

# THE CLASSROOM AS SHOP FLOOR: IMAGES OF WORK AND THE STUDY OF LABOR LAW

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## INTRODUCTION

Now, on the North Side, when I walk along the beach, I cannot even see South Chicago, except on a clear day. Even then, I just barely see the mills and the smokestacks far, far to the south, and the whole steel industry like a ship slowly sinking into the waves. I think of the men of Wisconsin Steel who are still on it who could not get off. It was a ship wreck. And nobody planned it, it just happened.<sup>1</sup>

Thomas Geoghegan's moving description of the demise of the steel industry in Chicago serves as a striking metaphor for the decline of the labor movement in this country. By now it has become a common refrain that union "density" in the United States is approaching historical lows.<sup>2</sup> Although a fourteen year period of decline was interrupted in both 1993 and 1994, when the total number of union members rose slightly from 1992 levels,<sup>3</sup> a prevailing view exists that "the era of collective bargaining that was born in the New Deal and that blossomed in the post-war decades

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1. THOMAS GEOGHEGAN, WHICH SIDE ARE YOU ON?: TRYING TO BE FOR LABOR WHEN IT'S FLAT ON ITS BACK 121 (1991).

2. "Union density as a percentage of private nonagricultural wage and salary workers has declined from a high of 38% in 1954 to 11.5% in 1992." Michael H. Gottesman, *In Despair, Starting Over: Imagining a Labor Law For Unorganized Workers*, 69 CHI.-KENT L. REV. 59, 59 n.1 (1993) (emphasis omitted). Organized labor as a percentage of the overall work force (public and private combined) declined from 34.7% to 15.8% over that same period. *Id.* Any growth in union representation during that time period has been in the public sector.

3. During these two years, the number of union members rose from 16.4 to 16.6 and 16.7 million wage and salary workers, respectively, with virtually all of the modest growth occurring in the public sector. *Bureau of Labor Statistics, Labor Relations Rep. (BNA) 145 LRR 193 d18* (February 21, 1994); *Economic Developments, Daily Labor Rep. (BNA) 1995 DLR 27 d23* (February 9, 1995). Total union representation in the public and private sectors combined remained steady at 15.8% of the work force in 1993, but dropped to 15.5% in 1994. *Id.* In addition, approximately two million additional workers were represented by unions at their workplace but were not union members themselves. *Id.*

is coming to an end.”<sup>4</sup> Much scholarly attention has been directed towards re-envisioning the workplace of the 21st century in light of the “effective collapse of the New Deal system itself”<sup>5</sup> and the diminished or even non-existent role for unions.

But what does the decline of labor mean to the labor law teacher? Is there any viability left to the “traditional” labor law course<sup>6</sup> or are we consigned to teaching our students primarily about models of regulating the workplace other than collective bargaining, where the role of labor is reduced to an historical footnote? In this article, I argue that notwithstanding the erosion of unionism, the traditional labor law course is an essential component of a law school’s curriculum.<sup>7</sup> My goal is not solely to provide a “defense” of the study of “traditional” labor law, but to describe an interactive or experiential approach to teaching the subject that allows students to better understand the values that underlie legal doctrine and to experience for themselves some of the issues that confront workers. In turn, it is my hope that this will generate greater interest in and a more genuine understanding of the employment relationship and the role of labor law in forging that relationship.<sup>8</sup>

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4. Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575, 576 (1992).

5. See, e.g., Joel Rogers, *Reforming U.S. Labor Relations*, 69 CHI.-KENT L. REV. 97, 101 (1993).

6. The “traditional” labor law course generally covers the historical origins and major topic areas of the Labor Management Relations Act. 29 U.S.C. §§ 141-187 (1988).

7. See Wilson McLeod, *The Importance of Traditional Labor Law in the Legal Curriculum*, 43 J. LEGAL EDUC. 123 (1993). Mr. McLeod’s thesis is that “studying traditional labor law enables students to think about law in a different way [because] even the conventional labor law course provides a uniquely political view of the law, and [often] . . . stands alone in the curriculum in revealing the active, biased role of law and government.” *Id.* at 124 (emphasis omitted). He argues that “[t]he standard labor law course is a politically charged study of jurisprudence that can give insight into the basic nature of law, in a way that the rest of the traditional curriculum rarely succeeds in doing.” *Id.* (footnote omitted). I fully agree with and echo Mr. McLeod’s arguments concerning the unique ability of labor law to explore the often hidden and biased dynamic in decision making. However, I also offer a rebuttal to the notion that traditional labor law should be buried side-by-side with the unionism that spawned it by demonstrating the continued essentiality of unions in representing the interests of workers, as well as the organizational opportunities that exist for a revitalized labor movement. I also offer a way to teach labor law which is consistent with the need to create a consciousness about labor’s influence on the lives of workers.

8. The potential for achieving this goal is reflected in a letter about the impact of the course written by a labor law student. This student wrote that although initially he did not have a keen interest in labor law, and “lacked [an] appreciation” for the subject, the “class taught [him] to appreciate the American workers’ struggle . . . [and] broadened [his] horizons . . . .” He also commented that “[the professor’s] teaching style highly emphasized active learning. In class, there were a number of exercises designed to teach us material through role playing. I found these teaching tools to be quite useful in learning.” Letter from labor law student on file with the author.

Part I of this article addresses why it is important to teach labor law, including the values and opportunities for reflection about lawyering that it contributes to the law school curriculum. While “[w]ork, or at least the aspiration to work, is ubiquitous,”<sup>9</sup> there seems to be little conscious social recognition of the centrality of work to the human condition. As I describe *infra*, because the study of “traditional” labor law is not only about legal doctrine but involves a study of the nature of work, the dynamic of the workplace, as well as the unstated political, social and economic assumptions that are implicit in the law, it offers a unique perspective on the values that shape decision making.

Furthermore, despite the attention devoted to changing the focus in the study of labor law, it may be premature to sound the death knell for unions and collective bargaining.<sup>10</sup> First of all, the alleged erosion of the employment at will doctrine is not so far advanced as some proponents would suggest, and affects but a small percentage of workers. Changes in employment at will law have done little, if anything, to alter the hierarchical nature of the workplace and employer dominance in governing the shop. I argue that, fundamentally, even where courts and state legislatures have carved out limited exceptions to the doctrine, and notwithstanding the enactment of legislation that provides additional protections for individual employees, no substitute has been found for the unique ability of unions to act as an instrument for the inclusion of employee voice in the daily regulation of the workplace. Consequently, I urge that the union movement, while not necessarily dead, must be revitalized in order to maintain a semblance of a countervailing force to rapacious capital.<sup>11</sup> Labor law’s role in the law school curriculum mirrors

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9. David L. Gregory, *Catholic Labor Theory and the Transformation of Work*, 45 WASH. & LEE L. REV. 119, 129 (1988).

10. See, e.g., Sid L. Moller, *The Revolution That Wasn't: On the Business as Usual Aspects of Employment at Will*, 27 U. RICH. L. REV. 441 (1993); *From Crisis to Cooperation: A New Direction in Industrial Relations*, Daily Labor Rep. (BNA) 1994 DLR 180 d23 (September 19, 1994) (speech by Professor Charles J. Morris to the U.S.-Mexico-Canada Conference on Labor Law and Industrial Relations); Tom Juravich & Kate Bronfenbrenner, *Obits for Labor Unions are Premature*, NEWSDAY, Viewpoints, January 12, 1995, at A37.

11. The urgent need for this opposing force is evidenced by the current attempts of the 104th Congress to dismantle regulatory controls in the workplace. For example, the U.S. Chamber of Commerce recently stated its concern over the “slew of federal employment laws [that] serve as ‘legal disincentives’ to hiring welfare recipients . . . .” *Welfare Reform: Employment Laws are Disincentives to Hiring Welfare Recipients*, Chamber Says, Daily Labor Rep. (BNA) 1995 DLR 28 d13 (Feb. 10, 1995). The Chamber has thus targeted 19 federal employment laws, including the Americans with Disabilities Act, Fair Labor Standards Act, Family and Medical Leave Act, Civil Rights Acts of 1964 and 1991, and the Occupational Safety and Health Act, as legal obstacles to hiring welfare recipients. *Id.* According to a “white paper” released by the Chamber, “[b]ecause almost every applicant and employee can select from a long list of possible reasons to sue an employer, American businesses face

this social and political function, as it provides an important balance to curriculums traditionally weighted heavily towards corporate and other forms of commercial law.

In Part II, I describe the experiential components of the labor law course that I teach, and discuss the pedagogical choices I have made as shaped by my years of practice and the unique learning environment of City University of New York (CUNY) School of Law. Beginning with the “premise . . . that all law teaching is clinical teaching,”<sup>12</sup> CUNY’s “stated institutional choice has led to an important emphasis upon experiential learning as embodied in simulation, field and clinical pedagogic methods.”<sup>13</sup> “Law in the Service of Human Needs,” the CUNY Law School motto,<sup>14</sup> resonates with the policies underlying basic labor legislation in the United States that seeks to empower and protect workers.<sup>15</sup> Furthermore, because a teacher’s choice of pedagogy is a choice that has an “intrinsic and inescapable moral content [it] should be made in light of the interests of the students, the faculty, the institution and oneself.”<sup>16</sup> CUNY’s emphasis on “public service and public interest

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huge disincentives to hiring even well-qualified welfare recipients. With good reason, employers are unwilling to hire individuals who have been receiving something for nothing when they can continue that lifestyle merely by filing an all-expense-paid lawsuit through which they can obtain a fortune.” *Id.* Such organized positioning, based on stereotyping and exploitativeness, cannot be controlled by legislation aimed at providing individual employment rights, especially when the legislative branch of government is in the hands of laissez-faire capitalists. It must be countered with a social and political movement, such as the union movement, which has the experience and retains the potential to struggle on behalf of the working class.

12. Howard Lesnick, *Infinity in a Grain of Sand: The World of Law and Lawyering as Portrayed in the Clinical Teaching Implicit in the Law School Curriculum*, 37 UCLA L. REV. 1157, 1158 (1990) (emphasis omitted). Professor Lesnick makes it clear, however, that the “clinical teaching” to which he refers is not the traditional “clinic” but “of the ‘classroom,’ law-focused courses that make up virtually all of the early, and the bulk of the later, experience that students have of law school.” *Id.* at 1158 n.1. Professor Lesnick proceeds to examine the “porous . . . dichotomy between teaching about law and teaching about lawyering,” and the inescapable implicit messages about what it means to be a lawyer inherent in all teaching, even when it is grounded in an explicit, substantive area of law. *Id.* at 1158.

13. John Delaney, *Demystifying Legal Pedagogy: Performance — Centered Classroom Teaching at the City University of New York Law School*, 22 SETON HALL L. REV. 1332, 1340 (1992).

14. 1995/1996 *Catalog*, CUNY School of Law at Queens College, at 7.

15. I am referring to well recognized statutory schemes such as the Labor Management Relations Act, which gave employees the right to unionize and engage in collective bargaining; the Occupational Safety and Health Act, which was enacted to provide all employees with a “safe and healthful” work environment; and Title VII of the Civil Rights Act of 1964 which outlawed discrimination in the workplace. Unfortunately, the policies underlying these statutes are often unrealized. See, e.g., Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978).

16. Delaney, *supra* note 13, at 1338.

law”<sup>17</sup> is an ideal setting for a worker’s perspective on the unstated policies that animate labor law jurisprudence and undermine the stated goals of labor law legislation.<sup>18</sup>

My approach to teaching labor law treats “the classroom as shop floor,” and involves a process of interactive teaching through simulations, problems and discussion, which draws upon some of the natural parallels that exist between workers and their employer and students and their school. In each setting a hierarchy exists that places workers and students in a lower status that can rob them of any effective voice in regulating their respective “workplaces.” Like a boss, a professor can directly impact (control) the fate of a student. “Just as the teacher retains authority for planning and grades, the supervisor . . . retains the power to hire, to fire, and to give raises . . . .”<sup>19</sup> My goal is to ultimately allow students to see the effects of that dynamic on workers, and to have them re-evaluate and perhaps abandon any assumptions they possessed concerning the employment relationship and the “proper” status of workers. By creating images of what it means to work, I seek to create images of the law. I also attempt to show students that labor law is not a relic of an historical age, but a complex living law that regulates a “fundamental dimension of human existence”<sup>20</sup> — meaningful work.

I have included in this article illustrative narratives about my early exposure to the workplace, and later experiences as a labor lawyer. These events have undoubtedly influenced my teaching because they have helped shape my understanding of what it means to work. According to Professor Howard Lesnick, “[t]o draw out of students what is latent inside them, teachers must . . . put more of [them]selves into [their] engagement with

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17. 1995/1996 *Catalog*, *supra* note 14, at 5.

18. Of course, the pedagogical approaches described in this article can be utilized in a variety of other law school settings, including those with a different perspective on the relationship between labor and capital.

19. Susan Bryant, *Collaboration in Law Practice: A Satisfying and Productive Process for a Diverse Profession*, 17 VT. L. REV. 459, 470 n.49 (1993). I recognize that class distinctions between boss and workers in the workplace, and the hierarchy this reinforces, may be more pronounced than that which exists between law professor and lawyers-in-training.

20. Gregory, *supra* note 9, at 130.

the subject matter of [their] teaching."<sup>21</sup> The narratives are meant to reflect some of this engagement.

## I. LABOR LAW

### A. Images of Work

*I was six or seven years old when I first saw my mother at work during summer vacation from school. I remember climbing the steep, narrow stairway that led from the street to the second floor of the old shingled building and the harsh, high-pitched whine of the sewing machines that startled me as I entered the room. I distinctly remember how the uneven floors creaked under my feet, and how the large, wood-framed windows let in rays of sun that illuminated the dust motes and specks of fabric suspended in the air. The dressmakers (operators), most of them Italian-Americans in that time and shop, looked up from their hunched positions, smiled and pointed me in the direction of my mother's machine. I found her there, fabric in hand, waiting for me. As she introduced me to the women working near her, I poked through the remnants of material that littered the floor, enveloped by the heat, dust and smell of fabric and sewing machine oil that filled the shop.*

*My mother, who immigrated to the United States from Sicily in 1938 at the age of nineteen, worked in many such dress shops in New York and New Jersey for over forty-six years. "Piece work," "samples" and "union," the language of the shop, became part of our language at home. Older now, but still sewing simply for the love of it, she spent a lifetime earning little, stitching together dresses that later sold in expensive stores.*

*I made several trips to my father's factory as a child. His first and only job after immigrating from Sicily in 1949 was as a mechanic with Buitoni Foods Co. It was a treat to ride the bus to his factory where my mother and I would surprise him at the end of his Saturday shift. Once, my father took me inside the factory to proudly show me the "sauce department" where he worked. I was struck by the enormous space and machinery, but most of all I was impressed by, and have never forgotten, my father's work clothes drenched in sweat. He worked long hours as I*

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21. Howard Lesnick, *Being a Teacher, of Lawyers: Discerning the Theory of My Practice*, 43 HASTINGS L.J. 1095, 1097 (1992). Coincidentally, Professor Lesnick notes that for most of his teaching career his "primary interest has been labor law." *Id.* at 1097 n.6. His attraction to the subject, like my own, "is embedded in [his] belief in the centrality of work to the meaningfulness of human life and the viability of democratic values." *Id.* While Professor Lesnick acknowledges that "any manifestation of this belief in [his] classes was probably wholly implicit" (*id.*), I have chosen to make a more explicit connection for my students between my beliefs and my teaching.

*grew up — leaving at 4:00 or 4:30 a.m. and returning twelve or fourteen hours later. Gone on Saturdays and sometimes part of Sunday, too. Overtime was critical to his dreams for his family. For thirty years he worked the blue collar beat — a steady, Union job at steady, if low, pay — fulfilling the American dream of the 1950's and 60's. He retired reluctantly, but his hands and fingers, some of which were missing tips, bore the burden of his long hours at work.*

*When I was sixteen years old, my father got me a summer job in the factory. My shift started at 6:00 a.m. and ended nine hours later. It was my work to make cardboard boxes using a staple machine for eight numbing hours a day. For a change of pace, I was given the job of swooping eight boxes of spaghetti at a time from the conveyor and loading them into my cardboard creations, which I would then glue shut and stack on a pallet. My co-workers, mostly Hispanic, working under the supervision of Italian-Americans in the changing demographics of that time, were also guilty of boredom. The worker in charge of the spaghetti conveyor often prayed and talked to "his" machine, imploring it not to break down. Co-workers taunted him mercilessly. Inevitably, a fight would erupt, with spaghetti boxes and glue brushes as the chosen weapons. I loved those moments and the yelling in different languages, voices and personalities otherwise hidden by monotony. The "fight," a loosening of the spirit, deadened by our work environment, ended too quickly as supervisors rushed to quell the spark. Work went on, but I did not. I lasted but two weeks working at Buitoni, compared to my father's thirty years, and went to work the rest of the summer as a drug store delivery boy. Much later I became a labor lawyer and, later still, a law school teacher.*

For me, a labor lawyer and labor law teacher, these personal stories, relived now by different generations, resonate with the experiences and values that have shaped my thinking and influenced my teaching about the nature, meaning and importance of work. I understand and try to present work to my students as a defining human condition. For better or worse, who we are is often measured by what we do for a living. Security in life is measured by the security of work; the loss of employment is devastating in both economic and psychological terms.<sup>22</sup> Furthermore, there is an

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22. Every day we are confronted with these realities. Social security numbers are distributed to track our working lives. Television, radio and the print media introduce us by occupation. Opinions about class and status are quickly, if unjustifiably, reached based on the kind of work we do or especially if we are unemployed. Stigma is often attached to the despair of unemployment and the fear of being unemployed is palpable. America's new "anxious class," as it is described by United States Secretary of Labor Robert Reich, "[consists] of millions of Americans who no longer can count on

intrinsic value to work apart from its remunerative worth.<sup>23</sup> Work “can instill a purpose to life and imbue it with meaning” and allows us to gain a measure of self respect and dignity.<sup>24</sup> It is also a source of community. Indeed, “in contemporary society, work has become *a* — and perhaps for many *the* — primary source of common life for adults.”<sup>25</sup> Furthermore, because “work creates a moral environment, and its influence extends to nearly every sphere of life,”<sup>26</sup> the workplace, and how it is regulated, reflects and embodies our values as a society. Yet, whether work is viewed as a “fundamental dimension of human existence”<sup>27</sup> or merely as a way of “paying for the costs of life”<sup>28</sup> the nature of the employment relationship and how it should be regulated are interrelated issues.<sup>29</sup> Today, much of the debate and focus is on the shape that such regulation should take in the future in light of the asserted demise of the labor movement in the United States.

### B. *The Decline of Unionism and the Workplace of the Future*

Since enactment of the Wagner Act in 1935,<sup>30</sup> national labor policy has centered on collective bargaining as a means of regulating the workplace. However, given the decline of unionism, there has been much scholarly attention paid to the workplace of the future and alternative methods of regulation.

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having their jobs next year, or next month, and whose wages have stagnated or lost ground to inflation.” Louis Uchitelle, *The Rise of the Losing Class*, N.Y. TIMES, November 20, 1994, §4, at 1.

23. See C. John Cicero, *TNS, Inc. — The National Labor Relations Board's Failed Vision of Worker Self-help to Escape Long Term Health Threats From Workplace Carcinogens and Toxins*, 24 STETSON L. REV. 19, 29 (1994).

24. *Id.* at 80.

25. Thomas C. Kohler, *The Overlooked Middle*, 69 CHI.-KENT L. REV. 229, 233 (1993) (emphasis added).

26. *Id.* (citing EMILE DURKHEIM, SUICIDE 378-84 (George Simpson ed., John A. Spalding & George Simpson trans., The Free Press 1966) (1897)).

27. See Gregory, *supra* note 9, at 130.

28. See Cicero, *supra* note 23, at 29. See also Howard Lesnick, *The Consciousness of Work and the Values of American Labor Law*, 32 BUFF. L. REV. 833 (1983) (discussing JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW (1983)).

29. Indeed, “the law governing the work relationship touches employees more directly and frequently than virtually any other aspect of the public ordering regime.” Kohler, *supra* note 25, at 232.

30. 29 U.S.C. § 151 et seq (1988). The Wagner Act or National Labor Relations Act (NLRA) was amended in 1947 by the Taft-Hartley Act. The Statute is now commonly referred to as the Labor Management Relations Act (LMRA).

Several factors have been identified as underlying the erosion in collective bargaining. For example, many observers believe that employer opposition to unionization, including unlawful employer conduct and the ineffectiveness of the law to prevent and remedy unfair labor practices, or to provide efficient mechanisms for union representation elections, have played a major role in the decline of unions.<sup>31</sup> The change in the economy from a manufacturing to a service base and the commensurate loss of a traditional source of union strength, is also cited as a reason for decline,<sup>32</sup> as is the failure of unions to organize the growing percentages of women and minorities in the workforce.<sup>33</sup> Other major considerations involve the dramatic rise of global competition and the inability of unions to deal with or prevent implementation of an employer's market-based decisions that impact on continued employment and job security, such as plant relocations, partial shutdowns, mergers, consolidations and downsizing.<sup>34</sup>

The response to the decline of unions and the search for alternatives for dealing with the role of labor in the workplace of the 21st century has been diverse. Some commentators suggest a system of workplace regulation that contemplates the absence of a union presence and a return to a free market system.<sup>35</sup> Several commentators, proceeding on the premise that unionism and collective bargaining as we know it is unlikely to survive, offer innovative and thoughtful alternatives such as nonmajority representation,<sup>36</sup> employee representation through caucuses formed along

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31. See, e.g., PAUL WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW (1990). See also Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization under the NLRA*, 96 HARV. L. REV. 1769, 1769-70 (1983); Michael H. Gottesman, *supra* note 2, at 62. According to Professor Gottesman, "the principal reason employees do not opt in greater numbers for unionization today is a fear that, one way or another, going that route will jeopardize their job security." *Id.* (footnote omitted). Juravich and Bronfenbrenner similarly observe that "[i]t should be no surprise given the almost complete encroachment on the legal rights of workers and unions — where workers are fired in one out of every four union elections for pursuing their legal right — that many no longer see unions as a viable means for achieving a voice in the workplace." Juravich & Bronfenbrenner, *supra* note 11, at A37.

32. See Samuel Estreicher, *Labor Law Reform in a World of Competitive Product Markets*, 69 CHI.-KENT L. REV. 3, 6 (1993).

33. See, e.g., Van Wezel Stone, *supra* note 4, at 580-81 n.14 (citations omitted).

34. See *id.* at 586-590. Professor Stone's thesis is that "to the extent that unions are currently perceived as ineffective, this perception is not fanciful, but rather reflects a reasonably correct understanding of how present labor law doctrine inhibits the power of unions to improve the wages and working conditions of their members." *Id.* at 584. That unions are perceived as inept is of critical importance to their ability to recruit members and, even more importantly, to forge a public image as the champion of the working class.

35. See, e.g., Richard A. Epstein, *A Common Law For Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357, 1357-58 (1983).

36. See Matthew W. Finkin, *The Road Not Taken: Some Thoughts on Nonmajority Employee Representation*, 69 CHI.-KENT L. REV. 195, 196 (1993).

ethnic, racial, gender or sexual identity lines;<sup>37</sup> the creation of Employee Participation Committees, modeled on West German Work Councils, which would "inform and consult" but not negotiate with management;<sup>38</sup> and establishing mechanisms to give employees more leverage within the governing structure of the corporation.<sup>39</sup> Other commentators suggest that unionism can be revived with appropriate legislative and/or internal reforms. For example, Professor Charles Craver proposes several "self-help steps that unions should pursue in order to survive[, including] (1) [the] develop[ment] [of] techniques to organize those workers who are traditionally non-union; (2) devis[ing] programs designed to enhance union economic power to counterbalance the significant power possessed by corporate employers; (3) expand[ing] the political influence of unions; and (4) work[ing] together with management to further their joint interests."<sup>40</sup> While varied and provocative, what many of these proposals share is their apparent concession to the diminished role for unions and the lack of focus on the possibilities for rekindling worker interest in and desire for unionization.<sup>41</sup>

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37. See Alan Hyde, *Employee Caucus: A Key Institution in the Emerging System of Employment Law*, 69 CHI.-KENT L. REV. 149, 149 (1993). Professor Hyde also argues for a relaxation of the prohibition against company unions under section 8(a)(2) of the NLRA in order to permit employees to voluntarily join company assisted caucuses that qualify as statutory labor organizations. *Id.* at 187. Several other commentators share in the view that section 8(a)(2) should be amended or modified to allow greater employee participation in workplace decision-making. See, e.g., Gottesman, *supra* note 3, at 86-7; Rogers, *supra* note 5, at 113-14. See also *infra* note 53 on the question of amending section 8(a)(2).

38. See WEILER, *supra* note 31, at 284-86.

39. See Gottesman, *supra* note 2, at 90-96. Professor Gottesman also proposes the use of "service providers" to assist employees in non-union settings by informing, educating and assisting them in the bargaining process. *Id.* at 81-83.

40. W. Gary Vause, *Symposium Overview — 1994 Critical Issues in Labor and Employment Law*, 24 STETSON L. REV. 1, 5-6 (1994) (citation omitted). See also CHARLES B. CRAVER, *CAN UNIONS SURVIVE?: THE REJUVENATION OF THE AMERICAN LABOR MOVEMENT* (1993). Professor Joel Rogers also stresses the internal reform of unions as critical to their renewal. See Rogers, *supra* note 5, at 126. See also *infra* note 54 on the subject of legal reforms.

41. I recognize that many would disagree with the premise that reawakening worker interest in unions is a preferred path to protecting employee rights in the workplace. However, I believe that worker interests are not well served by selective individual protections, but must be recognized within a broader social order that legitimates and reaffirms the importance of work(ers). Worker organizations, reflecting these objectives, offer a greater likelihood that the collective interests of the working class will be advanced. Of course the odds against success are high, but the consequences of failure are even higher. As noted by Professor Charles Craver, "[i]f the private sector rate [of union membership] drops from 11 percent currently to 5 percent or less by the end of the decade . . . organized labor's influence on the private sector economy . . . 'will be almost gone,' resulting in a lowering of wages and benefits throughout the economy due to the waning influence of union contracts on non-union employers." *Unions Must Change Course, Professor Says*, Labor Relations Rep. (BNA) 142 LRR 417 d29 (April 12, 1993) (interview of Professor Charles Craver by Bureau of National Affairs).

Yet, the task of re-energizing the union movement is critical and formidable. Today, the percentage of union represented workers in the private sector is actually smaller than when the Wagner Act was enacted.<sup>42</sup> If the current trend continues, “[t]he vast majority of workers in the twenty-first century will be thrown back to [a] nineteenth-century employment relationship[] under the at-will doctrine, armed only with some narrow twentieth-century expansions of common law employee rights under the at-will regime.”<sup>43</sup> For, “[d]espite . . . doctrinal improvements, it is simply fanciful to think that contract law provides workers with anything like the job security they are able to enjoy with unions.”<sup>44</sup> The essential fact remains that “in most important aspects, new or modified employment at will rules reaffirm the doctrine.”<sup>45</sup> “Critical privilege[s]” of an employer relating to the governance of the workplace, such as “determining work schedules; selecting, promoting, transferring, disciplining, laying off and discharging employees; assigning job tasks and scheduling shifts; and establishing compensation” remain unchanged and

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42. Jamin B. Raskin, *Reviving the Democratic Vision of Labor Law*, 42 HASTINGS L.J. 1067, 1068 (1991) (book review).

43. *Id.* at 1068.

44. *Id.* at 1068-69 n.6. There are three general categories of exceptions to the at will doctrine: employee reliance (generally on language in an employment manual), breach of an implied covenant of good faith and public policy. *Id.* See also Moller, *supra* note 10, at 458. Courts, in particular, have made inroads towards the protection of at will employees from unjust dismissal. For example, the public policy exception has been adopted by courts in thirty-two states, the covenant of good faith has been adopted by eleven states, while employee reliance on contract language to establish a contractual limitation on firings has been established in twenty-nine states. Van Wezel Stone, *supra* note 4, at 591-92 (citing Clyde W. Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7, 13-14 (1988) (citation omitted)). In addition, legislative reform of the employment at will rule has been enacted in Montana which requires “good cause” for discharge. MONT. CODE ANN. § 39-2-904 (1991). Other states have such “just cause” legislation under consideration including New York, Michigan, Pennsylvania, California, New Jersey, Colorado and Connecticut. See David Dominguez, *Just Cause Protection: Will The Demise of Employment at Will Breathe New Life Into Collective Job Security?* 28 IDAHO L. REV. 283, 284 nn.7-8 (1992). On a national level, the Uniform Employment Termination Act proposed the establishment of a just cause requirement for terminations. *Id.* at 284 n.9. However, while Professor Dominguez “supports the adoption of a statutory just cause standard to replace employment at will,” he criticizes such legislative measures because they narrowly define “just cause protection as an *individual* employment right to be asserted *post-discharge*.” *Id.* at 284. He argues that while the just cause standard benefits the workforce by impeding unjust dismissals, it ignores “the working community’s ongoing interest in collective job security.” *Id.* at 284-85. According to Professor Dominguez, by concentrating only on the wrongfully discharged individuals, “the role of just cause [is reduced] to [a] monetary compensation award[], offering little more than a forced ‘severance benefit.’” *Id.* at 285.

45. Moller, *supra* note 10, at 441-42. According to Professor Moller, “[c]oncentrating on the less obvious but more fundamentally important issue of the underlying balance of power [in the workplace] reveals that these developments [in the at will doctrine] are superficial, if not deceptive, in nature.” *Id.* at 442.

unfettered.<sup>46</sup> In addition, one must question how these employment-at-will "rights" will be enforced. Since filing a lawsuit is the only alternative available for vindicating those rights, and as this requires time and money, it is in the province of the well-paid worker, and not minimum wage or low wage earners, to pursue.

Furthermore, notwithstanding the current trend away from collective bargaining towards specific statutory or judicially created employment rights, the diminution of the role of the collective model imperils the gains made by the working class in the past sixty years.<sup>47</sup> The absence of a collective voice and unionized political constituency leaves individual employment rights "unstable."<sup>48</sup> That this collective voice has been insufficient and truncated does not reflect any inherent weakness in the collective model, but rather the values of decision makers that have routinely placed the interests of capital ahead of labor in the employment relationship.<sup>49</sup> The evisceration of the rights of workers has been the (intended) result. To argue that legislation and judicial decree will free or protect workers in the absence of a strong union movement is to place faith in a system of economic government whose abiding interest is the protection of private property. As aptly stated by Professor Raskin, despite their serious shortcomings,<sup>50</sup> "it is indisputable that unions have, by and large, been on the side of progressive social change and greater empowerment and advancement of working people. This bottom-line truth is one reason why business has embarked on a course of destroying the union movement."<sup>51</sup>

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46. *Id.* at 451.

47. "Beginning in the mid-1930s unions raised workers' wages well above what they otherwise would have been; the result has been a fairer distribution of the nation's wealth and greater purchasing power for the country's goods. Nonunionized workers also benefited, as employers raised their wages and gave them benefits to discourage them from joining unions. Conversely, when unions declined in the 1970s, so did the real wages of union and nonunion workers alike." John B. Judis, *Can Labor Come Back?*, THE NEW REPUBLIC, May 23, 1994 at 25, 32.

48. See Van Wezel Stone, *supra* note 4, at 638.

49. See, e.g., Klare, *supra* note 15, at 273-74; JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW (1983).

50. These shortcomings include issues of union racism, sexism, corruption, bureaucracy and a lack of a democratic process. Raskin, *supra* note 42, at 1082 n.30. See generally Michael J. Goldberg, *Affirmative Action in Union Government: The Landrum-Griffin Act Implications*, 44 OHIO ST. L.J. 649 (1983) (discussing the history of race and sex discrimination in unions and proposing affirmative action remedies to increase the number of women and minorities in positions of union leadership).

51. Raskin, *supra* note 42, at 1082 n.30. According to Professor Raskin, "[t]he crucial problem lies in the legal regime. The weakness of American labor law has emboldened management to reduce the union movement to a shadow of its former self by preventing citizens from exercising the rights secured to them by the Wagner Act." *Id.* at 1081-82. Professor Raskin's incisive article advances

Because of the historic role unions have played in asserting employee rights and in at least attempting, despite the odds, to balance the inequality of bargaining power between capital and labor,<sup>52</sup> it is critical to American workers that unionism survive. Collective bargaining must remain a cornerstone, albeit a weathered one, of national labor policy, and it is premature to create strategies for protecting employee rights solely on the model of a union-free, individualized, workplace of the Twenty-First century. Indeed, the continued presence and active representational role of unions in the workplace makes it more likely that cooperative workplace policies can be successful.<sup>53</sup>

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provocative ideas for the reform of labor law. For example, as a way of restraining "emboldened management," he proposes that Congress "amend the Racketeer Influenced and Corrupt Organizations Act (RICO) to make violations of section 8(a)(3) of the Wagner Act a predicate act sufficient to trigger the RICO statute." *Id.* at 1086 (citation omitted). Professor Raskin's suggested change in the law "would classify two or more serious unfair labor practices as a pattern of 'racketeering activity,' giving U.S. Attorneys the power to prosecute offenders, seize property 'acquired or maintained' in violation of the law, and invoke RICO's forfeiture provisions. It also would give 'any person injured' as a result of the business' pattern of unfair labor practices, such as workers illegally fired, an action for treble damages." *Id.* (citations omitted). Professor Raskin would also change the burden of proof to require an employer to justify *any* discharge or other "negative change in work status" during the course of a union election campaign by first appearing before "an administrative or judicial forum and sustaining its burden of proof that the discharge would not constitute an unfair labor practice." *Id.* at 1085. There can be no quarrel with Professor Raskin's statement that these changes in the law "would alter radically the employer's cost-benefit equation for engaging in such practices . . ." *Id.* at 1087.

52. The National Labor Relations Act itself refers to the imbalance of power between workers and capital and establishes the principle of collective bargaining as a means to address this "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 association . . ." 29 U.S.C. § 151 (1988). Indeed, one of the six statutory goals of the Wagner Act was an equalization of bargaining power. See Klare, *supra* note 15, at 281.

53. Over the past several years, much attention has been paid to the establishment of participatory worker management programs which do not run afoul of the NLRA's prohibition of company unions. section 8(a)(2) of the NLRA provides, in pertinent part, that it is an unfair labor practice for a company "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . ." 29 U.S.C. § 158(a)(2) (1988). The focus has been on both the nature of the committees and the subjects discussed; i.e., are the committees labor organizations and do they "deal[] with" management over terms and conditions of employment? 29 U.S.C. § 152(5) (1988). This has led to a debate over whether section 8(a)(2) should be repealed or modified in order to accommodate greater employee involvement in determining working conditions. The argument was stirred by the NLRB's decision in *Electromation, Inc.*, 309 N.L.R.B. 990 (1992), where the Board held that the employer's creation of employee "action committees" to deal with management over absenteeism, wage progression and no-smoking policies violated section 8(a)(2). See Estreicher, *supra* note 32, at 23. In response to management "fears" that the Board's ruling would hamper joint employer and employee collaboration on workplace strategies to enhance corporate competitiveness in the global marketplace, legislation was introduced in Congress to amend section 8(a)(2) to "allow for the establishment of employee participation programs dealing with productivity and efficiency." *Id.* at 22 n.66. Labor stands staunchly opposed to the legislation, fearing that it is a gambit to open the door to company unions which was closed by the Wagner Act in 1935. For additional discussion of participatory programs, see *infra* note 75.

### C. Images of Unionism

The central question remains, however, of how a union revival can be accomplished. Meaningful legal reform is a beginning.<sup>54</sup> However, legal reform must be accompanied by a strategy to reawaken (or create, as the case may be) the image of the union as an extension of the concerns and hopes of workers. During the early twentieth century, the use of symbolism and imagery was a centerpiece of the AFL's legal strategy.<sup>55</sup> Notwithstanding the debate over its use, "[a] growing number of scholars are emphasizing the role of narrative and metaphor in shaping law in general and labor law in particular."<sup>56</sup> Professor James Pope aptly describes the role of legal imagery as "providing a focus for labor movement activity at all levels from legal advocacy to mobilizing rank-and-file resistance."<sup>57</sup> Indeed, such imagery "helped to provide what is lacking in even the most thoughtful realist proposals today: a broad vision that can inspire workers and their allies to the extraordinary efforts necessary to bring about fundamental labor law reform."<sup>58</sup> Whether, as

54. See, e.g., WEILER, *supra* note 31, at 225-306; Raskin, *supra* note 42, at 1100-01; *Report and Recommendations of the Commission on the Future of Worker-Management Relations*, Daily Labor Rep. (BNA) 1995 DLR 6 d55 (January 9, 1995) [hereinafter *Dunlop Commission Report*]. For example, the 15 specific recommendations of the Dunlop Commission include: an expedited representation election procedure; increased use of section 10(j) injunctions; upgraded dispute resolution programs to assist in securing initial collective bargaining agreements; "clarification" of section 8(a)(2) to allow companies greater latitude in the operation of employee participation programs; and, the development of private arbitration alternatives for workplace disputes. *Id.*

55. See James Gray Pope, *The Past of Labor Law — And Its Future*, 39 UCLA L. REV. 481, 500 (1991) (reviewing WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* (1991)).

56. *Id.* at 501 (citations omitted). The debate centers on the efficacy of such imagery in furthering unionism. Professor Pope succinctly explains the arguments as follows: "It is not enough, [say its proponents], to debunk dominant myths with facts and figures; counter-narratives and metaphors play a vital role in legal change. Conversely, like the New Deal realists before them, modern realists dismiss this approach as 'romanticism.' Instead, they argue, legal change can and should come about through rational persuasion based on 'careful intellectual spadework.'" *Id.* (footnotes omitted).

57. *Id.* at 502.

58. *Id.* (citation omitted). See also Alan Hyde, *Endangered Species*, 91 COLUM. L. REV. 456 (1991) (reviewing WEILER, *supra* note 31). According to Professor Hyde, "[i]n order to motivate members, to induce action, to foster legislative change, and to exist at all, the union must make significant emotional, affective, motivating appeals to create . . . 'collective action.'" *Id.* at 471. He notes that a "growing literature describes in different settings the role of ideal, visionary appeals in the construction of collective identity and action, where appeals to economic interest either actually failed or would have failed." *Id.* (citation omitted). See also Denis MacShane, *Lessons for Bosses and the Bossed*, N.Y. TIMES, July 19, 1993, at A15 (calling for more "mass public protests" and "flamboyance" by the AFL-CIO which has traditionally "scorned organize[d] general strikes and street demonstrations"). Indeed, one of organized labor's major successes of the recent past, the Justice for Janitors campaign, "used '60s-style sit-downs and demonstrations to embarrass building owners." See

Professor Alan Hyde suggests, such “‘collective action’ will be organized around themes of employee participation, autonomy, or control . . . or around themes of community power . . . or other themes of contemporary organizing, such as employee ownership or feminism,” a “more inspirational vision to motivate worker action” is needed.<sup>59</sup> Indeed, as Professor Hyde states, ideally such a vision would “actuate a political crisis that might, in turn, result” in meaningful reform.<sup>60</sup>

Demographic and polling data suggest that American workers can still be inspired and have not given up on unionization. Though they may be skeptical about the effectiveness of unions, a 1988 Gallup Poll found that a commanding majority of Americans:

agree[d] that “labor unions are good for the nation as a whole” (60 percent saying yes to 26 percent saying no); that “the standard of living of many American workers has been seriously undermined by wage reductions and benefit cuts” (70 percent yes versus 23 percent saying no); that “without union efforts, most laws which benefit employees would be seriously weakened or repealed” (68 percent yes versus 21 percent no); and consequently that “existing labor laws should be strengthened to prevent corporations from denying workers rights to organize” (66 percent saying yes versus 25 percent no).<sup>61</sup>

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Judis, *supra* note 47, at 28. The impact of these and other strategies borrowed from the industrial unions of the '30s has resulted in a dramatic rise in organized janitors in Washington, D.C and Los Angeles: from 0 to 40%, and 30 to 90% respectively, in the 1980s. *Id.* at 27-28.

59. Hyde, *supra* note 58, at 472.

60. *Id.* According to Professor Hyde, history teaches that “[m]ajor pronoun labor law reform” occurs only when “high levels of industrial [labor] unrest” and disruption of the prevailing economic order occur. *Id.* at 470. See also Pope, *supra* note 55, at 499. Professor Pope notes that there is “a growing body of scholarship emphasizing the essential role of disruption in winning labor law reform.” *Id.*

61. Raskin, *supra* note 42, at 1081 (citing WEILER, *supra* note 31, at 108 n.8). More recent studies reach much the same conclusions. Professors Richard Freeman and Joel Rogers report that while a majority of workers prefer a joint, cooperative relationship with management, a “substantial minority of employees — several times the current level of union membership — want to join [unions].” RICHARD FREEMAN & JOEL ROGERS, *WORKER REPRESENTATION AND PARTICIPATION STUDY* (1994). According to their findings, 32% of non-union, non-managerial employees would vote for a union if an election were held today. *Id.* Indeed, “[a]mong current union members, 90 percent would vote to keep their union if a new election were held today . . . [and, o]verall . . . 40 percent of respondents [to the survey] reported that they would vote union in an election, and 40 percent reported that most workers at their workplace would vote union . . . .” *Id.* Professors Juravich and Bronfenbrenner, who interpret the study’s findings differently, argue that the conclusion reached by Freeman and Rogers that employees favor cooperative programs ignores the more compelling fact that “close to half of American workers, despite the odds, still continue to believe in unions and the possibility of real power in the workplace.” Juravich & Bronfenbrenner, *supra* note 10, at A37.

There is also "solid evidence to refute [the] thesis that union decline is a demographic inevitability."<sup>62</sup> Contrary to the accepted wisdom that the decline of unionization is wedded to the loss of America's industrial and manufacturing base, and is likewise irretrievable, large segments of employees in the new service economy, as well as previously overlooked sources for organizing, such as women workers, provide significant future opportunities for unions.<sup>63</sup> Indeed, as aptly noted by Professor Raskin:

The typical employee in the new post-industrial economy . . . is not a well-paid public relations professional at Ben and Jerry's enjoying free ice cream, liberal parental leave policies, and workplace democracy, but an unorganized supermarket check-out clerk with no health insurance, a waitress living on tips with no benefits or vacation, or an underpaid nurse changing bedpans in a hospital overrun by the contemporary urban epidemics of violence and disease.<sup>64</sup>

Yet, in order to succeed in organizing these workers, unions themselves must undergo a transformation. The male-dominated hierarchical unions that have been prevalent during the post Wagner Act era must become more democratic and diverse.<sup>65</sup> Unions must continue

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62. Raskin, *supra* note 42, at 1080. Thus, while "some new 'knowledge workers' may in fact shun unions in favor of a 'distinctive type of collective voice in the affairs of the workplace,' there are still 'large segments of office and service workers,' such as office clerk-typists and fast food counterpeople (as well as) computer operators, telemarketing employees, hotel clerks, and secretaries) who work 'in an assembly-line atmosphere — exactly the environment in which collective bargaining appeared so promising from the thirties to the fifties.'" *Id.* (citing WEILER, *supra* note 31, at 107-08). Furthermore, "the occupations growing fastest in absolute numbers, as opposed to rates of growth, are 'cashier, registered nurse, janitor, truck driver, and waiter and waitress.'" *Id.* at 1080-81 (emphasis omitted) (citing WEILER, *supra* note 31, at 108 n.7).

63. See, e.g., Judis, *supra* note 47, at 25. According to Judis, "[u]nions are discovering that they can organize workers they formerly ignored." *Id.* Thus, while "union leaders [once] assumed it was much more difficult to recruit nurses or waitresses than machinists or assembly-line workers, because service-sector workers were either professionals who disdained unions or part-time minimum wage workers who [did not] stay in on the job long enough to be organized. Today, union leaders have discovered it is quite possible to organize such workers, because the owners of hotels, hospitals or grocery stores [cannot] respond to organizing drives by threatening to move their businesses elsewhere." *Id.* Judis adds that unions are currently achieving "their greatest success among white-collar, service and government workers." *Id.*

64. Raskin, *supra* note 42, at 1081.

65. See Marion Crain, *Feminism, Labor, and Power*, 65 S. CAL. L. REV. 1819 (1992). Professor Crain argues that "unions must forge a solidarity that stretches across class, gender and race boundaries to reradicalize the labor movement." Marion Crain, *Images of Power in Labor Law: A Feminist Deconstruction*, 33 B.C. L. REV. 481, 526 (1992) (citation omitted) [hereinafter Crain, *Images of Power*]. In both of these visionary articles Professor Crain suggests "that a labor movement allied with the feminist movement and organized around a feminist conception of power would bring new vitality to unions as they struggle to empower workers, particularly women." *Id.* (citation omitted).

to expand their efforts at inclusion by organizing historically underrepresented populations, including the ever present large number of exploited immigrant and minority workers and to expand collective bargaining rights to cover all workers, especially migrant farm laborers. Indeed, it is ironic that so much scholarly attention is paid to creating or adapting to the union-free workplace of the twenty-first century, while migrant farm workers toil in relative obscurity under nineteenth century conditions that evoke the very reasons for enactment of the Wagner Act.<sup>66</sup>

The contingent workforce also provides a fertile ground for labor to cultivate. Today, the largest employer in the United States is not General Motors or AT&T, but Manpower, Inc.<sup>67</sup> The growth of the temporary workforce, as well as the dramatic rise in the use of part-time workers, coupled with seasonal employment, has created a class of vulnerable workers with little legislative protection.<sup>68</sup> The Dunlop Commission, while noting that contingent employment relationships maximize workforce

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66. While beyond the scope of this article, it must be noted that the plight of agricultural workers and migrant farm laborers continues to be neglected more than thirty years after Edward R. Murrow first brought their miserable working conditions to the attention of the American Public with his landmark documentary *Harvest of Shame*. *CBS Reports: Harvest of Shame* (CBS television broadcast, Nov. 25, 1960). Specifically excluded from coverage under the NLRA and other protective labor legislation (see Lori Nessel & Kevin Ryan, *Migrant Farmworkers, Homeless and Runaway Youth: Challenging the Barriers to Inclusion*, 13 LAW & INEQ. J. 99, 103-108 (1994)), the working conditions of the majority of migrant farm workers are punitive. They live in inadequate housing, are exposed to pesticides while working long backbreaking hours at minimum wage (*id.* at 105), and are often denied access to minimal social services. See, e.g., *State v. Shack*, 277 A.2d 369, 373 (N.J. 1971). "[R]ootless and isolated" (*id.* at 372), following the plantings of the Spring and harvests of the Fall, they travel long distances from home states, such as Florida or Texas, to stream states, such as New Jersey or New York, often in unsafe vehicles, in search of work. Nessel & Ryan, *supra*, at 121 n.109. Many of the farmworkers are immigrants or illegal aliens who, under the domination of a "crewleader," are misled, denied basic benefits and oppressed, sometimes into slavery. See, for example, Joyce E. McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment*, 4 YALE J. L. & FEMINISM 207 (1992), which includes an analysis of court decisions on the applicability of the 13th amendment in cases involving agricultural workers. See also Marc Linder, *Crewleaders and Agricultural Sweatshops: The Lawful and Unlawful Exploitation of Migrant Farmworkers*, 23 CREIGHTON L. REV. 213 (1989-1990); Nessel and Ryan, *supra*. While a dedicated cadre of legal and social service organizations advocate for change and provide crucial services, neither unions nor an appreciable number of academics have endeavored to expose the exploitation of these workers or pressed for critical legal reform.

67. See Laura McClure, *Working the Risk Shift*, THE PROGRESSIVE, Feb. 1994, at 23; see also *Senate Measure Would Protect Contingent Workers Under Labor Laws*, Daily Labor Rep. (BNA) 1994 DLR 193 d19 (Oct. 7, 1994).

68. There is no reliable government data on the extent of the contingent workforce. See H. Lane Dennard, Jr. & Herbert R. Northrup, *Leased Employment: Character, Numbers, and Labor Law Problems*, 28 GA. L. REV. 683, 695 (1994). According to statistical evidence provided by the authors, in 1984 there were 10,947 contingent or leased employees in 98 companies. By 1993, the numbers had risen to 1.6 million in 2,178 companies. *Id.* at 696.

flexibility and provide a mechanism for transitions between temporary and permanent jobs, nevertheless concluded that

contingent arrangements may be introduced simply to reduce the amount of compensation paid by the firm for the same amount and value of work, which raises some serious social issues. This is particularly true because contingent workers are drawn disproportionately from the most vulnerable sectors of the workforce. They often receive less pay and benefits than traditional full-time or 'permanent' workers, and they are less likely to benefit from the protections of labor and employment laws. A large percentage of workers who hold part-time or temporary positions do so involuntarily.<sup>69</sup>

Historically, the National Labor Relations Act has been interpreted to exclude temporary workers from collective bargaining units comprised of full-time and "regular part-time" employees.<sup>70</sup> Impervious to union organizational efforts, temporary workers increasingly have been utilized by management to insulate companies from becoming organized.<sup>71</sup> New strategies (and legal reform) must be developed to organize those employees excluded from union representation because they lack a "community of interest" with permanent employees. For example, such strategies could include organizing temporary workers at their employing agency based on a different combination of community of interest factors than those traditionally used in determining appropriate bargaining units.<sup>72</sup> Yet, whatever strategies and reforms are ultimately undertaken, the role for labor in this effort is rooted in its historic function and image as a voice for the most disempowered of the working class. Furthermore, because women comprise two-thirds of all part time workers and sixty percent of all temporary workers, they are disproportionately affected by

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69. *Dunlop Commission Report*, *supra* note 54, at 45. The Commission added that legal incentives currently exist to "create contingent relationships not for the sake of flexibility or efficiency but in order to evade . . . legal obligations." *Id.*

70. See, e.g., *See's Candy Shops, Inc.*, 231 N.L.R.B. 156, 156 (1977); *Brookdale Hospital Medical Center*, 313 N.L.R.B. 592, 593 (1993).

71. See *The Growing Contingent Workforce: A Challenge for the Future*, Daily Labor Rep. (BNA) 1993 DLR 154 d23 (Aug. 12, 1993) (paper by Jonathan P. Hiatt and Lynn Rhinehart presented to the American Bar Association Section of Labor and Employment Law).

72. The Dunlop Commission has recommended that the definition of employee and employer in labor, employment and tax law be changed to reflect "the economic realities" of the employment relationship. See *Dunlop Commission Report*, *supra* note 54, at 46. Other suggestions include enacting legislation "that would allow temporary workers to accumulate benefits from agency to agency and assignment to assignment." *Contingent Workers Unfairly Deprived of Benefits, Job Security, Senate Panel Told*, Daily Labor Rep. (BNA) 1993 DLR 114 d11 (June 15, 1993).

the legal sleight-of-hand that allows this disposable workforce to exist. Thus, far from being extinct, unions are "relevant, particularly to the women's movement, because they are properly situated to effect significant economic, political and social advances for working women."<sup>73</sup>

The reasons to continue to teach traditional labor law are many and varied. It is unwarranted to suggest that unionism is dead, and that, therefore, so is the teaching of traditional labor law. Indeed, an argument can be made that the decline in union density is purely cyclical and that unionism is holding its own and is on the rebound. For example, Professor Emeritus Charles J. Morris believes that "[a] reinvigorated labor movement, leaner, better educated and highly focused on new objectives, and for the most part headed by a new generation of leaders, has already begun to demonstrate a remarkable ability to capitalize on current opportunities for organizing and collective bargaining."<sup>74</sup> He states that a "fundamental change in direction" has already occurred in American labor relations involving the convergence of this change in direction by unions with three other factors: enhanced employee participation in the workplace;<sup>75</sup> the "chilling effect" of the *Electromation* decision;<sup>76</sup> and more

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73. Crain, *Images of Power*, *supra* note 65, at 484 (citations omitted).

74. See Morris, *supra* note 10, at 7. Professor Morris "find[s] [him]self in disagreement with the naysayers who have . . . predicted the virtual demise of organized labor and collective bargaining in the not-too-distant future [or] have foreseen a continued decline in union influence and relevance . . . ." *Id.* at 1. Tom Juravich and Kate Bronfenbrenner agree with Professor Morris' view. They conclude that "despite what the pollsters may report, and management may hope, trade unions will continue to exist in this country. For, no matter how embattled or how unfashionable, they remain the only vehicle for real power on the job for working Americans." Juravich & Bronfenbrenner, *supra* note 10, at A37.

75. However, Professor Morris suggests that "there is mounting evidence that for a participatory program to achieve its highest potential, the workers must share in a broad range of decision-making activities concerning both production methods and other work related subjects." Morris, *supra* note 10, at 3. He notes that "it is not surprising that most of the highly acclaimed success stories of employee involvement are those in which the programs are supported by independent labor organizations of the employees' own free choice." *Id.* Once more, Juravich and Bronfenbrenner agree. They argue that "without unions, which means without independence or power, these cooperative programs are hollow attempts to pacify workers' desire for a real voice on the job. The result is that these efforts rarely rise much above free doughnuts and happy talk." Juravich & Bronfenbrenner, *supra* note 10, at A37. Commenting on the WORKER REPRESENTATION AND PARTICIPATION STUDY (*supra* note 61), Juravich and Bronfenbrenner note that "Freeman and Rogers may have found that workers prefer these weak organizations to more powerful unions. What they fail to acknowledge is that this does not come from a lack of desire for real power, but is a product of the fear of employer retaliation." *Id.*

76. Contrary to the commonly espoused view that the NLRB's decision in *Electromation* has stifled "legitimate nonunion worker participation programs that involve employees in the production process . . . the chilling effect is being felt by numerous companies that maintain a variety of employee representation plans created by management that currently participate illegally in grievance handling and/or in the setting of employee compensation or other conditions of employment." Morris, *supra*

“vigorous and effective law enforcement” by the National Labor Relations Board.

Whatever the future holds for unions and the collective bargaining model of workplace regulation, the need to teach new generations about this version of labor law is paramount. It is no coincidence that “[a]s unionism has been systemically and professionally undermined, so too have wages, benefits, job security, worker privacy, morale and legal protections . . . .”<sup>77</sup> By teaching “traditional” labor law we assist in re-envisioning the role of labor and revitalizing the labor movement as a social and political force to protect the interests of workers. Furthermore, as I discuss below, teaching labor law through the imagery created by experiential learning can lead to a heightened understanding of the dynamic of the workplace and legal rules of the employment relationship. Thus, imagery and roleplaying in the “traditional” labor law classroom can contribute its share to the development of a social consciousness on the role of labor and a vision of its continued relevance to shaping the still emerging workplace of the twenty-first century.

## II. THE STUDY OF LABOR LAW

In this section, I describe various classes that use interaction between students and teacher as the basis for learning, as well as some of the other pedagogical tools utilized to reinforce doctrinal and skills learning in the “traditional” labor law course that I teach.<sup>78</sup> Students are taught labor law through the use of hypotheticals, problems, class discussion, a movie (*Harlan County*),<sup>79</sup> a documentary (*Harvest of Shame*)<sup>80</sup> and interactive exercises that are meant to engage them in the application of doctrine. In order to implement the experiential components of the curriculum, I use the analogy of classroom to shop floor and place students in the dual roles of employees and students.<sup>81</sup> Each class plan, and especially the

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note 10, at 5.

77. Gerry O’Sullivan, *Riesel was a Champion of Workers — They Sure Could Use Him Now*, PHILADELPHIA INQUIRER, January 14, 1995, at A11.

78. In addition to the traditional course, I teach a lawyering seminar in labor law that combines a doctrinal understanding of the National Labor Relations Act with trial advocacy. This course is part of CUNY’s fourth semester required lawyering curriculum. While several of the doctrinal classes use the same interactive pedagogy as is used in my labor law class, there is a greater focus on lawyering skills. In particular, students independently research and write a major memorandum of law and conduct a mock NLRB administrative hearing based on a simulation created by the author.

79. HARLAN COUNTY, U.S.A. (Cinema 5 1977).

80. *Supra* note 66.

81. See *infra* notes 88-91 and accompanying text.

experiential classes, incorporates themes involving the meaning of work, hierarchy in the workplace, and the social and political interests that shape decision making and influence doctrine. While a great deal of doctrine is covered, the theory of labor law is consistently stressed.<sup>82</sup> Indeed, the nature and dynamics of the employment relationship is a touchstone to which we return in virtually all doctrinal areas as a way of explaining and understanding the law and decision making process.

At the outset, drawing upon my experience in the practice of labor law, I attempt to show how union organizing can follow failed attempts by employees at improving working conditions through individual or collective actions.<sup>83</sup> The first case that students are assigned to read is *NLRB v. Washington Aluminum Co.*<sup>84</sup> concerning the nature of protected, concerted activity by employees over their working conditions under Section 7 of the NLRA.<sup>85</sup> A hypothetical fact pattern is used to illustrate how incipient employee protests over, or attempts to improve, working conditions, may lead to unionization in the face of employer indifference or hostility. The hypothetical is factually complex and permits exploration of the fine distinctions in applicable legal doctrine, including the dichotomy between protected, concerted activity and union activity. The hypothetical draws directly from the cases (i.e., *NLRB v. Washington*

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82. For example, the limits placed on employee Section 7 rights, such as the "disloyalty" doctrine (*see infra* note 123), is a lens through which we may examine issues of status and hierarchy in the workplace. Similarly, issues of status and workplace democracy inform our discussion of worker participation programs and their limits.

83. Labor law has a deserved reputation for being fact and rule intensive and, if allowed to, the traditional course can become immersed in minutiae best left to the practice of labor law, such as the many rules applicable to the processing of a representation case, including electioneering, contract bar and unit determinations. However, I believe the crux of the course must explore the reasons why employees engage in protected concerted activity and union activity. These include issues affecting worker safety and health, and how a collective bargaining relationship is created and the nature of collective bargaining. Also included are the economic weapons available to each side, alternative dispute mechanisms such as grievance and arbitration procedures, and the role of the union in the workplace. The limits placed on the use of economic weapons, such as the law of secondary boycotts and study of the mobility of capital, are similarly addressed. I close out the semester with a unit on migrant farm workers, focusing on migrant populations in the vicinity of New York City.

84. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962).

85. *Id.* at 9. The LMRA, 29 U.S.C. § 157 (1988), provides in pertinent part: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ." In *Washington Aluminum*, the Supreme Court held that seven employees who walked off the job because of the "bitterly cold" conditions in the plant were engaged in protected, concerted activity for the purpose of protesting a condition of employment — the lack of heat in the plant — and that their discharge violated the Act. 370 U.S. at 11.

*Aluminum*, *supra* note 81; *Meyers Industries, Inc.*;<sup>86</sup> and *City Disposal v. NLRB*<sup>87</sup>) in order to engage students in the process of analogical reasoning that is used when identifying and analyzing the legal issues presented in a particular fact pattern.<sup>88</sup>

A. *The Beginning of an Interactive Faculty/Student Relationship  
(or What Business is it of Yours?)*

As it is a pedagogic goal of the course to have students experience first-hand some of the issues impacting on the status of employees in the workplace, early in the semester students are required to complete an "employment application" that asks intrusive questions about private matters.<sup>89</sup> For example, the application inquires about health problems, drug use (including use of alcohol and tobacco), legal problems (including any tax delinquency), financial problems (including any bankruptcy filings and outstanding debt), as well as questions that are meant to uncover any latent union sympathies. The application also informs students that they are to submit to and pass a physical examination, which will include testing for drug use, as a condition of employment.<sup>90</sup> The objective, of course, is to raise questions concerning the nature of the employment relationship and the bounds of legitimate employer inquiry into the "qualifications" of its workers beyond their ability to do the work.<sup>91</sup>

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86. *Meyers Industries, Inc.*, 281 N.L.R.B. 882 (1986) [hereinafter *Meyers II*]. In *Meyers II*, the Board held that to find an employee's activity to be "concerted" under section 7, it must be "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee [herself]." *Id.* at 885.

87. *NLRB v. City Disposal*, 465 U.S. 822 (1984). In *City Disposal*, the United States Supreme Court distinguished *Meyers I* (*Meyers Indus., Inc.*, 268 N.L.R.B. 493 (1984)) and, affirming the Board, held that a single employee, acting alone, is engaged in concerted activity protected by section 7 when she acts to enforce the provisions of a collective bargaining agreement.

88. For example, students must apply the holding in *City Disposal* to a situation involving a contract proposal, rather than a settled term of an existing collective bargaining agreement.

89. The application refers to a fictional company, Espresso Trucking and Manufacturing Co., which has been created in order to place students in the role of employees. Throughout the semester, their status as fictional employees and as students is used to create workplace issues for discussion and analysis.

90. Student reaction to the application generally has been hostile and has resulted in the questioning of the employer's right to inquire about such personal matters.

91. The use of an employment application is a more recent addition to the course material and can be put to many different uses. For example, I have not yet experimented with making the application a requirement for "formal acceptance" into the labor law class. The application could be introduced as a "screening device" for course registrants and could be used to inquire into areas analogous to those on a job employment application. In addition to personal, educational and employment histories, the application could ask about grades in other courses, membership in any campus organizations, whether the student has had occasion to consult with the Dean of Students or

*B. The Employer Responds to the Union Organizing Drive: Free Speech or Unlawful Interference? (or What Have We Done Wrong?)*

A key tenet in the study of the union organizing drive is the nature of the employer's response, including the employer's first amendment right of free speech embodied in Section 8(c) of the LMRA.<sup>92</sup> As a way of introducing this unit, I subject my students to a captive audience speech. Coming in the midst of our study of the United States Supreme Court's seminal decision in *NLRB v. Gissel Packing Company*,<sup>93</sup> the doctrinal objective of this class is to expose students to the limits on employer speech<sup>94</sup> and to have them evaluate the lawfulness of my statements. However, there is another and perhaps equally important goal: to replicate an employer's control over its workers and the feeling of powerlessness that accompanies being ordered out of familiar surroundings and routines in the workplace. The class also examines the impact that this dynamic, including the disruption in normal work patterns, has on recollection and the gathering of facts.

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other administration officials, as well as whether this was done alone or with other students. My expectation is that students would rebel at such questioning. Yet, the pedagogic goal would be to contrast and examine the assumptions that workers make, as well as their expectations, about the employer's right to inquire about private matters, and their powerlessness to do anything about it because of the simple need for a job. My hesitation in using the employment application in this way on either the first or second day of class is that students, as yet unaware of the interactive approach used in the course and of the analogy drawn between students and workers, may feel threatened and intruded upon (as they should be) by the nature of my questioning.

92. Section 8(c) provides that "[t]he expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c) (1988).

93. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

94. In *Gissel*, the Supreme Court approved the National Labor Relations Board's imposition of a bargaining order as a remedy for serious employer unfair labor practices. However, the Court also addressed the limits to an employer's free speech rights under section 8(c). *Id.* at 617. In fashioning its standard, the Court noted that the "precise scope of employer expression" must be assessed "in the context of its labor relations setting," and that "an employer's rights cannot outweigh the equal rights of the employees to associate freely . . ." *Id.* The Court explained that "any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." *Id.* The Court concluded that "an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'" *Id.* at 618. Thus, while an employer "may even make a prediction as to the precise effects he believes unionization will have on his company . . . the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to [the] demonstrably probable consequences [of unionization] beyond his control" in order to invoke the protection of the first amendment. *Id.*

I begin class by informing the students that a matter of some importance has been brought to my attention which must be addressed before we begin our work for that day. I then instruct them to take their personal belongings and to follow me to a place outside of the classroom (usually to the lounge or simply down the hall) where I proceed to deliver my speech. Student reaction ranges from puzzlement and curiosity to fear (what have we done?). They murmur, "What is going on?" but generally have no idea that I, as their "employer," am about to deliver an anti-union campaign speech. As the speech begins, I take out a crumpled piece of paper from my pocket and inform the students that I discovered it in a trash can after our last class. (I add that this is a good way to keep tabs on what is happening in the shop). I then read what is printed at the top of the sheet which suggests that the employees of Expresso Trucking and Manufacturing Company are engaged in a union organizing drive.<sup>95</sup> At this point, students generally become aware of my ploy but fall into role as Expresso employees who are being subjected to their employer's initial reaction and disappointment over the incipient organizing effort.<sup>96</sup> My speech, which lasts about ten minutes, is varied in tone and uses different themes in an effort to persuade the employees to stick with the Company.<sup>97</sup> I include both lawful and unlawful statements in the speech as well as borderline remarks. Because I do not read from my notes during the speech, it takes on an extemporaneous quality. In my experience, this makes it more realistic and allows for greater discussion of what I did or did not say as my own recollection is often clouded by such a spontaneous

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95. The petition reads as follows: "We the undersigned employees of Expresso Trucking and Manufacturing Company of 65-21 Main Street, Flushing, N. Y., (the Law School's address) no longer being able to tolerate the arbitrary actions of management, hereby designate Local 560, International Brotherhood of Teamsters as our representative for collective bargaining purposes." The crumpled petition is unsigned but constitutes sufficient evidence to suspect that an organizing drive is underway. My choice of Local 560 is based on the infamous reputation of that Union, the first in the nation to be placed in trusteeship under the RICO statute, a fact which I try to use to the company's advantage during my speech. See *United States v. Local 560 International Brotherhood of Teamsters*, 780 F.2d 267 (3d Cir. 1985).

96. As one student stated about this exercise: "[The professor] exposes labor law students to the harrowing experience of employees' unequal bargaining power and their genuine need for legal protection . . . . After this exercise, students readily adopted the employees' role in [the professor's] fictional company as the semester progressed." Memo from labor law student on file with the author.

97. These themes include an appeal to the employees' sense of loyalty, that the union is an outsider which cannot deliver on its promises, the detrimental economic impact of unionization on the Company generally and employee terms and conditions of employment specifically, the nature of collective bargaining, including the negotiability of all existing terms and conditions of employment, and the economic weapons available to the parties, including the risks and costs inherent in striking to achieve the union's bargaining goals.

approach.<sup>98</sup> At various points, I seek to engage the students in discussion about their reasons for unionizing.<sup>99</sup> Student responses not only reflect an understanding of the different motivations that may provoke an organizing effort but provide an opportunity to explore the existing power dynamic between labor and management.<sup>100</sup>

Following the speech, students are asked to interview one another in an effort to recall and reconstruct the content of my remarks. The goal of this exercise is to demonstrate, in the first instance, the simple difficulty of recalling accurately what was said, even amongst “lawyers-in-training,” and to show how memory is subject to and influenced by personal bias and individual interest. Indeed, the exercise allows students to more directly understand facts from the perspective of a witness, as well as where the “universe of facts” come from in a particular case.<sup>101</sup> During the uniformly enthusiastic follow-up discussion in class, which is centered on the students’ versions of the facts compared to my own, they seem genuinely surprised at the variation in their stories, and at the impact of

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98. This, in and of itself, provides students with insight into the nature of what are later alleged as “facts” in a case.

99. For example, as part of this colloquy, I remind students of the personal favors I have done for them, such as loaning them money, granting them time off from work or looking the other way when they have been late for work, and how this will change with the advent of a union. I also single out a student whom I confront directly about the changes that will occur if the company is unionized. Student reaction to this tactic varies. Some silently observe while others, who are more assertive in the role play, may seek to remind me that working conditions, including wages and benefits, have not improved despite my promises to the contrary, and that this leaves them little recourse but to unionize. I have found that the degree and quality of student interaction depends on the individual and group personalities involved, as well as the size of the class.

100. For example, while (perhaps unlawfully) soliciting employee grievances and promising them improved working conditions and benefits, I make it clear that management possesses ultimate authority concerning terms and conditions of employment, including the critical issue of job security.

101. Students often speak of the “facts” subjectively and in the form of conclusions. For example, they refer to what I have said as being threatening, but do not sufficiently set forth the actual words that I used. They focus on the volume of my voice instead of the content of my message. This presents an opportunity for valuable learning on the dissonance between what the law views as being legally significant compared to what employees may find important. It is also an opportunity for students to become more discerning about the nature of evidence. See Abraham P. Ordovery, *Teaching Sensitivity to Facts*, 66 NOTRE DAME L. REV. 813 (1991). According to Professor Ordovery, “[w]hat students are not generally taught is sensitivity to the finding and gathering of information in the context which we define as the fact-finding process. Students know nothing about finding facts in the ‘real world sense.’ At the outset of the conflict, little is known about the complex of data, recollection, and human emotions that are referred to as facts during trial.” *Id.* at 815. I have also used this same lesson plan successfully when teaching Evidence. In either instance the idea is to show that facts in real life are often quite distinct from facts in appellate decisions.

the speech, especially insofar as it demonstrates employer authority over the workforce.<sup>102</sup>

Whenever I teach this class, I am surprised at how these mature, adult lawyers-in-training react like inexperienced students who have done something wrong for which they are about to be punished. To me, this is evidence of a dynamic at work where the authority of the professor, like that of a boss, carries with it the power to coerce (even at a school like CUNY which has endeavored to introduce alternatives to the hierarchical professor/student relationship). Student comments about the class routinely include reference to having experienced fear during the exercise. On more than one occasion students have approached me and confessed concern at what might have been written on the "petition."<sup>103</sup> This fear of "having been found out" surely simulates the feeling of workers whose organizing efforts have been discovered. A student in my Fall, 1994 class perhaps best summed up the experience when he described the class as engendering "feelings of fear, powerlessness and uncertainty," sentiments that are surely consonant with those of the "Losing Class."<sup>104</sup>

At the beginning of the next class, I distribute a memo to the "Expresso workers" reinforcing the hierarchical power dynamic of the workplace by demonstrating other ways in which management may respond to an organizing drive. The memo announces the filing of an election petition by the Union and informs employees of the existing rule of no solicitation/distribution in the employee manual. I also take the opportunity to promote two suspected union activists to managerial positions.<sup>105</sup> With respect to the no solicitation/no distribution rule,

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102. As a follow-up to this class, students are assigned the lawyering task of preparing their own captive audience speech. They are instructed to create their own company, and to explain the nature of the company's operations as well as the nature of its workforce. The speech must address the economic consequences of unionization on the company generally, and the impact on existing terms and conditions of employment, including wages and benefits. The speech, which is to be approximately five to seven typewritten pages in length, is evaluated on the basis of its overall content, including its persuasiveness, and on the student's ability to communicate the employer's position in a lawful way. Any unlawful statements must be acknowledged with an explanation of why the student chose to make the remark(s) in question. For example, consistent with class discussion of the paltry remedies available for violations of the NLRA, students may argue that under a "cost/benefit" analysis the impact of an unlawful remark, which can successfully derail the organizing drive, is worth the cost of an NLRB order that merely requires the employer to cease and desist from engaging in the conduct in question. Such an analysis, in turn, raises questions of professional responsibility and a lawyer's obligation to follow the law.

103. Apparently, they were concerned that pejorative statements (or worse) relating to ongoing issues affecting the student community at the Law School were included on the petition.

104. See Uchitelle, *supra* note 22.

105. The students selected for promotion are invariably those who appeared sympathetic to the union during my captive audience speech.

discussion centers on the employer's property rights and the alleged balancing of those interests with that of employees to associate and communicate freely. The timing of the rule's promulgation as well as its facial validity are also examined. The question of whether the promotion of two employees is a (more subtle) form of discrimination under Section 8(a)(3) of the Act also presents an interesting perspective on hierarchy in the workplace.<sup>106</sup> Students are not only asked to evaluate the lawfulness of the employer's conduct but to consider the motivation behind it and the impact it has on the workers both in terms of their continued participation in the organizing effort and as a matter of job security now that they are part of management.<sup>107</sup>

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106. Section 8(a)(3) of the NLRA provides, in pertinent part, that it is unlawful for an employer to discriminate "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . ." 29 U.S.C. § 158(a)(3) (1988). The promotion of a unit employee to a supervisory position in order to cut short her union activity has been held to violate section 8(a)(1) of the Act. *See, e.g., Pilot Freight Carriers, Inc.*, 221 N.L.R.B. 1026, 1029 (1975).

107. This also leads to an examination of the concept of an appropriate bargaining unit and the community-of-interest factors used to determine it. *See* 29 U.S.C. § 159(b). Student response reflects some measure of surprise at the employer's ability to structure and at times manipulate the workforce to suit its ends. Yet, virtually all of the factors routinely examined by the NLRB to determine the existence of a sufficient "community of interest" amongst a group or groups of workers to establish an appropriate bargaining unit are subject to the employer's control. It is the employer that creates the job titles, descriptions and qualifications of different employee classifications; assigns its employees to work in designated areas; creates lines of supervisory authority; and determines the amount and method(s) of compensation and other distinguishing terms and conditions of employment, such as hours of work and the degree to which job functions are integrated or employees interact with one another. *See, for example, Kalamazoo Paper Box Corp.*, 136 N.L.R.B. 134, 137 (1962), where the Board enumerated the factors it would scrutinize to determine if there was a sufficient community of interest between distinct groups of employees to include them in the same bargaining unit.

*C. The Collective Bargaining Relationship and the Prerogatives of Capital (and Professors)*

Section 8(d) of the Act imposes on the parties a duty to bargain in "good faith."<sup>108</sup> This simple notion, however, is interwoven with some of the most difficult issues arising under the NLRA both in theoretical and practical terms. For example, how do we determine whether good faith bargaining has occurred when the statute provides that neither party has to reach an agreement? What subjects are susceptible to collective bargaining and why? What are the economic weapons available to the parties to influence bargaining and what are the consequences attached to their use? What is the impact of the law of collective bargaining on job security and managerial prerogative? Because the law of collective bargaining engages issues related to the nature of the relationship between capital and labor, it is laden not only with difficult doctrinal coverage but with opportunities for theoretical analysis of implicit assumptions that define the existing balance of power. At heart, the teaching of collective bargaining can be viewed as a point of entry for examining the inroads that can be made into otherwise unfettered managerial discretion to run the enterprise. Yet students ordinarily do not easily grasp the nature of managerial prerogative in the workplace and the employer's ability to change existing terms and conditions of employment unilaterally. As a way of demonstrating this workplace relational dynamic, I announce a change in a matter of some importance to the students.

*D. A Change in Terms and Conditions of Student "Employment"*

In order to reinforce student understanding of the employer's unilateral control over terms and conditions of employment, absent some kind of statutory or other restraint on that discretion, I begin class by announcing a change in the way I will evaluate student performance for the purpose of determining course grades. I begin by informing students that I have been grading their campaign speeches and am less than pleased with the quality of their work. I also inform them that class participation has been lacking of late, as has been their level of preparation for class. They are then told that as a result, there will be a spot quiz on the readings for

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108. In pertinent part, section 8(d) of the NLRA defines "to bargain collectively [as] the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . ." 29 U.S.C. § 158(d) (1988).

that day's class and that the final grade in the course will now be based on the campaign speech, a final exam, and the results of the quiz which would count for twenty-five percent of the grade.<sup>109</sup> They are further advised that any of their colleagues who are not present for the quiz will automatically receive the grade of zero. Student reaction can best be described as reflecting disbelief. Yet, strangely, their reaction also includes an element of acceptance and responsibility. They dutifully write down the questions for the quiz as I dictate them (at times even asking me to repeat the questions). Like employees, they are being subjected to significant changes in what they had come to expect from their employer and must adapt to the suddenly changed circumstances. The question of what, if anything, they can do about it lies ahead.

In order to prompt discussion, I may react to their surprise and discomfort<sup>110</sup> by asking if anyone has a "problem" with what I am doing. Response to this question is varied. Some students object that what I am doing is unfair, which leads to a discussion of whether fairness is something that should be considered in regulating the workplace.<sup>111</sup> Other students remain silently optimistic that this may turn out to be an interactive exercise and that they will be spared from taking the quiz.<sup>112</sup> Inevitably a student will argue that the course syllabus, which sets forth the ways in which student performance will be evaluated, is the equivalent of a contract which cannot be changed unilaterally.<sup>113</sup> However, the assumption that the syllabus is a contract only leads to the next question: What alternatives exist should I nevertheless unilaterally change the 'terms and conditions' of their course work? Students, who by now are falling into role, generally state that either they will not do the assignment or they will go on strike. Issues of insubordination, the effect of a "no strike clause," the workplace rubric of "do it and grieve," and an introductory

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109. In the syllabus, I specify that the course grade is based on a lawyering exercise worth 25 points and a final exam worth 75 points.

110. I have had students comment after class that they felt genuine fear at the mention of a spot quiz accompanied by a change in how they expected to be evaluated for the course.

111. For example, I might turn the situation around by asking whether it would be fair for an employer to change working conditions without consulting with the employees in the event of an unexpected, but potentially profitable, market opportunity.

112. As stated by one student: "I was relieved when I realized that this was another sick exercise of [the professor's]." Memo from labor law student on file with the author.

113. This also provides a look ahead into the dichotomy between mandatory and permissive subjects of bargaining that will shortly be examined in *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). See *infra* notes 114-16 and accompanying text.

examination of the different kinds of strikes, including the permanent replacement issue, can be introduced as part of this discussion.<sup>114</sup>

As noted, students are not only relieved that this exercise is an interactive learning experience and not an actual quiz, but appear surprised by the limitations placed on the ability of workers to respond to management's unilateral imposition of working conditions. On the one hand, students recognize that collective action can serve as a potentially effective response to employer prerogative in running the workplace. Yet, they are immediately confronted with constraints on the exercise of that response. Thus, the twin goals of this interactive exercise are met — not only do students experience and better understand what is meant by a unilateral change in terms and conditions of employment, but they also leave class with a more concrete appreciation for the balance of power and hierarchy in the workplace. They recognize the potential for empowerment that collective action possesses, albeit with limitations on its use, and with consequences attached to its exercise of which they are not yet fully aware.

*E. Subjects of Bargaining (or What Can We Talk About, Anyway?)*

A related doctrinal area that is consistently challenging for students is the dichotomy between mandatory and permissive subjects of collective bargaining, especially as it relates to an employer's unilateral action which impacts on job security. I attempt to bridge the gap in understanding with an interactive exercise concerning the nature and breadth of managerial discretion and its effect on bargaining unit members. Following initial class discussion and analysis of the *First National Maintenance* case,<sup>115</sup> students are once more placed in role as employees of Expresso Trucking. A memo is distributed in class addressed to the "employees" of Expresso specifying various changes in Company operations which will occur upon the execution of a collective bargaining agreement with Local 560.

A learning objective of the class is to demonstrate that even where a union represents employees and a collective bargaining agreement is in place, the employer maintains significant unilateral prerogative, especially in matters touching upon the "core of entrepreneurial discretion" involving

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114. I leave a more extensive examination of the right to strike, including the matter of permanent replacement, for later in the semester.

115. In *First National Maintenance*, the Supreme Court limited the duty of an employer to bargain over those decisions, such as closing part of the business, that lie at the core of entrepreneurial discretion, despite its impact — the loss of employment — on employee terms and conditions of employment. *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 674-88 (1981).

the scope and direction of the enterprise.<sup>116</sup> In an effort to help define the distinction between those subjects on which bargaining is required and others where a company may act unilaterally, the memo provides notice of a variety of new work rules which will be put into effect either immediately or in a matter of days. These include: the elimination of a product line (plastic fruit) and the layoff of all plastic fruit assemblers, molders and dye mixers; the start-up of a new product line (assembly of "the club"), which will be performed by a sub-contractor in the plant; the institution of an additional shift and new shift times related to the introduction of the new product line; the institution of a drug/alcohol testing program as well as a total ban on smoking; and an increase in prices in the employee cafeteria.<sup>117</sup>

A goal of this class is to have students see the inherent weakness with a system of collective bargaining that bifurcates subjects into essentially what is and what is not negotiable.<sup>118</sup> We question whether certain management decisions should be insulated from the necessity of bargaining at all, or, if labor and management are to be partners in a "common enterprise," whether labor should have an equal say in market decisions faced by the company. In their roles as employees of Espresso, the students step into the shoes of employees facing the actual loss of employment, whether by corporate restructuring, plant relocation or downsizing. By role playing, students are given the opportunity to articulate an analysis of the issues that is more self-reflective and attuned

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116. See *Fibreboard Paper v. NLRB*, 379 U.S. 203, 222 (1964) (Stewart, J., concurring).

117. The memo also sets forth the contract's management rights clause and a clause regarding discharges for "just cause" which includes working or reporting for work under the influence of alcohol or drugs. The questions raised by the memo are difficult and require incisive analysis. For example, is the elimination of plastic fruit manufacturing a mandatory subject of bargaining? Is it a decision that goes to the heart of entrepreneurial discretion involving a change in the scope and direction of the enterprise or is it an unlawful layoff in violation of section 8(a)(3) of the NLRA? Is the decision to subcontract the new production line work a mandatory subject of bargaining? I distribute the memo in class for immediate discussion to replicate the suddenness that often accompanies management decisions. This requires students to quickly process the legal significance of the decisions and prepare a doctrinal response. However, given the difficulty of the numerous issues raised, as an alternative the memo may be distributed in advance of class with minor loss of impact, so that students may prepare more fully for analysis and discussion. The memo may also be the subject of a written assignment which can be used in course evaluation.

118. See WILLIAM B. GOULD, IV, *AGENDA FOR REFORM 172* (1993). Professor Gould, who is currently Chairman of the NLRB, argues that there are "profound" problems with the Court's decision in *First National Maintenance* because it "declaims against the proposition that labor is to be an 'equal partner' with management in the United States . . . ." *Id.* He sees a false dichotomy between those subjects of bargaining that are "mandatory" (because they have a direct relationship to employee terms and conditions of employment), and those that are "nonmandatory" (because they have only an attenuated impact on working conditions). *Id.* at 172-73.

to the real life consequences of legal theory concerning workplace regulation.<sup>119</sup>

*F. The Scope and Use of Economic Weapons in Collective Bargaining—Fire a Student and Risk a Strike?*

An examination of the nature and types of strikes under the NLRA, and the distinction between unfair labor practice and economic strikers, is critical not only for the doctrine involved, but for an understanding of the role that the decisionmakers' unstated "values and assumptions"<sup>120</sup> have played in shaping the law. The permanent replacement of economic strikers and its relationship to picket line misconduct serves as the focal point of this analysis. I use many hypotheticals reflecting the need for judicial, administrative and societal line drawing on these topics. Class

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119. An alternative approach to this subject is to analogize to the school/student relationship and to focus on those matters which settle an aspect of that relationship. See, for example, *Allied Chemical & Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), where the Court described those matters over which bargaining was required as issues that "vitality" affect terms and conditions of employment and which "[settle] an aspect of the relationship with the union." Also see *Ford Motor Co. v. NLRB*, 441 U.S. 488 (1979), which defined a mandatory subject of bargaining as one "plainly germane to the 'working environment' . . . [and] not among those 'managerial decisions, which lie at the core of entrepreneurial control.'" *Id.* at 498 (quoting *Fibreboard*, 379 U.S. at 222). I have tried this approach during lectures. For example, I have asked students whether the Law School should be allowed to unilaterally change the number of credits required for graduation and whether this subject settles an aspect of their relationship with the school — the amount of work they must perform satisfactorily in order to be "paid" (i.e., graduate). In addition, on one occasion I was asked to teach a class of high school juniors who had no knowledge of labor law. I decided that a simulated negotiation would be a good way to introduce them to the subject. In preparation for this two hour class, I created subjects for bargaining patterned on issues students typically face in school, with role instructions for those who would ultimately become the union and employer negotiators. I began by issuing a "Notice of New Rules" from the Principal to "all students," which were to take effect the next day. These included the institution of a new security clearance procedure when entering school; informing the students that their lockers would be subject to search at any time without notice; the lengthening of the school day; the institution of a drug/alcohol testing program, including random testing; a new dress code requiring students to wear uniforms; and the elimination of all extra-curricular programs, including sports, because of budgetary problems. I first allowed students to express their reactions to the rules and asked them whether they believed the school had the authority to institute the rules and whether they were fair or necessary. There was a surprising difference of opinion, and the typical combination of outspoken and tentative students. After initial discussion, we made the transition from school to workplace, and I separated the students into two groups: one representing management and the other labor. I provided each with some simple role instructions and let them at it. The results were surprisingly positive. The students began to quickly understand and play out the management/labor dynamic, and demonstrated an understanding of the interests underlying each side's negotiating position. See Julius G. Getman, *Colloquy: Human Voice in Legal Discourse*, 66 TEX. L. REV. 577 (1988). Consonant with my own experience in teaching these students, Professor Getman has aptly noted that he has "never taught a group of workers too simple to understand the intricacies of labor law." *Id.* at 588.

120. See ATLESON, *supra* note 49.

discussion and participation has been at a consistently engaged level when addressing the rights of strikers and the moral justification, if any, for acts of violence.<sup>121</sup> The perspective of the class, which leads to discussion concerning the power of the State and its arguably routine exercise on behalf of property interests at the expense of labor, as well as the absolute employer control in determining who will be terminated because of "picket line misconduct,"<sup>122</sup> opens up a fertile area for policy analysis, including the social and economic structuring of the employment relationship.<sup>123</sup>

This naturally leads to my "firing" of one of my students. I find this to be a refreshing way to begin our discussion of the concept of a duty of loyalty, and the limits placed on employee collective action as an economic weapon.<sup>124</sup> As class begins, a memo is issued from the owner of Expresso

121. For example, I raise hypotheticals that distinguish between acts that damage property and acts directed toward people in the context of analyzing the Board's decision in *Clear Pine Mouldings, Inc.*, 268 N.L.R.B. 1044 (1984). In *Clear Pine Mouldings*, the Reagan-appointed Board adopted an "objective test" in determining whether strike misconduct was sufficiently serious to justify denial of reinstatement, and held that a striker may be terminated when, under the circumstances, the misconduct at issue "reasonably tend[s] to coerce or intimidate employees in the exercise of rights protected under the Act." *Id.* at 1046 (citations omitted). The Board reversed established precedent to find that speech alone could constitute misconduct sufficient to justify the discharge of a striker. The Board thus "discarded the rule that verbal threats unaccompanied by physical acts never warrant denial of reinstatement." Terry A. Bethel, *Recent Decisions of the NLRB — The Reagan Influence*, 60 IND. L.J. 227, 283 (1985). Before *Clear Pine Mouldings*, the Board, with Court approval, took into account the "animal exuberance" of pickets caused by the highly volatile nature of the picket line (especially where replacement employees were hired) to excuse certain forms of "misconduct" involving speech and gesturing. See, e.g., *Midwest Solvents, Inc.*, 251 N.L.R.B. 1282, 1291 (1980) (citing *Huss & Schlieper Company*, 194 N.L.R.B. 572, 577 (1971) ("the applicable test . . . 'is whether the misconduct "is so violent or of such serious character as to render the employees unfit for further service," or whether it merely constitutes a "trivial rough incident" occurring in "a moment of animal exuberance"')); see also *Coronet Casuals, Inc.*, 207 N.L.R.B. 304, 304-305 (1973) ("not every impropriety committed in the course of a strike deprives an employee of the protective mantle of the Act," and "absent violence . . . a picket is not disqualified from reinstatement despite . . . making abusive threats against nonstrikers . . ."). The Board's ruling in *Clear Pine Mouldings* overruled *Coronet Casuals* and further restricted the tactics that could be used by pickets to persuade individuals not to cross the line.

122. We note, for example, how in a confrontation between a striker and a replacement employee, the employer may discharge the striker but continue to employ the replacement worker. However, an employer "is not free to apply a double standard [and] may not knowingly tolerate behavior by non-strikers or replacements that is at least as serious as, or more serious than, [the] conduct of strikers [on which the employer relies] to deny reinstatement . . ." *Aztec Bus Lines, Inc.*, 289 N.L.R.B. 1021, 1027 (1988). The refusal "to reinstate strikers for conduct of comparable or lesser seriousness" is, therefore, discriminatory and violates sections 8(a)(3) and (1) of the Act. *Id.*

123. Because the focus here is on pedagogy, it is beyond the scope of this article to analyze the different perspectives on the proper role of the State, and especially the police, in labor disputes. Whatever the perspective, the underlying policy tensions are ripe for discussion.

124. See generally *NLRB v. Local Union No. 1229, International Brotherhood of Electrical Workers (Jefferson Standard Broadcasting Company)*, 346 U.S. 464 (1953) (discussing an employee's duty of loyalty to the employer). To a significant degree, "the NLRA has been used to define the

Trucking to a specific student, with copies to the entire class.<sup>125</sup> The student selected for termination is someone that was outspoken in opposition to my attempt, during an earlier class,<sup>126</sup> to institute a spot quiz as well as a change in the method of evaluating student performance. The learning objectives of the class are varied. They include a review of the concept of protected concerted activity and whether a “dual motive” exists for the discharge;<sup>127</sup> a discussion and analysis of the circumstances when collective activity may lose its protected status under the test set forth in *Jefferson Standard*;<sup>128</sup> and a policy analysis of the status of the worker in the employment relationship.<sup>129</sup>

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employment contracts in terms of nineteenth-century master-servant law, a process that recognizes the lower status of employees in the employment context.” ATLESON, *supra* note 49, at 84. In *Jefferson Standard*, the lead case on this status question, the Supreme Court upheld the discharge of 10 employees for disparaging their employer’s product during a labor dispute. 346 U.S. at 468. The Court stated that “[t]here is no more elemental cause for discharge of an employee than disloyalty to his employer.” *Id.* at 472. The Court added that it was “equally elemental that the Taft-Hartley Act seeks to strengthen, rather than to weaken, that cooperation, continuity of service and cordial contractual relation between employer and employee that is born of loyalty to their common enterprise.” *Id.* (footnote omitted). Yet, as seen from the result in *First National Maintenance*, the concept of loyalty to a “common enterprise” is one-sided — management owes no loyalty to the employees when market decisions relating to the core of entrepreneurial discretion and judgment are involved. *First Nat’l Maintenance Corp. v. NLRB*, 452 U.S. 666, 686 (1981). This class allows for an in-depth exploration of the inherent fallacy of the concept of a “common enterprise” in the great majority of workplaces in the United States.

125. In sum, the memo makes reference to the student’s incitement of a “gross act of insubordination by urging [her] colleagues to disobey my legitimate work order” and accuses the student of being “disloyal” by disparaging my product and service to customers. In part, the memo uses language almost identical to the language used by *Jefferson Standard* in its discharge letter. The memo reads: “Now, however, you have turned from trying to persuade the public that the Company is unfair to you, to trying to persuade our customers that we give inferior service to them.” *See* 346 U.S. at 469. I use this language because it draws the distinction between what the Court views as a legitimate employee interest (the relationship with the employer) with an interest that is declared off limits to employees (the company’s service to and relationship with its customers). For an incisive critique of this view, see Cynthia L. Estlund, *What do Workers Want?: Employee Interests, Public Interests, and Freedom of Expression Under the National Labor Relations Act*, 140 U. PA. L. REV. 921 (1992).

126. *See supra* pp. 144-146 for a discussion of my class on unilateral changes.

127. *See generally Meyers II*, *supra* note 86 (discussing the definition of concerted activity); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983) (describing burdens of proof in cases involving dual motive for alleged discriminatory conduct). I believe it is important to review doctrine as the course progresses not only for its intrinsic learning value, but also as a way of demonstrating the inter-connectedness of legal doctrine to the issues generated.

128. Under *Jefferson Standard*, in order to be protected under the first amendment, the statements at issue must reflect a legitimate employee interest as well as a nexus with a labor dispute. *See* 346 U.S. at 476-77. For an in-depth discussion of this standard and the articulation of a new, more straightforward analytical framework, see Melinda J. Branscomb, *Labor, Loyalty, and the Corporate Campaign*, 73 B.U. L. REV. 291, 309-311 (1993).

129. *See generally* ATLESON, *supra* note 49; Cicero, *supra* note 23, at 71-80.

Initial class discussion centers on whether the activity by the student in objecting to my threatened unilateral change in the evaluation of students was protected. Focus then turns to my comment in the memo concerning the attempt to involve other students in the act of "disobedience." We next apply the *Jefferson Standard* test and analyze whether the conduct in issue has lost (or should lose) the protection of the law. Beginning with the question of whether the duty of loyalty imposed by the Supreme Court is required by the statute, discussion focuses on the unstated assumptions about the nature of the employment relationship and the values that drive decision making.<sup>130</sup> At first, students appear generally predisposed to accepting a limit on what negative statements an employee can make about her company, and that a discharge for this reason is justifiable. This can lead to an examination of several hypothetical situations presenting different images of loyalty, which can be used to prod discussion about the application of the legal standard and especially the policy behind it.<sup>131</sup>

The subject matter of this class presents a rich source of material for the discussion of values underlying the employment relationship, including the master/servant relationship and employment at will. Like the early English master/servant law, a key assumption underlying judicial interpretation of the NLRA is that "employees owe certain obligations of deference and respect to their employer."<sup>132</sup> This principle is also at the heart of the employment at will doctrine which has been the focus of much of the proposals for a new method of workplace regulation. It also affords the opportunity to examine a statutory regime that has been robbed of its radical potential by an unstated unwillingness to restrain the prerogatives of capital and elevate the status of labor in the employment relationship.

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130. For example, Professor Karl Klare has written that "[e]very instance of rule formulation and rule application involves some component, often subtle and obscure, of moral and political choice and, therefore, of decision-maker responsibility." Karl E. Klare, *Critical Theory and Labor Relations Law*, in *THE POLITICS OF LAW* 65 (David Kairys ed., rev. ed. 1990). According to Professor Klare, antiformalists believe that "the prevailing rules are not preordained by the nature of things, nor are particular case results required by legal logic. To the contrary . . . legal rules and decisions are contingent and conventional — they are products of human choice. There is always room for discretion . . . in applying the rules . . ." *Id.*

131. For example, students may be questioned on whether it would be lawful to discharge for disloyalty employees of a drug rehabilitation center who publicly criticize the performance of the executive director as not being in the best interests of the residents, see *Damon House, Inc.*, 270 N.L.R.B. 143 (1984); or a legal services lawyer who publicly states that the excessive caseload and understaffing in her office has led to poor client representation; or a scientist who publicly divulges that a metal used in aircraft production is prone to premature fatigue and poses a safety risk. See generally Estlund, *supra* note 125, at 921-922 (discussing employer retaliation against employee actions taken in the public interest).

132. ATLESON, *supra* note 49, at 84.

Furthermore, this dynamic is not unique to collective bargaining but lies at the heart of all workplace regulation, including the employment at will relationship. Indeed, amongst virtually all working people, the inherent power dynamic of the employment relationship, where capital controls labor, is accepted as inevitable.<sup>133</sup>

### G. *The Students Go On Strike*

The interactive approach to teaching labor law, and this class in particular, raises the question of how far to take the analogy of classroom to shop floor. My fear (hope?) had been that students would initiate some collective action, such as walking out in protest over the "discharge" of one of their colleagues or "striking" one of my classes and confronting me with a set of demands. Although this possibility raised the likelihood of a loss of teacher control over the learning environment, I believed that such risk taking would be worth the trouble and could be prepared for in advance. My sense had been that the learning that would occur concerning the efficacy of collective action, negotiation and dispute resolution alone could be a very valuable use of course time.

During the Fall, 1994 semester, my labor law students answered my wishes and engaged in a work action. In some respects, it was the culmination of efforts to have the students identify themselves as workers in both the fictional company, Espresso Trucking, and the classroom itself. Because the nature of the students' actions, including their preparations, illustrate a variety of pedagogical objectives and doctrine, I will detail the events of that class.

Approximately one hour before class was to begin, I returned to my office to find that what I believed to be a copy of the CUNY School of Law "CommUnity News" had been slipped under my door. The last paragraph was highlighted and read as follows:

The Labor Law class asks all students to join them in their boycott of John Cicero's unfair teaching practices (UTP). John has unilaterally made changes in the syllabus and has withheld grades on midterm papers and has consistently harassed and intimidated students throughout the semester. We ask for your support as a sign of Student Solidarity.

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133. "[T]he basic assumption [is] that enterprises must be organized and directed hierarchically. Employees are bound to obey the employer's commands and operational decisions; this is deemed a natural and eternal feature of the employment relationship." Klare, *supra* note 130, at 81.

The Labor Law Class<sup>134</sup>

When I saw what the students were planning, I was excited but admit to feeling some of the anxiety that students themselves experience during my interactive classes. Indeed, their collective tactics had an arguably greater impact: I was, in fact, forced to forego my final hour of class preparation in order to prepare a tactical and doctrinal response to the students and structure a class plan that built upon the role playing they had initiated.<sup>135</sup> Not knowing what to expect, I headed for class. There, outside the classroom door, were the labor law students picketing, chanting and “on strike.” They carried placards reflecting their disenchantment with my course, and with me both as their teacher and as president of Expresso Trucking.<sup>136</sup> The signs were diverse and reflected a range of labor law subjects. One sign read “Unlawful: Unilateral (Syllabus) Changes;” another read “Unfair: Surface Teaching;” and yet another stated “Picket: Ex[De]presso Trucking & Fruit Co.” In addition to the placards, the students carried plastic fruit — ostensibly manufactured by Expresso.<sup>137</sup> Several students, who were not members of the present class, acted as nonstriking or replacement employees and as foils for the striking

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134. I was completely fooled by the facsimile and thought this statement about my class (or “product”) had been disseminated to the entire student body. Although I felt confident that other students would see this as an artifice of an interactive learning process, I was not certain that this would be the case. I made it a point to remind myself to call the Dean of Students to inquire about space for my response in the next issue of the CommUnity News. Simply stated I, like an employer, was discomforted by the notion that the student body would take what was said about my “product” seriously. Of course, my emotional reaction and pedagogical response only serves to demonstrate the effectiveness of my student’s efforts. It did, however, provide me with the opportunity to include a *Jefferson Standard* issue concerning the duty of loyalty in my response.

135. The class, as originally conceived, dealt with lock outs and was the culmination of a unit on the economic weapons available to each party in collective bargaining. My response to the students covered four doctrinal areas: unilateral changes in employment conditions, including issues of entrepreneurial discretion (in the guise of academic freedom); protected concerted activity under section 7 and the limits to such conduct imposed under the duty of loyalty test in *Jefferson Standard*; the standard for determining acts of interference, restraint and coercion under section 8(a)(1); and collective bargaining, including the use of a lockout as an economic weapon.

136. It was interesting to observe how the symbiosis of classroom and company that I had tried to foster had been accepted by the students. They appeared to see themselves not only as students but also as employees. This has occurred on other occasions, although not as dramatically. For example, on one occasion a group of students who had to be absent from class wrote me a handwritten note asking to be excused, which they signed as “employees” of Expresso. The goal of this role playing is to enhance understanding of the law by experiencing its impact. See *supra* Part II.

137. In fact, the students had taken care to identify each piece of plastic fruit with the label “Made in the USA — Expresso.” During my campaign speech, I had explained that the plastic fruit market was highly competitive and dominated by foreign manufacturers and that Expresso was the last manufacturer of plastic fruit left on the East Coast of the United States.

students.<sup>138</sup> As I stood outside of the classroom (and unlawfully tried to “persuade” the strikers to abandon the picket line), several thoughts occurred to me, including whether the students planned on attending class and what my response should be if it appeared they would not. At that point I felt very much as though it was the students who were in control of the simulation and that I was the one awaiting my next role instruction. But, following some additional verbal exchanges between the strikers and myself concerning our respective rights,<sup>139</sup> one of the apparent leaders of the work stoppage matter-of-factly informed me that the students knew their rights, that they had not been permanently replaced, and that they intended to stop picketing and come to class.<sup>140</sup>

Apart from the obvious satisfaction that I, as a teacher, derive from this level of engagement with the subject matter on the part of my students, including their efforts in conceiving, preparing for and carrying

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138. The strikers and replacements traded barbs and an occasional plastic fruit was tossed, including one that struck the hapless owner of Expresso as he posted a written response to the work stoppage on the plant gate. Foul language directed at the owner was also heard. This conduct raised the issue of whether sufficiently serious striker misconduct had occurred to deny reinstatement to the culprits. See *Clear Pine Mouldings, Inc.*, 268 N.L.R.B. 1044 (1984). Does such misconduct “reasonably tend to coerce and intimidate” employees? *Id.* at 1046. A problem that I use in class to illustrate application of the *Clear Pine Mouldings* standard involves the case of a striking employee who throws a tomato at a bus carrying replacement workers. See *Massachusetts Coastal Seafoods, Inc.*, 293 N.L.R.B. 496 (1989). In that case, striking employees waited for a bus carrying replacement workers and assaulted the vehicle with vegetables. The tomato tossing employee was denied reinstatement. The Board adopted an Administrative Law Judge’s finding that the employee’s action “was not ‘of a purely impulsive and trivial nature,’ but was that of a willing participant in a preplanned and substantial effort to harass nonstriking employees;” and, as such, “was an effort to coerce and intimidate” them. *Id.* at 531. Yet, the very image of a plum tomato hurtling towards a multi-ton bus in which the scabs were being safely escorted is certainly more comical than intimidating. The striking students apparently chose to mimic this conduct.

139. The picket line discussion centered on the reasons why students struck, and my response to the strike. This included a statement of a willingness on my part to negotiate over arguably mandatory subjects, such as my method of evaluating students (see, e.g., *Safeway Stores, Inc.*, 270 N.L.R.B. 193, 196 (1984); *Fundacion Educativa Ana G. Mendez d/b/a/ Puerto Rico Junior College*, 265 N.L.R.B. 72, 72 (1982)), but not over permissive subjects, such as the work that would be covered over the remainder of the semester (which, I argued, involved the core of my academic (read entrepreneurial) discretion). See *First National Maintenance Corporation v. NLRB*, 452 U.S. 666, 686 (1981).

140. Once class began, our discussion naturally focused on the work stoppage and the doctrinal issues which it created. In a lively class conversation, students and I reflected on the inherent factors, assumptions and power dynamic that informed our role playing. For example, students were aware of the privileged status they held compared with strikers generally. Without the power to permanently replace them, the students controlled not only the timing and duration of the strike, but my ability to produce. Yet, students did wonder whether, notwithstanding this edge in tactics and circumstances, I would choose to lock them out (as I stated it was my right to do in the prepared written response I had posted when I first encountered the picket line). This allowed me to ultimately return to my initial class plan dealing with the subject of lock outs and to review the scope of economic weapons and the factors that impact on their use and effectiveness.

out the role play, is the less obvious question of the nature and extent of learning that has occurred. Indeed, does this pedagogy contribute in any meaningful way to a student's development into a lawyer? My experience, based on the comments of many students, suggests that they have been able to extract something of lasting value from the course.<sup>141</sup> For example, one student stated that the "interactive teaching techniques made labor law come alive and made certain labor law principles impossible to forget."<sup>142</sup> Another noted that "[the professor] deploys simulation exercises to great advantage . . . [h]e removes the comfortable distance between student and fictional fact pattern . . . [and] creates real and challenging roles by performing impromptu simulations."<sup>143</sup>

### *H. Images of Law*

As these comments reflect, above all else, an interactive approach to teaching labor law carries with it a greater potential for capturing a student's interest in the subject matter and fostering involvement with her learning. It seeks to "[bring] out something that is in a student, rather than putting something in that the student lacks."<sup>144</sup> Students bring to the interactive exercises their doctrinal learning as informed by their life experiences. Roleplaying allows students to see the issues by placing the doctrine in a structure of their own making. As suggested by Professor Phillip Meyer, "many students struggle to process, retain, and apply 'theoretical' information [but] cannot 'find' the issue because they literally cannot see it; that is, they are unable to visualize imaginistically the controlling principle or rule and transpose it onto a fact pattern."<sup>145</sup>

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141. I do not suggest that this success is attributable to my singular skills. Far from it. It is much more reflective of student interest in, and engagement with, a pedagogy that seeks to "provide more effective settings for participatory learning." Deborah L. Rhode, *Missing Questions: Feminist Perspectives on Legal Education*, 45 STAN. L. REV. 1547, 1564 (1993) (citation omitted). Professor Rhode's article focuses on the "values, skills, and substantive concerns that are often absent from the legal educational agenda." *Id.* at 1548. She articulates a feminist response that envisions "[l]aw schools committed to more cooperative, collaborative, and empathetic lawyering" where "far less reliance would be placed on large lectures or quasi-Socratic discussion [with] much greater emphasis . . . given to legal clinics, simulations, pro bono programs, and other settings for interactive, experiential learning." *Id.* at 1563. Fortunately, I have been given the opportunity to teach at a law school that has adopted this vision of legal education as its model.

142. Memo from Labor law student on file with author.

143. Memo from Labor law student on file with author.

144. See Lesnick, *supra* note 21, at 1097.

145. Philip N. Meyer, "*Fingers Pointing at the Moon*": *New Perspectives on Teaching Legal Writing and Analysis*, 25 CONN. L. REV. 777, 782 (1993). According to Professor Meyer, because of the "seismic shift of popular culture from a print-based culture to a post-literate, technologically based, oral and visual story culture[, w]e process information almost exclusively via imaginistic

Roleplaying allows students to transpose the rules onto themselves in what might be described as a self-visualized image of a fact pattern. Both linear thinking and imagination are thus stimulated leading to an increased potential for learning and creativity.<sup>146</sup>

When the students in my Fall, 1994 labor law class struck, they visualized the rules affecting them by creating an image of themselves as strikers. Their subsequent self-initiated roleplaying and simulation reinforced this self-visualization of the law. In fact, the students' image of themselves as employees continued to exert significant control over the learning agenda in the final weeks of the semester. For example, just after Thanksgiving break I returned to my office to find union membership cards signed by each of the students in my class taped to the door.<sup>147</sup> Each card signer identified herself as an employee of Espresso Trucking and the cards were all signed on the same date. They did not stop there, however. That same week they served me with a written demand to begin collective bargaining negotiations.<sup>148</sup> In the last week of the semester I was served with five different unfair labor practice charges "filed" by my students.<sup>149</sup> The charges covered the potentially unlawful conduct in which I had engaged over the course of the semester. Students challenged my promotion of two employees out of the bargaining unit upon the filing of an election petition; my discharge of one employee; my announced intention to change the method of evaluating students; my decision to relocate bargaining unit work and lay off unit employees; and a statement in my captive audience speech suggesting that I would close the business if it was unionized.<sup>150</sup> What is remarkable to me about these charges is the

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narratives." *Id.*

146. See Beryl Blaustone, *Teaching Evidence: Storytelling in the Classroom*, 41 AM. U. L. REV. 453, 458-459 n.20 (1992) (citing C. ROSE, ACCELERATED LEARNING 2, 11, 13-14 (1985)). As noted by Professor Blaustone, "[t]o achieve integrated learning in the classroom, lessons must be presented in context. This requires using realistic characters and everyday experiences in teaching to stimulate the students' visualization." *Id.* (citing P. KLINE, THE EVERYDAY GENIUS: RESTORING CHILDREN'S NATURAL JOY OF LEARNING — AND YOURS TOO 224-25 (1988)).

147. Students used a facsimile of an authorization card found in the statutory supplement to Rabin, Silverstein and Schatski's *Labor and Employment Law* casebook, which I use as the basic text for the course.

148. We did not have sufficient time to transition into a collective bargaining exercise. Although I did manage to serve the students with a list of demands that I had hastily drawn up in the short interval between receipt of their written demand and the beginning of class, there was insufficient preparation to permit a simulated negotiation.

149. Again, using a facsimile of a "Charge Against Employer," charges were slipped under my door or placed in my mailbox.

150. I was able to reply to the first two charges by creating a facsimile of a dismissal letter from the Regional Director of the NLRB which set forth a substantive response. Because the last three charges were filed during the last week of the semester, I did not have the opportunity to respond to

ability of students to review a semester of interactive work and select those instances where unfair labor practice issues are raised. In addition, their engagement with the work and understanding of doctrine is seen by both the nature of the allegations made and evidence included in support of the charges.<sup>151</sup> The collective nature of these efforts and the fact that they were self-initiated demonstrate to me a degree of involvement uncommon in law students.<sup>152</sup> Indeed, perhaps the students themselves best captured the theme of the semester when they described the type of establishment involved in each unfair labor practice charge they filed as an "Intellectual Factory."

This image of a law school class is consonant with the goals of simulation and roleplaying. It also reflects an image of legal education and the role of the law professor that bridges clinical and doctrinal perspectives. Whether it is as a result of role playing per se or its content, which may result in the recapturing of a personal life experience, my goal is to make students more aware of the "deeper value of knowledge (whether it be knowledge of legal doctrine, skills, history, or theory) as a means to greater understanding of the world and of oneself."<sup>153</sup>

Professor Lesnick eschews the traditional model of a law school as "a kind of universal filling station where students tank up on knowledge they will 'need' later."<sup>154</sup> He believes that this approach "trivializes both knowledge and the utility of knowledge . . . by overvaluing its utilitarian over its intrinsic worth [and] by focusing on narrowly instrumental measures of utility . . . ."<sup>155</sup> The movement to teaching employment law

them.

151. For example, students referred to my statement concerning "troublemakers" as evidence of unlawful motive; noted my disparate treatment of union supporters and that the nature of my company's operations did not change when I moved part of Expresso's operations to another state. See *Dubuque Packing Company, Inc.*, 303 N.L.R.B. 386, 391 (1991), *enforced sub nom.* *United Food and Commercial Workers Int'l Union, Local 150-A v. NLRB*, 1 F.3d 24 (D.C. Cir. 1993), where the Board created a new standard to determine when bargaining is required over a management decision to relocate work. "Where there is no proof of a 'basic change' in the business, a company must bargain over its decision to relocate unless it can prove either that the move does not involve labor costs or that bargaining would be futile." Lorraine Schmall & Charles Cappell, *The Impact of Dubuque Packing Co. Upon the Collective Bargaining Practices of Attorneys and Their Clients*, 24 STETSON L. REV. 111, 112 (1994).

152. As one student explained: "I think students became more passionately involved, and worked harder, in [these] simulations because we were often caught off-guard . . . . [The] problems required us to think on our feet." Memo from labor law student on file with the author.

153. Lesnick, *supra* note 21, at 1096.

154. *Id.* at 1095 (quoting Robert N. Bellah, *The New Religious Consciousness and the Secular University*, DAEDALUS, Fall 1974, at 110) (citation omitted)).

155. *Id.* at 1096.

doctrine at the expense of the “traditional” labor law course reflects this “filling station” approach to law school.<sup>156</sup>

For example, Professor Kropp dismisses the NLRA as “the focus of an earlier generation’s struggles” and urges “changes in the focus of the labor and employment law curriculum”<sup>157</sup> to address the “key pedagogical question . . . [of] whether the first, and often only, course law students take in labor and employment law should focus on collective bargaining, or on something else entirely?”<sup>158</sup> He concludes that “[w]hile the answer is not obvious, the better case is made for preparing students for the challenges they will confront in practice.”<sup>159</sup> But this is part of the problem with legal education. It is not possible to fill a student’s tank with sufficient doctrine to prepare her for the practice of law in a particular subject. It is more important to instill the skills that make knowledge transferable between doctrinal areas, and to develop a consciousness about lawyering and what it means to be a lawyer. Specific doctrinal learning is important, of course, as the setting for “clinical” teaching and as the “thing” that is used to teach law.<sup>160</sup> But it cannot be an end in itself.

Judge Harry Edwards perhaps best describes a model of doctrinal education that rejects the “filling tank” notion of legal education. According to Judge Edwards, in learning doctrine

the law student . . . [acquires] a capacity to use cases, statutes, and other legal texts. The person who has this capacity knows the full range of legal concepts: the concepts of property law, and procedural law, and constitutional law, and so on. This person is also skilled at interpretation: the reading of a case or statute, or a mass of case law, or a complex regulatory scheme. Finally, this person can communicate the interpretive understanding, both orally and in writing.

Doctrinal education, thus defined, is *not* the delivery of substantive information. Law schools should not seek to provide students a

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156. See, e.g., Stephen Howard Kropp, *Rethinking The Labor and Employment Law Curriculum: Legal Education’s Belated Response to the Demise of Collective Bargaining and the Rise of Individual Rights*, 60 U. CIN. L. REV. 433 (1991) (reviewing MATTHEW FINKIN ET AL., *LEGAL PROTECTION FOR THE INDIVIDUAL EMPLOYEE* (1989), and SAMUEL ESTREICHER & MICHAEL C. HARPER, *CASES AND MATERIALS ON THE LAW GOVERNING THE EMPLOYMENT RELATIONSHIP* (1990)).

157. *Id.* at 433.

158. *Id.* at 445.

159. *Id.*

160. See Lesnick, *supra* note 21, at 1096 (“teaching is using things to teach people”).

comprehensive knowledge of legal doctrine, *for it simply cannot be done.*<sup>161</sup>

### CONCLUSION

*I leave New York via the Holland Tunnel and rise above the oily marshes and waterways on a black ribbon of steel known as the Pulaski Skyway. The towers of lower Manhattan, turned to gold by the reflection of the setting sun, fade in my rear view mirror as I head towards Newark. Below is the detritus of industrial America still hard at work: a crossroads of industry, commerce and transportation and of jobs. Containers filled with freight are stacked high on the piers of Newark bay and Port Elizabeth where prehistoric cranes wait to load the cargo. Warehouses, factories and terminals compete for space amid swamps littered with piles of discarded tires, junk yards, oil drums and gas tanks. Roadways plied by trucks and railroad tracks crisscross the landscape, while jet planes seem to brush the surrounding highways as they land at Newark Airport. The existence of this core of America's industrial grit gives the lie to the truth of decline. It is a scene that perhaps only a labor lawyer can love: the stench of the oil refineries, the sight of flaming smokestacks, and at dusk, the otherworldly glow of the horizon through an industrial sunset.*

In this article I have attempted to develop a vision of teaching the traditional labor law course, and its emphasis on collective workplace regulation, that taps into the intrinsic values that underlie the employment relationship. The argument that a new employment law course focusing on individual rights and the erosion of the employment at will doctrine must replace "traditional" labor law, paints with too broad a brush. The impact of any erosion in the employment at will doctrine is felt by a very small percentage of the working population. The "overwhelming majority of discharged nonunion workers derive no benefit whatsoever from the recent judicial modifications; these kinds of cases are brought by managers and sales professionals — very rarely by secretaries and janitors."<sup>162</sup> Unionism can and must be revived to organize these and other underrepresented constituencies and to offer a nemesis to organized capital. A transformed union movement, one that is more aware and responsive to

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161. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 57 (1992) (emphasis added). See also Barbara Bennet Woodhouse, *Mad Midwifery: Bringing Theory, Doctrine, and Practice to Life*, 91 MICH. L. REV. 1977 (1993). Professor Woodhouse argues in favor of using simulation in the classroom in order to integrate doctrine and theory. *Id.* at 1977-78.

162. McLeod, *supra* note 7, at 130 n.27.

the needs and perspectives of women and other traditionally excluded workers, must continue to serve as the voice of the working, and not the losing, class.

Traditional labor law must be taught both because of the values it brings to the law school curriculum and the role it can play in rekindling the union fire. The use of experiential exercises and roleplaying is an effective pedagogy because it places labor law and its teaching in real life contexts and advances the goal of utilizing "[a] theory of instruction [that specifies] the experiences which most effectively implant in the individual a predisposition toward learning . . . ." <sup>163</sup> Furthermore, that predisposition is connected to the degree of involvement that students bring to their work. An interactive or experiential approach succeeds because it engages and creates interest, and acknowledges the potential for students to self actualize the law. In teaching labor law, as with revitalizing the union movement, images of work and the law of work are critical to success. The early classroom experience of fear and powerlessness can promote, and is transformed into, empowerment as students come to possess doctrine and policy.

Professor Lesnick has stated that "our teaching should be informed by our own ongoing engagement with the questions: 'Who am I? What am I doing here? What should I do with my life?'" <sup>164</sup> My colleague, John Delaney, sees faculty as the "promoters of dreams" and believes that "enabling . . . students to transform their lives is a powerful source of professional-life meaning and reward." <sup>165</sup> To me, these separate reflections merge themes of this article concerning the meaning and importance of work and the teaching of law. What we choose to do with our lives when we teach is bound up with the fortunes of our students and our capacity to provide them with the means to learn. To work at teaching and to teach about work are my personal responses to the questions posed by Professor Lesnick.

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163. Meyer, *supra* note 145, at 787 (citing JEROME S. BRUNER, TOWARD A THEORY OF INSTRUCTION 39-42 (1971)) (footnote omitted).

164. Lesnick, *supra* note 21, at 1099 (emphasis omitted).

165. Delaney, *supra* note 13, at 1341-42.