

**Regulating Coexistence in the New Political-Economy:  
Cross-Sector Collaboration in a Workforce Development Approach**

**By  
Orly Lobel**

**The Hauser Center for Nonprofit Organizations  
The Kennedy School of Government  
Harvard University**

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Orly Lobel is a Hauser Center Doctoral Fellow, Kennedy School of Government, Harvard University 2002-04; Clark Byse Fellow, Harvard Law School, 2003-04; Visiting Scholar, Yale Law School, 2003-04. LL.M. 2000, Harvard University (waived), LL.B. 1998, Tel-Aviv University. This project has been supported by the Hauser Center New Research Fund. The paper was presented in the Law and Society Annual Meeting, Pittsburgh June 2003.  
[olobel@law.harvard.edu](mailto:olobel@law.harvard.edu)

## **Abstract**

Private non-profit organizations are increasingly assuming key roles as human service providers within the new political economy. This paper aims to contribute to our understandings of how the participation of nonprofit intermediaries can modify the outcomes of the market and how such participation dynamically relates to policy and regulation. Developing an integrated approach to the question of sectoral difference and cross-sector collaboration, the paper focuses on the challenge of reform and sustainability in a particular social field -- Workforce Development -- situated at the intersection of law, market, and society. In an era of privatization, welfare-to-work reforms, and a “devolution revolution,” government agencies must often decide whether to support and cooperate with for-profit or nonprofit intermediaries, and how to structure the relations between them. Often, through newly adopted voucher systems, the choice is left to individual consumers to decide between service providers that vary in organizational form. Focusing on the emerging roles of non-profits as they respond to the changing realities of work and service provision, the paper questions conventional assumptions about divisions between sectors. In particular, the paper analyzes a series of quantitative and qualitative studies on differences in performance among publicly funded vocational training providers. By comparing the complex circumstances in which nonprofit initiatives in a mixed industry produce interventionist and redistributive effects with those in which organizational form seems insignificant, the goal is to provide a better normative understanding of the comparative advantage of different organizational forms in changing social contexts.

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# **Regulating Coexistence in the New Political-Economy: Cross-Sector Collaboration in a Workforce Development Approach**

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## **I. Introduction**

Private non-profits organizations are increasingly assuming key roles as human service providers within the new political-economy. This paper aims to contribute to our understandings of how the participation of nonprofit intermediaries can modify the outcomes of the market and how such participation dynamically relates to policy and regulation. Developing an integrated approach to the question of sectoral difference and cross-sector collaboration, the paper focuses on the challenge of reform and sustainability in a particular social field -- Workforce Development (WD) -- situated at the intersection of law, market, and society. This approach links an economic justice agenda with the mobilization of resources and energy across sectors.

Within the new market realities, Workforce Development is significantly led by new labor market intermediaries, primarily job training and placement institutions. As central actors in determining the new world of work, these intermediaries bridge the individual and the economy; the state and the market. These intermediaries exist in a great variety of organizational forms and structures. In an era of privatization, welfare reform, and a “devolution revolution,” government agencies must often decide whether to support and cooperate with for-profit or nonprofit intermediaries, and how to structure the relations between them. Often, through newly adopted voucher systems, the choice is left to individual consumers to decide between service providers that vary in organizational form. Focusing on the emerging roles of non-profits as they respond to the changing realities of work and social service provision challenges conventional assumptions about divisions between sectors. For nonprofits operating in these settings, government contracts and fees-for-service are a principal source of income, and mobilization often occurs in direct reaction to newly available public funding. These new realities are thus shifting conventional ideas about the role of the state and its relations to

other sectors. They also put into question the traditional dichotomies between nonprofit and for-profit organizations, in which for-profits are perceived as rational income generating entities while non-profits are assumed to operate voluntarily and philanthropically for those in need.

Aiming toward crossing disciplinary and sectoral debates, the paper traces an enduring puzzle: while many theoretical and empirical accounts assert that organizational form in social service provision does not determine the quality of the service provided, the identity of the constituents served by the organization, and the responsiveness of the organization to weaker parties in the market, others maintain that nonprofit involvement is crucial to ensure socially responsible practices; while some studies claim no particular impact or benefit from the presence of nonprofits to the improvement of the worklife of weaker social groups, other studies and cases reveal significant contributions from nonprofit participation in the social field of Workforce Development. It is this tension that poses a challenge for public policies aimed at encouraging responsible and equitable practices in the new market. Interpreting a multifaceted set of theoretical and empirical studies and integrating these findings within a framework of Workforce Development allows us to ask when and how organizational form influences such variations, producing differences in access, quality, equity, and impact on market practices. By comparing the complex circumstances in which nonprofits initiatives in a mixed industry produce interventionist or redistributive effects with those in which organizational form seems insignificant, the goal of this project is to provide a better normative understanding of the comparative advantage of different organizational forms within different contexts. The challenge for public policy is to acknowledge the sets of conditions and distinctive features under which competition, as well as collaboration, among different organizational forms will be socially desirable. Legal regulation, including exemptions, grants, and direct preference of an organizational status in government contracts, can generate a constructive coexistence of public, nonprofit, and for-profit entities that can achieve distributive goals, enhance the social value of the availability of nonprofit service providers, and create positive spillover effects in the performance of other actors.

## **II. Overview of the Argument**

The field of Workforce Development (WD) has been undergoing dramatic changes for several interrelated -- political, economic, and social -- reasons. Section III of the paper begins by describing the new legal regime governing WD. It describes the regulatory requirements enacted by the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) and the Workforce Investment Act (WIA), designed to reform earlier welfare and training laws. The new legal regime aims to correct the perceived inadequacies and inefficiencies of the then-existing system governed primarily by the Aid to Families with Dependent Children (AFDC) and the Job Training Partnership Act (JTPA). The section examines some of the fundamental innovations adopted by the enactments, including decentralization, integration of different federal block grants, creation One-Stop centers, Work First requirements, use of private providers, performance incentives, and the new voucher system for training. It then suggests the theme of converging ideologies, perspectives, and affiliations that have contributed to the reforms. Finally, section III(D) describes central features in the new economic realities, and the ways in which modes of production, advancements in technology, and the increased global mobility of labor and capital have all put an increased premium on skills and WD.

Section IV begins with a trilemma: the developments of the past several decades have vastly increased the significance of training, employability, and adaptability to rapidly changing markets, yet, these same developments have also reduced the incentives of employers to invest in WD with regard to the majority of the workforce. At the same time, legal reforms concerning direct governmental provision of social safety nets and support has put into question the ability of workers to seek help outside of the market. This section thus identifies what are the central challenges that a successful WD approach must tackle with today, including the weaknesses of past publicly funded training investments, as well as the structural biases that currently exist in recruitment, including existing gaps in access, the devaluation of certain skills, the premium on new “soft” skills, and the pervasive uses of network or word-of-mouth hiring. Exposing new dynamics of exclusion in this new era of human capital raises concerns about the allocation of investment, development, and opportunity among segments of the

workforce. Focusing on how some workers will not reach a basic minimum of training through the market, the promise of employability and up-skilling is illusive. These understandings reveal the multifaceted vision that is necessary for a comprehensive Workforce Development approach.

Building on this framework, Section V engages the on-going debate on theoretical and empirical differences between nonprofit organizations and for-profit organizations, asking the question: Should government, when privatizing human services, prefer contracting with nonprofit providers? It first looks at three central sets of challenges in the context of service privatization: performance measurement; competition; and the existing theoretical and empirical framework on nonprofit service providers. Second, it reports a series of quantitative findings on differences in performance among publicly funded training providers. These findings generally demonstrate that nonprofit providers are not more likely to serve disadvantaged clients and that neither for-profit nor nonprofit providers are consistently more effective in increasing participant's earnings and employment rates. However, these findings are then contrasted with five exemplary case studies that have been acknowledged in the literature as model interventions in the WD field. All of these cases studies have involved a central role for nonprofit actors. An integrated approach thus uncovers a great variation of effects that are produced by differences in organizational form. I argue that a broader approach of Workforce Development reorients our focus to significant contributions of the nonprofit sector in efforts for social change.

Section VI analyzes these observations, and an argument is put forth that a constructive balance must exist between sectors, in order to successfully negotiate the pervasive tensions that exist in the political project of Workforce Development. These sets of tensions include: density/mobility; adversarial/cooperative; universal/targeted; client/citizen; outcome/process; governance/provision. Rather than resolving these tensions, or denying their existence, transformative nonprofit initiatives operating in the WD field serve the crucial role of continuously negotiating these tensions, maintaining them visible, and understanding the tensions themselves as providing a potential space for action, agency, resistance, and change.

### **III. Workforce Development: Between Law, Politics, and Economic Realities**

#### **A. The New Workforce Development Legal Regime**

Until 1982, the federal government provided job-training programs, mainly focused on low-income individuals, through a bureaucratic centralized system. In 1982, as a result of converging forces, developments, and challenges to the existing system,<sup>1</sup> the Job Training Partnership Act (JTPA) was enacted as a major initiative of the Reagan Administration.<sup>2</sup> JTPA created a \$5 billion federally-funded employment and training program, primarily for disadvantaged workers. The Act authorized and supported local programs to train unskilled workers for entry into the labor market and assist them in finding jobs. This shift represented part of an on-going move toward decentralization and devolution of federal bureaucracy. More than 620 semiautonomous sub-states training centers were established to provide training and placement services. The JTPA directed the states to provide services to “those who can benefit from, and are most in need of, such opportunities,” requiring that the results “be measured by the increased employment and earnings of participants and the reduction in welfare dependency.” This latter requirement was another significant new feature of the policy -- the introduction of performance standards directly linked to budgetary constraints and efficiency. Another significant characteristic of the new initiative was the establishment of Private Industry Councils (PICs), which gave formal authority to private sector representatives in the administration of the program. In this new highly decentralized administration of job training, local administrative agencies could choose one or any combination for implementation: direct government provision, contracts with nonprofit providers, and contracts with for-profit providers.

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<sup>1</sup> See section III (B).

<sup>2</sup> 29 U.S.C.A. 50-50b. see also, See also, Greg Bass, Adult and Dislocated Worker Job Training Provisions of Title I of the Workforce Investment Act of 1998: Part 1--Federal, State, and Local Work-Force Investment System, 33 Clearinghouse Rev. 524 (2000).

A decade and half later, the Workforce Investment Act of 1998 (WIA)<sup>3</sup> has replaced the Job Training Partnership Act (JTPA), and is currently the new legal regime for disseminating funding from the United States Department of Labor to local job training programs. Maintaining the highly decentralized system established by JTPA, it aims to integrate the use of federal grants and eliminate the lack of coordination that was understood as the weakness of the JTPA system.<sup>4</sup> While under the JTPA system, different organizations and agencies within each state operated narrowly focused education and training programs, the Workforce Investment Act creates local integrated marketplaces, where job seekers can choose among a broad array of job placement services, training programs, and job opportunities counseling. It therefore integrates into the new system other publicly funded services, including, for example, special programs focusing on young adults in secondary and post-secondary vocational education programs under the Perkins Vocational and Technical Education Act (PVTEA). Moreover, the Act establishes a “One-Stop” delivery system, which provides job seekers with career centers in their neighborhoods where they can access core employment services and be referred directly to job training, education, and other services. The centralized location where job seekers can obtain information about all aspects of the job market is designed to make the job seeking process more efficient and to empower individual job seekers to make choices suited to their personal career needs and goals.<sup>5</sup> Each One-Stop center is comprised of partner organizations that provide core services. Required partners include adult education providers, employment services, welfare-to-work centers, and unemployment insurance services.<sup>6</sup>

The Act establishes a multi-tiered scheme for access to the services available through the One-Stop centers.<sup>7</sup> The WIA mandates the provision of universal access to the One-Stop system and to the core employment related services, including information on job vacancies, career options and counseling, employment trends and instructions on how to conduct a job search, write a resume or interview with an employer, student

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<sup>3</sup> Public law 105-220, 112 stat. 939.

<sup>4</sup> Nan Ellis, Individual Training Accounts under the Workforce Investment Act of 1998: Is Choice a Good Thing, 8 Geo. J. on Poverty L. & Pol’y 235 (2001) at 236.

<sup>5</sup> Id.

<sup>6</sup> Id. at 238.

<sup>7</sup> § 134(c)(1), 112 Stat. 936 (codified as amended 29 U.S.C. 2684 (2000))

financial aid, unemployment insurance assistance, assistance in establishing eligibility for welfare-to-work programs and obtaining financial aid, and follow-up sessions. The basic services of the one-stop centers are thus open to all individuals, regardless of economic background. However, priority for higher-level training activities is to be granted to “recipients of public assistance and other low-income individuals.” The second tier provides intensive services to adults and dislocated workers who are unemployed and unable to obtain employment through the core services. It also provides services for employed individuals that have been determined to need intensive services in order to retain employment that would allow for self-sufficiency.<sup>8</sup> Intensive services include a comprehensive assessment of employment skills, development of individual employment plans, group counseling, individual counseling and career planning, case management, and short-term pre-vocational services.<sup>9</sup>

Training services are provided under the third tier, which is available to individuals who have met the eligibility requirements for intensive services but who have been unable to obtain or retain employment through these services.<sup>10</sup> Under this tier, training services are directly linked to occupations that are in demand in the local areas, or in another area to which the individual is willing to relocate, will be made available.<sup>11</sup> The local agencies are prohibited from directly providing training services, but rather should seek other providers, unless the state waives the prohibition based on a determination that another entity is not available to meet local demand for such training. Training through individual choice is a major innovation of WIA. A voucher system is created by the Act’s requirement that training be provided through the use of Individual Training Accounts (ITAs), through which a participant chooses among eligible providers. Specifically, the One-Stop system is to provide participants with the list of eligible providers and related performance information. The state distributes a single list of providers identified from all local areas, making it available through all local One-Stop centers in the state. States may also enter into reciprocal agreements to allow eligible providers of training in one state to accept Individual Training Accounts provided in

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<sup>8</sup> Ellis, *supra* note, 240; § 134(d)(3)(A)(i)(I), (II), (ii), 112 Stat. 936 (codified as amended 29 U.S.C. 2684 (2000))

<sup>9</sup> Ellis, *supra* note, 240; § 134(d)(3)(C), 112 Stat. 936 (codified as amended 29 U.S.C. 2684 (2000))

<sup>10</sup> Ellis, *supra* note, 240; § 134(d)(4), 112 Stat. 936 (codified as amended 29 U.S.C. 2684 (2000))

<sup>11</sup> Ellis, *supra* note, 240; § 134(d)(4)(D), 112 Stat. 936 (codified as amended 29 U.S.C. 2684 (2000))

another state. The participant then chooses the program that best meets her needs, with payments arranged through the ITAs. Training may be provided through a contract for services in lieu of an ITA for: on-the-job training and customized training; where there are an insufficient number of providers to meet the competitive purposes of ITAs; or for programs offered by community-based organizations or other private agencies that serve special participant populations that face multiple barriers to employment.

The One-Stop centers are funded directly by federal block grants and the amount of funding each center receives annually depends on its success, based on the criteria articulated in the WIA.<sup>12</sup> The WIA specifies core performance indicators to state and local areas that focus on rates of entry into unsubsidized employment by participants, retention and earnings 6 months after entry, and skill educational attainment documented through a recognized credential for those who enter unsubsidized employment. Levels of performance affect the federal funding of the local program in subsequent years. Failure to meet expected levels of performance will lead to sanctions, and exceeding expected levels leads to receipt of incentive funds. The Act further requires that states and local agencies establish standards for success for organizations that provide training services.<sup>13</sup> It also establishes national employment statistics initiative to help monitor these standards. Finally, the WIA, continuing the JTPA initiative, aims to strengthen the role of the private sector by establishing local, business-led Workforce Investment Boards (WIB) to act as boards of directors, overseeing the local systems. The WIBs receive

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<sup>12</sup> Id. at 238.

<sup>13</sup> With respect to requirements for initial eligibility, a training provider that is a postsecondary education institution certified under the Higher Education Act and provides a program leading to a two or four-year degree or certificate, or that is an entity that carries out an apprenticeship program registered under the National Apprenticeship Act, is automatically eligible to receive funds if they file an appropriate application with the local board. Providers of programs not meeting either of those two conditions must satisfy alternative procedures that are established by the Governor for initial eligibility. That procedure is to include appropriate levels of performance if the provider previously provided training services and other appropriate criteria. Subsequent to the initial eligibility period, which will generally not exceed one year, all providers (including those that were automatically eligible) must meet performance criteria established by the Governor to maintain eligibility. The performance criteria are to include levels of performance for all individuals participating in the provider's program relating to: the rate of completion; the percentage of all such individuals who obtain unsubsidized employment (which also may include the percentage of those who obtained such employment in occupations related to the program); and the wages at placement of such individuals. The criteria also are to include levels of performance relating only to participants receiving assistance under this title who participated in the provider's program. These criteria include the percentage of those participants who completed the program and obtained unsubsidized employment, the retention rate in such employment and the wage rate of those participants who completed the applicable program 6 months after employment; and the rates of licensure or certification as appropriate of those who completed. Each provider also must submit information relating to the costs of the program. The local board may modify the performance criteria for programs of providers in the local area by increasing the levels of performance above the minimum levels established by the Governor.

information about the performance of each program and are required to seek public input and conduct meetings open to the public.

The Workforce Investment Act thus aims to provide a new framework for a comprehensive “workforce investment” system based on the idea of integration of resources, individual choice of training, and performance measurements for local program administrators and private providers.

### **B. Welfare Reform and the PRWORA**

At the same moment that the Welfare Investment Act is restructuring the system of universal and targeted public provision for job training and placement, the social provision for the most disadvantaged has been undergoing major changes. It is by now common knowledge that the 1996 Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) has fundamentally altered “welfare as we knew it.”<sup>14</sup> The Act converts the Assistance for Family with Dependent Children (AFDC), the Job Opportunities and Basic Skills program, and other welfare programs into a single block grant program to be used by states to provide cash and other benefits to individuals and families in need. Following the 1996 reform, the Welfare-to-Work bonus program was first authorized in 1997 to award \$3 billion in grants to states and local communities on a competitive basis in an effort to promote job opportunities and employment preparation for the hardest-to-employ recipients of cash assistance.<sup>15</sup>

PRWORA places new limits on welfare provision in several significant ways: by eliminating certain eligibilities; by placing rigid time limits for the receipt of assistance; and by placing a strong emphasis on job placement, rather than job training and adult education. First, the Act eliminates guarantee of benefits to certain individuals, for example, placing restriction on welfare eligibility for unwed mothers under age 18, families that have been on welfare for more than five years, and additional children born while families are on welfare.

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<sup>14</sup> Public law 104-193, 110 STAT. 2105.

<sup>15</sup> Barbara L. Bezdek, Contractual Welfare: Non-Accountability and Diminished Democracy in Local Government Contracts for Welfare-to-Work Services, 28 Fordham Urb. L.J. 1559 (2001) at 1589. The bonus program was authorized by the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251.

Second, the new federal law mandates a cumulative five year lifetime limit on the receipt of welfare. It further requires states to demonstrate in their state plans that they will require families to work after two years on assistance. The Act establishes annual participation rates in employment and work hour requirements for single-parents and two-parent families, with an exemption for single parents with children under 6 who are unable to find childcare. Recipients are required to meet their work requirement (20 hours weekly for single parents and 30 for two-parent families) through specified employment and employment-related activities. PRWORA requires states to engage 50 percent of welfare recipients in employment or job preparation activities by 2002. At the same time, it rewards states for lowering their welfare caseloads by reducing the 50 percent participation requirement by one percentage point for each percentage point drop in the caseload relative to that prior to enactment. Connecticut's Jobs First program illustrates most dramatically the welfare system's new focus on short-term job readiness training and immediate work placement, imposing the shortest limit in the country -- a lifetime welfare maximum of twenty-one months.<sup>16</sup>

Third, the new welfare regime also shifts the focus of the welfare system from longer-term educational investments to short-term job readiness training and immediate work placement. In contrast to regulations that existed before 1996, which encouraged workforce development through education and training, PRWORA emphasizes paid or unpaid work and activities designed to move welfare recipients into employment quickly. The law identifies 12 activities that states may count toward the work participation rate.<sup>17</sup> Work-related activities are defined narrowly, and are limited to skills-development and training to basic education classes for recipients without high school degrees. Training may not count toward the first 20 hours per week of participation required by PRWORA. The Act also limits the number of recipients in education and training programs to no

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16 Emily Bazelon and Tamara Watts, *Welfare Time Limits on the Ground: An Empirical Study of Connecticut's Jobs First Program*, 32 Conn. L. Rev. 717 (2000) at 723. See 42 U.S.C. §607(d)

17 Under Section 103(a) which revises the former Social Security Act, these activities are: unsubsidized employment; subsidized private sector employment; subsidized public sector employment; work experience (including work associated with the refurbishing of publicly assisted housing) if sufficient private sector employment is not available; on-the-job training; job search and job readiness assistance; community service programs; vocational educational training (not to exceed 12 months with respect to any individual); job skills training directly related to employment; education directly related to employment, in the case of a recipient who has not received a high school diploma or a certificate of high school equivalency; satisfactory attendance at secondary school or in a course of study leading to a certificate of general equivalence, in the case of a recipient who has not completed secondary school or received such a certificate; and the provision of child care services to an individual who is participating in a community service program.

more than 30 percent of those counted as fulfilling the work requirement.<sup>18</sup> Here again, the Act further establishes funding penalties for states that fail to meet the work participation rate or other requirements of the Act. To receive federal money under TANF, states must show that a growing percentage of recipients are engaged in work activities specified by the statute.<sup>19</sup>

Finally, a well-documented and debated provision, Section 104, allows states the option of contracting out the provision of training and other PRWORA services. States can either contract directly with charitable, religious, or private organizations or allow beneficiaries to redeem services with these organizations through certificates, vouchers, or other forms of disbursement. The states must engage in a policy of nondiscrimination with religious organizations, treating them on the same basis as any other nongovernmental provider.<sup>20</sup>

### **C. An Array of Ideological Forces**

The striking feature of the new reform is that it represents a convergence of highly divergent groups and political commitments. The new Acts are a hybrid result of the accumulative impact of economic, political, and legal forces, including conservative beliefs about poverty and neo-liberal understandings about public administration and market-based provision.

On the neo-liberal front, the decline in the commitment to public provision has been a result of a multiplicity of forces and years of political and social discontent with the welfare system and fear of “big government.” The new regime represents shifts to the “New Federalism,” decentralization, and increased involvement of private actors in the provision of public goods. Privatization movements often include a call for more responsibility for provision on the private, including both the for-profit and nonprofit, sector. Yet the irony is that while such calls often assume the independence of the private sector, the sector, and especially the nonprofit sector, is widely funded by federal

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<sup>18</sup> See 42 U.S.C. §607(c)(2)(D)

<sup>19</sup> Emily Bazelon and Tamara Watts, Welfare Time Limits on the Ground: An Empirical Study of Connecticut's Jobs First Program, 32 Conn. L. Rev. 717 (2000) at 723. See 42 U.S.C. §607(d)

<sup>20</sup> For excellent discussions on the charitable choice clause in relation to religion, see, Bane, Coffin, and Thiemann, Who Will Provide? The Changing Role of Religion in American Social Welfare (2000)

money.<sup>21</sup> In fact some of the components of provision have actually increased federal funding. Peter Dobkin Hall describes that since the beginning of the 1980s the conservative movement has evoked the Tocquevillian vision of private voluntary action in proposing massive budgetary cuts and pointing to the nonprofit sector as an alternative to government spending.<sup>22</sup> He further describes a paradox of the promotion of privatization -- the dismantling of state institutions of service provision, but at the same time a suspicion of nonprofit organizations as the instruments of special interests that need to be limited and controlled by law.<sup>23</sup>

The current reforms are indeed not solely about budgetary cuts. Much of the emphasis is on new structural incentives that will enhance competition, individual responsibility and private initiative. This emphasis builds on longstanding critiques on the inadequacy of bureaucratic arrangements in service provision. PRWORA was designed to reshape the roles and responsibilities of the welfare bureaucracy. While under AFDC system, local agencies simply provided and withheld cash assistance, now they are expected to move welfare recipients to work. Welfare intake administrators are now expected to assess a TANF applicant's needs, skills and interests and to match each client to a range of services identified by the agency to move recipients off the welfare rolls and into the workforce.<sup>24</sup> These ideas of competition, private choice, and market consumerism also inform the implementation of the new voucher system under WIA. However, like in the case of child care, health care, and educational vouchers, there have been many critiques about the adequacy of training vouchers to address the problems of disadvantaged workers in the new market. Some argue that vouchers may be ill-suited to meet the needs of the least employable job seekers because of lack of information and capacity to make informed choices. Recent developments also, as we shall, put into question vouchers from the perspective of whether competition and choice actually exist under the newly adopted structures.

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21 Salamon, *Partners in Public Service* 104-105.

22 Peter Dobkin Hall, *Resolving the Dilemmas of Democratic Governance: The Historical Development of Trusteeship in America, 1636-1996*, in *Philanthropic Foundations: New Scholarship, New Possibilities* 3, 34-35 (1999).

23 Peter Dobkin Hall, *Resolving the Dilemmas of Democratic Governance: The Historical Development of Trusteeship in America, 1636-1996*, in *Philanthropic Foundations: New Scholarship, New Possibilities* 3, 34-35 (1999).

24 Barbara L. Bezdek, *Contractual Welfare: Non-Accountability and Diminished Democracy in Local Government Contracts for Welfare-to-Work Services*, 28 *Fordham Urb. L.J.* 1559 (2001) at 1563.

A neo-liberal market-based ideology also informs Work First requirements on the individual level. WIA and PROWRA draw on strong, long-standing beliefs of self-sufficiency and market mobility, a message that work is an expectation of citizenship.<sup>25</sup> On the conservative front, the Work First philosophy is in part based on the belief that welfare encourages dependency. A dominant story describes welfare recipients with a diminished work ethic, that instead of seeking to improve and become self-sufficient, have children to get on welfare, a pattern that becomes a way of life from generation to generation.<sup>26</sup> Strict time limitations are believed to encourage welfare recipients to become self-sufficient and to positively socialize the poor into the workforce. The Work First philosophy includes further assumptions that jobs are available for those willing to find them and that the any job is superior to the receipt of public assistance.<sup>27</sup> Therefore, the goal is to move recipients off benefits and into jobs, with little concern about the quality of work and the overall change in income and well-being of the recipient.<sup>28</sup> Critiques of the reform argue that Work First philosophy ignores the fact that many recipients are the most hard to employ because of the racial, educational, and personal backgrounds, and that most low-wage workers remain stuck in their jobs.<sup>29</sup> Without providing for upward mobility, inequalities will persist and gaps will continue to grow.

This is a roughly sketched description of the multiple ideologies, practices, and interests that inform the current regulatory treatment of workforce development. The theme of competition among and convergence of, an array of beliefs will continue to be present, and revised, as we explore the implementation of WD programs in different contexts.

#### **D. Market Restructuring: Production, Technology, Globalizations**

The new economy, marked by growing flexibility, a dramatic decline in unionization, and rapid globalizations, has brought new patterns of work and

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25 Julia R. Henly, Barriers to Finding and Maintaining Jobs: The Perspectives of Workers and Employers in the Low-Wage Labor Market. in *Hard Labor*. P 48.

26 Joel F. Handler, THE "THIRD WAY" OR THE OLD WAY? 48 U. Kan. L. Rev. 765 (2000).

27 Joel F. Handler, THE "THIRD WAY" OR THE OLD WAY? 48 U. Kan. L. Rev. 765 (2000).

28 Matthew Diller, THE REVOLUTION IN WELFARE ADMINISTRATION: RULES, DISCRETION, AND ENTREPRENEURIAL GOVERNMENT, 75 N.Y.U. L. Rev. 1121 (2000).

29 48 U. Kan. L. Rev. 765 University of Kansas Law Review May, 2000 American Regulatory Policy: Have We Found The "Third Way"? THE "THIRD WAY" OR THE OLD WAY? Joel F. Handler

employment.<sup>30</sup> Today's workplaces promise less stability and the many forms of contingent employment relations are on the rise. Although any linear account is inevitably over inclusive, the last few decades have seen a shift from the "old" model of work, characterized by the realities of assembly-line production (Fordism) and by the theory of scientific management (Taylorism), to the "new" model of work, which is based on flexible, lean production, "relational coordination," "flat hierarchies," and the theory of managerialism.<sup>31</sup> As employers are shifting to lean and flexible settings, and are outsourcing many of their functions, temporary employment agencies are currently the fastest growing form of labor market intermediaries in the new economy, with the number of people working for temporary agencies constantly growing.<sup>32</sup>

As employment patterns become more contingent and dynamic, workplace security has become scarcer. Workers are expected to accommodate to change rapidly and to manage their own careers. They need to find jobs, and employers need to hire, more frequently. Indeed, the new social capital of the human capital era is understood to be *employability*, rather than stability. These new employment patterns have received many names, including the "casualization of the labor market,"<sup>33</sup> "new psychological employment contract", and the "boundaryless career."<sup>34</sup> Industrial organization literature describes the new implicit benefits of "employability security" that have replaced the job security and promotions that had been implicit in the "old" employment relationship.<sup>35</sup> These new terms include "general skills training, upskilling of jobs, networking opportunities and contact with firm constituents for employees at all levels of the firm,

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30 See, Orly Lobel, Agency and Coercion in Labor and Employment Relations: Four Dimension of Power in Shifting Patterns of Work, 4 U. Pa. J. Lab. & Employment L. 121 (2001).

31 See, Orly Lobel, Agency and Coercion in Labor and Employment Relations: Four Dimension of Power in Shifting Patterns of Work, 4 U. Pa. J. Lab. & Employment L. 121 (2001).

32 Orly Lobel, The Slipperiness of Stability: The Private Employment Agency and Flexible Work Arrangements, forthcoming Symposium: The Role of Contract in the Modern Employment Relationship, Texas Wesleyan Law Review 2003.

33 sassen, 34.

34 Stone, new psychological contract.

35 Stone, supra note 78.

micro-level job control, market-based pay, and firm-specific dispute resolution institutions for ensuring fairness.”<sup>36</sup>

Part of these new patterns are understood to be the result of the rapid globalizations over the past decade. There are a variety of ways in which the market is said to be “globalizing”, hence the use of the widely used term “globalization” in the plural. Globalization scholarship most often focuses on the geographic mobilization of capital, information, communication, and technology as the aspects that constitute and sustain the (desirable) processes of globalization. The effects of this type of globalization on the dislocation of work have been explicitly addressed in legislation such as the Economic Dislocation Worker Adjustment Assistance Act,<sup>37</sup> which mandates rapid responses, including job training subsidies and extended unemployment benefits by state governments, to cushion the effects of dislocation. By contrast, the mobilization of humans -- the migration lens -- is conceptualized as a *consequence* or a (mostly undesirable) *side effect* of globalization. Dominant narratives regarding the rapid growth of labor migration perceive it as a problem that must be solved, underestimating its relations to other aspects of globalizations, which, according to the same narratives, must be encouraged.<sup>38</sup> Thus, when attempting to explain the reasons for migration, mainstream discourses focus on push factors that drive individuals to migrate. These are mostly articulated as the growing economic and political inequalities among countries and the lack of material and social opportunities in countries of origin. Dominant narratives describe migration as an aggregation of individual decisions and actions of people who wish to improve their personal situation and evade the limitations of their home country -- mainly, poverty, overpopulation, and unemployment. In public debates, the story translates into what Saskia Sassen has termed a “mentality of invasion”, accompanied with an undertone of “crisis.”<sup>39</sup> Under this construction, the receiving country is viewed as a passive agent rather than one implicated in the process of emigration.<sup>40</sup> For policy

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<sup>36</sup> Id.

<sup>37</sup> 29 U.S.C. Sections 1651-1662c.

<sup>38</sup> Orly Lobel, *Family Geographies: Global Care Chains, Transnational Parenthood, and New Legal Challenges in an Era of Labor Globalization*, Current Legal Issues (Oxford University Press, 2002).

<sup>39</sup> Saskia Sassen, *Guests and Aliens* (1999).

<sup>40</sup> Saskia Sassen, *Guests and Aliens* (1999) at 7.

makers, the solutions to migration crises are therefore to be found primarily in border control and individual sanctions against undocumented migrants, including confinement and deportation. Labor migration has created new, and often invisible, divisions between “insiders” and “outsiders” in the new economy. Widespread migration flows of workers from poor countries have relegated labor-intensive low-wage services and production sectors, particularly in global metropolitans, to an informal, often invisible, migrant workforce.<sup>41</sup> These new divisions supplement on-going divisions among workers. Traditionally, work identity politics were generated by a “dual-labor market”, which, typically divided along gender, racial and ethnicity lines, has been characterized by “insiders” who were employed and promoted through internal labor markets, and “outsiders”, who were employed as a low-wage, part-time, and temporary reserve force.<sup>42</sup> On the other hand, at least formally, these outsiders could turn to the welfare state provisions of economic and social safety nets. Encoding welfare entitlements in the notion of citizenship, the Marshallian conception of the welfare state has been central to the 20<sup>th</sup> century configuration of welfare.<sup>43</sup> With the rapid intensification of globalization, the lines of gender and race (and, of course, class) that have characterized market segmentation are increasingly being supplemented by (interrelated) lines of nationality. The “new outsiders”, low-waged low-skilled migrant workers, are less likely to be able to turn to the formal mechanisms of the nation-state for the provision of welfare. Moreover, the rise of underground economies, in which informal migrant workforces operate, has

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41 See, generally, Peter Stalker, *The Work Of Strangers: A Survey Of International Labour Migration* (1994); Saskia Sassen, *Globalization and Its Discontents* (1998).

42 On internal labor markets, see, e.g., Frank Dobbin, John Sutton, John Meyer, and Richard Scott, *Equal Opportunity Law and the Construction of Internal Labor Markets*, 99 *American Journal of Sociology*, 396 (1993). On dual labor market theories, see, e.g., Marion Crain & Ken Matheny, “Labor’s Divided Ranks”: Privilege and the United Front Ideology, 84 *Corn. L. Rev.* 1542, 1575 (1999). Some social theorists even believe that working class fragmentation is a product of deliberate practice of employers, who benefit from opposition and racial and gender division within workers, producing a reserve army of marginalized workers. *Id.*

Welfare literature as well has begun to explore the ways in which conventional understandings of the historical package of welfare, as simply a neutral network of transferring wealth from taxpayers to recipients, has been constructed by traditional notions of family structures, and has, in some ways, reinforced gender and racial inequalities. See, Ann Orloff, *Gender in the Welfare State*, 22 *Annu. Rev. Sociol.* 51 (1996); Jet Bussemaker and Kees van Kersbergen, *Gender and Welfare States: Some Theoretical Reflections*, in *Gendering Welfare States* (Diane Sainsbury, ed. 1994).

43 On the concept of social citizenship and the welfare state, see, T.H. Marshall, *Citizenship and Social Class*, in *Class, Citizenship and Social Development: Essays* by T.H. Marshall 65 (1964). The Israeli example is striking in this context. Israel’s welfare package is in several formal and informal ways tied to its military service creating a de facto “first-class citizenship”, since Arab-Israelis rarely serve in the army (similar linkages can be found in other countries where some welfare benefits are linked to civil service). There are also other senses of how Arab-Israelis are “second-class citizens”, not receiving equal benefits in education, urban planning, and housing. Moreover, Israel’s growing population of illegal residents, its foreign workers, are not entitled to welfare benefits, which are granted to all citizens and residents. Since Israel does not have a *jus soli* principle of citizenship, the children of illegal foreign workers are not entitled to welfare benefits. Finally, the notion of national boundaries and welfare entitlements is perhaps most problematic in regard to the Palestinian-Israeli economic interdependency, and the Palestinian workers dependence on Israeli employment.

put into question not only the responsibility of countries to regulate their own economy but also the capacities to enforce these regulations. The new universal restrictions on direct welfare provision and safety nets further put into question the reliance on outside-of-the-market subsistence.

Thus, as will be further described in the following section, the new divisions of a new dual-labor market should be understood as divisions between *skilled* (rather than stable or secure), upward mobility jobs and “dead-end,” low-skill jobs. Dani Rodrik describes a central danger of globalization as exposing the fault line between those who have the skills to flourish in global markets, and those who do not; between those who can diversify their risks and those who cannot; those who are mobile and those who are not.<sup>44</sup> The reduction of barriers to trade and investment accentuates the asymmetry between those who can easily cross national borders and take their resources where they are most demanded (capital and highly skilled workers) and those who cannot (unskilled and semi-skilled workers). Freer movement makes the demand for the least mobile more elastic; the services of unskilled workers can be more easily substituted across national borders. Therefore, not only will unskilled workers lose jobs, but those who keep their jobs will be exploited. Inequality in wages in the United States has increased significantly during the past three decades.<sup>45</sup> Low-skill workers bear a larger share of the costs of improvements in work conditions. They stand to get lower wages, or at least not to share as before in the benefits of more efficient production, to absorb a greater share of the risks of downsizing, and to have great difficulties to bargain collectively and participate in the decisions of the firm.<sup>46</sup>

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44 See, Dani Rodrik, *Has Globalization Gone Too Far?* 6-7.

45 Lynn Karoly, *Changes in the Distribution of Individual Earnings in the United States 1967-1986*, 74 *Review of Economics and Statistics* 35 (1992); Chinhui Juhn, Kevin M. Murphy, and Brooks Pierce, *Wage Inequality and the Rise in Returns to Skill*, 101 *Journal of Political Economy* 410 (1993).

46 See, Dani Rodrik, *Has Globalization Gone Too Far?* 6-7.

## **IV. The Centrality of Workforce Development in Overcoming Structural Biases in the New Economy**

### **A. The Trilemma**

Worker training and continuing adult education have always been a bridge between the state and the market, between welfare and work, between low-wage workers and higher paying jobs. Even Adam Smith, now often represented as the father of the invisible hand and laissez-faire markets, believed that vocational education should be provided free to the working class in order to guarantee that they would be able to join society as full, productive citizens.<sup>47</sup> The past two decades, however, have vastly increased the significance of training. Changes in market requirements and in employment patterns place more value on skills and education than did the industrial workplace that preceded the new economy. At the same time, welfare reform and reductions in social provisions constrain the ability of workers to seek aid outside of the market.

Reform agendas for workforce development face a paradox, or rather a trilemma:

(1) The requirement of lifelong learning and training is becoming increasingly important in the new, ever-changing economy. The changing face of both the workplace and the workforce has placed a high premium on constant reskilling, networking, and employability.

(2) Yet, because of the new realities of high mobility, dislocation, and worker turnover, individual firms have less incentive to invest in skill training, particularly of less skilled workers.

(3) At the same time, welfare reform, guided by a Work First philosophy and reductions in direct social provisions, has created new constraints on the ability of workers to seek aid outside of the market.

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<sup>47</sup> Avishai Margalit, *The Decent Society*, 157 (1996).

While broad skills, versatility, adaptability, or more generally, employability, are the factors in succeeding in the new market, new legislation on public provision is less committed to ensuring the support needed for worker mobility and well-being.

### **B. Training and the New Premium on Skills**

In the United States, approximately 20 percent of the workforce is said to be deficient in basic skills, including reading, writing, arithmetic, and communication skills.<sup>48</sup> With regard to welfare recipients, about a third of the welfare population has less than a high school diploma.<sup>49</sup> As many as half of welfare recipients receive such low scores on tests of basic skills that they do not even qualify for many training programs.<sup>50</sup> Of those that graduate high school, only 7.6% read at a national average level.<sup>51</sup> International comparisons in this respect provide an unfavorable ranking for the United States.<sup>52</sup> These basic skills of job applicants have been rising in the past decade with some studies pointing to over 35 percent of applicants failing standard basic skill tests.<sup>53</sup>

On-site employer provided training for workers with high school education or less has decreased in recent years.<sup>54</sup> Only a few U.S. companies now offer in-house *basic* skills training compared to many that support formal training, particularly for supervisors and executives. "Corporate America has preferred to let the schools handle literacy. But that won't solve a problem that afflicts 20 percent of the adult work force today."<sup>55</sup> At the same time, research regarding welfare recipients has indicated that education and job training are the most important predictors of leaving welfare, while work experience

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48 John T. Dunlop, TO FORM A MORE PERFECT UNION, 9 Lab. Law. 1 (1993).

49 Ellis, *supra* note , 245. See Pamela Loprest, Families Who Left Welfare: Who are They and How are They Doing? (1999); Sandra Danziger, Mary Corcoran, Sheldon Danziger, Colleen Heflin, Ariel Kalil, Judith Levine, Daniel Rosen, Kristin Seefeldt, Kristine Siefert & Richard Tolman, Barriers to Work Among Welfare Recipients, 20 Focus 31 (1999); LaDonna A. Pavetti, Who is Affected by Time Limits?, in Welfare Reform: An Analysis of the Issues 31 (1995); K.H. Porter, Making Jobs Work: What the Research Says about Effective Employment Practices for AFDC Recipients (1990)

50 Ellis, *supra* note , 245, *citing* J.L. Aber, J. Brooks-Gunn & R.A. Maynard, Effects of Welfare Reform on Teenage Parents and their Children, 5 Future of Children 53 (Summer/Fall 1995), available at <http://www.futureofchildren.org/cr/05cri.htm>. See generally Anthony P. Carnevale & Donna M. Descrochers, Getting Down to Business: Matching Welfare Recipients' Skills to Jobs that Train (1999)

51 Ellis, *supra* note , 245-6. See Loic J.D. Wacquant & William Julius Wilson, Poverty, Joblessness, and the Social Transformation of the Inner City, in Welfare Policy for the 1990s 41 (Phoebe H. Cottingham & David T. Ellwood eds, 1989)

52 John T. Dunlop, TO FORM A MORE PERFECT UNION, 9 Lab. Law. 1 (1993).

53 *Id.* (Citing annual surveys of the American Management Association).

54 Dave E. Marcotte, CONTINUING EDUCATION, JOB TRAINING, AND THE GROWTH OF EARNINGS INEQUALITY, 53 Indus. & Lab. Rel. Rev. 602 (2000).

55 Why Business Should Invest in Literacy, Bus Wk 102 (July 20, 1992).

alone has little effect on leaving welfare.<sup>56</sup> Indeed, the pattern that is found the most valuable is many short training programs over several years, rather than one short term or one long-term program.<sup>57</sup>

The primary explanation for decreasing training opportunities and increasing wage and inequalities is the demand shift in favor of highly skilled, as well as the supply rise of low-skilled.<sup>58</sup> In the United States, as well as in other developed countries, there has been an increased demand for workers with specialized knowledge.<sup>59</sup> Employers are more likely to invest in training workers that already have high levels of education, particularly four years of college.<sup>60</sup> This is explained by several factors. First, employers view formal schooling lays a substantive foundation upon which future training can build. Second, employers tend to understand schooling as the basis that cultivates interests in learning, and lowers reluctance to engage in future training.<sup>61</sup> Third, employer funded training functions simply as a signaling device -- that certain types of workers have higher abilities and are worth the investment by the firm.<sup>62</sup> Economists predict that this pattern will become even greater as technological and structural changes continue to place a larger premium on cognitive and communication skills and the devaluation of manual skills.<sup>63</sup> Decline in manufacturing and increase in services has also reduced training opportunities within certain industries.<sup>64</sup> Moreover, as specialized skills become central to job performance, employers are more likely to consider the expected length of job tenure for on-the-job training. Therefore, they are likely to use statistical proxies,

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56 See, Barbara Gualt, et. al, Prospects for Low-Income Mothers' Economic Survival Under Welfare Reform, in *Welfare Reform: A Race to the Bottom?* (Sanford F. Schram and Samuel H. Beer ed.); The Institute for Women's Policy Research, Education and Job Training Under Welfare Reform, Welfare Reform Network News, Working Paper 9/10 (1997).

57 Dave E. Marcotte, CONTINUING EDUCATION, JOB TRAINING, AND THE GROWTH OF EARNINGS INEQUALITY. 53 Indus. & Lab. Rel. Rev. 602, 622 (2000).

58 John Bound and George Johnson, "Changes in the Structure of Wages during the 1980s." *American Economic Review*, Vol. 82, No. 3 (June), 371 (1992).

59 Alvin Goldman, Potential refinements of employment relations law in the 21st century, 3 *empl. Rts. & employ. Pol'y j.* 269, 275-76.

60 Lynch, Lisa M., and Sandra E. Black. 1998. "Beyond the Incidence of Employer- Provided Training." *Industrial and Labor Relations Review*, Vol. 52, No. 1 (October), pp. 64-81.

61 Dave E. Marcotte, CONTINUING EDUCATION, JOB TRAINING, AND THE GROWTH OF EARNINGS INEQUALITY. 53 Indus. & Lab. Rel. Rev. 602, 621 (2000).

62 Dave E. Marcotte, CONTINUING EDUCATION, JOB TRAINING, AND THE GROWTH OF EARNINGS INEQUALITY. 53 Indus. & Lab. Rel. Rev. 602, 621 (2000).

63 Dave E. Marcotte, CONTINUING EDUCATION, JOB TRAINING, AND THE GROWTH OF EARNINGS INEQUALITY. 53 Indus. & Lab. Rel. Rev. 602, 621 (2000).

64 sassen, 34.

including proxies such as gender and age, of the expected length in the particular firm.<sup>65</sup> And indeed, economists have found consistent gender gaps in company job training.<sup>66</sup> Consequently, firms offer to pay for education and training as an inducement for recruitment of the already best-positioned job seekers.<sup>67</sup>

Another reason that should be mentioned for the decline of employer-provided training has to do with the vast decline of unionism. In the past, the powers of collective action, including strikes, protest, and grievance procedures all contributed to ensure the rigidity of contract, and therefore allowing workers to trust these agreements. While long-term employment is often more efficient for both workers and employers, particularly when jobs involve firm-specific training, *individual* negotiations and enforcement of such contracts may have high costs.<sup>68</sup> Collective bargaining reduces the transaction costs of attaining job security by preventing opportunistic behavior by management.<sup>69</sup>

Training programs that are not on-the-job training have long been criticized of lagging behind the realities of the economy and falling short of the efforts of other rival countries.<sup>70</sup> A recurring failure of both private and public training programs has been the lack of coordination of the programs with the needs of the private job market.<sup>71</sup> A central

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<sup>65</sup> David Knoke & Yoshito Ishio, The Gender Gap in Company Job Training, 25 *Work & Occupations* 141, 161 (1998); Francine D. Blau, Occupational Segregation and Labor Market Discrimination, in *Sex Segregation in the Workplace* 117, 122-23 (Barbara F. Reskin ed., 1984); Stone : Historically, women tended to be placed in jobs that required few skills and were provided little or no on-the-job training; Claudia D. Goldin, Understanding the Gender Gap: An Economic History of American Women 100-03 (1990).

<sup>66</sup> David Knoke & Yoshito Ishio, The Gender Gap in Company Job Training, 25 *Work & Occupations* 141, 161 (1998); Francine D. Blau, Occupational Segregation and Labor Market Discrimination, in *Sex Segregation in the Workplace* 117, 122-23 (Barbara F. Reskin ed., 1984); Stone : Historically, women tended to be placed in jobs that required few skills and were provided little or no on-the-job training; Claudia D. Goldin, Understanding the Gender Gap: An Economic History of American Women 100-03 (1990).

<sup>67</sup> Stone, 590-591. citing See Daron Acemoglu & Jorn-Steffen Pischke, Beyond Becker: Training in Imperfect Labor Markets 4-5 (Nat'l Bureau of Econ. Research, Working Paper No. 6740, 1998) (giving examples of firms bearing the full costs of general training); John M. Barron et al., Do Workers Pay for On-the-Job Training?, 34 *J. Hum. Resources* 235, 250 (1999); Mark A. Loewenstein & James R. Spletzer, General and Specific Training, 34 *J. Hum. Resources* 710, 729-31 (1999). See generally Ronald G. Ehrenberg & Robert S. Smith, *Modern Labor Economics: Theory and Public Policy* 162-66 (6th ed. 1997) (presenting empirical studies that suggest employers bear much of the costs of on-the-job training, including training that is general).

<sup>68</sup> Dau-Schmidt, Kenneth Dau-Schmidt, A Bargaining Analysis of American Labor Law, 91 *Mich. L. Rev.* 419, 432 (1992). See also, Douglas L. Leslie, Labor Bargaining Units, 70 *VA. L. REV.* 353, 364-71 (1984).

<sup>69</sup> See, Stephen M. Bainbridge, Employee Involvement in the Workplace Governance Post -Collective Bargaining: A Retrospective on Selznick's Law, Society, and Industrial Justice, 7 (working paper series, www.ssrn.com, 2000). Bainbridge argues that "at least among lawyer-economists in the transaction costs branch of law and economics, the once widely-held view that unions exist to capture monopoly rents for workers in the form of higher wages and superior benefits has given way to an understanding that unions play an important role in reducing transaction costs by constraining strategic behavior by management". Id.

<sup>70</sup> William H. Simon, THE COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT 2002 *Wis. L. Rev.* 377 (2002).

<sup>71</sup> Paul Osterman, Employment Futures: Reorganization, Dislocation, and Public Policy 90 (1988).

Rashid Amjad, EMPLOYABILITY IN THE GLOBAL ECONOMY AND THE IMPORTANCE OF TRAINING: A SUMMARY OF THE 1998-99 ILO WORLD EMPLOYMENT REPORT, 20 *Comp. Lab. L. & Pol'y J.* 715 (1999).

role in training has been given to local high schools and community colleges, i.e., local public existing institutions.<sup>72</sup> Yet these sites of training did not achieve the much needed coordination between taught skills and actual job opportunities. The inadequacies of schools and community colleges has been attributed both to their ambivalence about their commitment to vocational training, and to the unwillingness of private employers to cooperate with these public institutions.<sup>73</sup> Moreover, one of the most important difficulties with training is anticipating the changing balance in the supply and demand for different skills and jobs in a local economy.<sup>74</sup> Often, these uncoordinated, even isolated, institutions have been largely inadequate in achieving the needed balance. Training is also now understood to require integration with the ability and the readiness of workplaces themselves to make changes in the job descriptions, organizational structures and hierarchies of newly trained workers. In order to make full use of the skills they provide, training programs or coordinated initiatives must therefore also assume roles in human resource allocation and organizational consulting.<sup>75</sup>

### C. A Market For Skills or Skills For The Market?

In general, the move from individuated to more coordinated work, paradigmatically linked with the move from production to services or from mass production to flexible production, has also brought an increased emphasis on what is termed “soft skills” and “emotional labor,”<sup>76</sup> including interpersonal skills, e.g., friendliness, teamwork, and ability to fit in.<sup>77</sup> These softer skills may even including such

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Lisa M. Lynch, Sandra E. Black, BEYOND THE INCIDENCE OF EMPLOYER-PROVIDED TRAINING, 52 *Indus. & Lab. Rel. Rev.* 64 (1998); W. NORTON GRUBB LEARNING TO WORK: THE CASE FOR REINTEGRATING JOB TRAINING AND EDUCATION (1996); Michael Cragg, PERFORMANCE INCENTIVES IN THE PUBLIC SECTOR: EVIDENCE FROM THE JOB TRAINING PARTNERSHIP ACT

13 *J.L. Econ. & Org.* 147 (1997); Marie-Louise Caravatti, THE ROLE OF GOVERNMENTS IN THE DEVELOPMENT OF HUMAN RESOURCES TRAINING FOR EMPLOYABILITY: THE U.S. SIDE 22 *Can.-U.S. L.J.* 37 (1996).

72 Osterman, *Id.*

73 William H. Simon, THE COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT 2002 *Wis. L. Rev.* 377 (2002).

74 Rosemary Batt and Paul Osterman, *Workplace Training Policy: Case Studies of State and Local Experiments*, W-P 106, Economic Policy Institute, 1993. 56.

75 Rosemary Batt and Paul Osterman, *Workplace Training Policy: Case Studies of State and Local Experiments*, W-P 106, Economic Policy Institute, 1993. 58.

76 See, See, Orly Lobel, Agency and Coercion in Labor and Employment Relations: Four Dimension of Power in Shifting Patterns of Work, 4 *U. Pa. J. Lab. & Employment L.* 121 (2001).

77 *Id.* at 256.

traits as appropriate affect, grooming, and attire.<sup>78</sup> These skills are emphasized and evaluated both during the hiring process and during the course of employment. For example, before hiring, the use of personality tests such, as the Hogan Psychological Test, examining ability to adjust, ambition, sociability, likeability, creativity, and prudence is now widespread.<sup>79</sup>

Within the growing importance of the concepts of soft skills and emotional labor, again new patterns of exclusion emerge. It is indeed easier to stereotype with regard to soft skills than with regard to harder skills, that are more formalized or technical, and can be more easily measured, quantified, or certified by a degree. Soft skills are also more contingent and dependent upon cultural norms. Because they are open-ended, they can be used as a pretext to other things, such as racial discrimination or discrimination against applicants who are suspected to be people that will want to unionize.<sup>80</sup> Thus, studies have shown that employers consistently discriminate against African-Americans when screening on the basis of soft skills.<sup>81</sup> Similarly, studies have found that certain types of emotional work are disproportionately delegated and expected of women in the workplace, while other emotions are thought to be better expressed by men.<sup>82</sup> These forms of discrimination and disparities are only beginning to be recognized by courts in anti-discrimination cases.<sup>83</sup>

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78 Id.

79 Jody Hoffer Gittel & James Powers, *Organizing Work to Support Relational Coordination*, Lecture at Sloan, MIT (March 14, 2000).

80 See, Moss and Tilly, *supra* note 167 at 271 (recommending the development and support of programs that will teach “code switching to assist inner-city Blacks in bridging the cultural divide with employers”).

81 Id.

82 Hochschild, *supra* note 171.

83 *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775 (1989). One example in which the court recognized gender discrimination in the context of soft skills is the *Price Waterhouse* case, in which the plaintiff, Ann Hopkins, was denied partnership in her accounting firm.<sup>83</sup> While she was often praised as an “outstanding professional”, and described as an employee with a “strong character, independence, and integrity”; “extremely competent, intelligent, strong, and forthright, very productive, and creative”, “Virtually all of the partners’ negative remarks about Hopkins...had to do with her “interpersonal skills”...indicated that she was sometimes overly aggressive, unduly harsh, difficult to work with and impatient with staff. There were clear signs, thought, that some of the partners reacted negatively to Hopkins’ personality because she was a woman. One partner described her as “macho”; another suggested she “overcompensated for being a woman”; a third advised her to take “a course at charm school.” Under these circumstances the majority opinion of the Supreme Court held that Hopkins was discriminated against on the basis of gender stereotyping.

## **D. Network Hiring**

Informal social networks and the resources they confer on their members are critical to understanding the field of Workforce Development.<sup>84</sup> What seems at first the least formal of the many processes of job placement -- word-of-mouth hiring -- is often the most common process in many industries. Employers recruit new workers largely through social network referrals.<sup>85</sup> For example, a 1990 study reports that over eighty percent of executives find their jobs through networking, and that about eighty-six percent of available jobs do not appear in the classifieds.<sup>86</sup> For employers, word-of-mouth hiring is an efficient, flexible process -- it has no formal form or structure; it is efficient since it does not require much effort or investment; and it relies on seemingly spontaneous pre-existing networks. These hiring networks themselves are flexible entities, without rigid structures or formal hierarchies. But flexible should not be confused with random. Informal networks operate and mediate the employment relationship in patterned ways. Saskia Sassen has described these developments as a shift of *market* functions, such as recruiting, educating, stability, security, and social policy, to the *household*, primarily community networks and family ties, especially among migrants. Sassen describes the polarization between firms and household as resulting in the vast informalization and devalorization of the latter.<sup>87</sup> As the following analysis will confirm, networks that are constructed in the legal world as “private” and unregulated are in fact central to understanding the functioning of today’s labor markets, and must be positively engaged in a workforce development agenda. Networks assume insiders and outsiders. Word-of-mouth hiring thus provides a window to flexibility and its relation to informality and the myth of randomness.

### **1. Word-of-Mouth Anti-Discrimination Cases**

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84 Julia R. Henly, Barriers to Finding and Maintaining Jobs: The Perspectives of Workers and Employers in the Low-Wage Labor Market. in *Hard Labor*. P 48 at 49.

85 Julia R. Henly, Barriers to Finding and Maintaining Jobs: The Perspectives of Workers and Employers in the Low-Wage Labor Market. in *Hard Labor*. P 48.

86 Gertrude Ezorsky, Racism and Justice: The Case for Affirmative Action 72 (1991).

87 See generally, Saskia Sassen, The Informal Economy: Between New Developments and Old Regulations, 103 *Yale L.J.* 2289 (1994); Saskia Sassen, *Globalization and Its Discontents*; Essays on the Mobility of People and Money 85-97 (1998).

During the 1970s and 1980s, several cases involving word-of-mouth hiring concluded that when word-of-mouth contributed to the exclusion of African-American workers it should not be allowed under Title VII.<sup>88</sup> In *Barnett* (1975),<sup>89</sup> the court compared the passive word-of-mouth recruiting of a company's drivers, which led to an all-white driving force, with the open recruiting and advertising in its other warehouse operations, which led to a mixed workforce. The court held that word-of-mouth hiring constituted disparate treatment under these circumstances. Similarly, in *Domingo* (1975),<sup>90</sup> the court found a word-of-mouth hiring practice to be discriminatory because of its tendency to perpetuate an all-white composition of the employer's work force. In this case, an employer recruited most of its cannery workers through a Filipino-dominated union and from Alaska native villages, while it recruited workers for other positions, including administrative and clerical workers, machinists, and other departments by word-of-mouth, mainly from Seattle. The latter group, and nearly all superintendents, foremen, and captains who did the recruiting, were white. In *Franks* (1976), a class action on behalf of African-Americans who had been denied employment as over-the-road drivers was brought against a trucking firm and a union. Word-of-mouth recruitment was found discriminatory under a disparate impact theory.<sup>91</sup> In *City of Corinth* (1979),<sup>92</sup> the court accepted a disparate treatment discrimination claim against a city's fire, police and administrative departments, stating that "the lack of any system of advertising job vacancies other than by word of mouth undoubtedly operated to the benefit of white applicants and to reduce the number of potential black applicants, for filling vacancies by word of mouth in a predominantly white work force naturally excludes blacks from easy access to such sources of information." Finally, in *Evergreen* (1982),<sup>93</sup> various city agencies and departments were held to be discriminatory, since "the lack of any system

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88 Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(b) (1994) prohibits employment discrimination on the basis of an individual's race, color, religion, sex or national origin.

89 *Barnett v. W.T. Grant Co.*, 518 F.2d 543, 549 (4th Cir. 1975).

90 *Domingo v. New England Fish Co.*, 727 F.2d 1429, 1435-36 (9th Cir. 1975).

91 *Franks v. Bowman Transp. Co., Inc.* 495 F.2d 398, 419-420 (5th Cir. 1974), rev'd on other grounds, 424 U.S. 747 (1976).

92 *NAACP v. City of Corinth*, 83 F.R.D. 46, 62 (N.D. Miss. 1979). See also, *Rowe v. General Motors Corp.*, 457 F.2d 348, 359 (5th Cir. 1972) (stating that white employees tend not to know African Americans who would be qualified to perform the work in question); *Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421, 427 (8th Cir. 1970) (finding existing white employees tend to refer members of their own race, thus perpetuating racial disparities); *Grant v. Bethlehem Steel Corp.*, 635 F.2d 1007, 1016 (2d Cir.1980) (an employer's word-of-mouth hiring of white foremen combined with a history of discrimination in the construction industry was held to raise a strong prima facie case of disparate treatment. Yet recognizing that word-of-mouth, although suspect, may still be upheld).

93 *NAACP v. Evergreen*, 693 F.2d 1367, 1369 (11th Cir. 1982).

of advertising job vacancies other than by word of mouth undoubtedly operated to the benefit of white applicants and to reduce the number of potential black applicants by excluding blacks from access to such information.”

However, more recent cases that examined the issue of word-of-mouth hiring have reached different conclusions. In 1991, in *Chicago Miniature Lamp*, the Court of Appeals for the Seventh Circuit held that word-of-mouth recruiting and hiring did not give rise to a claim of intentional discrimination, nor did the claim constitute disparate impact under Title VII. Similarly, in 1993, in *Consolidated Service Systems*, an anti-discrimination suit based on word-of-mouth practice was rejected.<sup>94</sup> One possible way to understand the different outcome of these cases is chronological. It has been argued, and indeed shown, that in many ways, there has been a decline in the commitment to anti-discrimination claims. This claim has been made for example by Linda Hamilton Krieger in an article entitled “Socio-Legal Backlash:”

Institutionalized practices like word-of-mouth recruitment and non-posting of job openings, once routinely invalidated as discriminatory, have been upheld with increasing frequency, treated by federal judges not as part of the problem, but simply as part of “the common nature of things.” Although disparate impact theory, first endorsed by the Supreme Court in 1971, seemed poised to displace a broad range of employment-related institutions, in subsequent years the requirements attending its successful mobilization were increasingly tightened and its sphere of permissible application progressively constricted, sharply circumscribing its transformative effect.<sup>95</sup>

However, a time-line does not unfold the entire story. Indeed, other less cited cases from the 1990s have continued to find word-of-mouth hiring which leads to a predominantly white workforce to be discriminatory.<sup>96</sup> In distinguishing among these cases, it is the race-line that seems to have been more significant. Word-of-mouth

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94 *EEOC v. Consolidated Service Systems*, 989 F.2d 233 (7th Cir. 1993).

95 Linda Hamilton Krieger, *AFTERWORD: SOCIO-LEGAL BACKLASH*, 21 *Berkeley J. Employment & Lab. L.* 476, 494-95 (2000).

96 In 1990, the Third Circuit appellate court held “that word-of-mouth hiring which results in a relatively small number of minority applicants is circumstantial evidence which helps to establish a reasonable inference of an employer’s discriminatory treatment of blacks as a class.” The fact that black applicants were required to undergo a burdensome application process while white applicants were being hired for apparently unskilled jobs through word-of-mouth in an all-white work force was sufficient to establish a *prima facie* case. *Metal Service Co.*, 892 F.2d at 350. In *Thomas*, the 4th circuit noted that that “word of mouth hiring...in the context of a predominantly white work force, serve[s] to freeze the effects of past discrimination”). *Thomas v. Washington County School Bd.*, 915 F.2d 922, 925 (4th Cir.1990).

discrimination claims have most often been brought by either an individual or a class of African-American plaintiffs or by the Equal Employment Opportunity Commission (EEOC) on behalf of African-Americans. Yet, while earlier cases involved a predominantly white workforce, Chicago Lamp and Consolidated involve a minority-minority competition. In Chicago Lamp, the company was located in a Hispanic/Asian neighborhood, and most of the workers were immigrants, many of whom did not speak English. Although in Chicago 36% of the workforce is African-American, the company only had 6% African-Americans. In Consolidated, the employer was a Korean-owned small company operating in a black neighborhood, and providing janitorial and cleaning services in buildings in Chicago. Over a period of several years 73 percent of the applicants and 81 percent of the hires were of Korean descent.

[[[also discuss - E.E.O.C. v. O & G Spring and Wire Forms Specialty Company (1991), involving a Polish employer and Polish immigrant workers.]]]

## **2. Minority-Minority Competition**

The context of ethnic hiring networks forces us to face the difficult question - when should public policy encourage, and when should it discourage, identity-based groups and identity-based activism? Attempting to offer “a humanist view of identity politics,” Amy Gutmann suggests:

Identity groups are most detrimental to democratic justice when they put group aggrandizement, regardless of its merit, above the fair treatment of individuals within or outside the group. Identity groups should be welcome when they serve as a needed source of mutual support, especially for disadvantaged individuals, and an organized means of pursuing greater justice for them.<sup>97</sup>

Yet, ethnic networks, in situations of minority-minority competition, do not seem to fit neatly into either one of the two classes that Gutmann sets out. As the workforce grows more and more diverse, competition among minorities for low-income jobs is gradually becoming the common case of discrimination claims. While ethnic hiring

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<sup>97</sup> Amy Gutmann, *A Humanist View of Identity Politics*, (2002).

networks serve as sites of mutual support of disadvantaged groups, *exclusion* of others, regardless of merit, from market opportunity has also been part of their functioning.

The courts in both *Chicago Lamp* and *Consolidated* were well aware of the minority-minority situations. In *Chicago Lamp*, the court emphasized that district court improperly used statistics in finding discrimination against blacks by ignoring two important factors – 1) the commuting time to the northwest Chicago plant which was located in an Hispanic/Asian neighborhood; and 2) the fact that fluency in English was not required for entry-level positions. Therefore, it reasoned, the appropriate geographical area for such statistical inquiry was not all of Chicago, since blacks on the south and west sides would be less willing to commute while non-English speakers would be particularly willing to apply to the job because of their inability to obtain other jobs and because of low commuting requirements. In *Consolidated*, Judge Posner, discussing the Korean community from which *Consolidated* hired its workers, emphasized more directly the value of cooperative behavior within minority groups:

In a nation of immigrants, this must be reckoned an ominous case despite its outcome. The United States has many recent immigrants, and today as historically they tend to cluster in their own communities, united by ties of language, culture, and background. Often they form small businesses composed largely of relatives, friends, and other members of their community, and they obtain new employees by word of mouth. These small businesses--grocery stores, furniture stores, clothing stores, cleaning services, restaurants, gas stations--have been for many immigrant groups, and continue to be, the first rung on the ladder of American success. Derided as clannish, resented for their ambition and hard work, hated or despised for their otherness, recent immigrants are frequent targets of discrimination, some of it violent. It would be a bitter irony if the federal agency dedicated to enforcing the anti-discrimination laws succeeded in using those laws to kick these people off the ladder by compelling them to institute costly systems of hiring. There is equal danger to small black-run businesses in our central cities. Must such businesses undertake in the name of nondiscrimination costly measures to recruit nonblack employees?<sup>98</sup>

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<sup>98</sup> EEOC v. Consolidated Service Systems, 989 F.2d 233 (7th Cir. 1993).

Such descriptions of migrant ethnic hiring networks seem to follow the claim that individuals who belong to a disadvantaged minority owe a special obligation to their group.<sup>99</sup> Following this rationale, Regina Austin writes:

If blacks are to prosper in the new global economy, they will need a strong ethnic identity and sense of mutual dependence and trust... Blacks must work on creating and articulating ethical ways of treating each other in commercial transactions. They need the moral equivalent of a black commercial code. They need assurances of quality, the equivalent of a "Kosher" standard of production. There must be mechanisms for guaranteeing the recirculation of money among blacks. The concept of the "black dollar" must have behind it institutionalized mechanisms of capital accumulation and capital venture.<sup>100</sup>

Ethnic *trading* networks in many settings operate to facilitate integration into the market, to develop trust and to allow people to commercially engage with one under while under a set of shared standards.<sup>101</sup> Ethnic *hiring* networks produce a cohesive, mutually supportive work force. The existence of group solidarity and community in the workplace, often produced by ethnic homogeneity, makes jobs that are generally considered undesirable much more attractive to the participants. Businesses rely on the

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<sup>99</sup> Some of such claims rely on the particular history that binds groups, whereas others cite a freerider rational, namely, that if individuals do not contribute to their group's struggles, they will be free-riding on its efforts and achievements in furthering justice and equality. Cite.

<sup>100</sup> Regina Austin, Symposium: Violence and the Outlaw "A NATION OF THIEVES": SECURING BLACK PEOPLE'S RIGHT TO SHOP AND TO SELL IN WHITE AMERICA, 1994 Utah L. Rev. 147.

<sup>101</sup> On the workings of ethnic trading, see, Janet T. Landa, Trust, Ethnicity, and Identity: Beyond the new Institutional economics of Ethnic Trading Networks, Contract Law, and Gift-Exchange 16-17 (1994) (The repertoire of identity symbols and signifiers, "cultural diacritica," include "language, religion, rituals, dress style, or dietary preferences that members look for and exhibit to show identity—and the underlying values, codes of ethics, or standards of morality shared by group members."); Lisa Bernstein, Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry, 21 J. LEGAL STUD. 115 (1992) (describing the relations of traders in the New York diamond industry in resolving disputes); Janet T. Landa, A Theory of the Ethnically Homogeneous Middleman Group: An Institutional Alternative to Contract Law, 10 J. LEGAL STUD. 349 (1981) (describing the function and structure of Chinese middleman groups and how these groups reduced transaction costs and facilitated exchanges in the absence of contract laws); Kevin Davis, Michael J. Trebilcock & Bradley Heys ETHNICALLY HOMOGENEOUS COMMERCIAL ELITES IN DEVELOPING COUNTRIES, 32 Law & Pol'y Int'l Bus. 331 (2001); Jack L. Carr & Janet T. Landa, The Economics of Symbols, Clan Names and Religion, 12 J. LEGAL STUD. 135 (1983); Robert Cooter & Janet T. Landa, Personal Versus Impersonal Trade: The Size of Trading Groups and Contract Law, 4 INT'L REV. L. & ECON. 15 (1984); Steven N.S. Cheung, The Fable of the Bees: An Economic Investigation, 16 J.L. & Econ. 11, 30 (1973); Robert C. Ellickson, A Hypothesis of Wealth-Maximizing Norms: Evidence from the Whaling Industry, 5 J.L. Econ. & Org. 83 (1989); Janet T. Landa, Culture and Entrepreneurship in Less-Developed Countries: Ethnic Trading Networks as Economic Organizations, in THE CULTURE OF ENTREPRENEURSHIP, supra note 96, at 53, 65 (analyzing effect of ethnicity in facilitating commerce); Robert Cooter & Janet T. Landa, Personal Versus Impersonal Trade: The Size of Trading Groups and Contract Law, 4 INT'L REV. L. & ECON. 15 (1984); Lisa Bernstein, Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms, 144 U. PA. L. REV. 1765 (1996); Richard H. McAdams, Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination, 108 HARV. L. REV. 1003 (1995); Mark D. West, Social Norms in Japan's Secret World of Sumo, 26 J. LEGAL STUD. 165 (1997). The concentration of African immigrants in certain kinds of vending has also been understood as a manifestation of "an efficient ethnic network" that absorbs new immigrants from the time they catch a taxi at the airport and introduces them to vending opportunities opened up by those who preceded them. See Deborah Sontag, Unlicensed Peddlers, Unfettered Dreams, N.Y. TIMES, June 14, 1993, at A1, B2 cited in [ ].

solidarity of ethnic groups to obtain transactional economies.<sup>102</sup> Information channels within ethnic networks reduce the cost of advertising for hires. But more than just the cost of advertising, word-of-mouth hiring ensures for employers a certain type of worker who will “mesh” with others. It also encourages workers to view themselves as collectively responsible, and to train, consult, and socialize newcomers. Even in the most traditional production sites, associated with the “old model” of work, employers seek the “right attitude” from workers. In a network structure, the desire to maintain a reputation as a good worker within the community deters opportunism on the job: “By trying to replicate their current work force through word-of-mouth hiring, many employers are simply following a common human trait of sticking with the tried and true.”<sup>103</sup>

However, this same logic is the reason that word-of-mouth hiring systematically leads to in-group preference and disparities among disadvantaged groups. Recent ethnographies reveal the patterned nature of network hiring. These studies find robust immigrant preferences among low-wage employers, showing that Latino and Asian immigrants are often favored over African-Americans, and that even immigrant blacks are favored over indigenous blacks. Roger Waldinger has conducted surveys of low-wage employers in the Los Angeles area -- restaurants, hotels, furniture manufacturing, printing, department stores, and hospitals.<sup>104</sup> Waldinger describes ethnic networks and niches as playing a crucial role in the availability of jobs for different communities.<sup>105</sup> His study finds that employers favor hiring through primarily immigrant and Hispanic ethnic networks, thereby increasingly excluding African-Americans. In an additional study, Waldinger and Bailey have documented how informal networks exclude minorities in the construction industry.<sup>106</sup> In yet another study conducted in several metropolitan

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102 Richard A. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* 69-72 (Harvard 1992).

103 U.S. DEPT OF LABOR, A REPORT ON THE GLASS CEILING INITIATIVE 12-25 (1991); Joleen Kirschenman & Kathryn M. Neckerman, “We’d Love to Hire Them, But ...”: The Meaning of Race for Employers, in *THE URBAN UNDERCLASS* 203, 217-30 (Christopher Jencks & Paul E. Peterson eds., 1991).

104 See, Handler, citing, Roger Waldinger, *Black/Immigrant Competition Re-assessed: New Evidence from Los Angeles I* (1995) (unpublished M.S. thesis draft, UCLA, on file with author).

105 In Waldinger terms, a network becomes a niche when a group’s representation in a particular industry is at least 150% of its share of total employment. Roger Waldinger, *Black/Immigrant Competition Re-Assessed: New Evidence from Los Angeles*, 40 *Socio. Perspectives* 365, 367 (1997); Roger Waldinger, *Still the Promised City? African-Americans and New Immigrants in Postindustrial New York* (1996). See also, Robert S. Goldfarb, *Methodological Commentary—Investigating Immigrant-Black Labor Market Substitution: Reflections on the Case Study Approach*, in *Immigrants and Immigration Policy: Individual Skills, Family Ties and Group Identities* 289 (Harriet Orcutt Duleep & Phanindra V. Wunnava eds., 1996); Robert Waldinger, *Who Makes the Beds? Who Washes the dishes? Black/Immigrant Competition Reassessed*, in *Immigrants and Immigration Policy: Individual Skills, Family Ties and Group Identities*, 265 (Harriet Orcutt Duleep & Phanindra V. Wunnava eds., 1996).

106 Roger Waldinger & Thomas Bailey, *The Continuing Significance of Race: Racial Discrimination in Construction*, 19 *POL. & SOC’Y* 291, 291-323 (1991).

areas, Harry Holzer similarly finds a preference for whites (in clerical/sales jobs) and Latinos (in blue-collar jobs) over African-Americans.<sup>107</sup> A recent report by the Community Service Society of New York describes the New York City apparel industry as “a bastion of ethnic network hiring.”<sup>108</sup> The report reveals the complex ways in which native-born workers and immigrants compete with each other in the low-wage labor market. The New York apparel industry serves as an economic gateway to new immigrants. Contractors, who employ the vast majority of apparel production workers, hire, almost exclusively, from social, family, and neighborhood networks within specific immigrant groups, using ethnic background as a screening device, “a ‘quick and dirty’ way to find workers who are willing to work hard for low wages.”<sup>109</sup> These employers do not require formal education or English language skills, but only “good” work ethic and willingness to put up with hard work, uncomfortable conditions, and low pay, and they often have negative stereotypes about the work habits of native-born blacks and Puerto Ricans.<sup>110</sup> In different contexts, employers interviewed believed that Latinos were harder workers, and that immigrants were likely to appreciate the low wages more than other workers.<sup>111</sup> Employers even admit preference of immigrants since they are less likely to invoke available remedies if they had been wronged.

It should be clear by now that the reliance on an ethnic network for labor supply tends to perpetuate a self-reinforcing circle. As such reliance becomes well established and results in successful hiring, employers will tend to believe more in the predictive power of ethnic markers.<sup>112</sup> Moreover, the ethnic network functions not only by

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107 Harry J. Holzer, Job Availability for Long-Term AFDC Recipients, in *Strategies for Self-Sufficiency: Jobs, Earnings, Child Support and the Earned Income Tax Credit, Welfare Reform in the 104th Congressional Forum III*, U. Wisconsin-Madison Inst. for Res. on Poverty Spec. Rep. No. 65, at 17 (1995).

108 <http://www.cssny.org/reports/execsum/execsum4.htm>.

109 *Id.*

110 *Id.* African-American have also engaged in conscious niche-creating networking. As Waldinger describes, the public sector became an African-American niche, since government as an employer has traditionally treated blacks with greater fairness than the private sector. A leader of a predominantly black clerical workers’ union tells Waldinger,

“My people have an excellent communications system: they know that jobs are available, they refer cousins, sons, daughter. People walk into personnel and drop off resumes like there’s no tomorrow”. Waldinger, 234. In an era of privatization, the public sector as a secure niche for African-Americans has greatly declined. “Even before the new immigrants were establishing themselves in the apparel industry in the 1960s and 70s, African-American and Puerto Rican New Yorkers were leaving the industry in pursuit of newly opened economic opportunity. Now the closing of former paths of advancement (such as government employment for African-Americans) is a reminder that ethnic enclave industries work to both create opportunity and limit access to it.” <http://www.cssny.org/reports/execsum/execsum4.htm>..

111 Katherine S. Newman, *No Shame in My Game: The Working Poor in the Inner City* (1999); Carol B. Stack, *Beyond What Are Given as Givens: Ethnography and Critical Policy Analysis*, 25 *Ethos* 191, 191 (1997); Regina Austin, *Contextual Analysis, Race Discrimination, and Fast Food*, 341 *J. Marshall L. Rev.* 207 (2000).

112 See, Waldinger,

providing immediate accurate information on job openings, but also to provide information that can guarantee that the applicants will get the job.<sup>113</sup> Workers inform their friends about the criteria employers look for when making hiring decisions and, on the other end of the decision making process, they serve the function of references and vouchers, giving their own good word to promote new applicants. If certain groups are less likely to be inside the referral loop, they are also less likely to have the insider perspective and insider recommendation that will help get them the jobs.

As we saw earlier, courts have struggled with these dilemmas of the promise and peril of network hiring by limiting the scope of the meaning employment “practice” for disparate impact discrimination claims under Title VII. Thus, in rejecting discrimination claims in the cases of minority word-of-mouth networking, the decisions have stated that “practice” connotes “active” behavior on the part of the employer. In *Chicago Miniature Lamp*, where the employer hired walk-in applicants who had heard about job openings from incumbent workers, the court declared there was no “employer practice:”

The [district] court erred in considering passive reliance on employee word-of-mouth recruiting as a particular employment practice for the purposes of disparate impact.<sup>114</sup>

Rather, the court described the process as a mere passive acceptance of the product of its non-supervisory employees telling their families, friends and acquaintances that the employer was looking to hire new employees. There was no practice since the employer did not actively initiate networking. There could also be no intentional discrimination, Judge Cummings explained:

Miniature's passive reliance on word-of-mouth to generate applicants must be given minimal weight because it involved no affirmative act by Miniature. Drawing the inference of intent from "non-action" is inherently more difficult than drawing the inference of intent from particular actions. This is especially true since intent means more than knowledge that a certain action (or non-action) will cause certain discriminatory results. Intent means a subjective desire or wish for these discriminatory results to

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<sup>113</sup> Id.

<sup>114</sup> *Miniature Lamp*, at.

occur.<sup>115</sup>

In Consolidated, the court similarly reasoned that since the employer did not take any significant action in hiring, there can be no intentional discrimination attributed to it. According to the court, only active aversion or preference for members of the employer's own ethnic/migrant community can be considered intentional discrimination. Here, the statistical disparity should rather be attributed simply to the make-up of Consolidated's employee community. No inference of intentional discrimination could be drawn from word-of-mouth hiring:

Even if the employer would prefer to employ people drawn predominantly or even entirely from his own ethnic or, here, national-origin community. Discrimination is not preference or aversion; it is acting on the preference or aversion. If the most efficient method of hiring...just happens to produce a work whose racial or religious or ethnic or national-origin or gender composition pleases the employer, this is not intentional discrimination.<sup>116</sup>

The court further explained that while efficiency was not a defense to intentional discrimination, here efficiency was the *reason* why the method was adopted:

It is the cheapest method of recruitment. Indeed, it is practically costless. Persons approach Hwang or his employees—most of whom are Korean too—at work or at social events, and once or twice Hwang has asked employees whether they know anyone who wants a job.<sup>117</sup>

The court accordingly held that a racially or ethnically homogenous workforce does not impose a duty to advertise hiring.

Networks thus appear in these cases as preexisting, spontaneous, almost non-existent, entities. Word-of-mouth appears and this image has later been carried on beyond the discrimination context.<sup>118</sup> In fact, a more context-sensitive normative approach

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<sup>115</sup> *Miniature Lamp*, at.

<sup>116</sup> *EEOC v. Consolidated Service Systems*, 989 F.2d 233 (7th Cir. 1993).

<sup>117</sup> *EEOC v. Consolidated Service Systems*, 989 F.2d 233 (7th Cir. 1993).

<sup>118</sup> Other courts have cited the classification produced in these cases of the reliance of employees word-of-mouth as a non-action that cannot result in liability See, *Jenson v. Eveleth Taconite Co.*, 824 F.Supp. 847, 61 USLW 2696, 61 Fair Empl.Prac.Cas. (BNA) 1252, 62 Empl. Prac. Dec. P 42,469 D.Minn.May 14, 1993

reveals the power of networks as labor market intermediaries. A fact-sensitive exploration often also reveals that more formal entities than an abstract idea of network are actually mediating the relationship. In such cases, networks become less and less invisible and look more and more like formal intermediaries. Although Chicago Lamp and Consolidated both appear as word-of-mouth hiring cases, looking into their facts reveals that this may not be the right way to construe the discrimination claims. A closer look at the Chicago Lamp case points to the fact that the owner had established a working relationship with two Hispanic organizations: the Spanish Coalition and the Latino Youth Organization. The owner would pass them the word when he needed new employees, and they would quickly supply him with new applicants. In Consolidated, there are also indications of more formalized intermediaries than simply the invisible network. First, the facts mention social functions in which prospective applicants approached the employer. Also, it is mentioned that the owner had in fact placed an advertisement in a Korean-language newspaper (as well as in the Chicago Tribune) although according to the stated facts, the ad resulted in zero hiring. In this role, the distinctions between ethnic-based organizations and other labor market intermediaries, nonprofit and for-profit, are significantly blurred. Economic opportunity is significantly determined by such efforts and through the inclusion or exclusion from networks. The courts have tried to mediate the underlying normative tensions between community and equality in these contexts, but have done so unsystematically, and by evoking, and further elaborating, false dualities of active and passive; practice and non-practice; and formal and informal. A more comprehensive workforce development approach that seeks to integrate existing networks and nonprofit organizations, as well as the for-profit sector, under the radar of public policy, must address these contemporary structures and dynamics of job search and hiring.

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“[When] the employees, rather than the employer, take the active role in recruiting. An employer's passive reliance on employees' actions is not the type of “affirmative act” that can result in disparate impact liability.”); Calderon from 1993, describing word-of-mouth hiring as “not an employment practice” (and citing Chicago miniature lamp and Consolidated) “What workers tell their friends is beyond the owners' control, and treating such activities as “farm labor contracting activities” would gut the exemption—for it is impossible to suppress word-of-mouth reports about the job.”. Calderon v. Witvoet, 999 F.2d 1101, 123 A.L.R. Fed. 697, 126 Lab.Cas. P 33,001, 26 Fed.R.Serv.3d 1494, 1 Wage & Hour Cas.2d (BNA) 872 7th Cir.(Ill.) 1993 (for the purpose of the inclusion under the family farm).

## V. Public Funds, Private Provision, Collaborative Efforts: Workforce Development In Action

### A. Initial Concerns

In light of these intertwined realities -- the gaps in hard and soft skills and in access to upskilling, the structural barriers to on-the-job training, and the implications of network hiring -- there is a danger of a further reinforcing circle, in which public support for workforce development declines, while only higher paid workers continue to acquire training, either from their employers or self-paid training. Employment anti-discrimination laws have been very limited in their ability to address the structural reasons for work inequality.<sup>119</sup> Moreover, as we have begun to explore, within the new economic realities, the traditional employer is no longer the single significant, and often not the primary, actor of the labor market. Social reform efforts to improve working conditions and employability are shifting to other actors. Increasingly, private intermediaries within the market serve important roles in shaping the economy and determining the nature of industries. They serve as relatively formal bases within gradually informalized, dispersed, and deregulated markets. In a large number of industries, the factors of stability, size, information, education, and reputation have been impacted. Many employers are too small and too dispersed to recover compensation. Certain employment laws require a statutory minimum number of employees in order for an employer to fall within their scope. For example, Title VII only covers employers with fifteen or more employees. The Family and Medical Leave Act only applies to employers of fifty or more employees. Thus, legally imposing responsibilities on market intermediaries, at times even constructing them as *employers*, has the potential to provide much needed legal protection.<sup>120</sup> Indeed, the concept of labor market intermediaries, independent of their organizational structure, is currently being rethought by policy

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<sup>119</sup> See generally, Susan Sturm, **Second** Generation Employment Discrimination: A Structural Approach, 101 Colum. L. Rev. 458 (2001).

<sup>120</sup> See also, Orly Lobel, The Slipperiness of Stability: The Private Employment Agency and Flexible Work Arrangements, forthcoming Symposium: The Role of Contract in the Modern Employment Relationship, Texas Wesleyan Law Review 2003.

makers with the goal of adequately addressing their roles in the realities of current markets.<sup>121</sup> For example, in 1997, the International Labor Organization (ILO) reversed its historic stance against labor market intermediaries and its skeptical view of non-standard forms of employment by adopting a new convention on employment agencies to replace the 1949 treaty that had endured until then.<sup>122</sup>

Non-profits operating in the new economy are increasingly acting as new market intermediaries. The two parallel moves of legal reform and market transformations have increased the share of the nonprofit sector in labor market restructuring while direct public sector provision has declined. Nonprofits are adapting to the new Welfare-to-Work conditions, and seeking Work First federal and state contracts and grants under WIA and PRWORA.<sup>123</sup> As labor market intermediaries, nonprofit often compete with for-profit firms in offering similar services. They are also finding new ways to collaborate with for-profits taking a more comprehensive approach to the challenges of the market. Together with for-profit intermediaries, they form a web of new actors within the labor market and the further exploration of their new roles is crucial in the search for relatively formal forces within new economic realities. Such exploration reveals a vast variety in the effects of organizational form on actual practices. Some nonprofits that have entered the market have created a new type of activism aimed at improving worklife conditions, particularly in vulnerable, unorganized settings. At the same time, other nonprofits have not proved to differ in any significant way from other service providers. By exploring nonprofit service activities in key locations of workforce development activity, we can begin to develop a broader framework for understanding these variations that can inform public policy. Before turning to the studies examining the questions of sectoral difference and cross-sector collaboration, let us focus our attention on three central challenges in the context of social service privatization: performance measurement; competition; and the existing theoretical and empirical framework on nonprofit service providers.

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121 See also, Orly Lobel, *Orchestrated Experimentalism in the Regulation of Work* (reviewing Osterman et. al, *Working in America: A Blueprint for New Labor Market*, MIT Press, 2001) forthcoming *Michigan Law Review* (2003); Orly Lobel, *Class and Care: The Roles of Private Intermediaries in the In-home Care Industries in the United States and Israel*, 24 *Harvard Women's Law Journal* 89 (2001); Orly Lobel, *Work, Welfare and Identity: The Challenges of Equity and Empowerment in a Post-Industrial, Globalized Society* [unpublished manuscript, on file with author, 2001].

122 See, *The Convention Concerning Private Employment Agencies 1997* (n. 181) revising the *Convention Concerning Fee-Charging Employment Agencies 1949* (n. 96).

123 See, Seefeldt et. al, *Nonprofits That Serve Welfare Recipients: Contractual Relations and Agency Effects*.

## **1. Performance Measurement and Incentives**

As described earlier, the performance requirements of the 1996 Personal Responsibility and Work Opportunity Reconciliation Act PRWORA (supplemented by the requirements Department of Labor's Welfare-to-Work implementation program)<sup>124</sup> and the Workforce Investment Act of 1998 (WIA) are designed to include meaningful benchmarks and outcome evaluation. Yet, performance measurements in the context of social good and social welfare, in which quality is not easily quantified, pose a variety of difficulties. Moreover, in the context of serving multiple constituencies and multiple objectives, the problem of assessing performance is all the more problematic.<sup>125</sup> Adding to these problems are the risks of commercialization and efficiency at the expense of equitable outcomes. The new WIA and PROWRA systems are designed to provide an incentive for states to identify service providers who can provide the highest levels of service and performance. This tends to encourage funding of those programs most likely to meet the stipulated performance outcomes and bring an "efficient" return on the investment of Federal dollars, thus risking the production of "cream skimming."

A recent study of the publicly funded private training programs under JTPA indicates some of the problems associated with measuring performance in these contexts.<sup>126</sup> Looking at training programs under the Job Training Partnership Act (JTPA), Courty and Marschke find that programs tend to report the enrollee's success in entering the labor market, but fail to report this information when she does not, in fact, find a job.<sup>127</sup> At the end of the year, after the monetary rewards are assured, there is a substantial rise in reports of unemployed enrollees. Moreover, it was found that, to a certain extent, training centers fail to report unemployed enrollees at all. Under JTPA, like the more recently enacted laws, government encouraged efficient performance of these service-providing agencies, by offering monetary incentives. Performance was

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124 20 CFR §645

125 See generally, Kanter and Summers, *Doing Well While Doing Good: Dilemmas of Performance Measurement in Nonprofit Organizations and the Need for a Multiple-Constituency Approach*, in Walter W. Powell, *The Nonprofit Sector: A Research Handbook* (1987).

126 P. Courty and G. Marschke "Measuring Government Performance: Lessons from a Federal Job-Training Program" *The American Economic Review*, Vol. 87, No. 2, *Papers and Proceedings of the Hundred and Fourth Annual Meeting of the American Economic Association*. (May, 1997), pp. 383.

127 P. Courty and G. Marschke "Measuring Government Performance: Lessons from a Federal Job-Training Program" *The American Economic Review*, Vol. 87, No. 2, *Papers and Proceedings of the Hundred and Fourth Annual Meeting of the American Economic Association*. (May, 1997), pp. 383, 384.

commonly measured as the extent to which the program succeeded in raising the human capital of its trainees.<sup>128</sup> The authors of this study conclude that managers of training centers act in a way that maximizes their private rewards at the expense of social welfare, and that government should not rely on the training centers' reports in measuring their success.<sup>129</sup>

Under JTPA, the practice of contracting the provision of government training service to non-governmental providers thus created the risk that the contracted agencies could direct participants into activities that satisfied the state's federal obligations but did not in fact result in permanent employment for participants.<sup>130</sup> These problems were understood to be partly a result of fragmentation of program responsibility at the federal, state and local levels and state variation in incentive policy. The performance standard chosen by the Department of Labor for states to use to monitor and reward state providers were based upon absolute levels following training rather than the value-added of the training services. States were given flexibility in developing incentives to encourage providers to meet the Department of Labor standards and thus stimulate gains in wages and employment and reductions in the welfare receipt. However, the moral hazard problem created by the absolute level, rather than the value-added, standards approach and the state variation in incentive policy led to state differences in earnings growth and "cream skimming."<sup>131</sup> Recent findings indicate that states seeking to improve performance standards and to minimize costs often discourage hard-to-serve candidates from accessing services, provided less basic skills training, and decreased the average length of their programs.<sup>132</sup> Some studies have found however that although higher incentives encouraged cream skimming, these negative were outweighed by the higher value-added of the programs funded under higher incentive schemes. Studies have also shown that a more flexible training administration at the state level improved the efficacy

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128 P. Courty and G. Marschke "Measuring Government Performance: Lessons from a Federal Job-Training Program" *The American Economic Review*, Vol. 87, No. 2, Papers and Proceedings of the Hundred and Fourth Annual Meeting of the American Economic Association. (May, 1997), pp. 383.

129 P. Courty and G. Marschke "Measuring Government Performance: Lessons from a Federal Job-Training Program" *The American Economic Review*, Vol. 87, No. 2, Papers and Proceedings of the Hundred and Fourth Annual Meeting of the American Economic Association. (May, 1997), pp. 383,386-7.

130 Barbara L. Bezdek, *Contractual Welfare: Non-Accountability and Diminished Democracy in Local Government Contracts for Welfare-to-Work Services*, 28 *Fordham Urb. L.J.* 1559 (2001) at 1562.

131 Michael Cragg, *Performance Incentives in the Public Sector: Evidence from the Job Training Partnership Act*, 13 *J.L. Econ. & Org.* 147 (1997) at 149

132 K.P. Dickson, R. W. West, D. J. Deborah, D.A. Drury, M. S. Franks L. Schlichtman and M. Vencill. "Evaluation of the Effects of JTPA Performance Standards on Client, Services, and Costs" *National Commission for Employment Policy Research Report No. 88-17* (1988).

of training programs, particularly in higher-incentive systems. These findings indicate that when states institute policies for making adjustments for unforeseen circumstances, such as changes in local unemployment levels, service providers are less likely to engage in cream skimming processes.<sup>133</sup> The aggregation of studies and problems findings have led to the new focus in WIA on enhancing the employment rates, yet many argue that the new indicators are also likely to have similar effects of creaming.<sup>134</sup>

One commentator described the worry of creaming when using private contractors for welfare to work programs as follows:

“[If in a welfare-to-work program], a vendor makes the highest profit by placing people in private sector jobs, there is a built in incentive to avoid having people in the caseload who are hard to place. It will be more profitable to exclude hard-to-place people by determining that they are ineligible for the program or sanctioning them for not abiding by all of the program's rules. These profit motives do not promote the public interest in improving the lives of the most marginalized people in our society. Hence, when joining private profit with public purpose, it is essential to create a system that either prohibits or makes unprofitable activities that are contrary to the public interest. . . . Even if a vendor is obligated to take hard-to-place participants, there is still an obvious incentive to sanction more costly participants by claiming they violated some rule, such as refusing to accept a job or missing a job interview.”<sup>135</sup>

Studying Baltimore's, Barbara Bezdek finds that creaming was a significant weakness stemming from the City's reliance on vendors to design its employment readiness program.<sup>136</sup> Baltimore's funded training programs engaged in extensive creaming, establishing academic, health, social and arguably economic requirements.<sup>137</sup> Trainees were required to have a high school diploma; a minimum eighth grade proficiency in writing and math; be in good health; pass a physical; be able to lift fifty pounds; pass both a drug screening test and a criminal background check; have a driver's

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<sup>133</sup> Id. at 156.

<sup>134</sup> C.J. Heinrich and L.E. Lynn “Government and performance: The Influence of Program Structure and Management on Job Training Partnership Act (JTPA) Program Outcomes”. P. 9.

<sup>135</sup> Melissa Kwaterski Scanlon, *The End of Welfare and Constitutional Protections for the Poor: A Case Study of the Wisconsin Works Program and Due Process Rights*, 13 Berkeley Women's L.J. 153, 163 (1998).

<sup>136</sup> Barbara L. Bezdek, *Contractual Welfare: Non-Accountability and Diminished Democracy in Local Government Contracts for Welfare-to-Work Services*, 28 Fordham Urb. L.J. 1559 (2001) at 1601.

<sup>137</sup> Id.

license; and preferably be willing and able to accept full-time employment as a Developmental Disability Assistance upon completion.<sup>138</sup>

Finally, adding to these problems is the uncertainty of the workings of the newly enacted voucher-system under WIA. The vouchers, which can be used to pay for the job training services, provide the least employable job seekers the freedom to choose the training program they believe will best suit their needs. Individual choice under conditions of uncertainty can be problematic to the operation of a training voucher system because training is a “post-experience good” with inherent information asymmetries. As a result, it may be difficult to determine the quality of training services even after a trainee has begun the program. Informed choice in the use of training vouchers requires that job seekers have knowledge about the labor market, present and future income potential, training providers success, and their own aptitudes for various occupations and training programs.<sup>139</sup>

## **2. The Assumption of Competition**

The privatization of social services commonly involves assumptions about the effectiveness of increased competition. However, in the absence of certain circumstances and structures, this assumption often turns out to be a false. In many cases, competition is virtually non-existent because of strong crowding out effects. In recent moves to contract-out social services, competition has concentrated between only a few large for-profit entities, such as Lockheed Martin and Maximus.<sup>140</sup> Thus, under the veil of competition, private providers often become de-facto monopolies. In New York City for example, which contracted out over \$500 million in job training and employment placement contract, large contracts with Maximus crowded out smaller, for-profit and

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<sup>138</sup> Id. at 1601. See Grant Agreement between Baltimore City Dep’t of Soc. Servs. & The Chimes, for Job Training and Placement Servs. App. A (1997).

<sup>139</sup> Id. at 244. See Burt S. Barnow, Vouchers for Government-Sponsored Targeted Training Programs, in *VOUCHERS: LOOKING ACROSS THE BOARD* (get citation)6.

<sup>140</sup> Michele Estrin Gilman, *LEGAL ACCOUNTABILITY IN AN ERA OF PRIVATIZED WELFARE* 89 Cal. L. Rev. 569 (2001).

nonprofit, bidders.<sup>141</sup> This particular case of New York is revealing on different levels, as Maximus' contracts were eventually deemed void because of corruption in the bidding process. During the contracting process, city officials were engaged in extensive meetings with Maximus executives, giving Maximus, according to the court, an unfair advantage in the process.<sup>142</sup> To add to the offense, Maximus has recently acknowledged the hiring of the father-in-law and family friend of the city's welfare commissioner during the stages of bidding.<sup>143</sup> As a result, contracts worth \$100 million have been legally suspended, waiting an investigation.<sup>144</sup> In other states, Maximus is being investigated for corruption in billing. The list of cases in which private contractors have been charged with incorrect billings for their contracted service provisions is growing, yet it should be noted that corruption cases have involved both for-profits and nonprofit providers.<sup>145</sup>

An example of structural considerations that must be taken into account in securing constructive competition is the not-so-surprising finding that the relative portion of each organizational form of service providers in the training market is influenced by the administrative authority that makes the contracting decisions. In the context of JTPA, when authority was granted to Private Industry Councils (PICs) or generally to private sector representative, a significantly higher number of contracts were granted to for-profits providers.<sup>146</sup>

The monetary stakes of performance and competition are high for nonprofit service providers. Much of the social service nonprofit sector relies almost exclusively on a combination of government contracts and fees for services.<sup>147</sup> This leads to the final

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141 Nina Bernstein, *New Problems with Welfare- to-Work*, N.Y. Times, Apr. 14, 2000, at B6. A study of welfare privatization in New Jersey found similar characteristics of larger bidders being much more successful than smaller entities. Richard W. Roper, *A Shifting Landscape: Contracting for Welfare Services in New Jersey*, Rockefeller Reports, at <http://rockinst.org/reports/rr10.html> (Dec. 23, 1998).

142 Christopher Drew & Eric Lipton, *2 With Ties to Chief of Welfare Got Jobs with Major Contractor*, N.Y. Times, Apr. 21, 2000, at A1. *A Judicial Rebuke for the City*, N.Y. Times, Apr. 17, 2000, at A18; Eric Lipton, *Judge's Ruling Bars Contracts in Welfare Plan*, N.Y. Times, Apr. 14, 2000, at A1. *Mayor Defends Welfare Hirings*, N.Y. Times, Apr. 23, 2000, § 1, at 30.

143 *Id.*

144 *Id.*

145 See, e.g., Christopher Drew, *Wisconsin to Audit Welfare Contractor*, N.Y. Times, May 11, 2000, at B14. (investigating Maximus) See Steve Schultze, *State Gets Tab for W-2 Firm's Outside Work*, Milwaukee J. Sent., Aug. 28, 2000, at 1A. (with regard to a nonprofit organization).

146 C.J. Heinrich and L.E. Lynn "Government and performance: The Influence of Program Structure and Management on Job Training Partnership Act (JTPA) Program Outcomes". P. 11, 18.

147 "[G]overnment purchase of service contracting with nonprofit service agencies in Massachusetts rose from \$25 million in 1971 to \$850 million in 1988." 147 Steven R. Smith & Michael Lipsky, *Nonprofits for Hire: The Welfare State in the Age of Contracting* 38-39 (1993).

preliminary set of questions concerning the debate about the legitimacy of nonprofit commercial or “market-based” activities.

\*\*\* Here there will be an expansion on Maximus’ investigation as well as the Maximus, Lockheed Martin, and other private companies crowding out of non-profits.

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### **3. The Regulation of Non-Profit Service Providers**

In a recent antitrust case, Judge Posner stated, “the adoption of the nonprofit form does not change human nature.”<sup>148</sup> The question of the legitimacy of business activities of nonprofits is central to the on-going debate about existing policies, exemptions, and other regulatory distinctions, as well as advantages, conferred upon the non-profit sector. In both theoretical and empirical accounts of nonprofits, there is disagreement in the literature as to what is the unique function of nonprofits in instances in which they operate in parallel avenues to for-profit firms. While some believe that nonprofits and for-profits behave in fundamentally different ways, others are skeptical of any market activity nonprofits, and view them simply as for-profits-in-disguise.<sup>149</sup>

Economic theorists often argue that nonprofits come into existence as a result of either market or governmental failure. Some view nonprofit exemption as based on the idea that the government has to compensate the nonprofit organization for its welfare activity, that otherwise would be funded by the government.<sup>150</sup> This justification is based on the common assumption that nonprofit organizations function better than for-profit organizations in the delivery of public services, especially when a “more costly” population is involved.<sup>151</sup> The distinctive feature of the nonprofit organization that is most often focused on in these analyses is the nondistribution constraint – the legal

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148 HCA v. FTC, 807 F. Supp. at 1390.

149 See Avner Ben-Ner & Theresa Van Hoomissen, Nonprofit Organizations in a Mixed Economy: A Demand and Supply Analysis, in *The Nonprofit Sector in the Mixed Economy* 35 (Avner Ben-Ner & Benedetto Gui eds., 1993) (stating that even though nonprofits do not distribute profits “some suspicion regarding the organization's incentives” remains). Indeed, even in terms of working environment, research shows that in many instances nonprofits are not more likely to offer a pleasant working environment. See, R. Emanuele and SH Higgins, Corporate Culture in the Nonprofit Sector: A Comparison of Fringe Benefits with the For-profit Sector, 12 *Journal of Business Ethics*; L.M. Salamon, The Marketization of Welfare – Changing Nonprofit and For-Profit Roles in the American Welfare-State, 34 *Social Service Review*. Henry B. Hansmann, The Two Nonprofit Sectors: Fees for Service Versus Donative Organizations, in *THE FUTURE OF THE NONPROFIT SECTOR* 91, 98-99 (Virginia A. Hodgkinson et al. eds., 1989); Jerald Schiff & Burton Weisbrod, Competition Between For-Profit and Non-profit Organizations in Commercial Markets, in *THE NONPROFIT SECTOR IN THE MIXED ECONOMY* 127 (Avner Ben-Ner & Benedetto Gui eds., 1993).

150 Bennett J.T. & DiLorenzo T. *Unfair competition: The Profit of Nonprofit* New York: Hamilton Press (1989).

151 Due to reasons I mentioned in my former summaries.

prohibition on distributing any assets or property of the corporation to members.<sup>152</sup> The nondistribution constraint has been described by the Supreme Court as the *raison d'être* of the nonprofit form.<sup>153</sup> Some theorists see the non-distribution constraint as simultaneously providing the rationale for the existence of the nonprofit sector and the protection for its decent operation. The nondistribution constraint helps overcome contractual failure in situations where the activities of the corporation are difficult to monitor, by removing the “profit motive” and assuring those who contribute to, and contract with, the organization that it will not exploit informational deficiencies to pursue their own private interests.<sup>154</sup> Rather than mere “profit”, theorists attribute to nonprofits a variety of distributional and other “bonoficing” objectives, including the promotion of fairness, equality, and empowerment.<sup>155</sup> Therefore, bound by the nondistribution constraint, nonprofits are assumed to have less incentive to raise their profits and cheat their consumers (although, at the same time, these constraints are also assumed to provide less incentive for behaving efficiently). For this reason, scholars hypothesize that consumers will prefer nonprofit providers when quality is not verifiable.<sup>156</sup>

On the other side of the debate, economists have argued that nonprofits maximize disguised profits, output quantity and quality, and various inputs, such as staff size.<sup>157</sup> These views attribute behavior and functions to nonprofits, which include prestige, employee income maximization, and discretionary spending.<sup>158</sup> If this is the case, the argument proceeds to claim the illegitimacy of the use of the “halo” effect of operating as a nonprofit simply as a marketing tool -- -- falsely bestowing a halo signal of the goodness and trustworthiness to the nonprofit sector as a whole and to any individual

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152 See Hansmann, *Reforming Nonprofit Corporation Law*, 129 U.Pa.L.Rev. 497, 502-507, 557 (1981); Hansmann, *The Role of Nonprofit Enterprise*, 89 Yale L.J. 835, 843-845 (1980).

153 *Austin v. Michigan State Chamber of Commerce*.

154 *Austin v. Michigan State Chamber of Commerce*.

155 WP-97-28 *Pricing and Rationing by Nonprofit Organizations with Distributional Objectives* By Richard Steinberg and Burton A. Weisbrod

156 See, Hansmann, *The Role of Nonprofit Enterprise*, 89 Yale L.J. 835, 843-845 (1980); Hansmann, *Reforming Nonprofit Corporation Law*, 129 U.Pa.L.Rev. 497, 502-507, 557 (1981); Weisbrod, *The Nonprofit Economy* (1988); Weisbrod, *Institutional Form and Organizational Behavior*, in *Private Action and the Public Good*, Ed., W. Powell and E.S. Clemens 69 (1998).

157 Jerald Schiff & Burton Weisbrod, *Competition Between For-Profit and Nonprofit Organizations in Commercial Markets*, in *THE NONPROFIT SECTOR IN THE MIXED ECONOMY* 127 (Avner Ben-Ner & Benedetto Gui eds., 1993).

158 See, generally, Evelyn Brody, *AGENTS WITHOUT PRINCIPALS: THE ECONOMIC CONVERGENCE OF THE NONPROFIT AND FOR-PROFIT ORGANIZATIONAL FORMS*, 40 N.Y.L. Sch. L. Rev. 457, 491-92 (1996).

nonprofit organization regardless of its particular nature.<sup>159</sup> Particularly in circumstances in which government contracts and fees are the central source of income for nonprofits, economists argue that returns to capital can be fully satisfied, and a founder might prefer the nonprofit form merely and precisely in order to appropriate the “halo” effect of operating as a nonprofit.<sup>160</sup>

As should be clear from the preceding paragraphs, the disagreement about the nonprofit behavioral model is acute. The sharpness of these debates has led some to conclude that any such attempt to generalize the differences between nonprofits and for-profits according to economic and social terms is misleading and that the choices between for-profit or nonprofit often run counter to any existing economic theory and theories of nonprofit behavior.<sup>161</sup>

The impact of the nonprofit sector through governmental contracting is yet another point of dispute in the literature. There is no dispute about the growth of the nonprofit sector as a result of new contracts with government -- social services is the sub-sector of the nonprofit sector that has experienced the largest growth in the last two decades. In this sub-sector, government funding is the largest source of income of nonprofit service providers, and larger than all private giving combined.<sup>162</sup> The second largest source of income is fee for service. As a result of what is referred to as the “marketization of welfare,” as well as “profiteering,” nonprofits are increasingly competing with for-profits, in a wide variety of forms.<sup>163</sup> There are competing arguments about the desirability of these realities and new partnerships with government. Ralph Kramer has argued that the lack of monitoring capabilities by governmental agencies as well as the increased dependency of government on the nonprofit sector for service provision has allowed nonprofit to receive governmental funds without altering their

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159 Evelyn Brody, Agents Without Principals: The Economic Convergence of the Nonprofit and For-profit Organizational Forms, 40 NYLR 457. (1996)..

160 See, generally, Evelyn Brody, AGENTS WITHOUT PRINCIPALS: THE ECONOMIC CONVERGENCE OF THE NONPROFIT AND FOR-PROFIT ORGANIZATIONAL FORMS, 40 N.Y.L. Sch. L. Rev. 457, 491-92 (1996).

161 Estelle James in Sharon Oster & Estelle James, Comments in *The Economics of Nonprofit Institutions: Studies in Structure and Policy* 154, 156 (Susan Rose-Ackerman ed., 1986).

162 Federal and state funding can take a variety of forms, including direct federal grants, direct contracts, grants to states and local governments; payments to individuals or financial agents on their behalf. See Salamon 1987, 105.

163 Burton Weisbrod, The Future of the Nonprofit Sector: Its Entwining with Private Enterprise and Government, 16 *Journal of Policy Analysis and Management*, 543 (1997).

practices or giving up their autonomy.<sup>164</sup> Smith and Lipsky by contrast argue that government contracting threatens the mission of nonprofits.<sup>165</sup> Again, at the root of these opposing arguments is the difference theoretical understandings about the purpose and workings of the nonprofit sector.

On the empirical side, the actual practices of nonprofits provide enough support for the different types of polar assumptions within the spectrum of the debate. Empirical findings regarding the impact of nonprofits in a competitive setting widely vary. Reports regarding nonprofits serving merely as covers for for-profit firms, as well as ample examples of non-profit entities that exemplify no de-facto difference from for-profit entities raise the question of the underlying normative assumptions concerning the nonprofit status.<sup>166</sup> Moreover, it is often the case that the fastest growing sector of nonprofits, market service providers, are involved in services that are not primarily directed at the poor or at innovative public interest goals. In different contexts, increasing empirical data shows that in competitive settings nonprofits have a greater tendency to behave similarly to their for-profit counterparts. In the health care field, researchers have found that nonprofit hospitals in areas with significant for-profit competition are more responsive to financial incentives and to market demands than other nonprofits.<sup>167</sup> However, some studies find that even in situations of competition, nonprofit vary from for-profit hospitals in certain important aspects and tend to contribute to socially desirable activities.<sup>168</sup>

In the case of the provision of care services, some studies have shown that in most states, there are no significant variations in the overall quality of service provided by nonprofits.<sup>169</sup> On the other hand, findings indicate that in states in which licensing

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<sup>164</sup> Ralph Kramer, Voluntary Agencies and the Contract Culture: 'Dream or Nightmare?' *Social Service Review* 68:33-60. (1994).

<sup>165</sup> Steven Rathgeb Smith & Michael Lipsky, *Nonprofits for Hire: The Welfare State in the Age of Contracting* (1993).

<sup>166</sup> Assumptions regarding the distinctions among organizational forms are also challenged when we find examples in which institutions that are financially set up by venture capital have clear non-profit, public interest goals.

<sup>167</sup> Mark G. Dugann, Hospital Market Structure and the Behavior of Not-for-Profit Hospitals: Evidence from Responses to California's Disproportionate Share Program, Working Paper 7966 (National Bureau of Economic Research 2000). Elaine Silverman and Jonathan Skinner, Are For-Profit Hospitals Really Different? Medicare 'Upcoding' and Market Structure, *RAND Journal of Economics* (2002).

<sup>168</sup> Jill Horwitz, *Why We Need the Independent Sector: The Behavior, Law, and Ethics of Not-Fot-Profit Hospitals*, UCLA Law Review (Forthcoming 2003).

<sup>169</sup> See, e.g., Cost, Quality, and Child Outcomes in Child Care Centers: Technical Report (Suzanne W. Helburn ed., June 1995); John R. Morris and Suzanne W. Helburn, Child Care Center Quality Differences: The Role of Profit Status, Client Preferences, and Trust, 29 *NVSQ* (2000); Cost, Quality, and Child Outcomes in Child Care Centers: Technical Report (Suzanne W. Helburn ed., June 1995); Susan Rose-Ackerman, *The Market for Loving-Kindness: Day-Care Centers and the*

requirements and regulatory standards are low, the overall quality of services was significantly higher in nonprofit child care centers than in for-profit centers<sup>170</sup> Related findings appear in studies of the nursing home industry indicating that for-profit nursing homes, which charge lower prices, attract residents who have relatives or other monitors, and so do not need to trust a nonprofit to provide higher quality.<sup>171</sup> These findings resonate with other studies that show that informed individuals are often more likely to prefer nonprofit care to for-profit, other things equal.<sup>172</sup> Yet, studies of entrepreneurial motivations in the child care industry show that often, as a result of imperfect knowledge regarding nonprofit status, concerns about control and decision-making abilities, and a desire to retain ownership, entrepreneurs automatically choose for-profit status in spite of minimal profit potential, thus defying conventional rationales of choice between the two organizational forms.<sup>173</sup>

At the same time, there is a widespread understanding in the literature and among activists that initiatives that challenge existing market practices and contribute to the empowerment of vulnerable social groups are most often set up as nonprofit entities. These initiatives may include a disciplining function on for-profit practices, forcing for-profit providers to adjust their operational strategies to be more akin to new nonprofit competitors. Some nonprofits enter the market with the specific purpose of generating efforts from for-profit private enterprises to get the business away from them -- introducing a signaling function of the existence of a market share that will have a distributional effect. In many cases within an intermediary setting, nonprofits directly enter spaces in which they represent weaker groups vis-à-vis powerful players. These cause-oriented nonprofits may either be more focused on ensuring compliance with

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Demand for Child Care, in C. Milofsky, ed. *Community Organizations: Studies in Resource Mobilization and Exchange* 170 (1988); M.D. Keyserling, *Windows on Day Care: A Report on the Findings of Members of the National Council of Jewish Women on Day Care Needs and Services in their Communities* (National Council of Jewish Women).

170 See, Cost, Quality, and Child Outcomes in Child Care Centers: Technical Report (Suzanne W. Helburn ed., June 1995); John R. Morris and Suzanne W. Helburn, *Child Care Center Quality Differences: The Role of Profit Status, Client Preferences, and Trust*, 29 NVSQ (2000).

171 Alphonse G. Holtmann & Steven G. Ullmann, *Transaction Costs, Uncertainty, And Not-For-Profit Organizations: The Case of Nursing Homes*, in *The Nonprofit Sector in the Mixed Economy*, 149.

172 See, Jeffery Ballou, *The Sources and Perceptions of Differences in Firm Behavior in the Presence of Information Asymmetries: The Role of the Nonprofit Firm in the Mixed Industry* (researching nonprofit and for-profit nursing homes in Wisconsin).

173 See, Brenda Bushouse, *Motivations of Nonprofit and For-profit Entrepreneurs in the Child Care Industry: Implications for Mixed Industries* (indicating that other factors that influence the entrepreneurial decision are governance structure, opportunity, potential for income, and service ethic).

existing law or aiming to supercede existing norms and standards, elevating and innovating market practices.

Henry Hansmann has argued that “the basic corporate law applicable to nonprofit organizations is at a remarkably immature state of development, and remains startlingly uninformed by either principle or policy.”<sup>174</sup> Since then, the laws regulating the taxation and corporate governance of nonprofits have been revised and extended, yet the challenge of integrating the nonprofit sector into public governance law is yet to be met. Peter Frumkin describes the state of current knowledge about when and under what circumstances one kind of provider, for-profit or nonprofit, is likely to serve the public interest better than the other as “generally poor.”<sup>175</sup> Developing these understandings directly implicates the current legal regulation and adjudication of nonprofits. Indeed, the gap between the assumptions upon which legal regulation of nonprofits rest and the reality of nonprofit activities has widened. Existing laws usually regulate the nonprofit sector as a whole (most often as any organization subject to section 501(c)(3) of the Internal Revenue Code), without differentiation between the types of functions that nonprofits perform, services, needs, goals, and reason for organizing in the nonprofit form.<sup>176</sup> At the same time, at least in principle, legal policies concerning organizational form are often aimed at structuring nonprofits around a redistribution function. Modeling the tensions produced by organizational variation in the mixed market of work-related intermediaries confronts these questions -- should we scrutinize commercial activities of nonprofits differently than other activities? Should we distinguish between the entrance of nonprofits into competitive commercial activities with the purpose of raising income versus the purpose of furthering ideological goals? Should funding and the nondistribution constraint be the guidelines for these distinctions or should we determine substantive outcomes? Legal analysis provides ways to respond to these questions with various tools. Public policy involves choices between subsidizing nonprofits, whether through tax exemptions, grants or other policies, and more direct targeting of certain activities, services, and structures. The law of nonprofits can also include regulation of

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174 Henry B. Hansmann, REFORMING NONPROFIT CORPORATION LAW, 129 U. Pa. L. Rev. 497, 500 (1981).

175 Peter Frumkin, On Preserving a Mixed Organizational Ecology.

176 It should also be noticed that some states deny full exemption if the nonprofit charges fees of more than a certain sum for their services.

degrees of control over decision-making processes, participation and legal standing rights, and fiduciary roles of government vis-à-vis nonprofit organizations on behalf of interested groups, including consumers, sponsors, donors and other stakeholders.<sup>177</sup> Finally, as a result of the enhanced role of nonprofit service providers in the restructuring of work and welfare, a crucial legal question involves preference of certain organizational forms in governmental contracting and the outsourcing of public services.<sup>178</sup>

## **B. Quantitative Findings**

Recent empirical studies of publicly funded job training service providers under the JTPA finds that there is no significant or consistent support for the assumption that nonprofits are likely to be more charitable than for-profits, or more likely to deliver better job training service to their clients.<sup>179</sup> An elaborate study conducted in Illinois uses a 10 year long data of administrative records from 1984 to 1994 at a local service delivery area, which included all of the contracts (about 750 contracts) between the local JTPA public agency and its providers. In this local agency, like many other localities, all organizations, established or new, public, for-profit, or nonprofit, were required to enter a competitive bidding process in order to obtain a governmental contract. The agency had a set of criteria in evaluating contractor proposals, mainly focusing on performance and capabilities. No explicit consideration was given to the organizational form in the

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177 Indeed, some argue that those who have an economic demand for the nonprofit form are best positioned to ensure that the nonprofit actually does improve upon the for-profit provision of services in the market Avner Ben-Ner, Who Benefits From the Nonprofit Sector? Reforming Law and Public Policy Towards NonProfit Organizations, 104 Yale L.J. 731 (1994). See also, Henry B. Hansmann's, Reforming Nonprofit Corporation Law, 129 U.Pa.L.Rev. 497 (1981) at 606 ('watchdog' function of shareholders, minimal though it may be, is nonexistent and that no independent group is empowered to elect the board of directors); Jones v. Grant, 344 So.2d 1210 (Ala.1977).

178 Policy choices in this context may also include using the non-delegation doctrine to prevent certain processes of privatization. These questions are all relevant also to enterprises that are not labor market intermediaries, for example adoption agencies, and activities such as standard-setting and private certification. It is increasingly clear that voluntary self-regulation for example, or initiatives of private accreditation and certification will only work in certain situations. The culture of the industry is significant – multiple factors determine their relative success. Such factors include professionalism, prestige and reputation at stake, multiplicity of actors involved, strong network links in the industry, a strong union. More detailed research is required in order to understand these differences and accordingly adopt adequate policies.

179 C.J. Heinrich Organizational Form and Performance: An Empirical Investigation of Nonprofit and For-Profit Job Training Service Providers, Journal of Policy Analysis and Management Volume 19, Issue 2, 2000. 233,238, Barbara L. Bezdek, Contractual Welfare: Non-Accountability and Diminished Democracy in Local Government Contracts for Welfare-to-Work Services, 28 Fordham Urb. L.J. 1559 (2001) at 1600.

decision process.<sup>180</sup> Nonprofits, public contractors and for-profits firms, each delivered 45, 23 and 21 percent of the program services, respectively.<sup>181</sup>

The first question examined in the study is whether for-profit organizations tend to serve a less needy population, compared to public providers or nonprofit organizations. Although JTPA required that at least 90 percent of their enrollees will be economically disadvantaged, the study compares which type of publicly funded provider serves a more needy population relative to the others, taking into account different sub-categories among those who are categorized as disadvantaged.<sup>182</sup> It relies on previous studies of the JTPA that indicate that a person is typically considered more needy if she falls under more of the following categories: high school dropout, not being in the labor force, having basic skills deficiencies, minimal work history, and no earnings in the previous year.<sup>183</sup> The study finds that *for-profit* programs were significantly *more* likely to provide vocational training to a more disadvantaged population relative to public providers and nonprofit organizations.<sup>184</sup> It also finds that the local JTPA agency was more likely to serve a more disadvantageous population relative to private nonprofit organizations.<sup>185</sup> As for services other than vocational training provided under JTPA, the conclusions were more mixed. The study finds that for-profit providers are more likely than nonprofits to deliver remedial education services to welfare recipients, to enrollees with basic skills deficiencies, and to those who have had no earnings during the pre-program year. On the other hand, they were significantly less likely to serve high school dropouts.<sup>186</sup> The study observes a significant difference between the different forms of organization pertains to

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180 C.J. Heinrich Organizational Form and Performance: An Empirical Investigation of Nonprofit and For-Profit Job Training Service Providers, *Journal of Policy Analysis and Management* Volume 19, Issue 2, 2000. 233, 239.

181 C.J. Heinrich Organizational Form and Performance: An Empirical Investigation of Nonprofit and For-Profit Job Training Service Providers, *Journal of Policy Analysis and Management* Volume 19, Issue 2, 2000. 233, 238-9.

182 C.J. Heinrich Organizational Form and Performance: An Empirical Investigation of Nonprofit and For-Profit Job Training Service Providers, *Journal of Policy Analysis and Management* Volume 19, Issue 2, 2000. 233, 240.

183 Heckman J.J., & Smith J.A., & Taber, C. What Do Bureaucratic Do? The Effects of Performance Standards and Bureaucratic Preferences on Acceptance into the JTPA Program. Paper prepared for the conference on Reinventing Government and the Problem of Bureaucracy: Implications for the Regulation and Reform. University of Arizona, May 5-6.

184 C.J. Heinrich Organizational Form and Performance: An Empirical Investigation of Nonprofit and For-Profit Job Training Service Providers, *Journal of Policy Analysis and Management* Volume 19, Issue 2, 2000. 233, 245.

185 These findings are in line with the Heinrich's conclusion in a different study, according to which, when the PIC is the sole supervisor (and as mentioned above more for-profits were contracted in as service deliverers), enrollees typically attain significantly higher wages. C.J. Heinrich and L.E. Lynn "Government and performance: The Influence of Program Structure and Management on Job Training Partnership Act (JTPA) Program Outcomes". P.21.

186 C.J. Heinrich Organizational Form and Performance: An Empirical Investigation of Nonprofit and For-Profit Job Training Service Providers, *Journal of Policy Analysis and Management* Volume 19, Issue 2, 2000. 233, 245.

the categories of services that they choose to provide. It was found that for-profit entities were significantly more likely to provide services characterized as more intensive and that had a skills-building character (such as vocational training, remedial education, and on-the-job training). Nonprofit organizations were more likely to provide less intensive services (such as employment counseling and job search).<sup>187</sup> It was also found that the less intensive services were more expensive for for-profits relative to nonprofits providers. Conversely, vocational training and remedial education, which were less likely to be provided by nonprofits, were found relatively more expensive for nonprofits.<sup>188</sup>

A second question examined in the study was whether public providers or nonprofit organizations generate better outcomes relative to for-profit organizations. The study finds that for-profit organizations contributed to significantly higher wages and higher rates of employment relative to nonprofit organizations.<sup>189</sup> The study finally finds that for-profit entities are more likely to respond to performance incentives established by the agency and to make adjustments to ensure that they improve their contract performance standards.<sup>190</sup> The study concludes that the data suggests that there is no economic justification for preferring nonprofits to for-profits in providing services funded by government contracts or grants.

These findings can be understood to be consistent with a different study that observed the workings of Baltimore's Work First contracts during 1998-99. The city's \$60 million expenditure on welfare-to-work services was delivered through seventeen contracts, that were given to thirteen vendors -- one was given to a private for-profit, five to non-profits, three to public colleges and four to City agencies.<sup>191</sup> The study reports grim results. The contracts produced only 2000 jobs for more than 10,000 TANF families. The majority of contractors paid to provide direct job placement services failed

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187 C.J. Heinrich *Organizational Form and Performance: An Empirical Investigation of Nonprofit and For-Profit Job Training Service Providers*, *Journal of Policy Analysis and Management* Volume 19, Issue 2, 2000. 233,245-6.

188 C.J. Heinrich *Organizational Form and Performance: An Empirical Investigation of Nonprofit and For-Profit Job Training Service Providers*, *Journal of Policy Analysis and Management* Volume 19, Issue 2, 2000. 233,249.

189 C.J. Heinrich *Organizational Form and Performance: An Empirical Investigation of Nonprofit and For-Profit Job Training Service Providers*, *Journal of Policy Analysis and Management* Volume 19, Issue 2, 2000. 233,253.

190 C.J. Heinrich *Organizational Form and Performance: An Empirical Investigation of Nonprofit and For-Profit Job Training Service Providers*, *Journal of Policy Analysis and Management* Volume 19, Issue 2, 2000. 233,255.

191 *Id.* at 1602.

to even provide that for most welfare recipients:<sup>192</sup> “the contracts propose services for too few, aim for quite limited employment outcomes, and for those few contacts expressly connected to real job openings, engage in creaming.”<sup>193</sup> This study concludes that the contracting process, in which the majority of contracts were with nonprofit providers, as a whole had only minimal effectiveness in meeting recipients’ employment and other needs.<sup>194</sup>

### **C. Model Cases of Nonprofit Interventions for Social Change**

Despite such findings indicating either the absence of difference or the absence of reason to grant preference to nonprofits operating as service providers in the context of training, a broader approach of Workforce Development reorients our focus to significant contributions of the nonprofit sector in efforts for social change. In the following section, I examine five case studies that have been particularly successful in addressing the issues of worker dislocation, vis-à-vis the market and political change, taking a WD approach. These cases have been singled out by economists, lawyers, public administrators, activists and/or policy makers as exemplary models. To the surprise of some, and consistent with the strong beliefs of others, it turns out that all of these cases involve nonprofit actors in central and highly significant roles. The section concludes with a brief description of additional forms of nonprofit intermediaries that together shape the field of WD. As we explore these cases, we shall continue to ask, what contributes to the transformative potential of nonprofit interventions in the new political economy?

#### **1. The Machine Action Project (MAP)**

An award-winning community-based WD program, the Machine Action Project (MAP) originated in Springfield, Massachusetts relying on collaborative networks of private and public institutions to build a successful economic strategy in the machine tool

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<sup>192</sup> Id.

<sup>193</sup> Id.

<sup>194</sup> Barbara L. Bezdek, Contractual Welfare: Non-Accountability and Diminished Democracy in Local Government Contracts for Welfare-to-Work Services, 28 Fordham Urb. L.J. 1559 (2001) at 1600.

and metalworking manufacturing industry.<sup>195</sup> MAP is a consortia constituting of several local unions, vocational education and community college institutions, the Central Labor Council, small and medium sized machine shops, local and state government, and the Private Industry Council established under JTPA.<sup>196</sup> As it established, MAP created an advisory board of twenty local leaders representing diverse constituencies: four union representatives, four company representatives, four training providers, two bankers, the president of the local community college, a church representative and a community representative. The breadth of the consortia is understood to be its strength in providing access to training through a broad constituency of employed and unemployed workers. The alliances of MAP were forged in direct reaction to the public funding that were made available by JTPA. Taking a broad WD approach, MAP conceives of training as a multidimensional challenges that links changes in product markets to changes in inter-firm cooperation, technology, work organization and the skill levels of workers.<sup>197</sup> MAP conducts regular surveying of market conditions and information gathering in order to better understand the changing needs for skills. In addition to gathering information from employers, MAP conducted surveys with over 700 workers in three trades: automotive repair, printing, and machining, in order to examine workers' perspectives on the use of skills and the effects of technological change in the workplace.<sup>198</sup> These trades were selected as representative of critical employment sectors in the rapidly changing, high-technology industries of Hampden and Hampshire Counties of Massachusetts. Following this initial study, MAP then surveyed a larger, more geographically dispersed group of workers, examining the particular ways in which increasing uses of advanced technologies are effecting the workforce. The surveys found a significant desire among workers to receive advanced training in order to adapt to changes in the new economy. MAP also worked closely with university researchers to develop a successful strategy of collaboration among firms, unions, government agencies and service providers, in order

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195 Rosemary Batt and Paul Osterman, *Workplace Training Policy: Case Studies of State and Local Experiments*, Working Paper 106, Economic Policy Institute, 1993. 56.

196 Rosemary Batt and Paul Osterman, *Workplace Training Policy: Case Studies of State and Local Experiments*, Working Paper 106, Economic Policy Institute, 1993. 56.

197 Rosemary Batt and Paul Osterman, *Workplace Training Policy: Case Studies of State and Local Experiments*, Working Paper 106, Economic Policy Institute, 1993. 56.

198 K. McGraw, R. Forrant A Workers' Perspective: Skills, Training, and Education in the Automotive Repair, Printing, and Metalworking Trades, <http://ncrve.berkeley.edu/Abstracts/266.html>.

to link local issues to regional and industry-wide structures. To increase access and equity, MAP actively recruited and helped disadvantaged trainees, particularly underrepresented women and minorities, by covering tuition costs at courses developed in conjunction with the Massachusetts Creative Development Institute, a nonprofit training organization. It also formed an alliance with groups such as the Nueva Esperanza, a community-based Hispanic agency, and established a “women in machining project”, taking a highly activist approach and linking training to additional services, including education about rights at work, support networks, child care service, and follow-up counseling.

The MAP model has also served as a useful way for responding to the problem of small-firm access to public sector funding.<sup>199</sup> Small firms often do not have the resources and sufficient information to develop training proposals to submit to the federal program. Moreover, the high costs associated with public administration of programs to small firms often means that small firms will not receive the attention they need in order to participate. As a nonprofit/for-profit/governmental network, MAP creates economies of scale for program administration. Economists Batt and Osterman describe MAP as “suggestive of a more innovative role that public agencies can play in supporting economic development – a role that goes beyond the simple provision of training funds or technical assistance to that of creating new forms of organization and cooperation within the private sector and between public and private sector organizations.”<sup>200</sup> The Project as a whole has been widely recognized as successfully tackling some important challenges of training, including accountability in the use of public and private funds, developing responsive training, providing equitable access, and linking the question of training to broader regional economic policies.<sup>201</sup>

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199 Rosemary Batt and Paul Osterman, *Workplace Training Policy: Case Studies of State and Local Experiments*, Working Paper 106, Economic Policy Institute, 1993. 61.

200 Rosemary Batt and Paul Osterman, *Workplace Training Policy: Case Studies of State and Local Experiments*, Working Paper 106, Economic Policy Institute, 1993. 56.

201 Rosemary Batt and Paul Osterman, *Workplace Training Policy: Case Studies of State and Local Experiments*, Working Paper 106, Economic Policy Institute, 1993. 61.

## **2. Project Quest**

Another award-winning model of a nonprofit WD initiative that has challenged traditional assumptions of vocational training is Project QUEST (Quality Employment and Skills Training). Following major shutdowns of manufacturing plants in San Antonio at the beginning of the 1990s, two community-based organizations, COPS (Communities Organized for Public Service) and Metro Alliance, decided to initiate a job training program that would be different from the grossly inadequate existing programs in the market.<sup>202</sup> The program is funded through a variety of sources, including federal and state grants, as well as local government funding. Unlike other training programs, Project QUEST is aimed at preparing workers for long-term, skilled positions that would enable them to break out of poverty. The training offered by Project Quest typically takes between 18 to 24 months, which is 6 to 12 months longer than the new welfare provisions of PRWORA allow. The unique circumstances in which the project was initiated, and its ongoing links to the community-based organizations that pioneered the program, as well as to other local organizations, has contributed to its success as a model for local nonprofit WD efforts. The project's community-based initiators have been central in securing the political and financial support of local and state agencies.

Quest serves over 400 trainees a year, nearly 40 percent of them welfare recipients and nearly two-thirds women. To fill most of its in-depth skill training needs, Quest uses the particular training services of Alamo Community College. Similar to MAP, Quest takes a comprehensive approach to WD and the problems of the new economy. It provides its trainees with a broad range of information and support services including, child-care subsidies, transportation, and referrals to health care. The project has been recognized as successful in addressing the skills mismatch employers and employees historically faced in the area, which led employers extensively recruit from outside of the region to fill high-skill jobs.

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<sup>202</sup> [Http://www.questsa.com](http://www.questsa.com); Project Quest has won an award from the KSG in 1995 [www.ksg.harvard.edu/innovations/winners/pqtz95.htm](http://www.ksg.harvard.edu/innovations/winners/pqtz95.htm) .

### 3. AGENDA and Metro Alliance

A third example of a successful community-based initiative that draws on federal resources to create programs that mobilize marginalized and dislocated workers is AGENDA.<sup>203</sup> AGENDA, a membership-based nonprofit organization in the Los Angeles area, focuses on poor community organizing, public policy education, grassroots leadership development, and community advocacy. In 1995, AGENDA initiated the Los Angeles Metropolitan Alliance (Metro Alliance) in order to link local neighborhood problems to regional solutions. The Metro Alliance is a coalition of organizing groups, labor unions, faith-based entities, and legal services advocates. One of its primary initiatives has been targeting the Los Angeles Workforce Investment Board (LA-WIB) as a funding source for a training program designed to open the health care industry to low-income job seekers.<sup>204</sup> The Alliance conducted an in-depth regional economic analysis that marked the health care industry as a potential high-wage growing market. The Alliance actively raised public attention to the need for increased access to health care jobs by holding a large community rally and staging a series of public demonstrations at WIB hearings. The mobilization was successful and the WIB designated funds for job training in the industry. The Alliance drafted a Healthcare Careers Training and Placement Program Proposal outlining a vision of community-based job training.

AGENDA, the initiating anchor of Metro Alliance, continues with other projects for job creation and overcoming structural problems that curtail economic justice. For example, AGENDA initiated a campaign to attach job creation conditions to a multi-billion dollar movie studio development.<sup>205</sup> The campaign won a commitment from the studio to fund a multimedia job-training academy for low-income workers and to make efforts to hire academy graduates.<sup>206</sup>

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<sup>203</sup> See, Scott L. Cummings, COMMUNITY ECONOMIC DEVELOPMENT AS PROGRESSIVE POLITICS: TOWARD A GRASSROOTS MOVEMENT FOR ECONOMIC JUSTICE 54 Stan. L. Rev. 399 (2001).

<sup>204</sup> Id.

<sup>205</sup> Id.

<sup>206</sup> Id.

#### 4. **Focus: Hope**

Focus: Hope was founded over 3 decades ago, following the 1967 riots in Detroit, Michigan, as a civil and human rights organization dedicated to overcome racism, poverty and injustice.<sup>207</sup> Since the early 1980s, the organization has invested much of its resources to the challenge of training and job placement. In 1981 it established a Machinist Training Institute, offering training to thousands of job seekers. MTI manages to secure good entry level wages for its graduates, and enjoys a 100 percent placement record.<sup>208</sup> In 1987, Focus: HOPE also developed a First Step program, and in 1989 the FAST TRACK program -- intensive four- and seven-week programs helping high school students improve their reading and math skills in order to qualify for further training in MTI. More than 4,000 individuals have graduated from these programs, moving up to the MTI or directly into the job market.<sup>209</sup>

In 1993, in reaction to the historical lack of access to engineering education among minorities, as well as the understanding that there is a growing shortage of manufacturing engineers with hands-on skills, Focus: HOPE developed the Center for Advanced Technologies. In coalition with universities and corporations it designed a twenty-first century curriculum for manufacturing engineering education. Its trainees learn much of their skills with three of the university partners.

In 1999, another program, an Information Technologies Center, was created to provide industry-certified training in network administration, network installation, and desktop support. Again, the project includes collaboration with industry partners, including Cisco, Microsoft, and the Computer Technology Industry Association. Focus: Hope reports that more than 900 students have graduated from the program and are earning competitive wages in rewarding, professional careers.<sup>210</sup>

Focus: Hope is also involved in broad workforce development support operating Focus: HOPE Manufacturing and Focus: HOPE Companies, subsidiary operations with

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207 See, Focus:Hope website, <http://www.focushope.edu>.

208 See, Focus:Hope website, <http://www.focushope.edu>.

209 See, Focus:Hope website, <http://www.focushope.edu>.

210 See, Focus:Hope website, <http://www.focushope.edu>.

industry contracts, as well as a Center for Children which provides child care and education. In addition to elaborate alliances with other organizations and businesses, 51,000 volunteers contribute to Focus: Hope success.

## **5. The South Bay Labor Council and Working Partnerships USA**

In California's Silicon Valley, the South Bay Labor Council aims to enhance union effectiveness and working conditions in the area by working with its nonprofit arm, Working Partnerships USA, and by building community alliances.<sup>211</sup> As many Silicon Valley workers have been experiencing difficulties in working conditions, the Council uses “a solid base of economic research and planning, a heightened community presence, and enduring alliances... attacking the problems on many fronts.”<sup>212</sup> It has been educating union and community leaders about labor and economic issues and researching the local economy to identify points where Working Partnerships USA could usefully intervene, and supporting workplace redesign. An exemplary initiative created by the Council is Together@Work – a new membership organization for temporary workers. Founded in 1995, Together@Work became a labor-led non-profit employment referral agency or “hiring hall” that has as its ultimate goal to increase the wage floor for lower-paid temp work and to ensure greater stability and better working conditions for its workers. Together@Work also included innovative programs to upgrade worker skills, particularly among low-income workers and former welfare clients. The organization obtains for its members higher pay, health care coverage, and better training opportunities. Its presence in the market has also put competitive pressure on local temp agencies to raise the conditions they obtain for temp workers. It thus succeeded in making systematic and structural changes in the temporary employment economy and shifting the terms of temporary work in the region by becoming a competitive alternative to for-profit employment agencies.<sup>213</sup>

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211 <http://www.workingforamerica.org/documents/Building/building11.htm>.

212 <http://www.workingforamerica.org/documents/Building/building11.htm>.

213 See, Paul Osterman et. al, Working in America: A Blueprint for the New Labor Market 118-119 (2001).

#### **D. An Expanding Array of Intermediaries**

A wide range of examples of non-profit intermediaries operating as direct employment agencies also include schools, training programs, labor union “hiring halls,” and worker, and employer associations. These intermediaries play significant roles in defining the ground rules and language of workforce development. For-profit firms are also setting up quasi-autonomous “straw” nonprofit employment agencies to avoid certain responsibilities as employers. Faith-based nonprofits are increasingly entering the job placement market as well. Some churches serve as placement agencies (with or without direct monetary contributions), with the mission both to help the poor in finding jobs, and to integrate these workers into their religious community. For example, the “Jesuit Free Employment Agency” set up by the Catholic Church in Greenville, South Carolina, serves to help immigrants find jobs and housing and provides English classes.<sup>214</sup> These activities of a wide range of nonprofit intermediaries are all examples of the direct participation in human service provision. Indirect efforts of nonprofits to improve the worklife of vulnerable groups increasingly involve participation in the referral market as well. These include non-governmental human rights organizations, which relate to employment agencies in complex ways, both in positive cooperation to ensure rights and in negative reporting on abusive practices of other agencies. At times, these organizations may become “super employment agencies,” compiling lists of favorable agencies to which they refer workers who approach them, and compiling “blacklists” of abusive agencies, from which they warn their clients.<sup>215</sup> Thus, the referral market constitutes a complex combination of for-profit and nonprofit actors, and the lines between the different types of actors are often blurred.

In addition to training and job placement, new intermediaries influence the WD field by making connections to broader aspects that impact the availability of and access to work. This includes making connections to such issues as housing, transportation,

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<sup>214</sup> See, David McGhee, *Reopening Liberty's Arms: steps Toward Open Immigration*, 4 Kan. J.L. & Pub. Pol'y 127, 132 (1994).

<sup>215</sup> Orly Lobel, *Class and Care: The Roles of Private Intermediaries in the In-home Care Industries in the United States and Israel*, 24 Harvard Women's Law Journal 89 (2001). In 2001, I conducted interviews with a variety of such employment agencies in Massachusetts and in Israel, examining their self-perceptions as to their dual responsibilities vis-a-vis the care worker and the in-home employer, and I have argued that agencies could serve an important role in increasing the visibility of a marginalized workforce. For my dissertation project, I will build on these understandings in order to better compare their roles.

banking and credit, child care and health care. Their activities include information collection and research, consulting, lobbying, organizing, and monitoring. One important example of new nonprofit intermediaries in the field of WD that focuses on supporting a particular challenge of new market is work/family activism. The changing nature of work and the unsettling breaks between employment, welfare, and family responsibilities, particularly as women's participation rates in the workforce have grown enormously, all contribute to the recent generation of a broad variety of non-profit work/family initiatives. These range from consulting and advocacy organizations to the direct provision of child care and other work-related services. These nonprofit initiatives include organizations such as Work Family Directions, Catalyst, the ThirdPath Institute, the Labor Project for Working Families and the Families and Work Institute, all promoting work/family policies and aiming to develop innovative practices within the labor market.

The Labor Project for Working Families is illustrative of such efforts. Founded in 1992 by the California Bay Area Labor Councils, the Labor Project for Working Families is a nonprofit organization funded by union contributions and private foundations.<sup>216</sup> Since its foundation, the Labor Project has expanded its work to assist unions all over the nation in making workplaces more family friendly. It provides technical assistance, resources and education to unions and union members addressing family issues in the workplace including child care, elder care, subsidy programs, backup/emergency-care programs, flexible work schedules, family leave, and quality of life issues. Other nonprofits initiatives focus on offering consulting services for employers in non-unionized settings, helping them to design and implement effective worklife strategies. These organizations often encourage strategic investments in the communities where their employees live and work. For example, Work Family Directions (WFD) offers tools to implement both on-site and community-based child care centers. WFD also manages a national fund established by the American Business Collaboration for Quality Dependent Care which has grown since 1992 into a \$100 million initiative to help ensure employees' access to necessary, quality dependent care services, improving care for working families. Many of these initiatives serve as the mediating link between employers and

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216 <http://laborproject.berkeley.edu/about.html>.

communities, bringing together local governments, school districts, service providers, and business leaders.

## **VI. Negotiating Tensions: Workforce Development as a Cross-Sectoral Project**

Taken together, the quantitative and qualitative findings point to a twofold reality. First, that as a general rule, it is not the organizational status alone that is the determinative factor for socially desirable activities of private providers. But, second, that the best examples of ideal type institutions turn out to be non-profit rather than for-profit. Taking a problem-oriented, cross-sectoral, social field approach allows us to see the difficulties with the translation of ideal sector typologies into realities. Yet, when the best conditions for ideal-type action exist, the potential for transformative activism is realized and the unique positioning of nonprofit actors is evoked.

The shifting realities and perceptions of the political economy in the social field of Workforce Development reveal the pervasive dilemmas in the reordering of social provision. These sets of tensions include: density/mobility; adversarial/cooperative; universal/targeted; client/citizen; outcome/process; governance/provision. Rather than resolving these tensions, or denying their existence, model nonprofits operating in the field serve the crucial role of continuously negotiating these tensions, maintaining them visible, and understanding the tensions themselves as providing a potential space for action, agency, resistance, and change. The key to the successful interventions of the exemplary nonprofit initiatives has been their unique ability, leveraging their nonprofit status to reach cautious, albeit always unstable, balances.

### **1. Density versus Mobility**

The scale of action of Workforce Development projects is one of the central questions of the field. The nonprofit model initiatives all followed strategies that focused

on particular areas and industries to enhance growth and competitiveness. Yet, focusing the efforts on local density and the mobilization of existing local networks has served as both opportunity and obstacle. The interaction of the local with the effects of different globalizations further puts into question the geography and scale of Workforce Development.

The creation of empowerment zones and community economic development programs is paradigmatic of the rationale of small scale local self-help and community favoring. These programs take a comprehensive approach to market/community interactions in a confined geographical area, and attempt to revitalize a particular neighborhood or confined area, through a wide range of activities, from small business assistance projects, through training in public schools, to transportation to workplaces. Moreover, empowerment zone legislation attempts to ensure that residents will benefit from business location in their communities by requiring that zone businesses employ at least 35 percent zone residents to qualify for tax incentives.<sup>217</sup>

However, recent studies show that, in fact, development efforts, including job creation, within designated zones of distressed neighborhoods will not necessarily lead to employment of zone residents. Even in neighborhoods that have undergone active development efforts, findings often indicate that the workforce does not reflect the racial composition of the neighborhood and that commuters are actually preferred to neighborhood residents.<sup>218</sup> We have seen earlier that the word-to-mouth hiring practices of small businesses, which rely on referrals from current employees, work to the disadvantage of inner-city blacks.<sup>219</sup> A recent study conducted in the Red Hook section of

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217 26 U.S.C.A. § 1397B(b)(6), (c)(5) (West Supp. 1994). See also, *Richmond v. Croson*, 488 U.S. 469 (1989), effectively bars any meaningful racial preferences by a local government under the Fourteenth Amendment. In contrast, a local preference does not implicate the Fourteenth Amendment's equal protection concerns. Instead, local preferences implicate the Sixth Amendment's privileges and immunities concerns. These concerns are far less fundamental and do not trigger strict scrutiny as do race-based preferences. See, e.g., *United Bldg. & Constr. Trades v. Camden*, 465 U.S. 208, 222 (1984) (implying that a well-tailored ordinance which required contractors working on city projects to employ a minimum percentage of city residents might not violate the Privileges and Immunities Clause); cf. *White v. Massachusetts Council of Constr. Employers*, 460 U.S. 204, 214-15 (1983) (holding that a city expending funds under its control—in whole or in part—on public construction projects is a market participant, and thus does not violate the Commerce Clause when it requires all city-funded construction to be performed by a workforce of at least half city residents). See also, Shanti K. Khinduka, *Community Development: Potentials and Limitations*, in *NEW PERSPECTIVES ON THE AMERICAN COMMUNITY* 396 (Roland L. Warren & Larry Lyon eds., 5th ed. 1988) (defining community development as, among other things, a process of attempting to "educate and motivate people for self-help" as well as "enable people to establish and maintain cooperative and harmonious relationships"); Patricia A. Wilson, *Empowerment: community economic development from the Inside Out*, 33 *URBAN STUD.* 617, 622 (1996). PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED* 137-38 (Myra Bergman Ramos trans., 1970).

218 Stack, 203.

219 Kathryn M. Neckerman & Joleen Kirschenman, *Hiring Strategies, Racial Bias, and Inner-City Workers*, 38 *SOC. PROBS.* 433, 433-41 (1991).

Brooklyn, New York, suggests that it is the absence of social networks, rather than the lack of nearby jobs, that is the primary significant reason for ghetto unemployment: "Red Hook's mix of industry and impoverishment seems to confound the logic behind enterprise zones. Numerous manufacturing plants and jobs exist in a neighborhood with high levels of poverty, unemployment and crime."<sup>220</sup> In Red Hook, local employers relied primarily on personal referral or social networks to find employees, which resulted in the inability of Red Hook residents to obtain jobs in their own neighborhood. The study suggests, however, that this pattern could be overcome by creating proxy networks in direct response to this problem. A community organization, "the South Brooklyn Local Development Corporation," established a screening and referral service to inform, socialize, and vouch for employees in a way similar to that of social and ethnic networks.

In addition to having an area focus, the model initiatives that we observed all adopted a non-local approach that moves into a regional level.<sup>221</sup> MAP for example expanded its information gathering to identify high-growth sectors within a regional economy and to develop customized job training programs to move low-income job seekers into these industries. AGENDA conducted an in-depth regional economic analysis to focus on potential high-growth markets. QUEST customized its training program in direct reaction to the problems of outside-of-the-region recruitment by employers. The One-Stop office established by the 1998 WIA further enables policy makers and activists to bridge these tensions – while it establishes local area offices, it also mandates the sharing of information among different localities in a state. Further provisions should seek to make this type of exchange more dynamic and accessible.

## **2. Adversarial versus Cooperative**

Nonprofits operating in the field of Workforce Development are situated simultaneously in adversarial and collaborative relations with both government and for-

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<sup>220</sup> Audrey G. McFarlane, EMPOWERMENT ZONES: URBAN REVITALIZATION THROUGH COLLABORATIVE ENTERPRISE, 5-FALL J. Affordable Housing & Community Dev. L. 35 (1995) Citing, Philip Kasinitz, The Real Jobs Problem, WALL ST. J., Nov. 26, 1993, at A8.

<sup>221</sup> Cummings.

profits firms. In sociology, such a tension has been termed “antagonistic cooperation”: A relationship between or among persons in which they join their efforts to produce something of value to the participants, while at the same time being in conflict over other things, most particularly the division among themselves of the product of their joint efforts.”<sup>222</sup>

In relation to government, the model initiatives all invested efforts in attempting to mobilize public grants and newly available federal resources. Indeed, some of the initiatives came into being in direct reaction to new public resources. Yet, the initiatives also resisted confining themselves to the particular vision that the public resources entailed. For example, QUEST’s training operations attests to the inadequacies of the time limitations established by PRWORA. They further seek to secure quality of work, compensation and conditions, defying the Work First message that any job is better than no job. Moreover, the projects often mobilize activism against public entities, for example, the rallies and demonstration organized by Metro Alliance at WIB hearings. In addition, many of the programs had a particular understanding about the exclusion of certain minority groups, and although the public contracts do not take formal stands about affirmative targeting of particular groups. Some of the initiatives have specifically aimed to include migrant groups that are not legally covered by the public projects.

With respect to private for-profit actors, as well as other nonprofit entities, again antagonistic cooperation characterized the nature of the model initiatives. All of the projects had an understanding that they must work together with the for-profit sector. The initiatives employed a coalition-based strategy to create systematic changes in the delivery of Workforce Development services to those in need. Scott Cummings similarly describes the move to more collaborative approaches of Sectoral Employment Intervention (SEI) that integrate employers, training providers, and social services agencies<sup>223</sup> The participation of certain founders of nonprofit service providers, such as community groups, as well as on-going governmental commitment to support certain

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222 Arthur Allen Leff, *The Leff Dictionary of Law: A Fragment*, 94 Yale L.J. 1855, 2031 (1985).

223 54 Stan. L. Rev. 399, 2001 Article COMMUNITY ECONOMIC DEVELOPMENT AS PROGRESSIVE POLITICS: TOWARD A GRASSROOTS MOVEMENT FOR ECONOMIC JUSTICE Scott L. Cummings; Greg Volz & Brad Castel, *Job Strategies in the Era of Welfare Reform: A Community-Based Model of Legal Services*, 33 Clearinghouse Rev. 569, 570 (2000).

initiatives, are significant factors in determining the relative success for a constructive coexistence of nonprofits in a mixed industry. Moreover, several of the initiatives contracted-out, or outsourced, some of their services to other, for-profit or nonprofit providers.

While collaborating across sectors, the model initiatives maintained, however, their Workforce Development mission that recognizes the nature of asymmetric power relations in the context of the labor market. The nonprofit initiatives followed a distributional objective and maintained their commitment to helping workers improve their worklife. This helps explain certain difference in behavior of nonprofits across industries. Unlike nonprofits that act as child care centers, broader Workforce Development nonprofits all have the distinctive feature of mediation between different market constituents -- labor and business -- in situations of asymmetrical power. They are also situated precisely at an intersection that provides opportunity to challenge a broad range of worklife related practices, at a moment when direct governmental regulation of the labor market is increasingly scarce. The existence of triangular relationships, in which intermediaries serve more than one type of consumer (e.g., mediating between business and labor) enhances the potential for interventionist practices of nonprofits. Within a triangular relationship, situations of pervasive power asymmetries can particularly benefit from the presence of nonprofit interventionist initiatives, which can shift distributional imbalances and empower weaker constituents to challenge existing structures and practices of the market. The adversarial/cooperative tension is an irresolvable tension, but it is also a clearly patterned and unequal tension: throughout prosperity and crisis, old and new economies, it is the worker rather than the employer who is more vulnerable to the tension and who has less power in shaping its shifting points of balance.<sup>224</sup>

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<sup>224</sup> See, Orly Lobel, Agency and Coercion in Labor and Employment Relations: Four Dimension of Power in Shifting Patterns of Work, 4 U. Pa. J. Lab. & Employment L. 121 (2001). .

### **3. Universal versus Targeted**

Transformative Workforce Development initiatives face the question of whether to provide universal services to all job seekers or to focus on targeted disadvantaged groups. The models that we observed aimed to aid lower-skilled workers seeking jobs, but also had as their mission the reform of industry-wide structures and institutions, working with both government and private firms to address pervasive challenges of the new market. While a central interest of the initiatives has been the desirable outcomes that certain arrangements and strategies can generate for low-income and subordinate groups, they have also taken an integrated broad approach, studying the possibilities of market restructuring through a Workforce Development approach.

All of the initiatives actively recruited disadvantaged groups while engaging universal workforce and industry-wide issues. Focus: Hope was founded with the mission of linking racism and poverty, but contributed to structural changes in the manufacturing arena. AGENDA designed its health care initiative with the purpose of opening the industry to low-income job seekers while engaging in the creation of universal wide employment standards. Some of the projects established targeted sub-divisions to address particular disadvantages of some of their constituents. MAP for example established a “women in machining project,” while having an overarching industry approach focusing on machine and manufacturing engineering. Several also formed alliances with other community-based groups to incorporate targeted challenges into their universal approach. MAP for example formed an alliance with Nueva Esperanza to support its Hispanic constituents.

The model initiatives are often formed at a particular moment of the closing of a major workplace and the dislocation of workers, yet the success of the programs in the long run is dependent on their ability to move from crisis management to ongoing training and retraining for market adjustment and local competitive advantage.<sup>225</sup> The mobilization occurred around low-income and dislocated workers at a moment of crisis and particular need, yet the initiatives proceeded to link the efforts to a broader vision of

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<sup>225</sup>See, Rosemary Batt and Paul Osterman, *Workplace Training Policy: Case Studies of State and Local Experiments*, Working Paper 106, Economic Policy Institute, 1993. 57, describing the inability of MAP to secure sufficient funding for a long-term strategy.

economic justice that involved a broader conception of constituents and stakeholder in the WD field.

For policy makers as well, the focus on the problem of training has shifted from attention to those below income cutoffs, to viewing the issue of inadequate training as generalized throughout the economy.<sup>226</sup> It is for this reason that training programs are now conceived as broadly based to serve a wide range of clients. The One-Stop offices established by the 1998 WIA are also a move to this direction. It provides universal access to all job seekers at the local career centers, while designating certain resources to targeted individuals.

#### **4. Clients versus Citizens (or, Outcomes versus Processes)**

A fourth tension exists between the value of the outcome goals set out by the WD initiatives and the process value by which the stakeholders participate in the initiative. This is, of course, not a dichotomous positioning and, in fact, it might be helpful to discuss three degrees of stakeholding – clients, consumers, and citizens. *Clients*, or “recipients,” implies a focus on product, without concerns about the structures that link the client to the provider; *Consumers* implies choice and satisfaction, but not necessarily participation. A *Citizen* approach embodies deep premises about the nature and legitimacy of the process of engagement, in addition to the efficient and just delivery of outcomes.

The model nonprofits engaged in both institutional reform (or space creation) and economic change. They combined outcome-oriented mission and process legitimacy by recognizing the promise of an overall goal and broad constituencies, rather than isolated consumer choice.<sup>227</sup> More than merely focusing on skills, information, and placement, community-led WD initiatives often become a site of empowerment for the integration of a variety of issues of social, political, and economic justice. The initiatives create new

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<sup>226</sup> Rosemary Batt and Paul Osterman, *A national policy for workplace training : lessons from state and local experiments*, Economic Policy Institute, 1993.

<sup>227</sup> In the academic world, some theorists have suggested that all nonprofits should be required to be run by active members. Avner Ben-Ner and Van Hoomissen propose that states grant stakeholders, including donor, volunteers, and customers, the power to elect boards, to sue boards and to oversee financial and decision-making processes. These proposals seem unrealistic in the context of WD cross-sectoral projects.

spaces for networking and collaboration. The new market has marked a shift from collective bargaining, as has been constructed by the National Labor Relations Act, to new models of employee organization, both within firms, such as "self-managed teams," "quality circles" and "employee-action committees", and in the broader arena of social change. Labor market intermediaries for social change, and particularly those with a WD approach, can be understood as the new unionism -- a new space for organizing, on-going association, delinked from the particular single employer. It suggests the possibility of consistency and stability in a field that is driven by mobility and flexibility. This new unionism involves greater ties to the community. It recognizes the significance of cross-initiative goals, such as overall socio-economic improvement, reduction of social gaps, citizen participation, empowerment, coalition formation, and governance.

### **5. Governance versus Provision**

The final, related tension that has been present throughout our exploration of the possibilities for reform is that of the relationship between innovating administration and governance structures and shifting in the substantive package of social provision. The model nonprofits operating in the field took a governance approach while competing for government funding as service providers. The initiatives often received the names as "project," "alliance," pointing to a governance function of the initiator and assuming a collaborative involvement of other actors. Thus, they were inclined to outsource some of their functions to other actors in the field. For example, to fill most of its in-depth, labor-intensive, skill training needs, that often required an elaborate existing infra-structure and specialization, the initiatives regularly used other providers. For example, to fill its in-depth skill training, Quest used the particular training services of Alamo Community College. Focus: Hope filled most of its skill training needs through three university partners. Focus: Hope also operated subsidiary operations, Focus: HOPE Manufacturing and Focus: HOPE Companies, with industry contracts. MAP also worked closely with university researchers and initiated strategic collaboration among firms, unions, government agencies and service providers. These structures confirm some of the

findings about the comparative advantage and specialization, and as a result, costs and efficiencies, between for-profit and nonprofits.

Earlier, we considered an important aspect of the regulatory shifts to private providers in an era of privatization -- the contingent link between public management techniques and the substantive ideologies about the value of welfare and provision.<sup>228</sup> The idea that privatized services would be more flexible and more efficient has been at the forefront of recent reform. However, public policy has yet to address in a systematic way the problems of sustaining *de facto* competition, reducing some of the negative effects of performance measurements on transformative action, and supporting the best-practices of constructive coexistence, both competitively and collaboratively, across sectors.

## VII. Conclusion and Directions for Research

The way regulation of an industry intersects with the regulation of sectors is a poorly studied question. While some scholars have offered theoretical explanations for the existence of variations between nonprofits and for-profits originating in the differences of organization form, relatively little research considers the effects of the market structure, public regulation, and distinctive, as well as relational, characteristics of different actors situated across fields. The social value of the availability of nonprofit alternatives in the market differs according to the regulatory and organizational structure of the industry in which they operate, and a complex set of characteristics determines whether a nonprofit will challenge existing practices in the market and intervene on behalf of weaker social groups.

In recent years, at the same time that the state is reducing direct provision of human services, it must rely on, as well as create and sustain, new market intermediaries

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<sup>228</sup> See also, Mathew Diller, *Form and Substance in the Privatization of Poverty Programs*, 49 UCLA L. Rev. 1739 (2002) (arguing that there is a link between the faith-based initiatives and the

to ensure socially desirable results in the world of work. Nonprofit organizations have been actively leveraging public workforce development resources to create transformative programs for social change. They are situated in competitive as well as collaborative relationships with both government and for-profits operating in the field. The field of work is particularly important when confronting these questions since it has always been at the forefront of social efforts for reform, but is currently undergoing vast transformation that is enabling nonprofits to assume new central roles in the labor market.

Providing a road map of the different and often contradictory empirical studies concerning different market intermediaries is essential to informed social policy. Law is a field that links the descriptive and the prescriptive. Legal regulation encourages and sustains different organizational arrangements of either non-profit or proprietary. Legal regulation that is more informed and context-sensitive could be designed to effectively promote the unique potential of nonprofits service providers as welfare-enhancing and socially responsible actors within the new political-economic realities. The underlying principle that must direct public values is that attaching public dollars to workforce development must involve concerns about public values.<sup>229</sup> With the right legal incentives and social architecture, new Workforce Development Institutions (WDI) have the potential to generate new forms of accountability and social responsibility, and nonprofits can fulfill their potential, serving both to increase the power and access of vulnerable groups and to develop tools to ensure adequate information, standards, fair practices, and community-building within the market.

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<sup>229</sup> See, generally, Martha Minow, *Partners, Not Rivals: Privatization and the Public Good* (2002).