

## Working (with) Workers: Implementing Theory

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### I. INTRODUCTION

The topic of this symposium issue sponsored by the Association of American Law Schools (AALS) is the role of the labor and employment law professor as a public intellectual. Despite the baggage accompanying the phrase “public intellectual,” the symposium topic is an important one, for the term carries more meaning than a mere “talking head” or “media figure” can express.<sup>2</sup> To make theoretical ideas more accessible to others, to connect theory and practice, to explain academic or scholarly ideas in a way that the public can understand—these ideas resonate with my philosophy of the law professor’s role. In fact, this is the essence of what we strive for as labor and employment law professors, and, to that end, this piece concludes with some advice for others who, like me, are relative newcomers to the academy.

This article concentrates on what I believe can be a fruitful collaboration between labor and employment law professors and groups (worker centers) that provide educational, financial, and technical legal assistance to workers. While I have written some op-ed pieces about worker rights and have written for several law professor web logs about employment law topics, these activities are more about educating the public than any sort of yearning for public recognition.<sup>3</sup> This discussion begins with several key assumptions, none of which are particularly radical. The first assumption is that most employment

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2. For example, the work of Amartya Sen, the Nobel-prize winning economist, could be seen as public intellectual work because of his efforts to describe and document poverty and the way that economic systems could intervene to prevent famine. See generally AMARTYA SEN, *POVERTY AND FAMINES: AN ESSAY ON ENTITLEMENTS AND DEPRIVATION* (1981).

3. Miriam A. Cherry, *Call the Foul Against Title IX: To Defeat Gender Discrimination, High Court Should Let Whistleblowers Sue for Retaliation*, LEGAL TIMES, Nov. 29, 2004, at 38 (discussing whistleblowers within Title IX context); Miriam A. Cherry, *Reality at Work*, LEGAL TIMES, Oct. 31, 2005, at 44 (discussing Donald Trump’s catchphrase “You’re Fired” on *The Apprentice* and its implications for at-will rule employment). I have been a guest on Concurring Opinions, <http://www.concurringopinions.com>, and PrawfsBlawg, <http://prawfsblawg.blogspot.com>, where I have written on employment issues, among other legal matters. Also, I am a regular contributor to ContractsProf Blog, [http://lawprofessors.typepad.com/contractsprof\\_blog](http://lawprofessors.typepad.com/contractsprof_blog).

law professors ground their discussion of the law in the experiences of workers and management. The second assumption is that most—if not all—law professors have a desire to reform labor and employment laws in ways that promote the well-being of workers while at the same time allowing businesses and entrepreneurs to maintain a competitive advantage.<sup>4</sup>

Within these broad parameters, there is room for law professors to become more involved with worker groups. One of the major concerns in the labor and employment field is that many workers lack a basic perception of employment law. For example, Professor Pauline Kim has empirically documented that many workers do not understand the at-will employment doctrine and believe that as long as they perform their duties appropriately, their employment will continue.<sup>5</sup> Others believe that they will be given an opportunity to improve their performance and fair warning if they are to be terminated. If protocol is not followed or employers do not provide fair warning, workers who do not understand the law and feel that they have been treated unfairly look for someone to blame.<sup>6</sup> Regardless of ideology, most labor lawyers agree that a fundamental lack of awareness of the law is neither fair nor efficient for workers or employers.

Although worker education projects are typically seen as a domain of plaintiff-side attorneys, worker rights education benefits everyone in the field. Law professors can certainly assist in this endeavor by educating the public about their rights, becoming more involved with worker advocacy groups, educating businesses about the law, and implementing novel theoretical structures. These opportunities are excellent ways for law professors to give back to their surrounding communities, which is the essence of the service requirement that many law schools implement for their professors. These efforts allow a professor to participate in the “public intellectual” domain of law. This educational component should be a part of every labor and employment professor’s work.

## II. THE VALUE OF WORKER CENTERS

How can these goals—especially those involving worker rights—best be

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4. These two goals may be seen as contradictory. In fact, they seem to highlight one of the major ideological contentions and debates in the field: the question of fairness versus efficiency. See Richard A. Epstein, *In Defense of the Contract At Will*, 51 U. CHI. L. REV. 947, 955-77 (1984) (describing tensions in these competing values as they manifest in employment termination). At the same time, these two competing ideologies have common goals, whether one approaches the subject from an employee or management perspective.

5. See Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 135-36 (1997).

6. One explanation of why there are overwhelming numbers of employment discrimination lawsuits is that a charge of discrimination is a proxy for workers who feel that they have not received a fair process in their terminations. See Anne Noel Occhialino & Daniel Vail, *Why the EEOC (Still) Matters*, 22 HOFSTRA LAB. & EMP. L.J. 671, 704 (2005).

effectuated in an era when labor unions are declining?<sup>7</sup> Some suggestions for reviving collective action include ensuring transparency in union elections, expanding into new sectors, and attempting different organizing techniques.<sup>8</sup> Some commentators have suggested that organizing around workplaces may be on the decline because the nature of work has changed, with employees moving horizontally among employers. In response to the increasingly transitory nature of work, commentators have proposed alternatives. For example, Professor Katherine V.W. Stone contemplates the idea of a union organized not by industry or type of work, but rather by geographical area.<sup>9</sup>

Another strategy is to foster, encourage, and consult with worker centers that provide technical and financial assistance. These worker centers usually assist low-wage or immigrant workers, the most underserved and vulnerable groups. Indeed, immigrant workers face even more difficulties in the wake of *Hoffman Plastic Compounds, Inc. v. NLRB*.<sup>10</sup> For example, the downturn in the housing market has left many immigrant workers in the construction industry uncompensated for time worked.<sup>11</sup> Afraid of being deported or otherwise retaliated against, they are often hesitant to bring their claims to government authorities.<sup>12</sup>

Over 140 worker centers exist nationwide, and many are organized according to a particular industry or a shared ethnicity, while others are organized based on geography.<sup>13</sup> According to Janice Fine, these diverse organizations draw from the roots of earlier enterprises, including groups from “social service agencies, fraternal organizations, settlement houses, community organizing groups, and unions to social movement organizations.”<sup>14</sup> Exploring the phenomenon around the country, Fine concludes that these worker centers

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7. See Stephen Franklin, *Union Refrain Starts to Move to Ethnic Beat*, CHI. TRIB., Oct. 13, 1999, at 1 (noting decline in union membership from 20.1% of the workforce in 1983 to 13.9% of the workforce in 1999); see also Scott Cummings, *Developing Cooperatives as a Job Creation Strategy for Low-Income Workers*, 25 N.Y.U. REV. L. & SOC. CHANGE 181, 182-83 (1999) (discussing detrimental effect of declining union membership on low-income areas).

8. See generally KATHERINE VAN WEZEL STONE, FROM WIDGETS TO DIGITS (2004).

9. See VAN WEZEL STONE, *supra* note 8, at 225-29.

10. 535 U.S. 137, 151-52 (2002) (holding NLRB lacks authority to award limited back-pay to illegal aliens); see also Christopher Ho & Jennifer C. Chang, *Drawing the Line After Hoffman Plastic Compounds, Inc. v. NLRB: Strategies for Protecting Undocumented Workers in the Title VII Context and Beyond*, 22 HOFSTRA LAB. & EMP. L.J. 473, 474-77 (2005) (describing effect of *Hoffman Plastic* and arguing for its narrow application to labor law and not to Title VII).

11. See Mark Ferenchik, *Employers Accused of Not Paying Latinos*, COLUMBUS DISPATCH, Oct. 15, 2007, at 1B (reporting how subcontractors underbid and are unable to pay workers).

12. See Ferenchik, *supra* note 11, at 1B (discussing how contractors often exploit the reticence of immigrants to report nonpayment).

13. Steven Greenhouse, *Immigrant Workers Find Support in a Growing Network of Assistance Centers*, N.Y. TIMES, Apr. 23, 2006, at A22 (describing advent of worker centers throughout United States). Greenhouse provides the following quotation from a New York City taxi driver: “We are all from different countries and our English is broken and nobody understands us . . . [b]ut the workers center was willing to listen to us. They provide us expertise. They provide us a lawyer. They support us.” *Id.*

14. JANICE FINE, WORKER CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM 12 (2006).

also perform an amalgamation of tasks that discrete groups have often performed, such as wage campaigns, worker education, and legal services.<sup>15</sup>

Professor Jennifer Gordon explores many of these strategies in her book, *Suburban Sweatshops*.<sup>16</sup> In helping to found and develop The Workplace Project, which operates in Long Island, New York, Professor Gordon discovered that varied approaches were required to address the problems associated with low-wage earners.<sup>17</sup> Professor Gordon documents her work to create an effective advocacy organization:

The Workplace Project path to participation had many elements, but one of the most prominent was the creative use of law. The Project used law to support its organizing in various ways: through outreach about rights; through a legal clinic designed to draw immigrants to the organization and introduce them to organizing as a complement to litigation; and through its Workers Course as a bridge between talking about rights and collective action. All of these are unconventional in that their goal was to build a strong organizing effort, as well as or more than to win legal victories.<sup>18</sup>

These efforts exceeded traditional client representation and involved educational efforts to make workers more aware of the law and their legal rights. Many other worker centers have sprung up across the country, including the Garment Worker's Center in Los Angeles, Voces de la Frontera in Milwaukee, and San Lucas Worker's Center in Chicago.<sup>19</sup>

### III. THEORY AND PRACTICE

Both the Workplace Project and other worker rights projects have proposed worker-owned businesses, or businesses structured to include more worker participation. These types of business structures have many benefits in contrast to the underground economy, where workers are frequently exploited by

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15. FINE, *supra* note 14, at 12-13 (discussing characteristics common to most centers in United States).

16. JENNIFER GORDON, *SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS* (2005).

17. GORDON, *supra* note 16, at 2-4 (describing unique set of problems immigrant workers face).

18. GORDON, *supra* note 16, at 6.

19. See Mary Ochs & Mayron Payes, *Immigrant Organizing: Patterns, Challenges, & Opportunities*, J. SOC. POL'Y, June 22, 2003, at 19 (describing work of various worker centers and their different strategies, including "mixing organizing and leadership development with worker education, English as a Second Language classes and various services"); see also FINE, *supra* note 14, at 269-82 (including comprehensive appendix of many worker centers across the country). With so many worker centers either established or in the process of becoming established, it is increasingly easy to get involved in the local community. I became involved with a worker advocacy group after I completed a lateral move to the University of the Pacific's McGeorge School of Law. This non-profit, WAGES, has partnered with workers and immigrant-owned businesses to provide assistance to these groups. It has been a great pleasure to work with their executive director and to begin to explore whether there are additional opportunities for collaboration with their organization and with students at the law school.

intermediaries. In a previous article, I proposed using the form of the Limited Liability Company (LLC) as a business form that could assist low-wage immigrant workers.<sup>20</sup>

Many of the problems with the way low-wage workers are currently paid stem from the fact that they are paid through the underground economy. As mentioned previously, these groups of workers often feel they have no remedy under the law, either because of high lawyer's fees or because they fear reprisal from the immigration authorities, depending on immigration status.<sup>21</sup> Many immigrant workers are exploited either by the day labor system or by their intermediaries, who set up the business and often speak English and translate for workers. In this business structure, the intermediary performs the necessary coordinating function of marketing, scheduling, and communicating with workers. The intermediary takes a "cut" of the income stream, paying those performing the actual work meager wages and typically no benefits.

The LLC structure allows workers to function as the owners of the business.<sup>22</sup> Under the LLC structure, workers hire the intermediary as an employee of the LLC. As an employee, the intermediary is paid a set wage to perform the functions of an office manager. However, the set wage results in the intermediary no longer taking a disproportionate share of the income generated. The same functions are still performed, but the pay is reallocated within the organization, resulting in a higher wage for those who are actually performing the service, rather than for those who are arranging for it to occur.

Another benefit of the LLC structure is that it allows for organized action on behalf of all the employees to receive benefits at work. Those individuals currently working in the "underground" economy lack health insurance, sick leave, worker's compensation, and other benefits commonly associated with employment.<sup>23</sup> While health insurance remains an optional benefit for employers and thus unattainable for many working-class Americans, a lack of insurance is essentially a defining feature of the underground economy. Compounding the problem, worker's compensation does not exist for on-the-job injuries in the informal economy. Domestic labor carries substantial risk of injury, such as slipping on a wet floor, injuring oneself while moving and lifting heavy objects, and being exposed to toxic cleaning chemicals.

With a member-managed LLC, the workers use technical assistance, both financial and legal, to decide what benefits would best serve their members. A

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20. See Miriam A. Cherry, *Decentering the Firm: The Limited Liability Company and Low-Wage Immigrant Women Workers*, 39 U.C. DAVIS L. REV. 787, 789 (2006); see also Cummings, *supra* note 7, at 185 (proposing worker cooperatives as a structure for effectuating change).

21. See Ferenchik, *supra* note 11, at 1B (suggesting reluctance of workers to bring claims encourages contractors to exploit them).

22. See Cherry, *supra* note 20, at 803.

23. See Lora J. Foo, *The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation*, 103 YALE L.J. 2179, 2181-83 (1994) (describing perils of informal economy and sweatshops for immigrant workers).

new health plan for one worker center could be spread across numerous LLCs advised by that center. This method of health insurance coverage provides for more affordability and greater coverage.

Lurking in the periphery of this discussion is the matter of immigration status. The principal reason why so many immigrant workers are willing to work for low wages and without benefits is that they may not have authorization to work and are therefore unable to fill out an I-9 form.<sup>24</sup> Because of the threat, explicitly stated or otherwise, of “calling the INS,” undocumented workers often have to accept working conditions prohibited by Congress. The *Hoffman Plastic* decision, which limited the remedies available to alien workers attempting to unionize, highlights the precariousness of legal protections afforded immigrant workers.<sup>25</sup>

Immigrant women, especially those of color, experience this problem most acutely.<sup>26</sup> Since the 1986 Supreme Court decision in *Meritor Savings Bank v. Vinson*,<sup>27</sup> the law has recognized that harassment on the basis of sex constitutes gender discrimination and is prohibited by Title VII.<sup>28</sup> Undocumented women workers are especially susceptible to coercion and harassment because they are afraid to alert authorities or to report harassment by an employer.<sup>29</sup>

The LLC ownership structure is not a perfect answer to these concerns, but it eliminates some of the problems associated with immigration status. Companies owned by foreign nationals are generally viewed favorably in the United States.<sup>30</sup> Such investment creates jobs within the United States and prevents the outsourcing of those jobs abroad. Additionally, many

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24. See Martha J. Schoonover & Marti Nell Hyland, *Employment Authorization Regulations and I-9 Compliance*, A.L.I.-A.B.A. 243, 245 (2001).

25. See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 150 (2002); see also Ho & Chang, *supra* note 10, at 492-95 (discussing increase of unreported illegal conduct as a consequence of *Hoffman*).

26. This is not to say that men cannot also be victims of sexual harassment at work. See generally *Oncale v. Sundowner Offshore Serv.*, 523 U.S. 75 (1998). The fact, however, is that sexual harassment is a problem that disproportionately affects women. See generally The U.S. Equal Employment Opportunity Commission, *Sexual Harassment Charges, EEOC & FEPAs Combined: FY 1997-FY 2007*, available at <http://www.eeoc.gov/stats/harass.html> (last visited May 6, 2008). In 1997, women filed close to ninety percent of sexual harassment complaints to the Equal Employment Opportunity Commission (EEOC). See *id.* In 2006, the numbers were similar, with women filing eighty-five percent of EEOC sexual harassment complaints. See *id.*

27. 477 U.S. 57 (1986).

28. See *id.* at 73 (establishing quid pro quo and hostile environment causes of action); see also Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 253 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (2000)).

29. See Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 HARV. C.R.-C.L. L. REV. 345, 345 (2001).

30. In fact, there is an immigrant program administered by U.S. Immigration and Citizenship Services that allows for wealthy individuals from overseas to “buy in” to the American dream. See Miriam Jordan, *Got \$500,000? The U.S. Awaits*, WALL ST. J., Nov. 2, 2007, at B1 (detailing little-known federal program called EB-5). In exchange for a \$500,000 investment in an underserved community, a foreign individual or family will receive conditional green cards, authorizing them to live and work in the United States. See *id.* This program is controversial because it may be at odds with the American dream.

undocumented workers encounter problems when they attempt to regularize their immigration status because they are forced to admit that they have not paid taxes. The LLC can arrange for tax returns to be filed. The intermediary, now the office manager, can also assist the members with filling out their tax returns. By addressing the tax issue, duly filed tax returns will allow members to focus all of their energy on the immigration problems they face.

There are drawbacks to the LLC structure, although they are not insurmountable. The first, and perhaps most significant drawback, is that it does not alter either a worker's status within the immigration system or the immigration system itself.<sup>31</sup> A worker who is undocumented will remain undocumented even after forming and participating in an LLC. The LLC cannot sponsor the worker to remain in this country or provide regularized immigration status for undocumented workers. On a public policy level, the immigration system needs to be reformed so that the United States is not creating a permanent, rotating socio-economic underclass.<sup>32</sup> While it is true that the LLC structure does not reform the immigration system, my contention is that it may at least provide a benefit for a significant number of workers.

Another issue is how to design a workable structure for the LLC that will create easier entrance and exit for members, while also clarifying member expectations. There must be a dismissal provision that addresses, without disrupting the structure, a member who is not doing their fair share of the work. From the perspective of workers, there is concern that the transparency of the structure could result in a disgruntled worker seeking to sue the LLC. Further, running an LLC is riskier because, like any business, it creates a risk that there will be no profits.

Still another objection to this structure is the argument that despite the creative business structuring, the members look like employees. Accordingly, for low-wage workers, the proposed LLC structure is not much different from the current practices of other types of businesses. The difference is that with the medical and legal professions, the workers either have the legal expertise to set up these business structures, or have the resources to access such expertise. With access to the professional expertise afforded by lawyers, there is no reason why housecleaners and other service providers should not also take advantage of this type of structure.

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31. See Robert Pear & Carl Hulse, *Immigrant Bill Dies in Senate: Defeat for Bush*, N.Y. TIMES, June 29, 2007, at A1.

32. See Christopher David Ruiz Cameron, *Borderline Decisions: Hoffman Plastic Compounds, the New Bracero Program, and the Supreme Court's Role in Making Federal Labor Policy*, 51 UCLA L. REV. 1, 2-5 (2003) (condemning United States immigration policy). Critical of the Court's decision in *Hoffman*, Cameron argues that it "places outside the law an underclass of low-wage Latino immigrants who are promised workplace rights in theory but not in practice." *Id.* at 24.

#### IV. ENCOURAGING NEW PROFESSORS IN THE PUBLIC INTELLECTUAL ENDEAVOR

Currently, I am in my fifth year of teaching law, and thus represent a relative newcomer to the academy. I think it is especially important for new labor and employment law professors to involve themselves with their surrounding communities in ways that can enhance their scholarship. New law professors often contend with a number of competing and stressful challenges: developing an effective teaching method, meeting (and exceeding) the scholarly requirements for tenure, serving on committees within the school, and providing services to the larger community. These tasks can be perceived as conflicting and mutually exclusive. While it is tempting to view these responsibilities as a zero-sum game, one of the best strategies to meet all of these requirements is to find synergies between them. One way to do this is to explore theories that worker groups might find useful, write about them, and then work with the groups to implement them.<sup>33</sup>

This symposium has provided a forum for critical analysis of the labor and employment law professor's role as a public intellectual. Ultimately, this has set up an ideal opportunity to discuss how theory and practice can come together. Worker centers provide a tremendous opportunity for labor and employment law professors to implement their theories, and to meet the requirements for service inherent in our own profession.

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33. Of course, there are other strategies, too. One could work on an article on pedagogy and thus learn more about teaching and learning theory.