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# Labor's Achilles Heel - The Unrecognized Worker

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# LABOR'S ACHILLES HEEL—THE UNRECOGNIZED WORKER

## I. INTRODUCTION

It is commonly assumed that in terms of legal protection and organizational representation, the U.S. worker is one of the most privileged in the world. Comparatively, this is true,<sup>1</sup> but it is equally true that only one half of the U.S. workforce is covered by even the minimal protection afforded by federal minimum wage and maximum hour legislation.<sup>2</sup> Of this, even fewer workers possess governmental recognition of the right to bargain collectively;<sup>3</sup> and of those "recognized" by law as eligible for union representation, even less are actually represented.<sup>4</sup>

The percentage of U.S. workers in unions today stands at 17.9%, lower than at any point since collective bargaining laws were passed.<sup>5</sup> It is one of the lowest percentages among the

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1. In 1980, the world's labor force consisted of about 1.8 billion workers, out of which only 535 million are in "developed" countries. In the "developing" countries, 25-30% of the labor force is "self-employed." Ten to twenty-five percent work not for wages but as part of a "familial" obligation. "A vast number of workers, including roughly 150 million day laborers and 300 million self-employed and family workers in the agricultural and informal sectors of the developing market economies, have little protection, either through membership of a workers' organisation or by effective legislation." INTERNATIONAL LABOR ORGANIZATION, WORLD LABOR REPORT 3-4 (1985) [hereinafter ILO REPORT]. Additionally, some of these countries maintain a system of forced labor that strips other legal protection from workers as well. For example, a study conducted in eight states in India found 2,244,000 workers in "debt bondage" in those states. *Id.* at 70.

2. In *Current Labor Statistics*, MONTHLY LAB. REV., Apr. 1986, at 74, the workforce in the United States is estimated to be more than 100 million. Out of this, only 56 million workers are covered by federal "protective" legislation such as FLSA and OSHA. L. WEINER, FEDERAL WAGE AND HOUR LAW 2-3 (1977) [hereinafter L. WEINER].

3. L. WEINER, *supra* note 2, at 2. Only 18 million are covered by federal collective bargaining legislation out of this 56 million.

4. BUREAU OF NATIONAL AFFAIRS, UNIONS TODAY: NEW TACTICS TO TACKLE TOUGH TIMES 7 (1985) [hereinafter BNA REPORT]. BNA lists the current figure at less than 18 million.

5. After a dramatic rise in unionization immediately following passage of the National Labor Relations Act, ch. 372 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151-168 (1982)), union membership remained at between 20 and 33%. R. STEINBERG, WAGES & HOURS 191 (1982). It began to decline in the mid-fifties and is now estimated to be at less than 17.9%. See *supra* note 4 and accompanying text.

world's "industrialized" nations.<sup>6</sup> Concomitantly then, more than four fifths of the workforce is "unrecognized," either in law or fact. To understand what has widely been recognized as the deteriorating position of organized labor in the United States, it is necessary to understand the composition of this "unrecognized" workforce,<sup>7</sup> and its legal status, *de facto* and *de jure*.

Traditionally, the categories that have been excluded either by law or in practice from the "privileges" granted the stereotypical U.S. worker include agricultural and household workers. Their exclusion from most protective legislation can be explained by the nature of their employment relationship. The rise in unionization in the U.S. closely paralleled the transformation of the economy from primarily agricultural to primarily industrial.<sup>8</sup> The proliferation of factories brought with it a centralization of the workplace, often creating both the increased need for and the possibility of successful efforts to organize.<sup>9</sup> This was not true of workers employed in the fields<sup>10</sup> or in private homes.

To these "traditionally" unrecognized workers can be added those categories that were subsequently created through the law of supply and demand to meet specific needs of industry. Included here are workers employed through such devices as subcontracting or temporary agencies. The indirect employer-employee relationship thus created has allowed employers to circumvent various benefits that would otherwise be available to workers.<sup>11</sup> An additional method of avoiding recognition and other protections secured both by organizational struggles and

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6. ILO REPORT, *supra* note 1, at 9. The ILO provides a table of trade union membership in the Organization for Economic Cooperation and Development (OECD) countries which ranks the United States in the lowest percentile in terms of union membership in industrialized countries. In fact, eighteen developing countries have higher percentages of union membership than the United States. *Id.* at 11 (table 1.2).

7. The term "unrecognized worker" will be used throughout this article to denote workers who are excluded from most federal legislation governing collective bargaining rights and wage and hour regulations.

8. "By 1889, industrial production had supplanted agriculture as the factories for the first time claimed more workers than the fields." R. STEINBERG, *supra* note 5, at 3.

9. *Id.*

10. Particularly migrant farm workers, where the transitory nature of both the employment and the residence continues to disrupt the ability to establish strong organizational ties.

11. ILO REPORT, *supra* note 1, at 10. ILO lists the increasing use of part-time migrant, transient and temporary employees as a factor in explaining a low union membership in the U.S. for the past twelve years. *See also infra* text accompanying note 227.

legislative efforts has been physical relocation to geographic areas where unionization is less prevalent or where local laws are less favorable to labor.<sup>12</sup> This phenomenon, known colloquially as the "run-away shop,"<sup>13</sup> has historically encompassed relocation both within the U.S. and overseas, particularly to third world countries. Recent events, however, have increasingly closed this avenue to employers. Domestically, long and costly legal battles have established union footholds even in traditionally anti-union strongholds.<sup>14</sup> Internationally, ejection of United States corporations after revolutions and civil wars in various African, Asian and Latin American nations has graphically demonstrated that many of these sources of "cheap labor" may be unwilling to continue in that role, forcing U.S. industry increasingly to seek out new "exploitable" pools of workers at home.<sup>15</sup>

It is in this historical context that a new category of "unrecognized worker" has been legislatively created from the abundant pool of unemployed<sup>16</sup> and otherwise unorganized workers. Whether they are labelled "trainees" in government-sponsored training programs, "recipients" in what is euphemistically called

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12. ILO REPORT, *supra* note 1, at 9. See also R. STEINBERG, *supra* note 5, at 5.

13. BLACK'S LAW DICTIONARY 1197 (5th ed. 1979).

14. An example of this is the Farah strike against the Texas clothing manufacturer, popularized in the movie *Norma Rae*, and the song *Come on Virgie*. The strike, lasting almost ten years and involving extensive NLRB proceedings, finally resulted in a contract and recognition of the union. See generally San Francisco Bay Area Farah Strike Support Committee, *Chicanos Strike at Farah* (Jan. 1974) (published by United Front Press).

15. The presence of U.S. corporations in these third world nations is common knowledge. Workers in these countries have traditionally been relied on by U.S. industry as a cheap source of labor and as a means of staying competitive in the global economy. Since the Viet Nam war (and the loss of rubber and oil resources along with the workers who processed them there), the expulsion of U.S. corporations from Nicaragua, and various other international upheavals, the cost of operating factories in these countries, even when legally permitted by the governments there, has become prohibitive. This is certainly a possible explanation for the recent interest by these corporations in such domestic innovations as the "urban enterprise zone," or the availability of "workfare" recipients to the private sector. See *infra* notes 17-18 and accompanying text.

16. The Bureau of Labor Statistics lists the unemployment rate at over 7% in 1985. *Current Labor Statistics*, *supra* note 2, at 74. This figure, however, does not include those who are not eligible for unemployment benefits, such as those who have never been employed, whose unemployment benefits have run out, or who have been working in jobs that are off the books or otherwise do not provide unemployment coverage. (Domestic workers fall into this category, for example).

"workfare,"<sup>17</sup> or simply unfortunate enough to be located in an "Urban Enterprise Zone,"<sup>18</sup> this latest category of "unrecognized worker" threatens to become a source of exploitable labor the likes of which has not been seen in this country since the 19th century, when slavery was ostensibly abolished. These workers, existing as they do outside of the normal channels of commerce and the traditional employer-employee relationship, have no well-defined legal status. This fact not only affords them little protection against their own exploitation, but makes it equally difficult to prevent their use as quasi-governmental "scabs" in undermining the legal and economic gains made by the "recognized" worker.<sup>19</sup>

What all of these categories of unrecognized workers have in common is that they have been defined in the negative by their exclusion from a governmentally recognized "right" to organize.<sup>20</sup> This is somewhat misleading since it can be argued that the right to organize is derived not from the statutory provisions of the National Labor Relations Act (NLRA)<sup>21</sup> and subsequent

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17. This term, which will be used throughout the article, generally will be applied to any arrangement whereby a recipient of a governmental grant of money or services is required to work in exchange for such grant.

18. An urban enterprise zone is a geographic area designated under recent state enactments for special treatment in terms of tax incentives and deregulation of employers who relocate to what is considered under the enactment to be an "economically depressed" area. While names and definitions vary from state to state at this time, legislation is pending before Congress for the creation of federal "urban enterprise zones." H.R. 1932, 99th Cong., 1st Sess. (1985) and S. Res. 2914, 99th Cong., 2d Sess. (1986), are the most recent proposals. It has been proposed that, among the regulations to be suspended in these zones, the minimum wage and various collective bargaining protections should either be eliminated or made more "flexible." Some Reagan administration officials have in the past described the minimum wage as one of the worst enemies of the unemployed, since it discourages employers from hiring those whose skill levels do not make them "deserving" of it. Former Secretary of Labor Ray Donovan has been quoted as saying that a "subminimum wage will cut minority unemployment faster and further than most other Government job programs and at no cost to the Government." *N.Y. Times*, May 6, 1984, at 25, col. 2.

19. As used here, the term "scab" refers to workers who undermine either directly as strikebreakers or indirectly through depressing the wages and benefits that organized workers might otherwise obtain.

20. In this context, a "right" to organize is defined as an affirmative statutory recognition of that right, including provision of a governmental administrative body to oversee and, where it is deemed necessary, intervene in relations between employers and employees.

21. The National Labor Relations Act, originally passed in 1935 as the National Labor Relations (Wagner) Act, ch. 372, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§

amendments, but from the U.S. Constitution, which prohibits the Government from interfering with freedom of association, speech and assembly.<sup>22</sup>

There are two problems with this argument, however. First, while the Constitution guarantees the right to associate and even to organize,<sup>23</sup> it does not assure "recognition" of that association, either by the employer or by the Government.<sup>24</sup> Actual recognition has generally required exertion of organizational force.<sup>25</sup> It is one thing to be able to meet in a room and discuss grievances. It is another to be able to force an employer to redress those grievances. "Recognition" of an association of workers can be bestowed by statute or it can be fought for directly, but before the benefits of association can be obtained, recognition must exist in some form or another. Secondly, despite any constitutional prohibitions against governmental "interference" with the right to associate, actual interference, either "under color of law" or by private parties acting with government protection, has existed throughout U.S. history.<sup>26</sup> When the government finally took affirmative legislative action to protect labor's right to organize, that "protection" itself proved to be a double-edged sword in the sense that it created a legal wall between the "haves" and the "have nots" of the working class. An analysis of the legal status of and recourse available to various categories of workers under U.S. statutory and case law reveals that labor is possibly in a weaker position today than it was before it was divided and categorized legislatively. This weakness is directly

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151-168 (1982)), has since been amended by the Labor Management Relations (Taft-Hartley) Act, ch. 120, 61 Stat. 136 (1947) (current version at 29 U.S.C. §§ 141-187 (1982)), and by the Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, 73 Stat. 519 (1959) (current version at 29 U.S.C. §§ 401-531 (1982)).

22. U.S. CONST. amend. I, XIV; *NAACP v. Alabama*, 357 U.S. 449, 460 (1957).

23. See, e.g., *NAACP v. Button*, 371 U.S. 415, 430 (1963).

24. See *Local 370, Int'l Union of Operating Eng'rs v. Detrick*, 592 F.2d 1045 (9th Cir. 1979); see also *Smith v. Arkansas State Highway Employees Local 1315*, 441 U.S. 463, 464 (1979), where the Supreme Court stated that while the first amendment protects the right to associate, it "is not a substitute for the national labor relations laws."

25. Ratner, *To them that Hath Shall be Given*, 9 INT'L J. SOC. OF LAW 303 (1981).

26. See generally R. BOYER & H. MORAIS, *LABOR'S UNTOLD STORY* (1972). This book offers extensive examples of the obstacles, both legal and otherwise, facing workers in their attempts throughout U.S. history to organize. Additionally, in F. FRANKFURTER & N. GREENE, *THE LABOR INJUNCTION* (1930), the authors trace the history of the use of the injunction against labor prior to federal laws specifically governing collective bargaining.

traceable to the presence of the unrecognized worker. A chain is only as strong as its weakest link.

## II. EARLY LEGISLATION

To understand the current position of the unrecognized worker, some legislative background is necessary. The history of labor law can best be described by division into two periods: pre- and post-NLRA. It was not until the acute upheaval of the Great Depression that it was considered constitutionally permissible to interfere with the freedom to contract<sup>27</sup> that was alleged to exist between the individual employer and employee. Early attempts by states to legislate wages and hour controls were held unconstitutional as intrusions on individual liberty.<sup>28</sup> The only protection available to the 19th century U.S. worker was self-protection through unions, organized independently of any governmentally bestowed status and along broad industrial lines.<sup>29</sup> The issues addressed by these early forms of labor organization often went beyond narrow trade concerns. Fights concerning the demand for the eight-hour day, for example, typically enlisted the support and participation of the whole community.<sup>30</sup> The tactics employed to win these early demands included mass demonstrations and marches that were neither legally sanctioned nor specifically proscribed. These were often met with equally "extra-legal" tactics by employers, such as the use of armed Pinkerton guards to break strikes.<sup>31</sup> These private armies

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27. See, e.g., *Lochner v. New York*, 198 U.S. 45, 61 (1905), which describes a New York maximum hour law as "an illegal interference with the rights of individuals to make contracts regarding labor."

28. F. FRANKFURTER & N. GREENE, *supra* note 26, at 147-48. See also R. STEINBERG, *supra* note 5, at 4.

29. The National Labor Union, organized in 1866, was the first nationwide federation of labor. It addressed, in addition to its members' labor demands and the need for inclusion of workers regardless of race or sex, such issues as currency reform and "Wall Street's control" of the economy. R. BOYER & H. MORAIS, *supra* note 26, at 35-36. Perhaps the best known of these early unions, the Industrial Workers of the World (or "Wobblies" as they were known colloquially), generally organized along class rather than trade lines, and added such issues as U.S. participation in what they considered to be a war instigated by the predatory capitalists of the United States to their agenda. *Id.* at 197-98. Boyer and Morais also describe the massive nationwide mobilization of the Knights of Labor for legislative recognition of a universal eight-hour day. *Id.* at 87-91.

30. Women and children, as well as those in sympathy with the workers' demands, were instrumental in these fights.

31. R. BOYER & H. MORAIS, *supra* note 26, at 68. See also F. FRANKFURTER & N.

were sometimes joined by government troops sent in to "keep order,"<sup>32</sup> and local criminal statutes<sup>33</sup> were often applied against the activities of the workers.

Despite judicial reluctance to permit legislative intervention between workers and their employers, the nascent unions were able to secure passage of several isolated labor laws before the turn of the century, generally after long and bloody battles.<sup>34</sup> One of the state aims of these early efforts was to bring the conditions of unorganized workers to a level of parity with those who were organized.<sup>35</sup> It was believed by these organizations that in the long run, this would protect both groups by preventing the development of a disadvantaged workforce that could be used to undermine gains made by organized workers. Consistent with this intent, one of the first federal labor laws, passed in 1885 through the efforts of the Knights of Labor, prohibited the importation of "contract labor."<sup>36</sup> Under the widely used con-

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GREENE, *supra* note 26, at 71-72, 120-21 (discussing the use by employers of paid spies and private armies).

32. An example of this is the infamous "Haymarket Massacre," an event that became the basis of the international celebration of "Mayday," except in the United States, where it is conspicuously not celebrated as a workers' holiday and has been renamed "Law Day." The "massacre" occurred when a bomb was thrown into a square where some 80,000 demonstrators and 1350 National Guardsmen were gathered on May 1, 1886, as part of the efforts of the Knights of Labor to establish the eight-hour day. Several leaders of the "Knights" were sentenced to death despite international protest; it was widely believed, though never proven, that the bomb was thrown by a provocateur paid by employers opposed to the Knights' demands. See R. BOYER & H. MORRIS, *supra* note 26, at 91-101.

33. Most commonly used were local ordinances such as those against trespass or vagrancy, which could be applied selectively against strikers or union organizers. In some cases, however, criminal statutes were written specifically aimed at or for use against labor. For example, in 1919, California enacted the Criminal Syndicalism Act, which defined "criminal syndicalism" as "any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage, unlawful acts of force or violence as a means of accomplishing a change in industrial ownership or control, or effecting any political change." G. GUNTHER, *CONSTITUTIONAL LAW* 1007 (11th ed. 1985).

34. See generally R. BOYER & H. MORRIS, *supra* note 26.

35. Ratner, *supra* note 25, at 306, 313. In E. BRANDEIS, *HISTORY OF LABOR LEGISLATION IN THE U.S.* (1935), the author describes the intent of promoters of the ten-hour law in Massachusetts as follows: "The legislation was really desired to bring the textile mills up to the ten-hour standard which had been secured in other trades largely through trade union action. The preponderance of women and children in [that] field had made organization particularly difficult."

36. R. BOYER & H. MORRIS, *supra* note 26, at 67 n.1. It is questionable, however, whether use of "contract labor" has in fact been eliminated by this law. Note the practice described in *Lopez v. Rodriguez*, 668 F.2d 1376 (D.C. Cir. 1981), where an employer



tract labor system, workers, recruited largely from overseas, became indebted to the employer for the cost of passage and food. They were then forced to work off the debt at whatever "wage" the employer set. When this practice was finally outlawed, the prescribed remedy was deportation of the contract worker.<sup>37</sup>

By the end of the 19th century, it became apparent that a complete "hands off" policy towards industrial relations was contributing to the development of monopolies that were themselves beginning to destroy the purported "laissez-faire" nature of the American economy.<sup>38</sup> When these monopolies began to exert their control not only over labor, but over the consumer market and their competition as well, federal authority to intervene was found. In 1890, the Sherman Antitrust Act was passed.<sup>39</sup> When the Act was first introduced, it was generally believed that "labor combination" did not come within its scope. However, between 1892 and 1896, the Government brought ten cases under the Act before the courts. Out of these ten, five were against labor and five were against corporations. Four of the five against labor were decided in favor of the government. Only one of the five against corporations was successful.<sup>40</sup>

By the turn of the century, union membership had increased from 447,000 in 1897 to 2,072,700 in 1904; a 364% increase.<sup>41</sup> Employers, organized through such vehicles as the National Association of Manufacturers,<sup>42</sup> began a counteroffensive designed to portray organized labor as a threat to the American system.<sup>43</sup> The first test of whether the Supreme Court would up-

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sponsored an immigrant domestic worker who was obliged to work for several years with the cost of room and board deducted from her wages in exchange for the sponsorship. See also *infra* note 191.

37. R. BOYER & H. MORAIS, *supra* note 26, at 67 n.1.

38. See *supra* note 28 and accompanying text.

39. Sherman Antitrust Act ch. 647, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1-7 (1982)).

40. R. BOYER & H. MORAIS, *supra* note 26, at 107 n.3. See also F. FRANKFURTER & N. GREENE, *supra* note 26, at 231-48 (apps. I & II).

41. R. BOYER & H. MORAIS, *supra* note 26, at 139.

42. The National Association of Manufacturers (NAM) was an organization of employers that played a prominent role in both opposing passage of legislation protecting labor and passing and enforcing (legally or otherwise) legislation against labor.

43. R. BOYER & H. MORAIS, *supra* note 26, at 140. NAM's official publication declared on December 1, 1904, that "[s]ince there is no economic difference between the shorter work day and the proposition to divide up all property and start all over again, the sentimentalists and meddlers all array themselves, whether they mean it or not, on the

hold application of the Sherman Antitrust Act against labor came in 1908. The case, *Loewe v. Lawlor*,<sup>44</sup> involved a national boycott organized against a hat manufacturer in an effort to force it to recognize the union. The court declared the Union Hatters of North America and the American Federation of Labor to be an illegal combination, and fined them what was then the staggering sum of \$234,000 for their activity.<sup>45</sup>

Six years later, the Clayton Antitrust Act of 1914<sup>46</sup> was passed as a revision of the Sherman Act. It was supposed to have protected labor from the injunctive reach of its predecessor.<sup>47</sup> Article 20 seemed to prohibit the enjoining of picketing, primary and secondary boycotts, assembly and other common forms of labor association.<sup>48</sup> In the first application of the new law by the Supreme Court, however, the Court read the Act to protect only legitimate aims of labor organizations and found that the secondary boycott fell outside of this protection.<sup>49</sup> It was not until 1932, with the passage of the Norris-LaGuardia Act,<sup>50</sup> that a specific anti-injunction policy was declared towards labor.

To defend the right to organize pre-NLRA, in the face of court decisions restrictive of that right, labor attempted to invoke the protection of the free speech and assembly guarantees of the first and fourteenth amendments. At least one labor or-

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side of the collectivists." *Id.*

44. 208 U.S. 274 (1908).

45. *Id.* See R. BOYER & H. MORAIS, *supra* note 26, at 140; See also F. FRANKFURTER & N. GREENE, *supra* note 26, at 215 (discussing the concept of illegal "combination of laborers").

46. Clayton Act, ch. 323, § 7, 38 Stat. 730, 731-32 (1914) (current version at 15 U.S.C. § 18 (1982)).

47. Section 6 of the Clayton Act included a declaration that "the labor of a human being is not a commodity or article of commerce." See F. FRANKFURTER & N. GREENE, *supra* note 26, at 142-43.

48. R. BOYER & H. MORAIS, *supra* note 26, at 181 n.7.

49. Duplex Printing Press Co. v. Deering, 254 U.S. 443, 469 (1921). Compare this decision with New York State's position on use of the secondary boycott as described in F. FRANKFURTER & N. GREENE, *supra* note 26, at 44.

50. 29 U.S.C. §§ 101-115 (1932). Frankfurter's and Greene's book, written shortly before the passage of the Norris-LaGuardia Anti-Injunction Act, was written partially as justification for that legislation. It should also be noted that under current law, "Norris-LaGuardia" protects unions and other labor associations from injunction only when the injunctions are sought outside of the auspices of the NLRA, "Taft-Hartley," and "Landrum-Griffin."

ganization, the Industrial Workers of the World (IWW),<sup>51</sup> consciously avoided narrow trade union demands and instead built a "one-big-union" platform. IWW organizers concentrated largely on unskilled and immigrant labor. Their free speech stand was based partially on a conscious choice to broaden their base to include the unemployed and others generally excluded from traditional unions, and partially on necessity. The practical and legal obstacles they encountered in their attempts to organize at the worksite<sup>52</sup> forced them to make their appeals on street corners as they moved from town to town to avoid arrest.<sup>53</sup> IWW organizers were jailed on charges ranging from loitering and disturbing the peace to "criminal syndicalism" or "incitement to riot." These charges were based on statutes that were in some cases passed specifically with the IWW them in mind.<sup>54</sup> Though their efforts did in fact broaden the base of union membership, the IWW itself ended up spending much of its energy and resources on lengthy defense trials attempting to get its leadership out of prison.<sup>55</sup>

The backbone of IWW and many of the unions in the early years of the 20th century was the large mass of immigrant laborers that had come to the United States for economic betterment. During World War I, the IWW took the position that its members should not participate in a war called by the "master class,"<sup>56</sup> that in effect pitted workers from one country against

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51. See P. BRISSENDEN, *THE I.W.W. - A STUDY IN AMERICAN SYNDICALISM* (1920).

52. Generally, these included trespass charges as well as the firing of workers who were caught talking to organizers. Where workers were migratory, the problems were compounded.

53. R. BOYER & H. MORAIS, *supra* note 26, at 173, 198.

54. For example, Justice Brandeis, in his concurring opinion in *Whitney v. California*, 274 U.S. 357 (1927), upholding a conviction under the California Criminal Syndicalism statute, noted that the Act did not appear to violate the fourteenth amendment since the California legislature, in passing the Act, based it on the "existence of a conspiracy, on the part of members of the International Workers of the World [sic], to commit present serious crimes."

55. By the end of February, 1918, 2000 Wobblies were in jail awaiting trial. R. BOYER & H. MORAIS, *supra* note 26, at 198. Most of these were convicted. In *Fiske v. Kansas*, 274 U.S. 380 (1927), an IWW organizer had been convicted in state court for soliciting new members for the organization. Even though the conviction was eventually overturned by the Supreme Court, several years and much-needed union funds had already been dedicated to the effort.

56. In a speech in support of Bill Haywood and other Wobbly leaders who were then in jail for their anti-war activities, Eugene Debs stated: "The master class has always

workers from another. This was particularly appealing to workers that had, in many cases, just come from Europe themselves. This campaign added the dimension of political struggle to that of economic that the IWW had been leading, and gave employers another avenue through which to attack labor: anti-sedition laws.<sup>57</sup> For an anti-war speech made at an IWW rally in Chicago, Eugene Debs, veteran leader of the Pullman strike of 1894,<sup>58</sup> was convicted in 1918 of ten different violations of the 1917 Espionage Act.<sup>59</sup> He was sentenced to ten years in prison.<sup>60</sup> The Attorney General who spearheaded the prosecution was Mitchell Palmer, a businessman on the boards of several banks and utility companies. He closely coordinated the running of the Justice Department with colleagues of his in the National Association of Manufacturers who would report "suspected" seditious activity to him. The Justice Department would then issue warrants for deportation.<sup>61</sup>

This coordination culminated in the "Palmer Raids" of January 2, 1920.<sup>62</sup> In one night, over 10,000 U.S. workers, both aliens and citizens, most of them trade union members and some of them trade union officials, were hauled from their beds, drag-

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declared the war; the subject class has always fought the battles." R. BOYER & H. MORAIS, *supra* note 26, at 200.

57. Laws against "sedition" and "seditious libel" in general (i.e., the prohibition against criticism of the Government, its laws or institutions) had been declared unconstitutional in the U.S. since the 18th century. G. GUNTHER, *supra* note 33, at 975. However, Congress used its powers under the emergency and war powers principle to pass the Espionage Act of 1917 which made it illegal to willfully cause or attempt to cause insubordination or to interfere with enlistment in the military. Under this law, no actual interference or advocacy of any unlawful acts was required. *Id.* at 986 n.3.

58. See generally F. FRANKFURTER & N. GREENE, *supra* note 26, at 17-19.

59. *Debs v. United States*, 249 U.S. 211 (1919).

60. In 1920, while Debs was serving this sentence, he ran in the presidential election and received over 900,000 votes (3.4% of the total). G. GUNTHER, *supra* note 33, at 989 n.1.

61. According to one federal official at the time, the process worked as follows:

[T]hese corporations are loaded up with what they call 'undercover' men who must earn their salaries. They go around and get into organizations and report the cases to the detectives for the larger companies. These detectives in turn report to the chiefs of police. . . generally. . . placed there by the corporations. The corporation orders an organization raided by the police department, the members are taken in, thrown into the police station, and the Department of Justice is notified.

R. BOYER & H. MORAIS, *supra* note 26, at 214.

62. *Id.* at 212-14.

ged out of meetings, grabbed on the streets and thrown into jail to await deportation proceedings. Of these, 6500 were later released without any charges at all. In 1924, J. Edgar Hoover, who had been Palmer's assistant during the raid and who was then acting director of the FBI, virtually admitted that what was done during the massive raid was not according to existing law.<sup>63</sup> The chilling effect that this had on labor organization, however, can be seen from the fact that between 1920 and 1923, membership in the American Federation of Labor dropped from over four million to under three million.<sup>64</sup>

### III. FEDERAL INTERVENTION IN LABOR RELATIONS

It took the extreme social, economic and political unrest of the thirties before labor legislation on a federal level was seriously considered. There are two possible explanations for this policy reversal. First, it can be said that conditions so drastically worsened that employers and legislators were forced to reconsider the existing policy on humanitarian grounds.<sup>65</sup> Alternatively, it was clear to some that in order to preserve stability, it had become essential to have some kind of "handle" on labor; to prescribe what would be considered "acceptable" and what would be "out of bounds."<sup>66</sup> Without any official grant of status, an existential labor movement had already proven itself capable of "interfering with the flow of commerce" in order to secure its demands.<sup>67</sup> Government "recognition" of the labor movement could only help to bring it within the scope of legislative con-

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63. *Id.* at 214 n.13.

64. *Id.* at 209.

65. This was certainly true of some of the proponents of federal labor legislation. *See, e.g.,* R. STEINBERG, *supra* note 5, at 5.

66. *Id.* at 13-14, Steinberg explains: "Sometimes, in order to maintain the fundamental features of the system, political elites will make concessions to the working class. Indeed, sociologist Fred Block and others contend, and I agree, that pressures for political reforms initiated by subordinate interest groups have been one of the most important stimulants to the expansion of the state."

67. In *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 31-32 (1937), the Court, in upholding the newly passed NLRA, stated:

[T]he grant of authority to the Board does not purport to extend to the relationship between all industrial employees and [employers]. It purports to reach only what may be deemed to burden or obstruct [interstate or foreign] commerce. . . . [I]t is the effect upon commerce, not the source of the injury, which is the criterion.

trol.<sup>68</sup> This latter purpose had been expressed as early as 1886, several years before then-president Grover Cleveland invoked the Sherman Antitrust Act against labor in the Pullman Strike.<sup>69</sup> In a presidential speech, Cleveland outlined a proposal for a federal apparatus to govern labor relations "before conditions worsened."<sup>70</sup> His proposal to set up an intervening governmental agency that would stand between labor and capital was not, however, to come about for fifty more bloody years.

It is probable that both benevolence and fear of the alternatives played some role in passage of the first federal labor laws. Only the latter, however, explains the exclusion of the large categories of workers most in need and least able to protect themselves. The original law submitted to Congress by Franklin Roosevelt was the National Industrial Recovery Act of 1933.<sup>71</sup> It covered workers in key industries by establishing industry boards composed of private representatives of business and labor. These boards would draft codes of "self-regulation" that would then take on the force of law.<sup>72</sup> It is axiomatic that labor's interests could only be effectively protected through these codes if the particular industry in question was already organized.<sup>73</sup> The NIRA was, however, declared unconstitutional both because it improperly delegated legislative power to private parties and because it was believed that Congress lacked the power to im-

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68. Ratner, *supra* note 25, at 304.

In terms of the actual historical experience of their short-run self interest, such innovations are seen by employers as restrictions on contractual liberty and by workers as protecting labor's welfare. [But] viewed more recently in terms of the long-run interests of these two classes, these reforms are cast as innovations that help to rationalize and sustain a social order objectively in the interests of the employers.

*Id.*

69. See *supra* text accompanying note 58.

70. DiBacco, *A Century of Federal Labor Law*, *Christian Science Monitor*, Apr. 14, 1986, at 16. "[T]he risk of a loss of popular support and sympathy resulting from a refusal to submit to so peaceful an instrumentality would constrain both parties to such disputes to invoke its interference and abide by its decisions." *Id.*

71. National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933). See G. GUNTHER, *supra* note 33, at 123.

72. *Id.*

73. An amorphous body of workers without political leadership or effective voice could not be represented on these boards, even if boards were established in these unorganized industries. As summarized by Ratner in his article: "Power begets reform; organization begets power." Ratner, *supra* note 25, at 306.

pose such regulation.<sup>74</sup>

The NIRA was followed in 1935 by the National Labor Relations (Wagner) Act.<sup>75</sup> This Act established an administrative agency empowered to regulate transactions between labor and management for the avowed purpose of insuring that these transactions were peaceful,<sup>76</sup> and equalizing what was widely recognized to be an unequal bargaining position between labor and management.<sup>77</sup> Employers were required to recognize and bargain with representatives of "employees" that had been "certified" by the National Labor Relations Board (NLRB). The Act defined who would and would not be considered an "employee."<sup>78</sup> Discretion to decide whether a workforce was covered by the Act, whether a particular group was an "appropriate bargaining unit," or whether a particular representative would be "certified," lay with the Board.<sup>79</sup> On the one hand, this made the job of the union easier. It no longer had to both organize the workers and fight the employer for recognition before it could even get to the bargaining table over wages and working conditions. As long as it was able to produce authorization cards from a specified number of appropriate employees, it could simply pe-

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74. *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

75. 29 U.S.C. §§ 151-168 (1982).

76. As stated by the Court in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42 (1937):

Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace. . . . This is such an outstanding fact in the history of labor disturbances that it is a proper subject of judicial notice and requires no citation of instances.

77. Section 1 of the Findings and Policies of the NLRA describes the "inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership associations." 29 U.S.C. §§ 151-168.

78. 29 U.S.C. § 152(3) reads:

The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter states otherwise but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of independent contractor, or any individual employed as a supervisor, or by any other person who is not an employer as herein defined.

Per § 152(2), "employer" excludes, *inter alia*, the U.S. government or any wholly owned Government corporation, or any State or political subdivision.

79. See generally 29 U.S.C. § 159.

tition for an election and be granted recognition. Theoretically at least, it was only then that the fight with the employer would begin, under the watchful eye of the NLRB.

There were, however, drawbacks to this process as well. Recognition that could be so easily won could now be just as easily taken away through decertification.<sup>80</sup> The limitation on who could be included in a particular bargaining unit resulted, for example, in the exclusion of some part-time or temporary workers or those in related but distinct units who would previously have been able to add their numerical strength to the unit's bargaining position.<sup>81</sup> Finally, a major "by-product" of this federal legislation was the creation of a segregated category of worker that was "unrecognized." While the Wagner Act was considered by both its supporters and opponents to be "pro-labor," it was, in reality, pro only a for small segment of labor. Not suprisingly, the law "recognized" only the segment that had already achieved a not insignificant degree of recognition on its own.

Ostensibly, the explanation for the exclusion of certain categories of workers from the labor laws is that, constitutionally, federal authority to regulate labor relations only extended to those categories engaged in labor "affecting commerce."<sup>82</sup> This might justify the Act's specific exclusion of those workers "in the domestic service of any person in his home."<sup>83</sup> It may also rationally apply to those employed by state and local governments.<sup>84</sup> It is difficult to see, however, how Congress could use

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80. Decertification elections to end union representation have increased more than threefold since 1970, with unions ousted three times out of four. Of the 301 decertification elections certified by the NLRB in 1970, unions won in only 91. In 1983, there were 922 decertification elections, with unions winning only 232. BNA REPORT, *supra* note 4, at 8.

81. See, e.g., *Justak Bros. v. NLRB*, 664 F.2d 1074, 1079-80 (7th Cir. 1981); *Cardo v. Lakeland School Dist.*, 592 F. Supp. 765 (1984).

82. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 31 (1937).

83. 29 U.S.C. § 152(3). Compare *Marshall v. Cordero*, 508 F. Supp. 324 (D.C.P.R. 1981) (the court rationalized the 1974 amendment to the Fair Labor Standards Act, 88 Stat. 55 (1974), 29 U.S.C. §§ 202-208, 210, 212-214, 216, 255, 260, 621 note, 630, 633a, 634, which included domestic workers for the first time).

84. 29 U.S.C. § 152(2). The "political subdivision" exclusion has, in addition to commerce clause limitations, invoked tenth and eleventh amendment concerns. See, e.g., *NLRB v. Austin Dev. Center*, 606 F.2d 785 (1979), where a private non-profit agency under contract with a city claimed the "political subdivision" exception in arguing that its employees should not be recognized.



this constitutional limitation on its powers to justify the exclusion of agricultural workers, whose effect on commerce had been recognized in various other Congressional enactments as well as in case law.<sup>85</sup>

A more practical explanation for the categorical exclusion of these groups of workers from federal law lies in the fact that at the time of the passage of the laws, these workers had not in fact been organized. The nature of their employment made workplace organizing more difficult, if not impossible. This in turn made traditional union methods of membership recruitment ineffective.<sup>86</sup> Traditional methods of enforcement of union demands were likewise unavailable based on, for example, the infeasibility of effectively picketing a field or private home.<sup>87</sup> It was not, in fact, until many years after NLRA that some of these unrecognized workers were able to make any headway in their organizing efforts. What success they did have came largely through use of tactics such as secondary boycotts, which had already been outlawed for use by "recognized" workers with the passage of the Taft-Hartley amendments to the NLRA.<sup>88</sup> At the time of their exclusion from the NLRA, these unrecognized workers, unlike their industrial counterparts, had not been able to exert effective organizational force on their own. Therefore

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85. Compare the exclusion of farm workers from NLRA protection on commerce clause grounds to the Supreme Court's rationale in upholding penalties imposed, pursuant to the Agricultural Adjustment Act of 1938, ch. 30, 52 Stat. 31, as amended, 7 U.S.C. §§ 1281-1393, on a farmer's excess wheat harvest. *Wickard v. Filburn*, 317 U.S. 111, 125 (1942) (the Court reasoned that, although the controversy was based on a small farmer's harvest of excess wheat for his own use, the activity could "be reached by Congress [because] it exerts a substantial economic effect on interstate commerce").

86. For domestics, the fact that the "employer" was generally employing a single individual, and the workplace was a private home, made it infeasible to attempt traditional labor association since even if other workers could be found, each faced an individual employer and unique conditions. See *infra* text accompanying notes 169-73. For farm workers, the transitory nature of the work, the fact that the employer controlled not only the worksite but the home as well in many cases, and the fact that the work was generally seasonal, all added to the difficulties in building a membership base.

87. In *Annenberg v. Southern California District Council of Laborers*, 113 Cal. Rptr. 519, 38 Cal. App. 3d 637 (1974), a California court upheld the right of domestic servants engaged in a labor dispute to picket the home, but put special restrictions on when and where the picketing could occur in light of the employer's right to privacy. The workers eventually lost their recognition bid and were replaced.

88. When these unrecognized workers did prove effective in their attempts to organize and to engage in "concerted labor action," the tactics they could most effectively use given their situation were outlawed. See, e.g., *infra* text accompanying notes 222-23.

coverage under the law was not necessary to quell unrest, i.e., to stop "unfettered" exercise of organizational strength. It was also not politically expedient to include these workers. They were not an organized political voice, while in many cases their employers were. Their exclusion then was in spite of the fact that it was precisely these categories of workers who were most in need of "protection."

This is consistent with the postulation by Marx and Engels, in their analysis of the dynamics of labor's relation to capital, that "all change in regard to the labor market is an outgrowth of class-based conflict,"<sup>89</sup> as opposed to humanitarian concern.<sup>90</sup> In effect, this means that the fact that an objective need exists is

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89. See generally Ratner, *supra* note 25, at 306-307. Marx explains that every historical "epoch" has two primary classes; the one that controls the means of production and the one that produces. In slavery (when the economy was based primarily upon individually owned farms), the classes were the masters and the slaves, and as long as the "mode" of production was sufficient to produce enough to maintain both classes, they co-existed in relative peace. When production on individual farms began to be insufficient based both on an increase in population and the need for some larger form of social protection from hostile outsiders, feudalism developed, bringing with it the development of the centralized "feudal estate" as the mode of production (or "sub-structure"), and introducing the serf as the primary producer. (Additional sub-classes also existed, such as knights, clergy, etc., but these did not play a primary role in the economic system. They were part of what Marx labels the "superstructure.") The feudal economy combined an agricultural base with the beginnings of other types of production. Artisans and other small producers formed the beginning of the "bourgeoisie," a class that was to expand and develop into larger more centralized industries. As technology advanced, this "bourgeoisie" began to produce in larger quantities and to centralize into factories and cities, and the agricultural production began to be secondary to this. Feudalism, (and small artisan production), was no longer sufficient to support the population that itself was increasingly removed from its land base, and relied on the production of others to survive. This was the beginning of "capitalism." Marx maintains that history progresses not because of the existence of great men or ideas, but primarily because of economic struggle to increase production and to provide more efficiently for man's basic needs, as those needs increase. *Id.*

90. In the preface to *CRITIQUE OF POLITICAL ECONOMY* (1859), Marx further explains his materialist conception of the development of laws and other changes in the political and social relationships (superstructure) of a society:

The mode of production of material life determines the social, political and intellectual life process in general. It is not the consciousness of men that determines their existence, but rather it is their social existence that determines their consciousness.

At a certain stage of their development, the material forces of production in society come into conflict with the existing relations of production or—what is but a legal expression of the same thing—with the property relations within which they have been at work before . . . With the change of the economic foundation, the entire immense superstructure is . . . transformed.

insufficient to cause the passage of social legislation. Extension of "legal" protection would seem to require a pre-existing organized constituency that could "translate demands for legal rights into effective political action."<sup>91</sup> The history of efforts by farm and domestic workers to improve their conditions would seem to bear this out.

It was not only unrecognized workers that were harmed by the labor laws; the effect of these laws on the workers they "recognized" has not been completely beneficent. One of the main strengths of organized labor pre-NLRA was the fact that it relied heavily on "labor solidarity," the ability to broaden the struggle of a particular group of workers through enlisting the support of others in the community sympathetic to their plight. The general strike of San Francisco in May of 1934, one year before the passage of the NLRA, was a dramatic example of this strength.<sup>92</sup> This massive strike which lasted through July of 1934, virtually shut down the city and involved not only other unions, but thousands of sympathizers who were not themselves in unions. While this "solidarity" was not directly restricted by provisions of the NLRA until nearly thirteen years later,<sup>93</sup> an indirect effect of the 1935 Act was to create a disincentive for unions to extend their organizing efforts beyond those workers covered by the Act. Unions no longer needed wide public support to win the right to bargain with employers.<sup>94</sup> The federal election machinery was a shortcut that allowed them to bypass this former source of organizational strength. Additionally, there was an incentive to concentrate membership enrollment on those workers who were covered by the Act, since recognition for these workers could be obtained through federal intervention at

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91. Ratner, *supra* note 25, at 307.

92. For a description of the effect of the coordination of all unions in the city to virtually shut down business until their demands were met, see R. BOYER & H. MORAIS, *supra* note 26, at 282-89.

93. In 1947, the Taft-Hartley Act, ch. 120, 61 Stat. 136 (1947) (current version at 29 U.S.C. §§ 141-187 (1982)), amendments to the NLRA explicitly prohibited such manifestations of labor solidarity as the secondary boycott and hot cargo agreements. See *supra* note 101.

94. Where previously a union would have to force an employer to recognize it, often requiring long strikes or other demonstrations of ability to apply political or economic pressure (both of which often entailed solicitation of outside help), the union could now obtain the same results through a petition to the NLRB. The only thing that was required was sufficient membership authorizations from the designated workforce.

a much lower cost in organization resources.<sup>95</sup>

In effect, passage of the NLRA made it advantageous in the short run for labor to narrow its sights, and consequently its potential base. In the long run, this has the potential to be a "fatal flaw" to organized labor itself, as the gap between the wages and conditions of organized and unorganized workers has made the latter an ever present source of "scab labor."<sup>96</sup>

Once organized labor's efforts were focused towards and dependent upon the use of governmental apparatus, the "tightening" of the apparatus and the restrictions it placed on labor's activities were a foreseeable "next step." In 1947, the Taft-Hartley amendments to the NLRA were passed in a cold-war atmosphere where labor was once again being depicted as an anti-American force.<sup>97</sup> 4,600,000 workers had gone out on strike in 1946, dissatisfied with returning from World War II to wage freezes and unemployment.<sup>98</sup> The stated purpose of Taft-Hartley was to make labor laws "two-sided"<sup>99</sup> through outlawing many of the activities that had been used by labor historically to win the "protection" of the laws in the first place.

Section 158 of the NLRA was amended to provide for injunctive relief against unions for violations of government-imposed sixty day cooling-off periods during which strikes could be prohibited.<sup>100</sup> Mass picketing, secondary boycotts, hot cargo agreements and contributions by unions to political campaigns were also outlawed.<sup>101</sup> In addition, recognition strikes were pro-

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95. While this might have been true initially, and in fact accounted for a great upsurge in union activity immediately following passage of the NLRA, unions today are finding it increasingly expensive to wage a successful election. Management employs various strategies in countering union efforts. Unions have had not only to meet these strategic counteroffensives, but to go back to some of the traditional union practices of seeking public support for their demands. See BNA REPORT, *supra* note 4, at 4-5.

96. See *supra* note 19.

97. R. BOYER & H. MORAIS, *supra* note 26, at 343.

98. *Id.* at 344.

99. Historical Note to the 1947 Amendment describes the purpose of the amendment as to "restate the declaration of policy and make the finding and policy of this subchapter 'two-sided.'" 29 U.S.C. § 151.

100. It was through this provision that the government enjoined the recent Long Island Railroad Strike.

101. Secondary boycotts are conducted for the purpose of coercing or influencing customers, patrons or suppliers to withdraw their business relations from an employer that is under attack by a union. It can also involve refusal to work for, purchase from or handle products of a secondary employer with whom a union has no dispute, for the

scribed except where the union was already certified by the NLRB.<sup>102</sup> Employers could seek both injunctive relief and damages for these activities. This, in effect, affirmatively rescinded the protection of the 1932 Norris-LaGuardia Act's prohibition against injunctions directed at labor activities,<sup>103</sup> and reinstated federal judicial jurisdiction.

Taft-Hartley signaled the beginning of another "red-baiting"<sup>104</sup> campaign. It was soon followed by passage of the McCarr-

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purpose of forcing him to stop doing business with the primary employer. BLACK'S LAW DICTIONARY 1212 (5th ed. 1979). A hot cargo agreement is a voluntary agreement between a union and a neutral employer whereby the latter agrees to exert pressure on another employer with whom the union has a dispute. *Id.* at 665.

102. 29 U.S.C. § 158(b)(7). It would, however, seem that if the NLRB "certified" a union to bargain, it would be unnecessary to strike. This has not been the case in practice.

103. This was true at least as applied to workers "covered" by the NLRA. In *Corporate Printing Co. v. N.Y. Typographical Union*, 555 F.2d 18 (1977), the court ruled that managerial workers excluded from NLRA were still protected by Norris-LaGuardia. It said that while the employer could discharge or refuse to bargain with the employees without committing an NLRA "unfair labor practice," he could not get a court injunction if the union's activities constituted a "labor dispute." It is, however, less clear whether Norris-LaGuardia's protection extends to "concerted actions" such as secondary (or even primary) boycotts conducted by independent contractors. The Sherman Antitrust Act has recently been invoked against a group of physicians in Arizona who were attempting to boycott participation in a Blue Cross "preferred provider organization" (PPO), based on their dissatisfaction with terms of the contracts that Blue Cross was asking them to sign. *See Arizona v. Maricopa County Medical Soc'y*, N. Y. Times, Mar. 10, 1984, § 4, at 3. Additionally, the status of workers who are considered to be covered by NLRB jurisdiction but are denied certification by the NLRB is still unclear. In the case of medical "housestaff" attempting to win recognition to bargain with non-profit hospitals, a court, in *Physicians Housestaff v. Murphy* 642 F.2d 492 (D.C. Cir. 1978) refused to review an NLRB decision that housestaff were primarily students and thus not eligible as "employees under the Act" to be recognized. In an NLRB decision entitled *Cedars-Sinai Medical Center*, 223 NLRB 57 (1976), the NLRB asserted jurisdiction over the workplace (since non-profit hospitals had been recently included in the NLRA's definition of "employer") but refused certification. When the organization, the Committee of Interns and Residents (CIR), then applied to the New York State Public Employees Relation Board (PERB), PERB found them to be employees under New York State law and certified them. The hospital obtained an injunction against CIR and PERB on the grounds that the NLRB decision was "pre-emptive." *NLRB v. Committee of Interns & Residents*, 566 F.2d 810 (2d Cir. 1977). The NLRB has consistently refused to grant recognition to these workers, yet the courts have likewise denied them the ability to seek other means of recognition. (It was alleged in a 1980 housestaff case that these workers earn approximately \$10,000 a year for a 70-100 hour week, or \$1.92-\$2.74 per hour. However, as "professional" employees, they are exempted from federal minimum wage and maximum hour laws.)

104. "The practice of denouncing groups or individuals as communist or sympathetic to communism, often with little evidence." FUNK & WAGNALLS STANDARD COLLEGE DIC-

ran Internal Security Act of 1950.<sup>105</sup> Under the latter, officers of "non-communist organizations" which had, in the opinion of the Subversive Activity Control Board, "parallel aims" to those of the Communist Party, had to register as leaders of "communist fronts." Failure to do so was punishable by a prison term. The fear of falling within the vague definition of communist fronts led many within the labor movement to call for the expulsion of some of their own leaders who had reputations for labor militancy.<sup>106</sup> The Internal Security Act was succeeded in 1952 by the McCarran-Walters Immigration Act which required some three million non-citizens to carry registration cards. Additionally, some eleven million naturalized citizens were threatened with denaturalization and deportation if they were found to be subversive.<sup>107</sup>

Towards the end of what is known as the "McCarthy era,"<sup>108</sup> the final major addition to the NLRA was passed in the form of the National Labor-Management Reporting and Disclosure Act (NLRDA).<sup>109</sup> Unlike previous amendments to federal labor law such as Taft-Hartley, this Act does not limit its reach to organizations of workers who are covered by NLRA.<sup>110</sup> It requires the registering of all labor associations, the bonding of union "employees,"<sup>111</sup> and the submission of extensive financial reports which must include sources of contributions.<sup>112</sup> Whether or not a particular labor association is entitled to or seeks fed-

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TIONARY 1127 (1968).

105. ch. 447, 56 Stat. 390 (1942), 50 U.S.C. §§ 781-835, (1982).

106. R. BOYER & H. MORAIS, *supra* note 26, at 368-69.

107. *Id.* A Transport Workers Union official was negotiating a strike settlement for Long Island bus drivers when immigration agents arrested him at the bargaining table and held him at Ellis Island for deportation to Canada.

108. "McCarthyism" is defined as "[t]he practice of making public and sensational accusations of disloyalty or corruption, usually with little or no proof or with doubtful evidence." FUNK & WAGNALLS, *supra* note 104, at 838. It is thus unnecessary to obtain objective legal conviction or even charges, as the desired effect is in public reaction. For additional discussion of the effect of this phenomenon on labor, see R. BOYER & H. MORAIS, *supra* note 26, at 373-78.

109. Ch. 120, 61 Stat. 136 (1947) (current version at 29 U.S.C. §§ 401-402, 411-415, 431-441, 461-466, 481-483, 501-504, 521-531 (1982)).

110. 29 U.S.C. § 402(i),(j).

111. 29 U.S.C. § 432.

112. 29 U.S.C. § 431. Compare NAACP v. Alabama, 357 U.S. 449 (1958), where local officials were considered to have "chilled" first amendment rights of freedom of association by requiring disclosure of membership and contribution lists of the local NAACP.

eral recognition or engages in other NLRA-covered activities, any organization that exists "for the purpose, in whole or in part, of dealing with employers" can be enjoined from activities under this Act.<sup>113</sup>

#### IV. FEDERAL WAGE AND HOUR STANDARDS

In addition to the above laws governing unions themselves and the employer-employee relationship, the other major field of federal labor legislation is the "protective" laws which regulate things like minimum wage, maximum hours, equal pay and occupational health and safety standards. The primary law in this field, the Fair Labor Standards Act of 1938,<sup>114</sup> was passed after previous attempts to set such standards had been held unconstitutional.<sup>115</sup>

The FLSA set minimum wage and maximum hours for workers "engaged in commerce or in production of goods for commerce."<sup>116</sup> It excluded all others, and when originally passed, specifically excluded all agricultural workers, domestic workers,

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113. 29 U.S.C. § 402(i). *See, e.g.,* Marshall v. Eastern Farm Workers Ass'n., No. 76 Civ. 167 (E.D.N.Y. Apr., 1979) (use of NLRDA action against a local farm worker association in Suffolk County, New York). There has also been a recent proposal by the President's Commission on Organized Crime that unions that are found to be "corrupt" be put into receivership under direct federal control. N. Y. Times, Mar. 7, 1986, § 1, at 19. (This is somewhat ironic considering the recent extensive prosecution by U.S. Attorney Rudolph Giuliani against corrupt *government* officials under RICO and other anti-corruption statutes.)

114. ch. 676, 52 Stat. 1060 (1938), 29 U.S.C. §§ 201-219 (1982).

115. *See, e.g.,* the Court's treatment of the Child Labor Act, ch. 432, 39 Stat. 675 (1916), in Hammer v. Dagenhart, 247 U.S. 251 (1918). The Act prohibited the interstate shipment of goods produced by child labor and claimed authority to do so under the Commerce Clause of Article I, § 5 of the U.S. Constitution. In holding the Act unconstitutional, the Court said:

In some of the states laws have been passed fixing minimum wages for women, in others the local law regulates the hours of labor of women in various employments. Business done in such States may be at an economic disadvantage when compared with States which have no such regulations; surely this fact does not give Congress the power to deny transportation in interstate commerce to those who carry on business where the hours of labor and rate of compensation for women have not been fixed by a standard in use in other States and approved by Congress.

247 U.S. at 273.

The court subsequently reversed its position on this, and, in United States v. Darby, 312 U.S. 100 (1941), found the Fair Labor Standards Act to be a constitutional exercise of Congress' power to regulate commerce.

116. 29 U.S.C. § 202.

government employees, independent contractors and those employed by small businesses.<sup>117</sup> Unlike the NLRA, the FLSA provided no administrative apparatus through which complaints could be aired.<sup>118</sup> It was geared towards enforcement through the courts, requiring that the individual worker have personal access to legal assistance in order to exercise any rights under the act.<sup>119</sup> While the FLSA has been amended over the years to include agricultural workers,<sup>120</sup> domestic workers,<sup>121</sup> and government employees,<sup>122</sup> there are many additional categories that, though not specifically listed in the Act itself, have been held in court decisions to be outside of its scope.<sup>123</sup>

There are two important points to bear in mind in examining the status of FLSA coverage. First, there is a large gap between black letter coverage and reality. This becomes clear through examination of various efforts by workers to enforce these "rights."<sup>124</sup> Second, a worker who is covered by the minimum wage, working forty hours a week, fifty-two weeks per year,

117. 29 U.S.C. § 203. See also L. WEINER, *supra* note 2, at 8.

118. L. WEINER, *supra* note 2, at 3-4.

119. In a recent report issued jointly by the American Civil Liberties Union and the American Friends Service Committee, National Immigration & Alien Rights Project, *The Hands That Feed Us* (April, 1986) [hereinafter ACLU Report], the authors list lack of access to legal services as one of the main obstacles faced by migrant farm workers in Florida in trying to obtain legal redress under the few laws that cover them. The report, at page 5, states:

When laws protecting farm workers are ignored, alien farm workers . . . have little access to the legal system. Few if any can afford private attorneys. There are only a small number of charitably-funded legal services in the state. Moreover, the LSC (Legal Services Corporation), established by Congress in 1974 to provide legal assistance for the indigent in civil matters, is specifically prohibited from funding representation of undocumented aliens or H-2 workers.

*Id.* at 5.

Even if the specific restriction did not exist, funds for LSC programs have been severely cut in the past seven years under the current administration.

120. L. WEINER, *supra* note 2, at 122. Agricultural workers are only covered under the current law if the employer uses five hundred "man hours" of labor in a calendar quarter. Additionally, until 1978, the minimum wage for farm workers was lower than for other workers. *Id.* at 122-25.

121. *Id.* at 134. See also *infra* note 152.

122. L. WEINER, *supra* note 2, at 104.

123. For example, retail and service workers, *id.* at 125, outside salesmen, *id.* at 113, seasonal workers, *id.* at 112, 130, fishing industry workers, *id.* at 138, students, the handicapped, and those employed in "sheltered workshops." 29 U.S.C. § 214.

124. The discussion that follows outlines some of the realities involved in attempting to enforce the provisions of FLSA and other laws.



is receiving \$6968 annually before taxes. The poverty level for a family of four in the U.S. is \$11,000 a year.<sup>125</sup> In reality, for many workers who are unorganized either through lack of NLRA recognition or simply through lack of an available organizational vehicle, the minimum wage is the *maximum* wage. Further, the vast majority of these workers have no health benefits or any other supplemental protection against the effects of an inadequate wage.<sup>126</sup>

#### V. ATTEMPTS BY UNRECOGNIZED WORKERS TO OBTAIN LEGAL REDRESS

It is deceptive to attempt to understand coverage of these labor laws (i.e., who is and isn't included and to what they're entitled) outside of the history of actual efforts of various categories of workers to exercise their rights under these laws. Public employees, for instance, have traditionally been excluded from labor laws. They have only recently been included under FLSA.<sup>127</sup> Only recently, too, have many states passed laws granting them collective bargaining rights. Even when given limited bargaining rights, all federal and most state and local employees are specifically prohibited from engaging in job actions or other concerted activities.<sup>128</sup> Federal employees are additionally for-

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125. BUREAU OF LABOR STATISTICS (November 1986). (For a single individual, the figure is \$5,360.)

126. Former HEW Secretary Joseph Califano has just proposed that the federal government pass a "minimum health care" law, similar to the minimum wage law. In his testimony before the Senate Labor and Human Resources Committee, Califano estimated that some 37,000,000 workers lack any kind of health insurance, an increase of 37% between 1980 and 1985. Additionally, current Medicaid regulations deny benefits to anyone between the ages of 21 and 65 who is neither disabled for at least twelve months nor suffering from an illness requiring hospitalization, if that person is not also on welfare. In other words, the "working poor" are no longer eligible for Medicaid. *Long Island Farmworker*, Feb., 1987, at 3, col. 1.

127. This inclusion, at first held to be unconstitutional in *National League of Cities v. Usery*, 426 U.S. 833 (1976), was only recently reinstated. See also ILO REPORT, *supra* note 1, at 14, discussing international policies regarding inclusion of public service workers in collective bargaining laws.

128. Civil Service Reform Act, 5 U.S.C. § 7116(b)(7)(A) (1978). Also, under § 7116(b)(7)(B), a union representing federal employees must take affirmative action to prevent or stop a strike by its members. The law was invoked as part of the destruction of the Air Traffic Controller's union (PATCO) after its members went on strike. The union was at first fined, then all air traffic controllers still on strike were fired, and finally the union was stripped of all recognition to bargain for its members. *N. Y. Times*, Aug.

bidden to participate in "political campaigns" by the Hatch Act.<sup>129</sup> According to recent Bureau of Labor Statistics (BLS) figures, there are almost three million federal employees.<sup>130</sup> This figure most likely excludes workers in federal job training programs<sup>131</sup> since, for most other purposes, they are not considered "civil service" employees.

State employees and employees of "political subdivisions" have historically been denied collective bargaining and other legislative protection under federal laws. This exclusion is based both on "federalism" concerns<sup>132</sup> and on the fact that their activities have not been considered to "affect commerce." BLS estimates their number at 13.5 million.<sup>133</sup> Various attempts by these workers to assert a recognition right under the first and fourteenth amendments have been rejected by the courts. In 1972, a federal judge, in *Richmond Educational Association v. Crockford*,<sup>134</sup> held that a refusal by the government to meet with, bargain with or recognize an association of its employees might be found to chill first amendment rights. However, in *Smith v. Arkansas State Highway Employees Local 1315*,<sup>135</sup> the Supreme Court rejected this argument, stating that local and state governments have no constitutional duty to recognize or bargain with their employees absent a self-imposed duty.

While most states now have some form of public employee bargaining mechanism,<sup>136</sup> these generally prohibit any exercise of leverage through "concerted labor action." As an alternative to strikes, these laws typically allow public employee associations, after being "certified" by some form of administrative

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16, 1981, § IV, at 5.

129. Hatch Political Activity Act, ch. 640, 54 Stat. 767 (1940), 5 U.S.C. §§ 1501-1503, 7324-7327 (1982).

130. *Current Labor Statistics*, *supra* note 2, at 80.

131. For example, CETA, Job Corps, etc. *See infra* text accompanying note 278.

132. *See, e.g.*, *National League of Cities v. Usery*, 426 U.S. 833 (1976).

133. *Current Labor Statistics*, *supra* note 2, at 80. As those with respect to federal employees, these figures are dubious at best, particularly in light of evidence that in some cities, more than 10% of the workforce actually performing government tasks are not considered "employees." *See infra* text accompanying notes 292-94.

134. 55 F.R.D. 362 (E.D. Va. 1972).

135. 441 U.S. 463 (1979).

136. *See, e.g.*, New York's Taylor Law, N.Y. CIV. SER. LAW §§ 200-214 (McKinney 1976), and California's Myer-Milius-Brown Act, CAL. GOV'T CODE §§ 3512-3524 (West 1971).

board, to "meet and confer" with government officials.<sup>137</sup> There is generally no recourse if their demands are rejected. In some cases, provision is made for mediation, generally by a government-appointed panel, with the highest legislative body in the locality being required to approve its decision.<sup>138</sup>

Despite a common presumption that government employees are both well paid and well protected by civil service and other regulations,<sup>139</sup> it appears that this may not be universally true. One of the more significant challenges to the 1974 amendments to the FLSA arose in 1976 in a suit by the League of Cities on behalf of various member states and municipalities nationally. In *National League of Cities v. Usery*,<sup>140</sup> the plaintiffs claimed that application of minimum wage and overtime provisions of the FLSA to "political subdivisions" would "intrude on the state's performance of essential government functions."<sup>141</sup> The main contention of the League was that the increased financial burden of paying their employees at the level required by federal standards would cripple them economically. California alone estimated that enforcement of the Act against its cities would increase its budget by between eight and sixteen million dollars.<sup>142</sup>

In ruling that the FLSA amendments in question were unconstitutional, the court reasoned that:

[Though it may] be desirable that the states, just as private employers, comply with these minimum wage requirements. . . [t]he state might wish to employ persons with little or no training, or those who wish to work on a casual basis, or those who for some other reason do not possess minimum employment requirements, and pay them less than the federally prescribed minimum wage.<sup>143</sup>

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137. See, e.g., N.Y. CIV. SER. LAW § 210.

138. See, e.g., New York, N.Y. Collective Bargaining Law §§ 1173-1177.0 (1967).

139. Therefore less in need of leverage available through strikes and other job actions.

140. 426 U.S. 833 (1976).

141. *Id.* at 839.

142. *Id.* at 846.

143. *Id.* at 848. Compare this to the stated policy behind the passage of FLSA originally, i.e., to insure the "maintenance of the minimum standard of living necessary for health, efficiency and general well being of workers." This purpose is not any less relevant if a worker is "untrained," assuming *arguendo* that lack of training is the real rea-

## VI. DOMESTIC WORKERS

It was not just the 13.5 million "civil service" workers that were affected by the *National League of Cities* decision. At the same time, a suit was going through the courts in California challenging the failure of California and various of its counties to pay minimum wage to workers hired under the state's Homemaker-Chore program.<sup>144</sup> This program, which is primarily federally funded, though administered by the states, provides in-home domestic services to aged and disabled recipients of Supplemental Security Income (SSI).<sup>145</sup>

In *Bonnette v. California Health and Welfare Agency*,<sup>146</sup> the plaintiffs, who were workers employed through the Homemaker-Chore Program, claimed that the county and state agencies were joint employers, each exerting control over the wages and conditions of work. They were suing to enforce provisions of FLSA which had just recently been added to include both domestic workers and government employees.<sup>147</sup> While the suit was in progress, *League of Cities* was decided, and the *Bonnette* defendants immediately tried to get the case dismissed. They argued that if the government was found to be the employer,<sup>148</sup>

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son an employer, public or otherwise, would want to avoid paying minimum wage. The same "lack of training" criterion is being advanced to justify the proposal that private employers located in "urban enterprise zones," see *supra* note 18, be allowed to waive payment of minimum wage.

144. Under the Homemaker-Chore Program, one of the services eligible to receive federal reimbursement under Title XX of the Social Security Act, 42 U.S.C. §§ 1397-1397f (1982), states (generally through local county administration) provide in-home domestic help to aged, blind and disabled welfare recipients. Various means are employed for provision of these services, including providing cash grants to the recipients so they can hire their own workers; use of civil service workers to provide the services; and use of a contracted agency or "vender" who employs workers to provide the services authorized by the counties.

145. Supplemental Security Income is a federally mandated program, administered by each state, that provides for supplemental income to aged, blind or disabled individuals whose income is below the federal standard (currently about \$500 per month for a single individual). SSI recipients are automatically eligible for Medicaid and for Title XX services such as in-home care. Many of these recipients are themselves "unrecognized workers" for whom no social security payments were made while they were working, so that they are now reliant on welfare in their old age.

146. 525 F. Supp. 128 (N.D. Cal. 1981), *aff'd*, 704 F.2d 1465 (9th Cir. 1983).

147. See *supra* notes 120-23 and accompanying text.

148. The governments involved (California and various counties) vehemently denied being the employer, claiming instead that the recipients were the employers. There are an estimated 70,000 homemaker-chore workers in California. The state spelled out a

the workers were not entitled to minimum wage under the *League of Cities* holding. If the workers were found to be employed instead by the individual recipients, they might be entitled to minimum wage as domestic workers but in that case, the government claimed, it was not a proper defendant. The court, in granting relief to the plaintiffs, held that the county and state were joint employers with recipients and that, in any case, the *League of Cities* holding was inapplicable since provision of homemaker-chore services was not an "integral function" of government.<sup>149</sup>

*League of Cities* has since been overturned by the Supreme Court in *Garcia v. San Antonio Metropolitan Transit Authority*.<sup>150</sup> Even though government "employees" are now protected by minimum wage, the larger problem of identifying an employer-employee relationship and enforcing any ensuing rights remains. It seems apparent that the government's opposition to the claims of the *Bonnette* plaintiffs was based less on avoidance of the minimum wage payment,<sup>151</sup> than on avoidance of the employer relationship. As can be seen in subsequent cases filed against cities and states nationally over similar "quasi-govern-

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choice of methods for the counties to provide the mandated services, *supra* note 144, after a 1971 IRS ruling in San Diego that these workers were not "independent contractors" as the state had originally tried to claim. At the time of the IRS decision, most counties sent the checks directly to the worker to pay for the services, but denied being the employer. The IRS ruled that under this system, the workers were "county employees" for the purpose of determining payment of social security and other taxes. After this, of the three service delivery methods considered "acceptable" by the state, most counties chose to send the check to the recipient so that the recipient would be the "employer." This removed from the Government all liability for fringe benefits. The recipient, however, had no control over the hours the worker was authorized to work, the pay the worker was to receive, or the tasks that were approved to be performed. There was also no payment of any Workers' Compensation or unemployment benefits, since the county denied being the employer and the recipient had neither the money nor the mechanism to pay. Minimum wage enforcement was equally difficult since, if the pay was inadequate, the recipient had no way of increasing it. An internal memo from San Joaquin County in 1976 estimated that "wages" paid to these workers under the cash grant method ranged from \$.14 to \$2.00 an hour.

149. *Bonnette*, 525 F. Supp. at 138-39. See also *supra* notes 140-43 and accompanying text.

150. 469 U.S. 528 (1985).

151. The amount in question in the *Bonnette* case was less than \$18,500 total, and a state minimum wage law specifically covering both state and local government employees and domestic workers had already been passed by the time the case reached the courts, so future compliance with federal standards was moot. *Bonnette*, 704 F.2d at 1465, 1468.

mental" programs, this question is far from resolved.<sup>152</sup>

Additionally, while the *Garcia* decision has, at least on paper, established the right of government employees to the minimum wage, the "political subdivision" exception remains as far as collective bargaining rights under federal laws are concerned.<sup>153</sup> As stated by the court in *Smith v. Arkansas State Highway Employees Local 1315*,<sup>154</sup> there is neither a constitutional nor statutory duty for state and local governments to bargain, in the absence of a state law. However, even where a state bargaining law is in place, there is no guarantee that a particular category of public employee will be recognized, particularly when the employment relationship is tenuous.<sup>155</sup> Thus, in *Cardo v. Lakeland School Dist.*,<sup>156</sup> the federal district court upheld a state administrative decision<sup>157</sup> excluding per diem teachers from bargaining with the school district. It reasoned that since there was a rational basis for the distinction,<sup>158</sup> there was no reason to conclude that the exclusion violated equal protection as the teachers charged. It went on to state that since collective bargaining was not a "fundamental right," and since "casual" or "temporary" workers were not a "suspect class," strict scrutiny

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152. In *McClune v. Oregon*, 643 F. Supp. 1444 (1986), a similar program in Oregon included regulations allowing payment of \$1.55 an hour under the "companion" exception to the FLSA minimum wage for domestic workers. (Under the 1974 amendments which provided domestic workers with FLSA coverage for the first time, "nursing companions and babysitters" were excepted.) In *McClune*, the court accepted the state's premise that cleaning a disabled recipient, doing his laundry and cooking, making beds, etc., was companionship. Despite finding, as the Bonnette court did, that the state was joint employer with the recipient (and thus a proper defendant), the *McClune* court chose to allow the private household worker exception. There is no such exception for public employees.

153. See 29 U.S.C. § 152(2).

154. 441 U.S. 463 (1979).

155. For example, where the work is temporary or part-time, or the worker is classified as a "trainee." Here the status of the employment relationship is not well defined, and the courts have not always been willing to find the worker an "employee of an employer." See *infra* text accompanying notes 253-94.

156. 592 F. Supp. 765 (1984).

157. The administrative agency involved was PERB (Public Employee Relations Board). See *supra* note 103.

158. The 1981 amendment to New York's Taylor Law gave per diem teachers collective bargaining rights only if they could show that they had received reasonable assurance of continued employment. This would seem to be a circuitous condition in that it would largely be through bargaining that they could receive such assurance.

would not be applied.<sup>159</sup>

In another case involving domestic workers hired through government programs, a petition was filed with New York City's Office of Collective Bargaining (OCB) in 1980 on behalf of workers employed in the city's Attendant Care Program.<sup>160</sup> The goal of the petition, brought jointly by two public employee unions,<sup>161</sup> was to win the right to represent some 15,000 workers hired to care for the city's aged and disabled SSI recipients. A similar petition, filed in 1978, had been rejected on technical grounds.<sup>162</sup> This time, the OCB admitted that the workers were "employees" and not independent contractors as the city had originally claimed. However, now the OCB used the fact that the city had decided in the interim to vendorize services<sup>163</sup> to deny jurisdiction. Citing *Ankh Services Inc.*,<sup>164</sup> the OCB held that the workers were more likely within the jurisdiction of the National Labor Relations Board.<sup>165</sup>

The OCB did note in passing:

[T]he realities of a contractually established rate for City reimbursement of the vendors might limit sharply the scope of negotiations between the vendors and a union of their employees on economic issues such as wages, and consequently that the vendors [might] not be able to meet the standard of ability to engage in meaningful col-

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159. The court admitted that there was a wide disparity of pay, but said that economic position alone did not make the class "suspect." *Cardo*, 592 F. Supp at 771. No federal court has found "poverty" to be a "suspect class" for the purpose of equal protection, absent the presence of a "fundamental right" being threatened. This is despite the obvious discriminatory treatment proffered to those without money. Several state courts (e.g., California's, in *Serrano v. Priest*, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971)) have attempted to apply strict scrutiny to discrimination based on economic status, but on the federal level, in *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973), the Supreme Court ruled otherwise.

160. *District Council 37 v. City of New York*, OCB Decision No. 20-80 (July 17, 1980).

161. *District Council 37* and *Service Employees International Union (SEIU)* are the two main labor organizations representing New York City employees.

162. One of the unions had failed to meet "proof of interest" requirements by producing a sufficient number of signed authorizations. See OCB Decision No. 61-78 (Nov. 30, 1978).

163. On November 15, 1979, the New York City Board of Estimate approved forty-two "purchase of service" contracts with private agencies. OCB Decision No. 20-80, at 7.

164. 243 N.L.R.B. 478 (1979).

165. As "employees of an employer" under NLRA. *Id.*

lective bargaining negotiations.<sup>166</sup>

However, the OCB dismissed this concern by observing that the difference between the contract rate of reimbursement to the vendors (\$4.15 an hour) and the minimum rate required by the city to be paid to the worker (\$3.35 an hour) was "sufficient" to provide room for the vendor to negotiate. The OCB also assured itself that the vendor was free to renegotiate yearly with the city should the union successfully press for more money.<sup>167</sup>

The issue of restriction on a government subcontractor's ability to engage in meaningful negotiations with workers was litigated in California in 1978. In *San Francisco v. California*, one vendor who had a substantial wage and fringe benefit agreement with its employees was chosen by the city to provide services under the Homemaker-Chore Program. The state rejected the city's contract with the vendor on review, stating that it exceeded the limits of allowable costs set by the state, and ordered the city to contract with a vendor paying lower wages. The court upheld the state's decision.<sup>168</sup>

This legal football of whether the government is the employer of these workers continues to be thrown around in courts. The reality is that the governments involved, through use of subcontracting or some other intermediary between them and the workers, have avoided responsibility both to bargain and to pay the workers a living wage and adequate benefits. Attendant care workers fall into the cracks of two major exceptions to the labor laws: government employees and private household workers. They may also be falling into the cracks of official labor statistics. Most government agencies have refused to count them as government employees. The Bureau of Labor Statistics lists only 1,256,000 domestic workers nationally as being employed in

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166. District Council 37 v. City of New York, OCB Decision No. 20-80, at 29. The "standard of ability" test is used by NLRB to determine if a potential employer who is under contract with a government agency will fall under the "political subdivision" exception. If too much control over conditions of work, wages, etc. is exerted by the government agency, the private contractor may be found to fall within this exception. Private nursing homes which are funded primarily through Medicare and Medicaid payments have tried to use this same argument in either refusing to bargain or claiming an inability to meet wage demands. *Ankh Services, Inc.*, 243 N.L.R.B. 478 (1979).

167. The contract also included an 18% ceiling on fringe benefits that could be paid to the worker (about 60 cents an hour).

168. 87 Cal.App.3d 959, 151 Cal. Rptr. 469 (1978).



1986.<sup>169</sup> It is unlikely that the 70,000 attendant care workers in California or the 15,500 workers in New York City's program are included in this figure.<sup>170</sup> It is also common for private employers of domestic workers to fail to report that employment.<sup>171</sup> Even when the employer is the government, it is common that no social security or other deductions are paid, adding further to the dubiousness of their reported numbers.<sup>172</sup> Whatever the actual figure, the fact that these workers are scattered in private homes and often don't come into contact with other workers makes organization difficult, even if "recognition" were available. The focus by the few organizations that have attempted to organize household workers has therefore naturally fallen on the attendant care programs, since there is at least a semblance of an "employer" to whom grievances can be collectively addressed.

It is in this context that an organizing drive was begun in 1973 by the California Homemakers Association (CHA).<sup>173</sup> CHA's membership constituency includes both freelance domestics and workers employed in the county-run Homemaker Chore Program. After an intensive membership drive, CHA presented a demand for recognition to bargain for a contract to the County of Sacramento in 1974.<sup>174</sup> The county's initial response was to deny being the employer of the workers and to declare them to be "independent contractors."<sup>175</sup> However, after a series of con-

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169. *Current Labor Statistics*, *supra* note 2, at 80.

170. For example, despite the fact that 70,000 workers (who are not considered "government employees") are employed as domestics in California's Homemaker-Chore Program, the official California census for 1970 lists the number of domestic workers statewide as 978. See *Gay v. Waiters' and Dairy Lunchmen's Union*, 489 F. Supp. 282, 306 (1980).

171. If an employer pays a particular worker less than \$50 per quarter, he is not required to pay social security. Many freelance domestics who work for several employers fall under this exemption.

172. In California, it was not until six counties were faced with active organizing drives of attendant care workers who were demanding fringe benefits and threatening law suits that the state legislature began directing payment of social security and other required taxes for these workers.

173. California Homemakers Association is an all-volunteer membership association run on a "mutual benefit" principle. Its members include both domestic and attendant care workers and the aged, blind and disabled recipients who receive care in the program. Unemployed workers are also represented.

174. Appellant's Opening Brief at 8, *California Homemaker Ass'n v. County of Sacramento*, No. 3 Civ. 17640 & 18810 (Cal. Ct. App. Jan. 12, 1981).

175. One county official expressed concern that an agreement to negotiate with a representative of "independent contractors" might violate the Sherman Antitrust Act. See

frontations between the workers, the recipients,<sup>176</sup> and the county, the Sacramento Board of Supervisors passed a resolution recognizing CHA as the representative of these "independent contractors" and agreeing to negotiate contracts that would cover the individual workers.<sup>177</sup> In consideration of this, CHA agreed not to file a lawsuit it was preparing which sought a declaration of the employer status.<sup>178</sup> Negotiation sessions were held over a two year period. During this time, the Board members began meeting in closed session to discuss ways of backing out of the agreement. Several months later, the Board unilaterally rescinded the recognition and repudiated any tentative agreements reached during negotiations.<sup>179</sup>

CHA filed suit in state court alleging breach of contract, fraudulent misrepresentation, concealment, and violation of

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*also supra* note 148.

176. CHA's inclusion of the recipients in its membership was based on the fact that contrary to the assertion by the county that the recipients were the employers, and therefore had interests adverse to the workers, the reality of the situation was otherwise.

177. Board of Supervisors of the County of Sacramento, State of California, Res. 74-230, March 11, 1974.

178. The question of whether the county would be found to be the employer was actively being raised in other counties as well. While the Sacramento activities progressed, CHA members in Santa Cruz County filed a complaint with the state Labor Commissioner under California Labor Code §§ 204, 207, 215, 227. They charged in the complaint that the county's payment of monthly checks to the recipients violated, among other things, state law regarding pay periods. Under the Code, "government employees" could be paid on a monthly basis. Private employees (including domestic workers) had to be paid bi-weekly. The complaint stated in the alternative that either the workers were government employees (and thus entitled to social security, fringe benefits, etc.) or they were private domestic workers (and thus entitled to bi-weekly pay). The Labor Commissioner at first tried to discourage pursuit of the complaint on the grounds that if he ruled the workers were employees of the recipients, the recipients would be subjected to fines. When the recipients joined the workers in their complaint, the matter was "taken under consideration." Two months later the Commissioner declared that the county was the employer therefore placing the issue "beyond his jurisdiction." CAL. LAB. CODE §§ 204, 207, 215, 227 (West 1971).

179. CHA became aware of this through a letter sent by one of the Supervisors. In it, he expressed concern that the meetings were in violation of state law requiring all "public business" to be conducted in open meetings. Under California's Brown Act, CAL. LAB. CODE §§ 5450-5461 (West 1971), the only possible exception to this open meeting requirement that would have applied to the county's conduct in this case was for when the Board was meeting to discuss negotiations with "county employees," an exception that the county could not claim here in view of their position on employer status. Appellant's Opening Brief at 50-51, California Homemaker Ass'n v. County of Sacramento, No. 3 Civ. 18810 (Cal. Ct. App. Jan. 12, 1981).

both due process and equal protection. CHA's position was that even in the absence of a statutory right to bargain, promises made by a government body in response to organizing efforts and to use of the "political" process by citizens should be enforceable, with good faith performance by the government required.<sup>180</sup> Additionally, CHA contended that the workers were entitled to due process before the Board resolution and subsequent agreements could be rescinded, since these promises constituted a property right that had accrued.<sup>181</sup> After several years of attempts by the county to have the complaint dismissed for failure to state a claim, the trial court acceded, and decided as a matter of law that the workers had no enforceable rights.<sup>182</sup> The California Court of Appeals, in an opinion stamped "not for publication," upheld the lower court's decision. One of the appellate justices labelled the effort "frivolous," while another stated that the issue was more appropriate for the legislature.<sup>183</sup>

During the course of CHA's fight in California, the state legislature voted to extend the minimum wage to domestic workers,<sup>184</sup> and later specifically included attendant care workers in the state's Workers' Compensation and Unemployment programs (while continuing to claim that they were not the employer). Previously, the only "unemployment" insurance that attendant care workers had was county welfare programs.<sup>185</sup>

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180. If statutory collective bargaining rights were not available, and CHA had not been dealing with the county "qua employer," then it had been dealing with it "qua public official," and, CHA argued, just as high a "good faith" standard should be expected. Appellant's Opening Brief at 52, No. 3 Civ. 18810.

181. CHA claimed their situation was analogous to that of plaintiffs in *Goldberg v. Kelly*, 397 U.S. 254, 262 n.8. (1970), where once a government had conferred a benefit on a recipient, that benefit became a "property right" entitling the recipient to a termination hearing. Appellant's Opening Brief at 16-20, No. 3 Civ. 18810.

182. No. 3 Civ. 17640 & 18810.

183. This was ironic since it had been the local equivalent of "legislature" that had just prevailed in rescinding the promises it had made in the course of CHA's attempt to use the "political process."

184. See *supra* note 151.

185. In a committee report recommending passage of this benefit bill, it was noted that voluntary extension by the state of these benefits was preferable to the alternative of forcing "certain employee groups" representing these workers to press for these benefits through litigation. Previously, the only "unemployment insurance" available to these workers was welfare. In fact, raising the Aid to Families with Dependent Children (AFDC) and General Assistance grant level had been part of CHA's original demands, based on this fact.

## VII. FARMWORKERS

The problems faced by these attendant care workers in asserting their rights under various laws are not dissimilar from those facing another category of unrecognized worker. Farmworkers, like domestic workers, are also handicapped in their efforts to organize, by lack of a centralized workplace or easily identifiable employer. They too have been traditionally excluded both from the laws and existing organizational vehicles. In 1960, Edward R. Murrow portrayed the conditions of migrant farm workers in Florida in *Harvest of Shame*, an award-winning documentary that was televised nationally.<sup>186</sup> Though numerous laws that were meant to "deal with" the problem were passed soon after this exposure,<sup>187</sup> conditions in the fields and migrant camps have not significantly changed since that time.

There are several explanations for this. One is that while much of the public's attention has been focused on the crew chief system as "the problem,"<sup>188</sup> it is only one of many devices employed by large growers and agribusiness to maintain control over farm workers. The crew chief system, much like vendorizing in the homemaker-chore programs, is designed to serve as a buffer between the worker and the true employer. The crew chiefs are generally paid by the owners to procure the needed number of workers. The crew chiefs in turn pay the farm workers after deducting for initial transportation costs and for other goods or services they provide.<sup>189</sup> This creates a debtor-creditor

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186. *Harvest of Shame* (Dec. 4, 1960) was one of the earliest "T.V. documentaries" that popularized this kind of investigative reporting. In commentary following the show, a congressman pledged that he "would not rest" until the conditions had changed. The show was aired again in the 1980s, and commentary at that time was on the fact that things *had not* changed. See, e.g., ACLU REPORT, *supra* note 119, describing current conditions faced by Florida's migrant farm workers. See also Christian Science Monitor, Apr. 11, 1986, at 3. It was immediately after national and international exposure generated by this documentary that several federal farm worker bills were introduced. Murrow and several government officials attempted to prevent it from being aired on the BBC in England, based on the embarrassment it would cause. N. Y. Times, Mar. 23, 1961, at 1.

187. See, e.g., Farm Labor Contractor Registration Act of 1963, 7 U.S.C. § 2041, as amended by 29 U.S.C. § 1801 (1983). When the Act was amended in 1983 it was retitled the Migrant and Seasonal Agricultural Workers Act. In general, "seasonal" farm workers, as distinguished from "migrant" farm workers, are those who live in an area year long but work in agriculture only during the harvest or other applicable season.

188. ACLU REPORT, *supra* note 119, at 48, 57.

189. *Id.* at 48.

relationship which can be used to maintain further control over the worker. This relationship, for example, enables the crew chief or employer to obtain the help of local police who are called on to arrest workers who attempt to leave the camps without paying their debts.<sup>190</sup> In a case filed in Florida in 1980 by hundreds of farm workers on a single camp, the workers claimed that they were forced to continue working for weekly pay checks amounting to five dollars, until the "debt" they had accrued was paid.<sup>191</sup>

While federal law now requires crew chiefs to register their labor camps,<sup>192</sup> this very "protection" can work against the interest of farm workers. For example, in Suffolk County, New York, workers were denied access to federally funded Migrant Health clinics based on the fact that they were living on "unregistered" camps.<sup>193</sup> Related laws governing health standards on the camps are rarely enforced,<sup>194</sup> and where they are, enforcement may mean shutting down the camp altogether by the Health Department, leaving the worker stranded with no housing at all. The fact that the migratory nature of the work makes farm workers dependent on employer-owned housing puts farm workers at another disadvantage not faced by other types of workers. The owner has control not only of the wages and working conditions, but also of the living arrangements.<sup>195</sup> If workers decide to take any action against an employer over the conditions of work, they stand to lose their home. This may explain

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190. *Id.* at 50.

191. See discussion of *Munoz v. Saldivar*, ACLU Report, *supra* note 119, at 50-51. Compare this practice, which is common practice in agricultural employment, to "contract labor," which was supposedly outlawed in the 19th century. See *supra* text accompanying notes 36-37. Additionally, the practice of "debt bondage," a system under which laborers and their families are forced to work for an employer in order to pay off their actually incurred or inherited debts, is a violation of international law since 1930. It is commonly believed to be a problem primarily affecting workers in Southeast Asia. ILO REPORT, *supra* note 1, at 67-70.

192. 29 U.S.C. § 1801.

193. Obviously, the ones that were not registered could be expected to be in the worst condition, with decreased maintenance of health standards. See ACLU REPORT, *supra* note 119, at 4. Farmworkers are 7-26 times more likely to contract parasitic diseases, many of which are spread through unsanitary living conditions. *Id.*

194. *Id.* at 35-39.

195. For a description of the problems faced by workers in "company housing," see F. FRANKFURTER & N. GREENE, *supra* note 26, at 101 n.9 (citing CHAFEE, THE INQUIRING MIND (1928)).

why only 2% of the farm worker population is organized, even where large numbers of them have the "advantage" of being thrown together twenty-four hours a day.<sup>196</sup>

This problem is exemplified by the experience of a group of migrant workers in Suffolk County, employed by the I.M. Young Company. These workers were hired to grade and process potatoes. In December, 1972, workers from two of Young's camps, along with their crew chiefs,<sup>197</sup> obtained the assistance of a local mutual benefits association, Eastern Farm Workers Association (EFWA), in setting up informational picket lines. They were protesting the fact that the company had been deliberately holding back work (and pay) while they waited for the price of potatoes to rise. Four days after the picketing began, the company declared that the camps were closed and enlisted local police in summarily evicting the workers. EFWA obtained a temporary restraining order<sup>198</sup> while it attempted to have the eviction declared illegal under New York landlord-tenant law. The workers claimed they had been paying "rent" in the form of deductions from their paychecks. The New York State Court of Appeals eventually ruled that the workers were "servants" rather than "tenants" under state law, since their housing was an incident of their employment, and therefore they could be legally evicted without a hearing.<sup>199</sup>

EFWA was able to continue the informational picket line since they had built an extensive network of community support that was able to provide alternative housing. This continued until 1976, when, at the request of the company, the U.S. Department of Labor filed suit against EFWA in federal district court.<sup>200</sup> It sought an injunction against the association's activities until EFWA complied with reporting requirements under NLMRDA.<sup>201</sup> Though I.M. Young workers were ineligible under

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196. ACLU REPORT, *supra* note 119, at 4.

197. It is not always the case that the interests of the crew chiefs are adverse to those of the workers. In this case, neither the farm workers nor the crew chiefs were receiving pay while work was being held back, and the crew chiefs incurred debt themselves through laying out their own funds to purchase food for the workers.

198. *Williams v. I.M. Young Co.*, No. 15770 (N.Y. 1972).

199. *Id.* See also *Guerra v. Sprenger*, 20 CLEARINGHOUSE REV. 174 (June 1986).

200. *Marshall v. Eastern Farm Workers Ass'n*, No. 76 Civ. 167 (E.D.N.Y. Apr. 1979).

201. *Id.* See *supra* text accompanying notes 110-13.

NLRA for collective bargaining recognition,<sup>202</sup> and they were "servants" under state landlord-tenant law, the all-volunteer association that assisted them in their fight was being charged with violation of federal labor law. Eventually, a consent order was signed,<sup>203</sup> and the Department of Labor dropped the suit, on the condition that the picket lines were withdrawn.

The use of foreign workers under various federal programs by agricultural employers has also posed an obstacle to the ability of farm workers to improve their conditions.<sup>204</sup> Under the H-2 program,<sup>205</sup> for example, if a foreign worker in this country by virtue of an employer's request to the Department of Labor is fired for any reason, the worker can be deported without a hearing.<sup>206</sup> This clearly serves to discourage these "guest workers" from complaining or joining citizen workers in any protest or job action. For workers in the country without any official "guest worker" status,<sup>207</sup> the threat of action by the Immigration and Naturalization Service (INS) is constant, whether or not the worker is engaged in actions against the employer. If an undocumented worker does file a complaint with the Department of Labor, the Department is required under an agreement with INS to submit the name of the worker to INS.<sup>208</sup>

The INS has not been the only official agency called on to "sweep" farm workers out of the way when it is no longer expedient to have them around. For example, until the New York Court of Appeals ruled it unconstitutional in 1967,<sup>209</sup> New

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202. Since they were "agricultural workers" rather than "employees" under NLRA.

203. The order, signed April of 1979, stated that EFWA was recognized not to be a "labor organization" under NLMRDA, and EFWA agreed, for its part, to notify the Labor Department if it ever decided to "deal with" an employer as described in the Act. *Marshall v. Eastern Farm Workers Ass'n*, No. 76 Civ. 167.

204. See generally, discussion of this problem in ACLU REPORT, *supra* note 119, at 62-66.

205. "H-2" comes from the Immigration and Nationality Act, ch. 477, 66 Stat. 163 (1952) (current version at 8 U.S.C. §§ 1101-1525 (1982)), which provides that workers can be admitted for temporary labor if sufficient unemployed U.S. workers capable of performing the work cannot be found. To qualify, an employer has to receive certification from the Department of Labor that American workers weren't willing and able to perform the jobs and that there will be no "adverse effect" on wages and working conditions. 8 U.S.C. § 1101(a)(15)(4)(ii).

206. ACLU REPORT, *supra* note 119, at 66.

207. That is, "undocumented" or "illegal" aliens.

208. ACLU REPORT, *supra* note 119, at 30 & app. II.

209. *Fenster v. Leary*, 20 N.Y.2d 309, 229 N.E.2d 426, 282 N.Y.S. 2d 739 (1967).

York's vagrancy law was used regularly to keep farm workers off the streets of Long Island's tourist towns during the summers, and to insure that growers could keep workers from leaving under threat of arrest by local police. However, the threat of deportation, used regularly to prevent large numbers of foreign born workers from protesting conditions that are clearly illegal, has the added insidious effect of dividing the agricultural workforce against itself. Through the successful use of these tactics of fear and intimidation against foreign workers, citizen farm workers have been made to view the foreign worker as the enemy.<sup>210</sup>

Existing farm worker organizations have taken divergent views on the issue of whether to include these undocumented workers in their organizational efforts.<sup>211</sup> Cesar Chavez and the United Farm Workers (UFW) have traditionally called for stricter enforcement of immigration laws against the undocumented worker. The Texas Farm Workers Union has, on the other hand, consistently maintained that inclusion of these workers will make their membership stronger. Because farm workers are excluded from NLRB jurisdiction, the Labor Board has never had occasion to rule on whether undocumented farm workers would be included in a bargaining unit of farm workers. The Board did decide such a question recently, however, in an analogous case involving undocumented workers employed in a leather processing plant. In *Sure-Tan, Inc. v. NLRB*, the United States Supreme Court upheld an NLRB decision which included these workers in the bargaining unit, and charged the employer with an unfair labor practice for turning them in to the INS in order to circumvent the Board's order to include them.<sup>212</sup> The court approved the NLRB's reading of the term "any employee"<sup>213</sup> to include undocumented workers, and went on to explain that such inclusion was consistent with the purpose of the National Labor Relations Act in encouraging and protecting the collective bargaining process. It reasoned:

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210. In the immediate sense, this is probably true, since he has the effect of depressing the wages, etc.

211. *Farm Labor Foots the Bill*, Long Island Farmworker, Nov., 1986, at 3.

212. 467 U.S. 883 (1984).

213. 29 U.S.C. § 152(3). ("Any employee" does *not*, however, include farm workers, domestic workers, etc.)



[A]cceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions. . . . If undocumented alien workers were excluded from participation in union activities and from protections against employer intimidation, there would be created a sub-class of workers without a comparable stake in the collective goals of their legally resident co-workers, thereby eroding the unity of all the employees and impeding effective collective bargaining.<sup>214</sup>

It is ironic that the recent passage by Congress of the Simpson-Rodino Immigration Law<sup>215</sup> will undermine the potentially significant effect of the *Sure-Tan* decision. The *Sure-Tan* Court explicitly based its holding on the fact that such inclusion under NLRA did not conflict with the policy of the Immigration and Nationality Act (INA) because "Congress has not adopted provisions in INA making it unlawful for an employer to hire an alien who is present or working in the U.S. without appropriate authorization."<sup>216</sup> Congress, in passing Simpson-Rodino, has now done just that.

The introduction of the crew chief or the undocumented worker has not been the only obstacles placed in the way of farm workers' efforts to deal with an employer. When agribusiness contracts for the product of the farm workers' labor through the intermediary of the small farmer, redress through traditional direct labor action is again foreclosed. A case in point is the recent struggle undertaken by the Farm Labor Organizing Committee (FLOC), an Ohio based organizing drive representing migrants employed in the tomato fields of northwest Ohio. Over 2000 workers sought a contract with Campbell Soup Company in Au-

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214. *Sure-Tan*, 467 U.S. at 892. It would seem that this same argument could be in favor of the inclusion in general of "unrecognized workers," since they have the same "depressing" effect on the U.S. labor force as a whole. However, that question was clearly beyond the scope of the Court's decision in *Sure-Tan*.

215. Immigration Reform & Control (Simpson-Rodino Immigration) Act of 1986, 8 U.S.C. § 1101. For discussion of Simpson-Rodino, see Kesselbrenner, *Challenging Simpson-Rodino*, Guild Notes, Winter, 1987, at 4, col. 1.

216. *Sure-Tan*, 467 U.S. at 892-93. See *supra* note 205.

gust, 1978.<sup>217</sup> The workers, employed in the fields of individual farmers who held contracts with Campbell, were paid at piece rates amounting to an estimated \$1.96 per hour.<sup>218</sup> Campbell refused to negotiate and claimed that it was not the employer.<sup>219</sup> When a walkout by the workers had no effect on Campbell,<sup>220</sup> FLOC initiated a nationwide boycott of Campbell's products. It took the workers eight years to force Campbell to sign an unprecedented three-party agreement covering six hundred workers. The agreement, signed in January, 1986, set prices to be paid by Campbell to farmers in order to guarantee \$4.50 per hour, insurance, and a grievance procedure, as well as union recognition for FLOC.<sup>221</sup> The boycott, first used successfully by agricultural workers in the grape fields of California in the fifties,<sup>222</sup> has recently been outlawed in three of four states that have given farm workers the right to bargain collectively.<sup>223</sup> Idaho, Kansas and Arizona all have made the secondary boycott an "unfair labor practice." Additionally, Kansas and Arizona have outlawed strikes by farm workers during critical harvest seasons.<sup>224</sup> While California's legislature has yet to proscribe these activities, it has virtually defunded the showpiece of that state's legislation, the Agricultural Labor Relations Board (ALRB). With a backlog of election and hearing petitions pending before the ALRB due to staff and funding shortages, UFW last year called California's farm labor act "useless," and called once again for a nationwide boycott of table grapes.<sup>225</sup> Ultimately, it has not been laws, but organization, that has produced

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217. BNA REPORT, *supra* note 4, at 62-66.

218. *Id.*

219. *Id.* at 63-64. The farmers, for their part, claimed they were powerless to increase the rates since Campbell set the prices to be paid for the crops.

220. Historically, strikes by farm workers have been ineffective due to, among other things, the impossibility of blocking access to the fields. Here, there existed the added problem that the fields did not belong to Campbell, and it was free to go elsewhere to seek tomato crops.

221. *Boycotts Revisited*, DOLLARS & SENSE, July-Aug., 1986, at 13.

222. *DiGiorgio Fruit Corp. v. NLRB*, 191 F.2d 642 (1951). The court held that DiGiorgio could not invoke NLRA's prohibition of the boycott against workers who were not employees under NLRB jurisdiction.

223. Koziara, *Agricultural Labor Relations Laws in Four States — A Comparison*, MONTHLY LAB. REV., May, 1977, at 14-18.

224. *Id.*

225. BNA REPORT, *supra* note 4, at 65.

the few advances farm workers have made. It is arguable, from the examples above, that the laws that do exist have at times hindered the efforts of farm workers more than they have helped.

### VIII. "CONTINGENT" WORKERS

While farm and domestic workers are the two most identifiable categories of "unrecognized worker," several additional job categories of equally unsettled status have been created or re-inspired in recent years. The New York Times, in a front page article<sup>226</sup> described an increasing reliance by employers on temporary, part-time and "leased" or subcontracted workers as a major factor in the destabilization of the labor movement and an undermining of the hard won protection of the labor laws.<sup>227</sup> Describing a growing "weakening of ties" between the employer and employee, the article estimated the size of this "contingent" workforce at 29.5 million. The article cited as the major reason for the rapid expansion of this workforce, the fact that it allows employers to reduce labor costs, payment of benefits, and in some cases, unionization.<sup>228</sup> One of the sub-categories within this pool of workers, employees in the "temp help supplier industry,"<sup>229</sup> has nearly doubled in three years from 400,000 to a September, 1986 figure of 750,000.

According to the Bureau of Labor Statistics, only 6% of the "Business Service Industry" is organized. Even if workers in this industry are found to be "employees,"<sup>230</sup> it is of the temporary agency, rather than the workplace. While an average employer may pay \$17.65 an hour, the average temp worker earns \$6.38 an

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226. Serrin, *Part-Time Work*, *New Labor Trend*, N.Y. Times, July 9, 1986, at 1, col. 1.

227. *Id.* See also ILO REPORT, *supra* note 1, at 10.

228. Serrin, *supra* note 226, at 14.

229. This category is exemplified by such agencies as "Kelly Girls" and "Manpower." Workers in this category are generally considered employees of the agency.

230. According to Thomas Bailey, Associate Resident Scholar at the Conservation of Human Resources Program of Columbia University, while he is skeptical of the claim that avoidance of unionization is the motivation for use of temps, he notes that even if temp workers are technically covered under the labor laws, high turnover and lack of central location are factors that make organizing extremely difficult. Telephone interview with Thomas Bailey, Associate Resident Scholar at the Conservation of Human Resources Program of Columbia University (Jan. 6, 1987).

hour, compared to her permanent counterpart earning \$8.54.<sup>231</sup> In cases where the temporary worker is hired directly, that worker may be found to have no recognized employee status as far as inclusion in a bargaining unit.<sup>232</sup> This is one of several factors that make the temp worker useful in breaking strikes, as was the case in the recent job action against AT&T.<sup>233</sup> It is currently the official policy of the federal government, under a 1985 Executive Order, to employ temporary workers as a way of cutting costs.<sup>234</sup>

If temporary workers have proved expedient for private employers in cutting labor costs,<sup>235</sup> it is no surprise that the Government, with its first trillion dollar budget and a deficit of 107.8 billion projected for fiscal year 1987,<sup>236</sup> would "seek greener pastures" as well. This practice may be particularly inviting to government officials since the public sector is the only category that has seen growth in union membership in the past several years.<sup>237</sup> As of March, 1986, 83,485 temporary workers were employed by the federal government, in positions ranging from secretaries to professionals.<sup>238</sup>

#### IX. WORKFARE: IS THE CURE WORSE THAN THE DISEASE

With all its fiscal problems, the Government as employer has one major advantage over its private sector counterparts. It has available to it a vast pool of workers, reliant on government aid in some form, who can, under current law, be required to work for no wages. Simultaneous with the growth of public sector organizing, the number of welfare recipients "employed" under various government programs has increased. Ostensibly designed to get recipients off welfare rolls and into "productive

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231. Lapidus, *Just to Make Ends Meet*, DOLLARS & SENSE, Nov., 1986, at 9.

232. See, e.g., *Cardo v. Lakeland School District*, 592 F. Supp. 765 (1984); see also *Justak Bros. v. NLRB*, 664 F.2d 1074, 1080 (7th Cir. 1981) (part-time employees who worked only sporadically were excluded from the bargaining unit).

233. Lapidus, *supra* note 231, at 10.

234. Serrin, *supra* note 226, at 14.

235. See Serrin, *Subcontracting: a Key Issue for Labor*, N.Y. Times, Nov. 26, 1986, at B8, col. 1.

236. U.P.I., Jan. 6, 1987.

237. BNA REPORT, *supra* note 4, at 7.

238. Serrin, *supra* note 226, at 14.

employment,"<sup>239</sup> such programs have tended instead to produce a large pool of workers tied permanently to government services,<sup>240</sup> and thus permanently obligated. In exchange for their labor, these workers get not a living "wage," but a subsistence level government grant. Due to the wide range of program titles and definitions in use nationally, accurate figures for determining the number of recipient-workers employed in these programs are hard to come by. There is no doubt, however, that the numbers are growing, as political pressure to "solve" the "welfare problem" increases.

Under the 1981 Federal Omnibus Budget Reconciliation Act,<sup>241</sup> a federal Community Work Experience Program (CWEP)<sup>242</sup> was created; which, for the first time, authorized states to require all Aid to Families with Dependent Children (AFDC) recipients to work in public or private non-profit agencies directly for their welfare checks.<sup>243</sup> CWEP additionally permits diversion of welfare grants to private for-profit employers who agree to provide "on the job training" in exchange for "em-

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239. Congressional Declaration of Intent, Job Training Partnership Act, 29 U.S.C. § 1501 (1982).

240. For example, in an interview with the Director of New York City's Work Experience Management Program, which oversees work assignments of over 15,000 Community Work Experience Program (CWEP) workers, Fran Sullivan estimated that over 1,500 of the current workers have been on the program longer than a year. According to Welfare Department statistics for October, 1986, of 9,547 Home Relief recipients enrolled in the Work Experience Program, only 188 entered regular employment, and of these, 178 had found the jobs on their own. Interview with Fran Sullivan, Director of the New York City Work Experience Management Program (Jan. 8, 1987).

241. 95 Stat. 357 (1981) This act is part of the federal "welfare reform" plan designed to reduce cost of government and put more reliance on private sector solutions. This Act introduced workfare on the federal level for the first time on more than an "experimental" basis.

242. CWEP was originally introduced in California in the early seventies when Ronald Reagan was governor. President Reagan has recently referred to this previous version as a "success." Lindsay, *Reagan Disputed on Work Program*, N.Y. Times, Apr. 13, 1986, at 35, col. 1. (One measure of this "success" was that many recipients were cut from the welfare rolls due to some type of non-compliance with the work requirements.)

243. Previous to this Act, workfare was primarily authorized on a state by state basis, and only for recipients without children since these programs (e.g., Home Relief in New York and General Assistance in California) are non-federally funded. AFDC families (i.e., those with children under 18 on federally funded assistance) were subject to more flexible "training" oriented programs, most of which were previously on a volunteer basis. See generally Gueron, *Work Initiatives for Welfare Recipients*, Manpower Demonstration Research Corp. (Mar. 1986).

playing" the subsidized worker.<sup>244</sup> The federal formula under this program for determining the number of hours the recipients will be required to work, is to divide the amount of the monthly grant by the minimum wage. Workers who refuse assignment are subject to sanctions, including complete loss of all welfare benefits for thirty, sixty or ninety days.<sup>245</sup>

While workfare is hardly a new concept, CWEP expands the category of employable recipients by including mothers with young children.<sup>246</sup> The other significant "contribution" to the workfare concept is the addition of private for-profit businesses to the list of potential employers.<sup>247</sup> These recent amendments to the body of federal workfare regulations are just beginning to be implemented by the states, and have yet to be challenged in the courts. As the role of workfare, both in the social welfare schemata and in the national employment picture, is increased, such challenges can be expected. Historically, the cases involving work requirements that have reached the courts have encompassed the position of recipient "qua beneficiary," rather than as "worker," and the challenges have centered on such issues as ad-

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244. *Id.* at 3.

245. According to a New York City Human Resources Administration (HRA) report from October of 1986, out of approximately 11,000 employable AFDC recipients sent to various job assignments, 1785 were sanctioned for some form of non-compliance. New York City Human Resources Administration, Comprehensive Employment Report (October 1986). See also Statewide Youth Advocacy Inc., Early Evidence From Monitoring, New York City's Employment Initiative For Public Assistance (AFDC) Recipients (May 1986). This report includes case histories of several recipients who were terminated due to faulty communication.

246. Gueron, *supra* note 243. See also *Dublino v. New York State Dep't of Social Servs.*, 348 F. Supp. 290 (1972) (regarding differences in treatment of AFDC versus Home Relief recipients vis-a-vis work requirements).

247. Though the language of CWEP couches use of workfare recipients in private settings in terms of "training," the fact that this use has tremendous potential for exploitation, and may be in violation not only of U.S. constitutional law, see *infra*, text accompanying notes 296-97, but potentially of international law. The International Labor Organization (ILO) in Geneva has produced an instrument, ratified by many nations, called the Forced Labor Convention, 1930 (No. 29). It specifically prohibits forced and compulsory labor for "the benefit of private individuals, companies or associations." ILO REPORT, *supra* note 1, at 67. This convention was followed by the Abolition of Forced Labor Convention, 1957 (No. 105), which additionally requires, *inter alia*, the abolition of any form of forced or compulsory labor "as a method of mobilising and using labor for purposes of economic development." *Id.* at 67. While the government has claimed that this is not the purpose of workfare, there is evidence, see *infra* note 285, that this is not the case.

equate notice before termination<sup>248</sup> or level of grant.<sup>249</sup> As the use of this "involuntary labor force" becomes more widespread, however, some definition of its rights or status "qua workers" is required.

The first legal test of the rights of "relief" workers in the U.S. courts arose in the context of claims by workers injured in the course of their "assignments." While most of the early federal work relief projects included statutory provisions to protect the injured worker,<sup>250</sup> many state statutes did not even consider the question of liability for such injury. Those that did were divided on the question of whether the worker was to be considered an "employee" for the purpose of compensation.<sup>251</sup> Courts, in reviewing the validity of these statutes and the legislative definitions given to the status of these workers, employed varying criteria to determine whether an employer-employee relationship existed. These included whether the relationship was voluntary or compulsory, the type of work performed, the mode of payment, and the amount of control being exercised over the worker by the agency.<sup>252</sup> The earliest of these decisions were premised on the assumption that a viable "employment relationship" must be founded on a "contract of hire." Where the government was obliged to provide the relief, and the indigent was required to reimburse the government with his services, the work was found to be compulsory. Under such circumstances, courts held that no "master-servant" relationship could exist, and, therefore, the worker was excluded from the coverage of the state's compensation laws.<sup>253</sup>

On the other hand, courts in Ohio and Pennsylvania found

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248. See, e.g., *Ramsey v. Lavine*, 82 Misc. 2d 322, 368 N.Y.S.2d 370 (Sup. Ct. 1975).

249. See *Young v. Toia*, 93 Misc. 2d 1005, 403 N.Y.S.2d 390 (Sup. Ct. 1977); see also *Milwaukee County v. Donovan*, 711 F.2d 983 (7th Cir. 1985).

250. See Polier & Donner, *The Status and Rights of Injured Relief Workers*, 36 COLUM. L. REV. 555, 570 (1936). The Works Project Administration (WPA), for example, set a monthly minimum payment of twenty-five dollars and expressly stated that the worker was not to be considered a federal employee. Additionally, Polier & Donner present an extensive historical survey of the use of work requirements attached to public "welfare," since the English "Poor Laws" of the middle ages. See generally *id.*

251. Brook & Simon, *Relief Workers and Workmen's Compensation*, 36 ILL. L. REV. 773 (1942).

252. *Id.*

253. See, e.g., *Vaivida v. City of Grand Rapids*, 264 Mich. 204, 249 N.W. 492 (1933); *McBurney v. Industrial Accident Comm'n*, 220 Cal. 124, 30 P.2d 414 (1934).

that the government agencies had the power to accept or reject a particular worker. This led them to the conclusion that the employment relationship was voluntary, thus entitling the worker to state compensation.<sup>254</sup>

The recent trend has been to consider these workers employees for the sole purpose of liability for injury. A recent California case involved a challenge by a "workfare" recipient under Los Angeles County's General Assistance program. He was denied compensation by the state after being hurt in his assigned job as a watchman in a local school district. The court firmly rejected the early California precedent which had denied employee status when the work was compulsory, and held that the worker was entitled to Workers' Compensation.<sup>255</sup>

In New York, a 1980 administrative opinion summarized the official position of the recipients under that state's Home Relief Program by declaring that "persons receiving home relief who are assigned to perform work for a municipality pursuant to Social Service Law § 164 are employees of that municipality and are therefore entitled to Workers' Compensation benefits."<sup>256</sup>

In terms of wages, the federal CWEP program specifically requires that workers assigned to CWEP jobs receive the minimum wage.<sup>257</sup> Such specific wage provisions have not, however, always been included in comparable state work programs. Prior to 1977, New York's Home Relief Program provided for computation of hours based on the size of the grant without specifying an hourly wage to be used in the calculation. Under a 1977

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254. See, e.g., *Industrial Commission of Ohio v. McWhorter*, 129 Ohio St. 40 (1934); *Hattler v. Wayne County*, 117 Pa. Super. 570, 178 A. 513 (Super. Ct. 1935), *aff'd per curiam*, 320 Pa. 280, 182 A. 526 (1936).

255. *County of Los Angeles v. Workers' Compensation Appeals Bd.*, 30 Cal. 3d 391 (1981). In rejecting *McBurney*, the court noted:

Paradoxically, the California courts concede that the purpose in creating the relationship [between the relief worker and the government unit for whom he worked] was to 'avert the stigma of pauperism' and then deny that the parties have succeeded in doing so. Thus, workfare participants should not have been treated as disfavored paupers merely because they needed to accept work from the government in order to keep from starving.

30 Cal. 3d at 402.

256. Op. State Compt. 80-256 (1980). They are specifically not, however, employees for other purposes, such as civil service status. See *Ballantine v. Sugarman*, 74 Misc. 2d 267, 344 N.Y.S. 2d 39 (Sup. Ct. 1973).

257. Thus avoiding the need for any legal determination of a CWEP worker's status under FLSA.



amendment, the law was changed to read that "[e]ach person assigned to a public work project shall be required to participate an average of three days per week without regard to the amount of budget deficit of the person or his family."<sup>258</sup> Workers who, as a result, were being forced to work for well below the minimum wage, challenged this provision in the case of *Young v. Toia*.<sup>259</sup> One of the named plaintiffs, Tina Young, was being required to work 104 hours per month as a painter for thirty dollars of state aid, or twenty cents an hour. The court ordered compliance not only with the state minimum wage, but with the state's constitutional mandate that

no laborer, workman or mechanic in the employ of a contractor or subcontractor engaged in the performance of any public works. . . shall. . . be paid less than the rate of wages prevailing in the same trade or occupation in the locality within the state where such public work is to be situated."<sup>260</sup>

Since *Toia*, New York's official policy has been that these workfare workers are to be "paid" rates at parity with civil service workers in comparable job categories.<sup>261</sup> However, § 164 of the state's Social Service Law also prohibits use of recipients to fill jobs "ordinarily and actually performed" by a regular worker.<sup>262</sup> To get around this, counties commonly list these jobs by different titles than those filled by civil servants.<sup>263</sup> This

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258. N.Y. Soc. SERV. LAW § 164(3)(b) (McKinney 1976), as amended by Chap. 77, § 8 of the Laws of 1977.

259. 403 N.Y.S.2d 390, 93 Misc.2d 1005 (Sup. Ct. 1977).

260. *Id.* at 394 (citing N.Y. Const. art. I, § 17).

261. A recent survey of the New York Work Experience Project (WEP) program conducted by the Manpower Demonstration Research Corporation reports that the "wage" is determined according to the job category of the work assignment, but that all wages are under five dollars per hour and over the minimum wage. See G. HOERZ & K. HANSON, A SURVEY OF PARTICIPANTS AND WORKSITE SUPERVISORS IN THE NEW YORK CITY WORK EXPERIENCE PROGRAM 5 (Sept. 1986). In the same report, however, the "average" civil service rate for the job categories surveyed was \$5.71 per hour. *Id.* at 13-14. From this, it would appear that New York is not in compliance with official policy as established in *Toia*.

262. N.Y. Soc. SERV. LAW § 164(2)(b) (McKinney 1976).

263. See, e.g., Memorandum on Behalf of Petitioners, District Council 37 v. Koch, No. 15508 (N.Y. Sup. Ct. 1982). In general, for every "civil service" title, the Public Workers Project (PWP) title has added "aide" (e.g., "messenger" becomes "messenger aide").

practice serves to insulate the localities from liability under both the "no displacement" and the "prevailing wage" requirements.<sup>264</sup>

An earlier challenge to compliance with both of these provisions was mounted in the 1973 case of *Ballentine v. Sugarman*,<sup>265</sup> which involved workers assigned to perform municipal jobs under the Public Workers Project (PWP).<sup>266</sup> The original plaintiffs were New York City home relief recipients who claimed they were not receiving wages and benefits at parity with those of regular civil service employees performing the same work. The recipients claimed they were entitled to these wages and benefits under state regulations.<sup>267</sup> In the alternative, they asked for a declaration that the forced labor aspect of the program constituted illegal "peonage."<sup>268</sup> They were joined in their suit by representatives of the regular city employees who, for their part, sought an injunction against the use of these home relief workers to displace civil service positions.<sup>269</sup>

The court, in dismissing the petition, held that the program violated neither the statutory "no displacement" provisions nor the state constitution's "merit and fitness" requirements for civil service hiring. It based this part of its opinion on a factual finding that the program was intended merely to "supplement" the work of regular employees during a time of manpower shortages due to budgetary restrictions.<sup>270</sup> As to the argument that the program violated federal anti-peonage statutes, the court labelled it "unpersuasive and without merit in all respects."<sup>271</sup> It also held that these workers were not civil service employees and

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264. These requirements are found both in the statute itself, see *supra* note 262, and in the New York State Constitution. See *Toia*, 93 Misc.2d 1005, 403 N.Y.S.2d 390 (Sup. Ct. 1977).

265. 74 Misc.2d 267, 344 N.Y.S.2d 39 (Sup. Ct. 1973).

266. Currently called "Work Experience Project" (WEP).

267. 74 Misc.2d at 269, 344 N.Y.S.2d at 40.

268. *Id.* The thirteenth amendment to the U.S. Constitution reads: "Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States." U.S. CONST. amend. XIII. "Peonage" is defined as "a condition of servitude compelling persons to perform labor in order to pay off a debt." BLACK'S LAW DICTIONARY 1022 (5th ed. 1979).

269. 74 Misc.2d at 269, 344 N.Y.S.2d at 41.

270. *Id.*

271. *Id.*

therefore were not entitled to fringe benefits.<sup>272</sup> Finally, the court deferred the question of whether the state's "comparable wage" requirement was being complied with to a future hearing, noting, however, that "it is neither possible, nor the Court's duty. . . to conduct a wide ranging inquiry to ascertain the facts as to all these 21,000 employees."<sup>273</sup> The city claimed it was paying parity wages. Ultimately, the question boiled down to the job title given to the particular worker.<sup>274</sup>

A year after *Ballentine*, the state home relief work program underwent a name change and was restructured to more closely simulate the actual "w number of positions available to be filled through regular civil service channels."<sup>275</sup>

In subsequent inge benefits were now to be provided. It is noteworthy that this version of the program specified that the workers were to be granted collective bargaining rights as well.<sup>276</sup> In *Gotbaum v. Sugarman*,<sup>277</sup> compliance with the non-displacement clause was once again challenged by the same union that represented civil service workers in *Ballentine*. Again, the court refused to find the program violative of the state law or constitution, retionalizing that decision on the grounds that "no true employer-employee relationship with the agencies where they work" existed.<sup>278</sup> The court went on to dismiss the complaint with the assurance that:

There appears to be no danger that an extra-legal and cognate system of government employment will be set up to evade the principle of merit. . . There is no indication whatever that employment of any of these persons on the welfare rolls will reduce the budgetary allocation for the

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272. *Id.* at 273, 344 N.Y.S.2d at 45. This is circuitous in that the city had been arguing that their lack of benefits was evidence that they were not civil service workers. See *infra* text accompanying note 284.

273. 74 Misc.2d at 273, 344 N.Y.S.2d at 45. Note, however, the court's use of the term "employees."

274. G. HOERZ & K. HANSON, *supra* note 261.

275. The Work Relief Experience Program. This was an experiment conducted during the administration of Mayor John Lindsay. It was approved by the state on a one year "demonstration" basis only, and was promptly rescinded when the year was up.

276. These provisions obviously brought the relationship of the worker closer than ever to one of an "employee" of the Government.

277. 78 Misc.2d 827, 829, 358 N.Y.S.2d 635, 637 (Sup. Ct. 1974).

278. *Id.* at 831, 358 N.Y.S.2d at 639.

number of positions available to be filled through regular civil service channels.<sup>279</sup>

In subsequent years, similar decisions on the question of civil service displacement were rendered in relation to the Comprehensive Employment and Training Act (CETA).<sup>280</sup> In *Campesi v. McGuire*,<sup>281</sup> a policeman had been laid off during the 1975 budget crisis and reinstalled in the same job between May 1977 and March 1978 under CETA. When he was finally rehired under as a civil service employee, he was denied the right to count the CETA time towards seniority or promotion. The court held that to rule otherwise, i.e., that a CETA worker had been acting as a civil service employee, would violate "state constitutional and statutory law, as well as federal proscriptions."<sup>282</sup>

When District Council 37 (DC37), the union that had been involved in the *Ballentine* and *Gotbaum* challenges, found it was unable to win a frontal attack against the home relief work program, it tried instead in 1981 to eliminate the program's potential for creating a scab labor force. The union petitioned the New York City Office of Collective Bargaining for certification to "accrete" the PWP workers as city employees in existing bargaining units for which it held certificates.<sup>283</sup> In opposition to the petition, the city offered four arguments:

- 1) The language of the statute creating PWP, labelling the workers as "recipients" and describing them as "employable but not employed," negated any inference that the legislature intended that they be considered employees. The city claimed that this interpretation was further supported by the fact that the worker received a welfare check, not a pay check, and received no fringe benefits other than Workers' Compensation.

- 2) The city lacked sufficient control over the workers to con-

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279. *Id.*

280. Under CETA, 87 Stat. 839 (1973), 29 U.S.C. §§ 801-999, *repealed by* 96 Stat. 1357 (Oct. 13, 1982), there were six different programs ranging from those aimed at supplementing civil service staff, to others directed at giving short-term work experience to minors. See *Papa v. Ravo*, 70 A.D.2d 59, 419 N.Y.S.2d 698 (App. Div. 1979) (where the court ruled that CETA workers were not entitled to seniority or other civil service benefits).

281. 88 A.D.2d 866, 451 N.Y.S.2d 767 (App. Div. 1982).

282. *Id.* at 869, 451 N.Y.S.2d at 768. The *Campesi* court cited *Ballantine v. Sugarman*, 74 Misc.2d 267, 270, 344 N.Y.S.2d 39, 42, as authority for this conclusion.

283. OCB Decision No. 21-81 (June 30, 1981). These workers now number 15,000.

stitute an employer relationship, since it was the state that defined the program, the amount of the grant, etc. The city claimed it was required to place the recipients in the work program "without regard to [its] needs or desire for the recipients' services."

3) The fact that the PWP workers' labor was involuntary prevented a finding of employee status.<sup>284</sup> As further support for this conclusion, the city pointed to the fact that the work programs had "rehabilitation" as their primary aim, with the "service" received by the city being only incidental to the "service" the city rendered to the recipients by providing them with useful skills.<sup>285</sup>

4) Since the grant was based on the recipients' need rather than on the value of the work performed, it was not "compensation for services" and did not evidence an employee relationship.<sup>286</sup>

The union's position was that the city agencies did have a choice in "hiring" recipients, and in fact applied for workers, conducted interviews, set tasks and job descriptions, established hours, etc.<sup>287</sup> Additionally, the union maintained that the worker's participation was no less "voluntary" because of loss of payment due to non-participation, than loss of salary would be to regular workers who failed to perform their jobs.<sup>288</sup> Finally,

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284. *Id.* To support this position, the city cited *Prisoners Labor Union at Bedford Hills v. Helsby*, 44 A.D.2d 707, 354 N.Y.S.2d 694 (App. Div. 1974) (PERB denied a petition by prisoners in various state facilities in which they asked to be certified to bargain, on the ground that their labor lacked "volition").

285. OCB Decision No. 21-81. This is directly contradicted by the Sept. 1986 Manpower survey, which almost universally found that the work performed was essential to the functioning of the agencies involved, and that the work supervisors felt that the majority of workers/recipients came to the jobs they filled with the skills needed to fill them. G. HOERZ & K. HANSON, *supra* note 261, at 15, 21.

286. OCB Decision No. 21-81. This, however, appears to contradict the holding in *Toia* that pay had to be computed at parity scale for hours worked rather than devoid of any relation to the value of the work performed.

287. Contrary to the city's claim that it "must" employ all eligible recipients regardless of the city's own manpower needs, only some 15,000 out of a pool of 120,000 recipients considered by HRA to be "employable and available" were in actual assignments as of December, 1986. New York City Human Resources Administration, *Employability Reports* (Dec. 1986). See, NEW YORK CITY HUMAN RESOURCES ADMINISTRATION OFFICE OF EMPLOYMENT SERVICES, *WORK EXPERIENCE PROGRAM* (1986) (promotional flyer sent to city and non-profit agencies soliciting requests for workfare assignees and describing the "application" process to obtain workers).

288. OCB Decision 21-81, at 14.

the union claimed:

Economic realities being what they are, it is unrealistic to expect PWP workers to gain employment in the 'regular' economy and that they should not be penalized simply because they are forced by law to go through the motions of doing so. . . Although the law prohibits PWP workers from replacing workers in the regular economy, the fact is that they do. They should, therefore, be given the same employee status as those workers.<sup>289</sup>

Recognizing that "no case has been found which directly deals with the status of working welfare recipients,"<sup>290</sup> the OCB denied the petition. It held, in addition to the arguments propounded by the city, that since the entire program was terminable at state discretion, the city's control was merely "derivative."<sup>291</sup>

Rather than appeal the OCB's decision, DC37 chose once again to attempt to enjoin the use of PWP workers on the grounds that, contrary to the court's rationale in *Gotbaum*, there was in fact evidence of an "extra-legal and cognate system of government employment"<sup>292</sup> emerging. In 1982, armed with new statistics showing a steady decrease in civil service positions as well as line for line identical job descriptions for current civil service and PWP titles, the union in *District Council 37 v. Koch*, charged:

At this historic juncture, given the high level of unemployment, the absence of jobs in either the public or private sector labor markets, and the crying need for city

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289. *Id.*

290. *Id.*

291. The OCB didn't comment on whether PERB would therefore have jurisdiction if the state in fact "controlled" the employee. The question of "temporary" and "terminable" was raised similarly in *Mon Valley United Health Services*, 238 NLRB 916 (1978). There, the NLRB ruled that federal manpower trainees in a private non-profit mental health center should be included in the regular bargaining unit based on a "substantial community of interest," and said that the indefiniteness of the duration of their employment based on the federal government's ability to terminate the funds was an insufficient basis. See also *Evergreen Legal Services*, 246 N.L.R.B. 964 (1979) where the NLRB reached a similar conclusion regarding CETA workers (lawyers and others) in a Legal Services Corporation-funded project in Washington State.

292. *Gotbaum*, 78 Misc. 2d at 831, 358 N.Y.S.2d at 639.

services, it is not unreasonable to conclude that PWP participants are being used solely as a permanent underpaid labor force to supplement the city's manpower shortage.<sup>293</sup>

This time, rather than attempting to dispute that allegation, the court, conceding that PWP workers made up 8-12% of the agencies' workforce and that the program could "at least in theory, pose a threat to the state's traditional civil service system," directed the union to the legislature as the more appropriate arena in which to address its grievances.<sup>294</sup>

## X. CONCLUSION

It is appropriate at this point to raise a fundamental contradiction in the positions taken by the Government throughout the above attempts to define the status of workfare workers. On the one hand, New York City and the OCB argued that the PWP workers had no choice but to work, likening their situation to prisoners in Greenhaven Correctional Facility who were denied recognition to bargain for lack of "volition" in their employment status.<sup>295</sup> The Board relies on this "involuntariness" to define the PWP workers as "not employees."

On the other hand, the PWP plaintiffs, in *Ballentine v. Sugarman*, had their claim that the program constituted illegal peonage in violation of the thirteenth amendment dismissed out of hand as fallacious, based on a previous ruling in *Dublino v. New York State Department of Social Services*.<sup>296</sup> The *Ballentine* court, quoting a court of appeals interpretation of the federal anti-peonage statutes, said:

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293. Memorandum on Behalf of Petitioners at 13 n.8, *District Council 37 v. Koch*, No. 15508 (N.Y. Sup. Ct. 1982). According to the memorandum, by the city's own admission over 31% of all PWP participants work for periods in excess of one year; 19% in excess of two years. 55% of PWP participants have been unemployed for over two years; 24% for at least seven years. *Id.*

294. *Id.*

295. See *supra* note 284. The court didn't distinguish the fact that prisoners are the only group that is exempt from the thirteenth amendment's prohibition against involuntary servitude. The fact that the condition of PWP workers is considered so similar to that of prisoners is strong indication that the thirteenth amendment may well be violated here. Workfare recipients have been "convicted" of nothing except poverty.

296. 348 F. Supp. 290 (1972).

"However difficult the loss of home relief is, a person is not held in a state of peonage when the only sanction for his refusing to work is that he will not receive payments currently. That may be a form of mankind's immemorial bondage of bread; but it is not peonage."<sup>297</sup>

There is an irreconcilable contradiction between these two positions, and it is precisely within that contradiction that an ominous future awaits a divided labor movement. Workfare workers, and others "outside of the normal channels of commerce and the traditional employer-employee relationship," cannot continue to play the role of "involuntary scab," without any legal avenue for redress of their grievances nor means of taking their place as workers in organized efforts to improve their collective condition. Whether or not the courts and legislatures recognize the right of these workers to organize, the rest of the labor movement must, or its members may find themselves "displaced" and on the other end of a PWP intake desk.

In a case that portends of this "ominous future" for labor, General Assistance<sup>298</sup> recipients in Sacramento, California, have challenged a program in that county that requires them to work, not for a welfare check, but for room and board in a Volunteers of America "shelter." In *Robbins v. the Superior Court of Sacramento County*,<sup>299</sup> an initial injunction against this "experimental" program has been issued, while the constitutionality under the federal and state constitutions<sup>300</sup> is decided. Given the precedents outlined above, this "quasi-governmental labor camp" may still be found to be not only legal, but a "final solution" to the problems of unemployment, homelessness and high cost of government all in one—all current national plagues. Whether or not one believes that this scenario is preferable to

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297. *Ballentine*, 74 Misc.2d at 273, 344 N.Y.S.2d at 45 (quoting *U.S. v. Shackney*, 333 F.2d 475, 486 (1964)).

298. General Assistance is California's version of New York's Home Relief program, for single adults.

299. 38 Cal.3d 199, 211 Cal. Rptr. 398, 695 P.2d 695 (1985).

300. The California State Constitution includes an explicit right to privacy, CAL. CONST. art I, § 1, as well as due process, equal protection, art I, § 7, and anti-"involuntary servitude" clauses, art. I, § 6.



the 19th century "hands off" policy of the Government towards labor, the price of liberty is the same now as it was then: organization.

*Sue Wasserman*