Commentary

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Law and the Evolving Shape of Labor: Narratives of Expansion and Retrenchment

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Abstract

This essay muses on the relationship between law, labor organizing, politics, and the role of academic scholarship on law and work since 1980. As globalization of manufacturing and labor migration have transformed American culture and labor, the boundaries of labor studies have expanded. The more expansive understanding of labor evident in modern scholarship is partly attributable to the decline in union density and the rise of social movements focused on expanding rights of marginalized workers. Yet hyper-capitalism and attacks on labor liberalism have threatened New Deal labor protections and social safety net programs that were core achievements of past labor organizing and foundations for future labor organizing. The rise of income inequality and the decline of middle class jobs, along with right-wing attacks on labor and social welfare legislation, signal a seismic cultural shift that we have only begun to experience and will shape the future of socio-legal studies of labor.

Keywords

Labor, immigration, social movements, middle class, employment, New Deal, hyper-capitalism, outsourcing

Labor has for generations offered irresistible opportunities uplifting scholarly stories of utopian aspirations, hope, determination, and triumph over adversity, as well as heartbreaking tales of brutal repression, betrayal, and defeat. Sociolegal studies of labor of the last generation are no exception in their contrasting narratives of expansion and narratives of decline. This is hardly surprising, given that globalization of product, supply and labor markets have transformed American society in ways that progressives regard as both good and bad. Some celebrate the rich cultural and racial diversity labor migration brought to American rural and urban life even as they lament

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the ways in which globalization of manufacturing have decimated once-great industrial cities like Detroit. The object of study is no longer limited to men of European descent in manufacturing and natural resources extraction; labor law studies include women, people of color, people with different physical and mental abilities, and lesbian, gay, bisexual, and transgender (LGBT) people.[1] Both on the ground and in academia, those who care about labor have bridged the divide between labor and civil rights activism so that the social justice claims of all people would be supported by activists and studied by scholars. Historians, anthropologists, sociologists, lawyers, and scholars of critical studies have displayed high hopes for what law could accomplish in freeing workers of all races and genders from the abuses of wage and chattel slavery in the nineteenth century.

Those hopes have been disappointed. Labor scholars, especially those who focus on law, have long been torn between an uplifting narrative of improvement and the possibilities of justice for working people on the one hand, and a depressing tale of how law and lawyers betrayed those they were supposed to protect. For much of the last quarter of the twentieth century, the betrayal narrative trumped, and the bitterness of the recriminations was sharpened by the magnitude of the disappointment, particularly as conservative courts limited the reach or promise of the civil rights laws and laws governing union organizing.[2] Harry Arthurs provocatively titled a recent book chapter "Labour Law After Labour," suggesting that labor as we knew it has all but disappeared.[3] Yet Arthurs goes on to explore the ways in which labor and labor law may be "subsumed into larger and more general socio-economic categories, and downtrodden members of the working class [may] be reincarnated as rights-bearing middle-class citizens," and labor law may "evolve into a broader, more inclusive and perhaps more efficacious regime of social ordering, field of intellectual inquiry and domain of professional practice."[4] Labor scholars, like labor activists, seem always to find something to hope for.

Although laws protecting American labor disappointed the hopes of progressive activists and humanities scholars, the field of labor law studies grew as the American workforce grew and changed. The outer boundaries of the field of inquiry expanded to

1. Paul Frymer, *Black and Blue: African Americans, the Labor Movement, and the Decline of the Democratic Party* (Princeton: Princeton University Press, 2008); Dorothy Sue Cobble, *Dishing It Out: Waitresses and their Unions in the Twentieth Century* (Urbana: University of Illinois Press, 1991); John Hoerr, *We Can't Eat Prestige: The Women Who Organized Harvard* (Philadelphia: Temple University Press, 1997); Ruth O'Brien, *Crippled Justice: The History of Modern Disability Policy in the Workplace* (Chicago: University of Chicago Press, 2001).
2. Derrick Bell, *Faces at the Bottom of the Well: The Permanence of Racism* (New York: Basic Books, 1992); Joel Rogers, "Divide and Conquer: Further 'Reflections on the Distinctive Character of American Labor Laws,'" *Wisconsin Law Review* (1990), p. 1; Karl Klare, "The Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness," *Minnesota Law Review* 62 (1978), p. 265.
3. Harry Arthurs, "Labour Law After Labour," in Guy Davidov and Brian Langille, eds., *The Idea of Labour Law* (New York: Oxford University Press, 2011), p. 13.
4. Id., p. 29.

include those who labor without pay, including in prisons[5] and in families,[6] and those who are paid for what formerly was not regarded as labor, including sex work,[7] in-home care-giving,[8] and graduate student teaching.[9] The push to inclusivity affected not only the subjects of study (and the opportunities to become a scholar) but the conceptualization of legal categories.[10] The borders between legal fields blurred, as immigration, welfare, local government, international, and other fields of law became as important as labor law and civil rights law in understanding and working with or for those who labor.[11] New forms of labor organizing blossomed, including among workers' centers, community groups, and social movements among immigrant workers. New forms of legal regulation at the federal, state and local level, as well as so-called "soft-law" initiatives like corporate codes of conduct and consumer watch-dog projects, sought to expand the effective regulation of working conditions throughout global corporations' supply chains. These initiatives sought to impose an obligation to ensure adequate working conditions on retailers and every entity in their supply chains with the goal of spreading American corporate wealth to workers across the world who help produce it.[12] These new organizing initiatives and the legal strategies that support them offer some of the most exciting and promising avenues for research on labor and for

5. Noah Zatz, "Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships," *Vanderbilt Law Review*, 61 (2008), p. 857.
6. Susan Sterett, *Public Pensions: Gender & Civic Service in the States, 1850–1937* (Ithaca, NY: Cornell University Press, 2003); Pierrette Hondagneu-Sotelo, *Doméstica: Immigrant Workers Cleaning and Caring in the Shadows of Affluence* (Berkeley: University of California Press, 2001).
7. Prabha Kotiswaran, *Dangerous Sex, Invisible Labor: Sex Work and the Law in India* (Princeton: Princeton University Press, 2011); Ann McGinley, "Trouble in Sin City: Protecting Sexy Workers' Civil Rights," *Stanford Law & Policy Review* 23 (2012) no. 2.
8. Peggie R. Smith, "The Publicization of Home-Based Care Work in State Labor Law," *Minnesota Law Review* 92 (2008), p. 1390; Hondagneu-Sotelo (2001).
9. Monika Krause, Mary Nolan, Michael Palm and Andrew Ross, eds., *The University Against Itself: The NYU Strike and the Future of the Academic Workplace* (Philadelphia: Temple University Press, 2008).
10. Among the consistent innovators in expanding the boundaries of legal scholarship on work are Marion Crain, Benjamin Sachs, and Katherine VW Stone. Marion Crain, "Managing Identity: Buying Into the Brand at Work," *Iowa Law Review* 95 (2010), p. 1179; Benjamin Sachs, "Despite Preemption: Making Labor Law in Cities and States," *Harvard Law Review* 124 (2011), p. 1153; Katherine Stone, *From Widgets to Digits: Employment Regulation for the New Economy* (New York: Cambridge University Press, 2004).
11. Felicia Kornbluh, *The Battle for Welfare Rights: Politics and Poverty in Modern America* (Philadelphia: University of Pennsylvania Press, 2007); Philip Martin, Manolo Abella and Christiane Kuptsch, *Managing Labor Migration in the Twenty-First Century* (New Haven: Yale University Press, 2006); Mae N. Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* (Princeton: Princeton University Press, 2004).
12. Brishen Rogers, "Toward Third-Party Liability for Wage Theft," *Berkeley Journal of Employment and Labor Law* 31 (2010), pp. 1–64.

improvements in labor standards.[13] Social movement organizing among workers who had been on the periphery of organized labor and mainstream civil rights activism eventually reignited flames of progressive activism that had flickered or nearly died in the American Federation of Labor and the Congress of Industrial Organizations (AFL-CIO), the National Association for the Advancement of Colored People (NAACP), and other established labor and civil rights organizations.[14] New leaders emerged, new strategies were formed, and day laborers, home care workers, taxi drivers, and many other low wage workers, including undocumented immigrants, achieved legal and organizing victories. And as they emerged from the invisibility of the underground economy, these workers attracted new scholarly interest and offered the hope of socially relevant academic research that would not be variations on a dispiriting history of racist, conservative, or just plain wrong-headed labor organizations of the past.

At the other end of the wage and prestige spectrum, a strand of scholarship examined the work relations, labor markets, norms, and law governing the engineering, software, web design, and technology jobs of the so-called new economy.[15] Of course, scholarly study of labor relations in the non-union high-end spectrum of the economy was nothing new, even if it was never as extensive (except in business schools) as the studies at the low wage end. As Hortense Powdermaker and Leo Rosten did in 1940s Hollywood,[16] anthropologists and sociologists have done ethnographic and other studies of the nature of labor and labor markets in the technology sectors.[17] As always, some legal scholars are eager consumers of such work, hoping to translate each new generation's thick description or other empirical study into analysis or prescription for the law.[18] The work varies from breathless and effusive praise of the freewheeling and

13. Ruth Milkman, Joshua Bloom and Victor Narro, eds., *Working for Justice: The LA Model of Organizing and Advocacy* (Ithaca, NY: ILR Press, 2010); Janice Fine, *Worker Centers: Organizing Communities at the Edge of the Dream* (Ithaca, NY: ILR Press, 2006); Jennifer Gordon, *Suburban Sweatshops: The Fight for Immigrant Rights* (Cambridge, MA: Belknap Press, 2005); Steven Henry Lopez, *Reorganizing the Rust Belt: An Inside Study of the American Labor Movement* (Berkeley: University of California Press, 2004); Dan Clawson, *The Next Upsurge: Labor and the New Social Movements* (Ithaca, NY: ILR Press, 2003); Ruth Milkman, ed., *Organizing Immigrants: The Challenge for Unions in Contemporary California* (Ithaca, NY: ILR Press, 2000).
14. Roger Horowitz, *"Negro and White, Unite and Fight!" A Social History of Industrial Unionism in Meatpacking, 1930–90* (Urbana: University of Illinois Press, 1997).
15. Gideon Kunda, *Engineering Culture: Control and Commitment in a High-Tech Corporation* (Philadelphia: Temple University Press, 2006); Christopher Kelty, *Two Bits: The Cultural Significance of Free Software* (Durham, NC: Duke University Press, 2008).
16. Hortense Powdermaker, *Hollywood the Dream Factory: An Anthropologist Looks at the Movie-Makers* (London: Secker & Warburg, 1951); Leo C. Rosten, *Hollywood: The Movie Colony, The Movie Makers* (New York: Harcourt Brace & Co., 1941).
17. Stephen R. Barley and Gideon Kunda, *Gurus, Hired Guns, and Warm Bodies* (Princeton: Princeton University Press, 2004); Alan Hyde, *Working in Silicon Valley* (New York: ME Sharpe, 2003).
18. Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (New Haven: Yale University Press, 2006).

creative "idea entrepreneurs" and "creative class"[19] that tended to reflect the optimism of business schools before the recent recession, to somewhat more sober warnings about the job instability and long hours of the "no collar" economy.[20] The labor markets and work rituals of the dot com entrepreneurs inspired excitement, bafflement, envy, and skepticism in equal measures, but few disputed that their work was important and different from much that had come before.[21] Even in film and media studies, a field that had long been focused on the interpretation of film and television programs or on the study of celebrity and its rarified labor market, some prominent scholars made a turn toward study of the labor of production, particularly among poorly-paid craft and below-the-line workers.[22]

Yet, as the boundaries of the field of labor law studies have expanded, the core has been hollowed out. Fewer scholars focus on unions or on workers in the middle of the skill and income spectrum because, quite frankly, unions and the middle class jobs they made are disappearing. As union density in the private sector plummeted to seven percent, law schools all but declared the law of unions and collective bargaining to be dead and did not replace labor law scholars who retired. In journalism, labor reporters were laid off as newspapers retrenched, only to be replaced by business reporters with distinctly more corporate knowledge and interests. If labor was at the core of American liberalism for much of the twentieth century,[23] organized labor's decline, the loss of stable and decently paid blue collar and white collar employment, falling real wages, persistently high levels of unemployment (especially among older workers, young workers, and urban African American communities), and loss of confidence about whether poorly paid jobs will become good jobs may be at the root of the current malaise in political culture.[24] The liberalism that pushed for rights of racial and other minorities, women, and immigrants is now endangered by the weakness of the older labor liberalism that protected the rights of an earlier generation of the proletariat to unionize in the late nineteenth- and early-twentieth centuries.

19. Richard Florida, *The Rise of the Creative Class And How It's Transforming Work, Leisure, Community and Everyday Life* (New York: Basic Books, 2002).
20. Andrew Ross, *No-Collar: The Humane Workplace and Its Hidden Costs* (Philadelphia: Temple University Press, 2003).
21. Jon Gertner, *The Idea Factory: Bell Labs and the Great Age of American Innovation* (New York: Penguin, 2012); Kelty (2008); Barley and Kunda (2004).
22. Matt Stahl, *Unfree Masters; Recording Artists and the Politics of Work* (Durham: Duke University Press, 2012); Richard E. Caves, *Creative Industries: Contracts Between Art and Commerce* (Cambridge, MA: Harvard University Press, 2000); John Thornton Caldwell, *Production Culture: Industrial Reflexivity and Critical Practice in Film and Television* (Durham, NC: Duke University Press, 2008); Vicki Mayer, Miranda Banks and John Caldwell, *Production Studies: Cultural Studies of Media Industries* (New York: Routledge, 2009).
23. E.g., Christopher L. Tomlins, *The State and the Unions* (New York: Cambridge University Press, 1983); Kevin Boyle, *The UAW and the Heyday of American Liberalism 1945–1968* (Ithaca, NY: Cornell University Press, 1995).
24. Arne L. Kalleberg, *Good Jobs, Bad Jobs: The Rise of Polarized and Precarious Employment in the United States, 1970s–2000s* (New York: Russell Sage, 2011); Richard Sennett, *The Culture of the New Capitalism* (New Haven: Yale University Press, 2006).

Meanwhile, certain well-funded segments of the political right used attacks on law protecting employee organizing as a wedge issue in a thinly veiled effort to undermine the basis of Democratic political power. After two decades of legal scholarship lamenting the weakness and irrelevance of labor law, it was surprising to see such well-funded and coordinated political attacks on the institutions that scholars had come to doubt were capable of making more than the most minimal difference. A flashpoint of this struggle was ignited when a senior executive at Boeing told the news media that the company was expanding production at a South Carolina plant that had just recently voted to decertify its union in retaliation against its unionized Washington state employees for having exercised their right to strike in the last few negotiating cycles. The National Labor Relations Board (NLRB) charged the company with violating the National Labor Relations Act, giving the Right a plum political moment to pit the workers of South Carolina against the workers of Washington in a reprise of a decades-old corporate strategy to foment racial and regional divides for political advantage.[25] The political success of Boeing's strategy was enhanced by the fact that much of the news coverage focused less on the illegal retaliation against employees' exercise of their right to strike than on whether companies have the legal right to locate their operations in whatever region seems best for business. The *Las Vegas Review-Journal* accused the NLRB of "threatening Boeing executives for having the gall to consider opening a plant in a right-to-work state."[26] The *Chicago Tribune* editorialized that "You have to wonder about a federal agency that sticks it to an American manufacturer creating thousands of good-paying jobs inside the nation's borders instead of overseas," and even the *New York Times* coverage of the case ultimately came to be dominated by the Republican attacks on the NLRB rather than on the company's admission that it retaliated against its unionized workers because they had exercised their statutory rights.[27]

In a related and also well-funded and well-coordinated effort, Republican majorities in mid-western state houses launched a full-scale attack on the legal rights of government employees to unionize. The Republicans in Wisconsin spared firefighters, police and prison guards unions – who tend to support Republican political candidates – while preventing unionization among Democratic-leaning teachers and other government workers.[28] Indiana became the first state in decades to adopt a right-to-work law.[29] Senate filibusters of nominations left the NLRB without a quorum for 27 months, which the Supreme Court declared, in an ideologically split 5–4 decision, deprived the agency of

25. *The Boeing Company*, Case No. 19-CA-3241 (April 20, 2011), available at https://www.nlrb.gov/node/516.
26. "NLRB Fumble," *Las Vegas Review-Journal* (May 17, 2012).
27. "NLRB v. Boeing – And Jobs," *Chicago Tribune* (September 6, 2011); Steven Greenhouse, "Labor Board Drops Case Against Boeing After Union Reaches Accord," *New York Times* (December 5, 2011), p. B3.
28. Joseph E. Slater, "Public Sector Labor in the Age of Obama," *Indiana Law Journal* 87 (2012), pp. 203–15.
29. Monica Davey, "Indiana Governor Signs a Law Creating a 'Right to Work' State," *New York Times* (Feb. 1, 2012), p. A12.

the power to decide cases.[30] After President Obama made recess appointments to allow the NLRB to function, the Chamber of Commerce and its allies argued that the NLRB was still incapable of acting because the recess appointments, in the Chamber's view, were invalid. Not content at that, the Chamber persuaded a federal court that the Board could not engage in rulemaking because a Republican member of the Board had refused to vote for or against the rule, thus creating the ability for any member of the Board to disable it from validly acting simply by refusing to cast a vote.[31]

One of the most disturbing legal initiatives in recent times has been enactment in Arizona and Alabama of laws rendering undocumented immigrant workers illegal in their very presence.[32] These laws make it a state crime for unauthorized immigrants to work, compel the police to check the immigration status of people they stop, and allow warrantless arrest of those without papers whom the police suspect of being illegally in the country. The Alabama law inflicts a total social death on unauthorized immigrants. It makes their contracts voidable which makes it impossible for them to own property, it requires schools to check the immigration status of children and to turn over for deportation any who cannot show they are lawfully in the country, and it makes it a crime for others to engage in some of the most fundamental human dealings with them. Not since the days of slavery has a state gone as far as Alabama to render a vital segment of the working class utterly outside the bounds of legal protection. And not since the early years of the Great Depression has labor seemed weaker and law seemed less able to make a progressive difference.

A distinctive aspect of scholarly work on law and labor is the close identification between the social justice aspirations of scholars and those of whom they study. As much as in any other field of socio-legal scholarship, scholars who write on labor seem to take to heart their narratives of expansion and decline and seem to hope that their work will be a part of a shared effort to transform the world. John Gaventa's classic and prize-winning study of quiescence in the face of legal and social injustice, *Power and Powerlessness: Quiescence and Rebellion in an Appalachian Valley*, is an example.[33] The book develops a sociological theory of power in an attempt to explain why the miners and other poor people in Appalachia were reluctant to join legal and organizing efforts to challenge their exploitation by coal companies. The book bears the imprint of Gaventa's own horror at the inequality and privation in the coal mining communities and suggests an ambition to overcome injustice by understanding how it occurs and why

30. *New Process Steel, LP v. NLRB*, 130 S. Ct. 2635 (2010); Catherine L. Fisk, "The Role of the Judiciary When the Agency Confirmation Process Stalls: Thoughts on the Two-Member NLRB and the Questions the Supreme Court Should Have, but Didn't, Address in New Process Steel, L.P. v. NLRB," *FIU Law Review*, 5 (2010), pp. 593–616.
31. *Chamber of Commerce v. NLRB*, 93 *Daily Labor Report (BNA)* AA-1 (May 14, 2012).
32. Acts of Alabama 2011-535, Ala. Code § 31-13-1; Arizona S.B. 1070, Ariz. Laws 2010 ch. 113, Ariz. Rev. Stat. § 11-1051, *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011), aff'd in part, rev'd in part, __ S. Ct. __ (June 25, 2012). As this article went to press, the U.S. Supreme Court invalidated core provisions of the Arizona law. The opinion in the Arizona case suggests most of the Alabama law is likewise invalid.
33. John Gaventa, *Power and Powerlessness: Quiescence and Rebellion in an Appalachian Valley* (Urbana: University of Illinois Press, 1980).

victims tolerate it. Gaventa's work stands not only as an example of the phenomenon of labor law studies having ambitions of social relevance, but also of the fundamental mystery that underlies the current situation of the working class. As the rich have gotten richer, the poor have gotten poorer, and labor exploitation has become or remained rampant, why are the masses not rising up to challenge the power of bankers, management side labor lawyers, and corporate leaders? Perhaps law is one of the reasons why.

The ambition of progressive labor lawyers in the late nineteenth and early twentieth century was to create industrial democracy and to bring a democratic rule of law to the workplace. In the place of arbitrary authority, industrial democracy would be a system of rules, developed and applied *by and for* workers and their unions in collaboration with supervisors and representatives of the corporate employer.[34] The demise of private sector unionism has brought the demise of industrial democracy. Some had hoped that employment law would fill the spaces in justice that labor law did not, both during labor's heyday and, especially, since. Laws enacted by legislatures and enforced by courts and agencies would prohibit discrimination, harassment, and retaliation based on status or political viewpoint and impose a floor below which wages and safety and health standards could not fall. Benign and bureaucratic personnel policies unilaterally implemented by forward-thinking corporate leaders would implement law and, where law is lacking, implement a system of private due process.[35] Recently, scholars, including, prominently, Cynthia Estlund, have continued this tradition by proposing new ways in which law can promote democratic workplace governance and more effective legal compliance.[36]

We now know that neither labor law, civil rights law, employment law nor personnel practice tempered the harshest edges of globalized bare-knuckle capitalism and the political strength of the corporate class.[37] Labor law was part of the problem. It became apparent in the 1980s and thereafter that the statutory right to strike was almost meaningless since the Supreme Court allowed employers to permanently replace striking workers, and an influential federal court of appeals even went so far as to hold that an employer could lock out its workers and then replace them.[38] Many books detailed how strikes

34. David Montgomery, *The Fall of the House of Labor* (New York: Cambridge University Press, 1989); Tomlins, *The State and the Unions*; Steven Fraser, *Labor Will Rule: Sidney Hillman and the Rise of American Labor* (New York: The Free Press, 1991).
35. Susan Sturm, "Second Generation Employment Discrimination: A Structural Approach," *Columbia Law Review* 101 (2001), p. 458.
36. Cynthia Estlund, *Regoverning the Workplace: From Self-Regulation to Co-Regulation* (New Haven: Yale University Press, 2010); Orly Lobel, "Interlocking Regulatory and Industrial Relations: The Governance of Workplace Safety," *Administrative Law Review* 57 (2005), p. 1071.
37. Paul Osterman, Thomas Kochan, Richard Locke and Michael Piore, *Working in America: A Blueprint for the New Labor Market* (Cambridge, MA: MIT Press, 2001); Joan Fitzgerald, *Moving Up in the New Economy: Career Ladders for U.S. Workers* (Ithaca, NY: ILR Press, 2006).
38. *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938); *International Paper Co. v. NLRB*, 115 F.3d 1045 (D.C. Cir. 1997); James Gray Pope, "How American Workers Lost the Right to Strike, and Other Tales," *Michigan Law Review* 103 (2004), p. 518.

failed, unions were broken, and law proved either useless or destructive to the employees' efforts to save their jobs and their union.[39]

Employment law was also part of the problem, as was made painfully obvious when the electronics retailer Circuit City decided to cut labor costs in 2003 and 2007 by firing its longest-employed and highest paid salespeople for no reason except that the company had previously rewarded their work by paying raises and now thought the workers were just paid too much. The company made clear that the firings were because of pay levels and allowed the fired employees to reapply for positions at a lower wage after ten weeks. The strategy ultimately failed, in the sense that Circuit City went out of business in 2009. But the strategy was not illegal.[40] The death knell of the old regime of stable employment was previously sounded in 1996 when AT&T laid off 40,000 employees. (AT&T preferred to characterize it as a "force management program" aimed at reducing "an imbalance of forces or skills" in the company.) The Vice President of Human Resources said "[p]eople need to look at themselves as self-employed, as vendors who come to this company to sell their skills," and another AT&T spokesperson said the "force management program" was as if the company had asked all its employees "to step out into the parking lot" so the company could review which employees had the knowledge and skills that made them worthy of being invited back into the building.[41] This, too, was not illegal. In this vision, middle-class, white-collar employees are treated as some combination of day laborers waiting for employment in the parking lot and vendors selling labor. In what has been termed the "Great Risk Shift," the risks of illness, economic downturn, disability, or market changes were shifted from stockholders to workers as companies sought to boost share price by reducing the costs and risks to companies of employing people to do its work.[42] The best one can say about the role of law in some of these episodes is that it was a helpless bystander.

In many of the assaults on labor over the last 30 years, law played a considerably more malign role than simply that of helpless bystander. I suspect, although it would be difficult to prove because the documentary evidence is all confidential attorney-client communications, legal advisors enabled corporate leaders to focus on investment analysts' concerns about reducing labor costs and advised how to eliminate

39. Julius G. Getman, *The Betrayal of Local 14: Paperworkers, Politics, and Permanent Replacements* (New York: ILR Press, 1999); Jonathan D. Rosenblum, *Copper Crucible: How the Arizona Miners' Strike of 1983 Recast Labor-Management Relations in America* (New York: ILR Press, 1995); Barbara Kingsolver, *Holding the Line: Women in the Great Arizona Mine Strike of 1983* (New York: ILR Press, 1989, 1996).

40. Carlos Tejada and Gary McWilliams, "New Recipe for Cost Savings: Replace Expensive Workers," *Wall Street Journal* (June 11, 2001), p. 1; Ylan Q. Mui, "Circuit City Cuts 3400 'Overpaid' Workers," *Washington Post* (Mar. 29, 2007), p. D1; Amy Joyce, "Circuit City's Job Cuts Backfiring, Analysts Say," *Washington Post* (May 2, 2007), p. D1; Jayne O'Donnell, "Circuit City's Death Traced Back to Layoffs," *USA Today* (Jan. 29, 2009), p. 5B.

41. Edmund L. Andrews, "Don't Go Away Mad, Just Go Away: Can AT&T Be the Nice Guy As It Cuts 40,000 Jobs?" *N.Y. Times*, Feb. 13, 1996, at D1, D6.

42. Jacob S. Hacker, *The Great Risk Shift: The Assault on American Jobs, Families, Health Care, and Retirement* (New York: Oxford University Press, 2006); Steven Greenhouse, *The Big Squeeze: Tough Times for the American Worker* (New York: Anchor Books, 2008).

employees. The lawyers probably told the executives that they owed a duty to investors to boost profits by firing employees and owed no duties to employees or to communities who would be hard hit by job losses. Lawyers surely helped executives to cut costs by outsourcing and by strenuously resisting union organizing. Confronted by collective actions seeking unpaid overtime under the Fair Labor Standards Act, management lawyers inserted mandatory arbitration agreements and class action waivers into standardized employment contracts, thus eliminating one of the only effective methods of enforcing wage and hour law.[43]

Wal-Mart is, of course, famous for elevating labor cost reduction to an art and resisting every effort at unionization.[44] Wal-Mart not only sells products produced overseas, it attempts to insulate itself from the cost of its domestic labor through subcontracting. The distribution aspect of Wal-Mart's business is done without employees. Tons of boxes arrive daily at the Ports of Los Angeles and Long Beach in containers on ships from China and other low wage manufacturing centers. Unionized longshore employees operate the cranes that unload the containers and put them on trucks driven by independent contractors. The truckers drive sixty miles north and east to a massive concentration of warehouses near Ontario, California where the containers are unloaded and sorted by hundreds of men. The men are employed by companies based in North Carolina and Tennessee. These companies, in turn, contract with a firm in Wisconsin, which contracts with Wal-Mart or with another intermediary that contracts with Wal-Mart. The standards imposed on the workers are impossible to meet: each must unload 600 boxes an hour. So the men work off the clock in order to meet their quotas. Injuries are common. Anyone who complains is fired. Every corporation in the chain from Wal-Mart on down disclaims responsibility for the working conditions of the warehouse workers, and law facilitates their strategy.[45] The same use of networks of contracts to insulate those who profit from labor from the claims of those who labor is common in agriculture, garment manufacturing, janitorial services, and even car washes.[46]

Throughout the economy, clever lawyers have devised strategies to reduce labor costs by deeming those who work to be unprotected by a whole range of laws. Law has been a crucial weapon in the thirty years' war on the American middle class worker. First, many corporations have taken advantage of legal loopholes through the use of labor contractors as intermediaries between the corporations and their labor. Sellers (Wal-Mart, Taco Bell),

43. Catherine Fisk and Erwin Chemerinsky, "The Failing Faith in Class Actions: Wal-Mart v. Dukes and AT&T Mobility v. Concepcion," *Duke Journal of Constitutional Law and Public Policy* 7 (2011), p. 73.
44. Nelson Lichtenstein, *The Retail Revolution: How Wal-Mart Created a Brave New World of Business* (New York: Picador, 2009).
45. Spencer Woodman, "Labor Takes Aim at Wal-Mart, Again," *The Nation* (January 23, 2012); Brishen Rogers, "Toward Third-Party Liability for Wage Theft," *Berkeley Journal of Employment and Labor Law* 31 (2010), pp. 1–64. Timothy P. Glynn, "Taking the Employer Out of Employment Law: Accountability for Wage-Hour Violations in an Age of Enterprise Disaggregation," *Employee Rights and Employment Policy Journal* 15 (2011), p. 201.
46. Ruth Milkman, Joshua Bloom and Victor Narro, eds., *Working for Justice: The LA Model of Organizing and Advocacy* (Ithaca, NY: ILR Press, 2011).

manufacturers (Apple, Levi's, Donna Karan), or producers (growers and agribusiness) can insulate themselves from legal responsibility for the working conditions of those who make, harvest, or ship their products, or who clean their stores or offices.[47] Second, where a labor contractor cannot be inserted between the corporation and those who labor to produce or sell its products, lawyers have devised schemes to exempt the corporation from liability for taxes and working conditions by classifying the workers as independent contractors.[48] Almost every protective labor law extends only to those who are "employees" and not to those who work as "independent contractors." In the case of truck drivers, this has had two advantages for corporations: the drivers' working conditions are unregulated and the company shifts the cost of maintaining the fleet of trucks to the drivers, thus reducing its fixed costs and absolving itself of liability for pollution or the responsibility to upgrade the fleet of trucks to comply with environmental or safety standards.[49]

Where an employee cannot plausibly be deemed an independent contractor, lawyers have devised other legal strategies to insulate corporations from responsibility for working conditions. Employees are exempt from wage and hour regulation under the so-called white collar exemptions if they are salaried executives, administrators, or professionals. Lawyers have demonstrated verve and ingenuity in pushing the boundaries of this exemption, persuading courts that low-level insurance claims adjusters are exempt administrators,[50] Starbucks baristas are exempt as executives or administrators,[51] and convenience store salesclerks are exempt executives.[52] Universities are thinning their ranks of employees by staffing courses with adjunct or contract faculty,[53] or with graduate students who are not "employees" at private sector universities because they are students.[54] Any employer with the caché or labor market power to convince aspiring entrants to the field to work for free can designate its low-level jobs as volunteer or internship opportunities.[55] Motion picture and television production companies famously

47. *Martinez v. Combs*, 49 Cal. 4th 35 (2010).
48. Noah D. Zatz, "Beyond Misclassification: Tackling the Employee-Independent Contractor Problem Without Redefining Employment," *ABA Journal of Labor and Employment Law* (2011), p. 279; Steven Greenhouse, "U.S. Cracks Down on 'Contractors' as a Tax Dodge," *New York Times* (Feb. 17, 2010), p. A1.
49. Scott Cummings and Steven A. Boutcher, "Mobilizing Local Government Law for Low Wage Workers," *University of Chicago Legal Forum* 1 (2009), pp. 199–203.
50. *Roe-Midgett v. CC Services, Inc.*, 512 F.3d 865 (7th Cir. 2008); *Robinson-Smith v. GEICO*, 590 F.3d 886 (D.C. Cir. 2010); *Cheatham v. Allstate Insurance Co.*, 465 F.3d 578 (5th Cir. 2006).
51. *Mims v. Starbucks Corp.*, 12 Wage & Hour Cas.2d (BNA) 213 (S.D. Tex. 2007).
52. *Thomas v. Speedway SuperAmerica*, 506 F.3d 496 (6th Cir. 2007).
53. Peter Schmidt, "Unions Confront the Fault Lines Between Adjuncts and Full-Timers," *Chronicle of Higher Education* (November 20, 2011).
54. Josh Rinschler, "Students or Employees? The Struggle Over Graduate Student Unions In America's Private Colleges and Universities," *Journal of College and University Law* 36 (2010), p. 615.
55. Anthony J. Tucci, "Worthy Exemption? How the DOL Should Apply the FLSA to Unpaid Interns at Nonprofits and Public Agencies," *Iowa Law Review* 97 (2012), p. 1363.

rely on scores of so-called interns who work for free even on projects that produce millions of dollars in profits for the studios and on which stars and other above-the-line talent are paid handsomely.[56]

If the middle class emerged in the industrializing and urbanizing America of the mid-nineteenth century, it may be withering in the post-industrial twenty-first.[57] Sixty years ago, C. Wright Mills insisted that in America the world of the white collar middle class represented "much that is characteristic of twentieth-century existence." He wrote "[t]he white-collar people slipped quietly into modern society," that "whatever common interests they have do not lead to unity," and predicted that "whatever future they have will not be of their own making."[58] Mills was right in the sense that the demise of the middle class was not of its own making; it was of the corporations' lawyers' making. In some respects, the decline of the American middle class in the last thirty years might leave Marxists having a last, bitter laugh. Skeptics were fond of pointing to the growth of the middle class as a refutation of the notion that capitalism would eventually push ever more workers into the ranks of the proletariat, but the economic vulnerability of white, blue, and pink collar workers in the Great Recession of 2008–20?? has vindicated Marx. There really is a capitalist class that exploits those who labor, the downward pressure on wages has been brutal over the last thirty years, and the law has been a crucial tool of the capitalists in achieving dominance. Vast swaths of the middle class were no more immune to the efforts of capital to squeeze labor than were the factory workers and small shopkeepers whom Marx envisioned as the victims of expropriation. The American experience with labor law in the past two generations suggests that law could be an instrument of progressive social change, particularly in the field of civil rights. It has also been an instrument of regressive or repressive social change, particularly in the decline of organized labor, the loss of pensions and social welfare protection, and the shift of wealth from the middle to the upper class.

It is a modest exaggeration to suggest that one goal of the New Deal was to prove Marx wrong, and, it is a similarly modest exaggeration to see contemporary struggles over the viability of New Deal labor and safety net legislation as a fight over whether Marx was right after all. The most significant transformation in law and labor over the last generation has been the unraveling of the safety net that law was once thought to provide to the most vulnerable. All the major New Deal legal innovations are inadequately enforced, especially in low-wage work, including the right to unionize, the guarantee of minimum wage and premium pay for overtime work, and insurance against accidents, disability, unemployment, and old age.[59] The U.S. Supreme Court's opinion in

56. Steven Greenhouse, "Interns, Unpaid by a Studio, File Suit," *New York Times* (September 28, 2011), p. B3.
57. Stuart M. Blumin, *The Emergence of the Middle Class: Social Experience in the American City, 1760–1900* (New York: Cambridge University Press, 1989).
58. C. Wright Mills, *White Collar: The American Middle Classes* (New York: Oxford University Press, 1951, 2002), p. ix.
59. Timothy P. Glynn, "Taking Self-Regulation Seriously: High-Ranking Officer Sanctions for Work-Law Violations," *Berkeley Journal of Employment and Labor Law* 32 (2011), p. 279; Ruth Milkman, et al., *Wage Theft and Workplace Violations in Los Angeles: The Failure of Labor and Employment Law for Low-Wage Workers* (UCLA Institute for Labor Research and Education, 2010).

the constitutional challenge to the health care reform law even calls into question an article of faith in constitutional law since 1937 that Congress has the power to regulate the economy to promote the general welfare.[60] Most of the major federal labor and employment laws face no immediate threat of repeal, although the privatization of Social Security received significant consideration in the Bush Administration and the recent attacks on public sector unions have focused on scaling back pension and health benefits for government workers.[61] But even the laws that are safe from outright repeal have not lived up to their promise of protecting the most vulnerable of workers. Activists in many places are working hard to enforce laws and to organize workers so that they can protect themselves, and the spread of worker centers, the growth of organizing among low-wage immigrant workers, and innovative state and local laws are evidence of a segment of the working class who are anything but quiescent.[62] But it is an uphill struggle in many areas to protect even basic and longstanding labor rights, much less to expand rights.

The attacks on New Deal labor protections represent a repudiation of efforts to govern risk through law. A major thread in contemporary political discourse has advocated allowing the wealthy to profit when risk benefits them and to shift to taxpayers or to the less privileged the costs of risks gone bad, all in the name of the need to promote growth and to create jobs. A major counter narrative, forcefully and eloquently articulated in much labor law scholarship of the past generation, tells the story of workers struggling to spread power, risk and wealth equitably across all segments of society and to use every legal and extra-legal tool at their disposal in that struggle. If the New Deal era truly is on the wane, today's fights over protective labor legislation, and the work of scholars who document those struggles, are manifestations of a dramatic legal and cultural seismic shift that will ripple outward for decades to come.

60. *Florida v. U.S. Dep't of Health and Human Services*, 648 F.3d 1235 (11th Cir. 2011), aff'd in part, rev'd in part *sub nom. Nat'l Fed. of Indep. Bus. v. Sibelius*, __ S. Ct. __ (June 28, 2012).
61. Catherine Fisk and Brian Olney, "Labor and the States' Fiscal Problems," in Peter Conti-Brown and David Skeel, eds., *When States Go Broke: The Origins, Context, and Solutions for the American States in Fiscal Crisis* (New York: Cambridge University Press, 2012), p. 253.
62. Jennifer Gordon, *Suburban Sweatshops: The Fight for Immigrant Rights* (Cambridge, MA: Harvard University Press, 2005); Catherine L. Fisk, "The Anti-Subordination Principle of Labor and Employment Law Preemption," *Harvard Law & Policy Review* 5 (2011), p. 17.