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Br(e)king the Exploitation of Labor?: Tensions Regarding the Welfare Workforce

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Cover Page Footnote

Professor of Law, St. John's University School of Law. B.A., 1973, The Catholic University of America; M.B.A., 1977, Wayne State University; J.D., 1980, University of Detroit; LL.M., 1982, J.S.D., 1987 Yale University. This Article benefited from comments upon earlier drafts presented at the Yale University Law School, Fifteenth Annual Meeting of the Policy Sciences Institute, October 25, 1996 and, on February 20, 1997 at the European University Institute Department of Law while I was a Visiting Fellow there. I especially thank EUI Professor Silvana Sciarra, the law students in her seminar on comparative social rights, and the Yale policy scents. William T. Leder, Laurie Ann Martino, and Juliet Varvarian, St. John's University School of Law students, Classes of 1997, 1998, and 1999 respectively, furnished excellent research assistance. St. John's University provided a faculty research leave.

BR(E)AKING THE EXPLOITATION OF LABOR?: TENSIONS REGARDING THE WELFARE WORKFORCE

David L. Gregory*

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Introduction

Capital is mobile; labor is not. This is the fundamental, practical, and operational reality of contemporary labor management relations. Multinational corporations readily can relocate their operations from, say, New York, to virtually any other point on the globe. Workers in New York do not have nearly the same corresponding mobility.

New Yorkers are at the epicenter of wrenching labor and social transmogrifications. Dynamic technology and computerization now facilitate the effectively instantaneous mobilization and mobility of capital, exacerbating this problem. Tremendous pools of wealth can be amalgamated through computer technology.¹ Meanwhile, labor has virtually no corresponding mobility.

For most of the past century, work routinized in the industrial model has been a defining thread of the social contract.² This con-

1. Everyone agrees that the influences of computer technology will be profound. There is considerable disagreement about whether computer technology will necessarily be a good means to a good end or the instrument for engineering Orwellian brave new worlds. The classic book on this topic is perhaps NICHOLAS NEGROPONTE, *THE ARCHITECTURE MACHINE* (1970). See also BILL GATES, *THE ROAD AHEAD* (1995); M. ETHAN KATSH, *LAW IN A DIGITAL WORLD* (1995); STANLEY KUBRICK, *2001: A SPACE ODYSSEY* (1968) (fictionalizing the popular nightmare of technological dominance, with Hal the computer engineering the death of his human managers); NICHOLAS NEGROPONTE, *BEING DIGITAL* (1995); NEIL POSTMAN, *TECHNOPOLY: THE SURRENDER OF CULTURE TO TECHNOLOGY* (1992); KIRKPATRICK SALE, *REBELS AGAINST THE FUTURE: THE LUDDITES AND THE INDUSTRIAL REVOLUTION—LESSONS FOR THE COMPUTER AGE* (1995); MARK SLOUKA, *WAR OF THE WORLDS: CYBERSPACE AND THE HIGH-TECH ASSAULT ON REALITY* (1995) (finding it increasingly difficult to separate reality from virtual existence, warning of the uglier aspects of seemingly unproblematic progress through computer technology, and urging reaffirmation of human connections to the non-computer-affected world); SHERRY TURKHELE, *THE SECOND SELF: COMPUTERS AND THE HUMAN SPIRIT* (1984). The popular press is also increasingly examining the issues of computer culture. See, e.g., Michael Krantz, *The Great Manhattan Geek Rush of 1995*, N.Y. MAG., Nov. 13, 1995, at 34; *The New York Cyber Sixty*, N.Y. MAG., Nov. 13, 1995, at 44 (quoting Mark Stahlman, co-founder of the New York Media Association, stating some people want to replace the Constitution with a different form of government using this new technology, but warning the technology and the World Wide Web will fail because people are already getting bored with it).

2. See Thomas Kohler, *Civic Virtue at Work: Unions as Seedbeds of the Civic Virtues*, 36 B.C.L. REV. 279 (1995) (examining unions' role as mediating devices in communities); Victor Davis Hanson, *Labor Is What Others Do For Us*, N.Y. TIMES, Sept. 3, 1996, at A21 (discussing how the devaluation of work threatens society). The norm of socially necessary structures to enable lives beyond poverty have been developed

ventional understanding of work is now increasingly frayed, and perhaps obsolete. The emerging consensus is that the workplace is often like Gertrude Stein's Oakland: there is no longer any "there;" there is no "place" in the workplace.³

The imperative to achieve more, qualitatively and quantitatively, with fewer human resources effecutuates the capitalist managerial paradigm to maximize enterprise profitability. As a result, underemployed and contingent/part-time/temporary workers—perhaps as much as one quarter of the workforce—make up a large pool of people, tenuously situated on the outer periphery of the economy and usually only a few economic steps removed from the unemployable and the unemployed.⁴

Although government employment data indicates that official unemployment in the United States is less than five percent, everyone recognizes that many of the details—and human beings—are lost in the government's peculiar non-counting. For example, when one counts the underemployed, temporary, and contingent part-time workers who now constitute conservatively multi-millions of workers, and those the government no longer counts, such as workers who have vanished from the official unemployment figures because they have exhausted their unemployment compensation

most recently in the intellectual renaissance of the republican civic virtues movement. See generally, FRANCIS FUKUYAMA, *TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY* (1995) (noting that the liberal political and economic institutions depend on healthy and dynamic civil society for their vitality); CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* (1993) (arguing that equal citizenship requires freedom from desperate economic misery); Robert Kuttner, *Needed: A Two Way Social Contract in the Workplace*, *BUS. WK.*, July 10, 1995, at 22 ("The elements of a decent, two-way social contract in the workplace require floors set by either national policies or strong labor unions."). This has long been a cornerstone of Catholic social teaching. See John Langan, *The Contract With American And Catholic Social Teaching*, *AMERICA*, July 29, 1995, at 10. For a related work on the necessity of meaningful employment in the social contract, see Richard J. Armeson, *Is Work Special? Justice and the Distribution of Employment*, 84 *AM. POL. SCI. REV.* 1127 (1990).

3. Even those workers who teleconference and telecommute routinely in cyberspace ultimately must have some physical site for their work; workers are not nearly as ephemeral, indeed metaphysical, as is capital.

4. See, e.g., Developments in the Law, *Temporary Employment and the Imbalance of Power*, 109 *HARV. L. REV.* 1647 (1996); Symposium, *New Approaches to Poverty Law, Teaching, and Practice: Changing Economy, Changing Lives: Unemployment Insurance and the Contingent Workforce*, 4 *B.U. PUB. INT. L.J.* 291 (1995); Symposium, *The Regulatory Future of Contingent Employment*, 52 *WASH. & LEE L. REV.* 725 (1995); Jennifer Middleton, *Contingent Workers in a Changing Economy: Endure, Adapt, or Organize?*, 22 *N.Y.U. REV. L. & SOC. CHANGE* 557 (1996). Many part-time and temporary workers are involuntary unemployed. U.S. DEP'T OF LABOR AND COMMERCE, *FACT FINDING REPORT, COMMISSION ON THE FUTURE OF WORKER MANAGEMENT RELATIONS* 21 (May 1994).

insurance benefits after twenty-six weeks, the “official” unemployment level may be only one-third of actual unemployment.⁵ In most metropolitan population centers, and especially among racial minority populations, there has been no effective and meaningful work for generations. At the same time, the national economy in 1997—and the job market—is reputedly stronger than in all but a few years of the post World War II half-century.⁶

The front page of the *Wall Street Journal* on May 28, 1996 reported that nearly one quarter of all recent college graduates are willing to work temporarily for “free.” They do so, in desperate efforts, to persuade employers by their diligence, competence, and hard work that they are worthy of consideration for subsequent (compensated) employment.⁷ This is a deeply troubling and very accurate barometer of the pervasive anxiety felt throughout the world of work. Likewise, there is an increasing number of anecdotes about displaced mid-career white collar managers and executives—terminated by the multi-millions throughout the past decade-and-a-half era of constant “down sizing”—who are also willing to work for “free.”⁸ These realities, perhaps more than any other vignette, highlight the issues surrounding the exploitation of “free labor.”

Welfare reform legislation, via the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996, now mandates that the adult welfare population find work, despite the structural absence of meaningful work opportunities for the unskilled and poorly educated in most environments.⁹ Most state

5. In October 1997, the national unemployment rate was reported as 4.7%, down from 4.9% in September. Kirk Johnson, *Unemployment Dips and Jobs Rise in City*, N.Y. TIMES, Nov. 26, 1997, at B6 [hereinafter Johnson I]. For that same period, the New York State unemployment rate remained steady at 6.4%. *Id.* Although higher than the state's rates, New York City's unemployment fell during that time to 9.1% from 9.3% in September. *Id.* New York City added over 53,000 new jobs during the first ten months of 1997, the City's best job-creation performance since 1984. *Id.*

6. See WILLIAM J. WILSON, *WHEN WORK DISAPPEARS* (1996); see also Steve Rhodes & Karen Springer, *Yup: Help Wanted*, NEWSWEEK, Jan. 13, 1997, at 52 (reporting 17.7% unemployment in inner-city Milwaukee, with major labor shortages in technology sectors in many metropolitan population centers).

7. See Paulette Thomas, *A Special News Report about Life on the Job and Trends Taking Shape There*, WALL ST. J. May 28, 1996, at A1.

8. See *id.*

9. “In 1996, there were seven million unemployed workers. . . . [A]t the same time, more than four million other workers wanted full-time work but were able to find only part-time jobs; thirteen million additional workers had year round, full-time jobs that paid less than the poverty level; and a million other people were so discouraged that they had stopped looking for jobs

governments, however, do not have enough resources to fund meaningful work programs on a significant scale. As a result, governments are placing an increasing number of welfare recipients in once protected public sector jobs.¹⁰

This Article examines the deep human rights concerns within the transmogrifying world of work, focusing on the integral part that

altogether. So, twenty-five million people—nineteen percent of the workforce—were out of work or underemployed.”

John E. Schwartz, *Mother Teresa's Economics Lesson*, N.Y. TIMES, Oct. 12, 1997, at B14.

The national unemployment rate in August and September 1997 was 4.9%. See Robert D. Hershey, Jr., *Job Growth Was Modest Last Month*, N.Y. TIMES, Oct. 3, 1997, at D1. In September, the manufacturing industry lost 16,000 jobs, mainly reflecting the temporary closing of several automobile plants for inventory adjustment and a sizable job loss in the apparel industry although factories had created 48,000 jobs in August. See *id.* In addition, 12.9% of the unemployed population quit their last jobs. See *id.* Moreover, “hidden unemployment,” consisting of 3.9 million people working part-time because full-time work was unavailable and 300,000 discouraged workers no longer looking for work, grew. See *id.*

Despite these statistics, in a Presidential statement following the October 3, 1997 release of the most recent economic data, President Clinton said: “Real wages are rising, the American economy has created 13.2 million new jobs since the beginning of my administration, and for the first time in twenty-four years, the unemployment rate has remained at or below five percent for six consecutive months.” Daniel J. Roy, *Job Growth Slows in September; Unemployment Remains at 4.9 Percent*, Daily Lab. Rep. (BNA) No. 193, at D-26 (Oct. 6, 1997).

Although the national unemployment rate in October 1997 was 4.7%, the unemployment rate for New York State was 6.4%. See Johnson I, *supra* note 5, at B6. At the same time, New York City's unemployment rate of 9.1% nearly doubled the national rate. See *id.* Nevertheless, according to Joseph Lhota, the City's director of the Office of Management and Budget, New York City is experiencing its largest increase in jobs in the last thirteen years. See *New York City Employment Growth Strongest in 13 Years*, CAP. MKT. REP., Sept. 23, 1997. A long-term trend in New York City remained unchanged as more jobs in high-skilled industries, such as business services, financial services, and tourism, were created. See Kirk Johnson, *Steady Jobless Rates*, N.Y. TIMES, Sept. 24, 1997, at B6. Furthermore, the publishing industry added about 10,000 jobs in the City last year. See *id.*

According to a report by Alan G. Hevesi, the New York City Comptroller, the types of jobs which are being created are mainly on Wall Street, at high-technology companies and firms that require advanced skill and education. See Thomas J. Lueck, *Job Boom in New York City Excludes City Residence*, N.Y. TIMES, Aug. 15, 1997, at B6. The City produced 21,900 new jobs in the first half of the year but recorded a drop of 23,900 in the number of working residents. See Rose Kim, *City Jobs Going to Suburbanites*, NEWSDAY, Aug. 15, 1997, at A32. This type of growth has created a wealth of opportunity, but not for people living in New York City. Skilled suburbanites have been displacing lesser-skilled City residents and reaping the benefits of the increased number of jobs. See Lueck, *supra*, at B6. This mismatch between location and skill level of new jobs reveals the true nature behind the healthy economy for low-skilled workers.

10. See E.S. Savas, *Welfare Reformers vs. Public-Sector Unions*, WALL ST. J., Nov. 21, 1996, at A22.

work plays in the definition, construction, maintenance, and enhancement of the social contract in the context of the New York City welfare workforce.

Part I reviews the “employee”/partner/independent contractor distinctions, focusing on recent case law, the regulatory tax regime, and related issues.¹¹ Part II examines the complex pressures that workfare legislation will exert throughout most sectors of the workforce and the unemployed. Part III explores the role of Catholic social teachings on workers’ rights as well as the reemergence of the “living wage” initiative. This Article concludes that the situation is grim, perhaps inexorably Malthusian. As huge pools of surplus labor bid unsuccessfully for increasingly scarce jobs, all but the most educated and technologically adept face unrelenting

11. For an excellent overview of case law and various statutory and treatise criteria regarding employer-employee and independent contractor relationships, see Richard R. Carlson, *Variations on a Theme of Employment: Labor Law Regulation of Alternative Worker Relations*, 37 S. TEX. L. REV. 661 (1996). See also John P. Hiatt & Lee W. Jackson, *Union Survival Strategies for the Twenty-first Century*, 12 LAB. LAW. 165 (1996); Lewis L. Malthy & David C. Yamada, *Beyond “Economic Realities”: The Case for Amending Federal Employment Discrimination Law to Include Independent Contractors*, 38 B.C.L. REV. 239 (1997); Claudia MacLachlan, *IRS Struggles To Define Independent Contractor*, NAT’L L.J., Sept. 16, 1996, at B1. The National Labor Relations Board is currently reconsidering the common law right-of-control test to determine whether a worker is an independent contractor. See *Labor and Management Revisit NLRB Test For Independent Contractors*, Daily Lab. Rep. (BNA) No. 233, at D-16 (Dec. 9, 1996).

Recently, both the Second and Sixth Circuits found that even partners dismissed by major firms are “employees” for Title VII employment discrimination law purposes. See *Simpson v. Ernst & Young*, 100 F.3d 436 (6th Cir. 1996); *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529 (2nd Cir. 1996). But see *Devine v. Stone Leyton & Gershman, P.C.*, 100 F.3d 78, (8th Cir. 1996) (finding that a paralegal fired by law firm could not successfully argue that all attorneys were employees of the firm for Title VII purposes); Chris Klein, *Partner May Be Judged ‘Employee’*, NAT’L L.J., Dec. 23, 1996, at B1. In *EEOC v. Fawn Vendors, Inc.*, 965 F.Supp. 909 (S.D. Tex. 1996), the court held that the employer had the right to control the details and manner of the salesperson’s work performance. *Id.* at 912. The worker was deemed to be an employee and not an independent contractor even though the salesperson had signed a document describing her as an independent agent, was paid on a commission-only basis, and did not have taxes withheld from paychecks. *Id.* at 913. Because the worker was an employee and not an independent contractor, her Title VII lawsuit for unlawful employment discrimination could proceed against the employer. *Id.* Of course, the double edge of the sword is that the injured independent contractor worker, unlike the statutory employee, may sue in tort, whereas the injured employee is usually limited to recovery pursuant to the workers’ compensation statute. In addition, temporary workers are often regarded as independent contractors—“contract” workers—who work for the temporary service agency provider. Thus, the temporary service agency provider is regarded as the employer and is subject to the employer provisions of the workers’ compensation statute. See, e.g., *Goodman v. Sioux Steel Co.*, 475 N.W.2d 563 (S.D. 1991).

downward pressures on wage compensation. These dynamics surrounding the welfare workforce shape the perception, and reality, of public and private sector employers towards workers well into the next century.¹²

I. The Work Relationship: "Employee" or . . . ?

Many approaches have been used to frame the working relationship, and to determine whether a worker is an "employee," an "independent contractor," a "partner," or something else. Labor and employment law generally presume that the worker is in an employee-employer relationship.¹³ The prevailing statutory and case law regime is very skeptical of those employers who seek to disavow the conventional employer-employee relationship, attempting instead to categorize their workers as "independent contractors" or "partners."¹⁴

The classification of a worker can have important tax consequences for both parties. An employer must withhold federal and state income tax from an employee's wages,¹⁵ pay federal and state payroll taxes,¹⁶ withhold FICA tax from wages,¹⁷ and report the employee's wages to the IRS and to the employee.¹⁸ Some employers are, therefore, seduced by the supposed immediate benefit resulting from a recharacterization of workers as "independent contractors." If the worker is an independent contractor, the employer does not have these extensive statutory obligations. The employer must submit an IRS Form 1099 for each worker to whom it pays more than \$600 per year, while the worker is responsible for

12. This Article is part of an ongoing and larger project regarding the enhancement of human dignity in the arena of work. See David L. Gregory, *Catholic Labor Theory and the Transformation of Work*, 45 WASH. & LEE L. REV. 119 (1987); David L. Gregory, *Dorothy Day's Lessons for the Transformation of Work*, 14 HOFSTRA LAB. L.J. 57 (1996); David L. Gregory, *The Right to Unionize as a Fundamental Human and Civil Right*, 9 MISS. C.L. REV. 135 (1988).

13. For example, the federal minimum wage law, the Fair Labor Standards Act, defines "employee" as "any individual employed by an employer." 29 U.S.C. § 203(e)(1) (1993). The United States Supreme Court has said "a broader or more comprehensive coverage of employees . . . would be difficult to frame." *United States v. Rosenwasser*, 323 U.S. 360, 362 (1945).

14. See Carlson, *supra* note 11, at 664-87.

15. I.R.C. § 3401 (West 1989 & Supp. 1995).

16. Federal Unemployment Tax Act, 26 U.S.C.A. § 3301 (West 1989 & Supp. 1995).

17. Federal Unemployment Tax Act, 26 U.S.C.A. § 3101 (West 1989 & Supp. 1995).

18. See Rita A. McConnell, *Defining the Employment Relationship*, in EMPLOYMENT LAW & PRAC. 47, 54 (Stephen F. Befort & Karen G. Schanfield eds., 1995).

declaring federal and state taxes on amounts received from the employer, and for federal self-employment tax.¹⁹

The Internal Revenue Service is aware that many employers may be tempted to disavow the employer-employee relationship and recharacterize their workers as independent contractors. Because the federal government relies on the traditional employer-employee relationship to maximize its tax receipts this knowledge has led the federal government to renew its efforts to reassert and strengthen the employer-employee relationship.²⁰ Therefore, an employer who misclassifies employees as independent contractors may be liable for past-due taxes, including interest and penalties.²¹

A. The Common Law Test

Under common law, the master-servant relationship is the traditional agency law criterion often used as a starting point in determining if a worker is an employee or independent contractor. The *Restatement (Second) of Agency* test is:

- (1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.
- (2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:
 - (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
 - (b) whether or not the one employed is engaged in a distinct occupation or business;
 - (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision.
 - (d) the skill required in the particular occupation;
 - (e) whether the employer or the worker supplies the instrumentality's tools, and the place of work for the person doing the work;
 - (f) the length of time for which the person is employed;
 - (g) the method of payment, whether by the time or by the job;

19. See *id.* at 54-55.

20. See *id.*; see also Leah Beth Ward, *Tax Rules Squeezing Independent Contractors*, N.Y. TIMES, Nov. 10, 1996, at sec. 3, p.9 ("The law at issue is Section 1706 of the Internal Revenue Code. . . . It requires companies to apply a 20-point test in distinguishing between employees and independent contractors.").

21. 26 U.S.C.A. § 3401 (1997).

- (h) whether or not the work is part of the regular business of the employer;
- (i) whether the parties believe they are creating the relation of master and servant;
- (j) whether the principal is or is not in business.²²

This test is case specific, focusing on the relationship between the parties and the work performed.

B. Case Precedents

The application of the common law test has become a widely litigated issue.

1. *Community for Creative Non-Violence v. Reid*

In *Community for Creative Non-Violence v. Reid*,²³ the United States Supreme Court used the common law test to determine whether a worker was an "employee." From the amalgam of variables set forth in the *Restatement (Second) of Agency*, the Court determined the salient factor to be the extent of supervisory "control" over the worker and the work: the greater the degree of "control," the more likely the worker is an employee rather than an independent contractor.²⁴

Reid arose after the trustee of an advocacy organization for the homeless entered into an oral agreement with Reid to create a sculpture. Once the sculpture, "Third World America," was completed, the parties disagreed about who owned the copyright. Under the Copyright Act of 1976²⁵ ("Act"), the person who "translates an idea into a fixed, tangible expression" is entitled to copyright protection.²⁶ Nonetheless, unless there is a written agreement to the contrary, the employer retains ownership when the work is made for hire.

The Court in *Reid* determined that the Act provided two avenues for works to acquire "work for hire" status, one for employ-

22. RESTATEMENT (SECOND) OF AGENCY § 220 (1958).

23. 490 U.S. 730 (1989). For commentary, see Elizabeth Flagg, *Insurance Agents Slip Through the "Good Hands" of ERISA: "Employee" Defined by Agency Principles in Nationwide Mutual Insurance Company v. Darden*, 28 WAKE FOREST L. REV. 1099, 1110 (1993).

24. The holistic "economic realities" of the worker's dependence on supervision in order to perform work is a symmetrically related and important test for the employer-employee relationship. See Carlson, *supra* note 11, at 667-71.

25. Copyright Act of 1976, Pub. L. No. 94-553, § 101, 90 Stat. 2541, 2541-98.

26. *Reid*, 490 U.S. at 737.

ees and another for independent contractors.²⁷ Because the Act did not define the term "employee," the Court concluded that Congress intended to maintain the master-servant relationship of the common law agency doctrine.²⁸ Applying these factors, the Court concluded that Reid was an independent contractor, not an employee.²⁹ As such, he retained the rights to the sculpture.

2. *Nationwide Mutual Insurance Company v. Darden*

In 1992, the United States Supreme Court again wrestled with the definition of "employee" in *Nationwide Mutual Insurance Company v. Darden*.³⁰ Darden, an insurance salesman, contracted to sell only Nationwide policies. Nationwide enrolled Darden in its retirement plan upon the condition that he would forfeit his entitlement to pension benefits if, within a year of his termination, he sold competitors' policies within twenty-five miles of his prior business location. After eighteen years of service, Darden was terminated. Darden then sold competitors' policies from the same location. Nationwide charged that Darden's new business activities disqualified him from receiving any pension benefits. Darden sued, pursuant to the Employee Retirement Income Security Act of 1974³¹ ("ERISA"). The district court granted summary judgment for Nationwide, finding that Darden was not a proper ERISA plaintiff because he was an independent contractor and not an "employee."³² ERISA tautologically defines "employee" as "any individual employed by an employer."³³

The court of appeals vacated and remanded.³⁴ It determined that while Darden probably would not qualify as an employee under traditional tests, the traditional definition was inconsistent with the declared policies and purposes of ERISA.³⁵ The court held that an ERISA plaintiff can qualify as an employee by showing a reasonable expectation that he would receive benefits, reliance on this reasonable expectation, and the lack of the economic bargaining power to contract out of the benefit plan forfeiture pro-

27. *Id.* at 731.

28. *Id.* at 740.

29. *Id.* at 752.

30. 503 U.S. 318 (1992); *see also* Flagg, *supra* note 23, at 1110.

31. 29 U.S.C. § 1001.

32. *Darden*, 503 U.S. at 320.

33. 29 U.S.C. § 203(e)(1) (1993).

34. *Darden v. Nationwide Mut. Ins. Co.*, 796 F.2d 701, 709 (4th Cir. 1986), *rev'd*, 503 U.S. 318 (1992).

35. *Id.* at 705.

vision.³⁶ The court of appeals reasoned that the term “employee” should be interpreted “in light of the mischief to be corrected and the end to be attained,”³⁷ and remanded the case. Under the new test, the district court found Darden to be an “employee.”³⁸

Citing *Reid*, the Supreme Court reversed.³⁹ The Court explained that ERISA’s definition of “employee” was pointless and tautological.⁴⁰ The Court adopted the common law definition, as it did in *Reid*, stating that the court of appeals relied on the “feeble precedents” of supposed “economic realities” in departing from common law agency principles.⁴¹ The Court applied the *Restatement of Agency* section 220 and common law criteria, not the “economic realities” test, to determine whether the worker was an employee:

[We] consider the hiring party’s right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.⁴²

3. *Simpson v. Ernst & Young*

During the past term, the United States Supreme Court denied certiorari to *Simpson v. Ernst & Young*.⁴³ Thus, the court of appeals’ decision holding many “partners” at a major accounting firm were “employees” rather than true partners-owners, for employment discrimination law purposes, remains the law. It is uncertain whether *Ernst & Young* signals that the Court is prepared to clarify further, or to reexamine significantly, the factors and the concepts

36. *Id.* at 706.

37. *Id.*

38. *Darden v. Nationwide Mut. Ins. Co.*, 717 F. Supp. 388, 393 (E.D.N.C. 1989), *rev’d*, 503 U.S. 318 (1992).

39. *Darden*, 503 U.S. at 322.

40. *Id.* at 323.

41. *Id.* at 324-25.

42. *Id.* at 323-24.

43. 100 F.3d 436 (6th Cir. 1996).

of the employment relationship it has thus far articulated in its *Reid* and *Darden* decisions.

In *Ernst & Young*, the plaintiff filed suit seeking damages pursuant to the Age Discrimination in Employment Act⁴⁴ ("ADEA"), which protects against age discrimination, and under ERISA⁴⁵ claiming the employer terminated him in order to deny retirement plan benefits. The court addressed the distinction between partners and employees, using a range of common law principles:

The right and duty to participate in management; the right and duty to act as an agent of other partners; exposure to liability; the fiduciary relationship among partners; use of the term "co-owners" to indicate each partner's "power of ultimate control;" participation in profits and losses; investment in the firm; partial ownership of firm assets; voting rights; the aggrieved individual's ability to control and operate the business; the extent to which the aggrieved individual's compensation was calculated as a percentage of the firm's profits; the extent of that individual's employment security; and other similar indicia of ownership.⁴⁶

Although the decision may be viewed as an application of the economic realities test, which has been questioned, the court explained that both the economic realities test and the common law test involve the employer's ability to control job performance and employment opportunities of the aggrieved individual.⁴⁷ In *Ernst & Young*, the court found that the plaintiff had no bona fide ownership interest, no fiduciary relationship, no share in the profits, no management control, no right to vote on decisions, and no job security. He was, therefore, not a partner but simply an employee limited to his position and under the control of those performing the managerial duties above.

On January 24, 1997, the United States Supreme Court denied hearing the case of *Simpson v. Ernst & Young*.⁴⁸ Without any clarification from the Supreme Court, the circuits remain divided in interpreting the term "employee." For example, the Tenth Circuit analyzed the "total bundle of partnership characteristics" to determine if one is a partner or an employee,⁴⁹ while the Eleventh Circuit focused on the "actual role played by the claimant in the operations of the involved entity and the extent to which that role

44. 29 U.S.C. § 621.

45. 29 U.S.C. § 1001.

46. *Ernst & Young*, 100 F.3d at 443-44.

47. *Id.* at 442.

48. *Id.* at 436.

49. *Id.* at 443.

dealt with traditional concepts of management, control and ownership."⁵⁰

II. The Welfare Workforce

On August 22, 1996, President Clinton signed into law the Personal Responsibility and Work Opportunity Reconciliation Act⁵¹ ("1996 Act"). Among its most significant features, the federal entitlements to welfare⁵² and the Aid to Families With Dependent Children⁵³ ("AFDC") programs have been abolished. They were replaced by the 16.3 billion dollar Temporary Assistance for Needy Families⁵⁴ state block grants program. Welfare recipients can receive benefits for a maximum of five years.⁵⁵ Once the time limit expires, participants will lose all benefits.⁵⁶ Only about twenty percent of those on public welfare, those who are the least employable, may remain on welfare beyond the five year maximum limit.⁵⁷ By legislative mandate, the New Deal welfare ethos is gone. The welfare poor⁵⁸ must now work to maintain benefits for a finite period, placing tremendous downward wage and job security pressures on public sector workers.

The new law also prohibits able-bodied, childless adults between the ages of eighteen and fifty from collecting food stamps for more than three months in any three year period unless they work at least twenty hours a week.⁵⁹ There is no exemption for recipients who cannot find work.⁶⁰ The new law severely penalizes welfare recipients who shrink from their work obligation. If parents with

50. *Id.*

51. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105. For a summary of the litigation quickly filed to challenge the new law on constitutional and other grounds, see Richmond C. Reuben, *The Welfare Challenge: States Face Tough Choices and Lawsuits under New Act*, 83 A.B.A. J. 34 (Jan. 1997).

52. 42 U.S.C. § 601(b) (1996).

53. 42 U.S.C. §§ 601-618 (1996).

54. Personal Responsibility and Work Opportunity Reconciliation Act § 103 (new § 402(a) of the Social Security Act).

55. *Id.* § 408(a)(7).

56. *Id.*

57. *Id.* § 408(a)(7)(c)(11).

58. Welfare recipients range from self-confident, college-educated, divorced mothers to high school dropouts addicted to drugs as well as those who fall somewhere in between. See John Harwood, *The Bumpy Road From Welfare to Work*, WALL ST. J., May 15, 1997, at B1.

59. 18 SOC. SERV. § 387.1 (1996).

60. *Id.*; see also Editorial, *Food Stamps for the Unemployed*, N.Y. TIMES, Dec. 26, 1996, at A26.

minor dependent children do not work pursuant to the federal mandate, the family will not receive the parents' share of the family's monthly welfare check for one month; for the second offense, the entire family loses its check for one month.⁶¹

A. New York City Workfare

New York City has instituted the largest public jobs program since the Great Depression in order to comply with the 1996 federal welfare reform legislation.⁶² The program may create a workforce of hundreds of thousands of former welfare recipients at a cost exceeding one billion dollars a year.⁶³ New York City has the largest state-sponsored work program ("workfare") in the country with 35,000 out of 450,000 welfare adults already working for their welfare benefits. More than 100,000 participants likely will enter the workforce within a few years, at a rate of 4,000 to 5,000 persons per month.⁶⁴

Workfare started in New York City as the Work Experience Program⁶⁵ ("WEP"). Under this program, able-bodied single people without children who receive money under the state's Home Relief ("HR") Program must work twenty-six hours each week.⁶⁶ New York City assigns them jobs ranging from picking up litter to cleaning up the Staten Island Ferry.⁶⁷ A number of workfare participants clean the City's parks as part of the Park Career Training Program⁶⁸ ("Pact").⁶⁹ Training and the seductive, but probably not realizable, promise of a permanent job are also part of this program. For example, an individual working thirty-five hours a week for Pact receives \$352 per month in HR benefits, plus \$112 per month in food stamps and Medicaid.⁷⁰

61. Personal Responsibility and Work Opportunity Reconciliation Act § 407(e)(1). Benefits are lost for two months on the third offense and for six months on the fourth offense. *Id.*

62. See David Firestone, *New York Girding for Surge in Workfare Jobs*, N.Y. TIMES, Aug. 13, 1996, at A1 [hereinafter Firestone I].

63. See *Workfare's Missing Link*, N.Y. TIMES, Oct. 21, 1996, at A16.

64. See Lizette Alvarez, *Giuliani and Union Praise Successes of Workfare*, N.Y. TIMES, Dec. 15, 1996, at sec. 1, p.51.

65. N.Y. COMP. CODES R. & REGS. tit. 18, § 385 (1996).

66. N.Y. COMP. CODES R. & REGS. tit. 18, § 385.13 (1995).

67. See Karen W. Arenson, *Workfare Rules Cause Enrollment to Fall, CUNY says*, N.Y. TIMES, June 1, 1996, at A1.

68. N.Y. COMP. CODES R. & REGS. tit. 18, § 385 (1996).

69. See Douglas Martin, *Making It Work*, N.Y. TIMES, Apr. 22, 1996, at sec. 13, p. 3.

70. See *id.*

Currently 4,500 workers are employed by the New York City Parks Department program; 500 are in Pact.⁷¹ There have been undeniable objective improvements credited to the work of these supplemental workers.⁷² For example, approximately ninety percent of the New York City parks were considered clean in 1996, up from seventy-six percent in 1995.⁷³ In addition, the City government asserts that the most important objective—moving persons from welfare dependency into productive employment—is gradually beginning to be achieved.⁷⁴ Approximately 110,000 people have completed the New York City workfare program.⁷⁵ According to one of Mayor Guiliani's senior advisors, the City had 235,000 fewer persons on welfare in February 1997 than in March 1995.⁷⁶

In April 1996, New York City began requiring those who receive AFDC benefits to work at least twenty hours a week or lose public assistance for their children.⁷⁷ These new workers, given no benefits other than Medicaid, effectively earn less than the federal minimum wage.⁷⁸ Many program participants receive as little as \$68.50 in cash and \$60 in food stamps every two weeks.⁷⁹ If adhering to a work requirement of twenty-six hours per week, that breaks down to approximately \$.80 to \$1.50 per hour, in addition to their welfare benefits.⁸⁰ Moreover, the work requirement is slated to increase steadily, mandating participants work thirty hours a week by the year 2000.⁸¹

The workfare program now costs New York City between \$1,200 and \$3,000 a year per workfare worker, with some City officials

71. *See id.*

72. *See id.*

73. *See id.*

74. *See id.*

75. *See id.*

76. *See* Steven Greenhouse, *City Labor Director Backs Effort to Organized Workfare Participants*, N.Y. TIMES, Feb. 9, 1997, at sec. 1, p.39 [hereinafter Greenhouse I]; Alvarez, *supra* note 64, at sec. 1, p.51 (remarking that there were 210,000 fewer New Yorkers on welfare in December 1996 than at its creation two years earlier).

77. *See* Greenhouse I, *supra* note 76, at sec. 1, p.39; Alvarez, *supra* note 64, at sec. 1, p.51. Travel money for students and child care support has been limited to two years, shortening the previous level of three years. *See* Greenhouse I, *supra* note 76, at sec. 1, p.39.

78. *See* Firestone I, *supra* note 62, at A1.

79. *See* Greenhouse I, *supra* note 76, at sec. 1, p.39.

80. *See* Greenhouse I, *supra* note 76, at sec. 1, p.39; Glenn Burkins, *Unions Aim to Recruit Workers Entering the Job Market Because of Welfare Overhaul*, WALL. ST. J., Feb. 7, 1997, at A20.

81. *See* Firestone I, *supra* note 62, at A1.

estimating that the per capita cost already is closer to \$3,500.⁸² These figures include the cost of supervising the workfare workers and the administrative monitoring of the program, but do not include child care, about \$6,500 per child.⁸³ The total cost to New York City might reach \$400 million a year, well beyond the amount the federal government provides.⁸⁴ New York State will be expected to pay an estimated \$1.3 billion for job-related programs over the next five years.⁸⁵ Each state must meet certain federal targets or lose substantial amounts of federal aid: twenty-five percent of adult welfare recipients must work twenty hours per week by the end of 1997 for the state to receive its full share of federal money under the new federal law; and fifty percent of welfare recipients must be in a workfare program by the year 2002.⁸⁶

According to Governor Pataki, if states are required to adhere to a federal minimum wage standard, the program will become too costly.⁸⁷ In addition, the Governor plans to scale back welfare benefits by forty-five percent over the next five years.⁸⁸ He wants to use \$354 million of the \$730 million available for welfare for other purposes.⁸⁹ For example, he suggests giving vouchers for food and clothes, rather than cash assistance, and proposes that the counties create job slots.⁹⁰ If the state does not provide enough money to the counties, however, any proposed voucher system will fail, and the counties will be unable to create a sufficient number of jobs.⁹¹

Moreover, the new workfare rules may be causing thousands of students to drop out of college, thus grossly frustrating the search for economic opportunity offered by higher education.⁹² Mayor Giuliani advocates putting welfare recipients to work, even at the expense of education, because working will restore a sense of dig-

82. *See id.*

83. *See id.*

84. *See id.*

85. *See* Joel M. Poch, *Workfare: An Analysis of a Doomed Elixir*, 69 N.Y. ST. B.J. 42 (April 1997).

86. *See* Rochelle Sharpe, *Work Week, Welfare to Work: A Special News Report About Life on the Job—and Trends Taking Shape There*, WALL ST. J., Jan. 21, 1997, at A1.

87. *See* Rachel L. Swarns, *Pataki Assails White House on Workfare*, N.Y. TIMES, May 17, 1997, at sec. 1, p.21.

88. *See id.*

89. *See* Editorial, *Funds for the Workfare Transition*, N.Y. TIMES, May 20, 1997, at A22.

90. *See id.*

91. *See id.*

92. *See* Arenson, *supra* note 67, at A1.

nity to those receiving public assistance.⁹³ In today's global, post-industrial economy, however, an education may be the best way out of a life of dead-end jobs and welfare dependency.⁹⁴ The number of students on welfare attending the City University of New York has dropped from 27,000 to 22,000.⁹⁵ Some experts argue that while some students may be dropping out because of rising tuition and decreasing financial aid, the large majority have left because of the welfare restrictions.⁹⁶ This type of employment provides only a short-term escape from welfare.⁹⁷

Justice Solomon of the New York State Supreme Court recently ruled that the City must stop assigning welfare recipients to workfare programs unless it first fully assesses their needs and skills to determine whether they should attend school instead.⁹⁸ By steering welfare recipients away from education, the system is undermining their job prospects and possibilities for economic advancement.⁹⁹ Justice Solomon also ruled that participation in workfare may not unreasonably interfere with education.¹⁰⁰

In another 1996 case, Justice Helen Freedman ordered the City to stop evaluating newly homeless parents for its workfare program.¹⁰¹ In the New York City workfare program, homeless adults living with their children in City shelters must work for the City in exchange for their welfare benefits.¹⁰² Justice Freedman held that

93. See David Firestone, *Praising the Wonders of Workfare, Giuliani Finds a Campaign Theme*, N.Y. TIMES, Mar. 20, 1997, at B3 [hereinafter Firestone II].

94. See *id.* A workfare position sweeping streets is not the same as a street-sweeper helping to pass the civil servant test. The welfare position is technically not a job, it is not secure, and does not offer any potential for advancement. The Sanitation Department has not hired any workfare participants because 15,000 are currently on the waiting list. See *id.*

95. See Arenson, *supra* note 67, at A1.

96. See *id.*

97. See *id.*

98. See Steven Greenhouse, *Judge Orders Assessments for Workfare Recipients*, N.Y. TIMES, Mar. 26, 1997, at B3 [hereinafter Greenhouse II].

99. See *id.* For example, a woman receiving welfare, who had to take a clinical internship to graduate as a respiratory therapist, was told she would lose almost one-third of her benefits if she did not work twenty hours per week, which she claimed would prevent her from completing her internship in time to take that fall's licensing exam. See Steven Greenhouse, *Judge Eases Workfare Rules for Recipients Taking Classes*, N.Y. TIMES, June 6, 1997, at B8 [hereinafter Greenhouse III].

100. See Greenhouse II, *supra* note 98, at B3.

101. See Randy Kennedy, *Workfare Screening of Homeless Starts, Then Stops*, N.Y. TIMES, Aug. 21, 1996, at B1; see also Matthew Goldstein, *Ban Continued on City Policy for Homelessness; Interviews for Workfare Blocked at Bronx Office*, N.Y. L.J., Aug. 30, 1996, at 1.

102. See David Firestone, *Homeless Parents in New York Face a Work Mandate*, N.Y. TIMES, Aug. 17, 1996, at A1 [hereinafter Firestone III].

the City could conduct interviews in City centers where families temporarily live before going into shelters, but could not force residents to work until they had moved into apartment-like city shelters.¹⁰³ Advocates for the poor argued that New York City deliberately is using workfare to deter homeless families from seeking welfare and housing.¹⁰⁴ The City administration contended that extending the workfare program to the homeless is a natural outgrowth of the program.¹⁰⁵ Justice Freedman found that this workfare requirement further disrupts the already disordered lives of homeless people, taking children away from parents who must report to jobs at a time when they cannot find shelter.¹⁰⁶

While the workfare program may be an ambitious project, probably only a small number of participants are going to find viable permanent jobs.¹⁰⁷ New York City's economy is growing too slowly to absorb hundreds of thousands of poorly educated, unskilled people.¹⁰⁸ In addition, a mismatch exists between the sectors of the economy that are growing—business services, media, and the computer and data services industry—and the largely poorly educated and unskilled welfare recipients who will be thrust futilely into the private sector job market.¹⁰⁹

Most welfare recipients are capable of performing low-skill, entry-level jobs. Even in cities where unemployment rates are low, the jobless rate for those seeking entry-level jobs may be twice that of other workers.¹¹⁰ For example, one study found that anywhere from four to nine workers are in search of entry-level jobs for every entry-level job opening.¹¹¹ There is also a geographic gulf between urban centers, where welfare recipients are concentrated,

103. See Kennedy, *supra* note 101, at B1.

104. See David Firestone, *Debating Workfare: Mayor's Effort Raises Questions Over Impact on Poor*, N.Y. TIMES, Aug. 21, 1996, at B4 [hereinafter Firestone IV].

105. See *id.*

106. See *id.*; see also Kennedy, *supra* note 101, at B1.

107. For example, the Work First New Jersey welfare law has resulted in commitments to provide 8000 jobs with private businesses. See Ronald Smothers, *Kmart Agrees to Hire 400 Ex-Welfare Recipients*, N.Y. TIMES, May 31, 1997, at A21. Kmart, which operates 47 stores and employs 6400, has agreed to hire 400 welfare recipients. To promote these partnerships a Job Link system has been suggested to put welfare recipients in contact with the private sector. *Id.*

108. See Alan Finder, *Welfare Clients Outnumber Jobs They Might Fill*, N.Y. TIMES, Aug. 25, 1996, at A1.

109. See WILSON, *supra* note 6.

110. See Bob Herbert, *In America: The Artful Dodger*, N.Y. TIMES, Mar. 10, 1997, at A15.

111. See *id.*

and suburban areas, where higher-wage jobs are often located.¹¹² Companies, therefore, need local county welfare agencies to help find job applicants, aid new workers with child care, provide employment counseling, and help transport employees to their jobs.¹¹³ It is estimated that only thirty percent of welfare recipients can make the transition to private sector positions with minimal support, while another forty percent could only be hired after extensive pre-employment counseling and training.¹¹⁴ Over thirty percent of welfare recipients, however, will never be able to work because of criminal records, drug addiction, or psychological problems.¹¹⁵

New York City holds 3.3 million jobs, although more than thirteen percent of its population is on welfare. Since the recession of 1990-1991, there has been a net gain of 90,000 jobs.¹¹⁶ Over the last three years, employment in the private sector has grown by an average of 1.5% annually.¹¹⁷ In 1996, 44,500 jobs were added to the private sector in New York City;¹¹⁸ 53,000 additional jobs were created in the first ten months of 1997.¹¹⁹ At this rate of growth, if every job gained in the City's economy went to a person on welfare, it would take well into the next century for the economy to absorb all of the 470,000 adults on welfare in New York City.¹²⁰

112. See William J. Holstein & Warren Cohen, *Ready, Aim, Hire*, U.S. NEWS & WORLD REP., Mar. 31, 1997, at 48; Frederick Rose, *Prospects Dim for Workfare, a Study Shows*, WALL ST. J., May 27, 1997, at 9A (noting that Nevada is expected to provide more than three times the number of jobs needed to put welfare recipients to work whereas New York, a welfare-heavy state, is projected to create just thirteen percent of the jobs needed).

113. See Holstein & Cohen, *supra* note 112, at 48.

114. See *id.*

115. See *id.*

116. See Clifford J. Levy, *Wall St. Profits Lead a Recovery in New York City*, N.Y. TIMES, Oct. 21, 1996, at A1 ("From January to August [1996], 32,000 new jobs were generated in the city [During] the same period [in 1995,] only 9,000 were created.").

117. See Randy M. Mastro, *New York's Job Market is Alive and Well*, N.Y. TIMES, Mar. 15, 1997, at A23.

118. See Kirk Johnson, *New York Created 44,500 Jobs in 1996*, N.Y. TIMES, Mar. 20, 1997, at B8.

119. See Eric Johnson, *U.S. Says New York Outdid Suburbs in '96 Job Growth*, N.Y. TIMES, Jan. 23, 1997, at B8; Johnson I, *supra* note 5, at B6.

120. Approximately 1.5 million jobs were lost during the 1990-91 recession, including one million jobs from the manufacturing and construction sectors. See Christopher J. Singleton, *Industry Employment and the 1990-1991 Recession*, MONTHLY LAB. REV. 15 (July 1993). The losses were especially severe in New York City. See Kirk Johnson, *Evolution of the Workplace Alters Office Relationships*, N.Y. TIMES, Oct. 5, 1994, at B1. During this recession, the manufacturing industry lost twenty percent of their jobs; finance, insurance, and real estate lost fourteen percent of their positions;

New York State is expected to generate less than half the number of low skilled positions necessary to absorb the welfare recipients expected to need work in the next two years.¹²¹ Also, 271,000 New York City residents are unemployed and looking for work, but not on welfare.¹²² About fifteen percent of the jobs in New York City are part-time, and another twenty percent are held by persons who reside in the suburbs.¹²³ The remaining jobs usually require far more education and skill than the average welfare recipient possesses, while jobs requiring less skill have markedly declined throughout the economy.¹²⁴ The Employment Policies Institute, an industries-funded center in Washington, D.C., estimates that "38% of the welfare population is functionally illiterate, unable to fill out a simple job application."¹²⁵

Workfare has not been successful thus far in helping any significant number of people in New York City find full-time jobs.¹²⁶ Fewer than one-tenth of the 125,000 people who have passed through the New York City program have reported finding permanent jobs.¹²⁷ Almost two-thirds have dropped out of the program and given up their benefits without indicating they have done so because they found a permanent job.¹²⁸ City officials argue that those who have left the program probably have obtained and maintained employment because the homeless rate has not appreciably increased.¹²⁹

and wholesale and retail trade suffered a twenty-eight percent job loss. See Samuel M. Ehrenhalt, *Economic and Demographic Change: The Case of New York City*, MONTHLY LAB. REV. 40, 41 (Feb. 1993). In the first half of 1996, "270,513 layoffs were announced, . . . 28% higher than the same period [in 1995]." Beth Belton, *Workers' Situation Seems to Be Improving*, USA TODAY, Sept. 9, 1996, at 5B. The current trend shows an increase in the number of jobs being created in some parts of the country. See Robert D. Hershey, Jr., *Labor Market Tightens but Pay Gains Stay Slim: Concerns Persist About Wage Inflation*, N.Y. TIMES, Sept. 5, 1996, at D1. These replacement jobs are mostly in the service sector and are accompanied by lower wages. See Sara Rimer, *The Fraying of Community*, in THE NEW YORK TIMES, THE DOWN-SIZING OF AMERICA 111, 114 (1996).

121. See Rose, *supra* note 112, at 9A.

122. See *id.*

123. See *id.*

124. The New York State Department of Labor reports that seventy-five percent of the new entry level employees in New York City require training and education beyond a high school diploma for entry level jobs. See *id.* Meanwhile, fifty-five percent of adult welfare recipients have not completed high school. See *id.*

125. See Burkins, *supra* note 80, at A20.

126. See David Firestone, *Workfare Cuts Costs but Tracking New Jobs Poses Problems*, N.Y. TIMES, Sept. 9, 1996, at B1 [hereinafter Firestone V].

127. See Firestone II, *supra* note 93, at B3.

128. See *id.*

129. See *id.*

According to Manpower Demonstration Research Corporation, a national nonprofit group that evaluates welfare experiments, welfare programs that offer useful vocational training have the greatest success in getting welfare recipients to better jobs.¹³⁰ New York City has about 1,500 people in small pilot training programs, learning skills like plumbing, carpentry, and specialized cleaning.¹³¹ Furthermore, some of the private companies that have hired former workfare participants report that only a few workers keep their “permanent jobs” more than a few months.¹³²

Since the beginning of the welfare changes in New York City in 1994,¹³³ 166,000 people have left the welfare rolls, and another 27,000 forfeited welfare benefits when told they had to spend twenty-six hours per week in the workfare program.¹³⁴ Workfare has reduced the city’s welfare rolls by 240,000 people in the last year.¹³⁵ Nationwide, there were 4,388,380 persons on welfare when the new federal legislation was signed into law in August 1996, a 7.1% decline since July 1995.¹³⁶ Between March 1994 and October 1996, every state, except Hawaii, experienced at least a five percent decline in the number of welfare recipients.¹³⁷ Evidence indicates that the rates of decline are accelerating.¹³⁸ In October 1997, the national employment rate declined to 4.7%, the lowest rate since 1973,¹³⁹ due, in some part, to some welfare recipients beginning to work.

B. Workfare Recipients Are Not Employees

The question whether a worker is an employee or an independent contractor applies to the welfare workforce as well. The salient issue is whether the welfare workers are “employees” protected by federal and state labor and employment laws. These core rights include the protection of the welfare workers’ right to unionize and

130. *See id.* While there are 35,000 people in the New York City workfare program, only a few thousand receive job-specific training. *See Firestone V, supra* note 126, at B1.

131. *See Firestone II, supra* note 93, at B3.

132. *See id.*

133. These changes include a new screening program and finger-imaging for participants.

134. *See Firestone II, supra* note 93, at B3.

135. *See id.*

136. *See Sharpe, supra* note 86, at A1.

137. *See Jason DeParle, A Sharp Decrease in Welfare Cases is Gathering Speed, N.Y. TIMES*, Feb. 2, 1997, at A1.

138. *See id.*

139. *See Johnson I, supra* note 5, at B6.

to bargain collectively with their employers regarding their hours, wages, and terms and conditions of employment, as well as the protection of federal minimum wage law or, in some municipalities, local "living wage" initiatives. The 1996 welfare legislation is essentially silent on many of these critical issues and, while litigation is certain to quickly proliferate, at present there is relatively little pertinent case law to serve as a benchmark.

1. *Johns v. Stewart*

Prior to the passage of the 1996 federal law, the Tenth Circuit applied the economic realities test to determine if workfare participants were "employees" within the broad statutory meaning of the Fair Labor Standards Act. In *Johns v. Stewart*,¹⁴⁰ the plaintiffs, welfare recipients, claimed they were unlawfully compensated below the minimum wage for the hours they participated in the Financial Assistance Emergency Work Program ("EWP") and General Assistance/Work Experience and Training Program ("GA-WEAT").¹⁴¹ They contended they were "employees" of the Utah Department of Human Services and, thus, entitled to receive the minimum wage pursuant to section 206 of the Fair Labor Standards Act of 1938¹⁴² ("FLSA").¹⁴³

In its determination, the court of appeals looked at the circumstances of the activity as a whole, including the economic realities of the relationship between the two parties. The court held that the work component of GA-WEAT and EWP was just one requirement of the programs.¹⁴⁴ To participate, recipients must meet a needs test, be at least marginally employable, have no dependent children, and agree to participate in education, training, skills development, and job search activities.¹⁴⁵ Furthermore, the court reasoned that the overall relationship between the plaintiffs and defendants was based on assistance, not "employment."¹⁴⁶ Unlike employers, workfare participants apply for public assistance, not for a state job; they do not receive checks from the state payroll;

140. 57 F.3d 1544 (10th Cir. 1995).

141. *Id.* at 1551.

142. 29 U.S.C. § 206 (1938). Under the FLSA, an "employee" is "any individual employed by an employer."

143. 57 F.3d at 1551.

144. *Id.* at 1558.

145. *Id.*

146. *Id.*

and taxes are not withheld from their checks.¹⁴⁷ By focusing on the overall relationship between the parties, the court thus found that workfare participants were not “employees” under the FLSA.

2. *Brukhman v. Giuliani*

In a potentially landmark decision, the New York Supreme Court in *Brukhman v. Giuliani*¹⁴⁸ held that workfare recipients must receive a “living wage”¹⁴⁹ where work performed was equivalent to that done by City employees.¹⁵⁰

In April 1996, the New York City Department of Social Services (“City DSS”) revised its Work Experience Program (“WEP”) to include recipients of Aid to Families with Dependent Children (“AFDC”), along with recipients of Home Relief (“HR”), who were already being assigned to work.¹⁵¹ AFDC recipients are limited to working twenty hours per week,¹⁵² since the City must also provide costly child care. Case workers calculate the number of hours a WEP participant must work on a biweekly basis by dividing the amount of the public assistance grant¹⁵³ by the federal minimum wage, regardless of the particular WEP assignment. On February 12, 1997, the New York State Department of Social Services (“State DSS”) issued a memo requiring local agencies to determine rates of pay in accordance with SSL section 336-c, although the Department of Labor does not have information which would assist in this determination. Workfare participants sought a preliminary injunction to stay the enforcement of their WEP obligations until they could be compensated according to the rate of pay of persons employed in similar occupations.

The City argued that workfare participants could not be considered “employees” or compared with City employees for wage calculations. The City emphasized a number of differences between City employees and workfare participants, including the limited variety of tools workfare recipients may use,¹⁵⁴ and prohibitions on

147. *Id.* at 1577. The court cited to *Marshall v. Regis Educ. Corp.*, 666 F.2d 1324, 1328 (10th Cir. 1981) (holding that resident-hall assistants (“RAs”) are not employees under the FLSA although the RA’s services benefited Regis, the student went to Regis for an education rather than to take this job, and the RA program is only one component of the entire educational relationship).

148. 662 N.Y.S.2d 914 (N.Y. Sup. Ct. 1997).

149. For a discussion of living wage initiatives, see *infra* Part III.B.

150. *Brukhman*, 662 N.Y.S.2d at 921.

151. *Id.* at 916.

152. *Id.*

153. *Id.* at 916. The public assistance grant includes food stamps for HR recipients.

154. *Id.* at 918.

placing collected trash into trucks.¹⁵⁵ Furthermore, the City claimed a difference existed between the "simple" filing required of a workfare participant and the "complex" filing a City clerk performs.¹⁵⁶ The City also attempted to distinguish answering "routine" calls from answering "complex" calls.¹⁵⁷ The court found these differences to be negligible and inconsistent with the goal of WEP, which is to enable participants to achieve independence through employment. Therefore, the court held that many jobs performed by the workfare participants were similar to the job duties of City employees.¹⁵⁸

The court focused on SSL section 336-c, enacted in 1990. SSL section 336-c provides that before an AFDC recipient may be assigned to WEP, the local social service agency calculates the number of hours the recipient must work by dividing the welfare benefits by the state minimum wage, federal minimum wage, or "the rate of pay for persons employed in the same or similar occupations by the same employer at the same or equivalent site."¹⁵⁹ As to the HR recipients, the court held that Article 1, section 17 of the New York State Constitution provided that laborers engaged in "public work" would not be paid less than the prevailing wages for such work.¹⁶⁰ SSL section 164 provides that the City DSS must provide "public work projects" for those who receive HR.¹⁶¹ The New York City regulations clearly identify the work performed by HR recipients as public work. Therefore, HR compensation must be measured according to those doing comparable work.¹⁶²

The issue became whether there was comparable work to make the proper computation. If no comparable work exists, or the state or federal minimum wage is higher, the employer must calculate the rate of pay based on the minimum wage. Thus, where the jobs

155. *Id.* at 916.

156. *Id.*

157. *Id.*

158. *Id.*

159. N.Y. SOC. SERV. § 336-c (2)(b) (McKinney 1990).

160. N.Y. CONST. art. I, § 17. This section provides:

"No laborer . . . , in the employ of a contractor or subcontractor engaged in the performance of any public work, shall . . . , be paid less than the rate of wages prevailing in the same trade or occupation in the locality within the state where such public work is to be situated, erected or used."

Id.

161. N.Y. SOC. SERV. § 164 (McKinney 1990).

162. *Bruckman*, 662 N.Y.S.2d at 920. The City DSS determines whether the general nature of the position assigned is similar to an existing job. This does not mean that social services must determine that a workfare participant will be engaged in every function of a particular job title.

of workfare recipients are substantially similar to workers in comparable positions and employed by the same employer, the rate of pay must be proportional.

C. Workfare Recipients versus Public Sector Employees

The inexorable labor relations impact of the new welfare reform upon current public sector employees and their unions will be profound. Since welfare recipients are legally considered welfare program participants, not public sector employees, they are not protected by the federal labor laws.¹⁶³ Moreover, they are expressly forbidden to unionize by the specific terms of the federal welfare legislation.¹⁶⁴ Recipients will lose their welfare benefits if they attempt a work slowdown or any other collective action.¹⁶⁵ In fact, they can lose their welfare benefits for the slightest infraction of the rules.¹⁶⁶

Although workfare may originally have been conceived to supplement the public sector work force, it has instead begun to supplant it.¹⁶⁷ Workfare has similarly altered the infrastructure of low wage employment by causing job displacement among the working poor.¹⁶⁸ Those employed in the public sector have found their jobs most at risk. Public sector employment is theoretically protected

163. See *supra* Part II.B. Federal protections not applicable to welfare workers include federal wage and hour, unemployment compensation, or workplace safety and health laws.

164. See Joe Sexton, *Discontented Workfare Laborers Mourn 'Union,'* N.Y. TIMES, Sept. 27, 1996, at B1. Four thousand of 35,000 workfare workers in New York City have signed authorization cards with the Association of Community Organizations for Reform Now (ACORN), with 15,000 to 20,000 more projected. See *id.*; David Gonzalez, *Acorn Yearns to Grow Tall, Via Workfare,* N.Y. TIMES, Jan. 11, 1997, at B1. Many workfare recipients believe that their working situation would improve if they could organize. See Julia Campbell, *Anger in Workfare Ranks,* N.Y. TIMES, June 1, 1997, at sec. 13, p.10. Among their complaints are the lack of proper equipment to perform their duties, the frequent threats by supervisors of losing their benefits, and the lack of training that will lead to better jobs. See *id.* ACORN, a nonprofit community activist group, is leading the initiative to coordinate programs for workfare recipients to bargain with employers. See *id.* ACORN has already gathered 11,000 signatures of workfare recipients, purportedly authorizing ACORN to speak on their behalf. See *id.* In addition, the AFL-CIO may begin to ally with the community organizers to help secure welfare workers more permanent governmental jobs, while also protecting the current employment opportunities of unionized municipal employees. See Leslie Kaufman, *Welfare's Labor Pains,* NEWSWEEK, Mar. 31, 1997, at 39.

165. See Firestone I, *supra* note 62, at A1.

166. See *id.*

167. See Poch, *supra* note 85, at 43 (1997).

168. For example, a welfare recipient was recruited to work at a hospital in New Jersey without pay, while a full time salaried employee for 27 years was limited to

by legislation, but government officials continue to seek reductions in labor costs.¹⁶⁹ President Clinton has issued a directive for the government to reduce welfare rolls by hiring an additional 10,000 welfare recipients as federal employees, despite federal government downsizing by 300,000 employees since 1993.¹⁷⁰

These costs and mandates will spur local governments to reduce the number of people on welfare while concomitantly pressuring local governments to "reinvest" and "downsize,"¹⁷¹ replacing full time, permanent employees with lower labor cost welfare workers.¹⁷² In many cases, the terminated workers are the new welfare laborers.¹⁷³

part-time work at half the pay. See Louis Uchitelle, *Welfare Recipients Taking Jobs Often Held by the Working Poor*, N.Y. TIMES, Apr. 1, 1997, at A1.

169. There are a series of cases already filed in New York by unions seeking protection against displacement challenging the expansion of Workfare into areas of work exclusively and traditionally performed by union employees. See Poch, *supra* note 85, at 44-46; see also AFSCME N.Y. Council 66 v. County of Niagara, 98 A.D.2d 970, 470 N.Y.S.2d 1022 (1983); Matter of Ballentine v. Sugarman, 74 Misc. 2d 278, 344 N.Y.S.2d 39, *aff'd sub nom*, Gotbaum v. Lindsay, 43 A.D.2d 815, 350 N.Y.S.2d 1000, *appeal dismissed*, 34 N.Y.2d 667, 311 N.E.2d 656, 355 N.Y.S.2d 1085 (1973); Matter of Danker v. Department of Health of City of New York, 266 N.Y. 365, 194 N.E. 857 (1935); AFSCME N.Y. Council 66 v. City of Lackawanna, 476 N.Y.S.2d 666 (4th Dep't 1984).

170. See Irvin Molotsky, *President Says the Government Will Hire 10,000 Off Welfare*, N.Y. TIMES, Apr. 11, 1997, at A26. President Clinton stated that the welfare rolls had been reduced by 20%, or 2.8 million people, during his first term. See *id.* He expects similar results in his second term by creating entry-level jobs in the Commerce Department, the Defense Department, the Department of Veteran Affairs, and the Social Security Administration. See *id.* A study from the Council of Economic Advisors suggested that more than 40% of the drop in welfare was attributable to the improvement in the economy, while about 30% was due to specific welfare reform efforts. See *id.*

171. See DAVID OSBORNE, *REINVENTING GOVERNMENT* (1991).

172. New Orleans, for example, has replaced its full-time sanitation workers with ad hoc day laborers. See Thomas, *supra* note 7, at A1.

173. *Id.* at A1. For example:

That contract workers are widely used is well known . . . as many as one-fifth of them, probably more than a million . . . have returned to their old companies, many after having been pushed off payrolls or lured off with lucrative buyouts. . . . The Labor Department recently produced the first major statistical evidence of people cycling back to their old employers as contract workers. Its report found that among five million contingent workers, 17% of a representative sample surveyed in 1995 said they had had a "previous different relationship" with the companies that now, in effect, rent them . . . Similarly, the American Management Association, in a survey of 720 companies that recently shed workers, found that 30% had brought back downsized employees, on contract or as rehired employees.

Louis Uchitelle, *More Downsized Workers Are Returning As Rentals*, N.Y. TIMES, Dec. 8, 1996, at A1.

By reducing the number of people on welfare, enrollment in workfare projects will decrease, which provides a strong incentive for local governments to make it harder for people to stay on welfare. The 1996 Act poses two options for the states: reduce caseloads by making eligibility more difficult or place recipients in jobs. Nonetheless, reducing certain programs, discarding the 60-year old entitlement that required the federal government to share the cost of programs, implementing a fixed annual grant that does not vary with the size of the poverty rolls, and limiting the duration of aid to five years, does not create needed jobs.¹⁷⁴ Instead, the current welfare reforms are eerily similar to the poor laws of colonial times which gave the poor the "choice" of working or starving.¹⁷⁵

Welfare programs are placed in the hands of local governments; they are no longer national entitlements.¹⁷⁶ The new bill caps annual federal aid at \$16.4 billion nationwide without new funding for jobs and training.¹⁷⁷ One study showed that the bill would move 2.6 million people into poverty and 11 million families would lose income.¹⁷⁸ New York State, for example, has already imposed a rigorous screening process for Home Relief.¹⁷⁹ Many believe that,

174. See Jason DeParle, *Cutting Welfare Rolls But Raising Questions*, N.Y. TIMES, May 7, 1997, at A1. For example, Milwaukee has adopted the strict rules envisioned by the federal welfare law by attempting to divert new applicants from the rolls, requiring recipients to work 35 hours a week for their benefits, and cutting welfare checks by \$4.25 for every hour of work missed. See *id.* This system has resulted in caseloads shrinking by 25% last year, and each month 1,800 additional people leave the rolls. See *id.* About 12,000 of the city's 26,000 welfare families are now enrolled in the work program. See *id.*

175. See William P. Quigley, *Work or Starve: Regulation of the Poor in Colonial America*, 31 U.S.F. L. REV. 35, 81 (1996).

176. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 401(b), 110 Stat. 2105; see also Quigley, *supra* note 175, at 82-3. The new laws provide block grants to the states. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 403, 110 Stat. 2105. States are required to spend set amounts in order to keep this aid. *Id.* § 403(a)(1). Work requirements are to be strictly enforced at the expense of having benefits cut. *Id.* § 407(e)(1). States are free to set eligibility and benefit levels and there is no minimum amount of benefits to be granted. *Id.* § 407. States may even choose whether to offer cash or other types of assistance. *Id.* § 404.

177. See Peter Edelman, *The Worst Thing Bill Clinton Has Done; Welfare Reform*, ATLANTIC MONTHLY, Mar. 1997, at 49. Federal funding will stay the same for six years and there will be no adjustments for inflation or population growth. See *id.* at 50. The Congressional Budget Office estimates that the bill falls \$12 billion short of providing enough funding for six years to meet work requirements. See *id.*

178. See *id.* at 46.

179. See Raymond Hernandez, *Rules on Welfare for New York Miss Goals for Change*, N.Y. TIMES, Sept. 22, 1997, at A1.

in the absence of federal regulations, the obstacles to staying on welfare will only increase.¹⁸⁰

New York state law forbids the replacement of regular employees with workfare participants,¹⁸¹ but much of the work previously performed by the 20,000 City employees who left their jobs in the past two years is now being done by the 35,000 workfare recipients in the City's Work Experience Program¹⁸² ("WEP"). Leaders of the New York City Transit Workers' Union agreed to let thousands of welfare recipients clean subways and buses in return for a guarantee that no union workers would be laid off until 1999.¹⁸³ Under the plan, the Metropolitan Transit Authority ("MTA") would eliminate about five hundred jobs through attrition, and use thousands of welfare recipients as subway cleaners under the workfare program.¹⁸⁴ When vacancies occur beyond the initial five hundred eliminated jobs, some welfare recipients will be hired full-time.¹⁸⁵ While an obvious practical result will be cleaner trains, buses, and stations, the main reason for the Union's support is the promise, for a few more years, of job security for its current membership.¹⁸⁶

Stanley Hill, the Executive Director of DC 37, AFSCME, AFL-CIO, New York City's largest municipal union comprised of more than 120,000 civilian members, wants Mayor Giuliani to freeze the City's current 35,000 person workfare force until extensive negotiations clarify matters.¹⁸⁷ Hill, who originally spoke out in favor of the workfare plan, was severely criticized by other labor leaders.¹⁸⁸ The law requires 200,000 welfare recipients in New York City to be placed into workfare jobs by the year 2002.¹⁸⁹ Under federal law, states must place a quarter of their welfare recipients into jobs by the end of 1997, and half by 2002.¹⁹⁰ Thus, New York City must expand its workfare force to 60,000 by 1998.¹⁹¹ Union leaders con-

180. See Edelman, *supra* note 177, at 58.

181. See Russ Buettner, *MTA Workfare Deal Illegal, Critics Say*, DAILY NEWS, Sept. 22, 1996, at 42.

182. See *id.*

183. See Richard Perez-Pena, *Transit Union Agrees to Allow Workfare Plan*, N.Y. TIMES, Sept. 19, 1996, at A1.

184. See *id.*

185. See *id.*

186. See *id.*

187. See Steven Greenhouse, *New York Union Leader Urges Halt to Broadening Workfare*, N.Y. TIMES, Sept. 23, 1996, at A1 [hereinafter Greenhouse IV].

188. See *id.*

189. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 407, 110 Stat. 2105.

190. *Id.*

191. See Greenhouse IV, *supra* note 187, at A1.

tend that workfare participants are taking jobs previously held by union members, but receive only a small fraction of the former City workers' pay and no employment benefits such as sick leave and vacation pay.¹⁹² Stanley Hill wants the City to hire union workers to fill vacancies in the municipal hospitals and to provide permanent jobs for workfare participants in the Parks Department.¹⁹³ He does not want workfare to be used simply to obtain concessions from the City's labor unions.¹⁹⁴

On September 27, 1996, Hill agreed to drop his demand that the City stop expanding its workfare program in exchange for a pledge by Mayor Giuliani to consider hiring an unspecified number of welfare workers as City employees.¹⁹⁵ The agreement gives the Mayor the ability to expand the workfare force beyond its 35,000 current participants.¹⁹⁶ The Mayor believes that the program will grow by 4,000-5,000 people per month, and likely will exceed 100,000 in a few years.¹⁹⁷

In addition, the New York City Transit Workers Union narrowly approved a labor contract that permits City welfare recipients to clean subways and buses.¹⁹⁸ The Union conceded after the City repeatedly warned that failure to approve the labor contract could lead to layoffs of thousands of Union members.¹⁹⁹ As many as 500 of the 2,800 unionized transit jobs will be eliminated through attrition, and the work thereafter will be performed by those in the workfare program.²⁰⁰ The new labor contract was approved by a vote of 8,183 to 7,410.²⁰¹ Dissident subway workers within the Union continue to protest, but the Union dominated by bus drivers ignores their cries.²⁰² Significantly, it is within the subway system that most of the workfare workers likely will be employed.²⁰³

192. *See id.*

193. *See id.*

194. *See id.*

195. *See* David Firestone, *Labor Leader Drops Demand on Workfare*, N.Y. TIMES, Sept. 28, 1996, at A25 [hereinafter Firestone VI]; Greenhouse IV, *supra* note 187, at A1.

196. *See* Firestone VI, *supra* note 195, at A25.

197. *See* Greenhouse IV, *supra* note 187, at A1.

198. *See* Richard Perez-Pena, *Transit Pact is Approved by Workers*, N.Y. TIMES, Oct. 23, 1996, at B1.

199. *See id.*

200. *See id.*

201. *See id.*

202. *See id.* The subway workers rejected the labor contract, 58% to 42%, while 75% of bus drivers voted to approve the contract. *See id.*

203. *See id.*

Although labor union leaders believe it is important that workfare workers find permanent employment, many union leaders believe that workfare is growing too fast, and taking jobs away from union workers.²⁰⁴ Despite the "no-layoff" clause in union contracts with New York City, there is a gnawing fear that many current full-time employees will be, over time, permanently displaced en masse by workfare workers.

III. The Role of Catholic Social Teaching on the Rights of Workers

The Catholic Church's eloquent and long-standing social teaching on the rights of all workers continues to be a beacon of jurisprudential and practical hope, transcending the often crabbed and hostile policies of particular nation-states toward the rights of workers.²⁰⁵

A. The Right to Unionize

The right to unionize is a fundamental human and civil right.²⁰⁶ In the international legal regime, major Conventions numbers 87 and 98 of the International Labor Organization protect workers' rights to associate freely, to organize, and to bargain collectively with their employers.²⁰⁷ Unfortunately, the United States is not a signatory to either of these Conventions.²⁰⁸ Moreover, the statutory labor relation law regime in the United States, exemplified by Section 2 of the National Labor Relations Act²⁰⁹ ("NLRA") and reinforced by case law,²¹⁰ removes supervisors, managers, domestic workers, and agricultural workers from the protections of the

204. See Greenhouse IV, *supra* note 187, at A1.

205. See generally David L. Gregory, *Catholic Labor Theory and the Transformation of Work*, 45 WASH. & LEE L. REV. 119 (1988); David L. Gregory, *Dorothy Day's Lessons for the Transformation of Work*, 14 HOFSTRA LAB. L.J. 57 (1996); David L. Gregory, *The Right to Unionize As A Fundamental Human And Civil Right*, 9 MISS. C.L. REV. 135 (1988); David L. Gregory & Charles J. Russo, *Overcoming NLRB v. Yeshiva University by the Implementation of Catholic Labor Theory* 41 LAB. L.J. 55 (1990).

206. See David L. Gregory, *The Right to Unionize as a Fundamental Human and Civil Right*, 9 MISS. C.L. REV. 135, 136 (1988).

207. See *id.*

208. See *id.*

209. 29 U.S.C. § 152(11) (1993).

210. See *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 686 (1980) (finding that university faculty are supervisors or managers, not "employees" protected by the NLRA); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 271 (1974) (finding that managers are not "employees" protected by the NLRA).

NLRA.²¹¹ Since these workers are not considered “employees” within the meaning of the Act, they are beyond the bounds of its direct protections.

Because the tensions regarding the welfare workforce are pervasively suffused with morals and ethics, as well as practical economic issues, Catholic social teaching on the rights of workers to unionize can be a powerful rhetorical instrument to change both legislation and broader public policy to regard the welfare workforce as “employees” with the fundamental human and civil rights to unionize. The Catholic social teaching does not artificially draw unduly narrow distinctions among the classes of workers who should be eligible to unionize. Pope Leo XIII developed this thinking in his classic Papal encyclical, *Rerum Novarum* (on the Condition of Labor), in 1891. Pope Leo XIII wrote:

In the first place—employers and workmen may themselves effect much in the matter of which We treat, by means of those institutions and organizations which afford opportune assistance to those in need, and which draw the two orders more closely together. . . . The most important of all are Workmen’s Associations; for these virtually include all the rest. History attests what excellent results were effected by the Artificer’s Guilds of a former day. They were the means not only of many advantages to the workmen, but in no small degree of the advancement of art, as numerous monuments remain to prove. Such associations should be adapted to the requirements of the age in which we live—an age of greater instruction, of different customs, and of more numerous requirements in daily life. It is gratifying to know that there are actually in existence not a few Societies of this nature, consisting of workmen alone, or of workmen and employers together; but it were greatly to be desired that they should multiply and become more effective.²¹²

The Catholic Church has consistently subscribed to and enhanced these principles supporting workers’ rights.²¹³ Within the United

211. See 29 U.S.C. § 152(3) (1993).

212. POPE LEO XIII, *RERUM NOVARUM* (ON THE CONDITION OF LABOR) 36 (1891).

213. See, e.g., POPE JOHN XXIII, *MATER ET MAGISTRA* (MOTHER AND TEACHER: CHRISTIANITY AND SOCIAL PROGRESS) 31-33 (1961); POPE JOHN PAUL II, *LABOREM EXERCENS* (ON HUMAN WORK) 20 (1981); POPE PAUL VI, *OCTOGESIMA ADVENIENS* (A CALL TO ACTION) 14 (1971); POPE PIUS XI, *QUADRAGESIMO ANNO* (AFTER FORTY YEARS) 31-33 (1931); SECOND VATICAN COUNCIL, *GAUDIUM ET SPES* (PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD) 68 (1965).

States, these universal principles of social justice have been reiterated by the United States Bishops.²¹⁴

B. The Renaissance of the "Living Wage" Initiative

In 1992, eighteen percent of Americans with full-time jobs nevertheless had annual earnings of less than \$13,091, while the official definition of poverty for a family of four was \$14,428.²¹⁵ In 1979, only twelve percent of all full-time workers earned comparably low wages.²¹⁶ Moreover, the minimum wage of 1968, adjusted for inflation, would be \$7.20 today.²¹⁷ The number of people not earning a living wage is increasing dramatically, and the minimum wage has fallen significantly below the poverty line.²¹⁸

Current federal law is silent as to whether the minimum wage is available for welfare recipients on workfare.²¹⁹ This has raised a debate as to whether welfare recipients should receive the federal minimum wage or a living wage.²²⁰ The White House has recom-

214. The National Conference of Catholic Bishops stated:

The Church fully supports the right of workers to form unions or other associations to secure their rights to fair wages and working conditions. This is a specific application of the more general right to associate. In the words of Pope John Paul II, "The experience of history teaches that organizations of this type are an indispensable element of social life, especially in modern industrialized societies." Unions may also legitimately resort to strikes where this is the only available means to the justice owed to workers. No one may deny the right to organize without attacking human dignity itself. Therefore, we firmly oppose organized efforts, such as those regrettably now seen in this country, to break existing unions and prevent workers from organizing.

NATIONAL CONFERENCE OF CATHOLIC BISHOPS, ECONOMIC JUSTICE FOR ALL 104 (1986); see also POPE JOHN PAUL II, CENTESIMUS ANNUS (ON THE HUNDRETH ANNIVERSARY OF RERUM NOVARUM) 7-8 (1991).

215. See Robert A. Rosenblatt, *Survey Finds Sharp Rise in Working Poor Salaries: The Number of Full Time Workers Who Earn Less Than a Living Wage Rose from 12% to 18% in 13 Years*, L.A. TIMES, Mar. 31, 1994, at 1.

216. See *id.*

217. See Paul Winslow, *Missouri Must Raise the Minimum Wage*, ST. LOUIS DISPATCH, Aug. 21, 1996, at 6B.

218. See William P. Quigley, *A Fair Day's Pay for a Fair Day's Work: Time to Raise and Index the Minimum Wage*, 27 ST. MARY'S L.J. 513, 539 (1996).

219. See Joel F. Handler, "Ending Welfare as We Know It"—*Wrong for Welfare, Wrong for Poverty*, 2 GEO. J. ON FIGHTING POVERTY 3, 29 (1994).

220. Justice Solomon of the New York State Supreme Court ruled that New York City must base pay on what the City pays a regular worker for similar tasks. See Steven Greenhouse, *Judge Rejects a Formula for Benefits in Workfare*, N.Y. TIMES, May 13, 1997, at B3 [hereinafter Greenhouse V]. This will mean the City will have to reduce the number of hours each welfare recipient has to work in order to avoid higher costs. One advantage to the workers besides higher wages is that they will be able to spend more time in education and training programs which will help them to move off welfare. The City will also benefit from this arrangement because it will be

mended that workfare recipients be covered by federal minimum wage law, but Republicans in the House of Representatives have sponsored legislation to repudiate the Clinton Labor Department's position.²²¹ The Republicans claim that workfare is not true employment, but merely an opportunity to learn proper working habits.²²² They argue that a minimum wage for workfare would make workfare prohibitively expensive and many states would, thus, have to reduce programs and risk losing federal aid for noncompliance.²²³ Furthermore, a minimum wage standard may reduce incentives for participants to leave welfare. In the case of New York City, this may also result in job displacement for union employees whose jobs may be performed by welfare workers at a lower cost to the City.²²⁴ As a result, some local governments have resolved to do even more, and require all doing business with the government to pay their workers a "living wage" well above the federal minimum wage.

1. Catholic Social Teaching and the Living Wage

The "living wage" principle is rooted in Catholic social teaching regarding the rights of workers. It has been repeatedly elucidated in papal encyclicals and in bishops' pastoral letters in some of the most eloquent language ever concentrated on the issues of just compensation.²²⁵ Within the domestic economy, the United States

able to employ more people by spreading the work around. In addition, this decision pleases union leaders who are afraid that cheap labor will replace them. *Id.*

221. See *Department of Labor Guidance*, Daily Lab. Rep. (BNA) No.103, at D-24 (May 29, 1997) ("Federal employment laws . . . apply to welfare recipients as they apply to other workers. The new welfare law does not exempt welfare recipients from these laws."); see also Robert Pear, *G.O.P. in House Moves to Bar Minimum Wage for Workfare*, N.Y. TIMES, June 12, 1997, at B16.

222. See *Greenhouse V*, *supra* note 220, at B3.

223. See *id.*

224. See Jason DeParle, *White House Calls for Minimum Wage in Workfare Plan*, N.Y. TIMES, May 16, 1997, at A1.

225. See, e.g., POPE JOHN XXIII, *MATER ET MAGISTRA* (CHRISTIANITY AND SOCIAL PROGRESS) (1961) ("The remuneration of work is not something that can be left to laws of the market; nor ought it to be fixed arbitrarily. It must be determined in accordance with justice and equity; which means that workers must be paid a wage which allows them to live a truly human life and to fulfill their obligations in a worthy manner. To raise or to lower wages unduly, with a view to private advantage, and with no consideration for the common good, is therefore contrary to social justice."); POPE JOHN PAUL II, *CENTESIMUS ANNUS* (ON THE HUNDRETH ANNIVERSARY OF RERUM NOVARUM) (1991) ("Profit is a regulator of the life of a business, but it is not the only one; other human and moral factors must also be considered which in the long term are at least equally important for the life of a business."); POPE LEO XIII, *RERUM NOVARUM* (ON THE CONDITION OF LABOR) (1891) ("Wages ought not to be insufficient to support a frugal and well-behaved earner. If through necessity or fear

Bishops apply two universal theories: (1) "the Church fully supports the right of workers to form unions or other associations to secure their rights to fair wages and working conditions,"²²⁶ and (2) "all people have the right to economic initiative, to productive work, to just wages and benefits, to decent working conditions as well as to organize and join unions or other associations."²²⁷

In the early 1900s, Monsignor John Augustine Ryan of the Catholic University of America was the single most prominent living wage champion in the United States. He believed that wages paid to the head of the household should be sufficient for every member of a family to perfect his or her rational nature.²²⁸ Such wages were essential for individual self-development.²²⁹ Ryan's beliefs were based on his formula for individual rights: "Every individual has a right to all things that are essential to the reasonable development of his personality."²³⁰

Monsignor Ryan bridged Catholic social teaching into the New Deal legislative reforms and favored the passage of the Fair Labor

of a worse evil the workman accepts harder conditions because an employer contractor will afford no better, he is made the victim of force and injustice Wages must be sufficient to enable him to maintain himself, his wife, and his children in reasonable comfort."); POPE PAUL VI, *POPULORUM PROGRESSIO (ON THE DEVELOPMENT OF PEOPLES)* (1967) ("It is unfortunate . . . a system has been constructed which considers profit as the key motive for economic progress, competition as the supreme law of economics, and private ownership of the means of production as an absolute right that has no limits and carries no corresponding social obligation. This unchecked liberalism leads to dictatorship rightly denounced by Pius XI as producing 'the international imperialism of money.' One cannot condemn such abuses too strongly. . . ."); POPE PAUL VI, *OCTOGESIMA ADVENIENS* (1971) ("Every man has the right to work, to a chance to develop his qualities and his personality in the exercises of his profession, to equitable remuneration which will enable him and his family 'to lead a worthy life on the material, social, cultural and spiritual level,' and to assistance in the case of need arising from sickness or age."); POPE PIUS XI, *QUADRAGESIMO ANNO* (1931) ("It violates right order . . . whenever capital so employs the working or wage-earning classes as to divert business and economic activity entirely to its own arbitrary will and advantage without any regard to the human dignity of the workers, the social character of economic life, social justice and the common good. . . . Wealth, therefore, which is constantly being augmented by social and economic progress, must be so distributed among the various individuals and classes of society, that the needs of all of which Leo XIII spoke, be thereby satisfied.").

226. NATIONAL CONFERENCE OF CATHOLIC BISHOPS, *ECONOMIC JUSTICE FOR ALL* (1986).

227. NATIONAL CONFERENCE OF CATHOLIC BISHOPS, *CATHOLIC FRAMEWORK FOR ECONOMIC LIFE* (1996).

228. For a thoughtful meditation on, in part, the work of Monsignor Ryan, see Harlan R. Beckley, *Love, Human Dignity, and Justice: Some Legacies from Protestant and Catholic Ethics*, 66 *NOTRE DAME L. REV.* 1053, 1063 (1991).

229. *See id.* at 1062.

230. *Id.*

and Standards Act²³¹ (“FLSA”), establishing the federal minimum wage.²³² The legislative history of the FLSA indicates that a primary purpose of the minimum wage law was to provide a living wage.²³³ President Roosevelt envisioned that the FLSA would guarantee a “living wage” and a “decent living” for all Americans.²³⁴ Reports to Congress supported the goal of the minimum wage as a living wage: the minimum wage was to establish a wage floor adequate to support life with human dignity, and a just wage in return for a day’s work.²³⁵

Now, more than sixty years later, the New Deal alliance between religion and labor shows signs of a resurgence.²³⁶ Living wage initiatives for all workers will be an important part of the alliance’s reform agenda.

231. 29 U.S.C. §§ 201-219 (1993).

232. See Beckley, *supra* note 228, at 1064.

233. See Quigley, *supra* note 175, at 529.

234. See *id.*

235. See *id.* at 530.

236. AFL-CIO President John Sweeney asked the Vatican to issue a statement on workers’ rights prior to the opening of the ministerial meeting of the World Trade Organization. See *Sweeney Asks Vatican to Issue Statement Critical of WTO Stance on Workers’ Rights*, Daily Lab. Rep. (BNA) No. 237, at D-7 (Dec. 16, 1996); REGINA BOTTERIL, THE FAITH & WORK CONGREGATIONAL STUDY GUIDE ON WORKER JUSTICE (1996); Steven Greenhouse, *Labor and Clergy are Reuniting to Help the Underdogs of Society*, N.Y. TIMES, Aug. 18, 1996, at A1 (following the New York State Labor-Religion Coalition, forty clerics formed the National Interfaith Committee for Worker Justice).

2. *The New York City Living Wage Legislation*²³⁷

The living wage bill was first introduced in New York City by Councilmember Sal Albanese in February 1995.²³⁸ It was designed to guarantee a living wage for all City employees, particularly those who work for contractors doing business with the City.²³⁹ About 12,500 workers with City contractors earn less than \$6.00 an hour with no health benefits.²⁴⁰ The bill would raise these workers' salaries to at least \$12.10 an hour, which would cover wages and the cost of benefits.²⁴¹ Several months later, Councilmember Kathryn Freed introduced her version of the living wage bill, which would guarantee health coverage, but did not mandate a direct dollar amount wage.²⁴² Freed instead proposed a wage that would enable workers to live above the poverty level in New York City.²⁴³

Neither of these bills gained much support; they were deemed too expensive.²⁴⁴ A later draft of the bill, supported by City Coun-

237. A number of other cities have also addressed living wage initiatives. In 1996, Milwaukee's City Council passed a living wage ordinance to pay employees of city contractors \$6.05 an hour. See Vikki Ortiz & Gail Perry-Daniels, *Living Wage Effort Gets Push at Town Hall Parley Here*, CAP. TIMES, Oct. 4, 1996, at 1A. In April 1997, the Los Angeles City Council voted to override Mayor Riordan's earlier veto of that city's living wage ordinance, and now requires those employers who contract with Los Angeles to pay at least \$7.50 an hour to approximately 7,500 workers. In addition, the affected workers receive medical coverage or an additional \$1.25 an hour to enable the worker to afford minimal medical coverage in the market. See Matthew Miller, *Wages of Politics*, NEW REPUBLIC 12, Feb. 10, 1997. In Massachusetts, the state legislature likewise overrode then-Governor Weld's veto, to require a minimum living wage of \$5.25 per hour, slightly above the federal minimum wage of \$5.15 per hour. A coalition of community and labor activists in Boston continue to call for a living wage of at least \$7.50 per hour to be paid to the employees of any contractor holding contracts of \$10,000 or more with the city of Boston. See Ted Bunker, *Activists Call for a Living Wage*, BOSTON HERALD, Sept. 3, 1996, at 20; Jane Slaughter, *Working for a Living Wage*, 60 THE PROGRESSIVE, Apr. 1996, at 16. There are also similar initiatives underway in Chicago, Houston, New Orleans, Denver, and Madison, Wisconsin. See, e.g., Frank James, *Baltimore Tries Out "Living Wage" Requirements—Goal is to Lift Low-Paid Workers Above Poverty*, CHI. TRIB., Dec. 28, 1995, at 1; Jonathan Kerr, *Missouri: Minimum Wage, Park Tax Head Ballot Issues*, WEST'S LEGAL NEWS, Sept. 13, 1996; Neal Peirce, *Minimum Wage Push: Cities, States Not Waiting for the Feds*, 19 NATION'S CITIES WEEKLY, June 17, 1996, at 7.

238. See E. Assata Wright, *Waging Battle for Decent Pay: Watered Down, The Living Wage Bill Will Probably Pass*, VILLAGE VOICE, June 18, 1996, at 2-3.

239. See *id.* at 10. The Federal Davis-Bacon Act, 40 U.S.C. §§ 276a to 276a-51, requires construction contractors to pay their workers prevailing wages which match union pay levels. See Wright, *supra* note 238, at 10.

240. See Wright, *supra* note 238, at 10.

241. See *id.*

242. See *id.*

243. See *id.*

244. See *id.*

cil Speaker Peter Vallone, was much narrower in scope.²⁴⁵ The "Prevailing Wage Bill," as it was renamed, was limited to four job categories (security, food service, custodial, and temporary/clerical) and did not include health benefits.²⁴⁶ Under this bill, workers in these categories would earn a prevailing wage for their job classification, as determined by a comptroller-conducted survey of private, non-union pay.²⁴⁷ The wage levels would range from a minimum of \$7.25 an hour for unarmed security guards to more than \$12.00 an hour for janitors.²⁴⁸ The bill also exempted the not-for-profit sector from compliance.²⁴⁹

Living wage proponents in New York assert that the gross income of a full-time minimum wage worker remains significantly below the \$14,783 federal poverty level for a family of four,²⁵⁰ as well as the \$19,100 a family of four living in the New York City area annually requires to live above the poverty line.²⁵¹ Many workers also rely on other social services such as Medicaid, rent subsidies, and food stamps to subsidize their income.²⁵²

The Prevailing Wage Bill was vetoed by Mayor Giuliani on August 7, 1996 after the City Council initially approved it.²⁵³ The Mayor opposed the bill because it would increase indirect labor costs substantially and raise formidable obstacles for firms wanting to do business with the City.²⁵⁴ The City Council, however, passed the living wage legislation, overriding Mayor Giuliani's veto by a vote of 42 to 5 on September 11, 1996.²⁵⁵ The Mayor vowed to sue the City Council to strike down the law.²⁵⁶

245. *See id.*

246. *See id.*

247. *See id.*

248. The Bill requires paying unarmed security guards \$7.25 an hour, food service workers \$9.00 an hour, temporary workers \$11.25 an hour, and janitors \$14.00 an hour. *See* Mohamad Bazzi, *Living Wage Bill Gains in Council*, *NEWSDAY*, June 7, 1996, at A6.

249. *See* Wright, *supra* note 238, at 10.

250. *See id.*

251. *See id.*

252. *See id.*

253. *See* Vivian Toy, *Giuliani Vetoes a Bill to Make City Contractors Raise Wages*, *N.Y. TIMES*, Aug. 8, 1996, at B2.

254. *See id.*

255. *See id.* For additional discussion of the living wage initiative, see JOHN SWEENEY, *AMERICA NEEDS A RAISE* 136 (1996) (presenting an overview of organized labor (AFL-CIO) initiatives for a just, living wage, considerably beyond the current federal minimum wage). *See also* G. Pascal Zachary, *New York Pay is Expected to Push Up Pay of Some Private Low-Skilled Workers*, *WALL ST. J.*, July 10, 1996, at A11.

256. *See* Toy, *supra* note 253 at B2.

3. *The Effect of the Living Wage on Public Sector Employees*

In most urban areas, especially among racial minorities, finding permanent, full-time, meaningful, and fulfilling work is often extremely difficult.²⁵⁷ Low-skill workers find themselves in jobs with little opportunity. Statistics show that unemployment is down and employers are hiring, but many of the new jobs offer minimum wage and little, or no, benefits.²⁵⁸ As a result, a great number of these low-skill, low-wage workers often hold two jobs and are still living at, or below, the poverty line.²⁵⁹

Women and minorities recently have made some strides in achieving meaningful work in the public sector.²⁶⁰ This is due, in part, to the greater constitutional protections afforded public sector workers.²⁶¹ In addition, a high percentage of the public sector workforce has turned to union representation as a means of attaining better working conditions and job security.²⁶²

Those who have been able to attain a level of dignity and respect as public sector workers are becoming frustrated as they see their employment jeopardized by the recent privatization of their once protected jobs and workfare programs.²⁶³ A large segment of the urban workforce has witnessed its jobs evaporate, lost to workfare participants with little, or no, employment protections. The potential reaction to this rapid deterioration could be devastating on the national level.

One long-term effect of workfare is the deterioration of the quality of public sector services. Workers with no rights, effectively making less than minimum wage, will have little recourse. The option of finding more meaningful employment will be drastically reduced by the welfare workers' general inability to look for "real" jobs, due to the requirement of meeting workfare obligations to maintain their welfare benefits. Two-thirds of the workers who have participated in New York's workfare program leave after a

257. See WILSON, *supra* note 6.

258. See Schwartz, *supra* note 9, at B14.

259. See *id.*

260. See James P. Allen, *Valley Perspective Ethnic Ties Help Determine Choice of Job Niches are Natural Result of Social Networks that Inform People of Work in Which Members of their Group are Hired*, L.A. TIMES, Oct. 12, 1997, at B7.

261. See Baru Rekha, *A Draconian Bill on Drug Testing*, DES MOINES REGISTER, Feb. 28, 1997, at 1.

262. See John Jacobs, Editorial, *Labor Movement's Wild Ride Sets Political Stage*, SACRAMENTO BEE, Nov. 25, 1997, at B7.

263. See Don Rudd, Editorial, *Will Privatization Cause Costs to Soar?*, ST. LOUIS POST-DISPATCH, Nov. 26, 1997, at B7.

few months.²⁶⁴ To conclude that these workers have found more fulfilling employment elsewhere, and that workfare was somehow the impetus, is naive. While the government argues that the core benefit to these new laborers lies in the very fact that they are working,²⁶⁵ these workers are actually forced into dead-end jobs which pay less than the minimum wage. Workers stripped of rights and protections find little fulfillment, and even less incentive to perform well. The government will permanently hire a small number of the workfare participants to give some hope of opportunity and incentive for good service.²⁶⁶ This, however, will simply result in a bitterly divided workforce of "haves" and "have nots."

The downward pressures workfare has asserted on the wages and employment security of the current public sector workforce are enormous. They will be only partially offset by the implementation of living wage initiatives in a few localities. Critics argue that the living wage initiatives will have the pernicious effect of raising unemployment in those areas.²⁶⁷ As a practical matter, local governments inexorably will reduce the size of their full time public sector workforces through attrition and layoffs to the smallest possible core full-time workforce. The work will be performed, in many cases, by former employees, now reduced to the workfare army by the loss of their previous government employment. The marginally upward, indirect wage pressures of living wage legislation sponsored by a few local governments will not be nearly enough to effectively stem this trend.

While unions and welfare agencies are lobbying for legislation to require workfare participants be paid the same wages and benefits, and afforded the same protections as other employees doing the same work,²⁶⁸ it would be grossly unrealistic to believe that such legislation will be broadly enacted. Over time, the unionized public sector will lose its bargaining power as segments of the unionized workfare are gradually transformed into the "regular" workforce. Whether "one big union" of welfare workers and current public sector full-time employees can ultimately emerge is a necessary, but dubious, proposition at best.

264. See Alvarez, *supra* note 64, at sec. 1, p.51.

265. See Firestone II, *supra* note 93, at B3.

266. See Alvarez, *supra* note 64, at sec. 1, p.51.

267. See Toy, *supra* note 253, at B2.

268. See Steven Greenhouse, *Wages of Workfare: Labor Rewriting Rules in Organizing Those who Work for their Welfare*, N.Y. TIMES, July 7, 1997, at B3; Steven Greenhouse, *Union Seeks to Enlist 35,000 in New York City's Workfare Program*, N.Y. TIMES, June 29, 1997, at sec. 1, p.23.

Conclusion

Over time, social and economic initiatives may have some positive influences and ease the plight of the most exploited welfare workers. Enlightened individual firms may also take unilateral ameliorating action. The egregious exploitation of poor workers will nonetheless continue to be a virtually intractable problem, even if the welfare workers successfully unionize and receive at least minimum wages. Mobilizing the media to raise the public consciousness will be indispensable in the inception of any viable, broad-based reform campaign.

The new welfare workforce may well auger the restoration of the poorhouse and, quite literally, the Dickensian workhouse. If the welfare workforce remains legally and practically unorganized, and isolated from any social solidarity with the broader labor and civic communities, the welfare workers will be cruelly exploited and even further alienated. Concomitantly, the public and private sector workers not in solidarity with the welfare workforce will see their wages and conditions of employment steadily erode as employers utilize the “free” welfare workforce. Soon enough, significant portions of the low-wage, low-skill public and private sector workforces will be perniciously trapped in the twenty-first century workplace equivalent of the “dark Satanic mill,”²⁶⁹ which exemplified the worst labor exploitation of the eighteenth century’s early industrial revolution.

Welfare workers can, however, be socially and politically organized and integrated into the broader labor and civic communities. This process can begin to occur through statutory labor and employment law provisions. For example, welfare workers can be considered “employees” protected by federal minimum wage or, preferably, by local and state “living wage” laws. If eligible to unionize, welfare workers will be absorbed gradually into both public and private sector employment. Thus, rather than increasing polarizations between welfare workers and the low-wage, low-skill public and private sector workers who are most threatened with job displacement, these tensions can be ameliorated, if not entirely harmonized, by treating welfare workers as employees.

That the current Republican Congressional leadership will support the necessary amendments to extant federal labor, employment, and welfare law is, admittedly, highly unlikely. Indeed,

269. William Blake, *And Did Those Feet in Ancient Time* in WILLIAM BLAKE, MITON (1804).

Congress recently attempted to repudiate the Clinton Labor Department's position that welfare workers are entitled to the protections of the federal minimum wage law.²⁷⁰ Therefore, in light of Republican Congressional hostility or, at best, indifference to extending statutory protections of federal labor and employment law to welfare workers, it is imperative that municipal and state governments expeditiously extend statutory protections at the local and state levels.

The fundamental policy and practical tensions have been very starkly drawn by the 1996 welfare workfare legislation. Whether these tensions can or will be effectively ameliorated has devolved to the welfare workers, to organized labor²⁷¹—for whom the welfare workers should be regarded as posing a wonderful opportunity for the reinvigoration of organized labor—and to local and state elected officials. New York City is at the epicenter of the nation's dangerous repudiation of the New Deal's social safety net. If this experiment fails, as it seems destined to over the course of the next recession, the nation's policy choices will be even more starkly posed.

270. See Christopher Georges, *GOP Drive to Deny Workfare Benefits Sputters in States*, WALL ST. J., Oct. 7, 1997, at A24; *D.O.L. Guidance*, Daily Lab. Rep. (BNA) No. 103, at E-3 (May 29, 1997).

271. The Comprehensive Employment and Training Act (CETA), Pub. L. No. 93-203 (1973), included workers in the same bargaining units as non-CETA employees. See *Mon Valley United Health Services*, 238 NLRB 916 (1978); *Evergreen Legal Services*, 246 NLRB 964 (1979).

