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Women and Children First, but Only If the Men are Union Members: Hiring Halls and Delinquent Child-Supporters

Lorraine A. Schmall

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WOMEN AND CHILDREN FIRST, BUT ONLY IF THE MEN ARE UNION MEMBERS: HIRING HALLS AND DELINQUENT CHILD- SUPPORTERS

LORRAINE A. SCHMALL*

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* Associate Professor of Law, Northern Illinois University. Special thanks to Professors Mary Becker, Natalie Clark, Mary DeShazer, and Suzanne Reynolds for their insights and encouragement. This article is dedicated to Sally Soukup, a single mother and an incomparable research assistant; her daughter; and my two daughters, all of whom inspired this research.

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I. INTRODUCTION

It seems to me that women almost always lose. And so do Unions. But they are not common crusaders. There have been a myriad of struggles involving women and unions—and these struggles are always about power. Unfortunately, from my perspective, both groups have in common a dearth of power, especially in these recessionary times. Neither organized labor¹ nor females² have been blessed in this era of new prosperity, trickle-down theories, and neo-individualism. One could posit that a likely goal of most of those with the power in this country is to keep the labor and the women's movement divided; to minimize the similarities between the two struggles and diminish the sense of commonality that may lead them to joint efforts.

In the context of the cases discussed in this paper, the dispute appears to be between divorced women with custody of their children, and their ex-husbands, who fail to support them. In actuality, the dispute is an example of the primacy of institutional authority, which favors those with the most power (and, coincidentally, money) over both women and working-class men. In this paper, I discuss why it is wrong to ask unions to help the state collect child-support from their members who have failed to pay. Theoretically, I favor any effort that helps custodial parents, usually women, take care of their children. What I oppose is the discriminatory enforcement of child support obligations against men who have joined unions to improve their market bargaining power, at a time when oppos-

1. PAUL WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* 108-14 (1990); Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983).

2. *WOMEN, WORK AND WAGES: EQUAL PAY FOR JOBS OF EQUAL VALUE* 24 (Donald Treiman & Heidi Hartmann eds., 1981) ("researchers have consistently found that a substantial part of the earnings difference cannot be explained by factors thought to measure productivity differences. Taken at face value, these results create a presumption of additional factors at work, possibly including institutional barriers and discrimination"); see, e.g., Mary Joe Frug, *Securing Job Equality for Women: Labor Market Hostility to Working Mothers*, 59 B.U. L. REV. 55 (1979).

ing unionization has become, once again, fashionable and respectable because of the factual and political climate in this country.³ I also oppose such collection efforts not only because they are discriminatory, but also because they create a false impression that something is actually being done to help these poor mothers.

Many commentators and students of society support the special struggles endemic to both women and unions; these sympathizers recognize that each has more in common with than in opposition to the other. Unfortunately, the barons of labor are well-known for their celebrated and frequent antipathy to the fiscal and social plight of women.⁴ Women have always been an integral part of the labor movement,⁵ but they have not equally benefitted by its achievements. The highest paid union members are, by and large, males⁶ and there is little

3. See Robert LaLonde & Bernard Meltzer, *Hard Times for Unions: Another Look at the Significance of Employer Illegalities*, 58 U. CHI. L. REV. 953 (1991) (noting that although there appears to be increased employer violations of the National Labor Relations Act, it is due to leaner economic times).

4. See, e.g., *Laffey v. Northwest Airlines*, 366 F. Supp. 763 (D.D.C. 1973), *cert. denied*, 434 U.S. 1086 (1978) (class action of female flight attendants for pay equal to that of male flight attendants); ELLEN FRANKH PAUL, *EQUITY AND GENDER, THE COMPARABLE WORTH DEBATE* (1989); WILLIAM F. PEPPER & FLORENCE R. KENNEDY, *SEX DISCRIMINATION IN EMPLOYMENT* (1981). One of the first times the Supreme Court considered the associational rights of unions was in the context of determining whether a state law that prohibited race discrimination violated a union's constitutional rights. The Railway Mail Association offered membership to "[a]ny regular male Railway Postal Clerk or male substitute Railway Postal Clerk . . . who is of the Caucasian race, or a native American Indian. . . ." *Railway Mail Ass'n v. Corsi*, 326 U.S. 89, 91 n.3 (1945); see also Clyde W. Summers, *The Right to Join a Union*, 47 COLUM. L. REV. 33, 34 (1947) ("Eight unions have been found which have constitutional provisions excluding women, but it is generally believed that exclusion of women is more widespread than this number would indicate.").

5. F. Ray Marshall, *The Act's Impact on Employment, Society and the National Economy*, in *AMERICAN LABOR POLICY: A CRITICAL APPRAISAL OF THE NATIONAL LABOR RELATIONS ACT* 16, 24 (Charles J. Morris ed., 1987). Unions had to deal with

the increased labor force participation rates of women, who are generally are less well-organized than men and whose presence as permanent, integral parts of the work force put pressure on traditional work rules and compensation systems oriented to male heads of households and based on the assumption that women were temporary peripheral labor market participants.

See also CAROLYN ASHBAUGH, *LUCY PARSONS: AMERICAN REVOLUTIONARY* (1976); *WITH BABIES & BANNERS: THE STORY OF THE WOMEN'S EMERGENCY BRIGADE* (New Day Films 1978).

6. See PAUL, *supra* note 4; BUREAU OF THE CENSUS, U.S. DEP'T OF

direct evidence that unions have as a goal to end the female claim to being the most impoverished class.⁷

The peculiar context of two recent California cases, *In re Marriage of Wilson*⁸ and *Senecker and the Butchers Union Local 532*⁹ pits women against unions in a unique way. The California Court of Appeal has had to decide what to do when a father who refuses to pay child support—a woefully common phenomenon—secures his employment through the services of his union-operated hiring hall. In each of the two cases, on the motion of the state attorney general, the court ordered the union joined as a defendant in a family law action, for the limited purpose of advising the court of the name and address of any employer to whom a delinquent father has been referred for work. The delinquents were not financially unable to pay; each was employed. They, however, changed jobs so frequently that the state statutory provision for automatic wage deduction was useless.

Feminists ought to celebrate any judicial endorsement of creative efforts to make fathers pay.¹⁰ At the same time, unionists may smart at what appears to be another affront to the political dignity and potency of organized labor. And skeptics can be rightfully concerned that such activism and stridency in

COMMERCE, NATIONAL DATA BOOK AND GUIDE TO SOURCES: STATISTICAL ABSTRACT OF THE UNITED STATES 1990 (110th ed. 1991). In 1988, there were 11,019 men in unions, as compared to 5,982 women in unions. The wage difference is equally dramatic, with men earning \$21,218 to women's average annual salary of \$16,380. *Id.* at 419 (extrapolated from table).

7. "Exclusion of Negroes, aliens, and women has been motivated primarily by a desire to eliminate these particular sources of notoriously cheap labor as potential job takers." Summers, *supra* note 4, at 36. Although motivated by institutional and financial survival, it appears that the union movement has lately focused upon women workers as organizers and objects of organization. See, e.g., *American Hosp. Ass'n v. NLRB*, 899 F.2d 651 (7th Cir. 1990); *Women Seen as Source of Growth for Labor Movement*, LAB. REL. WKLY., Sept. 19, 1990, at 859.

8. 257 Cal. Rptr. 477 (1989).

9. *Senecker and the Butcher's Union Local 532*, at 42450 Ct. No. 123668 (Cal. App. 1990) (unpublished decision). Neither case offers a complete factual background; the courts dealt with each application rather summarily.

10. My male colleagues are universally shocked at my concern about the instant efforts to collect. Law often can be only a series of band-aids used to try to improve social health when the overwhelming and radical changes that are necessary to find a cure are impossible to make. But, somehow, as Regina Austin eloquently describes in her article on being a woman of color, "I know that I am not just flying off the handle, seeing imaginery insults and problems where there are none." Regina Austin, *Sapphire Bound!*, 1989 Wis. L. REV. 539, 540.

collecting delinquent child support, though apt in any case, seems to be strangely lacking in almost every other context, since nearly one-half of all noncustodial fathers¹¹ do not comply with court orders to pay child support. No one ought to object to any effort that results in greater enforcement of parental financial obligation, even if it is only through inconsistent ardor. It is certainly better to get a few dollars more for a few more children than to be consistently but fairly inefficient. But one might query whether the system is more likely to take on the weak and least favored defendants, for example labor unions, on behalf of another powerless group—unsupported mother/caretakers—who rarely inspire such militant advocacy. Furthermore, however inconsistently and dispassionately, labor unions have helped improve the working lives of women. It would make some sense, rather than prohibiting this type of aggressive enforcement, to use it consistently and apply it equally across the board. However, it is only available because of the father's status as union member, which creates the problem.

The judicial decisions to join a union in a family law dispute—however tangentially—raises questions about motivation and effect. I have no sympathy for a father who does not support his children. But there are ways to make him do it that do not implicate his labor union. More efficient and efficacious collection, for example, a program where the family law court and not the destitute, unsupported mother, begins delinquency proceedings, has netted more money for needy children.¹² Better lawyering, faster-acting judges who move parties and their attorneys along when the support of children is at stake, and who set decent support levels in the first place, all would seem to help get some of these children, whose fathers refuse to support them, out of poverty. Jail—as a threat or a real alternative for delinquent fathers—can motivate a parent to support his child. The particular actions in *Senecker* and *Wilson*, while

11. K. Eckhardt, *Social Change, Legal Controls, & Child Support: A Study in the Sociology of Law* (1965) (Ph.D. Dissertation, University of Wisconsin), cited in DAVID L. CHAMBERS, *MAKING FATHERS PAY* 71 (1979); STERNMAN & DAVIS, *DIVORCE AWARDS & OUTCOMES: A STUDY OF PATTERN & CHANGE IN CUYAHOGA COUNTY, OHIO, 1965-1978*, at 8 (1981). In this case, at least, a gender generalization is appropriate: most mothers have the children and most fathers have the money. The latest amendments to federal child support laws, including automatic wage deductions payable to the family law court for the benefit of the children whose custodial parent is awarded support, vastly improved the post-1989 collection rate but no percentages are yet available.

12. See generally CHAMBERS, *supra* note 11.

laudatory as an aggressive effort to make fathers pay, do not represent a modality that least interferes with other important social, political, and personal interests. On the contrary, such suits at least raise the specter of interference with federal statutory and constitutional rights. Further, there is some reason to doubt whether such interference actually works to the benefit of the poor mother, on whose behalf the court is arguably treading on constitutional and statutory rights.¹³ Even if such a collection mechanism can work, these orders illustrate the kind of disparate and unreasoned judicial responses that worry me.

The social and political impact of this disparate enforcement of mothers' rights and the somewhat suspicious choice of a labor union as a handmaiden to the king in his collection and protection efforts is not amenable to proof through empirical data. In cases too numerous to mention, but well-known among plaintiffs' lawyers and academics who study the laws against discrimination, discriminatory intent is very difficult to prove, and defenses that suggest a legitimate business reason, despite the fact that a woman or an African-American or a union supporter lost a job, often carry the day in court for the alleged discriminator.¹⁴ The reason writers complain about the system, and its inherent inequities, is that change requires a modification in a belief-system, and the rejection of policies that impair people's chances of ever achieving equality under law.¹⁵ The worry about interference, both on constitutional

13. I concede that a union could, practically, comply with such an order, which would give the states' attorney the chance to establish a wage deduction from the start of the delinquent's employment, assuming that the delinquent takes the job to which he is referred. One must further assume that union timely advises the court; the court must then promptly enter an order for automatic wage deduction, which must be expedited to the new/current employer of the delinquent. With any luck, the delinquent will still be there. However, that creates the possibility that, were the union to fail to comply with a *Wilson* order, it may be sued in negligence. In the discussion, *infra* pp. xx-xx, of hiring halls, it is clear that many such halls have no regular procedure or professional staff to handle referrals.

There are also serious questions as to whom the plaintiff in such a negligence action could be. Is this yet another legal expense for the impoverished mother? Could the state hold the union in contempt? In addition, a union could raise a tenable preemption argument, since unions qua unions are rarely held liable for simple negligence. See *United Steelworkers v. Rawson*, 110 S. Ct. 1904 (1990). Again, a new cycle of treating unions differently than others, for example, employers who fail to withhold, raise all the same issues discussed herein.

14. See, e.g., *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

15. Justice Holmes' observation is apt here:

[P]erhaps one of the reasons why judges do not like to discuss

and federalism grounds, with the right of unions to be left alone, can be no more directly addressed. The joinder orders of the appellate court seem impermissible because they: (1) require the disclosure of confidential union information which would deprive unions and their members of their derivative First Amendment right of association; (2) facially discriminate between union members and others; (3) impose upon the privacy rights of the union and its members; (4) collide with the comprehensive regulation of labor relations which Congress has declared a strictly federal concern, emanating from the Commerce Clause; and (5) work detriment to the declared federal policy (in statutory language if not in practice in the *laissez faire* 1980s and 1990s) to encourage collectivization among workers.

Although it "feels" wrong to make the union cooperate with a family law court, and that feeling, I argue, ought to be sufficient to justify a court's decision not to use such a dubious collection mechanism, there is little legal precedent to prove interference with the constitutional or federal statutory rights of either the unions or their members. Any lawyer, however, could argue that the instant cases are unique and that there is something to worry about.¹⁶ As the law stands now, the constitutional right of workers to associate free from government restraint and inquiry may not extend to a case where a member asks that his union not help the state collect delinquent child support. And state family law is often excepted from federal control because of the historical right of *parens patriae*. Were this an ideal world, where law and sociology, rather than law and economics, were the standard, a court would hesitate before it entered an order like those in *Wilson* and *Senecker*.¹⁷

questions of policy, or put a decision in terms upon their views as law-makers, is that the moment you leave the path of merely logical deduction you lose the illusion of certainty which makes legal reasoning seem like mathematics. . . . Views of policy are taught by experience of the interests of life. Those interests are fields of battle.

Oliver Wendell Holmes, *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 7 (1894).

16. When *Mueller v. Oregon*, 208 U.S. 412 (1908), was decided, there was precious little precedent to help a woman argue that she was being denied the right to earn a living, a right that only men enjoyed. It really was not until last term, when the Court decided that fetal protection policies discriminate against women in *UAW v. Johnson Controls*, 111 S. Ct. 1196 (1991), that women could claim that case law supported their right to work, regardless of their fecundity.

17. Surely then we would have been spared *Bradwell v. State*, 83 U.S. (16 Wall) 30 (1872), and *Plessy v. Ferguson*, 163 U.S. 537 (1896).

This particular collection effort presents a conundrum. Consequently, while much of this discussion deals with why the California Court of Appeal is arguably correct in joining the unions, substantial discussion centers on what forces militate against those orders. My own opinion is that no court should be allowed to do what the California Court of Appeal did. The court's action advances women only at the expense of men who belong to unions, without trying to achieve the goal of universal child-support and without injury to anyone because of his labor association.

While refusing to concur with the decisions, it is fair to say that one reading of the case law would support their legality. Although both the union's and the member's goals are often political, the union is joined in this case as an entity with whom the delinquent father has a relationship analogous to a contract for economic gain—i.e., job referral—and the release of employment referral information in this discrete factual context may work no injury to the union's ostensible *raison d'être*: organizing employees for political and economic advantage.¹⁸ Despite constitutional endowment of union associational rights, a court reading extant jurisprudence could conclude that the *Wilson* and *Senecker* orders do not reach the level of "significantly interfering"¹⁹ with those associational interests; a standard which the Supreme Court has required to invalidate certain acts that impact upon first amendment rights. Although unions have a privacy right, the limited nature of the information the state asks the union to release here arguably, in comparison with those cases where information asked of unions was patently "private," may not impinge upon this privacy.

Nor would federalism, which in its purest form demands preemption of any state law which offends the management by the federal government of relations constitutionally or statutorily subject to the exclusive control of Congress, automatically preclude the issuance of the *Wilson* and *Senecker* orders. First, the state's interest in enforcing personal child support orders is largely unconnected with labor relations, which in every case involves the intercourse between employees and their unions or employers. Second, even the broadest reaches of preemp-

18. However, the union is in no way the delinquent's employer. It owes him no money which could and should be attached for the support of his children.

19. *Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 549 (1987) (requiring a club to admit women does not "significantly interfere" with and is no substantial threat to members' associational rights, since they were not required to "abandon or alter" any of their activities or basic goals).

tion demarcate those areas peripheral to labor relations and of enormous and historic local concern, as exceptions to the rule. Finally, congressional proscription of acts that discourage collectivization is directed at private employers, not at state action. Even if the National Labor Relations Act, which codifies those proscriptions, should apply by analogy to enforcement actions by the several states because of the NLRA's clear embodiment of federal policy, compliance with the California Appeal Courts' orders would not, except in an indirect way, discourage unionism.

Moreover, even the sacrosanctity of federal labor law has been cast aside where it appears to violate the purposes of laws that relate to the protection of family interests. For years before the Employee Retirement Income Security Act (ERISA)—a federal law imposed on all employers—was amended to allow alienation of retirement benefits to satisfy child support obligations, some courts found that pension money ought to be available for such use. They reached this result, even though ERISA has the clearest and broadest articulation of federal preemption of any labor statute, and despite the statutory proscription of alienation for any purpose.

However, in each of these areas of concern, the cases only suggest, but do not demand, a finding that the orders against the union are right.²⁰ The confluence of so many potential infringements—even where the joinder is legal within the parameters of case precedent—indicate that the court should not have done what it did. I may not be able to argue convincingly that the orders were unconstitutional,²¹ only that they

20. It seems too narrow an approach to law, labor law especially, to rigidly apply case precedent to a situation where politics, economics, philosophy, and anthropology all contribute to the way things work. A legal methods teacher in the first year of law school may be gratified that a student would read the cases and conclude that California acted appropriately in the instant cases; however, such formalism overlooks the other stimuli at work. Certainly, respected scholars would disagree about what makes law happen, and not all espouse rigorous case analysis. Cf. Matthew W. Finkin, *Revisionism in Labor Law*, 43 MD. L. REV. 23 (1984); Karl N. Llewellyn, *On the Good, the True, the Beautiful in Law*, 9 U. CHI. L. REV. 224 (1942).

21. Cases already decided by the Supreme Court seem to contradict that conclusion. So distinguished a panel of constitutional experts as John Nowak, Ronald Rotunda, and Nelson Young, in their "hornbook," comment: [I]ndividuals might associate to achieve economic or other goals that are unconnected to any fundamental constitutional right. For example, individuals might join together in labor unions or trade associations. This ability to control one's economic associations is a part of the liberty protected by due process, but the Court has refused to substitute its judgment for the legislature's as to the

threaten constitutional protections and statutory guarantees sufficiently to raise questions as to their use. *Senecker* and *Wilson* represent an unprovable point about law and power. David and Goliath is such a popular story simply because the results are unique, and perhaps heartening to the scores of losers who will never fell any giants. Women may view these California cases as good over evil, disenfranchised female over omnipotent male; but they may more likely represent what happens when two equally powerless groups go head to head. There is also some question about whether even the remote possibility of constitutional and federalism implications are worth the result, since union joinder may net no real money for the unsupported children,²² and there may be eminently more effective ways to get the children's bills paid. Unfortunately for unions, and for women, these alternative enforcement methods represent attacks upon those most powerful and most like the judges to whom the appeals for enforcement must be made: men with money.

II. DOES A GOVERNMENT ORDER TO A UNION TO IDENTIFY THE NAME OF AN EMPLOYER TO WHOM AN ADJUDGED DELINQUENT FATHER HAS BEEN REFERRED INTERFERE WITH ANY FIRST AMENDMENT RIGHT A UNION OR ITS MEMBERS MAY HAVE?

There is something troubling about making a union reveal information about one of its members to the government. A union has many functions, but surely none includes an obligation to help the state collect child support from non-paying, noncustodial parents.²³ Union members cannot use their

legitimate basis for restricting such types of association. So long as the legislature is rationally promoting an arguably legitimate government goal by restricting the activities of a business association, the Court will not invalidate this legislation.

JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW 948 (3d ed. 1989).

22. In its unpublished decision, the court noted that Robert Senecker worked an average of only two weeks for every employer, and that notification of the employer and attachment of wages would have been impossible in that time. Even with notice of the state's attorney within a few days of a delinquent's referral, it is clear that wages may never be attached if delinquents continue to change jobs so frequently.

23. An interesting comparison may be made to the Internal Revenue Code, 26 U.S.C. § 21(e)(9) (1988), which requires taxpayers who wish to take a child care credit to provide the government with the name and social security number of the child care provider. Although not of constitutional dimension, certain privacy interests are ignored because of the claim of the government of its need to raise revenues, to support, inter alia, child support

unions to protect them from legal obligations. But a delinquent father should not be in a worse position than any other employee simply because he belongs to a union.²⁴ Union membership ought to carry with it only the burdens that accompany the benefits of union membership: the dues, the subjection to internal discipline, and the participatory obligations. It ought not deprive a member of privacy, and make the union an unwilling conduit of information about the member. The instant cases are likely defensible because of their unique and limiting facts, but it is no great traverse to circumstances under which constitutional privileges may be threatened. To go even further, simply because it is not unconstitutional or illegal to demand such complicity of a union, does not mean it is good policy to do so.²⁵

enforcement mechanisms. See M. Morris, *The Child-Care Credit Conundrum* (unpublished manuscript on file with Northern Illinois University College of Law).

24. Of course, the state argued that an employee whose work is had through a union hiring hall is likely not to (and in the instant case, assuredly did not) stay with a single employer long enough for the state to secure an automatic wage deduction for child support. There is still a possibility that even were the union to report to the state the identity of the employer to whom it referred a delinquent, either the delinquent will not take, or will not be offered the job or, that the delinquent would still not work for that employer long enough to have his wages attached. Beyond that, there are other ways the state could recover delinquencies—an order to the delinquent that he either reveal his adjudged delinquencies to any employer or be held in contempt of court is one example. That way, not only union members but any itinerant employee would be less likely to evade familial obligation, and there would be no distinction in treatment due entirely to union membership status.

25. Political and social realities often mandate that the law change. For example, more than forty years ago, Professor Clyde Summers argued that unions ought to be made to admit blacks, women, and aliens. At the time, such exclusionary practices were not illegal. Professor Summers reasoned that a nineteenth century New Jersey chancery court's conclusion in *Mayer v. Journeyman Stonecutters Ass'n*, 20 A. 492 (N.J. Ct. of Chanc. 1890), which became the landmark case for sixty years and held that unions were voluntary associations with the absolute right to deny membership to anybody, was no longer apt in the middle of the twentieth century, when unions were powerful economic actors. See Clyde W. Summers, *The Right to Join a Union*, 47 COLUM. L. REV. 33, 39 (1947); cf. *Hopkins v. Price Waterhouse*, 409 U.S. 228 (1989), *remanded*, 737 F. Supp. 1202, 1210 (D.D.C. 1990) (large accounting firm that discriminated against a woman because of her sex can be ordered to make her a partner. "The fact that Price Waterhouse opposes her admission to partnership cannot control.").

A. *Historical Treatment of Labor Unions*

Unions are not popular with most capitalists. And unions have not had an easy time of it in this country. This, despite the fact that since the end of the nineteenth century, Congress has been concerned about, and has attempted to dissipate, the inequality of bargaining power between employees and employers.²⁶ Sometimes, the collective voice of our elected representatives and the judiciary articulates belief in the inviolable integrity of the individual worker;²⁷ at other times the concern is only for the efficient operation of business.²⁸ Whatever the motivation, it is part of our national policy to encourage collectivization. Perhaps for this reason, if for none other, intrusion into union affairs should be scrutinized carefully.²⁹

26. SELIG PERLMAN, *HISTORY OF TRADE UNIONISM IN THE UNITED STATES* (1950). Congress recognized that:

It is the employer's purpose to bring in ever lower and lower levels in competition among laborers and depress wages; it is the purpose of the union to eliminate those lower levels and to make them stay eliminated. That brings the union men face to face with the whole matter of industrial control. It is essential to note that in struggling for recognition, labor is struggling not for something absolute, as would be a struggle for a complete dispossession of the employer, but for the sort of an end that admits of relative differences and gradations.

Id. at 267; *see also* Norris-LaGuardia Act, 29 U.S.C. § 102 (1988) ("the individual unorganized worker is commonly helpless to exercise actual liberty of contract").

27. *See, e.g.*, Clayton Act, Act of October 15, 1914, 38 Stat. 730 (codified as amended at 15 U.S.C. §§ 12-27, 29 U.S.C. §§ 52, 53 (1988)) ("the work of an individual is not an article of commerce. . . ."); *American Steel Foundries v. Tri-City Council*, 257 U.S. 184, 209 (1921):

A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and his family. If the employer refused to pay him the wages he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers an opportunity to deal on equality with their employer.

28. *See, e.g.*, *First Nat'l Maintenance v. NLRB*, 452 U.S. 666 (1981).

29. *See, e.g.*, *UAW v. Lyng*, 648 F. Supp. 1234 (D.D.C. 1986). The district court, although later reversed by the Supreme Court, found the federal law disqualifying strikers and their families from receiving food stamps unconstitutional. The court noted that strikers, at least as "a historical matter," have "been subject to discrimination;" may be defined as a discrete group by "obvious and distinguishing characteristics;" and have frequently been in the stance of an unpopular political minority. *Cf. Lyng v. Castillo*, 477 U.S. 635, 639 (1986). There is judicially noticeable scholarly work evidencing discrimination in the form of public and official hostility against labor unions in general, and strikers in particular. *See, e.g.*, 18 *ENCYCLOPEDIA BRITANNICA, Trade Unionism* 563, 565-66 (1987); IRVING BERNSTEIN, *THE LEAN YEARS: A HISTORY OF THE AMERICAN WORKER, 1920-*

The first American labor case to be fully reported and remarked upon³⁰ made clear the reason for the defendant union's lack of popularity with those most powerful in the developing nation. In his charge to the jury, the city attorney who was prosecuting the several workers for striking for higher wages explained:

[T]he master employers have no particular interest in the thing . . . if they pay higher wages, you must pay higher for the articles. They, in truth, are protecting the community. . . . They have no interest to serve in the prosecution; they have no vindictive passions to gratify, . . . they merely stand as the guardians of the community from imposition and rapacity.³¹

No one had yet the audacity to say "What's good for business is good for America," but the sentiment was there just the same.³² It may never be clear whether the legal system supports its own moneyed constituents, whose most articulate and influential members are within society's highest economic strata or whether it reflects the values of society as a whole. But there was and is no doubt that the powerful and wealthiest (save those of highly publicized graft and criminality within the ranks of organized labor) disfavor unions.

Under English common law in the eighteenth century, combined action by workers to raise their wages was a criminal conspiracy.³³ That view remained intact until the middle of the nineteenth century. "A combination of workmen to raise their wages may be considered from a twofold point of view: one is to benefit themselves . . . the other is to injure those who do

1933 (1960). Indeed, there have been many legislative efforts to ameliorate the historic discrimination against labor unions and strikers. *See, e.g.*, 29 U.S.C. § 104 (1988) (no injunction against ceasing or refusing to work); 29 U.S.C. § 163 (1988) (preserving the right to strike).

30. *Commonwealth v. Pullis*, Phila. Mayor's Court (1806); 3 JOHN RODGERS COMMONS & EUGENE ALLEN GILMORE, *A DOCUMENTARY OF HISTORY OF AMERICAN INDUSTRIAL SOCIETY* 58-248 (1910).

31. COMMONS & GILMORE, *supra* note 30, at 137.

32. *See, e.g.*, Speech by Calvin Coolidge to the American Society of Newspaper Editors (Jan. 17, 1925) ("The chief business of the American people is business."); Speech by Charles Erwin Wilson to the Senate Armed Forces Committee (1952) ("What is good for the country is good for General Motors, and what is good for General Motors is good for the country.") in JOHN BARTLETT, *FAMILIAR QUOTATIONS* 736, 817 (15th ed. 1980).

33. *See, e.g.*, *Rex v. Journeymen Tailors of Cambridge*, 8 Mod. 10 (1721); *Rex v. Eccles*, 1 Leech C.C. 274 (1783), *cited in* CHARLES E. RICE, *FREEDOM OF ASSOCIATION* 76 (1962).

not join their society. The rule of law condemns both."³⁴ The criminal conspiracy theory and the nearly universal judicial disapproval of any collective efforts ended, at least in one important industrialized state, in 1842 when the Supreme Court of Massachusetts gave its imprimatur to a strike that was lawful both in its means—devoid of violent and trespassory activity—and its end—to achieve higher wages for the particular workers so combined.³⁵ At once, the court legalized strikes that sought improvements in wages and working conditions of the workers who struck, and disapproved any indirect political action by those same workers.

However, the discontinuance of criminal conspiracy prosecutions hardly marked the end of legal limitations on the right of laborers to organize. The conspiracy theory was scarcely laid to rest as creating a criminal offense when it was reborn as establishing civil liability in tort whenever either the means or the end were, by a judge's subjective standard, unlawful.³⁶ This elusive but widely adhered to "end-means" test, explained by Justice Holmes in a dissenting opinion in *Vegeahn v. Guntner*,³⁷ represented a more moderate and liberated view of union activity, but one which still limited unions to the business of improving the lot of their own members vis-a-vis their own employers, rather than attempting to achieve broader social goals. If unions were legal at all, it was simply because they were collective parties to an ordinary commercial contract. Collectivization was judicially—and later statutorily—endorsed simply to prevent unconscionable terms imposed by a dominant employer and to avoid any real foment among the historically abused working class.³⁸ The opinion of Justice Holmes makes that clear:

One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is patent and powerful. Combination on the other side is the necessary

34. *Commonwealth v. Pullis*, Philadelphia Mayors Court (1806); COMMONS & GILMORE, *supra* note 30, at 140.

35. *Commonwealth v. Hunt*, 45 Mass. (4 Met.) 111, (1842), *cited in* AMERICAN LABOR POLICY 273-74 (Charles J. Morris ed., 1987).

36. *Vegeahn v. Guntner*, 44 N.E. 1077 (Mass. 1896).

37. *Vegeahn*, 44 N.E. at 1079.

38. JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW (1985).

and desirable counterpart, if the battle is to be carried on in a fair and equal way.³⁹

This is hardly an exhaustive chronicle of American labor history. It is sufficient to note that unions, even before Jimmy Hoffa and J. Edgar Hoover, were warily, and often, hostilely regarded by the legal system. Even after unions were effectively legalized, they were made to tread jurisprudential waters.⁴⁰

It would require no particular omniscience to speculate that American courts would be conservative in their approach to the problems thrown up by unionism, even after the atrophy of the doctrine of criminal conspiracy. A judiciary nurtured in the culture of contract and property, and recruited largely from the middle and upper classes of society, would very naturally have moved slowly in the adaptation of its legal system to accommodate and privilege the injuries to recognized interests which collective action in its typical form necessarily inflicts. It was to be anticipated that organized labor would face an uphill struggle in gaining legal acceptance of its normal modes of conduct in the absence of legislative approbation, and so it has been.⁴¹

For a long time, even congressional endorsement of collective bargaining helped little to change how unions were treated by either their employer counterparts or by judges. The Clayton Act, passed in 1914,⁴² declared that the "labor of a human being" was not "an article of commerce;" that anti-

39. *Vegetahn*, 44 N.E. at 1077, 1081. I want to note that most references, regardless of source, to the American worker, are to the male worker. This is, and has been, only partially accurate. It may simply be another sign that our language is not gender-neutral and it is difficult to overcome the nearly universal past use of the male pronoun to refer to both sexes. It may also be symptomatic of the troubles between women and unions.

40. Federal courts often issued blanket injunctions. *See, e.g.*, *Toledo, A.A. & N.M. Ry. Co. v. Pennsylvania Co.*, 54 Fed. 730 (N.D. Ohio 1893); FELIX FRANKFURTER & NATHAN GREENE, *THE LABOR INJUNCTION* (1930). Collective bargaining contracts were unenforceable in court. *See, e.g.*, JOHN R. COMMONS & JOHN B. ANDREWS, *PRINCIPLES OF LABOR LEGISLATION* 118 (1920) ("The so-called 'contract' which a trade union makes with an employer or an employer's association is merely a 'gentleman's agreement,' a mutual understanding not enforceable against anybody."), *quoted in* Summers, *supra* note 25, at 40 n.35.

41. LEROY MERRIFIELD ET AL., *LABOR RELATIONS LAW: CASES & MATERIALS* 18 (1989).

42. 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12-27 (1988)).

trust laws were inapplicable to unions in most cases; and, that labor activity was virtually unenjoinable by federal judges. But the statute was largely nullified by a reactionary judiciary,⁴³ and the state courts, especially, were loathe to abandon their love affair with the labor injunction, even after Congress passed the Norris-LaGuardia Act in 1932.⁴⁴ Under that law, Congress hoped to crystallize its proscription of injunction by federal courts of peaceful labor disputes, but state judges were still reluctant to allow untrammelled collective action.⁴⁵

In 1935, the first comprehensive federal labor statute was passed—the Wagner Act⁴⁶—which had as its avowed purposes the encouragement of collective bargaining and the equalization of bargaining power between employers and employees.⁴⁷ This goal was, in part, achieved in the 1940s and 1950s. Now, however, there appears to be more than a little backsliding to the times when unions were officially and legally wrong. Perhaps the legislative approbation was not clear enough, was too *avant garde* for its times,⁴⁸ or was not really meant to be given a literal interpretation, but some commentators wonder if the National Labor Relations Act has been silently repealed.⁴⁹

43. See Walter E. Oberer, *The Regulation of Union Economic Power*, in *AMERICAN LABOR POLICY* 270 (Charles J. Morris ed., 1987).

44. 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. §§ 101-115 (1988)).

45. Stuart Linnick, *Injunctions*, in *BASIC LABOR RELATIONS* 92-94 (Bertrand B. Pogrebin & Selma Arnold eds., 1976).

46. 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1988)).

47. The purpose clause provides:

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. § 151 (1988).

48. WILLIAM E. LEUCHTENBURG, *FRANKLIN D. ROOSEVELT AND THE NEW DEAL*, 1932-40, at 151-52 (1963):

The Wagner Act was one of the most drastic legislative innovations of the decade. . . . No one, then or later, fully understood why Congress passed so radical a law with so little opposition and by such overwhelming margins. A bill which lacked the support of the administration until the very end, and which could expect sturdy conservative opposition, it moved through Congress with the greatest of ease.

49. There is a plethora of writing, the predominant conclusion of which

Judicial reactions to labor, at least in the past decade, seem antithetical to the fostering of collectivization.⁵⁰

Accepting congressional articulation as a reliable source of public policy and disapprobative of rewriting history, it appears our legal system should afford unions at least neutrality, if not advocacy. Despite the limited parameters of the California decisions, the purport of the Wagner Act and all its ill-fated predecessors seems ignored. Joining a union in a family law case may impose upon it obligations it was not meant to—indeed, could not—undertake. Every effort by unions to be more political, and to be less concerned with increasing the size of the paychecks of its members, has been halted by the American legal system—either its constabulary or its judiciary—since the Knights of Labor struck for child labor laws and universal public education in the 1870s.⁵¹ Judicial adoption of the end-

is that the Wagner Act, as amended and applied, has failed. See, e.g., Karl E. Klare, *Traditional Labor Law Scholarship and the Crisis of Collective Bargaining Law: A Reply to Professor Finkin*, 44 MD. L. REV. 731, 733 nn. 5-6 (1985).

50. Some argue that the Wagner Act was emasculated by the judiciary almost as soon as it was passed. See, e.g., *MacKay Radio & Tel. Co. v. NLRB*, 304 U.S. 333 (1938) (employers can permanently replace employees who are on strike thereby diminishing the union's collective strength); *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965) (employer can lock out employees in order to strengthen its bargaining position); A.H. Raskin, *Elysium Lost: The Wagner Act at Fifty*, 38 STAN. L. REV. 945 (1986); James B. Atleson, *Reflections on Labor, Power, and Society*, 44 MD. L. REV. 841 (1985). The judicial disinclination toward unions diminished somewhat the two decades after the NLRA was passed but appears to have heightened with a more conservative judiciary—appointed, by and large, by Ronald Reagan, whose pro-business/power philosophy was resoundingly supported by the free-market law and economics scholars. See, e.g., Richard E. Epstein, *A Common Law for Labor Relations: A Critique of New Deal Labor Legislation*, 92 YALE L.J. 1357 (1983); see also *Patternmakers' League of N. Am. v. NLRB*, 473 U.S. 95 (1985) (union members can quit the union at any time, even during a strike they voted to undertake, and the union cannot discipline them for quitting); *TWA v. Independent Fed'n of Flight Attendants*, 489 U.S. 426 (1989) (union members who quit the union and abandoned a strike need not be replaced at the end of the strike by employees who did not abandon the strike but had more seniority with the employer); *Indianapolis Power & Light Co.*, 273 N.L.R.B. 1715 (1985) (general no-strike clause precludes a union from engaging in a sympathy strike in solidarity with another local); *First Nat'l Maintenance v. NLRB* 452 U.S. 666 (1981) (employers need not bargain over changes in operations, even if they permanently displace workers represented by the union, if the changes involve entrepreneurial decisions about issues other than labor costs).

51. See, e.g., *New Orleans Steamship Ass'n v. General Longshore Workers*, 486 F. Supp. 409 (E.D. La. 1980) (union cannot lawfully strike in opposition to the Soviet Union's invasion of Afghanistan); Peter J. McGovern, *The Children's Rights and Child Labor: Advocacy on Behalf of the Child Worker*, 28 S.D. L. REV. 293 (1983); see also *Communications Workers v. Beck*,

means test for "legal" union activity, which decriminalized combinations of workers, probably created the business-unionism⁵² that represents all but the smallest part of organized labor activity in this country.⁵³ Consequently, it is mystifying to see state judges call upon unions to encourage their members to pay child support.

B. *Unions and the First Amendment*

People join unions for reasons other than pay raises.⁵⁴ They are often motivated by a desire to become a part of a whole—more powerful than each alone—and by a need to belong and associate.⁵⁵

The urge to join a union . . . came not only from expectation of economic gain through collective action. The hope that he would attain greater security—a square deal and protection from arbitrary discipline—was always highly important, but there was also an often unconscious desire on the part of the individual wage earner to strengthen his feeling of individual worth and signifi-

487 U.S. 735 (1988) and its progeny, which severely limit the right of unions to use collective funds for political advocacy—or for that matter, for any purposes some judge finds not germane to collective bargaining. If the Butchers or the Carpenters collectively decided that the California family laws disserved their single parent members by encouraging non-payment of child support, they could not take collective action that had an impact upon their employer to make their protest. In fact, they could not even take an ad in a newspaper to ask for legislative changes, without allowing their dues payors to dissent and to refuse to contribute to the cost of the ad.

52. This term refers to the impliedly "legal" goals of the labor movement which judges recognized in the latter part of the nineteenth and early part of the twentieth century. A union can engage in collective action to further its proper "business related goals," such as increased wages or better working hours. It cannot strike to further more general social goals which the collective has adopted. See, e.g., *International Longshoremen Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212 (1982) (despite unions' claim that unloading Soviet vessels to protest the invasion of Afghanistan was morally repugnant, their refusal to deal was unlawful secondary boycott).

53. Oberer, *supra* note 43, at 271.

54. However, that is a critically important reason. In 1947, Professor Clyde Summers, in addressing the rights of blacks, women, and other "minorities" to challenge their exclusion from unions, wrote: "To exclude a man from a club may be to deny him pleasant dinner companionship, but to exclude a worker from a union may be to deny him the right to eat." Summers, *supra* note 25, at 42.

55. There are many who would argue that people join unions because, through the application of union security clauses, they are required to. Since the opponents of organized labor are numerous and articulate, I feel no need to express or discuss that point of view.

cance in an industrialized society. Machinery was more and more making the worker an automatic cog in a process over which he had no influence or control. The complete impersonality of corporate business, with management far removed from any direct contact with employees, further accentuated this loss of individual status. The wage earner could find a satisfaction in membership in such a meaningful social organization as a labor union that was denied him as one of among many thousands of depersonalized employees The unions, often including some of the ritual of the fraternal lodges, met a very real need entirely apart from the support they provided for collective bargaining.⁵⁶

With these additional reasons for association, governmental interference in union matters takes on constitutional dimensions.⁵⁷ Beyond that, governmental activity should not discourage union membership, for fear of infringing upon basic human rights. Despite our mythology of rugged individualism, it is collectively that most human progress has been made. The racist and sexist denial of membership in such collectives to people of color or women⁵⁸ is reprehensible not only because it is debasing and discriminatory, but also because

56. FOSTER R. DULLES, *LABOR IN AMERICA* 205 (1949), *quoted in* GLEN ABERNATHY, *THE RIGHT OF ASSEMBLY AND ASSOCIATION* 186 (2d ed. 1961). For the sake of preciseness, I quote the passage as it was written. But these and other references to the worker as "he" fail to acknowledge the participation of more than half of the workforce who are women.

57. *See, e.g.*, the discussion in NOWAK ET AL., *supra* note 21, in which the authors, with great lucidity, explain that the derivative first amendment associational right has "three separate aspects": "economic associations" which are least protected from state infringement; the associational right "connected to the fundamental right to privacy" which requires "active judicial review"; and the "right to associate for the purpose of engaging in types of activity expressly protected by the first amendment," about which the authors conclude: "[t]his right cannot be limited by the government unless the limitation serves a compelling governmental interest unrelated to the suppression of ideas and this governmental interest cannot be furthered through means which are significantly less restrictive of the associational or expressive freedom." *Id.* at 948. Were I willing to adopt a more radical approach, I would argue that the *Wilson* and *Senecker* orders are unconstitutional, because unions are political, and because "the precise type of associational right that is asserted in a case may not be easily categorized, but the Court must consider the nature of the right in order to determine the validity of governmental restrictions at issue." *Id.* at 948-49. *See* *Lyng v. International Union*, 485 U.S. 360 (1988); *Roberts v. United States Jaycees*, 469 U.S. 609 (1984); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

58. *See, e.g.*, *Railway Mail Ass'n v. Corsi*, 426 U.S. 88 (1945); *Steele v. Louisville & Nat. R.R. Co.*, 323 U.S. 192 (1944).

membership is necessary for political, economic, and spiritual empowerment. Arthur Schlesinger wrote:

At first thought it seems paradoxical that a country famed for being individualistic should provide the world's greatest example of joiners. . . . To Americans individualism has meant, not the individual's independence of other individuals, but his and their freedom from governmental restraint. Traditionally, the people have tended to minimize collective organization as represented by the state while exercising the largest possible liberty in forming their own voluntary organizations. This conception of a political authority too weak to interfere with men's ordinary pursuits actually created the necessity for self-constituted associations to do things beyond the capacity of single person, and by reverse effect the success of such endeavors proved a continuing argument against the growth of stronger government.⁵⁹

C. Unions' and Members' First Amendment Rights

Union members enjoy the right to freely associate as a derivative freedom, concomitant to those enumerated in the First Amendment.⁶⁰ Unions have the same perquisites of citizenship as any other group. As the Supreme Court explained in *Roberts v. United States Jaycees*,⁶¹ the right to engage in activities protected by the First Amendment implies a "corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."⁶² Without the right to have somebody on your side in an unpopular movement, the freedom of speech is supernumerary.⁶³ Intuitively, union membership engenders articulation of beliefs and efficient efforts at seeking redress against the

59. Arthur Schlesinger, *Biography of a Nation of Joiners*, 50 AM. HIST. REV. 1 (1944), quoted in ABERNATHY, *supra* note 56, at 239.

60. *Elfbrandt v. Russell*, 384 U.S. 11 (1966); *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963); *NAACP v. Alabama*, 357 U.S. 449 (1958).

61. 468 U.S. 609 (1984).

62. *Id.* at 622.

63. A neat analogue under the NLRA is the employer's right to conduct polls. In several important cases, the Labor Board has been upheld in its reasoning that, normally, employees ought not to be individually asked about their union support, because it is much more difficult to speak individually than in a group as to one's collective interests. See *Hotel Employees & Restaurant Employees Union v. NLRB*, 760 F.2d 1006 (9th Cir. 1985); *Struksnes Const. Co.*, 165 N.L.R.B. 1062 (1967); *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964); *Blue Flash Express, Inc.*, 109 N.L.R.B. 591 (1954).

government, and most importantly, collective bargaining with a stronger economic adversary—the employer with the capital. The District Court of the District of Columbia⁶⁴ noted that “labor unions are labor organizations which exist for the purpose, inter alia, of advancing the economic and political interests of their members.”⁶⁵ These presumed collective interests of unions endow them with First Amendment protection. They have the right to speak collectively, and the First Amendment guarantee of free speech and association extends to the protection of an individual’s right to join a labor union.

One of the earliest Supreme Court statements of these principles was in *Hague v. Committee for Industrial Organization*,⁶⁶ in which the Court struck down an ordinance which vested uncontrolled discretion in city officials to permit or deny any group the opportunity to conduct an assembly in a public place. Justice Stone recognized the lawful and useful purpose of the Congress of Industrial Organizations to disseminate information about the National Labor Relations Act. Later, in *Thornhill v. Alabama*, the Court concluded that the Constitution protects “[f]ree discussion concerning the conditions in industry and the causes of labor disputes [which] appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society.”⁶⁷

Although unions clearly had an associational interest, it continued to be challenged by lower courts in decisions that reflected the historic antipathy to unions. In *Thomas v. Collins*,⁶⁸ the international president of the United Autoworkers, who was also the Vice-President of the Congress of Industrial Organizations, was arrested, tried, and convicted for violation of a Texas statute that required all union organizers to get an “organizer’s card” from the Secretary of State prior to any union membership solicitation. By a five to four margin, the Supreme Court held that the law violated the constitutional protection of free speech and assembly. It rejected the finding of the state’s highest court that the registration of union organizers was required “for the protection of the general welfare of the public, and particularly the laboring class.”⁶⁹

64. *International Union v. Lyng*, 648 F. Supp. 1234 (D.C. 1986), *rev’d sub nom.*, 485 U.S. 360 (1988).

65. *Lyng*, 648 F. Supp. at 1235.

66. 307 U.S. 496 (1939).

67. 310 U.S. 88, 103 (1940).

68. 323 U.S. 516 (1945).

69. *Id.* at 524. Note how the state’s paternalism toward workers, like

Despite some continuing official efforts to curtail union First Amendment rights, the Supreme Court has conceded them. For example, in *United States v. Congress of Industrial Organizations*,⁷⁰ the government claimed that a union could not publish, in its own newspaper, editorials or articles favoring specific candidates in a federal election without violating a law which prohibited certain group political spending. The majority of the Court did not determine the constitutionality of the act, since it found "in the Senate debates definite indication that Congress did not intend to include within the coverage of the section as an expenditure the cost of the publication described in the indictment."⁷¹ However, four concurring Justices explained why they would have found the act unconstitutional, based upon their notions of the union's freedom of assembly:

The expression of bloc sentiment is and always has been an integral part of our democratic and electoral processes. We could hardly go on without it. Moreover, to an extent not necessary now to attempt delimiting, that right is secured by the guarantee of freedom of assembly, a liberty essentially coordinate with the freedoms of speech, the press, and conscience. . . . There is therefore, an effect in restricting expenditures for the publicizing of political views not inherently present in restricting other types of expenditure, namely that it necessarily deprives the electorate, the persons entitled to hear, as well as the author of the utterance, whether an individual or a group, of the advantage of free and full discussion and of the right of free and full assembly for that purpose. The most complete exercise of those rights is essential to the full, fair and untrammelled operation of the electoral process. . . . To say that labor unions as such have . . . no vital or legitimate interest in it is to ignore the obvious facts of political and economic life and of their increasing interrelationship in modern society. . . . That ostrichlike conception, if enforced by law,

that toward women, more likely interferes with freedoms than guarantees them. See *Muller v. Oregon*, 208 U.S. 412 (1908) (state statutory scheme limiting the number of hours women can work each day is not offensive to fourteenth amendment); see, e.g., Patricia Williams, *Fetal Fictions: An Exploration of Property Archetypes in Racial and Gendered Contexts*, 42 FLA. L. REV. 81 (1990); Mary E. Becker, *From Mueller v. Oregon to Fetal Vulnerability Policies*, 53 U. CHI. L. REV. 1219 (1986).

70. 335 U.S. 106 (1948).

71. *Id.* at 116.

would deny those values both to unions and thus to that extent to their members, as also to the voting public in general.⁷²

This historic right to associate, both for mutual aid and protection and for the purpose of influencing the course of political events, was not easily won.⁷³ This difficulty is not surprising, since the legality of the very existence of unions—the right of workers to organize—was so belatedly recognized. The fact of association, the Court finally realized, meant that speech/action also had to be protected. But we are still struggling with the concept of unions as speakers.

Many people, including a few Supreme Court justices, are not entirely convinced that a union should not be considered, first and foremost, a political animal.⁷⁴ Justice Black dissented in *International Association of Machinists v. Street*,⁷⁵ wherein the

72. *Id.* at 143-44; cf. *NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958): Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. . . . Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.

73. ABERNATHY, *supra* note 56, at 190-91.

74. It is not merely an accident of violent or peaceful change of social order in a country that unions are always dismantled. Witness Poland, the Sudan, and the host of other nations where changes are quickly being wrought and worker collectives are under siege. See also *Beck v. Communications Workers of Am.*, 487 U.S. 735 (1988); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) (invalidating collection of dues for political purposes of unions, but affirmed their use for collective bargaining. In a concurrence, Justice Stevens wrote: "Nor is there any basis here for distinguishing 'collective-bargaining activities' from 'political activities' so far as the interests protected by the first amendment are concerned. Collective bargaining in the public sector is 'political' in any meaningful sense of the word. . . . Decisions reached through collective bargaining in the schools will affect not only the teachers and quality of education, but also the taxpayers and the beneficiaries of other important public services."); *Board of Educ. v. Chicago Teachers Union*, 412 N.E.2d 587 (1980). There may be no real difference between public and private sector bargaining in a macroeconomic sense. Large pay raises in the auto industry may lead to weakened import tariffs, steel subsidies, or any number of political solutions. Conversely, campaigning for candidates who oppose right-to-work legislation, or federal statutes like the Food Stamp Amendments, which disqualify strikers and their households from benefits, certainly affect the relative bargaining power of the union as an economic player.

75. 367 U.S. 740 (1961).

Court held that the Railway Labor Act was not intended to authorize political expenditures by a union of any dissenters' dues money, especially where there was a union security agreement which forced all employees to pay union dues.⁷⁶ He concluded that "[u]nions composed of voluntary members, like all other voluntary groups, should be free in this country to fight in the public forum to advance their own causes, to promote their choice of candidates and parties and to work for the doctrines or the laws they favor."⁷⁷ It is clear that in the current political environment unions espouse beliefs that probably are considered dissident, since the political party in the White House tends to espouse a free market theory, laissez-faire, and protection of capital.⁷⁸ Any claimed associational rights of the delinquent fathers in *Wilson* and *Senecker* must have some nexus to collective speech—however, that speech need not be directly political.

Arguably, the instant cases do not present facts which would suggest a need for protection of constitutional rights. In both *Wilson* and *Senecker*, the state was aware of the delinquent's membership in the union. Its subsequent demand for employment information was, therefore, less intrusive than if the state had merely asked the union if the delinquents were members, because a state's demand for release of membership lists has always caused courts particular concern. A worker cannot be deterred from joining a group with lawful ends because membership would carry with it the possibility that other constitutional rights would be abridged. Where membership in an organization would subject someone to censure within her

76. Justice Frankfurter wrote the opinion for the dissent, which sidestepped the issue of whether the Railway Labor Act was constitutional, and merely construed the Act as imputing these limits on union spending to advance their majority political positions. Before ascending to the Court, Frankfurter was an unqualified champion of collective bargaining and the rights of unions. In *Machinists*, and other cases, he disappointed many considered pro-labor by a rigid obeisance to his own notions of separation of powers and his belief that political, not judicial, resolutions of important labor issues were preferable. His distrust of the judiciary led to his frequent conclusions that the Court should avoid declaring acts of Congress void. See, e.g., Clyde W. Summers, *Frankfurter, Labor Law and the Judge's Function*, 67 *YALE L.J.* 266 (1957).

77. *Street*, 367 U.S. at 796.

78. See, e.g., Epstein, *supra* note 50. I would not call Professor Epstein a member of the "ruling hierarchy;" however much of the political thought he espouses has been typified by the members of the President's party in this country for the past decade. The President's initial vetoes of the amended civil rights bill and the extension of unemployment benefits bill demonstrates some of that philosophy.

community, the Court has demanded sufficient grounds for release of that membership information. In fact, freedom of association as a concept grew out of a series of cases in the 1950s and 1960s in which states were attempting to get group membership information in order to curb the groups' activities.

In the first case, *NAACP v. Alabama*,⁷⁹ the Court unanimously set aside a contempt citation imposed after the organization refused to comply with a court order to produce a list of its members within the state. The Court decided that Alabama had failed to demonstrate a need for NAACP membership lists which would outweigh the harm to associational rights that disclosure would produce.⁸⁰ The Court adhered to this conclusion in a later NAACP case, *Bates v. City of Little Rock*,⁸¹ because,

[t]here was substantial uncontroverted evidence that public identification of persons in the community as members of the organizations had been followed by harassment and threats of bodily harm. There was also evidence that fear of community hostility and economic reprisals that would follow public disclosure of the membership lists had discouraged new members from joining the organizations and induced former members to withdraw.⁸²

Certainly, the magnitude of harm and fear of a black or white member of the NAACP during the tumultuous sixties cannot be compared to the threat presented by the *Wilson* orders. But the similarities are not so discrete as to be of no moment. Messieurs Wilson and Senecker did not join their unions to avoid paying child support. They could have done that as easily by not collectivizing or, even better, by not work-

79. 357 U.S. 449 (1958).

80. The Supreme Court distinguished *New York v. Zimmerman*, 278 U.S. 63 (1928), in which the Court validated a New York law requiring any organization which "prescribes secret oaths as a condition of membership" to file its membership lists with the Secretary of State. The law was directed against the Ku Klux Klan, and specifically exempted labor unions, Masons, Oddfellows, and the Knights of Columbus—all relatively benign groups. The law in *Zimmerman* was an attempt to control a group's criminal activities, rather than an effort to decimate collective protest against heinous social wrongs. The Court did not explain why Klanners did not share the protection later granted to members of the NAACP; the Court did, however, note that one's primary and associational rights were not protected against lawful inquiry into unlawful activities. *Zimmerman* could, arguably, support either a protected claim of the defendant unions or the lawful intrusion by the State of California.

81. 361 U.S. 516 (1960).

82. *Id.* at 523-24.

ing. The threats to their right to belong suggests that the domestic orders against their unions fly in the face of this lately won but integral freedom. The associational rights of unions, and other groups, are subject to limitation which are necessitated by other, pressing societal needs. The gravamen of the argument is, however, the necessity. When more conventional and less intrusive methods of collecting child support are available, why should the specter of invasion into personal liberties be ignored?⁸³

In several cases where a union was treated exactly like other groups—which is not the case in *Wilson* and *Senecker*—and where there was no apparent reason why holding a union to the same standard would be harmful, state limitations were approved. For example, provisions of the Federal Election Campaign Act requiring the reporting and disclosure of contributions and expenditures to and by unions, (which, in this context at least, were identified as political organizations) were sustained in *Buckley v. Valeo*.⁸⁴

However, an Ohio law that replicated the FEC Act was found to violate the First Amendment in *Brown v. Socialist Workers Party*.⁸⁵ The Court examined the threat to a minor political party like SWP, and found that “even a small risk of harassment”⁸⁶ could seriously interfere with the SWP’s freedom and ability to disseminate ideas and solicit “support for an unpopular cause.”⁸⁷ The most recent data suggests that labor unions are regarded by the American public with great suspicion.⁸⁸ One may conjecture as to the reasons therefor, which may include a healthy disrespect for organizations that are corrupt and unresponsive to the membership. Conversely, the animus may stem from a real fear that association with unions—deemed unpopular by the government, as evidenced by President Reagan’s discharge of thousands of air traffic controllers

83. As one writer has observed: “In view of the importance of the right of association, it is suggested that the governmental requirement of disclosure of membership be looked on as a last resort measure, to be used only when laws punishing overt unlawful acts, honestly enforced, fail to afford the necessary protection.” ABERNATHY, *supra* note 56, at 228.

84. 424 U.S. 1 (1976).

85. 459 U.S. 87 (1982).

86. *Id.* at 98.

87. *Id.* at 97.

88. See AMERICAN ENTERPRISE INSTITUTE, THE PUBLIC’S CRITIQUE OF CONGRESS 82 (Jan.-Feb. 1991); Charles Craver, *The Current and Future Status of Labor Organizations*, 36 LABOR L.J. 210 (1985); LaLonde & Meltzer, *supra* note 3, at 953-56.

in 1980,⁸⁹ by a rash of decisions by the administration-controlled NLRB, and by affirmations of the need to diminish the authority of labor unions by the Supreme Court⁹⁰—can only hurt workers. The debate about the efficacy of collectivization and the appropriate (if any) role of unions in making the economy and the country work will always be with us. Whether one reads the trade journals of the National Association of Manufacturers, the law and economics adherents, or the Solidarity

89. *United States v. Professional Air Traffic Controllers Org.*, 504 F. Supp. 432 (N.D. Ill. 1980), *opinion supplemented by United States v. Professional Air Traffic Controllers Org.*, 504 F. Supp. 441 (N.D. Ill. 1980), *opinion supplemented by United States v. Professional Air Traffic Controllers* 504 F. Supp. 442 (N.D. Ill. 1980), *order rev'd United States v. Professional Air Traffic Controllers* 653 F. 2d 1134 (7th Cir.), *cert. denied*, *Professional Air Traffic Controllers v. United States*, 454 U.S. 1083 (1981).

90. *See, e.g., TWA v. Independent Fed'n of Flight Attendants*, 489 U.S. 426 (1989). The majority approved a position of the airline that it could recruit striking employees with less seniority to return to work to replace more senior flight attendants. Once they came back to work, they were entitled to keep that particular position—even though the employees they replaced had had to work years to get those more desirable duty stations, for example, Los Angeles rather than Topeka. Justice Brennan dissented:

The employer's promise to members of the bargaining unit that they will not be displaced at the end of a strike if they cross the picket lines addresses a far different incentive to the bargaining-unit members than does the employer's promise of permanence to new hires. The employer's threat to hire permanent replacements from outside the existing work force puts pressure on the strikers *as a group* to abandon the strike before their positions are filled by others. But the employer's promise to members of the striking bargaining unit that if they abandon the strike (or refuse to join it at the outset) they will retain their jobs at strike's end in preference to more senior workers who remain on strike produces an additional dynamic: now there is also an incentive for *individual* workers to seek to save (or improve) their own positions at the expense of other members of the striking bargaining unit. We have previously observed that offers of "individual benefits to the strikers . . . to induce them to abandon the strike . . . could be expected to undermine the strikers' mutual interest and place the entire strike effort in jeopardy."

Id. at 448-49 (citing *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 230-31 (1963)) (emphasis in original).

If the employer is prohibited from discriminating among members of the bargaining unit on the basis of strike activity in allocating post-strike jobs, then the employer should not promise certain bargaining-unit members that the jobs will be theirs permanently, merely because those members returned to work during the strike. *See NLRB v. Eric Resistor Corp.*, 373 U.S. 221 (1963); *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 33 (1938). Some observers believe that *TWA* comports with those decisions entered shortly after the NLRA was passed, which quickly emasculated the newly-empowered workers. Others feel that *TWA* has been the latest, and most devastating, in a series of anti-union decisions.

Forever newsletter, the issue is unresolvable through empirical proof. However, if we accept Justice Blackmun's characterization, "[h]aving determined that the individual worker standing alone lacked sufficient bargaining power to achieve a fair settlement with his employer over the terms and conditions of employment, Congress passed the NLRA in order to protect employees' rights to join together and act collectively . . ."91 as accurate, there is a national commitment to collective bargaining. It is, however, a cause that can be characterized as unpopular, and whose supporters and spokespersons are likely to engender more than a "small risk of harassment."⁹²

Certainly, however, when the disclosure becomes more individualized, as to *this* particular delinquent father who has had his due process and who has been adjudged delinquent and in violation of both a support agreement and state law, it may be that there is no associational right whatsoever. In light of his illegal conduct, it is arguable that he has very few rights.⁹³ Disclosure of a membership list or even the name of a single member might violate a group's freedom of association but certainly under circumstances quite different from those present in the cases of fathers who are delinquent in their child support payments. The Supreme Court has never recognized a privacy right to commit a crime. In *Hotel and Restaurant Employ-*

91. *Patternmakers League of N. Am. v. NLRB*, 473 U.S. 95, 118 (1985) (Blackmun, Marshall, and Brennan, JJ., dissenting).

92. *Brown v. Socialist Workers Party*, 459 U.S. 87, 98 (1982).

93. There is an interesting analogue to questions in administrative law where retroactivity, which ordinarily might bar agency action, is forgiven in certain situations where the agencies' retroactive application of a new rule would serve only to expand the class of persons who are precluded from committing a civilly illegal act. *See, e.g., NLRB v. Majestic Weaving Co.*, 355 F.2d 854, 860 (2d Cir. 1966) ("[a]lthough courts have not generally balked at allowing administrative agencies to apply a rule newly fashioned in an adjudicative proceeding to past conduct, a decision branding as 'unfair' conduct stamped 'fair' at the time the party acted, raises judicial hackles considerably more than a determination that merely brings within the agency's jurisdiction an employer recently left without, . . . or shortens the period in which a collective bargaining agreement may bar a new election, . . . or imposes a more severe remedy for conduct already prohibited. . . ."); *Leedom v. International Bhd. of Elec. Workers*, 278 F.2d 237 (D.C. Cir. 1960) (where the NLRB adopted a rule that its previous adjudications holding a contract of five years in length as a bar to any representational action was invalid and that it was more appropriate for the contract to be no longer than three years. The court upheld the action of the agency saying that (a) there was no proof that the retroactive application of the new contract bar rule worked a hardship upon the union; (b) periodic adjustments in the contract bar rules are necessary to achieve the statutory objective; and (c) any other rule would create an administrative monstrosity.).

ees and Bartenders International Union v. Read,⁹⁴ the Third Circuit conceded: "We begin with the assumption that the union qua union has certain rights that are protected by the first amendment. As a broad proposition, the first amendment protects non-political as well as political activity. . . . Additionally, some union activity presumably comes within the right to associate for expressive purposes."⁹⁵ However, the court found that New Jersey's Casino Control Act, which required all unions representing casino workers to tell the state who their officers were, and which mandated that any "career offender or a member of a career offender cartel"—a euphemism likely capable of legal definition—could not hold office in a casino union, "imposed no burden on Local 54's right of free association."⁹⁶ The union could disseminate ideas; it simply could not let professional criminals hold office.⁹⁷

The non-supporting fathers whose unions are now being asked to turn them into the state are not literally being denied the opportunity to freely associate or to disseminate ideas.⁹⁸ We cannot know whether either of these delinquent fathers is political. The unions to which they belong, however, have that potential—which will more likely be realized by having as large a membership as possible. As one court described it, "the prima facie case for an arguable first amendment claim" requires "a factual showing of harassment, membership withdrawal or discouragement of new members, or other consequences which objectively suggest an impact (or 'chilling') on the members' associational rights."⁹⁹ And some people, even those without support obligations, may object to belonging to a group that is subject to an order that could be characterized as requiring them to conspire against their members. If they do, is that not some proof of impact upon the rights of unions to exercise their First Amendment freedoms? The Supreme Court has made the point that: "[T]he right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or

94. 832 F.2d 263 (3d Cir. 1987).

95. *Id.* at 265 (citations omitted).

96. *Id.* at 266; *cf.* *Brown v. Hotel and Restaurant Employees*, 468 U.S. 491 (1984) (the Casino Control Act was not preempted by national labor law).

97. *Cf.* *Staub v. City of Baxley*, 355 U.S. 313 (1958) (invalidation of city ordinance which gave mayor and city council complete discretion to grant a permit for solicitation of group members, including union members, as prior restraint infringement of first amendment freedom of speech).

98. In fact, non-support of children may be a crime.

99. *O'Neal v. United States*, 601 F. Supp. 874, 878 (N.D. Ind. 1985).

advocated doctrine that is itself not protected."¹⁰⁰ People have the right to freely associate for common political and economic purposes, even if the association includes disreputes and deadbeats who fail and refuse to support their own children.

Any lawful objective of the union is protected, keeping in mind the historic parameters precluding truly pro-active political movement by a union. For example, the Court recognized that, like "political" organizations such as the NAACP, unions have the right to use lawyers to organize their members to assert their legal rights. In *United Mine Workers v. Illinois Bar Ass'n*,¹⁰¹ an Illinois court held that the union's employment of an attorney on a salary basis to represent any of its members who wished his services to prosecute a worker's compensation claim before the Illinois Industrial Commission constituted the unauthorized practice of law.

The Supreme Court reversed, relying on *NAACP v. Button*,¹⁰² an earlier case in which the Court decided that bar associations may not, under the guise of preventing "common-law barratry, maintenance and champerty"¹⁰³ prohibit lawyers from serving as the legal spokespersons for NAACP members who join together for the purpose of "vindicating legal interests."¹⁰⁴ In *Button*, the Court found that a Virginia law which banned the improper solicitation of any legal or professional business did not apply to the NAACP's practice of employing staff attorneys to furnish legal services to people who were willing to sue in an effort to challenge—and stop—Virginia's tradition of tolerating and legalizing racial segregation. The Court saw nothing amiss in the NAACP's practice of hiring lawyers to speak to groups and encourage their members to seek legal redress for racial wrongs. Procuring these lawyers was simply one way to pursue common and legal objectives.

The *United Mine Workers* Court rejected Illinois' contention that *Button* was not controlling because *Button* was concerned chiefly with litigation that could be characterized as a form of political expression. Justice Black wrote: "The litigation in question is, of course, not bound up with political matters of acute social moment, as in *Button*, but the First Amendment does not protect speech and assembly only to the extent it can be characterized as political."¹⁰⁵ He concluded that the state

100. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 908 (1982).

101. 389 U.S. 217 (1967).

102. 371 U.S. 415 (1963).

103. *Id.* at 438.

104. *Id.* at 437.

105. *United Mine Workers*, 389 U.S. at 223.

court's decree "thus substantially impairs the associational rights of the Mine Workers and is not needed to protect the State's interest in high standards of legal ethics."¹⁰⁶

Both Wilson and Senecker have an association with their union that could serve some purpose other than job referral. In *Roberts v. United States Jaycees*,¹⁰⁷ the Court observed that: "[D]etermining the limits of state authority over an individual's freedom to enter into a particular association . . . unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments."¹⁰⁸ The Court continued: "[c]ertain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State."¹⁰⁹ Although the Court made direct reference to "traditional" privacy cases—those devolving around family decisions,¹¹⁰ the relationship Wilson and Senecker have with their unions may be of a type deserving protection from state scrutiny—except in rare and extreme cases.

One district court found that a union members' privacy was violated by a law which made strikers and their families ineligible to receive food stamps during the course of the strike. In *International Union v. Lyng*, the court wrote:

The disputed limitation on food stamps for strikers interferes or threatens to interfere with the First Amendment right of the individual plaintiffs to associate with their families, . . . and with fellow union members, . . . as well as the reciprocal First Amendment right of each union plaintiff to its members' association with the union. It may be that a striker would not live apart from close family members in order to provide them with food stamps.

106. *Id.* at 225; accord *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576 (1971) (state court could not enjoin union from recommending to their members lawyers who had agreed with the union to a set fee in representing injured employees in claims against the government); *Brotherhood of R.R. Trainmen v. Virginia*, 377 U.S. 1 (1964) (first amendment guarantees the right of a union to recommend that their injured members seek the advice of union-selected lawyers throughout the country regarding workers compensation claims).

107. 468 U.S. 609 (1984).

108. *Id.* at 620.

109. *Id.* at 618-19 (citing family/privacy cases).

110. See, e.g., *Roe v. Wade* 410 U.S. 113 (1973); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

But as defendant has bluntly stated, the striker has, as an alternative to leaving his family, the further options of quitting his job or returning to work. Pursuit of either of these alternatives would obviously sever or at least threaten his association with his union and his fellow union members.¹¹¹

However, the Supreme Court found no substantial interference with fundamental privacy rights, reasoning that the striker could voluntarily end her temporary disqualification.¹¹² The Court conceded that a strike might be the embodiment of certain First Amendment rights of free association and expression, but that "does not require the Government to furnish funds to maximize the exercise of that right."¹¹³

The Supreme Court was not willing to use federal welfare money to subsidize collective activity. Such a conclusion was not surprising considering the political climate in which the decision was reached. However, the district court's analysis of the elements of the relationship between a union and its members is coherent and convincing—and the rejection of that

111. 648 F. Supp. 1234, 1239 (D.D.C. 1986); *cf.* *Lyng v. Castillo*, 477 U.S. 635, 643-47 (1986) (Justice Marshall dissented from the Court's conclusion that the government's presumption—that parents, children and siblings who lived together were a single household for purposes of food stamp eligibility, whereas nonrelated cohabitators were presumed not to be a single household—did not violate equal protection).

112. The constitution protects collective action as a form of speech, but both the method and the content of that speech are subject to limitations. *See* *Hudgens v. NLRB*, 424 U.S. 507 (1976); *Teamsters Local 695 v. Vogt*, 354 U.S. 284 (1957).

113. *Lyng v. International Union* 485 U.S. 360, 368 (1988). In *Ohio Bureau of Employment Servs. v. Hodory*, 431 U.S. 471 (1977), the Court rejected the union petitioner's claim that he was denied equal protection by a state law that disqualified strikers from receiving unemployment compensation during a strike. The Court chose not to deal with the question of disparate treatment of union employees, and merely approved the state's distinctions in preserving the limited amount of money in the unemployment fund. The Court arguably failed to recognize the myriad motivations for union membership. It is an interesting possibility that both *Hodory* and *Lyng* were wrongly decided in that they appear to ignore important Supreme Court precedent that developed around a so-called "entitlement theory." In a long line of cases, the Court decided that a state must have real justifications for depriving persons of government entitlement without affording the persons about to lose those benefits with due process. *See, e.g., Railroad Retirement Benefits Bd. v. Fritz*, 449 U.S. 166 (1980) ("windfall" benefits for some employees but not others are not violative of constitution); *Goss v. Lopez*, 419 U.S. 565 (1975) (student's temporary suspension from school requires due process safeguards); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (pretermination hearing required before benefits previously granted can be terminated).

analysis by the Supreme Court is not persuasive that there is a connection between being hungry and exercising the right to strike.¹¹⁴

Perhaps an important relationship like a workers union will some day be recognized as being eligible for constitutional protection within the conceptual right to privacy, a right which emanates from the First Amendment. But even without new forays into the recognition of personal rights, it is theoretically possible that the California court's demands upon these two unions interfere with the privacy of individual members as well as that of the union itself. Membership in a union is an important relationship, for reasons that include mutuality of political and economic goals, as well as the establishment of personal associations. The Teamsters International Union may be the kind of "large and basically unselective group[]" that the Court in *Roberts v. United States Jaycees* found unworthy of protection from the requirements of a state law that membership not be denied on the basis of sex.¹¹⁵ However, the local union hiring hall may be more like the type of association the Court would protect. The Court noted: "[T]he constitutional shelter offered such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty."¹¹⁶

Seneker and *Wilson* involve men whose marriages and families have fallen apart. They are neither seditionists nor gangsters. Their cohorts at the union hall may know their domestic problems, and may provide succor and support.¹¹⁷ Their situa-

114. The Supreme Court, simply by virtue of being supreme, is not necessarily infallible. To many minds, the Court was unforgivably tardy in discrediting laws that prevented interracial marriage (*Loving v. Virginia*, 388 U.S. 1 (1967) (freedom to choose one's spouse requires invalidation of Virginia's miscegenation laws)) and laws that prevented a grandmother and her grandsons from constituting a "single family" for zoning purposes (*Moore v. City of East Cleveland*, 431 U.S. 494 (1977)) because the constitution from which the Court finally drew these conclusions was two centuries old.

115. 468 U.S. 609, 621 (1984). Of course, unions are already subject to civil rights laws, so *Roberts* is factually distinct on this ground.

116. *Id.* at 619.

117. I would rather see that succor and support forthcoming when the delinquents tell their fellows at the hall that they will be thrown in jail if they continue to fail to support their children.

tions are qualitatively different than those in which associational rights were found to be justly limited.

In the instant case, the state is concerned with needy children. But that object alone should not justify radically different treatment of unions in child support collection cases. The very same motive—increasing the percentage of noncustodial parents who pay child support—was not constitutionally adequate for a state law that restricted the right of delinquent supporters to marry. In *Zablocki v. Redhail*,¹¹⁸ the Supreme Court invalidated a state law that precluded the issuance of a marriage license “[u]nless the marriage applicant submits proof of compliance with the support obligation and, in addition, demonstrates that the children covered by the support order are not then and are not likely thereafter to become public charges.”¹¹⁹ Harkening to its earliest family/privacy decisions, the Court found significant interference with fundamental interests. Important as it is for a state to find ways to make financially competent parents support their dependent children, it is incumbent upon the state to do it in ways that do not abridge other significant rights. In addition, the Court was bothered by the ineffectiveness of the statute in achieving its salutary ends:

First, with respect to individuals who are unable to meet the statutory requirements, the statute merely prevents the applicant from getting married without delivering any money at all into the hands of the applicant’s prior children. More importantly, regardless of the applicant’s ability or willingness to meet the statutory requirements, the State already has numerous other means for exacting compliance with support obligations, means that are at least as effective as the instant statute and yet do not impinge upon the right to marry.¹²⁰

Maybe Mr. Wilson and Mr. Senecker, neither of whom was indigent and both of whom filed income tax returns that put them solidly within the “middle class,”¹²¹ could have asked their new wives for the money. Perhaps they owned property that could have been subject to a lien; they may have been

118. 434 U.S. 374 (1978).

119. *Id.* at 375.

120. *Id.* at 390 n.16. The Court lists among those alternatives: wage assignments, civil contempt proceedings, and criminal penalties.

121. Telephone conversation with Josanna Berkow, Assistant Attorney General for the State of California, September 25, 1989. Brief for the respondent, *Senecker v. Senecker and Butchers Union Local No. 532* page 3 II AO42450, 3, (1989), identifying Mr. Senecker’s earnings for 1984 and 1986 based on his federal income tax.

threatened with jail if they did not pay. One may conjecture that a way would be found. Their unions need not have been subject to disparate treatment that threatens to interfere with their constitutional rights.¹²²

III. DELINQUENT FATHERS ARE A SOCIETAL PROBLEM OF ENORMOUS PROPORTION

Arguments against imposing additional obligations upon already burdened and weakened labor unions, against treating fathers in unions differently than fathers who are lawyers or businessmen, does not mean that strident, fair collection efforts are not absolutely necessary. The problems, both sociological and economic, presented by the non-payment of child support, are enormous. If they are not already there, divorced women and their children are often thrust into the lowest economic tiers of society, a phenomenon denominated the "feminization of poverty."¹²³ Women have always been poorer than men—especially after leaving a marriage.¹²⁴ A brief retrospective makes clear why this impoverishment is so predictable.

A. Historical Hierarchies

Even without regard to marital state, females do not fare well. This emanates most likely from the earliest male rumina-

122. See, e.g., ROBERT H. MNOOKIN & KELLY D. WEISBERG, *CHILD, FAMILY AND STATE* 235 (1989).

123. See, e.g., Gladys Kessler, *Crisis in Child Support: New Federal Legislation to Alleviate the Problem*, 20 TRIAL 28 (1984); see also OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEP'T OF HEALTH & HUMAN SERVICES, *SUMMARIES OF REPORTS BY STATE COMMISSION ON CHILD SUPPORT ENFORCEMENT* 51 (1986) [hereinafter CHILD SUPPORT ENFORCEMENT] (Typical were reports like that from the state of Illinois, that "nonpayment of child support is the single largest factor in the rising feminization of poverty."); KEN AULETTA, *THE UNDERCLASS 68-79* (1983) (between 1970-77 "the number of poor families headed by men declined by 25% . . . [but] the number of women who headed households below the poverty line jumped by 710,000 or 38.7%"); Jessica Pearson & Nancy Thoennes, *Supporting Children After Divorce: The Influence of Custody on Support Levels & Payments*, 22 FAM. L.Q. 319 (1988).

124. An interesting historical aside is that most women eschewed divorce precisely because they could not afford to leave their men. Even a bad husband is preferable to destitution. One study showed that "prior to the Civil War the seeking of a divorce had been, with very few exceptions, the exclusive province of men" (who almost always alleged their wives' adultery as grounds), but more women began to get their own divorces in those states "where it was hypothetically easiest for them to earn a living." MARY SOMMERVILLE JONES, *AN HISTORICAL GEOGRAPHY OF CHANGING DIVORCE LAW IN THE UNITED STATES* 31 (1987) (citing CARROLL WRIGHT, *A REPORT ON MARRIAGE AND DIVORCE IN THE UNITED STATES 1867-86* (1891)).

tions on 'natural' order, with men assuming a social, political, and economic role superior to women.¹²⁵ No less dubious nor more relied upon a legal source than the Christian bible established that women, as measured against a male supreme being, were inferior.¹²⁶ However, some women have surmised that the inferiority was not deigned by nature but was instead created and reiterated by the currently dominant group. Nineteenth century feminist Lucretia Mott said that the control of wives by husbands was not apostolic but was "done by law and public opinion."¹²⁷ Whether women shared this belief, their subjugation is part of what for centuries had been considered natural law. Women's inferior position was legitimated directly by men's claims that their God ordained them to be that way.¹²⁸ More than two hundred years ago, William Blackstone summarized:

[T]he three great relations in private life are. . . . 1. That of master and servant, which is founded in convenience, whereby a man is directed to call in the assistance of others, where his own skill and labor will not be sufficient to answer the cares incumbent upon him.¹²⁹ 2. That of

125. For an interesting discussion of the origins of the cultural ideology of female subordination, see Ricki Tannen, *Setting the Agenda for the 1990's: The Historical Foundations of Gender Bias in the Law: A Context for Reconstruction*, 42 FLA. L. REV. 163 (1990).

126. See e.g., 1 *Corinthians* 11:3-11:16; 1 *Timothy* 2:8-2:15.

127. Lucretia Mott, *Not Christianity but Capriestcraft*, in *FEMINISM: THE ESSENTIAL HISTORICAL WRITINGS* 76, 101 (Miriam Schneir ed., 1972).

128. See, e.g., 1 *Corinthians* 11:3-11:16; 1 *Timothy* 2:8-2:15.

129. 1 WILLIAM BLACKSTONE, *COMMENTARIES* *430.

husband and wife; . . .¹³⁰ [and 3.] that of parent and child.¹³¹

This immutable hierarchy continues; many argue it is actually reinforced by the common and statutory law of 'domestic relations.' Intervention by the state into family relationships, although ostensibly to promote equality and to foster other social goals such as guaranteed care of the children, may actually reinforce a hierarchy that was in existence at the time of the feudal system,¹³² and before.

130. *Id.*

By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and *cover*, she performs everything; and is therefore called in our law-french a *feme-vocert*; is said to be *covert-baron*, or under the protection and influence of her husband, her *baron*, or lord; and her condition during her marriage is called her *coverture*. Upon this principle, of an union of person in husband and wife, depend almost all the legal rights, duties and disabilities, that either of them acquire by the marriage. I speak not at present of the rights of property, but of such as are merely *personal*. For this reason, a man cannot grant any thing to his wife, or enter into covenant with her: for the grant would be to suppose her separate existence; and to covenant with her, would be only to covenant with himself: and therefore it is also generally true, that all compacts made between husband and wife, when single, are voided by the marriage.

Id.; cf. Mary E. Becker, *Barriers Facing Women in the Wage Labor Market and the Need for Additional Remedies: A Reply to Fischel & Lagar*, 53 U. CHI. L. REV. 934 (1986) (All working people need a "wife" to make achieving the most efficient and highest paid labor possible for every working person).

131. BLACKSTONE, *supra* note 129, at *410. Blackstone's perceptions have not been eschewed, despite protestations that we are more egalitarian. See, e.g., Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205 (1979).

Blackstone's law of persons contained only relations of formal inequality, such as king and subject, noble and commoner, pastor and parishioner, husband and wife, master and servant. His structure suggested that the human universe could be divided into two parts: a world of hierarchically ordered relations of people to one another, and an egalitarian world in which people dominated objects. The function of this odd procedure was to legitimate the status quo.

Id. at 350. Kennedy argues that little has changed.

132. Frances E. Olsen, *The Family and The Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

During the feudal period, individuals were not expected to be equal. Hierarchy was part of the natural order of things, paying homage to God. Even if an individual might properly change . . . position in the existing hierarchy, to try to alter the hierarchy itself would be

Until the middle of the nineteenth century, men had juridical power over women, based upon laws that established a husband's authority over his wife. Before that time in history, upon marriage, the wife became a legal nonperson, living under her husband's protection and cover. Beginning around 1850, and extending well into the twentieth century, depending upon the particular jurisdiction, laws denominated "married women's acts" reclaimed for women the legal rights and powers they automatically lost when they married, such as the right to hold property, enter contracts, and bring lawsuits, perhaps most importantly, against their own husbands.¹³³

Although removing some legal disabilities, these laws hardly empowered women to either assume economic parity with men, or even to force men to support their children. Access to the courts and the marketplace have little intrinsic worth; the actors—herein females—must have some other indicia of power, which, to date, is lacking. According to Frances Olsen:

The results of such reforms have often proved detrimental to women. Although the reforms promote equality they also undermine the altruistic bases of the family and thus leave women open to the kind of individualized particularized domination characteristic of market relations. The reforms have tended to give women equal rights, but they have not democratized the family.

The basis for the father's authority changed from juridical superiority to other forms of power, such as financial control and physical force, but the authority nonetheless continued. The mother might no longer be powerless simply because she was a wife, but she might well remain powerless for reasons that would seem more particular to her situation.¹³⁴

It was, of course, not until nearly the last quarter of the twentieth century that politicians decided that problems of sexual inequality had to be directly addressed legislatively.¹³⁵ Much in the same way Congress attempted to legitimate and

disgraceful. Everyone was considered to have an interest in keeping inferiors and superiors in their place.

Id. at 1513-14.

133. See, e.g., *Tresher v. McElroy*, 106 So. 79 (Fla. 1925); Sybil M. Jones, *The Problem of Family Support: Criminal Sanctions for the Enforcement of Support*, 38 N.C. L. REV. 1, 6 (1959).

134. Olsen, *supra* note 132, at 1532.

135. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2(a),(b),(c),(d),(e), (h) (1988).

fortify employee collectivization, and protect labor unions from the societal and judicial animosity that was later recognized as also directed against women,¹³⁶ it passed laws prohibiting judicially-approved workplace discrimination based on gender. An evaluation of the success of sex-discrimination laws is beyond the purview of this article, but there is hardly a universal claim of its success, and women, for reasons that likely include both willful discrimination and inherent social distinctions, have lesser earning power and access to employment opportunity.¹³⁷

B. *Women's Economic Disadvantages*

While no one would claim that the law was responsible for the traditional division of labor in the family, it did serve to sanction and reinforce family relationships which disserved the economic weal of the female except as a dependent.¹³⁸ There

136. *See, e.g.*, *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953) (employer and union allowed to negotiate "seniority credit" for those who served in WWII, even though they had not been employed by Ford prior to military service, with women consequently being fired and replaced by men); *Hartley v. Railway Clerks*, 277 N.W. 885 (1938) (employer could fire all married women, thus protecting the jobs of less senior male employees who were "heads of households").

137. *See, e.g.*, ELLEN F. PAUL, *EQUALITY & GENDER: THE COMPARABLE WORTH DEBATE* (1989); BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *NATIONAL DATA BOOK AND GUIDE TO SOURCES, STATISTICAL ABSTRACT OF THE UNITED STATES, LABOR FORCE, EMPLOYMENT & EARNINGS* 406, *MEDIAN INCOME OF YEAR-ROUND FULL TIME WORKERS* 449, *MONEY INCOME OF PERSONS* 449 (109th ed. 1989). (In 1987, women earned an average of \$17,504 to men's \$26,722, with white women earning \$2,000 more per year than African-American or Hispanic women. In 1987 white males earned almost \$50.00 more per week than white females. There is even a measurable difference in the wages of men and women when they are performing similar types of work. In 1987, managerial and professional men earned \$33,072 annually compared to managerial and professional women's earned income of \$22,932 annually (extracted from table). Men in technical sales and administrative support positions earned \$23,556 to women's \$15,236 annually (figures extracted from table). Male machine operators, fabricators and laborers earned \$17,888 to female's \$11,812 annually (figures extrapolated from table). Even in such diverse and unique areas as forestry and farming, there is a discrepancy in the annual wages, with men earning \$11,588 to women's \$9,932. African-American women have the lowest average earned income of any workers in the United States); *see also* Austin, *supra* note 10, at 561 n.99, and articles cited therein (young black mothers have special difficulties including less education, less work experience, and more difficulty securing child care and child support).

138. LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* (1985).

[L]aw's influence worked through prescriptions and proscriptions,

is implicit bias against working mothers because of their necessary obligations to their husbands and children.¹³⁹ It is interesting to note that some researchers argue that "employers might unjustifiably regard marital status as a proxy for commitment to work, indicating employment instability in the case of married women but stability in the case of married men."¹⁴⁰ In the context of divorce and child support actions, it is more likely that mothers have additional burdens upon their ability to earn money.¹⁴¹ They may have been absent from the work force for long periods of time devoted exclusively to child-bearing and raising.¹⁴² Beyond that, employers often resist providing the flexibility required to accommodate working mothers, and therefore either refuse to hire them; relegate them to less responsible (and lower-paying) positions; or hold them to the "male" standard,¹⁴³ which may lead to their evaluation as less than satisfactory, resulting in fewer, or no pay raises. Even among women with professional training, less lucrative jobs are often—if not usually—accepted in order to

incentives and disincentives. For example, by promising housewives lifelong support, the law created disincentives for women to develop their economic capacity and to work in the paid labor force. In addition, by making them responsible for domestic services and child care, it reinforced the primacy of these activities in their lives, leaving them with neither the time nor the motivation to develop careers outside the home. . . . The law similarly reinforced the traditional male role by directing the husband away from domestic activities and child care. It encouraged his single-minded dedication to work by making it clear that his family's economic welfare was his responsibility.

Id. at 2.

139. RICHARD R. PETERSON, *WOMEN, WORK & DIVORCE* 109 (1989) (even before they become mothers, women workers are at a disadvantage because employers expect them to eventually become wives and mothers who put paid work at a lower priority).

140. W. Stanley Siebert & Peter J. Sloane, *The Measurement of Sex and Marital Status Discrimination at the Workplace*, 48 *ECONOMICA* 125 (1981).

141. Herbert Jacobs, *Faulting No-Fault*, 1986 *AM. B. FOUND. RES. J.* 773, 779 ("An alternative theoretical explanation of the plight of divorced women might be based on the more fundamental problem of sex discrimination in employment").

142. PETERSON, *supra* note 139, at 43.

143. *Id.* That is, the standard to which it is appropriate to hold someone who has no primary child care responsibilities and has, as well, someone to do wifely chores which free up time for the worker. For the sake of completeness, I would harken against imposing such a standard upon men who have primary child care responsibilities. However, anecdotal data suggests that such men, because they are atypical and frequently viewed as up against different odds, are often supported—in their workplace—in their need to devote more time to their children.

accommodate the greater burden upon the female parent as primary care-provider for the children.¹⁴⁴ In some cases, women employed outside their homes may even have to quit their jobs because of the strain—or expense, including day care—of single parenting.¹⁴⁵ Even despite the absence of articulable legal impediments, practical and psychosocial barriers to economic parity for mothers remain. Despite some changes in family paradigms, it remains axiomatic that mothers do most of the “mothering”.¹⁴⁶ The statutory and common law that grew up to protect women may have actually put them in a worse position¹⁴⁷ than if they could have merely attempted to use the ordinary law of contract, assuming a jurisdiction where a woman could avail herself of notions of detrimental reliance and quasi-contract—and assuming a judge whose gender bias and experience would not taint his or her decisions—although as one California family law judge said: “[G]ender bias is going to rear its head in every single case, because what other case is there that is gender specific as to the litigants?”¹⁴⁸

144. See Mary Jo Frug, *Securing Job Equality for Women: Labor Market Hostility to Working Mothers*, 59 B.U. L. REV. 55 (1979) (because women have been expected to assume most parental responsibilities, they must often work on a part-time basis, take jobs with little responsibility and compromise employment opportunities); NEIL KALTER, *GROWING UP WITH DIVORCE* 10 (1990). But see Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretation of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1820 (1990) (“sex segregation does not persist because women’s commitment to the family leads them to ‘choose’ to consign themselves to lower-paid, female-dominated occupations” but because it is the preference of more powerful male decision-makers”).

145. James B. McLindon, *Separate But Unequal: The Economic Disaster of Divorce for Women and Children*, 21 FAM. L.Q. 351, 369 n.118 (1987).

146. Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1220 n.147 (1989) (empirical data to prove that most working women, rather than working men, assume primary responsibility for children); Schultz, *supra* note 144, at 1810 n.231 (“studies have universally found that women do far more child care and other domestic work than men and that married men increase their share of housework very little in response to increases in their wives’ paid employment”).

147. Some argue that modern divorce law has hurt women, either because of the ease with which spouses can leave a marriage, and a financially dependent wife, without her concurrence, or because the laws relating to post-divorce distribution of property leave the non or lower wage-earner in a worse position than under common law. See, e.g., WEITZMAN, *supra* note 138; Suzanne Reynolds, *Increases in Separate Prosperity and the Evolving Marital Partnership*, 24 WAKE FOREST L. REV. 239 (1989).

148. Judge Steven Z. Perren, of the Ventura County Superior Court. A California study revealed that 32.5% of the judges in family law courts in California were divorced. The authors suggest that that could increase bias

The voluminous literature that outlines the sore deficiencies in child-support levels, drawn from judicial decision and later from statute, might have been moot if women had actually been able to sue on the notion of the benefit of the bargain.¹⁴⁹ For example, in a much-talked about *non-marital* suit, *Marvin v. Marvin*,¹⁵⁰ the court enforced a contract between two unmar-

against women. I concede that divorced or divorcing women may harbor similar bias against men, but few of them are sitting judges. CALIFORNIA JUDICIAL COUNCIL, DRAFT REPORT OF THE JUDICIAL COUNCIL ADVISORY COMMITTEE ON GENDER BIAS IN THE COURTS, ACHIEVING EQUAL JUSTICE FOR WOMEN AND MEN IN THE COURTS 1484c - 3.4 (1990) One may argue, as does Professor Catherine MacKinnon, that sexual harassment trials present the same problems. See CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED* (1986); see also Lynn H. Schafran, *Gender and Justice: Florida and the Nation*, 42 FLA. L. REV. 181 (1990) (summary of the findings of the states that have initiated gender bias studies).

When the Florida Supreme Court Gender Bias Study Commission released its findings at a symposium sponsored by the *Florida Law Review*, Florida became the ninth state in which a state supreme court task force on gender bias had documented irrefutably that gender based biases are distorting the justice system and that the victims of this distortion are overwhelmingly women.

Id. at 181 (footnotes omitted).

149. Even this conclusion is debatable, however. Women have never fared well after divorce, despite the mythology of men being "taken to the cleaners." Only in this century did courts finally decide that a father had a legal, enforceable duty to support his children. In *Baldwin v. Foster*, 138 Mass. 449 (1885), Justice Holmes concluded that a father only need support his children living with a custodial parent if the mother's separation from the father was justified. See also Nan Hunter, *Child Support Law & Policy: The Systematic Imposition of Costs on Women*, 6 HARV. WOMEN'S L.J. 1, 3 n.16 (1983). While Blackstone listed a father's duty to support his offspring irrespective of custody as a "principle of natural law," this obligation was described as only "a moral duty without legal remedy." Henry Foster et al., *Child Support: The Quick and the Dead*, 26 SYRACUSE L. REV. 1157, 1157 (1975). Although some early cases approved parental child support, such as *Ward v. Goodrich*, 34 Colo. 369 (1905); *Alvey v. Hartwig*, 67 A. 132 (Md. 1907), then, as now, much of the child support was never paid. See JAMES SCHOUER, *A TREATISE ON THE LAW OF MARRIAGE, DIVORCE, SEPARATION AND DOMESTIC RELATIONS* 880-85 (1921), cited in Hunter, *supra* note 149, at 3. A 1948 study of child support in Detroit found that the divorced wife "receives very little property from the split of joint possessions, is given very little child support, and in two-fifths of the cases does not receive this support regularly." WILLIAM J. GOODE, *AFTER DIVORCE* 222 (1956), cited in Hunter, *supra* note 149, at 3; see also Marigold S. Melli, *Constructing a Social Problem: The Post-Divorce Plight of Women and Children*, 1986 AM. B. FOUND. RES. J. 759, 759-60 nn.2-3 (discussing the National Conference of Commissioners on Uniform State Laws 1908 Report) ("Women have always received an inadequate portion of the accumulated marital resources on divorce and minimal—or no—alimony. In addition, the level of child support received from noncustodial fathers has been disgracefully deficient and enforcement has been nonexistent").

150. 557 P.2d 106 (Cal. 1976).

ried persons, after their separation, in which the woman promised to perform traditional wifely tasks for the man and the man promised to provide financial security for the woman. One wonders if the plaintiff made out so well financially because her promisor was a movie star, or because she was not "protected" by the laws applicable to the marriage relationship.

C. *Peculiar Financial Problems of Divorced Women*

Increasing numbers of children live apart from at least one parent and thus need a child support award or agreement. Census figures for 1984 show over fourteen million children living with only one parent. Of that fourteen million, sixty-seven percent lived with a divorced or separated parent, eight percent lived with a widowed parent and the rest lived with a parent who had never married or whose spouse was absent for some reason other than marital discord. This is a significant increase from 1970 which revealed only 60.5% of children lived in a single parent household due to divorce or separation.¹⁵¹ In 1988, 9.4 million mothers were living with at least one child under twenty-one years of age whose fathers were not living in the households.¹⁵² If current trends continue, one of every two children born today will spend some time in a single parent household before reaching the age of eighteen.¹⁵³ The tragedy of our family law is that women who have been married, whose husbands at one point helped to support them and their children, are often financially traumatized by divorce, which "per se has enormously adverse economic consequences for many women."¹⁵⁴ Of women due child support, about half received the full amount; the remaining mothers were about equally divided between those receiving partial payment, and those receiving nothing.¹⁵⁵

The data that supports the proposition that women are getting poorer as they become divorced is myriad.¹⁵⁶ The stan-

151. These numbers include both children born in and out of wedlock. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORT, MARITAL STATUS & LIVING ARRANGEMENTS 1-5 (1985) (Series P-20, No. 399).

152. G.H. LESTER, U.S. DEP'T OF COMMERCE CHILD SUPPORT AND ALIMONY: 1987 (June 1990) (Series P-23, No. 167).

153. I. ELMAN ET AL., FAMILY LAW 380 (1986).

154. Herbert Jacobs, *Another Look at No-Fault Divorce and the Post Divorce Finances of Women*, 23 LAW & SOC. REV. 95, 113 (1989).

155. LESTER, *supra* note 152. About 5.6 million women were awarded child support. *Id.*

156. See, e.g., Heather R. Wishik, *Economics of Divorce: An Exploratory Study*, 20 FAM. L.Q. 79 (1986). In a study of Vermont couples, the author

dard of living for divorced parents after divorce changes enormously. The mother with children has an income that drops dramatically, while the non-custodial father experiences an equally dramatic increase in per capita income.¹⁵⁷ Women and children suffer by far the greater economic decline at the time of divorce and over subsequent years than do former husbands, especially where child support payments from the parent who lives elsewhere are inadequate and inconsistent.¹⁵⁸ Since 1960, the number of female-headed families has risen steadily both in absolute terms and as a percent of total families. Over the past twenty years the percentage of children living alone with their mothers has increased from about five percent to about twenty percent.¹⁵⁹

These data make clear why poverty seems to be primarily a woman's problem. Recent studies show that female-headed families were much more likely to be poor than other types of families, and the numbers are both shocking and depressing. About 36% of all female-headed families were poor, compared to 7.5% of married-coupled families; families maintained by single mothers with four or more children had a poverty rate of

found that post-divorce per capita income for men rises by 120%, and for women drops by 33%. This is slightly more dramatic than that found by Professor Weitzman. See WEITZMAN, *supra* note 138, at 327-40.

157. LESTER, *supra* note 152. See, e.g., CHAMBERS, *supra* note 11, at 76-77 (Figure 5.1). The Social Security Administration has three categories: the lower standard budget, the intermediate standard budget, and the higher standard budget, based upon what percentage of peoples' incomes are spent on food. Based upon the U.S. Department of Agriculture's "standard budget line," a figure devised by the Social Security Administration in 1963, only 17% percent of all the couples in a particular study in Genessee County, Michigan, lived above what the Social Security Administration calls a "higher standard budget" and around 50% lived between an intermediate and higher standard budget. See *id.* at 46 (Figure 4.1). After divorce, 92% of the fathers who lived alone and failed to pay support lived above the "higher standard budget." See *id.* at 47 (Figure 4.2). After divorce, if the non-custodial father paid support and the custodial mother lived on support only, 59% of all fathers would be above the "higher standard budget" while only 3% of all mothers would be above the "lower standard budget," with 97% of all mothers below the "lower standard budget". See *id.* at 49 (Figure 4.3).

158. THE PARENTAL CHILD SUPPORT OBLIGATION: RESEARCH, PRACTICE AND SOCIAL POLICY 14 (Judith Cassetty ed., 1983).

159. The number of female-headed families increased from 1.89 million in 1960 to 5.72 million in 1983. This represents an increase of from 7% to 19% of all families. In fiscal year 1982, 20% of the 62.4 million American children under 18 were living with their mother only. See JUDITH AREEN, FAMILY LAW CASES AND MATERIALS 665-66 (2d ed. 1985); see also Judy Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 HARV. C.R.-C.L. L. REV. 9 (1989) (70% of all African-American families below the poverty level had female heads of households).

78.5%, compared to a rate of 36.2% for all families with four or more children.¹⁶⁰ One family law judge noted: "The National Advisory Council on Economic Opportunity has predicted that if the current trend continues, by the year 2000, women and children will make up 100% of the poor in the United States."¹⁶¹

Part of the problem is that, even putting aside the questions of courts' failures to assess any or sufficient child support money, fathers simply do not pay.¹⁶² This is too often the case even where the noncustodial parent is able to make the payments.¹⁶³ The scale and magnitude of the child support orders outstanding have escalated to the point of being identified officially as a serious national social problem.¹⁶⁴ Six years ago, 5,390,000 women were awarded child support, but only 3,243,000 actually received any payments.¹⁶⁵ Additionally, the mean amount of child support payments received amounted to \$1510 annually. If the full amount due had been paid, the mean amount would have been \$2460¹⁶⁶—hardly sufficient but certainly better than half as much.¹⁶⁷

Court-ordered levels of support are frequently far below what is practically needed to support the children, and this, too, adds to women's and children's problems.¹⁶⁸ Public policy

160. See AREEN, *supra* note 159, at 665. According to a new study from the Census Bureau, 15.1 million children live in female-headed households, and more than 75% of those households fall below the poverty line. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS No. 744, PERSONS BELOW POVERTY LEVEL BY RACE OF HOUSEHOLDER AND FAMILY STATUS 459 (1990).

161. Kessler, *supra* note 123, at 30 (citing NATIONAL ADVISORY COUNCIL ON ECONOMIC OPPORTUNITY, CRITICAL CHOICES FOR THE '80s 19 (1980)).

162. Jessica Pearson & Nancy Theonnes, *Supporting Children After Divorce: The Influence of Custody on Support Levels & Payments*, 22 FAM. L.Q. 319, 338 (1988).

163. KALTER, *supra* note 144.

164. Kessler, *supra* note 123, at 29.

165. *Id.* In 1985 and 1986, 8,808,000 women's marriages ended in divorce. Some 5,396,000 of those women were entitled to court ordered child support (61.3%). Unfortunately, only 3,243,000 (only 74%) of those women actually received any support. The data does not suggest that those women who actually received support received the total amount due to them. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CHILD SUPPORT SELECTED CHARACTERISTICS OF WOMEN: 1985, at 369 (1990) (Table No. 611).

166. AREEN, *supra* note 159, at 666.

167. Kessler, *supra* note 123.

168. *Id.* (In 1981, there were at least 3.8 billion dollars in uncollected court ordered child support payments. In November 1983, in the District of Columbia, 79% of child support orders were not being complied with. A 1977 study in Los Angeles showed that within 6 months after the entry of a

perspectives on family support obligations suggest that child support levels are much lower than our laws ought to allow them to be.¹⁶⁹ Child raising simply demands more dollars than women have. Although the results from fortified federal and state child support collection laws are not yet available because of their nascency,¹⁷⁰ their passage was prompted by the unbelievable levels of nonsupport. Testimony at the Congressional hearings on legislation to strengthen child support collection, which eventually led to the amended uniform support law, identified "willful disregard of court orders, a pattern that people assumed was limited to lower income men, was now common among fathers of all social classes, because it was asserted judges failed to enforce the law."¹⁷¹

final divorce decree, one in three men failed to comply with child support obligations. A Cleveland study determined that most ex-husbands retained 80% of their former personal income after divorce, even after payment of all child support and alimony obligations); McLindon, *supra* note 145, at 369 ("Women generally are either paying more than half the expenses of raising their children or drastically reducing their children's standard of living regardless of their income group.").

169. See, e.g., Charles Brackney, *Battling Inconsistency and Inadequacy: Child Support Guidelines in the States*, 11 HARV. WOMEN'S L.J. 197 (1988); Robert G. Williams, *Guidelines for Setting Levels of Child Support Orders*, 21 FAM. L.Q. 281 (1987).

[R]ecent studies have shown that child support awards are critically deficient when measured against the economic costs of child rearing. A 1985 study performed for the United States Office of Child Support Enforcement estimated that \$26.6 billion in child support would have been due in 1984 if child support were set based on either of two alternative guidelines . . . [established in Delaware and Wisconsin]. . . . [A] Census Bureau study on child support found that \$10.1 billion in child support was reported to be due in 1983 and \$7.1 billion was actually collected. It can be seen from these two figures that there was a "compliance gap" of \$3.0 billion in 1983, but an "adequacy gap" of more than \$15 billion.

Id. at 283. Another source reports:

[W]hile the mean amount of child support received by these families (per family, not per child) increased from \$1800 in 1979 to \$2110 in 1981, after adjusting for inflation, this represented a 16% decrease in real dollars. Among poor households in the study, only 40% had support awards and only 60% of that group actually received any support at all.

CALEB FOOTE ET AL., *CASES AND MATERIALS ON FAMILY LAW* 791 (3d ed. 1985).

170. Jacobs, *supra* note 154, at 113.

171. WEITZMAN, *supra* note 138, at 263.

A Congressional witness testified that "confronted with overcrowded dockets, judges continue to exhibit a great reluctance to strictly enforce the existing laws. Instead, child support cases are often subjected to broad and inconsistent interpretation, making a mockery of our judicial system. The most pathetic aspect of this

When Congress passed the Uniform Reciprocal Support Enforcement Act, it did so not only because of congressional concern over non-payment of support but also to address insufficient child support awards.¹⁷² To further complicate—or explain—the problem of insufficient levels of court-ordered support, there seems to be enormous solicitude for noncustodial fathers. Lenore Weitzman, in interviews with California family law judges, found that greater concern was more often shown for the husband who had to support the children than for the wife who had to raise them. The California jurists stress the importance of maintaining *his* standard of living and *his* incentive to earn.¹⁷³

entire tragedy is that parents are unnecessarily subjecting their own children to substandard levels of living. Both the non-paying parents, [and] the legislative and judicial branches [of government] are at fault in this miscarriage of justice.

Id. (quoting Hearings Before the House of Reps., 98th Congress, 1st Session, 34-290 (1983) (statement of Ruth E. Murphy, Coordinator for Organization for Enforcement of Child Support)).

172. PUB. L. No. 98-378, 98 Stat. 1305 (codified at 42 U.S.C. §§ 651, 653, 658, 664 (1988)) (amending Part D of Title IV of the Social Security Act). Congressional intent in mandating uniform support guidelines was to “meet the problem that the amounts of support ordered are in many cases unrealistic. This frequently results in awards which are much lower than what is needed to provide reasonable funds for the needs of the child in the light of the absent parent’s ability to pay.” S. REP. NO. 387, 98th Cong., 2d Sess. 40 (1984), *reprinted in* 1985 U.S.C.A.N. 2397. The Uniform Reciprocal Enforcement of Support Act, which forms the basis for most state laws, including California, was passed to improve child support enforcement procedures. In part, it helped states and the federal government recapture money they had provided to unsupported families who received public aid. According to the U.S. Senate Finance Committee “[t]he enforcement of child support obligations is not an area of jurisprudence about which this country can be proud. . . .” *Id.* In addition to providing the states with a paradigmatic model for their own laws, the federal government assumes an additional role. It will upon a showing by the state that it has made diligent and reasonable efforts to collect amounts due using its own collection mechanisms, use the Internal Revenue Service to collect past due support from federal tax refunds of a nonpaying noncustodial supporting parent. These collections may be made on behalf of both AFDC and non-AFDC families. It will also make available the federal parent locator service to help find missing noncustodial non paying parents and it assigns to the state an obligation to collect support for an AFDC child whose rights to support have been assigned to the state. *See* Linda Elrod, *Kansas Child Support Guidelines: An Elusive Search for Fairness in Support Orders*, 27 WASHBURN L.J. 104, 105 n.12 (1987) (The purpose of URESA and the sanctions behind URESA are that the federal government will not reimburse a state for welfare payments it has made to a child who has a living parent who is capable of supporting that child and against whom the state has taken no collection actions.).

173. Two California judges explained the awards they would have

Such fraternal protection may account for the typically and scandalously insufficient child support awards. Mary Ann Glendon notes that the awards "tend to protect the former husbands' standard of living at the expense of ex-wives and children."¹⁷⁴ Some observers conclude that the support levels will be inadequate either because there is too little money available from the parents' resources, because the judges seem to be unaware of what it costs to care for and educate a child, or because the judges make the odd assumption that awards large enough to be adequate will not be complied with by the parents.¹⁷⁵ One interesting Colorado study found that two-thirds of the fathers in Denver who were ordered to pay child support, were ordered to pay less than they spent on monthly car payments.¹⁷⁶ Such data are not gimmickry; they are the dismal facts of life.

The decisions of the California appellate court must be adjudged against this backdrop of nonsupport, since their efforts to collect from Messieurs Wilson and Senecker may be honest attempts to get money for children. Although I might argue that the courts picked their victims wisely and that the

made: "You have to have money for him to be satisfied, to give him an incentive to keep earning and improving in his profession." Another judge observed: "He can't live on less than \$7,000 a year and exist. So I have to leave him with \$7,000, that leaves \$5,000 of his net income for her." WEITZMAN, *supra* note 138, at 17.

174. MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW* 232 (1989). Considering that statutory guidelines for child support are better, but still insufficient, one may agree with Martha Fineman's conclusion that: there are, it seems to me, no guarantees that state legislatures are better institutions than courts in which to achieve justice for women and children and they may be worse. They too operate in a cultural context where women's dependency is seen as an embarrassment, an anachronism, and inconsistent with notions of 'equality'. In addition, legislatures are filled today with male legislators who themselves have not been immune from the 'divorce revolution' and who might be tempted to legislate out of personal experience.

Martha L. Fineman, *Illusive Equality: On Weitzman's Divorce Revolution*, 1986 AM. B. FOUND. RES. J. 781, 786.

175. Homer H. Clark, Jr., *The Law of Domestic Relations in the United States*, § 17.1 (2d ed. 1987). See also CASSETTY, *supra* note 158, at 119-20; Carol S. Bruch, *Developing Normative Standards for Child Support Payments: A Critique of Current Practice*, 16 U.C. DAVIS L. REV. 49 (1982).

176. See Lucy M. Yee, *What Really Happens in Child Support Cases: An Empirical Study of Establishment and Enforcement of Child Support Orders in the Denver District Court*, 57 DENV. U.L. REV. 21, 24, 27 (1979) (the study also revealed that family law judges actually ordered fathers to pay, on the average, only 56% of what the Denver district court had promulgated as guidelines for support levels).

Senecker and *Wilson* decisions reflect the imbalance of power in American society and politics, the courts may simply agree with the conclusion of the United States Senate Committee that the problems were immense and tragic. The Committee's study of the problem led to the adoption of the first in a series of Uniform Reciprocal Enforcement of Support Acts, which form the basis for most state laws, including California's.¹⁷⁷

D. *Other Problems Associated with Non-Support*

Some commentators believe that a noncustodial parent who pays child support is more likely to be involved with the child or children he is supporting.¹⁷⁸ One study notes an interesting point on the purposes for enforcement of child support: A national survey completed in 1981 by sociologists at the University of Pennsylvania showed that half of all teenage children had not seen their fathers in the past year. One-third had not seen their fathers in the past five years. Of children from single-parent homes, only one out of six managed to visit with his or her father once a week or more. "[A]n unexpected dividend of legislation to tighten enforcement of child support obligations may be to increase divorced fathers' involvement with their children because fathers who pay child support may feel entitled to participate more actively in their children's lives."¹⁷⁹

No one has studied whether voluntary compliance with support orders automatically has a different psychosocial effect than payments made as a result of legal efforts at enforcement of delinquent support payments, but it is worth noting that any payment may improve the lives of the children who depend upon child support. It takes little rumination to understand that the lack of child support intensifies the emotional turmoil

177. S. REP. No. 387, 98th Cong. 2d Sess. 4 (1984), reprinted in 1985 U.S.C.C.A.N. 2397.

178. Judith S. Wallerstein & Shauna B. Corbin, *Father Child Relationships After Divorce: Child Support and Educational Opportunity*, 20 FAM. L.Q. 109 (1986).

179. AREEN, *supra* note 159, at 676 n.3. See also Kessler, *supra* note 123 ("Significantly, while there was some correlation between parents who provided child support and maintained contact with their children (although the level of child support made little or no difference) 45% of the parents who provided no support also had had no contact with their children in the last five years. Thus, it would appear that the payment of child support promotes a continuous relationship—no matter how tenuous—between children and their absent fathers."); Frank F. Furstenburg Jr. et al., *The Life Course of Children of Divorce: Marital Disruption and Parental Contact*, 48 AM. SOC. REV. 656, 665 (1983).

of separation and divorce.¹⁸⁰ Even without hypothesizing about improving familial relationships, lawyers, judges, and legislators ought to look at social ramifications of legal actions in order to inform their decisions in a more efficient way.¹⁸¹ It is patent that children who receive the appropriate financial support are more likely to fare better generally.¹⁸² One important and clear effect of divorce is the deteriorated financial condition—in most cases—of the custodial parent.¹⁸³ The purpose of this paper is not to query whether divorce is good or bad, or too easy or too difficult to get.¹⁸⁴ But it is immoral and naive to ignore the fact that

a growing body of evidence supports the conclusion that the social and economic success (or failure) of adults is, in very large measure, the consequence of the economic opportunities from which they benefitted as children. Social scientists have concluded that children from broken homes are no more likely to become juvenile or adult criminals or academic failures, for instance, than their

180. McLindon, *supra* note 145, at 394 ("Mothers are often engaged in an exhausting struggle simply to keep the family financially afloat. Thus, children receive less attention from their mothers. . . .").

181. Cf. CHARLES A. JOHNSON & BRADLEY C. CANNON, JUDICIAL POLICIES: IMPLEMENTATION AND IMPACT (1984); Jacobs, *supra* note 154, at 112, 113; see also California Judicial Counsel, *supra* note 148, at 1484C ("To the extent there is bias in family law cases, and the advisory Committee has found that bias is a serious problem in this field, the responsibility appears to be in part that the system has so little valued families that judges are effectively deprived of the experience, the knowledge, the time and the resources to do the right thing.").

182. See JUDITH S. WALLERSTEIN & JOAN B. KELLY, SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE 25 (1980); see also KANSAS DEP'T OF SOCIAL & REHABILITATION SERVICES, A KANSAS AGENDA FOR INVESTING IN WOMEN AND CHILDREN 11-12 (1985), cited in Elrod, *supra* note 172, at 109 n.47 (some of the societal costs of the post-divorce feminization of poverty are higher rates of children illness, crime, alcoholism, child abuse, and child neglect); Wallerstein & Corbin, *supra* note 178, at 119 (42% of children of divorce had either not entered or had left college before graduating, despite coming from a wealthy suburban area where 85% of high school graduates went to college); Elrod, *supra* note 172, at 110 n.54.

183. KALTER, *supra* note 144, at 22.

184. In her important book on divorce, WEITZMAN, *supra* note 138, Professor Weitzman argues that "liberalized" divorce laws have increased the problems for custodial parents. That is not my point of view, and, in any case, it is irrelevant to the issue of whether one particular effort at improving child support collection, which interferes with other rights, is proper. For a useful analysis of Weitzman's data and conclusions, see Symposium, *Review Symposium on Weitzman's Divorce Revolution*, 1986 AM. B. FOUND. RES. J. 759-97 (1987), especially Marygold S. Melli, *Constructing a Social Problem: The Post-Divorce Plight of Women and Children*, 1986 AM. B. FOUND. RES. J. 759 (1987).

counterparts from intact families, if their economic status does not suffer as a consequence of divorce or separation.¹⁸⁵

At least one writer argues that society has another reason to make sure parents support their children:

Among these reasons are included the belief that all children have a basic right to be supported by both parents, to the best of their economic and personal abilities, and the recognition that society has a vested interest in enforcing this right for the purpose of encouraging respect for the law and a sense of personal responsibility and promoting parental equity in the sharing of economic responsibility for children.¹⁸⁶

Beyond improving society's chances at having citizens made more productive and less destructive because of increased possibilities of financial security, aggressive enforcement of child support obligations reduces demand upon the system of public welfare. The funds applied to the maintenance of children who have parents with means can be more fairly and efficiently used for children who have either no parents or no source of private beneficence. Most of the modern federal legislation on child support collection is partially motivated by Congress' desire to protect the national welfare budget from the drain imposed upon it by economically able parents who disregard their parental obligations.¹⁸⁷

Such considerations, both on a micro and macro level, may suggest that arguments about the motive behind the *Wilson* and *Senecker* decisions are sophistry. If the state's most important concern is children, then it should not matter how it goes about collecting child support. And how would other enforcement alternatives, like jail or liens against fathers' homes, improve the lives of the unsupported children? There are certainly compelling reasons for making these two union workers support their children. But it cannot be inapt to query why them, when so many others are left alone to disregard the law, as evidenced by the sorry numbers of non-supporting parents? And why aggressive enforcement—in this one instance—which may not even be effective, when legislators and jurists refuse to establish decent minimal levels of support?

185. JUDITH CASSETTY, *CHILD SUPPORT AND PUBLIC POLICY* 47 (1978).

186. *Id.* at 13.

187. See Harry D. Kraus, *Reflections on Child Support*, 1983 U. ILL. L. REV. 99.

IV. SHOULD FEDERAL LABOR LAW PREEMPT CALIFORNIA APPELLATE COURT DECISIONS?

Beyond wondering whether the California Court of Appeal ought to have entered the orders in *Wilson* and *Senecker*, it must be determined whether it had the jurisdictional authority to do so. The most basic issue in any litigation is, frequently, what law applies. In this issue's simplest incarnation, a court must determine whether federal or state law applies. In early cases, the Supreme Court grappled with balancing federal supremacy with principles of comity and the states' rights to protect strictly local interests.¹⁸⁸ Engrafted upon this judicial concern that federal law is dominant are those comprehensive enactments of Congress that either explicitly or by implication preempt state law. Even the presence of a federal law that relates to a subject being litigated does not determine whether the states will be preempted.¹⁸⁹ It is no easy question. But I argue that a state court's jurisdiction to enforce its orders, upon which the orders in *Senecker* and *Wilson* were based, should not

188. *Donovan v. City of Dallas*, 377 U.S. 408 (1964) (state may not prevent parties from suing in federal court); *Toucey v. New York Life Ins. Co.*, 314 U.S. 118 (1941) (federal courts have limited power to enjoin state courts' action); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (where substantive law is involved, federal courts must apply the same law the state court would apply).

189. In *International Ass'n of Machinists v. Gonzales*, 356 U.S. 617, 619 (1958), the Court called its job "Delphic" in nature. One observer writes:

The comparison of the Court's interpretation of congressional will with the procedures at ancient Delphi was pertinent. At Delphi, the "holy ones," or priests, were charged with the responsibility of interpreting the will of Apollo, expressed through the Pythia, his prophetess. Originally, the Pythia was a virgin, a virgin being "the purer vehicle for divine communication," according to tradition.

20 *ENCYCLOPEDIA BRITANNICA*, *Oracle* 142 (11th ed. 1911). Later, however, using possibly the earliest recorded legal fiction, the Greeks changed the rule, and a married woman over 50 years of age *attired as a virgin* was employed as the Pythia. Inspired by mystic vapors, she spoke the will of Apollo. Her utterances may have been only unintelligible murmurs, but they were interpreted into relevance and set in metric or prose sentences by the "holy ones." According to Plutarch:

[s]o great became the fame and influence of Apollo that all Greece resorted to his instrument and mouthpiece at Delphi for information on cult procedure, politics, law and personal conduct in everyday affairs, from monarchs and tyrants to ordinary individuals, in spite of the fact that the responses were for the most part vague, evasive and ambiguous, especially on critical questions.

Michigan Transp. Co. v. Secretary of State, 201 N.W.2d 83, 95 n.21 (Mich. App. 1972) (quoting EDWIN OLIVER JAMES, *THE ANCIENT GODS* 244 (1960)).

extend to situations and relationships covered by federal law. Although a family law court should enforce its orders anyway it can, it should be preempted from acting when to do so implicates a labor union.

Perhaps no other area of law is so pervasively dominated by federal rules than the area of employment and labor relations.¹⁹⁰ The bulk of federal law does not, however, clearly delineate when states are precluded from acting, and the scope of preemption remains unsettled.¹⁹¹ Most courts, in all contexts, have concluded that the relationships among private sector "labor unions, union members and employers are governed solely by federal law."¹⁹² Generally, any other interpretation

190. See National Labor Relations Act of 1935 ("NLRA"), codified as amended at 29 U.S.C. §§ 151-166 (1988) (establishment and identification of unfair labor practices by both employers and unions; exclusive jurisdiction lies within the agency, the National Labor Relations Board, established to administer the Act); Labor-Management Relations Act of 1947 ("LMRA"), codified as amended at 29 U.S.C. §§ 141-144, 151-167, 171-187 (1988) (generally provides for concurrent jurisdiction in state and federal courts with mandatory application of federal substantive law); Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), codified as amended at 29 U.S.C. §§ 153, 158-60, 164, 186-187, 401-402, 411-415, 431-440, 461-466, 481-483, 501-504, 521-531 (1988) (regulates internal relationships between unions and their members; specifically authorizes state court actions in certain discreet circumstances); Railway Labor Act ("RLA"), codified as amended at 45 U.S.C. §§ 151-163, 181-188 (1988) (does not specifically address preemption but lodges most claims with the National Railway Adjustment Board, which administers the Act and adjudicates most "unfair labor practices and grievances"); Employee Retirement Income Security Act of 1974 ("ERISA"), codified as amended at 29 U.S.C. §§ 1001-1461 (1988) (specifically includes a preemption provision which has been expansively interpreted to prevent state regulation of areas relating to administration, funding, and benefit provisions of pension and other employee benefit plans).

191. See, e.g., Archibald Cox, *Recent Developments in Federal Labor Law Preemption*, 41 OHIO S. L.J. 277 (1980). Professor Cox concluded "[i]n the field of industrial relations, there has been more than thirty years of fighting over the boundary lines to finding the realm of exclusive federal control." *Id.* at 277. It can be argued that the additional ten years since his ruminations have not clarified the rules, and his conclusion that principles governing federal pre-emption and exclusive application of federal law do not lend themselves to "logical consistency" or to a "coherent and continuing body of law" remains correct. *Id.* at 300; see also Daniel N. Kosanovich, *Inching Through the Maze: Recent Developments in Pre-emption Under the NLRA and the Impact of Caterpillar, Hechler, and Others*, 4 LAB. LAW. 225 (1988).

192. *Globig v. Johns-Manville Sales Co.*, 486 F. Supp. 735, 740 (E.D. Wis. 1980) (citing *Amalgamated Ass'n of Street, Elec. Ry & Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971)); accord *International Bhd. of Elec. Workers v. Hechler*, 481 U.S. 851 (1987); *Local 24, Int'l Bhd. of Teamsters v. Oliver*, 358 U.S. 283 (1959) (Court refused to allow state to

could decimate unions and disturb national labor policy. However, the instant cases are unique in that the courts' inquiry and interest does not involve the relationship between the employees and their unions in the ordinary sense; herein the union is clearly a tertiary player in the main contest between divorced parties, with the state as enforcer of family law orders.

There are arguments both for and against preemption. The arguments for preemption in this case are the same as in any run-of-the mill case, and derive from Congress' and the Supreme Court's reasons for applying it. The causes for concern include cognizance of the fact that the state action involved runs contrary to the philosophy of the National Labor Relations Act, which encourages union organization and collectivization; a respect for the principle of primary jurisdiction, which would make the National Labor Relations Board the first—and only proper—forum¹⁹³ if the union's job referral practices which guaranteed the delinquents a shorter-than-average job constitute an unfair labor practice;¹⁹⁴ a desire to maintain the union's bargaining power; and lastly, the recognition of the historic antipathy of local judges to union activity.

The reasons that militate against the application of preemption, are, in this case, nearly in equipoise with the denial of state court jurisdiction. Even in *San Diego Building Trades Council v. Garmon*, the Supreme Court's seminal—and strongest—affirmation of preemption,¹⁹⁵ the Court defers to a state's right to adjudicate matters of intense local interest. Family law is a purely local province (despite the encouragement of better local laws through URESA), a conclusion reinforced by the judicially approved family law exceptions to the application of

apply its anti-trust laws to previously collectively bargained-for truck rental and lease arrangements); *Hill v. Florida*, 325 U.S. 538 (1945) (states could not restrict freedom of employees to select their own bargaining agents, freedom protected by § 7 of NLRA).

193. *San Diego Bldg. Trades Council v. Garman*, 359 U.S. 236 (1959).

194. In *Sears Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180 (1978), the Court did not exclude the state of California from hearing a trespass action involving the situs of picketing, even though the legality of the picketing in the first place was clearly within the NLRB's primary jurisdiction because "the controversy which Sears might have presented to the Labor Board is not the same as the controversy presented to the state court." *Id.* at 198; *cf.* *Farmer v. Local 25, United Bhd. of C & J of Am.*, 430 U.S. 290, (1977) (Although Court found state tort not preempted, it did so in part because the claims of intentional infliction of emotional distress and battery could be resolved without "accommodation of the special interests of unions and their members in the hiring hall context."). Normally, however, unfair labor practices are not resolved in state courts.

195. 359 U.S. 236 (1959).

federal pension law, ERISA, the reach of which is pervasive, even before Congress approved those exceptions through amendments to ERISA.¹⁹⁶ The proscriptions under the National Labor Relations Act do not apply to the actor here, the State of California.¹⁹⁷ Finally, this does not directly involve the type of relationship—that is, union versus employer, employee versus union, and so forth—that calls preemption analysis into play.

A discussion of whether California could exercise its jurisdiction in a family law case in a way that impacts upon a federally established and controlled relationship—between a union and its members—is, perforce, wrought with schizophrenic declensions. On the one hand, because of the importance and local nature of the subject matter—child support—and since the burden imposed on the union has little to do with its position vis-a-vis its bargaining counterpart, preemption seems inappropriate. But, because the joinder is directed at a union, and because the obligations being imposed upon it do affect the beneficiaries of what critics call “protectionist” legislation,¹⁹⁸ the threat of interference is more than specious.¹⁹⁹ As in the First Amendment area, the merest hint of interference coupled with the appearance, if not the presence, of bias against a politically disfavored group, and compounded by the

196. Retirement Equity Act amendments to the Employee Retirement Income Security Act (“ERISA”) codified as amended at 29 U.S.C. § 1056 (1988).

197. NLRA, 29 U.S.C. § 152(2) (1988), reads:

The term “employer” includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act [45 U.S.C.A. § 151 et seq.], as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

198. See Charles Fried, *Individual Collective Rights in Work Relations: Reflections on the Current State of Labor Law and Its Prospects*, 51 U. CHI. L. REV. 1012 (1984); Richard A. Posner, *Some Economics of Labor Law*, 51 U. CHI. L. REV. 988 (1984).

199. Cf. the dissents of Justices Brennan, Marshall, and Powell in *Belknap v. Hale*, 463 U.S. 491 (1983), which disagreed with the majority’s approval of individual state suits for breach of contract brought by strikebreakers who lost jobs the employer had promised were permanent, after the employer had settled an unjust labor practice charges by rehiring the strikers and dismissing the replacements. The dissenters would have preempted the state claims which lay “at the core of federal labor policy.” *Id.* at 524. I agree with the dissenters, and see how *Wilson* could interfere with federal regulation of labor relations.

limited utility of the solution, leads me to argue against these orders.

A. *Historical Purpose and Application of Preemption*

The logic behind preemption and the exclusive application of federal law to relationships between and among employees, their unions, and their employers, is that preemption is the only means to effectuate the purposes of Congress in establishing what federal labor laws there are and to guarantee legal uniformity among the important and integral relationships described. It seems generally agreed that federal law will preempt state law in three general areas: where the Court has required deference to the comprehensive administrative scheme and the primary jurisdiction of the National Labor Relations Board;²⁰⁰ where the state attempts to regulate matters that are inextricably linked with interpretations of, or problems arising out of, collective bargaining relationships;²⁰¹ and, where state adjudication may disturb a federally established balance of power between labor and management.²⁰²

200. See discussion of *Garmon*, *infra*.

201. The culmination of these relationships are, of course, the collective bargaining agreements. These contracts are comprehensively subject to federal labor law. See *International Bhd. of Elec. Workers v. Hechler*, 481 U.S. 851 (1987) (union safety promises in the context of training and referral from hiring halls are subject to federal breach of contract analysis and do not give rise to common law tort actions); *Allis Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985) ("questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law"). Two alternative arguments for the application of federal preemption to these two cases are that the hiring hall relationship arose out of a contract between the employer and the union. The first is a breach which is cognizable only as a federal wrong under § 101 of the 1982 Labor Management Relations Act. See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957). The other argument is that the union violated its duty of fair representation, which is also evaluated under federal law, either as an unfair labor practice or as a federal contract claim. See *Miranda Fuel Co.*, 140 N.L.R.B. 181 (1962), *enf. denied*, 326 F.2d 172 (2d Cir. 1963) (union has a duty to represent all employees in the bargaining unit) (regarding unfair labor practices); *Breining v. Sheet Metal Workers, Local 6*, 493 U.S. 67 (1989) (regarding federal contracts claim); *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151 (1983) (also regarding federal contracts claims); see also Lorainne Schmall & Martha Malin, *The Duty of Fair Representation: Enforcement & Remedies*, in *INDIVIDUAL RIGHTS WITHIN THE UNION* 422-93 (Martha H. Malin ed., 1987).

202. See Ray E. Smith & David A. Kayes, *Preempting State Regulation of Employment Relations: A Model for Analysis*, 20 U.S.F. L. REV. 35 (1985).

Primary jurisdiction is a term which means that labor questions should be resolved by the agency Congress created for that very purpose. It was explained in *Garmon*, in which the Supreme Court set forth a general standard for determining when state proceedings or regulations are preempted by the primary jurisdiction of the Labor Board. The Court noted that whenever an act is "arguably protected or prohibited" by the National Labor Relations Act, "states as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted."²⁰³ In *Garmon*, the Supreme Court decided that a California state court could neither issue an injunction against peaceful picketing nor award damages against the union for violation of state trespass law. Among the reasons for its decision was the Court's conclusion that labor issue are complex, should be resolved pursuant to the precise and reticulated legislation that relates to them, and are best left to the NLRB.

Garmon may be more apt in the instant case for its purport than its holding. The failure of a union to voluntarily relinquish the name of a potential employer of a delinquent father/union referee—or its failure to help or make its members comply with their child support obligations—are neither protected nor prohibited by the NLRA. The *Wilson* and *Senecker* orders affect the labor relationship only indirectly. Consequently, the notion of specific unfair labor practices defined by the Act, the resolution of which, under *Garmon*, would require deferral to the NLRB, may be inapposite under *Wilson* and *Senecker*. But such analysis cannot be so perfunctorily dismissed. There is a possibility that the union, in the way it has operated the hiring hall, has committed an unfair labor practice.²⁰⁴

B. *Hiring Halls and Unfair Practices*

Hiring halls are unique from most employment situations, and the Supreme Court has concluded that nearly all hiring hall

203. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245 (1959).

204. The analysis which follows is nearly identical to that which would be appropriate if the method of referral by the two defendant unions were, alternatively, violations of the unions' duty of fair representation or breaches of collective bargaining contracts. Although in the latter case, the forum would not be the Labor Board, the reasons for federal preemption are identical to those for primary jurisdiction in all meaningful ways. In any case, federal, and not state law, must control, regardless of forum. See generally Schmall & Malin, *supra* note 201.

cases are appropriately within—if not exclusively, at least primarily—the jurisdiction of the NLRB.²⁰⁵ Both parties to the instant suit allege that hiring hall jobs are uniformly short term.²⁰⁶ That may or may not be true. Often a hiring hall referral leads to permanent employment. In the instant case, where the employee actually worked at any given job no longer than two or three weeks, there is some reason to believe that the hiring hall process itself was abused, and the union may be violating the National Labor Relations Act in its operation of those halls.²⁰⁷

205. See *Local 100, United Ass'n of Journeymen & Apprentices v. Borden*, 373 U.S. 690 (1963) (if there is a possibility of unfair labor practice on the part of the union, the case is within the jurisdiction of the NLRB); *Local 207, Int'l Ass'n of Bridge Structural & Ornamental Workers Union v. Perko*, 373 U.S. 701 (1963) (any hiring hall conflicts must be addressed as unfair labor practices by the NLRB). But see *Breninger v. Sheet Metal Workers Local 6*, 493 U.S. 67 (1989) (unfair referrals which are unfair labor practices, but also cognizable as breaches of the duty of fair representation, are not within the Board's exclusive jurisdiction, but federal law is still exclusive jurisdictional basis).

The operation of hiring halls was first upheld by the NLRB in *Mountain Pacific Chapter of the Ass'n Gen. Contractors, Inc.*, 119 N.L.R.B. 883 (1957), *enforcement denied*, 270 F.2d 425 (9th Cir. 1959) (unfair for an employer to hire only union members referred from the hiring hall). The Board recognized that

it was to eliminate wasteful, time consuming, and repetitive scouting for jobs by individual workmen and haphazard uneconomical searches by employers that the union hiring hall as an institution came into being. It has operated as the crossroads where the pool of employees converges in search of employment and the various employers' needs meet that confluence of job applicants.

Id. at 896 n.8. In *Local 357, Int'l Bhd. of Teamsters v. NLRB*, 365 U.S. 667 (1961), the Supreme Court found that hiring halls, operated by union as sources of employees for employers who had a contract with the union, are not themselves violative of the NLRA, as long as the referees need not belong to the union.

206. *In re Marriage of Wilson*, 209 Cal. App. 3d 720, 257 Cal. Rptr. 477 (1989); *Senecker v. Senecker & Butchers' Union Local 532*, No. AD42450 (Ca. Ct. App. 2d 1988).

207. See, e.g., *International Union of Operating Eng'rs, Local 450*, 267 N.L.R.B. 775, 803 (1983); *Local 394, Labors' Int'l Union of N. Am.*, 247 N.L.R.B. 97, 114-16, 129 (1980); *Labors' Int'l Union of N. Am., Local 394*, 247 N.L.R.B. 97 (1980) (union bears the burden of proving objective and non-discriminatory criteria were used for referrals out of the hiring hall); Barbara J. Fick, *Political Abuse of Hiring Halls: Comparative Treatment Under the NLRA and the LMRDA*, 9 INDUS. REL. L. J. 339, 347 (1987) ("In distributing these jobs, a dispatcher can discriminatorily match jobs by referring his friends to the longer terms jobs while sending other applicants to the shorter jobs.").

It is important to note that hiring halls are not necessarily orderly processes or, for that matter, even halls. Some unions keep no list of referees at all, but simply give referrals to those individuals present at the hall at the time the request for workers is received.²⁰⁸ The phrase 'hiring hall' is a term of art, and while some unions have offices that are nearly identical to a state employment office, others have the spouses or children of business agents take calls from employers and serve as intermediary between them and people looking for work. Some union hiring halls are even operated from a dispatcher's home,²⁰⁹ or from an office within the union's business office. And while the concept of an out-of-work list suggests that the applicant signs the list, many unions permit oral notification of availability by the applicant to the dispatcher, who then places the name on the list. Moreover, an out-of-work list might not even exist. Some dispatchers attempt to keep "in their heads" the information concerning who is available for work and their respective priority rankings.²¹⁰ There are often no records kept to indicate what job openings were available with what employers and which applicants were referred by the hall.²¹¹ Finally, there are frequently no written guidelines available to determine referral rules and priorities.²¹²

If Wilson and Senecker changed jobs frequently, there are indicia that something is rotten in Denmark (or San Francisco).²¹³ One may conjecture that these fathers asked for jobs of short duration. There is little chance of every job over a

208. See *Laborers' Int'l Union of N. Am., Local 394*, 247 N.L.R.B. 97 (1980); see, e.g., *International Union of Operating Eng'rs, Local 406 v. NLRB*, 701 F.2d 504 (5th Cir. 1983) (union could not change longstanding hiring hall policies in a manner that was intended to deny an employee employment); *Polis Wall Covering*, 262 N.L.R.B. 1336 (1982), *enforced in part*, 717 F.2d 805 (3d Cir. 1983) (union hiring hall may not discriminate against any union member utilizing the union's hiring hall).

209. See, e.g., *International Ass'n of Bridge Workers, Local 350*, 164 N.L.R.B. 644 (1967).

210. Fick, *supra* note 207, at 245; see, e.g., *International Bhd. of Teamsters Local 328*, 274 N.L.R.B. 1053 (1985); *United Ass'n of Plumbers, Local 619*, 268 N.L.R.B. 766 (1984).

211. See *supra* notes 207-09.

212. Fick, *supra* note 207; see, e.g., *NLRB v. Laborers' Int'l Union, Local 644*, 810 F.2d 665 (7th Cir. 1987); *Iatse Local 646*, 270 N.L.R.B. 1425 (1984); *Journeyman Pipefitters Local 392*, 252 N.L.R.B. 417, 420-21 (1980), *enforcement denied*, 712 F.2d 225 (6th Cir. 1983).

213. See Fick, *supra* note 207, at 346-50 ("Because of the unique relationship between a hiring hall dispatcher and applicants for referral, possibilities of abusing the system to the detriment [or the benefit] of individual applicants are present.").

three-year period being too short to bring a father into a post-judgment supplemental proceeding to tell the court where he is working. It is more likely the case that skilled workers use a hiring hall only temporarily; either because the workers are inept and employers refuse to accept them as referrals, or because they are hired permanently by an employer whose first contact with them was through the hiring hall. If there were a conspiracy between the union and the delinquent to help the father evade his child support obligations, the union's hiring practices could be unfair and would likely be deemed to encourage union membership in violation of the NLRA.²¹⁴ Anyone can bring a charge against a union under federal law, including the state—or the nonsupported mother.²¹⁵ Of course, neither she nor the state could get the relief they sought, i.e.—the name of the potential employer. In the past, however, lack of remedy available from the NLRB has not precluded the application of primary jurisdiction principles,²¹⁶ or the ability of the NLRB to act.²¹⁷

An employer is not obligated to hire every individual sent from a hiring hall; even in what is called an exclusive arrangement, the employer is merely obligated not to seek or hire applicants from any other source. An employer may also retain the right to seek and employ applicants from alternate sources when the union hiring hall is unable to meet the employer's labor needs within a specified time period—usually twenty-four

214. 29 U.S.C. § 159(b)(3) (1988). One must argue that the special treatment was on account of union membership in order to actually be an unfair labor practice. *Laborers Local 135*, 271 N.L.R.B. 777 (1984). It may also be an unfair labor practice in the DFR context, or a breach of a collective bargaining agreement. In certain cases, discriminatory treatment in hiring hall referrals may be violative of another federal law, the Labor Management Reporting and Disclosure Act, 29 U.S.C. §§ 401-531 (1988), a law over which states and federal courts share jurisdiction. Although arising under different circumstances, and arguably illegalized by several different federal laws, preemption will still be an issue. *See, e.g., Murphy v. International Union of Operating Eng'rs, Local 18*, 774 F.2d 114 (6th Cir. 1985), *cert. denied*, 475 U.S. 1017 (1986).

215. *Cusano v. NLRB*, 190 F.2d 898, 903 n.8 (3d Cir. 1951) (only the filing of a charge by a person outside the Board can "provide the spark which starts the machinery of the Act running").

216. *Local 1199 DC, Retail, Wholesale & Dep't Store Union v. National Union Hosp. & Health Care Employees*, 533 F.2d 1205 (D.C. Cir. 1976).

217. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984) (although it is an unfair labor practice for an employer to report undocumented workers to the Immigration and Naturalization Service in retaliation for the workers' election of a union representative, there is no remedy because the Board cannot order reinstated any worker who is not legally able to work).

or forty-eight hours—without violating the union contract.²¹⁸ This adds another dimension to the argument that *Wilson* and *Senecker* were bad decisions: they may not increase the likelihood that the wages of a delinquent father will be attached, either because he will not be hired, or his employment may still not be of the duration necessary for the attachment.

The National Labor Relations Act prohibits any discrimination among or between union supporters and those who choose not to affiliate with—or even eschew—the union, if it tends to encourage or discourage union membership. It is, at the least, a tenable argument that a standing order from a court that a union release the names of potential employers to the state may discourage union membership, especially where that membership means that virtually all employment is through a hiring hall. The statutory proscription comes into play whenever the action directed against the individual is motivated by the employee's status qua union member.²¹⁹ If an employee

218. See *Hoisting & Portable Eng'rs, Local 4*, 189 N.L.R.B. 366 (1971) *enf'd*, 456 F.2d 242 (1st Cir. 1972); U.S. DEP'T OF LABOR, EXCLUSIVE UNION WORK REFERRAL SYSTEMS IN THE BUILDING TRADES (1970) *cited in Fick, supra* note 207, at 344 n.16.

219. *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Neither the employer nor the union must act discriminatorily to encourage or discourage union membership. To wit:

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer—

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by an action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the

changed jobs too frequently for the state to procure a wage attachment for delinquencies, as happened with Wilson and Senecker, but that employee were not associated with a union, the state would have to find some other way to collect unpaid child support. It could not mandate that the union, a stranger and third party in a family law action, help catch up with the delinquent. It is, therefore, beyond dispute that the fact of the delinquent fathers' union affiliation makes an important difference in how the state attempts to collect these delinquencies.

Similar to the First Amendment implications of the *Wilson* and *Senecker* orders, the conflict between them and federal labor law and policy may be more potential than kinetic.²²⁰ Ostensibly, the fact that the delinquent fathers in each case actually belonged to the union was irrelevant to the courts' holdings. But his association with the union is what subjects him to the unique collection efforts in each case. The salient characteristic of each was that his job referrals were had through the union. As a consequence, the union could inform the state of the names of potential employers, who could, under the state fam-

same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

29 U.S.C. § 158(a)(3) (1988); and

It shall be unfair labor practice for a labor organization or its agents—

* * *

to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

29 U.S.C. § 158(b)(2) (1988). Whether Wilson and Senecker were actually union members is irrelevant; their association with the union is critical.

220. The case would be entirely different if a state court had ordered a union to divulge its membership lists so that the district attorney could find out if any delinquents were union members, and therefore subject to a *Wilson*-type order. Analogous to the first amendment area, such an order would clearly offend the constitution under cases like *Buckley v. Valeo*, 424 U.S. 1 (1976); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); and *Thomas v. Collins*, 323 U.S. 516 (1945). There would also be serious federalism concerns with such intrusive and patently anti-collective-bargaining inquiry. In the two instant cases, the court knew of the delinquents' union membership.

ily law act, be ordered to withhold the wages of the fathers to satisfy the delinquencies.

There is reason to conclude that a domestic relations order would discourage workers from seeking membership or affiliation with a union for purposes of securing employment and therefore render such parents even less likely to pay child support. Union hiring halls are typical in industries where the work is highly skilled, and therefore, considerably more remunerative than for unskilled work; and, where the needs of any or perhaps all employers are not constant. In addition, workers who get jobs out of union hiring halls are paid the union-negotiated wage, which is statistically (even if not in every individual case) higher than employees who work as "independent" contractors for an employer.²²¹ Often, seasonal or temporary employees who do not get their jobs through a hiring hall do not qualify for any fringe benefits, either.²²²

It is logical to presume, therefore, that if Wilson or Senecker gave up the privilege and benefit of the hiring hall in order to evade the state's additional attempt at securing payment of child support arrearages, their children's chances of being supported are even more diminished. Without the union, each father would be faced with one of a few seemingly unattractive alternatives. He may work in the same industry, in temporary jobs, for less money. He may attempt to get a permanent position within the same industry, in which case the state would be able to successfully attach his wages eventually without the help of the union. He could work "underground" and not report his income, which would subject him to other legal sanctions, including from the state and federal tax authorities. Finally, he could not work at all.

C. *Federal Labor Proscriptions and the State as Actor*

In joining the union, the state has burdened an entity that owes no debt to the delinquent—unlike his employer—and serves only as his political and bargaining agent. The court has extended itself in a child support collection case in an aggressive and unique way.²²³ That raises the specter of animus

221. Union wages are generally higher than nonunion wages. For example, non-unionized persons in the manufacturing field earn \$313 weekly to unionized persons' \$389 weekly. Non-unionized transportation workers earn \$472 to unionized transportation workers' \$482. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACTS OF THE UNITED STATES, Tables 684, 661 (1989).

222. *B.G. Costich & Sons, Inc. v. NLRB*, 613 F.2d 450 (2d Cir. 1980).

223. Concededly, there are other instances of creative and aggressive

against unions. Although the court in *Wilson* noted that “[a]ny intrusion upon rights conferred constitutionally or by federal labor law was justified here by the compelling state interest in enforcing child support orders and the demonstrated absence of a less restrictive alternative,”²²⁴ there is no evidence that the court even considered a less restrictive alternative. Furthermore, this type of creative collection effort seems to be suspiciously absent in other contexts, since nearly one-half of all fathers do not pay.

There are other concerns. One may conjecture about why release of confidential information concerning where one works could discourage union membership, apart from wanting to evade legal process. An employee may have several important reasons for wanting to maintain his or her privacy regarding where he or she works or applies for work.²²⁵ A union member ought not feel that his membership means that his union must work against him in domestic relations areas. There are few good reasons to not pay child support—and those reasons will surely be recognized by a male-friendly court. But delinquent payors should not have to eschew collective labor activity. Unions exist to help, among others, supporting noncustodial parents earn more money. Unions are not enforcers of family law orders.²²⁶

child support enforcement. For example, a court may inquire into the level of earning of a parent ordered to provide support for his or her children. The court may demand proof of a supporting parent, to see if he or she is willingly earning less than necessary to support a child. *In re Marriage of Dennis*, 344 N.W.2d 128 (1984), the Wisconsin Supreme Court concluded that it may require a divorced father to make a search for other employment to increase or to add to his limited income in order to satisfy his child support obligations. The court found the decision in *Dennis* was commensurate with its earlier decision in *Balaam v. Balaam*, 187 N.W.2d 867 (Wis. 1971) where it held

a divorced husband should be allowed a fair choice for means of livelihood and to pursue what he honestly feels are his best opportunities even though he might for the present, at least, be working for a lesser financial return. . . . This rule is, of course, subject to reasonableness commensurate with his obligations to his children and his former wife.

Id. at 871.

224. *Wilson*, 209 Cal. App. 3d 720, 723, 257 Cal. Rptr. 477, 479 (1989).

225. Of course, even where the concerns are constitutional and not merely statutory, a union member cannot claim sanctuary from lawful process simply by virtue of union membership. *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63 (1928).

226. If the government wants unions operating as hiring halls to be considered employers for purposes of child support enforcement, the law should be amended to provide for that. Since there is no debt owed to a

The state of California is not a covered employer under the NLRA.²²⁷ However, even though California and its courts cannot commit an unfair labor practice illegalized by the NLRA, the state may be prohibited from joining the union as a defendant since a "second preemption doctrine protects against state interference with policies implicated by the structure of the Act itself. . . ." ²²⁸

Such a conclusion is part of another branch of preemption, related to concerns about federal labor policy, which requires the application of federal law to situations where the two primary parties to an actual or potential collective bargaining relationship are exercising their respective legal muscle in some type of contest. In *Machinists Lodge 76 v. Wisconsin Employment Relation Commission*, the Court opined that these battles should be left unregulated by local law, controlled only "by the free play of economic forces."²²⁹ The Court has been concerned with maintaining a balance of power, allegedly provided by the National Labor Relations Act.²³⁰ An argument can be made that there is nothing being imposed upon the unions herein that would patently diminish their bargaining power relative to their employer-counterpart/adversary. But, if the California courts' orders actually reduce the ability of the union to organize workers and recruit members, it may become an emasculate bargainer. Because it is the articulated policy of the NLRA to promote collectivization and bargaining,²³¹ and since there is at least a tenable concern that *Wilson* and *Senecker* could impose some constraints on the union, this conflict between the two fora—state and federal—cannot be completely ignored. There are no bright lines in determining whether state action must be preempted; these issues are often "translated into concreteness by the process of litigating elucidation."²³² Although some general pattern emerges, often inexplicable tolerance of state

member by the union, it is hard to see how the union could be treated as an employer under law. At least, however, federalism problems would be resolved, as they were when ERISA was amended to except alienation of benefits for use to satisfy domestic relations orders.

227. *Jervis Pub. Library Ass'n*, 262 N.L.R.B. 1386 (1982) (operators of public library granted exemption because library was an arm of the state).

228. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 749 (1985).

229. 427 U.S. 132, 140 (1976).

230. See CLYDE W. SUMMERS ET AL., *CASES AND MATERIALS ON LABOR LAW* Ch. 6 (1982). Whether federal law actually created an industrial equipoise is a debatable point raised by these authors.

231. 29 U.S.C. § 151 (1988).

232. *International Ass'n of Machinists v. Gonzales*, 356 U.S. 617, 619 (1958).

action by the Supreme Court²³³ has made definitive statements of preemption principles impossible.

D. *State Family Law as a Unique Exception*

From a slightly different perspective, an argument can be made that, whatever the preemption issues, California ought to be able to effectuate its family laws.²³⁴ Although the Supreme Court is perennially concerned with state interference in labor relations, a field enormously interesting to and frequently legislated upon by Congress, greater deference is afforded the states when they act on matters historically within their police powers, that is, the health, safety, and welfare of their citizens, than in other areas.²³⁵

Over a hundred years ago, the Supreme Court concluded that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States."²³⁶ Typically, the Court broadly searches the history and the pervasiveness, not only of the particular federal statute, but all general legislation in the area, to attempt to glean however nebulous a Congressional purpose to preempt state action in a specific case.²³⁷ It seems the inquiry is narrowed in the area of domestic relations, with a

233. See e.g., *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987) (individual employment contracts in a unionized setting are not completely preempted by federal law); *New York Tel. Co. v. New York State Dep't of Labor*, 440 U.S. 519 (1979) (New York's award of unemployment compensation to employees who are out of work because of their affirmative decision to strike does not interfere with the balance of bargaining power).

234. In *Wilson*, the court relied upon California Civil Code § 4380, which gives the family law court authority to enforce its judgments by such orders as the court in its discretion may deem necessary. *Wilson*, 257 Cal. Rptr. at 479.

235. See, e.g., *California Fed. Sav. & Loan v. Guerra*, 479 U.S. 272 (1987) (state can require employers to grant special leave to pregnant workers without violating federal laws against discrimination on the basis of gender); *DeCanas v. Bica*, 424 U.S. 351 (1976) (child labor, minimum wage, and workers compensation are within states' police power and should not be overridden by federal law); *Esplanada Co. v. Chicago*, 107 U.S. 678 (1883) (states have full power to regulate within their limits and that power includes regulation of construction roads, canals, and bridges).

236. *In re Burrus*, 136 U.S. 586, 593-94 (1890) (U.S. District Court has no authority to issue a writ of habeas corpus to restore a child to the custody of the father, when her grandparents, who took her into custody upon the death of her mother, refused to release her to her father seven years later, when he was "remarried and was well-prepared to take care" of her. Such matters "do not depend upon any act of congress, or any treaty of the United States or its constitution.").

237. See *Smith & Kayes*, *supra* note 202.

concomitant presumption that the state has almost free reign. The Court has concluded that “[o]n the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination of whether Congress has ‘positively required by direct enactment’ that state law be preempted.”²³⁸ There is certainly no positive requirement within the NLRA that state governments leave unions alone for all purposes. In *Garner v. Chauffers & Helpers Local 776*, the Court noted: “The National Labor Relations Act . . . leaves much to the states, although Congress has refrained from telling us how much. We must spell out from conflicting indications of congressional will the area in which state action is still permissible.”²³⁹

In *San Diego Building Trades Council v. Garmon*,²⁴⁰ the Supreme Court grappled with labor preemption and discussed it in terms of its broadest applications. The Court recognized that there would be exceptions to the application of the preemption doctrine. Litigable issues which were “merely peripheral” to federal labor law are within the power of the states to regulate, along with matters which are “so deeply rooted in local feeling and responsibility, that in the absence of compelling congressional direction, [the Court] could not infer that Congress had deprived the states of the power to act.”²⁴¹

Protection of children living in the state is clearly an important, if not compelling, state interest. Dating from the time this century when states enacted their “married women’s acts,” there was concern with establishing child support obligations.²⁴² In the Uniform Reciprocal Support Agreement Act (URESA), the federal government has imposed some procedural requirements upon the states in the area of family law, but only insofar as necessary to encourage them to take a more aggressive role in collecting child support.²⁴³ One reason for

238. *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979); see also *McCarty v. McCarty*, 453 U.S. 210 (1981) (on dissolution of marriage, state cannot divide military nondisability, regardless of state community property laws); *Liedel v. Juvenile Ct. of Madisco County*, 891 F.2d 1542 (11th Cir. 1990) (federal district court will not review final decision of state court of competent jurisdiction, in reference to a child custody complaint); *Barna v. Reed*, Civil No. 89-4742, 1990 WL 1473 (E.D. Pa., Jan. 9, 1990) (federal court does not have subject matter jurisdiction over custody proceeding currently in state court).

239. 346 U.S. 485, 488 (1953).

240. 359 U.S. 236 (1959).

241. *Id.* at 244.

242. See *Jones*, *supra* note 133.

243. See generally 42 U.S.C. §§ 651-659 (1988); *Kraus*, *supra* note 187.

URESA, and the sanctions behind URESA, is that the federal government does not want to reimburse a state for welfare payments it has made to a child whose parent is capable of supporting that child and against whom the state has taken no collection actions. Congress also wants the states to make capable parents support their children. This is significant, since one might argue that a state ought not to be found to interfere with federal labor policy if it is attempting to comply with clearly stated federal policy in the realm of domestic relations. Although there is nothing to suggest in *Wilson* or *Senecker* that either family was dumped onto the public dole as a result of the fathers' delinquencies, the federal child support law was amended to allow the states to use federal services to locate delinquent payors even where the nonsupported children were not on welfare.²⁴⁴ Where two federal laws, each representing an articulation of Congressional policy, have an impact upon a particular set of circumstances, the Court must attempt to reconcile them in a manner most likely to effectuate the purposes of each.²⁴⁵

Many of the earliest preemption cases presented the Court with matters of intense local concern. Despite their potential for conflict with the purpose of the NLRA, the Supreme Court allowed the states to exercise control. However, even cognizant of its deference to family law and health and welfare initiatives by the states, in most areas, the Supreme Court has generally recognized only a narrow exception to federal labor preemption—typically limited to proscriptions against criminal violence, trespass to property, and invasion of privacy. One exception to preemption had already been recognized in 1942 by the Supreme Court in *Allen-Bradley Local 111 v. Wisconsin Employment Relations Board*.²⁴⁶ The Court held that it was neither unconstitutional nor contrary to the federal labor scheme for a state court to enjoin strikers who violated state criminal laws. The strikers were engaged in mass picketing; obstructed and interfered with ingress and egress at the picketed employer's premises; threatened bodily injury and property damage to many of the employees who crossed the picket line; and actually engaged in violence, threats, coercion, and assault. These concerns, according to the Court, were strictly and passionately local.²⁴⁷ In *UAW-CIO v. Russell*,²⁴⁸ the Court

244. 42 U.S.C. § 666 (1988).

245. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984).

246. 315 U.S. 740 (1942).

247. *Id.* at 749.

248. 356 U.S. 634 (1958).

refused to vacate a state jury award to an employee who sued a union for wrongful interference with a lawful occupation. The plaintiff alleged that union pickets, through threats of bodily harm, barred his ingress to a plant during a strike. The Court concluded that the state had the power to act in a situation involving intimidation and violence.²⁴⁹

In *International Ass'n of Machinists v. Gonzales*,²⁵⁰ a union expelled one of its members in violation of a California law, which provided for a cause of action for breach of contract and recovery of damages for physical and mental suffering. The Court was not persuaded by the union's argument that its actions were concededly unfair labor practices under the NLRA. The Court concluded, as it had in an earlier case, that "the potential for conflict is too contingent, too remotely related to the public interest expressed in the Taft-Hartley Act, to justify depriving state courts of jurisdiction to vindicate the personal rights of an ousted union member."²⁵¹

State laws protecting private property owners from trespass are among those matters historically found by the Court to be of great local concern, and merely peripheral to federal labor regulation. The decision in *Sears Roebuck & Co. v. San Diego District Council of Carpenters*,²⁵² where the company sued in state court to enjoin union organizers from patrolling in front of the store, is consistent with this rationale. The Court held that a state trespass action was permissible, and not preempted, since the action concerned only the locus of the picketing—subject to state control—while the arguable unfair labor practice preempted under *Garmon* would focus on the object of the picketing. As a result, the dispute presented to the state court was not identical to that presented to the NLRB.²⁵³

Another noted exception to the *Garmon* rule is that made for a state's overwhelming interest in protecting its citizens from defamation. However, the exception is not as clear—or as uncategorically local—as with violence and trespass. In *Linn v. Plant Guard Workers Local 114*,²⁵⁴ the Court held that false and malicious statements made in the course of a labor dispute were actionable under state law if injurious to the plaintiff's

249. The Court reiterated this principle in *Amalgamated Ass'n of Street, Electric Railway & Motorcoach Employees v. Lockridge*, 403 U.S. 274 (1971).

250. 356 U.S. 617 (1958).

251. *Id.* at 621.

252. 436 U.S. 180 (1978).

253. *Id.*

254. 436 U.S. 180 (1978).

reputation, even though such statements were arguably unfair labor practices adjudicable by the Labor Board. However, the Court reached an accommodation with federal labor policy by requiring adherence to federal standards for proving actual damage and malice to make out such a claim, even if filed in state court.²⁵⁵

Even in some cases where the gravamen of the complaint devolved from a union's operation of a hiring hall, the Supreme Court has allowed the states to act. In *Farmer v. Carpenters & Joiners Local 25*,²⁵⁶ the Supreme Court found that neither the policy nor the language of federal labor statutes preempted a state cause of action by a union member against his union alleging that, because of his dissident intra-union political activities, the union had intentionally engaged in outrageous conduct, threats, and intimidation, causing him to suffer severe emotional distress and bodily injury. The Court found that, although as in *Linn*, part of the action complained of could have been an unfair labor practice, that is, the union's duty to lawfully operate a hiring hall from which plaintiff claimed he was intentionally not referred, the defendant's conduct was "so outrageous that no reasonable man in a civilized society should be expected to endure it."²⁵⁷ Since no federal labor law could remedy his wrongs, the claim was not excluded from state control. The state, on the other hand, had a substantial interest in protecting its own citizens from the kind of criminal abuse and intentionally tortious acts about which plaintiff complained. Moreover, the potential for interference with the federal scheme was minimal, since the tort action could be resolved without reference to (1) any accommodation of the special interests of union and members in the hiring hall context—the part of the complaint that was arguably an unfair labor practice; (2) the collective bargaining agreement; or (3) the legal status of the union as a plaintiff's representative.²⁵⁸

But even though the Supreme Court has allowed the states to take certain matters that affect labor relations into their own hands, that does not foreclose the possibility that the instant cases should not be locally governed. The Supreme Court has preempted certain actions where a state court fails to acknowledge federal policy, even though there may be no articulable

255. The Court required the application of the test articulated in *New York Times v. Sullivan*, 376 U.S. 254 (1964) (plaintiff must prove defamatory statements were made with malice and intent to cause damage to plaintiff).

256. 430 U.S. 290 (1977).

257. *Id.* at 301.

258. *Id.* at 302.

reason for preemption.²⁵⁹ This harkens to Congressional distrust of parochial jurists whose antipathy to collective bargaining and worker empowerment was, and is, known. The Supreme Court, in *Amalgamated Ass'n of Street, Electric, Railway and Motorcoach Employees v. Lockridge*, concluded:

The course of events that eventuated in the enactment of a comprehensive national labor law . . . reveals that a primary factor in this development was the perceived incapacity of common law courts and state legislators, acting alone, to provide an informed and coherent basis for stabilizing labor relations conflict and for equitably and delicately structuring the balance of power among competing forces so as to further the common good.²⁶⁰

Dating from the earliest federal legislation regulating injunctive power of the courts, Congress recognized that local judiciaries, with regional political, moral, and philosophical agendas, simply could not be trusted to effectuate the purposes of federal law to encourage collective bargaining and protect the integrity of an institutionalized representative of employee voice.²⁶¹

259. The Supreme Court's statements as to the imprecision and intuition of preemption are myriad. *See, e.g., Brown v. Hotel & Restaurant Employees*, 468 U.S. 491, 509 (1984) ("It can no longer be maintained . . . [that federal law] necessarily and obviously conflicts with every state regulation" when discussing the application of the federal preemption doctrine.); *Belknap, Inc. v. Hale*, 463 U.S. 491, (1983) (the Court will determine state regulation or actions preempted where there is a "risk that the state will sanction conduct that the Act protects"); *E.I. Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978) ("unless courts discern from the totality of circumstances that congress sought to occupy the field to the exclusion of the States"); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 156-57 (1978) (there is an assumption that the state's powers are not to be superseded by federal statutes unless that was the clear and manifest purpose of Congress); *Farmer v. Carpenter*, 430 U.S. 290, 302 (1977) ("Our cases indicate . . . that inflexible application of the doctrine is to be avoided").

260. 403 U.S. 274, 286 (1971).

261. The preamble to the National Labor Relations Act states that: The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes

Not only was a need for uniformity apparent; there was—and is—a recognition that state, local, and federal public policy does not always coalesce. Congress, by and large, meant to leave unions alone—except for holding them responsible for violation of their statutory duties and proscriptions.²⁶² Since the instant orders would not have been entered if the union were not the job referral source for the delinquent fathers, it can hardly be argued that the unions' status is irrelevant. The unions cannot be analogized to an employer against whom a wage deduction order is entered, because the employer actually owes a debt—in the form of wages—to the delinquent. The unions are the collective bargaining agents, and the group political voice, of these delinquent fathers. They are not obligors. The *Wilson* and *Senecker* orders are unlike the cases where the Supreme Court allowed union members to sue their unions in state court. They, instead, impose an affirmative obligation upon unions to become involved in matters that have nothing to do with their representative or bargaining responsibilities, but which, if they perform negligently, might begin another cycle of analysis of federal preemption. These orders impede Congressional intent and should, I think, not have been entered.

E. *The ERISA Analogy*

Whenever an area of law is subject to Congressional control courts tread gingerly. Even under the Employee Retirement

the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees. . . .

It is declared hereby to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. § 151 (1988).

262. There are, of course, some exceptions to this rule. When a union's status as union is totally irrelevant, federal preemption and protection is not in issue. *See, e.g.,* *Hulahan v. Sheehan*, 522 S.W.2d 134 (Mo. Ct. App. 1975) (plaintiff sued for personal injuries when he slipped and fell on union hall steps).

ment Income Security Act (ERISA), the federal law that protects employee pension benefits from state-ordered attachment, courts frequently concluded that, because of federal preempting these funds should even be protected from satisfying child and spousal support obligations. It took an act of Congress to convince courts that even such "logical" incursions into federally-protected domains are appropriate. By analogy, the *Wilson* and *Senecker* orders interfere with federal control and should not slip by as typical and part of an aggressive system enforcing child support obligations.

ERISA is a law with pervasive preemption provisions.²⁶³ ERISA provides that the federal law "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . not exempt under § 1003(b) of this title."²⁶⁴ Congress so provided because the states were too slow in providing for or protecting employee health and pension benefits. Both the legislative history and the aftersight of judicial fortification make clear the preemptive strength of the statute.²⁶⁵ The test of preemption is whether the state law "relates" to any employee benefit plan not otherwise exempt from the act. Sponsors of ERISA spoke of the breadth of the preemption provision. Senator Williams said:

It should be stressed that with the narrow exception specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for federal regulations, thus eliminating the threat of conflicting or inconsistent state and local regulation of employee benefit plans. This principle is intended to apply in its broadest sense to all actions of state or local governments or any instrumentality thereof, which have the force or effect of law.²⁶⁶

263. See 29 U.S.C. §§ 1001-1461 (1988).

264. 29 U.S.C. § 1144 (1988). This express and detailed preemption clause is unique in labor law; preemption is simply implied from the National Labor Relations Act. See 29 U.S.C. §§ 151-169 (1988).

265. David Gregory, *The Scope of ERISA Preemption of a State Law: A Study in Effective Federalism*, 48 U. PITT. L. REV. 427, 454 (1987) ("In order to effectuate the central policy objectives of ERISA, which is to encourage voluntary pension plan development and to protect and strengthen employee pension plan rights, ERISA's framers properly thought it essential that ERISA not be compromised by a host of potentially contradictory state laws.").

266. 120 CONG. REC. 29 § 933 (1974).

Congress created only narrow exceptions to preemption, and applied this principle in its broadest sense to foreclose any non-federal regulation of employee benefit plans.²⁶⁷

The Burger court, which normally demonstrated what has been called an "ingrained predisposition to find against the power of the federal government,"²⁶⁸ repeatedly endorsed a broad reading of ERISA preemption. For example, in *Alessi v. Raybestos-Manhattan, Inc.*,²⁶⁹ the Supreme Court held unanimously that a New Jersey law that prohibited pension offsets by amounts awarded in worker's compensation was preempted by ERISA because the state law "related to" an employee benefit plan. The Court reached this conclusion, despite two good reasons for a contrary result. The first was the precedent which allowed state regulation in cases of patent local interest, since worker's compensation is generally considered to be of the direst importance to local residents and a clear example of the *Garmon* exceptions to preemption.²⁷⁰ The second was that the New Jersey law appeared to comport with the policy behind ERISA—protection of employees' deferred benefits. But, the statute was preempted because, according to the Court, it eliminated one method for calculating pension benefits—integration with other public benefits—which was permitted by federal law.²⁷¹ The Supreme Court noted:

It is of no moment that New Jersey intrudes indirectly, through a workers' compensation law rather than directly, through a statute called 'pension regulation.' ERISA makes clear that even indirect state action bearing on private pensions may encroach upon the area of exclusive federal concern. . . . ERISA's authors clearly meant to preclude the state from avoiding through form the substance of the preemption provision.²⁷²

267. See generally James D. Hutchinson & David M. Ifshin, *Federal Preemption of State Law Under the Employee Retirement Income Security Act of 1974*, 46 U. CHI. L. REV. 23 (1978).

268. Gregory, *supra* note 265, at 459.

269. 451 U.S. 504 (1981).

270. *New York Tel. Co. v. New York Dept. of Labor*, 440 U.S. 519 (1979) (federal law does not preempt the New York statute that allowed the payment of unemployment compensation to strikers); *cf. Baker v. General Motors Corp.*, 478 U.S. 621 (1986) (state law which prohibited unemployment compensation to strikers on the grounds that the state refused to finance the strikes that caused their unemployment not preempted).

271. *Alessi*, 451 U.S. at 524.

272. *Id.* at 525. This commitment to the breadth of the preemptive force of ERISA was reiterated recently in *Mackey v. Lanier Collections*

In 1984, Congress amended ERISA to exempt qualified domestic relations orders²⁷³ to insure that ERISA's anti-garnishment and preemption provisions could not be used to block the enforcement—against any choate benefits of the non-supporting parent—of qualified domestic relations orders providing for child support. Even before 1984, some courts that considered the issue found that federal preemption was inapt in family law order cases²⁷⁴ because the purposes of the orders and the federal pension law were nearly identical. There was no uniformity on the issue, however.²⁷⁵

State courts had to deal with ERISA in those cases where a custodial spouse attempted to garnish vested pension benefits that belonged to a delinquent father. Despite the intuitively correct choice of attaching any money the delinquent may have to insure payment of court-ordered support, the courts had to deconstruct ERISA's clear anti-alienation provisions.²⁷⁶ Such

Agency & Serv., Inc., 486 U.S. 825 (1988). The Court refused to allow the state of Georgia to specifically protect ERISA welfare plan proceeds from garnishment by general creditors of plan participants. The Court reasoned that, although ERISA plans were supposed to be protected against encroachments that would result from beneficiaries' assignment of these benefits to general creditors, certain non-pension benefits could not be free from state methods for collecting judgments in the normal course. Not unlike the issue in *Alessi*, therefore, even state actions which ostensibly mirror the concern of Congress that these benefits be protected had to be preempted because they "relate to" an employee benefit plan.

273. 29 U.S.C. § 1056(d)(3)(B) (1988):

Each pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order. . . . "[Q]ualified domestic relations order" means a domestic relations order—which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan, . . . relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant. . . .

274. See, e.g., *Carpenter's Pension Trust v. Kronschnabel*, 632 F.2d 745 (9th Cir. 1980), cert. denied, 453 U.S. 922 (1981); *AT & T v. Merry*, 592 F.2d 118 (2d Cir. 1979); *Senco, Inc. v. Clark*, 473 F. Supp. 902 (M.D. Fla. 1979).

275. "The courts are divided on the question of whether [ERISA's] anti-assignment clause applies to state domestic relations orders and also on the question of whether the pre-emption clause [Section 514 (a)] refers to State domestic relations laws and court orders." H.R. REP. No. 98-655, pt. 1, at 30 (1984), cited in *Mackey v. Lanier Collections Agency & Serv., Inc.* 486 U.S. 825, 838 n.13 (1988).

276. ERISA provides that "each pension plan shall provide that benefits provided under the plan may not be assigned or alienated." 29 U.S.C. § 1056(d)(1) (1988).

statutory provisions led most plan documents to include typical anti-alienation language such as:

[T]o the extent permitted by law, none of the benefits hereunder or payments of any contract of insurance or property held in any trust hereunder shall be subject to any claim of any creditor of any member; and shall not be subject to attachment or garnishment or other legal proceedings by any creditor of any member or any beneficiary of any member; and neither the member nor any beneficiary shall have the right to alienate, encumber or assign any of the benefits, payments or proceeds of any contract issued pursuant hereto or property held in any trust hereunder.²⁷⁷

The rationale of the courts that decided to allow a spouse to garnish pension benefits was that Congress created the anti-alienation provisions, in part, to protect the dependents of the beneficiaries, as well as to protect the wage-earners themselves.²⁷⁸ For example, in *Operating Engineers Local 428 Pension Fund v. Zamborsky*,²⁷⁹ the Ninth Circuit observed that family law had always belonged exclusively to the states, citing the Supreme Court's decision in *In Re Burrus*.²⁸⁰ In grappling with the issue of whether the union-administered pension fund ought to release money pursuant to a domestic relations order and subsequent garnishment, the court re-examined the

277. *Pepitone v. Pepitone*, 436 N.Y.S.2d 966 at 968 (1981).

278. In *Cartledge v. Miller*, 457 F. Supp. 1146 (S.D.N.Y. 1978), the court reasoned: "[R]ather than intending to undermine the family law rights of dependents, spouses and children, the legislature was concerned that employees and their beneficiaries—the entire family—be protected by ERISA Thus the conclusion is warranted that, like the previous congressional exemptions, ERISA's anti-assignment or alienation sections were included only "to protect a person and those dependent upon him from the claims of creditors," not to insulate a bread winner from the valid support claims of spouse and offspring. *Id.* at 1156. The statute itself mandates that:

a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

- (A) for the exclusive purpose of:
 - (i) providing benefits to participants and their beneficiaries; and
 - (ii) defraying reasonable expenses of administering the plan;
- (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

29 U.S.C. § 1104(a) (1988).

279. 650 F.2d 196 (9th Cir. 1981).

280. 136 U.S. 586 (1890).

Supreme Court's decision in *Hisquierdo v. Hisquierdo*, wherein the Court had opined:

[O]n the rare occasion when state family law has come into conflict with a federal statute, this court has limited review under the supremacy clause to a determination whether congress has "positively required by direct enactment" that state law be preempted A mere conflict in words is not sufficient. State family and family property law must do "major damage" to "clear and substantial" federal interests before the supremacy clause will demand that state law be overridden.²⁸¹

Other courts had similarly reasoned. In *Pepitone v. Pepitone*,²⁸² the New York Supreme Court not only ordered that the famous delinquent father's pension benefits could be attached to satisfy his support obligations, but that he could be forced to take a much-reduced early pension benefit in order to guarantee that his children's welfare would be attended to more promptly. The court found that Pepitone's arrearage in alimony and child support of more than \$40,000 gave his ex-wife the right to sequester his pensions benefits and to compel him to elect early retirement.²⁸³

In *Mallory v. Mallory*,²⁸⁴ a New Jersey trial court found that it comported with the purpose of ERISA to allow a custodial spouse, whose husband was delinquent in his child support

281. 439 U.S. 572, 581 (1979); see also *Zamborsky*, 650 F.2d at 199-200: [B]y enacting ERISA congress has not "positively required by direct enactment" that garnishments of the sort at issue here be preempted. Moreover, it cannot be said that these garnishments "do 'major damage' to 'clear and substantial' federal interests." Indeed, portions of ERISA suggest that interpreting ERISA as precluding the sort of garnishment here at issue would be directly contrary to its goals and purposes. In § 2 of ERISA, . . . Congress made certain findings. Of particular relevance is its statement that it finds "that the continued well being and security of millions of employees and their dependents are directly affected by . . . [employee pension benefit] plans." This establishes that congress was not only concerned with the welfare of employee participants but also with the welfare of dependents of employee participants. Therefore, to now hold that ERISA may be used as a means to frustrate enforcement of the obligation of an employee participant to support his dependant spouse, would be contrary to congress' purpose in enacting ERISA.

282. 436 N.Y.S.2d 966 (1981) (Joe Pepitone played baseball for the Yankees, and adds support to the prior claim that fathers-across-the-economic-board fail to support their children).

283. *Pepitone*, 436 N.Y.S.2d at 970.

284. 432 A.2d 950 (N.J. Super. 1981).

payments, to levy upon the corpus of an IRA pension fund created pursuant to 26 U.S.C. § 408. The court found that the anti-alienation provisions of ERISA did not prevent the transfer. The court relied on the justification in an earlier case, *Schlaeffer v. Schlaeffer*:²⁸⁵

[T]he usual purpose of exemptions is to relieve the person exempted from the pressure of claims hostile to his dependant's essential needs as well as his own personal ones, not to relieve him of familial obligations and destroy what may be the family's last and only security short of public relief.²⁸⁶

The *Mallory* court also found that if it were to hold that the corpus was not subject to execution, it would "provid[e] a very effective vehicle whereby an individual may escape his support obligations and thereby transfer the obligation and responsibility for those individuals to the welfare facilities of the state."²⁸⁷

It made good sense to attach these pension funds. But any incursions by state courts into a federally-regulated area of law deserves scrutiny. Even in this instance, Congress felt the obligation to amend ERISA to make clear what kinds of state actions would not violate the act. Although ERISA's preemption is codified, it can be argued that the NLRA should not be preempted for the same reason some courts were loathe even to order pension benefits attached for the benefit of the beneficiary's children: federal law is pervasive, and if Congress wanted the states to act despite the presence of federal law and policy, it would act to let the states know.²⁸⁸

V. THE IDENTITY OF THE PARTIES TO THIS PARTICULAR STRUGGLE SUGGEST THAT THE RESULTS MAY BE MOTIVATED MORE BY A DESIRE TO MAINTAIN THE STATUS QUO THAN BY A RATIONAL DESIRE TO GET CHILDREN THE SUPPORT THEY NEED

At the risk of appearing overly skeptical, the question must still be asked whether all this possible intrusion and reorganization of power is worth the result. Did the court single out these defendants because they were unionists? Will the Mizzes Senecker and Wilson get their men—or more importantly—

285. 112 F.2d 177 (D.C. Cir. 1940).

286. *Id.* at 185.

287. *Mallory*, 432 A.2d at 954.

288. See Justice Kennedy's dissent in *Mackey v. Lanier Collections Agency & Serv., Inc.*, 486 U.S. 825, 841 (1988) (The Court should not infer that Congress would allow general creditor garnishment simply because it approved domestic relations attachments in its ERISA amendments.).

their money, in the end? Could all of this have been done a different way?

Let us assume, for the moment, that the court was—consciously or unconsciously—preserving the social order, and imposing upon the least favored a burden to support a slightly less impotent, and slightly more favored group. Certainly, such a theory is neither new nor totally without merit. Since the time of the Legal Realists, and now with the currency of Critical Legal Studies, people have been wondering whether judicial decisions are not more than a mechanical, formalistic application of legal rules, precedents, and statutory interpretations. It is hard to see that *Wilson* and *Senecker* are any different than those scores of decisions which make the critics disavow the conclusion that legal decisions are “made on a legal basis rather than on the basis of social, political, moral or religious prospectives.”²⁸⁹ Even those adherents to the philosophy of legal positivism and formalism must concede that law is not a vacuum; that decisions which appear to be nothing more than a careful application of rules to situations may just as likely reflect what decisionmakers feel, intuit, or believe.²⁹⁰ Appearing to be lax in enforcing child support obligations, and assuming a stridency of effort only when the object of that stridency is as disfavored as the class of unsupported women and children, seems to comport with what certain legal theorists—who see a kind of predetermination in judicial decisions—believe. “The positivist theory of the interpretation of law is directly connected with the social and political ends of juridical positivism itself: the preservation of legality and of the legal order, the strengthening of social certainty and the predictability of the behavior of public authorities”²⁹¹

289. See David Kairys, *Law and Politics*, 52 GEO. WASH. L. REV. 243, 243 (1984).

290. It is axiomatic that the decisionmakers tend not to be the disenfranchised, former Hippies, radicals, or even liberals. There are dramatically few women, secessionists, and/or people of color on the bench. In fact, most of the appointments to the federal bench—and to important positions in the United States Department of Justice—over the last decade were made among lawyers who, as students, were members of the Federalist Society—a self-denominated “conservative” group opposed to judicial activism and dedicated to a “strict construction” of the U.S. Constitution. This group had as an early advisor Justice Antonin Scalia, whose appointment was not favored by women, unions, or those groups or persons commonly considered “liberals.”

291. MIECZYSLAW MANELI, *JURIDICAL POSITIVISM AND HUMAN RIGHTS* 97 (1981).

A. *Things Always Go Better For Those Who Are Better*

Some scholars (and probably many less "scholarly" who opine over kitchen tables, in food stamp lines, and at factory time clocks) argue vehemently that the system is skewed, and that fairness exists only for those who already get more than they deserve. Wythe Holt has called this influence upon legal results "Tilt," which he defines as:

a fancy and somewhat sanitized word for oppression, signifying that the bias and prejudice which everyone experiences everyday is neither random nor fortuitous. Few effects of Tilt are clear and unambiguous; although some people derive a net benefit from Tilt, most are burdened by it. Tilt favors those with wealth, power, and status but hurts those at the lower end of the socio-economic scale: women, non-whites, and third world people.²⁹²

Holt argues that people refuse to acknowledge this bias, pretend it can go away, and generally avoid "the problem posed by Tilt by separating law from politics, attempting to confine their discussion to an internal, legalistic rationale within which the legal results might be judged acceptable."²⁹³

Obviously, all of the results in *Wilson* and *Senecker* can be explained away on other grounds. We can say that the reason there is such a dreadful record of enforcement of child support is that judges are convinced that the support orders are not simply rarely enforced but really unenforceable. We could also posit that there are purely economic reasons for nonpayment of support, that is, that most nonpayers are too poor to pay child support in the first place. It may be argued that any rational judge could see that the Child Support Enforcement Amendments, and state family laws, require vigorous enforcement efforts and that—at least in this case—the judges were attempting, perhaps for the first time, to invigorate the enforcement process. One could guess that the judge concluded that incarceration of a nonpayer parent would have a devastating effect both upon the potential income and upon the family commonweal. It could either be a fortuity that unions often lose and that women often lose, or that neither usually has the equities or the best prepared and most expensive legal counsel.

I argue, though, that these two cases comport with theories of discrimination on the bases of gender and class, and

292. Wythe Holt, *Tilt*, 52 GEO. WASH. L. REV. 280, 280 (1984).

293. *Id.* at 282-83.

with the current notions of economic reality: the freedom of contract, supply-side economics, and other important theories that have strong theoretical bases and politically potent adherents.²⁹⁴ My brief history of the treatment of unions and women under law suggests that the two groups share a common experience of not frequently prevailing.

Some may claim that the California Court of Appeal is responding to what has too long been ignored;²⁹⁵ it is possible that it simply reacted to the many lawyers and scholars who have finally taken up the cause of women and children and who criticize our legal system for failing to remediate serious social problems. One scholar has suggested that

the real "divorce revolution" in recent years has been a revolution in consciousness—a heightened awareness of the failure of our divorce system to apportion fairly the economic burdens of marital dissolution.' The post-divorce plight of women and children . . . has become a social problem because it has begun to be described as such, not because it is something new. . . . It seems likely that laws which can capture and articulate widely shared sentiments about the value of child-raising can thereby increase, at least to a modest degree, their own effectiveness in dealing with post-divorce dependency. Conversely, laws which implicitly tap into the all-too-familiar currents of egoistic individualism, or into even darker pools of resentment and group bias, will contribute in their way to the perpetuation of the problem.²⁹⁶

It may be that these decisions "[w]hen correctly located within a broader, more complicated awareness of the nature and history of common law adjudication, . . . merely constitute a part

294. See also MACKINNON, *supra* note 148 (ideological neutrality is the capstone of an intellectual edifice by which the whole of society is subjected to the agendas of the dominant class). Discrimination on the basis of race is likely the most virulent and destructive in our society. However, in the context of child support enforcement, courts appear to be more motivated by their own notions of "fair" treatment based upon the just deserts of a particular gender and class, than by racist considerations.

295. The female Deputy Attorney General, Josanna Berkow, who argued for the orders in *Wilson* and *Senecker*, rejoiced in her victory for women. See ABA Ctr. on Children & the Law, Child Support Prosecutors' Bulletin, Vol. I, No. 1 (January 1990).

296. MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW* 238 (1989) (citing Melli, *supra* note 149) ("Damaging social conditions become social problems only when they are perceived and advertised as such in public discourse").

of the evolution of society's consensual adjustment to felt needs"²⁹⁷

But this feminist victory is less than patent when one examines who it is opposing these orders. Unions, as discussed earlier, have always fared poorly, unless their opponents are an even poorer, less powerful, entity.²⁹⁸ The only recent exception to the rule that those most like an institutional power in this country always win may be *Communications Workers v. Beck*.²⁹⁹ Beck is an employee who, by virtue of the union security provisions of the collective bargaining agreement, is required to pay union dues even though he chose not to belong to the union. He, with the help of a nationally-organized coalition of employers and other defenders of "individual" rights, convinced the Supreme Court that the union had breached its

297. Holt, *supra* note 292, at 284. However, Holt claims that the "consensus" that such writers talk about is not an agreement among the whole, or even the greater part, of society but only among—and essentially for the benefit of—elite segments and groups. The judges who acted 'in favor of' women in these two California cases may have actually empowered unsupported female parents. They may be examples of decisionmakers who can rearrange, democratize, and infuse with justice the possession of social status and power, because, in joining the unions and striving to get for these women what (little) law gave them in the first place, they "act[ed] out of empathy and intuition." See Claire Dalton, Book Review, *The Politics of Law: A Progressive Critique*, 6 HARV. WOMEN'S L.J. 229, 234-38 (1983); cf., Holt, *supra* note 292, who argues that "most capitalists or macho men are also acting out of empathy and intuition" and little social change is accomplished. Holt, *supra* note 292, at 287 n.35. The California Appellate Court's decision to join the union rather than imprison Rodney Wilson for not paying years of child support could be an example of what Peter Gabel argues in his paper on political imagery:

The fact is that 'our federalism', our 'fundamental values' that were being carried to the states through the fourteenth amendment and to private parties through the commerce clause were never really intended to achieve social justice by abolishing the hierarchy system and giving power to the large masses of people. They were intended to maintain these very hierarchies while at the same time satisfying a very genuine wish within liberal consciousness to 'help' poor people, third world people, those most oppressed by the system.

Peter Gabel, *The Mass Psychology of the New Federalism: How the Burger Court Political Imagery Legitimizes the Privatization of Everyday Life*, 52 GEO. WASH. L. REV. 263, 269 (1983).

298. See Michael J. Goldberg, *The Duty of Fair Representation: What the Courts Do in Fact*, 34 BUFF. L. REV. 89 (1985) (most plaintiffs who sue their unions for failure to represent them do not prevail in court); see also Ronald Turner, *Intentional Misconduct and the Union's Duty of Fair Representation: The Seventh Circuit's Hoffman Standard*, 63 CHI.-KENT L. REV. 43 (1987); Lorraine Schmall, *Workplace Safety and the Union's Duty After Lueck and Hechler*, 38 KAN. L. REV. 651, 664-65 (1990).

299. 487 U.S. 735 (1988).

representational duty by using Beck's dues money to advance the collective political purposes of the union—even though the union eventually rebated his and the other dissenters' money. The radical explanation, and the one that fits the paradigm being suggested here, is that Beck had an institution as his advocate, to wit, the powerful National Right to Work Committee, whose interests parallel that of the owners of capital.³⁰⁰ Further, *Beck's* holding reinforces the conclusion that unions do not generally function as political creatures because the powers that be do not want them to.

I am not the first to wonder why, even when motivated by the twin goals of following legal precedent and pursuing justice, courts and legislators do so much less than they could.³⁰¹ Often, courts seem to hinder the very groups about which they pontificate as needing especial consideration.³⁰² Judges are

300. *Cf. Flight Attendants v. TWA*, 489 U.S. 426 (1989) (union members who quit the union and abandon a strike need not be replaced at the end of the strike by employees who did not abandon the strike but had more seniority with the employer); *Patternmakers League of N. Am. v. NLRB*, 473 U.S. 95 (1984) (union members can quit the union at any time, even during a strike they voted to undertake, and the union cannot discipline them for quitting); *First Nat'l Maintenance v. NLRB*, 452 U.S. 666 (1981) (employers need not bargain over changes in operations, even if they permanently displace workers represented by the union, if the changes involve entrepreneurial decisions other than those about labor costs); *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180 (1978) (store owner can get state court injunction against peaceful union picketing protesting store's use of non-union carpentry contractors); *Indianapolis Power & Light*, 273 N.L.R.B. 1715 (1985) (general no-strike clause precludes a union from engaging in a sympathy strike in solidarity with another local).

301. For an interesting comparison to the fact that the goal in *Senecker and Wilson* may have been salutary, but the means and rationale therefore were faulty, see Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978), suggesting that decisions under the Wagner Act, by institutionalizing unions, reinforced the institutional basis for worker oppression, even though the material conditions of workers were slightly improved.

302. *See, e.g., In re Marriage of Brantner*, 67 Cal. App. 3d 416 (1977). In what I take to be an effort by a judge to decry the debasement of women, and to recognize the importance of work in the home, presiding judge Robert H. Gardner wrote:

A woman is not a breeding cow to be nurtured during her years of fecundity, then conveniently and economically converted into cheap steaks when past her prime. . . . [T]he husband simply has to face up to the fact that his support responsibilities are going to be of extended duration—perhaps for life. This has nothing to do with feminism, sexism, male chauvinism, or other trendy social ideology.

It is ordinary common sense, basic decency, and simple justice. *Id.* at 419-20. Of course, the need to distinguish a woman from an animal,

either unaware;³⁰³ reluctant to change the status quo or risk the embarrassment of conspicuous reversal by an appellate court; or, take on the power structure that installed the judges in their own positions. They often, it can be said, refuse to choose "other, more humane options that could make this country a better place."³⁰⁴

B. *Enforcements as a Small Part of the Problem*

Wilson and *Senecker* clearly do not reflect the least intrusive and most efficient means of collecting child support. I concede there are no judicial requirements for the adoption of such a standard before a state can act. But neither is there a requirement that these considerations be wholly irrelevant.

The evidence is overwhelming that states have done almost everything wrong if they are seriously attempting to improve the lot of children after divorce. Dissolution of a marriage for people with children is emotionally exhausting, legally complex, and financially debilitating. Many women do not even seek child support because they cannot afford to fight for it, or because they recognize the futility of their efforts. For those who do, courts and legislatures have yet to arrive at fair and consistent levels of child support. Finally, courts and state attorneys general have been unwilling and unable to enforce

and the suggestion that feminism is either comparable to "male chauvinism" or is "trendy" suggests adherence to the status quo of male legal superiority—and requires a reasoned response beyond this brief note. Cf. ALAN DAVIS, *WOMEN, RACE & CLASS* 10 (1981).

303. CALIFORNIA JUDICIAL COUNCIL, DRAFT REPORT OF THE ADVISORY COMMITTEE ON GENDER BIAS IN THE COURTS, ACHIEVING EQUAL JUSTICE FOR WOMEN & MEN IN THE COURTS, Part 5-4 (1990) ("the system has so little valued families that judges are effectively deprived of the experience, the knowledge, the time, and the resources to do the right thing").

304. David Kairys, *Law & Politics*, 52 GEO. WASH. L. REV. 243, 259 (1984). Kairys uses an analogy to plant closings in which he says that, although courts tend to bemoan plant closings, the loss of revenue for a community that has for years given a particular industry tax benefits, and the end of the sacrifice of toil and trouble of all of the employees within the community who worked for the plant that is now about to close, both lead courts to universally conclude that nothing legal can be done to prevent the closings. The courts reason that the plant closing cannot be prevented by law because, after all, the capitalist who invests his or her capital has the right to withdraw it. He argues that it is just as easy to look at the situation and decide that courts ought to act differently, because, for example, "the community requires a lien on the plant for all that it contributed. . . . [T]his theory serves to place the real social cost of the move on the corporations rather than on the workers, the community, and the taxpayers who fund the welfare system." *Id.* at 258. Our social fabric could change to the point where such a lien theory would be acceptable; it just has not done so thus far.

more than fifty percent of the orders that do exist, and unsupported mothers often lack the wherewithal to get it for themselves.³⁰⁵

It is not as if lawmakers, lawyers, judges, and various sundry others (especially divorced mothers with too many bills and too few dollars) are unaware of the problem. Some of the proposed solutions are eminently practical. Others are more theoretical—and among the latter are ones which despair of ever solving the problems short of a revolution in thought.³⁰⁶ But if the shortcomings are well-known, it makes sense to at least consider the alternative solutions before adding to the burdens of an already weakened working class.

For example, the U.S. General Accounting Office found that “prompt attention by child support collection agencies to absent parents beginning to pay child support is important to establish good payment habits. This would include, for example, fast and systematic follow up on past due support payments.”³⁰⁷ The GAO found this sorely lacking among all the states it studied. The primary reasons therefor were “inadequate staff”³⁰⁸ and previously, no federal incentive for states to collect non-AFDC support.³⁰⁹ Federal legislation³¹⁰ already requires the states to establish procedures for mandatory wage

305. Cf. Lucy E. White, *Subordination, Rhetorical Survival Skills and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1, 4 (1990) (persons victimized by discrimination against their race, gender, and/or class are not protected by the “procedural rituals that are formally available to them”).

306. See Christine Harrington & Janet Rifkin, *The Gender Organization of Mediation: Implications for the Feminization of Legal Practice*, INST. FOR LEGAL STUDIES (Feb., 1989); Fineman, *supra* note 174, at 781 (“A major problem when law and legal change are viewed as something distinct from or outside of culture is that such a notion can lead to the conclusion that one can identify and correct ‘errors’ in the law, thus correcting the problem, while the society remains unchanged. . . . Those who tend to focus on legal change as the way to social change have it backwards, it seems to me. In my opinion, the culture must change if there is to be real reform. In the context of marriage and divorce, this is an inherently pessimistic position, given the current unlikelihood and impracticality of necessary major cultural changes concerning gender. A recognition of the difficulty of change, however, does not allow us to escape the conclusion that law is imbedded in our culture—that it is culture from which law springs and through which it will be implemented. If society is not ‘ready’ for reform, there will be none”).

307. U.S. GENERAL ACCOUNTING OFFICE, REPORT TO THE HONORABLE MARIO BIAGGI, HOUSE OF REPRESENTATIVES, NO. B-183433, CHILD SUPPORT COLLECTION EFFORTS FOR NON-AFDC FAMILIES 3 (Oct. 30, 1984).

308. Michigan for example cites lack of staff as one reason for delayed enforcement action for delinquent payors. *Id.* at 8.

309. The law used to allow the states a 12% incentive for collecting AFDC support, because all money collected is turned back to state and local

withholding; impose liens against real and personal property for amounts of overdue support; and require an individual who has demonstrated a pattern of delinquent payments to post a bond, or give some other guarantee to secure payment of overdue support. These options are available without securing the complicity of a labor union in the government's collection efforts.³¹¹ There is nothing in the record to suggest that the state of California tried other ways to make Wilson and Senecker support their children.

David Chambers suggests the following possibility:

[I]f a federal system were established under which withholding occurred from the first moment of an order and traveled with the person wherever he took work within the country, the need for much of the current enforcement system would largely disappear. To make such a system work, the federal government would need to create a national computerized system probably tied to the man's social security number. Employers would be required to make a check on a new employee through a social security office to learn whether support payments were to be withheld from his wages. Under such a system, payments would be nearly perfect except for the unemployed, the self-employed, and those able to evade the floating wage assignment by falsifying their social security numbers or by colluding with the employer.³¹²

Among other possible routes for enforcement of child support are attachment and sequestration of the husband's money or property within a state, which may provide a wife with reme-

welfare agencies. Now there are incentives for non-AFDC collections. *See id.* at 9.

310. Pub. L. No. 98-378, 98 Stat. 1305 (codified as amended at 42 U.S.C. §§ 651, 653, 658, 664 (1988)) (amending part D of Title IV of the Social Security Act).

311. There are any number of sources available to litigants, attorneys, judges, and commentators which explain how child support enforcement can be improved. *See, e.g.*, OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEP'T OF HEALTH & HUMAN SERVICES, CHILD SUPPORT PROJECT CENTER ON CHILDREN & THE LAW; AMERICAN BAR ASSOCIATION, CHILD SUPPORT REFERENCE MANUAL (1989); U.S. DEP'T OF HEALTH & HUMAN SERVICES, OFFICE OF CHILD SUPPORT ENFORCEMENT, A GUIDE FOR JUDGES IN CHILD SUPPORT ENFORCEMENT (2d ed. 1987) [hereinafter *A Guide for Judges*]; HOROWITZ, *How Private Attorneys Can Use Enforcement*, THE MATRIMONIAL STRATEGIST, at 1 (1975); Gladys Kessler, *Crisis in Child Support: Federal Legislation to Alleviate the Problem, Trial*, at 29 (Dec. 1984); Cumens & Cohen, *Enforcement of Child Support Orders Against Self-Employed Obligor*, Fair Share 3 (June 1986).

312. CHAMBERS, *supra* note 11, at 258-59.

dies even if the husband is no longer in the state. There are also the options of garnishment, tax refund interceptions, and attachment of workers compensation, disability or other benefits.³¹³ Finally, equitable remedies and writs that require compliance with court orders must be considered.³¹⁴

Contempt sanctions are also available.³¹⁵ For some reason, judges are reluctant to hold a non-supporting father in contempt of a court's order.³¹⁶ But it can be an efficacious method of making fathers pay. Contempt may be "civil" or "criminal," although there is no clear, practical distinction either in process or purpose between the two.³¹⁷ Whether the objective for threatening to or actually jailing a delinquent is punitive or remedial, "specific and general deterrence are characteristics of both forms of contempt: to tell the particular offender that the court means business and to send a pointed message to other scoff laws."³¹⁸ Forty years ago, the National Conference of Commissioners on Uniform State Laws, which was meeting to discuss the adoption of a uniform support act,

313. *A Guide for Judges*, *supra* note 311, at Chapter 8.

314. *Id.*

315. A court has had the authority to punish persons who violate its valid judgments "since the dawn of judicial antiquity," *Mary G v. Souder*, 305 S.W.2d 883, 886 (Mo. Ct. App. 1957). Longer, in fact, than courts have been willing to find a noncustodial parent obligated to support his own children.

316. The federal Child Support Enforcement Agency reports: "Judges are frequently reluctant to impose harsh penalties like incarceration, even though the threat of going to jail is a good inducement to pay." CHILD SUPPORT ENFORCEMENT, *supra* note 123, at xii. *But see* Robert L. Gottsfield, *The Child Support Problem: Credible Threat and Use of Incarceration Works*, 26 ARIZ. L. REV. 12 (1984) (former chief judge of domestic relations division, Maricopa County, Arizona, argues for "systematic and unbiased" use of incarceration).

317. *See Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624 (1988) (in a contempt proceeding a presumption of ability to pay child support violates the due process clause if the proceeding is criminal rather than civil in nature); FOOTE ET AL., *supra* note 169, at 806.

318. FOOTE ET AL., *supra* note 169, at 806. The irony in Wilson's case, and likely the case of many other non-supporting fathers who remarry, is that it is the second wife who eventually must bear the burden of supporting the children of her husband's first marriage. *See, e.g., Sorenson v. Secretary of the Treasury*, 475 U.S. 851 (1986) (father's delinquencies can be satisfied by interception by funds "owed" to his second wife as excess earned income credits which were entirely attributable to her wages and unemployment compensation benefits). However, where it can be presumed that the second wife makes her once separate income available to the husband as "family" resources, it is better to use her money to help keep her husband out of jail than ask her husband's union to help the state collect.

agreed that criminal enforcement should be a part of a state's enforcement powers.³¹⁹

There are other alternatives, including the possibility that employers assume the burden of discovering whether an employee has an outstanding child support obligation.³²⁰ Another writer has suggested the imposition upon the obligor to inform employers of his support obligations. "Failure to do so might make it mandatory for the employer to discharge the obligor or more effectively impose a 10% civil penalty (to be paid to the child on the amount due during the unreported period)."³²¹ By holding in contempt a father who fails to pay support, the court may send the father to jail until he pays or agrees to pay. The willingness of a well-organized enforcement agency to use jail as a sanction has already been demonstrated to have a significant effect on the proportion of fathers who make child support payments.³²²

A criminal nonsupport proceeding, distinguishable from contempt as based upon a violation of a separate state statute, is also a "most powerful weapon, because in some jurisdictions a criminal nonsupport claim filed by a wife can lead to the immediate police arrest of the husband."³²³ A problem associated with any kind of criminal proceedings, either non-support or contempt, is that

some courts will not entertain a criminal complaint if the husband makes any support payments at all, no matter how inadequate. . . . Unlike civil contempt, if a husband is in prison, payment does not lead to automatic release. Often, however, the husband is put on probation if he keeps up support payments.³²⁴

319. WILLIAM BROCKELBANK & FELIX INFAUSTO, *INTERSTATE ENFORCEMENT OF FAMILY SUPPORT* 17 (1971) ("it was felt that, while actual extradition would be of little use, the *threat* of extradition [and criminal enforcement] might be a powerful weapon in the case of shiftless and slippery obligors.").

320. CHAMBERS, *supra* note 11, at 258.

321. See David C. Carrad, *A Modest Proposal to End Our National Disgrace*, 2 *FAM. ADVOC.* 31 at 43 (1979), *cited in* CASSETTY, *supra* note 158.

322. CHAMBERS, *supra* note 11.

323. *Bryne v. State*, 362 So. 2d 812 (Fla. Dist. Ct. App. 1979); see also ROBERT MNOOKIN & D. KELLY WEISBERG, *CHILD, FAMILY, AND STATE* 234 (1989).

324. MNOOKIN & WEISBERG, *supra* note 323, at 234. The efficacy and the ethics of such methods of enforcing support have often been questioned, but usually by men. See, e.g., FOOTE ET AL., *supra* note 169:

[I]mprisonment for nonsupport has obvious disadvantages: it is expensive for the state and no income for the children is going to be generated while the fathers are in jail. Its justification despite these

The most credible critique of incarceration as a means of enforcing the important obligation of supporting one's child is that, it too, reflects the current structure of power in our society. Chambers, whose research shows that incarceration is effective, claims to be philosophically opposed to jailing people for nonpayment of support, in part, because he believes the sanction is applied unequally.³²⁵ He suggests that many who are incarcerated are less blameworthy than those who are not. He found that unskilled blue collar workers and men with employment difficulties or alcohol problems were over-represented in jail, while managers and professionals were under-represented.³²⁶ Tossing deadbeat dads into jail is hardly the best way to enforce family obligations, but it should not be overlooked—or so rarely and unfairly applied as to remove it as any incentive to support one's children.

C. *Women as Ordinary Economic Actors Rather Than "Wives"*

In determining whether a women would be better off without the benefit of the "protection" of divorce laws, it is apt to

drawbacks, therefore, depends upon its efficacy in specific and general deterrence: do men who are actually jailed learn their lesson and pay in the future, and does the threat of jail deter disobedience to support orders by fathers who otherwise shirk their obligations?

Id. at 108. According to Harry Krause, "serious questions must be raised concerning the practice of jailing defaulting parents for civil contempt." HARRY KRAUSE, *CHILD SUPPORT IN AMERICA: THE LEGAL PERSPECTIVE* (1981). I love Harry Krause's tragic story about a prosperous home builder:

Certainly civil contempt incarceration for non-payment of support may be overly harsh and counterproductive in some circumstances. In one publicized case, a once-prosperous home builder served five years and five months in a Vermont prison for failing to pay \$2550 for support of his wife and nine children—without having had a jury trial or the benefit of other constitutional safeguards applicable to accused criminals. While in jail, Mr. Chicoine lost his livelihood, suffered several heart attacks and cost the state between \$10,000-\$14,000 to maintain. His family—on welfare—cost \$6,900 per year. His wife often visited him in prison and said "there's not one night we didn't pray for him." On release from jail, the state told him that unless he paid an additional \$22,000 to his wife covering the period during which he was in jail he would be re-imprisoned! If he might have been able to pay the original amount when the tragedy started, now he certainly could not pay that or the arrears accrued in the interim.

Id. at 71-72. One wonders if the prayers culminated in food and shelter for his nine unsupported children.

325. See CHAMBERS, *supra* note 11, at 253.

326. *Id.* at 201-16.

discuss what protections she might be afforded under ordinary principles of equity and justice.³²⁷

If the state could, for a moment, be theoretically free of all statutes which treat the family members qua family members uniquely, there might be different modes of justifying legal child support duties, establishing the measure of those obligations, and enforcing those obligations.³²⁸ Certain assumptions are necessary for this theoretical foray. Even without special "protective" family law statutes, we would need to be in a jurisdiction which enforces contracts implied in law and one which recognizes the notions of social contract—i.e. moral obligations. In such a place, the following scenarios could exist. With or without the existence of a lawful marriage (that is, one which complies with statutory procedures) assume a woman and man live together for ten years. During that time, male says to female: "If you have and bear children, stay at home and raise them, I will support you and them." Assume the man does so for eight years. Assume further, that he leaves this relationship. The mother could go into a court of equity and enforce an implied-in-law contract. She could sue for specific performance, i.e., the man continuing his level of support, or she could sue for restitution, i.e. what she had to assume to support those children.³²⁹ At the same time, of course, the

327. I am indebted to Professor Rodolphe J.A. de Seife for his explanation of traditional contract law and his willingness to theorize about the possibility of a remedy for women whose children are unsupported.

328. Elizabeth Cady Stanton in 1860 addressed the New York state legislature and urged that if marriage were to be viewed as a civil contract, "let it be subject to the same laws which control all other contracts." *Quoted in FEMINISM: THE ESSENTIAL HISTORICAL WRITINGS* 113 (Miriam Schneir ed., 1972).

329. If the female parent received restitution, see RESTATEMENT (SECOND) OF CONTRACTS § 344 (1979), these remedies might include: § 372, requiring restoration of a specific thing, or § 345, awarding a sum of money which "may as justice requires be measured by either, a) the reasonable value to the other party of what he received in terms of what it would have cost him [sic] to obtain it from a person in the claimant's position, or b) the extent to which the other party's property has been increased in value or his other interests advanced." See RESTATEMENT (SECOND) OF CONTRACTS § 371 (1979); see also *Moses v. Macferlan*, 97 Eng. Rep. 676 (1760), where the court stated:

If the defendant be under an obligation from the ties of natural justice to refund, the law implies a debt and gives this action founded in the equity of the plaintiff's case, as it were, upon a contract ('quasi ex contractu', as the Roman law expresses it). . . . This kind of equitable action, to recover back money, which ought not in justice to be kept, is very beneficial, and therefore much encouraged. . . . [I]t lies from money paid by mistake; or upon a consideration which happens to fail; or from money got through

woman and man could have a lawful informal parole contract based upon an oral agreement (which might otherwise be unenforceable because of the statute of frauds). The traditional "if you have children and raise them I will pay for them" could be a bilateral contract.³³⁰

Fran Olsen also makes an argument for "neutral" treatment of women and families in another context.³³¹

[I]t might be objected at this point that the state could indeed remain neutral with respect to the family by treating wife-beating, just as it would any other assault and by applying the same laws of self defense and impaired capacity to the wife's self help that it would apply generally.³³²

She argues that instead of condonation by law officials of wife-beating, evidenced by the state's policy of "failing to enforce prohibition . . . a policy that empowers wife beaters to act with the acquiescence of the state . . .,"³³³ wives should be protected from assault as stranger-victims would be. Because of the state's unwillingness to become involved in what it calls "private misfortune," and its fear of "undermining the positive values of the private family,"³³⁴ women are given less protection. Of course, the fact that it is mostly impossible to charge a man with rape if his unwilling sexual partner is his wife,³³⁵ suggests the inequity of "special" treatment for families. Women

imposition, (express or implied); or extortion' or oppression; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances. In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.

Id. at 678, 680-81, reprinted in EDWARD MURPHY & RICHARD SPEIDEL, *STUDIES IN CONTRACT LAW* 433 (3d ed. 1986).

330. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 12 (1979); JOHN D. CALMARI & JOSEPH M. PARILLO, *CONTRACTS* 18 (3d ed. 1987).

331. Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1509 n.53 (1983).

332. *Id.*

333. *Id.* at 1510 n.54.

334. *Id.* at 1509 n.50.

335. See, e.g., MODEL PENAL CODE § 213.1 (1962) which recommends against the crime of marital rape in nearly every case where there is no serious aggravation because marriage suggests a "kind of generalized consent" to intercourse. Cf. DIANA E.H. RUSSELL, *RAPE IN MARRIAGE* (1982). For an excellent summary of state laws on marital rape and an interesting analysis of the argument for criminalizing unwanted intercourse between married people, see Robin West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 FLA. L. REV. 45 (1990).

would fare much better under ordinary criminal or tort rules.³³⁶

In the post-divorce legal context, even if the state were to remain "neutral" in establishing the level of support needed when the noncustodial, higher-earning parent is initially assessed a support obligation, the custodial parent would likely fare better. The new "fair" revised judicial guidelines for establishing child support obligations, which have significantly increased the levels but have not yet matched the real needs of the children being supported,³³⁷ would likely net less than a suit in contract. There may also be the possibility of a tortious interference with a contract claim, if the harm is foreseeable, and if the father committed acts which forced the mother to breach her promise. A woman could likewise sue in quasi-contract for restitution.

Intervention by the state into family relations has often proved to be the least effective weapon for females. The legal treatment of women and children, and this "see how far we will go this one time to help you out" foray by the California courts may be a practical demonstration of the theory of Mari Matsuda: "The ideas emanating from feminist legal theorists and legal scholars of color have important points of intersection that assist in the fundamental inquiries of jurisprudence: What is injustice and what does law have to do with it."³³⁸ Were the state to treat females as juridical equals of men, and treat their relationships with men the same as their relationships with strangers in the market place, women may do much better. Alternatively, the state could treat women preferentially, by radicalizing and reforming the hierarchical notions, recognizing that because of women's lesser economic power and because of the familial obligations that inure only to women in

336. See also *Bruno v. Codd*, 396 N.Y.S.2d 974 (N.Y. Sup. Ct. 1977), *rev'd*, 407 N.Y.S.2d 165 (N.Y. App. Div. 1978), *aff'd*, 393 N.E.2d 976, (1979); Raymond I. Parnas, *The Police Response to the Domestic Disturbance*, 1967 Wis. L. REV. 914.

337. For example, a father of three with a net income of \$50,000, under current law, may be assessed \$1400 a month toward his children's support. This amount, which sounds generous, certainly is insufficient for raising three children. Even if we presume that the mother is capable of paying her own rent, the average rent for a three bedroom house in a community of 5,000 is about \$600. Subtract \$150 for the mother's share. Presume, modestly, \$120 a week for food, \$100 a week for daycare, and a few extra line items, such as insurance, medical expenses, and clothing. The recommended guidelines would only maintain these children at just above poverty level.

338. Mari Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7, 8 (1989).

our culture, they should be compensated and treated differently than men.³³⁹

VI. CONCLUSION

The irony of a critique of the way courts try to help is that their reasoned response may be to cease trying. What can judges do? They, as guardians and makers of law, are faced with often irreconcilable demands. The interests I present are not atypical in their seeming inconsistency. Should we not applaud, rather than attack, an effort to make fathers pay?

The problem with what happened in these two cases is that they represent one result when two disfavored "outsiders" are juxtaposed in a legal battle, if judicial responses are indeed colored by cultural understandings and personal notions of what is right. They also inappropriately suggest that every effort to enforce child support is being undertaken; that is simply not true. Theoretically, if any benefit inures to women, who occupy one of the lower rungs on a socio-economic ladder, it derives from a burden added to unions, who likewise share the space at the bottom. Consequently, no meaningful redistribution of power takes place. Unless we accept an immutable hierarchy as necessary for our survival, it makes no sense to avoid changing the way things work.

Although women suffer dramatically after divorce, very little of their pain derives from the fact that some men get jobs out of hiring halls, and the wages of those men can rarely be attached. For the former Mizzes Senecker and Wilson, I suppose, anything would help. These women had no child support for the dozen or so years it took the state to determine how to collect it. While they were waiting, millions more dollars in child support were never paid, and, it seems, no one did much about that. It is not clear that these two women ever got the meager support some judge ordered their husbands to pay. What is clear is that unions, which have precious little economic power right now, have an additional duty that could subject them to liability in tort. Workers' collectives, which have

339. Actually, preferential rather than neutral treatment would be better for women who support their own children, because as Olsen argues, state neutrality, such as the state's refusal to become involved in family affairs, means the ratification and reinforcement of social roles within the family that were openly hierarchical. *See, e.g.*, California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987) (California's law that guaranteed a pregnant woman that her job would be protected during a limited maternity leave was found not to violate Title VII's prohibitions against sex discrimination).

been prohibited from engaging in any kind of social activism, have been told to help the state collect child support. And women, who will continue to suffer invidious discrimination in the workplace, being the primary caretakers of children before divorce, and sole providers for them after divorce, have been offered a bone. Perhaps the well-meaning and inspired jurists and legislators can be moved to seek other avenues to put women and children first when a marriage falls apart.