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OCCUPY OUR OCCUPATIONS: WHY “WE ARE THE 99%” RESONATES WITH WORKING PEOPLE AND WHAT WE CAN DO TO FIX THE AMERICAN WORKPLACE

Sarah Leberstein* & Anastasia Christman**

INTRODUCTION

The experts have named “Occupy” 2011’s word of the year,¹ even as the path for the Occupy Wall Street (OWS) movement itself is un-
clear. Protest sites throughout the country are threatened with closure, and recent polling shows that a slim majority of respondents see their physical presence as a public nuisance. The same polls however, show that between forty and forty-eight percent of respondents continue to see OWS as representing the frustrations of most Americans. By coining the phrase “We Are the 99%,” OWS has distilled a general sense of lost equilibrium such that even four months after its start, OWS remains able to “occupy” the popular imagination of a significant portion of the public. As The New York Times observed,


3. Rasmussen Reports, supra note 2; Connelly, supra note 2.
OWS took a sentiment “in the air” and converted it into “simple math.”

Although most onlookers are not pitching tents at an Occupy camp, they are nevertheless experiencing the division between the 1% and the 99% every day in their occupations. Workers at all levels are feeling precarious and exposed, and their ability to defend their labor rights and bargain collectively to set workplace standards is under attack. OWS’s early assertion that the movement represents “all people who feel wronged by the corporate forces of the world” resonated with the suspicion among millions of U.S. workers that employment no longer provides certainty today or promise for tomorrow. Indeed, workers in the United States have less relative economic mobility—the ability to move outside the economic class of one’s

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5. In the context of the workplace, we embrace the metaphorical power of the “99%” label—even if statistically many of those who do not earn enough to be at the very top of the income ladder nevertheless enjoy more financial stability—in part, because it reflects the self-reported flattening of class distinctions among a population that overwhelmingly defines itself as “middle-class,” and in part, because it reflects the commonly shared disconnect between the professions that place people in the top tiers and those that keep others in the lower tiers. As Paul Krugman has pointed out, “43 percent of the super-elite are executives at nonfinancial companies, 18 percent are in finance and another 12 percent are lawyers or in real estate. And these are not, to put it mildly, professions in which there is a clear relationship between someone’s income and his economic contribution.” Paul Krugman, We are the 99%, N.Y. TIMES, Nov. 24, 2011, at A35.


8. In 2011, the Pew Economic Mobility Project polled respondents on their sense of their own economic future and that of the country. Less than one-third felt confident in its own financial situation, and more than half rated the national economy as poor. Fifty-nine percent believe it will be harder for their children to move up the income ladder, and eighty percent believe that the government does an ineffective job of helping poor and middle-class Americans. See Poll 2011: Economic Mobility and the American Dream—Where Do We Stand in the Wake of the Great Recession?, ECON. MOBILITY PROJECT http://www.economicmobility.org/economicmobility/poll2011 (last visited Mar. 5, 2012).
parents—than in most other industrial nations.\(^9\) At the same time, legislative changes to safety net programs and increasingly hostile rhetoric against those who depend upon them have signaled to workers that they are on their own.

Even before the Great Recession, workers struggling with stagnant wages and stalled mobility were confronted by an idealized “meritocracy” that suggested their failure to rise was due to flaws in their character rather than a system where the rules were stacked against them.\(^10\) Even now, several years into the recovery, an unprecedented number of workers are feeling the stigma. The Great Recession came on the heels of another slow “jobless” recovery; from 2000 to 2007, average annual job growth was only 0.6%,\(^11\) leaving millions un- or under-employed and providing no pressure to increase the wages of those still at work.\(^12\) The jobs that are being added to the economy are concentrated in higher-wage skilled professions or lower-wage jobs, while mid-wage jobs like machinists, kindergarten teachers, and sales representatives accounted for only 6.2% of net employment growth between 2001 and 2008.\(^13\) This new hourglass economic model squeezes out any promise of economic mobility for most workers.\(^14\)

Even with the start of this most recent “recovery,” wage growth and job growth stagnated. Between the second quarter of 2009, when

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12. The Bureau of Labor Statistics calculates the unemployment rate using a household survey asking respondents if they are currently in the labor force, meaning if they are working or actively looking for work. This number does not include those who continue to want work, but have become “discouraged” and are no longer actively seeking work. This also does not include those who are involuntarily working only part-time, or those who have been compelled to accept work below their skills level rendering them “under-employed.” For more details, see BUREAU OF LABOR STATISTICS, U.S. DEPT OF LABOR, HOW THE GOVERNMENT MEASURES UNEMPLOYMENT, http://www.bls.gov/cps/cps_hrgm.htm (last visited Mar. 5, 2012).


the recovery began, and the fourth quarter of 2010, national income rose by $528 billion, with the vast majority of that increase—$464 billion—going to pretax corporate profits and just $7 billion going to aggregate wages and salaries (after accounting for inflation). In contrast, in the recovery that began in 1991, 50% of the growth in national income went to wages and salaries during the first six quarters after the recession ended, while corporate profits actually fell by 1% during that period. That this “recovery” has disproportionately favored corporations over workers may help to explain why such a large swath of the workforce feels left behind. The social compact whereby Americans believed that both the opportunity for prosperity and the burdens of economic change would be widely shared is in shreds, making working people especially responsive to OWS’s rallying cry of “the 99%.”

In this Article, we review some of the methods by which corporations and their allies have diminished workers’ leverage in the workplace, providing decades worth of lived experiences that ratify the OWS critique. We also suggest concrete policy solutions to rebuild the workplace as a point of opportunity, to “re-occupy” our occupations. Worker and community organizations have taken the lead in challenging workplace insecurity and injustice, though the path to broad coalition work remains unmapped. As we move into the third year of the purported economic recovery and the election season opens the dialogue on what kind of economy we want as a nation, these case studies in policy design suggest ideas to take “occupy” from the word of the year to a solid economic plan.

I. WORKERS ARE FALLING BEHIND

A. Running Faster to Stay in Place

Long before the first tents were set up, even before the Great Recession, working people were working harder just to keep their heads above water. Between 1973 and 2007, productivity (the output per hour) went up by 83%, while pay for the median worker increased by


16. Id.
only 10%. Had typical wages been in line with productivity increases, by 2005, workers would have seen a 6 to 70% rise in their paychecks. These lost dollars have added up; researchers estimate that in the first decade of the twenty-first century alone, the failure of wages to keep up with productivity increases has cost workers more than $200 billion in lost labor compensation.

Wages have stagnated as a result. For two decades, high-school educated workers in particular saw miniscule wage increases; in the private sector their paychecks rose just 4.8%, and those in state government struggled with a barely perceptible 2.6% growth. The federal minimum wage, theoretically the floor that upholds workers’ wages and provides them some level of leverage in negotiating their pay, has increased only five times since the late 1960s. Because federal legislation fails to index minimum wage to rising costs of living, the minimum wage now stands at roughly two-thirds the value it had it 1968 and is less than 40% of the average wage. To compensate for stagnant wages, families depend ever more heavily on multiple wage earners, entering into the “two-income trap” in which adults—


21. The minimum wage under the Fair Labor Standards Act has been changed and expanded many times since it was originally passed in 1938. In 1961, Congress passed amendments that increased the minimum for previously covered workers from $1.00 to $1.25 by 1963. A 1966 amendment took the minimum wage from $1.00 to $1.60 over the course of 5 years. In 1974, Congress amended the law again to increase the rate to $3.35 by 1981. Amendments in 1996 brought the pay level to $5.15 by 1997, after which Congress failed to increase the minimum wage for a full decade. It was most recently raised through the Fair Minimum Wage Act of 2007, which increased the minimum wage from $5.15 to $7.25 in three phases. See History of Changes to the Minimum Wage Law, U.S. DEPT LABOR, http://www.dol.gov/whd/min wage/coverage.htm (last visited Mar. 5, 2012).

especially women—cannot afford to quit their jobs, but find that increased costs for child care and transportation mean they cannot really afford to keep them either.\(^{23}\)

Some pin the blame for stagnant wages on American workers’ lack of skills and education, arguing that these alleged deficiencies make them unable to compete in the modern economy.\(^{24}\) And indeed, the income gap between skilled and unskilled labor has grown exponentially as earnings for those with college degrees dramatically outpace those of workers without post-secondary education, adding pressure for working-class families to send children to university. By 2009, this college wage premium had risen to 84\%.\(^ {25}\) These premiums in earnings come with a steep price; since the 1990s, tuition and fees at public universities have grown by almost 130\%,\(^ {26}\) with the result that graduates can see repayments that consume more than 15\% of their income. In an international context, the United States is “clearly the worst place to be” for low-income high-education debt graduates.\(^ {27}\) Many OWS activists have called for student debt forgiveness, noting that because it is non-dischargeable, loan debt can follow a borrower for years.\(^ {28}\)


\(^{24}\) Ironically, during the 1970s, sociologists, economists, and policy makers fretted that American workers were overeducated for the job market, a position they dramatically reversed in the 1980s and 1990s. For a review of this literature, see Michael J. Handel, Skills Mismatch in the Labor Market, 29 Ann. Rev. Sociol. 135 (2003). As researchers at the Political Economy Research Institute have pointed out, however, of the thirty occupations with the largest growth, twenty-one do not require more than a high school degree, and Department of Labor projections estimate that sixty-eight percent of jobs in 2016 will be accessible to workers with a high school degree or less. See John Miller & Jeannette Wicks-Lim, Unemployment: A Jobs Deficit or a Skills Deficit?, Dollars & Sense 9, 10 (Jan.–Feb. 2011), http://www.peri.umass.edu/fileadmin/pdf/other_publication_types/magazine___journal_articles/ds-janfeb2011--miller-wicks-lim.pdf.


Sadly, taking on these debt burdens doesn’t guarantee a job. Unemployment for recent graduates with a bachelor’s degree is just under 9%, with holders of degrees in architecture, information systems, and the fine arts averaging over 10% unemployment.29 Furthermore, the benefits of higher educations are not spread equally across occupations, with the greatest rewards concentrated amongst managerial and health professionals. Nor do the benefits accrue equally across race and gender lines. In fact, women need to have a doctoral degree to earn as much as men with a bachelor’s degree.30 On average African Americans’ lifetime earnings are 13 to 16% less than their Caucasian counterparts, a discrepancy that increases to 23% less for those with professional degrees.31

B. Where Have All the Good Jobs Gone?

Even now, in the third year of the “recovery,” job growth remains sluggish. According to the Department of Labor (U.S. DOL), in December 2011, the total unemployed, including those out of work, discouraged workers who have stopped looking for jobs, and those employed only part-time for economic reasons, remained at 15.2%.32 Early data indicates that while many mid-wage jobs were lost during the recent recession, lower-wage industries are returning more quickly.33 The federal government predicts that some mid-wage professions that suffered significantly in the recession, for example architecture and engineering, may only barely recover their 2006 employment levels by 2020, while occupations generally classified as lower-wage, such as personal care aides and home health aides, are predicted to

31. Id. at 11.
have the largest percentage growth over the next decade. By 2018, the U.S. DOL expects the fastest growing occupational groups to include home health aides (with a projected growth of 50%), home care aides (46%), food preparation workers (15%), and medical orderlies and attendants (19%). This pattern is not new. Between 1980 and 2005, the number of U.S. labor hours in service occupations—jobs that typically entail caring for or assisting others like home health care aides, child care workers, janitors, or food service workers—grew by 35%. As an economist pointed out at the time, “[T]he jobs we are creating pack less of a punch for the economy.... With less income, there is less spending and less growth.”

Low-wage jobs carry additional financial burdens for the worker beyond low wages. If employers in these occupations offer health care plans, they typically demand high deductibles, cover only a small proportion of their workforce, or impose long waiting periods to qualify for coverage. In 2010, nearly one-third of working-age adults spent 10% or more of their income on premiums or out-of-pocket medical care costs, an increase of 10% over 2001. Forty-four million people are currently trying to pay off medical debt, with one-quarter carrying more than $4000 in debt. As a result, researchers estimate that in 2007, more than six out of every ten bankruptcies came as a

40. Id. at 9.
result of lost income due to illness or mortgaging a home to pay medical bills, an increase of almost 50% since 2001.41

Similarly, most low-wage workers will be on their own once they are too old for the workplace. As of 2008, only 53.2% of private-sector workers had an employer-sponsored retirement plan,42 with only 20% in a defined benefit pension plan.43 This pattern is especially true for low-income, part-time, young workers at small firms. According to one recent study, “fewer than 40 percent of private sector workers in the bottom income quartile work for a firm that sponsors a retirement plan.”44 Even the fortunate few with defined benefit plans have seen dramatic drops in their funds’ status, an average of 30% in 2008.45 Between October 2007 and 2008, the value of equity assets in defined benefit and 401(k) accounts dropped by about $4 trillion.46 These shortfalls combined with the lost value of most older Americans’ largest asset, their homes, has placed 51% of all households—and a dismaying 60% of low income households—“at risk” of being unable to maintain their pre-retirement standard of living.47 This issue does not affect only older workers; the Center for Retirement Research notes that barring dramatic changes in the economy, the greatest number of “at risk” households are, in fact, those of Generation X-ers who currently have lower wealth-to-income ratios than their elders.48


44. CALABRESE, supra note 42, at 4.


48. See id. at 2.
C. Wage Theft and the Decline of the Organizations that Fight It

It comes as little surprise that low-wage workers are often cheated out of the pay they earn. But the extent of the problem is surprising. A survey of low-wage workers in three large U.S. cities showed that 26% of workers were paid less than the legally required minimum wage, and more than three quarters were not paid required overtime.49 Government agencies charged with protecting workers from this wage theft have been starved of resources; the budgets for the four key U.S. DOL regulatory agencies ensuring occupational safety, fair pay, and federal contract compliance have been essentially flat since the late 1970s.50 One study estimates that the resulting diminished regulatory staff coupled with the growth of establishments has resulted in a decline in the rate of investigations per establishment of more than 50%.51 For the many workers who are not covered by federal protections, or who would find making claims at the state level more efficient than at the federal, the situation is equally grim. Since 2007, most states have reduced the number of full time employees dedicated to wage and hour enforcement or have instituted furloughs among this staff,52 and researchers have found that many states are less than rigorous in enforcing state-level laws that protect low-wage workers.53

Lost wages is not a problem affecting only low-wage workers. Many mid- and upper-wage workers are similarly affected by their employers’ efforts to keep wages down. Entire industries have made concerted efforts to lower labor costs by bilking workers of their pay.


51. Id. at 6.


In 2010, the Department of Justice filed complaints against several high-tech brand-name corporate giants, including Google, Apple, Adobe, and Intel, stating that agreements between the companies reduced competition for highly-skilled employees and made it impossible for them to leverage their knowledge and training for better wages.54 Despite the complaint and the proposed settlement, workers in Silicon Valley remain wary and fearful, unwilling to talk about their own work conditions lest it prove to be “career suicide.”55

Overworked and underfunded public agencies struggle to keep up with the problem of lost wages at the same time that labor unions, which also help workers fight unfair conditions, are under virulent attack. A recent analysis of union elections found that in 57% of cases employers threatened to close the plant, in just over 30% of cases they discharged workers, and in 47% of cases they threatened to cut wages and benefits.56 Here, too, elected leaders are threatening the funding and authority of regulators who would protect workers’ right to organize. In 2011 alone, union opponents in Congress introduced or passed bills or amendments designed to defund the National Labor Relations Board; five would limit workers’ rights to free and fair elections, and eleven would limit the body’s ability to enforce rules and regulations.57

Even workers whose ability to collectively bargain seemed secure now find themselves under attack. Right-wing economists and politicians decry public sector unions as a threat to the sovereignty of the state.58 In numerous states, public sector workers are being told they must take pay and benefit cuts, and furloughs in order to protect public services, even as states give an estimated $70 billion a year in subsidies to private industries with few accountability measures to guar-

54. Press Release, Dep’t of Justice, Office of Public Affairs, Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements (Sept. 24, 2010).
56. KATE BRONFENBRENNER, ECON. POL’Y INST., NO HOLDS BARRED: THE INTENSIFICATION OF EMPLOYER OPPOSITION TO ORGANIZING 235 (May 20, 2009).
57. Bridges-Curry, supra note 6.
antee promises of jobs. As New Jersey Governor Chris Christie opined, “there can no longer be two classes of citizens: one that receives rich health and pension benefits, and all the rest who are left to pay for them.” In Wisconsin, Ohio, and Indiana, workers are engaged in battle against legislators seeking to end their right to bargain collectively. Governors in New York, California, and Massachusetts have all used language that posits public employees and taxpayers as two separate entities with conflicting interests.

The recent attacks on public sector unions reveal an underlying race and gender bias. As a recent study points out, the public sector “is the single most important source of employment for African Americans.” Indeed, African Americans are 30% more likely to be employed in the public sector. Further, the exemptions from politicians’ attacks are telling. In Wisconsin, 70% of law enforcement personnel and 96% of firefighters are male. Conversely, 80% of teachers and 95% of nurses, who were not exempted from the law, are women.

Many observers have struggled to understand the cause of declining union density, but comparisons across countries reveal that the


63. Id.


65. Id.

single greatest predictor for low union density may be political opposition to them. These efforts not only contribute to the declining number of American workers represented by unions, now at 14.8 million members or 11.8% of the workforce, but also call into question the basic premises of due process, free speech, and self-governance.

II. THE DECLINE OF STANDARD WORK

Although U.S. workers might shake their heads at the term “non-standard work,” the term the rest of the English-speaking world uses would trigger nods of recognition: “precarious work.” Increasingly, we have come to accept work that is insecure, uncertain, poorly paid, and which lacks even basic wage or safety protections. Employers embrace new employment models in the name of “flexibility,” which all too often leave workers in an ambiguous status and make claiming lost or stolen wages difficult at best.

A. You Don’t Work Here Anymore, Now Get to Work

Businesses’ increased emphasis on “flexibility” in all industries—from manufacturing to retail, high-tech, back office customer service, and higher education—means that millions of workers do not have a long-term relationship with their employer. Instead, numerous for-profit “labor market intermediaries” control workers’ day-by-day workplace, effectively “leasing” them back to the firms for which they perform labor, and leaving them unsure who carries responsibility for workers compensation, tax withholding, and unemployment insurance. By the early 1970s, “temp agencies” won new state laws that made them statutory employers rather than “employment agencies,”

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Not Taken . . . Yet: U.S. Labor and the Current Economic Crisis, 14 WORKING USA 73 (2011).


71. For an overview of temporary work as a management strategy, see Erin Hatton, The Temp Economy: From Kelly Girls to Permatemps in Postwar America (2011).
exempting them from many state regulations and making it almost impossible for temporary employees to organize. By 2008, as temporary work grew in ever more highly skilled positions, this employment model affected more than 2.3 million workers. Companies have come to see “temporary” workers as a permanent part of their workforce, entering into long-term contracts with agencies and allowing the agencies in practice to become an extension of the company human resources department by performing the hiring, firing, and even payroll functions. As legal scholars have pointed out, these practices limit the security of all workers by reducing pressure to raise wages and benefits and by relieving employers of legal obligations to their own workforce.

In related practices, employers are increasingly shifting their workforces off their books by misclassifying workers as “independent contractors” to evade responsibility for workplace laws and to create confusion among workers. Numerous state and federal studies have shown that approximately 10 to 19% of employers may be misclassifying workers as independent contractors, with the levels in construction work as high as 30%. Despite federal and state government crackdowns on this tactic, large employers in many sectors continue to use this scheme, including FedEx Ground, landscaping companies and construction, building services, port trucking, and home health care, to name a few.


75. Francoise Carre & Randall Wilson, Univ. of Massachusetts, Boston, Ctr. for Soc. Pol’y, The Social and Economic Costs of Employee Misclassification in Construction (2004); see also Michael P. Kelsay & James I. Sturgeon, Dep’t of Econ., Univ. of Missouri-Kansas City, The Economic Costs of Employee Misclassification in the State of Indiana (2010). For information on other state reports, see http://www.carpenters.org/misclassification/key_studies.html.


By issuing workers an IRS 1099 independent contractor form instead of a W-2, or by paying the employee off the books, and providing no tax forms or tax reporting and withholding, employers can argue they are off the hook for any rule protecting an “employee.” This includes even the most basic rights to minimum wage and overtime premium pay, health and safety protections, job-protected family and medical leave, antidiscrimination laws, and the right to bargain collectively and join a union. Misclassifying employers stand to save upwards of 30% of their payroll costs, including employer-side FICA and FUTA tax obligations, workers compensation, and state taxes paid for “employees.”

The test to determine if a worker is truly an independent contractor is complicated, and procedures vary from state to state. Nevertheless, workers might find themselves confronted with legal documents that affirm their independent status with little explanation of what that term means for them. The practice dissuades many work-


81. See, e.g., Lee’s Industries, Inc., Case No. 4-CA-36904, Decisions and Orders of the National Labor Relations Board (N.L.R.B. Feb. 25, 2010).


85. See for instance, the form that workers must sign in Rhode Island for the Department of Labor and Training. STATE OF RHODE ISLAND, DEPT OF LABOR AND TRAINING, DIV. OF WORKERS’ COMPENSATION, NOTICE OF DESIGNATION AS INDEPENDENT CONTRACTOR PURSUANT TO R.I.G.L § 28-29-17.1 (2006), available at
ers from ever attempting to exercise their rights. In fact, they may assume they have none simply because of the label their employer has given them. Whether the affected workers are garment workers, farm laborers, warehouse workers, or janitors bilked by a fly-by-night contractor, construction workers, home health aides or nurses denied unemployment insurance benefits when they are laid-off, or computer software technicians, or television writers attempting to recoup overtime pay, the employer’s mechanisms and the effect on the workers are often surprisingly similar across sectors. Workers at opposite ends of the socio-economic spectrum may be forced into the same take-it-or-leave-it deals when looking for a job—and face the same practical and legal burdens when they later attempt to stake a claim to the social-safety net benefits or wage-and-hour protections that they have been cheated of by their employers.

Not only is the scope of these problems broad, the practices have become so rampant in certain industries that they have fueled wholesale shifts from middle-class, family-supporting jobs to work that pays poverty-level wages with no benefits. For example, over the past three decades, the port trucking industry has undergone a dramatic transformation; large unionized companies that once provided workers with decent wages and benefits now “contract” with truckers classified as independent contractors. The worker declares that he is an independent contractor and signs away his right to workers’ compensation benefits, but the form does not include an explanation of how one determines true independent contractor status meaning that the worker must rely on the employer to do so.


87. See, e.g., Torres-Lopez v. May, 111 F.3d 633, 636 (9th Cir. 1997); Antenor v. D&S Farms, 88 F.3d 925, 927 (11th Cir. 1996).


90. See, e.g., Coke v. Long Island Care at Home, Ltd., 376 F.3d 118, 130 (2d. Cir. 2004), rev’d on other grounds, 551 U.S. 158 (2007) (holding that home care attendant working for agency employer who placed workers in individual homes can sue for unpaid wages).

sified as independent contractors who bear the burden of buying or leasing and maintaining their trucks, have little bargaining power, and seldom receive benefits like health insurance. Earnings for port truckers have plummeted during this time to just 65% of the national average for truck drivers, and below or close to the poverty level in many regions.

Corporations that employ these practices cheat not only their own workers, but taxpayers at large, draining local, state and federal coffers at the expense of corporate profits, and undermining vital safety net programs. Moreover, these practices cost taxpayers in lost social security, unemployment, and other taxes. A 2009 Government Accountability Office report estimated that independent contractor misclassification kept $2.72 billion out of federal coffers in 2006, and states report that they are losing tens-of-millions to hundreds-of-millions of dollars annually in income tax revenues and workers’ compensation and unemployment insurance contributions.

B. Losing Your Job is “Just a New Way of Doing International Business.”

Ironically, one instance when low-wage service workers may feel more secure than their higher-skilled counterparts is in debates about sending jobs out of the country. The 2004 presidential campaign put the growing practice of sending jobs overseas, or “offshoring,” into the spotlight. That year, a survey of businesses showed that 86% of employers planned to outsource more technology work in the next twelve months. With political leaders telling Americans that off-
shoring jobs was just a new way of doing international trade, and business leaders telling them to stop “whining” about the practice, workers had little reason for optimism. In fact, by 2009, outsourcing had become a $500 billion global industry. An industry study concluded that companies will soon offshore as many as 800,000 back office administrative, human resources, procurement, finance, and information technology jobs, shifting almost $30 million from wages into company coffers. Others predict that by 2015, as many as 3.3 million jobs could be sent overseas with a loss of $136 billion in wages for US workers.

Even workers at the highest end of the pay scale have reason to be fearful. Through the recession, legal services have increasingly been outsourced to overseas companies charging well under $100 per hour, and law firms are hiring lawyers on short-term contracts paying as little as $15 an hour. Similarly, an engineer may find his employer expects him to compete in wages against one who earns 80 to 88% less in Shanghai or India. Even college professors, the very emblem of a safe, liberal, and elite profession, may find some aspects of their jobs outsourced overseas or to low-priced online operations including grading, lecturing, and even curriculum design. Tax laws

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100. Press Release, Hackett Group, Hackett: Offshoring of Back Office Jobs Is Accelerating; Global 1000 to Move More than 350,000 Jobs over Next Two Years (Jan. 6, 2009).


that give corporations tax breaks for moving jobs overseas and allow
deductions for capital costs for new equipment for offshore facilities
send the message to employers and workers that long-term commit-
ments to American workers are not in a company’s best interest.

III. A DISINTEGRATING SAFETY NET

As workers are buffeted by the rise of low-wage jobs, the decline of
workplace stability, and widespread wage theft, they are also con-
fronted by unemployment numbers that are nearly unprecedented in
their size and longevity. The specter of hordes of eager replacement
workers, coupled with threats to funding for unemployment insurance
(UI) benefits, make it difficult for workers to protest unfair working
conditions confidently. While the economy is slowly creating new
jobs, as of January 2012, more than 7.3 million people were claiming
unemployment benefits with millions more involuntarily working
only part-time, working at jobs well below their skill level, or so dis-
couraged that they have dropped out of the system entirely. This re-
cover has been marked by long-term unemployment, a circumstance
that hit older workers and workers of color especially hard.

UI benefits have been critical in supporting the slow recovery; since 2009, more than seventeen million unemployed workers applied
for and received these benefits, allowing them to put nearly $180 bil-
lion into their local economies. Although these benefits are hardly
generous (state benefits averaged only $300 per week), they kept
3.4 million families out of poverty in 2010, allowed workers to care
for their families, and assessed the best options for finding remunera-
tive work. With only 3.5 million job openings at the end of 2011 (the


106. U.S. DEP’T OF LABOR, UNEMPLOYMENT INSURANCE WEEKLY CLAIMS REPORT

107. GERALD MAYER, CONGRESSIONAL RESEARCH SERV., THE TREND IN LONG-
TERM UNEMPLOYMENT AND CHARACTERISTICS OF WORKERS UNEMPLOYED FOR
MORE THAN 99 WEEKS 13 (Dec. 20, 2010).

108. NAT’L EMP. LAW PROJECT, HANGING ON BY A THREAD 3 (2011), available at
http://nelp.3cdn.net/68172c0fee66b3e294_czn6iiviu.pdf.

109. NAT’L EMP. LAW PROJECT, HOLIDAY MESSAGE FROM HOUSE OF REPRESENT-
ATIVES TO LONG-TERM UNEMPLOYED: ‘TIS BETTER TO ABANDON YOU THAN TO

110. ARLOC SHERMAN, CTR. ON BUDGET AND POL’Y PRIORITIES, POVERTY AND
FINANCIAL DISTRESS WOULD HAVE BEEN SUBSTANTIALLY WORSE IN 2010 WITHOUT
GOVERNMENT ACTION, NEW CENSUS DATA SHOW 1 (Nov. 7, 2011), available at
latest data available at this time), it becomes clear that without this lifeline many families would suffer terribly.

Nevertheless, recipients of UI benefits have been subjected to harsh criticism. One lawmaker recently cited the need to “get those people out of the slacker rolls,” while others have called for mandatory drug testing claiming that many unemployed were “more or less sitting at home getting stoned.” In a situation all too familiar to recipients of other safety net benefits like the Supplemental Nutrition Assistance Program or Temporary Assistance to Needy Families, the long-term unemployed find themselves hectored by business leaders, elected officials, and the media to take “personal responsibility” for their own wellbeing while the public safety net is stigmatized as a “moral hazard.” Again, the effect of this language is to pit one group of workers against another, to appeal to one group as “taxpayers” and the other as “swindlers,” and suppress dialogues like that inspired by OWS that question the efficacy of the system.

IV. REBUILDING WORK AS A PATHWAY TO OPPORTUNITY

The long history of union organizing and gradual implementation of regulatory workplace protections teaches us that no job is inherently “good.” Although lawmakers call for a return to quality manufac-

turing jobs, the family wages, safety rules, health care benefits, and pensions that accompanied these jobs were all hard-fought victories. The narrative of the “99%” can be empowering in allowing widely disparate groups of workers to understand the systemic nature of the injustices they experience in their own workplace. It will, however, be for naught if they do not also embrace the activism of the “Occupy” frame and seek to redress those injustices. Members of the OWS movement are moving to confront harmful policies by challenging unfair foreclosures and submitting comments on proposals for Wall Street reforms. Already we are seeing the candidacy of the first “Occupier” in a Pennsylvania race for Congress. Here we lay out policy suggestions that may redress some of the unjust employment practices that have whittled away the perception of work as a pathway to opportunity and would level the playing field for workers to retake some security in their workplaces.

A. Raise the Minimum Wage and End Outdated Exclusions

Eight states have already taken action by legislating annual increases to their minimum wage rates indexed to inflation, with several other states and cities considering similar bills. In 2012, more than one million workers in Arizona, Colorado, Florida, Montana, Ohio, Oregon, Vermont, and Washington saw increases in their wages to

119. Nate Kleinman, an active participant in the Occupy Philadelphia movement, has clearly stated that Occupy itself does not make political endorsements, but that the experiences he has had in the Occupy movement may shape his platform and candidacy. Dylan Byers, The First Occupy Candidate: Nate Kleinman, POLITICO (Jan. 24, 2012, 12:57 PM), http://www.politico.com/blogs/media/2012/01/the-first-occupy-candidate-nate-kleinman-112057.html.
between $7.64 and $9.04 per hour. The Economic Policy Institute has estimated that these increases will increase wages for directly and indirectly affected workers by more than $578 million and will add the equivalent of over 3000 jobs. But according to the Bureau of Labor Statistics, nearly 3.8 million workers still work at or below the minimum wage, often in fast growing industries like retail. A full-time worker earning $7.25 an hour brings home about $15,000 a year, barely above the federal poverty line for a family of two people. Unfortunately, the federal minimum wage has fallen far below its historic value; currently it is $7.25 per hour and would have to be set at over $10 per hour to achieve the value it held in 1968. Furthermore, fast-growing low-wage jobs like home care continue to be excluded from the Fair Labor Standards Act by overbroad U.S. DOL regulations, rendering 2.5 million workers ineligible for basic protections like the minimum wage and overtime pay.

Furthermore, in recognition of changes in our economy and the increasing prevalence of low-wage jobs, lawmakers need to repeal or narrow exclusions in minimum wage and overtime standards that have driven down standards in key sectors such as agriculture, domestic and home care work, and food service. Several states have ended or narrowed exemptions in conjunction with campaigns to raise the state minimum wage, as Missouri did in the course of a 2006 state ballot initiative. The initiative raised the minimum wage while closing


123. PHI, SENATE BRIEFING ON HOME CARE WORKERS, U.S. HOME CARE WORKFORCE: BASIC FACTS (Oct. 6, 2011). The U.S. DOL issued a Notice of Proposed Rulemaking on December 27, 2011, that would revise the companionship and live-in worker regulations under the Fair Labor Standards Act to clarify job descriptions for these workers, describe activities and duties that go beyond the companionship function, change record-keeping requirements and make clear that employees of third party staffing agencies are not exempt from minimum wage and overtime protections.
exclusions for home care and domestic workers. Ohio and Arizona also saw similar campaigns in 2006. In 2010, New York passed the nation’s first Domestic Worker Bill of Rights, marking the culmination of a six year organizing campaign led by Domestic Workers United and the New York Domestic Workers Justice Coalition. The new law closes gaps in the Minimum Wage Act that had resulted in substandard protections for domestic workers, and extends new protections to this group, including annual paid time off. A similar effort is now underway in California. And in late 2011, the U.S. DOL published proposed rules that would significantly narrow the companionship exemption, thereby extending minimum wage and overtime protections to the vast majority of our nation’s 2.5 million home care workers. Initiated by the National Domestic Workers Alliance, and now involving dozens of organizing and advocacy groups and unions, the Caring Across Generations campaign has backed the U.S. DOL’s proposed companionship rules as part of a bold and comprehensive set of policy reforms to improve standards in the home care industry for both recipients of home care services and for the workers. The campaign has had remarkable success at bringing together a wide range of workers and activists who have suffered the effects of inadequate funding for these vital services, and has taken a lead on generating comments in support of the proposed rule. Unsurprisingly, however, the campaign faces continual challenges in balancing the sometimes competing interests of groups an-
ious about how limited Medicaid, Medicare, and other public funding will be spent.

B. End Tax Incentives for Outsourcing American Jobs and Create Incentives for U.S. Job Creation

We agree with recent calls to end the tax privileges that accrue to companies that outsource jobs.\textsuperscript{131} “Deferral” rules that allow corporations to delay paying taxes on overseas income until they bring it to the United States encourages corporations to keep it in overseas tax havens. Corporations use the funds they bring back not for hiring, but to benefit shareholders and owners.\textsuperscript{132} Companies should not be able to deduct the costs of moving their operations abroad; instead the deduction for investment in plants and equipment in businesses located in the United States and deductions for research and development should be reauthorized. Surveys of business owners have found that 95% wanted to implement growth plans, but only 53% were able to obtain funding.\textsuperscript{133} Researchers estimate that commercial banks are carrying $1.4 trillion in excess capital that, if deployed strategically, could enable private businesses and the public sector to create as many as nineteen million new jobs over three years.\textsuperscript{134}

We must, however, also support programs that create the demand for new business innovation and subsequent new jobs. Addressing the shortcomings in the Property Assessed Clean Energy Program,\textsuperscript{135}

\begin{itemize}
\item \textsuperscript{133} JOHN K. PAGLIA, PEPPERDINE PRIVATE CAPITAL MARKETS PROJECT, STATE OF SMALL BUSINESS REPORT 7 (Fall 2011), available at www.bschool.pepperdine.edu/privatecapital.
\item \textsuperscript{135} The Property Assessed Clean Energy Programs (PACE) have been authorized in dozens of states and would allow property owners to repay the costs for ener-
the Home Star and Build Star\textsuperscript{136} programs would create demand for energy efficiency retrofits and the wide range of equipment they entail. Reauthorizing the Surface Transportation Act, adequately funding the Federal Highway Administration, and supporting investments in new forms of public transit would similarly create demand for construction jobs that cannot be outsourced, but would also support research, architecture and engineering jobs that come with advances in research and design. The BlueGreen Alliance, a coalition of labor unions and environmental groups, is not only drafting and supporting strong policy proposals to advance these goals, but has also launched state-based grassroots organizations to advocate for quality jobs that will stay in the U.S.\textsuperscript{137} In Portland, Oregon, Clean Energy Works Portland advocated for and won a Community Workforce Agreement covering residential retrofit projects that mandated contractors pay fair wages and ensure access to jobs for hard-hit local residents. The pilot project was so successful that a state-wide initiative is being planned with the goal of upgrading 6000 homes and creating or retaining 1300 jobs.\textsuperscript{138}

C. Support Strong Enforcement of Labor Standards and Hold Employers Accountable

Workers need stronger tools to fight wage theft, and employers need stronger disincentives to steal from their workers. First, in order to encourage employers’ compliance with core wage and hour laws,
states, and cities (where permitted), should raise the stakes for employers by enhancing monetary and other penalties for violations of wage and hour laws. Strategies to better compensate workers, deter violators, and facilitate legal action include: establishing triple damages provisions for minimum wage, overtime, and other related violations; increasing civil fines against employers and making them non-discretionary; allowing workers to recover attorneys' fee and costs in litigation to encourage lawyers to assist workers in filing lawsuits; and lengthening the deadlines for wage claims.

Second, to allow workers to enforce their rights, workers need better protection from retaliation to ensure they have the protection they need to make complaints. State Departments of Labor should: allow anonymous complaints or third parties, such as unions or workers centers, to file complaints; be required to keep the identities of complaining workers confidential for as long as possible during investigations; and permit one worker to file a complaint on behalf of a group of affected workers. Further protection from retaliation can be provided by amending state anti-retaliation laws to create legal protection that any adverse or discriminatory action taken by an employer within a certain period of time after the worker makes a complaint is presumed to be retaliatory.

Third, workers' rights advocates have made significant progress in targeting abuses by collaborating with state departments of labor, state attorneys general, and the U.S. DOL. Advocates can, and should, encourage public enforcement agencies to affirmatively target and investigate high-violation industries through unannounced audits and industry specific approaches, regardless of whether individual workers bring complaints. Following passage of the Domestic Worker Bill of Rights in New York, Domestic Workers United, other domestic workers rights organizations, and allies began meeting with the New York Department of Labor to educate investigators and other key staff on common patterns of abuse and barriers to compliance; to discuss the most effective ways to inform workers and employers about the new law; and to urge the agency to prioritize claims brought by domestic workers to enforce the new provisions. At the national level, a coalition of advocates and attorneys has made significant headway in promoting a series of federal reforms to the U.S. DOL, informed by years of experience advocating for workers. The National Employment Law Project's 2010 *Just Pay* report outlines these
key policies, many of which the U.S. DOL has already begun to act upon. Finally, enhancing agency resources or, as is too often the case, fending off attempts to trim staff and budgets, is also key to safeguarding workers’ ability to pursue claims.

D. Stop Independent Contractor Misclassification and Hold Subcontracting Employers Responsible

States have taken the lead in initiating reform efforts to combat independent contractor misclassification and subcontracting abuses by making better use of agency resources to document the problem and coordinate on enforcement and tightening up the rules to ensure employers are held accountable for their employees. Almost half of the states now have a task force or commission to document the problem and better direct enforcement efforts, while many others have strengthened their labor laws to make it harder for employers to avoid compliance. In the last legislative session, Virginia, New Hampshire, and Utah set up commissions to study and coordinate state agency efforts to identify and investigate independent contractor abuses. Several states have proposed laws that would create a presumption of “employee” or “employer” status for those performing or receiving labor or services for a fee, as Massachusetts and other states do. Partially in response to steady campaigning by the United Brotherhood of Carpenters and Joiners and the International Brotherhood of Teamsters, Pennsylvania, Delaware, and Maine passed sector-specific laws targeting industries with rampant independent contractor misclassification, such as construction and de-

livery. A growing number of states are raising the stakes for violators by enabling members of the public to bring suits against lawbreakers and by increasing penalties for misclassification violations. A new Massachusetts law, for example, provides for a private attorney general action against employers that break the workers’ compensation law,\(^{148}\) while Massachusetts,\(^{149}\) Kansas,\(^{150}\) and California\(^{151}\) have all passed laws or proposed laws increasing civil penalties or allowing for the issuance of stop-work orders against lawbreakers.

The federal government is joining the states in tackling independent contractor misclassification, although prospects of federal legislation look less promising than in the states. Two bills have been introduced in Congress: the Payroll Fraud Prevention Act,\(^{152}\) which would amend the recordkeeping requirements of the Fair Labor Standards Act to require employers to keep records relating to non-employees who perform services for remuneration; and the Taxpayer Responsibility, Accountability and Consistency Act,\(^{153}\) which would amend the Internal Revenue Code to tighten up the rules that give employers a “safe harbor” when they misclassify employees as independent contractors. Offering more potential for the near-term, the U.S. DOL has initiated a multi-agency initiative to strengthen and coordinate federal and state efforts to identify and deter employee misclassification.\(^{154}\) The IRS recently announced the launch of the Voluntary Worker Classification Settlement Program,\(^{155}\) which will enable employers to resolve past worker misclassification problems by voluntarily reclassifying their workers prospectively and making a minimal payment covering past payroll tax obligations rather than waiting for an IRS audit.

In addition to these agency and legislative reform efforts, several union campaigns have employed a mix of legislative action, litigation,

\(^{151}\) Cal. Labor Code § 226.8 (West 2006).
\(^{152}\) S. 770, 112th Cong. (2011).
worker organizing, and media outreach to challenge the business models of corporations that misclassify workers as independent contractors or use abusive subcontracting schemes to deny workers’ rights and drive down pay. Of particular note are the Teamsters’ campaign challenging FedEx’s move to classify drivers in its Ground Division as independent contractors (in contrast to the unionized United Parcel Service) and so shift many of the costs of business onto its workforce,156 and Change to Win’s Port Trucking campaign calling attention to the port trucking industry’s move to an independent contractor model.157 Similarly, Warehouse Workers United fights to improve conditions for logistics workers employed in warehouses and distribution centers serving the nation’s largest retailers including, but not limited to, Walmart.158

Yet, even as these advocates make impressive headway in fighting independent contractor misclassification and abusive subcontracting schemes, they face new attacks to roll back protections in this field, including a Maine Executive Order repealing the state’s independent contractor misclassification taskforce,159 and efforts by industry groups to carve out exemptions for their workers from the broad definitions of employee in states labor and employment laws. For example, a 2011 Maryland law160 creates an exemption from the state’s unemployment insurance system for messenger service drivers who have signed an independent contractor agreement with their employer.


Although recent job reports have revealed slow and steady progress in the economy, far too many remain in “jobless” recovery. Many people have been out of work for more than six months and risk being perceived by potential employers as having stagnant skills or being insufficiently motivated. Other, often younger, workers risk delayed attachment to the workforce, a condition that can adversely affect their earning power for decades.161

We have examples of specific programs that have effectively put people back to work after the Great Recession, but must make the commitment to fund and expand them. The Temporary Aid to Needy Families Emergency Fund, created by the American Reinvestment and Recovery Act, reimbursed states for 80% of the costs of subsidizing jobs for low-income workers and placed 260,000 adults and youth in jobs before expiring in September 2010.162 In twenty-three states, laws creating work-sharing programs, avoiding layoffs by cutting the hours for all employees but providing them with a partial weekly unemployment benefit, have been credited with saving 265,000 jobs between 2009 and 2010.163 Similarly, in twenty-eight states, workers can draw on partial UI benefits if their hours are reduced or if they find part-time work;164 in the other states, claimants must be looking for full-time work to qualify for UI.165 Allowing for partial benefits not only makes sense in an economy that still has more than four applicants for every job opening, but also provides at least a small income to affected workers that in turn is spent in their communities. Unfortunately, numerous states were forced to borrow

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165. Id.
money from the federal government to finance their UI programs during the Great Recession; years of poorly financed rainy day funds and numerous employer tax breaks left state governments ill-equipped to address high levels of unemployment. Now states are cutting benefits and duration of benefits for out-of-work families in their time of need.\textsuperscript{166} We must support tax reforms that will allow states to fund UI programs sufficiently to weather future economic downturns without asking workers to shoulder the entire burden.\textsuperscript{167}

\section*{CONCLUSION}

For decades workers have seen conditions deteriorate in the workplace and their right to challenge these declines through regulatory action or union organizing have been undercut. Millions experience circumstances in their daily occupations that have primed them to respond to calls to confront corporate power by “occupying” public space. Workers face concerted efforts by employers to cheat them out of wages, to redefine their employment status, and to game the tax code at the expense of U.S. jobs and public revenues. Politicians defund critical regulatory agencies, pit the interests of workers against the public, rail against public safety net programs, and vilify those who depend upon them during economic downturns. Workers are ready for a framework that emphasizes their common interests and encourages them to band together to take action, making OWS rhetoric appealing and empowering.

But to succeed we must move beyond slogans. Many states and cities have already begun to tackle these problems, often as a result of campaigns by coalitions between workers and community advocates, there is still a long way to go. If we are to reaffirm the power of work to define our sense of well-being and our faith in the promise of opportunity, we must implement more practices that challenge the privileging of corporations and the 1\% over the 99\% of workers. The task is daunting and difficult, and the political power of those who would protect the status quo is strong. Nevertheless, OWS has opened a dialogue about justice—economic and political—in the midst of what


\textsuperscript{167} For the threats to unemployment insurance solvency and moves in the states to reduce benefits, see Claire McKenna & George Wentworth, Nat’l Emp. Law Project, Unraveling the Unemployment Insurance Lifeline (Aug. 2011), available at http://nelp.3cdn.net/833c7eeb782f18dbb3_a5m6b0wvp.pdf.
promises to be a hard-fought electoral season. This confluence of a compelling framework, a critique that resonates with common experience, and an electorate concerned about perpetuating longstanding inequities presents an opportunity to unite the 99% behind efforts to improve our workplaces.