TOWARD NEW STRATEGIES FOR LOW-WAGE WORKERS*

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Traditionally, employment law and poverty law have been treated as separate fields serving distinct clienteles and practiced by different specialists. The core of modern employment law has been labor law, that is, the law concerning union organization, collective bargaining, arbitration, and related concerns of management, unions, and employees in industries and occupations that are unionized or are potential targets for unionization. Thus, the primary clientele of employment law consists of business organizations, particularly larger ones, and employees who are relatively better off as compared to their nonunion counterparts. Labor law in this sense is generally practiced by union, management, and government counsel who concentrate full time on their specialty. In recent decades, with a shrinking unionized sector and expanding statutory and common law remedies for employees, particularly in the fields of race, gender, age, sexual preference, and disability discrimination, the part of employment law concerning the individual rights of employees, whether unionized or nonunion, has burgeoned.[1] Indeed, the trend is so advanced that employment law is now deemed a separate specialty from labor law.[2] However, in practice,

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[1] *See generally* Alan Hyde, *Beyond Collective Bargaining: The Politicization of Labor Relations Under Government Contract*, 1982 WIS. L. REV. 1, 36-41; Karl Klare, *Workplace Democracy & Market Reconstruction: An Agenda for Legal Reform*, 38 CATH. U. L. REV. 1, 38-40 (1988) [hereinafter *Market Reconstruction*].

[2] Most law schools now offer Employment Law and Labor Law as separate courses, with Employment Discrimination usually offered as yet a third specialty course. A new generation of case books has appeared to cater to the market of employment law courses. *See generally* SAMUEL ESTREICHER & MICHAEL C. HARPER, CASES & MATERIALS ON THE LAW GOVERNING THE EMPLOYMENT RELATIONSHIP (2d ed. 1992); MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW: CASES & MATERIALS (1987); CHARLES A. SULLIVAN ET AL., CASES & MATERIALS ON EMPLOYMENT LAW (1993); STEVEN L.

employment law generally concerns the better-paid or better-positioned employee. In order to secure legal representation, would-be employee plaintiffs ordinarily must either have institutional support (e.g., union backing) or financial reserves (e.g., some middle-level managers and highly paid professionals), or they must earn sufficiently high salaries as to present the potential for a significant monetary recovery and, thus, a substantial contingent fee.[3]

By contrast, poverty law focuses on the problems of poor people,[4] low-income earners[5] and people whose primary income-source is government enti-

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WILLBORN ET AL., EMPLOYMENT LAW: CASES & MATERIALS (1993); MATTHEW W. FINKIN ET AL., LEGAL PROTECTION FOR THE INDIVIDUAL EMPLOYEE (1989). In my view, Canadian academics take a better approach. In Canada, the law of employment is taught as an integrated subject, combining both individual rights and collective bargaining. *See* LABOUR LAW CASEBOOK GROUP, LABOUR LAW: CASES, MATERIALS & COMMENTARY (4th ed. 1986); *compare* ROBERT J. RABIN ET AL., LABOR & EMPLOYMENT LAW: PROBLEMS, CASES AND MATERIALS IN THE LAW OF WORK (1988) (taking similar approach). *See generally* Brian Langille, *Labour Law is a Subset of Employment Law*, 31 U. TORONTO L.J. 200 (1981)(discussing the rationale for the Canadian approach).

[3] *See generally* PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR & EMPLOYMENT LAW 82 (1990) [hereinafter GOVERNING THE WORKPLACE] (citing studies showing that, in both the United States and Canada, successful claimants under common law protections against unjust dismissal "are drawn disproportionately from the ranks of upper-level employees—managers and professionals—with very little representation of factory or clerical workers").

[4] As used herein, "poor people" means people who have very little money and assets; "poverty" refers to the situation of having very little money and assets. *Cf.* CHARLES KEIL, URBAN BLUES 1 (1966) (discussing similar problems of terminology in professional literature and defining "urban lower-class people" as "those who live in big cities and have very little money"). The Legal Services Corporation "Poverty Guidelines" are set at 125% of the poverty income level by family size as determined by the Department of Health and Human Services. *See* 45 C.F.R. Part 1611, App. A (1993). In 1993, that figure was $17,938 for a family of four living in the continental United States. *Id.* As is well known, poverty in the sense of lack of money and assets highly correlates with other forms of disadvantage, such as limited educational opportunity, poor health care, political marginalization, unemployment and underemployment, being a victim of racism, etc.

[5] As used here, "low-income earners" and "low-wage earners" mean individuals whose primary income-source is paid employment and whose employment earnings place them in the bottom third of the income distribution. This definition is somewhat more inclusive than others appearing in the literature. For example, U.S. Government statistics define "workers with low earnings" as individuals whose "annual earnings are less than the poverty level for a four-person family." BUREAU OF THE CENSUS, U.S. DEP'T. OF COMMERCE, WORKERS WITH LOW EARNINGS: 1964 TO 1990, CURRENT POPULATION REPORTS, CONSUMER INCOME, Series P-60, No. 178 [hereinafter COMMERCE DEPARTMENT STUDY] (Mar. 1992), at 1. In 1990, that amount was $12,195, *id.*, and 18.0% of year-round, full-time workers fell below this threshold, *see id.* at 2 and 3 (Table B). The report also utilizes the concept of "year-round, full-time attachment workers," meaning "persons who spent at least 50 weeks during the year at work or

tlement programs. Most of civil poverty law practice deals with non-workplace problems such as housing, consumer, family, immigration, and benefits issues. The poverty bar consists primarily of Legal Services lawyers, public interest centers, and some neighborhood practitioners. The earnings of unionized employees typically place them above the maximum income levels that determine eligibility to receive assistance from Legal Services programs,[6] although, during the long recessions of the 1980s and 1990s, an increasing number of unionized employees cycled through the welfare system due to layoffs and job loss. The Legal Services enabling statute[7] places direct and indirect restrictions on involvement by Legal Services attorneys and staff in labor and organizing activities.[8] Although some Legal Services lawyers practice in the individual rights area of employment law, the poverty bar and the labor and employment bar are largely separate groups with distinct career lines, and there is little cross-over between the two fields.

The cleavage between the employment and poverty bars reflects the social distance between their respective clienteles. Organized labor was itself once a "poor people's movement."[9] But due to labor's huge success in the period from the 1930s to 1960s, unions lifted millions of employees and their families out of poverty and into a higher standard of living with improved working condi-

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looking for work and who either worked 35 hours a week or more or who worked fewer hours for nonvoluntary reasons." *Id.* at 2. In 1990, 25.7% of persons thus defined had low earnings. *Id.* at 3 (Table B).

[6] 45 C.F.R. § 1611.3 (1993) requires grantee Legal Services programs to establish a maximum income level for client eligibility that does not exceed 125% of the current official Federal Poverty Income Guidelines.

[7] The Legal Services Corporation Act, 42 U.S.C. §§ 2996 - 2996[l] (Supp. 1994) [hereinafter LSCA].

[8] The LSCA and regulations promulgated thereunder directly prohibit Legal Service programs and personnel from engaging or participating in strikes, picketing, and boycotts, except as permitted by law in connection with Legal Services employees' own employment situation, *see* 42 U.S.C. § 2996f(b)(6) (Supp. 1994) and 45 C.F.R. § 1612.6 (1993); from supporting or conducting training programs that encourage or facilitate labor activities, *see* 42 U.S.C. § 2996f(b)(6) (Supp. 1994) and 45 C.F.R. § 1612.9(a)(2) (1993); and from organizing or initiating the formation of a labor union, coalition, network, or alliance, *see* 42 U.S.C. § 2996f(b)(7) (Supp. 1994) and 45 C.F.R. § 1612.10(a) (1993), except that Legal Services attorneys may provide legal assistance to eligible clients who desire to plan, establish, or operate organizations, *see* 42 U.S.C. § 2996f(b)(7) (Supp. 1994) and 45 C.F.R. § 1612.10(b) (1993). Legal Services programs are also permitted to use segregated funds received from private entities to conduct certain limited forms of the above activities. *See, e.g.*, 45 C.F.R. § 1612.13(f) (1993) (allowing use of private funds to encourage poor people to consider organizing in order to foster joint solutions to common problems, but neither public nor private funds may be used to initiate or organize groups, coalitions, alliances, or labor unions).

[9] *See generally* FRANCES FOX PIVEN & RICHARD A. CLOWARD, POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL 96-180 (1977) (classic study treats rise of labor unions among industrial workers as a poor people's movement).

tions and job security. As a result, the unionized sector of employment developed along its own path and over the years grew distant from the socio-economic worlds of low-wage earners and welfare recipients.

There are significant exceptions to the above generalizations. For example, the National Employment Law Project (NELP) has championed the employment-related interests of low-wage earners and the poor, energetically working to forge links between the poverty and labor bars, and between poor people's advocates and labor unions. Parallel efforts are underway in various local Legal Services offices. Similarly, some labor unions have retained a social-unionist fervor and continue to concentrate their organizing activities and resources on low-wage and poor workers.[10] Still, an unfortunate breach has developed between the various social groups represented by poor people's advocates, on the one hand, and organized labor, on the other.

A diverse group of experienced labor lawyers, Legal Services attorneys, policy analysts, and academics recently convened to address this dilemma and seek ways to bring these constituencies together. The group launched a Task Force on Legal Strategies for Low-Wage Workers [herein "the Task Force"].[11] The Task Force aspires to become a national clearinghouse for

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[10] Outstanding recent examples include the Service Employees International Union (SEIU), particularly its "Justice for Janitors" campaign described below, *see infra* text at Section IV and notes 76-82, and various regional and local bodies of the Amalgamated Clothing and Textile Workers Union (ACTWU), American Federation of State, County & Municipal Employees (AFSCME), Hotel & Restaurant Employees Union (HERE), International Ladies Garment Workers Union (ILGWU), United Farm Workers (UFW), United Food & Commercial Workers (UFCW), and United Mine Workers (UMW), particularly organizing drives these unions have led among food service, hospital, farm, fishery, and garment employees.

[11] The initial Task Force participants, with institutional affiliations listed for identification purposes only, were: Frances Ansley, University of Tennessee College of Law; Gary Bellow, Harvard Law School; Fred Block, Department of Sociology, University of California at Davis; Françoise Carré, Center for Labor Research, University of Massachusetts, Boston; Bryan Decker, Angoff, Goldman, Manning, Pyle, Wanger & Hiatt, P.C., Boston, MA; Maurice Emsellem, National Employment Law Project; Larry Engelstein, Legal Department, Service Employees International Union; Laura Gallant, Neighborhood Legal Services, Lynn, MA; Mark Greenberg, Center for Law and Social Policy; Monica Halas, Greater Boston Legal Services; Alan Hyde, Yale Law School; Duncan Kennedy, Harvard Law School; Karl Klare, Northeastern University Law School (convener); Linda Krieger, Stanford Law School; Homer La Rue, District of Columbia School of Law; Howard Lesnick, University of Pennsylvania Law School; Rick McHugh, Legal Department, United Auto Workers; Carlin Meyer, New York Law School; Molly McUsic, University of North Carolina School of Law; Mary O'Connell, Northeastern University Law School; Peter Pitegoff, School of Law, State University of New York at Buffalo; James Rowan, Northeastern University Law School; Katherine Shea, Legal Department, Service Employees International Union, Local 509, Cambridge, MA; Ira Sills, Segal, Roitman & Coleman, Boston, MA; Bill Simon, Stanford Law School; Lucie White, Harvard Law School; and, Lucy Williams, Northeastern University Law School.

ideas and information and to undertake local demonstration projects in Boston (where many of the participants are based). The goals of the initiative are: (1) to develop new strategies for advancing the legal and social interests of low-wage workers; (2) to promote dialogue between, and common efforts, by advocacy groups that now speak for particular subgroups among low-wage workers and poor people; and (3) to develop a collaborative style of legal services delivery based on innovative linkages between community-based organizations, labor unions, the progressive bar, and law schools that will emphasize strategic analysis and planning and explore new methods to draw on the intellectual and pedagogic resources of law schools for social justice advocacy. The Task Force will explore a range of activities to accomplish these goals including: creating "policy forums" to encourage dialogue on questions of policy and strategic interest between low-wage workers, poor people, their advocates, and supportive academics; providing academic and research support for policy advocacy by low-wage workers' advocates; encouraging basic research with an orientation to inform theory by the experience of practice; establishing referral, continuing legal education, and constituency education programs; and developing new law school offerings, both traditional and clinical, focused on the concerns of low-wage workers.

The purpose of this article is to recount the thinking behind the formation of the Task Force and to state the case for common cause between unionized workers, nonunion low-income earners, welfare recipients, and other groups represented by labor lawyers, Legal Services attorneys, welfare rights advocacy groups, community economic development projects, civil rights organizations, and the public interest bar. Part I of this article provides a more detailed definition of the target groups whose interests are of concern to the Task Force and discusses why those groups comprise a distinct constituency with common interests. Part II sketches the contours of U.S. social policy, attempting to show how our institutions and public policy combine to neglect the needs of low-wage workers and to perpetuate poverty and income inequality. Part III explores how the common interests of low-wage workers and poor people have sometimes been overshadowed by tensions and conflicts among different groups of low-wage workers, rendering more difficult the task of forging alliances. The thesis of this Part, and of the article as a whole, is that all low-wage workers and poor people would be better off if strategies could be developed to compose such internecine conflicts and to facilitate joint action, particularly joint action between organized labor and community-based poor people's groups. The article concludes in Part IV with a discussion of a promising recent effort that exemplifies the type of strategic innovation the Task Force wishes to study and promote. A future article will hopefully report on the activities of the Task Force itself and the results of the collaboration.

I. DEFINING A CONSTITUENCY

A. *Introduction*

This project seeks to identify and conceptualize common problems and interests of people on the lower rungs of the socio-economic ladder by focusing on their experiences at work and in low-wage labor markets. Specifically, the Task Force seeks to understand the shared needs and problems of low-wage earners,[12] welfare recipients,[13] immigrant workers, the elderly (particularly those who live on limited retirement incomes and/or those who work full or part-time in low-wage jobs), and disabled people. We use the inclusive rubric "low-wage workers" to refer to the amalgam of these distinct but partially overlapping groups.[14]

Immigrant workers are included along with low-wage earners because they are disproportionately represented in low-paying jobs.[15] Older and retired people increasingly seek to supplement their income by working in low-paying service sector jobs and thus share common interests with other low-wage earners. Additionally, most public and private retirement-income schemes, including pension plans and "social security,"[16] determine eligibility for benefits and/or the extent of benefits on the basis of the recipient's prior work history in paid labor markets. Groups which encounter barriers, such as race and gender discrimination, to regular, secure, and highly compensated employment prior to retirement are likely to be disadvantaged with respect to retirement benefits. In other words, retirement-income problems frequently derive from problems of labor-market marginalization and/or discrimination. Disabled people who seek work are often discriminated against or not accommodated in paid employment and are frequently shunted off to low-paying jobs.

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[12] *See supra* note 5.

[13] "Welfare recipients" refers to individuals and families whose income derives primarily from participation in the Aid to Families with Dependent Children (AFDC) program, *see* Social Security Act Subchapter IV-A, 42 U.S.C. §§ 601-17 (1991); or certain 100% state-funded programs of last-resort cash assistance, commonly known as "general relief" or "general assistance," *see, e.g.*, the Massachusetts program for Emergency Aid to the Elderly, Disabled, and Children (EAEDC), established by Mass. St. 1991, c. 255 (partially codified in M.G.L.A. c. 117A, §§ 1 - 10 (1993)).

[14] As a practical step toward facilitating alliances between the different groups of poor people and low-wage earners, the Task Force seeks to bring together lawyers who represent these groups, particularly poverty, civil rights, immigration, community economic development, and labor lawyers.

[15] *See* U.S. DEP'T. OF LABOR & U.S. DEP'T. OF COMMERCE, COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, FACT FINDING REPORT [hereinafter DUNLOP COMMISSION REPORT] (May 1994), at 14 ("[i]mmigrants are disproportionately employed in low-wage import-competing industries").

[16] The popular phrase "social security" refers to the portion of the Social Security Act establishing the old-age and survivors insurance benefits program, *see* 42 U.S.C. §§ 401-22 (1991) (establishing program).

B. *Welfare & Work*

If there is a novelty in the project's conception of its constituency, it is in the insistence on including welfare recipients under the umbrella of "low-wage workers." One of the most prevalent assumptions in contemporary political debate is that workers and welfare recipients are separate groups, having fundamentally opposed interests. The popular conception, widely disseminated by the media, is that welfare recipients pursue lazy and promiscuous lives ripping off the system, in contrast to honest working people who contribute to society and therefore deserve to be subsidized by government.[17] Almost all American politicians, across the political spectrum from conservative to liberal, advocate "welfare reform," meaning plans to reduce, eliminate, or attach onerous conditions to entitlements for the purpose of forcing welfare recipients into the labor market.[18] Underlying this apparent political consensus is a body of academic and journalistic work that purports to establish that welfare actually *causes* poverty by inducing recipients to become psychologically and behaviorally dependent on government assistance and therefore unwilling and/or unable to enter paid labor markets ("welfare dependency thesis").[19] Both Democrats and Republicans advocate forcing recipients off welfare, making them go to work at paid jobs or unpaid make-work positions.

The welfare dependency thesis and the accompanying, demeaning images of welfare recipients have no reliable empirical foundation[20] and are deeply

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[17] For example, the federal tax treatment of home ownership represents a major subsidy to the middle class. In FY 1993, the estimated tax expenditure represented by the combination of the deductibility (for federal income tax purposes) of mortgage interest on owner-occupied homes and the deductibility of state and local property taxes on owner-occupied homes was about $61.8 billion. *See Tax Expenditures Chapter from the President's Fiscal 1995 Budget*, 62 TAX NOTES 1055, 1057 (1994) (Table 6-1) (U.S. Government Budget data as released by the White House). (Residential rents are not ordinarily deductible for federal tax purposes.) Needless to say, taxpayers who avail themselves of the home ownership deductions are under no legal or social pressure to perform labor. By contrast to the home ownership tax subsidy, AFDC was a $25.2 billion program in FY 1993, counting both the federal and state shares. *See* HOUSE COMM. ON WAYS AND MEANS, OVERVIEW OF ENTITLEMENT PROGRAMS: BACKGROUND MATERIAL AND DATA ON PROGRAMS WITHIN THE JURISDICTION OF THE COMM. ON WAYS AND MEANS, 102d Cong., 2d Sess. 654 (1992) (Table 19). *See also* Jared Bernstein, *Rethinking Welfare Reform*, DISSENT, Summer 1993, at 277 (tax expenditures from deductions for interest on home mortgages were 3.1 percent of federal spending in 1992, while spending on AFDC was less than 1 percent of federal spending).

[18] *See* Jason DeParle, *The Welfare System: Way Out Front on a Hot-Button Issue*, N.Y. TIMES, Oct. 20, 1994, at A25 (reporting that virtually every major 1994 candidate claims to be a stern-minded welfare reformer and that the campaign pledge "to crack down on welfare and make people go to work" is a mantra intoned by most politicians).

[19] *See, e.g.*, MICKEY KAUS, THE END OF EQUALITY (1992); CHARLES MURRAY, LOSING GROUND: AMERICAN SOCIAL POLICY, 1950-1980 (1984).

[20] *See* Lucie E. White, *No Exit: Rethinking "Welfare Dependency" from a Differ-*

imbued with racist[21] and sexist[22] connotations. A very large percentage of welfare recipients work for pay.[23] This work almost always occurs in low-wage labor markets or the informal economy. In one recent study, about thirty-nine percent of single mothers receiving AFDC benefits also earned labor market income during the twenty-four month study period (1986-1987).[24] Another excellently designed study based on extensive in-depth interviews with fifty Chicago-area welfare recipients produced a higher estimate: just over half of the respondents said they earned income in low-wage jobs.[25]

As Kathryn Edin argues in the cited study, welfare does not induce dependency because benefit levels are much too low to permit recipients to rely on welfare to provide for themselves and their families.[26] As a matter of survival, almost all recipients must find ways to supplement their welfare benefits. Her study revealed that *every* participant interviewed supplemented their welfare grant with some form of concealed income.[27]

The evidence indicates that the vast majority of welfare recipients would

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ent Ground, 81 GEO. L.J. 1961, 1964 n. 15 (1993) (citing numerous empirical studies that rebut the welfare dependency thesis).

[21] *See generally* Lucy A. Williams, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*, 102 YALE L.J. 719, 741-46 (1992) (exploding stereotypes and myths by marshalling empirical data and arguing that current public debate regarding welfare plays to racial fears and prejudices). *See also* Lucie E. White, *supra* note 20, at 1965-67 (arguing that the welfare dependency thesis "channels anxiety about economic and social change toward a racialized target" and citing sources); and Rosemary L. Bray, *So How Did I Get Here?* N.Y. TIMES, Nov. 8, 1992, § 6, at 35 (welfare reform prescriptions "not only reflect an insistent, if sometimes unconscious, racism but rest on a bedrock of patriarchy").

[22] *See generally* Williams, *supra* note 21; and Randy Albelda, *The Misogyny Behind 'Welfare Reform,'* BOSTON GLOBE, Dec. 29, 1993, Fin. Edn., at 15 (arguing that contemporary public discussion of welfare is pervaded by sexist attitudes and policies).

[23] It is difficult to gauge the extent of welfare recipients' participation in paid labor. One problem is that studies often rely on "point-in-time" data (recording whether the recipient is earning income at or near to the time of the study). This method of data collection systematically understates recipients' paid employment, which is often seasonal or cyclical in nature. Another problem is that recipients have a strong incentive to underreport their earned income. Recipients are obliged to notify the welfare agency of earned income, which (after an initial period) will result in a nearly dollar-for-dollar reduction in the grant (and typically without allowing full recoupment of work related expenses). Detection of nonreported income earned by recipients is imperfect.

[24] INSTITUTE FOR WOMEN'S POLICY RESEARCH, COMBINING WORK AND WELFARE: AN ALTERNATIVE ANTI-POVERTY STRATEGY 9 (1992).

[25] Kathryn Edin, *Surviving the Welfare System: How AFDC Recipients Make Ends Meet in Chicago*, 38 SOC. PROBLEMS 462, 467 (1991). *See generally* Kathryn Edin & Christopher Jencks, *Reforming Welfare*, *in* CHRISTOPHER JENCKS, RETHINKING SOCIAL POLICY: RACE, POVERTY, AND THE UNDERCLASS 204-35 (1992).

[26] *See* Edin, *supra* note 25, at 472.

[27] *Id.* at 462.

prefer to hold paid jobs, to acquire both the income and the pride and dignity our culture associates with paid labor, and to avoid the ignominy of being on welfare. However, the economy simply does not generate enough jobs, for which recipients are qualified, that pay sufficiently generous wages and fringe benefits to permit recipients to leave welfare. The wage rates available in labor markets must be high enough to cover the considerable costs added to the household budget by labor market entry, such as the costs of transportation, child care, and clothing.

Moreover, legal rules and institutional features of low-wage labor markets present significant barriers and disincentives to recipients who might want to leave welfare.[28] State welfare programs must provide Medicaid benefits[29] to families participating in AFDC,[30] whereas many, if not most, low-wage jobs do not provide health insurance coverage for the employee or family members.[31] The transition from welfare to work may also result in a loss of or

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[28] Highlighting the perverse incentive structure entrenched by American social policy is not meant to suggest that welfare recipients and potential claimants make their major life decisions (whether to seek or take a job, to have children, to marry, and so on) on the basis of a simple cost-benefit analysis of the monetary and in-kind advantages and drawbacks of a particular course of action. Rational-choice modeling is a valuable technique in social inquiry, but simplistic versions of the approach are unhelpful. Scholars and commentators studying welfare and low-wage labor frequently ignore the complexity of human motivation. Recipient choices and behavior respond to a range of material, social, and psychological factors that may and frequently do overshadow the incentive effects of prevailing wage rates and benefit levels. *See generally* Williams, *supra* note 21 (marshalling evidence of failure of behavior modification welfare reform initiatives to achieve stated goals, among other reasons, because based on inadequate appreciation of complexity of recipient motivation). Nonetheless, the perverse incentives set up by welfare law and labor market structure do form the background field against which poor people must make choices about work.

[29] Medicaid is a program of assistance to poor people with respect to medical costs. *See* 42 U.S.C. §§ 1396 - 1396v (1992 & Supp. 1994).

[30] *See* 42 U.S.C. § 1396a(a)(10)(A)(i)(I) (1992 & Supp. 1994) (to qualify for federal subsidy, state Medicaid plans must provide assistance to AFDC recipients).

[31] Anecdotal evidence suggests that loss of medical coverage is a significant reason why at least some welfare recipients defer permanent entry into the paid workforce. *See, e.g.*, Edin, *supra* note 25, at 471 n. 4 ("[a]pproximately one-third [of sample of AFDC recipients] said they would not take a job without benefits because they or their children had expensive health care needs"). *See also* Mary Jo Bane & David T. Ellwood, *Is American Business Working for the Poor?*, HARV. BUS. REV. (Sept.-Oct. 1991), at 66 (arguing that lack of health insurance is the primary obstacle for single-parent families trying to get off welfare); and DAVID T. ELLWOOD, POOR SUPPORT: POVERTY IN THE AMERICAN FAMILY 176 (1988):

> Usually, single mothers who earn their way off welfare lose medical protection four or [sic] nine months later. The loss of protection can be a significant worry, especially for women in low-paying jobs that offer little or no medical protection. There is no reliable evidence on how many people on welfare choose not to work for fear of losing Medicaid, but anecdotal evidence suggests the number could be

reduction in rental subsidies or an increase in rental payments in public housing; a decrease in food stamp benefits; the loss of some child-care subsidies; and uneven supervision of children during working hours.[32] Departure from welfare for entry into a low or minimum wage job often leads to a net decline in household income for a recipient's family.[33] Another consideration is that the type of jobs for which most recipients are viable candidates often involve night work and/or work at isolated sites or in private homes (e.g., janitorial services, house cleaning, kitchen work). Such jobs have exceptionally high incidence rates of sexual harassment and sexual violence.[34]

The basic flaw of most contemporary "welfare reform" proposals is that they propose to *push* recipients from welfare into the labor market by enforcing punitive policies designed to make life on welfare less attractive. That is, politically popular welfare reform proposals take aim at the "supply side" of the labor market equation (they seek to increase the supply of low-wage labor by inducing recipient entry into regular paid employment). Such policies are unnecessary, because most recipients have strong independent motivation to seek work; and they are also ineffective because there are an insufficient number of jobs with the necessary wage, benefit, and institutional features to absorb and retain would-be labor market entrants.

Effective and enduring welfare reform must aim at the "demand side" of the labor market equation. Reform policy must be designed to "pull" recipients into the labor market and hold them there by enlarging the number and enhancing the quality and security of available jobs. That is, meaningful welfare reform can only be achieved through a more aggressive and sophisticated *jobs* policy.

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[32] Against these disincentives to earning income must be weighed the cash payment that might be obtained by low-wage earners with children under the Earned Income Tax Credit program, *see* 26 U.S.C. § 32 (1993 & Supp. 1994).

[33] Welfare recipients interviewed in the Edin study indicated that they would need a job in the $7 to $10 dollar per hour range to make the transition from welfare to paid work a paying proposition. Edin, *supra* note 25, at 471. *See also* Robert Scheer, *Sagging Economy Hurting Jobs-Based Welfare Reform*, L.A. TIMES, Oct. 29, 1992, § A, at 1 (citing Michigan and California studies showing that family income declines when welfare recipients take low-wage jobs, and, in California study, government savings in reduced welfare costs are more than offset by increased costs for training, child care, counseling, transportation, and other supports needed to secure recipient entry into jobs).

[34] *See* White, *supra* note 20, at 1980-81, 1983-84; *cf. id.*, at 1989 (violence in poor women's lives, including industrial accidents and sexual violence in employment, is pervasive but insufficiently attended to by policy-makers). *See also* Jason DeParle, *Welfare Mothers Find Jobs Easy to Get but Hard to Hold*, N.Y. TIMES, Oct. 24, 1994, at A1 (citing evidence that threats, physical assaults, and other forms of interference by boyfriends upset at prospect of women's economic independence pose a significant barrier to the women's departure from welfare, a factor typically overlooked by policymakers).

These observations bring to light a fundamental community of interest between welfare recipients and the other categories of low-wage workers. Recipients, earners, elderly employees, and labor-market discriminatees such as immigrants and disabled people would all be well served by policies designed to generate more and better jobs. This program would include policies designed to encourage long term, sustainable economic growth; more effective, lifetime training programs[35]; and the development of an expanded service infrastructure providing, among other things, affordable and accessible child care and a universal health scheme. The core goal of a revised jobs policy should be to create continuing institutional pressure to raise the labor market floor and gradually to squeeze low-wage labor out of the economy. This could be accomplished by increasing social provision (e.g., expanding entitlements to training and job-related child care); by increasing the minimum wage and tightening occupational health and safety requirements; by expanding the coverage of employment standards legislation; and by improving the legal environment for worker self-organization and collective bargaining ("labor law reform").[36]

Thus, the same gaps in American social policy that make it difficult to leave welfare for regular employment (for example, the low level of the minimum wage and the absence of a universal health insurance scheme) are among the precise policy defects most harmful to the interests of low-wage earners. Both groups are injured by existing policies that reflect a lack of societal commitment to ending poverty. The interests of welfare recipients and low-wage earners are closely linked in yet another way as well. The labor market behavior of wage earners is deeply and negatively influenced by the large and visible group of Americans consigned to live in poverty by the choices embedded in the nation's social policy. Wage earners' fears of extreme poverty and the disgrace of welfare act as a permanent brake on worker militancy and therefore exercise dampening pressure on wage rates. Conversely, lifting the social floor by eliminating poverty would likely enhance the bargaining power of low-wage earners (and, indeed, of many better compensated employees).

Finally, there is yet another reason to include welfare recipients in a constituency of low-income workers. Quite apart from activity in the labor market or informal economy, almost all welfare recipients work in the sense that they

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[35] A U.S. Department of Labor report recently found that the job retraining program for workers displaced by foreign trade, one of the most generous, is largely ineffective even though the target population's average skill base and job marketability is presumably much higher than that of most welfare recipients. *See U.S. Study Says Job Retraining Is Not Effective*, N.Y. TIMES, Oct. 15, 1993, at A1. The Dunlop Commission on labor law reform recently announced the stark conclusion that "[t]he current training system does not meet the needs of less educated workers." DUNLOP COMMISSION REPORT, *supra* note 15, at 13.

[36] *See generally* SHELDON FRIEDMAN ET AL., RESTORING THE PROMISE OF AMERICAN LABOR LAW (1994) [hereinafter RESTORING THE PROMISE]; GOVERNING THE WORKPLACE, *supra* note 3.

perform substantial but unpaid labor in the home (homemaking and child care). The popular image of recipients as nonworkers is fueled by and perpetuates sexist stereotypes that devalue women's work and deny the indispensable contribution of caretaking to social reproduction.[37] These very same attitudes disadvantage women in paid labor markets by legitimating gender-based occupational segregation and underpayment for work perceived to be "female." The demeaning stereotypes of welfare recipients particularly stigmatize women who, for a variety of reasons (some voluntary, some involuntary), have taken the nontraditional path of becoming a single parent.[38] Thus, there is an essential affinity of interest between welfare recipients and all women earners who are trying to break through conventional images and to pioneer new roles.

C. *Contingent Workers*

An issue of concern to the Low-Wage Task Force is the increasing prevalence in the United States of "contingent employment."[39] This refers to work relationships that depart from regular, full-time employment with a particular employer. The most important categories of contingent work are part-time work; work relationships styled as subcontracting, leasing, or independent contractor arrangements[40]; temporary work[41]; day-labor; seasonal work; and ille-

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[37] The overwhelming majority of adult welfare recipients are women. The Administration for Children and Families (ACF), Office of Family Assistance (OFA), in the U.S. Department of Health and Human Services (HHS), reported that women comprised 89 percent of adult AFDC recipients in the FY 1991 caseload. *See* U.S. DEP'T OF HEALTH AND HUMAN SERVICES, CHARACTERISTICS AND FINANCIAL CIRCUMSTANCES OF AFDC RECIPIENTS FY 1991 (n.d.), at 2 (report prepared by the AFDC Information and Measurement Branch, Division of Program Evaluation, OFA/ACF/HHS). In FY 1992, the most recent year for which data could be obtained, the figure remained 89 percent women among adult AFDC recipients (per telephone interview with OFA/ACF/HHS staff member, November 14, 1994).

[38] *See generally* Albelda, *supra* note 22.

[39] In place of this term, European labor law and industrial relations literature employs the phrase "atypical workers." This usage is avoided here because it encodes an implicit bias in favor of full-time, continuous employment, that is to say, predominantly white, male employment. An alternative rubric employed both here and abroad is "casual employment" (and the developing trend is termed "the casualization of employment"). These formulations are also highly misleading. Many contingent relationships are tenuous at law but in practice involve very long term attachment to a particular employer—but without the legal status and benefits of a regular or permanent job. Of the available, unsatisfactory terminology, "contingent workers" is gaining currency as the preferred term. "Contingent" suggests uncertainty, insecurity, and conditionality. A problem with this term, however, is that it might be taken to mean that so-called "regular" employment is secure and guaranteed without condition, which is not true in today's economy, nor was it in the past. Still, regular employees generally enjoy superior benefits and job security as compared to contingent workers.

[40] "Subcontract" or "leased" employees ostensibly work for and are controlled by a referral agency rather than by the employer actually utilizing the labor. This is a com-

gal work relationships such as those involving undocumented immigrants or illegal child labor.[42] Although some contingent workers are highly paid (for example, some computer engineers working as consultants), the majority of contingent workers are not highly compensated. Indeed, contingent employment is a major cause of low wages and benefits. Accordingly, the low-wage worker constituency, as defined herein, contemplates the inclusion of many, if not most, contingent employees (while acknowledging that some contingent workers do not fit the low-wage mold).

II. THE LOW-WAGE WORKFORCE AND AMERICAN SOCIAL POLICY

This section presents an overview of salient trends in U.S. social policy that account for both the common interests of and cleavages between the various groups of working and poor people and suggests a framework for understanding the relationship between welfare policy and labor market structure. Although low-wage workers are a rapidly expanding group, policy debate and public interest lawyering frequently overlook their needs and interests.[43]

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mon arrangement in the service sector. In "independent contract" arrangements, the employer purports to retain the employee directly as an independent contractor or entrepreneur. Hiring an outside attorney or management consultant is a familiar case, but in recent years employers have extended this model to an astonishingly wide range of job categories.

[41] Temporary work is usually a subcategory of subcontract work. Its special feature is that the referral agency successively dispatches the individual employee (e.g., a clerical worker) to work for short periods of time at a large number of different firms.

[42] This article relies extensively on the following, excellent overviews of contingent employment: NEW POLICIES FOR THE PART-TIME AND CONTINGENT WORKFORCE (Virginia L. duRivage ed. 1992); JOHN J. SWEENEY AND KAREN NUSSBAUM, SOLUTIONS FOR THE NEW WORKFORCE: POLICIES FOR A NEW SOCIAL CONTRACT (1989). *See also* Françoise J. Carré, Virginia duRivage, and Chris Tilly, *Representing the Part-Time and Contingent Workforce: Challenges for Unions and Public Policy*, *in* RESTORING THE PROMISE, *supra* note 36, at 314; Dorothy Sue Cobble, *Making Postindustrial Unionism Possible*, *in id.*, at 285; Regina Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 STAN. L. REV. 1 (1988); Jonathan P. Hiatt and Lynn Rhinehart, *The Growing Contingent Workforce: A Challenge for the Future*, Daily Labor Report (BNA), at E-1 (August 12, 1993). On the situation in Germany, *see generally* Ulrich Mückenberger, *Non-Standard Forms of Work and the Role of Changes in Labour and Social Security Regulation*, 17 INTL. J. SOC. OF L. 381 (1989).

[43] Recently, there have been some encouraging signs of high-level policy interest in the problems of low-wage workers. Secretary of Labor Robert Reich has focused considerable attention and energy on jobs policy and training programs that would assist low-wage workers, among others. The Women's Bureau of the Department of Labor sponsored a ground-breaking conference on October 14, 1993, focusing on the employment law reform concerns of women workers, including those in the low-wage, nonunion sector. Senator Howard Metzenbaum, chair of the Senate Labor and Human Resources Subcommittee on Labor, convened a conference on February 8, 1994, to

A. *Background*

Low-wage work has always been a feature of the labor market landscape in the United States, even during organized labor's ascendant years in the two decades after the Second World War. Steep wage inequality is a hallmark of American life.[44] The United States now has the highest degree of wage inequality among the developed nations.[45] Also, the slow growth of wages has been a significant problem in recent years.[46] One study concluded that between 1979 and 1989 approximately eighty percent of the workforce experienced real wage decline.[47] Substantial expansion of the low-wage sector occurred in that period.[48] The evidence suggests that the growth in low-wage

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examine the problems of contingent workers. Secretary Reich addressed this meeting, arguing that contingent workers are not adequately protected by U.S. labor laws. Women's Bureau Director Karen Nussbaum offered a statement stressing the particularly harmful consequences for women of legal loopholes regarding contingent workers. *See Reich Says New Legislation May Be Needed to Protect Contingent Workers*, 8 Labor Rel. Week (BNA) 174-75 (February 16, 1994). On October 5, 1994, Senator Metzenbaum introduced a comprehensive bill to extend labor and civil rights law protections to part-time and contingent employees and to ensure them more equitable treatment. S. 2504, 103d Cong., 2d Sess. (1994).

The Dunlop Commission on labor law reform has also addressed the problems of contingent workers. Statements presented to the Commission by Director Nussbaum (December 15, 1993), John J. Sweeney, President of the SEIU (December 15, 1993), Lane Kirkland, President of the AFL-CIO (November 8, 1993), and by the author (January 19, 1994), emphasized the concerns of low-wage employees and the contingent workforce. The Commission recently devoted an entire hearing to these concerns. *See* 8 Labor Rel. Week (BNA) 767-68 (August 3, 1994).

In other developments, newly appointed National Labor Relations Board Chairman William B. Gould IV has indicated that his agency will devote special attention to the problems of part-time and contingent employees. *See* 8 Labor Rel. Week (BNA) 900-901 (September 14, 1994). And the United States voted in favor of a new International Labor Organization convention on improving protections for part-time workers. Congress has not yet ratified the convention. *See ILO Adopts Protections For Part-Time Workers*, 146 Labor Rel. Rep. (BNA) 309 (July 4, 1994).

[44] "The U.S.'s decentralized wage setting, with rent sharing between prosperous firms and their workers, and limited provision of 'social wages' [i.e., publicly financed entitlements] puts the country at the top of the developed world in wage inequality." Richard B. Freeman and Joel Rogers, *Who Speaks for Us? Employee Representation in a Nonunion Labor Market*, *in* EMPLOYEE REPRESENTATION: ALTERNATIVES & FUTURE DIRECTIONS (B. Kaufman & M. Kleiner, eds. 1993), at 13, 44.

[45] *See* DUNLOP COMMISSION REPORT, *supra* note 15, at 19 (so finding).

[46] *See generally* Paul Weiler & Guy Mundlak, *New Directions for the Law of the Workplace*, 102 YALE L.J. 1907, 1909-10 (1993) (citing sources).

[47] LAWRENCE MISHEL & JARED BERNSTEIN, THE STATE OF WORKING AMERICA 1992-93, 3-4 (1993).

[48] *See generally* COMMERCE DEPARTMENT STUDY, *supra* note 5; *see id.* at 1-3 (summarizing highlights of study findings). *Cf.* DUNLOP COMMISSION REPORT, *supra* note 15, at 17 (finding that "[t]he gap in earnings between higher paid and more educated

employment reflected structural or long-term (rather than cyclical) factors.[49] Also, the demographic composition of low-wage work is neither gender, nor race neutral. Women and minority group members of both sexes are considerably more likely to be low-wage earners than white males.[50]

The rapid increase of contingent employment is an important factor contributing to the expansion of low-wage work. The contingent sector is expanding for a variety of reasons. Employers can sometimes achieve efficiency advances through flexible scheduling of work hours and by periodic or seasonal adjustment of workforce size. Many Americans seek part-time work and/or job-sharing for lifestyle reasons, such as the desire to combine paid employment with other challenges and commitments like parenting. However, the recent growth in part-time employment is primarily involuntary. A less benign but significant motive for substituting contingent for regular employees is to avoid the legal obligations and payments attached to the conventional employment relationship (e.g., wage and hour protections; and, social security, unemployment insurance, and worker's compensation payments). Another reason employers substitute contingent for more attached employment is to gain certain legal advantages in their efforts to avoid or undermine unionization.[51]

B. *Contours of U.S. Social Policy*

The existence of a large low-wage sector in the United States is neither inevitable nor accidental. Where other countries have made significant progress in ameliorating poverty, reducing wage inequality, and lifting the wage floor, low-wage employment has been perpetuated in the United States by our laws and social policies. To be precise, the United States has *chosen* a legal regime that not only tolerates but in some ways actively encourages low-wage work and the persistence of extreme poverty.[52] The following are some general

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or skilled workers and lower paid and less educated workers has increased greatly in the U.S.").

[49] COMMERCE DEP'T STUDY, *supra* note 5 at 4.

[50] *Id.* at 2, 4-5.

[51] *See infra* text at Section IV and notes 77-82.

[52] A growing literature examines how legal rules structure markets and under what circumstances rule changes can reconstruct markets to produce beneficial redistributive effects. Basic sources include: Jack Beermann & Joseph Singer, *Baseline Questions in Legal Reasoning: The Example of Property in Jobs*, 23 GA. L. REV. 911 (1989); Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, 15 LEGAL STUD. F. 327 (1991); *The Effect of the Warranty of Habitability on Low Income Housing: 'Milking' and Class Violence*, 15 FLA. ST. U. L. REV. 485 (1987); *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982); Duncan Kennedy and Frank Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711 (1980); Karl Klare, *Legal Theory and Democratic Reconstruction: Reflections on 1989*, *in* A FOURTH WAY? PRIVATIZATION, PROPERTY, AND THE EMERGENCE OF NEW MARKET ECONOMIES 310-33 (Gregory S. Alexander & Grażyna Skąpska eds. 1994); *Market*

features of American law and social policy lying behind the persistence of poverty and low-wage labor.

1. Minimalism: The distinctive characteristic of American social policy is minimalism. Compared to other advanced democracies, the United States has a very low "social minimum wage and benefits package."[53] Decentralized wage setting institutions are combined with parsimonious social guarantees and entitlements.[54]

A basic American assumption is that society does not guarantee its citizens minimally decent material conditions.[55] Instead, the United States has largely

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Reconstruction, supra note 1; Lawrence Kolodney, *Eviction Free Zones: The Economics of Legal Bricolage in the Fight Against Displacement*, 18 FORDHAM URB. L.J. 507 (1991); Molly McUsic, Note, *Reassessing Rent Control: Its Economic Impact in a Gentrifying Housing Market*, 101 HARV. L. REV. 1835 (1988); Frances Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J. L. REF. 835 (1984); and Joseph Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1987).

[53] "Social minimum wage and benefits package" refers to a society's legally mandated economic floor. As used here, this term is intended to be somewhat more inclusive than the more familiar phrase "social wage," which connotes only benefits and transfer payments provided by *government*. Here, "social minimum wage and benefits package" includes such public benefits *but also includes* mandates binding upon *private employers* (such as minimum wage obligations and safety standards).

Five branches of law determine the social minimum wage and benefits package:

(1) *social provision*, meaning government-provided benefits and entitlements guaranteed by law (the "social wage");

(2) *employer mandates*, that is, minimum wages, benefits, and conditions that employers are legally obligated to observe or provide ("labor standards law");

(3) *government purchasing and contracting activity*, including particularly the effects of social criteria embedded in government procurement policy (such as affirmative action set-asides and prevailing wage requirements);

(4) *immigration and international trade law*, particularly the degree to which labor and human rights guarantees embedded in trade policy affect prevailing labor conditions in immigration-source and trade-partner nations; and

(5) *the background regime of legal entitlements and prohibitions* that structure power relations between employers and employees (such as rules about the power of the employer to discharge employees, about the incidents of ownership of real property, and about union organizing and strikes). *See generally* Klare, *Market Reconstruction, supra* note 1, at 13-40.

[54] *See generally* Joel Rogers, *Divide and Conquer: Further "Reflections on the Distinctive Character of American Labor Laws,"* 1990 WIS. L. REV. 1; and Richard B. Freeman and Joel Rogers, *supra* note 44.

[55] Full-time, year-round work at the federal minimum wage yields an income of $8840, well below the poverty line for a family of four (in 1992, $14,335) and only slightly above the poverty line for individuals (in 1992, $7143). *See Poverty in U.S. Grew Faster than Population Last Year*, N.Y. TIMES, October 5, 1993, § A, at 20; *Number of Poor in U.S. Growing, Report Finds*, BOSTON GLOBE, October 5, 1993, Fin. Edn., at 3.

privatized the welfare function. That is, the provision of basic needs such as income, retirement security, and health care are a matter of contract. For the most part, access to income and in-kind benefits is conditioned on the possession of a job or the status of being in a family relationship with someone who possesses a job. Yet, above an exceedingly low floor, policy leaves to bargaining in labor markets which wages and benefits will accrue to which jobs. Many jobs provide little or no benefits beyond the wage itself. That low-wage labor is so widespread in the United States reduces the pressure of labor costs that would otherwise motivate employers to substitute capital-intensive for labor-intensive production methods. Thus, the persistence of a low-wage labor sector slows productivity growth and technological innovation.

2. Labor-market attachment tests: Eligibility for public programs of benefit provision and social security is closely tied to an individual's labor market history and attachment.[56] Thus, United States law on welfare and social security favors individuals who have a long, continuous, and full-time work history. Groups that experience difficulty in establishing strong labor market attachment because of race or gender discrimination, disability, caretaking responsibilities, or other causes, are the groups with the greatest need for *public* provision of fall-back benefits and income security. However, weak labor market attachment is precisely why members of these groups are found to be ineligible for, or receive reduced entitlements under, many of our most important public welfare and income security programs.

3. The family wage: American social policy is founded on the concept of the "family wage." In the nineteenth century, the family wage idea was a working class demand that every employee should earn wages sufficient to support a family in decent living conditions. Gradually the concept was given a new meaning with an altogether different ideological spin, namely, that since the breadwinner earns a family wage, other family members should remain outside the paid labor market or at least should bid only for low-wage, irregular, or part-time jobs.[57] As a normative ideal and in practice, the idea of the

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[56] For an overview, see Mary P. O'Connell, *On the Fringe: Rethinking the Link Between Wages and Benefits*, 67 TUL. L. REV. 1421 (1993). A graphic contemporary example appears in the Clinton Administration's proposed Reemployment Act of 1994, S. 1951, 103d Cong., 2d. Sess. Title II of this bill would establish a program of income support to assist permanently laid-off individuals who are participating in long-term training programs. Income support for retraining is an important and promising policy initiative. Unfortunately, § 202(a)(2) of the proposal would establish a three-year "tenure screen" restricting eligibility for benefits to employees who, at the time of permanent lay-off, had been continuously employed for at least three years by the employer from whom such individual was permanently laid off.

[57] *See generally* Martha May, *Bread Before Roses: American Workingmen, Labor Unions and the Family Wage*, *in* WOMEN, WORK AND PROTEST: A CENTURY OF U.S. WOMEN'S LABOR HISTORY 1-21 (Ruth Milkman ed. 1985) [hereinafter WOMEN, WORK AND PROTEST].

breadwinner provided cultural and institutional support for a gendered division of labor and male supremacy. In turn, entrenched forms of occupational segregation that devalue women's work helped perpetuate a low-wage labor sector. The family wage idea retains force today through the labor-market attachment criteria for benefits eligibility, the relative absence of social supports for working parents, and the punitive treatment of single mothers by welfare and unemployment insurance policy.

4. Assumptions about the typical worker: Like social welfare law, United States collective bargaining law is modeled on an image of the typical worker as a full-time employee with a long-term, continuous, single-site relationship to a particular employer.[58] This model is mismatched with the contemporary trend toward more transitory and mobile ("contingent") employment relationships. The policy mismatch is particularly obvious with respect to the rules under which unions obtain the legal right to represent and bargain for a group of employees. The standard operating procedure (representation elections in well-defined bargaining units) is increasingly irrelevant to large sectors of the workforce, and particularly to contingent, low-wage employees. Thus, there is a causal connection between the law's preference for full-time, continuous employees, who historically have been predominantly white, male workers, and the problem of union membership decline.

5. Unintended consequences: An ironic result of labor's postwar success is crucial to understanding the contemporary politics of work and welfare. The postwar European model was to entrench extensive social guarantees and pursue high-wage growth strategies based on public and private investment in human capital (e.g., in training). Obviously, the presence of strong labor and social democratic political parties facilitated the adoption of this approach, but the high private wage/high social wage policy's success was also dependent on a particular set of background industrial relations conditions: high union density, centralized wage-determination, and wage extension laws that diminished incentives for employers to compete by depressing labor standards. During the Second World War, there was some tentative talk among progressive American labor leaders and activists about social democracy and centralized planning, but no political base for a social democratic turn crystallized.[59] As the Cold War unfolded, organized labor focused its attention, partly by choice and partly by necessity, on the collective bargaining arena.

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[58] *See generally* Dorothy Sue Cobble, *supra* note 42; Joanne Conaghan, *The Invisibility of Women in Labour Law: Gender-neutrality in Model-building*, 14 INTL. J. SOC. L. 377 (1986); Howard Wial, *The Emerging Organizational Structure of Unionism in Low-Wage Services*, 45 RUTGERS L. REV. 671 (1993).

[59] For a superb discussion, see David Brody, *The Uses of Power I: Industrial Battleground*, *in* DAVID BRODY, WORKERS IN INDUSTRIAL AMERICA 173-214 (1980); *The Uses of Power II: Political Action*, *in id.* at 215 -257. *But see also* DAVID BRODY, IN LABOR'S CAUSE: MAIN THEMES ON THE HISTORY OF THE AMERICAN WORKER 221-50 (1993) (author questions some theses of his earlier work).

Over the next decade it gradually became clear that leading employers were prepared to pay handsomely for labor peace and managerial control over the firm. The implicit tradeoff, celebrated as marking the "end of ideology," was that the large employers offered generous compensation to their employees, in return for which unions tacitly accepted managerial power and prerogative within enterprises, granted enforceable no-strike obligations, and effectively abandoned any lingering welfare state aspirations. Within this context, the labor movement realized phenomenal successes in raising living standards. Through collective bargaining, unions lifted millions of American workers and their families out of poverty and into the middle or lower middle class.

Several important background conditions sustained the fragile postwar social compact. International wage competition was weak (at least as compared to today), and many primary sector employers were sheltered from competitive pressures by domestic regulatory programs.[60] At least for a time, labor was organizationally strong and could put some political clout behind its mainstream or mildly progressive positions. While they never became reconciled to collective bargaining, most employers accepted it as a political *fait accompli* and generally obeyed the law. Also, the civil rights revolution was just beginning, and the resurgence of organized feminism was still years away. The cultural atmosphere glorified the male-breadwinner/female-homemaker model and all of its associated gender stereotypes about the division of labor and paid employment.

During the last three decades, these conditions have unraveled.[61] The combined pressures of chronic recession, intensified international wage and product competition, and domestic deregulation induced management to evade or undo its postwar *modus vivendi* with labor. An astonishing number of employers were willing to break the law to resist or undercut unionism, and the National Labor Relations Board (NLRB) has been unable or unwilling to enforce the terms of its enabling statute.[62]

Apart from public employment and a select few private sector occupations, union membership has declined steadily since the mid-1950s.[63] Labor's politi-

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[60] As in the airline and trucking industries.

[61] For an excellent overview, see Joel Rogers, *Reforming U.S. Labor Relations*, *in* THE LEGAL FUTURE OF EMPLOYEE REPRESENTATION 95-125 (Matthew Finkin ed. 1994) [hereinafter LEGAL FUTURE].

[62] *See generally* GOVERNING THE WORKPLACE, *supra* note 3, at 105-133. The recent appointments of William Gould as Chairman of the NLRB and Fred Feinstein as NLRB General Counsel signal a resolve to revitalize the agency and to develop more creative and effective tools with which to enforce the law. *See generally* WILLIAM B. GOULD IV, AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONS AND THE LAW (1993).

[63] Union density (i.e., union membership as a percentage of the paid workforce) has plummeted from a high of 35.5% in 1945 to 15.8% in 1993. However, in the private sector (which accounts for more than 80% of paid employment), union density is now only 11.2%. *See Number Of Union Members Rose In 1993*, 145 Lab. Rel. Rep. (BNA) 207 (Feb. 21, 1994). Private sector union density is now at roughly the same

cal and economic clout have declined correspondingly, and, for several reasons, its moral appeal and social image have been tarnished. Meanwhile, the civil rights movement and contemporary feminism have sparked dramatic political and cultural changes that have profoundly affected the world of paid employment. Since the 1950s, growing percentages of women have steadily entered the paid labor market, and the values and expectations of many of today's workers increasingly clash with the traditional family-wage model.

Moreover, labor's postwar successes occurred against a background of durable labor market segmentation. In the American institutional context of decentralized wage setting, labor's postwar gains in the collective bargaining process were *not* extended to workers as a whole. The labor market bifurcated into a primary sector (high wage, high skill) and a secondary sector (low wage, low skill). The economic and social progress fostered by collective bargaining surely had some spill-over effect on the secondary sector, but its most potent impact was felt in the primary sector consisting of the unionized firms and large non-union employers who, for a time, took their cues from collective bargaining.[64] Jobs in the secondary sector pay few or no fringe benefits, have insecure tenure, and offer few possibilities of training and advancement. Involuntary contingent statuses are common. The demographic composition of the low-wage, non-union sector is disproportionately female and minority.[65]

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level as prevailed before the Wagner Act and the great organizing drives of the 1930s. *See* Weiler & Mundlak, *supra* note 46, at 1911 (citing sources).

[64] They did so, in part, to avoid unionization by staying one step ahead, and, in part, to realize the productivity advantages flowing from rule-based rationalization of industrial relations. *See generally* THOMAS A. KOCHAN, HARRY C. KATZ, AND ROBERT B. MCKERSIE, THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS 3-46 (1986); David Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CAL. L. REV. 663 (1973).

[65] The rate of unionization of an industry correlates inversely with the percentage of women in that particular field. *See* Ruth Milkman, *Organizing the Sexual Division of Labor: Historical Perspectives on "Women's Work" and the American Labor Movement*, SOCIALIST REV., no. 49 (Jan.-Feb. 1980), at 95-96. Although the female percentage of union membership has increased steadily in recent years (to a current high of about 37%), it still lags behind women's percentage of the paid workforce. The leadership of organized labor, particularly at the top, remains largely a male bastion. *See generally* Ruth Milkman, *Women Workers, Feminism and the Labor Movement Since the 1960s, in* WOMEN, WORK & PROTEST, *supra* note 57, at 300-22. Contrary to popular perception, people of color are overrepresented in union membership relative to their proportion of the population. Among nonunionized workers, both women and minority group members desire unionization at higher rates than white males. *See* Thomas A. Kochan, *How American Workers View Labor Unions*, MONTHLY LAB. REV. (April, 1979), at 23, 25. No doubt this finding reflects the greater potential value of unionization in closing income inequality gaps for these groups. *See* Roberta Spalter-Roth, Heidi Hartmann & Nancy Collins, *What Do Unions Do For Women?, in* RESTORING THE PROMISE, *supra* note 36, at 193-206 (unionization disproportionately benefits women and minority groups by raising wages, closing pay gaps, and improving job tenure).

Another aspect of union success, albeit within a limited zone of the economy, should be mentioned at this point. During World War II, labor rightfully expected concessions in return for its no-strike pledge, but anti-inflation wage ceilings limited the amount of wage increases the National War Labor Board (NWLB) could grant. To sweeten its packages, the NWLB began a practice of inserting fringe benefits into labor contracts. After the War, employers vigorously resisted fringe bargaining.[66] But fringe bargaining soon became a mandatory, and then eventually, a commonplace subject of collective bargaining. As the golden age of collective bargaining unfolded in the 1950s and 1960s, provision of health and retirement benefits to unionized workers, retirees, and their families through collectively bargained employee welfare programs—that is to say, through the privatization of welfare provision—became a central part of the social policy landscape in the United States. But this evolution dissipated whatever working class political energy might have been directed toward entrenching programs of *social provision* of health and income security for *all* citizens. Ironically, the very success unionized workers achieved in obtaining fringe benefits through collective bargaining reduced the incentive unions might otherwise have had to join political alliances to fight for the provision of social benefits as a matter of right under public law.

In retrospect, the privatization (or contractualization) of the welfare function has damaged the interests of both unionized workers and poor people. As the background conditions that sustained collectively bargained systems of welfare provision have eroded in recent years, labor now finds itself isolated and on the defensive. Many employers have reneged or defaulted on contractual promises to fund health and retirement security, promises upon which workers relied for a generation.[67] That law mandates so parsimonious a labor market floor made it easier for employers to ratchet down wages and benefits during the era of concession bargaining in the 1980s. The lack of any sort of overall economic planning or industrial policy in the United States reduces job security even in the primary sector and renders current labor market adjustment policies ineffective.

In combination, minimalist social provision tied to labor market experience, the family wage model, and persistent labor market segmentation have had a disastrous impact on the economic fortunes and self-realization opportunities of women and minorities, and particularly on the ability of women to achieve economic security independent of men. In turn, this has impeded alliances between organized labor and other movements for social justice. Hard fought victories gradually bonded labor to a political system that has not done as well

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[66] For example, Charles E. Wilson, then president of General Motors, issued a statement in 1948 condemning the notion of collective bargaining over pensions as a step that would lead inexorably to totalitarianism and the end of the American way of life. *See* JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 148 (1983) (quoting statement).

[67] *See generally* Staughton Lynd and Alice Lynd, *Labor in the Era of Multinationalism: The Crisis in Bargained-For Fringe Benefits*, 93 W. VA. L. REV. 907 (1991).

by other groups. This compromised labor's moral and political leadership and its ability in its current time of need to reach out to and ally with nonlabor groups.

For social justice activists a generation ago, there was a reflexive connection between unionism and advocacy for the poor. That instinct is not automatic today. For better or worse, many of today's social justice activists do not instinctively identify with labor's cause, and many devoted unionists do not instinctively sympathize with the poor. Meanwhile, elites successfully deploy divide-and-conquer tactics, such as the politicians' current "welfare reform" fad, to pit unionized workers and poor people against each other.[68]

III. Points of Conflict

A *raison d'être* of the Low-Wage Task Force, as well as recent projects undertaken by the National Employment Law Project, several unions, and other groups, is to promote dialogue and common action between labor and poor peoples' groups and advocates.

Veterans of the labor upsurge of the 1930s and 1940s might be puzzled by a call for a labor/poor peoples' alliance. Within living memory, the American labor movement, or much of it, *was* a poor peoples' movement and self-consciously identified as such. Allying unionized workers and the poor was a basic tenet of CIO social unionism a generation ago. Indeed, labor activists from that period took for granted that workers and the poor were essentially the same constituency. Progressive unions spoke up for and took action on behalf of the unemployed, poor tenants, immigrants, and other non-unionized groups.

Some unions retain that character today and continue to concentrate effort and resources to organize low-wage earners. In the labor movement as a whole, however, the spirit of social commitment has faded since the heyday of the CIO.[69] For much of the labor movement today, identification with very poor people, such as inner-city welfare recipients or undocumented sweat-shop workers, is attenuated at best.

Simultaneously, the politicized, "social movement" spirit that characterized many of the early Legal Services programs has somewhat weakened. Successive Republican Administrations, hostile to the idea of subsidized legal representation for the poor, placed severe legal and financial restrictions on Legal

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[68] Congress recently extended unemployment compensation benefits for long-term unemployed workers, by itself a desirable policy, but financed that benefit extension through a simultaneous reduction in Supplemental Security Income benefits for immigrants. *See generally* Unemployment Compensation Amendments of 1993, Pub. L. No. 103-152, 107 Stat. 1516 (103d Cong., 1st Sess.) (1993).

[69] Some unions never captured the spirit of social commitment even then. Parts of the union movement played and continue to play a significant role in struggles for race and gender justice, while other unions have long records of opposition and resistance to race and gender equity. *See generally* Karl Klare, *The Quest for Industrial Democracy and the Struggle Against Racism: Perspectives from Labor Law and Civil Rights Law*, 61 Or. L. Rev. 157, 162-164 (1982).

Services programs and pressured managers to shy away from highly political approaches to Legal Services work. In the 1980s, poverty lawyers were compelled by the Reagan Administration's hostility to Legal Services to devote much of their energy simply to resisting the dismantling of their programs. Largely for these reasons, but perhaps also because of changes in philosophy and outlook internal to Legal Services,[70] the alliance-building and organizing focus (which included working relationships with organized labor) gradually gave way, in some Legal Services programs, to an emphasis on individual client service. Nonetheless, other programs continue to think of poverty law in community organizing terms and to nurture labor/Legal Services alliances, among others. Moreover, a new type of labor/Legal Services connection arose when many Legal Services employees themselves opted for unionization.

Many advocates from both the labor bar and Legal Services continue to see the need for and work toward alliances between labor and poor peoples' movements. However, revitalizing labor/poor peoples' alliances today requires hard work: establishing connections, fostering dialogue, promoting education and mutual concern, and learning creative ways to engage in joint action around common issues.

The difficulty of coalition-building between these groups is heightened by a number of specific controversies that have arisen in recent years.

First, the most obvious tensions between labor and the poor concern questions of race and gender-based affirmative action in hiring and layoffs. Although many labor unions have fought alongside civil rights and community groups to achieve affirmative action programs and set-asides, many other unions have opposed or resented such programs.

Second, conflicts have surfaced between the goals of community economic development and affordable housing, on the one hand, and a basic labor movement tenet that government procurement and subsidy programs should adhere to union ("prevailing") wage standards, on the other hand.[71] Additionally, some community development enterprises and nonprofit organizations have actively resisted unionization by their own employees.

Third, as the welfare reform debate unfolds, tensions have arisen between labor and advocates for the poor. A recent controversy in Illinois illustrates this point. A bill in the Illinois legislature proposed to set aside five percent of the jobs created by State of Illinois public works contracts and subcontracts for welfare recipients. Proponents of the bill were explicit that one goal was to assist racial minorities. The bill was scuttled after vigorous opposition from a

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[70] *Cf.* William Simon, *The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reform Era*, ___ U. MIAMI L. REV. ___ (1994) [forthcoming] (decline of emphasis, in recent poverty law scholarship, on collective action by poor people).

[71] *See, e.g.*, Shawn G. Kennedy, *Wage Proposal May Hurt Affordable Housing, Critics Say*, N.Y. TIMES, Nov. 15, 1993, § B, at 3 (reporting on debate over whether union attempt to extend state prevailing wage law to publicly subsidized projects undermines goal of increasing the supply of affordable housing).

coalition of construction trade employers and unions. Employers sought to defeat the plan out of fear that it would be an entering wedge for affirmative action. The construction unions fought the plan out of a concern that it would displace working and/or laid-off union members.[72]

Welfare reform proposals calling on government to subsidize low-wage jobs for welfare recipients may generate other highly divisive conflicts between organized labor and welfare recipients in the future. Organized labor supports genuine job creation programs, but some proposals under serious consideration today threaten to transfer existing jobs from unionized workers to welfare recipients without expanding job opportunities overall. Subsidized job placements for welfare recipients may also undercut union wage rates. Indeed, policymakers often argue that subsidized jobs designed as transitional placements for welfare recipients *must* be made less attractive than jobs generated in the labor market, to preclude an incentive to enter welfare in order to secure a better job. From labor's point of view, this kind of thinking in political circles raises the danger that welfare reform programs will bust union wage and benefit standards.

At times, welfare reform may pose an opposite risk for labor. Some proposals for transitioning recipients into the paid workforce assume that subsidized placements should provide a *superior* benefits package (such as above-minimum wages, child care assistance, sick leave, and continuing training). The idea is that above-market benefits will increase the likelihood that recipients will make an enduring transition. Reform should be designed to "make work pay," in the words of the Clinton Administration, meaning that any family supported by a full-time wage earner should not be poor. This policy is appealing, but does not come to grips with the fact that many current full-time workers in the low-wage sector, including some unionized workers, are in poverty. Unions are not likely to support generous wages-and-benefits conditions for transitioning recipients when, because of legal and practical impediments to low-wage unionism,[73] they frequently cannot achieve such benefits for their own, employed members through collective bargaining.

Given that there is no realistic possibility of full employment in the foreseeable future, genuine conflicts of interest will arise between different groups and communities of low-wage earners and poor people competing for scarce jobs. It may be comforting to reassure ourselves that all victimized groups share a common interest in fundamental social change. However, these present-day conflicts are very real and not easily minimized or composed. Innovative and imaginative policy and advocacy approaches are needed to bring the potentially competing groups of low-wage workers together in common struggle.

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[72] The episode is analyzed in Linda Mills, *An Escape From Welfare and Poverty*, FAMILY MATTERS (CENTER FOR LAW AND SOCIAL POLICY), August, 1993, at 7-9.

[73] *See infra* text at section IV and notes 77-82.

IV. SEEKING COMMON GROUND

Both the labor movement and the poor are politically isolated and in need of allies. Despite differences of outlook and political culture, as well as the above noted specific conflicts of interest, a common ground can be reached. Both groups need universal, affordable health care. Both need affordable and accessible child care programs. Both would gain from the encouragement of egalitarian, community-based economic development. Both need a serious national commitment to job creation and lifetime training opportunities. Both unionized employees and recipients in transition from welfare to work have an interest in improving the quality of and compensation accruing to jobs.

Increased public spending directed toward poor people would create social service jobs that might begin to replace some of the manufacturing jobs eliminated by deindustrialization. In turn, organization of white collar and service workers might revitalize the labor movement and begin to reverse its downward slide. There are promising organizing successes among private-sector white collar employees (e.g., the victory of the Harvard Union of Clerical and Technical Workers[74]), and the public sector has been one of the few consistent areas of union growth in recent decades.[75]

Without minimizing the difficulty of building durable alliances, there is an overarching goal around which both labor and poor peoples' groups could rally: the need to use both public power (legislation and adjudication) and private power (collective worker organization) to raise the labor market floor. Law reform should aim to raise the labor market floor by directly mandating payment of and by better situating workers to bargain for higher wages and benefits in employment, as well as by mandating more generous social provision. Of course, articulating the common interest is easy. The difficulty lies in fostering dialogue between communities so that these disparate groups can stitch together mutually supportive programs of action.

This process is beginning to happen, and a few successful examples are in place. A goal of the Task Force project is to collect, study, and disseminate

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[74] For a superb discussion, see *Finding Their Voice*, BOSTON REV. (Oct-Nov. 1993), at 3-5 (interview with Harvard Union of Clerical & Technical Workers leader Kris Rondeau).

[75] In the public sector, which admittedly comprises a much smaller share of total paid employment, 1992 union density was at 36.7%. This high figure was reached despite the fact that many states do not permit public sector collective bargaining. Union density among eligible public employees in the "bargaining states" (states that facilitate public employee collective bargaining) is estimated to be as high as 70%. In the federal sector, union density reaches as high as 50% among white collar and 85% among blue collar workers. A new study shows that in recent years the union-win rate in the public sector has been a staggering 85%. *See* Kate Bronfenbrenner & Tom Juravich, The Current State of Organizing In the Public Sector (unpublished paper presented to the AFL-CIO Public Employee Department conference, San Francisco, California, September 30, 1993) (copy on file with author). *See also Public Sector Unions Win*, 144 Labor Rel. Rep. (BNA) 253 (October 25, 1993).

information about these experiences. This article concludes by discussing one particularly promising and creative effort in order to impart a sense of the rich possibilities for labor/poor peoples' alliances.

The case in point is an on-going union organizing effort among low-wage building service employees, led by the SEIU's Justice for Janitors (JFJ) campaign.[76] As previously noted, the SEIU retains an organizational culture and sense of mission very much in the tradition of social unionism, inclusiveness, and egalitarianism. The employees organized by the JFJ campaign are building maintenance and janitorial workers in metropolitan areas (e.g., a notable success has been achieved in the Los Angeles area). Wages in this industry are so low that even a union contract may not lift building service workers out of the low-wage sector. Involuntary part-time employment is common in the industry, and employees often work two or three jobs. Many are recent immigrants.

From a union organizing standpoint, a crucial fact about this group of employees is that few have strong attachment to a particular worksite. Traditional union organizing techniques and the representation model implicit in the National Labor Relations Act (NLRA) assume worksite attachment (with some exceptions not applicable to janitors[77]). For example, the conventional model assumes that a union achieves representation rights in an election conducted within a fixed bargaining unit. Traditional organizing methods focus on establishing a union structure or committee within the plant through slow and patient persuasion of employees. This committee in turn leads the union's election campaign at the workplace. These legal assumptions and organizing methods have limited relevance to mobile and contingent employees, such as janitors, who work alone or in small groups at isolated locations to which their attachment is tenuous.

Several other factors compound the difficulty of unionizing the building services industry.[78] The business entity that is truly in a position to bargain over wages and benefits is the purchaser of building maintenance services, generally the owner or lessor of the building. But building maintenance personnel are often employed by a building service contractor, who supplies or "leases" janitorial staff to the building owner. These service contractors usually operate on a very thin margin, and the competition for contracts is usually brisk due to the low entry barriers to the industry, and because service contracts are commonly terminable at will on short notice. Assuming the employees have rights

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[76] *See generally* Elise Blackwell, *A Commitment to Organizing: Justice for Janitors*, BEYOND BORDERS (Spring 1993), at 16. The description of JFJ to follow relies heavily on discussions with union legal staff and academic supporters close to the campaign.

[77] *See, e.g.*, NLRA § 8(f), 29 U.S.C. § 158(f) (1994) (exception allows pre-hire collective agreements in the construction industry).

[78] This discussion of the legal setting of service sector organizing relies heavily on Jonathan Hiatt and Lynn Rhinehart, *supra* note 42; Wial, *supra* note 58; and Craig Becker and Larry Engelstein, Labor Law Reform for Who? Labor Law in the Emerging Service Sector (unpublished paper by SEIU counsel on file with author).

under the NLRA at all,[79] those rights typically obtain against the service contract company, *not* the building owner. Only in rare cases of a tight connection between the contractor and the building owner are the two entities treated as a "joint employer."

However, bargaining with the service contract company is often ineffective or meaningless. The contractor's profit margin is often so narrow that, unless the building owner is prepared to increase compensation, wage concessions made by the service company in collective bargaining may simply result in loss of bids, termination of contracts, or even withdrawal from the field. For bargaining to be practical and effective, the union needs to be able to apply its wage appeals and pressure to the building owner. But in the typical case the owner is not the employer and therefore has no collective bargaining obligations. Moreover, the NLRA prohibits unions from employing traditional pressure tactics against the owner.[80] Although an employer may not discharge employees solely because they have exercised their right to unionize, a building owner is legally entitled to terminate its contract with a service company solely because the service provider's employees have unionized.[81]

JFJ has devised an array of imaginative strategies to contend with these difficulties. There are three major components to their approach. First, maintenance personnel are organized on a geographic ("sectoral") basis, rather than on a building to building or bargaining unit basis. JFJ seeks to induce leading employers in a city (service contractors and also building owners) to agree to minimum wage and benefit standards, in the hope that the entire regional industry will eventually accept these standards. Where successful, this approach is a classic instance of the use of collective worker power to lift the labor market floor, something accomplished in Europe by social provision and/or statutory wage extension.

Second, JFJ typically bypasses the National Labor Relations Board election process (although organizers do resort to the NLRB to challenge retaliatory discharges of union supporters). In lieu of an election campaign culminating in the traditional government sponsored ballot, JFJ's organizing effort is built around community mobilization in the mode of 1960s civil rights activism (e.g., through street marches and publicity campaigns aimed at the general

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[79] Many contingent employees are excluded from NLRA coverage, e.g., as independent contractors. *See* NLRA § 2(3), 29 U.S.C. § 152(3) (1994) (excluding individuals having the status of independent contractor from NLRA rights).

[80] For example, routine economic pressure (such as picketing designed to induce other employees, e.g., truckdrivers, to cease work for or refuse deliveries), which would be lawful when applied to the employer, may, when applied to the building owner, constitute an illegal secondary boycott in violation of NLRA § 8(b)(4), 29 U.S.C. § 158(b)(4) (1994).

[81] *See* Local 447, United Ass'n. of Journeymen & Apprentices (Malbaff Landscape Construction), 172 N.L.R.B. 128 (1968) (employer does not unlawfully discriminate against employees by ceasing to do business with another employer because the latter's employees have engaged in protected union activity).

public). Organizers see mobilization of community sentiment, rather than a vote triggering a legal obligation, as the key to initiating an effective bargaining process. The most important union institution for organizing purposes is not the plant committee (which may not even exist), but the union hall, which in practice becomes community meeting place, an organizing base, a social service referral agency, a cultural center, and generally a place where solidarity, participation, and a sense of empowerment are generated.

A third element of the strategy is to use litigation to enforce basic social standards. Interestingly, most of the legal work generated by JFJ campaigns does not involve collective bargaining law, but rather social legislation. Ancillary to its organizing efforts, the union uses the legal process to enforce rights and guarantees under minimum wage and maximum hour legislation, child labor prohibitions, occupational safety and health regulation, disability rights, immigration law, and protections against sexual harassment.

Successful enforcement of statutory rights allows the union to provide some concrete assistance to employees prior to achieving a collective bargaining agreement, while simultaneously applying pressure to the employer. Indeed, given the fragmented nature of the industry, it is overly cumbersome to enforce labor standards through the usual contract administration methods such as grievance arbitration. Increasingly, the union seeks through litigation to enlist the state in playing a more systematic and aggressive role in enforcing labor standards.

On balance, the litigation component of the strategy may not be the most important in terms of actually organizing the employees, but it does create many opportunities for alliance building. The rights-enforcement strategy often works most effectively when it links employee interests to the those of another constituency. For example, a suit about working conditions in a building might join the employees' concerns about safety and security with parallel concerns harbored by tenants and other building users. Building conditions suits can also seek to vindicate the rights of the disabled or the rights of other low-wage workers in their identities as tenants of other properties owned by the same realtor group.

Similar potential for alliance building arises where low-wage workers serve populations of poor people who are served by Legal Services offices. Consider, for example, a group of nursing home service employees who take care of poor residents. Suppose that the employees go on strike, and the employer hires permanent replacements in their place. Hiring strike replacements often deals a devastating blow to a strike, but it is generally lawful under the NLRA.[82] It is unlikely, however, that the strike replacements will have been properly trained or certified and thus able to provide competent care. While the striking employees lack standing to challenge the quality of care, the nursing home residents may launch such a challenge through Legal Services counsel. An

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[82] *See generally* NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333 (1938), and its progeny. Efforts to amend the NLRA so as to overrule *Mackay Radio* have died in Senate filibuster, most recently in 1994.

employee/resident alliance building on the link between labor standards and quality of patient care might provide both groups with meaningful leverage against the employer. Certainly such an alliance would assist the union in efforts to present an appealing case to the public.

Like other aspects of the JFJ campaign, standards enforcement litigation is enormously expensive. Social workers, nurses, civil servants and other moderately well off SEIU members throughout the United States contribute millions of dollars in dues money to assist and organize janitors and nursing home aides in distant cities. Although some union members may grumble about the high cost of dues, they continue to pay them and to elect officers who dedicate union resources to these organizing efforts. This is a little noted but highly significant expression of solidarity between the union movement, low-wage workers, and poor people.

Having said that, unions cannot afford to prosecute all the meritorious cases that arise. No union can provide counsel for all the members and potential members regarding their various work-related legal problems. In addition to funding questions, ethical considerations might bar union counsel from representing individual employees. Thus, unions seeking to organize low-wage workers must inevitably rely on the Legal Services bar for assistance in serving this constituency. What a socially conscious labor movement can provide in return is support and legitimacy for the cause of welfare recipients and other poor peoples' groups who are marginalized and isolated in our political system.