, it can be

<sup>98</sup> QUADAGNO, *THE COLOR OF WELFARE*, *supra* note 73, at 175.

<sup>99</sup> Lott & Bullock, *supra* note 49, at 194.

<sup>100</sup> § 604a.

<sup>101</sup> Judith B. Goodman, *Charitable Choice: The Ramifications of Government Funding for Faith-Based Health Care Services*, 26 NOVA L. REV. 563, 563 (2002).

<sup>102</sup> Andrea Pallios, *Should We Have Faith in the Faith-Based Initiative?: A Constitutional Analysis of President Bush's Charitable Choice Plan*, 30 HASTINGS CONST. L.Q. 131, 132 (2002).

<sup>103</sup> § 604a(b).

<sup>104</sup> See Vanessa Gallman, *Kids Emerge As Focus of Welfare Debate*, SAN JOSE MERCURY NEWS, July 30, 1996, at A9. On the other hand, though Bush's fund for Charitable Choice would mix federal money and private giving, it was never expected to be more than \$1.8 billion over ten years. Marc Lacey with Laurie Goodstein, *Bush Fleshes Out Details of Proposal to Expand Aid to Religious Organizations*, N.Y. TIMES, Jan. 30, 2001, at A15. Additionally within the Charitable Choice scheme, the government must provide a secular alternative to any such services. *Id.* For a further discussion on the impact of welfare reform on child abuse, see Nancy A. Wright, *Welfare Reform Under the Personal Responsibility Act: Ending Welfare as We Know It or Governmental Child Abuse?*, 25 HASTINGS CONST. L.Q. 357 (1998).

<sup>105</sup> The Personal Responsibility Act was passed because it promised to save as much as \$61 billion over six years by cutting back money available for various welfare programs. See Wright, *supra* note 104, at 359 n.10.

<sup>106</sup> David Leonhardt, *Poverty in U.S. Grew in 2004, While Income Failed to Rise for 5th Straight Year*, N.Y. TIMES, Aug. 31, 2005, at A9. Nationally, the poverty rate in 2004 increased to 12.7% from 12.5% in 2003; in New York, it rose to 20.3% in 2004 from 19% in 2003. *Id.* "Poverty levels have changed only modestly in the last three decades, rising in the 1980's and falling in the 1990's, after having dropped sharply in the 1960's." *Id.* Rates decreased from more than 22% in 1960 to a low of 11.1% in 1973. *Id.*

said that the Personal Responsibility Act effectively destroyed one of the pillars of the American social liberal state. In 1999, 11.8%, or 32.3 million people, lived in poverty—with the majority of those families living well below the poverty line<sup>108</sup>—in 2004, the official poverty rate had steadily grown to 12.7%, or 37 million people.<sup>109</sup> In 1999, the federal poverty threshold for a family of four was \$17,184.<sup>110</sup> Despite inflation rates, the federal poverty threshold was only \$19,307 in 2004<sup>111</sup>—and these numbers cover only part of our poor. They do not include the working class that cannot afford health care, proper housing, or education—that would add tens of million of people to our count.<sup>112</sup> This very schematic picture depicts a systemic problem that affects our entire society: whether to accept that the poor are part of it or to segregate them. Can private charity help manage, contain, or solve this problem?

This question, however, poses difficulties. First, charity, even when it provides social services, is not meant to resolve structural social problems—it assists individuals.<sup>113</sup> Second, even if poverty results from a lack of personal responsibility, charity is not the answer because inadequate individualized services or minimal cash distributions are not enough to make a meaningful difference. Personal economic success is not simply the consequence of isolated decisions.<sup>114</sup> Data show that personal decisions are shaped by an individual's physical and social contexts.<sup>115</sup> A person's physical characteristics, including gender, age, race, and ethnicity, in addition to his or her access to resources, such as education and health care, are major factors in the equation of personal economic success.<sup>116</sup> In fact, the availability of resources such as money, education, and social support vitally affects the degree of personal agency and responsibility. Poverty limits options, which, in turn, undermines agency and personal responsibility. The failure of the previous welfare system confirms the taxing nature of inadequate

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<sup>107</sup> Lott & Bullock, *supra* note 49, at 195.

<sup>108</sup> *Id.* at 192.

<sup>109</sup> CARMEN DENAVAS WALT ET AL., INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2004, at 9 (2005), <http://www.census.gov/prod/2005pubs/p60-229.pdf>.

<sup>110</sup> Lott & Bullock, *supra* note 49, at 192.

<sup>111</sup> DENAVAS WALT ET AL., *supra* note 109, at 45.

<sup>112</sup> Lott & Bullock, *supra* note 49, at 195–96.

<sup>113</sup> BAKAL, *supra* note 4, at 222–51.

<sup>114</sup> Jacquelin W. Scarborough, *Welfare Mothers' Reflections on Personal Responsibility*, 57 J. SOC. ISSUES 261, 262 (2001).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

resources. Significantly, data surveying single mothers on welfare attending college showed that their best survival choice was to rely on public assistance, albeit minimal, during that time because it provided benefits such as health care, food stamps, and rent subsidies.<sup>117</sup> None of the surveyed single mothers, however, considered private charity and its unknown benefits.<sup>118</sup>

The defunct welfare system might have stigmatized its recipients, but because its employees had more expertise and efficiency than those of private charities focused on social services—such as Boys Town, the Boy Scouts, and the Girl Scouts<sup>119</sup>—it also helped out many more millions of Americans. Destroying the national welfare system and outsourcing it to the private sector—depriving families of a quasi-reliable financial support—is not and cannot be the answer to our systemic poverty problem.

### C. *On the Neo-Liberal State and Distributive and Corrective Justice*

The reality is that private charity cannot replace public assistance, and, as shown above, charity does not intend to do that. In fact, as discussed here, we have witnessed a decrease in private charity aimed at social services. The only real problem is that the state has decided to renege on its natural commitments, such as providing for its poor, even though being poor is often the result of state job and welfare policies.

Any society can tolerate public services and fund them through taxes if it believes that the community has to take care of its needy members. The moment it starts questioning that duty and regards its poor as “undeserving,” Thomas Ross reminds us, society will stop funding services for the disadvantaged. Once the label of undeserving poor creeps into popular belief, it becomes very difficult to perceive poverty accurately, as originating in “the structure of America’s political economy”<sup>120</sup>—not in the behavior of the poor, who are often described as deviant, criminal, and “beyond hope and [without] any sense of initiative.”<sup>121</sup>

These cultural assumptions inform and are reflected in legislation, such as the 1996 Personal Responsibility Act,<sup>122</sup> as well as in judicial opinions. The U.S. Supreme Court has previously dis-

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<sup>117</sup> *Id.* at 262–72.

<sup>118</sup> *Id.*

<sup>119</sup> BAKAL, *supra* note 4, at 222–51.

<sup>120</sup> ROSS, *supra* note 92, at 1508.

<sup>121</sup> *Id.* at 1507.

<sup>122</sup> Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996).



played a lack of empathy for the poor, acknowledging only the “narrowest constitutional grounds for addressing their interests.”<sup>123</sup> For example, in a 1970 decision, *Dandridge v. Williams*,<sup>124</sup> the Court held that an absolute limit of \$250 per month for a public assistance grant, regardless of the size of the family and its actual need, did not violate the Equal Protection Clause of the Fourteenth Amendment.<sup>125</sup> There are countless other decisions like *Dandridge*, all of which display the Justices’ belief in corrective justice.<sup>126</sup>

One such example is *Bowen v. Gilliard*,<sup>127</sup> in which the Supreme Court considered the constitutionality of an adjustment in the distribution of welfare (AFDC) benefits in an impoverished American household. The Court concluded that a governmental decision to reduce a family’s welfare benefits, in light of the support a member of the family received from his non-custodial parent, did not violate the Equal Protection Clause of the Fourteenth Amendment, nor the Due Process or Takings Clause of the Fifth Amendment.<sup>128</sup> In other words, the governmental decision did not need any corrective action by the judiciary.

Moreover, the Court was able to look at the government’s actions as an insulated act, which could be judged outside its larger implications (though in this case the implications were limited to a family setting). For instance, in upholding the policy under the Takings Clause, Justice Stevens refused to consider the financial impact of the policy on the family as a whole, instead considering only the impact on the child.<sup>129</sup> Instead, the Court chose to consider the policy’s financial impact on the child alone, as if the child had no mother or siblings. Additionally, Justice Stevens stated that a child has no vested interest in receiving the same level of child support payments, as if the Justice had never heard of a reliance argument. Despite the Court’s rationale, its holding penalized the child and his family because their financial resources were de facto reduced.<sup>130</sup>

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<sup>123</sup> Ross, *supra* note 92, at 1509.

<sup>124</sup> 397 U.S. 471 (1970).

<sup>125</sup> *Id.* at 486. Now can we blame the Justices for not counting members of the underclass among their acquaintances?

<sup>126</sup> Corrective justice argues that it is not a matter of fairness and justice to take care of the poor (the poor are mostly undeserving anyway), because it is not an appropriate role of the state to do so. The state can and should enable justice, but only when a wrong is involved.

<sup>127</sup> 483 U.S. 587 (1987).

<sup>128</sup> *Id.* at 597.

<sup>129</sup> *Id.* at 606–07.

<sup>130</sup> *Id.* at 605.

Justice Brennan, writing in the dissent, was more sensitive to the impact of the policy on both the child and his family. In Justice Brennan's view, the Court's decision condoned the government telling a "child who lives with a mother receiving public assistance that it cannot both live with its mother and be supported by its father. The child must either leave the care and custody of the mother, or forgo the support of the father and become a Government client."<sup>131</sup> Stated another way, while every other child has a right to rely on the support of a non-custodial parent, a child living with a parent who receives public assistance cannot. Even worse, the majority failed to recognize that, under the policy it upheld, a "child must choose between the father and mother solely because other household members are indigent and desire public assistance," and it is the "presence of these persons in the household, not the child's voluntary application for public assistance, that triggers the requirement that it choose which parental relationship to maintain."<sup>132</sup>

So much depends on the way one chooses to judge an act, individually or within the socio-economic context of that member's class.<sup>133</sup> But such choice is not readily available. Taking a contextual view would require a distributive approach to justice. Such an approach is not only very expensive, but also not clearly demanded by any oppositional (radical) movement as we will see in the next Section of the Article. So, if no one pushes for it, why bother?

Under the prevalent conservative view, in the neo-liberal state, the poor are poor because of their behavior—not because of any structural problems with the economic system. To the extent that poverty is thus perceived as an individual behavioral problem and not a structural one—which would imply a wrong done to the poor on a larger social scale—the state, especially the emaciated masculine state, has no duty to interfere. Instead, its relegated role is that of a night watchman.<sup>134</sup> All it can do is correct private wrongs and protect individuals from those private wrongs.

This discourse is not new. Its roots are in the Aristotelian discourse of justice, which analyzed both corrective and distributive justice.<sup>135</sup> Interestingly, the Aristotelian treatment of distributive justice specified what needed to be equally shared in society—

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<sup>131</sup> *Id.* at 610 (Brennan, J., dissenting).

<sup>132</sup> *Id.* at 625.

<sup>133</sup> See A.W. Phinney III, *Feminism, Epistemology, and the Rhetoric of Law: Reading Bowen v. Gilliard*, 12 HARV. WOMEN'S L.J. 151, 158–59, 166 (1989).

<sup>134</sup> See LASSALLE, *supra* note 61.

<sup>135</sup> ARISTOTLE, NICHOMACHEAN ETHICS 118–20 (Martin Ostwald trans., 1962).

those goods that determined one's good or bad fortune, such as money—because those goods,<sup>136</sup> Aristotle believed, were in limited supply.<sup>137</sup> In other words, we cannot all be filthy rich, but we can and should all enjoy decent living.

The culture that once embraced social democracy is under assault everywhere, including Western Europe. The United States, in particular, is leading the way with its emaciated neo-liberal state. Optimistically, William Forbath argues American liberalism may not be dead.<sup>138</sup> Despite the world's policymakers longing for the American market, which is unencumbered by “government-enforced social and economic rights,”<sup>139</sup> the Europeans, unlike us, are not yet prepared to relinquish the social dimension of citizenship guarantees<sup>140</sup> (with a minimum of economic welfare and security). Therefore, perhaps, we in America need to refocus our critical analysis and address the problems public assistance faces today, reinvigorating the public debate about what type of discourse could promote much-needed public assistance.

## II. ON RADICALISM AND POSTMODERN THOUGHT

This Section grew out of the observation that, while the welfare state is shrinking, we are witnessing members of the social groups most affected by this nefarious situation becoming more and more visible in the public and private sectors, including the nonprofit sector. This Section presumes that this visibility is closely connected to various academic and non-academic movements which promoted social (tribal) diversity, both in the public and private sphere, and which pressured legislators and judges to make necessary changes in our laws. Moreover, this Section assumes that the limit of their visibility—which improved their individual lives but not necessarily those with whom they identify biologically (or tribally)—is also directly connected to the values those movements promote.

Among the poor, non-white minorities and women, especially single mothers and the elderly, are most vulnerable.<sup>141</sup> Thus, it was

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<sup>136</sup> These goods should not be confused with “public goods,” such as cleaner air or indigenous knowledge. For more on the “public goods” discourse, see Peter Drahos, *The Regulation of Public Goods*, 7 J. INT'L ECON. L. 321 (2004).

<sup>137</sup> William Mathie, *Political and Distributive Justice in the Political Science of Aristotle*, 49 REV. POL. 59, 64–66 (1987).

<sup>138</sup> FORBATH, *supra* note 66, at 3.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> Lott & Bullock, *supra* note 49, at 192; Joy K. Rice, *Poverty, Welfare, and Patriarchy*:

only expected that they were also the first to be affected by the welfare reform policies of 1996. For example, in 1999, 74% of newly-created jobs in the areas with the most growth paid less than a livable wage, and 46% paid less than half a livable wage.<sup>142</sup> Out of these jobs, those most often available to mothers leaving welfare for work were “maid, cashier or waitress” and other such service industry jobs, which often did not pay the minimum wage or provide benefits.<sup>143</sup>

During this period, we also witnessed the rise to prominence of members of these destitute-prone groups. More and more women are politically successful: Carol Moseley Braun, Hillary Clinton, Condoleezza Rice, and Elizabeth Dole are among the most politically engaged. Overall, women—whether white or non-white—are increasingly represented in the judicial, legislative, and executive branches of government, as well as in the corporate<sup>144</sup> and nonprofit world.<sup>145</sup>

Nevertheless, their personal success stories have not caused a systemic change, or even a slow-down, in the demise of the social liberal state. During the better days of the welfare state—when “the percentage of black 18- to 24-year-olds enrolled in college grew from 13% in 1965 to 22.6% by 1975,”<sup>146</sup> and the number of college-educated African-Americans “holding white-collar jobs increased by 522 percent”<sup>147</sup>—the quality of life for the poor African-Americans, especially African-American women, declined “on nearly every indicator.”<sup>148</sup> For example, the number of children born out of wedlock, which is one indicator of poverty, doubled to 62.6% in less than two decades, from the early 1970s to the late

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*How Macro-Level Changes in Social Policy Can Help Low-Income Women*, 57 J. SOC. ISSUES 355, 355 (2001).

<sup>142</sup> Lott & Bullock, *supra* note 49, at 195.

<sup>143</sup> *Id.*

<sup>144</sup> In 2002, women held 2140 of the 13,673 corporate officer positions in the Fortune 500—twice as many as in 1995. See CATALYST, WOMEN IN THE FORTUNE 500, at 2, [http://www.catalystwomen.org/pressroom/press\\_releases/2-10-05%20Catalyst%20Female%20CEOs%20Fact%20Sheet.pdf](http://www.catalystwomen.org/pressroom/press_releases/2-10-05%20Catalyst%20Female%20CEOs%20Fact%20Sheet.pdf) (last visited Mar. 23, 2006).

<sup>145</sup> For example, within the last decade, all the presidents of the Red Cross have been women. See The American Red Cross, Presidents, Chairmen and Chief Executive Officers, <http://www.redcross.org/museum/president.pdf> (last visited Mar. 29, 2006). An increasing number of faculty members across the nation’s campuses are women. For example, there has been a 10% increase in female faculty at Yale University. See Yale University Office of the Provost, An Initiative to Enhance Faculty Diversity within the Faculty of Arts and Science, [http://www.yale.edu/provost/html/provost\\_ltr\\_diversity.html](http://www.yale.edu/provost/html/provost_ltr_diversity.html).

<sup>146</sup> QUADAGNO, THE COLOR OF WELFARE, *supra* note 73, at 176.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

1980s.<sup>149</sup> In a society that does not offer adequate public assistance for child care<sup>150</sup> and whose working class is dominated by women employed in service jobs receiving lower wages than men in manufacturing jobs, an increased number of children born out of wedlock, coupled with declining wages, is a major reason for the shrinking of the middle class and the soaring number of individuals who fall into poverty.<sup>151</sup>

While apparently paradoxical, this Article suggests that this phenomenon is the natural result of a lack of classical radical discourse that could successfully oppose the current corporate-driven political environment. Such discourse would be class-based, but none of the dominant postmodern schools of thoughts is interested in this approach.<sup>152</sup>

Increased reliance on private charities for social services, which is possible because the volume of these services is continually shrinking, might be connected to a lack of oppositional critical discourse—a discourse that believes in general solutions to systemic problems and could pressure the incumbent ideology to promote much-needed changes. The radical discourse of the day has abandoned community socio-economic values for a postmodern and post-material ideal of individual achievement that often exalts tribal non-economic features at the expense of those who require economic support, such as education, good health, and decent housing. Postmodern radicalism promotes individual success and ignores the destitute masses, under the pretext that it cannot speak on their behalf. For example, postmodern feminism encourages a cacophony of individualistic ideologies that often banish any reference to historical social context, as if individuals can develop somehow outside the society in which they want to flourish and sometimes govern and control.

Gary Minda puts both feminism and critical race theories into the context of the current postmodern jurisprudential discourse. He explains how postmodern jurisprudence—schools of thought focused on understanding the law and the adjudicatory process<sup>153</sup>—represents a rejection of the New Deal philosophy and its

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<sup>149</sup> *Id.*

<sup>150</sup> See generally Martha Fineman, *The Nature of Dependencies and Welfare "Reform,"* 36 SANTA CLARA L. REV. 287 (1995–1996).

<sup>151</sup> QUADAGNO, *THE COLOR OF WELFARE*, *supra* note 73, at 180.

<sup>152</sup> See generally Neačsu, *The Wrongful Rejection*, *supra* note 9.

<sup>153</sup> The five jurisprudential movements that reflect the postmodern sensibilities are feminism, critical race theory, critical legal studies, law and literature, and law and

meta-narrative.<sup>154</sup> While the postmodern skeptical attitude is a welcome addition to any school of thought, however, a limited, even castrated agenda that discredits the need for systemic solutions is far from radical or subversive. To the contrary, its very attraction, its moodiness, its ennui,<sup>155</sup> its theoretical impotence makes it easily defeatable. Postmodernism is not an attack on the very existence of mainstream jurisprudence. Postmodernism is derivative work. It is a variation on the same theme. As a result, co-opting it has been the successful strategy of the hegemonic discourse.<sup>156</sup>

Although feminism aims to eliminate gender subordination,<sup>157</sup> it avoids a meta-narrative structural approach to the causes of gender subordination. Instead, feminism seems to be satisfied with patching-up solutions that rest on diversifying the shrinking number of the haves<sup>158</sup> or the illusory rights the Supreme Court recognizes one day only to deny or limit the following day.<sup>159</sup> It is very troubling that some feminists confidently reject efforts to collapse discourse into some essential demand, such as income distribution.<sup>160</sup> While fairness, justice, and equity require more than income distribution, without a decent income that enables adequate access to market goods—such as education, housing, and health care—we cannot meaningfully talk about fairness, justice, or equity. While the diverse values individuals hold deserve respect,

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economics. GARY MINDA, *POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END*, 83–105, 224–46 (1995).

<sup>154</sup> *Id.* at 224.

<sup>155</sup> *Id.* at 233.

<sup>156</sup> For a more detailed analysis of this argument, see generally Neașu, *The Wrongful Rejection*, *supra* note 9.

<sup>157</sup> MINDA, *supra* note 153, at 228.

<sup>158</sup> If feminism wants more women in the workplace, for example, but the market does not allow everybody to be employed (or even worse, it reduces the number of jobs), then women end up replacing (for lower pay) men in the work force. A similar process happens with outsourcing non-professional government jobs to the private sector for lower wages. In this instance, women usually hold both types of jobs; the only difference is in pay: Once outsourced to the private sector, the job comes with less earnings, as other panelists, such as Jeanne Mullgrav, Commissioner of the New York City Department of Youth and Community Development, highlighted during the post-panel discussion at the *New York City Law Review Symposium*. This effect is not limited to the United States. See, e.g., Charlotte Denny, *Professionals' Pay Packets Fail to Keep Pace: Waves of Privatisation Have Led to Big Changes*, *GUARDIAN* (London), Mar. 21, 2001, at 3, available at <http://society.guardian.co.uk/commongood/comment/0,,460102,00.html>.

<sup>159</sup> Dana Neașu, *Tempest in a Teacup or the Mystique of Sexual Legal Discourse*, 38 *GONZ. L. REV.* 601, 617–25 (2002–2003).

<sup>160</sup> See generally Gillian K. Hadfield, *Feminism, Fairness and Welfare: An Invitation to Feminist Law and Economics* 1 *ANN. REV. L. & SOC. SCI.* 285 (2005).

poverty causes a pain in the stomach that only food can soothe.<sup>161</sup>

Moreover, when 57% of the poor are women and 70% of working women earn less than \$20,000 yearly, what we need is a distributive public policy program which addresses the systemic cause of poverty.<sup>162</sup> And that cause is first a quantifiable, socio-economic one; even poverty of knowledge and obscurantism are economic in nature.

### III. RETHINKING OUR PUBLIC ASSISTANCE

This brief Section highlights the democratic need of providing a decent level of social services for all. If democracy requires active citizenship, then it cannot afford hungry, destitute, and hopeless people whose sole public activity may be limited to engaging in crime to survive. Ignoring poverty will only increase the number of have-nots, and we cannot put them all in jail (although we are certainly trying our best!). The longer we wait, the costlier a price we will pay as a society. The need to remake our public assistance programs is imminent. Today we have the luxury to think about how to improve them—tomorrow we may not.

Public assistance for the most disadvantaged groups, such as mothers and children, would definitely require a welfare theorem which emphasizes the role of quality, caring labor. The immediate public implication of such a reform is obvious. As Gillian K. Hadfield recently noted: “Caring labor has significant public good attributes, particularly if we emphasize the relationship between quality care of children and the production of social capital in the form of norms of honesty, trust, civic engagement, reciprocity, respect for law, and so on.”<sup>163</sup> NGOs, such as charities, have never been meant to solve such systemic problems. They are part of civic society—the part of society that can provide constructive criticism to governments.

Of course, the previous solution, providing single mothers with cash to take care of their children, was not ideal. Perhaps it was only slightly better than the one used today: herding and bus-ing mothers to under-paid jobs while unqualified people take care of their children.<sup>164</sup> A decade ago, Martha Fineman suggested that

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<sup>161</sup> For a more vivid description of this phenomenon, see Nobel Prize laureate Knut Hamsun’s story about a young writer on his own, unable to find work, starving, and homeless in Christiania. KNUT HAMSUN, *HUNGER* (Robert Bly trans., Farrar, Straus & Giroux 1967) (1890).

<sup>162</sup> Rice, *supra* note 141, at 355.

<sup>163</sup> Hadfield, *supra* note 160, at 293.

<sup>164</sup> Sharon Lerner, Op-Ed., *Working Hard and Losing Out*, N.Y. TIMES, Dec. 11, 2005,

the United States should look at how other industrialized countries have dealt with this issue and develop its own policies based on European ones.<sup>165</sup> Joy K. Rice, too, argued in support of macro-level reforms that would alleviate women's poverty, focusing on equal pay for equal work, one year of postsecondary education, universal health insurance, and preventive health services.<sup>166</sup> Those solutions seem more compelling today than ever.

Only a policy based on justice that is twofold—distributive and, to the extent necessary, corrective—could be successful. There is no fault or wrong-doing behavior that causes poverty. Poverty exists because the system cannot provide jobs for all. Under these circumstances, to pretend that charities can take care of the destitute is not only disingenuous, it is callous and dangerous. It is dangerous because poverty can breed subclasses not unlike the Roman proletariat, which was indeed easily silenced with bread and circuses but equally useless for any purpose other than manipulated election results. I doubt that we are looking to the last days of the Roman Empire as our democratic model.

#### CONCLUSION

This Author views the emaciation of the neo-liberal state as a democratic mistake. Democracy requires active citizenship, yet the ignored, the hungry, and the abused cannot become involved citizens. Furthermore, gender- and race-neutral policy requires “redistribution of status and social power,”<sup>167</sup> and its enactment depends on the disenfranchised, such as women and African Americans, becoming actors, not policy objects, in the political process.

Private charities cannot deal with such a systemic problem. Thus, if democracy is a value we treasure, we need to reassess our current public assistance policies and accept redistributive justice.

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§ 14, at 13; see also Susan Chirac, *If Welfare Mothers Must Go To Work in Clinton Plan, Will Children Gain?*, N.Y. TIMES, Aug. 9, 1994, at B8 (discussing Clinton's welfare plan and its impact on welfare mothers); Leslie Kaufman, *Women Who Leave Welfare Find Few Day Care Options*, N.Y. TIMES, May 10, 2004, at B1.

<sup>165</sup> See generally Fineman, *supra* note 150.

<sup>166</sup> Rice, *supra* note 141, at 363–68.

<sup>167</sup> Quadagno, *Race, Class, and Gender*, *supra* note 56, at 27.



