

Post-Welfare Lawyering: Clinical Legal Education and a New Poverty Law Agenda

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Russell Franklin¹ called the law school clinic from the county jail, where he was serving a nine-month sentence. He claimed his boss owed him two weeks' wages, so a law student went to the jail to interview him. Mr. Franklin had been working full-time at an auto transmission repair shop under the jail's work release program. When he quit, his boss said that she would not pay him his last paycheck because his work was not good and because he had stolen tools from the shop. Mr. Franklin told the law student that his work was as good as anyone else's, and he certainly did not steal anything. The clinic took the case. The student researched the applicable law, concluding that any employer deductions from Mr. Franklin's pay for alleged loss or damage were improper, and that Mr. Franklin's status as an inmate did not alter his rights as a worker. The student attempted to negotiate with the employer, but she still refused to pay. The student drafted and filed a small claims lawsuit, conducted informal discovery, and prepared Mr. Franklin to testify at trial. The

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1. Both of these scenarios are based on cases conducted by the Neighborhood Law Project. Client names and other identifying information have been changed to protect confidentiality.

case settled on the eve of trial and the boss wrote Mr. Franklin a check for everything he was owed.

Maria Hernandez worked behind the counter at a mid-sized grocery. She and the other workers, all of whom were Hispanic, routinely worked between sixty-five and seventy-five hours per week—usually for ten to fourteen hours per day, six days per week. For this, Maria was paid \$350 per week, which calculated to under \$5.00 per hour without any overtime pay. When Ms. Hernandez asked her boss about minimum wages and overtime, her boss said she was not going to pay because she could not afford it, adding that she was already behind in her taxes. Ms. Hernandez finally quit her job, fed up with her boss' excuses. She had heard about a Centro de Derechos Laborales (Workers Rights Center) in her neighborhood. She went there, and brought several other former mercado workers, five in all, with her. The center referred them to the law school clinic across the hall, where two students became their lawyers. The students interviewed each worker in depth, prepared detailed charts of their hours worked, and filed a complaint with the local wage and hour enforcement agency, alleging over \$40,000 in two years' worth of unpaid wages and overtime. When that failed to prompt the employer to pay, the law students withdrew the agency complaint, and filed a case in state court.

INTRODUCTION

Some nine years ago, in the summer of 1996, President Bill Clinton signed the federal welfare reform bill into law, making good on his campaign promise to “end welfare as we know it.”² The statute (the Personal Responsibility and Work Opportunity Reconciliation Act, known as PRWORA)³ eliminated Aid to Families with Dependent Children (AFDC), a sixty-year-old cash assistance welfare program, and replaced it with Temporary Assistance to Needy

2. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

3. *Id.*

Families (TANF), with its headline-grabbing work requirements and time limits.⁴ This single piece of legislation marked a dramatic shift in American welfare policy, and in public discourse about poverty, work and “self-sufficiency.”

Ours is the “post-welfare” era, and it is ripe with opportunities for poverty lawyers to shape a new poverty law agenda. This era is characterized by the millions of former welfare recipients who entered the wage-labor force, and by a new public dialogue about post-welfare poverty. Journalists, social scientists, and policymakers have been watching these “welfare leavers,” assessing their labor market participation, their “success,” and their economic well-being.⁵ Together, these observers and actors have created a new academic, political, and cultural terrain on which American poverty is debated and constructed—one where “the working poor” has replaced “the welfare recipient” as the trope of American poverty.⁶ Poverty lawyers must account for this new social category and, I argue, should take advantage of the current historical moment to expand justice for these workers and others in post-welfare poverty.

A second recent historical development makes this a fertile time for development of a new poverty law agenda. The post-welfare era corresponds with the birth of the “worker center” movement: the nationwide development of non-profit, often faith-based, service centers designed to organize and advocate on behalf of low-wage workers. The National Interfaith Committee for Worker Justice (NICWJ), founded, perhaps not coincidentally, when welfare reform passed in 1996, counts as members sixty local worker centers nationwide.⁷ These local centers function as gathering places and organizing venues for workers in the post-welfare economy; some

4. *See infra* note 42.

5. *See infra* notes 51–65 and accompanying text.

6. *See infra* notes 66–75 and accompanying text.

7. *See generally* Interfaith Worker Justice, <http://www.iwj.org> (last visited Jan. 14, 2006). For a geographical list of centers, see Interfaith Worker Justice, Local Groups, <http://www.iwj.org/outreach/lg.html> (last visited Jan. 14, 2006). The National Study on Worker Centers, an on-going project sponsored by the Economic Policy Institute and by the Neighborhood Funders Group, has mapped 118 worker centers in thirty states. The map is available at <http://www.labornotes.org/pdf/workercentermap-aug03.pdf> (last visited Jan. 14, 2006). *See also* JANICE FINE, WORKER CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM (forthcoming 2006).

centers have lawyer and law student affiliates, and some do not, but the centers are exciting laboratories to examine the effectiveness of new and creative anti-poverty advocacy efforts, particularly in the area of workplace rights, and poverty lawyers should be a part of them.

The confluence of these two events—welfare reform and the growth of the worker center movement—offers enormous opportunities for development of a new social justice agenda for the working poor. While the mission of the NICWJ is not limited to working with immigrant workers, that sub-group of workers is identified by many as particularly vulnerable, and perhaps amenable to a faith-based organizing model.⁸ There are distinct disabilities associated with being a recent immigrant worker (most notably the language barrier and the at least perceived threat of deportation),⁹ and these factors must influence any organizing or legal strategy. While there has been some academic and activist writing on the importance of worker centers for immigrant (mostly Latino) workers,¹⁰ less attention has been paid to the opportunity for low-wage *citizen* workers to become involved in the centers. However, many of the workplace challenges of immigrant workers are shared by citizen workers. Unlivable wages, lack of job security, wrongful terminations, lack of benefits and unsafe working conditions are common in the low-wage workforce, whether the workers are undocumented or not.

These workplace issues, and others, could form the basis of a consolidated workers' agenda. Indeed, fostering alliances between "welfare leaver" workers and immigrant workers has the potential to be an important part of building a strong movement for worker justice more generally; lawyers, including law school clinics, can help craft the poverty law agenda as part of this movement. Our time demands a new poverty law agenda, and law school clinics can be

8. Interfaith Worker Justice, *supra* note 7. *See generally* JENNIFER GORDON, *SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS* (2005). The Madison worker center was launched by a report specifically regarding the situation of Latino immigrants in Dane County, Wisconsin. *See infra* notes 126–31 and accompanying text.

9. *See infra* note 137.

10. *See supra* note 7.

important laboratories for exploring models of lawyering for the post-welfare working poor.¹¹

Clinics have historically provided important legal services for the poor. Consistent with that history, clinics' substantive agendas should respond to the post-welfare reality. Of course, every law school clinic has its own particular mission, history and context. There are criminal defense, environmental, economic development, and child advocacy clinics, to name only a few. I do not mean to suggest that all clinics should convert to a single project of representing the post-welfare working poor in wage and hour or other workplace issues. Nor do I mean that all clinics should be designed with an eye on any particular "justice" agenda. I mean, rather, that clinics overall, to the extent they are part of the anti-poverty lawyering community, should respond to the particular demands of this historical moment, within the appropriate confines and design of their particular program. Specifically, clinics should engage with clients as workers and as members of the post-welfare working poor.¹²

I argue here that, because they are *not* first resort legal service providers but rather are somewhat insulated within academic settings,

11. Other lawyers and activists committed to social justice for the poor—motivated, too, by welfare reform—have called for poverty lawyers generally to broaden their competency to include some familiarity with employment law subjects, and have produced resources to facilitate the process. The leading national practice journal for poverty lawyers, *Clearinghouse Review*, published numerous individual pieces on subjects in this area in the years immediately following welfare reform, guiding advocates' attention to the working poor and to a new poverty law agenda. See, e.g., Sharon Dietrich et al., *An Employment Law Agenda: A Road Map for Legal Services Advocates*, 33 CLEARINGHOUSE REV. 541 (2000); David Huffman-Gottschling, *Addressing Labor Law Issues for Low-Income Workers: Encouraging Collective Self-Help*, 35 CLEARINGHOUSE REV. 411 (2001); Rick McHugh, *Recognizing Wage and Hour Issues on Behalf of Low-Income Workers*, 35 CLEARINGHOUSE REV. 289 (2001); Naomi Zauderer, *Supporting Low-Income Workers: An Organizer's Perspective*, 34 CLEARINGHOUSE REV. 666 (2001).

12. This is not to obscure the fact that not all poor people are in fact able to work. Indeed, some lawyers for the poor spend their careers litigating disability cases in which they argue that their clients are not able to work, and are deserving of government sustenance. Just who is and who is not "able" to work has been the source of much controversy throughout U.S. history. The remarkable book that inspired this symposium, WILLIAM P. QUIGLEY, *ENDING POVERTY AS WE KNOW IT: GUARANTEEING A RIGHT TO A JOB AT A LIVING WAGE* (2003), includes an overview of this history. By urging a "post-welfare working poor" conception of our clients, I do not intend to suggest that all clients are so situated, but rather that, for those who are, a self-conscious identification as such will advance our thinking about the injustices they face and how to respond to them.

clinics have the opportunity to step back and critically observe the post-welfare era and the responding lawyering experiments. From this position, clinics can play an important role in developing a substantive agenda for social justice lawyering that accounts for current political, legal and economic realities. I specifically encourage law school clinics to investigate the growth of immigrant worker power enabled by the worker center movement, and to lend their students' time and energy to developing alliances between those centers and citizen workers in service of a larger concept of worker power in the low-wage economy. Finally, law school clinics should embrace the task of training a new generation of "post-welfare" poverty lawyers. This training should include schooling both in the labor market dynamics that shape low-income peoples' economic activities and in critical and creative approaches to the role of law and lawyers in social justice for the "post-welfare" poor.

The Neighborhood Law Project (NLP) of the University of Wisconsin Law School is undertaking this kind of experimentation. Principally through representing low-wage workers in wage and hour cases, NLP students participate in the local movement for economic justice for the working poor in Madison, Wisconsin. By exposing students to welfare reform implementation in our community, to labor market dynamics, and to the academic literature about models of progressive lawyering for social justice, NLP aspires to engage students in creative thinking about the role of lawyers in the struggle for justice for the working poor. By giving students the opportunity to work closely with lay advocates and organizers in the local worker center and to create their own projects in this area, NLP offers a model of collaborative justice work that can be applied not only in the arena of low-wage workplace issues, but also in a wide range of social justice lawyering subjects.

In this Article, I describe NLP's work as a model for lawyering and clinical legal education in the post-welfare era. Section I starts with a very abbreviated overview of the federal poverty level, its relationship to wage data, and its inadequacies as a measure of economic hardship. This section also briefly describes welfare reform and the surrounding historical circumstances that have given new

currency to the term “the working poor.” I argue that this term creates opportunities, not without risks,¹³ for poverty lawyers. Finally, Section I describes the low-wage workplace into which many former welfare recipients have been thrust, and includes an overview of the types of legal issues (broadly defined) that low-wage workers typically face.

Section II contains a detailed description of the clinical students’ work in NLP, principally of their work representing low-wage workers in administrative and judicial proceedings to collect unpaid wages and overtime, as an example of clinical education in the post-welfare era. This section is quite detailed, explicating the statutory scheme under which the students enforce their clients’ rights and the clinical educational benefits of this practice. Thus, Section II may be of most interest to clinical educators, or to others interested in learning how clinical teachers assess substantive legal areas for pedagogical value.

Finally, Section III provides a critical analysis of NLP’s work and discusses the model of social justice lawyering that the NLP practice embodies. This section notes that despite the influx of former welfare recipients into the workforce, these are *not* the workers who have approached NLP for assistance or representation, and offers suggestions for further study and experimentation on creating alliances between welfare leavers and immigrant workers. I conclude with a discussion of how the NLP model can be used generally in the post-welfare era to bring lawyering to the working poor, and specifically in clinical legal education, to train a new generation of “public interest” lawyers for our time. Further, Section III joins the debate over the social justice mission of clinical education in the United States.¹⁴ I argue that, while there is without a doubt room in

13. See *infra* Part I. C (discussing the risk of pitting one set of clients, the “deserving” working poor, against another, the “undeserving” clients not engaged in wage labor).

14. See generally Jane H. Aiken, *Provocateurs for Justice*, 7 CLINICAL L. REV. 287 (2001); Antoinette Sedillo Lopez, *Learning Through Service in a Clinical Setting: The Effect of Specialization on Social Justice and Skills Training*, 7 CLINICAL L. REV. 307 (2001); Kimberly E. O’Leary, *Clinical Law Offices and Local Social Justice Strategies: Case Selection and Quality Assessment as an Integral Part of the Social Justice Agenda of Clinics*, 11 CLINICAL L. REV. 335 (2005); Stephen Wizner, *Beyond Skills Training*, 7 CLINICAL L. REV. 327 (2001); Stephen Wizner & Robert Solomon, *Law as Politics: A Response to Adam Babich*, 11 CLINICAL L. REV. 473, 477 (2005).

clinical legal education for a wide range of missions and commitments, those of us whose clinic designs explicitly endorse a social justice agenda play an important, perhaps unique, role in the delivery of legal services to the poor. Given that role, it is vital that our clinic designs account for social and historical shifts affecting our clients. In the current era, a conception of our clients as “the working poor” will advance both our service and pedagogical missions.

I. BACKGROUND: POVERTY WAGES, WELFARE LEAVERS, AND THE WORKING POOR

A. *The Federal Poverty Measure*

The calculation of the federal poverty threshold was developed in the mid-1960s, and is based on a “one-third for food” formula that itself was based on family consumption patterns from a decade earlier.¹⁵ The basic formula has not changed since its formulation. A current year’s dollar value thresholds are issued annually, and are expressed in terms of annual income and family size. Thus, for example, the most current federal poverty threshold (2004) for a family of one adult and two children is \$15,219.¹⁶ The poverty threshold is geographically uniform; a single set of numbers is used to assess poverty whether a family lives in San Francisco or the South Bronx. According to the U.S. government, 12.7% of Americans were “poor” in 2004, in that their annual incomes fell below the federal poverty threshold, or “poverty line.”¹⁷ This is a rise from 12.5% in 2003.¹⁸

15. Social Security Administration economist Mollie Orshansky designed the federal poverty measure in 1963 based on data from a 1955 Department of Agriculture Food Consumption Survey. See Gordon M. Fisher, *The Development of the Orshansky Poverty Thresholds and Their Subsequent History as the Official U.S. Poverty Measure* (May 1992) (U.S. Census Bureau, Poverty Measurement Working Papers), available at <http://www.census.gov/hhes/poverty/povmeas/papers/orshansky.html>.

16. U.S. Census Bureau, *Poverty Thresholds 2004*, <http://www.census.gov/hhes/www/poverty/threshld/thresh04.html> (last visited Jan. 14, 2006).

17. CARMEN DE NAVAS-WALT ET AL., U.S. CENSUS BUREAU, *INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2004*, at 16 (2005), available at <http://www.census.gov/prod/2005pubs/p60-229.pdf>.

18. The poverty rates for 1959 through 2003 are available at <http://www.census.gov/hhes/poverty/histpov/hstpov2.html> (last visited Jan. 14, 2006).

The methodology for determining the federal poverty measure has not changed since it was established, but it has been the subject of intense debate from its beginning; anti-poverty advocates argue that it is much too low, while defenders argue that, if anything, the federal poverty thresholds overstate American poverty.¹⁹ Critics of the federal poverty measure decry the lack of any geographic variation, and note that spending and consumption patterns have changed considerably since the mid-1960s.²⁰ The federal government itself recognizes that the official poverty thresholds are too low to accurately state a family's need for certain types of in-kind assistance. Many federal means-tested programs use a multiplier of the threshold, or its cousin, the poverty guideline,²¹ to establish financial eligibility. For example, while eligibility for Food Stamps is a somewhat complex matter, when gross monthly income is involved in the determination, a family is eligible if its income is below 130% of the poverty guidelines.²² The cut off for eligibility for federally-funded legal services is 125% of the guidelines.²³ A number of alternative measures have been proposed, but none have been adopted.²⁴ Perhaps it is not surprising that the federal poverty measure has not changed. Many alternative measures result in a "rise" in the poverty rate, and no federal administration wants to be the one on whose watch there was a dramatic "increase" in poverty.²⁵

19. For a summary of the critiques of the FPL, from both the left and the right, see Douglas J. Besharov & Peter Germanis, *Reconsidering the Federal Poverty Measure* (June 14, 2004) (unpublished manuscript), available at <http://www.welfareacademy.org/pubs/poverty/povmeasure.pdf>.

20. *Id.*; see also Economic Policy Institute, *Poverty and Family Budgets: Frequently Asked Questions*, http://www.epi.org/content.cfm/issueguides_poverty_povertyfaq (last visited Jan. 14, 2006) (summarizing critiques of the federal poverty measure).

21. See *infra* note 17.

22. 7 C.F.R. § 273.9(a) (2004).

23. 45 C.F.R. § 1611.3(b) (2004).

24. See Robert Haveman & Melissa Mullikin, *Alternatives to the Official Poverty Measure: Perspectives and Assessment* (unpublished manuscript), available at <http://irp.wisc.edu/research/method/havemanall.pdf>; see also JOE DALAKER, U.S. CENSUS BUREAU, *ALTERNATIVE POVERTY ESTIMATES IN THE UNITED STATES: 2003*, available at <http://www.census.gov/prod/2005pubs/p60-227.pdf>.

25. See Gary Burtless, *Political Consequences of an Improved Poverty Measure* (unpublished manuscript), available at <http://www.irp.wisc.edu/research/method/burtlessall.pdf>. An episode of the NBC television political drama series, *The West Wing*, articulated this dilemma for a liberal Democratic administration, whose staff recognized the shortcomings of

Of course, one important use of any poverty measure should be to assess the adequacies of a worker's income to keep a family secure. If work is offered as the only socially legitimate prevention of, or remedy for, poverty, we must measure the fruits of work (wages) against whatever measure of poverty we select. We might even take the bold step of setting the minimum wage according to such a standard.²⁶ The federal poverty threshold and the minimum wage are not calculated in reference to one another, but the math is not complicated: a single breadwinner for a family of three must earn \$7.60 per hour, almost 150% of the federal minimum wage of \$5.15 per hour,²⁷ to live above even the *official* poverty line. We might call \$7.60 per hour the "poverty wage" for a single mother with two children. Indeed, a full-time job paying the federal minimum wage generates an annual gross salary of just \$10,300; the only household with a poverty threshold at or lower than that amount consists of a single person.²⁸

Some argue for a benchmark of a family's economic hardship that is substantially higher than the federal poverty measure. Anti-poverty academics and activists frequently use the "Family Economic Self-Sufficiency" (FESS) standard, based on specific, local costs of modern family life (such as housing, health care, and child care), as a

the federal poverty measure, but who could not recommend that it be adjusted to reflect real family need because of the dramatic impact on the poverty rate that would result. *The West Wing: The Indians in the Lobby* (NBC television broadcast Nov. 21, 2001). For a description of this episode, see http://www.nbc.com/The_West_Wing/episode_guide/54.shtml (last visited Jan. 14, 2006).

26. Indeed, the inadequacy of the federal minimum wage to meet a family's needs has long been the subject of concern for advocates for the working poor and low-income people. The Economic Policy Institute, a non-partisan think tank on economic issues, with particular emphasis on the interests of "working people," provides materials and analysis on minimum wage issues. See Economic Policy Institute, EPI Issue Guide: Minimum Wage, http://www.epi.org/content.cfm/issueguides_minwage_minwage (last visited Jan. 14, 2006). The movement to raise minimum wages, or so-called "living wages," at the local level was the subject of the *New York Times Magazine* cover story on January 15, 2006, entitled *What is a Living Wage?*, by Jon Gertner. See also Paul K. Sonn, *Citywide Minimum Wage Laws: A New Policy Tool for Local Governments*, ECON. POL'Y BRIEF (Brennan Ctr. for Justice, New York, N.Y.), June 2005, available at <http://www.brennancenter.org/programs/downloads/minimumwage-policybrief.pdf>.

27. 29 U.S.C. § 206(a)(1) (2000).

28. The 2004 federal poverty threshold for a household of one person under age sixty-five is \$9827; over age sixty-five it is \$9060. See *Poverty Thresholds 2004*, *supra* note 16. All of the annual incomes in this section are based on 2000 hours per year.

more realistic, quantitative assessment of American poverty.²⁹ The hallmark of the FESS method is that each line item of the budget has its own source and rationale. For example, to determine a family's reasonable housing costs in any given area, the FESS method starts with the fair market rent by locality, as published by the U.S. Department of Housing and Urban Development.³⁰ Local organizations in over thirty states have adopted the FESS standard,³¹ local users collect the area's data according to the FESS line items and methodology. One end-product of a local FESS study is a local "self-sufficiency wage." For example, while the federal "poverty wage" for a single adult with two children is \$7.60 per hour,³² that family's "self-sufficiency wage" for Dane County (Madison), Wisconsin is between \$13.75 and \$23.00 per hour, depending on the age of the children.³³

Even using the FPL, the federal government acknowledges that work does not always lift a person or family out of poverty. The Bureau of Labor Statistics reports every year on the number of Americans who remain poor despite work.³⁴ A worker who worked

29. The FESS standard was created by Wider Opportunities for Women, a national women's employment policy organization, and by Dr. Diana Pearce of the University of Washington. Materials about the FESS standard are available at The Self-Sufficiency Standard, www.sixstrategies.org/sixstrategies/selfsufficiencystandard.cfm (last visited Jan. 14, 2006).

30. Each state's report includes a standard section setting forth the FESS methodology. See, e.g., DIANA PIERCE & JENNIFER BROOKS, THE SELF-SUFFICIENCY STANDARD FOR WISCONSIN 2004, at 5 (2004), available at <http://www.sixstrategies.org/files/WI%20Full%20Report%20FINAL%204-15-04%20.pdf>.

31. The FESS project is operating in community organizations in some thirty-six states; reports are posted on the website of the Economic Policy Institute. See Poverty and Family Budgets, http://www.epinet.org/content.cfm/issueguides_poverty_budgetsbystate (last visited Jan. 14, 2006); see also The Self-Sufficiency Standards for Wis., <http://www.wiwomensnetwork.org/selfsufftables2004.pdf> (last visited Jan. 14, 2006).

32. The 2004 poverty threshold for a family of one adult and two children was \$15,219. That divided by 2000 (hours per year for full-time work) is \$7.61. See Poverty Thresholds 2004, *supra* note 16.

33. See The Self-Sufficiency Standards for Wis., *supra* note 31, at 6. In St. Clair County, Illinois, which includes East St. Louis, the self-sufficiency wage for this family is \$16.30 per hour. DIANA PEARCE & JENNIFER BROOKS, THE SELF-SUFFICIENCY STANDARD FOR ILLINOIS 52 (2001), available at <http://www.womenemployed.org/docs/II%20Self%20Sufficiency.pdf>. For that same family in Cook County, Chicago, the self-sufficiency wage is \$18.60 per hour. *Id.* at 41.

34. The most recent of these reports was issued in March, 2005, reporting on 2003 data. See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, REPORT NO. 983, A PROFILE OF THE WORKING POOR, 2005, available at <http://www.bls.gov/cps/cpswp2003.pdf>. The definition

or looked for work at least twenty-seven weeks in any given year, and yet had an income below the federal poverty line, is a member of “the working poor” for purposes of the federal government’s official measure.³⁵ The most recent of these reports, issued in March of 2005 and reporting on 2003 incomes, reported that twenty percent of all “poor” people in 2003 were the “working poor.”³⁶ Over five percent of all Americans are working poor, using the federal government’s measure of poverty.³⁷ The Bureau helpfully observes three major labor market problems that keep workers in poverty: “Unemployment, low earnings, and involuntary part-time employment.”³⁸

B. Welfare Reform, Welfare Leavers, and Economic Hardship

Because it frames the current cultural potency of the phrase “the working poor,” the rhetoric surrounding welfare reform and its effects should be briefly reviewed. While welfare reform changed the daily economic lives of millions of former AFDC recipients, it also represented the triumph of a new view of poor people, work, and dependency. The official goal of the nation’s “welfare” policy became connecting welfare recipients to work.³⁹ TANF, the cash assistance program that replaced AFDC, has two cornerstones: first, recipients must engage in “work activity” to remain eligible; second, there is a sixty-month lifetime limit on aid.⁴⁰ The rhetoric of welfare reform in the 1990s sounded in work; the problem to be solved was not “poverty,” but, rather, the “nonwork” of welfare recipients.⁴¹

of “worker” for these purposes was developed in 1989 by BLS researchers Bruce Klein and Philip Rones. See Bruce W. Klein & Philip L. Rones, *A Profile of the Working Poor*, MONTHLY LAB. REV., Oct. 1989, at 3.

35. BUREAU OF LABOR STATISTICS, *supra* note 34, at 1.

36. *Id.* (“Although the Nation’s poor were primarily children and adults who were not in the labor force, 1 in every 5, or 7.4 million individuals, were classified as “working poor.”).

37. *Id.*

38. *Id.* at 3.

39. For an overview of PRWORA and TANF, see JASON DEPARLE, AMERICAN DREAM: THREE WOMEN, TEN KIDS, AND A NATION’S DRIVE TO END WELFARE (2004); see also COMM. ON WAYS AND MEANS, U.S. HOUSE OF REPRESENTATIVES, THE 2003 GREEN BOOK § 7 (2004), available at http://waysandmeans.house.gov/media/pdf/greenbook_2003/Section7.pdf.

40. 42 U.S.C. § 602(a)(1)(A) (2000); *id.* § 608(a)(7)(A).

41. See generally LAWRENCE M. MEAD, THE NEW POLITICS OF POVERTY: THE

Indeed, while ending “dependence” on welfare is among the legislative goals of PRWORA,⁴² decreasing poverty is not.⁴³

The welfare reform debate of the 1990s featured familiar themes, most notably⁴⁴ that of the “deserving” and the “undeserving” poor.⁴⁵ As Bill Quigley has shown, the dominant American discourse since colonial days has divided the poor into the categories of “deserving” and “undeserving,” with the distinction being marked with reference to wage-labor, the work ethic, and the need to preserve labor discipline.⁴⁶ Within this discourse, unless he or she has a demonstrably good (that is, socially legitimate) reason, an able-bodied person is expected to work and support him or herself through private wage-labor. A non-working poor person for whom there is no excuse not to work is undeserving—of sympathy, social services, or public economic support.

For purposes of AFDC and TANF, the most salient “non-working poor person” was the single mother, whose prevalence on the AFDC

NONWORKING POOR IN AMERICA (1992); CHARLES A. MURRAY, *LOSING GROUND: AMERICAN SOCIAL POLICY, 1950–1980* (1984).

42. The purpose of the statute is to permit states to design programs that:

- (1) provide assistance to needy families so that children may be cared for in their own homes or in the homes of relatives; (2) end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage; (3) prevent and reduce the incidence of out-of-wedlock pregnancies and establish annual numerical goals for preventing and reducing the incidence of these pregnancies; and (4) encourage the formation and maintenance of two-parent families.

42 U.S.C. § 601(a) (2000).

43. The solution one proposes for poverty is inextricably tied to what one believes is the cause of poverty. Mark R. Rank has called for a shift in the American conception of the cause of poverty from the individual to structural forces. See MARK R. RANK, *ONE NATION, UNDERPRIVILEGED: WHY AMERICAN POVERTY AFFECTS US ALL* (2004).

44. Because eligibility for AFDC required that a child be deprived of the support of a parent, the recipient parent’s status as “single” is statutorily required. 42 U.S.C. § 606(a)(1) (2000).

45. The rhetorical categorization of the poor into the “deserving” and the “undeserving” is so prevalent that it evades citation, as might the notion that traditional American values are described as “mom, baseball, and apple pie.” See, e.g., MICHAEL B. KATZ, *THE UNDESERVING POOR: FROM THE WAR ON POVERTY TO THE WAR ON WELFARE* (1st ed. 1989); MURRAY, *supra* note 41.

46. See QUIGLEY, *supra* note 12, at 29–33 (discussing the history of how English, colonial, and United States welfare policy reflects the cultural prescription for work and serves the economic needs of capital for low-cost labor); see also Joel F. Handler, “*Constructing the Political Spectacle*”: *The Interpretation of Entitlements, Legalization, and Obligations in Social Welfare History*, 56 BROOK. L. REV. 899, 927–31 (1990).

rolls was the problem to be solved. Welfare reform embodies the view that a single mother without other means of economic support (husband or other responsible adult) is not, without other factors, exempt from the social expectation of work. Reform proponents, indeed, prevailed with the argument that it was the availability of welfare itself that kept these women and their children in poverty by creating a dependency on public support that squelched their abilities to become self-supporting through work (or supported by a husband, through marriage).⁴⁷ With welfare reform, work was officially anointed as the national “welfare” (really, “non-welfare”) policy.

Welfare caseloads came crashing down in the late 1990s, but there is debate over whether or to what extent the decline is attributable to the passage of PRWORA. The AFDC caseload peaked in 1994, when over five million families (over fourteen million individuals) and over 14% of all American children received AFDC aid.⁴⁸ Because the number of individuals on AFDC had begun to drop before passage of welfare reform (those fourteen million recipients were down to 12.6 million in 1996, and to 7.2 million by 1999),⁴⁹ it is difficult to distribute causation of the caseload decline across various factors. The strong economy and overall job growth of the early 1990s contributed as well, but the main purpose of welfare reform, to get people off welfare, was obviously successful.⁵⁰

47. Robert Rector of the Heritage Foundation called welfare a “social toxin,” and argued that “[h]igher welfare payments do not assist children; they increase dependence and illegitimacy, which have a devastatingly negative effect on children’s development. It is welfare dependence, rather than poverty, which has the most negative effect on children.” Robert Rector, *Why Congress Must Reform Welfare*, BACKGROUNDERS, Dec. 4, 1995, at 1, <http://www.heritage.org/Research/Welfare/BG1063.cfm>.

48. COMM. ON WAYS AND MEANS, U.S. HOUSE OF REPRESENTATIVES, THE 2000 GREEN BOOK tbl. 7-4 (2000), available at <http://aspe.hhs.gov/2000gb>.

49. Admin. for Children and Families, U.S. Dep’t of Health and Human Servs., Temporary Assistance for Needy Families (TANF) Fact Sheet, <http://www.acf.hhs.gov/news/facts/tanf.html> (last visited Jan. 14, 2006) [hereinafter TANF Fact Sheet].

50. “[A]cademic consensus seems to be that somewhere between 15 percent and 30 percent of the [caseload] decline is attributable to welfare reform.” Jared Bernstein & Mark Greenberg, *Reforming Welfare Reform: What Reform Wrought, and What Must Be Done Now*, in MAKING WORK PAY: AMERICA AFTER WELFARE 196, 201 (Robert Kuttner ed., 2002). But see Robert Rector & Patrick F. Fagan, *The Continuing Good News About Welfare Reform*, BACKGROUNDERS, Feb. 6, 2003, <http://www.heritage.org/Research/Welfare/bg1620.cfm> (calling welfare reform a success, and crediting it, not good economic conditions, for reduced poverty, increased employment of single mothers, and a reduced number of children living in single

For purposes of crafting a post-welfare legal agenda, we must ask: Where did the women who used to make up the AFDC caseload go? How do they make their income? What is their economic situation now? There are, of course, no easy answers to these questions; the women went different places depending on their personal and socio-familial circumstances.⁵¹ Indeed, so many social scientists have been studying these questions that their work, collectively, is known as “the leaver studies,” referring to the former recipients who have “left” welfare.⁵² In assessing the leavers’ condition, the federal government emphasizes “independence” from welfare:

Since the enactment of Temporary Assistance for Needy Families (TANF) program in 1996, millions of families have moved from dependence on welfare to greater independence through work. Employment among low income single mothers (earning below 200 percent of poverty), reported in the U.S. Census Bureau’s Current Population Survey (CPS) has increased significantly since 1996. Although it declined slightly in 2002, it is still 8 percentage points higher than in 1996—a remarkable achievement, particularly since it remained high through the brief recession in 2001. Among single-mothers with children under age 6—a group particularly vulnerable to welfare dependency—employment rates are still 13 percentage points higher than in 1996. . . . Thirty-six percent of unemployed adult welfare recipients entered the work force in FY 2002. Fifty-nine percent of those who started work were still employed six months after getting a job.⁵³

mother households).

51. See DEPARLE, *supra* note 39, for a detailed social history of three Milwaukee families affected by welfare reform, and the complex social and economic realities that make up their lives.

52. The U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation (ASPE), funds many “leaver studies” and uses this terminology. ASPE produces reports on the results of these studies. *See, e.g.*, GREGORY ACS & PAMELA LOPREST, U.S. DEP’T OF HEALTH AND HUMAN SERVS., FINAL SYNTHESIS REPORT OF FINDINGS FROM ASPE “LEAVERS” GRANTS (2001), available at <http://aspe.hhs.gov/hsp/leavers99/synthesis02/index.htm>.

53. TANF Fact Sheet, *supra* note 49.

Of course, it is self-evident that former recipients' "dependence" on welfare has decreased because the bill eliminated the entitlement to cash assistance and installed radically stricter eligibility and participation criteria. The social problem the bill was designed to solve was too many people on welfare; it is not surprising that caseloads declined.

The questions of the current employment, income, and hardship of these women and their children are more complicated than that of their independence from cash assistance, and some leaver analysts present a less than rosy picture of their post-welfare well-being. While they may be employed in large numbers, that employment has not necessarily led to an improved economic position. Focusing on the economic well-being of women who left welfare, the Institute for Research on Poverty at the University of Wisconsin found that, in the first year after leaving welfare, families' incomes dropped twenty percent.⁵⁴ Even after three years, only forty percent of leavers had annual incomes higher than they had while on welfare.⁵⁵ Other analysts also concluded that the real income of low-income mothers declined after welfare reform and that the remaining safety net failed to make up the difference.⁵⁶ One of the early studies of the economic impact of welfare reform's implementation concluded, not surprisingly, that in many situations, former welfare recipients' economic situation worsened in part because they had higher expenses in the work force than they had had on welfare.⁵⁷

As a final feature of the backdrop for the emergence of "the working poor," the labor market impact of welfare reform should be examined briefly. Were there jobs for the welfare leavers, and, if so, what kinds of jobs? As Congress debated the reauthorization of

54. Maria Cancian et al., *Before and After TANF: The Economic Well-Being of Women Leaving Welfare*, 76 SOC. SERV. REV. 603, 615–23 (2002).

55. *Id.*

56. Jeff Chapman & Jared Bernstein, *Falling Through the Safety Net: Low-income Single Mothers in the Jobless Recovery*, in EPI ISSUE BRIEF (Econ. Policy Inst., Issue Brief No. 191, Apr. 11, 2003), available at <http://www.epi.org/Issuebriefs/ib191/ib191.pdf>; see also THE 2000 GREEN BOOK, *supra* note 48, at app. L.

57. The strategies of these women for surviving despite the gaps between their incomes, whether from welfare or from work, were studied and presented in KATHRYN EDIN & LAURA LEIN, MAKING ENDS MEET: HOW SINGLE MOTHERS SURVIVE WELFARE AND LOW-WAGE WORK (1997).

PRWORA,⁵⁸ and particularly whether the number of required hours of work per week should be raised from thirty to forty,⁵⁹ Heather Boushey and David Rosnick summarized employment data in the years immediately following welfare reform and the impact on the job market for welfare leavers. They noted that between 1996 and 2000, over sixty percent of welfare leavers were employed in just nine industries, primarily in the service sector.⁶⁰ Moreover, Boushey and Rosnick demonstrated that those nine industries were growing during that time period faster than other industries, creating a job market for former welfare recipients.⁶¹ The study cautioned that the growth in those industries slowed significantly by 2003, and that both the brief recession in 2001 and its slow recovery hit these low-wage workplaces hard.⁶² Boushey and Rosnick concluded that, because of this slowdown, there were nine million “missing jobs” as of 2004 that would have been there but for the negative growth of 2001-04.⁶³ They characterized the job situation for welfare leavers, in light of this data, as “grim.”⁶⁴ Gary Burtless, a Brookings Institution economist, similarly predicted that welfare leavers might find jobs, but they were likely to be low-paying and of short duration.⁶⁵

With these sobering labor market statistics as background, I turn to one potential “bright side” of welfare reform for low-income people: the rise of the terminology and rhetoric of “the working poor,” with its elevated, somewhat noble, social status and its potential to increase political power for the post-welfare poor.

58. The original Act had a six-year lifespan, requiring Congressional action to renew it by September 30, 2002. The bill has still not been formally reauthorized; instead, Congress has passed a series of continuing resolutions to keep the original bill in place, for six months at a time, until a new bill is passed. *See* 42 U.S.C. § 603(a)(1)(A) (2000) (authorizing spending through September 30, 2002).

59. *See id.* § 607(c) for details regarding percentage of a state’s participants who must perform minimum numbers of hours of approved work activity. A maximum of thirty hours per week over 2000 is authorized. *Id.*

60. HEATHER BOUSHEY & DAVID ROSNICK, CTR. FOR ECON. AND POLICY RESEARCH, FOR WELFARE REFORM TO WORK, JOBS MUST BE AVAILABLE (2004), http://www.cepr.net/publications/welfare_reform_2004_04.htm.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. GARY BURTLESS, CAN THE LABOR MARKET ABSORB THREE MILLION WELFARE RECIPIENTS? (2000), <http://www.brook.edu/views/papers/burtless/20000301.pdf>.

C. Where Does that Leave the Leavers? The Rise of “The Working Poor”

Social scientists’ interest in the welfare leavers, and in the success or failure generally of a piece of legislation as dramatic as welfare reform, has a partner on the popular culture side. Several journalists followed the progress of welfare reform, telling new stories to the American public about low-income people, and giving new familiarity to the term “the working poor.”⁶⁶ Where American popular rhetoric about poverty was once dominated by the figure of the “welfare queen” enjoying a leisurely life of AFDC entitlements, a new figure emerged with welfare reform: the hard-working, barely-making-ends-meet member of a new social class, the working poor.

Nothing was more instrumental in creating this new category than Barbara Ehrenreich’s bestselling book, *Nickel and Dimed*, which chronicled her undercover attempts to make ends meet while working in low-wage jobs in three American cities.⁶⁷ The book, an excerpt of which was first published in 1999 as an article in *Harper’s Magazine*,⁶⁸ was a cultural phenomenon that gave rapid visibility to poverty and deprivation among workers in the post-welfare economy. More than a million copies of *Nickel and Dimed* were sold, and it spent nearly two years on numerous bestseller lists. Most importantly, though, *Nickel and Dimed* gave rise to a whole new literature of books, magazine cover stories, and talk show segments about low-wage work and the working poor.⁶⁹ The emergence of this literature should be seen as evidence of a new moment for

66. In addition to Barbara Ehrenreich, among the best known are Jason DeParle of the *New York Times* and Katherine Boo of *The New Yorker*.

67. BARBARA EHRENREICH, *NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA* (2001).

68. Barbara Ehrenreich, *Nickel-and-Dimed: On (Not) Getting by in America*, HARPER’S MAG., Jan. 1999, at 37.

69. See, e.g., SHARON HAYS, *FLAT BROKE WITH CHILDREN: WOMEN IN THE AGE OF WELFARE REFORM* (2003); RANK, *supra* note 43; DAVID K. SHIPLER, *THE WORKING POOR: INVISIBLE IN AMERICA* (2004); BETH SHULMAN, *THE BETRAYAL OF WORK: HOW LOW-WAGE JOBS FAIL 30 MILLION AMERICANS AND THEIR FAMILIES* (2003); Series, *Class Matters*, N.Y. TIMES, May 19–June 17, 2005; Tim Jones, *The Working Poor*, CHI. TRIB., Apr. 25, 2004, at C1; Anna Quindlen, *A New Kind of Poverty*, NEWSWEEK, Dec. 1, 2003, at 76. Bill Moyers produced a series of three documentaries for PBS, collectively entitled *Surviving the Good Times*, that followed several working poor families through the 1990s.

policymaking about American poverty.⁷⁰ Here we are, post-welfare, and we still have poverty. Without welfare policy to debate, policymakers should turn their attention four-square to American poverty, including the poverty that persists despite the all-American remedy for poverty—work.

While in the AFDC era poor people were dismissed as non-workers, lazy, and outside of dominant American culture, in the post-welfare era, poverty and work are no longer plausibly opposed. As a social category, “the working poor” takes the wind out of the sails of the traditional dichotomy between the “deserving” and the “undeserving” poor, which associated the former with work and the latter with sloth. Former Labor Secretary Robert Reich expressed it thus:

The one clearly positive consequence of welfare reform has been to move several million people from being considered “undeserving poor” because they don’t work to being viewed as “deserving” poor because they do. Most former welfare recipients are as poor as they were before, but the fact that they now work for their meager living has altered the politics surrounding the question of what to do about their poverty.⁷¹

New York Times reporter and author Jason DeParle also notes the new moral status of the post-welfare working poor: “Trading welfare checks for pay stubs, [the working poor] staked a moral claim to a greater share of the nation’s prosperity.”⁷² Unfortunately, federal policymakers since the passage of PRWORA have seemed less than concerned about Reich’s “question of what to do” about post-welfare poverty. It seems the only way legislators know how to discuss “poverty” is to discuss “welfare,” and now that welfare has ended, so,

70. One might think of this as an example of the power of “framing” in public life. See GEORGE LAKOFF, *DON’T THINK OF AN ELEPHANT!: KNOW YOUR VALUES AND FRAME THE DEBATE* (2004). Welfare reform gives anti-poverty advocates an opportunity to “re-frame” the American poor as members of the hard-working American middle class.

71. Robert B. Reich, *Introduction: Working Principles: From Ending Welfare to Rewarding Work* to MAKING WORK PAY, *supra* note 50, at vii, xi.

72. DEPARLE, *supra* note 39, at 327.

too, has the conversation. Poverty is now invisible because the “welfare problem” has been solved.⁷³

While poor people have always worked, and some workers have always been poor, the category of “the working poor,” newly deserving, has now begun to settle in and gain social familiarity. The new working poor, made visible by journalistic interest in welfare leavers and given fodder by social scientists studying the effects of the new statute, have opened the door to a new discussion of American poverty with a new terminology. The end of welfare means that “welfare dependency” can no longer plausibly be scapegoated as the cause of American poverty. With the cultural backing of *Nickel and Dimed*⁷⁴ and its progeny, low-wage workers and their advocates have an opportunity to turn America’s attention to an anti-poverty, as opposed to anti-welfare, agenda. This agenda can be crafted, in part, by examining the legal issues likely to arise in the low-wage workplaces from which the poor now get their “meager living.”⁷⁵

D. Legal Issues in the Low-Wage Workplace

For a variety of reasons, including limited education, scant work history, and race and sex discrimination, most former welfare recipients are in so-called “low-wage jobs.”⁷⁶ This phrase is a

73. “Low-wage workers have vanished from a domestic agenda that’s been dominated by a tax-cutting frenzy, mostly aimed at the same upper-income families who have enjoyed such outsized gains.” *Id.*

74. Outrage at the working conditions and lack of political power of the working poor is by no means unanimous. Indeed, one conservative journalist attacks Ehrenreich’s enterprise as “utterly misleading” on the facts of making ends meet in low-wage jobs. See Steven Malanga, *The Myth of the Working Poor*, CITY J., Autumn 2004, http://www.city-journal.org/html/14_4_working_poor.html (“[Ehrenreich] fixes the parameters of her experiment so that she inevitably gets the outcome that she wants—“proof” that the working poor can’t make it.”).

75. Reich, *supra* note 71, at xi.

76. It should be noted that, in this post-welfare era, thousands if not millions of working-poor Americans are working in quasi-public “workfare” assignments. These are the positions, often in the private labor market, in which TANF recipients work to “earn” their cash assistance. For example, in Wisconsin, a TANF participant may be assigned to work twenty hours per week in a clerical position at a participating non-profit organization. There has been considerable litigation nationwide addressing the question of whether these individuals are “welfare recipients” or “workers” for purposes of labor and employment law. Employers have argued, generally without success, that, as “recipients,” these individuals are not covered by anti-discrimination laws, wage and hour laws, health and safety protections, or other protective labor schemes. In most of these contexts, courts have found that these individuals are “workers”

misnomer, because such jobs are characterized by more than just low wages—they are also characterized by a cluster of terms and conditions that make them difficult, unpleasant, and unable to lift a family out of poverty.⁷⁷ These are short-term, at-will jobs characterized by low and erratic pay, long hours, unpaid overtime, no sick time, no health insurance, no unions, and often dangerous conditions. Some economists label these jobs as “secondary segment”:

Jobs in the primary segment are core jobs. These pay higher wages and are more likely to provide fringe benefits (such as health insurance and paid vacations) than jobs in the secondary segment. They also have ladders upward (often within the same firm), whereby workers can steadily improve their earnings and living standards over time. Jobs in the secondary segment, on the other hand, are peripheral jobs. They pay low wages, offer few benefits, tend to be nonunion, and generally have worse working conditions than core jobs in the primary sector.⁷⁸

“Low-wage” workers are disproportionately female, of color, and without a college education.⁷⁹ Moreover, there has been a decline over the last two decades in the real earnings of low-wage workers and a rise in their numbers as a percentage of the total work force.⁸⁰

The low-wage workplace is only minimally regulated, and the working-poor experience considerable, often “legal,” injustice and

and enjoy the legal protections that accompany that status. See U.S. DEP’T OF LABOR, HOW WORKPLACE LAWS APPLY TO WELFARE RECIPIENTS (1997), <http://www.dol.gov/asp/w2w/welfare.htm#How>; see also *United States v. City of New York*, 359 F.3d 83 (2d Cir. 2004) (finding that workfare participants are protected by Title VII).

77. One way to define a job as “low-wage,” of course, is to peg it to the federal poverty threshold. The “poverty wage” for a single mother with two children is \$7.60 per hour. See *supra* note 32 and accompanying text. Using the 2004 poverty threshold for a family of two adults and two children (\$19,157 per year), any wage earner for a family of four earning below \$9.75 per hour is below the poverty line. See *supra* notes 15–17 and accompanying text.

78. Jared Bernstein & Heidi Hartmann, *Defining and Characterizing the Low Wage Labor Market*, in URBAN INST., U.S. DEP’T OF HEALTH AND HUMAN SERVS., THE LOW WAGE LABOR MARKET: CHALLENGES AND OPPORTUNITIES FOR ECONOMIC SELF-SUFFICIENCY 15, 17 (1999).

79. *Id.* at 16.

80. *Id.*

exploitation.⁸¹ Indeed, *Nickel and Dimed* is filled with anecdotes about the almost daily disrespect, lack of control, and arbitrariness that Ehrenreich experienced in her low-wage jobs. From a legal perspective, the cornerstone of any analysis of the low-wage workforce is the at-will employment doctrine. Low-wage jobs are overwhelmingly *at-will* jobs.⁸² Employers can hire and fire at-will, “for any reason or no reason,” as it is frequently stated.⁸³ This is the starting place for analyzing many legal issues in the low-wage workplace, and many workers are surprised and dismayed when they learn of it. For example, a worker may come to a law office (or law school clinic that serves low-income people) because he has been fired from a job. His story is one of the boss not liking him, and of a “personality conflict.” The actual termination was because of some allegation of poor performance, but the worker reports that his performance was in fact average, certainly no worse than that of many others on his shift. The worker seeks redress; he wants reinstatement, or wants the manager who terminated him disciplined for unfairness. Workers view these terminations as wrongful, but absent additional facts (discussed below) such terminations are perfectly lawful in the at-will workplace. Employers can terminate (or refuse to hire, or demote, or otherwise alter the conditions or terms of employment) for no reason or for any reason, including arbitrary personal dislike of a certain worker.

81. One is reminded of Austin Sarat’s 1990 statement that “the law is all over” the “welfare poor,” and that “[l]aw is, for people on welfare, repeatedly encountered in the most ordinary transactions and events of their lives. . . . Law is immediate and powerful because being on welfare means having a significant part of one’s life organized by a regime of legal rules.” Austin Sarat, “. . . *The Law is All Over*”: *Power, Resistance and the Legal Consciousness of the Welfare Poor*, 2 YALE J.L. & HUMAN. 343, 344 (1990). In some ways, the opposite is true for the post-welfare working poor. While injustice is “all over” them, the law reaches actually very little of it. *See also* Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049, 1050 (1970) (stating that “poor people are always bumping into sharp legal things”).

82. *See* Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 126–27 (1976).

83. *See, e.g.*, LEGAL AID SOC’Y, WORKERS’ RIGHTS CLINIC: EMPLOYMENT LAW MANUAL 2005–2006, at 24 (2005) (characterizing the at-will doctrine as an employer’s ability to fire a worker “at any time for a good reason, a bad reason or no reason at all”).

The two most significant checks on the at-will doctrine are contract law⁸⁴ and anti-discrimination law,⁸⁵ but neither provides much comfort to a typical low-wage worker.⁸⁶ Indeed, workers are often bewildered (if not appalled) at how little of their exploitation is remedied by law. They are not well-educated on the at-will doctrine and may be misinformed based on prior experiences as contract employees or as employees for an employer who voluntarily terminated workers only for cause. Many workers have an instinct that the employment relationship *should* be one of basic fairness, and that they should not be fired unless there is a good reason.

Similarly, the actual operation of anti-discrimination law is difficult to explain to a lay person. A worker may say that she was fired because of her gender or race, but the prospect of proving it may be dim. They may report that the boss does not like them because of their race, but have no actual evidence—in the form of “smoking gun” comments or statistical comparison of the treatment of other workers—to substantiate their claims. Further, these workers often understand intuitively that the boss will say that they were fired for some other, pretextual, reason, and that the deck is stacked against them in the credibility contest over what was the *real* reason for the termination. Many workers react with familiarity to the prediction that the boss will testify that the worker was fired for a non-discriminatory reason: “Oh, yeah, that’s what they always say.”

At-will employment, unprovable discrimination, non-livable wages: these are among the experiences that await welfare recipients transitioning to work. This kind of persistent, almost routine, exploitation and lack of control over the terms of one’s work has profound effects on a person’s sense of self and expectations of the

84. Only 12.5% of U.S. “wage and salary workers” were represented by a union in 2004, compared with 20.1% in 1983. Few low-wage workplaces (such as retail or service) are governed by a collective bargaining agreement. Bureau of Labor Statistics, Union Members Summary, <http://www.bls.gov/news.release/union2.nr0.htm> (last visited Jan. 14, 2006).

85. Several other employment law doctrines and protective regimes are at play in any employment relationship, including workers’ compensation, the Occupational Safety and Health Act, social security, and sexual harassment. I intend in this section to provide only the broadest overview of legal issues in the low-wage workplace and, of course, any particular issue needs to be analyzed under particularly applicable law.

86. The at-will doctrine should be considered in light of any jurisdiction’s law of “wrongful discharge.” See Feinman, *supra* note 82.

legal system. Even if he or she does not focus on employment law, a lawyer who works with poor people needs to understand this segment of the labor market, and be familiar with its dynamics and its effects on workers. Poverty lawyers should master the rudiments of employment law, and become familiar with the culture of its enforcement in their local legal environments. As much as these lawyers have historically needed to know the basics of Food Stamp eligibility or whether their local Public Housing Authority is accepting applications, they now also need to know the basics of at-will employment, wage and hour enforcement, and where low-wage earners can go if they have been exploited on the job. Lawyers in low-income settings should be able to teach clients about the basic employment doctrines of at-will employment and discrimination,⁸⁷ and should be sufficiently educated on these topics to inquire intelligently about the (unlikely) existence of a union or other contracts governing the employment relationships. Lawyers should be able to competently refer clients who have been terminated to local enforcement agencies or discrimination attorneys.

In addition to this individual “issue spotting” in client interviews, poverty lawyers can also play an important function in educating the community on the legal subjects associated with the low-wage workplace. That is, in addition to responding competently to inquiries from individual prospective clients who complain about injustice at work, poverty law offices can proactively educate low-wage workers about their workplace rights. Many of these subjects, such as the relationship between the at-will doctrine and anti-discrimination regimes, are suitable for community legal education workshops or written educational materials. As discussed below, these are also projects entirely appropriate for clinical law students.

87. A third subject that poverty lawyers should grasp, at least minimally, is unemployment insurance. Because of their patterns of attachment to the labor force, many low-wage workers are ineligible for unemployment insurance. *See* ECON. POLICY INST., EPI ISSUE GUIDE: UNEMPLOYMENT INSURANCE (2004), http://www.epinet.org/issueguides/unemployment/epi_unemployment_insurance_issue_guide.pdf. Indeed, as veteran Milwaukee legal services attorney Patricia DeLessio noted, AFDC functioned somewhat as unemployment insurance for the poor. That AFDC operated as an entitlement enabled these low-wage workers, often ineligible for unemployment insurance, to maintain some minimum income as they cycled, often involuntarily, in and out of the wage labor force. Interview with Patricia DeLessio, Attorney, Legal Action of Wis., Milwaukee, Wis. (summer 2005).

Welfare reform has changed the political, legal, and social context in which “the poor” are conceived and constructed. Poor people’s identity as “workers” is now central. Former welfare recipients now rely on wage work for a larger percentage of their family incomes than they did before, and most of them are earning those incomes in low-wage, at-will jobs. The laws governing those jobs and their limits should become an important feature of the new, post-welfare, poverty law agenda. While in an earlier era that agenda was dominated by welfare policy, entitlements and constitutional protections,⁸⁸ in the current era lawyers concerned about justice for the poor must contend with the post-welfare employment setting. The next section demonstrates how one law school clinical program, the Neighborhood Law Project at the University of Wisconsin, engages law students in this enterprise.

II. POST-WELFARE CLINICAL LEGAL EDUCATION: TEACHING SOCIAL JUSTICE FOR THE WORKING POOR

While the exact number is impossible to determine, there can be no doubt that a significant number of former welfare recipients entered the low-wage workforce in the wake of welfare reform. The end of welfare entitlement meant that many former welfare recipients must now rely on wage employment for a larger percentage of their families’ income than in the AFDC era. The low-wage workplace where most earn that income presents unique and important legal issues, and a new poverty law agenda should account for and address them. This section contains a detailed description of the work of the Neighborhood Law Project (NLP) in Madison, Wisconsin, as an example of work that can be a part of the post-welfare agenda in light of this shift. By way of this example, I argue that law school clinics can be useful laboratories for piloting post-welfare poverty lawyering. The NLP “experiment” includes a close partnership between a law school clinic and a worker center, and spawns

88. I refer here to the Fourteenth Amendment and other constitutional cases that poverty law champions litigated in the 1960s and 70s seeking substantive rights and procedural protections for the poor, mostly in the context of AFDC. *See, e.g.*, *Jefferson v. Hackney*, 406 U.S. 535 (1972); *Wyman v. James*, 400 U.S. 309 (1971); *Dandridge v. Williams*, 397 U.S. 471 (1970); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *King v. Smith*, 392 U.S. 309 (1968).

important lessons about the potential for collaboration across sub-groups of the working poor and for the development of worker power. Law school clinics can also be important sites for employing “new” models of lawyering—styled by some as “collaborative,”⁸⁹ “rebellious,”⁹⁰ or “community”⁹¹ lawyering—in addition to traditional attorney—client relationships to examine their viability for building worker power in the post-welfare world.

*A. Clinical Education as a Post-Welfare Lawyering Laboratory:
Curriculum and Practice Design for the Working Poor*

To say that poverty lawyers need to respond to welfare reform by conceiving of their clients as members of the working poor does not provide much guidance. Indeed, as in all social practices, the lived experience of post-welfare lawyering depends on local context, including local resources, local legal culture, and the local labor market. The prescription is broad: encounter clients as workers and explore their barriers to economic self-sufficiency with an eye toward how the law and lawyers, if at all, might assist. Law school clinical programs can play a unique role in this multi-sited encounter and exploration. Freed from many of the factors that constrain other providers of legal services to the poor and operating with an express mission to participate in an academic inquiry into the social conditions in which law is practiced, law school clinics can experiment with projects explicitly engaging with the working poor. Clinical faculty can report on the success, however measured, of these experiments. Finally, clinicians can examine students’ reactions to the conception of poor people as workers as a window into the power of the new social category in the larger issue of social and economic justice for the poor.

89. See Ascanio Piomelli, *Appreciating Collaborative Lawyering*, 6 CLINICAL L. REV. 427 (2000); Ascanio Piomelli, *The Democratic Roots of Collaborative Lawyering*, 12 CLINICAL L. REV. (forthcoming 2006); Lucie E. White, *Collaborative Lawyering in the Field? On Mapping the Paths from Rhetoric to Practice*, 1 CLINICAL L. REV. 157 (1994).

90. See GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO’S VISION OF PROGRESSIVE LAW PRACTICE* (1992).

91. See Shauna I. Marshall, *Mission Impossible?: Ethical Community Lawyering*, 7 CLINICAL L. REV. 147 (2000); see also Christine Zuni Cruz, *[On the] Road Back in: Community Lawyering in Indigenous Communities*, 5 CLINICAL L. REV. 557 (1999).

One experiment underway at the University of Wisconsin Law School reveals that collaboration with a local worker center can advance the interests of both institutions and reap enormous educational benefit for the law students. It also reveals that, at least locally, there is a great divide between immigrant and non-immigrant workers that must be bridged to create effective worker power in the local economy.⁹²

1. Overview of Neighborhood Law Project

To understand NLP's practice on behalf of the post-welfare working poor, one needs a general understanding of the clinic's mission and context. NLP is a community-based poverty law clinical program at the University of Wisconsin Law School.⁹³ While this Article focuses on NLP's employment (and in particular, wage and hour) practice, the clinic also provides representation and advocacy in landlord-tenant and public benefits matters. Like most law offices for low-income clients, NLP also engages in a smattering of miscellaneous matters, such as credit report errors, uninsured car accident liability, and the occasional small tort case. While NLP does not have formal income eligibility criteria, all of its clients are poor. They are (non-student) renters, social security recipients, TANF participants, and workers with jobs that pay significantly less than living wages; rare is the job that pays over \$10 per hour, and most NLP working clients earn between \$7.50 and \$10 per hour.⁹⁴ NLP's pedagogical philosophy is the conventional clinical approach of

92. For another description of post-welfare lawyering in law school clinics, see Stephen Loffredo, *Poverty Law and Community Activism: Notes from a Law School Clinic*, 150 U. PA. L. REV. 173 (2001).

93. NLP's clinical faculty is made up of the author and a second clinical assistant professor working half-time; the student:faculty ratio is approximately 6:1 in the full-time summer session, and 8:1 in the academic year. Students either participate in NLP's full-time summer clinic (forty hours per week for twelve weeks), or in the academic year clinic. In the academic year, students register for seven credits in the fall and four in the spring, which corresponds, under Law School rules, to about twenty-five hours per week in the fall and fifteen hours per week in the spring. For an overview of the clinic, see its description on the University of Wisconsin Law School website at <http://www.law.wisc.edu/fjr/eji/neighborhood/index.htm>.

94. This characterization is based on the author's general familiarity with the clinic's clients; to protect client privacy, the clinic does not collect data about its clients' economic situations, but learns of them only as they arise in the casework.

vesting primary responsibility for case matters in the student, seeking to promote students' autonomous exercise of professional judgment while providing intense supervision and opportunity for reflection.⁹⁵ The clinic practice is designed with this philosophy in mind; we strive to select matters likely to have a scope, duration, and complexity appropriate for a beginning lawyer under clinical supervision.

NLP is community-based, and the core of the NLP clinical experience is the students' time at the neighborhood office, approximately two miles from the Law School. Each student spends about half of his or her weekly clinic hours at the office conducting intakes,⁹⁶ greeting the public, meeting with clients,⁹⁷ and generally staffing the office.⁹⁸ The office is located on South Park Street, the main commercial artery of Madison's South Side, one of the city's areas of concentrated poverty. Low-income residential neighborhoods run for a few blocks on either side of Park Street.

Madison is a city of just over 208,000 people.⁹⁹ While the 2000 median household income in the City was \$41,941,¹⁰⁰ the City's poverty rate (15% in 2000)¹⁰¹ is above the nation's overall rate

95. See DAVID F. CHAVKIN, *CLINICAL LEGAL EDUCATION: A TEXTBOOK FOR LAW SCHOOL CLINICAL PROGRAMS* (2002).

96. In the summer of 2004, NLP students conducted complete intake interviews with over eighty prospective clients, and opened case files on twenty-four of them. In the 2004–05 academic year, the students conducted over 125 interviews and opened forty-eight new cases. These numbers do not include the scores of “referral only” calls that the students field in the office, or the matters that the students inherit from the previous session's students.

97. My use of the word “client” is reluctant, conveying as it does the conventional conception of the attorney-client relationship in which the client is the passive, grateful recipient of the lawyer's expertise and professionalism. This conception has been the subject of considerable criticism, particularly in the area of lawyering for social justice for traditionally marginalized and disempowered communities. See White, *supra* note 89. Nevertheless, in addition to its other activities, NLP does engage in some traditional litigation, and the word “client” does apply, even as we labor to a more collaborative model of our work.

98. The community office has no secretarial or administrative staff. Students are responsible for answering the phone, returning calls, scheduling appointments, stocking forms, and general office practices.

99. U.S. Census Bureau, Fact Sheets, <http://factfinder.census.gov> (enter Madison, Wisconsin) (last visited Jan. 14, 2006).

100. Answers.com, Madison, <http://www.answers.com/topic/madison-wisconsin> (last visited Jan. 14, 2006).

101. U.S. Census Bureau, *supra* note 99 (click on Economic Characteristics, Show More).

(11.3% in 2000).¹⁰² Poverty rates for Madison's single mothers is higher than the City's average (18.6%), and more than twice that rate (39%) if they have children age five or under.¹⁰³

Race and poverty demographic data at the neighborhood level are more difficult to discern. The United States Census Bureau reports data by census tract, or even down to the census block. However, as in many cities, Madison's census tracts are larger than its residential neighborhoods, and the census blocks do not accurately reflect socioeconomic residential patterns. Thus, U.S. Census data do not give a useful picture of the poverty or race data of the City of Madison. School district data, which can be parsed by neighborhood, comes closer.¹⁰⁴

The South Side, where NLP is located, is understood to comprise three neighborhoods: Bram's Addition, Burr Oaks, and Capitol View. The race and poverty data for those three neighborhoods are striking and reveal a significant concentration of low-income people of color. Fully 93% of the children who live and go to public school on the South Side are of color.¹⁰⁵ While the City of Madison as a whole is just 5.8% African-American,¹⁰⁶ 46% of the children who live in the three South Side neighborhoods and attend Madison public schools are African-American.¹⁰⁷ Twenty-three percent of South Side children are Hispanic,¹⁰⁸ while the City's overall population is just over 4% Hispanic.¹⁰⁹

The income data is similarly dramatic. While again the Census Bureau's poverty data is not synchronized to these neighborhoods, the school data paints a picture of poverty on the South Side. Almost one third of the individuals estimated to live in the South Side's

102. U.S. Census Bureau, Historical Poverty Tables, <http://www.census.gov/hhes/poverty/histpov/hstpov2.html> (last visited Jan. 14, 2006).

103. U.S. Census Bureau, *supra* note 99 (click on Economic Characteristics, Show More).

104. Mary O'Donnell of the City of Madison Planning and Development Department graciously provided and patiently explained the City's neighborhood data (notes on file with author). The City's neighborhood data is not published, but is based on the Madison Metropolitan School District attendance data by school. *See* Madison Metro. Sch. Dist., District Statistics, <http://www.madison.k12.wi.us/stats.htm> (last visited Jan. 14, 2006).

105. *Id.*

106. U.S. Census Bureau, *supra* note 99.

107. Madison Metro. Sch. Dist., *supra* note 104.

108. *Id.*

109. U.S. Census Bureau, *supra* note 99.

school districts are on some form of public assistance.¹¹⁰ Similarly, 85% of these students participate in the means-tested free or reduced lunch program.¹¹¹ The South Side has the predictable social challenges accompanying such demographics: an aging housing stock, elevated crime rate, minimal retail, etc. In short, for anyone who has spent time in low-income American neighborhoods, the South Side is a familiar place. NLP does not want for clients in any of its practice areas.

The strip mall where the clinic is located is fronted by a vast parking lot, and runs down the middle of this set of neighborhoods. The clinic's neighbors on the strip include some mainstream retail, a public library, a public health center, an Asian grocery, a pawnshop and a payday lender. The clinic shares its entryway off the parking lot with many of the mall's other non-profit tenants: Madison Urban Ministries (a self-proclaimed "social justice" organization that operates re-entry programming for prisoners after incarceration); the Wisconsin Women's Business Initiative Corporation; the South Metropolitan Planning Council (an umbrella group for the South Side's neighborhood associations); the "service learning" office of the consortium of local colleges and universities; and the Workers' Rights Center (WRC), with which the clinic works closely. At the front of the building at this entrance is the cheerful Head Start classroom with signs that greet one with "Welcome" in many languages.

NLP enjoys considerable freedom in designing its practice for maximum pedagogical and service effects. Its service mission is to provide a broad range of legal and advocacy services to low-income individuals in the communities surrounding the University of Wisconsin Law School. Its educational mission is to create a learning environment where, by having real responsibility for important client matters, law students learn "lawyering skills" (broadly conceived) and to think critically about the role and limits of law as a force for justice and social change for the poor.

110. Public assistance programs included in the data are Food Stamps, Medicaid, and the Section eight housing voucher program. Madison Metro. Sch. Dist., *supra* note 104.

111. *Id.*

Unlike federally funded legal services providers (such as Legal Services Corporation), NLP's work is not restricted by statute.¹¹² Nor is NLP funded by any grantor with a stake in clinic design.¹¹³ NLP has therefore been relatively free, subject only to broad approval from the Law School administration, to select subject areas, client populations, and modes of service delivery with an eye only on maximum pedagogical and service (justice) effects. In exercising this freedom, NLP benefits from the University of Wisconsin Law School's intellectual tradition in so-called "Law in Action," a part of the larger, interdisciplinary, "Law and Society" movement.¹¹⁴ "Law in Action," as an organizing principle for legal academic work, takes as its starting point the idea that law is fundamentally a social practice, and that it is determined as much by the actual players and their institutional and personal incentives as by doctrine or commitment to any set of "rules."¹¹⁵ The Law in Action tradition of the University of Wisconsin Law School makes it a productive laboratory for clinical education, which by definition seeks to mine lessons out of true experience in law.

112. Since its inception in 1974, LSC funding has come with strings attached. *See* 42 U.S.C. §§ 2996–96l (2000). In addition to basic income eligibility requirements (125% of FPL), current restrictions on LSC practice include a prohibition on using the funds to "act as an organizer, of any association, federation or similar entity," to provide any type of legal services associated with provision of a "nontherapeutic abortion," or to provide any type of representation associated with school desegregation. *See id.* § 2996f(b). For a detailed history of the restrictions on the use of LSC funds, see Symposium, *The Future of Legal Services: Legal and Ethical Implications of the LSC Restrictions*, 25 *FORDHAM URB. L.J.* 279 (1998). The 1996 specific restriction preventing LSC-funded attorneys from litigating systemic welfare issues was struck down in *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001).

113. NLP has enjoyed the support of the Evjue Foundation, the charitable arm of the area's afternoon newspaper, *The Capital Times*. The Foundation funds projects that show "promise of contributing significantly to the welfare of the people of the community." *The Capital Times*, Basic Grant Policy, <http://www.madison.com/tct/evjue/policy/> (last visited Jan. 14, 2006).

114. The "Law and Society" movement has organized itself into the Law and Society Association (LSA), founded in 1964. LSA describes itself as a "group of scholars from many fields and countries, interested in the place of law in social, political, economic and cultural life." *See* *The Law and Soc'y Ass'n*, www.lawandsociety.org (last visited Jan. 14, 2006). LSA publishes the academic *Law & Society Review*, and hosts several workshops and conferences nationally.

115. A frequently used statement to illustrate the "Law in Action" concept is attributed to Frank Remington, a member of the University of Wisconsin Law School faculty from 1949 to 1992. He noted that "criminal law is what happens in the back of a squad car on a hot summer night" (paraphrase).

NLP has an express social justice mission. While of course primarily an institution dedicated to legal education, the clinic's identity, too, is as a member of the community of Madison lawyers who serve the poor, with explicit aims both to help individual poor people who have suffered legal harms, and to be involved institutionally in larger anti-poverty policy initiatives. The clinic's service goal is to work with the poor as their lawyers and to inquire critically into the social, political, and economic forces that maintain their poverty. NLP works closely with other legal providers to ensure that services are not duplicative, and to leverage the clinic's freedom to select matters for high "justice impact." The clinic undertakes cases and projects that, in the clinical faculty's judgment, lie at the "crossroads" where education and service meet.¹¹⁶ The faculty continually reassesses the program, looking for matters both well-suited to law students' learning needs and likely to enhance justice for the poor people in the local community in light of changing social and political conditions. The social justice emphasis of the clinic is highlighted in recruitment and public materials about the clinic.

NLP's caseload reflects a commitment to both small-scale "service" matters and larger "impact" matters.¹¹⁷ The "service" cases are individual litigation matters in any of the clinic practice areas. Typical cases involve security deposits, eviction defense, small wage and hour claims (under \$5,000),¹¹⁸ and public benefits matters, such as Food Stamp reductions or TANF case closures. As in all litigation practices, many of these cases are resolved through investigation, research, and negotiation, although the clinic does conduct a number of small claims trials every year. As described below, the "impact" projects of the clinic have so far consisted of multi-client, higher value (over \$10,000) wage and hour cases, community education projects and organizing initiatives. Each student's NLP workload is

116. Perhaps a better image is of a Venn diagram, with the two circles being "pedagogy" and "service," or "student learning needs" and "community legal needs," and the clinic practice occurring in the intersection where the two circles overlap.

117. See Wizner & Solomon, *supra* note 14, at 474–76 (distinguishing between "reform" matters and "service" cases).

118. In Wisconsin, the small claims court has exclusive jurisdiction over matters with a dollar value of less than \$5,000.00. WIS. STAT. ANN. § 799.01 (West 2001).

comprised of individual service matters and at least one community impact project.

A student's NLP client work is complemented by two weekly clinic meetings, one a "seminar" and the other an "office meeting" ("case rounds"). The subject of the clinic seminar, after the initial substantive law and skills "bootcamp" is complete, is, loosely speaking, social justice lawyering for the poor, with an emphasis on the working poor. The goal of the seminar is to provide an intellectual context for the work that the students do on behalf of and with their low-income clients. Without minimizing the significance of learning lawyering skills, the NLP curriculum emphasizes that every lawyer chooses where to deploy those skills, and devotes him or herself most emphatically to the skills most beneficial to the clients he or she expects to serve. The NLP seminar is designed to provide an exploration of the life and concerns of working poor Americans, and of the responses law and lawyers have made to those concerns.

To set the stage for this intellectual inquiry, each NLP student starts his or her clinic term by independently preparing "The Family Budget," an exercise designed to answer the simple question: What hourly wage would a single mother of two need to earn to be self-sufficient in Madison?¹¹⁹ The students are specifically instructed not to rely on any public benefits programs (Food Stamps, Medical Assistance, a Section 8 housing voucher, etc.) in crafting their budget. They are further told they may utilize mainstream discount retail stores, but cannot rely on charity or local second-hand thrift stores. The goal of the exercise is to derive the cost of self-sufficiency on the private market in the NLP local community. Predictably, every single student comes back with an hourly wage radically higher than any client will ever be earning.¹²⁰ The students next are exposed to the wage data for the occupations that dominate

119. For this exercise, and for much more, I am forever indebted to Bill Quigley, the keynote speaker of this Symposium, who taught me, in my first year of lawyering for the poor, that "It's all about work."

120. Depending on the seriousness with which the student treats the exercise, the choices and omissions they make in spending (haircuts, birthday parties, travel, and savings are almost always neglected), and their creativity, students' needed hourly wages range from \$10 to \$30 per hour.

Madison's local economy¹²¹ and compare that to their monthly budgets.

The purpose of this exercise is three-fold. First, it is to give the students some "fact investigation" experience: they must pick up the phone and call landlords to inquire about rents, utilities, and security deposits; they must call daycare providers to ask about waiting lists and fees; they must go to the grocery store and fill a basket with food and diapers and paper towels and do the math. They are told that some of this information is available on the Internet, but that there is no substitute for "hitting the streets." This work is an introduction to the "gumshoe" work they will be expected to do as they investigate their clients' cases and for which the law school classroom curriculum has typically not prepared them.

Second, the exercise has obvious "consciousness raising" goals: many University of Wisconsin law students come from economically stable, second or third generation middle class families, and simply do not know how much it costs for a family to live.¹²² The benefits of this consciousness are apparent the first time a student interviews a prospective client who is being threatened with eviction because she fell behind in her \$685 monthly rent—having done the family budget, the student is much more likely to understand the circumstances that the client inevitably recites about why she fell behind (such as job loss, or unexpected car or medical expenses). Students' consciousness is similarly raised with respect to the "budget busters"

121. Occupational and wage data for "metropolitan statistical areas" can be found at Bureau of Labor Statistics, U.S. Dep't of Labor, Metropolitan Area Wage Data, <http://www.bls.gov/bls/blswage.htm#Metropolitan> (last visited Jan. 14, 2006).

122. A corollary benefit of the exercise is the discussion it prompts among students about the line items in a family budget. Some consider long-distance service a luxury; others consider weekly movies a necessity. Most omit haircuts, and none include babysitting hours for mom to go out with her friends or on a date. Often, a self-identified poor student chimes in with hard-nosed stories about life on the economic edge. These conversations reveal deeply held beliefs about what a family "needs," and about how culture and socioeconomic class are expressed through consumer spending. The exercise can be an emotional experience, too, as students confront the deprivation that even people with "good" jobs must face. Professor Lucie White has written a piece that describes the reactions of her students at Harvard Law School to a version of the family budget exercise and the teaching opportunities the exercise creates. Lucie E. White, *Facing South: Lawyering for Poor Communities in the Twenty-First Century*, 25 *FORDHAM URB. L.J.* 813 (1998). NLP students read an excerpt of this article after they have finished their budgets.

of health care and child care, two line items that low-wage jobs do not cover.

Third, the exercise provides an opportunity for the clinic's first inquiry into the role of law with respect to the working poor: now that students see that the hypothetical family cannot make ends meet on the wages available, what, if anything, should we as lawyers do about it? How do we evaluate "treating the symptoms" of the working poor (e.g., by negotiating a payment plan on a rent arrearage) against "curing the disease" of inadequate wages and lack of affordable housing and health care? What is our role, as compared to that of social workers, legislators, activists, organizers, and the poor themselves, in addressing poverty? With the family budget as a reference point, the core of the seminar curriculum is exposure to and discussion of critical and academic literature on the subject of lawyering against poverty.¹²³

The local setting and clinical design of the Neighborhood Law Project provide a milieu in which law students and clinical faculty can explore lawyering for the working poor. The specific litigation practice that most engages the questions associated with this new social group are the clinic's wage and hour matters.

2. Wage & Hour Enforcement

While most of NLP's clients are "the working poor" regardless of the subject area in which the clinic represents them, NLP students most directly engage with clients as workers in wage and hour and other employment matters. In recent years, NLP has developed expertise in individual and group representation in wage and hour

123. The syllabus varies, but excerpts of the following books and articles are among those most frequently assigned: LÓPEZ, *supra* note 90; Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443 (2001); Ingrid V. Eagly, *Community Education: Creating a New Vision of Legal Services Practice*, 4 CLINICAL L. REV. 433 (1998); Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407 (1995); William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 OHIO N.U. L. REV. 455 (1994); Sarat, *supra* note 81; Wexler, *supra* note 81; Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990). The students also write at least one reflection paper on this theme.

cases. Indeed, NLP is virtually the only entity in Madison that provides representation in relatively small-scale wage and hour matters.¹²⁴ At any given time, NLP's caseload includes a number of small claims (under \$5000), individual wage and hour cases, and one or two larger-scale, multi-client matters. These wage and hour cases are excellent clinical teaching cases—they move at a pace and in tribunals friendly to students enrolled in a two-semester clinic, they involve detailed fact investigation and both formal and informal discovery, they arise under a relatively straightforward statutory scheme, there are important strategic decisions to be made early in each case, and they are amenable to negotiation and settlement after thorough investigation and research. These are also important justice cases. Low-wage workers in Madison, as in many places, are uninformed about their rights, are afraid of losing their jobs, and are thus vulnerable to exploitation. A worker's right to be paid for his or her work is uncontroversial (although, as discussed below, working with these clients can spark controversy about the clinic's other, less "worthy," clients), but there are few legal resources available to enforce that right. Law students often find working on these cases to be highly meaningful and satisfying both politically and personally.

NLP has had an opportunity to develop even greater expertise in wage and hour matters since the founding of a worker center on Madison's South Side. Many advocates and organizers are urging lawyers to partner with community groups and organizations in a multi-faceted movement for justice in the low-wage economy,¹²⁵ and the relationship between the clinic and the worker center is an example of such a partnership. The Workers' Rights Center (WRC)¹²⁶

124. The local LSC-funded office provides no representation in wage and hour or any employment matters. The Attorney General's office does conduct some activities in the wage and hour area, but we have never known it to represent individual workers seeking their wages. As discussed, *infra* note 112, the statute also contemplates a role for the district attorney of the county in which unpaid work was allegedly performed. However, the Dane County district attorney has told NLP supervising attorneys that his office can only afford to deploy resources in this area in "significant" cases, such as those involving criminal fraud. The only other provider we are aware of is a new non-profit law firm that was founded in 2004 by, among others, an NLP alumna.

125. See, e.g., Zauderer, *supra* note 11, at 666 (noting, among other observations, that "welfare recipients are workers now").

126. See Interfaith Coalition for Worker Justice, <http://www.workerjustice.org/wrc.html> (last visited Jan. 14, 2006).

is a project of the Interfaith Coalition for Worker Justice of South Central Wisconsin. Founded in 2002, the WRC is a faith-based social service organization modeled, in part, on The Workplace Project in Hempstead, New York,¹²⁷ that provides information and lay advocacy to low-wage workers on workplace matters. Arising from a 1999 study of the working conditions of Dane County's growing Latino population,¹²⁸ the WRC is a faith-based social service organization that provides information and law advocacy to low-wage workers on employment and other workplace matters. The study was prompted by the more than doubling of the Latino population in Dane County in a ten-year period, and concern about the economic stability of those families.¹²⁹ A diverse, community-based commission was formed, and a fact-finding delegation established.

The commission published its report, *Can't Afford to Lose a Bad Job*, in 2001; its recommendations included establishing a Workers' Rights Center.¹³⁰ The Coalition itself undertook the project, and the WRC opened its doors—across the hall from NLP—on November 13, 2002, with one staff person and a steering committee.¹³¹ The primary function of the WRC is to recruit and train lay advocates to work with low-wage immigrant and non-immigrant workers.¹³² The lay advocates are trained in basic employment law. They conduct intake interviews and, under the supervision of the program director, advocate for workers to solve a variety of workplace problems.

The goals of the WRC are not only to assist individual workers to resolve individual workplace problems but, more broadly, to empower the Latino, low-wage immigrant worker community. Ultimately, the WRC hopes to build a powerful organization that will

127. The Workplace Project is described in detail in GORDON, *supra* note 8.

128. CTR. ON WIS. STRATEGY, UNIV. OF WIS.-MADISON, *CAN'T AFFORD TO LOSE A BAD JOB* (2001), <http://www.workerjustice.org/latino-execsum-english.pdf>.

129. *Id.*

130. *Id.*

131. Knowing from the beginning that there would be a close collaboration between the two organizations, the inaugural Steering Committee included the author, as Director of NLP, and an affiliated staff attorney, who had been funded by a Skadden Arps fellowship to represent low-wage workers and public benefits recipients in Dane County.

132. The Madison organization is a chapter of the National Interfaith Committee for Worker Justice, which is headquartered in Chicago and provides training, materials, and other support. See <http://www.iwj.org> (last visited Jan. 14, 2006).

serve as a deterrent to employers who attempt to exploit Latino workers, on the tacit expectation that these workers are friendless and unlikely to resist. WRC and NLP work closely together, generally meeting weekly to discuss incoming cases and projects. The proximity of and collaboration with the WRC gives the law students a concrete setting in which to explore the respective roles and expectations of lawyers, lay advocates, and organizers, and a context in which to evaluate their own litigation efforts against other strategies for building power for the working poor.

a. Litigating Wage and Hour Cases: Clinical Opportunities in Traditional Lawyering for the Working Poor

The clinic's wage and hour litigation practice engages students in a number of conventional lawyering practices. Each individual litigation matter offers "teaching moments" on the role of the lawyer, the justice effects of the work, and the lessons about the lives of the post-welfare working poor that are revealed through the work. Clinical faculty guide students to pause at these moments and reflect upon the lessons learned. This section describes the wage and hour practice, and the opportunities for social justice lawyering and clinical learning that it creates.

Unpaid wages are a significant problem in the American labor market, including the low-wage workplace. While unpaid wages themselves are impossible to count, the government does track its own enforcement of wage and hour laws. The U.S. Department of Labor reports that it collected over \$165 million in back wages for over 265,000 workers in the fiscal year 2004.¹³³ More than a quarter of those wages (\$43 million) were collected as back wages for workers in "low-wage" industries.¹³⁴ In this federal context, both total wages collected and those collected from identified low-wage settings have steadily risen since 2001.¹³⁵ The Wisconsin Department of Workforce Development (DWD), which enforces the Wisconsin

133. U.S. Department of Labor, Employment Standards Administration, 2004 Statistics Fact Sheet, <http://www.dol.gov/esa/whd/statistics/200411.htm> (last visited Jan. 14, 2006).

134. *Id.* (identifying nine industries as "low-wage," including day care, restaurants, and janitorial services).

135. *Id.*

wage and hour scheme, reports that in recent years it has collected approximately \$2 million per year in back wages for workers.¹³⁶

In both the federal and state contexts, of course, the agencies can report only those back wages that they themselves have knowledge of through their own collection efforts. Any unpaid wages collected by workers through informal advocacy or private causes of action are not included in these figures. Moreover, these figures cannot be taken to represent the extent of the problem of unpaid wages in the U.S. economy. Because of lack of knowledge about their rights and the process for enforcing those rights, lack of access to legal services, fear of deportation¹³⁷ or other retaliation, and other barriers, many workers with unpaid wages or unpaid overtime presumably do not seek legal redress.

American workers are protected by a range of statutes; the right to be paid, and to be paid time-and-a-half for any hours over forty in a single week, is found in the federal Fair Labor Standards Act (FLSA).¹³⁸ Like many states, Wisconsin has codified a “mini-FLSA”¹³⁹ with a two-tiered (administrative and civil court) system of enforcement of wage and hour provisions. Wisconsin’s law¹⁴⁰ provides a scheme for the recovery of unpaid wages and overtime, along with penalties,¹⁴¹ and has a generous definition of “employer,” making anyone who employs one or more persons subject to its

136. The DWD has not formally published these data for the past few years. This information is based on private correspondence with the Chief of the Department’s Labor Standards Bureau, July 2005.

137. It is important to note that an employer’s threat of deportation, as retaliation for seeking back wages or otherwise, may ring quite hollow. Indeed, the NLP practice has not once experienced an actual phone call or other attempt to report an undocumented worker to immigration authorities. As Jennifer Gordon has explained, “[e]mployers might threaten to call the INS . . . but they retreated in the face of the argument that doing so would expose them to penalties under the employer sanctions laws, which imposed fines on employers who knowingly hired undocumented workers or failed to check for valid documents.” GORDON, *supra* note 8, at 78.

138. 29 U.S.C. §§ 201–19 (2000).

139. For various reasons, most notably that our local branch office of the U.S. Department of Labor does not enforce small individual wage cases, NLP has concluded that proceeding under the state statute is virtually always preferable to proceeding in federal court under the FLSA. This may not be the case in every venue, and provides an interesting “law in action” subject for clinic students to investigate in their own local legal context.

140. WIS. STAT. ANN. §§ 109.01–.15 (West 2002).

141. *Id.* § 109.11.

requirements.¹⁴² The statute creates both a public scheme of enforcement and a private right of action for unpaid wages.¹⁴³ A worker claiming to have unpaid wages may elect either to file a claim with the DWD or may proceed directly to state court; there is no requirement that a worker exhaust administrative remedies before filing a civil lawsuit.¹⁴⁴ There is, however, an incentive to proceed administratively, and for employers to respond to such a complaint quickly. If a matter is litigated in civil court after an administrative investigation has *commenced*, a prevailing worker is entitled to up to 50% additional damages in any resulting civil judgment; if the agency investigation was *completed*, the penalty damages rise to up to 100% of the unpaid wages.¹⁴⁵ Thus, every potential wage claim begins with a strategic decision whether to go first to the agency, or directly to litigation.¹⁴⁶ The choice is often presented as one between a quick process (go immediately to court) versus a slower but potentially more valuable one (file with the DWD, predicting that the employer will not pay, and then go to court and seek penalty wages).

The DWD process is commenced by filing a simple, user-friendly complaint form.¹⁴⁷ Once it receives a complaint, the agency¹⁴⁸ assigns an investigator, whose first action is to send a copy of the complaint to the employer with a cover letter setting a deadline (usually ten to twenty days) for a response. At this point, the investigation is “commenced,” for purposes of the 150% penalty damages. If the employer responds with a denial of liability, as in the NLP’s experience they usually do, the agency investigator then asks the

142. *Id.* § 109.01(2).

143. *Id.* § 109.03(5) (“Each employee shall have a right of action against any employer for the full amount of the employee’s wages . . .”).

144. *Id.* (“An employee may bring an action against an employer under this subsection without first filing a wage claim with the department . . .”).

145. *Id.* § 109.11(2).

146. An even earlier strategic question may be whether to proceed formally against the employer at all, or to first request the wages informally. In the NLP practice, often a lay advocate at the Workers Rights Center will have done the informal advocacy and demand, and will refer the case to the clinic for the more formal, litigious moves if necessary. *See supra* notes 131–32 and accompanying text.

147. The form can be accessed at <http://dwd.wisconsin.gov/dwd/forms/ERD/doc/LS-119-E.doc> (last visited June 1, 2006).

148. The NLP practice is confined to Dane County, Wisconsin, where Madison is located; the practice described here is the practice for the unit that investigates Dane County claims.

worker for additional information verifying their claim. From that point, correspondence back and forth may ensue, with each side trying to persuade the investigator of its version of the facts. Ultimately, the investigator issues a decision, finding either for the claimant, in which case the decision sets forth the amount of wages owed, or finding for the employer.¹⁴⁹ In NLP's experience, the investigation and determination process, from start to finish, takes between three and six months.¹⁵⁰ Once the determination has been issued, the agency investigation is "completed" for purposes of the 200% penalty damages.¹⁵¹

The statute contemplates both public and private enforcement. On the public side, chapter 109 authorizes the department itself to bring a civil action on behalf of the worker against the employer for unpaid wages.¹⁵² Additionally, the statute enables the department to refer a case to the district attorney of the county in which the alleged violation occurred, and commands the district attorney to commence and action in state court.¹⁵³ In reality, neither of these public actions takes place absent extraordinary circumstances, such as a "repeat player" employer or criminal fraud. That is, for the "run of the mill" wage and hour case, public enforcement is not an option, and the worker, if she wishes to continue her fight, must resort to a private lawsuit in state court under the statute's private right of action.¹⁵⁴ The appropriate venue for a chapter 109 wage claim is the circuit court in

149. Any party aggrieved by the investigator's decision can request reconsideration by the Division Chief.

150. While improvements can, of course, always be recommended, NLP is quite lucky to be located in a jurisdiction where the wage and hour investigative agency works quickly and effectively. The relatively quick processing of a DWD complaint is one of the features that makes this an excellent clinical practice; in just one semester students see real advances on their cases. Other jurisdictions are not so lucky. *See, e.g.*, Gordon, *supra* note 123, at 418 (noting that, at the time of publication, the New York State Department of Labor routinely took eighteen months to process a wage and hour case).

151. At least, this is the analytic position that NLP has taken. It has not been tested in litigation.

152. WIS. STAT. ANN. § 109.09(1) (West 2002).

153. *Id.* ("[T]he department may refer such an action to the district attorney of the county in which the violation occurs for prosecution and collection and the district attorney *shall* commence an action in the circuit court having appropriate jurisdiction.") (emphasis added).

154. *Id.* § 109.03(5) ("Each employee shall have a right of action against any employer for the full amount of the employee's wages due on each regular pay day as provided in this section . . .").

the county where the alleged violation occurred; if the amount in controversy is under \$5000, the worker can pursue her claim in the small claims court.¹⁵⁵

NLP clinic students represent clients at many stages of this process and work on wage and hour issues in other contexts as well. Representing a claimant in the DWD process gives law students an opportunity to conduct intense fact investigation, legal research, and client counseling and to engage in advocacy, strategy, and negotiation. As in all litigation matters, the first step in any NLP wage and hour case is fact investigation, starting with sufficient preliminary investigation to satisfy the attorney's ethical responsibility to file only non-frivolous claims.¹⁵⁶ The necessary facts to allege a wage and hour violation are simple and easy for a law student to evaluate: the worker must have worked for the employer, at a certain agreed wage, and wages for a certain number of performed hours must have been unpaid.

While these are simple allegations, they can be difficult to establish in the low-wage workplace. First, even the simple matter of hours worked can be complex in this setting. One of the characteristics of the low-wage workplace is erratic hours. Ask a low-wage worker to describe her typical work schedule, and the response may be a complicated story of calling in to see if she is on the schedule that day, of working several days in a row and then not at all for several days, and of working different hours on different days.¹⁵⁷ Additionally, few workers keep their own, independent written records of hours actually worked. The employer may not have kept payroll records, either, although they are required by law to do so.¹⁵⁸

Further complicating the issue of hours worked is the reality that the players in a low-wage workforce are often known only by their

155. *See supra* note 118.

156. WIS. STAT. ANN. § 802.05 (West 2002); WIS. SUP. CT. R. 20:3.1(a) (2004).

157. The lack of predictability, both of work hours and of resulting hour-driven income, is another feature of the low-wage workplace that the law does not touch. Absent a contract, a worker has no right to any number of hours per week. This gives employers an extraordinary power over the daily lives of low-wage workers and their economic stability. As difficult as scheduling a meeting with a lawyer can be given this reality, imagine the problem of scheduling a dentist appointment or a parent-teacher conference.

158. 29 C.F.R. § 516.2 (2005); WIS. STAT. ANN. § 108.21 (West 2002); *see infra* note 164.

first names. The workers themselves may not be able to guide their attorney to, for example, their co-workers on a given shift, their immediate supervisor, or to a customer who could testify to their hours and performance. Finally, where the workers do not speak English, often the language of the entire workplace is not English. Witnesses, such as co-workers and customers, may also speak no English. If the supervising attorney or the clinic students do not speak the language of the witnesses, the case may demand the engagement of a professional interpreter, or other initiative to ensure the accurate comprehension and presentation of the facts.¹⁵⁹

In some wage cases in the low-wage economy, finding the *employer* can similarly be challenging. Many low-wage employers are somewhat “fly-by-night.” NLP’s wage and hour caseload frequently involves small-scale employers or industries in which businesses open and close, disappear, or open again with a different name. Investigation into the formalities of these companies (e.g., Articles of Incorporation, business licenses, assets) is likely to be unsuccessful because many never undertake these niceties. These defendants can be hard to find (and even harder to collect from). For example, in 2003, NLP litigated a multi-plaintiff case against a local commercial cleaning company for which workers cleaned various bars, restaurants and offices after hours. Each plaintiff had suffered several months without any pay, and the back pay claimed was over \$13,000 in total. The company was not incorporated, and the only names associated with it at the State Department of Financial Institutions were those of the owner and his son. A visit to the company’s “office” address revealed a virtually vacant storefront in an abandoned industrial site; the company owned no other real estate in the county. While the clinic was able to locate the defendant, and, in fact, proceeded to mediation and judgment against him,¹⁶⁰ the workers were never able to collect, because of lack of alienable assets.¹⁶¹

159. The clinical teaching issues and opportunities involved in working with interpreters are explored in Angela McCaffrey, *Don't Get Lost in Translation: Teaching Law Students to Work with Language Interpreters*, 6 CLINICAL L. REV. 347 (2000).

160. *Colin v. Pyramid Commercial Cleaning*, No. 2003-CV-220 (Dane Co. Circ. Ct. Mar. 4, 2004).

161. Interestingly, and as more evidence of the nature of some low-wage employers, the

Once the preliminary fact investigation is complete, the student attorneys counsel their client(s) with respect to certain early strategic choices, such as whether to commence enforcement in the DWD or go directly to state court.¹⁶² Whichever path they take, students must turn from fact investigation to persuasive writing. As ever, the students are encouraged to view the process with a critical eye, starting with a view of the complaint form itself. Students are urged not to blindly accept the DWD form as the only way to commence an investigation, and to think about how it can be completed to put their client's case on the strongest footing from the beginning. In most cases, NLP uses the form only for its mandatory check-boxes, and sets forth the client's story in a detailed accompanying letter. Drafting this letter can be one of the most comprehensive legal writing tasks that a student will undertake in the clinic, as it requires complete mastery of the facts, command of the governing law, and persuasive rhetoric to direct the investigator's attention where the student thinks it belongs.

Once the letter is submitted, the student takes the lead in assessing and responding to the on-going investigation, which can include gathering records, working with client(s) to respond to the investigator's questions, and perhaps negotiating with the employer or his or her attorney.¹⁶³ Generally the investigator requests that the employer respond to the worker's complaint, and submit all applicable employment and payroll records. If records are produced, students have the opportunity to conduct a comprehensive document review.¹⁶⁴ Sometimes the employer's records are simply false. NLP is

cleaning company owner's name came to light in the summer of 2005 as NLP began to investigate an unpaid wage claim against another commercial cleaning company. Students will have to confront the ethical issue of representing new clients against a "new" company, after informing them that one of their potential defendants already has a substantial money judgment against him in favor of prior clinic clients.

162. See *supra* note 146.

163. The investigators use what they call the "best available information" to make a determination. If the employer fails to respond to a complaint, the investigator enters what amounts to a default determination based on the facts asserted by the worker in the complaint.

164. This is a moment in the case where the illegitimacy of the workplace can function to the employees' advantage, and give the law students a chance to do legal research and apply doctrine to their particular case. If an employer has failed to comply with record-keeping requirements under the law, the worker's version of the hours worked is presumed to be true. The Fair Labor Standards Act imposes record-keeping duties on employers, and there can be

currently litigating a case in which the workers will testify that their biweekly paychecks and paystubs are fraudulent. In one worker's case,¹⁶⁵ the paystub reports sixty-eight hours worked in a two-week pay period, and records the \$7.00 hourly wage for those sixty-eight hours, with seemingly proper deductions for social security and other taxes. The attached check transmits to the worker approximately \$365 in net pay and states that it is payment for hours worked in that two-week pay period. In fact, the worker performed those sixty-eight hours *every* week, and received \$365 in cash every other week. For example, every first and third Friday, the worker received a check for \$365, and every second and fourth Friday, the worker received \$365 in cash. The worker never received overtime pay (for twenty-eight hours per week) to which she was entitled under the law. Such a case provides an evidentiary challenge for the student attorneys who must persuade the fact-finder that the proffered payroll records are inaccurate and, in fact, fraudulent.

Success in the DWD process comes in the form of an agency determination that wages are owed. However, the agency has no enforcement power, and this determination goes only so far. If an employer refuses to pay despite a DWD determination, the agency sends the employee a letter setting forth his or her options in going forward and telling the worker that he or she may file a private lawsuit to collect the wages owed. The agency also generally informs the worker that the matter has been forwarded to the district attorney's office, but with the realistic prediction that the prosecutor's office will take no action. The letter often recommends that the worker (if he or she is not already represented by NLP) call the clinic, or seek other counsel should he or she wish to pursue the claim in court.

serious consequences for employers who fail to comply. The U.S. Supreme Court held in 1946 that, while the burden of proving unpaid wages always falls to the plaintiff, where an employer has failed to keep employment records, that burden can be met with the worker's testimony, without the need for written documentation. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687–88 (1946). Indeed, if the employee submits evidence sufficient to create a reasonable inference of unpaid work, the burden shifts to the employer defendant to rebut that inference. Application of this doctrine is an excellent lawyering task for clinic students.

165. This case formed the basis of the "Maria Hernandez" scenario at the beginning of this Article.

Like the DWD investigation, the small claims wage and hour case is an excellent clinical learning experience. The students convert their DWD work (complaint, correspondence, and investigative plan) into pleadings and a discovery plan. The case is commenced by filing and service, and the defendant is given a written answer date, generally within two to three months of service.¹⁶⁶ Because the general rules of civil procedure apply in small claims court, the students have access to formal discovery at this stage—access that they lacked during the DWD process. Students thus have the opportunity to draft interrogatories, requests for admission, and requests for production of documents.¹⁶⁷ This process also triggers reflection and discussion of the economics of full-boar litigation of small claims matters. While a law school clinic may, because of its pedagogical mission, expend considerable resources (in time, at least, if not in money) on a small claims case, such practice is unrealistic in the private sector.

Employers are often surprised to be sued by low-wage workers (of course, getting the word out that these workers may seek legal recourse is part of NLP's goal, with an eye toward creating an incentive for employers to comply with the law); as a result, they are sometimes willing to negotiate with the client at this point. Great lessons can be learned from these negotiation sessions. One student marveled at an employer's lack of sophistication, to whom he had to explain the fundamentals of wage and hour law, not to mention civil litigation, numerous times before the employer agreed to pay the worker what he was owed. The employer repeatedly "explained" to the student that the worker had not been as skilled as he had claimed, and that it had cost her (the employer) money to "re-do" his work.¹⁶⁸

166. While the Wisconsin Rules of Civil Procedure generally govern actions in the small claims court, there are some exceptions, including issues of timing and answering. A small claims commissioner can, in fact, decide the case on the merits on the answer date if the parties do not intend to call witnesses and agree to proceed on that day. WIS. STAT. ANN. § 799.207 (West 2001). If, alternatively, the parties do not agree, or the papers warrant, the court will schedule the matter for a hearing within a few months. It is NLP's uniform experience that wage and hour defendants, if they respond at all, do so in writing by disputing the wages claimed, and that the court sets the case for a hearing on the merits.

167. Parties in small claims cases technically have authority to take depositions as well, but NLP has not done so in any of its small claims wage and hour cases.

168. This was so in the case that formed the basis of the "Mr. Franklin" scenario that begins this Article.

The student found himself explaining the at-will doctrine to the *employer*, noting that her only remedy for shoddy work was to fire the worker (which she of course had done), not to refuse to pay him for hours worked. The unrepresented employer in this case regularly asked the student attorney if he thought she should pay, if the deal was fair, and generally for advice in how to resolve the matter. In addition to the experience of explaining legal concepts in lay terms, this gave the student the opportunity to explore the contours of the Rule of Professional Conduct regarding communication with an unrepresented party.¹⁶⁹

Indeed, responding to proffered defenses is an important part of NLP's wage and hour work; low-wage employers often understand the legal terms of their employment relationships no better than do the workers. The defenses that are thus asserted are often illegitimate. The issue of "shoddy work" and the at-will doctrine arises frequently in negotiating cases. Even if they do not dispute the unpaid wages, employers articulate numerous reasons why they should not have to pay their workers. Shoddy work, theft, and damage are frequently given as "defenses" to wage claims. The Wisconsin statutes are explicit that an employer may not make any deductions from an employee's pay for "faulty workmanship, loss, theft or damage" absent the employee's written authorization, and that any such deductions absent that authorization entitle the worker to twice the withheld amount in damages.¹⁷⁰ Some employers, although fewer than one might think, also "defend" wage claims by alleging that the workers are undocumented. Student attorneys explain that immigration status is irrelevant to a wage claim.¹⁷¹

169. WIS. SUP. CT. R. 20:4.3 (2004).

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

Id.

170. WIS. STAT. ANN. § 103.455 (West 2002). Wisconsin seems to be among the most protective of employees in this regard, and clinicians or other lawyers interested in wage cases should be certain to consult their own statutory scheme.

171. The investigating staff of the DWD has explicitly stated that it does not inquire into a claimant's immigration status and considers it irrelevant to the merits of a claim.

In the rare cases that do not settle, small claims wage and hour cases provide extraordinary trial opportunities for clinical law students. The trials have most of the formalities of any civil trial (the biggest exception being that the rules of evidence do not strictly apply)¹⁷² and the commissioners are friendly to student practice. Students must outline their claims, prepare the clients and other witnesses to testify, learn the rudiments of introducing documentary evidence, and prepare opening statements and closing arguments. Governed by traditional clinical methodology, NLP clinical faculty “second chair” the trials, sitting near enough to assist the student as necessary, but signaling in every way possible that the student is the worker’s lead counsel.¹⁷³

The detailed description above maps some of the “lawyering skills” that are necessary for investigating and litigating a small wage and hour case in Madison. Perhaps more important, these matters also provide a window into important larger issues about seeking justice for and with the working poor. As it should, the clinical experience in this setting presents larger lessons about the legal system and its operation from the individual client matters.

In both administrative and court tribunals, students’ involvement engages them in a process in which they see how their legal training advances their clients’ social and economic position. As in many clinical settings, being involved in depth in a single, detailed matter gives a student personal experience with lessons about law and justice that endure more than abstract observations. From a simple “access to justice” perspective, a NLP student working on a wage and hour case must confront the reality that the clinic is, essentially, the only law firm in the county that provides representation in these cases. This is at least partially due to the reality that the wage and hour cases of the working poor, because of the economics (they cannot afford to stay at a job that is not paying), tend to involve

172. WIS. STAT. ANN. § 799.209(2) (West 2001).

173. This methodology is, of course, tempered by an assessment of the individual student’s readiness and ability to conduct the trial competently. See generally Margaret Martin Barry, *Clinical Supervision: Walking that Fine Line*, 2 CLINICAL L. REV. 137 (1995); David F. Chavkin, *Am I My Client’s Lawyer?: Role Definition and the Clinical Supervisor*, 51 SMU L. REV. 1507 (1998).

relatively small dollar figures, prohibitively small for a private attorney.¹⁷⁴

In addition to the basic access to justice point that is raised by the NLP wage and hour practice, other social justice themes emerge. For many law students, the initial client interviews and follow-up client meetings are an education in themselves about post-welfare poverty. The day-to-day reality of life among the working poor is invisible to many Americans, including many law students. Hearing their clients' stories about the nature of the work that they do, the hours that they work, and even the wages that they are *supposed* to be earning (let alone the fact that those wages have gone unpaid) educates the students far more than reading about low-wage work. Having done the family budget exercise, the students know what it means to earn \$7.00 per hour in the Madison housing market. Knowing about the local eviction process, the students also know the exquisite vulnerability to homelessness that their clients face for missing or being late with rent. Many of NLP's clients work in service industry jobs that affect the students as consumers as well; when the clinic was litigating the case against a local commercial cleaning company,¹⁷⁵ there was much discussion of the pros, cons, and ethics of organizing a boycott of the campus bars that were among the clients' work sites.

The students also learn how the invisibility of the working poor amplifies the challenge of seeking justice for them. Many middle class people simply do not know the reality of life on the economic margin and do not, for example, personally know anyone who works seventy hours per week, or works two jobs simultaneously. There is a measure of incredulity in some people's reactions to these facts. While to a recent Mexican immigrant it is not only credible, but also predictable, that a worker would work over twelve hours a day, to many middle class people this does not sound reasonable, and therefore does not ring true. Convincing a "civilian" decision-

174. Of course, the small claims court contemplates *pro se* litigants, and workers are free to file their own enforcement cases. This gives rise to interesting conversations in the clinic seminar. Can these cases be competently litigated *pro se*? While technically available to low-wage workers, are there barriers (language, cultural, educational, or other) to workers' using the courts without advocates? What are the system's obligations in light of these barriers?

175. See *supra* note 160 and accompanying text.

maker—be it a DWD investigator, small claims commissioner, or state court judge or jury—to credit a worker’s testimony about these shifts can be challenging. Clinic students must discuss ways to enhance their clients’ testimony to overcome the assumption that a “regular” work week consists of five eight-hour days.¹⁷⁶

Students also learn about (lack of) access to the justice system, and the barriers that low-wage workers face in seeking legal remedies. First, litigation takes time: time to meet with your lawyer, tell your story, review your statement, attend a mediation, consider a settlement offer and, finally, to attend a trial or hearing. When a family budget depends on scores of hours of wage work per week, taking time off from work to participate in these events can be impossible.¹⁷⁷ Second, cultural barriers can prevent low-wage workers from feeling comfortable participating in a wage claim or other case. For recent immigrants, particularly from countries in whose legal systems corruption and violence are endemic, enforcing a statutory right literally feel physically dangerous.¹⁷⁸ Whether realistic or not, the fear of deportation for workers who lack work authorization is also crippling. Even citizen low-wage workers, though, can face a form of cultural barrier to the justice system: the at-will doctrine (correctly) teaches workers that their bosses have extraordinary power over them and enormous discretion in administering the workplace. Living in such an economic setting can erode one’s sense that “the system” can protect you. If it is so easy to fire a worker, for any reason or for no reason, isn’t it also easy for a boss to refuse to pay a worker? In a world where workers have so few rights, how can a worker prove that an employer’s records are fraudulent?

NLP’s wage and hour litigation matters are an important part of the local community’s enforcement of low-wage workers’ rights. The practice gives clinical students significant litigation experience and real-life engagement with the deployment of law in pursuit of social

176. Many thanks to my colleague, Vicky Selkove, for this observation.

177. It goes without saying that low-wage workers do not have any “personal time,” paid or unpaid, to use to attend these sessions. Meetings must happen after work, in between shifts, or on a day off—sometimes a day taken off, without pay, just to participate in the case.

178. See GORDON, *supra* note 8.

justice for the post-welfare poor. Because of the limits in the practice, students may also experience frustration at being unable to prove a case, maintain a relationship with a client, or a larger frustration at how individual litigation fails to address in any systemic way the injustice and exploitation of NLP's client population. The clinic therefore supplements its litigation practice with "community impact projects" in collaboration with the local worker center and other community players. The clinical practice in those projects is described in the next section.

b. Beyond Litigation: Community Lawyering for the Post-Welfare Working Poor

The foregoing section described the NLP students' wage and hour litigation practice and highlighted the application of traditional (litigation) lawyering skills to the legal needs of the post-welfare working poor in a specific statutory context. This section describes some of the other work—"community lawyering" work—that clinic students perform to enhance access to justice for workers in the post-welfare economy.

"Community lawyering" is a phrase without a consensus definition. In this context, I use it to mean a wide range of non-litigation projects and work, all undertaken with an eye toward increasing the political and social power of low-income people. These activities are seen as a complement to the individual case work, and the NLP curriculum includes readings and discussion of pieces from an extensive literature on the role of law and lawyers in a broad fight for social justice.¹⁷⁹ Students are encouraged to critically examine the interplay between their litigation work and these other activities, particularly with respect to questions of empowerment of poor people and long-term solutions to the problem of American poverty and low-wages.

NLP's community lawyering activities fall loosely into two categories: community legal education and "political" work. The community legal education projects consist of conducting workshops for low-income people and their advocates on legal subjects of

179. See *supra* note 123 and accompanying text.

interest, such as “How to Protect Your Security Deposit,” or “At-Will Employment.” Law students have trained the lay advocates at the Workers’ Rights Center on at-will employment, wage and hour law, and the basics of employment discrimination. They have conducted workshops for various Latino service agencies on driver’s license revocations and security deposit law. Perhaps most interesting from the perspective of the post-welfare poverty law agenda, NLP has cultivated a relationship with the local “Job Center,” the welfare reform headquarters for the county.¹⁸⁰ The Job Center offers a variety of on-site educational programs, attendance at which can also, for some participants in some programs in some weeks, “count” toward their W-2 hours. NLP conducts community legal education sessions as part of these programs, most recently on Wisconsin’s eviction law and its implementation at the local level. NLP students also produce written community education materials; the clinic currently has an inventory of student-written brochures on subjects including Section 8 Terminations, Eviction, Wage Garnishment, and Wisconsin’s Uninsured Motorist Law. Like the workshops, drafting these brochures requires students to express complicated legal proceedings in lay terms.

Community legal education has long been a complement to individual casework for various legal services providers,¹⁸¹ and it complements both the “skills” agenda and the “social justice” agenda of clinics that serve the poor. First, on the skills side, to prepare a workshop, students must master the substantive material. They must think creatively about how to communicate often complex, technical information (e.g., the function of the DWD in a wage claim, or notices to quit as a jurisdictional prerequisite to an eviction action) to lay people, including lay people with very limited formal education.

180. All Dane County participants in the state’s W-2 program are required to spend some time at the Job Center. Immediately upon acceptance into the program, each new W-2 participant is enrolled in a mandatory week-long curriculum designed to orient her to the program and its requirements. Later, her “Employability Plan,” the contract she enters with the W-2 agency to receive her monthly check, will set forth the “work activities” that she must pursue in order to remain eligible for the program and to “earn” her full monthly benefit amount. In the typical case, many of these monthly hours will consist of searching for a job (and documenting that search to satisfy the caseworker who determines compliance with the contract).

181. See Eagly, *supra* note 123.

The workshops also give students the chance to speak publicly, answer questions on their feet, and respond spontaneously to people's sometimes emotional reactions to the law.¹⁸² All of these are generally useful skills for a lawyer to master.

Second, the workshops are part of NLP's broad agenda to improve access to justice for the low-income people in Madison and surrounding communities. Because, as in most communities, there are insufficient resources to give every poor person who needs one a lawyer, the workshops enable the students to disseminate legal information that the audience members may be able to use on their own or as advocates for their friends and neighbors. From the perspective of offering a social justice education, the workshops expose students to experiences that individual client representation does not: in the workshop setting, students engage in conversation with collections of low-income people. In these groups, low-income people build off one another as they discuss their experiences with law. Students can quickly feel like outsiders as the "audience" becomes the teacher and the participants in the workshop "testify" about law. Students are also exposed to the social circumstances (and material conditions) in which low-income people gather (e.g., as compelled "recipients" of various "services," or as members of a fledgling neighborhood or other association).¹⁸³ These circumstances require students to confront some strategic and rhetorical questions: are there implications for the agenda or tone of these sessions if they

182. At a workshop in July, 2005, a law student was confronted by a gentleman in the audience who, in response to her statement that a judge in a child support case will look at both parties' overall financial situation before entering a final order, shouted out, "No he won't! He just give [sic] the lady whatever she wants!"

183. Community legal education is not without its critics. Sometimes dismissed as "rights talk," or "know your rights" sessions, such educational workshops are of course not designed to foment radical social change. Rather, they are an opportunity for someone with knowledge about how the system operates to convey that knowledge to others. By definition, such workshops refer to the law as it already exists and operates. There may be radical potential in these settings, as many injustices that are not remedied by law are described. One might wonder if a lawyer or law student is the best person to facilitate such a turn in the conversation. As many have described, lawyers tend to be more invested in the status quo than are other social actors. See, e.g., Wexler, *supra* note 81, at 1056–57 (noting that he, as an attorney, was uncomfortable with certain confrontational tactics that his clients pursued); see also John Bouman, *The Power of Working with Community Organizations: The Illinois FamilyCare Campaign—Effective Results Through Collaboration*, 38 CLEARINGHOUSE REV. 583 (2005).

are formally sponsored by an agency on which the audience members rely for income? How should the forum affect the material?

In addition to community education, NLP students participate in “political” community lawyering activities, both legislative and organizational, with an eye toward broader social change. On the legislative front, for example, the clinic is preparing, with the support of the DWD division that enforces Wisconsin’s wage and hour law, to draft proposed state legislation that would toll the statute of limitations for a wage claim during the dependency of a DWD investigation. This exercise is meaningful to the involved students because they have seen their own clients’ cases decline in value with every week that the DWD does not make its determination. Students in the summer of 2005 also participated in a door-to-door job skills survey being administered by a neighborhood association in one of Madison’s most challenged neighborhoods. The results of the survey will be used in negotiating with the City as it distributes public money for business development in the neighborhood; survey data will be used to assure that the development will benefit the residents of the neighborhood.¹⁸⁴

NLP students’ most active political work on behalf of their working poor clients is a current (summer and fall of 2005) campaign to require employers in the City of Madison to give sick time to their workers.¹⁸⁵ As part of this campaign, clinic students conducted the “traditional” legal work of researching any possible argument that such a local requirement would be preempted by the Family Medical Leave Act. They also, however, participated in inner-circle campaign strategy meetings, surveyed current and prior clinic clients on the availability of sick leave in their jobs and, for those who had no sick leave, on the effects of those policies on their work history and on their health. Students identified workers who might be interested in playing a public role in the campaign, either by being interviewed by

184. Pat Schneider, *Hundreds Show Up in Hopes of a Job*, CAPITAL TIMES, July 26, 2005, at 1C. “The job fair was hosted by developer Gorman and Co. as part of an agreement with neighborhood residents who had sought guarantees of jobs when Gorman purchased the former grocery with the assistance of the city to redevelop the site as housing.” *Id.*

185. See Dean Mosiman, *Public Weigh in on Sick Leave*, WIS. ST. J., Aug. 22, 2005, at B1; Lee Sensenbrenner, *Group Wants Input on Paid Sick Leave*, CAPITAL TIMES, Aug. 11, 2005, at 1B.

a local news outlet or testifying at the anticipated town meeting on the subject. As this Article goes to print, members of the Madison City Council are preparing to draft a proposed ordinance. If passed, Madison would be the first municipality in the country with such a requirement.¹⁸⁶ Working on this campaign, NLP students experienced first-hand a role for lawyers in the movement for social justice for the poor beyond litigation. The sick leave campaign is an example of the kind of community lawyering activities in which clinics are well-situated to participate; federally-financed poverty lawyers are unable to undertake this kind of campaign work,¹⁸⁷ and private lawyers are unlikely to be able to afford it.

The work of NLP students on behalf of and in collaboration with their working poor clients is a demonstration of a law practice expressly designed to respond to the post-welfare historical moment, and to the role of law in seeking justice for the working poor. Incorporating both “traditional” litigation work and broader, community impact projects, the practice offers law students first-hand experience with the law and its limits in responding to a particular social problem.

III. JUSTICE FOR THE WORKING POOR: DIRECTIONS FOR THE FUTURE AND A ROLE FOR LAW SCHOOL CLINICS

The “end of welfare as we knew it” has fundamentally changed the terrain on which American poverty is understood, debated, and constructed. The cultural force of welfare reform demands that the legal response to poverty now expressly contemplate low-income people as workers. Poor people continue, of course, to have needs in housing, consumer, family, and other legal areas, but engaging with them as workers has enormous organizing and social justice potential. While there are without question disadvantages to adopting the historical dichotomy between the “deserving” and the “undeserving” poor, the political conception of the poor as workers fits them squarely within the former. This categorization has the power to

186. Campaign materials are available at Healthy Families, Healthy City, <http://www.healthyfamiliesmadison.org> (last visited Jan. 14, 2006).

187. *See supra* note 112.

dislodge some of the contempt and dismissal of the poor as lazy, and thus to open some doors for a more substantive discussion of American poverty. Poverty lawyers are responding to this historical change, and law school clinics offer settings in which these responses can be piloted and examined. NLP's wage and hour practice, with its litigation and community lawyering features, is an example of such a clinical education experiment in the post-welfare environment.

Clinical lawyering on behalf of and in collaboration with the working poor also gives students and teachers the opportunity to engage in important reflection on the social construction of poverty in the post-welfare era. Even the small experiment in Madison, Wisconsin described here has revealed an important lesson about lawyering for the working poor, perhaps with broader implications. Reflecting upon the wage and hour practice of the Neighborhood Law Project, one is struck immediately by the fact that, almost without exception, the clinic's clients are Spanish-speaking, apparently recent immigrant workers. The same trend is true with the clinic's worker center partner; over 75% of the workers who sought its assistance between 2002–04 were Latino.¹⁸⁸ Thus, while two important trends involving the working poor may have emerged over the past ten years—welfare leavers entering the workforce and the emergence of worker centers—these two sub-groups of low-wage workers have not overlapped in the poverty law arena, at least not in the small sample of the Neighborhood Law Project. Why is this? It cannot be that there are no welfare leavers in the Madison community. The welfare population in Dane County was never large (an average monthly AFDC caseload of 9264 recipients in 1994, AFDC's peak year),¹⁸⁹ but poor people in Madison were nonetheless affected by welfare reform. Presumably, national trends operate in

188. Interview with Patrick Hickey, Interim Director, Interfaith Coalition for Worker Justice, Madison, Wis. (July 22, 2005) (data on file with the author).

189. Wis. AFDC Caseload, http://www.dwd.state.wi.us/dws/rsdata/docs/afdc_average_cy94.xls (last visited Jan. 14, 2006). Milwaukee County had an average of over 100,000 recipients in the same year. *Id.* Caseloads were down significantly statewide by 1997 (Dane County: 1539; Milwaukee County: 23,250). *See* Wis. Total AFDC & W-2 Caseload, http://www.dwd.state.wi.us/dws/rsdata/docs/total_afdc_w2_caseload_cy97.xls (last visited Jan. 14, 2006). In 2000, there were only 1100 unduplicated W-2 cases in Dane County. *See* Unduplicated W-2 Participants by County, http://www.dwd.state.wi.us/dws/rsdata/docs/w2_unduplicated_total_county00.xls (last visited Jan. 14, 2006).

Madison, and many of these workers now are engaged, however erratically, in the low-wage labor market, working in Madison's restaurants, hotels, retail, and other low-wage industries. Despite this presumed influx, almost none of NLP's wage and hour clients are "welfare leavers." Virtually all are Latino and, given how recently most seem to have immigrated to the United States, they could never have been on AFDC or W-2.

Are Latinos "over-represented" in the clinic's practice compared to their numbers in the community's working poor? Are welfare leavers "under-represented"? Do welfare leavers not have wage and hour problems? It does not seem likely that only Latino workers have unpaid wage claims in Madison and surrounding communities. A review of DWD claims filed in Dane County for 2000–05 suggests that perhaps fewer than 7% of them are by Latino workers.¹⁹⁰ Are these non-Latino claimants filing DWD complaints on their own in the relatively complainant-friendly DWD process?¹⁹¹ Is there a difference in outcome between these *pro se* workers and those the clinic represents? These questions, and the larger ones they implicate, deserve future study.

The dominance of Latino workers in NLP's wage and hour practice can be explained, at least on a micro level, by the fact that the WRC is the clinic's most steady source of referrals on these cases. The WRC's express mission, at least originally, was to serve the immigrant community, and it is part of a national network of centers founded explicitly to serve Latino workers. The center is increasingly well-known in Madison's relatively small Latino community, and word of mouth as its primary outreach technique keeps its services within the Latino social network. However, perhaps there are additional explanations for the dominance of Latino workers at the WRC and as clients of NLP. Perhaps it is simply the case that, for all the injustice, exploitation, and insecurity that welfare leavers experience in the low-wage workplace, unpaid wages and overtime

190. Data provided by DWD Labor Standards Bureau (July 22, 2005) (on file with author). The analysis is based on the author's admittedly subjective, stereotypical coding of the surnames of claimants as "Hispanic" (e.g., "Rodriguez"—yes; "Anderson"—no).

191. There is no basis to believe that they are represented in any significant numbers by other counsel.

are not among them. The abuses that Barbara Ehrenreich chronicled in *Nickel and Dimed*, after all, did not include unpaid wages.¹⁹² It may be, as Jennifer Gordon and others have documented, that one of the peculiar vulnerabilities facing immigrant workers is significant unpaid wages.¹⁹³ Perhaps, because of their unique exposure to the threat (even if unrealistic)¹⁹⁴ of deportation, immigrant Latino workers tolerate weeks on end of unpaid wages where a citizen worker would not. Unpaid wages thus accumulate to a point where litigation is reasonable (recall NLP's clients who worked seventy-two hours per week for two years without a dime of overtime). A citizen worker, outside of that culture of expectation and exploitation, would likely quit before tolerating such treatment.

Another factor may be the racial and ethnic segregation of the labor force. An utterly unscientific review of the NLP wage and hour caseload indicates that certain industries are over-represented: landscaping, cleaning, and one significant Latino retail chain. Many of the Latino workers who NLP students have represented work in settings where virtually all of the workers are Latino. This would suggest that Latino workers often work in a Latin ghetto, where long, unpaid hours are simply part of the bargain.¹⁹⁵

Is there potential for organizing and collaboration between welfare leavers and immigrant workers? Can the post-welfare environment, forcing more poor people into the wage labor market, prompt alliances between these two groups across what could be cultural, language, and even economic barriers? For generations, the

192. See EHRENREICH, *supra* note 67. Most of Ehrenreich's comments about wages are about their dramatic inadequacy. She discusses the Economic Policy Institute's work on "living wages," saying:

[M]any people earn far less than they need to live on. How much is that? The Economic Policy Institute recently reviewed dozens of studies of what constitutes a "living wage" and came up with an average figure of \$30,000 a year for a family of one adult and two children, which amounts to a wage of \$14 an hour. This is not the very minimum such a family could live on; the budget includes health insurance, a telephone, and child care at a licensed center, for example, which are well beyond the reach of millions.

Id. at 213; see also *supra* note 25.

193. See *supra* note 8.

194. See *supra* note 137 and accompanying text.

195. See generally GORDON, *supra* note 8.

availability of exploitable undocumented workers has been a challenge to organized labor and social justice advocates, and this challenge has not always been met by seeking to expand labor's power generally by reaching out to non-citizen workers. Does the emergence of the worker centers affect this dynamic? Do they offer a venue for linkage between these two groups of low-wage workers? The poverty law community should reach out to worker centers to explore projects in this area. Additionally, without diminishing the peculiar vulnerability of immigrants to exploitation, or its particular expressions and effects, the worker center movement should expand its vision to include citizen low-wage workers.

While not unique in their ability to do so, law school clinics may play an important role in creating conditions for collaboration between welfare leavers and immigrant workers, or an otherwise conceived local movement for justice for the working poor. First, building such a movement across language and cultural barriers takes time—time away from individual service cases. Because law school clinics have a primary educational function, and are not “first-responder” legal services providers, this time can be expended in service of the learning mission of the clinic, as well as the justice effects for the local community.

Second, because they are located within academic institutions with traditions of inquiry and reporting, law school clinics can combine research and action that can result in published work about their community lawyering experimentation. Clinics can participate in community-based research, at least on a small, subjective scale, on the legal needs of welfare leavers in employment and other contexts, including an analysis of where those needs do and do not correspond to the legal concerns of the immigrant workers who are the outreach priority of worker centers.

Third, many clinics enjoy a freedom that first-responder providers do not. The fact that most clinics do not rely on outside funders liberates them from funders' pressure to maximize client numbers; this releases clinics to take risks, and to keep their case volume low enough that each experiment can be mined for its implications. Indeed, freedom from LSC and other restrictions is an important rationale for robust law school funding for clinical education. It is this freedom that enables clinics to undertake some of the

experimentation and modeling that gives them a unique role in social justice lawyering.

Finally, the tradition of “reflective lawyering” in the clinical setting¹⁹⁶ creates settings in which important aspects of lawyering for the post-welfare working poor can be examined. Working with the “deserving” working poor, whether in a law school clinic or elsewhere, can provoke important and interesting reflection about working with low-income clients generally in the post-welfare environment.

NLP’s “mixed” caseload of immigrants and citizens, workers and non-workers (mostly disabled SSI recipients), enables students to reflect on their own biases and assumptions about “the poor.” NLP’s practice creates an opportunity to compare one’s reactions to a “hardworking” immigrant wage and hour client with those to a non-working eviction client or SSI claimant. Do poverty lawyers prefer being allied with one type over the other? The fear is that the new social category of “the working poor” only reifies the social condemnation of the nonworking poor. If, as Reich says, the silver lining of welfare reform is that working poor people can take pride in participating in mainstream American culture, how shall we conceive of (and craft a social justice agenda with) the ones who *do not* work?

President Clinton, at the time of signing the federal statute, claimed that his campaign slogan to “end welfare as we know it,” had a sibling: the promise to “make work pay.”¹⁹⁷ That promise remains unfulfilled. Millions of American workers are now largely without a social safety net, and we must address their labor and employment legal issues. Now that poor people are “liberated” from the stigma of welfare, advocates can join them in an aggressive agenda for redistributive justice in the workforce. As welfare reformers take credit for putting the “welfare queen”¹⁹⁸ to work, it is the new task of

196. See generally Justine A. Dunlap & Peter A. Joy, *Reflection-in-Action: Designing New Clinical Teacher Training by Using Lessons Learned from New Clinicians*, 11 CLINICAL L. REV. 49, 50–53 (2004); Kenneth R. Kreiling, *Clinical Education and Lawyer Competency: The Process of Learning to Learn from Experience Through Properly Structured Clinical Supervision*, 40 MD. L. REV. 284 (1981).

197. See Reich, *supra* note 71, at vii–viii.

198. See Catherine R. Albiston & Laura Beth Nielsen, *Welfare Queens and Other Fairy Tales: Welfare Reform and Unconstitutional Reproductive Controls*, 38 HOW. L.J. 473 (1995).

anti-poverty advocates to respond to the conditions in which she works, and to the fact that her work has by no means lifted her family out of poverty.

The newly recognized social category of “the working poor” provides a platform from which lawyers, organizers and others can frame such an agenda. Many low-income people and their allies are hard at work on this project, crafting a substantive strategy for responding to the fact that post-welfare wages do not make ends meet. Lawyers need to take and define their place in the struggle. Clinic students are hungry for this kind of project, where they can engage in litigation work on behalf of individuals and groups while also doing community legal education and organizing.

A service mission has long been an important part of the clinical education identity.¹⁹⁹ While of course clinics train lawyers in important “lawyering skills” (trial advocacy, interviewing, negotiating, counseling, etc.), they historically do so in the context of representing poor people, who face unique legal issues of exclusion, exploitation, and lack of access to major institutions, including law. Indeed, in my view, any separation between the two educational features—skills and justice—disappears in many iterations of the actual clinical experience. When one’s client is Mr. Franklin, NLP’s (not so socially attractive) jail inmate who has been exploited by his employer, preparing that client to testify at trial demonstrates that every deployment of one’s “skill” at direct examination occurs on a social stage: the design of the examination, the selection and sequencing of questions, the placing of emphasis all must take account of the client’s social position. Giving him a voice in the public forum of a court or other tribunal demands different “skills” than doing the same for a more privileged, and thus more naturally

199. Stephen Wizner, *The Law School Clinic: Legal Education in the Interests of Justice*, 70 *FORDHAM L. REV.* 1929, 1935 (2002).

The founders of the clinical legal education movement, responding to the social ferment and legal rights explosion in America during the 1960s, envisioned clinical legal education not only as a way of enriching legal education with professional training, but as a means of stimulating law schools to attend to the legal needs of the poor and minorities, and engaging students in the pursuit of social justice in American society.

“credible,” client. In preparing to examine Mr. Franklin, a clinic student sees that the line between skills and social justice is blurred.²⁰⁰

While any competent clinical teacher can explain how a lawyer-in-training would benefit from clinical education, many clinicians consider our “home” in lawyering for the poor and for social justice. The social history of clinical legal education in the United States is inextricably bound with the history of lawyering for social justice, and bringing access to law to people, particularly the poor, who are under-served by the legal profession.²⁰¹ Even if this were not motivated by the political beliefs and commitments of clinical teachers, the connection between clinics and the poor has an ideologically neutral cause: it is generally only the poor who are willing to trust (or who are asked to trust, by a market-based legal system in which legal services are priced well outside the typical “family budget”) their legal problems to law students. Almost by definition,²⁰² law school clinics serve the poor; middle and upper class people take their problems, if they have them, to “real” lawyers.²⁰³ While this important conversation is not the focus of this Article, I hope to encourage law school clinics to recognize the new economic and political setting in which our poor clients live and to adapt to the new setting. Because clinics are not typically crushed by huge caseloads, but rather can select subject areas and individual cases and projects with potential for both teaching and service, clinics are in a strong position to experiment with models of providing legal services to, and collaborating with, low-wage workers for social justice.

200. See Jon C. Dubin, *Clinical Design for Social Justice Imperatives*, 51 SMU L. REV. 1461, 1478–82 (1998).

201. See Wizner, *supra* note 199, at 1933–34 (noting that clinical education’s early and constitutive financial support from the Ford Foundation in the 1960s to create the Council on Legal Education for Professional Responsibility was expressly to “provide grants to law schools to establish legal clinics to serve the poor”); Wizner, *supra* note 14. See generally Aiken, *supra* note 14; Lopez, *supra* note 14; Wizner & Solomon, *supra* note 14, at 477.

202. While there is no official definition of clinical education that contemplates that clinics serve the poor, many have observed the natural ability of clinics to teach social responsibility of lawyers with respect to access to justice. Wizner & Solomon, *supra* note 14.

203. *Id.* at 478 (“We have no question that many landlords, including wealthy corporations, would jump at the chance to have free representation of the quality that they observe our students providing to their adversaries.”).

The purpose of this Article has not been to argue that all clinics should expressly adopt the mission of advancing justice for the post-welfare working poor, let alone the even more narrow task of litigating wage and hour cases. Rather, it is to demonstrate an example of such a mission, and the benefits to both clinic students and clients that can result. I argue that the selected subject area matters little in clinic design, but that clinics can do important work by searching for those social spaces where their pedagogical and service objectives overlap. In those spaces, lessons about the role of the lawyer in movements for justice for the under-represented can be harvested.