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# “LABOR’S DIVIDED RANKS”: PRIVILEGE AND THE UNITED FRONT IDEOLOGY

Marion Crain† & Ken Matheny††

## INTRODUCTION

The American workforce, once a relatively homogenous group by race, ethnicity, and gender, has grown increasingly diverse.<sup>1</sup> As the workforce has diversified, workplace disputes, once framed in terms of class conflict and considered the province of labor unions, have been eclipsed by identity-based claims raising issues relating to race, ethnicity, gender, sexual orientation, or disability. Antidiscrimination laws reify and reinforce gender, ethnic, race, sexual orientation, and disability consciousness in workers, and academics, civil rights lawyers, and progressive social change movements have enthusiastically taken up these causes.<sup>2</sup> Meanwhile, the labor movement has fallen into public disfavor, as indicated by the corresponding drop in union density.<sup>3</sup> Increasingly, the lines of identity politics divide the workforce more than issues of class unite it.

American labor law, however, remains steadfast in the face of these changes, behaving as if class consciousness and class solidarity were the only relevant forms of collective worker protest and assuming

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<sup>1</sup> See CHARLES B. CRAVER, CAN UNIONS SURVIVE?: THE REJUVENATION OF THE AMERICAN LABOR MOVEMENT 38 (1993) (describing a long-term trend of increasing workforce participation by women and minorities).

<sup>2</sup> See Molly S. McUsic & Michael Selmi, *Postmodern Unions: Identity Politics in the Workplace*, 82 IOWA L. REV. 1339, 1339-40 (1997).

<sup>3</sup> See Robert J. LaLonde & Bernard D. Meltzer, *Hard Times for Unions: Another Look at the Significance of Employer Illegality*, 58 U. CHI. L. REV. 953, 953 (1991) (pointing out that union density fell from 35% in 1953 to 12% by 1989); Paul C. Weiler, *Hard Times for Unions: Challenging Times for Scholars*, 58 U. CHI. L. REV. 1015, 1017 (1991) (explaining that private-sector union density is expected to drop below 10% by the year 2000). See generally PAUL C. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* 9-10 (1990) (explaining underlying causes of the rise in union density in the 1950s and its subsequent decline in the 1970s and 1980s).

a class-based unity among employees that does not always exist. The National Labor Relations Act<sup>4</sup> (NLRA) addresses itself only to the presumed class conflict among employers and employees, ignoring and downplaying conflicts among employees themselves. The NLRA assumes that workers doing the same type of work at a common worksite share common class and economic interests. Consequently, the NLRA establishes a representational structure in which a single union—a "united front"—represents all workers in that unit and speaks with a single voice on their behalf. This united front ideology, enshrined in labor law through the exclusivity and majority-rule doctrines, obscures significant material conflicts of interest within the working class. When conflicts along identity lines have surfaced, adherents to the united front ideology have portrayed them as undermining the economic interests of the working class, particularly its unionized segment, and swept them back under the rug.

American unionists have enthusiastically embraced the united front ideology because they fear that acknowledging divisions within the working class would assist employers in their efforts to undermine working class solidarity by pitting one group of workers against another. To the contrary, by suppressing identity issues in labor unionism, unionists enhance employers' ability to divide the workforce. By allying itself with disempowered groups of workers inadequately represented by labor unions working within the confines of majority rule, an employer can send the message that labor unions represent only the more powerful race- and gender-privileged workers, while the employer champions outsider-employees' interests.

In this Article, we argue that labor law's preoccupation with employer-employee conflict stems from an essentialist vision of the race- and sex-privileged worker who is economically exploited only within the dimension of class.<sup>5</sup> The united front ideology ignores the race

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<sup>4</sup> 29 U.S.C. §§ 151-169 (1994).

<sup>5</sup> We focus primarily upon conflicts of interest arising out of gender privilege, with some attention to conflicts arising out of racial privilege. In a companion article, we discuss in more detail conflicts of interest arising out of racial privilege, and the organizing opportunities that these conflicts might present or deny to unions. See Marion Crain & Ken Matheny, *Making Rhetoric Reality: Labor, Race and Class* (1998) (unpublished manuscript, on file with authors).

More theoretical and empirical work should be done with regard to other axes along which privilege functions, including heterosexual and able-bodied privilege. Division within labor's ranks exists along these axes as well. For example, the Americans with Disabilities Act (ADA) requires the employer to make reasonable accommodation to an employee's known disability. See 42 U.S.C. § 12112(a), (b)(5)(A) (Supp. II 1996). Often, such accommodation conflicts with the rights of able-bodied employees established in the labor contract. Compare *Eckles v. Consolidated Rail Corp.*, 94 F.3d 1041, 1051 (7th Cir. 1996) (holding that, in the context of a disabled worker's ADA action against his employer and union, "the ADA does not require disabled individuals to be accommodated by sacrificing the collectively bargained, bona fide seniority rights of other employees"), *cert. de-*

and gender specificity of class consciousness, masking the diverse ways in which people experience class consciousness and undertake class protest. This impoverished understanding of class consciousness circumscribes union-organizing efforts and shapes other union strategies in ways that limit labor's constituency. The image of a white, male, manufacturing-based working class shapes union praxis and public perception of the labor movement, excluding and alienating those who now collectively comprise the majority of the U.S. workforce: women, racial and ethnic minorities, and service workers. In short, suppressing identity-based conflicts of interest among sectors of the working class not only directly disadvantages the most economically marginalized workers, it undermines organized labor's ability to respond to employer efforts to exacerbate these divisions and prevents labor unions from mobilizing a larger portion of the working class.

Once thought necessary to preserve solidarity in a relatively homogeneous workforce unified by its common economic concerns but potentially divided by individual economic interests, the exclusivity and majority-rule doctrines have outlived their usefulness. Denying the divisions within the working class through the united front ideology has proven to be *more* insidiously divisive than confronting them. The ideals of universality and solidarity, while important, have not risen to the challenge of mobilizing a diverse workforce. In this Article, we seek to explain how and why the dream of worker solidarity has been frustrated, and to describe the roles that employers, labor unions, and more-privileged workers have played in the process.<sup>6</sup>

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*nied*, 520 U.S. 1146 (1997), *with Aka v. Washington Hosp. Ctr.*, 116 F.3d 876, 896 (D.C. Cir. 1997) (holding that seniority rights of workers under a collective bargaining agreement do not automatically defeat an employee's request for accommodation under the ADA and requiring the court to make an individual determination in each case), *vacated and reh'g en banc granted*, 124 F.3d 1302 (1997), *op. reinstated in part on reh'g*, 156 F.3d 1284, 1303, 1306 (1998) (declining to rule on whether a per se or a balancing approach is more appropriate and remanding for a determination of whether the proposed accommodation actually conflicted with the seniority system). See generally Robert A. Dubault, *The ADA and the NLRA: Balancing Individual and Collective Rights*, 70 IND. L.J. 1271 (1995) (discussing potential conflicts between the ADA and the NLRA). These conflicts create a dilemma for unions: Who is their primary constituency, and what is their proper role? See generally Mary K. O'Melveny, *The Americans with Disabilities Act and Collective Bargaining Agreements: Reasonable Accommodations or Irreconcilable Conflicts?*, 82 Ky. L.J. 219 (1993-1994) (arguing that labor unions, as vocal supporters of the ADA, see the potential of the ADA to help them obtain improved working conditions for the growing number of disabled workers and that they will probably cooperate fully in helping disabled workers function effectively on the job). *But see Eckles*, 94 F.3d at 1043 (involving a disabled employee's complaint naming the union as defendant in its capacity as representative of the majority of workers).

<sup>6</sup> Because some may view any focus on labor's internal discord as divisive of solidarity and disloyal to the goals of the labor movement, we want to make clear at the outset that this Article critiques labor law and labor unionism from the left. We do not seek to place blame on the operation or organized workers, but to explore how the structure of the labor market, the operation of race- and gender-privilege, the dynamics of the relation between or-

We begin in Part I with the synopsis of a case, *EEOC v. Mitsubishi Motor Manufacturing of America, Inc.*,<sup>7</sup> which illustrates the fragmenting of workers' class, race, and gender interests, paying particular attention to the impact of the legally coerced united front on worker solidarity along gender lines. In Part II, we outline the labor law principles of majority rule and exclusivity which undergird the united front ideology and the origin of those principles. Part III discusses how privilege has shaped the labor market and labor unionism, and explores the ramifications on class solidarity of ignoring gender and racial consciousness. Part IV analyzes the role that gender exploitation has played in constructing the experience of class in the United States and explains why the workforce remains divided along gender lines. Part V argues for a fundamental rethinking of the united front ideology, and the majority-rule and exclusivity doctrines. We return to the *Mitsubishi* case to illustrate our arguments. We conclude that recognizing and institutionalizing identity-based divisions within the working class would facilitate organizing and coalition-building among groups of workers, ultimately redounding to the benefit of the entire working class.

## I

### THE PROBLEM ILLUSTRATED: *EEOC v. MITSUBISHI MOTOR MANUFACTURING OF AMERICA, INC.*

*Mitsubishi* illustrates the divisions within labor's ranks along gender and, to a lesser degree, racial lines. It also illustrates the ways in which unions and employers typically respond to these divisions within the framework of existing law.

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ganized labor and employers, and the labor laws have functioned both to keep less-privileged workers on the economic periphery and to undermine union power.

The perception of the working class as a monolithic whole has contributed to an all-or-nothing vision of labor law partisanship; one is either for or against labor, and no middle ground exists from which a constructive critique can be levelled. See THOMAS GEOGHEGAN, *WHICH SIDE ARE YOU ON? TRYING TO BE FOR LABOR WHEN IT'S FLAT ON ITS BACK* (1991). Thus, as William Gould observed in a preface to his critique of the labor movement's treatment of black workers, "[o]ne must repeat the litany of good deeds done [by labor] . . . to avoid being [seen] . . . as a stalking horse for management interests." WILLIAM B. GOULD, *BLACK WORKERS IN WHITE UNIONS: JOB DISCRIMINATION IN THE UNITED STATES* 16 (1977). The senior author has elsewhere sung the praises of unions as past, present, and potential future advocates for women and people of color, and continues to endorse labor unionism as a vehicle for social change for outsider groups. See Marion Crain, *Confronting the Structural Character of Working Women's Economic Subordination: Collective Action vs. Individual Rights Strategies*, KAN. J.L. & PUB. POL'Y, Spring 1994, at 26 [hereinafter Crain, *Confronting the Structural Character*]; Marion Crain, *Feminism, Labor, and Power*, 65 S. CAL. L. REV. 1819 (1992) [hereinafter Crain, *Feminism, Labor, and Power*].

<sup>7</sup> 990 F. Supp. 1059 (C.D. Ill. 1998).

### A. The Claim

On April 9, 1996, the EEOC filed what is thought to be the largest class-action sexual harassment suit ever on behalf of female autoworkers against their employer, Mitsubishi Motors. The EEOC investigation disclosed that "as many as 500 of the 893 women in the plant" had suffered sexual harassment.<sup>8</sup> The women autoworkers alleged misogynist conduct in the plant by both male autoworkers and supervisors, including physically abusing women (e.g., slapping women on the buttocks, touching their breasts and crotches), pinning sexually obscene signs to the backs of unknowing women, placing obscene graffiti on the fenders of cars coming down the assembly line and obscene pop-ups which appeared unexpectedly in the cars when women were assembling them, wrapping automotive parts in pornographic newspapers, assaulting women with factory equipment (e.g., placing hoses, wrenches, and air guns between women's legs), playing pranks on women (e.g., dousing the seats of cars that women must sit on with butane, making obscene motions with bananas, placing plastic penises in buckets of tools), sabotaging women's work (which sometimes led to injuries), circulating pornographic photos of production-line workers and male managers having sex with women who did not work at the plant during a private party, posting lists on the walls ranking the women in the plant by their estimated breast sizes, and abusing women verbally (e.g., referring to women as "sluts," "whores," and

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<sup>8</sup> Kim Moody, *Sexual Harassment at Mitsubishi: Where Was the Union?*, LAB. NOTES, June 1996, at 1. The case captured national media attention not only because of its size (the plaintiff class originally was estimated to number 800 women, including all those who had been employed during the relevant time frame), but also because Mitsubishi pursued the unusual course of resisting the EEOC investigation. See John Nichols, *Fighting the Legal Battle Against Sexual Harassment*, CAP. TIMES (Madison, Wis.), Apr. 29, 1996, at 1C (interviewing Sarah Siskind, the private attorney handling the case that spawned the EEOC investigation). Mitsubishi emphatically denied the EEOC's charges and launched an aggressive legal counterattack in the private lawsuit filed against it. See Rochelle Sharpe, *Fighting Back: A Mitsubishi U.S. Unit Is Taking a Hard Line in Harassment Battle*, WALL ST. J., Apr. 22, 1996, at A1. Company lawyers requested the plaintiffs' gynecological and psychological records, as well as information about their living arrangements, which Mitsubishi argued were relevant to proving a pattern of promiscuous behavior by individual plaintiffs. See *id.* Mitsubishi also initiated a public relations pressure campaign: it "financed a protest . . . by . . . 2500 employees outside the EEOC offices in Chicago, shutting down production at the [Illinois] plant, [and] provid[ed] everyone who went a full day's pay, a free lunch, and free round-trip transportation on chartered buses." Kirsten Downey Grimsley et al., *Fear on the Line at Mitsubishi: Women Recount Allegations of Sexual Harassment at Auto Plant*, WASH. POST, Apr. 29, 1996, at A1. Finally, the case also raised speculation about whether the Japanese-managed company promoted sexist attitudes endemic to Japanese culture within its American workforce. See Nichols, *supra*, at 1C.

"bitches," referring to them by their breast size numbers, and asking them about their sexual habits and preferences).<sup>9</sup>

Some workers also contemporaneously filed racial harassment suits against the company. The allegations of racial harassment included verbal abuse (i.e., calling African American employees "niggers"), crude drawings of Ku Klux Klan figures on the lockers of African American workers, and racialized sexual harassment.<sup>10</sup> Subsequently, twenty-one African American workers filed a racial-discrimination and harassment suit, naming both Mitsubishi and United Auto Workers Local 2488 as defendants.<sup>11</sup>

## B. The Company's Response

Mitsubishi initially responded to the EEOC suit by mobilizing its employees in a public-relations campaign directed against the EEOC. Management characterized the sexual harassment charges as "character criticism[s] of the highest magnitude," and urged employees to express publicly their concern "that the lawsuit could damage car sales and cost them their jobs."<sup>12</sup> A significant number of workers came to the company's defense by attending a company-financed rally at EEOC offices in Chicago, collecting over \$2000 to finance the placement of ads in local newspapers, writing letters to the editor attacking their female coworkers and charging that women avoided the repercussions of poor work performance because managers feared sexual harassment charges, and calling their congressional representatives on phone banks established at the plant.<sup>13</sup> Harassment at the plant increased as worker anger mounted, with one woman receiving a death threat.<sup>14</sup>

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<sup>9</sup> See Grimsley et al., *supra* note 8, at A1; see also Nichols, *supra* note 8, at 1C; MacNeil/*Lehrer News Hour* (PBS television broadcast, Apr. 26, 1996) (transcript No. 5515, on file with authors).

<sup>10</sup> See Grimsley et al., *supra* note 8, at A1.

<sup>11</sup> See *African American Mitsubishi Workers File Suit Alleging Harassment, Discrimination*, 1999 Daily Lab. Rep. (BNA) No. 63, at A-8 (Apr. 2, 1999).

<sup>12</sup> Sharpe, *supra* note 8, at A1 (internal quotation marks omitted). Some commentators have suggested that Mitsubishi's public relations response to the EEOC suit deliberately sought to undermine union solidarity by dividing the workforce along gender lines. See *Sexual Harassment: Mitsubishi Employees Converge on EEOC Office; Union Questions Firm's Response*, 1996 Daily Lab. Rep. (BNA) No. 78, at D-8 (Apr. 23, 1996). By making the EEOC and the litigation scapegoats for its slumping sales, the company could use the EEOC suit to divert attention from a looming problem: "Chrysler's agreement to sell Mitsubishi products through its dealerships expire[d] in 1999," and Chrysler had indicated that it would not renew the agreement. Moody, *supra* note 8, at 14. Anticipating major cutbacks in the near future, the company could have been playing upon fears of job loss to divide the workforce and thereby undermine the union's solidarity and power to resist the cutbacks. See *id.*

<sup>13</sup> See Sharpe, *supra* note 8, at A1.

<sup>14</sup> See Robyn Meredith, *Few at Mitsubishi Are Silent over Accusations*, N.Y. TIMES, Apr. 26, 1996, at A20.

In its defense, Mitsubishi argued that the labor agreement barred sexual harassment claims because the plaintiffs failed to exhaust their remedies under the agreement itself.<sup>15</sup> The company also argued that it "took reasonable and prompt steps" to redress the alleged harassment as soon as it became aware of the harassment's existence and that it should not be held responsible for worker actions of which it had no notice.<sup>16</sup>

Subsequently, Mitsubishi sought to boost its credibility in the public eye<sup>17</sup> by hiring former Labor Secretary Lynn Martin as a consultant and asking her to revamp the company's sexual harassment policy.<sup>18</sup> Martin ultimately recommended that the company institute comprehensive training for all employees. In addition, she recommended the immediate reopening of previously unfruitful discussions with the union on including an Equal Application Agreement in the labor contract, rather than waiting for the next collective bargaining contract negotiations. An Equal Application Agreement would establish a joint labor-management committee and require action within forty-eight hours after receiving a complaint of racial or sexual discrimination or harassment.<sup>19</sup>

Two years later, Mitsubishi settled the lawsuit by paying over \$34 million to the more than 350 women in the EEOC class action: "[T]he largest class of claimants ever to be compensated in an EEOC-initiated . . . sexual harassment suit and the largest cash amount to be paid to resolve such a dispute."<sup>20</sup>

### C. The Union's Role

United Autoworkers Union, Local 2488, represents the male and female autoworkers at the Normal, Illinois plant. Local 2488 was not a named defendant in *Mitsubishi*, and it was joined in the consent decree voluntarily so that it might assist in implementing the decree's terms.<sup>21</sup> Nevertheless, its response to the harassment played a pivotal

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<sup>15</sup> See *Mitsubishi Asks Judge to Dismiss Suit Filed by EEOC Alleging Sex Harassment*, 1996 Daily Lab. Rep. (BNA) No. 122, at A-10, A-11 (June 25, 1996).

<sup>16</sup> *Id.*

<sup>17</sup> See Meredith, *supra* note 14, at A20.

<sup>18</sup> See *Former Secretary of Labor Martin To Review Mitsubishi's Workplace Policies*, 1996 Daily Lab. Rep. (BNA) No. 94, at A-18 (May 15, 1996).

<sup>19</sup> See *Mitsubishi, Lynn Martin, Announce Plan To Reform Workplace*, 1996 Daily Lab. Rep. (BNA) No. 137, at A-21 (July 17, 1996). Martin subsequently produced a comprehensive set of recommendations for internal reform intended to convert Mitsubishi Motors into a model workplace. See *Lynn Martin Unveils 34-Point Plan for Making Mitsubishi Model Workplace*, 1997 Daily Lab. Rep. (BNA) No. 30, at AA-1 (Feb. 13, 1997).

<sup>20</sup> *Mitsubishi Settles EEOC Suit for \$34 Million; Agency Says Class, Amount Largest Ever*, 1998 Daily Lab. Rep. (BNA) No. 113, at AA-1 (June 12, 1998).

<sup>21</sup> See *Consent Decree Between EEOC, Mitsubishi Motor Manufacturing of America, and United Auto Workers*, 1998 Daily Lab. Rep. (BNA) No. 113, at E-6 (June 12, 1998) [hereinafter *Consent Decree*]. An attorney for the women who filed the private lawsuit said that she con-



role in the filing of the EEOC lawsuit. Although most union contracts at other big U.S. automakers contain an Equal Application Agreement, the Mitsubishi-UAW contract did not.<sup>22</sup> According to Local 2488 officials, the union proposed the Equal Application Agreement during bargaining negotiations, but Mitsubishi refused it, and the union did not pursue the issue further.<sup>23</sup> In fact, the labor contract in force at the time of the suit lacked any specific provisions dealing with sexual harassment whatsoever. Instead the union encouraged workers and managers to solve problems without involving the union.<sup>24</sup>

Although the UAW and Local 2488 officially condemn sexual harassment, Local 2488 officers refused to proceed with formal grievances on complaints brought by women members involving member-on-member harassment and even some supervisor-on-member harassment. *Washington Post* reporters investigating the lawsuit discovered that Local 2488's civil rights committee (which is charged with addressing sexual and racial discrimination and harassment issues) received sexual harassment complaints from numerous women over the preceding four years, but that Local 2488 officers instructed the committee not to investigate the cases or pursue them further.<sup>25</sup> Appeals by women to the International UAW yielded no further action, notwithstanding its public condemnation of sexual harassment in the workplace.<sup>26</sup>

Instead, current and former presidents of Local 2488 tried to handle member-on-member harassment complaints informally by talking to the harasser or attempting a "reconciliation." Union leaders took these courses of action to prevent the company from disciplining the harassers, but Local 2488 kept no records of these attempts, and its officers admitted that they did not always succeed.<sup>27</sup>

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sidered adding the union as a defendant, but decided against it because, she said, "we didn't want to make two enemies." Rochelle Sharpe, *Divided Ranks: Women at Mitsubishi Say Union Fell Short on Sexual Harassment*, WALL ST. J., July 10, 1996, at A1 (quoting the attorney).

<sup>22</sup> See Kirsten Downey Grimsley & Frank Swoboda, *Women Say Union Local Ignored Harassment: UAW Leaders at Mitsubishi Plant Reportedly Failed To Act on Complaints*, WASH. POST, June 8, 1996, at C1; Moody, *supra* note 8, at 14; Sharpe, *supra* note 21, at A1.

<sup>23</sup> See Moody, *supra* note 8, at 14.

<sup>24</sup> See Sharpe, *supra* note 21, at A1. The lack of an anti-sexual harassment clause in a union contract is not unusual. Although 87% of the collective bargaining agreements in a recent BNA survey contained clauses prohibiting "discrimination on the basis of race, color, creed, sex, national origin, or age," another survey by BNA found that only 57% of the contracts contained a policy explicitly dealing with sexual harassment. BNA, BASIC PATTERNS IN UNION CONTRACTS 127-28 (14th ed. 1995); *Employer Bargaining Objectives, 1996*, 1995 Daily Lab. Rep. (BNA) No. 188, Special Supp. at 7 (Sept. 28, 1995).

<sup>25</sup> See Grimsley & Swoboda, *supra* note 22, at C1. Because the civil rights committee had no formal authority in the union structure—only the union's bargaining committee was authorized to deal with management—most complaints stalled there. See *id.*

<sup>26</sup> See Sharpe, *supra* note 21, at A1.

<sup>27</sup> See Grimsley et al., *supra* note 8, at A1; Moody, *supra* note 8, at 14.

In eight years, the union filed only six harassment grievances with Mitsubishi on behalf of women, all of which involved allegations of quid pro quo harassment perpetrated by supervisors who threatened job loss in order to obtain sexual favors.<sup>28</sup> Even after the union filed charges with the EEOC and the EEOC began investigating the incidents, neither the International UAW nor Local 2488 made any further effort to address the problem of sexual harassment.<sup>29</sup> Ironically, the first formal grievance which Local 2488 filed in a hostile work environment peer-on-peer harassment case was brought on behalf of an alleged *harasser*, whom the company had discharged following the filing of the EEOC charges.<sup>30</sup>

Several women interviewed by *Washington Post* reporters confirmed that the union's formal complaint system did not effectively redress sexual harassment claims; some believed that they would face retaliation from both their coworkers and the company if they pursued formal complaints.<sup>31</sup> Indeed, Local 2488 officials themselves did not model decorum in the workplace: during the EEOC investigation, Mitsubishi instructed Local 2488 Vice President Donald Shelby to remove pictures of women taken from the *Sports Illustrated* swimsuit issue which he had posted near his workbench.<sup>32</sup> Some workers described the union as permeated by a sexual atmosphere, telling tales of post-shift tailgate parties held in the company parking lot after local bars closed down at which female strippers were a main attraction.<sup>33</sup>

Furthermore, when Mitsubishi organized a protest by its workers against the EEOC in the wake of the EEOC investigation, Local 2488 remained "neutral," telling members that "they were free to attend the protest" at EEOC offices.<sup>34</sup> Then, two days before the company-organized demonstration, the International UAW intervened; United Auto Workers President Stephen Yokich publicly chastised Mitsubishi for refusing to cooperate in the EEOC investigation and reaffirmed the International's official policy condemning sexual harassment of

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<sup>28</sup> See Moody, *supra* note 8, at 14; Sharpe, *supra* note 21, at A1.

<sup>29</sup> See Moody, *supra* note 8, at 14. The union treated complaints of racial harassment similarly. The union encouraged employees who complained about the placement of Klu Klux Klan recruitment materials in the men's restroom not to break rank with their "brothers and sisters" in the union. See Grimsley & Swoboda, *supra* note 22, at C1; Sharpe, *supra* note 21, at A1.

<sup>30</sup> See Sharpe, *supra* note 21, at A1.

<sup>31</sup> See Grimsley & Swoboda, *supra* note 22, at C1.

<sup>32</sup> See Meredith, *supra* note 14, at A20.

<sup>33</sup> See Grimsley & Swoboda, *supra* note 22, at C1.

<sup>34</sup> Brenda Warner Rotzoll & Lynn Sweet, *Workers Stand Up for Mitsubishi: 3,000 Protest Sex Harassment Charges by Feds*, CHI. SUN-TIMES, Apr. 23, 1996, at 1; see also Drew Fetherston, *Pride and Shame: Harassment Case at Mitsubishi Plant Shakes Heartland*, NEWSDAY, May 6, 1996, at A3 (reporting that Union Local head Chick Kearney described the Local's position on the protest as "neutral").

workers.<sup>35</sup> Two months later, the International UAW announced that its Civil Rights Department would intensively train Local 2488 officials on dealing with sexual and racial discrimination and harassment. It also recommended that the International UAW and Mitsubishi jointly sponsor a sexual harassment awareness program for the entire Mitsubishi workforce.<sup>36</sup> A Mitsubishi spokesperson characterized the UAW's proposal as "redundant," because employees at Mitsubishi had already begun participating in company-sponsored sexual harassment training sessions which the company had initiated two months previously.<sup>37</sup>

Ultimately, the union played almost no role in the resolution of the problem. The consent decree established a three-person panel charged with monitoring and reviewing Mitsubishi's implementation of the nonmonetary terms of the decree. Those terms include new sexual harassment policies requiring Mitsubishi to investigate all sexual harassment complaints within three weeks and to prepare a written finding and a remediation proposal for each complaint within seven days of completing the investigation.<sup>38</sup> Significantly, no union official sits on that panel or participates in the decree-monitoring process.<sup>39</sup>

#### D. The Intervention of Nonlabor Groups

Angered by the company's resistance to the EEOC investigation and the union's failure to respond adequately to harassment complaints, civil rights and feminist organizations entered the fray on behalf of the wronged women workers. The National Organization for Women, the National Rainbow Coalition, and Operation PUSH launched consumer boycotts and pickets of Mitsubishi in the United States, and a parallel Japanese group known as the Equal Opportunity Network brought pressure to bear on Mitsubishi in Japan.<sup>40</sup> The threat of a consumer boycott against its products induced Mitsubishi

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<sup>35</sup> See Moody, *supra* note 8, at 14; UAW President Stephen P. Yokich Comments on Mitsubishi EEOC Case and Blasts Mitsubishi for Planned Demonstration, PR NEWSWIRE, Apr. 21, 1996, available in LEXIS, Allnewsplus File.

<sup>36</sup> See *Autoworkers Announces Initiatives on Harassment Training at Mitsubishi*, 1996 Daily Lab. Rep. (BNA) No. 125, at A-18 to -19 (June 28, 1996).

<sup>37</sup> *Id.* (internal quotation marks omitted).

<sup>38</sup> See *Consent Decree*, *supra* note 21, at E-10.

<sup>39</sup> See *id.* at E-11. The panel consists of an employer appointee, an EEOC appointee, and a neutral appointee agreed upon by both parties.

<sup>40</sup> See *U.S., Japanese Groups Say They Will Widen Mitsubishi Protest to Other Firms*, 1996 Daily Lab. Rep. (BNA) No. 125, at A-5 (June 28, 1996); *Women and Minority Groups Announce National Boycott of Mitsubishi Products*, 1996 Daily Lab. Rep. (BNA) No. 90, at A-13 (May 9, 1996).

officials to meet directly with feminist and civil rights leaders in the United States and in Japan.<sup>41</sup>

### E. What's Going On Here?

The dynamics in this case are not unique. A recent survey of hostile work environment cases arising in union settings found that most unions discourage their female members from formally acting through their unions to combat sexual harassment by male coworkers.<sup>42</sup> The frustrated victims often turn to private lawyers or feminist groups for redress (the National Organization for Women's Legal Defense Fund has represented the plaintiffs in several key cases), suing both their employers *and* their unions.<sup>43</sup>

Alternatively, the victim complains directly to the employer, causing the employer to take disciplinary action against the harasser.<sup>44</sup> The union then often files a grievance on behalf of the harasser protesting the discipline, and the victim becomes the key witness for the employer.<sup>45</sup> Thus, the common scenario finds the female victim of discrimination or harassment pitted against her union and her coworker harasser(s), and represented by a nonlabor group, by the

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<sup>41</sup> See *Civil Rights Groups Will Expand Their Boycott Against Mitsubishi*, 1996 Daily Lab. Rep. (BNA) No. 109, at A-12 (June 6, 1996).

<sup>42</sup> See Marion Crain, *Women, Labor Unions, and Hostile Work Environment Sexual Harassment: The Untold Story*, 4 TEX. J. WOMEN & L. 9, 14 (1995).

<sup>43</sup> See, e.g., *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847, 879 (D. Minn. 1993) (explaining that the union's conflict of interest in representing its members rendered the grievance procedure in the collective bargaining agreement ineffective to address sexual harassment complaints brought by one union member against another and characterizing the union's and the employers' efforts to address sexual harassment complaints as "half-hearted"); *Judge Refuses To Dismiss Union from Hostile Work Environment Case*, 1998 Daily Lab. Rep. (BNA) No. 235, at A-11 (Dec. 8, 1998) (describing rationale for union's potential liability in perpetuating racially and sexually hostile work environment: union acquiesces in employer's discriminatory practices when it is involved in selecting and managing the workforce at the job site and fails to respond adequately to harassment complaints); *Sex Discrimination: Eveleth Ordered To Pay 16 Female Miners \$221,500 in Damages, Fines for Harassment*, 1996 Daily Lab. Rep. (BNA) No. 226, at A-2 (Nov. 22, 1996) (describing award entered against Eveleth Mines and the United Steelworkers in class action sex discrimination and hostile work environment sexual harassment case).

Nonlabor groups' intervention on behalf of workers is not unique to sexual harassment cases. A recent issue of *Labor Notes* reported that the NAACP is investigating complaints by black drivers of the United Parcel Service (UPS) in Oakland, California that the UPS denied them delivery routes in safe neighborhoods in violation of seniority guarantees in the collective bargaining agreement; the drivers claim that Teamsters Local 70 ignored their complaints. *NewsWatch*, LAB. NOTES, Jan. 1997, at 4. Similarly, in *Eckles v. Consolidated Rail Corp.*, 94 F.3d 1041 (7th Cir. 1996), a disabled worker, whose allies included as amici the Equal Employment Opportunity Commission (EEOC), Lambda, and various disability rights advocates, argued "that contractual rights gained under collective bargaining agreements must give way to [individual employees'] federal[ ] . . . civil rights." *Id.* at 1046 n.8, 1042-43.

<sup>44</sup> See Crain, *supra* note 42, at 12, 34-35.

<sup>45</sup> See *id.* at 11.

EEOC, or by the employer itself (depending on whether the scenario is in the context of Title VII litigation or of a grievance which the union filed on behalf of a discharged harasser under a collective bargaining agreement). We next turn to an analysis of the role that labor law—as distinguished from union strategy—plays in constructing this scenario.

## II

### LABOR LAW AND THE UNITED FRONT IDEOLOGY

A central objective of the NLRA is to further labor peace by containing the conflict between capital owners and workers.<sup>46</sup> By conferring upon workers the right to organize and to act collectively, and by requiring employers to bargain with the labor organization representing a majority of the employees in an appropriate unit, lawmakers sought to channel labor unrest into bargaining and arbitration on a worksite basis. Ultimately, Congress hoped to avoid the violent nationwide strikes which seriously interfered with the flow of interstate commerce.<sup>47</sup> Accordingly, the NLRA addresses the inequality of power that exists between employer and worker, rather than between union and worker or between groups of workers. In an effort to increase union power within the workplace, the NLRA enforces a "united front" on labor's side of the bargaining table: once a union obtains majority status in a bargaining unit, it becomes the exclusive, collective voice of the workers.<sup>48</sup> This section examines the origins and centrality of the united front ideology in American labor law.

#### A. The Role of Class in Labor Law

In light of its goal of restraining and channeling class conflict, the NLRA codifies the recognition of classes. In doing so, it attempts to separate those parties with antithetical material interests so that capital owners sit on one side of the bargaining table and labor on the other.<sup>49</sup> The NLRA confers privileges and benefits primarily on "em-

<sup>46</sup> See 29 U.S.C. § 151 (1994) (describing the deleterious effect that labor unrest has on interstate commerce and declaring a policy intent to mitigate this damage by protecting labor's right to bargain collectively).

<sup>47</sup> See National Labor Relations Act §§ 1, 8(a)(5), 9(a), 29 U.S.C. §§ 151, 158(a)(5), 159(a) (1994); Archibald Cox, *The Duty To Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1407-08 (1958) (detailing the purposes of the National Labor Relations Act).

<sup>48</sup> See Roger B. Jacobs, *The Duty of Fair Representation: Minorities, Dissidents and Exclusive Representation*, 59 B.U. L. REV. 857, 858 (1979).

<sup>49</sup> See David Abraham, *Individual Autonomy and Collective Empowerment in Labor Law: Union Membership Resignations and Strikebreaking in the New Economy*, 63 N.Y.U. L. REV. 1268, 1293 (1988) ("The legal substance of labor law,' as Sinzheimer pointed out, 'lies in the recognition of classes by the law.' Once those classes are recognized, the law establishes certain norms, which 'attempt to temper the employer's power to command.'" (quoting OTTO KAHN-FREUND, *LABOUR LAW AND POLITICS IN THE WEIMAR REPUBLIC* 79, 81 (Roy Lewis

ployees."<sup>50</sup> The NLRA defines the term "employee" broadly, but excludes employers and those acting directly or indirectly in the interests of an employer, including supervisors.<sup>51</sup> Although the Supreme Court has struggled with the problem of middle-level managers, who arguably possess some of the features of each of the adversaries, it ultimately categorized managers as more akin to capital owners than to rank-and-file workers. The Court reasoned that managers not only act in the employer's interest, thereby posing a risk of divided loyalties, but they also occupy sufficiently powerful positions in the economic hierarchy that they do not need the NLRA's protection.<sup>52</sup>

Leaving the policing of the precise boundary between capital owners and labor to the National Labor Relations Board (NLRB) and the courts, the NLRA proceeds to codify the antagonistic nature of the relationship. Section 8(a)(2) of the NLRA prohibits employer domination or assistance of a labor organization.<sup>53</sup> Originally aimed at

& Jon Clark eds. & Jon Clark trans., 1981) (quoting 1 HUGO SINZHEIMER, *The Background of Labour Law, in* LABOUR LAW AND THE SOCIOLOGY OF LAW 72 (Otto Kahn-Freund & Thilo Ramm eds., 1976) (footnotes omitted) (internal quotation marks omitted)).

Capital-owners vehemently opposed the Act, fearing that it would encourage and promote class conflict and labor activism and potentially "Sovietize" the country. See Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 285-89 & n.74 (1978).

<sup>50</sup> N.L.R.A. § 7, 29 U.S.C. § 157 (1994).

<sup>51</sup> See N.L.R.A. §§ 2(2)-(3), 29 U.S.C. § 152(2)-(3) (1994). The employer's need for front-line representatives in its dealings with employees creates the chief rationale for the exclusion of supervisors; Congress considered it vital that supervisors' loyalties were not divided between employer and union. See Marion Crain, *Building Solidarity Through Expansion of NLRA Coverage: A Blueprint for Worker Empowerment*, 74 MINN. L. REV. 953, 972-73 (1990).

<sup>52</sup> See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 283-84 (1974) (finding that managerial employees were implicitly excluded from coverage under the NLRA because they occupy a higher rung than supervisors in the workplace hierarchy). A few years later, the Court sought to harmonize the exclusion of managerial employees with the NLRA's explicit inclusion of professional employees, explaining that the risk of divided loyalties would be too great to tolerate if the law permitted managerial employees to organize against the employer while simultaneously shaping and implementing its policies. See *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 689-90 (1980) (holding that faculty members who possess great authority in academic matters are managerial employees outside the NLRA's purview, notwithstanding the NLRA's explicit inclusion of professional employees). Subsequently, the Court excluded confidential employees—those who assist or act in a confidential relation to persons exercising managerial functions in the field of labor relations—on the divided loyalties rationale. See *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 180-81 (1981) (explaining that "the labor-nexus test" which defines the "narrow group" excluded as confidential employees is justified in that "'management should not be required to handle labor relations matters through employees who are represented by the union . . . and who in the normal performance of their duties may obtain advance information of the [c]ompany's position with regard to contract negotiations, the disposition of grievances, and other labor relations matters'" (alterations in original) (citations omitted) (quoting Hoover Co., 55 N.L.R.B. 1321, 1323 (1944))).

<sup>53</sup> N.L.R.A. § 8(a)(2), 29 U.S.C. § 158(a)(2) (1994).

eradicating the "company union," a company-controlled entity which employers institute to pacify employees and stave off union-organizing efforts, the NLRB has since applied section 8(a)(2) to block more supposedly innocuous participatory management schemes which employers design to increase productivity as well as to forestall worker dissatisfaction.<sup>54</sup> Furthermore, section 2(5) of the statute defines the term "labor organization" as one that deals with the employer on "grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."<sup>55</sup> Together, sections 2(5) and 8(a)(2) prohibit labor and employers from coming together in a nonadversarial posture, and focus labor's attention on the centrality of its conflict with capital; in effect, these sections define and constitute labor organizations by reference to their antagonistic relationship with employers.<sup>56</sup>

The NLRA cements the adversarial model by mandating a united front on labor's side of the table: it obligates the employer to bargain with the duly certified labor organization representing a majority of its employees (in an appropriate unit). Conversely, it prohibits the employer from bargaining with nonmajority unions where a majority union exists.<sup>57</sup> These twin requirements, respectively dubbed the majority-rule doctrine and the exclusivity doctrine, together guarantee majority unions a monopolistic status as the employees' representative in a particular workplace. A duty of fair representation, which the

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<sup>54</sup> See *Electromation, Inc. v. NLRB*, 35 F.3d 1148, 1157 (7th Cir. 1994) (upholding the Board's decision that cooperative action committees violated section 8(a)(2) of the NLRA because they functioned in a "representational capacity" and were dominated by the employer, but observing that "in many [other] cases, the interests of the employer and employee are not mutually exclusive").

Some argue that an employer can use such company-dominated forums, despite their cooperative appearance, to indoctrinate employees in anti-union views and displace the union as the employees' representative. See, e.g., Anna S. Rominger, *Rethinking the Paradigm: Can the Wagner Act and Labor-Management Cooperation Coexist?*, 8 DEPAUL BUS. L.J. 159, 175-76 (1996). Others maintain that room still exists for productive labor-management cooperation efforts. See generally Jon Blumenthal, Note, *Remediating Electromation, Inc. v. NLRB and Its Progeny: The Future of Employee Participation Programs*, KAN. J.L. & PUB. POL'Y, Winter 1996, at 193 (discussing legislative attempts to overrule *Electromation*).

<sup>55</sup> N.L.R.A. § 2(5), 29 U.S.C. § 152(5) (1994).

<sup>56</sup> See generally Marion Crain, *Images of Power in Labor Law: A Feminist Deconstruction*, 33 B.C. L. REV. 481, 505-09 (1992) (describing sections 2(5) and 8(a)(2) as constituting the adversarial relation between labor and employers).

<sup>57</sup> See N.L.R.A. §§ 8(a)(5), 9(a), 29 U.S.C. §§ 158(a)(5), 159(a) (1994). In other words, by winning an election, a union gains the right and shoulders the obligation of bargaining on behalf of all the workers in the unit, whether or not they voted for the union and whether or not they become union members. See N.L.R.A. § 9(c), 29 U.S.C. § 159(c) (1994). While the NLRA does not preclude unions from representing less than a majority of employees, the NLRB has long held that an employer's refusal to bargain with a representative of less than a majority is not an unfair labor practice. See Alan Hyde et al., *After Smyrna: Rights and Powers of Unions That Represent Less than a Majority*, 45 RUTGERS L. REV. 637, 644 & n.23, 645 (1993).

Supreme Court imposes in an effort to deter discrimination by majority unions against minority interests within unions, mediates the majority-rule and exclusivity doctrines.<sup>58</sup> Because both doctrines are vital to the legally coerced united front, we next undertake a fuller discussion of them.

## B. The Majority-Rule and Exclusivity Doctrines

### 1. *Origins*

Although the concepts of majority rule and exclusive representation appeared in some state laws as early as 1880, the doctrine of majority rule gained significance in American labor relations between 1890 and 1925, when railroad unions adopted it in an effort to eliminate jurisdictional disputes and intervention rivalries.<sup>59</sup> Congress then adopted the doctrines of majority rule and exclusive representation in the Wagner Act.<sup>60</sup>

The Wagner Act prohibits an employer from bargaining with individual employees once a majority of workers has selected a representative. Congress permitted a narrow exception to this rule: individual employees or groups of employees may address their grievances to the employer if the union can be present and the adjustments do not contradict the labor contract.<sup>61</sup> Moreover, if the employer and the exclusive representative of the majority enter into a collective agreement, that agreement supersedes all prior contracts between the employer

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<sup>58</sup> See *Vaca v. Sipes*, 386 U.S. 171, 177 (1967) (stating that the duty of fair representation which an exclusive bargaining agent owes to those employees which it represents "includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion [in collective bargaining and in enforcing the labor contract] with complete good faith and honesty, and to avoid arbitrary conduct").

<sup>59</sup> See Herbert Schreiber, *The Origin of the Majority Rule and the Simultaneous Development of Institutions To Protect the Minority: A Chapter in Early American Labor Law*, 25 *RUTGERS L. REV.* 237, 238-40 (1971). Although majority rule has deep roots in American labor law, the doctrine has not been adopted in labor laws outside of North America. See Hyde et al., *supra* note 57, at 641 n.14; *infra* note 359 & accompanying text.

<sup>60</sup> The Wagner Act was the original piece of federal labor legislation that formed the foundation of the NLRA. See National Labor Relations (Wagner) Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-187 (1994)). The Wagner Act and its subsequent amendments, Labor-Management Relations (Taft-Hartley) Act, ch. 120, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-197 (1994)), and Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (codified as amended at 29 U.S.C. §§ 153-187 (1994)), are collectively referred to as the National Labor Relations Act.

<sup>61</sup> See 29 U.S.C. § 159(a). The employer must bargain only with the exclusive representative. The interests of individual workers are submerged in the collective interests of workers in the unit. See *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 684 (1944) (holding that employer bargaining with individual employees is "subversive of the mode of collective bargaining which the statute has ordained").



and individual employees.<sup>62</sup> Furthermore, once the majority selects an exclusive representative, employees may not engage in concerted activity, even if "otherwise protected by law, unless approved by the majority representative."<sup>63</sup> Finally, the exclusive representative can, and usually does, exercise complete control over any grievance system that a collective bargaining agreement creates.<sup>64</sup>

The Wagner Act's proponent, Senator Wagner, considered majority rule indispensable to achievement of the Wagner Act's goals.<sup>65</sup> Wagner viewed unions as "organic groups unified by solidarity interests and norms."<sup>66</sup> He assumed that the preferences of individual employees inherently would align with the group's interest or would become so aligned through the force of law, or through formal or "informal inculcation of norms" and sanctions for behavior that deviated from those norms.<sup>67</sup> Further, Wagner expressed concern that, in the absence of majority rule, employers would "interfere with the practical effectuation of [employees' right to bargain collectively through representatives of their own choosing] by bargaining with individuals or minority groups in their own behalf."<sup>68</sup> Senator Wagner justified the corollary to majority rule—exclusivity—with an efficiency rationale, commenting that "it is practically impossible to apply two or more sets of agreements to one unit of workers at the same time" and that "collective bargaining can be really effective only when workers

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<sup>62</sup> See *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944) ("Individual contracts . . . may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act [for] collective bargaining.")

<sup>63</sup> Schreiber, *supra* note 59, at 238 & n.6.

<sup>64</sup> See Clyde W. Summers, *The Individual Employee's Rights Under the Collective Agreement: What Constitutes Fair Representation?*, 126 U. PA. L. REV. 251, 255-56 (1977) (observing that, while the NLRA does not give unions exclusive authority in presenting and settling grievances, collective bargaining agreements usually grant this power to unions).

<sup>65</sup> See Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1452-53 (1993) (contrasting Wagner's organic vision of unions with President Franklin Roosevelt's "purely associational . . . conception of unionization").

<sup>66</sup> *Id.* Barenberg explains that Wagner felt that only autonomous (noncompany) unions with majority support and exclusive representative status could offer adequate "organic solidarity and collective empowerment." *Id.* at 1453 n.317, 1496.

<sup>67</sup> *Id.* at 1454-55.

<sup>68</sup> *Labor Disputes Act: Hearings on H.R. 6288 Before the House Comm. on Labor*, 74th Cong. 16 (1935) [hereinafter *Labor Disputes Act*] (statement of Senator Robert F. Wagner), reprinted in 5 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 2473, 2490 (1949) [hereinafter LEGISLATIVE HISTORY]; see also Kenneth M. Casebeer, *Holder of the Pen: An Interview with Leon Keyserling on Drafting the Wagner Act*, 42 U. MIAMI L. REV. 285, 331-32 (1987) ("It was a natural part of Senator Wagner's political thinking that unless you had majority rule, you had nothing. Without majority rule, you just had the division of labor within itself that management could foster and exacerbate.")

are sufficiently solidified in their interests to make one agreement covering all."<sup>69</sup>

Union advocates and economists joined Wagner in arguing that the exclusivity doctrine was indispensable to the Act's success: employees must present a united front to the employer, or they would compete among themselves and thus undermine one another's efforts.<sup>70</sup> From labor's perspective, "any variation in individual employment terms is a potential threat"; unanimous employee cooperation "is essential to a union's control of bargaining and contract formation with an employer."<sup>71</sup> Unions feared that an employer could undermine union support by rewarding individual workers who defect from the union because this scheme would send the message that the union is ineffectual and that conditions might be more favorable without it.<sup>72</sup>

Not surprisingly, employers strongly opposed the majority-rule provision of the Wagner Act. In testimony before the seventy-fourth Congress, employer representatives repeatedly argued that majority rule would trample individual workers' rights.<sup>73</sup> The House Report

<sup>69</sup> *Labor Disputes Act*, *supra* note 68, reprinted in 5 LEGISLATIVE HISTORY, *supra* note 68, at 2473, 2490. The House Report was adamant in its position that one contract must cover all of the workers in the unit. The Report stated:

There cannot be two or more basic agreements applicable to workers in a given unit . . . . If the employer should fail to give equally advantageous terms to nonmembers of the labor organization negotiating the agreement, there would immediately result a marked increase in the membership of that labor organization. On the other hand, if better terms were given to nonmembers, this would give rise to bitterness and strife, and a wholly unworkable arrangement whereby men performing comparable duties were paid according to different scales of wages and hours.

H.R. REP. NO. 74-972, at 18 (1935), reprinted in 6 LEGISLATIVE HISTORY, *supra* note 68, at 2956, 2974.

Even if one contract must cover all employees, it does not follow that only one representative may exist. An employer could, for example, bargain simultaneously with two or more representatives and make the resulting contract applicable to all the workers. The Report considered this possibility, but rejected it on the grounds that "the agreement probably would not command the assent of the majority and hence would not have the stability which is one of the chief advantages of collective bargaining." *Id.* Even if multiple representatives were to bargain for one contract which would apply to all workers, a majority of the representatives would still have to assent to the overall agreement, and thus the result would be the same from the worker's viewpoint; meanwhile, the employer would benefit from the added "dissension and rivalry" among multiple worker representatives. *Id.* at 2975 (quoting *In re Houde Eng'g Corp.*, 1 N.L.R.B. 35, 40 (1934)).

<sup>70</sup> See George Schatzki, *Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity Be Abolished?*, 123 U. PA. L. REV. 897, 926 (1975) (questioning the united front assumption).

<sup>71</sup> Richard R. Carlson, *The Origin and Future of Exclusive Representation in American Labor Law*, 30 DUQ. L. REV. 779, 788 (1992) (emphasis omitted).

<sup>72</sup> See *id.*

<sup>73</sup> For example, Walter Gordon Merritt of the League for Industrial Rights (an employers' organization) compared majority rule to fascism: "I think this majority rule comes pretty nearly to the idea with which Mr. Mussolini originally started, in effect if you got a bare plurality the other party is rooted out. It would be almost like saying our Senate must

responded by observing that, because the collective bargaining agreement applied to all the workers, minority groups gained "all the advantages of united action."<sup>74</sup> The Report also observed that section 9(a) of the Act preserved the right of individuals and groups of workers to present grievances to their employers.<sup>75</sup> It further argued that agreements favoring the majority over the minority are impossible because section 8(3) forbade any discrimination based on union membership.<sup>76</sup> Finally, in response to charges that majority rule would establish the closed shop, the Report contended that negotiations between the representative and the employer could settle this issue.<sup>77</sup>

Senator Wagner was probably correct in his view that those who opposed majority rule in their testimony before Congress did so primarily because they opposed collective bargaining itself. At the very least, they opposed collective bargaining with an independent union that the employer did not control.<sup>78</sup> Nonetheless, the employer representatives identified a central problem that has plagued labor law: protecting the interests of minority groups in a legal regime based on majority rule.

Although women and people of color now comprise significant minorities in the labor movement, the white and male majority continues to dominate labor unions.<sup>79</sup> As institutions legally obligated to

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be made up exclusively of Democrats." *National Labor Relations Bd.: Hearings on S. 1958 Before the Senate Comm. on Educ. and Labor*, 74th Cong. 319 (1935) [hereinafter *Hearings*], reprinted in 4 LEGISLATIVE HISTORY, *supra* note 68, at 1705. Mr. Merritt favored proportional representation. See *id.* Employers' biggest fear was that majority rule and exclusive representation would lead to the closed shop. See, e.g., *Hearings*, *supra*, at 795 (statement of L.H. Sessions, Muskegon Employers Association), reprinted in 4 LEGISLATIVE HISTORY, *supra* note 68, at 2181 ("If this bill were to be enacted into law, the unfortunate employee who happened to be working in some plant . . . which was controlled by the American Federation of Labor . . . would find himself in the position where he must either join the union or seek work in some other plant.").

<sup>74</sup> H.R. REP. NO. 74-972, at 19, reprinted in 6 LEGISLATIVE HISTORY, *supra* note 68, at 2975.

<sup>75</sup> See *id.*

<sup>76</sup> See *id.* (discussing section 8(3) as amended at section 8(a)(3)).

<sup>77</sup> See *id.*

<sup>78</sup> See *Labor Disputes Act*, *supra* note 68, at 17 (statement of Robert F. Wagner), reprinted in 5 LEGISLATIVE HISTORY, *supra* note 68, at 2491. Supporters of majority rule repeatedly cited *In re Houde Engineering Corp.*, 1 N.L.R.B. 35 (1934), during the legislative hearings. See *id.* In *In re Houde Engineering Corp.*, the UAW had prevailed in the union election, but the employer persisted in bargaining with the company-dominated minority union as well. See *In re Houde Eng'g Corp.*, 1 N.L.R.B. at 35. The Board required the employer to bargain exclusively with the UAW, the independent majority union, ruling that bargaining with the minority union undermined the majority union's ability to represent the workers. See *id.* at 40.

<sup>79</sup> As of 1997, 39% of labor union members were female. See *AFL-CIO Urges Affiliates To Spend More, Recruit Women for New Organizing Programs*, 1997 Daily Lab. Rep. (BNA) No. 33, at C-1 (Feb. 19, 1997). As of 1995, blacks were 15.5% of union members. See Louis Uchitelle, *Black Labor Leaders Want Greater Voice/AFL-CIO Election Seen As Opportunity To Make Their Case*, S.F. CHRON., July 17, 1995, at A5. In 1998, Latinos comprised approximately

secure the best deal possible for the majority of their members, local unions have incentives to seek benefits for the white, male majority, sometimes at the expense of women and people of color. When unions have done so, the ensuing tension sometimes has led to litigation.<sup>80</sup>

## 2. *Restriction of Collective Action by Dissident Minorities*

In *Emporium Capwell Co. v. Western Addition Community Organization*,<sup>81</sup> the Court delineated the parameters of the majority-rule and exclusivity doctrines. It established that the interest of a minority group within a bargaining unit in avoiding injuries wrought by race discrimination was subordinate to the overriding goal of class solidarity. In this case, black workers who were dissatisfied with their union's efforts to address the employer's racial discrimination picketed the employer's department store and distributed leaflets that urged consumers to boycott the store until it ceased discriminating against minorities.<sup>82</sup> The employer fired two of the workers.<sup>83</sup> The NLRB and the Court then faced the question of whether the picketing was concerted activity protected by section 7 of the NLRA.<sup>84</sup>

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8.3% of union members. See José La Luz & Paula Finn, *Getting Serious About Inclusion: A Comprehensive Approach*, in *A NEW LABOR MOVEMENT FOR THE NEW CENTURY* 171, 172 (Gregory Mantsios ed., 1998).

<sup>80</sup> See, e.g., *Woods v. Graphic Communications*, 925 F.2d 1195, 1198 (9th Cir. 1991) (describing how union opposed disciplinary action against white members who were guilty of racial harassment); *Farmer v. ARA Servs., Inc.*, 660 F.2d 1096, 1103 (6th Cir. 1981) (reporting district court's finding that union negotiated agreements that perpetuated effects of past discrimination and refused to pursue grievances of female employees); *Jones v. Cassens Transp.*, 617 F. Supp. 869, 878-79 (E.D. Mich. 1985) (finding that union worked to save jobs of male employees during a lay-off at the expense of jobs of female employees), *rev'd on other grounds sub. nom. Jones v. Truck Drivers Local Union No. 299*, 838 F.2d 856 (6th Cir. 1988); *Seep v. Commercial Motor Freight, Inc.*, 575 F. Supp. 1097, 1105 (S.D. Ohio 1983) (finding that the union excluded female-dominated clerical bargaining unit from National Master Freight Agreement and permitted its male members to cross picket line formed by unionized female clerical employees protesting sexual discrimination by employer); *Union Found Liable for Sex Bias After It Failed To Represent Woman*, 1995 Daily Lab. Rep. (BNA) No. 186, at A-6 (Sept. 26, 1995) (reporting that a union official failed to process a female worker's sexual harassment grievance—which included rape by a male union member—"in deference to the perceived desires of [the local's] male membership" (alteration in original)).

<sup>81</sup> 420 U.S. 50 (1975).

<sup>82</sup> See *id.* at 55-56. The black workers peacefully picketed on their own time. See *Emporium & W. Addition Community Org.*, 192 N.L.R.B. 173, 181 (1971).

<sup>83</sup> See 420 U.S. at 56.

<sup>84</sup> If the black workers' concerted activity was protected under section 7, their discharges would be unlawful under the NLRA. If it was not a protected activity, the discharges would be lawful under the NLRA (unless otherwise illegal under some separate statutory scheme).

The Board, over the vigorous dissents of two of its members,<sup>85</sup> adopted the trial examiner's conclusion that the NLRA did not protect the picketing and that the workers' protest was, in effect, an attempt to circumvent the exclusive representative and to bargain directly with the employer.<sup>86</sup> The Court of Appeals for the District of Columbia reversed the Board's determination, finding that the legislative priority of ending race discrimination, as expressed in Title VII of the Civil Rights Act of 1964,<sup>87</sup> dictated that authorities give special latitude to collective action aimed at eliminating an employer's racial discrimination.<sup>88</sup> The court's decision forced the exclusive-representation doctrine to yield in this context.<sup>89</sup>

The Supreme Court, however, reversed the Court of Appeals and agreed with the Board.<sup>90</sup> Although no evidence existed that the protest caused any actual harm to the union—indeed, the union officially stated that the employer *did* discriminate against minorities—the Court concluded that permitting separate protest and bargaining by a dissident minority would ultimately undermine the union's power.<sup>91</sup> While acknowledging the importance of the national labor policy against race discrimination, the Court rejected the argument that the policy justified separate protest and bargaining by the dissident employees.<sup>92</sup> Justice Marshall, writing for the majority, advanced the united front rationale in support of the Court's ruling. He explained that allowing minority employees to bargain separately with employers could fragment and weaken unions, which would adversely affect their ability to combat discrimination in the long run.<sup>93</sup>

As Professor Iglesias has demonstrated, although the Court paid lip service to the idea that the NLRA must be interpreted in light of

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<sup>85</sup> See 192 N.L.R.B. at 173, 177 (Jenkins and Brown, Members, dissenting in separate opinions).

<sup>86</sup> See *id.* at 185-86.

<sup>87</sup> Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1988).

<sup>88</sup> See *Western Addition Community Org. v. NLRB*, 485 F.2d 917, 928 & n.33 (D.C. Cir. 1973).

<sup>89</sup> See *id.*

<sup>90</sup> See *Emporium Capwell, Inc. v. Western Addition Community Org.*, 420 U.S. 50, 60-61, 70 (1975).

<sup>91</sup> See *id.* at 66. The union and the black workers did not disagree on the underlying fact that the employer practiced race discrimination. See 192 N.L.R.B. at 180. Rather, they disagreed over the means to combat the alleged discrimination. The union wanted to address racial discrimination on a case-by-case basis, while the black workers insisted that, because racial discrimination constitutes an injury to all minority employees, the union should address it collectively, not individually. See *id.* at 181. The union did not, however, oppose the black workers' picketing or distribution of leaflets. See *id.* at 182.

<sup>92</sup> See 420 U.S. at 66-68.

<sup>93</sup> See *id.* at 67-70. According to Justice Marshall, the union "has a legitimate interest in presenting a united front on [race discrimination] as on other issues and in not seeing its strength dissipated and its stature denigrated by subgroups within the unit separately pursuing what they see as separate interests." *Id.* at 70.

Title VII's nondiscrimination policy, the Court's ruling accomplished just the opposite.<sup>94</sup> The *Emporium Capwell* decision fragmented the doctrinal areas of race discrimination and class exploitation; it treated the two statutes as if they were independent of one another, thus ensuring that the substantive rights created by Title VII could not be enforced through the procedural mechanisms of the NLRA.<sup>95</sup> Consequently, *Emporium Capwell* significantly curtails the ability of women and minorities to act collectively to oppose gender and race discrimination in a unionized workplace.<sup>96</sup>

### C. The Duty of Fair Representation

To mitigate the majority-rule and exclusivity doctrines, the Supreme Court has imposed a duty of fair representation upon unions.<sup>97</sup> The duty of fair representation (DFR) places a union in a fiduciary-like relationship with the workers it serves as bargaining agent, both in the negotiation of the labor contract and in its administration.<sup>98</sup> The Court first articulated the DFR in *Steele v. Louisville & Nashville Railroad Co.*,<sup>99</sup> a Railway Labor Act case involving racial discrimination by a union. In *Steele*, the union negotiated an agreement designed to give the most desirable jobs only to whites.<sup>100</sup> The Court ruled that the DFR obligated a union chosen to represent a group of

<sup>94</sup> See Elizabeth M. Iglesias, *Structures of Subordination: Women of Color at the Intersection of Title VII and the NLRA*. NOT! 28 HARV. C.R.-C.L. L. REV. 395, 424 (1993).

<sup>95</sup> See *id.*

<sup>96</sup> Title VII confers rights on individuals who must turn to the courts to enforce them. As the protesters in *Emporium Capwell* apparently realized, discrimination is a group injury that group action best remedies. See *supra* note 91. Rigid adherence to the doctrines of majority rule and exclusive representation makes it difficult for collective worker action to be used to combat discrimination when race- and gender-privileged workers dominate the labor movement. See Iglesias, *supra* note 94, at 429. Ironically, because section 7 of the NLRA would protect collective employee action to oppose discrimination when there is no exclusive representative, women and minorities in nonunionized workplaces enjoy greater freedom to engage in concerted activity to oppose discrimination than women and minorities in unionized workplaces. See, e.g., *NLRB v. Downslope Indus.*, 676 F.2d 1114, 1119 (6th Cir. 1982) (finding that employer violated section 8(a)(1) of the NLRA by discharging nonunionized female employees who refused to work in protest of plant manager's sexual harassment of employees).

<sup>97</sup> See, e.g., *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944).

<sup>98</sup> See Michael J. Goldberg, *The Duty of Fair Representation: What the Courts Do in Fact*, 34 BUFF. L. REV. 89, 91 (1985).

<sup>99</sup> 323 U.S. at 204 ("[T]he statute . . . does require the union, in collective bargaining and in making contracts with the carrier, to represent non-union or minority union members . . . without hostile discrimination, fairly, impartially, and in good faith.").

<sup>100</sup> See *id.* at 195-97. Without informing the black employees whom it was supposed to represent, the union sought to amend the existing labor contract to exclude all black firemen from employment. See *id.* at 195. The union and employer essentially agreed that only whites could fill the most desirable jobs. See *id.* The appellant was one of four black firemen whom the employer replaced with a white worker and forced to accept a less remunerative job. See *id.* at 196.

employees to represent all of the employees, not just the majority.<sup>101</sup> This duty, the Court explained, requires the exclusive representative to act without hostile discrimination against any of its constituents.<sup>102</sup>

Imposition of such a duty was necessary, the Court reasoned, if it was to uphold the Railway Labor Act as constitutional.<sup>103</sup> The Court noted that the Act deprives minority members of the ability to choose a representative of their own or to bargain individually with their employer.<sup>104</sup> Further, Congress conferred on the bargaining representative "powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents."<sup>105</sup> Conferring such power upon the bargaining representative without imposing any corresponding duty toward its members would thus raise significant constitutional questions.<sup>106</sup> The Court has since extended the duty to the NLRA context as well.<sup>107</sup>

### 1. *The Nature and Scope of the DFR*

In *Vaca v. Sipes*,<sup>108</sup> the Supreme Court established the standard for assessing whether a union's grievance-handling procedure violates the DFR. The Court required that the plaintiff-employee prove that the union's grievance handling was "perfunctory."<sup>109</sup> Lower courts have interpreted "perfunctory" to mean something more than mere negligence: the plaintiff must prove "actual bad faith or arbitrary conduct."<sup>110</sup> Courts have also required proof that the union's poor performance affected the arbitrator's decision.<sup>111</sup> Under this standard, courts afford minimal scrutiny to a union's performance in grievance handling and arbitration.<sup>112</sup> Unions have "considerable discretion to control the grievance and arbitration procedure," and employees are

<sup>101</sup> See *id.* at 200.

<sup>102</sup> See *id.* at 203.

<sup>103</sup> See *id.* at 203-04.

<sup>104</sup> See *id.* at 200.

<sup>105</sup> *Id.* at 202.

<sup>106</sup> See *id.* at 204.

<sup>107</sup> See *Vaca v. Sipes*, 386 U.S. 171, 177-83 (1967); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337 (1953). A union's violation of its DFR gives rise to both a common law claim actionable in court and an unfair labor practice claim. See *Local Union No. 12, United Rubber Workers*, 150 N.L.R.B. 312, 319 (1964), *enforced*, *Local Union No. 12, United Rubber Workers v. NLRB*, 368 F.2d 12 (5th Cir. 1966); *Miranda Fuel Co.*, 140 N.L.R.B. 181, 185-86 (1962), *enforcement denied*, *NLRB v. Miranda Fuel Co.*, 326 F.2d 172 (2d Cir. 1963) (refusing to reach issue of whether any invidious discrimination by a union against a member is an unfair labor practice).

<sup>108</sup> 386 U.S. 171 (1967).

<sup>109</sup> *Id.* at 191.

<sup>110</sup> *E.g.*, *Hagans v. Budd Co.*, 597 F. Supp. 89, 96 (E.D. Pa. 1984) (quoting *Riley v. Letter Carriers Local No. 380*, 668 F.2d 224, 228 (3d Cir. 1981)).

<sup>111</sup> See, *e.g.*, *id.*

<sup>112</sup> For example, plaintiff-grievant failed to show a breach of the DFR based on the fact that he was not present at the meeting where the union decided that his grievance would

"subject to the union's nonarbitrary discretionary power to settle or even abandon a grievance, even if it can be later demonstrated that the employee's claim was meritorious."<sup>113</sup> A widely acclaimed study showed that plaintiffs rarely prevail in DFR actions.<sup>114</sup> The courts' hands-off approach increases the potential that the interests of numerical minorities within unions will remain unrepresented.

Many commentators have noted that the DFR is extraordinarily vague. Several have observed that the union's status as exclusive representative should at least require the union to adhere to the constitutional requirements of due process and equal protection; they argue that a labor union should have at least the same duty to the employees it represents as a legislature owes to the citizens it represents.<sup>115</sup> Others have borrowed the more specific due process standards mandated by the Constitution for administrative agencies<sup>116</sup> or have suggested imposing minimal procedural safeguards derived from more general due process standards.<sup>117</sup> Alternatively, the labor law might

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not proceed to arbitration, and he may not even have received notice of the meeting. See *Freeman v. O'Neal Steel, Inc.*, 609 F.2d 1123, 1126-27 (5th Cir. 1980).

<sup>113</sup> *Id.* at 1126 (quoting *Turner v. Air Transp. Dispatchers' Ass'n*, 468 F.2d 297, 299 (5th Cir. 1972)).

<sup>114</sup> See Goldberg, *supra* note 98, at 96 (reviewing the DFR opinions published from 1977 to 1983 and finding that plaintiffs won in less than five percent of the cases).

<sup>115</sup> See Archibald Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151, 167 (1957) (discussing the origin of the DFR and its usefulness as a tool for resolving conflicts of interest within a collective bargaining unit); see also Michael C. Harper & Ira C. Lupu, *Fair Representation As Equal Protection*, 98 HARV. L. REV. 1211 (1985) (arguing that the standards generated by the norm of equal protection comprehensively address all DFR issues). Harper and Lupu believe that a model of "principled democracy" should be used to judge a union's compliance with the DFR. *Id.* at 1224 (internal quotation marks omitted). Principled democracy requires decisionmakers to "regard all persons on whose behalf they are authorized to act as having equal and positive value." *Id.* This "principle of equal respect" forbids a decisionmaker from treating some persons as "inherently more worthy than others." *Id.* Using the principle of equal respect, a court can determine if a union has violated its DFR by inquiring whether a union's action has a "principled justification" or if the union's action was motivated by "unequal respect for some employees." *Id.* at 1232.

<sup>116</sup> See Lea S. VanderVelde, *A Fair Process Model for the Union's Fair Representation Duty*, 67 MINN. L. REV. 1079, 1085 (1983). VanderVelde's model would require "[a] union to take whatever steps are necessary to determine the merits of a grievance before abandoning it." *Id.* at 1156. If the union decides that the grievance is "clearly meritorious," it must pursue the grievance even if the majority of employees pressure it to abandon the grievance. *Id.* at 1156-57 (internal quotation marks omitted). If the union decides that the grievance is only "arguably meritorious" and it has given the grievant the opportunity to make her case, the union may decide not to pursue the grievance. *Id.* at 1157. Courts should limit review of the union's handling of the grievance, in all but extreme cases, to whether the union followed the correct procedures in determining the merits of the grievance. See *id.* Thus, in the vast majority of cases courts should not second guess the union's determination of the grievance's merit. See *id.*

<sup>117</sup> See Ross E. Cheit, *Competing Models of Fair Representation: The Perfunctory Processing Cases*, 24 B.C. L. REV. 1, 3 (1982) (arguing that courts should use principles of due process to determine if the union's grievance handling violates the DFR). Under this model, the union must provide minimal procedural safeguards to all grievants. See *id.* at 29. These



look to tort concepts of reasonableness for guidance and evaluate a union's actions in light of what other unions do under similar circumstances.<sup>118</sup>

Nevertheless, most agree that courts should defer in some significant way to the judgment of the union as exclusive bargaining representative, particularly when the union acts in its capacity as representative of the unit as a whole.<sup>119</sup> Some commentators take the position that, except in clear cases of invidious discrimination, courts should not review a union's actions as exclusive representative because no intelligible standards exist by which courts could determine distributive or procedural fairness.<sup>120</sup> Because no overarching theory of fairness exists, these commentators argue that when a court finds that a union's negotiations violate the DFR, the court merely substitutes its judgment for the judgment of the exclusive representative chosen by the majority of the unit's employees.<sup>121</sup>

All of these critiques assume the continuation of a legally coerced united front. These commentators focus on whether the union's internal processes fairly determine the interest of the majority of its members. They do not address the more fundamental question of

safeguards include the right to be heard and the right in every case for a reasoned decision by the union. *See id.*

<sup>118</sup> *See id.* at 23-24. In this model, determining a union's reasonableness depends on many factors, "including the past practice of the union, the practice of other unions and the specific facts of the case." *Id.* at 24. Both intentional and negligent behavior may violate the DFR. *See id.* at 23-24.

<sup>119</sup> *See, e.g.,* Martin H. Malin, *The Supreme Court and the Duty of Fair Representation*, 27 HARV. C.R.-C.L. L. REV. 127, 183 (1992) (suggesting that courts should first distinguish whether the union was acting primarily as the collective bargaining representative of the unit as a whole or primarily as an advocate for the individual grievant). In Malin's analysis, a union handling a grievance acts primarily as collective bargaining representative of the unit as a whole when the union uses the grievance system as a way of clarifying the contract. *See id.* at 169. For example, a grievance that might affect how the employer calculates seniority would implicate the union's role as representative of the whole unit. *See id.* at 172. When the union acts primarily as representative of the entire unit, courts should afford significant deference to its judgments, and should find the union to have violated the DFR only if its actions were irrational. *See id.* at 183-84. If, however, the union acts primarily as an advocate for the individual grievant, courts should accord less deference to its decisions, and should hold it to a duty of reasonable care. *See id.* at 184. Malin states:

[I]f a court finds that the union has not exercised reasonable care, it should hold the union liable for a DFR breach. As a remedy it should remand the matter to the grievance procedure to enable the parties to proceed to arbitration. If the grievance has already been arbitrated, the court should vacate the award and remand for a new hearing before a different arbitrator.

*Id.* at 185.

<sup>120</sup> *See* Mayer G. Freed et al., *Unions, Fairness, and the Conundrums of Collective Choice*, 56 S. CAL. L. REV. 461, 463 (1983). For a spirited reply, see Alan Hyde, *Can Judges Identify Fair Bargaining Procedures?: A Comment on Freed, Polsby & Spitzer*, *Unions, Fairness, and the Conundrums of Collective Choice*, 57 S. CAL. L. REV. 415 (1984).

<sup>121</sup> *See* Freed et al., *supra* note 120, at 473.

whether legally imposed class-based solidarity is either economically rational or morally just. They accept the premise that the primary, overarching conflict that supersedes all others is between employers and workers, and they assume that the benefits of providing workers a united front in this battle outweigh the detriments of suppressing other, less important and less fundamental conflicts of interest within the working class.

## 2. *The DFR, Privilege, and Exploitation*

The duty-of-fair-representation doctrine provides a rich case study of the judicial promise of workplace representation for minority workers imposed upon a relatively privileged group: white- and male-dominated unions. In exchange for this judicial imposition, courts have allowed the suppression of the interests of the less-privileged within the working class.<sup>122</sup> The DFR is a by-product of exclusivity; therefore, without exclusivity, workers can freely choose their own representatives rather than run the risk of being submerged within a majority-run union that does not represent their interests. Absent exclusive representation, conflicts between workers and their representatives would occur less often and raise fewer substantial issues, and the importance of the DFR would decrease.<sup>123</sup>

To what extent do conflicts of interest within the working class exceed the remedial abilities of the DFR and necessitate separate representation? The concepts of privilege and exploitation play the key role in this analysis. Even if the more-privileged sectors of the working class dominate the less-privileged sectors, a single representative *can* serve on behalf of both in the contest against capital as long as the interests of the two groups do not conflict in a material way, and the more-privileged group does not benefit from oppressing the less-privileged group. If dynamics within the working class actually meet these conditions, commentators properly focus on reforming internal union democracy and on strengthening the DFR doctrine. If, however, the more-privileged group actually exploits the less-privileged group, and the two groups possess antagonistic economic interests, the law should allow separate representation to facilitate compromise between the competing interests. We turn next to these issues.

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<sup>122</sup> See Barbara J. Flagg, *Changing the Rules: Some Preliminary Thoughts on Doctrinal Reform, Indeterminacy, and Whiteness*, 11 BERKELEY WOMEN'S L.J. 250, 252 (1996) (observing that legal doctrine—particularly that which purports to redistribute power or wealth—reflects the perspective of the promises “made by the privileged to the disadvantaged members of society” and “expresses the substance of the promises the privileged are willing to make, and ostensibly to keep”).

<sup>123</sup> See Schatzki, *supra* note 70, at 903. Indeed, some have observed that nonmajority unions would likely not owe a duty of fair representation to their members at all. See Hyde et al., *supra* note 57, at 651 n.42.

## III

## PRIVILEGE AND THE DIVIDED LABOR MARKET

If privilege within the working class creates the opportunity for intraclass exploitation, one must unravel what, exactly, the concept of privilege encompasses. Privilege within the working class assumes two forms, both of which have economic consequences: privilege race or gender confers (white and male workers are privileged relative to people of color and women), and privilege union organization confers (the organized are privileged relative to the unorganized). Historically, these two forms of privilege overlapped, so that organized workers disproportionately consisted of white, male workers, while the unorganized disproportionately included people of color and women.

## A. Privilege Conferred by Race or Gender

Privilege develops when law and social custom systematically confer benefits and advantage on the dominant group in a social hierarchy.<sup>124</sup> The characteristics of privileged groups define societal norms; because the privileged benefit from societal norms, they can ignore the very existence of such norms, and their privilege becomes invisible to them.<sup>125</sup> Racial (white) privilege derives from white suprem-

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<sup>124</sup> See Stephanie M. Wildman, *Privilege in the Workplace: The Missing Element in Antidiscrimination Law*, in PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA 25, 29 (Stephanie M. Wildman ed., 1996) [hereinafter PRIVILEGE REVEALED]; Stephanie M. Wildman & Adrienne D. Davis, *Making Systems of Privilege Visible*, in PRIVILEGE REVEALED, *supra*, at 7, 13.

<sup>125</sup> See Barbara J. Flagg, "Was Blind, But Now I See": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 957 (1993) ("The most striking characteristic of whites' consciousness of whiteness is that most of the time we don't have any. I call this the *transparency* phenomenon: the tendency of whites not to think about whiteness, or about norms, behaviors, experiences, or perspectives that are white-specific."); Martha R. Mahoney, *Whiteness and Women*, in *Practice and Theory: A Response to Catharine MacKinnon*, 5 YALE J.L. & FEMINISM 217, 220 (1993) ("A crucial part of the privilege of a dominant group is the ability to see itself as normal and neutral. This quality of being 'normal' makes whiteness . . . invisible as air to white people, while it is visible or offensively obvious to people defined outside the circle of whiteness."); Jean S. Phinney, *Stages of Ethnic Identity Development in Minority Group Adolescents*, 9 J. EARLY ADOLESCENCE 34, 41 (1989) (reporting that white subjects in study of racial identification did not think of themselves as having an ethnicity other than "American"); Wildman & Davis, *supra* note 124, at 13-14. In effect, having the luxury to ignore the benefits that whiteness, maleness, or heterosexuality confer demonstrates the power of privilege—only dominant groups have this luxury. See Marlee Kline, *Women's Oppression and Racism: Critique of the "Feminist Standpoint"*, in RACE, CLASS, GENDER: BONDS AND BARRIERS 39, 51 (Jesse Voist et al. eds., 1991); Robert W. Terry, *The Negative Impact on White Values*, in IMPACTS OF RACISM ON WHITE AMERICANS 119, 120 (Benjamin P. Bowser & Raymond G. Hunt eds., 1981) ("*To be white in America is not to have to think about it*. Except for hard-core racial supremacists, the meaning of being white is having the choice of attending to or ignoring one's own whiteness.").

As a group's power and privilege grow relative to other groups, its members feel freer to ignore their own advantage; on the other hand, those who lack privilege must "deny their identity in order to survive." Cheryl I. Harris, *Whiteness As Property*, 106 HARV. L. REV. 1707, 1744 (1993). If they fail to do so, the dominant group will likely feel threatened. See

acy;<sup>126</sup> gender and sexual orientation privilege (male, heterosexual) stems from gender hierarchy.<sup>127</sup> Both systems confer material advantage, in the form of higher wages and fringe benefits, on members of the privileged groups, whose ability to conform to societal norms of education, job performance, attractiveness, and other significant measures of workplace worthiness gives them an economic advantage in the market.<sup>128</sup>

Over time, privilege holders come to see their economically privileged position as an entitlement, a "right" which they may resort to violence to protect.<sup>129</sup> For example, the "right" to occupy high-waged positions in the workplace hierarchy corresponds to racial and gender privilege.<sup>130</sup> The privilege holders acquire a proprietary attitude toward such jobs, and will defend them with occupational turf-guarding strategies which include violence.<sup>131</sup> These race- and gender-segregated occupational enclaves in turn reinforce the aspect(s) of identity, which is the basis for their segregation; thus, certain occupations become "male" or "white," and the characteristics of the privilege holders shape the standard of performance attached to those jobs.<sup>132</sup> Society views the economic privilege that flows from holding such relatively privileged positions in the workplace hierarchy as "earned" and achieved.<sup>133</sup> Likewise, society views the lack of privilege as deserved and justified.<sup>134</sup> For example, blacks are viewed as slow, lazy, igno-

Janet E. Helms, *Toward a Model of White Racial Identity Development*, in *BLACK AND WHITE RACIAL IDENTITY: THEORY, RESEARCH AND PRACTICE* 49, 50 (Janet E. Helms ed., 1990) (finding that racism is correlated with a lack of a sense of positive white identity and suggesting that the absence of a positive white identity may cause whites to feel threatened by the presence or assertion of racial consciousness in or by nonwhite groups).

<sup>126</sup> See Wildman & Davis, *supra* note 124, at 17.

<sup>127</sup> See *id.*

<sup>128</sup> See *id.* at 29.

<sup>129</sup> See Margalyne Armstrong, *Privilege in Residential Housing*, in *PRIVILEGE REVEALED*, *supra* note 124, at 43, 49.

<sup>130</sup> Occupational segregation by race or sex, and the corresponding effect on wages are well documented. See, e.g., TERESA ARNOTT & JULIE A. MATTHAEI, *RACE, GENDER, AND WORK: A MULTICULTURAL ECONOMIC HISTORY OF WOMEN IN THE UNITED STATES* 316-17 (1991) (concluding that workplaces remain segregated by race, ethnicity, and gender, with members of disempowered groups consistently assigned jobs with lower pay, fewer benefits, and more dangerous working conditions).

<sup>131</sup> See Crain, *supra* note 42, at 16-17, 18-22 (describing dynamics of sexual harassment in male-dominated, high-waged occupations); *supra* notes 13-14 and accompanying text (describing reaction of male workers at Mitsubishi to the EEOC litigation).

<sup>132</sup> See Cameron Lynne Macdonald & Carmen Sirianni, *The Service Society and the Changing Experience of Work*, in *WORKING IN THE SERVICE SOCIETY* 1, 14-15 (Cameron Lynne Macdonald & Carmen Sirianni eds., 1996) (describing how personal characteristics of workers in occupationally segregated sectors determine who employers consider desirable, or even eligible, to fill the jobs, who will desire the jobs, how the jobs are performed, what expectations customers and management will have of workers in those jobs, and the strategies workers will use to adapt to, resist, or embrace aspects of the jobs).

<sup>133</sup> Armstrong, *supra* note 129, at 51-52.

<sup>134</sup> See *id.* at 52-53.

rant, lascivious, and violent, while whites are seen as industrious, virtuous, and law-abiding.<sup>135</sup> The dominant culture then further imposes its values upon workers through the evaluation of their performance.<sup>136</sup> In short, presumptions of worth attach to the status of being white and to being male.<sup>137</sup>

Further, whiteness and maleness yield "psychological" wages which depend upon the continued presence and suppression of those beneath them in the social and economic hierarchy.<sup>138</sup> Racial privilege imposes a limit or "floor" on how far down the hierarchy a white worker can fall; he will never become black.<sup>139</sup> As David Roediger has explained, "status and privileges conferred by race could be used to make up for alienating and exploitative class relationships."<sup>140</sup> Thus, suppressing those beneath them in the occupational hierarchy allows relatively privileged workers to accept their positions in the class hierarchy without losing self-esteem; privileged workers define themselves as not unorganized but organized, not black but white, not female but male, and thereby escape the bottom of the class hierarchy.<sup>141</sup> In this way, the privilege of being white or male possesses value independent of the direct market-wage advantage attached to it; privilege becomes a form of property that translates into material gains through an enhanced perception of the quality of work performance.<sup>142</sup>

<sup>135</sup> See IAN F. HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 10, 28 (1996); see also Janet E. Helms & Ralph E. Piper, *Implications of Racial Identity Theory for Vocational Psychology*, 44 J. VOCATIONAL BEHAV. 124, 134 (1994) (discussing studies in which high levels of racial stereotyping were found to be inherent in white managers' attitudes toward black workers).

<sup>136</sup> See *id.*

<sup>137</sup> See LOPEZ, *supra* note 135, at 199.

<sup>138</sup> See W.E.B. DU BOIS, *BLACK RECONSTRUCTION* 700-01 (photo. reprint 1976) (1935) (describing public deference blacks accorded whites, and preferential treatment for whites in employment, in the courts, and in schooling).

<sup>139</sup> See ANDREW HACKER, *TWO NATIONS* 29-30, 217 (1992).

<sup>140</sup> DAVID R. ROEDIGER, *THE WAGES OF WHITENESS* 13 (1991).

<sup>141</sup> See LOPEZ, *supra* note 135, at 200-01; see also DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* at v (1992) (suggesting that even the poorest whites gain self-esteem by gazing down societal hierarchies towards blacks).

<sup>142</sup> See LOPEZ, *supra* note 135, at 29; HARRIS, *supra* note 125, at 1758-61. See generally GEORGE LIPSITZ, *THE POSSESSIVE INVESTMENT IN WHITENESS: HOW WHITE PEOPLE PROFIT FROM IDENTITY POLITICS* (1998) (arguing that society encourages whites to invest in "whiteness" and to reap its cash benefits). At the same time, lack of privilege becomes a handicap which confers a relative disadvantage upon the un-privileged. Ellis Cose has elaborated on the specific ways in which lack of racial privilege disadvantages upper- and middle-class blacks by identifying a "dozen demons" that occupy their time and energy—thus conferring a relative advantage upon the race-privileged because they do not face a struggle to "fit in" (to display speech, manners, dress and educational pedigree typical of a class-privileged white), exclusion from private clubs, internalized expectations of failure resulting from having one's professional competence constantly questioned, blocked employment opportunities, tokenism, presumptions of failure by employers, coping fatigue, occupational pigeonholing, identity dilemmas, self-censorship and the drain of internalized rage, self-deception, and stereotyping or guilt by association. ELLIS COSE, *THE RAGE OF A PRIVI-*

Aspects of privilege have also gained legal status, so that law plays a significant role in shaping the identity of the privileged. Whiteness and maleness, for example, have historically conferred a legal status that created property rights for whites and men.<sup>143</sup> Similarly, law constructs family and sexuality; the law confers on heterosexuals the right to marry one's life partner but denies this right to homosexuals. Consequently, homosexuals lose the corresponding economic advantages that legal marriage bestows upon heterosexuals.<sup>144</sup> Family relationships confer derivative privilege. For example, access to the benefits of another with privilege through marriage or kinship relations operates together with intraracial marriage patterns to advantage disproportionately white women over men and women of color because white women are more likely to enjoy access to the primary sources of economic privilege: white men who are their fathers, brothers, or husbands.<sup>145</sup>

Finally, law constructs work in part according to the gender and racial identity of those who perform it. The law considers unpaid household labor primarily affective in nature, and hence not work.<sup>146</sup> The law does not define those who perform it (predominantly women) as workers; their work is devalued in marital contracts, treated as a mere aspect of marital relations under the social security system, not taxed, undervalued in tort damage calculations, undercompensated in calculations of their contribution to family property rights upon divorce, and ignored under welfare reform and workfare laws.<sup>147</sup> The law similarly devalues paid domestic labor, and those

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LEGED CLASS 55-68 (1993); see also Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming To See Correspondences Through Work in Women's Studies*, in RACE, CLASS, AND GENDER: AN ANTHOLOGY 70, 73-75 (Margaret L. Andersen & Patricia Hill Collins eds., 1992) (listing the ways in which racial privilege operates).

<sup>143</sup> See Harris, *supra* note 125, at 1725-26; see also LIPSITZ, *supra* note 142, at 41 (describing how construction workers' apprenticeship programs disproportionately benefit the sons of white union plumbers, enabling working class white men to pass the value of their trade membership on to their sons as a form of property).

<sup>144</sup> See generally Eric Heinze, *Gay and Poor*, 38 How. L.J. 433, 435, 442 (1995) (observing that the lack of legal recognition afforded to gays' relationships with their partners and children aggravates gays' financial burdens). Heinze notes that gay women face the double or triple burdens of economic disadvantage based on their sex, their sexual orientation, and their race, in combination with their legal inability to marry their partners and gain meaningful economic rights. See *id.* at 443-44. But see Baehr v. Miike, 910 F.2d 112 (9th Cir. 1996) (finding that state failed to show the compelling state interest necessary to justify prohibition on same-sex marriage, and striking down Hawaii's prohibition on same-sex marriage as unconstitutional).

<sup>145</sup> See Aída Hurtado, *Relating to Privilege: Seduction and Rejection in the Subordination of White Women and Women of Color*, 14 SIGNS: J. WOMEN CULTURE & SOC'Y 833, 843-44 (1989).

<sup>146</sup> See Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 Nw. U. L. REV. 1, 4 (1996).

<sup>147</sup> See *id.* at 27-72.

who do it (disproportionately women of color) often find themselves outside the protective umbrella of labor and employment law.<sup>148</sup>

### B. Privilege Conferred by Union Organization

The U.S. labor market includes two distinct internal markets: a primary sector featuring high wages, full-time, stable employment, and union protections; and a secondary market featuring low wages, unstable, temporary or part-time employment, dead-end jobs with few prospects for upward mobility, and no union protections.<sup>149</sup> Workers in the secondary market serve as the "shock absorbers" in a changing economy, picking up the slack when production pace increases and suffering layoffs when business cycles slow down. Whites and men disproportionately populate the primary market, while women, immigrants, and people of color crowd together in the secondary market.<sup>150</sup> Several commentators have recognized that labor unions have functioned as an elite force within the working class by redistributing wealth not only from capital to labor, but from unorganized labor to organized labor,<sup>151</sup> and within organized labor, from less-

<sup>148</sup> See *id.* at 72-79 (examining the exclusion of paid domestic workers from coverage under the NLRA, OSHA, and workers' compensation laws).

<sup>149</sup> See RICHARD EDWARDS, *CONTESTED TERRAIN: THE TRANSFORMATION OF THE WORKPLACE IN THE TWENTIETH CENTURY* 167-68 (1979). See generally MICHAEL J. PIORE, *BEYOND INDIVIDUALISM* 86 (1995) (describing the dual labor market).

<sup>150</sup> See Regina Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 STAN. L. REV. 1, 42 (1988). Women constitute two-thirds of all part-time and temporary workers (compared to 45% of the labor force as a whole), and African Americans comprise 10% of temporary workers and 16% of involuntary part-time workers (compared to 10% of the labor force as a whole). See Francoise J. Carté, *Temporary Employment in the Eighties*, in *NEW POLICIES FOR THE PART-TIME AND CONTINGENT WORKFORCE* 45, 50 (Virginia L. duRivage ed., 1992) [hereinafter *NEW POLICIES*]; Chris Tilly, *Short Hours, Short Shift: The Causes and Consequences of Part-Time Employment*, in *NEW POLICIES*, *supra*, at 15, 42; see also *Toward a Disposable Work Force: The Increasing Use of "Contingent" Labor: Hearing Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources*, 103d Cong. 27 (1993) (statement of Delores Crockett) (reporting that in 1992, 13,664,000 part-time workers—two-thirds of all part-time workers—were women); Kathleen Barker & Kathleen Christensen, *Charting Future Research*, in *CONTINGENT WORK: AMERICAN EMPLOYMENT RELATIONS IN TRANSITION* 306, 308-09 (Kathleen Barker & Kathleen Christensen eds., 1998) (explaining that, while estimates vary depending upon the definitions used, blacks, Hispanics, and women are disproportionately over-represented in the contingent workforce and in non-standard work arrangements); Arne L. Kalleberg, *Part-Time Work and Workers in the United States: Correlates and Policy Issues*, 52 WASH. & LEE L. REV. 771, 775 (1995) (observing that black and Hispanic men and women are more likely to be involuntarily employed as part-time workers than white men and women); Patricia Schroeder, *Does the Growth in the Contingent Work Force Demand a Change in Federal Policy?*, 52 WASH. & LEE L. REV. 731, 733 (1995) (noting that "the percentage of African Americans in the temporary workforce is double that of the whole workforce," that "two out of every three temporary workers are women," and that "the female rate of involuntary part-time work is 44% greater than that of men").

<sup>151</sup> See STANLEY ARONOWITZ, *FALSE PROMISES: THE SHAPING OF AMERICAN WORKING CLASS CONSCIOUSNESS* 254-55 (1973) (arguing that over the past 50 years of industrial unionism, labor unions have been most successful at redistributing income within the working class); Schatzki, *supra* note 70, at 932 (arguing that "the most certain impact unions have had in

privileged labor to more-privileged labor.<sup>152</sup> As Justice Holmes observed almost 100 years ago: "Organization and strikes may get a larger share for the members of an organization, but, if they do, they get it at the expense of the less organized and less powerful portion of the laboring mass. They do not create something out of nothing."<sup>153</sup> Historically, labor unions have worked against the interests of the unorganized underclass in order to protect the job security and enhance the wages of the organized working class; conversely, the underclass

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our society's distribution of wealth has been to give to the organized worker and to take away from the unorganized").

We do not imply that the unorganized would be better off if unions did not exist. Clearly, unions have reduced income inequality between the capital-owning and laboring classes. However, so far as society as a whole is concerned, unionization has resulted in a modest decrease in income inequality. See RICHARD B. FREEMAN & JAMES L. MEDOFF, *WHAT DO UNIONS DO?* 92-93 (1983) (contending that, on balance, unionism in America has reduced income inequality by about three percent). Further, the labor movement's political support and campaign contributions have been important factors in shaping the social and economic policies of the Democratic party which, we believe, are advantageous to the working class as a whole. See THOMAS BYRNE EDSALL, *THE NEW POLITICS OF INEQUALITY* 145 (1984). Finally, unions have been vocal advocates of specific legislation—such as the Family and Medical Leave Act—that, in our view, benefits the entire working class, unorganized as well as organized. See Judith L. Lichtman et al., Testimony of 9 to 5, the National Association of Working Women et al. 8 (Apr. 6, 1994) (unpublished testimony submitted to the Comm'n on the Future of Worker-Management Relations, on file with the *Cornell Law Review*). Unions have been particularly helpful to women and people of color in this regard. See *Examining a Fundamental Change in Soc'y That Retards Progress and Opportunity in Our Nation—the Decline of Labor Union Membership*, Hearing Before the Subcomm. on Employment and Productivity of the Comm. on Labor and Human Resources, 102d Cong. (1992) (statement of Marion Crain); Crain, *Confronting the Structural Character*, *supra* note 6, at 30; see also AFL-CIO *Urges Affiliates To Spend More, Recruit Women for New Organizing Campaigns*, 1997 Daily Lab. Rep. (BNA) No. 33, at C-1 (Feb. 19, 1997) (reporting that female union members earn 38% more and have 35% higher benefits than similarly employed nonunion female workers).

<sup>152</sup> Large differences in pay persist between union men and women, and union whites and people of color. Women remain the majority of low-wage workers: in 1992, 70% of all women workers earned less than \$20,000 per year; 40% earned less than \$10,000 per year. See BUREAU OF CENSUS, U.S. DEP'T OF COMMERCE, ser. P60-184, *CURRENT POPULATION REPORTS: MONEY INCOME OF HOUSEHOLDS, FAMILIES, AND PERSONS IN THE UNITED STATES: 1992-98* (1992). Blacks and Hispanics continue to comprise a significant percentage of the low-income workers in the U.S. See Celine-Marie Pascale, *Normalizing Poverty*, *Z MAG.*, June 1995, at 38, 39-40 (reporting that in 1991, 42.4% of blacks and 32.8% of Hispanics had household incomes under \$15,000; 60.6% of Blacks and 54.4% of Hispanics had household incomes under \$25,000, compared with 39.2% of whites; and 47.1% of female-headed households with minor children lived below the federal poverty line); AFL-CIO DEP'T OF ECON. RESEARCH, *AMERICA NEEDS A RAISE 3* (1996) (documenting gender, African American, and Hispanic wage gaps).

Unions appear to have raised wages overall without substantially altering societal structures of racial and gender inequality. While unions may not have created these pay inequalities, historically they have perpetuated them. See David Slavin, *Jobs with Justice?*, *Z MAG.*, Nov. 1995, at 17-18; Rhonda M. Williams & Peggie R. Smith, *What Else Do Unions Do?: Race and Gender in Local 35*, *REV. BLACK POL. ECON.*, Winter 1990, at 59, 63-71 (documenting wage inequalities by race and sex resulting from occupational segregation reinforced by the union contract).

<sup>153</sup> *Plant v. Woods*, 57 N.E. 1011, 1016 (Mass. 1900) (Holmes, C.J., dissenting).



has provided scab labor for capitalists during strikes and suppressed the wages of organized workers by its willingness to work for minimal wages.<sup>154</sup> Consequently, a schism developed between the organized working class and the unorganized poor.<sup>155</sup> More recently, the implementation of workfare programs reveals the ongoing tension between organized labor and the unorganized poor. Workfare programs have "create[d] a pool of contingent workers" who compete with unionized employees but will work "for a fraction of their pay" and with no benefits.<sup>156</sup>

Worse, workfare workers "will be channeled into low-waged service occupations" which employ the most economically vulnerable and politically marginalized workers.<sup>157</sup> Thus far, rather than embracing them and organizing them as allies in the struggle against the capital-owning class, "some public sector unions have watched with fear and loathing as [workfare workers] have begun to fill slots once occupied by [union members]."<sup>158</sup>

<sup>154</sup> See ERIK OLIN WRIGHT, *INTERROGATING INEQUALITY: ESSAYS ON CLASS ANALYSIS, SOCIALISM AND MARXISM* 254 (1994).

<sup>155</sup> See WILLIAM PFAFF, *CONDEMNED TO FREEDOM* 105-06 (1971) (observing that established unions are barely interested in the unorganized poor, but view them instead as "troublesome recruits" and threats to organized labor).

<sup>156</sup> Annette Fuentes, *Slaves of New York*, IN *THESE TIMES*, Dec. 23, 1996-Jan. 5, 1997, at 14. The threat to union jobs posed by the growth of workfare programs is undeniable. Fuentes reports that since workfare was instituted in New York City, Hospital Workers Local 420 lost 2000 union jobs, and AFSCME District Council 37 lost 11,000 members. See *id.* at 15-16.

<sup>157</sup> Katherine Sciacchitano, *Divide and Conquer*, IN *THESE TIMES*, Feb. 3-16, 1997, at 21.

<sup>158</sup> Fuentes, *supra* note 156, at 15; see also Frances Fox Piven, *The New Reserve Army of Labor, IN AUDACIOUS DEMOCRACY: LABOR, INTELLECTUALS, AND THE SOCIAL RECONSTRUCTION OF AMERICA* 106, 115-16 (Steven Fraser & Joshua B. Freeman eds., 1997) (describing the reaction of New York City unions to the implementation of workfare, and concluding that "New York unions are trading in the prospects of the poor . . . for short-term protections for current workers and, by extension, incumbent union leadership," thereby participating in the demise of unionism and deterioration in workers' condition). Exceptions exist. CWA Local 1180 has assumed a relatively progressive stance with regard to workfare workers, backing their efforts to organize themselves, and assisting them in raising workplace health and safety standards. See Fuentes, *supra* note 156, at 17. Andy Stern, President of the SEIU, warns that labor and welfare recipients must see themselves as allies in order to avoid a "two-tiered workforce." Sciacchitano, *supra* note 157, at 23. The Massachusetts Job Project, a group dedicated to organizing contingent workers, and the Massachusetts Welfare Network are attempting to build alliances among contingent workers, welfare recipients, and immigrant workers. See *id.*

At its 1997 annual meeting, the AFL-CIO considered the issue and decided that its affiliate unions should seek not only to protect existing union members from displacement, but also to extend the benefits of union representation to workfare recipients by organizing them. See *Statements Related to Welfare Reform Adopted by AFL-CIO Executive Council*, Feb. 17, 1996 [sic], 1997 Daily Lab. Rep. (BNA) No. 33, at E-20 (Feb. 19, 1997) (title date incorrect in original). Whether affiliate unions will heed the AFL-CIO's charge and organize workfare workers remains to be seen.

### C. What Responsibility Does Organized Labor Bear for the Perpetuation of Market Privilege?

Two competing theories attempt to explain the roles that employers and organized labor play in creating and maintaining the dual labor market and its corresponding hierarchy of gender and racial privilege: "dual labor market theory" and "split labor market theory."

#### 1. *Dual Labor Market Theory*

Dual labor market theory (or labor market segmentation theory) posits that because working class fragmentation primarily benefits employers, employers deliberately promote racial and gender divisions within the working class in order to blunt opposition, to suppress workers' wages, and to weaken their bargaining power.<sup>159</sup> According to this theory, the capital-owning class supports and encourages prejudice and discrimination in the job, housing, and educational systems, thereby establishing a privileged economic and social position for white male workers and undermining class solidarity.<sup>160</sup> The racist and sexist tendencies of the white working class enable employers to pay white male workers lower wages in exchange for occupational segregation by race and sex. In effect, white male workers willingly forego compensation in order to avoid working with black workers or alongside women.<sup>161</sup> Employers then pay blacks and women even less. Thus capital receives enhanced profits by disadvantaging all labor.<sup>162</sup> This fragmentation also creates a reserve army of marginalized workers whom employers can exploit to produce a higher surplus than is possible from white male workers alone, and whom employers

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<sup>159</sup> See WILLIAM JULIUS WILSON, *THE DECLINING SIGNIFICANCE OF RACE* 4-5 (1980); Edna Bonacich, *The Class Question in Global Capitalism: The Case of the Los Angeles Garment Industry*, in *MAPPING MULTICULTURALISM* 317, 318-19 (Avery F. Gordon & Christopher Newfield eds., 1996). See generally EDWARDS, *supra* note 149, at 163-99 (discussing the theory of labor market segmentation, and arguing that sex and race divisions in labor's ranks benefit employers because they introduce different lines of identification and so blur the lines between employer and employee).

<sup>160</sup> See WILSON, *supra* note 159, at 5.

<sup>161</sup> See MARTIN CARNOY, *FADED DREAMS: THE POLITICS AND ECONOMICS OF RACE IN AMERICA* 40 (1994) (summarizing argument of economist Michael Reich); see also, e.g., *NLRB v. Bush Hog, Inc.*, 405 F.2d 755, 757 n.2 (5th Cir. 1968) (finding that the employer's statement that a union election victory would result in racial integration of the plant and the corresponding implication that employer would preserve plant segregation if the union did not win were a promise of what amounted to a benefit: continued plant segregation); *Key Corp. Holiday Inn*, 209 N.L.R.B. 11, 11 (1974) (finding that company had unlawfully threatened employees by insinuating that it would replace white employees with blacks or require them to work alongside blacks if the union prevailed in the election—"a condition which certain employees might consider unpleasant").

<sup>162</sup> See CARNOY, *supra* note 161, at 40.

can use to dampen business cycles and fluctuations in the labor market and to counteract higher wage demands by white male workers.<sup>163</sup>

Dual labor market theory postulates that employers manipulate the white male working class's participation in this process, either by duping the working class or by bribing it:

The "duped" perspective sees [white labor] as having been sold a bill of goods by capital, including an ideology of racism, so that they deflect their hostility from the real enemy, capital, on to subordinate racial minorities. By this clever ruse, capital succeeds in a "divide and rule" game. The "bribed" viewpoint sees white labor, especially its leadership, as having been bought off by capital from continuing the class struggle.<sup>164</sup>

## 2. *Split Labor Market Theory*

In contrast to dual market theory, split labor market theory posits that employers neutrally favor free competition among workers, but yield under pressure from organized labor to create a labor aristocracy or privileged position for white male workers.<sup>165</sup> Under this theory, white male labor, as opposed to employers, is more overtly antagonistic to blacks and women.<sup>166</sup> White male labor benefits most directly and immediately from racial and gender stratification of the workforce; hence, it perpetuates the divisions in the working class.<sup>167</sup>

A split labor market exists when two or more groups of workers, whose price of labor for the same work differs, compete; one group works for less because its resources are fewer and its goals differ from those of the more expensive group. The differences between the groups result from historical forces and cultural conditioning (rather than because of the prejudices of employers). Consequently, capital

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<sup>163</sup> See *Media Mailers, Inc.*, 191 N.L.R.B. 251, 251-52 (1971) (describing company president's statements to male employees that if the union won the election, "work previously done by men would be done by women, and that there would not be enough work for everybody," and statements to female employees on layoff status that the union's failure to admit women to membership would block their employment through the union hiring hall); WILSON, *supra* note 159, at 5; Edna Bonacich, *The Past, Present, and Future of Split Labor Market Theory*, in 1 RESEARCH IN RACE AND ETHNIC RELATIONS 17, 38-39 (Cora Bagley Marrett & Cheryl Leggon eds., 1979).

<sup>164</sup> Bonacich, *supra* note 163, at 40.

<sup>165</sup> See WILSON, *supra* note 159, at 5; Edna Bonacich, *A Theory of Ethnic Antagonism: The Split Labor Market*, in THE AMERICAN WORKING CLASS: PROSPECTS FOR THE 1980s, at 73, 87-88 (Irving Louis Horowitz et al. eds., 1979).

<sup>166</sup> See Edna Bonacich, *Abolition, the Extension of Slavery, and the Position of Free Blacks: A Study of Split Labor Markets in the United States, 1830-1863*, 81 AM. J. SOC. 601, 602 (1975).

<sup>167</sup> See Bonacich, *supra* note 165, at 87-88. Bonacich does not suggest that the racist and sexist policies that privileged white male labor employs are necessarily exploitative; she contends that they are simply a defensive reaction to the threat of displacement by cheap labor. See Edna Bonacich, *Capitalism and Race Relations in South Africa: A Split Labor Market Analysis*, in 2 POLITICAL POWER AND SOCIAL THEORY: A RESEARCH ANNUAL 239, 242 (Maurice Zeitlin ed., 1981) [hereinafter POLITICAL POWER].

can exploit one group more easily than the other.<sup>168</sup> In this explanation of the divided labor market, the state, law, and culture all contribute to the exploitability of a particular group. The African American experience of slavery and Jim Crow laws, white women's restriction to the home and unpaid domestic labor, protectionist restrictions on when women may work and on jobs at which they may work, exclusions of certain groups from coverage under labor and employment statutes, the implementation of workfare for those on welfare, and anti-immigration policies all have contributed to the exploitability of women and people of color.<sup>169</sup>

The split labor market theory does not deny that the fundamental conflict lies between employers and higher-priced labor; it simply emphasizes that a further conflict of interest exists between the more privileged workers and those who are less privileged. Thus, the less privileged unwittingly serve capital as a tool to undermine the wages of the more privileged, and ultimately become the chief victim in the struggle between employers and labor.<sup>170</sup> The employers' profit-maximizing preference for lower-paid labor threatens the interests of higher-paid labor; the weakness of lower-paid labor, its inability to resist an unreasonable offer, and managerial coercion make the threat credible.<sup>171</sup> The two classes of workers express their conflicts as racial antagonism or gender hostility, when in reality, class conflict lies at the root of their differences.<sup>172</sup>

### 3. *A Comparison of the Two Theories*

Thus, the two theories disagree over which group bears primary responsibility for creating and maintaining the dual labor market and the divided working class—employers or organized labor. Both explanations, however, may correctly explain the labor market because, like the working class, the capital-owning class is not monolithic. Individual employers' interests may differ from those of the capital-owning class as a whole. For example, some employers depend on cheap labor more than others.<sup>173</sup> The dual labor market theory concerns it-

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<sup>168</sup> See Bonacich, *supra* note 165, at 80-81.

<sup>169</sup> See Michael Burawoy, *The Capitalist State in South Africa: Marxist and Sociological Perspectives on Race and Class*, in 2 *POLITICAL POWER*, *supra* note 167, at 279, 285.

<sup>170</sup> See Bonacich, *supra* note 166, at 607.

<sup>171</sup> See Bonacich, *supra* note 165, at 81-84. Under this theory, employers do not instigate the dual labor market, but they certainly profit from it by utilizing the lower-waged class to undermine the position of higher-waged labor. See *id.* at 83.

<sup>172</sup> See WILSON, *supra* note 159, at 6, 44-45; Bonacich, *supra* note 165, at 82.

<sup>173</sup> See Burawoy, *supra* note 169, at 285; see also Joel Rogers, *Divide and Conquer: Further "Reflections on the Distinctive Character of American Labor Laws"*, 1990 *Wis. L. Rev.* 1, 37-40 (explaining how individual capital-owners' attitudes toward unionization may vary with the density and centralization of unionization because of differential impacts on their competitive positions in the industry).

self primarily with the efforts of the capital-owning *class* to protect itself on the terrain of class struggle. Under this theory, the interest of the capital-owning *class* favors fragmenting the working class. The split labor market theory, on the other hand, focuses on the interests of individual employers in maximizing profit; these employers may well benefit more if the occupational hierarchy is not differentiated between white or male labor on the one hand and black or female labor on the other. In this case, employers may in fact replace more expensive labor with cheaper labor.<sup>174</sup>

#### 4. *Employer Strategies and Organized Labor's Response*

Regardless of who created it, employers can exploit the price differential between the two groups of workers in various ways. First, employers may displace high-priced labor with cheap labor (e.g., by hiring strikebreakers from the lower-priced group).<sup>175</sup> Though direct displacement of one group by another rarely occurs, the threat of such displacement is powerful. Alternatively, employers may exploit the price differential between groups of workers by diluting or deskilling a job—breaking a job into simpler component activities—and then substituting cheaper labor for the higher-priced labor which performed the original jobs.<sup>176</sup> Employers use occupation or sector segregation as a third avenue to exploit the wage differential between groups of workers. In sector segregation, cheap labor occupies the jobs or sectors where pay and conditions of work are most degraded.<sup>177</sup> Finally, employers may exploit the price differential between lower-priced labor and higher-priced labor by exporting production processes to countries where labor is cheap, either by importing cheap products for resale or by moving production operations overseas.<sup>178</sup>

In each of the strategies outlined above, employers move from the higher-priced to the lower-priced source, and undermine any gains achieved by higher-priced (organized) labor. Higher-priced labor might respond with one of three strategies: (1) exclusion—it could seek to exclude lower-paid labor from high wage territories alto-

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<sup>174</sup> See RUTH MILKMAN, *GENDER AT WORK: THE DYNAMICS OF JOB SEGREGATION BY SEX DURING WORLD WAR II*, at 5-7 (1987); Burawoy, *supra* note 169, at 283.

<sup>175</sup> See Bonacich, *supra* note 159, at 25-26.

<sup>176</sup> See *id.* at 26.

<sup>177</sup> See *id.* at 27. Government policy and programs may support the ability of relatively high-priced labor to refuse these undesirable jobs. For example, public assistance programs available to U.S. citizens have historically provided an alternative—albeit an unattractive one—to some jobs or sectors, so that classes of immigrants with precarious legal status who are ineligible for these social programs, fear deportation, and whose recent historical experience of abject poverty and oppression in other countries makes them more exploitable fill these jobs. See *id.* at 28.

<sup>178</sup> See *id.* at 29.

gether; (2) caste—where the group is essential to the market's functioning (as in the case of American slaves or women in Western countries), it could resort to a caste system institutionalizing ethnic, racial, or gender stratification; or (3) inclusion—it could organize and incorporate the lower-paid workers.<sup>179</sup> Historically, labor has pursued the exclusion and caste strategies, but signs emanating from the AFL-CIO's new leadership indicate that unions may be ready to change course and pursue the inclusion strategy instead.

a. *Exclusion*

When attempting to prevent employers from accessing cheap labor markets, organized American labor usually lobbies Congress for protection from the international labor markets. This type of protectionism usually takes shape as statutory immigration controls and trade barriers prohibiting employers from importing competing labor and products. Although protectionist propaganda, such as the "buy American" slogan, obscures the racial and gender dynamics of modern protectionism, women workers in Third World countries create the predominant displacement threat. In other words, race and gender still stand at the heart of the conflict.<sup>180</sup>

b. *Caste*

In the caste strategy, the higher-paid group controls certain jobs and receives pay at a higher wage scale, while relegating the cheaper workers to a set of jobs that have a lower wage attached to them (occupational segregation by sex and race).<sup>181</sup> The higher-paid group creates this stratification by weakening the cheaper group further until it is no longer useful to employers. The higher-paid group obtains this result either by preventing such workers from receiving an education or developing the skills necessary to compete effectively, or by denying them the political resources necessary to undercut higher-waged labor

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<sup>179</sup> See Bonacich, *supra* note 165, at 73-74; Bonacich, *supra* note 166, at 607.

<sup>180</sup> See Bonacich, *supra* note 163, at 32.

<sup>181</sup> See Bonacich, *supra* note 165, at 84-85. The National Committee on Pay Equity reports that in 1990, women were disproportionately overrepresented as secretaries (99.1% female), registered nurses (94.5% female), child-care workers (97% female), telephone operators (89% female), data-entry keyers (87.2% female), and primary- and secondary-school teachers (73.7% female). Black women were disproportionately represented as private household workers, cooks, housekeepers, and welfare aides. Hispanic women were disproportionately represented as graders and agricultural workers, housekeepers, electrical assemblers, and sewing machine operators. Asian women were disproportionately represented as marine life workers, electrical assemblers, dressmakers, and launderers. Native American women were disproportionately represented as welfare aides, child-care workers, teacher's aides, and foresters (other than logging). These occupations consistently correlated with low wages. See National Comm. on Pay Equity, *The Wage Gap: Myths and Facts, in RACE, CLASS, AND GENDER IN THE UNITED STATES: AN INTEGRATED STUDY* 129, 129-31 (Paula S. Rothenberg ed., 1992).

through governmental regulations. Typically, excluding lower-paid workers from labor unions or refusing to organize the sectors in which they work will ensure that they do not gain sufficient political resources to protect themselves.<sup>182</sup> Thus, as split labor market theory predicts, employers become allied in a paternalistic fashion with the less powerful underclass. The relatively privileged sector of the working class then pressures employers to reach a compromise in which employers exchange the right to completely displace white male labor for labor's concession to allow people of color and white women to remain in the workforce, albeit at the bottom of a rigid occupational hierarchy.<sup>183</sup>

Labor leaders often adopt the dual labor market theory's explanation of race or sex discrimination in employment and deny responsibility for its effects, blaming the employer for creating divisions along race and sex lines. By adopting the dual labor market theory, labor leaders ignore the fact that the labor movement historically has helped to create and preserve the caste hierarchy of occupations within the workplace by restricting entry into those occupations, bargaining for wage rates that institutionalize occupationally segregated workforces, and failing to remedy untenable working conditions created by privileged members in cases of racial or sexual harassment.<sup>184</sup> Alternatively, international labor unions sometimes blame their local unions for antediluvian attitudes on race and sex, reserving the moral high ground for themselves (as in *Mitsubishi*). Ample evidence exists, however, that the local unions, while often more aggressive in their

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<sup>182</sup> See WILSON, *supra* note 159, at 7; Bonacich, *supra* note 165, at 86; Bonacich, *supra* note 163, at 31-32.

<sup>183</sup> See CARNOY, *supra* note 161, at 51; WILSON, *supra* note 159, at 8; Bonacich, *supra* note 166, at 607.

<sup>184</sup> See PHILIP S. FONER, *ORGANIZED LABOR AND THE BLACK WORKER 1619-1981*, at 430-31 (International Publishers ed., 1981) (1974) (describing union collaboration in maintaining separate lines of promotion and seniority for black and white workers, and in segregating blacks into menial, low-paying, dead-end jobs); GOULD, *supra* note 6, at 15-16, 18-19 (listing practices utilized by unions to retain a racial caste system, including restricting admissions to apprenticeship programs jointly administered by employers and unions, denying journeymen cards to qualified black nonunionists, refusing blacks union admission, creating segregated auxiliary locals for blacks, maintaining separate lines of seniority and promotion, and excluding blacks from leadership positions in unions); *Union Local Agrees to \$75,000 Settlement of Suit Based on Representative's Conduct*, 1998 Daily Lab. Rep. (BNA) No. 139, at A-5 (July 21, 1998) (describing settlement of suit filed by the EEOC against Local 25 of the United Autoworkers Union on ground that "it failed to take prompt and appropriate action" to halt union official's racial and sexual harassment of three GM supervisors). *But see New Suit Filed Against Publix Claiming Sex Discrimination*, 1996 Daily Lab. Rep. (BNA) No. 61, at A-7 (Mar. 29, 1996) (describing class-action sex-discrimination suit alleging that Publix Supermarkets discriminated against female workers by channeling them into jobs with lower pay and fewer opportunities for advancement than those available to males, filed with the assistance of the United Food and Commercial Union, which is waging a corporate organizing campaign against Publix).

perpetuation of these views, take their cues from the international leadership.<sup>185</sup>

### c. *Inclusion*

Ironically, when high-priced labor deploys the exclusion and caste strategies, its short-term effort to prevent its own displacement limits the economic development of cheaper labor groups, reinforces the dual labor market, and consequently preserves the threat of displacement.<sup>186</sup> Preferably, high-priced labor would institute an equalizing strategy that focused on raising the price of cheap labor. High-priced labor could accomplish this by pressuring the government to establish and support minimum standards legislation applicable both nationally and extraterritorially to U.S. companies employing labor abroad, and by organizing both the domestic and international lower-priced labor groups.<sup>187</sup> This is the strategy toward which organized labor is now turning. Whether such a strategy will succeed against the backdrop of a working class divided along race and gender lines depends in large part upon the nature of intraclass dynamics: Will the white, male, organized working class gain more than it loses from an alliance with historically unorganized (and disproportionately female and racial minority) labor?

## IV

### LABOR'S DIVIDED HOUSE: GENDER AND EXPLOITATION

In order to answer this question, we must understand exactly what white or male workers gain by virtue of their race- and gender-privileged positions in the labor hierarchy. Subordinated and exploited by employers, organized race- and sex-privileged workers nevertheless occupy a position of power relative to those beneath them in the occupational hierarchy. Thus, the opportunity for intraclass exploitation exists.

#### A. What Is Exploitation?

Exploitation refers to a social relation that allows "one group of people to appropriate the fruits of labor of another group."<sup>188</sup> More

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<sup>185</sup> See GOULD, *supra* note 6, at 20-21 (describing the AFL-CIO's resistance to the implementation of Title VII as it affected the seniority rights of existing race-privileged members).

<sup>186</sup> See Bonacich, *supra* note 163, at 32, 34.

<sup>187</sup> See *id.* at 33.

<sup>188</sup> WRIGHT, *supra* note 154, at 27. Relying heavily on the work of Marxist economist John Roemer, Wright reconstructs an exploitation-centered theory of class that identifies four axes of exploitation: labor power, control over the means of production, differential skill levels, and organizational exploitation. See Erik Olin Wright, *A General Framework for the Analysis of Class Structure*, in *THE DEBATE ON CLASSES* 3, 7-19 (Erik Olin Wright et al. eds.,



than simple income inequality, exploitation exists only when a causal relationship obtains between the incomes of individuals or groups. For true exploitation to occur, the income of the exploiting group must depend causally on the efforts of the exploited group.<sup>189</sup> We can thus distinguish exploitation from mere economic oppression, or

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1989) [hereinafter Wright, *A General Framework*]. Exploitation of each of these assets depends upon the capacity of the asset holder to deprive others of that asset. See *id.* at 12 n.22. Multidimensional exploitation is possible. See Erik Olin Wright, *The Conceptual Status of Class Structure in Class Analysis*, in BRINGING CLASS BACK IN: CONTEMPORARY & HISTORICAL PERSPECTIVES 17, 26 (Scott G. McNall et al. eds., 1991).

Labor power is exploited through market exchanges: "[W]orkers are paid a wage that covers the costs of production of their labor power; capitalists receive an income from the sale of the commodities produced by workers. The difference in these quantities constitutes the exploitative surplus appropriated by capitalists." Wright, *A General Framework*, *supra*, at 18. Employers use market changes to exploit differential ownership and control over the means of production: here, exploitation arises from property relations. See *id.*

Skill exploitation refers to the ability of owners of scarce skills to extract a rent component in their wages, an amount "above and beyond the costs of producing and reproducing the skills themselves." WRIGHT, *supra* note 154, at 251. Wright explains:

[Skill exploitation] implies that people with high levels of skills . . . receive high income not simply because they have high skills, but because of the differentials in skill levels across actors. The highly skilled would become worse off if the unskilled obtained skills; they thus have an interest in maintaining skill differentials, and this is what underpins the claim that their income reflects exploitation. If a skilled person's income reflected no more than the amount of time and resources it takes to obtain the skill, then there would be no skill-based exploitation. The higher incomes would simply be reimbursement for real costs incurred.

Wright, *A General Framework*, *supra*, at 12 (footnotes omitted). Thus, for a skill to serve as the basis for exploitation, it must be scarce, and skill owners must be able to translate scarcity into higher incomes. This can occur in three ways: "[First, skills] may require special talents that are naturally scarce in a population; second, access to the training necessary to develop the skill may be restricted . . . ; third, a certification system may be established" to limit the use of the skill. *Id.* at 21.

Similarly, the organization of the production process generates productivity independent of "labor power, the use of the means of production, or the skills of the producer." *Id.* at 16. For example, apparel manufacturers concerned with reducing production costs have restructured work organization to enhance the productivity of the existing labor force when technological changes and mechanization are not feasible. See Ian M. Taplin, *Recent Manufacturing Changes in the U.S. Apparel Industry: The Case of North Carolina*, in GLOBAL PRODUCTION: THE APAREL INDUSTRY IN THE PACIFIG RIM 328, 333 (Edna Bonacich et al. eds., 1994). In exploiting organization, managers appropriate surplus through the power that they command in a bureaucratic structure:

The asset is organization. The activity of using that asset is coordinated decision making over a complex technical division of labor. When that asset is distributed unequally, so some positions have effective control over much more of the asset than others, then the social relation with respect to that asset takes the form of hierarchical authority. Authority, however, is not the asset as such; organization is the asset and is controlled through a hierarchy of authority.

Wright, *A General Framework*, *supra*, at 17.

<sup>189</sup> See ERIK OLIN WRIGHT, CLASSES 36 (1985); WRIGHT, *supra* note 154, at 40;. To put it more positively, the poor are "'not the bottom[,] . . . [but] the foundation.'" Edna Bonacich, *Racism in Advanced Capitalist Society: Comments on William J. Wilson's The Truly Disadvantaged*, J. SOC. & SOC. WELFARE, Dec. 1998, at 41, 44 (quoting Rev. Jesse Jackson).

domination. Economic oppression occurs when one group deprives another of access to productive resources.<sup>190</sup> But economic oppression does not necessarily connect the material deprivation of one group with the material benefit another group enjoys.<sup>191</sup> We can also distinguish sexual or racial domination from class exploitation because sexual and racial domination does not necessarily imply antagonistic material interests.<sup>192</sup>

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<sup>190</sup> See WRIGHT, *supra* note 154, at 43.

<sup>191</sup> Wright explains:

In exploitation, *the material well-being of exploiters causally depends upon their ability to appropriate the fruits of labor of the exploited.* The welfare of the exploiter therefore depends on the *effort* of the exploited, not merely on the deprivations of the exploited. In non-exploitative economic oppression there is no transfer of the fruits of labor from the oppressed to the oppressor; the welfare of the oppressor depends on the exclusion of the oppressed from access to certain resources, but not on their effort. . . .

The crucial difference between exploitation and non-exploitative oppression is that in an exploitative relation, the exploiter *needs* the exploited since the exploiter depends upon the effort of the exploited. In the case of non-exploitative oppression, the oppressors would be happy if the oppressed simply disappeared.

*Id.* at 40.

<sup>192</sup> Although a few Marxist theorists have suggested that race and sex should be analyzed as separate axes of exploitation, see Philippe Van Parijs, *A Revolution in Class Theory*, in THE DEBATE ON CLASSES, *supra* note 188, at 213, 222-26, Wright adheres to the view of the majority of Marxist theorists that focusing on race or sex will detract from the explanatory power and clarity of class theory, see Wright, *A General Framework*, *supra* note 188, at 4-6 (criticizing domination-centered concepts of class such as feminism or critical race theory on the ground that they further a relativistic understanding of "multiple oppressions" which lacks explanatory power and clarity). The Marxist assumption is that although race and sex have some impact on social inequality, they do not materially shape the experience of class exploitation, either for women and people of color or for the white, male, working class. See Erik Olin Wright, *Race, Class and Income Inequality*, 83 AM. J. SOC. 1368, 1369 (1978) [hereinafter Wright, *Race*]; Erik Olin Wright, *Women in Class Structure*, 17 ECON. & SOC. 35, 61-63 & n.1 (1989) [hereinafter Wright, *Women*].

For example, although Wright does not claim that all race discrimination is really disguised class oppression, and acknowledges that racism has an independent impact on income inequality, he concludes that class differences in income are greater than race differences, and that therefore class relations are central to understanding social inequality. See Wright, *Race*, *supra*, at 1389, 1395 ("[T]he common position of black and white workers within the social relations of production generates a basic unity of economic situation."). Nevertheless, Wright does note that black workers are exploited at a higher rate than white workers, and he acknowledges the existence of real, material divisions between races in the working class. See *id.* at 1393. Like other Marxist theorists, he glosses over the import of these divisions with the statement that the underlying fundamental class interests of blacks and whites across modes of production supersede their immediate differing interests within a given mode of production. See *id.* at 1394 & n.17.

Similarly, Wright rejects the relevance of gender to his theory of class, restricting its importance to the more narrow realm of "understanding and explaining the concrete lived experiences of people." Erik Olin Wright, *Rethinking, Once Again, the Concept of Class Structure*, in THE DEBATE ON CLASSES, *supra* note 188, at 269, 290-91. Accordingly, Wright attempts to explain the role of gender in class theory as "mediating" class location. Wright, *Women*, *supra*, at 40-42. Although Wright purports to reject the conventional view that women's class identity is derivative of their husbands', see *id.* at 37-40, he substitutes an equally derivative analysis of families as mechanisms linking married women—though ap-

Thus, the privileged affirmatively exploit their privilege when they gain an economic advantage at the expense of the labor of the less privileged. Wright gives the following example of exploitation: "If I kick the peasants off the land and let them fend for themselves in the bush, then I have merely oppressed them materially; if I use my ownership of the land as a basis for hiring them back to work the fields, then I exploit them."<sup>193</sup>

## B. Gender Privilege and Economic Exploitation

We next consider the gender-specific history which has made women vulnerable to economic exploitation by both employers and gender-privileged members of the working class.<sup>194</sup> In doing so, we hope to strip away the false veneer of gender neutrality associated with class exploitation and to show why the gender divisions within labor's house have persisted despite labor law's united front strategy.<sup>195</sup> In

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parently not married men—to the class structure through their husbands, parents, and children, see WRIGHT, *supra* note 154, at 252; Wright, *Women, supra*, at 40-41, 62. This is particularly jarring when juxtaposed against the empirical data on which Wright relies, which indicate that in 1980 a full 20% of women were working at jobs whose social class status was higher than that of their husbands. See Wright, *Women, supra*, at 36. More current data suggest that the percentage of married women in the waged labor force who provide half of their families' income has grown significantly. A 1995 study found that 55% of all employed women and 48% of employed married women contributed at this level. 1 FAMILIES AND WORK INST., WOMEN: THE NEW PROVIDERS 33 (1995). Finally, Wright dismisses in a footnote the radical- and socialist-feminist argument that women's unpaid labor within the household creates a direct class relation to domestic production, which is structured by both class and gender exploitation, thus placing women in a distinct class relation to both their husbands and capitalists. See Wright, *Women, supra*, at 63 n.1.

<sup>193</sup> WRIGHT, *supra* note 154, at 43-44.

<sup>194</sup> Exploitation along the axes of race and sex within the working class has taken historically different forms and deserves independent analyses. Although systems of racial and sexual exploitation intersect with one another (most obviously in the lives of women of color), only separate analysis can avoid unwittingly minimizing the impact of either. See generally Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implications of Making Comparisons Between Racism and Sexism (or Other Isms)*, in PRIVILEGE REVEALED, *supra* note 124, at 85. On the other hand, separate analyses implicitly assume that the experience of women of color is synonymous with that of either black men or white women. See Deborah K. King, *Multiple Jeopardy, Multiple Consciousness: The Context of a Black Feminist Ideology*, 14 SIGNS: J. WOMEN CULTURE & SOC'Y 42, 44-45 (1988). In an effort to chart a course between these twin dilemmas, we focus here on sex as a system of exploitation, but explicitly take up the position of women of color as well.

<sup>195</sup> We take much of our inspiration in this regard from a provocative article by Karen Brodtkin Sacks, *Toward a Unified Theory of Class, Race, and Gender*, 16 AM. ETHNOLOGIST 534 (1989). Sacks discusses the significance of comprehending class, race and gender oppression as parts of a unitary system, rather than analyzing the separate systems of capitalism, white supremacy, and patriarchy. See *id.* In particular, by unmasking the race and gender specificity of class consciousness, we hope to draw attention to the wide range of ways in which class consciousness and class protest are experienced and to highlight the likelihood that these more concrete understandings will create new possibilities for mobilization. See *id.* at 542 (citing empirical research suggesting that working class consciousness is racially specific, gender specific, kinship specific, and historically specific); see also ROBIN D.G. KELLEY, *RACE REBELS: CULTURE, POLITICS, AND THE BLACK WORKING CLASS* 18-22 (1994) (cata-

this subsection, we identify the sexually-specific forms that class exploitation has assumed, and show how this exploitation—both “intra-class” (worker-worker) and “interclass” (employer-labor)—has divided labor against itself.

### 1. *Home and Market*

Any analysis of gender and class centers on the dynamics of the relation between women's unpaid labor in the home and women's paid labor in the market; the intersection between production and reproduction constructs.<sup>196</sup> Women's unpaid labor has been ignored and devalued, primarily by defining child-bearing and -rearing, house-keeping, and meal preparation as non-work.<sup>197</sup> The unpaid work that women perform has been defined instead as a precondition to production, rather than production itself, and as an expression of affection, rather than a market exchange; those who do it are viewed as nonproductive, superfluous appendages rather than workers.<sup>198</sup> The

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logging the many forms that black working class resistance has taken in the workplace, and pointing out how day-to-day strategies like foot dragging, absenteeism, pilferage, slow-downs, and work sabotage have been erased in historians' accounts of the working class because they were not recognized as forms of class resistance); JOHN C. LEGGETT, *CLASS, RACE, AND LABOR: WORKING-CLASS CONSCIOUSNESS IN DETROIT* 82-83, 145, 149-52 (1968) (arguing that traditional union-organizing strategies, which focus on the worksite, are ineffective in reaching the black working class, many of whom are unemployed or tenuously employed, and suggesting that community-based unionism would be far more likely to mobilize black workers).

<sup>196</sup> See Rosalind Pollack Petchesky, *Reproduction and Class Divisions Among Women*, in *CLASS, RACE, AND SEX: THE DYNAMICS OF CONTROL* 221, 221 (Amy Swerdlow & Hanna Lesinger eds., 1983).

<sup>197</sup> Ursula Leguin explains this eloquently:

In our culture [the art of making order where people live] is not even considered to be work. 'Do you work?' and having stopped mopping the kitchen and picked up the baby to come to answer the door she says, 'No, I don't work.' People who make order where people live are by doing so stigmatized as unfit for 'higher' pursuits; so women mostly do it, and among women poor, uneducated, or old women more often than rich, educated, and young ones.

Ursula K. Leguin, Talk for Bryn Mawr Convocation (May 17, 1986) (transcript, on file with authors); see also HOLLY SKLAR, *CHAOS OR COMMUNITY?: SEEKING SOLUTIONS NOT SCAPEGOATS FOR BAD ECONOMICS* 61-63 (1995) (describing how U.S. Department of Labor underestimated unemployment among women by asking questions that assumed that those who did housework rather than work in the waged labor market were voluntarily unemployed); Ruth Hubbard, *Social Effects of Some Contemporary Myths About Women*, in *RACE, CLASS, AND GENDER IN THE UNITED STATES: AN INTEGRATED STUDY*, *supra* note 181, at 45, 47 (noting that the term “work” has increasingly come to be defined as meaning what men do, and explaining how women's work has been trivialized, ignored, and undervalued in economic and in political terms).

<sup>198</sup> See ANGELA Y. DAVIS, *WOMEN, RACE AND CLASS* 234-35 (1981). The devaluation of housework is most directly a byproduct of the Industrial Revolution, which necessitated a “generalized reevaluation of production.” *Id.* at 228. As the exchange value of a commodity became paramount, domestic labor was devalued as an inferior form of work because it did not generate profit. At the same time, women were “ideologically redefined as the guardi-

failure to recognize as workers those who perform domestic labor or who work in the home extends to women who labor in the home of another for pay, as well as to those who do piecework for employers in their own homes for pay.<sup>199</sup>

The perceived dichotomy between work done in the home and work done in the market significantly influences our understanding of how employers exploit women in waged work. As historically unpaid household laborers, women enter the waged labor market from an economically backward position, more vulnerable to exploitation than men. Isolated in the household setting, women are less likely to develop class consciousness as a proletariat—particularly a sense of the collectivism more easily perceived by workers in a factory or on an

ans of a devalued domestic life." *Id.* Angela Davis explains how this operated across racial boundaries:

The reality of women's place in nineteenth-century U.S. society involved white women, whose days were spent operating factory machines for wages that were a pittance, as surely as it involved Black women, who labored under the coercion of slavery . . . .

. . . Since popular propaganda represented the vocation of *all* women as a function of their roles in the home, women compelled to work for wages came to be treated as alien visitors within the masculine world of the public economy. Having outstepped their "natural" sphere, women were not to be treated as full-fledged wage workers.

*Id.* at 229. See generally Reva B. Siegal, *Home As Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 YALE L.J. 1073, 1092 (1994) (noting that in post-agrarian economies a woman's household work became an indistinguishable and invisible part of "family life" and that census measures of the post-Civil War economy characterized women's household work as "unproductive," excluding women who performed income-producing work in the home from the tallies of those "gainfully employed" (internal quotation marks omitted)); Silbaugh, *supra* note 146, at 81 (discussing the vision of housework as an expression of affection rather than a market exchange and consequent devaluation of housework); Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571, 1572-74 (1996) (listing assumptions underlying the market-oriented approach to ending women's economic subordination, and arguing that the failure to value and tax women's nonmarket work contributes to the false and gendered distinction between women's paid work in the market and women's unpaid work in the home).

<sup>199</sup> "The paid domestic worker is the victim of association with the unpaid domestic worker." Silbaugh, *supra* note 146, at 79. But see Dorothy E. Roberts, *Spiritual and Menial Housework*, 9 YALE J.L. & FEMINISM 51 (1997) (arguing that domestic work is segregated into its spiritual and menial aspects, with spiritual work more highly valued and performed primarily by privileged white women, and menial work devalued and performed by minority, immigrant, and working class women). Paid domestic workers are excluded from coverage under section 2(3) of the National Labor Relations Act, 29 U.S.C. § 152(3) (1994), and under a Occupational Safety and Health Act regulation, 29 C.F.R. § 1975.6 (1998). Moreover, the vast majority of state workers' compensation statutes excludes domestic workers. See Silbaugh, *supra* note 146, at 78. Similarly, the paid worker who does piecework for an employer in her home is typically viewed as an independent contractor beyond the reach of employment and labor laws. See Eileen Boris, *Organization or Prohibition?: A Historical Perspective on Trade Unions and Homework*, in *WOMEN AND UNIONS: FORGING A PARTNERSHIP* 207, 224 (Dorothy Sue Cobble ed., 1993). See generally *HOMEWORK: HISTORICAL AND CONTEMPORARY PERSPECTIVES ON PAID LABOR AT HOME* (Eileen Boris & Cynthia R. Daniels eds., 1989).

assembly line.<sup>200</sup> As women have moved into the waged labor market in increasing numbers, individual males have sought to keep women tied to the household performing the necessary work of keeping a home: preparing meals, cleaning, and raising children. These pressures have further hindered women's economic development by limiting their occupational choices to those that are compatible with the continued performance of unpaid homemaking duties<sup>201</sup> and by limiting the leisure time that women have available to invest in organizing activities. Finally, the failure to define women's work as work itself inhibits women's class consciousness and impairs opportunities for organizing around work as women experience it.<sup>202</sup>

One can deconstruct the division between family and market work further by examining slave women's work. As Jacqueline Jones has observed, "[i]f work is any activity that leads either directly or indirectly to the production of marketable goods, then slave women did

<sup>200</sup> See Bonacich, *supra* note 163, at 52-53.

<sup>201</sup> See Lucinda Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1125-26 (1986); Mary Jo Frug, *Securing Job Equality for Women: Labor Market Hostility to Working Mothers*, 59 B.U. L. REV. 55, 57-58 (1979). Debate rages about whether women employed in part-time jobs voluntarily select these jobs because the jobs are compatible with homemaking and child care obligations, or they are forced into them because these are the majority of jobs available. Compare Edward A. Lenz, "Contingent Work"—*Dispelling the Myth*, 52 WASH. & LEE L. REV. 755, 762-63 (1995), with Ann Bookman, *Flexibility at What Price? The Costs of Part-Time Work for Women Workers*, 52 WASH. & LEE L. REV. 799, 800-02 (1995), and Arne Kalleberg, *Part-Time Work and Workers in the United States: Correlates and Policy Issues*, 52 WASH. & LEE L. REV. 771, 776-79 (1995). Whichever it is, a disproportionate number of women work part-time at jobs in which they earn 60% of the average hourly wage of a full-time worker and are statistically likely to lack important fringe benefits such as pension and health insurance. See CHRIS TILLY, *SHORT HOURS, SHORT SHRIFT: CAUSES AND CONSEQUENCES OF PART-TIME WORK* 1, 10 (1990).

<sup>202</sup> See PAULINE HUNT, *GENDER AND CLASS CONSCIOUSNESS* 155 (1980). Hunt explains how women come to perceive their work in our dualistic economic system:

[W]ork as a housewife isn't work—it's 'being at home' (the place of leisure), work in the office or factory isn't work—it's 'getting out of the house for a bit' . . . . There is no possibility here of comradeship or unity in struggle . . . . [Women's] exploitation is invisible behind an ideology that masks the fact that they work at all—their work appears inessential.

*Id.* (quoting JULIET MITCHELL, *WOMAN'S ESTATE* 139 (1971)).

Similarly, paid labor-market jobs disproportionately likely to be filled by women are sometimes regarded by workers themselves as so low in the occupational hierarchy as to be outside the meaning of "labor." See RICHARD SENNETT & JONATHAN COBB, *THE HIDDEN INJURIES OF CLASS* 236 (1972) (noting the reduced autonomy and control over time that most service jobs involve, and hypothesizing that service workers view themselves as lower in status than nonservice workers in part because they are forced to define their own function in terms of the shifting demands of others and thus feel more dependent upon, and at the mercy of, their employers). Feminist researchers have argued that jobs traditionally held by women are typically associated with "female" character traits, such as passivity and docility, and involve job duties which are similar to those that women did in the home for no wage. See ROBERTA GOLDBERG, *ORGANIZING WOMEN OFFICE WORKERS: DISSATISFACTION, CONSCIOUSNESS, AND ACTION* 26 (1983). The strong association of service-sector jobs with women and their traditional (unpaid) labor in the home goes a long way toward explaining the undervaluation of paid service-sector jobs. See Silbaugh, *supra* note 146, at 79.

nothing *but* work"; not only did their work in the fields and in the white slaveholder's household produce value, but even their labors in caring for themselves and their families contributed to the value of the master's property because slaves were both productive workers and marketable commodities in themselves.<sup>203</sup> Yet as slaves, society perceived them as property rather than workers, so that the full measure of their exploitation went untheorized. The legacy of slavery and the continuing disproportionate allocation of menial household labor to black women reinforce both white supremacy and patriarchy, effectively rendering black female domestics a permanent service caste.<sup>204</sup>

## 2. *Women's Social Class Identity*

Because conventional class analysis ignored women's unpaid domestic work and devalued much of women's paid market work, it struggled both to define women's class status and to explain their role in the capitalist system. Women derived their class affiliations from their husbands' or fathers' occupational positions.<sup>205</sup> Assuming that families pool their resources, conventional class analysis viewed all family members as benefitting equally from the income-generating capacity of any single member. From this perspective, family wealth maximization strategies rationally privileged the husband's job and class imperatives because the husband typically earned the higher wage.<sup>206</sup>

Analysis of women's class affiliations as derivative reflects the cultural perception of women as "secondary" wage earners who work for "pin money."<sup>207</sup> Viewing women's class fortunes as linked to those of their husbands in turn justifies lower relative wages for women and

<sup>203</sup> Jacqueline Jones, *Black Women, Work, and the Family Under Slavery*, in *FAMILIES AND WORK* 84, 85 (Naomi Gerstel & Harriet Engel Gross eds., 1987).

<sup>204</sup> See BONNIE THORNTON DILL, *ACROSS THE BOUNDARIES OF RACE AND CLASS: AN EXPLORATION OF WORK AND FAMILY AMONG BLACK FEMALE DOMESTIC SERVANTS* 12-13 (1994). Blacks are more than three times, and Latinos more than twice, as likely as whites to be employed as domestic service workers in private households. See Edna Bonacich, *Inequality in America: The Failure of the American System for People of Color*, in *RACE, CLASS, AND GENDER: AN ANTHOLOGY*, *supra* note 142, at 96, 101.

<sup>205</sup> See REEVE VANNEMAN & LYNN WEBER CANNON, *THE AMERICAN PERCEPTION OF CLASS* 181 (1987); Zillah Eisenstein, *Constructing a Theory of Capitalist Patriarchy and Socialist Feminism*, in *WOMEN, CLASS, AND THE FEMINIST IMAGINATION* 114, 138 (Karen V. Hanson & Ilene J. Philipson eds., 1990); Wright, *Women*, *supra* note 192, at 37.

Studies of *women's* class perceptions show that it is only *men* who view women's class position as derivative. Women adopt a maximizing strategy, identifying by their individual occupational status if they are themselves managerial (regardless of their husband's occupation), or by affiliation with their husbands' class status if their husbands are managerial (regardless of their own occupation). Men, by contrast, tend to ignore their wives' jobs, identifying their class status solely by reference to their own occupations. See VANNEMAN & CANNON, *supra*, at 190.

<sup>206</sup> See Wright, *Women*, *supra* note 192, at 38.

<sup>207</sup> VANNEMAN & CANNON, *supra* note 205, at 181.

ties family benefits, such as health insurance and pensions, to male-dominated jobs.<sup>208</sup> Thus, this analysis justifies underpayment for women's waged labor while obscuring their nonwaged contributions to the wages earned by the head-of-household (male) worker.<sup>209</sup>

Black women challenge traditional models of class analysis. Since black women so often provide the sole or primary income for their families, models of social class that privilege the husband's occupation in ascertaining social class are particularly inappropriate for them.<sup>210</sup> Employment patterns for black men and women ensure black women's continuing attachment to the paid labor force. While black men's work in low-skilled manufacturing pays better than black women's work, it tends to be less secure and less plentiful than the lower-waged, but more secure domestic-service work often performed by black women.<sup>211</sup> Further, more black women than black men occupy professional and managerial positions. Consequently, black heterosexuals experience difficulty with intraracial assortative mating.<sup>212</sup> Accordingly, a larger percentage of black women head their households at all economic levels.<sup>213</sup>

Black women's disproportionate location in domestic service and agricultural labor, however, placed them outside the protection of the labor laws and contributed to their isolation from the labor movement, reinforcing the absence of black women's paid work in class-conflict theory.<sup>214</sup> When black women were employed in the industrial sector, they entered the bottom rungs of the hierarchy and found themselves engaged in physically demanding, intellectually deadening

<sup>208</sup> See Marion Crain, *Between Feminism and Unionism: Working Class Women, Sex Equality, and Labor Speech*, 82 GEO. L.J. 1903, 1915-19 (1994).

<sup>209</sup> See HUNT, *supra* note 202, at 182; Karen Brodtkin Sacks, *Generations of Working-Class Families, in MY TROUBLES ARE GOING TO HAVE TROUBLE WITH ME: EVERYDAY TRIALS AND TRIUMPHS OF WOMEN WORKERS* 15, 18 (Karen Brodtkin Sacks & Dorothy Remy eds., 1984) [hereinafter *My Troubles*].

<sup>210</sup> See PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT* 45 (Routledge Perspectives on Gender vol. 2, 1990).

<sup>211</sup> See *id.* at 59. Racial discrimination means that even families who elevate themselves to middle-class status are economically less secure than white middle-class families. See *id.* at 60.

<sup>212</sup> See *id.* at 61. Assortative mating refers to the tendency of men and women to marry others of a similar economic status. See MICKEY KAUS, *THE END OF EQUALITY* 31-32 (1992); CHRISTOPHER LASCH, *THE REVOLT OF THE ELITES AND THE BETRAYAL OF DEMOCRACY* 33 (1995).

<sup>213</sup> See COLLINS, *supra* note 210, at 61. bell hooks observes that these employment patterns simultaneously contribute to the tendency of black women to support patriarchy, and divide the black community. Bitter about the paid labor they must perform to help their families survive, black women sometimes direct their hostility and rage toward black men. Black women, who equate masculinity with the ability to be a primary or sole breadwinner, feel cheated and betrayed by black men who cannot or will not assume these roles, and their perception of black men as emasculated and contemptible reflects this. See BELL HOOKS, *AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM* 92-93 (1981).

<sup>214</sup> See COLLINS, *supra* note 210, at 45; Jones, *supra* note 203; King, *supra* note 194, at 65.



work.<sup>215</sup> Black women held some of the dirtiest and most degrading jobs in tobacco factories, cotton mills, and flour manufacturing; yet, class theorists and union organizers continued to ignore them.<sup>216</sup>

### 3. *Employer Interests in Exploitation by Sex*

Restricting women to the home historically served two purposes for employers: first, it prevented the disruption of the social order in the factories (and consequent interference with production) that would have prevailed if women had taken "men's" jobs in a time of mass unemployment;<sup>217</sup> second, preserving the home and family as a sanctuary for repair of body and soul ameliorated the trauma male industrial workers suffered from the fragmentation and degradation of factory labor.<sup>218</sup> Women not only physically reproduced the next generation of workers, but also socially reproduced existing workers, re-creating them each day so that they might go back into the plants and factories.<sup>219</sup> Hence, women's unpaid domestic labor indirectly supported capitalism, through women's contribution to family life.

New feminist research reveals other ways in which women's unpaid labor benefits employers.<sup>220</sup> Employers appropriate women's labor without their entering the waged-employment relation by shifting work to the consumer that was once paid work.<sup>221</sup> Thus, female consumers bag their own groceries, locate and collect their own merchandise in retail stores, serve themselves and their children at buffets or soft drink machines, bus their own tables in quick-order restaurants, pump their own gasoline, select and order merchandise from catalogues by telephone, and otherwise serve themselves rather than relying upon paid clerks to serve them.<sup>222</sup> This analysis provides an additional explanation for the low wage attached to the service occupations in which waged women are disproportionately located. As employers transfer retail service work to women consumers, they require fewer service workers, and they expect no special skill or knowledge of

<sup>215</sup> See COLLINS, *supra* note 210, at 43, 48.

<sup>216</sup> See KELLEY, *supra* note 195, at 27, 57.

<sup>217</sup> See ARONOWITZ, *supra* note 151, at 201.

<sup>218</sup> See *id.*

<sup>219</sup> See *id.* at 202.

<sup>220</sup> See Nona Y. Glazer, *Servants to Capital: Unpaid Domestic Labor and Paid Work*, in FAMILIES AND WORK 236, 236 (Naomi Gerstel & Harriet Engel Gross eds., 1987). See generally NONA Y. GLAZER, WOMEN'S PAID AND UNPAID LABOR: THE WORK TRANSFER IN HEALTH CARE AND RETAILING (1993).

<sup>221</sup> See Glazer, *supra* note 220, at 237. Women are more likely to be consumers because of their role in family caretaking, which typically includes purchasing groceries, meals, and clothing for their families. See *id.* at 241-44.

<sup>222</sup> See *id.* Glazer notes the class specificity of this work transfer, pointing out that the upper class has been less willing to tolerate work transfer reorganizations by capitalists, so that retailers must continue to provide clerk service in high-priced establishments catering to the wealthy. See *id.* at 244.

the product being sold of those who remain. Consequently, the wages of the remaining service workers inevitably decline.<sup>223</sup>

When women enter the waged-labor market, employers benefit by maintaining an occupationally segregated workforce in which the vast majority of women are restricted to low-paying, dead-end, minimal-benefit jobs.<sup>224</sup> Employers have a classwide interest in maintaining a labor force in which workers are occupationally segregated by sex, so that they can exploit the gender divisions to undermine the class solidarity of workers.<sup>225</sup> Sexism in the male working class allows employers to pay male workers lower wages in exchange for maintaining the gendered division of labor between the workplace (male) and the home (female).<sup>226</sup> In addition, employers can blunt women's resistance to managerial control by fragmenting their class and gender identities. Employers seek to control women's resistance on class grounds by forcing women to focus on their gender identity through sexual harassment and by segregating women in jobs with perceived feminine characteristics. Alternatively, employers will deny women's demands for gender-specific treatment, such as maternity leave, by stressing women's generic class identity.<sup>227</sup>

<sup>223</sup> See *id.* at 239, 247.

<sup>224</sup> See MILKMAN, *supra* note 174, at 5-6 (describing labor-market segmentation theory and its flaws); Heidi Hartmann, *Capitalism, Patriarchy, and Job Segregation by Sex*, in *WOMEN, CLASS, AND THE FEMINIST IMAGINATION*, *supra* note 205, at 146, 167 (describing labor-market segmentation theory's understanding of occupational segregation by sex as a capitalist structure which dilutes class unity by obfuscating the basic two-class nature of capitalism).

<sup>225</sup> See *id.*

<sup>226</sup> See CARNOY, *supra* note 161, at 51.

<sup>227</sup> See Karen J. Hossfeld, "Their Logic Against Them": *Contradictions in Sex, Race, and Class in Silicon Valley*, in *WOMEN WORKERS AND GLOBAL RESTRUCTURING* 149, 149-50 (Kathryn Ward ed., 1990). Hossfeld has documented how this fragmentation occurs in the Silicon Valley microelectronics production industry. See *id.* Although working class women have long done factory and wage work, the cultural ideology that such a role is unfeminine persists, based on an upper-class norm that women did not need and were not permitted to work outside the home. See *id.* at 158-59. Thus, women factory workers attempt to compensate for the perceived undermining of their femininity that results from their role as manual laborers, just as they attempt to compensate within their marriages for the perceived undermining of the male breadwinner identity that their waged-labor-force participation may entail. See *id.* at 164-65; see also ARLIE HOCHSCHILD, *THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* 222, 271-79 (1989) (observing that women who earned more than their husbands often performed the bulk of the housework in an effort to reinforce traditional gender roles that their usurpation of the breadwinner role undermined). By calling attention to women's gender identity through strategies such as sexual harassment, occupational segregation, hiring discrimination, color-coding uniforms by sex, and running columns in the company newsletter dealing with cooking and fashion tips, management reminds women workers that they are women first and encourages them to place this identity above their identity as workers. See Hossfeld, *supra*, at 160. None of the women in Hossfeld's study viewed their jobs as a primary part of their identity or as a source of self-esteem; their primary identities were wrapped up in family roles, with their waged work seen only as an economically necessary extension of their roles as family caretakers. See *id.* at 165. Yet when women workers seek work-related benefits resulting from their traditional family roles as child caretakers, they are told that such

Thus, by employing women at low wages, employers benefit from exploiting the prevalent gender ideology that home and family define women's primary identity, that family-related concerns are separate from work-related concerns, and that women's waged-labor-market work is less valuable than men's.<sup>228</sup> At the same time, however, employers sometimes benefit from treating male and female labor as interchangeable. For example, an employer can increase profits by substituting cheap female labor for more expensive male labor. Moreover, the presence of low-paid, part-time workers (who are disproportionately women vulnerable to exploitation because they are attempting to accommodate their paid-labor-market work to their unpaid homework) depresses the wages and benefits of full-time workers in related jobs.<sup>229</sup>

#### 4. *Male Workers' Interest in Exploiting Women Workers*

The question still remains why male workers and the male-dominated labor movement previously have not pursued a more vigorous strategy of inclusion. In an argument parallel to the split labor market theory, "dual systems" socialist feminists have shown how male workers profit by exploiting the paid and unpaid labor of female workers. In their view, patriarchy and capitalism, as dual systems, form a partnership to exploit women.<sup>230</sup> Dual systems analysis posits that male workers have a material interest in perpetuating a gendered division of labor because it enforces low wages for women and keeps them dependent on, and subordinate to, men at work and at home. Heidi Hartmann explains:

Low wages keep women dependent on men because they encourage women to marry. Married women must perform domestic chores for their husbands. Men benefit, then, from both higher wages and the domestic division of labor. This domestic division of labor, in turn, acts to weaken women's position in the labor market.<sup>231</sup>

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issues are not the employer's problem, or that they distract from women's focus on waged work and so legitimate the employer's devaluation of women's productivity. *See id.* at 162, 168.

<sup>228</sup> *See* Hossfeld, *supra* note 227, at 167-68.

<sup>229</sup> Full-time workers employed in labor market sectors where part-time workers constitute one-third of the workforce receive an average of \$1.21 less per hour than identical full-timers employed in industries where there are no part-time workers. *See* TILLY, *supra* note 201, at 12. Because employers can substitute part-time workers for full-time workers in related jobs, the larger the percentage of part-time workers in an industry, the lower the wages and benefits paid to the workers in that industry, even those who are employed full-time. *See id.*

<sup>230</sup> *See, e.g.*, Hartmann, *supra* note 224. Dual systems theory analyzes patriarchy and capital as separate systems of oppression and then assesses their dialectical relation to one another. Hartmann is perhaps the most well-known dual systems socialist-feminist theorist. *See* ROSEMARIE TONG, *FEMINIST THOUGHT: A COMPREHENSIVE INTRODUCTION* 179 (1989).

<sup>231</sup> Hartmann, *supra* note 224, at 147-48.

In Hartmann's view, patriarchy precedes capitalism, and job segregation by sex simply extends the traditional sexual division of labor in the home.<sup>232</sup> Thus, patriarchy "shapes the form that modern capitalism takes."<sup>233</sup>

This gendered division of labor more than merely dominates or oppresses women solely for gender power; it exploits women. Men appropriate the value of women's unpaid services in the home, while they also profit from the higher wages paid in occupations from which women are excluded by virtue of their unpaid care-taking duties.<sup>234</sup> Thus, if working class women and men intend to mount a unified class struggle against capitalist exploitation, men must relinquish their privileged positions in the labor market and forfeit the traditional division of labor at home.<sup>235</sup>

In an argument parallel to dual labor market theory, the socialist-feminist "unified systems" theory examines capitalism and patriarchy at their intersection rather than considering each separately.<sup>236</sup> This theory, promoted most strongly by Iris Young, posits that the marginalization of women and their function as a secondary labor force is an essential and fundamental characteristic of capitalism.<sup>237</sup> Capitalism was founded on a gender hierarchy that defined men as primary and women as secondary.<sup>238</sup> This arrangement serves capital owners' interests: women function as a reserve army of labor, available to absorb the slack in the economy in either direction as circumstances change.<sup>239</sup> Further, capital owners can use sexism to divide the workforce, thereby undermining class solidarity and suppressing the wages of higher-paid workers (men).<sup>240</sup>

<sup>232</sup> See *id.*

<sup>233</sup> *Id.*

<sup>234</sup> Traditional family law principles in most jurisdictions reinforce male appropriation of women's unpaid domestic labor, allocating disproportionate control over marital property to the wage-earner and clinging to remnants of the common law title system in the division of property at divorce. See Ann Laquer Estin, *Love and Obligation: Family Law and the Romance of Economics*, 36 WM. & MARY L. REV. 989, 998 (1995); see also Joyce Davis, *Enhanced Earning Capacity/Human Capital: The Reluctance To Call It Property*, 17 WOMEN'S RTS. L. REP. 109, 116, 120 (1996) (discussing family law's reluctance to recognize the contribution made by homemaker spouses to the acquisition of new forms of property by the wage-earner spouse).

<sup>235</sup> See Hartmann, *supra* note 224, at 168-69.

<sup>236</sup> See IRIS M. YOUNG, *Socialist Feminism and the Limits of Dual Systems Theory*, in *THROWING LIKE A GIRL AND OTHER ESSAYS IN FEMINIST PHILOSOPHY AND SOCIAL THEORY* 21, 32-35 (1990) [hereinafter YOUNG, *Socialist Feminism*]; IRIS YOUNG, *Beyond the Unhappy Marriage: A Critique of the Dual Systems Theory*, in *WOMEN AND REVOLUTION: A DISCUSSION OF THE UNHAPPY MARRIAGE OF MARXISM AND FEMINISM* 43, 50-56 (Lydia Sargent ed., 1981) [hereinafter Young, *Beyond the Unhappy Marriage*].

<sup>237</sup> See Young, *Beyond the Unhappy Marriage*, *supra* note 236, at 58.

<sup>238</sup> See *id.*

<sup>239</sup> See *id.* at 59-61.

<sup>240</sup> See *id.*

Unified systems theory goes beyond the dual labor market theory by observing the ways in which male workers as well as capital owners benefit from the gendered division of labor.<sup>241</sup> Male workers obtain a particular privilege, or heightened status, in this hierarchical arrangement. Thus, they rationally attempt to retain that privilege.<sup>242</sup> For example, one can understand sexual harassment as a systematic tool by which male workers replicate the gender hierarchy inside the labor market, a hierarchy reinforced by the capital owners' marketing of women's bodies as symbols of sexuality.<sup>243</sup>

### C. Prospects for Solidarity Across the Gender Divide

#### 1. *The Labor Movement's Role in Women's Exploitation*

Historically, the labor movement supported the vision of women as the physical and social reproducers of the next generation of (male) workers.<sup>244</sup> Through the family wage ideology, the labor movement proclaimed "the social right of the working class to the ideal of family and gender roles": female domesticity and male breadwinning.<sup>245</sup> Although this ideology did connect class issues of subsistence and justice to gender by asserting the right of the working class family to a living wage, it did so by advocating the male workers' privi-

<sup>241</sup> See *id.* at 61.

<sup>242</sup> See *id.*

<sup>243</sup> The relationship between these two phenomena—sexual harassment and the marketing of women's sexuality—is evidenced by the widespread use of pornography in hostile work environment sexual harassment. See YOUNG, *Socialist Feminism*, *supra* note 236, at 29; see also *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1495, 1497 (M.D. Fla. 1991) (finding that a hostile work environment existed in violation of Title VII, relying partly upon evidence of pictures and posters prevalent in the workplace that demeaned and sexualized women and their bodies, including: pornography hanging on the walls, advertising calendars featuring pin-up girls, a dart board depicting a woman's breast with the nipple serving as the bull's eye, and a picture of a woman's pubic area with a meat spatula pressed against it). The prevalence of sexual harassment in workplaces where the employer emphasizes women's sexuality in its marketing strategy, as in Hooter's and Stroh's beer, further evidences this relationship. See Morrison Torrey, *We Get the Message—Pornography in the Workplace*, 22 Sw. U. L. Rev. 53, 126-27 n.296 (1992).

<sup>244</sup> See Marion Crain, *Feminizing Unions: Challenging the Gendered Structure of Wage Labor*, 89 MICH. L. REV. 1155, 1162-66 (1990).

<sup>245</sup> Martha May, *Bread Before Roses: American Workingmen, Labor Unions and the Family Wage*, in *WOMEN, WORK AND PROTEST* 1, 5 (Ruth Milkman ed., 1985) [hereinafter May, *Bread Before Roses*]; see also ALICE KESSLER-HARRIS, *OUT TO WORK* 153 (1982); Martha May, *The Historical Problem of the Family Wage: The Ford Motor Company and the Five Dollar Day*, in *FAMILIES AND WORK*, *supra* note 220, at 111, 122 [hereinafter May, *Family Wage*]. In May's view, the family wage was a concession which employers made to unionists who sought higher wages; for Ford Motor Company, the wage was tied to the family structure because the company believed that the presence of a dependent female domestic worker was a stabilizing force for the male worker-breadwinner, and thus ultimately profitable for the company. See *id.* at 122-25. It produced lower turnover rates and stifled demands for unionization at a key juncture. See *id.* at 120-23. It also legitimated low female wages, providing still another advantage for employers. See *id.* at 125.

lege to enjoy wives who were not burdened by duties outside the home and were instead available to fulfill their maternal obligations to their children.<sup>246</sup> Although the family wage ideology linked women's work in the home to capitalist productivity through the wage paid to the male breadwinner,<sup>247</sup> it ultimately reinforced gender distinctions in work roles and divided the spheres of home and market along gender lines even further, attaching value only to work done in the market.<sup>248</sup>

The labor movement also embraced the depiction of women as secondary wage earners. The movement viewed men as breadwinners, while it viewed women as oriented "primarily toward marriage, home-making, and the rearing of children."<sup>249</sup> Further, the labor movement saw family and job as dichotomous, conflicting with one another and competing for women's time and commitment.<sup>250</sup> For women, family came first.<sup>251</sup> From this perspective, assumptions arose about the permanence of work or lack thereof for women; the paid-labor experience was thought to be "merely an interlude between school and marriage," so that the union meeting became "a poor competitor with 'dates' for her free time."<sup>252</sup> The movement considered married women's paid work supplementary to the family income, often reserved for "extras" or "luxuries," while men's income met basic living expenses.<sup>253</sup> Ultimately, industrial relations scholars and union organizers asserted that women were difficult to organize or even unorganizable, docile once organized, and questioned women's commitment to class struggle.<sup>254</sup>

<sup>246</sup> See May, *Bread Before Roses*, *supra* note 245, at 8-9.

<sup>247</sup> See May, *Family Wage*, *supra* note 245, at 124.

<sup>248</sup> See *id.* at 124-25; see also Glazer, *supra* note 220, at 250.

<sup>249</sup> JOEL SEIDMAN ET AL., *THE WORKER VIEWS HIS UNION* 9 (1958); see also ARONOWITZ, *supra* note 151, at 297. Aronowitz notes that the Department of Labor gave women's supposed role as secondary wage earners "the status of a statute" by classifying "married women as 'secondary wage earners.'" *Id.* at 208-09.

<sup>250</sup> See Crain, *supra* note 244, at 1178-79.

<sup>251</sup> See Myra Marx Ferree, *Sacrifice, Satisfaction, and Social Change: Employment and the Family*, in *MY TROUBLES*, *supra* note 209, at 61, 62. By contrast, "sociologists . . . see the relationship, for men, between family and job as one of mutual support and complementarity." *Id.* at 62. While it is certainly true that employment in the United States is structured in such a way that it conflicts with women's performance of family care obligations, this conflict is a byproduct of the structure of full-time employment and the expectations surrounding it—expectations created around a model of a male head of household with dependent spouse-homemaker—rather than existing in women's heads or their psyches. See *id.* at 63.

<sup>252</sup> SEIDMAN ET AL., *supra* note 249, at 9.

<sup>253</sup> See HUNT, *supra* note 202, at 150-51, 182; Ferree, *supra* note 251, at 71.

<sup>254</sup> As Aronowitz explained:

[W]omen are believed by union leaders to be the group most resistant to labor organization. Their alleged temporary tenure on their jobs, the widespread beliefs that they are "secondary" wage earners who enter the labor market for extra money and can leave it at any time, that they tend to be

From the unions' perspective, women were "a serious competitive menace," affecting men's livelihood and job security as well as their very masculinity (a large part of men's gender role depended on breadwinning).<sup>255</sup> Where women assumed historically male work roles associated with heavy industrial work, they particularly imperiled masculinity.<sup>256</sup> In these jobs, women threatened both male gender identity and male social and economic dominance.<sup>257</sup> Class-conscious unionists responded to the competitive menace that women posed in three stages. First, they supported protective legislation limiting the

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more dependent upon and loyal to the company than men, and that internecine warfare constantly rages among them are some of the notions that make male-dominated unions reluctant to recruit women.

ARONOWITZ, *supra* note 151, at 297. Vanneman and Cannon assert that

[t]he traditional stereotype has questioned women's commitment to class struggle; it has regarded their employment as a source of "pin money" and concluded that their grievances are either borne patiently (because temporary) or avoided by withdrawal. Women have long been reputed to be poor candidates for union organization and, once organized, to have dubious staying power during strikes.

VANNEMAN & CANNON, *supra* note 205, at 181. See generally Crain, *supra* note 244, at 1171-84 (detailing and deconstructing stereotypes about women's "unorganizability").

Nevertheless, many scholars have documented the fierce solidarity and class consciousness—albeit often displayed in a different form than that typical of male unionists—of which women workers are capable. See, e.g., DILL, *supra* note 204, at 90-96 (cataloguing "stories of resistance" of black female domestic workers who set limits through chicanery, pilfering, and detachment from the job, and resisted ever more invasive employer demands in an effort to maintain self-respect); KAREN BRODCKIN SACKS, *CARING BY THE HOUR: WOMEN, WORK, AND ORGANIZING AT DUKE MEDICAL CENTER* (1988) (describing sustained organizing drive in which the predominantly black female workforce mobilized internal structures of women's work groups and community and family networks); RUTH SIDEL, *WOMEN AND CHILDREN LAST: THE PLIGHT OF POOR WOMEN IN AFFLUENT AMERICA* 62-66 (1986) (describing experience of Local 34 of the Federation of University Employees, an affiliate of the Hotel Employees and Restaurant Employees International at Yale University, which successfully organized and bargained on behalf of a large and diverse unit of clerical and technical workers, 82% of whom were women); Cynthia B. Costello, *Women Workers and Collective Action: A Case Study from the Insurance Industry*, in *WOMEN AND THE POLITICS OF EMPOWERMENT* 116 (Ann Bookman & Sandra Morgen eds., 1988) (describing the capacity of clerical workers in a small Wisconsin insurance firm to respond to authoritarian management policies with militant collective action); Hossfeld, *supra* note 227, at 171-73 (describing how women workers in the Silicon Valley deliberately used management's gender logic against it, playing on white male managers' cultural misconceptions about gender by exploiting their stereotypical ideas about hormonal shifts, arm strength, and the importance of manicures to women); Louise Lamphere, *On the Shop Floor: Multi-Ethnic Unity Against the Conglomerate*, in *MY TROUBLES*, *supra* note 209, at 247 (describing daily resistance strategies employed by female piece-rate garment workers); Nina Shapiro-Perl, *Resistance Strategies: The Routine Struggle for Bread and Roses*, in *MY TROUBLES*, *supra* note 209, at 193 (describing nontraditional shop floor resistance strategies utilized by female costume jewelry workers, and arguing that they reflect a silent, militant struggle by workers for control over the production process).

<sup>255</sup> SIDNEY M. PECK, *THE RANK-AND-FILE LEADER* 181, 185-91 (1963).

<sup>256</sup> See *id.* at 181.

<sup>257</sup> See *id.* at 182; see also Crain, *supra* note 42, at 19-20 (describing how sexual harassment is in part a response to the threat that women entering historically male occupations pose to male gender identity and to male social dominance).

work that women could do.<sup>258</sup> Later, they used their superior organizational power through unionism to maintain and perpetuate sex-segregated job structures.<sup>259</sup> Finally, they advocated equal pay for women in an effort to prevent employers from using female labor to undercut the male wage structure.<sup>260</sup>

Organized labor's approach to the economic exploitation of black women offered even less hope that labor unionism would significantly improve their lives.<sup>261</sup> Samuel Gompers advocated the return of women to the home and the exclusion of blacks from unions, or at least from the most economically rewarding positions in the crafts.<sup>262</sup> Thus, organized labor denied black males a family wage (adequate to support their families), doubly disadvantaging black women.<sup>263</sup> Even when unions began organizing black male and female workers, they continued to reproduce white supremacy and male privilege within the workforces that they represented.<sup>264</sup>

## 2. *The Gendered Character of Class Consciousness*

For decades, women unionists have asked whether society can transform the unionism culture to accommodate the female work experience.<sup>265</sup> The masculine culture of unionism arises from the labor movement's history and construction of class consciousness as well as from our male-as-worker, male-as-breadwinner understanding of work.<sup>266</sup> Incubated in bars and taverns, and permeated with language

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<sup>258</sup> See Bonacich, *supra* note 163, at 53.

<sup>259</sup> See Hartmann, *supra* note 224, at 168.

<sup>260</sup> See PECK, *supra* note 255, at 204-05, 208; Bonacich, *supra* note 163, at 53. However, class-conscious unionism failed to respond to the male workers' gender-dominance concerns; indeed, the issue was never addressed inside the labor movement, as no one saw the "woman question" as raising issues about the role of gender in employers' exploitation of workers. See PECK, *supra* note 255, at 208.

<sup>261</sup> See King, *supra* note 194, at 63.

<sup>262</sup> See FONER, *supra* note 184, at 430-31; King, *supra* note 194, at 64.

<sup>263</sup> See King, *supra* note 194, at 64.

<sup>264</sup> See Williams & Smith, *supra* note 152, at 71-72 (evaluating occupational segregation by race and sex and its impact on job grading and wage determination in Local 35, the service and maintenance union at Yale University, and finding that whiteness and maleness correlate with higher salary grades and wages).

<sup>265</sup> See THERESA WOLFSON, *THE WOMAN WORKER AND THE TRADE UNIONS* 24-25 (1926). See generally ROCKING THE BOAT: UNION WOMEN'S VOICES, 1915-1975 (Brigid O'Farrell & Joyce L. Kornbluh eds., 1996) (describing union women's struggles to organize and empower themselves through the labor movement); ANNEISE ORLECK, *COMMON SENSE & A LITTLE FIRE: WOMEN AND WORKING CLASS POLITICS IN THE UNITED STATES, 1900-1965* (1995) (describing the careers of four women union organizers and activists—Rose Schneiderman, Pauline Newman, Fannia Cohn, and Clara Lemlich Shavelson—who fought for inclusion of women and women's interests in the labor movement).

<sup>266</sup> See WOLFSON, *supra* note 265, at 55 ("The business of making a living, as we understand it, is still fundamentally a man's business. Small wonder, therefore, that the rules of game are men's rules, and that those rules when applied to women cause friction, to say the least.").



such as "brothers" and "brotherhood," male labor did not construct unionism as either accessible to or comfortable for women.<sup>267</sup> On account of the masculine nature of unionism and its preoccupation with job-based identity, unions visualize workers as unisex and assume that men and women form their class consciousness in the same way, that they perceive the significance of workplace issues similarly, and that they resist managerial control through the same means.<sup>268</sup> Consequently, union organizing occurs at the workplace rather than in the community,<sup>269</sup> union organizers disproportionately target industrial workers rather than service-sector workers, and unions mobilize workers primarily around job-based issues like wages, hours, and overtime pay rather than around family-based or gendered concerns such as child care benefits, family care leave, sexual harassment, and unequal pay.<sup>270</sup>

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<sup>267</sup> See HUNT, *supra* note 202, at 160-61; see also ELIZABETH FAUE, *COMMUNITY OF SUFFERING & STRUGGLE: WOMEN, MEN, AND THE LABOR MOVEMENT IN MINNEAPOLIS, 1915-1945*, at 6 (1991). Unfortunately, this masculine culture is not solely a matter of historical significance. Last year, the International Brotherhood of Teamsters considered changing its name to reflect the growing numbers of women in the Teamsters' ranks. The name-change proposal was voted down two-to-one, with one union member explaining that "employers would think we're a bunch of [wimps]." Paulette Thomas, *A Special News Report About Life on the Job and Trends Taking Shape There*, WALL ST. J., Oct. 1, 1996, at A1 (alteration in original) (internal quotation marks omitted); see also Frank Swoboda, *Teamsters Vote: It Ain't Heavy, It's Their Brotherhood*, WASH. POST, July 18, 1996, at D10. But see *ILWU Convention Votes Name Change*, 1997 Daily Lab. Rep. (BNA) No. 87, at A-9 (Apr. 6, 1997) (reporting that the International Longshoremen's & Warehousemen's Union has adopted a gender-neutral name, the International Longshore & Warehouse Union, in recognition of its significant female membership).

<sup>268</sup> See HUNT, *supra* note 202, at 2; Marion Crain, *Gender and Union Organizing*, 47 INDUS. & LAB. REL. REV. 227, 245 (1994).

<sup>269</sup> See HUNT, *supra* note 202, at 159. Several writers have suggested that the assumption that the workplace is the primary site of class conflict is both gendered and raced, preventing a more radical mobilization strategy which would utilize community-based organizing and reach out to the unemployed as well as the employed. See FAUE, *supra* note 267, at 4; LEON FINK, *IN SEARCH OF THE WORKING CLASS: ESSAYS IN AMERICAN LABOR HISTORY AND POLITICAL CULTURE* 242-43 (1994); LEGGETT, *supra* note 195, at 145, 151-52.

<sup>270</sup> See HUNT, *supra* note 202, at 160-62. Just as racism does not shape whites' daily experience and sense of self, so that whites can look upon racism as an issue faced by people of color, antiracist work by whites becomes an "optional, extra project, but not one intimately and organically linked to our own lives." RUTH FRANKENBERG, *WHITE WOMEN, RACE MATTERS: THE SOCIAL CONSTRUCTION OF WHITENESS* 6 (1993). Sexual harassment and conflicts between work and family responsibilities are not part of men's daily life experience and thus do not shape their identity, so that men categorize these issues as "women's issues" that are external to them. See KELLEY, *supra* note 195, at 27 (noting that union leaders have failed to see problems of sexual harassment as important collective bargaining issues, particularly when it is racialized or occurs between workers); Stan Gray, *Sharing the Shop Floor*, in RACE, CLASS AND GENDER: AN ANTHOLOGY, *supra* note 142, at 462 (arguing that "many men pay lip service to women's rights," but do not confront the sexism of their brothers on the shop floor because they do not see that sexism is harmful to their long-term interests and ultimately undermines class solidarity).

The gendered nature of issue definition by working class men and women, however, is sometimes even more subtle. For example, the ways in which male-dominated unions and

Further, mobilization around class interests has sometimes taken explicitly gendered forms. All-male work groups frequently bond around sexual entendre, sports, and horseplay; some researchers have characterized such gender-conscious bonding as class consciousness.<sup>271</sup> Some female unionists have asserted that organizing women will require either some parallel form of gender-conscious bonding or, at the very least, an understanding of women's life experience, language, and culture.<sup>272</sup> Similarly, ample evidence illustrates that worker resistance to employer exploitation sometimes assumes gender-specific forms.<sup>273</sup> Women workers disproportionately employ resistance strategies that are less overtly confrontational and therefore

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women-centered unions have perceived and responded to the introduction of technology into the workplace differ significantly. Feminist research suggests that the introduction of new technology into the workplace becomes the vehicle through which both class and gender struggles rage: historically, technology has been used to deskill and degrade women's work, to further entrench the sexual division of labor, to cement job segregation, and to justify low wages for women. See Helen Marchant, *Women and Technology*, Soc. DEV. ISSUES, Winter 1987, at 54, 62, 67. For workers on the bottom of the occupational hierarchy, high-tech culture carries with it the risk of ever more extreme marginalization. See DONNA J. HARAWAY, SIMIANS, CYBORGS, AND WOMEN: THE REINVENTION OF NATURE 169 (1991).

Thus, while most male-dominated American unions have presented little opposition to management's use of technology to deskill, ceding the right to control the work process to management as long as the fruits of enhanced productivity are shared with the remaining workers through higher wages or other economic benefits, unions with a significant complement of women members have not been as complacent. Some have made challenging the technological restructuring of work a central part of their struggle. Compare Robert Howard, *High Tech Control of Workers*, in THE RESHAPING OF AMERICA: SOCIAL CONSEQUENCES OF THE CHANGING ECONOMY 109, 119-20 (D. Stanley Eitzen & Maxine Baca Zinn eds., 1989) (describing historical passivity of American unions), with HARAWAY, *supra*, at 172 (noting SEIU District 925's emphasis on technical restructuring of work), and Howard, *supra*, at 120-21 (describing shift toward attempting to gain more control for workers manifested in CWA policy).

<sup>271</sup> See RICK FANTASIA, CULTURES OF SOLIDARITY: CONSCIOUSNESS, ACTION, AND CONTEMPORARY AMERICAN WORKERS 79-80 (1988); Michael Yarrow, *The Gender-Specific Class Consciousness of Appalachian Coal Miners: Structure and Change*, in BRINGING CLASS BACK IN: CONTEMPORARY AND HISTORICAL PERSPECTIVES, *supra* note 188, at 285, 304-06 (documenting the gendered nature of class consciousness in Appalachian coal miners, and finding that "[m]iners' gender consciousness reinforces their class consciousness by stiffening their class militance with masculine toughness and cementing their solidarity with male bonding" and spawning a sense of indignation at the unmanly subordination they experience at work); cf. Gray, *supra* note 270, at 470-71 (describing how male bonding around masculine workplace cultures functions as a form of rebellion against the perceived civilizing discipline imposed by women in the family sphere, and operates to exclude women workers and undermine class unity); Yarrow, *supra*, at 303-04 (noting that male bonding can be an obstacle to class solidarity when it occurs across managerial lines, resulting in a "shared hostility of foreman and male miners to the introduction of women into the mines," and describing how this hostility takes the form of intraclass sexual harassment aimed at women who seek to enter the mines, or when the masculine character with which hard, dangerous work is endowed obscures the reality of class exploitation).

<sup>272</sup> See WOLFSON, *supra* note 265, at 130, 133-34; Crain, *supra* note 268, at 245-46.

<sup>273</sup> See Hossfeld, *supra* note 227, at 170-71; see also *supra* note 254 and accompanying text.

less risky for vulnerable workers than work stoppages and filing grievances.<sup>274</sup> For example, work sabotage, pacing, slowdowns, and pilferage abound among the most vulnerable workers, yet they are rarely recognized as evidence of class militance.<sup>275</sup>

Thus, in order to be truly effective in organizing and representing women, the labor movement cannot simply pull women into the fold; unionism must undergo a fundamental transformation to be relevant to the many women clustered in the service sector. The labor movement must rethink at least the following class and gender issues: (1) the ways in which service sector employment differs from industrial sector work (including the interjection of the customer or patient into the employer-worker dyad, the personal and collaborative relationships that characterize service sector employer-employee interactions, and the semi-autonomous nature of some service sector jobs); (2) the growth of contingent employment (including part-time, temporary, leased, and off-site workers); (3) the shift of worksites to "virtual offices" and, increasingly, to the home; and (4) the breakdown of the historical separation between home and work in workers' lives that occurs when a full-time caretaker-homemaker spouse does not exist to support the wage-earner spouse.<sup>276</sup>

Many feminists believe that class struggle will liberate women only if women form separate organizations and unite with men from a separate base of power because "[m]en have more to lose than their chains" in an alliance with women workers.<sup>277</sup> Otherwise, men's immediate self-interest in exploiting women may predispose them to the status quo or some less egalitarian economic system than the one women demand.<sup>278</sup>

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<sup>274</sup> See Hossfeld, *supra* note 227, at 170-71.

<sup>275</sup> See *id.*

<sup>276</sup> See Dorothy Sue Cobble, *The Prospects for Unionism in a Service Society*, in *WORKING IN THE SERVICE SOCIETY*, *supra* note 132, at 333, 336-40; see also Susan C. Eaton, "The Customer Is Always Interesting": *Unionized Harvard Clericals Renegotiate Work Relationships*, in *WORKING IN THE SERVICE SOCIETY*, *supra* note 132, at 291, 320-21 (explaining that, although control over work has been a primary issue for industrial sector employees, it is "too simplistic a category of analysis in the clerical context," because "the product of much [clerical] work is a relational interaction, not a commodity").

<sup>277</sup> Heidi Hartmann, *The Unhappy Marriage of Marxism and Feminism: Towards A More Progressive Union*, in *WOMEN AND REVOLUTION: A DISCUSSION OF THE UNHAPPY MARRIAGE OF MARXISM AND FEMINISM*, *supra* note 236, at 1, 32-33.

<sup>278</sup> See *id.* Scholars have made parallel arguments with regard to aspects of racial and heterosexual privilege. See, e.g., Gloria Joseph, *The Incompatible Menage À Trois: Marxism, Feminism, and Racism*, in *WOMEN AND REVOLUTION: A DISCUSSION OF THE UNHAPPY MARRIAGE OF MARXISM AND FEMINISM*, *supra* note 236, at 91; Christine Riddiough, *Socialism, Feminism and Gay/Lesbian Liberation*, in *WOMEN AND REVOLUTION: A DISCUSSION OF THE UNHAPPY MARRIAGE OF MARXISM AND FEMINISM*, *supra* note 236, at 71. Just as women cannot trust men to give up their gender privilege, black women cannot trust white women to give up racial privilege, nor can lesbian and gay workers trust heterosexuals to examine heterosexual privilege. See Joseph, *supra*, at 104-05; Riddiough, *supra*, at 73-34. These analyses also sug-

We agree that only separately organized women's unions will ensure that women's exploitation within capitalism becomes a central aspect of the struggle against capitalism.<sup>279</sup> The alternative—allowing the labor movement to marginalize women's interests by channeling women's issues into the feminist movement—hurts both women and unions. While internal reform of labor unions in more liberatory directions<sup>280</sup> is a positive step, it does not go far enough toward overriding the compelling forces militating towards maintaining the status quo.<sup>281</sup>

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gest that separate bases of organization may be necessary in order for each group to be heard. See Joseph, *supra*, at 105.

For example, the fact that lesbians as a group are permanently denied access to sharing in a male wage and benefits associated therewith through marriage makes their class position different from that of gay men or heterosexual women. See Petchesky, *supra* note 196, at 229. Low female wages also reinforce compulsory heterosexuality because heterosexual marriage becomes a matter of economic necessity for women who cannot subsist on their own incomes, or even the combined incomes of two women. Thus, lesbian women have a stronger stake in class struggle than heterosexual women do; raising women's wages and making it possible for women to exist economically outside heterosexual marriage has obvious liberatory implications for those wishing to form life partnerships with other women as an alternative to heterosexual marriage. See Lisa Duggan, *The Social Enforcement of Heterosexuality and Lesbian Resistance in the 1920s*, in CLASS, RACE, AND SEX: THE DYNAMICS OF CONTROL, *supra* note 196, at 75, 76-77.

<sup>279</sup> Possible directions include adding women's departments, promoting women to positions of power within unions, beginning a dialogue about difference, and hiring more female and union organizers.

<sup>280</sup> See YOUNG, *Socialist Feminism*, *supra* note 236, at 30-31; Young, *Beyond the Unhappy Marriage*, *supra* note 236, at 62-63.

<sup>281</sup> Although we are sympathetic to the views and proposals that Molly McUsic and Michael Selmi express in their essay *Postmodern Unions: Identity Politics in the Workplace*, see *supra* note 2, we do not share their optimism about the willingness of the labor movement to transform itself from within when it is hobbled by legal doctrines which reflect and reinforce the principle of majority rule at every turn. McUsic and Selmi propose a cosmopolitan renaissance—a celebration of difference within a community committed to solidarity—within unions as a means of charting a course between the twin dilemmas of fragmentation and erasure. See McUsic & Selmi, *supra* note 2, at 1341. They outline some general internal union reforms and observe that empathy and an open dialogue about difference are key to such a course. See *id.* at 1366, 1371-72. While we agree with these sentiments and proposals, and have at times been advocates of them ourselves, see, e.g., Crain, *Feminism, Labor, and Power*, *supra* note 6, at 1868-69, we no longer view them as sufficient. In our view, the argument itself demonstrates the barriers posed by majority rule. For example, McUsic and Selmi suggest that unions "eschew a majoritarian perspective" and "reconsider majority rule as the principal decisionmaking technique within the union," casting aside the goal of finding a position that can obtain majority support in favor of an open dialogue about one which might serve the interests of all. McUsic & Selmi, *supra* note 2, at 1369, 1371. While this goal is laudable and is one which we support wholeheartedly, it seems to us to be asking too much of unions to initiate this course in the context of a labor law which imposes upon them a legal duty to advocate on behalf of the majority.

## V

THE RISKS OF A UNITED FRONT STRATEGY IN A CONTEXT OF  
INTRACLASSEXPLOITATION

Thus far we have argued that the unidimensional vision of the race- and sex-privileged worker promoted by unionism and labor law has circumscribed which workers are organized, the sites where the organizing occurs, the subjects around which organizing is done, and the form that worker protest assumes.<sup>282</sup> In short, privilege has confined the agenda of the labor movement. In the context of a labor law regime imposing a legally coerced united front, the existence and suppression of intraclass conflict have also undermined labor's ability to respond effectively to employers' divide-and-conquer strategies. Labor's inability to respond to these strategies makes it easier for employers to divide the workforce and creates a representation gap for the most marginalized workers.

In this section, we argue that although common class interests and the presence of a common enemy *can* unite workers, an effective mobilization strategy must also recognize the potentially divisive nature of gender and race. Although the united front ideology and the vision of a working class unified by its common interest have intuitive appeal as ideals, they cannot serve as methods to achieve those ideals when exploitative intraclass relations also exist. In order to overcome the divisions among workers, the labor movement and labor law must first take affirmative steps to become conscious of them. Refusing to acknowledge divisions along race and gender lines only entrenches them, maintains the status quo, and reinforces privilege.<sup>283</sup> Among other things, this means that, rather than pretending unity, the labor movement must recognize and confront the barriers that racial, gender, heterosexual, and class privilege pose to solidarity. It must acknowledge differences in interest where they exist and develop strategies in which control is shared.<sup>284</sup> We begin by returning to our starting point: *EEOC v. Mitsubishi Motor Manufacturing of America, Inc.*

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<sup>282</sup> See *supra* Part IV.B.

<sup>283</sup> See LOPEZ, *supra* note 135, at 176-77, 179 (discussing the same problem in the context of the debate between color-blindness and race-consciousness). A focus on sameness and refusal to acknowledge the material significance of differences reinforces racism and sexism, while race- and gender-consciousness oppose it. See FRANKENBERG, *supra* note 270, at 157, 162 (finding that white women who focused on sameness tended to deny the significance of color and to strive not to notice it, while race-cognizant women demonstrated a "new sense of self: a sharpened awareness of how racism had structured their own lives and of the extent to which their own thinking had been, and continued to be, informed by racism").

<sup>284</sup> See Kline, *supra* note 125, at 53; see also LIPSITZ, *supra* note 142, at 56 (arguing that unification across ethnic and racial divides can only be achieved if "we examine honestly and critically the things that divide us in the present").

A. *EEOC v. Mitsubishi Motor Manufacturing of America, Inc.*

Did the men at Mitsubishi simply dominate their female co-workers, so that the union might have represented both adequately? Or did a relationship of exploitation exist that placed the union in an inherently conflicted position as the representative of both groups? Would a separate representative have better served the women? Would it have better served the *men*?

1. *Why Did the Harassment Occur?*

Sociologists have explained that hostile work environment harassers have two goals: first, they seek to maintain the individual male worker's privileged position vis-à-vis the victim and the larger social structure of male dominance; second, they attempt to preserve a male monopoly over high-wage jobs.<sup>285</sup> Male workers employed in traditionally male occupations tend to perpetrate the most severe harassment against their female peers.<sup>286</sup> Since the gender and class identities of men are intertwined in masculinized jobs, the entry of female workers into these occupations threatens male workers' gender and class interests.<sup>287</sup> Hostile work environment sexual harassers seeking to preserve high-wage jobs as male turf engage in planned, self-aware behavior designed to remind women of their "female fragility"<sup>288</sup> and their status as trespassers, and to warn them that they venture into male territory at their own risk.<sup>289</sup>

The dynamics at Mitsubishi illustrate the turf-guarding function of worker-on-worker sexual harassment. Analysts speculated that the coworker harassment was a reaction by men to the unusually high

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<sup>285</sup> See MARTHA J. LANGEAN, *BACK OFF!: HOW TO CONFRONT AND STOP SEXUAL HARASSMENT AND HARASSERS* 41-42, 45-50 (1993). See generally Crain, *supra* note 42, at 18-22 (discussing research documenting motives of harassers). See also Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 *YALE L.J.* 1683, 1690-91 (1998) (arguing that sexual harassment is primarily motivated by gender-based considerations rather than sexual ones, driven not by the desire for sexual domination, but by a desire to preserve favored lines of work—and the wage superiority, sense of identity and manhood, and other privileges associated therewith—as masculine territory).

<sup>286</sup> See Crain, *supra* note 42, at 27.

<sup>287</sup> See Edward Lafontaine & Leslie Tredeau, *The Frequency, Sources, and Correlates of Sexual Harassment Among Women in Traditional Male Occupations*, 15 *SEX ROLES* 433, 439 (1986) (finding that male peers who lack an institutional basis for their authority over women in the workplace may utilize sexual harassment as one of the few avenues available to assert power over women there); The People, *Socialism Would Reduce Sexual Harassment*, in *SEXUAL HARASSMENT* 106, 107 (Carol Wekesser et al. eds., 1992) (citing a study finding that most incidents of sexual harassment stem from efforts by male workers to retain their labor market advantage by harassing women who attempted to enter traditionally male jobs).

<sup>288</sup> Suzanne C. Carothers & Peggy Crull, *Contrasting Sexual Harassment in Female- and Male-Dominated Occupations*, in *MY TROUBLES*, *supra* note 209, at 219, 224.

<sup>289</sup> See LANGEAN, *supra* note 285, at 47-48; Michael S. Kimmel, *Clarence, William, Iron Mike, Tailhook, Senator Packwood, Spur Posse, Magic . . . and Us*, in *TRANSFORMING A RAPE CULTURE* 119, 131 (Emilie Buchwald et al. eds., 1993).

number of women (twenty percent of the workers at the Normal, Illinois plant were women) who were hired into the desirable high-waged jobs (salaries were as high as \$50,000 per year) in this relatively new plant.<sup>290</sup> Workers who served on the hamstrung UAW civil rights committee confirmed that Local 2488 union officials responded to harassment complaints with the quip "Hey, McDonald's is always hiring."<sup>291</sup>

The male unionists at Mitsubishi who perceived female entry into their traditionally male-dominated occupations as a threat to the job market for men and to their traditional role as breadwinners thus possessed an inherent conflict of interest with women who were in the same bargaining unit and who were represented by the same union.<sup>292</sup> Although Mitsubishi exploited this division between men and women by organizing the anti-EEOC protests in an effort to undermine union solidarity, the male workers had an independent economic interest in maintaining their gender-privileged status as high-wage earners. Thus, while the sexual harassment at Mitsubishi superficially appears to have been about sex and maintaining a gender hierarchy, it was also about class and maintaining an economic hierarchy.

## 2. *Why Didn't the Union Represent the Women's Interests?*

The UAW explained its passive response to the women autoworkers' claims by declaring that its primary duty was to protect the jobs of its members and that preserving job security took precedence over pursuing sexual harassment complaints; sexual harassment was the employer's problem.<sup>293</sup> This explanation placed the union in a reactive position and created two different problems for it. First, the union's position misunderstood and underestimated the nature of sexual harassment and the harm it caused to its victims.<sup>294</sup> Unredressed hostile work environment sexual harassment poses a serious risk of loss of employment for its victims,<sup>295</sup> making the women's com-

<sup>290</sup> See Fetherston, *supra* note 34; MacNeil/Lehrer News Hour, *supra* note 9.

<sup>291</sup> Sharpe, *supra* note 21, at A1 (quoting Sandra Gilbert, former head of the union's civil rights committee).

<sup>292</sup> See Barbara Shaman, *Outside Machinist*, in ALONE IN A CROWD: WOMEN IN THE TRADES TELL THEIR STORIES 164, 170 (Jean R. Schroedel ed., 1985). Even the union's informal efforts to persuade harassers to stop harassing reflected gendered assumptions about the breadwinner role: the local's president said that he told one harasser, "[If you don't stop, y]our family is going to lose its job." Sharpe, *supra* note 21, at A1.

<sup>293</sup> See Sharpe, *supra* note 21, at A1. Again, this response by the union is quite typical of the way in which the majority of unions view their obligations to members in this situation. See Crain, *supra* note 42, at 34-35.

<sup>294</sup> See James E. Gruber & Lars Bjorn, *Women's Responses to Sexual Harassment: An Analysis of Sociocultural, Organizational, and Personal Resource Models*, 67 Soc. Sci. Q. 814, 817 (1986).

<sup>295</sup> See Crain, *supra* note 42, at 28-29.

plaints a matter of job security.<sup>296</sup> Sexual harassment in the workplace causes a loss of motivation, lowered job satisfaction, negative attitudes toward coworkers and supervisors, high absenteeism and turnover, and a lowered sense of confidence.<sup>297</sup> Work performance suffers, and psychological and physical effects of emotional distress relating to the harassment may cause victims to incur expenses associated with treatment and lost work time.<sup>298</sup> Ultimately, the majority of victims quit their jobs or seek a transfer to avoid the harassment.<sup>299</sup> Alternatively, the employer fires or demotes them for poor performance or absenteeism.<sup>300</sup>

Second, the UAW's reactive approach in this case ultimately undermined its efficacy in representing its male workers' job security as well as its female workers' job security.<sup>301</sup> Rather than attempting to intervene and stop the harassment before it escalated, the UAW's passive stance on harassment ultimately exposed the harassers to discipline and discharge.<sup>302</sup> Further, the UAW's passivity led directly to the female workers' appeal to external sources for assistance, like private lawyers and the EEOC, which in turn created opportunities for Mitsubishi to exacerbate the divisions in the workforce along gender lines and to undermine the union's solidarity.<sup>303</sup>

Some unionists have acknowledged an active role for unions in redressing and preventing sexual harassment. Deborah Greenfield, associate general counsel for the AFL-CIO, recently observed that addressing member-on-member sexual harassment warrants union involvement because sexual harassment is an affront to dignity on the job, which "goes to the core of unionism."<sup>304</sup> Nevertheless, Greenfield insists that the employer bears the primary responsibility for redress and prevention of sexual harassment in the workplace; the grievance and arbitration mechanism should not be a substitute for an employer policy addressing sexual harassment.<sup>305</sup> Greenfield reasons that the grievance and arbitration machinery in a labor contract is intended for use in vindicating employees' collective rights against the employer, while sexual harassment entails the resolution of individual claims against individual harassers.<sup>306</sup> This description of sexual har-

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296 *See id.*

297 *See id.* at 22-23, 28-29.

298 *See id.* at 28-29.

299 *See id.*

300 *See id.* at 22-23, 28-29.

301 *See Sharpe, supra* note 21.

302 *See id.*

303 *See id.*

304 *Advice on Prevention, Investigations Offered by Advocates at ABA Session*, 1999 Daily Lab. Rep. (BNA) No. 61, at C-2 (Mar. 31, 1999).

305 *See id.* at C-2 & C-3.

306 *See id.*



assessment misconstrues hostile work environment sexual harassment by overlooking its gender and class dynamics for female workers: excluding sexual harassment claims from the grievance and arbitration process implicitly privileges the gender and class interests of male workers over the gender and class interests of women workers.

The problem is not simply that sexism persists within unions.<sup>307</sup> Nor can the union's dilemma be captured by characterizing it as a choice between privileging men's gender interests over women's in a class context.<sup>308</sup> The union's difficulties in representing both men and women—particularly in the context of a traditionally male-dominated workplace where the occupation itself has become masculinized—stem from the union's gendered understanding of class, class consciousness, and the forms that class exploitation assumes.<sup>309</sup> The union—and ultimately, the labor law—does not see the women's complaints of sexual harassment as raising class issues at all. Rather, it sees only gender issues that are not the union's (or labor law's) concern.

This case and others like it<sup>310</sup> demonstrate that the cleavages in the working class along gender lines exist prior to any employer efforts to exacerbate them, and that if unions do not deal with them in an effective way, employers, the courts in individual employee or class action lawsuits, the EEOC and private lawyers, and nonlabor social movement groups will usurp the unions' role.<sup>311</sup> Indeed, in *Mitsubishi*, the women's de facto unions became the EEOC and a Chicago-based advocacy group known as "women employed."<sup>312</sup>

#### B. Another Example: *Harris v. Civil Service Commission*

*Harris v. Civil Service Commission*<sup>313</sup> provides another recent example of a union caught on the horns of the dilemma posed by representation of two groups of workers whose interests divide along identity lines. In that case, Madeline Harris applied for the position of transit manager with the San Francisco Municipal Railway.<sup>314</sup> Like other applicants, she took an employment examination which the Civil Service

<sup>307</sup> See Brigid O'Farrell & Suzanne Moore, *Unions, Hard Hats, and Women Workers*, in *WOMEN AND UNIONS: FORGING A PARTNERSHIP* 69 (Dorothy Sue Cobble ed., 1993).

<sup>308</sup> See *supra* text accompanying notes 265-70.

<sup>309</sup> See *id.*

<sup>310</sup> See, e.g., *EEOC Affirms Sexual Harassment Charges by Women at Ford Facilities in Chicago*, 1999 Daily Lab. Rep. (BNA) No. 4, at A-8 (Jan. 7, 1999) (reporting that the EEOC has issued a determination finding merit in charges of racial and sexual harassment made by women employed at two Ford Motor Co. plants in Chicago).

<sup>311</sup> See *supra* notes 42-43, 45 and accompanying text.

<sup>312</sup> See *Report Points to Progress at Mitsubishi, but Foul Language and Harassment Persist*, 1999 Daily Lab. Rep. (BNA) No. 16, at A-12, A-13 (Jan. 26, 1999).

<sup>313</sup> 65 Cal. App. 4th 1356 (1998).

<sup>314</sup> See *id.* at 1361.

Commission created as part of the application process.<sup>315</sup> Her score on the examination placed her at the top of the applicant pool.<sup>316</sup> In the interim, however, the commission canceled the test and invalidated the eligibility lists which the test results had produced because of the test's disparate impact on black applicants.<sup>317</sup> The decision to cancel the tests and the associated eligibility lists directly resulted from union pressure on the commission.<sup>318</sup>

Harris argued that the commission had abused its discretion by failing to attempt to validate the tests as sufficiently job-related, effectively penalizing another protected group, white women.<sup>319</sup> Canceling the tests thus adversely affected women and violated the provisions of the California Fair Employment and Housing Act.<sup>320</sup> The California Court of Appeals denied her claim, however, ruling that the city commission's decision could be examined only for an administrative abuse of discretion, which was not present under the circumstances.<sup>321</sup>

In this case, the union privileged the interests of black applicants over those of white women, leaving white women as a group without an advocate before the commission when it determined the test's validity.<sup>322</sup> The union in this case, clearly in an impossible position, was forced to choose between the interests of its workers by assigning a priority to race- or gender-identity concerns. The union's decision disadvantaged white women workers by depriving them of a representative who could have argued their position before the commission in a timely fashion, and who might have affected the commission's decision-making process.<sup>323</sup> The lack of a representative forced Harris to go outside the union to find an advocate to make her claim as an individual.<sup>324</sup> She presumably funded that representation herself, rather than receiving the benefit of a representative funded out of union dues, which effectively would have spread the costs across the entire organized workforce. Moreover, the single-representative system deprived all workers of the opportunity to fully debate the test's efficacy and impact upon various groups of workers. A multiple-representative system might have reached a better substantive result, or at

<sup>315</sup> See *id.*

<sup>316</sup> See *id.*

<sup>317</sup> See *id.*

<sup>318</sup> See *Divided Court Rejects White Woman's Claim over Cancellation of Biased Employment Test*, 1998 Daily Lab. Rep. (BNA) No. 154, at A-6 to A-7 (Aug. 11, 1998) [hereinafter *Divided Court*].

<sup>319</sup> See *Harris*, 65 Cal. App. 4th at 1361.

<sup>320</sup> See *id.*

<sup>321</sup> See *Divided Court*, *supra* note 318, at A-6, A-7.

<sup>322</sup> See *Harris*, 65 Cal. App. 4th at 1361.

<sup>323</sup> See *id.*

<sup>324</sup> See *id.*

least afforded the commission other alternatives that might have reached a compromise between the competing interests. Ultimately, the coerced united front scenario functioned to further entrench pre-existing identity divisions within the workforce.

### C. The United Front Ideology As a Form of Essentialism

The united front ideology in labor unionism effectively parallels the problem of essentialism identified in feminist theory. Essentialism in feminism refers to the assumption that a universal woman's experience of oppression exists that is stable across political and personal contexts.<sup>325</sup> Race- and class-privileged feminist theorists have failed to recognize fully the differences that exist between and among women, and have not incorporated into their theory the implications of women's different experiences of oppression, both out of strategic concerns about fragmentation and because of the strong lure of simplicity in clearly defined categories.<sup>326</sup> Similarly, the united front ideology in unionism assumes that a single, universal experience of class oppression common to all workers exists regardless of gender, race, or other relevant aspects of identity.<sup>327</sup> Labor unionists have resisted acknowledging differences among workers, fearing fragmentation of the labor movement,<sup>328</sup> and labor law has supported this strategy.<sup>329</sup>

Some unionists and progressive intellectuals have gone further, blaming identity politics for the demise of the labor movement and suggesting that internecine battles and divisions within the Left are the fault of feminism, the civil rights movement, or the gay and lesbian movement.<sup>330</sup> These critics of identity politics have succumbed to essentialism, assuming a universal experience of class in the face of

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<sup>325</sup> See Trina Grillo, *Anti-Essentialism and Intersectionality: Tools To Dismantle the Master's House*, 10 BERKELEY WOMEN'S L.J. 16, 19 (1995). See generally ELIZABETH V. SPELMAN, *IN-ESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* 75 (1988).

<sup>326</sup> See Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 586 (1990); Marlee Kline, *Race, Racism, and Feminist Legal Theory*, 12 HARV. WOMEN'S L.J. 115, 116-18 (1989). This has been an especially intractable problem in feminist legal theory because the law encourages and reinforces simple, unitary categories. See Harris, *supra*, at 585; Martha Minow, *Feminist Reason: Getting It and Losing It*, 38 J. LEGAL EDUC. 47, 47-48 (1988). For example, white feminists who dominate contemporary feminist thought may assume and work from a "woman's standpoint" based upon assumptions about a common experience of oppression that is in fact limited to the forms of oppression experienced by white women. See Kline, *supra* note 125 (critiquing the work of feminist standpoint theorist Nancy Hartsock); Mahoney, *supra* note 125 (critiquing the theory of feminist Catharine MacKinnon because of its focus on privileged white women in analyzing the "shared sexual exploitation" of all women).

<sup>327</sup> See *supra* notes 195, 265-75 and accompanying text.

<sup>328</sup> See *id.*; see also *supra* notes 70-72 and accompanying text.

<sup>329</sup> See *supra* notes 59-69, 81-93 and accompanying text.

<sup>330</sup> See Michael Eric Dyson, *The Labor of Whiteness, the Whiteness of Labor, and the Perils of Whitewashing*, in AUDACIOUS DEMOCRACY: LABOR, INTELLECTUALS, AND THE SOCIAL RECONSTRUCTION OF AMERICA 164-68 (Steven Fraser & Joshua B. Freeman eds., 1997); Todd Git-

overwhelming evidence that class exploitation is gendered and raced.<sup>331</sup> Their race- and gender-privileged status affords them the luxury of ignoring the fact that a white, male identity politics has dominated the labor movement for decades.<sup>332</sup> Proposals for labor movement reform predicated on such essentialist assumptions minimize the valid concerns of historically marginalized groups, and risk re-enacting past errors and entrenching lingering barriers to inclusion.<sup>333</sup>

Moreover, maintaining the fiction of uniformity about the experience of class exploitation risks undermining the labor movement's strength. These risks include exclusion of a rapidly expanding segment of the workforce (white women, people of color, and immigrant workers), internal fragmentation of the movement, and an impoverished understanding of the gender and racial mechanics of class exploitation.<sup>334</sup> Feminist Marlee Kline might have been speaking to labor unionists when she wrote:

[While] fully confronting the differences that exist among women may appear to fragment and weaken the solidarity and strength of feminists[,] . . . I believe we have little choice but to follow the path of recognizing difference. . . . While we should work toward building solidarity, we cannot pretend union when it does not exist. Rather, we must acknowledge we are divided and develop strategies to overcome our fears and prejudices . . . .<sup>335</sup>

### 1. *How the Labor Movement Loses Under the United Front*

Race and sex divisions within the working class negatively impact union organizing efforts and contract negotiations in the United States.<sup>336</sup> Recent empirical studies of union win rates establish that

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lin, *Beyond Identity Politics: A Modest Precedent*, in AUDACIOUS DEMOCRACY: LABOR, INTELLECTUALS, AND THE SOCIAL RECONSTRUCTION OF AMERICA, *supra*, at 152, 156.

<sup>331</sup> See *supra* notes 195, 265-75.

<sup>332</sup> See Dyson, *supra* note 330, at 170.

<sup>333</sup> See *id.* at 171; Patricia Lippold & Bob Kirkman, *Blocking Bridges: Class-Based Politics and the Labor Movement*, in A NEW LABOR MOVEMENT FOR THE NEW CENTURY 219, 223, 227 (Gregory Mantsios ed., 1998) (advocating a focus on class-based issues common to all working people, such as the "America Needs a Raise" campaign); cf. Mae M. Ngai, *Who Is an American Worker?: Asian Immigrants, Race, and the National Boundaries of Class*, in AUDACIOUS DEMOCRACY: LABOR, INTELLECTUALS, AND THE SOCIAL RECONSTRUCTION OF AMERICA, *supra* note 330, at 173-77 (detailing the racist origins of the labor movement's "look for the union label" slogan, observing that appeals to solidarity are relative, and suggesting that we ask "solidarity among whom—and against whom?").

<sup>334</sup> See *supra* notes 79, 81-96, 338-45 and accompanying text.

<sup>335</sup> Kline, *supra* note 326, at 146-47.

<sup>336</sup> See, e.g., SEIU Names Northern California Official To Oversee Troubled Los Angeles Local, 1995 Daily Lab. Rep. (BNA) No. 180, at A-15 (Sept. 18, 1995) (describing racial conflict in SEIU Local 399 (whose building-service division led the highly successful "Justice for Janitors" organizing campaign), which disrupted first contract negotiations and enabled employers to exploit the divisions to delay negotiations, ultimately necessitating the creation of a trusteeship by the international); Susan Carey, *Contract Negotiations Divided United's*

unions are more likely to win elections when the work unit is homogeneous by race and by sex.<sup>337</sup>

Worse, the refusal to recognize divisions within the working class has eclipsed insights into the larger picture of capitalist exploitation of *all* workers. One cannot predict the future global expansion of capitalism without understanding the interactive dynamics of race, sex, and class in exploitative relations between employers and workers, and among groups of workers. The patterns of capitalist expansion and the strategies of exploitation which employers utilize reveal that race and gender occupy a central role in the restructuring of capitalist relations: labor is becoming ethnicized and feminized, both in the United States and worldwide.<sup>338</sup>

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*Workers*, WALL ST. J., Aug. 28, 1996, at B1 (discussing split between United Airlines's flight attendants and the rest of United's workforce over perceived threat to flight attendants' job security posed by United's plan to hire lower-paid foreign flight attendants to staff its international flights and unions' failure to challenge this in buyout negotiations); Stanley Ziemba, *Uniting United First Task for Worker-Owners*, CHI. TRIB., July 13, 1994, § 1, at 1 (describing division between United Airlines's predominantly male pilots and machinists, and its predominantly female flight attendants over the relative burdens imposed by pay and benefit cuts required to finance the employee buyout imposed).

<sup>337</sup> A study by the AFL-CIO Department of Organization and Field Services covering 189 elections in units of over 50 workers between July 1986 and April 1987 found that where women made up more than 75% of the unit, the union's win rate was 57%, as compared to a 33% success rate when women made up less than half of the workforce. AFL-CIO DEP'T OF ORG. & FIELD SERVS., AFL-CIO ORGANIZING SURVEY: 1986-87 NLRB ELECTIONS 1, 6 (1989). The win rate rose steadily as the female percentage of the workforce rose, with unions displaying a spectacular win rate of 90% in units where the workforce was 95% female, more than "double the rate for the sample as a whole (43 percent)." Ruth Milkman, *Union Responses to Workforce Feminization in the United States*, in *THE CHALLENGE OF RESTRUCTURING: NORTH AMERICAN LABOR MOVEMENTS RESPOND* 226, 237-38 (Jane Jenson & Rianne Mahon eds., 1993). Win rates for units with an overwhelmingly male workforce were also higher than for those with gender-mixed workforces (though not as high as those for overwhelmingly female units, a phenomenon that Milkman attributes in part to the greater propensity toward unionization among women than men). See *id.* Similarly, where the unit was racially homogeneous, the win rate was higher: if the work unit was greater than 75% African American, Hispanic, or Asian, the win rate was 65%, compared to a 35% win rate where less than three-quarters of the workers were African American, Hispanic, or Asian. See *id.* at 239.

<sup>338</sup> Some use the phrase "feminization" of the workforce" literally to refer to the growing numbers of women entering the global labor market, occupying jobs that once would have gone to male workers in America and undercutting male wages because of their lower pay. Richard P. Appelbaum, *Multiculturalism and Flexibility: Some New Directions in Global Capitalism*, in *MAPPING MULTICULTURALISM*, *supra* note 159, at 297, 298; Richard J. Barnett, *The End of Jobs*, HARPER'S MAG., Sept. 1993, at 47, 49.

The feminization of work has an additional, more substantive meaning. Some have observed that the burgeoning secondary labor market, threatening now to engulf the primary labor market, actually represents the "feminization" of work—the restructuring of work to resemble more closely the jobs that women have performed in the past:

Work is being redefined as both literally female and feminized, whether performed by men or women. To be feminized means to be made extremely vulnerable; able to be disassembled, reassembled, exploited as a reserve labour force; seen less as workers than as servers; subjected to time

Immigrants and women of color disproportionately occupy the bottom rungs on the economic ladder wherever U.S. capitalism has reached precisely because they are the most vulnerable to exploitation.<sup>339</sup> Employment and labor legislation usually does not regulate their labor, particularly labor they perform in the informal sector (homework, or work subcontracted to semi-clandestine enterprises), and they suffer legal disabilities (such as illegal immigrant status for those in the United States) which in turn make them willing to work for lower wages and less likely to unionize in response to poor working conditions.<sup>340</sup> American employers utilize enhanced technology and mobility to expand into global markets unregulated by American law, seeking out the point of least resistance and fostering a standard of exploitation based on the lowest common denominator.<sup>341</sup> Ultimately, this triggers a "race to the bottom" in which all workers lose.<sup>342</sup>

Lack of legal protection, however, does not fully explain why people of color and women are more exploitable. By drawing on "preexisting patriarchal and racist ideologies" that workers themselves have internalized, employers can fragment workers' identities into their class-based, gender-based, and race- or ethnic-based aspects, splintering their consciousness and blunting class identification.<sup>343</sup> At the

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arrangements on and off the paid job that make a mockery of a limited work day . . . .

HARAWAY, *supra* note 270, at 166. This phenomenon of an overall shift toward work, wages, and working conditions historically typical of jobs in the secondary labor market is alternately referred to as the "immiseration" of work. See FREDERIC JAMESON, *POSTMODERNISM, OR, THE CULTURAL LOGIC OF CAPITALISM* 348 (1992) (referring to the "immiseration" of marginalized groups).

<sup>339</sup> See Laura Ho et al., *(Dis)Assembling Rights of Women Workers Along the Global Assembly Line: Human Rights and the Garment Industry*, 31 HARV. C.R.-C.L. L. REV. 383, 384-86 (1996). For example, women of color comprise some 75-100% of the low-paid high-tech production industry labor force in the United States: the lower the pay and level of skill which the job requires, the higher the percentage of women of color employed in it. See Hossfeld, *supra* note 227, at 155. The minority groups that are employed in the lowest-paid and lowest-skilled job categories vary by region (in the Silicon Valley, Third World immigrant women predominate; in the southeast, blacks predominate; in the southwest, Hispanics predominate), but the job categories in which they are employed and their status in the occupational hierarchy do not differ by region. See *id.* at 156 n.4.

<sup>340</sup> See Kathryn Ward, *Introduction and Overview to WOMEN WORKERS AND GLOBAL RESTRUCTURING*, *supra* note 227, at 1, 2.

<sup>341</sup> See Appelbaum, *supra* note 338, at 314.

<sup>342</sup> See *id.* at 306-13.

<sup>343</sup> Hossfeld, *supra* note 227, at 149-50, 157. For example, through the vehicles of occupational segregation by gender and ethnicity or race, sexual and racial harassment, stressing women workers' feminine characteristics through requirements that they wear particular uniforms, and encouraging flirting and dating with supervisors so as to distract women from their poor working conditions and divide them from one another, management in many Silicon Valley microelectronics production shops emphasizes the tension between women's identity as waged workers and their cultural identity as women. See *id.* at 159-61.

same time, employers can undermine labor's collective resistance by using labor's internal divisions to pit groups of workers against one another.<sup>344</sup> The alienated white male worker, who sees himself as superior to blacks and women, can align himself psychologically with a more powerful white elite—the capitalist boss—with whom he may share only the common characteristic of a privileged racial identity. The worker's racial and gender privilege, in combination with the American dream of social mobility, thus encourages his acquiescence and participation in the economic hierarchy.<sup>345</sup> In order to mount a fundamental challenge to the existing structure, white male workers must question not simply their own class status, but the racial and gender privilege that justifies the status quo.<sup>346</sup>

## 2. *Prospects for the Future: Inclusion*

Unionism must now confront squarely the divisions that exist within the working class along race and gender lines and pursue a strategy of inclusion, rather than the strategies of exclusion and caste which it has favored in the past. Only by eliminating price differentials between groups of workers can labor prevent employers from pitting one group against the other.<sup>347</sup> Some hopeful signs indicate that the labor movement has started down this path. Under John Sweeney's leadership, labor has explicitly changed its agenda to one of inclusion.<sup>348</sup> With the help of worker centers that focus on a broad array of needs in a particular ethnic community, unions and worker-advocacy groups have begun to experiment with inclusive organizing strategies that reach across ethnic barriers inside the U.S. and form joint labor movements that stretch across international boundaries (especially into Mexico) to prevent capital relocation in response to

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<sup>344</sup> See Bonacich, *supra* note 159, at 319-28 (offering an analysis of the Los Angeles garment industry as an illustration of how capitalists exploit class, race, and ethnic divisions among workers, and concluding that both class-based and race- or ethnicity-based strategies will be necessary for workers to combat such exploitation effectively).

<sup>345</sup> See Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1380-81 (1988).

<sup>346</sup> See *id.* at 1380.

<sup>347</sup> See Bonacich, *supra* note 163, at 30.

<sup>348</sup> See Glenn Burkins, *AFL-CIO Plans Campaign for a Rebound*, WALL ST. J., Feb. 18, 1997, at A24 (reporting that President John J. Sweeney has announced plans for the AFL-CIO to begin a major recruiting drive aimed at women and has shifted the AFL-CIO's focus to organizing low-waged workers). See generally A NEW LABOR MOVEMENT FOR THE NEW CENTURY, *supra* note 333 (collecting essays recommending reforms oriented toward a strategy of inclusion); John Sweeney, *Afterword to id.* at 333 (embracing the inclusion strategy).

worker pressure.<sup>349</sup> At present, these efforts are only in an embryonic stage.<sup>350</sup>

So far, the ways in which the capitalist class uses race and gender to exploit labor remain unstudied by both labor and the new social movements (identity politics).<sup>351</sup> If gender and race are viewed as loci

<sup>349</sup> See Ho et al., *supra* note 339, at 405-06; see generally Frances Lee Ansley, *U.S.-Mexico Free Trade from the Bottom: A Postcard from the Border*, 1 TEX. J. WOMEN & L. 193 (1992) (describing initiation of cross-border relations between U.S. women workers whose jobs deindustrialization has eliminated or threatened, and women working in the Mexican maquiladoras, to which some of the U.S. women workers' jobs have been relocated).

<sup>350</sup> See Fran Ansley, *Standing Rusty and Rolling Empty: Law, Poverty, and America's Eroding Industrial Base*, 81 GEO. L.J. 1757, 1891-92 (1993) (describing new challenges that labor organizers seeking to forge bonds across international boundaries face); Bob Davis et al., *Unions Threatened by Global Economy*, WALL ST. J., Mar. 25, 1996, at A11 (describing problems that labor unions seeking to organize internationally face, and tendency of unionists to see foreign workers as competitors rather than potential allies). While transnational feminist and cross-racial or ethnic organizing seems to have a stronger foothold, it has not focused on economic rights, tending to privilege civil and political rights instead. See Margaret Etienne, *Addressing Gender-Based Violence in an International Context*, 18 HARV. WOMEN'S L.J. 139 (1995) (discussing efforts of international women's groups and human rights activists to obtain recognition of gender-based violence and discrimination as violations of basic human rights); Ho et al., *supra* note 339, at 410-13; Lynn Norment, *How African-Americans Helped Free South Africa*, EBONY, Aug. 1, 1994, at 52-56 (crediting efforts of an alliance of African American groups including the NAACP, TransAfrica, and the Rainbow Coalition for the end of apartheid in South Africa).

<sup>351</sup> An excellent example of the real-world consequences of this theoretical gap is offered by David Harvey, *Class Relations, Social Justice and the Politics of Difference*, in PLACE AND THE POLITICS OF IDENTITY 41 (Michael Keith & Steve Pile eds., 1993). Harvey blames the weakening of working class politics in part on the rise of new social movements, which he believes have fragmented the working class. See *id.* at 47. He argues that the antiracist and feminist movements have not been adequately responsive to or concerned with issues of class exploitation, even when gender and race have intersected with it. See *id.* As evidence, Harvey points to the failure of the feminist and antiracist movements to engage politically with the disastrous chicken processing plant fire at Imperial Foods in Hamlet, North Carolina in the fall of 1991. See *id.* The case revealed harsh truths about the low pay and working conditions at the plant, as well as management's attitude toward the workers (locked doors to the plant, which blocked the workers' escape during the fire, were said to have been necessary to prevent pilferage by workers). See *id.* at 41-42. Noting that of the 25 people who died in the fire, 18 were women and 12 were African American, Harvey suggests that the seeming paralysis of progressive politics in the face of class oppression indicates classist tendencies in both movements. See *id.* at 44. He contrasts the apparent passivity of the antiracist and feminist movements in that context with their efforts at political agitation in the same time frame around the issue of the nomination of Clarence Thomas to the United States Supreme Court. See *id.* at 44, 47. Harvey concludes that a traditional form of class politics could have provided better protection for the interests of the Hamlet workers despite their race and ethnicity, and despite the fact that "working-class politics regrettably makes no explicit acknowledgement of the importance of race and gender," because in this situation the commonality of class exploitation was primary. *Id.* at 59-60.

Harvey's analysis overlooks the fact that no union had organized the Hamlet plant and that this fact is due in part to labor's weakness in the South—which in turn is traceable to the historical impact of slavery and the racial tensions that linger between white and black workers—as well as its historical failure to target and organize women of color. See ALAN DRAPER, *CONFLICT OF INTERESTS: ORGANIZED LABOR AND THE CIVIL RIGHTS MOVEMENT IN THE SOUTH, 1954-1968*, at 6, 39-40 (1994) (explaining that Southern unionists who sup-



of exploitation that intertwine with class exploitation, however, one can more clearly see how employers use gender, race, and class to structure relations between themselves and labor, and can imagine an alliance among labor and identity politics movements that might offer a more radical and effective challenge to capitalistic systems of exploitation.<sup>352</sup>

#### D. The Role of Law in Fragmenting Gender, Race, and Class

Under the current legal regime, the message that women and people of color receive from the law is that civil rights laws, rather than labor law, protect their work interests.<sup>353</sup> In short, labor law and labor unions exist for white men. Workers hear this message from union organizers, implicitly<sup>354</sup> or explicitly.<sup>355</sup> Law professors hear it from their students.<sup>356</sup>

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ported racial segregation often resigned from the union to protest the AFL-CIO's policy of racial integration); FONER, *supra* note 184, at 7-8 (describing how slavery functioned as a deterrent to trade unionism, particularly in the South); King, *supra* note 194, at 64 (pointing to the intersection of racist and sexist union policies, and its impact on black women). As we have argued, the failure of the labor movement to overcome these divisions in practice is in large part a result of deficiencies in class theory—in particular, the exclusion of intraclass race and gender exploitation—which are reflected in union practice and in the law. See *supra* Parts II-IV; see also Louis Uchitelle, *Black Labor Leaders Want Greater Voice*, S.F. CHRON., July 17, 1995, at A5 (noting comments by black labor leaders at the Coalition of Black Trade Unionists, who pointed out that if organized labor's leadership had been more responsive to the demands of black unionists, the debate on issues like the North American Free Trade Agreement (NAFTA) might have been deeper and broader (e.g., had racial concerns been part of the dialogue, labor's campaign against NAFTA might have stressed the impact of the diversion of corporate investment from urban communities where unemployed blacks predominate)).

<sup>352</sup> See *supra* notes 175-79; see also May Chen & Kent Wong, *The Challenge of Diversity and Inclusion in the AFL-CIO*, in A NEW LABOR MOVEMENT FOR THE NEW CENTURY, *supra* note 333, at 185, 191-92, 201 (describing the bridge-building function of identity constituency groups within the AFL-CIO, and the potential for alliances between labor and people of color); Ngai, *supra* note 333, at 173, 177-79, 182-85 (describing marginalization of Chinese immigrants within organized labor, the impact of global competition on American jobs, and the need for labor to confront immigration "at the level of policy").

<sup>353</sup> See Iglesias, *supra* note 94, at 491; *supra* notes 94-96 and accompanying text.

<sup>354</sup> See STANLEY ARONOWITZ, WORKING CLASS HERO: A NEW STRATEGY FOR LABOR 143 (1983) (observing that "when trade unionism loses its character as a social movement and reduces its activities to sectoral economic action, workers outside the labor movement get the signal that unions are not for them").

<sup>355</sup> See *NLRB v. Eurodrive*, 724 F.2d 556, 557 (6th Cir. 1984) (reciting facts involving a union organizer who pointed to the company's sole black employee, stated that the white employees needed the union to protect their jobs just as the black employee enjoyed the protection of antidiscrimination laws, and promised that the union, if elected, would reinstate an employee who had been fired for racially harassing the black employee).

<sup>356</sup> See Crain, *supra* note 208, at 1903 n.1 (relating the question asked by a student in a labor law class, "What do women have to do with labor law?"); Donna E. Young, *Two Steps Removed: The Paradox of Diversity Discourse for Women of Color in Law Teaching*, 11 BERKELEY WOMEN'S L.J. 270, 280 (1996) (describing exchange with student in which the student told his black female law professor that he would consider taking a class from her in civil rights

American labor law poses significant hurdles to an inclusive strategy.<sup>357</sup> We must rethink the united front ideology and its doctrinal underpinnings: majority rule and exclusivity. The united front strategy is inherently flawed because gender-, race-, and ethnicity-neutral experiences of class oppression simply do not exist. The united front strategy has denied difference and submerged the voices of the disadvantaged inside the movement, ultimately forcing them to cast their lot with employers, to look to nonlabor groups for a voice on issues of great economic and personal significance to them, or more frequently, to suffer silently outside the labor movement.<sup>358</sup> This strategy, codified in the majority-rule and exclusivity doctrines, hamstring labor's ability to respond to workers' demands and undermines its support base with a rapidly growing sector of the working class. Because women and people of color now constitute a significant percentage of the workforce available to capital as a reserve army to undercut higher-priced labor, the united front ideology and the legal doctrines it spawned require reexamination.

### 1. *Majority Rule Is the Minority Rule*

Majority rule, exclusivity, and the united front ideology are unique to American and Canadian labor law regimes; other forms of worker organization and collective representation prevail in most economically advanced democracies.<sup>359</sup> Only in the United States and Canada must an individual worker join the organization that commands the support of a majority of workers to obtain the rights of collective organization, participation, and a voice on workplace issues. Relative to other systems of collective labor relations, majority-rule and exclusivity systems accord a low value to the rights of workers to participate in workplace governance;<sup>360</sup> majority rule deprives workers of a voice in workplace governance if the union cannot command a

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law, but not in labor law, because "civil rights is where you live." (internal quotation marks omitted)).

<sup>357</sup> See *supra* notes 59-93 and accompanying text.

<sup>358</sup> See *supra* notes 40-44, 149-54 and accompanying text; see also Chen & Wong, *supra* note 352, at 187-92 (describing historical policies of exclusion pursued by the AFL-CIO with regard to women and people of color and their lingering impact).

<sup>359</sup> See generally COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS IN INDUSTRIALIZED MARKET ECONOMIES (R. Blanpain & C. Engels eds., 5th ed. 1993) (collecting essays describing forms of worker representation in Belgium, Australia, France, the United Kingdom, Switzerland, Hungary, Germany, Italy, Israel, the Netherlands, and the United States). Japanese law requires employers to bargain with any union representing at least two people; multiple unionism is common. See Karl J. Duff, *Japanese and American Labor Law: Structural Similarities and Substantive Differences*, 9 EMP. REL. L.J. 629, 633 (1984); see also Hajime Matsuzaki, *Enterprise Unionism in Japan*, 34 J. INDUS. REL. 617, 618 (1992) (reviewing HIROSUKE KAWANISHI, ENTERPRISE UNIONISM IN JAPAN (Ross E. Mover trans., 1992)).

<sup>360</sup> See David Beatty, *Constitutionalizing a Labour Code: Creative Uses of Comparative Law*, 8 COMP. LAB. L.J. 211, 215-17 (1987).

majority, and exclusivity silences the voices of those who comprise the minority if the union does command a majority.<sup>361</sup>

Many other countries have demonstrated the viability of alternative means of employee representation and collective bargaining that show more respect for employees' freedom of association and simultaneously produce greater union density and effectuation of worker voice than are experienced in the United States.<sup>362</sup> Some comparative labor law scholars have observed that the adherence to principles of majority rule and exclusivity is responsible in part for the low union density in the United States and Canada relative to other industrialized countries.<sup>363</sup> In 1980, for example, over eighty percent of the German workforce benefitted from participation in workplace decision-making processes.<sup>364</sup> As of 1987, the Canadian system offered protection to thirty-five to forty-five percent of its workforce.<sup>365</sup> By contrast, the American system offers protection to only fourteen percent of the workforce.<sup>366</sup>

## 2. *Situating Our Critique of Majority Rule*

We certainly do not present the first criticism of majority rule and exclusivity. Previous critics have focused primarily upon the role the doctrines play in denying a voice to large numbers of workers.<sup>367</sup> The race and sex of the unrepresented workers are irrelevant in these anal-

<sup>361</sup> See *id.*

<sup>362</sup> See M. Biagi, *Forms of Employee Representational Participation*, in *COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS IN INDUSTRIALIZED MARKET ECONOMIES*, *supra* note 359, at 315. Two general categories of alternative industrial relations systems exist: those which recognize multiple representations among a limited group of competing organizations designated by a governmental organization as "most representative" within a workplace (Belgium, France, Ireland, Norway, and Switzerland), and those which recognize purely consensual representation by giving every worker an equal right of participation in collective bargaining regardless of union affiliation (Austria, Italy, the Netherlands, and Germany). See *id.* at 328-35.

<sup>363</sup> See *id.* at 315, 318.

<sup>364</sup> See Clyde W. Summers, *Worker Participation in the U.S. and West Germany: A Comparative Study from an American Perspective*, 28 *AM. J. COMP. L.* 367, 377 (1980).

<sup>365</sup> See Beatty, *supra* note 360, at 236.

<sup>366</sup> See Burkins, *supra* note 348, at A24 (reporting that overall union membership in the United States declined from 14.9% of the workforce in 1995 to 14.5% in 1996).

<sup>367</sup> See, e.g., Richard R. Carlson, *The Origin and Future of Exclusive Representation in American Labor Law*, 30 *DUC. L. REV.* 779 (1992); Matthew Finkin, *The Road Not Taken: Some Thoughts on Nonmajority Employee Representation*, 69 *CHI-KENT L. REV.* 195 (1993); Schatzki, *supra* note 70; George Strauss, *Is the New Deal Collapsing? With What Might It Be Replaced?*, 34 *INDUS. REL.* 329, 339-41 (1995); see also *Workplace Democracy Goal Largely Unmet Under NLRA, Speakers Tell Conference*, 1995 *Daily Lab. Rep. (BNA)* No. 196, at C-1, C-2 (Oct. 11, 1995) (reporting Professor Clyde Summers's challenge to the majority-rule principle, and his proposal that the law be amended "to require employers to recognize and bargain with 'any substantial group' of employees that seeks recognition").

yses.<sup>368</sup> Some who have criticized the doctrine have done so, however, in an explicit effort to address the problem of the underrepresentation of women and minorities within the union structure.<sup>369</sup> Most commentators have focused on intra-union reforms or reforms addressed to the duty of fair representation, rather than advocating abrogation of the majority-rule and exclusivity doctrines.<sup>370</sup>

We advance a combination of these two rationales, one that recognizes the historical role of racial and gender privilege in union organizing and bargaining. Those at the bottom of the occupational hierarchy are least likely to be the targets of union-organizing drives and to enjoy the advantages of collective bargaining in a majority-rule system: not only are unions less likely to target them for organizing because of the sectors in which they are located, but the employer can

<sup>368</sup> Sometimes, even though the commentator's analysis does not hinge on the race or sex of the workers, the groups of underrepresented workers which the commentator gives as illustrations of those who lose under the majority-rule doctrine are statistically more likely to be women or minority workers. See, e.g., Finkin, *supra* note 367, at 217 (noting that nonmajority representation would better serve the interests of contingent workers).

<sup>369</sup> See, e.g., Iglesias, *supra* note 94; Eileen Silverstein, *Union Decisions on Collective Bargaining Goals: A Proposal for Interest Group Participation*, 77 MICH. L. REV. 1485 (1979).

<sup>370</sup> See *supra* notes 115-21 and accompanying text. These critiques can be seen as supporting majority rule and exclusivity by proposing structural changes that would accommodate competing interests within majority unions. For example, Silverstein has proposed that groups within unions who have common concerns adverse to the majority union's could form interest groups, and unions would be required to deal in good faith with these interest groups. See Silverstein, *supra* note 369, at 1519. More recently, Cobble has argued that unions could be redesigned to promote intra-union bargaining interest groups. She believes that "such formalized intraunion bargaining structures would ensure that the class needs of employees are met along with the needs that flow from their different racial, ethnic, and gender identities." Dorothy Sue Cobble, *Making Post Industrial Unionism Possible*, in RESTORING THE PROMISE OF AMERICAN LABOR LAW 285, 302 (Sheldon Friedman et al. eds., 1994). In addition, these interest groups might have "a limited right to veto decisions of the majority, to assure that union leadership will heed their concerns." Silverstein, *supra* note 369, at 1519.

Such interest-group bargaining would be a major advance over the status quo. However, we agree with Iglesias that a more transformative rethinking of the ideology that drives the majority-rule and exclusivity doctrines is necessary. See Iglesias, *supra* note 94, at 499 (noting that the structures of majority rule and exclusivity are "fundamental obstacles to the creation of institutional arrangements that would invite increased participation by the new social movements" in labor organizing and representation of the most disadvantaged workers). So long as the law provides for majority rule, unions necessarily will be institutions that cannot represent effectively the interests of minorities without running the risk of alienating the majority. Giving minority interest groups a veto weapon would not significantly change this situation. In many (probably most) instances, the majority will be large enough to override an interest group's veto. In those workplaces where the need is greatest—where there is a small minority with interests adverse to the majority's—a veto threat will be of no help. Finally, these proposals for intra-union reform do not address the problem of workforces where no union exists at all, and where traditional unions are unlikely to target the workforce for organizing. Cf. Alan Hyde, *Employee Caucus: A Key Institution in the Emerging System of Employment Law*, 69 CHL-KENT L. REV. 149, 159-62 (1993) (discussing the legal status of employee caucuses—including identity caucuses—in the nonunion workplace).

more easily destroy the union's majority because of the high turnover and ready supply of alternative labor which characterizes these unskilled service-sector workers.<sup>371</sup> Further, once organized, the economic interests of this group will probably diverge from, or in some cases stand at odds with, those of the predominantly white and male majority of union members.

### E. The Alternative: Multiple Representatives

If labor abandoned the united front ideology, nonlabor groups with an interest in supporting workers could engage and represent workers, either separately or in cooperation with an established labor union. Such organizations already exist;<sup>372</sup> denouncing majority rule would formally authorize them to speak for workers during contract negotiations and to represent workers in grievance arbitration conducted pursuant to the labor contract, which would in turn enhance these organizations' ability to organize and mobilize workers. Many of these groups organize themselves around identities, such as race or gender, and work against the economic exploitation of their constituencies.<sup>373</sup>

While some groups work from within the labor movement,<sup>374</sup> others work from outside it, supporting traditional labor unions in

<sup>371</sup> See Beatty, *supra* note 360, at 236-37.

<sup>372</sup> For examples of such organizations, see those listed in the Resource Directory of ARTHUR B. SHOSTAK, *ROBUST UNIONISM: INNOVATIONS IN THE LABOR MOVEMENT* 296-314 (1991) (listing organizations supporting workers). We have argued elsewhere that the definition of labor organization in section 2(5) of the NLRA is broad enough to permit civil rights organizations and feminist organizations to represent workers who choose them as representatives without the need for amendment. See Crain & Matheny, *supra* note 5.

<sup>373</sup> For example, the group Pride at Work seeks to win domestic partner health benefits and extended family benefits, such as leave rights for family care and bereavement purposes. See MIRIAM FRANK & DESMA HOLCOMB, *PRIDE AT WORK: ORGANIZING FOR LESBIAN AND GAY RIGHTS IN UNIONS* (Lesbian & Gay Labor Network 1990).

<sup>374</sup> The AFL-CIO has granted affiliation status to a handful of groups to serve as labor support organizations; these groups are interested in working together with labor to build organizing networks designed to raise class consciousness among their constituencies and to educate labor about their constituencies' work-related concerns. Groups currently affiliated or seeking affiliation with the AFL-CIO include the Coalition of Labor Union Women (CLUW), the Asian Pacific American Labor Alliance (APALA), the Coalition of Black Trade Unionists, Frontlash, and Pride at Work. See DIANE BALSER, *SISTERHOOD & SOLIDARITY: FEMINISM AND LABOR IN MODERN TIMES* 151-213 (1987) (describing CLUW's origins, activities, and ideological outlook); *COALITION OF BLACK TRADE UNIONISTS PAMPHLET* (describing goals and objectives of the Coalition) (on file with authors); *COALITION OF LABOR UNION WOMEN, STATEMENT OF PURPOSE: STRUCTURE AND GUIDELINES* (1974) (describing CLUW's goals of unifying union women and bringing their concerns to the attention of labor leaders, and summarizing its past efforts in the areas of affirmative action, family and child leave, and anti-sexual harassment policies, among others); *FRONTLASH, DEFINING FRONTLASH* (describing Frontlash, the AFL-CIO's affiliated youth support arm, which strives to get students involved in community and labor movements and to help them see and care about labor issues) (on file with authors); see also Kent Wong, *Building Unions in Asian Pacific Communities*, 18 *AMERASIA* J. 149, 153-54 (1992) (describing APALA's

their organizing and economic-pressure activities.<sup>375</sup> Nine to Five, the National Association for Working Women is probably the best known of these groups. It runs a hotline designed to answer working women's questions about workplace issues ranging from sexual harassment to pregnancy discrimination to issues of worker dignity. The group works to educate and mobilize women around issues of concern to them, including child care, family leave, pay equity, rights of part-time and temporary workers, and health and safety issues surrounding video display terminals.<sup>376</sup> New union structures called "workers' centers" link workplaces and communities, organizing from a community base. Often these structures focus on immigrant workers with a strong ethnic identity and a range of needs stemming from language barriers, unfamiliarity with the U.S. legal system, and illegal status.<sup>377</sup> Finally, some groups merge occupational and identity

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role in coordinating the organization of Asian American workers inside the labor movement through a community-based organizing model); Arnold Beichman, *Durable Vehicle for Racial Equality*, WASH. TIMES, Aug. 14, 1994, at B3 (describing how the A. Philip Randolph Institute seeks racial equality through unionism); Amy Carroll, *Gay/Lesbian Activists Talk AFL-CIO Affiliation*, LAB. NOTES, Aug. 1996, at 6 (describing efforts of Pride at Work to obtain AFL-CIO affiliation); Philip Dine, *Black Unionists Share Worries About NAFTA*, ST. LOUIS POST-DISPATCH, Nov. 5, 1993, at 1F (describing activities of the Coalition of Black Trade Unionists in calling attention to the economic burdens borne disproportionately by blacks); Nancy Feigenbaum, *Labor Leader Tries To Organize Hispanics*, ORLANDO SENTINEL, Feb. 7, 1994, at 25 (describing activities of the Labor Council for Latin American Advancement, which targets Hispanic workers for union organization); *Students Accuse Four Law Firms of Union Busting*, N.Y. TIMES CAMPUS LIFE, Dec. 16, 1990, at 60 (describing law student group organized by Frontlash which mobilized protests against law firms that do union-busting and antilabor legal work).

<sup>375</sup> See Carroll, *supra* note 374 (describing the role of San Francisco Bay Area's Pride at Work chapter in supporting a UFCW strike in a grocery store located in the heart of the gay community).

Some of these organizations are regional in character and work to increase labor's presence in particular parts of the country. See Mary Hollens, *Workers Centers: Organizing in Both the Workplace and Community*, LAB. NOTES, Sept. 1994, at 8, 9 (describing community and workplace organizing done by the Carolina Alliance for Fair Employment, a South Carolina-based organization); Peter Rachleff, *A Page from History: Seeds of a Labor Resurgency*, 258 NATION 226 (1994) (describing activities of North Carolina-based Black Workers for Justice, which does community and workplace organizing in the South).

<sup>376</sup> See 9 TO 5, NAT'L ASS'N FOR WORKING WOMEN, "BUSINESS AS USUAL": STORIES FROM THE 9 TO 5 JOB SURVIVAL HOTLINE (1991) (on file with authors); 9 TO 5, NAT'L ASS'N OF WORKING WOMEN, ON THE JOB WITH 9 TO 5 (on file with authors).

<sup>377</sup> See Hollens, *supra* note 375, at 8 (describing the role of workers' centers for South-Asian women in New York City, for Chinese workers in Boston, and for Mexican workers in Texas); see also Ruth Needleman, *Building Relationships for the Long Haul: Unions and Community-Based Groups Working Together To Organize Low-Wage Workers*, in ORGANIZING TO WIN: NEW RESEARCH ON UNION STRATEGIES 71 (Kate Bronfenbrenner et al. eds., 1998) (describing three cooperative arrangements between community-based organizations and labor unions); Steven A. Chin, *Former Garment Worker Emerges As Labor Leader*, S.F. EXAMINER, May 5, 1994, at A21 (describing Katie Quan's efforts in establishing both the Asian Pacific American Labor Alliance and San Francisco Bay area workers' centers).

It is beyond the scope of this Article to explore these organizations and their potential at further length. We do so, however, in a companion article to this one, showing how race

issues.<sup>378</sup>

If we jettison the united front mandate and make room in the law for nonmajority organizing, we will create enhanced opportunities for new experiments in worker representation. Both labor and nonlabor groups—as well as workers themselves—should gain from these experiments. Under the current majority-rule and exclusivity regime, unions face an all-or-nothing situation; labor's existence depends on winning elections.<sup>379</sup> In the absence of majority rule, unions would not need to expend precious resources in a life-or-death struggle to win elections. Further, because workers' organizations will represent only their members, they could avoid time-consuming, costly unit-determination battles and duty-of-fair-representation suits.<sup>380</sup> Workers would select the organization that they felt would represent their interests, and organizations that have historically been estranged from labor would gain members by demonstrating their ability to represent their constituents with respect to matters of great practical concern: fair wages, elimination of discrimination and harassment, day-care facilities, family leave, flexible hours, and so on.

Community- and identity-based organizing and structures would also produce a more nuanced understanding of the form and strategies of economic exploitation, and of the worker mobilization strategies needed to overcome them. Organization around multiple sources of identity facilitates the development of a sense of self and feelings of respect for one's own race, gender, or sexual orientation, and fosters a sense of community.<sup>381</sup> Further, such race-, gender-, and ethnic-specific structures work against the tendency to ignore or gloss over conflicts, and to wax overly romantic about commonalities of interest among the disadvantaged; they ensure a mechanism for the voice of the most oppressed groups in the decision-making process.<sup>382</sup>

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and gender have been and continue to be intertwined with class issues in organizing workers. See Crain & Matheny, *supra* note 5.

<sup>378</sup> See *Female Coal-Miner Organization Fights Extinction*, WALL ST. J., Feb. 6, 1996, at A1 (describing the Coal Employment Project, a network of support groups for female coal miners).

<sup>379</sup> See Clyde Summers, *Unions Without Majority—A Black Hole?*, 66 CHL-KENT L. REV. 531, 533-34 (1990). In recent years, sophisticated anti-union tactics by employers have made it quite difficult for unions to win NLRB elections. See, e.g., Finkin, *supra* note 367, at 202 n.32 (pointing out that in recent years unions have been losing more elections than they have been winning).

<sup>380</sup> See Hyde et al., *supra* note 57, at 651 n.42; Schatzki, *supra* note 70, at 924 (suggesting that eliminating majority rule removes the doctrinal underpinnings of the duty of fair representation).

<sup>381</sup> See Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society*, 81 CAL. L. REV. 863, 901 (1993).

<sup>382</sup> See *id.* at 912; see also Dyson, *supra* note 330, at 171 (observing that we will transcend internecine conflicts within the labor movement only by explicitly taking race and identity politics into account).

This inclusion is absolutely essential because the position of the more privileged, even within a social movement, both prevents the privileged from understanding the interests of the less privileged and tends to self-perpetuate (since the position of the privileged depends upon the continued subordination of others).<sup>383</sup> Through coalition organizing, common oppressions play only one role in a larger story.<sup>384</sup>

## F. Objections

Critics could make two objections to eliminating exclusive representation: First, organizations representing less than a majority will not be strong enough to deal effectively with employers; second, dealing with a multiplicity of groups representing workers will be inefficient and costly for employers. As to the first objection, defenders of majority rule and exclusivity maintain that a united front strategy is necessary to create solidarity within a group of workers that lacks cohesion and faces virulent opposition from employers.<sup>385</sup> Only through a united front can workers attain sufficient economic leverage through their unions in dealing with the employer. One cannot, however, create solidarity by imposing it from above; illusory and su-

<sup>383</sup> See IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 184-85 (1990).

<sup>384</sup> See Mary Coombs, *Interrogating Identity*, 11 *BERKELEY WOMEN'S L.J.* 222, 247 & n.138 (1996) (book review). Iris Young best describes the vision of coalition underlying this analysis, likening it to Jesse Jackson's Rainbow Coalition:

In traditional coalitions diverse groups work together for specific ends which they agree interest or affect them all in a similar way, and they generally agree that the differences of perspective, interests, or opinion among them will not surface in the public statements and actions of the coalition . . . . In a Rainbow Coalition, by contrast, each of the constituent groups affirms the presence of the others as well as the specificity of their experience and perspective on social issues . . . . Ideally, a Rainbow Coalition affirms the presence and supports the claims of each of the oppressed groups or political movements constituting it, and arrives at a political program not by voicing some 'principles of unity' that hide difference, but rather by allowing each constituency to analyze economic and social issues from the perspective of its experience.

YOUNG, *supra* note 383, at 188-89.

Here, perhaps, is where our fundamental disagreement lies with our colleagues McUsic and Selmi. They characterize arguments for separate representation on the basis of identity, such as those made by Iris Young, as reflecting a "fear of coalition-building," or a fear "of any attempt to find or forge common interests among different groups." McUsic & Selmi, *supra* note 2, at 1340. We disagree. Arguments for separate representation and analysis of identity issues by constituent groups which are part of a larger movement seeking to build a coalition—such as the argument we advance in this Article, as well as the argument Young articulates—are simply a different means of arriving at the same ends: educating one another about our differences and furthering coalition-building in the struggle for progressive change.

<sup>385</sup> See Derek C. Bok, *Reflections on the Distinctive Character of American Labor Laws*, 84 *HARV. L. REV.* 1394, 1401-04, 1409-11 (1971); Finkin, *supra* note 367, at 200.



perfidious at best, such solidarity will dissolve quickly when the employer attempts to undermine it.<sup>386</sup>

Further, we must reexamine the assumption that coerced solidarity confers economic clout. As Professor Finkin has demonstrated, advocates of the united front exaggerate its benefits in invoking economic pressure.<sup>387</sup> Majority unions do not always succeed in putting effective economic pressure on an employer. One need only consider the great difficulty that majority unions have had recently in winning strikes.<sup>388</sup> Indeed, one experienced labor lawyer wrote that the odds against a union are so great that it is "insane" to go on strike.<sup>389</sup> While this may be an exaggeration, the crushing defeat of unions in well-publicized strikes against Phelps Dodge, Hormel, Caterpillar, and others grimly illustrates the trouble that even strong unions have winning strikes.<sup>390</sup> Enhanced capital mobility, the ability of employers to rely on technology to continue operation during a strike, and employers' increased willingness to hire permanent replacement workers raise the distinct possibility that the strike is becoming obsolete.<sup>391</sup> Moreover, strikes divide workers, ripping families and communities apart.<sup>392</sup> Finally and most importantly, reliance on the strike

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<sup>386</sup> See Finkin, *supra* note 367, at 200; see also Schatzki, *supra* note 70, at 926-29 (pointing out that many members of a typical bargaining unit do not support the majority union, and observing that solidarity under majority rule is a "myth").

<sup>387</sup> See, e.g., Matthew W. Finkin, *Labor Policy and the Elevation of the Economic Strike*, 1990 U. ILL. L. REV. 540, 547 (noting that a minority union's position "would not be significantly different from that of a union which had a majority in a bargaining unit encompassing only a minority of the employer's work force"); Finkin, *supra* note 367, at 201 (observing that the legal limits on the union's ability to command the financial support of bargaining unit members, and the law's emphasis on the individual's right to cross the strike picket line and the employer's privilege to attempt to induce her to do so, significantly undermine the practical significance of the united front).

<sup>388</sup> The literature on the growing ineffectiveness of the strike weapon is vast. See generally Finkin, *supra* note 387; Roger Keeran & Greg Tarpinian, *Public Policy and the Recent Decline of Strikers*, 18 LAB. STUD. J. 481 (1989-1990); John Hoerr, *Is the Strike Dead?*, AM. PROSPECT, Summer 1992, at 106.

<sup>389</sup> GEOGHEGAN, *supra* note 6, at 5.

<sup>390</sup> For poignant illustrations of this point, see, for example, DAVE HAGE & PAUL KLAUDA, *NO RETREAT, NO SURRENDER: LABOR'S WAR AT HORMEL* (1989) (detailing the bitter strike involving Local P-9 of the UFCW against Hormel Corporation in Austin, Minnesota), and JONATHAN D. ROSENBLUM, *COPPER CRUCIBLE: HOW THE ARIZONA MINERS' STRIKE OF 1983 RECAST LABOR-MANAGEMENT RELATIONS IN AMERICA* (1995) (describing the USWA's failed strike against Phelps Dodge Corporation).

<sup>391</sup> See CHARLES C. HECKSCHER, *THE NEW UNIONISM: EMPLOYEE INVOLVEMENT IN THE CHANGING CORPORATION* 60-61 (ILR Press 1996) (1988) (discussing how management's ability to anticipate strikes, to shift production, and to use technology to operate during strikes compromises a strike's effectiveness). Heckscher writes, "It has become so easy to break strikes that companies sometimes encourage them." *Id.* at 61. Heckscher points out that strikes impose heavy financial burdens on members and that a failed strike can devastate a labor union. He writes, "A strike for a union is like a sting for a bee—painful for the enemy, but often more damaging to the attacker in the end." *Id.* at 30.

<sup>392</sup> See *supra* note 390.

means that only a relatively small number of privileged workers in select (usually oligopolistic) industries can enjoy the advantages of collective bargaining because less-privileged workers, especially in the service sector, undergo great difficulty in mounting effective strikes.<sup>393</sup>

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<sup>393</sup> See Christopher Bavis, *Labor Arbitration As an Industrial Relations Dispute Settlement Procedure in World Labor Markets*, 45 LAB. L.J. 147, 147-49 (1994) (pointing out that a labor law system that relies on strikes does not provide the same opportunities for all employees to enjoy collective bargaining).

A plausible argument can be made that it is time to cast aside labor's historic reliance on strikes to resolve disputes and to replace it with interest arbitration. Such a shift would make collective bargaining available to economically weak workers while redistributing income in more fundamentally radical ways. See *id.* at 149. William Gould has raised the further suggestion that the quest for labor-management cooperation might create interest in more peaceful ways of resolving conflict, possibly resulting in "attempts to apply the experience gained in grievance arbitration to interest disputes about new contract terms." WILLIAM B. GOULD IV, *A PRIMER ON AMERICAN LABOR LAW* 214 (3d ed. 1993). Gould also speculates that the use of interest arbitration in the public sector might "have substantial impact on the private sector." *Id.*; see also Roger G. Howlett, *Interest Arbitration in the Public Sector*, 60 CHI.-KENT L. REV. 815, 836-37 (1984) (arguing that interest arbitration should be the means for resolving all labor disputes and that interest disputes should be resolved in a civilized manner rather than "through trial by combat"); Theodore J. St. Antoine, *Federal Regulation of the Workplace in the Next Half Century*, 61 CHI.-KENT L. REV. 631, 652-53 (1985) (stating that in certain industries, such as transportation, communications, and public utilities, compulsory interest arbitration is preferable to strikes). Furthermore, it has been argued that the United States should adopt the Canadian practice of using interest arbitration in first contract disputes. See Errol Black & Craig Hosea, *First Contract Legislation in Manitoba: A Model for the United States?*, 45 LAB. L.J. 33, 38 (1994).

The main objection to private-sector interest arbitration is that it involves an unacceptable intrusion of the government into the workplace. Labor law is based on the notion that what goes on at the workplace is a private matter between the employer and the employees and that, in general, the public has no interest in the substantive terms of a collective bargaining agreement. See Klare, *supra* note 49, at 295. Labor law conceives of the organized workplace as an autonomous realm privately governed by labor and management, with the government's role limited to ensuring that the process of collective bargaining is observed, but not with establishing the terms of the agreement. See Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1513 (1981) (pointing out that the NLRA has been interpreted to confer only procedural, not substantive, rights on labor); see also Karl E. Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358, 1417 (1982) (arguing that the public-private dichotomy is an attempt to conceive of economic life apart from government and law).

This public-private dichotomy leads to a simplistic belief that we must choose between two distinct models of workplace governance: either free collective bargaining and private ordering of the workplace, or governmental dictation of the terms of employment. See Karl E. Klare, *Workplace Democracy & Market Reconstruction: An Agenda for Legal Reform*, 38 CATH. U. L. REV. 1, 14 (1988) ("It is conventional in American political and legal rhetoric to treat bargaining, described as 'freedom of contract' or 'private ordering,' and administration through law, known as 'governmental intervention' or 'regulation,' as dichotomous, polar opposites."). However, an unresolved tension exists between the so-called private ordering of the workplace and the strong public policy of eradicating sexual and racial discrimination. For example, the public-private dichotomy influenced Justice Marshall's opinion in *Emporium Capwell*. See *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 62 (1974). Justice Marshall emphasized that the NLRA exists to facilitate the process of collective bargaining and that, accordingly, the rights created by the NLRA, such as the right to engage in concerted activity with one's fellow employees, "are protected not for their own sake but as an instrument of the national labor policy of

Furthermore, abolishing majority rule and exclusivity would breathe new life into alternative economic weapons such as boycotts and picketing. As new bridges are built between unions and nonlabor groups, they might join in utilizing picketing and boycott strategies to bring pressure on employers.<sup>394</sup> Boycotts can effectively publicize labor's message and mobilize public opinion, particularly if they are organized around issues perceived as having a social justice component (far more likely if feminist or antiracist groups are involved).<sup>395</sup> These are also relatively low-risk economic pressure tactics that may have more appeal and practical utility for the most disadvantaged workers.<sup>396</sup> Finally, eliminating majority rule and exclusivity would undermine the constitutionality of the restrictions on secondary boycotts because of the potentially broad impact on political speech by nonlabor groups; ultimately, the secondary boycott provisions would probably be struck down or repealed.<sup>397</sup>

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minimizing industrial strife 'by encouraging the practice and procedure of collective bargaining.'" *Id.* (quoting 29 U.S.C. § 151 (1994)). The public-private dichotomy holds that the government's interest in workplace governance is limited to process, and, not surprisingly, the emphasis on process over substance pervades *Emporium Capwell*. Indeed, the fired black employees lost in *Emporium Capwell* mainly because they, according to the Court, attempted to undermine "orderly collective bargaining process[es]" for eliminating discrimination by circumventing the union in an attempt to bargain directly with the employer. *Id.* at 69. Such behavior cannot be tolerated because it could damage "the bargaining process that the principle of exclusive representation is meant to lubricate." *Id.* However, the public policy of eliminating workplace discrimination requires a focus on substance, and *Emporium Capwell* offered the Court the opportunity to transcend the public-private dichotomy and to rule that, at least so far as discrimination is concerned, labor law must address substantive conditions of employment. But, unfortunately, the public policy of combatting discrimination was subordinated to the myth of private ordering of the workplace via the industrial government established by the union and management.

The belief that the public has no interest in the contents of collective bargaining agreements simply does not apply to sexual and racial discrimination because of the strong public policy against invidious discrimination. Much has changed since Congress enacted the Wagner Act. A great deal of legislation, from Title VII to the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (1994), has been enacted which undermines to a considerable degree the belief that what transpires at the workplace is a purely private matter. Furthermore, the state has not been diffident about intruding into the workplace when it has believed that exigent circumstances require intrusion. For example, the state intervened to regulate labor-management relations during both World Wars. More recently, the state has intervened in the workplace as part of the so-called war on drugs. See Marion Crain, *Expanded Employee Drug-Detection Programs and the Public Good: Big Brother at the Bargaining Table*, 64 N.Y.U. L. REV. 1286, 1335-42 (1989). Thus, given the strong public policy against discrimination evidenced by Title VII, precedent exists for government interference in the ordering of the private relationship between employer and union.

<sup>394</sup> See James Gray Pope, *Labor-Community Coalitions and Boycotts: The Old Labor Law, the New Unionism, and the Living Constitution*, 69 TEX. L. REV. 889 (1991) (discussing the advantages of such combinations and the issues raised under both antitrust law and existing labor laws).

<sup>395</sup> See Crain, *supra* note 208, at 1985-87.

<sup>396</sup> See *id.* at 1985.

<sup>397</sup> Many scholars have criticized the secondary boycott prohibitions and have suggested partial or full repeal. See, e.g., CRAVER, *supra* note 1, at 145-46 (arguing that Con-

Professor Finkin has adequately answered the second criticism raised by defenders of the majority rule—workability—and we need not repeat at length points already eloquently made elsewhere.<sup>398</sup> To summarize, Finkin notes that the problem of multiple bargaining agents already exists under current law: where the Board certifies multiple units within a workplace, the employer must bargain with each of them.<sup>399</sup> Further, separate unions may agree to form a coalition and to bargain jointly with the employer, if the employer agrees.<sup>400</sup> Finally, if a fear exists that bargaining representatives will proliferate excessively, the statute could set a minimum level of employee support (expressed in terms of a percentage of the relevant workforce) as a condition of employer recognition.<sup>401</sup>

In short, multiple representations could ultimately unify the working class by encouraging discussion and a compromise-style resolution of conflicts where they do exist. If differences do bring groups into direct conflict, even to the extent of stalling decision making and undermining the solidarity of the larger group, multiple representations would still be preferable to the situation that exists today, where the vast majority of workers—and particularly those at the bottom of the income scale—have no collective representations in their workplaces, and where those who do—like the women who work at Mitsubishi Motors—may find their interests ignored by the majority union in a travesty of solidarity.

### CONCLUSION

This Article argues that current labor law doctrine and the labor union practices consistent with it facilitate capitalist exploitation of the working class along gender and racial lines as well as along class lines. While employers undoubtedly have taken advantage of opportunities to exacerbate the divisions within the working class in order to undermine working-class unity, the labor movement's failure to con-

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gress should recognize the growing imbalance of power between workers and employers and permit some forms of secondary boycotts); PAUL WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* 272-73 (1990) (proposing that the law be amended to allow striking workers to ask other workers not to provide services to, or handle products from, the struck employer); Cobble, *supra* note 370, at 297 (proposing that secondary boycotts for purpose of organizing workers be protected); Crain, *supra* note 208, at 1996-99 (suggesting that secondary boycott prohibitions are unconstitutional as applied to labor speech raising issues of race or gender, and proposing that secondary boycott prohibitions not be applicable to pressure activities undertaken by unions in the service of race or sex equality goals in the workplace); St. Antoine, *supra* note 393, at 653-54 (arguing that restrictions on secondary boycotts should be relaxed).

<sup>398</sup> See Finkin, *supra* note 367, at 202-04.

<sup>399</sup> See *id.* at 202-03.

<sup>400</sup> Finkin and Schatzki note that a coalition-forcing or accommodating provision might be desirable to encourage this. See *id.* at 205; Schatzki, *supra* note 70, at 919.

<sup>401</sup> See Finkin, *supra* note 367, at 204.

front and recognize the divisions that exist within the working class has contributed to the problem. One can fairly place some of the responsibility for this problem at the labor movement's door, particularly when one considers the lengthy history of feminist and antiracist critiques showing that labor has at times actively fought for the interests of white men at the expense of those of women and people of color.<sup>402</sup>

But the problem runs deeper than sexism and racism within the labor movement. Labor's ambivalence about including women and people of color in its agenda symptomatizes a much more complex and deeper-running schism within the working class. The gendered and racial nature of economic exploitation creates the potential for conflicts of interest to arise within the working class on economic matters. The unidimensional vision of class consciousness spawned by prevailing law and union practice is thus both incomplete and misleading. It suggests that unions can mobilize workers around common class interests behind a united front, when in fact this may not be possible in a diverse workforce.

The labor law doctrines of exclusivity and majority rule thus ensure that unions seeking to represent gender- and race-diverse workforces will suffer role conflict. The law's strategy of suppressing divisions within the working class to present a united front on labor's side of the bargaining table has not proved equal to the task of organizing or representing such workforces. Unfortunately, despite wishful thinking and emotional appeals to class unity, "divisions between men and women will not simply disappear in the magic of solidarity."<sup>403</sup> Because these divisions are based upon material conflicts of interest which lie at the heart of worker organizing and collective bargaining under labor law, they will continue to fester and grow unless they are unmasked and addressed directly. In our view, this attention is unlikely to occur in a system characterized by a legally coerced united front.

We do not argue here for a system in which differences between workers are always accentuated; from an organizing perspective, it may often be necessary to accentuate common economic interests shared by workers. In other contexts, however, it may be more effective to affirm differences among groups of workers in order to highlight gender- or race-based exploitation and raise workers'

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<sup>402</sup> See, e.g., Michèle Barrett, *Unity Is Strength? Feminism and the Labour Movement, in WOMEN AND THE PUBLIC SPHERE: A CRITIQUE OF SOCIOLOGY AND POLITICS* 89 (Janet Siltanen & Michelle Stanworth eds., 1984).

<sup>403</sup> *Id.* at 95.

consciousness—a strategy which majority rule and exclusivity foreclose. All we seek here is breathing room in the law, so that the decision whether to emphasize similarities or differences can be made in context.<sup>404</sup>

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<sup>404</sup> Cf. Ruth Colker, *The Anti-Subordination Principle: Applications*, 3 WIS. WOMEN'S L.J. 59, 60, 80 (1987) (making the same argument in the context of feminism and antidiscrimination law).