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# Which Side Are You On? Unionization in Social Service Nonprofits

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# Which Side Are You On? Unionization in Social Service Nonprofits

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# WHICH SIDE ARE YOU ON? UNIONIZATION IN SOCIAL SERVICE NONPROFITS

*Eduardo R.C. Capulong\**

*They have Cesar Chavez posters in their offices, and it's, "Si, se puede; si, se puede." But when it comes to their own workers, it's, "No lo puedo."<sup>1</sup>*

## INTRODUCTION

Union drives in social service nonprofits are increasingly commonplace. In recent years, nonprofit social service workers have made efforts to affiliate with the Service Employees International Union (SEIU),<sup>2</sup> American Federation of State, County and Municipal Employees (AFSCME),<sup>3</sup> Communication Workers of America,<sup>4</sup> Office and Professional Employees International Union (OPEIU),<sup>5</sup> National Union of Hospital and Health Care Employees,<sup>6</sup> to name a few.<sup>7</sup> Yet despite their contemporary and enduring signifi-

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\* Acting Assistant Professor, New York University School of Law. The Author thanks Diana Yoon for her excellent research assistance and Rebecca Weston and the New York University Lawyering Faculty for their invaluable comments on earlier drafts of this Article.

<sup>1</sup> The Author overheard this comment in 1998 while on a picket line to support the unionization of workers at La Raza Centro Legal, a community law office in San Francisco. "Si, se puede," is Spanish for "yes, we can," a pro-union chant immortalized by Cesar Chavez and the United Farm Workers. "No lo puedo" means "no, I can't."

<sup>2</sup> See, e.g., Suzanne Espinosa Solis, *AIDS Group Workers Vote to Unionize*, S.F. CHRON., Apr. 23, 1994, at A19; Ilana DeBare, *In the Name of the Father: Catholic Values Invoked by Both Sides in Hospitals' Battle with Union*, S.F. CHRON., Aug. 25, 1998, at D1.

<sup>3</sup> See, e.g., Robin J. Moody, *Nonprofits Get Organized*, PORTLAND BUS. J., July 16, 2004, at 1, available at <http://www.bizjournals.com/portland/stories/2004/07/19/story1.html>.

<sup>4</sup> See, e.g., Angela Cortez, *Detox Staffers Vote for Union*, DENVER POST, Jan. 10, 1998, at C-03.

<sup>5</sup> See, e.g., Jack Hopkins, *El Centro, Union Settle Dispute*, SEATTLE POST-INT., July 16, 1998, at B2.

<sup>6</sup> See, e.g., Lini S. Kadaba, *Labor Leaders Organize Unions for Philadelphia Child Care Workers*, PHIL. INQ., Apr. 21, 1998.

<sup>7</sup> See generally Fredrick Kunkle, *Home Therapists Give Inova A Dose of Unions*, WASH. POST, Oct. 30, 2000, at B07 (Organization of Home Care Professionals); *Center for Disabled Workers Target of Union*, TIMES UNION (Albany, N.Y.), Sept. 5, 2002, at E4 (Union of Needletrades, Industrial, and Textile Employees); John Downey, *Local Non-profit's Workers OK Union Representation*, CHARLOTTE BUS. J., Apr. 11, 2005, at <http://charlotte.bizjournals.com/charlotte/stories/2005/04/11/story7.html> (United Steel-

cance—nonprofit workers today provide more social services than the federal, state, and local government combined, and analysts predict their ranks to continue to grow in the years ahead—the trend has attracted little scholarly attention. Thus far, scholars have examined emerging issues from management’s perspective,<sup>8</sup> linked union standards with the provision of quality client services,<sup>9</sup> and identified a mutuality of interests between nonprofit management and the labor movement.<sup>10</sup> In a groundbreaking 2000 study based on the interviews of forty nonprofit staff and board members, professional union organizers, and foundation personnel in San Francisco and New York, Jeanne Peters and Jan Masaoka categorized five emerging themes facing nonprofit management: decision-making, management and human resource management, wages and benefits, political context, and racial tension.<sup>11</sup> Discussing “women’s work,” Peggie Smith called for the unionization of child care workers to ensure quality affordable child care, arguing that placing the concerns of child care workers “at the center of child care policies is . . . critical . . . to solving the child care crisis.”<sup>12</sup> Kristin Jenkins Gerrick made a similar argument with respect to home health care workers.<sup>13</sup> Finally, observing a mutuality of the interests between Community Action Agencies (CAA) that run Head Start programs and the labor movement, Eloise Passachoff urged CAA management and organized labor to press cooperatively for legislative and administrative reform and pursue other joint initiatives.<sup>14</sup>

This Article joins this nascent area of study and examines nonprofit union organizing from an institutional perspective. Using anecdotal information about unionization efforts at private, com-

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workers of America); Bennett Baumer, *Lifespire Under Fire: Staffers Consider Union*, CITY LIMITS, Aug. 15, 2005, at <http://citylimits.org/content/articles/weeklyView.cfm?articlenumber=1762> (Civil Services Employees Association).

<sup>8</sup> Jeanne B. Peters & Jan Masaoka, *A House Divided: How Nonprofits Experience Union Drives*, 10 NONPROFIT MGMT. & LEADERSHIP 3 (Spring 2000).

<sup>9</sup> See generally Peggie R. Smith, *Caring for Paid Caregivers: Linking Quality Child Care with Improved Working Conditions*, 73 U. CIN. L. REV. 399 (2004); Kristin Jenkins Gerrick, *An Inquiry into Unionizing Home Healthcare Workers: Benefits for Workers and Patients*, 29 AM. J.L. & MED. 117 (2003).

<sup>10</sup> See generally Eloise Passachoff, “Head Start Works Because We Do:” *Head Start Programs, Community Action Agencies, and the Struggle Over Unionization*, 38 HARV. C.R.-C.L. L. REV. 247 (2003).

<sup>11</sup> Peters & Masaoka, *supra* note 8.

<sup>12</sup> Smith, *supra* note 9, at 402.

<sup>13</sup> Gerrick, *supra* note 9, at 133.

<sup>14</sup> Passachoff, *supra* note 10, at 247–48.

munity-based social service and advocacy organizations<sup>15</sup>—and informed by the Author’s own experience working in the nonprofit sector and with labor unions<sup>16</sup>—it asks a basic question: Do unions belong in social service nonprofits, or are such efforts somehow misguided? Social service nonprofits play a dual institutional role: as progressive organizations representing society’s highest ideals and as governance structures mediating the vagaries of social spending. Union drives bare a deep tension in this role. Depending on how they are conceived, unions are either salvation or anathema. This Article examines their roles and explores strategies to harmonize their conflicting tendencies. Among those strategies, this Article argues that the industry-wide unionization of social service nonprofits is the best means by which to actualize the nonprofit ethos and counteract these organizations’ tendency to lower wages and working conditions, thereby facilitating cuts in social spending. Part I discusses the factors that have led to increased unionization among social service nonprofit workers. Part II summarizes recurring issues and discusses this specific role conflict. Finally, Part III harmonizes this dual role, making the case for industry-wide unionization and concludes by discussing union organizing as a uniquely transformative process.

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<sup>15</sup> Lester Salamon has noted the difficulty of defining the term “social service nonprofits.” LESTER M. SALAMON, *AMERICA’S NONPROFIT SECTOR: A PRIMER* 81 (1999) [hereinafter SALAMON, *NONPROFIT PRIMER*] (“The term itself is ambiguous, and the range of organizations typically grouped under it exceedingly diverse.”). This Article uses the term “social-service nonprofits” to include advocacy organizations and specifically focuses on incorporated organizations providing “social and legal services, including individual and family social services, job training, and vocational rehabilitation services, residential care, day-care, and legal aid services; [and] civic, including advocacy organizations, civil rights organizations, neighborhood-based organizations. . . .” *Id.* at 33. Salamon differentiates between nonprofit organizations that are “member-serving” (e.g. labor unions and social and fraternal organizations), which cater primarily to its members, versus those that are “public-serving” (e.g. churches and social service providers), which cater primarily to the public. *Id.* at 22. Of the 1.6 million nonprofit groups currently in existence, about 400,000 are “member-serving” and 1.2 million “public-serving.” *Id.* “Public-serving” groups are comprised of four distinct organizations: funding intermediaries, religious congregations, service providers, and advocacy agencies. *Id.* at 24. The latter two are the “heart of the public-serving nonprofit sector.” *Id.* at 32. Accounting for 40% of all nonprofits, they employ 80% of all nonprofit employees. *Id.* at 32–33. For a more detailed discussion of the term “social services,” see Steven Rathgeb Smith, *Social Services*, in *THE STATE OF NONPROFIT AMERICA* 152 (Lester M. Salamon ed., 2002) [hereinafter *STATE OF NONPROFIT AMERICA*].

<sup>16</sup> I have worked with such nonprofits as the Northern California Coalition for Immigrant Rights, Community Service Society, American Civil Liberties Union, and Center for Constitutional Rights; and with such unions as the Service Employees International Union (SEIU), Hotel Employees and Restaurant Employees Union (HERE), and International Longshore and Warehouse Workers Union (ILWU).

## I. THE NONPROFIT SOCIAL SERVICE INDUSTRY

Three interrelated trends underlie the wave of unionization in social service nonprofits: the dramatic growth of the nonprofit sector; the neo-conservative/neo-liberal era of fiscal austerity—in particular the privatization of social services historically delivered by the state and resulting “marketization” of nonprofits—and the labor movement’s turn from the manufacturing to the service sector. Taken together, these trends explain why labor unions were motivated to organize social service nonprofits and why nonprofit workers increasingly turned to unions to address workplace concerns.

A. *Growth: The Great Society and the Nonprofit Sector*

“Why don’t you guys cut all that shit, freedom riding and sitting in shit, and concentrate on voter registration,” Attorney General Robert Kennedy famously admonished leaders of the Congress for Racial Equality and Student Nonviolent Coordinating Committee during the Civil Rights movement. “If you do that, I’ll get you tax-free status.”<sup>17</sup> This vulgar moment captures a historic compromise that defined an era: In their quest for more radical social transformation, the progressive social movements of the 1960s and early 1970s<sup>18</sup> spurred the creation of the Great Society programs, which, in turn, swelled the nonprofit sector.<sup>19</sup> The growth was a uniquely American experience attributable, according to Lester Salamon, to “ingrained American attitudes of hostility to central government.”<sup>20</sup> With only minor interruptions during the recessions of 1991 and 2001, the nonprofit sector has experienced continuous growth,<sup>21</sup> providing an ever-increasing percent-

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<sup>17</sup> HOWARD ZINN, SNCC: THE NEW ABOLITIONISTS 235 (1965).

<sup>18</sup> For a succinct history of these social movements, see VAN GOSSE, *THE MOVEMENTS OF THE NEW LEFT 1950–1975: A BRIEF HISTORY WITH DOCUMENTS* (Bedford/St. Martin’s, 2005).

<sup>19</sup> Citing the work of Lester Salamon, Dennis Young has described the particular features of governance in the United States: “[T]he 1960s was the watershed era in which the United States emphatically embraced the third party government model by significantly expanding expenditures on social programs without commensurate enlargement of government employment. Rather than delivered through government bureaucracy, new services were implemented largely through arrangements with private, nonprofit suppliers.” Dennis R. Young, *Third Party Government*, in *THE NATURE OF THE NONPROFIT SECTOR* 365 (J. Steven Ott ed., 2001) [hereinafter *NATURE OF NONPROFIT SECTOR*].

<sup>20</sup> SALAMON, *NONPROFIT PRIMER*, *supra* note 15, at 63.

<sup>21</sup> Cassie J. Moore, *Nonprofit Organizations Are Hiring Workers at a Faster Pace Than Government, Business*, *CHRON. OF PHILANTHROPY*, June 10, 2004, at 37; John S. Irons & Gary Bass, *Recent Trends in Nonprofit Employment and Earnings: 1990–2004*, *OMB WATCH TAX AND BUDGET REPORTS* 3 (2004).

age of the total social services available within the United States.

The creation of a vast nonprofit sector has attracted the interest of a wide range of scholars, many of whom have measured its spectacular growth over the past four decades.<sup>22</sup> For example, Steven Rathgeb Smith and Michael Lipsky found that, between 1965 and 1970, federal expenditures for social welfare services nearly tripled and a large portion went to private nonprofits.<sup>23</sup> Between 1965 and 1980, government spending on social welfare grew by 637%—more than 15% per year in real dollars—and expanded from 11.5% of gross national product to 18.5%.<sup>24</sup> “During the first part of this period, 1965–1975, the principal source of growth was actual program expansion triggered by the creation of a host of new federal programs. Between 1975 and 1980, the principal source of growth was inflation, which boosted pension and health payments considerably.”<sup>25</sup> Between 1977 and 1996, the nonprofit sector growth outpaced the growth of the economy as a whole—expanding by 96% after inflation compared with a 64% growth in gross domestic product.<sup>26</sup>

Organizations grew exponentially. In 1967, Burton Weisbrod observed that 309,000 organizations were designated tax-exempt by the Internal Revenue Service.<sup>27</sup> In less than twenty years, that number would triple.<sup>28</sup> Correspondingly, in that same period, non-

<sup>22</sup> For an interesting historical account of the development of the nonprofit sector, see Peter Dobkin Hall, *Inventing the Nonprofit Sector: 1950-1990*, in NATURE OF NONPROFIT SECTOR, *supra* note 19, at 112.

<sup>23</sup> STEVEN RATHGEB SMITH & MICHAEL LIPSKY, NONPROFITS FOR HIRE 55 (1993).

<sup>24</sup> SALAMON, NONPROFIT PRIMER, *supra* note 15, at 61.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 68.

<sup>27</sup> BURTON A. WEISBROD, NONPROFIT ECONOMY 62 (1988).

<sup>28</sup> *Id.* This is probably an underestimation of the total number of nonprofits because many do not incorporate or have significant enough income to apply for tax-exempt status. Weisbrod also notes that through the late 1950s and early 1960s, the Internal Revenue Service was receiving about 7000 applications for tax-exempt status. *Id.* at 63. That number doubled in 1965 (to 14,000) and quadrupled by 1984 (to more than 64,000, but dropped substantially to 59,000 in 1985). *Id.* Cf. Dennis R. Young, *Complementary, Supplementary or Adversarial? A Theoretical and Historical Examination of Nonprofit-Government Relations in the United States*, in NONPROFITS AND GOVERNMENT: COLLABORATION AND CONFLICT 31, 52 (Elizabeth T. Boris & C. Eugene Steurele eds., 1999) [hereinafter COLLABORATION AND CONFLICT] (noting that the federal government allocated “massive new funding for social services, health care, education, and the arts” after World War II, “but largely resisted the creation or expansion of new government bureaucracies to deliver those services. In terms of theory, the transactions and production costs associated with contracting with or subsidizing existing nonprofits, as well as creating many new nonprofit organizations, were apparently more reasonable than those associated with administering a greatly expanded governmental delivery system”).

profit employment increased from 9.3% to 11.7% of total nonagricultural employment.<sup>29</sup> Specifically, the sector's annual growth rate was highest between 1987 and 1992<sup>30</sup>—the years immediately preceding the recent wave of unionization.<sup>31</sup> From 1997 to 2001, the social services field experienced the highest percentage increase in employment: a growth rate of more than 17%.<sup>32</sup>

As of 1998, the latest year for which comprehensive data are available, there were an estimated 1.6 million nonprofit organizations in the United States, employing approximately 10.9 million paid workers.<sup>33</sup> Together, they provide some 20% of all services.<sup>34</sup> Health and educational organizations comprise nearly 70% of this vast sector.<sup>35</sup> Taken together, they account for about \$445 billion in total nonprofit revenues.<sup>36</sup> In contrast, social and legal services, and civic, social and fraternal organizations account for approximately 15% (\$94.6 billion) of revenues.<sup>37</sup> Correspondingly, health and education/research organizations employ nearly 65% of all paid nonprofit workers (7.1 million), while social and legal services, and civic, social, and fraternal organizations employ slightly over 20% (2.4 million).<sup>38</sup>

A statistical finding particularly germane is that, among all nonprofits, civic and social service organizations are experiencing<sup>39</sup>—and are expected to continue to experience<sup>40</sup>—the fastest

<sup>29</sup> WEISBROD, *supra* note 27, at 62.

<sup>30</sup> *Id.*

<sup>31</sup> *See supra* notes 2–7.

<sup>32</sup> Moore, *supra* note 21.

<sup>33</sup> INDEP. SECTOR AND URBAN INST., THE NEW NONPROFIT ALMANAC AND DESK REFERENCE, at xxix (2001), *excerpt available at* <http://www.independentsector.org/PDFs/NAExecSum.pdf> [hereinafter NONPROFIT ALMANAC]. Unlike the business sector, volunteer labor accounts for a substantial part of nonprofit employment. In 1998, the sector was estimated to have benefited from the volunteer efforts of some 5.8 million full-time-equivalent workers. *Id.* This number has broad ramifications for labor organizing but is outside the scope of this Article.

<sup>34</sup> *Id.* at 34; SALAMON, NONPROFIT PRIMER, *supra* note 15, at 22; Moore, *supra* note 21. The size of the nonprofit sector is, of course, dwarfed by the business sector, which comprises 93.8% of all organizations in the United States. NONPROFIT ALMANAC, *supra* note 33, at xxviii. Of the total 27.7 million organizations in the U.S. in 1998, 26 million were corporate. *Id.*

<sup>35</sup> NONPROFIT ALMANAC, *supra* note 33, at 5.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 9.

<sup>39</sup> SALAMON, NONPROFIT PRIMER, *supra* note 15, at 69.

<sup>40</sup> ARSEN J. DARNAY, AMERICAN SALARIES AND WAGES SURVEY 1559 (6th ed. 2001). According to this data, which reflect figures reported between October and December 1999, social workers are expected to increase 36.1% between 1998 and 2008, while “welfare eligibility workers and interviewers” are expected to decrease 7.6%,



growth. Today, they constitute an estimated 56% of all nonprofits in the country<sup>41</sup> and, as of 1997, employed between 1.6 million to 2 million workers.<sup>42</sup> These are the workers who provide child care, individual and family counseling, information and referral services, employment and training services, emergency relief, immigrant and disaster assistance, rape crisis counseling, AIDS-related services, domestic violence shelters, advocacy services, and a variety of other social services. They are the focus of this Article.<sup>43</sup>

*B. Challenge: The Neoconservative/Neoliberal Agenda*

Just as the progressive social movements of the 1960s and early 1970s ushered a massive expansion in federal social spending, so the social conservatism of the 1980s and 1990s curtailed it. Social service organizations comprise the nonprofit subsector most reliant on government financial support. In 1997, for example, this subsector drew 52% of its revenues from the state.<sup>44</sup> Cuts in state social spending wrought by the neoconservative/neoliberal agenda wreaked havoc on social service organizations; many folded outright. Those that survived faced stiffer competition and were subsequently forced to adopt increasingly market-oriented practices.

The mantra of fiscal conservatism began to dominate federal social spending policy in the 1980s. During that period “the Reagan administration attacked federal spending in precisely the areas where federal support to nonprofit organizations was most extensive.”<sup>45</sup> As a result, “federal support to nonprofit organizations,

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suggesting the privatization of these jobs. *Id.* But see Irons & Bass, *supra* note 21 (concluding that the nonprofit labor market has “weakened significantly”). Specifically, the percentage of workers classified as “social and human service assistants” is expected to grow 52.7% between 1998 and 2008—from 268,444 to 409,872 workers. *Id.*

<sup>41</sup> SALAMON, NONPROFIT PRIMER, *supra* note 15, at 33 (educational organizations account for 22%; health organizations 14%; and cultural/recreational organizations 8%). *Id.*

<sup>42</sup> Smith, *supra* note 15, at 154–58.

<sup>43</sup> *Id.* at 155; see also SALAMON, NONPROFIT PRIMER, *supra* note 15, at 33.

<sup>44</sup> NONPROFIT ALMANAC, *supra* note 33, at xxxvi; see also WARREN JENSEN, NONPROFIT LANDSCAPES: A STUDY OF NONPROFIT ORGANIZATIONS IN NORTHEASTERN CALIFORNIA 16 (2002) (70% of funding of northeastern California nonprofits comes from government).

<sup>45</sup> Lester M. Salamon, *The Resilient Sector: The State of Nonprofit America*, in STATE OF NONPROFIT AMERICA, *supra* note 15, at 3, 12 [hereinafter Salamon, *Resilient Sector*]. In another study, Salamon and others estimate that “the percentage of GDP devoted to federal spending in areas of interest to nonprofits, outside of Medicare, Medicaid, and income assistance, declined some 40 percent between FY 1980 and FY 1997, so that by FY 1997 it was only 60 percent of what it had been in FY 1980.” Alan J. Abramson et al., *The Nonprofit Sector and the Federal Budget: Recent History and Future Directions*, in COLLABORATION AND CONFLICT, *supra* note 28, at 99, 105. A common misconception

outside of Medicare and Medicaid, declined approximately 25% in real dollar terms in the early 1980s and returned to its 1980 level only in the late 1990s.”<sup>46</sup> Social service organizations providing day care, counseling, employment and training, legal services, and other services to children, families, and the elderly were “the biggest losers in dollar terms over the [fiscal year] 1982–97 period.”<sup>47</sup> Cumulatively, these agencies lost about \$2.2 billion a year.<sup>48</sup> President Ronald Reagan argued that his budget cuts would provide opportunities for private nonprofits. Promoting private initiative as a panacea for the shortfall, he exhorted in a 1982 address to the New York Partnership:

You believe private initiative, the private sector, are essential to economic and social progress—and so do all of us in our Administration . . . . The key to rebuilding communities is individual initiative, leadership, personal responsibility . . . . No one denies that Government has an essential role to protect those in need, to provide opportunity, to pave the way, but ultimately, it is individuals—millions of everyday citizens—who brave new horizons, expand freedom and create better lives for us all.<sup>49</sup>

“To those who pointed out that such organizations relied extensively on government support to enable them to carry out their existing functions,” wrote Salamon, “the administration expressed the hope that private giving would fill any resulting gap.”<sup>50</sup> It did not. In fact, partly because of Reagan’s regressive tax policy, which made charitable giving more costly, private charitable giving fell as a share of total nonprofit income—from 17% in 1977 to 10% in 1996.<sup>51</sup> Thus, the nonprofits that survived the Reagan-era cuts or came into existence during and after that period were forced to work harder.

### 1. Era of Privatization

Yet even as those austerity measures destroyed parts of the so-

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tion about the nonprofit sector is that it is funded primarily by foundation grants and individual donations. In truth, the majority of funding comes from government.

<sup>46</sup> Salamon, *Resilient Sector*, *supra* note 45, at 12.

<sup>47</sup> Abramson et al., *supra* note 45, at 112.

<sup>48</sup> *Id.* Nonprofits lost a total of \$55.3 billion between fiscal years 1982 and 1997—or \$3.5 billion per year. *Id.*

<sup>49</sup> *Excerpts from Address by Reagan on Role of Private Groups*, N.Y. TIMES, Jan. 15, 1982, at A14; *see also* Barbara R. Bergmann, *Charity Needs Coercion*, N.Y. TIMES, Dec. 13, 1981, at 3; *Study Finds Groups that Help the Poor Hurt by Budget Cuts*, N.Y. TIMES, May 7, 1982, at D18; Barnaby J. Feder, *Cutting Big Government, Round 2*, N.Y. TIMES, Feb. 12, 1989, at 4.

<sup>50</sup> SALAMON, NONPROFIT PRIMER, *supra* note 15, at 67.

<sup>51</sup> *Id.* at 70; *see also* Abramson et al., *supra* note 45, at 114–17.

cial service subsector,<sup>52</sup> the subsector as a whole continued to grow, albeit at a slower rate.<sup>53</sup> Unlike the previous era, however, when growth went hand-in-hand with government expansion, growth beginning in the 1980s came increasingly in lieu of it. Eugene Steurele and Virginia Hodgkinson observed that, in this period, growth in nonprofit employment nearly mirrored the decline in government employment.<sup>54</sup>

Many of our government officials like to proclaim their success at reducing the size of government and point in particular to the decline in the direct employment of individuals. In truth, what has occurred in large part is that the government has increasingly paid others to perform the work it finances.<sup>55</sup>

In other words, non-union social service nonprofit workers simply replaced their unionized counterparts in government.

The state has always depended on private entities to deliver services.<sup>56</sup> This form of privatization<sup>57</sup>—through so-called purchase-of-service (POS) agreements—was in fact the cornerstone of nonprofit sector growth in the 1960s and 1970s.<sup>58</sup> In 1971, for example, POS agreements represented 25% of state spending on social services. By 1976, this figure had increased to 49%.<sup>59</sup> Today, it is nearly 60%.<sup>60</sup>

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<sup>52</sup> Since the Clinton-era Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (1998), for example, 32% of home health care agencies have closed. Gerrick, *supra* note 9, at 121.

<sup>53</sup> This partly had to do with continued increases in Medicaid and Medicare expenditures, which boosted health care nonprofits (and prompted many who lost funding from other programs to simply shift federal draw-downs to these programs). SALAMON, NONPROFIT PRIMER, *supra* note 15, at 116–17.

<sup>54</sup> C. Eugene Steurele & Virginia A. Hodgkinson, *Meeting Social Needs: Comparing Resources of the Independent Sector and Government*, in COLLABORATION AND CONFLICT, *supra* note 28, at 71, 88.

<sup>55</sup> *Id.*

<sup>56</sup> Michael Dukakis, *Personal Reflections on Purchase of Services: A View from a State Capitol*, in THE PRIVATIZATION OF HUMAN SERVICES: CASE STUDIES IN THE PURCHASE OF SERVICES 19 (Margaret Gibelman & Harold W. Demone, Jr. eds., 1998).

<sup>57</sup> Other forms of privatization include voucher programs and sale of state assets. See generally DEMETRA SMITH NIGHTINGALE & NANCY M. PINDUS, PRIVATIZATION OF PUBLIC SOCIAL SERVICES (1997), available at <http://www.urban.org/url.cfm?ID=407023&renderforprint=1>.

<sup>58</sup> Ralph M. Kramer, *Voluntary Agencies and the Contract Culture: "Dream or Nightmare?"*, in NATURE OF NONPROFIT SECTOR, *supra* note 19, at 369.

<sup>59</sup> SMITH & LIPSKY, *supra* note 23, at 55.

<sup>60</sup> Elizabeth T. Boris, *Introduction: Nonprofit Organizations in a Democracy: Varied Roles and Responsibilities*, in COLLABORATION AND CONFLICT, *supra* note 28, at 15; see also Hilhel Schmid, *The Role of Nonprofit Human Service Organizations in Providing Social Services: A Prefatory Essay*, in ADMIN. IN SOC. WORK, 2004, at 1, 6 (health and social services nonprofits provide 59.8% of services).

Even in the earlier era of overall growth, POS policy had been intended explicitly to counteract the gains of the union movement in the government sector. Government subcontracting “blossomed” in the 1970s primarily because of “the dramatic rise in the pay of local government employees in the 1960s and 1970s.”<sup>61</sup> It was then that unions were able to

successfully challenge[ ] . . . laws exempting city employees from unemployment compensation, social security, minimum wage protection and other benefits enjoyed by the private sector worker. The resulting increases in pay and benefits made public sector workers a more expensive proposition than ever before. Local public employee unions experienced dramatic membership increases. . . . Whereas previously public employees had given municipalities total control over public expenditures in return for job security, unions in the 1970s began to demand a larger role in local policy-making for their members. As a result, many local public officials gradually abandoned their protective attitudes toward employees, and began to consider cost-saving alternatives such as contracting out.<sup>62</sup>

Thus, the expansion of the nonprofit social service sector in the 1970s was, *by design*, an expansion premised on flouting union standards.<sup>63</sup> What became of paramount concern to labor unions and nonprofit workers in the subsequent era was the use of POS agreements to privatize *existing* union jobs.<sup>64</sup> Privatization resulted in huge cost savings, which benefited not nonprofit workers, but “the new owners or operators” and the government.<sup>65</sup>

The incentive to contract with nonprofits is obvious. Nonprofits are “flexible” and cheaper.<sup>66</sup> Government prefers them because

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<sup>61</sup> MARVIN J. LEVINE, *PRIVATIZATION OF GOVERNMENT: THE DELIVERY OF PUBLIC GOODS AND SERVICES BY PRIVATE MEANS* 5 (1990).

<sup>62</sup> *Id.* at 6.

<sup>63</sup> Of particular relevance here, too, is the fact that there was deep distrust between the New Left activists and government at that time, which contributed to the privatization of what otherwise would have been government jobs. *Id.* at 6.

<sup>64</sup> *Id.* at 10–19.

<sup>65</sup> Michael Glanzer, *Union Strategies in Privatizations: Shakespeare-Inspired Alternatives*, 64 ALB. L. REV. 437, 440 (2001). The growth of purchase-of-service agreements since the 1980s has blurred the boundaries between public and private sectors as “reflected in numerous metaphors, such as third-party government, indirect public administration, the contract state, nonprofit federalism, the new or mixed political economy of welfare, and so forth.” Kramer, *supra* note 58, at 31; cf. Nancy Ehrenreich, *The Progressive Potential in Privatization*, 73 DENV. U. L. REV. 1235, 1237 (1996) (arguing that privatization need not serve conservative ends).

<sup>66</sup> See Thomas A. Reiner, *Privatizing State and Local Government Services: The Role of Not-for-Profit Organizations*, in *RESTRUCTURING STATE AND LOCAL SERVICES: IDEAS, PROPOSALS, AND EXPERIMENTS* 121 (Arnold H. Raphaelson ed., 1998).

they can limit transaction costs, have experience in service delivery, and are thought to be more responsive to diverse client groups.<sup>67</sup> In 1992, for example, a typical group-home counselor employed by the State of New York earned an annual salary of \$25,500, while a nonprofit counselor made \$16,900.<sup>68</sup> Ultimately, the threat this disparity posed to unionized civil sector jobs forced unions—particularly government sector unions—to organize nonprofits.

## 2. “Marketization” of the Nonprofit Sector

The era of privatization—along with the new culture of fiscal austerity—increased market competition among nonprofits and between nonprofits and for-profits. These trends, in turn, led to the increased “marketization” of the nonprofit sector. Consequently, today nonprofits are “drawing far closer to the market economy than perhaps at any time in their history.”<sup>69</sup>

Neil Gilbert has described this process as one of “transformation.”<sup>70</sup> To compete for dwindling federal and state dollars, social service nonprofits increasingly adopted the market culture, while management—and nonprofit staff in general—professionalized.<sup>71</sup> Nonprofit management extolled corporate methods.<sup>72</sup> Nonprofits partnered with big business, spun off for-profits, and increasingly relied on fees for services. To the extent that they infused the nonprofit sector with more efficient, professional methods, these changes were a welcome development, but the changes also destabilized the nonprofit sector. For example, Rathgeb Smith observed that increased reliance on fees for services “means that nonprofits are in an inherently more unpredictable and unstable revenue situation . . . . [A]n indirect effect [of this instability] is to add further pressure on nonprofits to be entrepreneurial and more businesslike in order to compete more effectively in the new,

<sup>67</sup> James M. Ferris, *The Double-Edged Sword of Social Service Contracting: Public Accountability Versus Nonprofit Autonomy*, in NATURE OF NONPROFIT SECTOR, *supra* note 19, at 395–96.

<sup>68</sup> Michael Winerip, *On Sunday, What Do Nonprofits Do? Take a Look*, N.Y. TIMES, Dec. 13, 1992, at 49.

<sup>69</sup> Dennis R. Young & Lester M. Salamon, *Commercialization, Social Ventures, and For-Profit Competition*, in SALAMON, STATE OF NONPROFIT AMERICA, *supra* note 15, at 429.

<sup>70</sup> See Smith, *supra* note 15, at 150 n.1 (citing Neil Gilbert, *The Transformation of Social Services*, 51 SOC. SERV. REV. 624, 641 (Dec. 1977)).

<sup>71</sup> SALAMON, NONPROFIT PRIMER, *supra* note 15, at 164–65.

<sup>72</sup> See, e.g., CompassPoint Nonprofit Services, <http://www.compasspoint.org> (last visited Feb. 21, 2007); Nonprofit Risk Management Center, <http://nonprofitrisk.org/about/about.htm> (last visited Feb. 21, 2007); Alliance for Nonprofit Management, <http://www.allianceonline.org> (last visited Feb. 21, 2007).

more unstable environment.”<sup>73</sup> In an exaggeration that nonetheless spoke to this trend, another commentator observed that nonprofits were now “big business.”<sup>74</sup>

The new environment, observed Salamon, led to a “broader and deeper penetration of the market culture into the fabric of nonprofit operations:”

Nonprofit organizations are increasingly “marketing” their “products,” viewing their clients as “customers,” segmenting their markets, differentiating their output, identifying their “market niche,” formulating “business plans,” and generally incorporating the language, and the style, of business management into the operation of their agencies. Management expert Kevin Kearns argues that nonprofit executives are now “among the most entrepreneurial managers to be found anywhere, including the private for-profit sector.”<sup>75</sup>

Indeed, “nonprofit America appears to be well along in a fundamental process of ‘reengineering’ that calls to mind the similar process that large segments of America’s business sector have undergone since the late 1980s,” noted Salamon.<sup>76</sup> Corporate America borrowed from nonprofits as well, increasingly “incorporating management approaches that have long been associated with nonprofit work, such as the emphasis on organizational mission, the ethos of service to clients, and the need to imbue staff with a sense of purpose beyond the maximization of profit.”<sup>77</sup>

The Clinton-era 1996 welfare reform legislation<sup>78</sup> dramatized the challenges nonprofits faced during this period by allowing for-profit companies to compete for social service contracts. To fight for a \$40 million welfare-to-work contract, for example, the YWCA of Greater Milwaukee had to create a for-profit limited liability corporation with two for-profit partners.<sup>79</sup> Without emulating corporate culture, nonprofits were simply no match for corporate giants

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<sup>73</sup> Smith, *supra* note 15, at 173.

<sup>74</sup> Passachoff, *supra* note 10, at 258.

<sup>75</sup> Salamon, *Resilient Sector*, *supra* note 45, at 39.

<sup>76</sup> *Id.* at 6.

<sup>77</sup> *Id.*; see also Burton A. Weisbrod, *The Complexities of Income Generation for Nonprofits*, in *FUTURE OF THE NONPROFIT SECTOR* 103 (Virginia A. Hodgkinson, Richard W. Lyman and Assoc., eds., 1989).

<sup>78</sup> Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 8 U.S.C. and 42 U.S.C.); see also Christine N. Cimini, *Welfare Entitlements in the Era of Devolution*, 9 *GEO. J. ON POVERTY L. & POL’Y* 89, 92-104 (2002) (summarizing history of welfare system and changes wrought by 1996 reform).

<sup>79</sup> BILL BERKOWITZ, *PROSPECTING AMONG THE POOR: WELFARE PRIVATIZATION* 16 (May 2001), available at <http://www.arc.org/pdf/296bpdf.pdf>.

like Lockheed Martin, Maximus, and Electronic Data Systems, which also vied for such contracts.<sup>80</sup>

The process of marketization also caused the broad vision and long-term goals of nonprofits to conflict with the short-term, market-inspired goals of for-profit companies. This conflict made it particularly hard for nonprofits to compete for contracts. As Rathgeb Smith explained:

Performance standards for . . . agencies are set in a top-down fashion, primarily at the federal level. This can cause conflicts with agency missions and orientations. For example, in job training programs, the federal emphasis is on job placement, whereas many community-based organizations are much more likely to emphasize “living wage” jobs and longer-term job training to achieve this goal. Government also takes a much more restricted view of eligible clients than community organizations do.<sup>81</sup>

This comment by William Ryan spoke to the institutional conflict that followed:

By playing in the new marketplace . . . [nonprofits] will [be] force[d] . . . to reconfigure their operations and organizations in ways that could compromise their missions . . . . It is precisely this . . . that could endanger the nonprofits as they are forced to adopt—and perhaps abandon—the very qualities that enabled them to advance social causes in the first place.<sup>82</sup>

### C. *Organized Labor’s Turn to the Service Sector and Nonprofits*

As the nonprofit sector underwent this transformation, the labor movement went through a crisis of its own. During this period, organized labor turned its focus away from the manufacturing sector and onto the service sector for two interrelated reasons. First, because unions have been historically concentrated in the industrial sector, when the U.S. economy de-industrialized in the 1970s, union density declined.<sup>83</sup> Unions therefore had to find new sec-

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<sup>80</sup> *Id.*

<sup>81</sup> Smith, *supra* note 15, at 174.

<sup>82</sup> William P. Ryan, *The New Landscape for Nonprofits*, HARV. BUS. REV., Jan.-Feb. 1999, at 127, 134.

<sup>83</sup> “Military Keynesianism . . . strained the financial system to the point of crisis and contributed to the virtual destruction of the competitive position of American manufactures.” MIKE DAVIS, *PRISONERS OF THE AMERICAN DREAM* 181 (1986). The recession that lasted from November 1973 to March 1975 was “by far the longest and deepest economic downturn in the United States . . . since the Great Depression.” THOMAS FERGUSON & JOEL ROGERS, *RIGHT TURN: THE DECLINE OF THE DEMOCRATS AND THE FUTURE OF AMERICAN POLITICS* 78 (1987). It was the time in which “the great develop-

tors of the economy to organize. Second, in response to the political agenda that accompanied de-industrialization—the “right turn” that U.S. society undertook beginning in the mid-1970s—unions increasingly took on a defensive position and retreated from confronting big business.<sup>84</sup> Threatened by a world economic crisis, superior foreign competition—particularly from Japan and Germany—and union militancy inspired by social movements of the 1960s and 1970s,<sup>85</sup> big business and its political allies counterattacked. As a *Business Week* editorial put it at the time:

Some people will have to do with less—cities and states, the home mortgage market, small businesses and the consumer will all get less than they want. It will be a hard pill for many Americans to swallow—the idea of doing with less so that big business can have more. Nothing that this nation or any other nation has done in modern history compares in difficulty with the selling job that must be done to make people accept the new reality.<sup>86</sup>

That “selling job” succeeded. Wages and working conditions have fallen steadily since then, a trend partly attributable to the long-term decline in union membership. From a peak rate of 27% in 1979<sup>87</sup> union density has fallen to 13.8% today.<sup>88</sup> To stem the decline, unions turned to—and squabbled over—the rapidly expanding service sector<sup>89</sup> and one of its fastest growing segments: nonprofits.<sup>90</sup>

The privatization of existing civil service positions served as

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ments that eventually drove American politics to the right became dramatically evident.” *Id.*

<sup>84</sup> See, e.g., DAVIS, *supra* note 83; FERGUSON & ROGERS, *supra* note 83; HOWARD ZINN, *A PEOPLE’S HISTORY OF THE UNITED STATES* 529 (1980).

<sup>85</sup> See JEREMY BRECHER, *STRIKE!* 249–71 (1997) (discussing wildcat strikes of early 1970s).

<sup>86</sup> John Carson-Parker, *The Options Ahead for the Debt Economy*, *BUS. WEEK*, Oct. 12, 1974, at 120, *quoted in* ROBERT FISHER, *LET THE PEOPLE DECIDE: NEIGHBORHOOD ORGANIZING IN AMERICA* 123 (1994).

<sup>87</sup> U.S. Historical Tables: Union Membership, Coverage, Density and Employment, 1973–2006, <http://www.trinity.edu/bhirsch/unionstats> (follow “U.S. Historical Tables: Union Membership, Coverage, Density and Employment, 1973–2006 All Wage and Salary Workers” hyperlink) [hereinafter U.S. Historical Tables]. See generally ART PREIS, *LABOR’S GIANT STEP* (1964) (discussing the rise of the U.S. labor movement).

<sup>88</sup> U.S. Historical Tables, *supra* note 87.

<sup>89</sup> The service economy grew rapidly between 1970 and 1985. Denis Johnston & Gabriel Rudney, *Characteristics of Workers in Nonprofit Organizations*, 110 *MONTHLY LAB. REV.* 28, 28 (July 1987).

<sup>90</sup> See, e.g., Steven Greenhouse, *A.F.L.-C.I.O. Puts Recruiting at Top of Its Agenda*, *N.Y. TIMES*, Feb. 17, 1997, at 12; Jeff Sturgeon, *Labor Hopes for Rebound: Union Leaders Plan Campaign to Halt Declining Membership*, *ROANOKE TIMES* (Va.), Mar. 3, 1996, at G1; Frank Swoboda, *A Matter of Organization: Labor Confronts Need to Boost Numbers*, *WASH. POST*, Sept. 8, 1998, at D9.



the catalyst for government sector unions such as the SEIU and AFSCME to organize social service nonprofits. At its convention in 1990, AFSCME—one of the unions hardest-hit by the privatization agenda—resolved to organize nonprofit workers.<sup>91</sup> In the Bay Area, SEIU Local 790 reportedly received one million dollars to organize nonprofits.<sup>92</sup> These unions pursued a two-prong strategy: stop privatization<sup>93</sup> and “follow the work,” that is, organize the agencies to which the work was contracted.<sup>94</sup> The AFL-CIO devoted substantial resources to nonprofit campaigns. By the mid-1990s, nonprofit unionization gained prominent media attention, and high-profile campaigns emerged in San Francisco, Boston, and New York, among other cities.<sup>95</sup> Observed Flo Green, Executive Director of Los Angeles-based California Association of Nonprofits: “It’s very clear to those of us in the nonprofit world that we have been targeted.”<sup>96</sup>

#### D. *Characteristics of Nonprofit Workers*

No union strategy, no matter how well-planned, can succeed without the initiative of nonprofit workers themselves. The era of fiscal austerity meant the altruism nonprofit workers brought to their work came increasingly into conflict with market forces. At the same time, the direct conversion of civil service positions into private nonprofit jobs also made it easier for nonprofit workers to gain a different—perhaps more structural—perspective of their working conditions. By contracting out services that had been per-

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<sup>91</sup> AFSCME, *Organizing the Unorganized*, Res. 125 (1990), available at <http://www.afscme.org/resolutions/1990/r29-125.htm>. For an overview of AFSCME’s organizing campaign targeting privately operated social service work, see AFSCME—Opening New Doors, <http://www.afscme.org/publications/1201.cfm>.

<sup>92</sup> George Cothran & John Mecklin, *Union Disorganizing*, S.F. WEEKLY, Jan. 7, 1998, at 6, available at <http://www.sfweekly.com/Issues/1998-01-07/news/columns2.html>. SEIU Local 790 has grown from a 10,000-member union consisting mostly of public employees in 1984 to a membership of more than 30,000 workers in the government, private, and nonprofit sectors in 2003. SEIU Local 790, <http://www.seiu790.org/our-local> (last visited Feb. 21, 2007).

<sup>93</sup> In San Francisco, for example, SEIU 790 sought legislation that would stop the city from contracting out services “that could potentially be performed” by city workers; declare that it is “not the intent of the city” to use contracting out to pay lower wages or benefits; and require employers with city contracts to maintain neutrality during union drives. Editorial, *Stop This Contract Before It Soaks City*, S.F. CHRON., June 23, 1997, at A20, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/1997/06/23/ED37256.DTL>.

<sup>94</sup> Interview with Dale Butler, Field Representative, SEIU Local 790 in S.F., Cal. (Dec. 2 & 5, 2005).

<sup>95</sup> See *supra* notes 2–7.

<sup>96</sup> John Yewell, *Labor Pains*, METRO SANTA CRUZ, June 25, 1998.

formed by government workers, nonprofit workers were able to directly compare the terms of their employment with those of their downsized counterparts.<sup>97</sup> The characteristics defining the sizeable nonprofit social service workforce that has emerged over the last thirty years—and the conditions under which nonprofit workers increasingly found themselves—became the staple issues of nonprofit unionization drives.

### 1. Altruism As a Motivating Factor

Nonprofit workers want to “do good.”<sup>98</sup> A 2001–2002 survey found that nonprofit workers were less motivated by “job security, the salary, benefits or the paycheck” than they were by the “chance to help the public, to make a difference, to do something worthwhile, and [to have] pride in the organization . . . .”<sup>99</sup> Consequently, they are more ideologically committed to their work, are more political, and expect a more “collegial” and democratic or participatory work environment.<sup>100</sup> Because of these characteristics, one writer observed, “employees of nonprofit groups, often steeped in the discourses of rights and justice, are seen as more likely to be pro-union.”<sup>101</sup> Perhaps unsurprisingly, nonprofit workers expect more autonomy in the workplace, which means that they are more free to define their duties and therefore more prone to experience greater job ambiguity (and less supervision)—a fact that correlates with more stress on the job and more job dissatisfaction.<sup>102</sup>

### 2. Substandard Wages, Benefits, and Working Conditions

“Unfortunately,” Paul Light observed, “nonprofit employees love their work so much that they set themselves up for exploita-

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<sup>97</sup> Equity theory holds that “employee motivation not only depends on the pay and performance relationship that the employee experiences, but it also depends on the pay and performance of *other* employees with whom the person compares himself or herself. Social comparisons are very important.” Joan E. Pynes & Meredith A. Newman, *Nonprofit Sector Unionization and Gender Equity*, 21 REV. PUB. PERS. ADMIN. 5, 11 (Spring 2001).

<sup>98</sup> Philip H. Mirvis & Edward J. Hackett, *Work and Work Force Characteristics in the Nonprofit Sector*, 106 MONTHLY LAB. REV. 3, 8 (April 1983).

<sup>99</sup> Paul C. Light, *The Content of Their Character: The State of the Nonprofit Workforce*, 9 NONPROFIT Q. 6, 9 (Fall 2002).

<sup>100</sup> *Id.* at 7–9.

<sup>101</sup> Jennifer C. Berkshire, *Nonprofit Groups Turn to Unions to Organize Workers and Collaborate on Common Causes*, CHRON. OF PHILANTHROPY, NOV. 21, 2002, <http://www.philanthropy.com/jobs/2002/11/28/20021128-945997.htm>.

<sup>102</sup> Mirvis & Hackett, *supra* note 98, at 8.

tion.”<sup>103</sup> The commitment to clients is, in fact, such a powerful motivator that it sometimes discourages nonprofit workers from leaving substandard employment.<sup>104</sup> Thus, even as nonprofit workers tend to be pro-union generally, they may not be pro-union for themselves.

Believing that they should not take funds dedicated to client programs, particularly when budgets are tight, many nonprofit workers minimize their own work-related concerns. In return for the “intrinsic rewards” of nonprofit work,<sup>105</sup> nonprofit workers forego the better pay, benefits, and working conditions offered by the for-profit and government sectors.<sup>106</sup> Across the board, nonprofit pay for comparable work is 11% to 20% lower than pay in the corporate and government sectors.<sup>107</sup> One study found that nonprofit workers earn only 67.5% of what comparable for-profit workers make and 67.1% of what comparable government workers make,<sup>108</sup> figures that are apparently worsening.<sup>109</sup> Between 1998 and 2003, for example, the salaries of all nonprofit workers rose 8%, 5% less than the increase for all other workers.<sup>110</sup> Health, pension, and other benefits are also generally lower in the nonprofit sector.<sup>111</sup> Finally, nonprofit workers are less likely to be employed full-time<sup>112</sup> and are less likely to be promoted.<sup>113</sup>

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<sup>103</sup> Paul C. Light, *The Nonprofit Example: Find a Way to Make Government More Like a Nonprofit, and It Can Only Improve*, GOV'T EXECUTIVE, Nov. 2002, at 76, available at <http://www.brookings.edu/views/articles/light/november2002.htm>.

<sup>104</sup> Peters & Masaoka, *supra* note 8, at 312.

<sup>105</sup> Light, *supra* note 99, at 9.

<sup>106</sup> There is the school of thought, however, that nonprofit workers are generally substandard; that is, they would otherwise not be as employable in the business or government sector. See generally Anne E. Preston, *The Nonprofit Worker in a For-Profit World*, 7 J. LAB. ECON. 438 (1989) (wage differential between workers in nonprofit sector versus those in business and government possibly reflects low quality in former); CAROL L. BARBEITO & JACK P. BOWMAN, NONPROFIT COMPENSATION AND BENEFITS PRACTICES (1998).

<sup>107</sup> Christopher J. Ruhm & Carey Borkoski, *Compensation in the Nonprofit Sector*, 4 J. HUM. RESOURCES 992 (2003). The wage gap can be explained by the concentration of nonprofit work in the low-wage economy. *Id.* at 1017. Nonprofit jobs are concentrated in seven “fairly narrowly defined” industries, including hospitals, social services, education, and religious organizations. *Id.* at 1006–09; see also Preston, *supra* note 106, at 460; BARBEITO & BOWMAN, *supra* note 106, at 37–62.

<sup>108</sup> Mirvis & Hackett, *supra* note 98, at 7.

<sup>109</sup> Irons & Bass, *supra* note 21, at 4.

<sup>110</sup> Harvy Lipman, *A Growing Disparity*, CHRON. OF PHILANTHROPY, Nov. 10, 2005, at 37.

<sup>111</sup> Irons & Bass, *supra* note 21, at 7; BARBEITO & BOWMAN, NONPROFIT COMPENSATION, *supra* note 106 at 62–74.

<sup>112</sup> Johnston & Rudney, *supra* note 89, at 31.

<sup>113</sup> See generally JED DEVARO & DANA SAMUELSON, WHY ARE PROMOTIONS LESS LIKELY

### 3. High Productivity, Worker Burnout, and Turnover Rates

At the same time, nonprofit workers work long hours—on average 43.6 hours per week compared to 40.4 hours for government workers<sup>114</sup>—in jobs that typically involve substantial emotional challenges.<sup>115</sup> It is no wonder that nonprofit workers often complain of burnout. In a 2001–2002 study, nonprofit employees “reported high levels of stress and potential burnout. Seven out of ten strongly or somewhat agreed that they always have too much work to do and that it is easy to burn out in their jobs.”<sup>116</sup> These are jobs serving a high demand with woefully inadequate resources.<sup>117</sup>

It is likely that this situation will only worsen because of increased demand. As John Irons and Gary Bass have found:

Recent studies and anecdotal evidence indicate that nonprofits are being forced to provide more and more services to more and more people. With increases in outlays for non-labor items (such as food, medical supplies, etc.) nonprofits might be forced to reduce funding allocated to staff.<sup>118</sup>

Long-term demographic changes in the U.S. population are also likely to exacerbate this situation. As Salamon has observed, “recent social and demographic trends such as increased female participation in the labor force, the graying of the population, and the rise in the divorce rate have expanded the demand for services such as day care, nursing-home care, and counseling that nonprofits have traditionally provided.”<sup>119</sup> Given these job conditions, it is hardly surprising that there is a high level of turnover in nonprofit social service jobs. One study found that one out of three workers leaves his or her job within two years.<sup>120</sup>

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IN NONPROFIT FIRMS? (2003), available at <http://client.norc.org/jole/SOLEweb/DeVaro&Samuelson.pdf>.

<sup>114</sup> Mirvis & Hackett, *supra* note 98, at 7–8.

<sup>115</sup> Gerrick, *supra* note 9, at 120.

<sup>116</sup> Light, *supra* note 99, at 9.

<sup>117</sup> *Id.*

<sup>118</sup> Irons & Bass, *supra* note 21, at 6 (citing CAL. ASS’N OF NONPROFITS, HOLES IN THE SAFETY-NET: STUDY OF FUNDING CUTBACKS AND SAFETY-NET NONPROFITS IN CALIFORNIA (2004); WOODS BOWMAN, FISCAL CRISIS IN THE STATES: ITS IMPACT ON NONPROFIT ORGANIZATIONS AND THE PEOPLE THEY SERVE (2003); THOMAS GAIS ET AL., A DIVIDED COMMUNITY: THE EFFECTS OF STATE FISCAL CRISES ON NONPROFITS PROVIDING HEALTH AND SOCIAL ASSISTANCE (2003)); see also Harvy Lipman & Elizabeth Schwinn, *Faith in His Budget*, CHRON. OF PHILANTHOPY, Feb. 17, 2005, at 22 (noting that President Bush’s 2006 budget would “tighten eligibility rules so that 200,000 to 300,000 fewer people would be eligible for food stamps by 2010 . . . and parents of some 300,000 children would lose federal subsidies for child care”).

<sup>119</sup> Moore, *supra* note 21, at 37.

<sup>120</sup> Paul Schmitz & Kala Stroup, *Building Tomorrow’s Nonprofit Work Force*, CHRON. OF

#### 4. Demographics of Staff and Management

Nonprofit workers display the incongruous demographic trait of being both more educated and less educated than other workers.<sup>121</sup> A 1980 survey revealed that 25% of nonprofit workers had completed four or more years of college, while only 18% of the entire labor force had achieved that level of education.<sup>122</sup> Conversely, one third of nonprofit workers had not completed high school, compared with only one quarter of non-high school graduates in the workforce as a whole.<sup>123</sup>

In the nonprofit sector, there is a higher ratio of professionals to non-professionals than in the for-profit and government sectors.<sup>124</sup> Women<sup>125</sup> and African Americans<sup>126</sup> are also disproportionately represented. For example, the “typical home health care worker,” observed Gerrick, is a “middle-aged, minority female who is a single head of household with a high school diploma.”<sup>127</sup>

Nonprofit management, on the other hand, resembles management in the for-profit sector: It tends to be white, male and well-paid. For example, a study by the *Chronicle of Philanthropy* of nonprofit compensation in more than 3770 organizations found that, between 1998 and 2003, nonprofit CEOs’ pay grew at twice the rate of the average nonprofit worker, rising 16% after adjusting for inflation.<sup>128</sup> In the same period the average nonprofit worker salary grew only by 8%.<sup>129</sup> In 2003, nonprofit leaders were paid five times their average employee.<sup>130</sup> If current trends continue, by 2018 nonprofit CEOs will be making six times what other employees are paid.<sup>131</sup> While this gap may be insignificant compared to

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PHILANTHROPY, July 21, 2005, at 2; see also JEANNE PETERS ET AL., COMPASSPOINT NON-PROFIT SERVS., HELP WANTED: TURNOVER AND VACANCY IN NONPROFITS 8 (2002), available at [http://www.compasspoint.org/assets/10\\_helpwanted.pdf](http://www.compasspoint.org/assets/10_helpwanted.pdf) (finding 8% vacancy rate in total nonprofit workforce).

<sup>121</sup> Johnston & Rudney, *supra* note 89, at 29.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> Mirvis & Hackett, *supra* note 98, at 4; Johnston & Rudney, *supra* note 89, at 32; see BARBEITO & BOWMAN, *supra* note 106, at 10 (in 1994, women comprised 68.2% of paid nonprofit workforce).

<sup>126</sup> NONPROFIT ALMANAC, *supra* note 33, at 136.

<sup>127</sup> Gerrick, *supra* note 9, at 119.

<sup>128</sup> Lipman, *supra* note 110, at 37.

<sup>129</sup> *Id.* at 26; see also Preston, *supra* note 106, at 460 (finding a far greater salary differential between nonprofit and for-profit managers and professionals (-.20) than the difference at the level of clerical and sales workers (-.05)).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 28.

the wage gap in the corporate world, it does, as one writer put it, “erode[ ] a sense that we’re all in this together.”<sup>132</sup> Unsurprisingly, this wage disparity has been one of the main factors animating pro-union sentiment.

## II. UNIONIZATION ISSUES AND THE SOCIAL SERVICE NONPROFITS’ INSTITUTIONAL ROLE

The specific workforce characteristics mentioned above are the staple issues of union drives in social service nonprofits, though these issues are generally no different from those that arise elsewhere. The difference is in the way the antagonists fight over them—a difference, in turn, founded on the specific institutional role of social service nonprofits. Their dual role as both progressive and regressive organizations leads proponents and opponents of unionization to invoke one or the other side of this contradiction—to the exclusion of the other—to support their positions. In the process, social service nonprofits also articulate competing ideological visions on how to solve the problems they confront.

### A. *Recurring Issues*

There are, to be sure, labor issues specific to nonprofit unionization. Nonprofits that are religious or considered “political subdivisions” of the state are, for instance, exempt from the jurisdiction of the National Labor Relations Board.<sup>133</sup> Similarly, agencies that

<sup>132</sup> *Id.* at 26. The wage gap is of course nowhere near the corporate analogue: In 2004, the average CEO in the corporate sector was paid 431 times that of the ordinary worker. SARAH ANDERSON ET AL., EXECUTIVE EXCESS 2005: DEFENSE CONTRACTORS GET MORE BUCKS FOR THE BANG 13 (Aug. 30, 2005), available at <http://www.faireconomy.org/press/2005/EE2005.pdf>.

<sup>133</sup> See, e.g., St. Edmund’s Roman Catholic Church, 337 N.L.R.B. 1260 (2002) (religious organization); Ukiah Adventist Hosp., 332 N.L.R.B. 602 (2000) (same); Hinds County Human Res. Agency, 331 N.L.R.B. 1404 (2000) (political subdivision); Enrichment Servs. Program, Inc., 325 N.L.R.B. 818 (1998) (same). President George Bush’s Faith-Based Initiative may lead to additional exemptions for religious organizations. See Exec. Order No. 13,198, 3 C.F.R. 750 (2002), reprinted in 5 U.S.C. § 601 (creating seven agency centers for Faith-Based and Community Initiatives); Exec. Order No. 13,199, 3 C.F.R. § 752 (2002), reprinted in 5 U.S.C. § 601 (declaring policy in favor of including faith organizations in social service efforts and creating the White House Office of Faith-Based and Community Initiatives to develop, lead, and coordinate efforts to implement that policy); Press Release, Office of the Press Sec’y, Establishment of White House Office of Faith-Based and Community Initiatives (Jan. 29, 2001), available at <http://www.whitehouse.gov/news/releases/2001/01/20010129-2.html>. This initiative can be seen as an effort to circumvent unionization in social service nonprofits. Although outside the scope of this Article, there are also labor issues specific to both nonprofits that are already unionized and nonprofits in general. For example, nonprofit volunteers are typically exempt from the Fair Labor Standards

contract with government—including nonprofits—may be obligated to recognize existing bargaining units under certain circumstances.<sup>134</sup>

Nonprofit workers and management battle over wages, benefits, and racism, sexism, and homophobia in the workplace.<sup>135</sup> They battle over agency mission, governance, and clientele; and they battle over related political issues, such as privatization.<sup>136</sup> Peters and Masaoka found similar themes,<sup>137</sup> as did Passachoff.<sup>138</sup> To make one crude comparison, in the recent transit strike in New York City, workers and management fought over wages and benefits; spoke of the agency's public service mission and on behalf of their ridership; and contextualized their dispute within larger developments taking place politically and economically, most notably around the question of pension benefits.<sup>139</sup>

#### B. *The Battle over Institutional Role*

What differentiates nonprofit unionization is the dynamic that animates the clash of interests. Social service nonprofits perform a unique, contradictory role.<sup>140</sup> Carol Estes, Elizabeth Binney, and Linda Bergthold captured this contradiction in their observation that nonprofits enjoy a "special legitimacy" because of their "historical and contemporary role and character [as representing] pluralistic, participatory, and noneconomic motivations of charity and

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Act, 29 U.S.C. §§ 101–219 (1988). See Bazil Facchina et al., *Privileges and Exemptions Enjoyed by Nonprofit Organizations*, 28 U.S.F. L. REV. 85, 114–16 (1993).

<sup>134</sup> See generally Erin M. Gee, *The Application of the Doctrine of Successorship to the Privatization of Government Services*, 32 CAL. W. L. REV. 167 (1995); B. Glenn George, *Successorship and the Duty to Bargain*, 63 NOTRE DAME L. REV. 277 (1988).

<sup>135</sup> See *supra* notes 2–7; Peters & Masaoka, *supra* note 8; Passachoff, *supra* note 10; see also Pynes & Newman, *supra* note 97, at 5.

<sup>136</sup> See *supra* notes 2–7; Peters & Masaoka, *supra* note 8; Passachoff, *supra* note 10.

<sup>137</sup> Peters & Masaoka, *supra* note 8, at 305. Peters and Masaoka review the scant literature on this subject and observe that the range of issues motivating unionization in nonprofits compares with those issues present elsewhere. *Id.* at 306–08.

<sup>138</sup> Passachoff, *supra* note 10 (discussing wages, benefits, pensions, race, gender, clientele, among others, as issues in Head Start union drives).

<sup>139</sup> See, e.g., Steven Greenhouse, *Transit Union Calls for Strike in Divided Vote*, N.Y. TIMES, Dec. 20, 2005, at A1.

<sup>140</sup> See generally Henry Hansmann, *Economic Theories of Nonprofit Organization*, in THE NONPROFIT SECTOR 27 (Walter W. Powell ed., 1987) (discussing the different economic and political roles of nonprofits); see also James Douglas, *Political Theories of Nonprofit Organization*, in THE NONPROFIT SECTOR, *supra*, at 43; Kirsten G. Gronbjerg, *Markets, Politics, and Charity: Nonprofits in the Political Economy*, in NATURE OF NONPROFIT SECTOR, *supra* note 19, at 218 ("Nonprofits play a critical role in the U.S. political economy. As voluntary associations, they suit the American preference for private auspices. As institutions established for charitable or common purposes, they alleviate the need for such action under public auspices.").

the spirit of giving, privatism, individualism, and the democratic impulse.”<sup>141</sup> These roles and characteristics are an eclectic agglomeration, but they can be boiled down to a dual conception. On the one hand, they advance progressive principles by their very existence: Nonprofits undeniably occupy a revered position in the economic, political, social, and ideological landscape. Through privatization, however, they also collectively have become a structural vehicle by which government circumvents union standards and makes deep social spending cuts. In this sense, they have played a regressive institutional function. In nonprofit unionization, one or the other side of this equation becomes a primary force.

### 1. The Pro-Union Position: Social Service Nonprofits As Representative, Progressive Institutions

Everyone loves nonprofits—or at least what they represent. It seems that no amount of praise is sufficient for this unique institution.<sup>142</sup> Although there is no fixed definition of the word “charitable”—for the purposes of this Article the key qualification is tax-exemption and hence nonprofit status<sup>143</sup>—the term “nonprofit” connotes a certain humanity, ethicality, or morality, which are tax-exemption rationales the Supreme Court has recognized in such decisions as *Walz v. Tax Commissioner*<sup>144</sup> and *Bob Jones University v. United States*.<sup>145</sup> The “government relieves from the tax burden religious, educational, and charitable activities,” one commentator explained, “because it wishes to encourage them *as representing the highest and noblest achievements of mankind*.”<sup>146</sup> Consequently, as Pas-

<sup>141</sup> Carol L. Estes et al., *How the Legitimacy of the Sector Has Eroded*, in *FUTURE OF THE NONPROFIT SECTOR*, *supra* note 77, at 22–23.

<sup>142</sup> See, e.g., JEFFREY M. BERRY & DAVID F. ARONS, *A VOICE FOR NONPROFITS* 1–3 (2003) (nonprofits “represent what is best about our country . . . . [N]onprofits have a higher calling, a more noble purpose [and] embody the caring, charitable side of us”); Schmid, *supra* note 60, at 10 (nonprofits “maintain an altruistic ideology of charity and concern for others [and] fulfill a social mission aimed at promoting justice, equality and well-being for individuals, groups and communities”). Of course, there have been high-profile cases of mismanagement in social service nonprofits. But the enmity resulting from them is trained on particular people, rather than on the institution as a whole. See James J. Fishman, *The Nonprofit Sector: Myths and Realities*, 9 *N.Y.C. L. REV.* 303, pt. IV.

<sup>143</sup> Nina J. Crimm, *An Explanation of the Federal Income Tax Exemption for Charitable Organizations: A Theory of Risk Compensation*, 50 *FLA. L. REV.* 419, 429 (1998) (“charitable” is to be applied in “its generally accepted legal sense”).

<sup>144</sup> 397 U.S. 664, 672–73 (1970).

<sup>145</sup> 461 U.S. 574, 609 (1983) (Powell, J., concurring).

<sup>146</sup> John D. Colombo, *The Role of Access in Charitable Tax Exemption*, 82 *WASH. U. L. Q.* 343, 364 n.85 (2004) (quoting Chauncey Belknap, *The Federal Income Tax Exemption*



sachoff noted, “the avowed mission of many social service agencies . . . is to empower individuals, families, and communities in poverty and to assist them along the path to economic self-sufficiency.”<sup>147</sup> For example, the nonprofit California health conglomerate Catholic Healthcare West believes in promoting “justice, dignity [and] collaboration.”<sup>148</sup> Action for Boston Community Development has as its “lifelong mission to promote self-help for low-income people . . . .”<sup>149</sup> Lifespire, in New York City, seeks to help clients “reach life’s aspirations.”<sup>150</sup>

These values and specific aims are the cornerstone of pro-union demands. For example, in seeking better wages and benefits—particularly pay equity for comparable work<sup>151</sup>—nonprofit workers expect their agencies to engage in practices that are consistent with these principles.<sup>152</sup> In one union drive examined by Peters and Masaoka, the politics of privatization figured explicitly as a primary motivating factor: “We didn’t want to be part of driving people’s wages down. The money nonprofits are getting is money government is not getting, let’s face it. If we take on more work, we absorb the social service and welfare cuts.”<sup>153</sup>

Peters and Masaoka found that, for pro-union staff, unmet expectations in this regard “created a sense that they had been misled or betrayed.”<sup>154</sup> More than workers in the corporate sector, nonprofit workers expect a collegial, supportive, and inclusive workplace that is safe and free of racism, sexism, and homophobia.<sup>155</sup>

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*of Charitable Organizations: Its History and Underlying Policy*, in RESEARCH PAPERS SPONSORED BY THE COMMISSION ON PRIVATE PHILANTHROPY AND PUBLIC NEEDS 2025, 2033–35 (U.S. Dep’t of the Treasury ed., 1977) (emphasis added); see BERRY & ARONS, *supra* note 142, at 3; see also Rob Atkinson, *Altruism in Nonprofit Organizations*, 31 B.C. L. REV. 501, 567 (1990) (nonprofits provide “metabenefit” of altruistic activity in society, in addition to specific goods and services).

<sup>147</sup> Passachoff, *supra* note 10, at 248–49.

<sup>148</sup> Jason Tackenouchi, *Getting Organized*, DAILY NEWS L.A., Feb. 13, 2000, at B1. In fact, the Catholic Church has a policy of supporting unionization. Pynes & Newman, *supra* note 97. The church “fully supports the rights of workers to form unions or other associations to secure their rights to fair wages and working conditions [and] firmly opposes organized efforts . . . to break existing unions or prevent workers from organizing.” DeBare, *supra* note 2.

<sup>149</sup> About ABCD — Action for Boston Community Development, <http://www.bostonabcd.org/about.htm> (last visited Feb. 21, 2007).

<sup>150</sup> Baumer, *supra* note 7.

<sup>151</sup> Respondents in Peters and Masaoka’s survey rated “[i]nequity between their own compensation and that of workers in similar government jobs . . . more important than the absolute level of compensation.” Peters & Masaoka, *supra* note 8, at 312.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 313.

<sup>154</sup> *Id.* at 310.

<sup>155</sup> *Id.*

Indeed, as Peters and Masaoka found, “there appears to be a heightened expectation that nonprofits will be more supportive, fair, and diverse than for-profit employers.”<sup>156</sup> Moreover, “the most frequently articulated reason for [workers’] pro-union stand” is the need for a greater “voice” in agency decision-making.<sup>157</sup> As one of their interviewees said, “A lot of our work is about empowering people. But we didn’t feel empowered. We wanted more of a voice, more decision-making power.”<sup>158</sup>

Client interests also figure prominently into pro-union demands. Said one nonprofit worker: “A lot of times workers on the frontlines see exactly what a client needs and yet when we presented this to management . . . we were blatantly disregarded.”<sup>159</sup> Others argue that better treatment means more stability and higher morale, the benefits of which inure to the clients.<sup>160</sup> Peggie Smith has made this argument about child care workers,<sup>161</sup> as has Kristin Gerrick vis-à-vis home health care workers.<sup>162</sup> Unionization, says Smith, “stands to benefit not only the child care workforce, but also the children who receive care. Studies have consistently shown that when child care workers are treated with respect and dignity, they are more likely to provide quality care and to remain in their jobs.”<sup>163</sup> From these anecdotal examples, it is clear that nonprofit social service workers who unionize rely on a progressive and specific institutional identity to advance their cause.

## 2. The Anti-Union Position: Social Service Nonprofits As Regressive “Mediating Structures”

In contrast, unionization opponents point to the other, equally characteristic side of the nonprofit contradiction, which was theorized nearly thirty years ago. In an article that “provided the Reagan administration with the philosophical justification for divesting public social programs to the nonprofit sector,”<sup>164</sup> Peter Berger and Richard John Neuhaus argued for “alternative mecha-

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<sup>156</sup> Peters & Masaoka, *supra* note 8, at 311.

<sup>157</sup> *Id.* at 309; *see also supra* notes 2–7.

<sup>158</sup> Peters & Masaoka, *supra* note 8, at 309.

<sup>159</sup> *See Espinosa Solis, supra* note 2.

<sup>160</sup> Peters & Masaoka, *supra* note 8, at 312.

<sup>161</sup> Smith, *supra* note 9.

<sup>162</sup> Gerrick, *supra* note 9.

<sup>163</sup> Smith, *supra* note 9, at 402.

<sup>164</sup> DAVIS L. GIES ET AL., *THE NONPROFIT ORGANIZATION: ESSENTIAL READINGS* 4 (1990).

nisms . . . to provide welfare-state services”<sup>165</sup> and for “rethinking the institutional means by which government exercises its responsibilities.”<sup>166</sup> The alternative institutions, they argued, must be informal “laboratories of innovation in social services.”<sup>167</sup> Indeed, Berger and Neuhaus specifically disparaged professionalization and unionization—and especially the “unionization of professionals”—as a threat to the utility of these so-called “mediating structures.”<sup>168</sup> In the context of the reactionary “selling job” that big business and government had to do at the time,<sup>169</sup> such “alternative mechanisms” simultaneously appease and “empower.”<sup>170</sup> Salamon made a similar observation about advocacy organizations:

By making it possible to surface significant social and political concerns, to give voice to under-represented people and points of view, and to integrate these perspectives into social and political life, these organizations function as a kind of *social safety valve* that has helped to preserve American democracy and maintain a degree of social peace in the midst of massive, and often dramatic, social dislocation.<sup>171</sup>

Hillel Schmid has alluded to the benefits of such governance structures: Transferring governmental functions to social service nonprofits

undoubtedly serves some inherent interests of the government, such as: (1) creating a political climate that enables and justifies cuts in government programs; (2) laying the groundwork to charge clients directly for some expenses for services (health, welfare, education, housing, etc.); (3) protecting the government against public responses to budget cuts . . . . These inherent functions shift the accountability and responsibility for reporting about availability[,] accessibility, and quality of services from government to nongovernment organizations, thereby relieving the government of direct responsibility for the well-being of its citizens.<sup>172</sup>

It is this institutional conception of social service nonprofits that animates the anti-union position. In response to workers’ eco-

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<sup>165</sup> Peter Berger & Richard John Neuhaus, *To Empower People: The Role of Mediating Structures in Public Policy*, in GIES ET AL., *id.* at 13.

<sup>166</sup> *Id.* at 16.

<sup>167</sup> *Id.* at 18.

<sup>168</sup> *Id.* at 13.

<sup>169</sup> See *supra* text accompanying note 86.

<sup>170</sup> Berger & Neuhaus, *supra* note 165.

<sup>171</sup> Lester M. Salamon, *Nonprofit Organizations: America’s Invisible Sector*, ISSUES OF DEMOCRACY, Jan. 1998, <http://usinfo.state.gov/journals/itdhr/0198/ijde/salamon.htm> (emphasis added).

<sup>172</sup> Schmid, *supra* note 60, at 3.

conomic demands, nonprofit managers typically—and understandably—claim that their “hands are financially tied.”<sup>173</sup> Even though some of them are quite handsomely paid,<sup>174</sup> they argue that nonprofits simply cannot provide better wages, benefits, and working conditions because funding is chronically unpredictable and inadequate. Said Green of the California Association of Nonprofits:

We rely on contracts and donations, and tomorrow’s income is not guaranteed. The fear is the degree over which services might be interrupted to meet the demands of a union contract . . . . We have always been able to hire and fire based on resources. One of the reasons government contracts with us is because we can do things cheaper, because we have been non-union, and the government is unionized.<sup>175</sup>

“We work on one-year contracts,” said another nonprofit executive. “Nobody is permanent.”<sup>176</sup> The “reality,” echoed Cynthia Matthews of Santa Cruz Planned Parenthood, is that “nonprofits can *never* hope to equal the compensation levels of public institutions or private industry.”<sup>177</sup> These nonprofit managers point out that competition for these scarce funds has only gotten stiffer as the number of nonprofits multiply and for-profits penetrate traditional nonprofit markets.<sup>178</sup>

In this conception, the nonprofit’s role is to address government irresponsibility and ameliorate need by providing “value-priced services.”<sup>179</sup> Light captured this Sisyphean task:

<sup>173</sup> Passachoff, *supra* note 10, at 254; *see also* Gerrick *supra* note 9, at 123.

<sup>174</sup> Lipman, *supra* note 110 (discussing pay of various nonprofit CEOs).

We would never have expected that the activists who oppose excessive salaries would target not the compensation in excess of \$1 million in the corporate sector, but Reverend Cecil Williams of Glide Memorial Church and Lonnie Hicks of Family Service Agency, both of whom have salaries just above or just under [\$]100,000.

Jan Masaoka, Executive Dir. CompassPoint Nonprofit Servs., Talk at the San Francisco Community Foundations Forum: 9.5 on the Richter Scale (Sept. 28, 1998), *available at* [http://www.compasspoint.org/assets/122\\_9point5onrichterscale.pdf](http://www.compasspoint.org/assets/122_9point5onrichterscale.pdf) [hereinafter Masaoka, 9.5 on the Richter Scale].

<sup>175</sup> Yewell, *supra* note 96. Employers claim their “hands are tied by state and federal regulations and reimbursement rates.” Gerrick, *supra* note 9, at 123.

<sup>176</sup> *See, e.g.*, Bennett Baumer, *Organizing the Organizers*, CITY LIMITS WKLY., June 13, 2005, <http://www.citylimits.org/content/articles/viewarticle.cfm?articlenumber=1735>.

<sup>177</sup> Yewell, *supra* note 96 (emphasis added).

<sup>178</sup> *See* Jennifer Moore, *A Corporate Challenge for Charities*, CHRON. OF PHILANTHROPY, Aug. 13, 1998, at 1.

<sup>179</sup> Edward Epstein, *Charities Chafing over Bargaining Offer from Union*, S.F. CHRON., Feb. 2, 1998, at A13. Weisbrod’s work on public goods theory suggests that nonprofits tend to serve a gap-filling role vis-à-vis governmental enterprise, “meeting some of the supramedian or idiosyncratic demand for public goods that is left unmet by govern-

Doing more with less appears to come with the IRS tax exemption letter. But unlike the federal government, the nonprofit sector cannot disguise its deficits by ignoring future liabilities or changing the start of the fiscal year. And unlike the private sector, it cannot shelter itself by eliminating unprofitable product lines, declaring bankruptcy, or falsifying profits. The nonprofit sector will do what it has always done: it will ask its workforce to work harder and longer, and its workforce will do just that.<sup>180</sup>

Unlike the pro-union position, this pessimistic conception accepts rather than challenges the conditions of nonprofit funding. The premium is therefore on nonprofits to be “flexible”—or “resilient.”<sup>181</sup> Management must be able to govern unilaterally and restructure “on a dime.”<sup>182</sup> Often, this has been framed as the flexibility to innovate—flexibility that would be compromised by unionization. “A very strong ingredient in innovation is being able to quickly respond to community needs,” said one foundation executive. “If nonprofits have to meet and confer at length about these shifts, it may be quite distracting. It may cut off a training field for new young leaders.”<sup>183</sup> Indeed, union standards could mean program cuts or, worse, result in the agency’s closure.<sup>184</sup>

Furthermore, like their corporate and government counterparts, nonprofit managers typically portray unions as “outsiders” or “third parties:” a bothersome and unnecessary layer of bureaucracy.

Decision making is . . . strongly associated with management’s perception of the uniqueness of the nonprofit culture. Managers and funders expressed concern that the introduction of a union, with its requisite formal structures and processes, would mean a loss of flexibility in the ways decisions are made. They stressed that flexibility is especially important in the nonprofit sector because of its implications for developing timely, high-quality programming and for responding to changes in funding streams.<sup>185</sup>

This vision is all the more compelling because many, if not most, managers are well-intentioned, hard-working individuals—

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ment provision.” Henry Hansmann, *Economic Theories of Nonprofit Organizations*, in FUTURE OF THE NONPROFIT SECTOR, *supra* note 77, at 27, 35.

<sup>180</sup> Light, *supra* note 99, at 6.

<sup>181</sup> Salamon, *Resilient Sector*, *supra* note 45.

<sup>182</sup> Peters & Masaoka, *supra* note 8, at 310.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*; see also BERKOWITZ, *supra* note 79.

<sup>185</sup> Peters & Masaoka, *supra* note 8, at 310.

and, indeed, many are union supporters.<sup>186</sup> Again and again, however, many are compelled to oppose unionization because of social service nonprofits' role as quasi-governmental appendages.<sup>187</sup> Nonprofit managers sometimes even invoke the agency mission to justify their anti-union stance. The Santa Cruz Planned Parenthood, for example, marshaled its pro-choice mission to urge workers to "choose" a non-union shop: "We believe in choice," said spokeswoman Cynthia Mathews.<sup>188</sup> More frequently, however, nonprofit managers simply draw a bright line between nonprofit workers, who should expect substandard working conditions in return for the work's intrinsic rewards, and agency clients to whom the organization is committed. "I am not warm to the idea of workers protecting themselves," said one executive director. "If you want to work in nonprofits, it's going to be lumpy."<sup>189</sup> As with their pro-union antagonists, nonprofit managers (and workers) who oppose unionization rely on one side of the social service versus nonprofit duality.

### III. THE CASE FOR INDUSTRY-WIDE UNIONIZATION

As the previous section illustrates, underlying the range of issues that arise when social service nonprofits unionize is a fundamental debate about their institutional role. During these organizing drives, pro- and anti-union advocates articulate two competing and seemingly irreconcilable visions: Proponents look to social service nonprofits as representing society's noblest aspirations, while opponents consign them to society's "social safety valve." By demanding that nonprofits provide better wages, benefits, and working conditions and make good on their organizational missions, unionization proponents undeniably advance

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<sup>186</sup> *Id.* at 309 ("Many managers view themselves as pro-labor yet struggle to articulate reasons that nonprofits should be exempt from unionization but other organizations should not. Their fears for the financial viability of their organizations are relatively straightforward, but their reasons to protect the nonprofit sector and culture from unionization are just beginning to become clear.")

<sup>187</sup> See Gronbjerg, *Nonprofits in the Political Economy*, *supra* note 140, at 224–25. Social service nonprofits and public sector agencies have a symbiotic relationship: "Once the public-nonprofit grants or contract funding system is established, public agencies purchase more than service capacities and access to infrastructures, and nonprofits obtain more than revenues. The relationship comes to involve also the exchange of legitimacy, knowledge, and influence." *Id.* (internal citation omitted). "[N]onprofit organizations function more often as a substitute for government rather than in their traditional roles as an alternative, a supplement, or a complement." Kramer, *supra* note 58, at 369.

<sup>188</sup> Yewell, *supra* note 96.

<sup>189</sup> Peters & Masaoka, *supra* note 8, at 311.

idealistic principles that are the *raison d'être* of social service nonprofits. Yet by demanding that nonprofit staff be flexible and willing to sacrifice, unionization opponents also articulate a historical function that is no less a part of the nonprofit identity. Social service nonprofits indeed embody a contradictory role, and union campaigns force nonprofit staff to clarify which tendency—the progressive or the regressive—will define their agencies. Unionization forces nonprofit staff to choose sides and define, ultimately, the nature of the nonprofit sector. Should nonprofits concretely extend their representative ideals—indeed their specific organizational missions—to their workers? Or should nonprofits require their workers to exempt themselves from those aspirations and force them to absorb the contrary interests of the state?

A. *Harmonizing Nonprofit Values and Union Standards*

Of course, the answers to these questions depend, in part, on how one views unions generally, but these opposing tendencies are reconcilable. Not only does unionization improve client services and substandard wages, benefits, and working conditions, it also vindicates nonprofit values and counteracts nonprofits' tendency to facilitate cuts in social spending. The first step in harmonizing social service nonprofits' institutional role, therefore, is to reject the strictures of social service nonprofit funding—already-meager government, foundation, and other private monies dedicated principally to programmatic, not labor, costs. There have been promising initiatives in this regard. For example, realizing the mutual interests that Smith and Passachoff have observed,<sup>190</sup> nonprofits, organized labor, and other advocates have coalesced to:

- Lobby federal, state and local agencies to increase overall funding for social service contracts. In San Francisco, a coalition of nonprofits and labor unions joined forces to seek an increase in the funding of POS contracts.<sup>191</sup>
- Lobby foundations to build in higher labor costs into their program grants.<sup>192</sup>

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<sup>190</sup> See Masaoka, 9.5 on the Richter Scale, *supra* note 174; see also SALAMON, STATE OF NONPROFIT AMERICA, *supra* note 15, at 309.

<sup>191</sup> Edward Epstein, *S.F. Nonprofits, Union Reach Tentative Pact*, S.F. CHRON., Feb. 20, 1998, at A20; see also Passachoff, *supra* note 10, at 254–55 (suggesting a retirement plan and public school compensation scale to improve Head Start benefits and pay).

<sup>192</sup> Smith, *supra* note 9; Passachoff, *supra* note 10. See, e.g., SALAMON, STATE OF NONPROFIT AMERICA, *supra* note 15, at 309; Masaoka, 9.5 on the Richter Scale, *supra* note 174, at 3; see also Passachoff, *supra* note 10, at 254–55 (discussing creation of retirement plan and adoption of public school compensation scale as ways in which to improve Head Start benefits and pay).

- Advocate for POS contracts to abide by civil service pay scales. In San Francisco, although it was not fully successful, SEIU Local 790 sought parity between the pay scales of city and nonprofit employees doing comparable work.<sup>193</sup> The union also pursued legislation declaring that it was “not the intent of the city” to use POS contracts to lower wages or benefits.<sup>194</sup>
- Negotiate “successorship clauses” whereby existing bargaining units in privatized government work transfer over to contracted nonprofits.<sup>195</sup>
- Enlist collective support to increase the chances of nonprofits winning POS contracts from for-profit agencies.<sup>196</sup>

These initiatives are worth continuing and building upon, but it is important to emphasize the need for *industry-wide* unionization. Perhaps more so than in any other industry—because of its reliance on government contracts—industry-wide unionization would ensure that social service nonprofits are not forced to compete against each other in a contracting race to the bottom. Industry-wide unionization would remove the incentive to pit agencies against one another. Without industry-wide union standards, the state—in partnership with anti-union nonprofit management (and staff)—will always have the incentive to exploit the altruistic commitment of nonprofit workers.

### B. *Union Organizing and Fundamental Social Change*

While unionizing social service nonprofits industry-wide would improve wages and working conditions, neutralize social service nonprofits’ regressive governance function, and concretize nonprofit values, there is also something specific about the process of union organizing, as opposed to, say, legislative or administrative remedies, that paves the way for fundamental social change. On a more basic level, the battle over unionization is a debate about how to solve the seemingly intractable problems facing social service nonprofits: namely the desperate living conditions of the poor, the sick, and the elderly—and the rest of the oppressed and exploited who constitute the clientele of human service agencies.

Consciously or not, the anti-union position bespeaks the ideol-

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<sup>193</sup> SEIU Local 790 was able to get 82.5 cents out of every city worker’s dollar; of course, that still gives the City of San Francisco a 17.5% windfall. Interview with Dale Butler, *supra* note 94.

<sup>194</sup> Editorial, *supra* note 93.

<sup>195</sup> See text accompanying note 134.

<sup>196</sup> *Id.*



ogy of an individualist, charitable solution; one in which nonprofit staff—workers and management alike—are cast as morally driven martyrs whose personal sacrifice is the *sine qua non* of their clients' welfare. Accepting that nonprofit funding is finite, appeals for more resources will always land on deaf ears, and a broad-based campaign challenging the state's economic priorities is impossible, anti-union advocates opt for a self-sacrificing solution. Their strategy is to appeal to the charitable impulse and devolve responsibility for addressing societal problems on a discrete and ideologically predisposed few who "get it." This not only wittingly or unwittingly articulates the notion that well-intentioned "help" is the solution, it also pessimistically dismisses the possibility of convincing others to create change. While unsurprising given the current lack of a sustained progressive movement, union campaigns can cut through such pessimism to find the areas of commonality between nonprofit activists and the working class. Benevolent efforts by well-meaning individuals are undoubtedly invaluable, but, given the enormity and systemic nature of most social, economic, and political problems in the United States, no amount of well-intentioned acts of direct service and martyrdom will ever be enough.

Pro-union workers, on the other hand, espouse the ideology of a collective, political solution. Conjoining their clients' class interests with their own, they challenge nonprofits' oft-hidden and institutionally regressive role and make common cause against the broader systemic forces causing these conditions. By creating an important bulwark against the insidious use of nonprofits as "mediating structures," unionization provides a crucial step towards more structural solutions to these social ills.

In seeking unionization, nonprofit workers challenge the external and internal conditions under which their agencies operate. They reject the mantra of fiscal austerity and argue for "expanding the pie"—that is, additional funding not only for agency programs, but also to improve wages, benefits, and working conditions. That coalition, in turn, refocuses the causes of and solutions to social problems from the personal to the systemic—from clients and workers to broader forces and interests.

#### CONCLUSION

The trends in government social spending, the nonprofit sector, and the labor movement make it likely that efforts to unionize social service nonprofits will continue—even heighten. Further cuts in and privatization of state social services can only exacerbate

the funding crisis and marketization that these organizations have endured over the past thirty years. The crisis in the labor movement, too, will ensure that unions remain focused on the nonprofit sector. Indeed, the recent split in the AFL-CIO might actually increase the number of nonprofit union drives.<sup>197</sup> Nonprofit workers will continue to shoulder these stresses. How they—and management—respond to unionization will depend on their view of what nonprofits' role is and ought to be and ultimately on their interest in fundamental social change.

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<sup>197</sup> Karla Grossenbacher, *The AFL-CIO Split: What It Means to Non-Union Nonprofits*, RISK MGMT. ESSENTIALS (Nonprofit Risk Mgmt. Ctr., Wash., D.C.), <http://nonprofitrisk.org/nwsltr/archive/employment010206.htm>.