

DON'T MOURN — REORGANIZE! AN INTRODUCTION TO THE NEXT WAVE ORGANIZING SYMPOSIUM ISSUE

SETH D. HARRIS*

In 2005, only 7.8% of workers in the private sector of the United States economy were union members.¹ This is the lowest private-sector union density rate since the U.S. Bureau of Labor Statistics began collecting comparable data in 1983.² While 36.5% of public-sector workers were union members, only one-fifth of American workers are employed by government.³ Thus, while the absolute number of workers who are union members and the absolute number of workers represented by unions increased slightly in 2005, this small change of direction cannot rewrite the larger story of a continuing and consistent decline that has lasted for decades.⁴ Rather, the 2005 union density statistics are merely the latest chapter in a long narrative about the decline of union power in the private-sector workplace, traditionally organized industries, the American economy, and American political life.

* Associate Professor of Law and Director, Labor & Employment Law Programs, New York Law School. B.S., Cornell University's School of Industrial & Labor Relations, 1983. J.D., New York University School of Law, 1990. My colleagues Lenni Benson, Carlin Meyer, Frank Munger, Beth Noveck, David Johnson, and Chris Kendall each made important contributions to the success of the Next Wave Organizing Symposium. Carbonell Fellows Abbey Gruber and Amelia Baker and my assistant Jamie Wenger were equally essential to the success of the Symposium and many other events in 2004-05. I dedicate this introduction to the organizers whose work inspired the Next Wave Organizing Symposium. I hope this issue does them justice, as they struggle to assure justice for workers throughout our country.

1. News Release, U.S. Bureau of Labor Statistics, Union Members in 2005 (Jan. 20, 2006), *available at* <http://www.bls.gov/news.release/union2.nr0.htm>. About 1.6 million workers benefitted from union representation without becoming union members. *Id.*

2. *See id.*

3. This estimate is produced by comparing total private employment data with government employment data drawn from the most recent current employment survey. *See* U.S. Bureau of Labor Statistics, Employment, Hours, and Earnings from the Current Employment Statistics Survey (National), <http://data.bls.gov/cgi-bin/surveymost?ce> (last visited Oct. 18, 2005).

4. *See* News Release, U.S. Bureau of Labor Statistics, Union Affiliation of Employed Wage and Salary Workers by Selected Characteristics (Jan. 20, 2006), *available at* <http://www.bls.gov/news.release/union2.t01.htm>.

Despite the declining union density rate, workers still have good reason to organize themselves into unions. Pressured by globalization, new technologies, and flagging regulation of the labor market, real wages for the large percentage of workers who have a high-school diploma or less education, particularly men, have been flat or declining for the past three decades.⁵ A smaller percentage of workers had employer-provided health care in 2003 than in 1979 and the rate of coverage was the lowest it has been in those three decades.⁶ The incidence of employer-provided pensions has declined to a lesser degree since 1979,⁷ but there has been a much steeper decline in the number of workers who have stable, predictable defined-benefit plans.⁸ And workplace discrimination remains a stubborn and persistent obstacle to equal employment opportunity for large segments of the American workforce.⁹

Even workers' yearning for an effective voice in the governance of their workplace has not waned. Substantial evidence suggests that workers would like to be represented in the workplace and that a large plurality of unorganized workers would join unions if given the chance.¹⁰ Nonetheless, workers have not been organizing in numbers large enough to sustain or build unions' power.

5. LAWRENCE MISHEL, ET AL., *THE STATE OF WORKING AMERICA 2004/2005*, 152 tbl.2.17, 154 tbl.2.d18 (2003); U.S. Census Bureau, *Educational Attainment of Civilians 16 Years and Over in Labor Force, by Age, Sex, Race, and Hispanic Origin: 2004*, tbl.5 (March 2005), <http://www.census.gov/population/socdemo/education/cps2004/tab05-01.pdf>. Among civilians in the labor force, fully 62% have some college education, but not a college degree, or less education.

6. MISHEL ET AL., *supra* note 5, at 137.

7. *Id.* at 137-41.

8. John Turner et al., *Defining Participation in Defined Contribution Pension Plans*, 126 MONTHLY LAB. REV., Aug. 2003, at 36 (discussing data from 1984 through 1998 showing the steep decline in defined-benefit plan enrollments and a steep increase in defined-contribution plan enrollments).

9. Nearly 80,000 charges of employment discrimination were filed with the U.S. Equal Employment Opportunity Commission in Fiscal Year 2004. U.S. Equal Employment Opportunity Commission, *Charge Statistics - FY 1992 Through FY 2004*, <http://www.eeoc.gov/stats/charges.html> (last visited Feb. 20, 2006). Within a reasonable margin of error, the number of charges has been roughly consistent for more than a decade. *Id.*

10. See RICHARD B. FREEMAN & JOEL ROGERS, *WHAT WORKERS WANT* 140-55 (1999) (providing survey data demonstrating, among other things, that the overwhelming majority of employees would like to have an independent employee organization representing them in the workplace).

Several explanations have been offered for this chasm between workers' interests and desires on the one hand, and unions' organizing success rates on the other hand. A group of important unions, assigning some responsibility to the union movement's failure to commit itself fully to organizing new members, recently quit the AFL-CIO to re-focus their resources on organizing.¹¹ Many labor law scholars lay the blame squarely at the feet of misdirected and "ossified" American labor laws which empower employers to deter their employees from unionizing and frustrate workers' efforts to organize.¹² Other scholars have focused instead on the economic shocks that struck the American economy in the 1980s and 1990s as a result of globalization, technology, deregulation, and other forces.¹³

11. See Ron Fournier, *A Third of Unionized Labor Breaks from AFL-CIO*, STAR-LEDGER (NEWARK, NJ), July 26, 2005, at 3; Will Lester, *UFCW Decides to Bolt the AFL-CIO*, ASSOCIATED PRESS, July 29, 2005. See also Steven Greenhouse, *4th Union Quits AFL-CIO in a Dispute Over Organizing*, N.Y. TIMES, Sept. 15, 2005, at A14; Steven Greenhouse, *United Farm Workers Quit A.F.L.-C.I.O.*, N.Y. TIMES, Jan. 13, 2006, at A14; Change to Win, Change to Win Home Page, <http://www.changetowin.org> (last visited Jan. 10, 2006). The Change to Win Federation, an alternative labor federation to the AFL-CIO, consists of six unions that have disaffiliated from the AFL-CIO — the Service Employees International Union, the International Brotherhood of Teamsters, the United Food and Commercial Workers International Union, the United Farm Workers, the United Brotherhood of Carpenters and Joiners of America, and UNITE/HERE — and one union, the Laborers International Union, that maintains affiliations with both federations. *Id.* See generally Robert B. Reich, *Divided They'll Stand — and Maybe Taller*, WASH. POST, July 29, 2005, Bus. Section (former U.S. Secretary of Labor discussing some of the economic and strategic trends underlying the AFL-CIO split).

12. See, e.g., JAMES B. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* 26-27, 30, 47 (1983); PAUL WEILER, *GOVERNING THE WORKPLACE* 10-11, 13-15 (1990); Cynthia Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527 (2002); Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1795 (1983). Some scholars have made this argument by suggesting alternative organizing approaches under the existing labor law regime. See, e.g., CHARLES J. MORRIS, *THE BLUE EAGLE AT WORK: RECLAIMING DEMOCRATIC RIGHTS IN THE AMERICAN WORKPLACE* (2004) (arguing that unions should pursue minority representation in workplaces rather than exclusively seeking to represent majorities within bargaining units as authorized by Section 9 of the National Labor Relations Act).

13. See, e.g., PAUL OSTERMAN, *SECURING PROSPERITY: THE AMERICAN LABOR MARKET: HOW IT HAS CHANGED AND WHAT TO DO ABOUT IT* (1999) (analyzing changes in the employee-employer relationship in light of "the growing use of labor without perquisites on a 'contingent' basis, new organizational strategies that diminish the need for middle managers, technological innovations . . . and the eroding threat of union organization"); PAUL OSTERMAN, ET AL., *WORKING IN AMERICA: A BLUEPRINT FOR THE NEW LABOR MARKET* (2001) (creating a "coherent intellectual framework for thinking about

But there is another story about workers and organizing that can be obscured by debate over declining union density and its causes. Despite all of the forces arrayed against them, workers are organizing. They may not be organizing in the same way, or organizing the same people, or pursuing precisely the same goals. Nonetheless, workers are organizing into labor unions and into new types of worker organizations that look and function quite differently from traditional unions. On January 27 and 28, 2005, New York Law School's Labor & Employment Law Program, in cooperation with the Justice Action Center and the Institute for Information Law & Policy, presented the Next Wave Organizing Symposium to help bring together worker organizers, trade union officials, technologists, students, and scholars in law, industrial relations, economics, public policy, and other fields — that is, to combine the worlds of practice and theory — to tell this story and assess its meaning.

More specifically, the purpose of the Next Wave Organizing Symposium was to seek answers to three questions. First, are the same workers who have been the traditional targets of organizing efforts also the targets of new organizing efforts, or are worker organizers redefining who is a “worker” or an “employee”? Second, are worker organizers using the same tactics they have employed in the past, or are they using new technologies and other tools and tactics in new ways? Third, are the goals of organizing efforts the same or have they changed? Are worker organizations pursuing increased bargaining power against a particular employer or in a labor market, or have their efforts expanded to encompass other social and economic goals?

The Next Wave Organizing Symposium and this symposium issue are not the first word on workers' continued efforts to organize. Jim Brudney recently described unions' use of voluntary agreements with employers for card-check recognition and neutrality during organizing drives to evade the pitfalls and delays associated

and understanding what was new in the American job market” — in light of the sustained prosperity of the 1990s — “and what were the implications of the changed situation for public policy”); KATHERINE V. W. STONE, *FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE* (2004) (discussing labor policy in the digital era).

with the National Labor Relations Act's (NLRA) formal processes.¹⁴ Next Wave Symposium panelist Jennifer Gordon has documented her experience founding and leading an immigrant worker center in suburban New York to redress conditions in "suburban sweatshops."¹⁵ Janice Fine, another Next Wave Symposium panelist, has been among the first to document the increasing number and types of immigrant worker centers and other non-union worker organizations across the United States.¹⁶ And Alan Hyde, yet a third Next Wave Symposium panelist, has addressed the "tetralogy" of organizing low-wage service workers in New York City.¹⁷

The goal of the Next Wave Organizing Symposium was to expand the body of knowledge about workers' organizing and the organizations they have constructed to which these authors and others have already contributed. It was also to offer some scholarly insights into developments in worker organizing and, in places, to propose how worker organizers might maximize their effectiveness.

Charles Heckscher's article *Organizations, Movements, and Networks* advances the thesis that the nature of organizations and movements has changed and that workers' organizing must change as well.¹⁸ Heckscher argues that, with the increasing decentralization and process-orientation of employers, worker organizations should de-emphasize traditional strategies of collecting workers into mass organizations in favor of systematic alliances and tactics like "swarming."¹⁹ His article offers a historical perspective on worker organizations, but also proposes how worker organizations can create networks to increase their effectiveness in the future.

Fred Feinstein, a former General Counsel of the National Labor Relations Board, writes in his article *Renewing and Maintaining*

14. See James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819 (2005).

15. See JENNIFER GORDON, *SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS* (2005).

16. See Janice Fine, *Worker Centers: Organizing Communities at the Edge of the Dream*, 50 N.Y.L. SCH. L. REV. 417 (2005-2006).

17. See Alan Hyde, *Who Speaks for the Working Poor?: A Preliminary Look at the Emerging Tetralogy of Representation of Low-Wage Service Workers*, 13 CORNELL J.L. & PUB. POL'Y 599 (2004).

18. See Charles Heckscher, *Organizations, Movements, and Networks*, 50 N.Y.L. SCH. L. REV. 313 (2005-2006).

19. *Id.* at 331.

Union Vitality: New Approaches to Union Growth about how individual labor unions and the AFL-CIO have adjusted their organizing behavior to the realities of labor law, the new economy, and shifting employer tactics and public sentiments.²⁰ Feinstein considers new strategies and tactics to increase the number of workers joining traditional unions.²¹ He also discusses new organizations created by the union movement that do not engage in collective bargaining, but represent workers in the political arena and, in some cases, their workplaces.²² New York Law School (NYLS) student Lauren Snyder profiles one such new organization: Working America, the AFL-CIO's community political outreach program.²³

Danielle van Jaarsveld's article *Overcoming Obstacles to Worker Representation: Insights from the Temporary Agency Workforce* closely examines another non-traditional, union-organized structure which, in this case, focuses on "contingent workers" who do not find protection within the existing labor law framework: the Washington Alliance of Technology Workers (WashTech), organized by the Communications Workers of America (CWA), AFL-CIO.²⁴ Van Jaarsveld uses her case study to propose answers to two larger questions: (1) Without access to collective bargaining, how can contingent workers find protection in the workplace? (2) What kind of strategies are suited to the representation of contingent workers?²⁵

Alan Hyde's article *New Institutions for Worker Representation in the United States: Theoretical Issues*, serves as a useful bridge from the union movement's organizing efforts to worker organizing efforts by other organizations and groups of workers.²⁶ Hyde creates a valuable taxonomy for the various forms of non-union worker organizations — Hyde calls them "Alternative Worker Organizations" to distinguish them from traditional labor unions — that have been

20. See Fred Feinstein, *Renewing and Maintaining Union Vitality: New Approaches to Union Growth*, 50 N.Y.L. SCH. L. REV. 337 (2005-2006).

21. See *id.* at 338-39.

22. See *id.* at 349.

23. See Lauren Snyder, Organization Profile, *Working America*, 50 N.Y.L. SCH. L. REV. 589 (2005-2006).

24. See Danielle D. van Jaarsveld, *Overcoming Obstacles to Worker Representation: Insights from the Temporary Agency Workforce*, 50 N.Y.L. SCH. L. REV. 355 (2005-2006).

25. See generally *id.*

26. See Alan Hyde, *New Institutions for Worker Representation in the United States: Some Theoretical Issues*, 50 N.Y.L. SCH. L. REV. 385 (2005-2006).

organized in the United States.²⁷ Working from his categorical structure, Hyde considers the real and perceived obstacles facing these organizations' endeavors, including the legal regimes within which they operate.²⁸

NYLS graduate Helena Lynch profiles the Industrial Areas Foundation, a community organizing project founded by Saul Alinsky, which is among the oldest of the non-union worker and community organizations represented at the Next Wave Organizing Symposium.²⁹ NYLS students Sarah Kelly and Christine Tramontano profile Working Today (more recently known as the "Freelancers Union"), which is among the newest non-union worker organizations.³⁰ Working Today uses a benefits model to organize "independent contractors" who fall outside the definition of "employee" used in labor law and many employment laws.³¹

Janice Fine's article *Worker Centers: Organizing Communities at the Edge of the Dream* gives definition to one of the most important worker organizing phenomena that has occurred outside the union movement: the rising number and effectiveness of immigrant workers centers.³² Fine profiles nine immigrant worker centers as case studies for the much larger group of such centers she has identified, but she also undertakes a broader effort to describe immigrant workers centers, their origins, functions, structures, memberships, roles in the immigrant communities that foster them, and the contexts from which they arose and in which they operate.³³ She also offers a frank assessment of their strengths and weaknesses along with proposals for their improvement.³⁴ Fine's article in this symposium issue is a prelude to the publication of a study which it summarizes.

Victor Narro's article *Impacting Next Wave Organizing: Creative Campaign Strategies of Los Angeles Worker Centers* also considers immi-

27. *See id.* at 385.

28. *See generally id.*

29. *See* Helena Lynch, Organization Profile, *Industrial Areas Foundation*, 50 N.Y.L. SCH. L. REV. 571 (2005-2006).

30. *See* Sarah N. Kelly & Christine Tramontano, Organization Profile, *Working Today*, 50 N.Y.L. SCH. L. REV. 597 (2005-2006).

31. *Id.* at 601.

32. *See* Fine, *supra* 16.

33. *See id.*

34. *See id.* at 451-63.

grant worker centers.³⁵ Narro contributes four case studies: three studies of organizing campaigns by immigrant worker centers in Los Angeles and a separate effort to effect public policy by a coalition of immigrants' rights advocates.³⁶ These studies assess the effectiveness of these campaigns and the viability of immigrant worker centers' strategies. NYLS student Joshua Leonardi profiles the National Employment Law Project which, among other things, serves as something like an informal general counsel and legal advisor to many immigrant worker centers.³⁷ NYLS students Heather Volik and Rosanna Kreychman profile the AFL-CIO's Immigrant Workers Project which also provides technical and legal assistance to immigrant organizing efforts and advises labor union leaders on questions pertaining to immigration and organizing immigrant workers.³⁸ NYLS graduate Emily Stein profiles the Workplace Project, an immigrant worker center on New York's Long Island which was founded by Next Wave Organizing Symposium panelist Jennifer Gordon.³⁹

Jim Pope presented the closing keynote address at the Next Wave Organizing Symposium. His article, *Next Wave Organizing and the Shift to a New Paradigm of Labor Law*, provides a provocative conclusion to this symposium issue.⁴⁰ In essence, Pope considers the diverse worker organizing efforts described in the other panelists' presentations and seeks to interpret their meaning and find a guiding, even unifying, principle.⁴¹ In the process, he directly asks and answers the question of whether there is a "next wave" of worker organizing and, to the extent there is, how it might usher in a new era of reform for American labor law.⁴² Pope finds no dominant

35. See Victor Narro, *Impacting Next Wave Organizing: Creative Campaign Strategies of Los Angeles Worker Centers*, 50 N.Y.L. SCH. L. REV. 465 (2005-2006).

36. See *id.*

37. See Joshua N. Leonardi, Organization Profile, *National Employment Law Project*, 50 N.Y.L. SCH. L. REV. 579 (2005-2006).

38. See Rosanna M. Kreychman & Heather H. Volik, Organization Profile, *Immigrant Workers Project*, 50 N.Y.L. SCH. L. REV. 561 (2005-2006).

39. See Emily Stein, Organization Profile, *The Workplace Project*, 50 N.Y.L. SCH. L. REV. 607 (2005-2006).

40. See Jim Pope, *Next Wave Organizing and the Shift to a New Paradigm of Labor Law*, 50 N.Y.L. SCH. L. REV. 515 (2005-2006).

41. See *id.*

42. See *id.*

paradigm in the new forms and strategies of worker organizing that have emerged to date.⁴³ Instead, he proposes his own paradigm for the future of worker organizing rooted in the constitutional principle of freedom of association which encompasses all of the organizing forms and structures discussed in this volume.⁴⁴ In Pope's view, "[t]he animating principle of this paradigm is that workers — and not employers or government — should determine how, with whom, and in what forms workers organize."⁴⁵

In sum, the Next Wave Organizing Symposium and the articles contained in this symposium issue offer some answers to the three questions posed above. First, worker organizers, ranging from immigrant worker centers to the Industrial Areas Foundation⁴⁶ to the AFL-CIO's Working America,⁴⁷ are redefining "worker" and "employee." Their efforts to aggregate workers' individual power into collective power are not constrained by the NLRA's cribbed definition of "employee."⁴⁸ Further, the workers they target differ from organization to organization.⁴⁹ Second, worker organizers are using new tactics.⁵⁰ Some rely on new technologies, but others represent innovative new organizing models like the benefits-model employed by Working Today.⁵¹ Finally, the goals of worker organizing range broadly from efforts to achieve particular outcomes in a labor market to public policy initiatives, like those of California's immigrant worker centers,⁵² to efforts that more closely resemble racial and ethnic civil rights struggles than traditional union organizing.

Thus, an important lesson of the Next Wave Organizing Symposium is that the metaphor of a "wave" may be too limiting.

43. *See id.* at 530.

44. *See id.* at 534.

45. *Id.* at 535.

46. *See* Lynch, *supra* note 29.

47. *See* Synder, *supra* note 23.

48. *See* 29 U.S.C. § 152(3) (2000).

49. *Compare e.g.* Fine, *supra* note 16 (analyzing the rise in worker centers, which target immigrant and low-wage workers), *and* Narro, *supra* note 35 (assessing the viability of immigrant worker centers in improving the lives of low-income immigrant workers) *with* van Jaarsveld, *supra* note 24 (discussing labor law and employment regulations affecting high-tech contingent workers).

50. *See generally, e.g.,* Feinstein, *supra* note 20; Fine, *supra* note 16.

51. *See* Kelly & Tramontano, *supra* note 30.

52. *See* Narro, *supra* note 35.

Worker organizations in the twenty-first century are not a single mass cresting toward one identifiable destination. Instead, they have diverse organizational forms, targets, methods, and goals. In other words, workers are finding a host of ways to organize themselves in the workplace and beyond. And this symposium issue tells part of their story.