

## Securing Public Interest Law's Commitment to Left Politics

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**ABSTRACT.** “Public interest law” is a vague concept, encompassing a multitude of diverse forms of legal practice, whose meaning is often taken for granted. Yet despite being amorphous and undertheorized, public interest law is also highly institutionalized, making it an important arena for political contestation. At the same time, traditional forms of progressive public interest law have lost their effectiveness due to structural changes in the legal infrastructure in the preceding decades brought about by powerful right-wing political forces. In this context, this Essay argues that progressive lawyers must redefine public interest law such that it centers on a commitment to developing left political power: the capacity to effectuate the fundamental structural transformations of society necessary to achieve justice and equality for all. Through an analysis of the challenges facing the “new working class” in the United States, this Essay shows how a commitment to building left political power implies specific directions for the practice of labor lawyers. Ultimately, this Essay aims to model the type of analysis that can translate a commitment to strategic left politics into concrete forms of lawyering practice in any area. As a broad and inclusive progressive movement grows and gains momentum, a shared perspective among public interest lawyers in different fields will be a tremendous asset to aligning various strands of that movement into a cohesive and powerful whole.

### INTRODUCTION

Does public interest law have a substantive unifying principle? Or is public interest law merely a blanket shorthand for thousands of individual lawyers whose practices are motivated by political beliefs, however dissimilar? This Essay argues that progressive lawyers must construct a shared ethos for public interest law that centers on a commitment to developing the political power of the left. In the current legal and political environment, the transformative potential of traditional forms of public interest legal advocacy has been largely

neutralized. It is therefore crucial that progressive public interest lawyers advocate a political movement consistent with their clients' ultimate interests.

Scholars have long studied how public interest law<sup>1</sup> has responded to changing historical conditions. A "golden age" of public interest law was ushered in by the success of the litigation strategy employed by the National Association for the Advancement of Colored People' (NAACP) in *Brown v. Board of Education*<sup>2</sup> in 1954. In the 1960s and 1970s, federally-funded legal services and other public interest organizations focused on impact litigation in a variety of fields.<sup>3</sup> Because of a liberal Supreme Court and vibrant left-wing political movements, this was a period when "confidence in law's transformative potential was matched by significant structural possibilities for liberal legal reform."<sup>4</sup> But by the 1980s and 1990s, the political environment that had made this legal liberalism possible had ended decisively with the elections of Presidents Reagan and George H.W. Bush, and the rise of the New Democrats.<sup>5</sup>

Searching for alternative strategies, public interest lawyers shifted the conversation away from the topic of impact litigation and even began to downplay the importance of lawyers.<sup>6</sup> Top-down, lawyer-driven strategies gave way to various versions of "collaborative lawyering," in which the lawyer-client relationship itself was theorized as a critical site of politics. Lawyers were cautioned to avoid dominating their clients through traditional, hierarchical relationships, which could impair their clients' ability to independently engage in both individual and collective forms of political resistance.<sup>7</sup> At the same time, the critical legal studies (CLS) critique of rights questioned legalism's potential to further genuine social transformation, in part because legal rights tend to transform

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1. Many conservative lawyers consider themselves public interest lawyers. In Part II, I offer a descriptive definition of "public interest law" that acknowledges this fact. See *infra* notes 48-51 and accompanying text. The discussion in this Essay, however, concentrates on the development of progressive public interest law in the United States. This focus reflects the Essay's argument for building an understanding of public interest law rooted in left politics.
  2. 347 U.S. 483 (1954).
  3. See Scott L. Cummings & Ingrid V. Eagly, *After Public Interest Law*, 100 NW. U. L. REV. 1251, 1252-54 (2006).
  4. *Id.* at 1256 n.39.
  5. The New Democrats were a centrist faction of the Democratic Party whose rise to prominence in the in the 1980s and 1990s included the election of Bill Clinton as President. See Jon F. Hale, *The Making of the New Democrats*, 110 POL. SCI. Q. 207, 207-08 (1995).
  6. See Sameer M. Ashar, *Public Interest Lawyers and Resistance Movements*, 95 CALIF. L. REV. 1879, 1905-06 (2007).
  7. See GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* 38, 60-70 (1992); Ashar, *supra* note 6, at 1905-07; Ascanio Piomelli, *Appreciating Collaborative Lawyering*, 6 CLINICAL L. REV. 427, 438-43 (2000); Lucie E. White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699, 760-66.

the concrete bonds of solidarity necessary for collective action into abstract exercises of those rights.<sup>8</sup> Overall, this wave of scholarship “significantly influenced the construction of the role of the public interest lawyer and, for some, sowed doubts in the minds of public interest lawyers about their own efficacy and nurtured the fear that they quell, rather than nurture, collective action.”<sup>9</sup>

Ultimately, the legal strategies of impact litigation and “collaborative lawyering” alone were not able to prevent the decline of the American left. Perhaps for this reason, more recent public interest law commentators have continued to develop new ideas about the relationship between lawyers and collective action. Rather than accepting as axiomatic that law deradicalizes or demobilizes clients and political movements, scholars and practitioners have engaged in concrete analyses of how law and politics—and lawyers and political actors—are imbricated. Synthesizing the lessons of the past, faith in the law and faith in “extralegalism” have been replaced in recent years by critical approaches to both that recognize the specific and important contribution that lawyers can make in political movements, while remaining attentive to the potential pitfalls of legal activism.<sup>10</sup>

Today, the rise and popularity of “movement lawyering” within public interest law reflects a general acceptance of these new approaches. In a foundational article on the subject, Scott L. Cummings defines movement lawyering as “a model of practice in which lawyers accountable to marginalized constituencies mobilize law to build power to produce enduring social change through deliberate strategies of linked legal and political advocacy.”<sup>11</sup> This definition evinces a broad-minded, critical understanding of the role of lawyers and the law in progressive politics.

Informed by this conception of movement lawyering, this Essay proposes that public interest law must take up a new shared ethic that is responsive to the current legal and political conditions that shape how lawyers can advance progressive goals. The central challenges facing public interest law today are the long-term decline of progressive power that has resulted in a conservative shift in the courts and a concomitant narrowing of public interest lawyers’ political ambitions and vision, from which lawyers have not recovered since the Reagan era. In contrast with a harm reduction approach to public interest

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8. See, e.g., Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1382-84 (1984).

9. Ashar, *supra* note 6, at 1907.

10. See, e.g., Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937 (2007); see also Scott L. Cummings, *Critical Legal Consciousness in Action*, 120 HARV. L. REV. F. 62, 68, 70 (2007) (responding to Professor Lobel and labeling his own approach “constrained legalism”).

11. Scott L. Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645, 1652-53 (emphasis removed).

law,<sup>12</sup> I argue that progressive public interest lawyers' political beliefs, together with our expert understanding of how social oppression and domination operate through legal mechanisms, obligate us to adopt a shared commitment to support the development of left political power.

Crucially, although this Essay embraces Cummings's formulation of movement lawyering, it also advances that formulation further by incorporating a substantive commitment to left politics—that is, to the fundamental structural transformation of current social, economic, and political institutions to achieve justice and equality for all.<sup>13</sup> This commitment is vital because a purely tactical or methodological definition of public interest law, rather than a political one, risks perpetuating the current vagueness problem of “public interest law”: that it is a floating signifier so indeterminate that it can be attached to legal work *against* the public interest.<sup>14</sup>

Of course, even in alliance with movements for justice and equality, public interest lawyers may fail to transform society for the better. But the moral commitments that have motivated individuals to use the tool of law to achieve social justice create an obligation to try—and to be as politically effective as possible. The following analysis models how this might be accomplished by taking an expansive view of lawyers as political actors. The work of public interest lawyers is not limited to leveraging state power on behalf of clients through formal legal mechanisms. It is also sensitive to the political consequences of the conduct of lawyers in their relationships with clients and the public. This vision of public interest law sees the field as dynamic and ever-changing in its strategies and methods of practice. It is not defined by specific tactics, but rather by a commitment to adapt the lawyer's technical skills and specific cultural authority to concrete legal and political contexts in the service of providing maximum support to building left political power.<sup>15</sup>

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12. See *infra* notes 57–59 and accompanying text.

13. See, e.g., Nathan J. Robinson, *The Difference Between Liberalism and Leftism*, CURRENT AFFAIRS (June 7, 2017), <https://www.currentaffairs.org/2017/06/the-difference-between-liberalism-and-leftism> [<https://perma.cc/3W2V-RQH8>].

14. Indeed, Cummings recognizes that this is already happening: “The idea of a social movement has become its own brand, an ideology that different interest groups adopt to cloak their activity in the legitimacy of grassroots participation.” *Id.* at 1731.

15. In emphasizing a commitment to a political project, the vision laid out in this Essay touches on longstanding debates about the ethics of representing individual clients and advancing political goals simultaneously. See, e.g., Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976). While these important questions are largely beyond the scope of this Essay, I note that the perspective articulated here sits comfortably alongside some skepticism of the prevailing professional norms that currently drive a wedge between client representation and politics. As Sameer Ashar argues: “The tension between social justice goals and legal means is not inherent. It is

This Essay lays out a new vision for public interest law through an examination of some of the challenges facing the new American working class, from the perspective of a labor lawyer and informed by my experience at UNITE HERE Local 11 as a *Yale Law Journal* Public Interest Fellow. Part I describes three interconnected challenges: the declining power of organized labor; the limitations of labor and employment law; and the ongoing prevalence of sexual harassment in the workplace. Part II then explains why and how public interest lawyers should adopt a core commitment to building left political power. In Part III, I revisit the challenges laid out in Part I in light of this new vision of public interest law, and provide examples of how labor lawyers are enacting this conception in practice.

### I. CHALLENGES FACING THE “NEW WORKING CLASS”

The workers I represented through my *YLJ* Fellowship at UNITE HERE Local 11 make up the “new working class.”<sup>16</sup> Local 11’s members are predominantly immigrants, people of color, and women who work in the hospitality industry throughout Southern California and Phoenix, Arizona. While this social category has been coalescing for decades, it has not yet displaced the conservative white industrial worker as the dominant representation of the “work-

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a product of the path development of legal practice in which every dispute is characterized and defined as one between individuals or between individuals and the state.” Sameer M. Ashar, *Deep Critique and Democratic Lawyering*, 104 CALIF. L. REV. 201, 222-23 (2016).

16. See Tamara Draut, *SLEEPING GIANT: HOW THE NEW WORKING CLASS WILL TRANSFORM AMERICA* (2016); Gabriel Winant, *The New Working Class*, *DISSENT* (June 27, 2017), [https://www.dissentmagazine.org/online\\_articles/new-working-class-precarity-race-gender-democrats](https://www.dissentmagazine.org/online_articles/new-working-class-precarity-race-gender-democrats) [<https://perma.cc/TT8R-KNRY>]. There are many pressing topics relating to labor and work—from teachers’ strikes, see, e.g., Mike Elk, *America’s Teachers on Strike: “We Are Done Being the Frog that is Being Boiled”*, *GUARDIAN* (May 5, 2018, 6:00 AM), <https://www.theguardian.com/us-news/2018/may/05/americas-teachers-on-strike-we-are-done-being-the-frog-that-is-being-boiled> [<https://perma.cc/32UJ-ZG37>], to the “fissured workplace,” see DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* 7-14 (2017) (arguing that large corporations splitting off functions once managed internally has been a successful cost-cutting strategy, but that it has come at the cost of workers’ wages, benefits, and standard of living), and from white-collar organizing, see, e.g., Alana Semuels, *Organized Labor’s Growing Class Divide*, *ATLANTIC* (Jan. 26, 2018), <https://www.theatlantic.com/business/archive/2018/01/union-organizing-media-white-collar/551453> [<https://perma.cc/LD26-TYJ2>], to new forms of coercive and prison labor, see Noah D. Zatz, *A New Peonage?: Pay, Work, or Go to Jail in Contemporary Child Support Enforcement and Beyond*, 39 SEATTLE U. L. REV. 927 (2016) (arguing that ostensibly benevolent offers to work in lieu of prison time is constitutionally dubious); Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 VAND. L. REV. 857 (2008)—but I focus here on some select challenges facing these workers.

ing class,” nor has it fully asserted itself as an organized force in American politics.<sup>17</sup> The most salient contemporary problems in our society—poverty and precariousness, sexual harassment and assault, racial discrimination, oppressive policing and hyper-incarceration, addiction, domestic abuse, homelessness—all afflict this new working class.

This Part focuses on three interconnected challenges facing this group of workers: the declining power of organized labor; the limitations of labor and employment law in preventing abuses; and sexual harassment in the workplace. As I explain, employment law protections have failed to guarantee a dignified baseline of wages and working conditions amid the U.S. labor movement's declining workplace and political power. The task for labor lawyers, and for public interest law generally, is to help build the power that makes positive reform possible again.

Contrary to cynics and naysayers of all political persuasions,<sup>18</sup> the American labor movement is very much alive, and recent developments offer reasons to be optimistic for its future.<sup>19</sup> Yet from the historical standpoint of the past half century, it is no exaggeration to say that “American labor unions have collapsed.”<sup>20</sup> Following the upsurge in organizing during New Deal, union density—the percentage of workers in unions—rose to a peak of 35% in the mid-1950s.<sup>21</sup> Density remained largely stable through the postwar period, until the 1970s and 1980s saw the labor movement's precipitous decline, as structural changes in the global economy magnified the force of a sustained employer

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17. See Winant, *supra* note 16; see also Robin D.G. Kelley, *The New Urban Working Class and Organized Labor*, 1 NEW LAB. F. 7, 10 (1997) (arguing that “[p]rogressives need to look beyond outdated ‘working class’ images” if there is to be a successful labor movement).
18. See, e.g., Teresa Ghilarducci, *Farewell to America's Middle Class: Unions are Basically Dead*, ATLANTIC (Oct. 28, 2015), <https://www.theatlantic.com/business/archive/2015/10/unions-are-basically-dead/412831> [<https://perma.cc/Q4WW-2MFY>]; Maggie McGrath, *Unions Are Dead? Why Competition Is Paying Off For America's Best Workers*, FORBES (Dec. 12, 2017), <https://www.forbes.com/sites/maggiemcgrath/2017/12/12/unions-are-dead-why-competition-is-paying-off-for-americas-best-workers> [<https://perma.cc/E3B4-JQ67>] (arguing that “competition [between employers concerned with retaining their employees] now delivers what unions once did”).
19. See Dana Goldstein, *Teachers in Oklahoma and Kentucky Walk Out: “It Really Is a Wildfire”*, N.Y. TIMES (Apr. 2, 2018), <https://www.nytimes.com/2018/04/02/us/teacher-strikes-oklahoma-kentucky.html> [<https://perma.cc/P5XY-4EVT>] (describing a wave of teachers' strikes in 2018); Semuels, *supra* note 16; Art Swift, *Labor Union Approval Best Since 2003, at 61%*, GALLUP (Aug. 30, 2017), <https://news.gallup.com/poll/217331/labor-union-approval-best-2003.aspx> [<https://perma.cc/HMY2-NMZR>].
20. Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 5 (2016).
21. Steven Greenhouse, *Union Membership in U.S. Fell to a 70-Year Low Last Year*, N.Y. TIMES (Jan. 21, 2011), <https://www.nytimes.com/2011/01/22/business/22union.html> [<https://perma.cc/28TH-TV3>].

offensive that unions could not effectively resist.<sup>22</sup> As a result, union density has plummeted: by 2017, just 10.7% of all workers in the United States belonged to a union, including only 6.5% of private-sector workers.<sup>23</sup> And even the relatively high unionization rate in the public sector—34.4% in 2017<sup>24</sup>—is almost certain to drop sharply in the wake of *Janus v. American Federation of State, County, and Municipal Employees*, in which the Supreme Court overturned decades of precedent to declare that public sector employees could not be required to pay “fair share fees” to a union as a condition of employment.<sup>25</sup> These general trends have had significant implications for the new working class, as women, people of color, and global South immigrants entered the labor market in large proportions in the same period that unions were in protracted decline.<sup>26</sup>

Falling union density translates into a weakened capacity to advance working class politics. The political power of unions comes from their ability to offer their members a political framework for work-related challenges, foster members’ engagement in solidaristic direct actions, such as pickets and strikes, that

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22. See NELSON LICHTENSTEIN, *STATE OF THE UNION: A CENTURY OF AMERICAN LABOR* 215 (2002).
23. Bureau of Labor Statistics, *Union Members—2017*, U.S. DEP’T LAB. 2-3 (Jan. 19, 2018, 10:00 AM), [https://www.bls.gov/news.release/archives/union2\\_01192018.pdf](https://www.bls.gov/news.release/archives/union2_01192018.pdf) [<https://perma.cc/J5TU-L3HT>].
24. *Id.* at 2.
25. *Janus v. Am. Fed’n of State, Cty., & Mun. Emps.*, No. 16-1466, slip op. at 48-49 (U.S. June 27, 2018), [https://www.supremecourt.gov/opinions/17pdf/16-1466\\_2b3j.pdf](https://www.supremecourt.gov/opinions/17pdf/16-1466_2b3j.pdf) [<https://perma.cc/JY3C-C7NP>] (holding that “fair share fees,” the mechanism by which public sector employees were required to pay fees equal to the cost of representation in a union that was obligated to provide representation to them, are unconstitutional under the First Amendment). *Janus* creates a “free rider problem” because public sector unions are still required to represent workers even if they do not pay any fees or dues. Wisconsin passed a “right to work” law in 2011 that achieved the same result for that state. Following the law’s passage, membership rates in public sector unions plummeted, salaries stagnated, and employers made substantial cuts to employee benefits. See Molly Beck, *Union Membership Down Nearly 40 Percent Since Act 10*, WIS. STATE J. (Jan. 27, 2017), [https://host.madison.com/wsj/news/local/govt-and-politics/union-membership-down-nearly-percent-since-act/article\\_60c1bb7e-3ae3-57d0-b4b3-a9aa46foe59f.html](https://host.madison.com/wsj/news/local/govt-and-politics/union-membership-down-nearly-percent-since-act/article_60c1bb7e-3ae3-57d0-b4b3-a9aa46foe59f.html) [<https://perma.cc/Z5D4-S72C>]; David Madland & Alex Rowell, *Attacks on Public-Sector Unions Harm States: How Act 10 Has Affected Education in Wisconsin*, CTR. FOR AM. PROGRESS ACTION FUND (Nov. 15, 2017, 2:00 PM), <https://www.americanprogressaction.org/issues/economy/reports/2017/11/15/169146/attacks-public-sector-unions-harm-states-act-10-affected-education-wisconsin> [<https://perma.cc/CY8F-F7V9>].
26. See Mitra Toossi, *A century of change: the U.S. labor force, 1950–2050*, BUREAU OF LAB. STAT. MONTHLY LAB. REV. 15 (May 2002) (describing the dramatic increases in the labor participation rates of women since 1950, in particular between 1970 and 1980, and the rising proportion of the U.S. population classified as of Hispanic origin between 1980 and 2000).

help to cement working class identity and interests, and mobilize their members' support for electoral efforts that advance those interests through voting, door knocking, signature gathering, phone banking, and monetary contributions. Dwindling membership weakens a union's ability to achieve these objectives.<sup>27</sup> And so it should come as no surprise that in parallel with the drop in union density, the story of labor law in recent decades has also been one of decline. Indeed, the last best chance for modestly progressive labor law reform on a national level, the Employee Free Choice Act, foundered in 2009 despite significant Democratic majorities in both chambers of Congress and an Obama presidency.<sup>28</sup>

Shrinking unions, declining political power, and an inability to pass necessary labor law reform create a vicious cycle. There is a scholarly consensus that American labor law is deeply unfavorable to workers, moribund, and "ossified."<sup>29</sup> The remedies available for unlawful employer conduct under the National Labor Relations Act,<sup>30</sup> the main federal statute governing private-sector labor organizing and unions, fall far short of what would be required to deter employers from flouting the law. For example, employer anti-union campaigns involving illegal intimidation and threats against union-supporting employees will, in most cases, result only in an order from the National Labor Relations Board requiring the employer to post a notice in the workplace informing workers of their rights under labor law.<sup>31</sup> Even the more substantial remedies that an administrative law judge can impose, like backpay and reinstatement for workers fired for their union activity, can be delayed for years through appeals to the NLRB and the federal circuit courts.<sup>32</sup> This means that employers can and do fire workers who are leaders of organizing campaigns: one study

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27. See JAKE ROSENFELD, *WHAT UNIONS NO LONGER DO* 159-181 (2014); Andrias, *supra* note 20, at 33.

28. See Harold Meyerson, *Why Can't Labor Get a Little More Help From Its Friends?*, AM. PROSPECT (March 27, 2010), <http://prospect.org/article/why-cant-labor-get-little-more-help-its-friends-o> [<https://perma.cc/2CR5-Q825>].

29. For a recent and thorough summary of these issues, see Andrias, *supra* note 20, at 13-36. For additional discussion, see Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527 (2002) (arguing that American labor law has been uniquely insulated from change, thus largely precluding its adaptation to new economic conditions).

30. 29 U.S.C. §§ 151-169 (2012).

31. See 29 U.S.C. § 160(c); Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization under the NLRA*, 96 Harv. L. Rev. 1769, 1788-89 n. 67 (1983); Thomas C. Barnes, Note, *Making the Bird Sing: Remedial Notice Reading Requirements and the Efficacy of NLRB Remedies*, 36 Berkeley J. Emp. & Lab. L. 351, 352-357 (2015).

32. See Kate Bronfenbrenner, *No Holds Barred: The Intensification of Employer Opposition to Organizing*, ECON. POL'Y INST. 18 (2009), <https://www.epi.org/files/page/-/pdf/bp235.pdf> [<https://perma.cc/H34G-PCCC>].



estimates that in the 2000s, activists faced a fifteen to twenty percent chance of being illegally fired.<sup>33</sup> Many employers know that even if terminations are eventually found to be illegal, by the time of a union activist's reinstatement, the organizing drive may very well be over, a casualty of unlawful intimidation and retaliation.<sup>34</sup> Thus, while individual workers may receive backpay and reinstatement,<sup>35</sup> there is often no real remedy for the damage done to the collective action that the NLRA is supposed to protect.<sup>36</sup>

Employment law has also failed to address the challenges this new working class faces in the workplace. Employment law consists of the collection of federal, state, and local laws that set standards and create protections for workers without regard to their union status. These regulations create baselines for wage rates, antidiscrimination protections, health and safety, overtime, and newer rights like paid sick leave and fair scheduling.<sup>37</sup> Yet even the most basic of employment law protections, the minimum wage, often fails to effectively address undercompensation.

The reality that low-wage workers face does not match the law on the books. Wage theft is rampant, with one study estimating that minimum wage violations alone exceed \$15 billion per year.<sup>38</sup> Lacking adequate resources for staffing, state and federal enforcement agencies can take action against only a miniscule percentage of violators.<sup>39</sup> This leaves workers to pursue their own claims, forcing them to choose between risking retaliation by their employers in response to bringing a claim, or never receiving what they were rightfully owed—an unjust dilemma that reflects the vast imbalance of power between

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33. John Schmitt & Ben Zipperer, *Dropping the Ax: Illegal Firings During Union Election Campaigns, 1951-2007*, CTR. FOR ECON. AND POL'Y RES. 15 (Mar. 2009).

34. See Andrias, *supra* note 20, at 26.

35. *But see Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) (holding that undocumented immigrant workers are ineligible to receive backpay when terminated illegally for engaging in union activity). This lack of protection is a further barrier to the organization of the “new working class.”

36. These enforcement problems have plagued the NLRA for decades. Paul Weiler's landmark study on the inefficacy of labor law remedies, published more than thirty years ago, found that the “rate of employer violation of the NLRA suddenly began a precipitous climb” as early as 1957. Weiler, *supra* note 31, at 1779.

37. See Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2688-89 (2008).

38. David Cooper & Teresa Kroeger, *Employers Steal Billions from Workers' Paychecks Each Year*, ECON. POL'Y INST. 2 (May 10, 2017), <https://www.epi.org/publication/employers-steal-billions-from-workers-paychecks-each-year-survey-data-show-millions-of-workers-are-paid-less-than-the-minimum-wage-at-significant-cost-to-taxpayers-and-state-economies> [<https://perma.cc/C4PJ-RPB9>].

39. See *id.*

low-wage workers and their employers in the American market economy. Undocumented immigrant workers, who are concentrated in low wage industries, are especially vulnerable to workplace violations because they can be subject to deportation.<sup>40</sup> The Fair Labor Standards Act (FLSA), which establishes federal minimum wage and overtime protections, lacks opt-out class actions and private injunctive relief, hindering its capacity to systemically prevent wage theft.<sup>41</sup> And even when workers win lawsuits for wage theft, they often fail to collect any money, because unscrupulous employers are able to avoid payment by filing for bankruptcy or hiding their money in other ways.<sup>42</sup> If the goal of employment law is to maintain baseline standards for all workers, it has clearly failed.

Unsurprisingly, low-wage workers face similar enforcement problems with respect to antidiscrimination laws. They are routinely subject to sexual harassment and assault without recourse. The #MeToo movement exploded in late 2017, beginning with high-profile allegations of sexual harassment and assault against men in the entertainment industry but quickly expanding to inspire a discussion about sexism and sexual violence in all areas of American life.<sup>43</sup> Working-class women have seized the opportunity to highlight how sexual harassment is rampant in their workplaces, and further, how their economic precariousness and lack of power make it even more difficult to report their supervisors, much less obtain justice.<sup>44</sup> Given that nearly *three-quarters* of sexual harassment complaints with the Equal Employment Opportunity Commission (EEOC) include an allegation of retaliation, it is no wonder that low-wage women who need their jobs to survive are especially at risk.<sup>45</sup> Unlike the hyper-public world of Hollywood, the men filling the ranks of management at hotels,

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40. See SHANNON GLEESON, *PRECARIOUS CLAIMS: THE PROMISE AND FAILURE OF WORKPLACE PROTECTIONS IN THE UNITED STATES* 10-12 (2016).

41. See Jordan Laris Cohen, *Democratizing the FLSA Injunction: Toward a Systemic Remedy for Wage Theft*, 127 *YALE L.J.* 706, 708-10 (2018).

42. Sarah Maslin Nir, *Workers Find Winning a Wage Judgment Can Be an Empty Victory*, *N.Y. TIMES* (Apr. 14, 2017), <https://www.nytimes.com/2017/04/13/nyregion/workers-find-winning-a-wage-settlement-can-be-an-empty-victory.html> [https://perma.cc/3VVT-UY2X].

43. See Christen A. Johnson & K.T. Hawbaker, *#MeToo: A Timeline of Events*, *CHI. TRIB.* (Sept. 19, 2018, 4:15 PM), <http://www.chicagotribune.com/lifestyles/ct-me-too-timeline-20171208-htmstory.html> [https://perma.cc/BY33-JAHR] (last visited Sept. 24, 2018).

44. See Alana Samuels, *Low-Wage Workers Aren't Getting Justice for Sexual Harassment*, *ATLANTIC* (Dec. 27, 2017), <https://www.theatlantic.com/business/archive/2017/12/low-wage-workers-sexual-harassment/549158> [https://perma.cc/5YCN-J3AS].

45. Jocelyn Frye, *Not Just the Rich and Famous*, *CTR. FOR AM. PROGRESS* (Nov. 20, 2017), <https://www.americanprogress.org/issues/women/news/2017/11/20/443139/not-just-rich-famous> [https://perma.cc/HN7B-HEE4].

resorts, and restaurants are not famous, and allegations against them will not typically generate the public relations nuisance for employers that can help to force action against harassers.<sup>46</sup> This combination of the threat of retaliation and the relative anonymity of the accused intensifies the difficulty for low-wage women workers, particularly immigrants and women of color, to hold perpetrators accountable.

The new working class faces innumerable challenges, but the three highlighted above—the declining power of organized labor, the limitations of labor and employment law, and sexual harassment in the workplace—demonstrate that as the labor movement’s workplace and political power has declined, the protections the law affords have failed to guarantee a baseline of dignified working conditions. As I address in the next Part, the failure of existing legal structures to address the poverty and precariousness this new working class faces demands that progressive public interest lawyers build the political power necessary to address those systemic deficiencies.

## II. A GUIDING PRINCIPLE FOR PUBLIC INTEREST LAW: BUILDING LEFT POWER

The problems outlined above are systemic and severe. Legal reforms are necessary to ultimately address these injustices, but the American working class does not have the political power to enact them, as evidenced by the labor movement’s failure to pass the Employee Free Choice Act in 2009, even with Democratic control of the presidency and Congress.<sup>47</sup> In recognition of this weakness, and that of the American left generally, this Part turns to why and how progressive lawyers should construct a new concept of public interest law that holds building left political power as its core. Only such a commitment will be commensurate to the challenges and opportunities of the present moment.

“Public interest law” is an umbrella term that encompasses (1) a wide range of lawyering practices that are predominantly, but not exclusively, considered politically progressive<sup>48</sup>; (2) an amalgamation of cause lawyering<sup>49</sup> and repre-

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46. See Samuels, *supra* note 44; see also Rachel Arnow-Richman, *Of Power and Process: Handling Harassers in an At-Will World*, 128 YALE L.J.F. 85, 92-95 (2018) (describing how contractual job-security protections afforded to executives can also discourage employers from taking action against high-level employees accused of harassment).

47. In the last half century, labor law reform also failed under the Democratic administrations of Presidents Jimmy Carter and Bill Clinton. See Meyerson, *supra* note 28.

48. See Ann Southworth, *Conservative Lawyers and the Contest Over the Meaning of “Public Interest Law”*, 52 UCLA L. REV. 1223 (2005) (describing the rise of conservative “public interest law

senting the underrepresented; (3) a variety of legal tactics, from impact litigation and policy advocacy to direct services and law and organizing<sup>50</sup>; and (4) a set of practices that vary in the degree to which political motivations are made explicit.<sup>51</sup> If this definition is rambling, it is because public interest law lacks an organizing principle.

Yet despite its amorphous nature, public interest law is also highly institutionalized, making it an important arena for political contestation. The term's popularity and moral authority have led law schools to devote to it a significant portion of their curricular and programmatic offerings, both academic and clinical. Classes, lectures, career-development resources, post-graduation fellowships, scholarships, and loan repayment assistance programs all center around the concept.<sup>52</sup> Major progressive lawyering conferences like the Rebellious Lawyering Conference, Getting Radical in the South, and the Robert M. Cover Retreat identify themselves as public interest law events.<sup>53</sup> The set of opportunities for each cohort of law students to engage in progressive lawyering is essentially identical to the contemporary institutional forms of "public interest law." In this way, the idea of public interest law profoundly affects the legal profession by mediating progressive lawyers' relationship to trends and movements in progressive politics writ large.<sup>54</sup>

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firms" in the 1970s and 1980s that asserted right-wing causes as a competing vision of the public interest).

49. Austin Sarat and Stuart Scheingold defined cause lawyering as "using legal skills to pursue ends and ideals that transcend client service—be those ideals social, cultural, political, economic, or, indeed, legal." AUSTIN SARAT & STUART SCHEINGOLD, SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING 3 (2004).
50. See, e.g., *Public Interest Work Types*, HARV. L. SCH., <https://hls.harvard.edu/dept/opia/what-is-public-interest-law/public-interest-work-types/> [<https://perma.cc/FDM6-Q894>].
51. See Martha Minow, *Political Lawyering: An Introduction*, 31 HARV. C.R.-C.L. L. REV. 287, 288-90 (1996); Ann Southworth, *What is Public Interest Law: Empirical Perspectives on an Old Question*, 62 DEPAUL L. REV. 493, 497-501 (2013).
52. See, e.g., *Public Interest*, NW. PRITZKER SCH. L., <http://www.law.northwestern.edu/academics/curricular-offerings/public-interest/> [<https://perma.cc/RH55-GQA5>]; *Public Interest Law*, SW. L. SCH., <https://www.swlaw.edu/curriculum/concentrations-and-customizations/public-interest-law-concentration> [<https://perma.cc/4Z2K-XKGG>]; *Social Justice and Public Interest*, BERKELEY L. U. CAL., <https://www.law.berkeley.edu/academics/areas-of-study/social-justice-public-interest> [<https://perma.cc/UBR5-L4MY>]; *Public Interest Law at Vanderbilt*, VAND. L. SCH., <https://law.vanderbilt.edu/public-interest> [<https://perma.cc/2F7Y-QHYZ>].
53. See *Rebellious Lawyering 2018*, YALE L. SCH., <https://reblaw.yale.edu> [<https://perma.cc/2LFQ-X8UR>]; *GRITS (Getting Radical in the South) Conference*, <https://gritsconference.org/> [<https://perma.cc/3ZXA-AMMU>]; *31st Annual Robert M. Cover Retreat*, YALE L. SCH., <https://law.yale.edu/31st-annual-robert-m-cover-retreat> [<https://perma.cc/W3FH-YFNY>].
54. See Ann Southworth, *What Is Public Interest Law: Empirical Perspectives on an Old Question*, 62 DEPAUL L. REV. 493, 495-96 (2013) ("The contest over the meaning of public interest law

But although “[t]he field of public interest lawyering, like most institutional arrangements, has a taken-for-granted feel to it,” in which observers and participants seem to intuitively know what it is and is not, the definition of public interest law has shifted significantly over time and is always subject to change in response to political movements and changing legal and political circumstances.<sup>55</sup> For example, the Legal Services Corporation (LSC), the largest source of funding for civil legal aid in the United States, was created in 1974 in part because of a “newly refined service ideal that recognized individual voluntarism was insufficient to address the needs of the poor.”<sup>56</sup> A new understanding of the “public interest” played a role in spurring a massive, publicly funded expansion and restructuring of legal services provision that cemented a new baseline for the public’s understanding of what justice required.

This understanding was partially lost in subsequent decades, however. The 1980s and 1990s were a difficult period for progressive politics and lawyers, marked by decline and demoralization.<sup>57</sup> In his study on “left-activist” lawyers in Seattle in the 1990s, Stuart Scheingold documented a “shift from system change to providing meaningful assistance to those who are victims of that system,” which he called “a kind of least-common-denominator commitment to victims” that became “the ideological principle driving left-activist lawyering in Seattle.”<sup>58</sup> Scheingold concluded: “By and large, the dominant response to the unfavorable trends of the 1990s has been sharply curtailed expectations—a tacit abandonment of transformative objectives . . . . For at least some left-activists this reduction in scale is not so much a tactical retreat as a reinterpretation of what it means to politicize legal practice.”<sup>59</sup>

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is symbolically important because the phrase conveys approval; the organizations, activities, and lawyers associated with the term are understood to enhance access to justice, or advance some vision of the public good. This struggle over discourse also carries direct and practical implications because financial benefits—such as law school scholarship eligibility, summer funding, loan forgiveness, and pro bono credit—sometimes turn on the definition of public interest law. Thus, how the phrase is used and defined is integrally related to the allocation of some types of legitimacy and resources within the American legal profession.”). Indeed, the right’s efforts to establish a “conservative public interest law” demonstrates its recognition of these stakes.

55. ROBERT SAUTÉ, *FOR THE POOR AND DISENFRANCHISED: AN INSTITUTIONAL AND HISTORICAL ANALYSIS OF AMERICAN PUBLIC INTEREST LAW, 1876-1990*, at 10 (2008).

56. *Id.* at 13.

57. See, e.g., Adolph Reed, *Nothing Left: The Long, Slow Surrender of American Liberals*, HARPERS, Mar. 2014, at 28, 28-29 (describing this decline across several policy areas).

58. Stuart Scheingold, *The Struggle to Politicize Legal Practice: A Case Study of Left-Activist Lawyering in Seattle*, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* 118, 126-27 (Austin Sarat & Stuart Scheingold eds., 1998).

59. *Id.* at 133-34.

In the 1980s and 1990s, legal scholars debated the potential effects of developments in progressive lawyering on the emergence of mass political movements.<sup>60</sup> They evaluated the merits of legal practice according to their ability to help move politics from, in Cornel West's formulation, a period of conservative stability to one of progressive movement ascendancy.<sup>61</sup>

For example, in the critical legal studies (CLS) and critical race theory (CRT) debate over the use of "rights" rhetoric, CLS scholars argued that rights discourse should be abandoned because it potentially stultified the development of solidarity, crucial to the emergence of movements. To describe a specific political activity with others as an exercise of rights was to transform a concrete experience of solidarity into something wholly abstract.<sup>62</sup> CRT scholars disagreed, pointing out that rights rhetoric was pervasive in the Civil Rights Movement and likely spurred the development of mass participation and powerful solidarity.<sup>63</sup> Around the same time, advocates for a "collaborative lawyering" model of practice called on progressive lawyers to strengthen their clients' capacities to empower themselves through collective action by avoiding dominating their clients within the lawyer-client relationship.<sup>64</sup> In turn, critics saw this model as a depoliticizing focus on the microdynamics of power in the lawyer-client relationship that distracted from or undermined efforts to engage in the collective political work necessary to truly transform clients' lives beyond the individual case.<sup>65</sup>

This debate then has centered on the efficacy of legal tactics in advancing and strengthening progressive movements for political power. But if progressive public interest lawyers are driven by a desire to remake society to be more fundamentally just, fair, and equal, this aspiration necessarily entails a concern

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60. See *supra* notes 6-9 and accompanying text.

61. Cornel West, *The Role of Law in Progressive Politics*, 43 VAND. L. REV. 1797, 1799-80, 1804 (1990).

62. See Tushnet, *supra* note 8, at 1382-83.

63. See Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 357 (1987); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 417 (1987) ("For blacks, the prospect of attaining full rights under the law has always been a fiercely motivational, almost religious, source of hope.").

64. See, e.g., LÓPEZ, *supra* note 7; Piomelli, *supra* note 7; White, *supra* note 7.

65. See Joel F. Handler, *Postmodernism, Protest, and the New Social Movements*, 26 LAW & SOC'Y REV. 697 (1992); William H. Simon, *The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era*, 48 U. MIAMI L. REV. 1099 (1994).

with the effectiveness of the means used to further these social justice objectives – what might be called “strategic politics.”<sup>66</sup>

The retreat toward a defensive stance – that is, a “shift from system change to providing meaningful assistance to those who are victims of that system”<sup>67</sup> – in the 1980s and 1990s was a predictable response to the prevailing political trends and the experience of defeat.

But the current moment presents new challenges and opportunities, and it calls for progressive lawyers to renew their commitment to a politics of social transformation. On the one hand, the present legal structure – like that of the 1980s and 1990s – is an intensely unfavorable arena in which to pursue significant reforms. Conservative political victories have dramatically reconfigured the courts, capped by the most conservative Supreme Court in modern American history.<sup>68</sup> In turn, conservative Justices have promulgated radical doctrinal developments in the law that will present enduring obstacles to reform through court-centric tactics like impact litigation.<sup>69</sup> Meanwhile, civil legal services and public defense are grossly underfunded, exacerbating difficulties in accessing justice and magnifying the harms of immigration enforcement, economic inequality, and the carceral state.<sup>70</sup> In short, almost all of the potential that the legal system may have had to transform society toward progressive ideals – or even simply to protect the most vulnerable from harm – has been all but snuffed out by the right’s political power.

On the other hand, we are living through a wave of progressive movement energy: Occupy Wall Street,<sup>71</sup> the 2006 “Day Without Immigrants” demon-

66. See JONATHAN SMUCKER, HEGEMONY HOW-TO: A ROADMAP FOR RADICALS 118-25 (2017).

67. Scheingold, *supra* note 58.

68. Nate Silver, *Supreme Court May Be Most Conservative in Modern History*, N.Y. TIMES (Mar. 29, 2012), <https://fivethirtyeight.blogs.nytimes.com/2012/03/29/supreme-court-may-be-most-conservative-in-modern-history> [<https://perma.cc/QMS5-7GGQ>].

69. See Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 LAW & CONTEMP. PROBS. 195, 195-213 (2014); Sheldon Whitehouse, *Conservative Judicial Activism: The Politicization of the Supreme Court Under Chief Justice Roberts*, 9 HARV. L. & POL’Y REV. 195 (2015).

70. See Pete Davis, *Our Bicentennial Crisis: A Call to Action for Harvard Law School’s Public Interest Mission*, HARV. L. REC. 3-15 (2017), <http://hlrecord.org/wp-content/uploads/2017/10/OurBicentennialCrisis.pdf> [<https://perma.cc/U29B-3DRX>]. A budget blueprint released by President Trump for the fiscal year 2018 proposed cutting all federal funding for the Legal Services Corporation. See Dorothy Samuels, *Trump Targets the Legal Services Corporation*, AM. PROSPECT (Apr. 11, 2017), <http://prospect.org/article/trump-targets-legal-services-corporation> [<https://perma.cc/E2RF-PF6A>].

71. See Jesse Myerson, *Occupy Didn’t Just “Change the Conversation.” It Laid the Foundation for a New Era of Radical Protest.*, IN THESE TIMES (Sept. 17, 2016), <http://inthesetimes.com/features/occupy-legacy-five-year-anniversary-mayday.html> [<https://perma.cc/9PCZ-BT4X>].

strations,<sup>72</sup> the Bernie Sanders campaign,<sup>73</sup> Black Lives Matter,<sup>74</sup> the Fight for \$15,<sup>75</sup> the anti-oil pipeline Standing Rock protests,<sup>76</sup> an upsurge in teacher strikes,<sup>77</sup> and the #MeToo movement against sexual harassment and assault,<sup>78</sup> to name a few. Although this latest groundswell has not yet translated into durable political power, it represents the best opportunity for public interest lawyers to bring their vision of legal and political reform into being.<sup>79</sup> Reconstructing public interest law so that building left political power becomes its core commitment could help translate this political energy into political power.

As mentioned in the Introduction, Scott Cummings's definition of "movement lawyering" provides a roadmap for the kind of lawyering tactics that this entails: "a model of practice in which lawyers accountable to marginalized constituencies mobilize law to build power to produce enduring social change through deliberate strategies of linked legal and political advocacy."<sup>80</sup> Where this Essay's conception of public interest law departs from Cummings is in its substantive political commitment to *left* power, which is the capacity to effectuate the fundamental structural transformations of society necessary to achieve justice and equality for all. It is a commitment that draws from progressive lawyers' particular expertise in the law and legal institutions, which allows them to more readily recognize that fundamental changes to the legal structure

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72. See Mark Engler & Paul Engler, *The Massive Immigrant-Rights Protests of 2006 are Still Changing Politics*, L.A. TIMES (Mar. 4, 2016, 5:00 AM), <http://www.latimes.com/opinion/op-ed/la-oe-0306-engler-immigration-protests-2006-20160306-story.html> [https://perma.cc/9ELT-VJQS].

73. See Editors, *What Did Bernie Do?*, JACOBIN (Jan. 18, 2017), <https://www.jacobinmag.com/2017/01/what-did-bernie-do> [https://perma.cc/RXT9-29TF].

74. See KEEANGA-YAMAHTTA TAYLOR, *FROM #BLACKLIVESMATTER TO BLACK LIBERATION* (2016).

75. See Steven Greenhouse, *How to Get Low-Wage Workers Into the Middle Class*, ATLANTIC (Aug. 19, 2015), <https://www.theatlantic.com/business/archive/2015/08/fifteen-dollars-minimum-wage/401540> [https://perma.cc/M5H7-Q8SA].

76. See Rebecca Solnit, *Standing Rock Protests: This is Only the Beginning*, GUARDIAN (Sept. 12, 2016, 8:45 AM), <https://www.theguardian.com/us-news/2016/sep/12/north-dakota-standing-rock-protests-civil-rights> [https://perma.cc/28DZ-GTZS].

77. See Rachel M. Cohen, *Politicized by Trump, Teachers Threaten to Shake Up Red-State Politics*, INTERCEPT (Apr. 17, 2018, 10:37 AM), <https://theintercept.com/2018/04/17/teacher-strikes-west-virginia-oklahoma-kentucky-arizona> [https://perma.cc/E5HX-YC5B].

78. See Johnson & Hawbaker, *supra* note 43 (last visited Sept. 24, 2018).

79. A recent example of how progressive politics can lay the groundwork for legal transformation is Larry Krasner's transformation of the Philadelphia District Attorney's office following his election as district attorney. See Shaun King, *Philadelphia DA Larry Krasner Promised a Criminal Justice Revolution. He's Exceeding Expectations.*, INTERCEPT (Mar. 20, 2018, 3:59 PM), <https://theintercept.com/2018/03/20/larry-krasner-philadelphia-da> [https://perma.cc/RC5N-R3YJ].

80. See Cummings, *supra* note 11 (emphasis removed).



must be made if justice is to be actualized.<sup>81</sup> It also challenges progressive lawyers to ensure that their individual practice and their collective professional identity align with the political currents that have the best chance of building enough power to enact necessary reforms.

### III. LABOR LAWYERING IN THE PUBLIC INTEREST

This Part provides some examples of how a vision of public interest law focused on adapting to legal and political contexts in the service of building left political power plays out in practice. Informed by my fellowship experiences, it focuses on the particular methods, tactics, and roles for public interest lawyers presented in union-side labor law practice. By examining the particularities of how law and politics shape the terrain upon which workers struggle to overcome the contemporary problems of the workplace, as this Essay did in Part I, we can draw parallels and derive general ideas for public interest lawyering in all fields.

First, in their interactions with workers and organizers, union-side labor lawyers should deploy legal rhetoric in measured ways. Because union power is derived from the commitment, organization, and action of workers themselves, lawyers should be careful not to demobilize workers by emphasizing legal solutions to workplace injustices. This is especially important given that many employer actions, while unlawful, are unlikely to be adequately or timely remedied.<sup>82</sup> Given this breakdown in enforcement, lawyers should emphasize that organizing their coworkers to take collective action is ultimately the most reliable and effective way to improve working conditions.

At the same time, legal violations and legal protections can be a strong force for motivating workers to organize for power on the job. Lawyers can help workers overcome their fear of confronting employers by affirming the legality of workers' actions and by pointing out that some of the injustices they face are not only morally wrong, but also illegal. The key here is to maintain a balance between using the legal violations to motivate action and providing workers with realistic expectations about legal remedies. This requires labor lawyers to understand their role holistically, to go beyond a purely legalistic view of their responsibilities, and to consciously exercise the cultural authority they have in service of empowering workers. Instead of fostering reliance on their expertise and exclusive access to legal mechanisms, lawyers can use the trust that work-

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81. See Robinson, *supra* note 13.

82. See *supra* notes 29-36 and accompanying text.

ers have in them to strengthen workers' resolve and help give them the courage to take direct collective action against employer abuses.<sup>83</sup>

This may seem to simply be an example of good lawyering generally—managing client expectations according to an accurate understanding of how particular rights are enforced and using legal action to motivate clients to assert their rights while not crowding out other forms of action. But a commitment to building left politics further entails raising workers' consciousness about the deficiency of current legal regimes and their need for fundamental transformation. While any good lawyer would accurately explain to clients the likely outcomes of legal action, a public interest lawyer with a commitment to building left political power would ensure that no client leaves an interaction with the lawyer with the understanding that their ultimate aim should be to remedy the legal violations they have suffered. In our society, where an individualist legalism is often the default mode of understanding harms and wrongs, many workers are inclined to understand injustice at work through the framework of legal violations, and many others are more comfortable confronting abusive bosses through legal channels rather than through direct collective action. The public interest lawyer's job is therefore to use legal action to help agitate workers about unlawful employer conduct while promoting an understanding that their organizing goals and aspirations should not be limited to winning a legal case.<sup>84</sup>

Second, union-side labor lawyers should continuously search for new legal mechanisms to help convince employers to sign contracts with workers and their unions. Workers fighting for improvements in pay, benefits, and conditions of employment are ultimately demanding that their employer allocate more money to labor; such improvements have a value that can be expressed in dollars. Termed "concession costs" or the "cost of settlement," there is a monetary amount at stake that employers will typically resist giving up, unless workers can make the cost of refusing to settle greater than the cost of settlement.<sup>85</sup> While worker organizing, actions and strikes are the core of these efforts, lawyers can supplement them by holding employers accountable for legal violations other than those covered by traditional labor and employment law. Some examples include violations of transnational law, health and safety codes, and consumer protection and unfair business practices law. The possibilities here

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83. This example is an attempt to put into practice an approach to akin to Lucie White's concept of "third-dimensional lawyering": "helping a group learn how to interpret moments of domination as opportunities for resistance." White, *supra* note 7, at 763.

84. This could be understood as an attempt to combine the lessons of both sides of the CLS/CRT debate on rights rhetoric. See *supra* notes 62-65 and accompanying text.

85. JANE F. McALEVEY, *NO SHORTCUTS: ORGANIZING FOR POWER IN THE NEW GILDED AGE* 61 (2016).

depend on the local jurisdiction, but the general principle is straightforward: labor lawyers should embrace legal strategies outside of their typical practice areas when it can help an organizing campaign move forward.<sup>86</sup>

Of course, using creative tactics or developing multiple practice areas is not especially innovative. But a political vision of public interest law also calls for a reconfiguration of lawyers' identity as defined more by service to political movements (and the skillsets this requires) rather than by expertise in certain doctrinal areas. In other words, to be a labor lawyer means not only to know labor law, but to have a deep understanding of the possibilities of the lawyer's role in the labor movement. One of the most important consequences of this approach would be to change how future public interest lawyers are trained in law schools. It would mean devoting resources toward teaching political analysis, legal strategy vis-à-vis contentious politics, and pragmatic legal problem-solving skills. Classic problems in the public interest law literature could be taught in a classroom setting rather than only as part of clinics.<sup>87</sup> UCLA's David J. Epstein Program for public interest law students, with its seminars on lawyering skills and public interest law and its requirement that participants take courses "designed to expose . . . students to the relationship between law and systems of power," is one model for academic programs in this vein.<sup>88</sup>

Finally, labor lawyers should embrace the space created by the recent upsurge in social-justice movements to connect issues of racism, sexism, and xenophobia with worker organizing and the labor movement.<sup>89</sup> Public interest lawyers should explicitly recognize these issues as irresolvable without a transformation in power relations between workers and their employers. In today's context, that transformation requires building worker organization and work-

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86. For examples of unions and workers' organizations taking this approach, particularly through the use of local government law, see Scott L. Cummings and Steven A. Boucher, *Mobilizing Local Government Law for Low-Wage Workers*, 2009 UNIV. CHI. LEGAL F. 187; Katherine Stone and Scott Cummings, *Labor Activism in Local Politics: From CBAs to 'CBAs'*, in *THE IDEA OF LABOUR LAW* 273 (Guy Davidov, Brian Langille, eds., 2011).

87. The clinical experience is, of course, crucial. "While critical and interdisciplinary perspectives can be explored in law school classes and seminars, they cannot replicate the experience of an immersive confrontation with an intractable social problem and close work with clients and organizers on that problem." Ashar, *supra* note 15, at 219.

88. *David J. Epstein Program in Public Interest Law and Policy Specialization: Program Curriculum*, UCLA L., <https://law.ucla.edu/academics/degrees-and-specializations/specializations/david-j-epstein-program-in-public-interest-law-and-policy/curriculum> [<https://perma.cc/6F8G-YRP2>].

89. See Marion Crain & Ken Matheny, *Labor's Identity Crisis*, 89 CALIF. L. REV. 1767 (2001) (arguing that a narrow commitment to economic issues is insufficient, and that labor unions should embrace social justice goals that encompass other forms of hierarchy among workers); Kimberly M. Sánchez Ocasio & Leo Gertner, *Fighting for the Common Good: How Low-Wage Workers' Identities Are Shaping Labor Law*, 126 YALE L.J.F. 503 (2017).

ers' political power. As discussed above in Part I, justice for low-wage workers, particularly those subject to various vectors of identity-based oppression, is impossible without the collective action of workers at the "shop floor" level. Individual reports and legal claims of harassment and discrimination have not been enough to stop these abuses. In order to be seen and respected, the largely invisible workers of the new working class must establish their collective power through demonstrations of their ability to create crises for their employers—undergirded by their potential use of the strike weapon.

So-called "class" and "identity" politics are not disaggregated in the lived experience of members of the new working class, who are subject to exploitation, discrimination, and oppression because of power imbalances in undemocratic workplaces.<sup>90</sup> A holistic struggle for dignity and respect at the workplace must therefore encompass all forms of injustice. To be sure, we must continue to work to overcome the perception that organized labor is peripheral to movements addressing identity-based oppression. Unions' exclusionary history has contributed to a perception of class as "raced-white and gendered-male."<sup>91</sup> Some have even suggested that efforts to build collective power are in tension with antidiscrimination law's individual rights framework.<sup>92</sup> But the failure of the employment law regime to enforce even basic worker standards has made a reevaluation of this position necessary as a matter of political and legal strategy.<sup>93</sup> Likewise, the power to end injustices at work lies in the collective action of workers of color and women, LGBT, and immigrant workers.

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90. See Nelson Lichtenstein, *Trashing Identity Politics: Does It Really Get Us Back to Class?*, 67 INT'L LAB. & WORKING-CLASS HIST. 42, 43 (2005) ("[C]lass identity in the US has always been so interwoven with the ethnic, racial, and gender particularities of various regions, cities, and industries . . .").

91. Marion Crain, *Whitewashed Labor Law, Skinwalking Unions*, 23 BERKELEY J. EMP. & LAB. L. 211, 213 (2002); see also LICHTENSTEIN, *supra* note 22, at 74-76 (describing the failure of many New Deal-era industrial unions to challenge hierarchical, racially segregated employment practices); Michael Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193, 196 (noting the AFL-CIO and NAACP's support for sanctions for employers that hire immigrants unauthorized to work as part of the Immigration Reform and Control Act of 1986).

92. See REUEL SCHILLER, *FORGING RIVALS: RACE, CLASS, LAW, AND THE COLLAPSE OF POSTWAR LIBERALISM* 5 (2015) (arguing that labor law's underlying principle of democratic majoritarianism and antidiscrimination law's antimajoritarianism conflicted with one another). *But see* Sachs, *supra* note 37 (discussing the use of antiretaliation provisions of employment law statutes to protect worker organizing).

93. See Craig Becker, *Thoughts on the Unification of U.S. Labor and Employment Law: Is the Whole Greater than the Sum of the Parts?*, 35 YALE L. & POL'Y REV. 161, 188 (2016) ("[I]t has become more and more evident that our labor and employment laws are not only not incompatible, but depend crucially on one another in order to make real their respective promises to working people in the United States: 'to representatives of their own choosing' and to 'labor con-

UNITE HERE has been at the forefront of integrating “economic” and “identity” struggles. In cities across the country, locals of the union have been pushing “panic button” ordinances, which require hotels to provide devices to their housekeepers for summoning help when facing sexual assault or other threatening conduct by guests.<sup>94</sup> Juana Melara, a member of Local 11, and Sandra Pezqueda, a worker who has been organizing with the union, were featured in *Time Magazine*’s 2017 Person of the Year issue as “Silence Breakers.”<sup>95</sup> Their activism and that of other housekeepers have helped bring working class women’s experiences of harassment and assault into mainstream conversations surrounding the #MeToo movement.<sup>96</sup> Local 11’s efforts to pass “panic button” ordinances in multiple cities in Southern California have been made possible by the political space created by workers who have spoken out.<sup>97</sup> At the same time, these efforts demonstrate the critical importance of worker organizing, collective power, and labor laws that foster and protect organizing for addressing an issue that is commonly understood as within the realm of “identity politics,” and within the jurisdiction of antidiscrimination law and its individual rights framework.

In these campaigns, labor lawyers have played crucial roles in drafting legislation, developing messaging to the public, collaborating with workers who have experienced harassment and organizers to file strategic lawsuits, and sustaining the impact of individual legal claims by opposing nondisclosure agreements in settlements. While the examples in this Part pertain specifically to la-

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ditions’ conducive to ‘the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being.’”).

94. Josh Eidelson, *Hotels Add ‘Panic Buttons’ To Protect Housekeepers from Guests*, BLOOMBERG (Dec. 13, 2017), <https://www.bloomberg.com/news/articles/2017-12-13/hotels-add-panic-buttons-to-protect-housekeepers-from-guests> [<https://perma.cc/3H4V-2899>].
95. Stephanie Zacharek, Eliana Dockterman & Haley Sweetland Edwards, *Person of the Year 2017: The Silence Breakers*, TIME (2017), <http://time.com/time-person-of-the-year-2017-silence-breakers> [<https://perma.cc/EJ8C-8K8Q>].
96. Susan Chira & Catrin Einhorn, *The #MeToo Movement: Blue-Collar Women Ask, ‘What About Us?’*, N.Y. TIMES (Dec. 20, 2017), <https://www.nytimes.com/2017/12/20/us/the-metoo-moment-blue-collar-women-ask-what-about-us.html> [<https://perma.cc/3CWX-4P63>]; Michel Martin, *Service Industry Worker Speaks on Sexual Harassment*, NAT’L PUB. RADIO (Dec. 21, 2017), <https://www.npr.org/2017/12/21/572699226/women-in-low-wage-jobs-speak-on-sexual-harassment> [<https://perma.cc/4EWN-4KBP>].
97. Hugo Martin, *Workers at Terranea Resort and Trump Golf Club Want ‘Panic Buttons’ in Case of Sexual Assaults*, L.A. TIMES (Feb. 26, 2018), <http://www.latimes.com/business/la-fi-hotel-panic-button-20180226-story.html> [<https://perma.cc/X39P-4968>] (detailing Local 11’s efforts to pass an ordinance in Rancho Palos Verdes, California); Judith Lewis Mernit, *Under the Radar: Hospitality Workers Battle Sexual Harassment Daily*, CAP. & MAIN (Dec. 18, 2017), <https://capitalandmain.com/under-the-radar-hospitality-workers-fight-sexual-harassment-daily-1218> [<https://perma.cc/99S6-YL7Y>] (detailing efforts in Long Beach, California).

bor lawyering, they aim to model the type of analysis that can translate a commitment to strategic left politics into concrete forms of lawyering practice in any area. As a broad and inclusive progressive movement grows and gains momentum, a shared perspective among public interest lawyers in different fields will be a tremendous asset to aligning various strands of that movement into a cohesive and powerful whole.

## CONCLUSION

“Public interest law” defines so many progressive lawyers’ experiences, yet is largely taken for granted. Interrogating the meaning of public interest law is worth the effort, and is incumbent on lawyers who share a commitment to making society more just, fair, and equal. As progressive lawyers, our training and experiences give us a special perspective into how people are subjugated by political and legal systems. We are also equipped with a set of technical skills that can be a boon to any political effort. Whether our full power and promise will be realized depends on our ability to consciously shape the field of public interest law towards a commitment to building left political power: the capacity to effectuate the fundamental structural transformations of society necessary to achieve justice and equality for all. The present is deeply troubling—yet sparks of radical potential can be seen everywhere. Public interest law must live up to the moment.

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