Movements in Crisis: Employee Owned Businesses – A Strategy for Coalition Between Unions and Civil Rights Organizations

Leroy D. Clark
The Catholic University of America, Columbus School of Law

Follow this and additional works at: http://scholarship.law.edu/scholar

Part of the Civil Rights and Discrimination Commons, and the Labor and Employment Law Commons

Recommended Citation
Movements in Crisis: Employee-Owned Businesses—A Strategy for Coalition Between Unions and Civil Rights Organizations

LEROY D. CLARK*

INTRODUCTION

Our country has seen two great movements for justice: one led by labor unions to protect workers, and the other led by civil rights organizations to end racial segregation and discrimination.1 The two movements have had much in common in terms of the tasks that they confronted and the tactics used. Both built organizations based on a growing membership that had little or no financial resources. Both readied their constituency psychologically to demand that discrimination and coercion cease against the organization and its members and, to go much further, demand that there be a significant redress in the imbalance of power. Both movements demanded and secured federal and state legislation, which achieved far-reaching and significant changes to the status quo, bringing fairness and equity into the working and living conditions of practically all Americans. Both profoundly shaped the terms under which all Americans live, even those who have never been active members of either movement. While both movements were occasionally marred by a loss of discipline and lapse into violence, they achieved their major goals primarily through

* Professor of Law, Catholic University Law School. I wish to acknowledge the excellent research and editorial suggestions of Ms. Yvette Brown, of the Law Library at Catholic University Law School.

1. This article will address only the civil rights organizations that worked to end racial segregation of blacks. It is possible that the analyses and prescriptions offered herein would apply with equal force to other minority groups, but this writer is not confident about his knowledge of the current scope and nature of disadvantage suffered by other groups, so the comment is limited.
non-violent resistance and calls for the public to embrace the morality and legitimacy of their goals.

Both movements, however, after many years of great success, have in the last fifteen to twenty years, experienced very sharp constriction in membership, diminution in influence, and an identity crisis in terms of future direction. The early periods of achievements by both movements were greatly reinforced, not only by new legislation, but by successful litigation as well. One can imagine, therefore, that the current period of a search for a new identity might also be positively influenced by creative ideas for new legislation or new legal strategies that address the needs of each movement's constituency.

One might have expected that progressive legal scholars in Critical Legal Studies ("CLS") or Critical Race Theory ("CRT") would have actively addressed this need for new legal initiatives. This writer is concerned about a dysfunctional distance between the writings of those two very visible schools of legal scholarship and the practicing public-interest-oriented bar that would service the labor and Civil Rights movements. CLS scholars have written very powerful analyses in their deconstruction of the current legal order, and they serve as the major critics of the more conservative law and economics school of legal thought. Critical Race Theorists have also written strong analyses of the entrenched and, indeed, unconsciously rooted nature of racism in the law. This writer cannot lay claim to having read all of the literature because it is voluminous. I am convinced, however, by Professor Harold McDougall's argument (found in this issue) that many CRT articles have no strategy of counter-attack or implementation that the progressive bar could work with in legal consultation, legislative reform, or litigation to change the status quo. This writer has


5. Admittedly academics, particularly those in a pre-tenure condition or seeking promotion, are under some pressure to produce work considered of a "theoretical" quality above that which would qualify as simple continuing legal education. One would hope, however, that it does not dictate only writing which is too attenuated from the needs of that portion of the bar that has very limited resources to advance the interests of the Labor and Civil Rights constituency.
Movements In Crisis

elsewhere expressed some doubt about the sweeping attack that Judge Harry T. Edwards made on the CLS school, but there is some legitimacy to his criticism that it has been too remote from the concerns of the practicing bar and the judiciary. Another commentator goes further and accuses the CLS school of virtually abandoning the task of constructing a progressive agenda to address “the most pressing needs of the nation.” Others have expressed similar criticisms of Critical Race Theorists, and at least one scholar wrote explicitly to meet this challenge.

One qualification must be made: the need for legislative reform or constitutionally oriented litigation was much more easily conceived for both the labor movement and the Civil Rights movement in their inception. Workers were largely without any legal protection for their organizing efforts or working conditions prior to passage of legislation such as the National Labor Relations Act (“NLRA”). Cases like Plessy v. Ferguson sustained laws segregating blacks into a functional group of “untouchables,” under the “separate but equal” concept. Leaders of the later created Civil Rights movement clearly knew that the premise of Plessy had to be strategically isolated in litigation and ultimately confronted, as it was in Brown v. Board of Education.

The circumstances confronting blacks and ordinary workers today, as opposed to the early days of the labor and Civil Rights movements, are more ambiguous and freighted with elements of power distributions along class lines. The new environment makes strategy decisions, particularly those with a legal dimension, more difficult. It is, however, precisely because of that greater difficulty that the creative talents of legal scholars are needed to produce viable, achievable initiatives. It is in this spirit that the proposal is made herein for a

---

8. See Gene R. Nichol, Law’s Disengaged Left, 50 J. LEGAL EDUC. 547, 547 (2000) (“[The academic left] has few programs to offer the American people, no platforms for progress. It seems almost proud of its unwillingness to stoop to hope or enterprise.”).
9. See Anthony V. Alfieri, Practicing Community, 107 HARV. L. REV. 1751, 1764 n.12 (1994) (“Critical race scholars have lagged in their analysis of practice [as opposed to theory].”).
10. 163 U.S. 537 (1896).
coalition between the two movements around the development of worker-owned businesses.12

I. LABOR UNION'S ACHIEVEMENTS

As the country was founded, most persons worked in circumstances not conducive to organized unions. There was the black slave population, and many whites were indentured servants bound to years of service before becoming free labor.13 As free laborers, work was often done by guilds of artisans who employed apprentices and sold their products to the public directly.14 The majority of workers worked on small farms, often owned by a single family.15

By the mid-1800s, the industrial revolution was in full swing, and workers increasingly left farms and found employment in mines, factories, and small urban businesses.16 Slavery, which operated indirectly to suppress wages of free laborers, would also end around this time. The changes were more conducive to the development of unions and the use of the collective strength of organization to improve wages and working conditions.

Employers, however, mounted multiple-pronged attacks to disrupt and suppress the growth of unions, seeing them as a threat to employers' control over the workplace and profits. They initiated sophisticated legal challenges to unionization, and succeeded in having the courts hold that unionization was a criminal conspiracy or violated antitrust laws.17 Employers also engaged in “self-help”—they floated black lists amongst themselves of workers who had been fired because the workers evidenced interest in joining a union. Under the infa-

12. This writer has tried to develop other legislative or litigation strategies to address real problems confronting the black community. See Leroy D. Clark, The Future Civil Rights Agenda: Speculation on Litigation, Legislation, and Organization, 38 Cath. U. L. Rev. 795 (1989); Leroy D. Clark, New Directions for the Civil Rights Movement: College Athletics as a Civil Rights Issue, 36 How. L.J. 259 (1993).
13. See Frank Tennenbaum, The Negro in the Americas, in BLACK HISTORY: A REAPPRAISAL 56-75 (Melvin Drimmer ed., 1968); CHARLES B. CRAVER, CAN UNIONS SURVIVE? 10 (1993) (“During the Colonial period, there were relatively few free workers. The great majority of laborers were either slaves or indentured servants.”).
15. In the early 1800s, 80% of workers were self-employed, and by 1950 the majority of workers were employed by the 2 to 3% of the population who owned about half of all private property. See CRAVER, supra note 13, at 55.
16. See id.
17. See Loewe v. Lawlor, 208 U.S. 274 (1908) (holding that secondary boycott is a violation of the antitrust laws); Coronado Coal Co. v. United Mine Workers of Am., 268 U.S. 295 (1925) (holding that organization strike is a criminal conspiracy designed to interfere with interstate commerce).
Movements In Crisis

mous "yellow dog" contracts, employers required workers to agree not to join a union.

Despite the active resistance of employers, unions grew from the 1890s through 1917 due, in part, to the intervention of the federal government, which sought labor peace during World War I. Once federal intervention was withdrawn at the war's end, the employers' tactics began to erode union membership. Union membership in all industries dropped 28% between 1920 and 1923, and an additional 5% from 1923 to 1929.

Organized labor achieved some legislative victories during this period. The Clayton Act, passed in 1914, sought to immunize union strike activity against charges that such activity was in violation of the antitrust laws. That was followed by the Adamson Act in 1916, which required overtime pay after an eight-hour day.

The most peaceful, orderly attempts to organize a union could still, however, be met with employer intimidation. Unions, in response, backed the election of President Franklin D. Roosevelt. Roosevelt's administration, looking desperately to pull the American economy out of the depression begun in 1929, secured passage of the National Labor Relations Act in 1935. This Act protected workers against retaliation for engaging in union activity and required employers to bargain with a union elected by the employees. It was thus a tremendous victory for workers to permit them, with legal protection, to collectively address their working conditions. Union membership went up from 3 million in 1933 to 16.9 million by 1953.

Unions have also been influential in securing legislation that protected workers in general, outside of their formal membership—like

---

18. See Daniel Nelson, Shifting Fortunes: The Rise and Decline of American Labor, From the 1820s to the Present 69-103 (1997). Nelson concludes that the federal pro-union policy during the World War was the "most important development" in the high level of union membership. See id.
19. See id.
23. See generally Craver, supra note 13, at 10-33.
24. See id.
27. See id.
28. See Nelson, supra note 18, at 104.
the Social Security Act, the Fair Labor Standards Act, and in later years, the Economic Opportunity Act of 1964 (anti-poverty legislation) and the Occupational Safety and Health Act of 1971.

II. ACHIEVEMENTS OF CIVIL RIGHTS ORGANIZATIONS

Organizations specifically designed to assist or end discrimination against blacks began roughly within the same time frame as unions; the late 1890s and early 1900s. With the Civil War over, the Thirteenth Amendment formally ended slavery in 1865, and the Fourteenth and Fifteenth Amendments granted equal citizenship rights to freed blacks. For a brief period, between 1866 and 1877 ("Reconstruction"), blacks exercised their rights as citizens and equals. However, with the withdrawal of federal troops in 1877, bitter and resentful southern whites began a campaign to preserve the already subordinated and poor status of blacks and to segregate them. The campaign ranged from organized Ku Klux Klan violence against blacks seeking to vote to formal state legislation separating the races in many aspects of public life, such as schools, primary elections, public accommodations, and even some aspects of private life, like residence and marriage.

The National League on Urban Conditions (now the National Urban League) was created in 1910. The organization was designed to secure employment opportunities and provide training and social service supports for the many blacks leaving the rural South and migrating to cities. The National Association for the Advancement of Colored People ("NAACP") was instituted in 1909 and sought to end racial discrimination against blacks in all aspects of public and private life. The primary techniques of the NAACP, in its incipience, were research and exposure of the disabilities imposed on blacks; lobbying
for protective, anti-discrimination legislation; and instituting litigation against state-imposed segregation as unconstitutional. The public education program was aimed at whites who often did not know, with precision, the oppressive conditions under which blacks lived; but it was also aimed at blacks, through an organ like "The Crisis" magazine, in order to apprise them of the full breadth and depth of segregation.

The litigation program was initially the most successful. NAACP counsel convinced the U.S. Supreme Court to end the exclusion of blacks from juries, from all-white Democratic Party primaries, and from publicly funded graduate professional schools. The litigation was often strategically timed to avoid emotional blocks to acceptance of the demands for equality, thus maximizing the possibility of acceptance. The most important constitutional victory came in Brown when the Court held that states could not continue racial segregation in public schools.

The genius of the black organizational struggle against discrimination, however, came to fruition in the late 1950s and early 1960s. Organizations like the Southern Christian Leadership Conference ("SCLC"), the Student Non-Violent Coordinating Committee ("SNCC"), and the Congress of Racial Equality ("CORE"), mounted a visible, mass-based public protest against racial segregation. The campaign was so successful that not even the still resistant southern bloc in Congress could stop the passage of legislation prohibiting discrimination in public accommodations, voting rights, fair housing, and employment.

The Civil Rights movement may also have indirectly been an incitement to the revival of the women's movement in the 1960s and the

---

41. Legal attacks were made on southern public graduate schools before public elementary, junior high, and high schools because states usually had separate and allegedly equal facilities for blacks in the latter, but they often had no facility for blacks in the former. Integration of graduate professional schools also did not present the specter of black males sitting next to white females, since females were rare in the graduate school context. See Jack Greenberg, Crusaders In The Courts: How A Dedicated Band Of Lawyers Fought for The Civil Rights Revolution 5-6 (1994). The challenge to state prohibition of interracial marriages was one of the last constitutional challenges to be made. See Loving v. Virginia, 388 U.S. 1 (1967).
42. 347 U.S. 483.
growth of unions in the public sector in the 1980s. It also provided an atmosphere in which other groups that experienced disadvantage, like the elderly and the disabled, could mobilize for and attain legal protection.\textsuperscript{47}

III. THE CURRENT CRISIS

The foregoing discussion shows that there were forces arrayed against each movement. Yet, through charismatic leadership mobilizing its constituency, sometimes engaging in creative risk-taking supported by effective litigation, and achieving new legislation, the Civil Rights Movement and the labor movement became potent forces in American life. Moreover, while the basic legislation secured by both movements has sometimes been compromised by judicial interpretation, or subjected to conservative political amendments and counter-legislation, not even the extreme wing of political conservatives would push today for repeal of that basic labor and civil rights legislation.

Yet today, each movement could be described as in crisis, facing charges of impotence and lack of direction. These charges are not merely the sniping of ideological foes of each movement, but are reflected in the current data about the organizations that now comprise each movement.

A. Unions

The situation for unions has become so critical that in 1993, Professor Charles B. Craver published a book entitled “Can Unions Survive?”\textsuperscript{48} There, he detailed the problematic decline in union membership. There was a steady but absolute increase in union membership in the non-agricultural workforce from 1954 to 1980.\textsuperscript{49} In 1970, union membership stood at 19 million and in 1980 at 22 million.\textsuperscript{50} The problem was that the workforce at large was growing at a

\begin{footnotes}
\footnote{The civil rights movement provided the energy, the inspiration, and the model for virtually every effort of social reform that emerged in the remarkable decade of the 1960s. The women’s movement, the anti-war movement, the student movement, the movement to end poverty, the struggle for Indian rights, Chicano rights, and gay rights—none of these would have been conceivable were it not for the driving force of the civil rights movement.}
\footnote{Id.}
\footnote{48. See CRAVER, supra note 13.}
\footnote{49. See id. at 35.}
\footnote{50. See id.}
\end{footnotes}
faster pace than union membership. Thus, union membership, which comprised 35% of the workforce in 1954, declined to 27.3% in 1970, and 23% in 1980.51

During the 1980s things became worse. Union membership declined not only relatively, but also absolutely. By 1990, there were only 16,740,000 members and they comprised only 16.1% of the non-agricultural workforce.52 Moreover, the 16.1% figure was only that high because of a rapid growth of union membership in the public sector. If one discounted union membership in the public sector, unions had organized only 12.1% of private sector employees.53

Membership continued to decline after Professor Craver published his book; union membership as a proportion of the total non-agricultural workforce fell every year from 1983 to 1997.54 Moreover, unionization in the public sector remained 37% for every year between 1997 and 1999.55

The declines in membership have been attributed to a number of factors, some beyond the control of union leadership given the current maximal control which executives have over traditional businesses. For example, union membership decreased by 2 million during the economic recession of the early 1980s.56 However, even after the economy began to revive after 1983, the figures above show that unionization continued to decline.

A partial explanation is that some businesses moved to southern and southwestern states that had so called “right to work” statutes or constitutional provisions.57 Under these laws, even a union elected by a majority of the employees could not require the non-supporting employees to become members.

The most devastating impact on union membership, however, was the export of blue-collar jobs to third world countries.58 These countries had high unemployment—thus U.S. firms could hire labor at wages far below U.S. union scale.59 Unionization, therefore, could not

51. See id.
52. See id.
53. See id.
56. See Nelson, supra note 18, at 150.
57. Eleven of the twenty-one States that have “right-to-work” laws are southern states. See 12 EMP. COORDINATOR (RIA) ¶ LR-35,005 (2002).
58. See Nelson, supra note 18.
59. See id.
take hold in foreign countries with high unemployment and extreme poverty.

Three other factors may have been at play. First, U.S. companies increasingly adopted a style of violating the NLRA by firing, or otherwise retaliating against, employees who expressed an interest in joining a union. The aggressive retaliations intimidated workers, thus dampening support for unions. Moreover, the processes of the National Labor Relations Board ("NLRB") are slow and the penalties too weak to deter employers. A second factor is that the courts (sometimes led by the NLRB) have interpreted the NLRA in ways which were hostile to union organizing. A prime decision in this vein is *NLRB v. Mackay Radio & Telegraph Co.*,61 which allowed employers to hire replacements for striking employees, and to retain them even after the strike is over. A third factor is that a union may win an election, but an employer may still, under the NLRA, lawfully refuse to enter into a collective bargaining agreement; employers refuse to do so approximately 40% of the time.62 This can dampen employees' interest in a union that they see as impotent.

Commentators sympathetic to unions have generally proposed two solutions. The first solution is captured by Professor Paul C. Weiler's proposal that the NLRA be amended to increase the penalties for unfair labor practices by employers, to streamline the processing of cases before the NLRB and to bar employers from permanently replacing striking workers.63 There are serious impediments to this proposal being a resolution of the current dilemma and demise of unions. The almost unbroken history post passage of the NLRA is that employers have achieved the amendments that they sought and unions have not.

The Taft-Hartley Act of 194764 outlawed most forms of the secondary boycott, thus depriving unions of the potent weapon of striking against a company doing business with the employer with whom the union had a labor dispute. The NLRA did not cover public sector


61. 304 U.S. 333 (1938).


63. See Weiler, *Promises to Keep*, supra note 60.

employees or farm workers, and the Taft-Hartley Act added to the exclusion by depriving "independent contractors" and "supervisors" of protection if they formed or joined a union. The net result is that approximately one-half of the workforce is not covered by the NLRA.

The Landrum-Griffin Act of 1959 further prohibited unions from bringing pressure on a primary employer, even through a peacefully obtained agreement with a secondary employer not to do business. Restrictions were also placed on "recognition picketing," which unions had begun to rely upon to force employers to deal with them.

The nadir of organized labor's political weakness was dramatically demonstrated in the defeat of the Labor Reform bill of 1977-78, even though it was only a modest attempt to streamline NLRB procedures and encourage union organizing. Moreover, the bill was defeated when the Democratic Party, which organized labor had steadfastly supported, was in control of both houses of Congress. During the administrations of Reagan-Bush, unions could not muster support in the Senate for an amendment that would bar the hiring of permanent replacements for economic strikers. In more recent times, organized labor was not able to defeat the North American Free Trade Agreement ("NAFTA"), which unions argued would mean a further loss of jobs to Mexico. Then President Bill Clinton, whom unions supported, backed the NAFTA legislation.

Moreover, unions are totally out-gunned on one front—employers have vastly superior financial resources to propagandize against

65. The Supreme Court has expanded the reach of these exclusions. See Allied Chem. & Alkali Workers Local Union No. 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971) (holding that retired employees were not protected under the NLRA because they were no longer seeking employment with their former employer); NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974) (excluding all managerial employees from protected unionization regardless of whether their policy-formulating activities relate to the company's labor relations); NLRB v. Yeshiva Univ., 444 U.S. 672 (1980) (holding that university faculty are considered managerial employees and thus excluded from the NLRA).


67. Unions, at one time, placed economic pressure on an employer (and its employees) by picketing when they did not formally have majority support from current employees. NLRA section 8(b)(7) prohibits such "recognition picketing" when there is another union recognized by the employer, when there has been an election in the preceding twelve months, or when the picketing exceeds thirty days and the union has not filed a petition for an election. See 29 U.S.C. § 158(b)(7).

68. See Nelson, supra note 18, at 153.

69. See id.

specific union initiatives and influence who is elected to political office. Even Democratic politicians, who no longer have grass roots local political clubs upon which to rely, know that they are more vulnerable to opponents who are well financed.\textsuperscript{71}

Given the history outlined above, and the array of forces that the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") must confront to secure amended legislation to enhance traditional union organizing, it is unlikely to be forthcoming from Congress in the near future. Moreover, there is now no clear pro-labor majority on the U.S. Supreme Court that would prompt a re-examination of outstanding anti-union decisions.

A second solution to union problems comes from Professor Charles B. Craver. He suggests that unions must commit more energy and resources to union organizing, both domestically and internationally.\textsuperscript{72} The problem with this solution is that since Craver's writing, unions have committed more resources to traditional organizing. The result has been dismal. Union membership dropped in the year 2000 to 13.5\% of all workers and to a mere 9\% of the private sector.\textsuperscript{73} This writer believes that only fresh approaches (hopefully the one proposed herein) will generate new membership in the private sector.

B. Civil Rights Organizations

A crisis of identity and direction now confronts African American civil rights organizations also, but the crisis has different dimensions from that of labor organizations. The prime problem that civil rights organizations face is defining a current program after enormous, smashing successes.

Civil rights organizations achieved sweeping anti-discrimination legislation, which translated into dramatic improvements in many facets of black life. George Wallace was the last politician openly espousing racial segregation in the early 1960s and even he did an about

\footnotesize{\textsuperscript{71} The top leadership of the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") may not see an amendment of the NLRA as a priority for unions. John J. Sweeney, the current President of the AFL-CIO, once stated that the NLRA had been so totally captured by employers through "power politics and management strategies" that he saw no reason to expend energy on trying to amend the Act. John J. Sweeney, \textit{Is There a Need to Amend the National Labor Relations Act?}, 52 \textit{Fordham L. Rev.} 1142, 1143 (1984). In qualification, his statement was made after the bitter defeat of the Labor Reform Act, and approximately ten years before he assumed the presidency, so it may not represent his current view.

\textsuperscript{72} \textit{See Craver, supra} note 13, at 59-88.

face on the issue towards the end of his political career. This was not a testament to Wallace's moral regeneration, but recognition of the growing black voter strength attributable to the Voting Rights Act. There were other clearly documentable improvements in blacks' conditions and opportunities. Over the last thirty years, blacks have generally reduced the gap between themselves and whites in income, increased their graduation from universities and professional schools, and achieved a wide-ranging residential integration into previously all-white enclaves, like suburbs.

Most importantly, much of this phenomenon of growing and increased racial integration can continue without the energy and resources of civil rights organizations pushing it. The reason: a panoply of federal and state agencies now have the authority to enforce the laws prohibiting racial discrimination in all aspects of public life where it may still exist. Civil rights organizations do not bemoan this outcome; the legislation for which they lobbied, are built in these law enforcement mechanisms. They could not have, on their spare budgets, undertaken the nation-wide enforcement effort that was needed. When this writer joined the NAACP Legal Defense Fund, Inc. ("LDF") in the 1960s to do civil rights litigation, there were only seventeen staff attorneys. We litigated to end segregation in public institutions, such as schools and parks, defended persons charged with civil disobedience who were protesting racial segregation, and even took on cases challenging the death penalty as being disproportionately applied to blacks. When I became the General Counsel of the Equal Employment Opportunity Commission in 1978, I had a staff of over 300 lawyers concentrating solely on employment discrimination.


75. In 1977, the median income of black married couples was $10,666 below that of white married couples ($34,833 versus $45,499). See National Urban League, State Of Black America app. 2 at 211-14 (1999). By 1997, the difference between those two groups had narrowed to $6,726 ($45,372 versus $52,098). See id.

76. The percentage of blacks graduating from college rose from 5.4% in 1960 to 15.4% in 1995, and the percentage of blacks enrolled in law schools grew from 1% in 1960 to 7.5% in 1995. See William G. Bowen & Derek Bok, The Shape of the River: Long Term Consequences of Considering Race in College and University Admissions 9-10 (1998). Attendance at elite institutions also increased: black enrollment in Ivy League colleges rose from 2.3% in 1967 to 6.3% by 1976. See id. at 7.


78. See Greenberg, supra note 41, at 366.
There is still a remaining watchdog role for civil rights organizations, for example, to ensure that enforcement is not diluted or under-financed. There is also a need to protest continuing racial insults not governed by current legislation, such as southern states continuing to fly the confederate flag or racial profiling in which black drivers are disproportionately subjected to police surveillance and stops. These issues are likely to be met with silence by cautious politicians. The main task, however, of the eradication of racial discrimination is now functionally where it ought to be—the job of the government.

This writer does not suggest that covert racial discrimination has disappeared. I only suggest that civil rights organizations need not expend a large quantum of resources on that phenomenon. The organizations have performed their most critical role; they have, through public persuasion, largely convinced white Americans that overt racial discrimination is profoundly wrong and unfair. Thus, it was made illegal. That is the reason the remaining discrimination is now covert.

Besides, this writer speculates that the bulk of covert racial discrimination is likely to be exercised against that part of the black public that is most capable of detecting and objecting to it: the black middle class.79 Whites are likely to try to hoard only those opportunities that have high value, and these are the opportunities that only the black middle class will have the credentials, resources, and capacities to compete for—promotions to a higher status level in employment, purchase of a home in a middle class neighborhood, or admission to a medical school.

There is probably not much racial discrimination operative in who gets the job serving hamburgers in a McDonald’s restaurant. The black poor today are hemmed into racial ghettos created by the lingering effects of the overt practice of racial segregation in housing in the pre-1960s years.80 They, unlike the black middle class, did not have the resources to escape these ghettos, and thus they are trapped in inadequate public schools and lack access to employment, which is

79. This is the view of the black middle class according to polls conducted by Professor Jennifer L. Hochschild. See Henry Louis Gates, Jr., & Cornel West, The Future of the Race 20 (1996) ("Affluent blacks are also more likely [than poor blacks] to see blacks are economically worse off than whites, and to see discrimination as blacks’ most important problem . . . .") (citing Jennifer L. Hochschild, Facing Up To The American Dream: Race, Class, And The Soul Of The Nation (1995)).

 Movements In Crisis

growing in the suburbs. This writer believes that most of their problems today are mediated more by poverty and its collateral effects than by simple racial discrimination. Indeed, if I had one criticism of Professor McDougall’s contribution to this issue it would be that his article describes racism as if it were a phenomenon uniformly experienced by all blacks. There is insufficient attention to the fact that the experiences of the most vulnerable and politically weak blacks (the poor blacks) are now radically different from that of middle class blacks. High rates of incarceration for crime are largely borne by the black poor, not the black middle class. The black poor may be victimized more by class structure than racial structure.

Civil rights organizations, however, have made the black middle class aware of the various laws barring racial discrimination, and that middle class has the sophistication to resort to private counsel or complain to the appropriate officials to generate recuperative action.

The crisis now for civil rights organizations is if racial discrimination is not the main agenda, then what should be? For some civil rights organizations, whose sole or primary modus operandi was protest activity to secure anti-discrimination legislation, the answer has been that they completely folded (for example, SNCC) or fell into a demise of virtual invisibility that was the functional equivalent of folding (for example, SCLC or CORE). The older, more stable and complex organizations, like the NAACP, National Urban League, or the LDF, survived but also began to experience the impact of an identity crisis.

The NAACP, the oldest and largest civil rights organization, experienced a loss in membership that paralleled that of the labor movement. In 1960, NAACP membership comprised 1 million persons. By 1994 the membership dropped 40% to barely 600,000, and the or-

81. See id.
82. See JAMES Q. WILSON & RICHARD J. HERRNSTEIN, CRIME AND HUMAN NATURE 461 (1985). Blacks are about one-eighth of the population but accounted in 1980 for about one-fourth of all those arrested for burglary, larceny, auto theft, and aggravated assault, and among young persons blacks account for about half of those arrested for murder and rape, and for nearly two-thirds of those arrested for robbery. Id.
83. In civil litigation, the general rule is that each side bears its own cost for retaining counsel. However, a number of civil rights statutes require a defendant to pay the plaintiff’s counsel’s fees when the plaintiff prevails. See, e.g., Civil Rights Act of 1964, Title II, § 204(b), 42 U.S.C. § 2000a-3(b) (2002) (attorney’s fees in suits alleging racial discrimination in public accommodations); Civil Rights Act of 1964, Title VII, § 706, 42 U.S.C. § 1988(b) (2002) (attorney’s fees in suits alleging racial discrimination in employment).
ganization announced a 3 million dollar deficit.\footnote{See \textit{Lawrence Otis Graham, Member of the Club: Reflections on Life in a Racially Polarized World} (1995).} Part of the demise in the organization's status and financial situation was due to the incompetent and corrupt leadership of its then Chief Executive Officer Ben Chavis and then Board Chairman William Gibson.\footnote{Chavis was fired by the Board of Directors for the unauthorized use of organization funds to settle a charge of sexual harassment lodged against him. \textit{See Scott Shephard, NAACP Reawakens From Financial Bind, The Atlanta Journal and Constitution, Nov. 27, 1998, at 14A. Several Board members filed suit against Gibson alleging that he had misused $1.4 million in NAACP funds. See \textit{id}.}\footnote{\textit{See id.}}

Kweisi Mfume replaced Chavis in 1996, and Merlie Evers (widow of the slain civil rights organizer, Medgar Evers) defeated Gibson for the Board Chair in an election in 1995 and served until 1998.\footnote{\textit{See id.}} Julian Bond, the former SNCC activist and Georgia State legislator, took over the Chairmanship in 1998.\footnote{\textit{See id.}} The three of them worked hard over the ensuing years, with the result being that the organization returned to a fiscally sound position.

The organization, however, by the year 2001, had a lower national membership total (500,000) than in 1994.\footnote{Lawrence Otis Graham, writing in 1995, made a strenuous criticism of the NAACP as an organization. He said, with its overly long list of programs, it had "spread itself too thin to be consistently successful," and that "reevaluation of NAACP goals is desperately needed."\footnote{\textit{See Lawrence Otis Graham, Member of the Club: Reflections on Life in a Racially Polarized World} (1995).} One wonders if Graham might make the same criticism today. In 2001, the NAACP announced for the first time, a five-year plan focused on black voting power, universal healthcare, improvement of schools and housing, adequate wages, and legislation to deal with the underpinnings of racial discrimination.\footnote{Even the current CEO of the NAACP, Mfume, commented at the organization's July 2001 conference that the NAACP needs to "reinvent itself."\footnote{\textit{See Sykes & Thomas-Lynn, supra note 84.}}} Even the current CEO of the NAACP, Mfume, commented at the organization's July 2001 conference that the NAACP needs to "reinvent itself."\footnote{\textit{See Joe Gyan Jr., NAACP Plan Focuses on Growth, Votes, The Advocate, July 12, 2001, at 1B.}}

The LDF is likewise facing some difficult choices in terms of direction.\footnote{Despite the similarity in name, the NAACP Legal Defense Fund was separated out from the NAACP in 1940. The NAACP engaged in political lobbying, and thus persons could not receive tax deductions for contributions to the organization. Setting up the LDF as a sepa-}
edge litigation that may be beyond cautious public law enforcement officials. This type of litigation was more needed in the early years when anti-discrimination legislation was being defined by the courts. With over thirty-five years of court decisions resolving ambiguities and open questions, however, such litigation would inevitably decrease out of necessity. The leadership of the LDF recognized this crisis of direction and has held conferences around the country, in recent years, inviting knowledgeable persons to comment on and propose lines for future legal activity.

C. The Potential for Coalition: Labor and Civil Rights Organizations

During the late nineteenth and early part of the twentieth centuries there was a fair amount of distance, and even antagonism, between blacks and the labor movement. Unions openly excluded blacks from membership. Indeed, this history of exclusion prompted the NAACP to oppose passage of the NLRA because it created, in effect, a monopoly power in unions over worker representation, but had no provision requiring that union membership be open to all regardless of race. Additionally, agricultural workers and domestic servants were excluded from coverage under the NLRA and during the 1930s, 70% of black workers, were concentrated in these two occupations.

From their perspective, unions were dismayed when employers, jeopardizing the potency and success of a union-led strike, hired black workers as scabs. Blacks also worked for non-unionized employers for lower wages than employers were paying in unionized companies, rate charitable organization, with a separate Board of Directors, solved that problem. See GREENBERG, supra note 41, at 19. The NAACP has, however, always maintained its own in-house legal staff, and the LDF has rendered legal support to civil rights organizations other than the NAACP.

94. Griggs v. Duke Power Co., 401 U.S. 424 (1971), is one of the most important cases in the employment discrimination arena: it was brought by the LDF. Griggs held that illegal discrimination included not only acts deliberately designed to discriminate, but also included neutral practices that had a discriminatory impact on a particular racial or ethnic minority. This requires employers to justify any such practices as necessary to the running of their business. Id. at 432.


96. Agricultural workers and domestic servants were also excluded from other legislation actively sought by organized labor, for example, the Fair Labor Standards Act. See id. at 97.

97. See Ray Marshal, The Negro in Southern Unions, in THE NEGRO AND THE AMERICAN LABOR MOVEMENT 137 (Julius Jacobson ed., 1968) ("Between 1900 and the 1920s numerous Southern coal strikes were broken by Negroes.").
thus indirectly restraining the demands that unions could make for their membership.

The entire union movement was not monolithically hostile to blacks. In the early 1900s, the United Mine Workers Union, then the largest union in the country, began integrating racially.98 From the 1930s on, some CIO unions, like in the automotive industry, began supporting racial integration of union membership.99 Finally, the AFL-CIO gave formal support to passage of the Civil Rights Act of 1964, which outlawed racial discrimination in employment and in union membership. The current top leadership of the labor movement, like ALF-CIO president John Sweeney, is committed to practicing the non-discrimination policy in that legislation. Indeed, recent studies show that black workers are more likely to be members of a union than white workers.100

Thus, with much of the overt antagonism between the two movements having been overcome, they should be ripe for coalition if they can find common goals and methods. Civil rights organizations are now at the juncture, in terms of priorities, where unions have always been: the economic empowerment of the average worker. Civil rights organizations broke down legalized American apartheid, and then successfully integrated blacks, as voters and public officials, into politics. The economic empowerment of blacks is the prime unfinished agenda.

IV. EMPLOYEE-OWNED BUSINESSES: ADVANTAGES FOR BOTH MOVEMENTS

A. Current Problems

Under our current regime, unions have virtually no control over any of the following processes: expansion or relocation of a business locally or abroad, hiring, and contraction of the business via lay-offs of employees or total termination of a business. Indeed, under many collective bargaining agreements there is a “Management Rights” clause, which, expressly or implicitly, reserves control over hiring, layoffs, or total closure of the business for the employer. Court decisions inter-

100. See MANNING MARABLE, BLACK LEADERSHIP 189 (1998).
preting provisions of the NLRA have reinforced management's unilateral control over these functions.\textsuperscript{101}

Layoffs, ostensibly for economic reasons, became a raging phenomenon in the 1980s and early 1990s, prompting some commentators to claim that the "silent pact" between unions and companies not to engage in such activity had been broken. Moreover, lay-offs traditionally affecting only the blue-collar worker began to impact the white-collar managerial and professional workforce.\textsuperscript{102}

Employers, generally, have no incentive to fire a productive worker. Data show, however, that some companies have fired productive employees when they evidence an allegiance to a union. The bottom line is that the de facto unilateral (and even sometimes illegal) control that management now has over hirings, firings, lay-offs, and closure can generate and has generated unemployment for union members or union supporters.\textsuperscript{103}

Blacks historically have absorbed a disproportionate share of unemployment. From 1949 through 1964, blacks had an unemployment rate double that of whites.\textsuperscript{104} The Civil Rights Act of 1964 had a strong impact on lessening employment discrimination and giving blacks access to better paying jobs.\textsuperscript{105} By the 1980s, blacks had 9 billion dollars more per year in real income, adjusted for inflation, than they would have had if they had remained arrayed throughout the economic spectrum as they were prior to passage of the Act.\textsuperscript{106} Al-

\textsuperscript{101} See, e.g., Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263 (1965) (holding that an employer has no duty to bargain with the union about the decision to completely shutdown a business, and it is not a violation of the NLRA even if the shutdown is done solely to escape dealing with the union). The Worker Adjustment and Retraining Act of 1986 requires firms to give sixty days advance notice to employees when they contemplate a plant closing. See Paul C. Weiler, Governing the Workplace: The Future of Labor and Employment 155 (1990) [hereinafter Weiler, Governing the Workplace]. Paul C. Weiler, however, criticizes the legislation as inadequate because it does not guarantee retraining or assignment to a new position or provide for severance benefits. See id.

\textsuperscript{102} See Lind, supra note 74, at 202 ("[I]n 1991, unemployment among managers rose 55%, compared to only 15% among the population as a whole, as a result of corporate downsizing."); Victor G. Devinatz, Office Workers Unite; Labor Day a Holiday for White-Collars, Too, Chicago Tribune, Sept. 1, 2000, at 23 ("[W]hite-collar employees experienced the major brunt of corporate downsizing in the early 1990s, a phenomenon that used to be reserved exclusively for blue-collar employees.").

\textsuperscript{103} See Weiler, Governing the Workplace, supra note 101, at 110-12.

\textsuperscript{104} See Franklin & Moss, supra note 35, at 513.

\textsuperscript{105} Between 1970 and 1990, black employment as police officers, electricians, bank tellers, health officials, and pharmacists doubled or tripled, while the black workforce increased by only 60%. See Andrew Hacker, Two Nations: Black and White, Separate, Hostile, Unequal 121 (1992).

though the unemployment rates of all groups went down during the economic boom period of the 1990s, the unemployment rate of blacks remained double that of whites.\textsuperscript{107}

B. Response of Employee-Owned Businesses to the Current Problems

Current federal legislation has some tax incentives for the development of Employee Stock Ownership Plans ("ESOP").\textsuperscript{108} However, while the legislation permits corporations to donate stock to employees, it does not require them, concomitantly, to share managerial control of the corporation with employees.\textsuperscript{109} In this guise, it is merely a tax advantage for the corporation and another form of income (stock dividends) for employees. This structure of current ESOP is not adequate to meet the ideal of an employee-owned business to which this writing is directed.

What is envisaged here is that all, or a very large percentage of the persons who work in the business, will own all or a controlling share of stock in the business. Most importantly, it presupposes that the employees, through a democratic structure, will maintain control over all of the major and minor decisions as to how the business is to operate, including the conditions for work and supervision.\textsuperscript{110} This


\textsuperscript{108} At the federal level, ESOP is a statutory pension program that invests in employer stock. See 26 U.S.C. § 4975 (1994). A number of requirements are suspended to allow the program to operate; it is, for example, exempt from the requirements of the Employee Retirement Income Security Act of 1974 ("ERISA") that pension plans be diversified, and that only 10\% of a plan’s assets be invested in employer stock. See 29 U.S.C. § 1107(a) (2002). The corporation also has the statutory right to borrow to make the stock purchase on behalf of the employee, which is then held in trust pending repayment of the debt. See Richard L. Doernberg & Jonathan R. Macey, ESOPs and Economic Distortion, 23 HARV. J. ON LEGIS. 103, 107-108 (1986) (documenting these and other facets of ESOP); William R. Levin, The False Promise of Worker Capitalism: Congress and the Leveraged Employee Stock Ownership Plan, 95 YALE L.J. 148, 151-153 (1985) (discussing the statutory setting for ESOP).

\textsuperscript{109} Joseph R. Blasi has criticized the ESOP program as a management manipulated device for getting subsidization without relinquishing any of the power of controlling the business. See JOSEPH R. BLASI, EMPLOYEE OWNERSHIP: REVOLUTION OR RIPOFF? 15-28, 122-57 (1988); see also MARTIN CARNOY & DEREK SHEARER, ECONOMIC DEMOCRACY: THE CHALLENGER OF THE 1980s 134 (1980) ("[E]mployee stock ownership plans . . . turn workers into stock-holders ("capitalists"), but do not, in practice, give workers ownership or management decision-making rights: rather, they put part of workers’ wages at the disposal of management and owners without forcing them to divest control of profits.").

\textsuperscript{110} Nor am I here concerned with slight increases in the degree of participation of employees in determining their working conditions that are the focus of many “quality of working life” experiments. See CARNOY & SHEARER, supra note 109, at 133 ("Participation in decisions about the height of a workbench, the size of the parking lot, or the availability of a coffee machine may
would mean, in places now unionized, that union members would gain control over the processes noted above of hiring, lay-off, and the movement of the business’ capital that are now exclusively under the control of management in an investor-owned business.

What are some of the benefits that could flow from this new structure of employee-ownership? For one, employee-owned businesses need fewer high paid supervisors to monitor and “watch” employees because the employees participate in the profits that are generated by self-discipline and are not shirking work. An employee in an investor-owned business has little incentive to share the ways in which he might work “smarter”—be more productive—with his managers. The typical employee is paid a set wage for the life of the collective bargaining agreement and thus receives no financial benefit from sharing that information. Moreover, he is not likely to make suggestions that can translate into employing him fewer hours. These risks do not necessarily inhere in an employee-owned business.

Secondly, some commentators estimate that investor-owned businesses structurally create more unemployment than employee-owned businesses because they cannot adopt some of the flexibility that can inhere in the latter. The predicted higher level of productivity in an employee-owned business, noted above, can be translated into a lower-priced product or service, enabling the capture of a larger share of the market. A larger share of the market can permit an increase in employment. Some critics of employee-owned businesses argue that such employees would have a tendency to want to “hoard” all of the profits for themselves and not hire additional personnel, but the empirical data does not support such predictions.

Furthermore, the flexibility of an employee-owned business might have prevented the disaster that many black employees suffered when they disproportionately lost jobs during the massive downsizing in the 1980s. When investor-owned firms cut labor costs because of diminished business, it is usually done through lay-offs governed by

\*\*\*

make workers feel better about their jobs, but they do not change the fact that workers can be fired with two weeks’ notice, without explanation or discussion, or that they must answer to the whims of the foreman or manager.”).  
112. See id. at 167 n.22.
seniority. Many blacks, recent hires due to the push of the Civil Rights Act, also had relatively less seniority. Thus a seniority governed lay-off process disproportionately impacted them. This outcome was reinforced by the interpretation of the employment discrimination law that it was not a violation for blacks to be laid off first, even if they had been refused employment on racial grounds before or after the Act was passed.\textsuperscript{114}

An employee-owned business need not be rigidly locked into seniority governed lay-offs, which require only a small group to bear all of the negative consequences. Such a business can, because of its democratic control, more easily adopt the alternative of lowering the income of all employees to ride out any temporary need to reduce costs.

No argument is made here that the transition to employee-owned businesses can totally eliminate unemployment. A fair amount of unemployment between the 1950s and the 1980s was due to a number of economic factors and public policy initiatives, which resulted in a reduced demand for unskilled labor.\textsuperscript{115} Black males, for example, occupy a disproportionate percentage of such unskilled workers.\textsuperscript{116} However, it is also true that factors that generally reduce unemployment, like the booming economy of the 1990s, have operated to reduce unemployment for blacks, including the unskilled.\textsuperscript{117}

Therefore, if employee-owned businesses become more widespread and structure themselves to avoid unemployment, they are likely to protect blacks also. Reducing unemployment is of particular concern to the black community given the fact that this community is so strongly associated with crime; there is a high rate of incarceration for black men; and

\begin{itemize}
\item \textsuperscript{114} See Int'l Bd. of Teamsters v. United States, 431 U.S. 324 (1977) (holding that blacks denied employment before the passage of Title VII of the Civil Rights Act of 1964 cannot claim that a seniority system has an adverse impact on them under the \textit{Griggs} analysis); Firefighters v. Stotts, 467 U.S. 561 (1984) (holding that blacks hired under an affirmative action plan to remedy discrimination in hiring after Title VII was operative are still subject to early lay-offs under the seniority system).
\item \textsuperscript{115} See David Schwartzman, \textit{Black Male Unemployment}, 25 The \textit{Rev. of Black Pol. Econ.} 77 (1997) (noting that the unemployment rate for unskilled workers rose from 5.4% in the 1950s to 10% in the 1980s).
\item \textsuperscript{116} See \textit{id.} at 77. Schwartzman includes service workers, laborers, operatives, and farm workers in the unskilled; 46% of blacks are in that group in comparison to 27% of whites. \textit{See id.}
\item \textsuperscript{117} See \textit{id.} (noting that unemployment of the unskilled fell from 10% in the 1980s, to 7.6% by 1996; the unskilled, however, are still unemployed in the 1990s at a higher level than they were in the 1950s).
\end{itemize}
other disabilities flow from it, such as the single-parent household sunk in poverty.\textsuperscript{118}

The relentless downsizing by investor-owned firms in the 1980s (partly through exporting jobs to low wage countries abroad), and the recession of 1990-92 was not only a problem for blacks, but may also constrain unions in their collective bargaining activities currently. William J. Wilson notes that when unemployment drops as it did in the mid to late 1990s, the rate of voluntary resignations increases, because workers are confident in finding new jobs. However, during the 1990s, the “quit” rate decreased.\textsuperscript{119} Also, wages did not rise during this period, despite the tight labor market. Wilson speculates that the activity of investor-owned firms during the 1980s and early 1990s produced a high level of anxiety in the workforce about security.\textsuperscript{120} Workers fearful of unemployment may be reluctant to demand higher wages. This anxiety could restrain unions’ aggressiveness in demanding higher wages during collective bargaining.\textsuperscript{121}

\section*{C. Wealth Disparity}

Another growing problem should prompt unions and civil rights organizations to consider promoting employee owned businesses: the accelerating disparity in income and static wealth between the top 20\% of the population and the remaining 80\%.\textsuperscript{122} Income refers to a flow of money over time, usually from work (wages), pensions, or welfare, and static wealth refers to the stock of assets that a person owns at a given point in time.

The average worker’s real income rose (with adjustments for inflation) from the end of World War I through 1973.\textsuperscript{123} Between 1973 and 1996, however, the aggregate income of the bottom 80\% of the

\footnotesize{\textsuperscript{118} See generally Wilson, supra note 113 (painting a stark picture of the mounting and multiple disabilities that the poorest portion of black community suffers due to the absence of work). It must be noted, however, that employee-owned businesses is not a strategy that can address, in a major way, the vulnerabilities of the black poor. The strategy presupposes employment, but the black poor are disproportionately unemployed, or are in minimum-wage jobs that would preclude investment of a portion of their own income in the business. A different range of strategies are needed to address the problems of those below the poverty line.

\textsuperscript{119} See William Julius Wilson, The Bridge Over The Racial Divide: Rising Inequality and Coalition Politics 30-32 (1999).

\textsuperscript{120} See id.

\textsuperscript{121} As William Julius Wilson puts it, “[w]orkers in the United States feel that they cannot rely on weak unions to bargain effectively for higher wages . . . .” Id. at 32.

\textsuperscript{122} See id. at 2.

\textsuperscript{123} See id.}
population declined or stagnated, while the income of the top 20% increased significantly.\textsuperscript{124}

The stagnating wages of the average employee is in sharp contrast to the accelerating income of many high level executives. A union publication charges that "the annual rise in executive pay routinely exceeds nearly every measure of economic activity, including corporate profits, wages, inflation, and the stock market."\textsuperscript{125}

The excessive compensation results from executives developing significant personal, financial, and business ties to members of the Board of Directors' compensation committees, thus compromising their independence. Unions in the typical investor-owned firm have no members on the Board of Directors to monitor and object to excessive executive compensation arrangements. Needless to say, blacks have no stake in the status quo of exorbitant payments going to the upper echelon of executives because blacks, even with an accelerated movement into higher paying jobs, occupy only a small portion of such positions.

By the mid-1980s, one-half of 1% of the population possessed 26.9% of the static wealth. The top 10% of the population controlled 68% of the static wealth.\textsuperscript{126} By the mid-1990s, the concentration was even more intense: the top 10% of the population held 86% of the individual net financial wealth in America.\textsuperscript{127} Static wealth can be used to cope with unforeseen emergencies, or temporary or longer-term loss of regular income (take for instance, the retired elderly). This increasing upward movement to a small population of the security that static wealth provides can only endanger and destabilize the vast bulk of union members.

Wealth deprivation is even more exaggerated for blacks. Excluding homes and autos, white households have ten times as much in net financial assets as black households.\textsuperscript{128} Moreover, that disparity in

\textsuperscript{124.} See id. 
\textsuperscript{125.} AFL-CIO, PUB. NO. 0-297-0498-5, TOO CLOSE FOR COMFORT: HOW CORPORATE BOARDROOMS ARE RIGGED TO OVERPAY CEOs 3 (1998). 
 Movements In Crisis

static wealth is not fully explained by disparity in income.\textsuperscript{129} Clearly, blacks also have a huge stake in any institutional re-arrangements which promise to generate some redistribution of wealth.

One study suggests that employee-owned businesses may have the impact of distributing wages and wealth more equitably.\textsuperscript{130} The analysts compared 102 companies in which employees were stockowners with 499 investor-owned companies as a control group.\textsuperscript{131} Using pensions as a measure of static wealth, the average value per participant of all retirement benefits of employees who were stockowners more than doubled that of employees in investor-owned companies.\textsuperscript{132} Most importantly, the creation of larger retirement benefits did not diminish wages in the employee-owned companies. The median wage in companies with ESOP was 8% higher than the median wage in investor-owned companies.\textsuperscript{133} The findings also undercut the claim that extremely high compensation of executives is due solely to market forces and competition for talented executives. The employee-owned firms were obviously able to attract managers who are as competent as the investor-owned firms.

V. EXPANDING SUPPORT

A. Unions

One premise of this writing is that neither the labor nor Civil Rights movement can duplicate their past dramatic successes by continuing the tactics and goals of the past. Unions, for example, had their greatest organizing successes among blue-collar workers (in auto-manufacturing, coal mining, hotel, and restaurant industries) and
government employees.\textsuperscript{134} They have not had much success in organizing white-collar workers or professionals, with the exception of teachers in public schools.\textsuperscript{135}

Why have unions been unable to organize white-collar workers? Richard B. Freeman speculates that white-collar workers do not believe that they need the kinds of protections that unions typically delivered to blue-collar workers.\textsuperscript{136} As he says, "they usually receive higher pay, have more freedom on the job, and have more job security."\textsuperscript{137} They may also rely on mobility as the device for obtaining proper working conditions. Moreover, managers or supervisors are not protected under the NLRA if they join a union.\textsuperscript{138}

White collar workers now may not have the same high level of security and mobility as they did almost twenty years ago when Freeman wrote his book, but unions should be able to capture their interest through promising the even higher level of autonomy and control that would emanate from owning the business. There is, for example, one factor that makes for instability in white-collar employment—namely lay-offs due to age. Mandatory retirement of elderly executives was the norm until outlawed in 1978, but some executives can still lawfully be forced to retire against their wishes if certain conditions are met.\textsuperscript{139} A formal legal prohibition was needed because the typical investor-owned business has a strong financial incentive to replace highly paid (usually white collar) employees with younger employees at a lower salary. The overwhelming bulk of age discrimination suits are brought by white male executives and professionals, indicating that the old practice of jettisoning the elderly may still be in vogue, at least for this class of workers. In addition, the law is currently in flux as to whether replacing an older worker with a younger worker to lower labor costs is a violation of the Age Discrimination in Employment Act.\textsuperscript{140}

\begin{footnotes}
\item[134] See Freeman & Medoff, supra note 32, at 27.
\item[135] See id. (30\% of blue-collar workers belong to unions versus 9\% of white-collar workers).
\item[136] See id. at 32.
\item[137] Id.
\item[139] The Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 631(a) (2002), protects employees over age forty from discrimination in hiring, firing, or working conditions because of their age. But the law also explicitly allows the forced retirement of an executive over age sixty-five, who has occupied his position for two years and is given an annual pension of at least $44,000. See 29 U.S.C. § 631(c) (2002).
\item[140] Using higher salaries (a "neutral measure") to make negative employment decisions could adversely impact older workers more than younger workers. It is not clear if the Griggs
\end{footnotes}
Given this climate, unions may now have a pitch to the previously unreachable white-collar employees: join the union that aims for employee-owned businesses and end the vulnerability to lay-offs and discharges based on a factor (age) that all employee co-owners can understand they will face at some point in time.

Doctors are a group of white-collar professionals who may be especially responsive to union led initiative towards ownership of the business. This may sound strange because these are a group of professionals who traditionally owned the business that their patients frequented. They were, however, not protected in employee-ownership by law and practice—like lawyers were in private law firms—because "partners" (former "employees") must own part of the business.\(^{141}\) By the mid-1990s, however, many doctors under the managed care systems developed by businesses have, in effect, become salaried employees.\(^{142}\) A by-product of the change was reduced income and mountains of burdensome paperwork. However, the most critical concern of many physicians is that they believe that they have lost control over medical decision-making for their patients.\(^ {143}\) Recapturing ownership of the business might redress that loss of professional control. This could become the goal of the Doctors Council, a group affiliated with the Service Employees International Union and the AFL-CIO.

principle is applicable to the ADEA. See S.J. Kaminshine, The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment Act, 42 F.L.A. L. REV. 229, 259 (1990). In Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993), however, the court held that length of service (a "neutral measure") is analytically distinct from age, and thus an employer who engaged in adverse actions against the most senior employees would not, per se, violate the ADEA.

141. Professional ethics and state law require that lawyer-professionals own their business. See Model Code of Prof'l Responsibility Canon 33, 34, 35 (1908), reprinted in Thomas D. Morgan & Ronald D. Rotunda, Selected Standards on Professional Responsibility 379, 388-89 (1988); Model Code of Prof'l Responsibility DR 3-102(A), 3-103(A), 5-107(C) (1981), reprinted in Thomas D. Morgan & Ronald D. Rotunda, Selected Standards on Professional Responsibility 29, 30, 42 (1988); Charles W. Wolfram, Modern Legal Ethics 56-57, 62-63 (1986) (most states have modeled their rules after the Model Code). Professional ownership has, in the past, also been characteristic of other service professions, like accounting, investment banking, advertising, engineering, medicine, and architecture. See James W. Jones, The Challenge of Change: The Practice of Law in the Year 2000, 41 Vand. L. Rev. 683 (1988). There is some speculation, however, that as professional firms become more specialized and complex (for example law firms owning satellite businesses), there may be pressure to demand a change in professional rules to allow investor ownership. See id. Lawyers' ownership of their firm is under attack; some U.S. accounting firms have "purchased" law firms abroad, raising questions about how to reconcile very different ethical standards in the two professions. See Phillip S. Anderson, Facing Up to Multidisciplinary Practice, 50 J. Legal Educ. 473, 473-74 (2000).


143. See id.
B. Civil Rights Organizations

Civil rights organizations that take up the cause of employee-owned businesses may also capture (or recapture) the allegiance of the black middle class that is not currently engaged with their organizations. Blacks who were middle class (or had aspirations of becoming so) had a huge stake in the success of the civil rights organizations in the 1950s and 1960s. Blacks were largely segregated from white suburbs, kept from attending elite colleges and universities, denied employment in higher status jobs, and even denied access to many ordinary public accommodations, like restaurants and recreational centers. Black middle-class support of civil rights organizations, therefore, could be driven solely by self-interest.

The sizeable portion of the black community that now makes up the middle class may see civil rights organizations as less relevant to their current needs. This may explain, in part, the 40% drop in membership in the NAACP between 1960 and 1994, noted earlier. The current black middle class has created a host of organizations that are independent of civil rights organizations (like the National Council of Black Engineers and Scientists or the National Association of Black Accountants), which are designed to address many of this class' currently perceived needs. What is more, these independent organizations monitor and address any racial discrimination that may crop up against its membership, so civil rights organizations are less necessary for that function.

Civil rights organizations could begin to act as a catalyst for these independent black organizations to consider ownership of any enterprise in which their membership is employed. This might revive in the members of these organizations a view that civil rights organizations are again relevant and central to their current needs.

VI. THE SPORTS INDUSTRY: POSTER BOY FOR EMPLOYEE-OWNERSHIP

The potential fruitfulness of the approach of civil rights organizations working in conjunction with the labor movement could not be better illustrated if they both made it a top priority to pursue employee-ownership in the professional sports industry. In many businesses, the accumulation of sufficient capital to purchase a business

144. For example, black college students formed and led the SNCC.
Movements In Crisis

may be a slowly developing process because employees can only afford to invest a small portion of the wages or salaries in stock—the rest is needed to meet the ordinary expenses of housing, food, auto payments, and the like. However, the income of professional athletes in baseball, football, basketball, or hockey is so far above the norm that they could easily purchase a franchise. Indeed, it may be that very potential for employee-ownership which has prompted the rule in professional basketball prohibiting players from having an ownership stake in any team in the league, including the team for which they play.\textsuperscript{145} It is not widely known, but when professional baseball was started, the teams in the league were all player-owned.\textsuperscript{146}

If one thinks about what makes the industry of professional sports valuable, and how it functions, it may be an industry peculiarly suited for being employee-owned. In many industries, the investors are critical because they provide enormous amounts of financial capital for raw materials, plants, advertising, and distribution. However, in most professional sports, the finished product that the public is buying is the athlete’s talent. Finishing the product is done exclusively by the athlete, through his own expenditure of human resources (labor) well before he joins the professional team, and it is done, unless there have been some fraudulent under-the-table-payments, without any financial recompense from the professional team’s owner.

Furthermore, the owners of professional sports teams are subsidized by a number of processes. In many cities, the “plant” (stadium) is paid for by the municipality, and owners often coerce a municipality into providing an even more profitable arena by threatening to take the team to another city.\textsuperscript{147} (This strategy, by the way, does not in-

\textsuperscript{145} See Mike Wise, Pro Basketball: Jordan Delays Making His Move, \textit{N.Y. Times}, Sept. 25, 2001, at D1; Joe LaPointe, Lemieux Plans to Be a Player-Owner, \textit{N.Y. Times}, Dec. 8, 2000, at D1. Magic Johnson purchased shares in the Los Angeles Lakers basketball team when he retired, and was required to sell his shares when he returned to play for the Lakers for a short time. See Joe LaPointe, Lemieux Plans to Be a Player-Owner, \textit{N.Y. Times}, Dec. 8, 2000, at D1. Michael Jordan also had to relinquish his shares in the Wizards basketball team when he left management and became a player for the team. See Mike Wise, Pro Basketball: Jordan Delays Making His Move, \textit{N.Y. Times}, Sept. 25, 2001, at D1. The rule is quite understandable to the extent that it prevents a conflict of interest—a player could not play for one team and have a financial stake in the success of a rival team. However, the rule also forbids a player from owning an interest in the team for which he plays, where no conflict of interest would exist. \textit{See id.}

\textsuperscript{146} See History Of Baseball Was Largely Hit Or Miss, \textit{Chapel Hill Herald}, June 24, 2001, at 16 (“The first professional baseball league, the National Association, was formed in 1871. Nine teams were fielded that year and by 1875, [thirteen] teams belonged to the league. Until then, players had owned the teams and operated the games.”).

\textsuperscript{147} See John Siegfried & Andrew Zimbalist, The Economics of Sports Facilities and Their Communities, 14 J. Econ. Persp. 95 (2000). (“Since the 1950s, taxpayers have been the primary
Some sports, like football and basketball, also have, in effect, "farm teams" that cost them nothing—they have names like Duke University, Georgetown University, and even taxpayer supported farm teams like the University of Michigan. The owners of sports teams do not have expenditures like that of most other businesses (for example, advertising, which encompasses the Sports Pages of the local newspaper). Given all of this subsidization why do the athletes need "owners" who sit in the stands, facing none of the risks of injury that the athletes face, and sometimes interfering in the managing of the team to the detriment of its reputation? The owners, by the way, must be cognizant of the fact that they are a dispensable group. One reads in the newspapers frequently about an athlete who signed a five-year contract worth 20 million dollars and very little is ever published about the yearly profit of the owners.

The labor movement should be interested in transferring ownership to the athletes because it would be a very dramatic and visible statement of this possibility. The sports industry could become the "poster-boy" for communicating the idea of employee-ownership to other industries. The professional athletic associations should begin to work on the idea.

Civil rights organizations could also promote the idea because of the high proportion of black athletes in some major sports who would benefit from such plan. Athletes could capture the profit now received by the owners, or even share that profit as a gift to the public in lower ticket prices.

VII. THE LEGAL ASPECTS

A. Need for Legislative Reform

New legislation is needed in the arena of employee-owned businesses. Fortunately, unions may not face the resistance they encountered in trying to amend the NLRA because some political investors in stadia built for the use of privately-owned professional sports teams. Team owners have argued that sports facilities boost local economic activity; however, economic reasoning and empirical evidence suggest the opposite.".

148. Mark Cuban, the owner of the Dallas Mavericks basketball team, has received a number of fines for "his passionate approach to criticizing officiating." See Jodie Valade, $250,000 is Another Fine Mess for Cuban; Mavs Owner Scoffs at Record NBA Penalty, DALLAS MORNING NEWS, Jan. 5, 2001, at 1A.
 Movements In Crisis

conservatives have advocated or supported employee-shareholding.\textsuperscript{149} The labor movement, pulling on its constituency in Congress, and civil rights organizations, working through minority caucuses, might pursue four forms of reform.

First, an amendment should be sought of the current ESOP legislation to permit the tax advantages to accrue only (or more lucratively) to businesses that can show that, in addition to majority stock ownership in the corporation, the employees collectively possess effective control over management.\textsuperscript{150}

Democratic control over a business may be more feasible for small businesses than large corporations. A few large worker-owned enterprises exist,\textsuperscript{151} but it has primarily taken hold in smaller businesses.\textsuperscript{152} It is not necessarily a detriment that the worker-owner concept may be more easily achieved in the small business setting. Small businesses generate a larger share of new jobs than large corporations, and the labor movement and civil rights organizations share an interest in lowering unemployment.

The second kind of reform that could be pursued would be amendments to legislation that advances loans to small businesses. Loans should be favored for applicants who plan true worker-control of the business.

A third initiative would, in political terms, be best advanced by civil rights organizations. It would focus on minority businesses that benefit from federal affirmative action programs and seek amend-

\textsuperscript{149} See Blasi, supra note 109, at 7. Blasi reports that “Senator Russell Long (D-La.) has been the main architect of ESOP law, although his initiatives easily attracted widespread support on both sides of Capitol Hill.” See id. Blasi also indicates that conservative investment banker and lawyer, Louis Kelso supplied Senator Long with much of the analysis needed to support the legislative proposals. See id.

\textsuperscript{150} Tax subsidies are a powerful stimulus to the development of worker-ownership. Beginning in 1984, the tax code permitted banks to exclude from income to be taxed, half of the interest payments made on loans to ESOP. See I.R.C. § 133 (West Supp. 1991) (repealed by the Small Business Job Protection Act of 1996, Pub. L. No. 104-188, Title I, § 1602(a), 110 Stat. 1755). The legislation generated a high level of lending by banks to ESOP, and the lending was only diminished when it was amended to allow this kind of deduction only where the ESOP would constitute a majority of the stock. See Joseph Blasi & Douglas Kruse, The New Owners: The Mass Emergence Of Employee Ownership In Public Companies And What It Means To American Business 75 (1991).

\textsuperscript{151} See Corey M. Rosen, Employee Ownership: Performance, Prospects, and Promise, in Understanding Employee Ownership 2 (Corey Rosen & Karen M. Young, eds., 1991) (“Employees own a majority of the stock in three of the country’s ten largest integrated steel manufacturers, two of the ten largest private hospital management companies, two of the three largest shipbuilders, two of the ten largest construction companies, and many others.”).

ments that would give priority to minority companies that are worker-owned, or have a plan to become so.

A fourth goal would be more controversial, but may also be critical. It may be difficult for many employees to amass the capital that would be necessary to purchase a share in a business, but there are federally supported programs designed to facilitate home ownership through subsidizing lower cost loans ("Freddie Mac" and "Fannie Mae"). Why not have a program of federal subsidies to facilitate ownership of the business in which one works? Indeed, federal legislation should take this extra step.

One fear that unions may have in pushing for employee ownership is that it may mean that a business that was fully owned by its employees would not need a union to service non-existent employees. However, the labor movement could take a leaf from the book of the Civil Rights movement. One could push for the creation of a federal agency that would provide the assistance and guidance that employees need in beginning to explore employee ownership. Such an agency would relieve unions of this task. But if an organization achieves the protection of its constituency through federal programs, then it ought to welcome a reduced role for its own private, but usually under-funded initiatives—this is what happened in the Civil Rights movement.

B. New roles for the Legal Staffs

Both the labor movement and the African American Civil Rights movement have had full-time legal staffs to service their needs. Unions have a legal counsel’s office attached to the AFL-CIO, and local unions retain lawyers in private practice on an as-needed basis. For the African American community, there has been the LDF, the General Counsel’s office of the NAACP, the Lawyers Committee for Civil Rights Under Law, and the Minority Business Enterprise Legal Defense and Educational Fund.

153. See Howard Gleckman, Fannie Mae And Freddie Mac Circle The Wagons, BUSINESS WEEK, April 10, 2000, at 48 ("Fannie and Freddie were originally chartered by Congress three decades ago to make mortgages cheaper and more accessible. They purchase home loans from mortgage lenders, package them, and resell them on Wall Street.").

154. The investment banker and lawyer Louis Kelso has recommended this further step in his advocacy of ESOP. See BLASI & KRUSE, supra note 150, at 7.

There are a number of issues about which employees will need legal advice and special structuring to accommodate a worker-owned establishment. The business must be incorporated and structured to immunize worker-owners from personal liabilities and debts of the worker-cooperative. Few states have incorporation statutes specifically designed for worker cooperatives. Therefore, specially drafted by-laws will be needed to achieve the goals of full worker control.

Employees will be presented with the difficult issue of how to achieve and sustain democratic control of the business by the current workers and at the same time recognize that superior labor contributions may have a claim to a higher level of equity ownership (for example, management and employees with greater seniority). One must also, however, not have too high a financial barrier to entry into "owner" status, to avoid development of a host of "employees" like most traditional business corporations. There must, on the other hand, be adequate compensation for the ownership shares of workers who leave the cooperative or retire.

A union may be able to initially organize only those employees with sufficient immediate financial resources to have partial ownership of a business. A host of legal questions can develop involving potential conflicts of interest when a union seeks to continue to represent such workers, who are both employees and stockholders, with ownership interests in the corporation.

---

156. This assumes, quite naturally, that the federal agency proposed above, will be a long time in becoming a legislative reality.


158. Some state statutes limit membership in the worker cooperative to natural persons; other statutes permit outside shareholders. See id. Workers will have to be advised of the limitation in the event that they do not have the financial capacity to wholly own the business. This might also be another avenue for legislative reform. See id.

159. The Mondragon Co-operative System in Spain has an arrangement, which seems to solve this problem. Each worker has an equal vote in the management of the business, but workers can accumulate higher levels of equity accumulation. See Deborah Groban Olson, Union Experiences with Worker Ownership: Legal and Practical Issues Raised by ESOPS, TRASOPS, Stock Purchases And Cooperatives, 1982 Wis. L. Rev. 729. New members can buy their interest in the cooperative in installments, and retiring members are paid their equity over a number of years. See id.

160. There is the question of whether the employee-stockholders can be considered "employees" within the meaning of the NLRA, such that they can continue to demand that the Corporation bargain with them through an elected representative. See Brookings Plywood Corp., 98 N.L.R.B. 794, 798 (1952) (holding that the employee stockholder is protected by the Act unless his ownership interest gives him effective influence over corporate policy). There are questions of whether employees without stock can be in the same bargaining unit as employees.
Some share transactions may be governed by the Securities Exchange Act, and workers will need advice on compliance.\textsuperscript{161}

Advice will be needed as to tax liability; cooperatives can be structured to achieve certain tax benefits.\textsuperscript{162}

In a large sense, it means that the legal staffs should be reoriented to give much of the kind of legal assistance now given to traditional businesses by the corporate department of large law firms, coupled with the special and more difficult arrangements needed to achieve the democratic goals of the worker-owned establishment. This might call for a sharply different direction for such legal staffs, but it is a perfect opportunity to seek foundation funding to underwrite the transition training. There are also, quite fortunately, some current organizations that could be a very valuable resource in the transition training, such as the Worker Ownership Institute ("WOI")\textsuperscript{163} and the National Center for Employee Ownership ("NCEO").\textsuperscript{164} Both organizations have published a wealth of valuable information on how to organize and sustain employee-owned businesses.\textsuperscript{165}

\textbf{CONCLUSION}

It is a daunting challenge, to say the least, for two movements that have been enormously successful to move in a vastly different direction toward supporting and generating employee owned businesses. The Marxist left sought to supplant or replace capitalism, but its "top down" autocratic approach failed. Perhaps it is time for a different, "bottoms-up" approach, like employee-owned businesses, to create the potential for a new class of capitalists—union members. What better place than America to start; we have democracy in the

---

\textsuperscript{161} See Olson, supra note 159. There are also questions of whether union representatives can sit on the board of directors of corporations in the same industry without violating the antitrust prohibitions on interlocking directorships. See generally id.

\textsuperscript{162} See Solomon & Kirgis, supra note 157, at 278.

\textsuperscript{163} WOI is located at Five Gateway Center, Pittsburgh, Pennsylvania, 15222. It is a joint labor-management committee of union locals and executives in employee-owned companies in the steel industry.

\textsuperscript{164} NCEO is located at 1736 Franklin Street, Oakland, California, 94612; Corey Rosen is the Executive Director.

\textsuperscript{165} See John Logue et al., Worker Ownership Institute, Participatory Employee Ownership: How it Works—Best Practices in Employee Ownership (1998). The authors of this volume (John Logue, Richard Glass, Wendy Patton, Alex Teodosio and Karen Thomas) are on the staff of the Ohio Employee Ownership Center of Kent State University. The NCEO publishes the Employee Ownership Report bi-monthly and regularly sponsors conferences on issues relevant to employee ownership.
political arena, why not in the economic arena?\footnote{See Carney \& Shearer, supra note 109, at 135.} One would hope that the two most powerful movements this country has seen would have the energy and daring to act as the catalyst for this approach.