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CHANGING, NOT BALANCING, THE MARKET:
"ECONOMIC" POLITICS AND "SOCIAL" PROGRAMS

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Now that a global market supposedly reigns triumphant, virtually every progressive project stands accused of violating market principles. But whether progressives attempt to complement the market or to conform to it, the demands of the market appear to sharply constrain progressive politics. "Market" challenges to progressive ideas are the latest version of the classic regressive argument that nothing important in law and policy can change.¹

The very division between "market" and "non-market" goals works strategically to undermine progressive policies, regardless of which side of this divide progressives choose to advocate. Progressives should reject the question whether or not progressive policies are consistent with a market approach. Instead, we should ask what kinds of markets, in whose

interests, deserve public support?

The persistent argument that "the market" constrains progressive goals gets its substantial power in part from a rhetorical strategy that places those constraints beyond political and analytical questioning. Even though many legal scholars and policymakers give lip service to the idea that markets and states are thoroughly entangled, many are nonetheless content to place much of the responsibility for a world of hideous inequality and violence on "market forces" that elude human agency and interest. The time is particularly ripe for re-engaging the critical legal challenge of imagining, over and over again, how some important things might indeed change for the better² - even those important things identified as "markets."

I. Challenging the Distinction between Equity and Efficiency

Progressive policies rest on the belief that government support for broad-based economic security enhances societal well-being. Against this ideal stands the "free market" credo that government *abstention* from broad-based economic protection is the key to societal well-being. But the difference between these opposing visions is not that one takes a "social" or "non-market" approach and one an "economic" or "market" approach. Instead, these opposite visions represent the difference between an egalitarian and anti-egalitarian approach to political economy. So-called "market" arguments recover and re-invigorate traditions of race, gender, sexual, and class inequality under the more legitimate-sounding name of "economic efficiency." Outside the United States, this challenge to egalitarian goals is commonly translated not as "the

market" but as "neoliberalism" or "neocolonialism," recognizing the issue is not "economics" but one particularly problematic economic ideology.

This neoliberal economic ideology claims to promote the normative principle of "efficiency" distinct from an alternative normative goal of "equitable (re)distribution."³ "Efficiency" means maximizing the economic pie, while equity means dividing the economic pie. The imagined choice between "efficiency" and "equity" values creates a double bind for progressive support for welfare state and regulatory state policies. Progressives can choose "efficiency," which risks sacrificing *equality* in order to support economic *growth*. Or, progressives can choose "redistribution," which risks sacrificing economic *growth* to support *social* goals, leaving a smaller economic pie with smaller slices available to satisfy those social needs. Either way, progressive goals lose.⁴ If the free market is by definition the system that maximizes overall well-being, then redistribution -- which by definition diverges from "free market" resource allocation -- inherently risks detracting from overall well-being.⁵

But what distinguishes "overall" well-being -- larger pies for everyone -- from partisan gain -- larger slices of the pie for *some* at others' expense? The term "efficiency" distinct from "equity" simply means the "public" interest distinct from "private" or "special" interests -- a distinction that escapes objective calculation. However diligently legal and policy experts add up "costs" and "benefits" of various policy options to arrive at an "overall" sum of net social gain distinct from private gain, that sum boils down to subjective moral judgments about what counts as a cost versus a benefit, and whose costs and benefits count for how much.

"Efficiency" is not a goal that progressive policies should "balance" or "accommodate" with the goal of equitable distribution, because so-called efficiency concerns are inevitably, inextricably about equity. By conceiving the progressive project as "weighing" efficiency against redistribution, we concede a crucial part of the argument -- that progressive goals are not about advancing the public interest. Before debating how much to balance *particular* interests in dividing the pie against the *aggregate* interest in a bigger pie, we should insist on debating the more fundamental question of whose views of whose particular interests count in defining that bigger pie -- the overall public interest.

Take the 1999 meeting of the World Trade Organization in Seattle, where a newly coalesced activist movement challenged neoliberal trade policies as a major barrier to progressive goals.⁶ Most mainstream U.S. commentary accused the protests of recklessly rejecting "the market."⁷ Many who praised the activists' social and environmental goals nonetheless faulted the protesters for failing to keep those goals in their proper place: as special supplements to the "economic" goals that normally bring overall gain (maximizing the pie).⁸ In this view, progressives can best help market losers (such as American steelworkers, indigenous peoples, or endangered species) by concentrating on building a better safety net, not by disrupting efficiency-oriented "free trade" policies.⁹ Why challenge the market just because some are left out? The conventional neoliberal wisdom scolds progressives by explaining that if we derail those engines of economic growth, we will end up with more poverty, more environmental destruction, more market losers, and weaker social safety nets.¹⁰ Rather than trying to rewrite the rules of international free trade in the interests of American labor or exotic

sea creatures, progressives should advocate for government resources to retrain or relocate those Teamsters and turtles to better enable them to live with (or perhaps die less painfully from) the new rules of the efficient global market.¹¹

But the difficulty of defending, much less expanding, targeted "safety nets" in an economy driven by neoliberal "market" policies was precisely what motivated much of the protests. The same "market" arguments insist that in a competitive global economy, governments cannot afford such to sacrifice "growth" for "equitable redistribution." In the prevailing neoliberal framework, then, a redistributive "safety net" is both the only cure for the neoliberal market's devastating casualties, and the critical disease the neoliberal market must constantly fight off. This double bind legitimates sharp government constraints both upon protections for "market losers" and upon those "market losers" themselves.

If Teamsters and turtles are "special" interests deserving of compassionate "redistribution" for failing to measure up in a competition that brings public gain, then they are likely to continue to get short shrift. In contrast, if the gains to owners and leaders of Enron, Boeing and Halliburton are identified with successful competition in a publicly beneficial global market, then their gains will be likely to continue to justify the sacrifices they impose on the "losing" others. Protesters in Seattle attempted to break through the conventional wisdom's double bind by reversing the charges, identifying the so-called "market" approach with elite special interests dependent on lavish government spending and regulatory protection with devastating costs to public well-being.¹²

II. Defending "Social" Programs Against "Economic" Reforms

Income support programs typically get more attention than international trade agreements in discussions of social equity in post-New Deal America. But by the late 20th century, "market" accusations helped justify and mobilize major restrictions in two of the most prominent U.S. income security programs. First, the 1996 federal "welfare reform" law eliminated Aid to Families with Dependent Children (AFDC),¹³ and second, in the 1990s many states enacted systemic legislation aimed at reducing the amount and availability of workers' compensation benefits.¹⁴ These two programs represent opposite sides of the conventional division between redistribution and efficiency. AFDC is the classic redistributive program, while workers' compensation is the classic model of an efficiency-based safety net scheme. But both examples show how the division itself serves to undermine progressive goals for increased economic equity.

A. "Economic" Arguments Against AFDC

In the 1990s, AFDC became a powerful symbol of the failure of progressive anti-poverty ideas. What transformed this program providing income support for impoverished single parent families into a substantial threat to the public interest? Many scholars and activists have described how political support for AFDC eroded as the program moved away from its original limited focus on white widows and their marital children to provide increased benefits for

women of color and for divorced or never-married white mothers.¹⁵ This evidence supports the theory that AFDC lost its public virtue because of prevailing ideologies equating the virtuous public with white privilege and with patriarchal heterosexual marriage.

But much of the debate over AFDC has not focused squarely on weighing the public -- and private -- interests in maintaining (or undoing) hierarchies of race, gender, class and sexual status. Instead, AFDC's threat to the public is often characterized in so-called "market" terms as a problem of harmful *economic* incentives. The prevailing wisdom explains AFDC as "redistribution" that transfers benefits to targeted individuals at the expense of others. Because such redistribution (by definition) departs from the free market's cost-internalizing exchanges, it risks producing incentives that decrease overall efficiency. Critics often explain the negative spillover effects of redistributive programs as the problem of "moral hazard."

Moral hazard is a concept derived from the insurance industry to describe the problem that protection against risk of loss encourages those protected to take less care to reduce those losses.¹⁶ Critics of AFDC often argued that by giving needy families income support, AFDC made more families needy.¹⁷ In the conventional economic analysis, AFDC's income protection for single mothers reduced their incentives to avoid the costs of single motherhood by returning to the wage labor market after childbirth, by avoiding pregnancy and child-rearing, or by marrying wage-earning men. According to the moral hazard theory, AFDC created a "cycle of dependency" that, in the long run, hurt both the public in general as well as the needy families targeted for benefits. This analysis concludes that, despite intentions to benefit society overall,

AFDC ends up promoting the opposite -- social pathology. This idea of "moral hazard" helped rationalize the 1996 welfare reform law replacing AFDC with a new family income support program,¹⁸ Temporary Assistance to Needy Families (TANF).¹⁹ TANF restricts benefits to encourage single mothers to pursue wage labor and marriage and to discourage nonmarital pregnancy.

But it is political rhetoric, not "economic" method, that leads this "market" approach to uncover welfare's supposedly inefficient incentive effects. The "moral hazard" argument takes incentive effects previously recognized and even intended as publicly beneficial and recharacterizes these effects as harmful, uninformed economics.

First, the incentive effects described as the economic problem of "moral hazard" boil down to political questions of relative bargaining power. By providing a partial substitute for wage work (or for wage-earning spouses), welfare programs like AFDC can increase impoverished mothers' bargaining power -- that is, their relative elasticity of demand for wages (or for wage-earning spouses). Welfare gives impoverished single mothers a substitute for wage earning (or for marriage to a wage earner) that therefore makes them less captive "customers" in the labor (or marriage) market, able to reduce wage labor (or marriage) as their costs rise and to hold out for higher quality jobs (or spouses). In short, by providing protection against poverty costs, AFDC decreases incentives for women with children to reduce the costs of their poverty by marrying or by earning wages. Of course, these incentive effects exist only to the extent that impoverished single mothers have control over jobs (or spouses), and only to the extent that

AFDC's income support substitutes for wage income (or wage-earning spouses). Nonetheless, to some extent and in some contexts, welfare benefits potentially give recipients more bargaining power with which to refuse work or family arrangements that they believe will interfere with their well-being.

The purportedly economic term "moral hazard" begs the question why any particular change in bargaining power is a net societal loss rather than a net societal gain -- a "moral opportunity," to use the alternative term coined by political scientist Deborah Stone.²⁰ The question of whether increased bargaining power is good or bad for the overall public interest turns on prevailing judgments about whether the bargainers are perceived as deserving members of the public. Early supporters of AFDC explained that society would benefit from enhancing the bargaining power of widowed white mothers, giving them the power to hold out for better work and family options.²¹ In contrast, for many decades after its origin, AFDC's design and implementation discriminated against African American mothers in order to induce them to remain in low-waged jobs. For example, as welfare scholars Jill Quadagno and Dorothy Roberts have discussed, a Georgia Congressman opposed proposals to expand family income support in the early 1970s by warning, "There's not going to be anybody left to roll these wheelbarrows and press these shirts."²² As AFDC became less racially discriminatory, and more publicly identified with never-married or divorced women and with women of color, the increased bargaining power of welfare recipients became more suspect in the predominant political view.

Second, arguments about welfare's "moral hazard" also obscure the fact that any

incentive effects -- changes in bargaining power -- are reciprocal, so that they change the behavior not just of welfare recipients but also of employers and others.²³ Other things being equal, the presence of AFDC benefits will induce employers to offer higher wages or better working conditions to employ single mothers who can substitute welfare for work. As those welfare benefits become less adequate or less readily available, employers' relative bargaining power increases so that they can shift more of the costs of working to employees -- providing lower pay (down to the minimum wage) and less favorable working conditions. This protection for employers potentially spills over to increase costs to many others in society. For example, a shift in bargaining power from workers to employers might lead to reductions in workers' long-term productivity, as less control over wages, hours and working conditions means a greater toll on their physical and emotional health. Or, if workers' reduced bargaining power means less pay or less time for good family care, charities and taxpayers might bear the burden of filling the gaps. Perhaps the increased supply of low-waged workers and resulting downward wage pressure would trickle up the wage scale to increase economic insecurity for struggling middle class families.²⁴

By considering the incentive effects of AFDC on employers as well as on single mothers, we can see the double standard of prevailing economic analysis: increased bargaining power for impoverished parents (especially for unmarried mothers of color), but not for employers, counts as "moral hazard" that reduces aggregate societal resources. *Inadequate* welfare can create an arguably vicious cycle of dependency, or a "race to the bottom," whereby employers are increasingly dependent on keeping workers in poverty to maintain profitable production. If

cheap and docile labor provides an easy means of avoiding innovations that would lower both workers' and employers' costs in the long run, then government protection for cheap labor will encourage employers to lock into business strategies that will make "high-road" production even more difficult to achieve. In contrast, for example, if better welfare benefits provided an alternative to low-wage work for Black domestic workers, the men who wear the shirts the Georgia Congressman feared would not get pressed might instead do the pressing themselves, perhaps replacing some of their unproductive leisure time. Perhaps the Congressman would wear shirts needing less costly maintenance. Or perhaps his shirts would be pressed by more productive commercial laundries employing fewer but more highly paid workers.

Rather than challenging the double standard of prevailing "moral hazard" arguments, many scholars and advocates have defended welfare by focusing on how to reduce welfare's supposedly harmful incentive effects. One approach attempts to control welfare recipients' behavior, turning "redistribution" into a market-like exchange of "reciprocal obligations" through increased "personal responsibility."²⁵ In contrast, another approach attempts to exonerate welfare recipients from personal responsibility for supposedly harmful behavior by more carefully limiting welfare to those whom market incentives are unlikely to reach.²⁶

The 1996 federal law replacing AFDC with more restricted TANF benefits generally adopts a punitive version of the first "personal responsibility" approach.²⁷ The more progressive versions of this approach hope to encourage single mothers to engage in more wage work by redirecting welfare from income grants to work-based assistance, for example through increased

support for child care, health insurance, or job training.²⁸

But by continuing to construe government support for poor families as "redistribution" that departs from market responsibilities, progressive arguments for generous work assistance risk getting caught in a double bind. If such aid appears to give families more for their work than what they have "earned" in the existing labor market, then that aid likely will be similarly limited (or combined with further controls on recipients) to encourage even more "personal responsibility." If the current anti-family low-wage labor market embodies a publicly beneficial market of reciprocal exchanges, then work-based assistance (like family care assistance) risks appearing to be an unreciprocated, undeserved gain harmful to the public.

Moreover, the double standard of moral hazard excuses others who benefit from government assistance from personal responsibility for public harms. Work assistance programs (such as government-funded child care or health benefits) protect employers from the costs of low-wage labor, but typically these programs impose no "personal responsibility" on those employers (or their managers and shareholders) for ensuring reciprocal community gains for this assistance. This view counts employers' interest in avoiding labor costs as a beneficial public interest because it is identified with overall market efficiency, while counting impoverished families' interest in government assistance as undeserved (or only minimally or grudgingly deserved) redistribution that produces individual gain at the expense of most others.²⁹

A second approach to defending welfare against accusations of harmful incentives relies

on *relieving* impoverished families of personal responsibility for public harm. In this view, progressives can avoid the problem that redistribution changes individual recipients' market bargaining power by limiting redistribution to individuals who lack meaningful control over their choices. Some empirical evidence supports the argument that restricting welfare benefits does not substantially change the work, marriage, or family choices of many impoverished single mothers.³⁰ The theoretically harmful incentive effects of welfare will be minimal in practice if impoverished women lack access to work or to working husbands, or to control over their sexuality or childbearing, or if welfare benefits are too meager or too stigmatized to induce substantial changes in women's work, marriage, or childbearing behavior. In addition, some hope to dismiss arguments about the incentive effects of welfare by emphasizing that the primary beneficiaries are impoverished children, who have little control over -- and therefore little responsibility for -- their parents' bad choices.³¹

But this approach to defending welfare against accusations of harmful incentives also produces a double bind for progressive welfare advocates. If the public good is generally produced by individuals making free choices in response to market incentives, while welfare is a redistributive exception for individuals incapable of those socially beneficial choices, then once again welfare -- and welfare recipients -- are likely to be sharply constrained to avoid threatening the public interest. In the prevailing view, "innocent" single mothers with little chance of securing family-supporting jobs or husbands are likely to need not extra freedom from market demands, but extra government supervision to substitute for market (or masculine) discipline. The 1996 change from AFDC to TANF reflects and reinforces the view that impoverished

mothers and children now have a moral and political responsibility to personally bear the costs of a market that puts good dependent care out of reach of many workers, and good work out of reach of many parents. Without challenging the assumption that good family life is a privilege restricted to market winners -- and that market winning is a prime measure of good family life -- arguments about impoverished families' innocence are unlikely to inspire much support for aid from market "winners."³²

And if progressives justify welfare as support for impoverished children who cannot help being born to mothers unsuccessful in the labor or marriage markets,³³ then that argument may reinforce the idea that impoverished children deserve not more income but less parenting from their "unsuccessful" mothers -- and more supervision from government, depending on their race and gender status. Following the 1996 welfare reforms, concern for "innocent" children of impoverished parents has often led not to government help for their parents' wage work or child care, but to increased government transfer of children from parents to state custody.³⁴

Welfare recipients will rarely be proven "innocent" in a framework that presumes a double standard for responsibility for the public good. Wealthy capital owners and corporations, more than low-waged workers and their families, are likely to be automatically excused from responsibility for harm to workers' families and to society in general. In the prevailing view, managers' and shareholders' desire to extract more work with less pay from workers is not a personal choice for enrichment at the expense of others, but instead is a natural and necessary force emanating from a competitive global market. In contrast, impoverished single mothers'

desire to reduce wage work in favor of family care appears not as a natural and necessary result of inevitable human dependency,³⁵ but as a personal moral failure. The strategy of targeting economic protection to income losses beyond individual responsibility, without questioning how the current market distributes responsibility for income losses (often according to class, gender, and race status), will at best justify only meager, biased, and perpetually suspect welfare programs.

B. "Economic" Arguments Against Workers' Compensation

Workers' compensation, which provides income replacement and medical benefits for work-related disability, also became a prominent symbol of the failure of progressive policies in the late 20th century United States. In the conventional story, workers' compensation originated in a voluntary political compromise in the early 20th century, when workers gave up their right to tort suits against employers for occupational injuries and illnesses in exchange for limited no-fault compensation of medical costs and lost wages.³⁶ This prevailing story contrasts workers' compensation to "welfare."³⁷ It is supposedly not charitable redistribution from employers to workers, but an efficient market bargain that brings reciprocal gains to both, with positive spillover effects on society as a whole -- reducing consumer prices by producing incentives for safety and for minimizing administrative costs.³⁸ Workers' compensation, therefore, is the classic example of a "market" approach to progressive policies, in the conventional wisdom.

But the example of workers' compensation shows that the strategy of locating progressive

policies within "the market" does not protect those policies from "economic" criticism. If workers' compensation is designed to achieve efficiency (overall savings), rather than redistribution (transfers to workers from others), then changes in that supposedly efficient design will risk upsetting that design.

Advocates of recent workers' compensation reforms often argued that the system had been converted from its original goals into a "welfare" program requiring employers to subsidize undeserving workers at the expense of overall economic growth. As with AFDC, the idea of "moral hazard" helped portray workers' compensation benefits as harmful "redistribution."³⁹ In the prevailing view, the problem stemmed from well-intentioned efforts to expand compensation in the 1970s, following a bipartisan federal commission's findings that benefits were inadequate to satisfy the program's original goals.⁴⁰ According to this analysis, expanded benefits created new opportunities for injured workers and their doctors and lawyers to manipulate the system to reap gains at the expense of others. Instead of simply covering workers' accidental occupational losses, expanded benefits induced workers to claim *more* lost income and medical expenses: the classic moral hazard problem that protection against loss increases risk of loss. In this theory, as more generous benefits came closer to replacing wages for some workers, and as these more generous benefits could be tapped as income for doctors and lawyers assisting workers in making claims, workers had more incentives to substitute workers' compensation for wages or for non-occupational medical expenses. Moreover, in the conventional wisdom, as workers' compensation expanded to cover a wider range of workers and occupational accidents and illnesses, benefit awards became more uncertain and subjective, thereby allowing workers -- and

their doctors and lawyers -- to get away with claiming benefits for more questionable losses.⁴¹

Using this reasoning, reform advocates argued for law reforms that would control claimant-side moral hazard by reducing benefit awards, by restricting access to claimants' attorneys and doctors, and by restricting benefits for some types of injuries and illnesses.⁴² As with AFDC, the lesson of the conventional story of workers' compensation is that departing from market principles for social welfare purposes, however well-intended, leads to overall public harm. But once again, a closer look shows that the harm of "moral hazard" comes not from objective "economic" fact or "market" principle but from a particular, and particularly problematic, vision of social welfare.

Again, the incentive effects described as harmful "moral hazard" are simply a matter of changes in bargaining power that instead can be construed (from a different political or moral standpoint) as beneficial "moral opportunity." If more generous benefits and benefit claiming procedures encourage more workers to make more claims for injuries, that could simply mean that workers are getting compensated for more rightful benefits than they were previously.⁴³ In the prevailing theory, the change from the 19th century tort system to workers' compensation was economically "efficient" precisely because it decided to resolve in workers' favor the longstanding and abundant uncertainties and controversies about the causes and effects of injuries and illnesses. In place of restrictive fault-based defenses that attempted to limit employers' share of responsibility for workers' losses, the no-fault workers' compensation system of strict employer liability was rationalized as a way to shift employers' incentives (and

aggregate resources) from *contesting* injury claims to *preventing* injuries and illnesses -- even those previously construed as workers' personal responsibility. According to the conventional "market" theory, the public would benefit overall by giving workers more bargaining power to encourage employers to assume responsibility for minimizing workers' losses (regardless of fault).

What turned this incentive effect from moral opportunity to moral hazard? The historical practice in state workers' compensation systems (as in AFDC) often fell far short of the professed original goals, thereby dampening any potential incentives for increased employer responsibility for workplace safety. Narrow definitions of covered injuries excluded many of the most severe occupational harms, procedural and evidentiary barriers barred many claims, and benefit awards often fell far below meaningful wage replacement levels. As with AFDC, progressive advocacy for more equitable benefits in the 1960s and early 1970s led to changes that addressed some of these concerns and raised the possibility that workers would have more meaningful gains in bargaining power over the costs of work injuries. But as with progressive reforms to AFDC, well-funded industry-linked interests countered this shift in bargaining power with an opposing political and media movement that portrayed benefit recipients as undeserving "special interests" whose gains hurt overall well-being.

As with AFDC, reform advocates turned the incentive effects of workers' compensation from moral opportunity into moral hazard in part by dressing up problematic ideas about race, class and gender as uncontroversial "economics." Commentators and press reports often

illustrated their story of workers' compensation's descent from market bargain to welfare fraud and abuse by contrasting the image of the traditional "deserving" white male industrial claimant suffering acute, violent trauma with contemporary vignettes questioning the work ethic, honesty or fortitude of immigrant, female, nonwhite, or low-waged service workers complaining about minor or "subjective" aches and pains.⁴⁴

Once again, the focus on controlling supposed benefit abuse obscured the reciprocal nature of the incentives characterized as "moral hazard."⁴⁵ As controls on claimant-side moral hazard make compensation for occupational harm more meager or more costly for workers, these controls will protect employers and insurers from more of the costs of workers' injuries and illnesses. Other things being equal, this protection will induce employers and insurers to decrease safety, re-employment and other work improvements, thereby further shifting the costs of work accidents onto workers -- and also onto their families, communities and taxpayers.

But by identifying employers and insurers with "the market" -- an invisible force of nature producing overall well-being -- the conventional view masks their capacity for the strategic personal gain. "Moral hazard" is transformed into "moral opportunity" by rhetoric portraying employers and insurers as passive players who automatically deliver claims cost savings to others through better benefits, more jobs, and cheaper consumer prices.⁴⁶ In contrast, because the conventional view locates injured workers' interests outside of that imagined "market," it can present them as powerful agents capable of manipulating the market to benefit "special interests."

As with AFDC, efforts to defend workers' compensation by focusing on claimant "moral hazard" remain caught within a double bind. Taking the approach of *increasing* workers' personal responsibility, some hoped to enhance support for "deserving" claims by imposing stronger controls on claimant fraud and by restricting benefits for "subjective" injuries. But controls on worker-side "moral hazard" are likely to bring further erosion of workers' compensation benefits, not stronger, more accessible and equitable benefits. Workers will have less power to prove they "deserve" benefits -- or the savings from denying illegitimate benefits -- in a system that gives employers and insurers more power to reduce costs by denying benefits as illegitimate. In fact, substantial evidence supports the theory that recent anti-fraud reforms are likely to increase employer and insurer moral hazard: employers and insurers may be more likely to use questionable or fabricated complaints about worker fraud to enhance their profits, to deny legitimate claims, to lobby for statutory benefit cuts, to avoid correcting safety hazards, and to discourage workers' demands for less costly work.⁴⁷

Taking the alternative approach of *minimizing* workers' personal responsibility for controlling overall costs, some have advocated giving up on workers' compensation's original goal of promoting efficiency through incentives for loss prevention.⁴⁸ Instead, this strategy aims to redesign workers' compensation to focus solely on distributive goals. For example, some propose to take the no-fault design further to create a program of more limited compensation for injuries and illnesses regardless of work-relatedness, financed by taxpayers rather than by employers.⁴⁹ This approach aims to avoid the costly complexity and controversy of determining which claims are legitimately employers' responsibility.

But if workers' protection from the cost of work accidents counts as government redistribution, while employers' protection from the costs of work accidents (tort immunity and reduced compensation benefits) counts as the normally efficient market, then such a "welfare-based" approach reinforces the view that workers deserve only meager or temporary benefits. If workers depend on taxpayer-funded "welfare" for their protection from work accident costs, then cuts in that protection will likely seem even more in the public interest than cuts in employers' protections. Complex and costly controversies about incentive effects will remain -- as the AFDC example demonstrate -- with the problem simply transferred from controlling illegitimate "work" losses to controlling illegitimate "disability" losses. And of course, the employer and insurer interests that resist changes in incentive effects of workers compensation (enhanced workers' bargaining power) are likely to be similarly effective in organizing and funding resistance to expanded taxpayer-funded disability programs.

The losing choices -- double binds -- offered by such strategies for defending workers' compensation against economic criticism might appear to demonstrate that market forces do inevitably limit progressive goals. But the incentive effects that undermine progressive goals are natural or necessary only if we presume that elite employers' and owners' interests naturally and necessarily count more than others' interests in determining the aggregate public interest. By identifying incentive effects as changes in relative bargaining power, we can see the "unintended" consequences of progressive policies as problems driven by human agents in contingent political contexts, not by immutable laws of nature.

The current global market may well be structured to give many employers substantial bargaining power to resist attempts to cut their pie slices -- their protection from high workers' compensation costs, for example. They may be able respond to such demands by threatening to take the whole pie away -- by automating or moving to a state or nation with less workers' compensation protection. Or they may be able to augment their pie pieces by reaching for others' plates -- raising consumer prices, contesting legitimate benefit claims, or lowering workers' wages.

But whether a market allowing employers and capital owners to hang on to their larger share of the pie at the expense of others is good or bad for the public overall is a matter of political ideology, not economic fact. A double standard of moral hazard underlies the equation of the overall public interest with economic elites' power to extract a losing bargain from others - - sacrifice your workers' compensation benefits, or sacrifice your jobs. Employers who seek legislative protection from their high costs of workers' injuries by threatening to move to a state (or nation) with lower benefits are typically viewed as engaging in efficient market competition, not inefficient "moral hazard." Why is employers' ability to shift the costs of occupational harm to others identified with the normal, or ideal, market that brings aggregate gain, while workers' ability to shift those costs to employers counts a deviation from that market to enrich special interests? Because neoliberal "market" arguments use circular reasoning that starts and ends with the moral premise that employers and owners, but not most workers, can be trusted with power to divide up the pie for others.

III. Redefining the Public Interest in Economics

By stripping "economic" discussions about "incentive effects" of their pseudo-scientific veneer, progressives may be better able to challenge the underlying political vision that claims the overall public will benefit from a market structured to harm so many. "Balancing" social equity against market efficiency is a losing proposition because, by tautological definition, protection against market losses always threatens to disrupt the "efficient" market. Similarly, the attempt to re-fashion social redistribution to better accommodate "market forces" will require ever-tighter restrictions to keep equitable benefits, or their beneficiaries, in their place -- that is, a place where they have diminished power to shape the market in their interest. Helping market losers will always seem to detract from the public good if that good is primarily identified with a market structured to direct resources toward an elite few at many others' expense.

This chapter has presented a two-part alternative defense to the accusation that progressive policies produce incentives distorting efficient markets. This alternative defense rests on recasting these incentive effects from naturalized market forces to changes in the distribution of power to extract a better bargain from others -- power that is contingent on the legal rules that shape the background and foreground of a given market.

First, any charge of harmful incentive effects invites the counter-question of why the alleged effect -- the change in bargaining power -- is harmful rather than helpful to society overall. "Moral hazard" can be turned into "moral opportunity" by showing that alleged

behavior changes amount to diminished bargaining power for certain interests that should not be assumed to represent public values. In addition, even though progressives should count some alleged "moral hazard" as fraud or abuse harmful to the public, the further question remains whether any given approach to policing that fraud and abuse will produce even more harmful results from those who stand to gain from anti-fraud measures. Controls on benefit fraud in welfare or workers' compensation (through stiffer penalties or lesser benefits), even if well-intentioned, may in practice also potentially produce harmful incentive effects. Which personal gain at others' expense counts as societal harm deserving public action -- inefficient moral hazard -- and which counts as societal gain deserving public deference -- an efficient market "win"? It depends on whose losses are public versus personal responsibilities. In more practical terms, this means recognizing and responding to the underlying status assumptions about race, gender, class, disability and sexuality that shape ideas about whose losses get privileged as public concerns and whose get penalized as private failings.

Second, an analysis of moral hazard as bargaining power leads to an alternative response to the argument that market incentives defeat progressive policies by concentrating harmful effects on those vulnerable groups targeted for progressives' help. The so-called "market forces" that lash back at progressive attempts to defend or expand social welfare programs are not necessarily illusory just because they are not the product of inevitable, impersonal economics. To the contrary, the complex incentive effects of progressive policies demand even more progressive attention if we understand these consequences to be driven by human rather than natural law, in the interest of inegalitarian distribution rather than aggregate well-being.

Progressive hopes for programs like AFDC and workers' compensation get dashed not because progressive policies inevitably produce smaller pies likely to eventually produce smaller slices for their intended beneficiaries. Instead, the problem is that these programs often have not gone far enough to give their beneficiaries bargaining power sufficient to hang on to their expanded pieces of pie. By recognizing the double standard of moral hazard, we can better reject the view that progressive policy defeats arise from natural laws of economics -- market-correcting incentives that reject redistribution in favor of aggregate well-being. Instead, these countervailing effects that undermine progressive policies come from inadequate legal controls on personal gain-seeking by the particular "special" interests likely to lose from progressive policies. For example, policies that discourage or control capital flight (nationally and internationally) could decrease the employer "moral hazard" that forces the losing progressive choice between protecting jobs and protecting workers' compensation benefits. Or different insurance market structures might better decrease the insurer "moral hazard" that forces a losing progressive choice between better benefits for injured workers and affordable insurance for their employers.⁵⁰

Following that revised understanding of progressive politics' incentive effects, the progressive goal should be to fashion a "market" -- a political economy -- in which progressive policies are no longer as costly to their intended beneficiaries. That means progressive policies may be more practical -- more likely to avoid backlash consequences -- the more their scope goes beyond targeted efforts to assist the most vulnerable. The lines that hold up the so-called

safety net are interwoven with the lines that form the market as a whole. "Background" rules governing "market" matters such as international trade, international finance, tax, business regulation, and labor regulation are central to progressive strategies for improving social welfare programs.⁵¹

Protection against "market" losses always creates incentives that potentially change "the market." Instead of trying to *reduce* or *excuse* the market-changing incentives of progressive policies, a progressive vision of a democratic society can *embrace* those incentives as steps toward shaping a different -- and better -- market.

ENDNOTES

1. See Robert W. Gordon, Some Critical Theories of Law and Their Critics, in *The Politics of Law: A Progressive Critique* 641, 643 (David Kairys, ed. 1998) (explaining that "the dominant message of orthodox legal training was then and still is today that a basically unalterable value consensus, a basically unchangeable system of economic and political realities, a basically frozen system of legal understandings and institutions, fix rigid outer boundaries to thinkable social change").
2. I am borrowing from Gordon, *supra* note 1, at 658 (summarizing progressive legal theory's goal, "It ought to be of some value to demonstrate that, over and over again, the arguments for why nothing important can change are no good").
3. See Mark Blaug, *Economic Theory in Retrospect* 549-93 (5th ed., Cambridge Univ. Press 1996) (discussing the history of general welfare economics as a struggle to establish a measure of efficient outcomes separate from distributive judgments and noting the failure to find purely positive basis for this distinction); Yuval P. Yonay, *The Struggle Over the Soul of Economics* 150-153 (1998) (explaining how attempts to construct neoclassical economics as a science relied on the contested idea of an objective standard of efficiency). Non-neoclassical economists have long questioned this distinction. See A. Allan Schmid, *Law and Economics: An Institutional Perspective*, in *Law and Economics* 69 (Nicholas Mercuro ed., 1989) ("The whole point is that global welfare maximization is meaningless"); Guido Calabresi, *The Pointlessness of Pareto, Carrying Coase Further*, 100 *Yale L.J.* 1211, 1227-28 (1991) (distributional analysis is an "inevitable and hence essential part of efficiency analysis"); Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 *Stan. L. Rev.* 387, 420 (1981) (explaining that "the notion of a 'tradeoff' between the 'hard' datum of efficiency and the inherently subjective 'political' datum of equity is apologetic nonsense"); Martha T. McCluskey, *Illusion of Efficiency in Workers' Compensation "Reform,"* 50 *Rutgers L. Rev.* 657, 666-67, 716-750 (1998) (showing this distinction is grounded in political rhetoric, not fact or impartial logic).
4. See Martha T. McCluskey, *Subsidized Lives and the Ideology of Efficiency*, 8 *American Univ. J. of Gender, Social Policy & the Law* 115, 124-25 (2000) (comparing this losing choice between efficiency and redistribution choice with what many feminists have criticized as women's losing choice between equal treatment and special treatment).
5. See McCluskey, [Illusion of Efficiency] *supra* note 3 at 717-723 (explaining how the efficiency/redistribution distinction by definition makes redistribution suspect).
6. See generally, Janet Thomas, *The Battle in Seattle: The Story Behind and Beyond the WTO Demonstrations* (Golden, Co: Fulcrum Pub. 2000).
7. See, e.g., Juan M. Del Aguila, *The Politics of Free Trade in Latin America*, 50 *Emory L.J.* 759, 762-63 (2001) (criticizing "violent protests" in Seattle, Washington, D.C., Vienna, and Quebec for showing "appalling ignorance of what it takes to integrate weak economies into

global processes"); Susan Tiefenbrun, *Free Trade and Protests: The Semiotics of Seattle*, 17 *Ariz. J. Int'l & Comp. L.* 257, 282 (2000) (characterizing protestors as "ancients" resisting modernity but arguing that unemployed workers who lose out from what she presumes are inevitable overall gains deserve some compensation).

8. See, e.g., Editorial, *The Collapse in Seattle*, N.Y. Times, Dec. 6, 1999 at A30 (acknowledging the need for the WTO to strike "a more sensitive balance" between trade "liberalization" and protestors' concerns about WTO governance, labor, and the environment, but arguing that this is best achieved by letting the WTO's "march toward open trade" continue with minor reforms).

9. See, e.g., Thomas L. Friedman, *The Lexus and the Olive Tree* 358-59 (1999) (advocating that neoliberal policies be balanced with limited safety nets for "those who cannot compete" in newly integrated global markets).

10. See, e.g., Jim Chen, *Globalization and Its Losers*, 9 *Minn. J. Global Trade* 157, 216 (2000) (imagining neoliberal trade policies as part of a natural and inherently good evolutionary process so that, "In a world full of losers, the case for trade liberalization becomes all the stronger.").

11. See, e.g., Editorial, *Stopping the World*, N.Y. Times, Apr. 15, 2000, at A16 (arguing that "misguided but heartfelt" protests against the neoliberal policies of the World Bank, International Monetary Fund, and World Trade Organization represent a "growing popular unease" that would be "dangerous to ignore," but that "there is no realistic--or beneficial-- way to reverse or even slow the forces that are driving the world economy.").

12. See Marjorie Cohn, *The World Trade Organization: Elevating Property Interests Above Human Rights*, 29 *Ga. J. Int'l & Comp. L.* 427 (2001) (explaining that the Seattle protests recognized that neoliberal trade policies represent not a neutral "free market" but a system of special legal protections for the interests of multinational corporations).

13. See 42 U.S.C.A. section 601 (repealed 1996); Martha T. McCluskey, *The Politics of Economics in Welfare Reform*, in *Feminism Confronts Homo Economicus: Gender, Economics and the Law* (Martha A. Fineman & Terence Dougherty ed.) (forthcoming Cornell Univ. Press 2004) (critiquing economic arguments against AFDC).

14. See McCluskey, [Illusion of Efficiency] *supra* note 3 (surveying the various workers' compensation reforms and their rationales).

15. See Kenneth J. Neubeck & Noel A. Cazenave, *Welfare Racism: Playing the Race Card Against America's Poor* 17-35 (2001) (summarizing and analyzing the scholarly literature linking declining support for welfare to gendered racism); Mimi Abramovitz, *Regulating the Lives of Women: Social Welfare Policy from Colonial Times to the Present* 319-42 (1988) (discussing how ideologies of race, gender and sexuality influenced changes in AFDC from 1945 through the early 1980s).

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16. See Tom Baker, *Genealogy of Moral Hazard*, 75 *Tex. L. Rev.* 237 (1996) (analyzing the origin and contemporary uses of the term).
17. See, e.g., Robert Rector & William F. Lauber, *America's Failed \$5.4 Trillion War on Poverty* 3 (1995).
18. See Baker, *supra* note 16 at 237-40 (analyzing the use of "moral hazard" in arguments for welfare reform).
19. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 1996 U.S.C.C.A.N. (110 Stat.) 2015 (codified at 42 U.S.C. section 601 et seq.).
20. See Deborah A. Stone, *Beyond Moral Hazard: Insurance as Moral Opportunity*, 6 *Conn. Ins. L.J.* 11 (2000).
21. See Ricky Solinger, *Beggars and Choosers: How the Politics of Choice Shapes Adoption, Abortion and Welfare in the United States* 148 (2001) (citing historical evidence of claims by government officials that AFDC would encourage mothers to "stay at home where they were needed" and have more power to make their own choices choice about whether and when wage work was in their families' interest).
22. See Jill Quadagno, *The color of Welfare: How Racism Undermined the War on Poverty* 130 (1994) (quoting Rep. Phillip Landrum); Dorothy E. Roberts, *Welfare and the Problem of Black Citizenship*, 105 *Yale L.J.* 1563, 1584 (1996).
23. For more analysis of the multi-sided or "relational" nature of moral hazard, see Baker, *supra* note 16 at 275; McCluskey, *[Illusion of Efficiency]* *supra* note 3 at 747 (developing Baker's analysis in the context of workers' compensation reforms).
24. For a discussion of this trickling up of downward wage pressure, see Robert M. Solow, *Lecture III: Guess Who Pays for Workfare*, in *Work and Welfare* 23, 26-30 (Amy Gutman ed., 1998).
25. See Rector and Lauber, *supra* note 17 at 4 (stating, in a Heritage Foundation report influential in lobbying for the 1996 welfare reforms, that "reciprocity and work" is critical to welfare reform); Linda C. McClain, *Citizenship Begins at Home: The New Social Contract and Working Families*, in *Progressive Politics in the Global Age* 95, 97-99 (2001) (explaining and criticizing welfare reform as a new social contract based on mutual contributions in the form of wage work).
26. See Michael J. Graetz & Jerry L. Mashaw, *True Security: Rethinking American Social Insurance* 229, 312 (1999) (arguing that welfare should aim to benefit those perceived as "innocent" of responsibility for their choices).

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27. See, e.g., 42 U.S.C. section 607(c)(2)(B) (2004) (requiring single parents of children under six years old to participate in at least twenty hours of work activities outside the home); 42 U.S.C. section 608(a)(7) (2004) (limiting welfare benefits to a cumulative lifetime total of five years to encourage a transition to wage work or marriage to an earner of a family-sustaining wage).
28. See, e.g., Samuel Bowles & Herbert Gintis, *Is Equality Passe? Homo Reciprocans and the Future of Egalitarian Politics*, *Boston Rev.*, Dec./Jan. 1998-99, at 4.
29. For an example of legal scholarship using "economics" deploying this double standard of personal responsibility to rationalize work-oriented welfare reforms, see Amy L. Wax, *Rethinking Welfare Rights: Reciprocity Norms, Reactive Attitudes, and the Political Economy of Welfare Reform*, 63 *L. & Contemp. Problems* 257 (2000).
30. For discussion of this empirical evidence, see Lucy A. Williams, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*, 102 *Yale L.J.* 719, 739-40 (1992); Linda C. McClain, *"Irresponsible" Reproduction*, 47 *Hastings L.J.* 339, 382 (1996).
31. See, e.g., Graetz & Mashaw, *supra* note 26, at 229, 312 (concluding that family income support programs draw political support from the fact that "[m]ost people view children as economically vulnerable through no fault of their own").
32. See Solinger, *supra* note 21 at 199 (analyzing welfare reforms as a part of an ideological movement to make motherhood a class privilege).
33. Graetz and Mashaw, *supra* note 26, at 124 (advocating for reconceiving welfare benefits as protection against "the risk of being born into the wrong family").
34. See Dorothy Roberts, *Shattered Bonds: The Color of Child Welfare* 173-200 (2002) (describing how welfare reform is part of a systematic process of undermining the Black family by encouraging removal of children from Black mothers).
35. See Martha Albertson Fineman, *The Autonomy Myth: A Theory of Dependency* 38 (The New Press 2004) (arguing that biological dependency should be reconceived as inherent in the human condition so that it is understood as public responsibility).
36. See McCluskey, *[Illusion of Efficiency]* *supra* note 3 at 670 (discussing prevailing theory of the original workers' compensation "bargain").
37. See, e.g., Rep. of the Nat'l Comm'n on State Workmen's Compensation Laws 36 (1972) ("Workmen's compensation must be an insurance program, not a welfare program.").
38. See, e.g., Orin Kramer & Richard Briffault, *Workers' Compensation: Strengthening the Social Compact* 3 (1991) ("society as a whole" benefits from workers' compensation).

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39. See McCluskey, *supra* note 3, at 744 (discussing arguments about claimant "moral hazard" by advocates of workers' compensation reform).
40. See generally Rep. of the Nat'l Comm'n on State Workmen's Compensation Laws, *supra* note 37 (reporting findings of committee appointed by President Nixon pursuant to federal legislation governing occupational health and safety).
41. See McCluskey, [Illusion of Efficiency], *supra* note 3, at 743-44, 767-787 (discussing and criticizing arguments of increased uncertainty due to expanded benefits).
42. See McCluskey, [Illusion of Efficiency], *supra* note 3, at 787-912 (analyzing and criticizing specific reform measures).
43. See McCluskey, [Illusion of Efficiency] *supra* note 3, at 746-47.
44. See McCluskey, [Illusion of Efficiency] *supra* note 3, at 885-86 (giving examples); Tom Brokaw & John Larson, False Claim for Workers' Compensation Discovered by Hidden Camera (NBC Nightly News, May 30, 2000) (emphasizing workers' immigrant status and lack of morals in example of benefit fraud).
45. See McCluskey, [Illusion of Efficiency] *supra* note 3, at 747-49.
46. See Martha T. McCluskey, Deconstructing the State/Market Divide: The Rhetoric of Regulation from Workers' Compensation to the WTO, in *Feminism Confronts Homo Economicus: Gender, Economics and the Law*, Martha Fineman and Terence Dougherty eds., (forthcoming Cornell Univ. Press 2004) (discussing how rhetorical location "inside" versus "outside" of an imagined market gives or masks moral and economic agency).
47. See, e.g., Ted Rohrlich & Evelyn Larrubia, Anti-Fraud Drive Proves Costly for Employee Benefits, *L.A. Times*, Aug. 7, 2000, at A1 (discussing employers' and insurers' strategic use of false or misleading complaints of benefit fraud to promote reform legislation); Allegations of Workers' Compensation Fraud, 1999 Wis. Dep't of Workforce Dev. (2000) (finding widespread abuse of fraud allegations); McCluskey, [Illusion of Efficiency] *supra* note 3, at 875, 887-893 (discussing how anti-fraud laws operate to shift costs from employers to workers in general).
48. See, e.g., Graetz and Mashaw, *supra* note 26, at 211-12.
49. See, e.g., Graetz and Mashaw, *supra* note 26, at 287.
50. See Martha T. McCluskey, Book Review of Terry Thomason et al, *Workers' Compensation: Benefits, Costs and Safety under Alternative Insurance Arrangements*, 27 *J. of Health Politics, Policy and Law* 683-89 (2002) (discussing the possibility that insurance market reforms may decrease employers' costs without sacrificing workers' benefits); Martha T. McCluskey, *Insurer Moral Hazard in the Workers' Compensation Crisis: Reforming Cost Inflation, Not Rate*

Suppression, 5 Employee Rights and Employment Policy J. 55, 114-132 (2001) (discussing alternatives to traditional commercial workers' compensation insurance).

51. See Lucy A. Williams, Property, Wealth and Inequality Through the Lens of Globalization: Lessons from the United States and Mexico, 34 Ind. L. Rev. 1243, 1260 (2001) (advocating more analysis of the interrelationships between global economic policy and neoliberal welfare reforms in the U.S.).