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Race and Legal Education

**\*380** DEVELOPING A COURSE ON THE RIGHTS OF LOW-WAGE WORKERS

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- Over the last two decades, the number of U.S. workers in the private sector who are not represented in unions has climbed to nearly 90 percent. [\[FN1\]](#)
- Most undocumented immigrant workers are not entitled to back pay or reinstatement when an employer unlawfully discharges them in retaliation for supporting or joining a union. [\[FN2\]](#)
- Scores of domestic workers have little legal recourse when they are sexually harassed on the job because they are in effect excluded from Title VII protections based on the minimum number of employees required for employer coverage. [\[FN3\]](#)

As the chasm widens between rich and poor in the U.S., these examples of workers' issues underscore the urgent need for law schools to do more to train students to represent women, immigrants, and people of color as workers. Most labor and employment law courses, by concentrating on the collective bargaining process and Title VII, address a dwindling population of workers and only a limited slice of the problems that assail growing numbers of workers. The experiences of immigrant, temporary, part-time, contract, and other low-wage workers are mainly absent from the law school curriculum, for many of these workers labor outside the fold of unions and do not litigate Title VII claims because of the formidable hurdles that they face in filing them. [\[FN4\]](#)

**\*381** The intersections between race, gender, class, immigration, and citizenship have produced a highly stratified workforce. In today's workplaces, as has been true historically, immigrants, women, and people of color are segregated in jobs with the worst conditions. [\[FN5\]](#) For instance, women and African-Americans are overrepresented in temporary and part-time employment, where jobs are low-paying and workers have little or no control over their hours. [\[FN6\]](#) Immigrants and women of color also number disproportionately among those who toil in sweatshops, contending with subminimum wages, nonpayment of wages, compulsory overtime, and long hours leading to damaged health. [\[FN7\]](#) Although these workers may rejuvenate the labor movement, [\[FN8\]](#) their legal struggles remain marginal to law school discourse.

Drawing upon my experience in teaching a course at the City University of New York School of Law called The Rights of Low-Wage Workers, this article offers suggestions for broadening law school coverage of low-wage workers' issues. Current assaults on racial and economic justice must be understood through the prism of a labor and employment law system that permits employers to subordinate and exploit record-breaking numbers of workers of color, immigrants, and women. At the same time, immigrant, undocumented, and contingent workers have responded to these assaults with creative-sometimes groundbreaking-litigation and organizing. Expanded offerings on the efforts of low-wage workers to invigorate an agenda for economic justice will give lawyers-in-training an under-

standing of the strategies that workers are using to achieve some measure of collective justice.

Such offerings will also contribute to the development of economic justice as a serious legal academic discipline that unifies several doctrinal strands. Students are better positioned to represent low-wage workers and provide legal assistance to workers' organizing campaigns when they understand how the intersectionality of class, gender, race, immigration, and citizenship shapes oppression in the workplace. Often race and gender issues are fragmented and marginalized in law schools by being relegated to race-and-the-law or gender-and-the-law courses. If core courses integrate race and gender issues, time constraints inevitably result in these issues' being shortchanged. Legal discussions about class occur even less frequently, and immigration and citizenship\*<sup>382</sup> issues certainly lie far outside the mainstream of law courses. A focus on low-wage workers' issues provides fertile ground for exploring how race, gender, class, and citizenship give rise to multiple identities and interests on the part of women, immigrants, and people of color as workers.

Students could also benefit from critically examining the role of judicial interpretation in perpetuating class-based assumptions that have the power to defeat alliances between workers. They also would be well served by seeing how immigration and citizenship have been used to augment exclusion and discrimination based on race. As a result, law schools could address issues of class and citizenship in the classroom on more equal footing with race and gender, and all these domains to a much greater degree.

This article discusses possibilities for increasing law school coverage of legal issues affecting low-wage workers. The first part provides an overview setting forth a framework for curricular expansion of low-wage issues. The second explains the substance and methods of my course. The article concludes with lessons learned.

### **The Need for Curricular Expansion of Low-Wage Issues**

The idea for seeing a course on the rights of low-wage workers as part of a developing discipline grew out of two projects at CUNY-the Worker and Employment Law Project (WELP) and the Immigrant Initiative on Enriching Legal Education. Both projects seek to deepen legal education by promoting the inclusion of underrepresented perspectives in traditional law school curricula. In recognition of the difficult new challenges faced by workers in the present economy, WELP was established in 1999 to prepare CUNY law graduates to represent workers within and outside the trade union movement in the full array of issues that derive from the employment relationship. At about the same time CUNY launched the Immigrant Initiative to identify suggestions for integrating perspectives about immigrants into clinical education and doctrinal areas such as family, contract, criminal, and labor and employment law.

At their inception both projects were animated by the need to retrofit legal education to respond to the changing demographics of the U.S. population. Some predict that immigration may account for as much as two-thirds of the increase of the U.S. population in the next half-century, with the Asian and Latino workforce growing more rapidly than other groups. WELP and the Immigrant Initiative promote integrating perspectives about immigrants into legal education because new lawyers will increasingly be representing clients who are immigrants. Moreover, as the student bodies of law schools diversify, schools will be training students from immigrant backgrounds who aspire to practice law in the service of their communities.

It was also important to situate The Rights of Low-Wage Workers (RLWW) within a broader paradigm, and not treat it principally as a topical course about immigrants. The basis for WELP was the recognition that momentous changes in the U.S. and world economy have presented workers with formidable challenges. The convulsive upheavals that have occurred in many workplaces because of the restructured economy and globalization have exposed serious \*<sup>383</sup> deficiencies in our labor and employment laws. [\[FN9\]](#) The conditions of immigrant workers are similar

to those faced by an expanding workforce of other low-wage workers, such as temporary, part-time, and contract workers. For these reasons, RLWW aims to help students construct a broader framework for understanding the conditions of low-wage workers, gaps in our current regime of labor and employment laws, and possibilities for addressing these gaps, even as it devotes much attention to issues about immigrant workers.

A review of labor, employment, and constitutional law casebooks confirms the need for more courses to address these issues. Despite the rich historical role of immigrant labor in the U.S. and the expanding use of immigrant workers throughout the world economy, most labor law casebooks do not deal with the rights of immigrants as workers. Most prominently, the seminal and until 2002 the only-Supreme Court case to address the rights of immigrant workers to organize and join unions under the National Labor Relations Act [FN10] is missing from most labor law casebooks. [FN11]

While most labor and employment casebooks include a section defining who is covered by the National Labor Relations Act or Title VII of the Civil Rights Act, cases on immigrant, part-time, and temporary workers are usually absent. [FN12] And yet whether these groups of workers, who now constitute a large part of the workforce, fall outside the status of protected employee is contested as more employers restructure their workforces to rely less on the standard full-time employee. Employers have tried to use the reconfiguration \*384 of the way work is organized and performed to change the definition of *employee*. Consequently, who is or is not covered by labor protections assumes special significance in today's workplaces as employers litigate to exclude large categories of workers from minimum labor and civil rights protections.

A different problem arises in the enforcement of the Fair Labor Standards Act. The FLSA represents our national policy on minimum wages and maximum hours. Yet employers are robbing large numbers of workers of their wages and time, in direct violation of the FLSA, through such practices as not paying wages, paying subminimum wages, and forcing workers to work overtime off the clock. [FN13] These practices afflict not only sweatshop garment and factory workers, but also people employed by corporate giants in low-paid service jobs. [FN14] As more workers turn to the FLSA to recover their rightful wages, immigrants, women of color, and low-wage workers are likely to encounter special legal issues or problems of proof that can block their claims.

These issues provide valuable educational opportunities. Law students should learn how to document the employment relationship, the hours of work, or the amount of wages owed when a worker is paid off the books or in cash, as is true of many immigrants. Especially thorny and sensitive issues arise when an employer threatens deportation for an immigrant worker who files a FLSA claim. Further, many low-wage workers are stymied in their efforts to recover wages or unpaid overtime when manufacturers or other businesses contract work to marginal subcontractors who fail to pay wages. Accordingly, the strategic and tactical considerations involved in FLSA litigation on behalf of low-wage workers should become more central to the coverage of the FLSA in law schools, particularly because it was intended to protect the most exploited workers in the labor market.

In addition, studying the exemptions and exclusions originally contained in the FLSA, and those that survive, offers a cautionary tale of the act's inadequate protection of immigrants, women of color, and low-wage workers in the service sector. [FN15] To a significant degree, these exclusions were explicitly based on racism and sexism. [FN16] Lawmakers also incorporated class-based assumptions in deciding which echelon of workers merited protection under the FLSA and which did not. [FN17] The exclusions resulting from these class assumptions essentially operate to fragment and split the interests of workers across class and occupation. [FN18] An understanding of the architecture of the FLSA and its legal history suggests the kinds of labor and employment legislative\*385 reforms that would give low-wage workers opportunities for unifying their interests with those of other workers.

There is also room for locating the rights of low-wage workers as a discipline within constitutional law. The

topic of economic rights is addressed in constitutional law casebooks primarily through questions of access-e.g., access to low-income housing, due process safeguards for access to public assistance benefits, and access to education. But there are numerous possibilities for addressing the rights of individuals as workers more squarely within constitutional law. A rich body of constitutional case law directly implicates the rights of workers. [\[FN19\]](#) Some of the cases pertain to the scope of state and/or congressional authority to regulate workers' wages, hours, and conditions. These cases, particularly those from the late 1800s and early 1900s striking down labor regulations, are instructive about judicial conceptions of the proper relationship between workers and employers, labor and capital, and the state and workers. When these cases are taught, the focus is usually on the scope of congressional power under the Commerce Clause. There is enormous potential, though, for exploring these cases to discern a constitutional jurisprudence on the rights of workers, and examining to what extent the Constitution can provide an affirmative source of rights for workers. [\[FN20\]](#)

Understandably, most core courses on labor, employment, or constitutional law are taught under time constraints that make it hard to cover, let alone exhaust, the range of legal issues that affect low-wage workers. At the same time, employers' efforts to deregulate the workplace make it important for law schools to dedicate greater resources to training their students on these issues. It is thus worthwhile to address low-wage workers' issues in a separate course as well as integrating some of them into core courses. This will make the fight for economic justice and its relationship to civil rights more prominent in what law schools teach.

### **Substance and Methods of the RLWW Course**

#### *Syllabus*

The course had two main goals. One was to create a discourse that put at its center the struggles of workers whose stories are left out of most casebooks. The other was to give lawyers-in-training tools and strategies for representing immigrant and contingent workers. The course was organized around four themes: how recent changes in the domestic and global economy have marginalized low-wage (immigrant, contract, subcontracted, temporary) workers; the gaps in our current system of labor laws for protecting these workers; proposed law reform on contingent work; and new kinds of litigation being **\*386** brought by sweatshop workers. While much of the course was about identifying deficiencies in our labor laws, important themes about law and community also recurred as organizing principles. Paralleling our study of the legal status of various groups of workers were questions about the relationships between law and organizing, between public interest lawyers and community, and between the local and the global. Consequently, there were two tracks to the course—one on the substantive law, the other on the process of law and lawyering. [\[FN21\]](#)

The first five classes, on problem identification, set the stage for the rest of the course. [\[FN22\]](#) We examined the major transformations in the economy since the early 1980s, and the consequences of these changes for workers across income, skills, occupation, education, race, and gender. The readings addressed the impact on professionals and managers, as well as the resurgence of sweatshop conditions for low-wage workers. Most recently, the course has paid increased attention to the deteriorating working conditions of white-collar workers due to compulsory overtime and job insecurity. The purpose was to encourage students to probe the possibilities and limits of organizing across class and occupation. [\[FN23\]](#)

The next six classes (classes 6-11) addressed the working conditions and legal rights of immigrant workers under the National Labor Relations Act and the Immigration Reform and Control Act of 1986. The aim was to lay a foundation on which to build a critical framework for looking at employer-worker relations in the law that could apply to other workers besides immigrants. We began with an overview of the role of immigrant labor in industrialized and newly industrialized nations to discern patterns in the worldwide migration of labor. [\[FN24\]](#) In this context

we explored the impact of immigrants on the job opportunities and wages of those who are native-born, especially \*387 African-Americans, since this is a hotly contested issue that figures prominently in immigration and labor policy debates. [FN25] Classes 9 and 10 dealt with the rights and remedies available under the NLRA to immigrant workers, especially undocumented workers who are fired or harassed for participating in workplace organizing. [FN26] These classes established a major recurrent theme of the course—that for many low-wage workers, who falls within the definition of *employee* and who should be denied statutory labor protections has become vigorously contested by employers seeking to erode labor standards. Finally, we explored the prospects for immigrant workers who want to organize in view of the limitations of the NLRA and, specifically, what organizing outside of the NLRA entails. [FN27]

To further an understanding of the strategies used by employers to place low-wage workers beyond the reach of labor regulation, we turned to the practice of subcontracting in the garment, janitorial, and high-tech-information industries. This group of eight classes (12-19) examined the forces at play in various subcontracting systems, combined with the pressures of global production and increased foreign imports that have resulted in the revival of sweatshops. We looked at the rights of subcontracted workers under the NLRA to see how the downgrading of conditions of workers has unfolded. [FN28] In addition, we examined the use of the Fair Labor Standards Act for recovering unpaid wages and overtime pay, and we explored new litigation strategies, including the joint employer doctrine, under the FLSA for piercing the subcontracting system. [FN29] Besides the joint employer doctrine, students have been interested in the use of criminal law as another tool to enforce the accountability of employers who willfully violate labor laws as a pattern and practice. [FN30] We also considered other solutions, such as legislative proposals for \*388 stronger labor laws, voluntary codes of conduct to establish minimum international labor standards, and community organizing campaigns.

The course then turned (in classes 20-23) from subcontracting to other forms of “casual,” impermanent, or intermittent work arrangements by addressing the obstacles faced by independent contractors and by part-time and temporary workers. [FN31] Again, the theme was how increasing numbers of workers are placed outside the safety net of labor law protection and social welfare benefits.

The next two classes (24-26) sought to situate the conditions of low-wage workers in the U.S. in the larger context of the impact of global capitalism on workers abroad. In the past I have assigned readings on the restructuring of worldwide financial markets in this section to give students a broader perspective of economic globalization. [FN32] But students usually found this material too dense and dry. This year I abandoned those readings and concentrated exclusively on the use of international law to address domestic and international labor law violations through the Alien Torts Claims Act. [FN33] Students responded favorably to the change. We also looked at attempts to enforce international labor standards through the extraterritorial application of U.S. labor laws, and explored alternative visions of the nation-state for challenging global capitalism. The last class (27) was dedicated to a synthesis of the course and the various proposals for change that were addressed during the semester.

#### *Text and Materials*

The absence of a casebook on the topics to be covered appeared at first daunting but turned out to be an advantage. Unfettered by the constraints of a standard casebook, a teacher is both freed and forced to make deliberate choices about how to situate and frame issues. Should the course, for instance, define the issues primarily as legal, and thus concentrate mostly on legal texts? For what purpose and to what degree should the political and social dimensions of the problems be addressed? How much should the topics be historicized? What would constitute an appropriate mix of these approaches so that the course would not risk becoming scattered or superficial?

In addition, because current events and new developments keep course materials always in flux, a teacher may

have more flexibility to reorganize her course accordingly when operating outside the framework of a casebook. A teacher might also feel freer to make changes to the course based on an evaluation of how students have responded to specific reading assignments.

**\*389** I structured the readings to offer a multidisciplinary perspective on the rights of low-wage workers. The primary texts in most law school classrooms are appellate cases, which often present a rarefied and limited perspective on complex social problems. While law would be central to the course, I wanted to contextualize the issues to reflect real life, and to encourage students to see how legal doctrine is also socially and politically constructed. For each class, readings were drawn from the multiple perspectives of law, history, social science, political science, economics, and political theory. [\[FN34\]](#) I wanted the assembled readings to give students many opportunities to step out of their role as lawyers-in-training to think outside the legal box. I hoped that a cross-disciplinary approach would help them to reflect on the dynamics between law and other arenas for social change.

The question of voice was also important in selecting readings for the course. From whose point of view would we see the issues affecting low-wage workers- judges, lawyers, workers, social scientists, labor economists, organizers? Since the dominant texts in law classes are cases, the voices students usually hear are those of judges. Other voices that could help lawyers in thinking about social problems are usually excluded by the case method. Moreover, the judicial voice usually is one of detachment and dispassion. The implicit message students get from cases is that thinking like a lawyer means distancing oneself from emotion and context.

I wanted students to listen to many different voices as they explored new ways to think about labor and workers' rights in a changing world. Just as important, the readings were intended to stir emotion and controversy. [\[FN35\]](#) Within law, we would hear from a broader range of the legal community, not just judges. We would read the personal narratives of public interest lawyers, pleadings in new litigation efforts, law review articles by practicing attorneys seeking to bridge practice and theory, proposed legislation, and studies commissioned by lawmakers. We would read commentary and proposals from historians, social scientists, labor economists, and political theorists.

Most important, the voices of workers and organizers would be part of the course. The course was not about workers as idle subjects who stand on the sidelines while others battle for them—a depiction perpetuated by the case method. Rather, we would hear from workers as people actively fighting for their own dignity inside and outside the legal system. We would read narratives of workers using the law to further their goals, accounts of organizing **\*390** campaigns of workers, and analyses and blueprints for change written by workers. [\[FN36\]](#)

#### *The Classroom Climate*

I presented the course as a joint undertaking and encouraged students to take ownership of the process. In two of the three years I have taught the class, I structured it so that a team of two students acted as coleaders for each class; they had to plan the class, present and supplement the assigned readings, and manage a discussion that elicited the active participation of other students. Each week, the roles of teacher and students were fluid. While my presence and guidance were important, there was no one voice established as the expert.

I encouraged the students to see the discussions as opportunities to share, probe, and challenge, and to make them far-ranging in character and tone. In the spirit of minimizing the tacit censorship that can result unconsciously when viewpoints are labeled irrelevant, very little in substance or emotion was considered off point. It was also clear that there was room for the use of personal narrative, not as colorful tales but as analyses of the issues examined.

The course requirements were structured to acknowledge that students had varied reasons for enrolling in the course, and that the course could mean something quite different for each student. In addition to coleading one class,

each student was required to produce written work or some combination of written work, which could include reflection papers about the course, full-length research papers, group projects, or accounts of projects done in conjunction with organizations addressing workers' rights.

### Lessons Learned

The students' enthusiasm for the course has been a heartening reminder that we can enrich law school courses if we are willing to experiment with what we teach and how we teach. Most of us have to make tradeoffs as we teach students how to manipulate rules as advocates and at the same time try to cover enough doctrine to prepare them for a bar exam. Even though we value student-centered and collaborative learning, the constraint of time sometimes forces us to sacrifice context and forgo a multidisciplinary approach in favor of a more efficient delivery of the material that positions the teacher as the expert. The second- and third-year students in RLWW genuinely appreciated the challenge of studying workers' issues from a cross-disciplinary approach and seeing more clearly the limitations and possibilities of lawyers' roles in representing low-wage workers.

More broadly, the enthusiastic response to the course suggests there are plentiful opportunities for recasting law school curricula to tap into student \*391 interest in labor and employment. No matter what our occupations, the time we spend at work, our identities as workers, and our treatment at the workplace define significant dimensions of our lives. Evident among the students in RLWW was a thirst for understanding the conditions of workers as a way of seeing what might be in store for themselves as workers, or a way of placing what they, their family, and their friends have experienced as workers in a larger context. There was keen interest in the transformation of the world economy, the changing demographics and stratifications of the workforce, the role of unions and other forms of workers' organizations, and the chaotic upheavals that have occurred in many workplaces.

Students who were specifically interested in representing workers on labor and employment issues recognized that with less than ten percent of the workforce unionized they must add to what they learned in their labor and employment law courses. They were eager to understand the loopholes in labor and employment laws for protecting immigrant, contingent, and other workers who are excluded or exempted from coverage, and to learn about the legal and organizing strategies that these workers are successfully using.

Just as important, students welcomed additional opportunities to critically examine law from a distinctly workers' perspective. They learned immensely from recognizing the multiple interests and identities of workers and the complexities that all those create for workers' collective struggles. A course on low-wage workers' issues is valuable because it has the potential to unify what is mostly a fragmented legal discourse about race, gender, class, immigration, and citizenship. Legal doctrine is marked by a strong tendency to devalue and suppress workers' self-identities and interests. [FN37] For example, judicial interpretations of labor and employment laws are replete with instances in which race and gender discrimination at the workplace are split from issues of class oppression; [FN38] courts have held that the former is the exclusive domain of Title VII and the latter belongs to the NLRA. [FN39] In understanding the shared identities and interests, and sometimes contradictory claims, of immigrants, women, and people of color in their struggles as low-wage workers, students gain a sense of how labor, citizenship, and civil rights reform are necessarily interdependent.

A course about low-wage issues also enables students to tackle sensitive issues about class conflict as they appear in the law. Students in RLWW examined court decisions and statutes on workers' rights to discern class and antiimmigrant bias, not just race or gender bias. [FN40] They remarked that it was illuminating to see how the law is infused with class-based assumptions and \*392 antiworker bias—a theme they believed warranted more attention throughout law school. Some of the students added that it was more common in their law classrooms to hear race and gender discussed than to hear any mention of class.

Indeed, critical race and feminist theory have contributed enormously to expanding discussion of race and gender in law schools. As a result, students are exposed to discourse about race and gender in a way that is not true of class issues. Discussions about race frequently become a proxy for addressing class, in which the two are conflated—or, more accurately, class is subsumed within race. Over the years I have taught RLWW, I have noticed that students are fairly comfortable with addressing racism and sexism, perhaps because they are more accustomed to these discourses. Discussions that challenge class-based assumptions and identities sometimes have produced a more uncertain though visceral tension in the classroom. For these reasons, I believe that the development of a jurisprudence on economic justice would position an analysis of class, along with race and gender, as central in determining how labor and employment laws should be rehailed.

If class is subsumed within race in the law school classroom, citizenship issues are not even on the discursive map except in topical immigration courses. [\[FN41\]](#) Yet students in the course made clear that their understanding of workers' issues and globalization would have been incomplete without an examination of citizenship and immigration. In particular, they found it tremendously important to see how citizenship and immigration have been deployed as perniciously as race and gender in structuring the labor market to the detriment of women, people of color, immigrants, and ultimately all workers.

Finally, expanding law school curricula about low-wage workers can help students develop insights about the role of lawyers in social movements. When studying how current labor and employment laws marginalize large groups of workers, students in RLWW continually face the limitations of the legal system, and the possible constraints on their own roles as future lawyers. Questioning the role of law in achieving social change forces them to probe alternative and creative legal strategies as well as organizing campaigns. In evaluating, assessing, and comparing alternative avenues for advancing the rights of low-wage workers, students have had to reflect upon the dynamics of how law can work supportively alongside community-based organizing.

This process of reflection can give rise to respectful and fruitful collaborations between law students and workers' organizations. For instance, a third-year CUNY student who took RLWW in 2001 was given a New York State County Bar Association award for his work with an antisweatshop workers' group on the issues of compulsory overtime and occupational health. The student's involvement with the workers' group grew out of a project for the course.

**\*393** The expansion of law school curricula on labor and employment issues can also serve as a springboard to encourage lawyers-in-training to think about their domestic work in a global framework. When examining low-wage workers' issues, students must consider the interrelationship between local and global. The widening chasm between rich and poor in the U.S. occurs against the backdrop of economic and technological globalization, regional free trade agreements, and the unrestrained ability of employers to move capital across borders. Students must contend with questions that take them beyond U.S. borders: whether reforms of domestic laws alone are adequate to advance workers' interests, how international law can be used as a vehicle for enforcing domestic labor rights, and how to enforce U.S. corporate accountability abroad.

Most notably, studying the struggles of low-wage workers to invigorate an agenda for economic justice will enhance the training of law students to represent the rising numbers of workers who are exploited. In the process, we will help students acquire a deeper understanding of themselves as workers and lawyers, and contribute to a jurisprudence that seriously examines how law reinforces notions of class and power between workers and employers. By endeavoring to bring together a discourse about race, gender, class, immigration, and citizenship, we should be able to deepen our collective learning about visions and strategies that may achieve a broader embrace of collective justice.

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[FN1]. See Jeremy Brecher & Tim Costello, A New Labor Movement in the Shell of the Old? *Z Mag.*, Apr. 1996, at 1, 3.

[FN2]. See [Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 149-52 \(2002\)](#).

[FN3]. See Donna E. Young, Working Across Borders: Global Restructuring and Women's Work, 1 *Utah C. L.* 1, 27-28, 33-34 (2001). See also Title VII of the Civil Rights Act of 1964, [42 U.S.C. § 2000e](#)-2(b) (2000).

[FN4]. Many low-wage workers are essentially precluded from filing claims by statutory numerical thresholds for coverage of employers. Equally significant, low-wage workers who earn at or below the minimum wage encounter difficulty in finding lawyers to represent them in Title VII claims because their potential back pay and damage awards are likely to be small.

[FN5]. See Donna E. Young, [Racial Releases, Involuntary Separations, and Employment At-Will](#), 34 *Loy. L.A. L. Rev.* 351, 363-73 (2001).

[FN6]. See Clyde W. Summers, [Contingent Employment in the United States](#), 18 *Comp. Lab. L.J.* 503, 506-14 (1997).

[FN7]. Shirley Lung, [Exploiting the Joint Employer Doctrine: Providing a Break for Sweatshop Garment Workers](#), 34 *Loy. U. Chi. L.J.* 291, 297 (2003); see generally Miriam Ching Yoon Louie, Sweatshop Warriors: Immigrant Women Workers Take On the Global Factory 41 (Boston, Mass., 2001).

[FN8]. See generally Robin Kelley, The New Urban Working Class and Organized Labor, *New Labor Forum*, Fall 1997, at 7; Nelson Johnson, [Reflections on an Attempt to Build "Authentic Community" in the Greensboro Kmart Labor Struggle](#), 2 *U. Pa. J. Lab. & Emp. L.* 675 (2000); Peter Kwong, Chinese Staff and Workers' Association: A Model for Organizing in the Changing Economy? 25 *Soc. Pol'y* 30 (1994); Roger Waldinger et al., Helots No More: A Case Study of the Justice for Janitors Campaign in Los Angeles, in *Organizing to Win: New Research on Union Strategies*, eds. Kate Bronfenbrenner et al., 102-19 (Ithaca, 1998).

[FN9]. See Dunlop Comm'n on the Future of Worker-Mgmt. Relations, Final Rep. (Washington, 1994), available at <<http://www.ilr.cornell.edu/library/downloads/KeyWorkplaceDocuments/DunlopCommissionFutureWorkerManagementFi>>; Catherine Ruckelshaus & Bruce Goldstein, *From Orchards to the Internet: Confronting Contingent Work Abuse* (New York, 2002), available at <<http://www.fwjustice.org/images/orchards.pdf>>.

[FN10]. [Sure-Tan Inc. v. NLRB, 467 U.S. 883 \(1984\)](#). Eight years later the Supreme Court revisited the issue in *Hoffman Plastic Compounds*. See *supra* note 2.

[FN11]. See, e.g., Stanley D. Henderson, *Labor Law: Cases and Comment* (New York, 2001); Walter E. Oberer et al., *Cases and Materials on Labor Law: Collective Bargaining in a Free Society*, 5th ed. (St. Paul, 2002). A case with a one-sentence reference to *Sure-Tan* is included in Robert J. Rabin et al., *Labor and Employment Law: Problems, Cases and Materials in the Law of Work*, 3d ed. (St. Paul, 2002). I found a cursory discussion of *Sure-Tan* and/or *Hoffman Plastic Compounds* in two casebooks: Theodore J. St. Antoine et al., *Labor Relations Law: Cases and Materials*, 10th ed., 258-59 (Charlottesville, 1999); Arthur B. Smith et al., *Employment Discrimination Law: Cases and Materials*, 5th ed. (New York, 2000) (containing a one-paragraph note on *Hoffman Plastic Compounds* in the 2002 Supplement).

[FN12]. Casebooks typically contain scant discussion or no treatment of contingent workers. Of the various categories of contingent workers, independent contractors receive the most treatment, although coverage is cursory; other contingent workers such as part-time and temporary workers receive less attention or none at all. See Oberer & Costello, *supra* note 1; Henderson, *supra* note 11; Rabin et al., *supra* note 11; Smith et al., *supra* note 11 (limited coverage of contingent worker issues but contains a case addressing whether citizenship discrimination is illegal discrimination under Title VII and a three-page discussion of the Immigration Reform and Control Act of 1986). For casebooks that offer a more substantial treatment of the range of contingent worker issues, see Samuel Estreicher & Michael C. Harper, *Cases and Materials on Employment Discrimination and Employment Law* (St. Paul, 2000); Steven L. Willborn et al., *Employment Law: Cases and Materials*, 2d. ed. (Charlottesville, 1998).

[FN13]. Lung, *supra* note 7, at 291-98.

[FN14]. See Steven Greenhouse, *U.S. Jury Cites Unpaid Work at Wal-Mart*, N.Y. Times, Dec. 20, 2002, at A26.

[FN15]. See Suzanne B. Mettler, *Federalism, Gender, and the Fair Labor Standards Act of 1938*, 26 *Polity* 35 (1994); Marc Linder, [Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal](#), 65 *Tex. L. Rev.* 1335 (1987).

[FN16]. Mettler, *supra* note 15, at 43-48; Linder, *supra* note 15, at 1341-54.

[FN17]. See Deborah C. Malamud, [Engineering the Middle Classes: Class Line-Drawing in New Deal Hours Legislation](#), 96 *Mich. L. Rev.* 2212, 2288-89 (1998).

[FN18]. *Id.* at 2316-21.

[FN19]. See, e.g., [Lochner v. New York](#), 198 U.S. 45 (1905); [Hammer v. Dagenhart](#), 247 U.S. 251 (1918); [Schechter Poultry Corp. v. United States](#), 295 U.S. 495 (1935); [R.R. Ret. Bd. v. Alton R.R. Co.](#), 295 U.S. 330 (1935); [West Coast Hotel Co. v. Parrish](#), 300 U.S. 379 (1937); [NLRB v. Jones & Laughlin Steel Corp.](#), 301 U.S. 1 (1937); [United States v. Darby](#), 312 U.S. 100 (1941).

[FN20]. For example, some labor activists argue that the constitutional basis for defining workers' rights should be grounded in the freedom of association and speech clauses rather than the commerce clause. See Judy Atkins & David Cohen, *A Proposal for a 21st Century Trade Union Education League, Working USA*, Winter 2003-2004, at 41-61.

[FN21]. Indeed, students have found compelling the lawyering issues implicated in representing individual workers in order to achieve collective justice. One article that they found especially illuminating, about how certain models

of lawyering can squelch worker initiative and organizing, was Julie A. Su, [Making the Invisible Visible: The Garment Industry's Dirty Laundry](#), 1 J. Gender Race & Just. 405 (1998).

[FN22]. In prior years I have started the course with readings documenting the deindustrialization of the U.S. from a macroeconomic perspective so that students would have a context for understanding the downgrading of working conditions for many workers. See Barry Bluestone & Bennett Harrison, *The Deindustrialization of America: Plant Closings, Community Abandonment, and the Dismantling of Basic Industry* 140-49, 164-85, 190 (New York, 1982). This material, though important and useful, did not generate lively discussion. Instead, this year I assigned [Lochner v. New York](#), 198 U.S. 45 (1905), to emphasize the basic American legal framework for addressing workers' rights. Students enjoyed examining *Lochner* from an altogether different perspective from that of their earlier reading of the case as first-year students. And they enjoyed contrasting the *Lochner* paradigm, in which the Court perceived workers' interests and demands as special interests, with an account of a creative organizing campaign in Greensboro, North Carolina, in which the community would not allow workers' identities and interests to be split. See Johnson, *supra* note 8. Throughout the semester students used these two readings as critical reference points for class discussions.

[FN23]. In particular, the topic of high-tech "sweatshops" gave rise to animated discussion about the validity of drawing similarities between low-wage and high-wage workers. Some students cautioned that doing so risked diverting attention from the most exploited workers.

[FN24]. See Nigel Harris, *The New Untouchables: Immigration and the New World Worker* (New York, 1995); Saskia Sassen, *Globalization and Its Discontents* (New York, 1998).

[FN25]. A particularly useful reading on this topic is Roger Waldinger, *Still the Promised City? African-Americans and New Immigrants in Post Industrial New York* 157-73 (Cambridge, Mass., 1996), which provides an account of the ethnic division of labor in the U.S. hotel industry.

[FN26]. Among the cases discussed were [Sure-Tan Inc. v. NLRB](#), 467 U.S. 883 (1984); [Hoffman Plastic Compounds v. NLRB](#), 535 U.S. 137 (2002); [NLRB v. A.P.R.A. Fuel Oil Buyers Group](#), 134 F.3d 50 (2d Cir. 1997). We devoted considerable attention to the limits imposed by these cases on the rights of undocumented immigrant workers. At the same time, students were eager to discuss strategies for limiting the impact of *Hoffman Plastic Compounds*, the Supreme Court's most recent pronouncement on the issue.

[FN27]. For this class I invited members of local independent workers' centers to speak about how and why they organize outside of the NLRA, the role of law in their organizing, and their relationship to trade unions. The next time the course is offered. I plan to assign Kwong, *supra* note 8, and excerpts from Penda D. Hair, *Louder Than Words: Lawyers, Communities and the Struggle for Justice: A Report to the Rockefeller Foundation* (New York, 2001) (describing various community-based movements and struggles for workers' rights).

[FN28]. The cases discussed included [NLRB v. Burns Int'l Sec. Serv. Inc.](#), 406 U.S. 272 (1972); *S. Cal. Gas Co.*, 302 N.L.R.B. 456 (1991); [Malbaff Landscape Constr.](#), 172 N.L.R.B. 128 (1968).

[FN29]. For a discussion of the most substantive cases on the use of the joint employer doctrine on behalf of sweatshop garment workers, see [Lopez v. Silverman](#), 14 F. Supp. 2d 405 (S.D.N.Y. 1998); *Zheng v. Liberty Apparel Co.*, No. 99 Civ. 9033 (RCC) (S.D.N.Y. Mar. 13, 2002); [Bureerong v. Uvawas](#), 922 F. Supp. 1450 (C.D. Cal. 1996). See Lung, *supra* note 7, at 315 nn.183-84 for cases addressing the joint employer doctrine in other industries.

[FN30]. See complaint for [Bureerong](#), 922 F. Supp. 1450, on RICO claims.

[FN31]. Among the cases discussed were [Nationwide Mut. Ins. Co. v. Darden](#), 503 U.S. 318 (1992); [Walters v. Metro. Educ. Enter., Inc.](#), 519 U.S. 202 (1997); [Vizcaino v. Microsoft Corp.](#), 120 F.3d 1006 (9th Cir. 1997); NLRB v. W. Temp. [Serv., Inc.](#), 821 F.2d 1258 (1987).

[FN32]. Saskia Sassen, *The Global City*: New York, London, Tokyo 3-9, 64-67, 328 (Princeton, 1991).

[FN33]. See [Doe v. Unocal Corp.](#), 110 F. Supp. 2d 1294 (C.D. Cal. 2000); Michael J. Wishnie, [Immigrant Workers and the Domestic Enforcement of International Labor Rights](#), 4 U. Pa. J. Lab. & Emp. L. 529 (2002). See also [Labor Union of Pico Korea, Ltd. v. Pico Prod., Inc.](#), 968 F.2d 191 (2d Cir. 1992). Of all the readings I have assigned for this section of the course in the last two years, students have been most excited about the ATCA cases.

[FN34]. Among such readings were Johnson, *supra* note 8; Bluestone & Harrison, *supra* note 22; Michael D. Yates, *The New Economy and the Labor Movement*, 52 Monthly Rev. 28 (2001), available at <<http://www.monthlyreview.org/0401yates.htm>>; Peter Cappelli, *The New Deal at Work: Managing the Market-Driven Workforce* (Boston, 1999); Michael Piore, *The Economics of the Sweatshop*, in *No Sweat: Fashion, Free Trade, and the Rights of Garment Workers*, ed. Andrew Ross, 135 (New York, 1997); Jean McAllister, *Sisyphus at Work in the Warehouse: Temporary Employment in Greenville, South Carolina*, in *Contingent Work: American Employment Relations in Transition*, eds. Kathleen Barker & K. Christensen, 221 (Ithaca, 1998).

[FN35]. See, e.g., [Domsey Trading Corp.](#), 310 N.L.R.B. 777 (1993).

[FN36]. One particularly effective reading was Louie, *supra* note 7. Students appreciated hearing the direct voices of immigrant women workers in this piece. See also National Mobilization Against Sweatshops, *It's About TIME! The Campaign for Workers' Health* (New York, n.d. [2001]); McAllister, *supra* note 34; Chisun Lee, *Domestic Disturbance: The Help Set Out to Help Themselves*, *Village Voice*, Mar. 19, 2002, at 31.

[FN37]. See Elizabeth M. Iglesias, [Structures of Subordination: Women of Color at the Intersection of Title VII and the NLRA](#). NOT! 28 Harv. C.R.-C.L. L. Rev. 395, 469-70 (1993).

[FN38]. See Marion Crain & Ken Matheny, [Labor's Identity Crisis](#), 89 Cal. L. Rev. 1767, 1815 (2001).

[FN39]. See *id.*; Iglesias, *supra* note 37, at 424.

[FN40]. In the future I plan to assign excerpts from Ruthann Robson, [To Market, To Market: Considering Class in the Context of Lesbian Legal Theories and Reforms](#), 5 S. Cal. Rev. L. & Women's Stud. 173 (1995) and Malamud, *supra* note 17, to discuss the issue of class and economic status as a protectable identity.

[FN41]. This is likely to change, however, given that governmental efforts to fight terrorism have catapulted citizenship and immigration to the forefront of domestic and international policy.