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Unions, Education, and the future of Low-Wage Workers

Michael Selmi¹

Forthcoming in Univ. of Chicago Legal Forum Symposium Issue

I. INTRODUCTION

As I write this, the United States economy has slipped into a deep recession. Each day brings another wave of massive layoffs, and very few workers have been spared the pain of our economic turmoil. As is so often the case, low-wage workers – which I will define here as those who work for hourly wages of \$12 and below – are the most precarious.² The service industry, from retail establishments to hotel and restaurants, even extending to individuals who employ nannies, house cleaners and gardeners, has all experienced significant retraction, with little indication that the end might be near. The unemployment rate now exceeds 8% nationally with four states topping 10%.³

The demise of Detroit's automobile industry may signal a turning point for the future of low-wage work. As we watch the massive layoffs, the closing of plants, the cutting of health benefits and the debate about the impact of union wages on the domestic industry's competitiveness, there is little question that we are watching the end of an era – an era that has been vanishing for thirty years but for which there remains deep nostalgia. For decades, the automobile industry symbolized good middle-class jobs for those with a high school education, jobs that provided a decent living, outstanding benefits and job security. But those jobs, like the steel mills before it, are quickly disappearing, and in terms of the low-wage labor market, the most critical development is that they have not been replaced by similar jobs.

In this paper, I will discuss the future of low-wage work, and more important, the future of low-wage workers, and explore ways in which we might be able to provide more meaningful work to those who currently occupy the low-wage sector of the economy. As a general matter, and in a most reductionist way, there are two fundamentally different approaches to improving the quality of life for low-wage workers. One strategy, often dependent on union organizing, seeks to make low-wage jobs better, by increasing wages, improving working conditions and providing for job security. This strategy effectively seeks to replicate what occurred in the automobile industry in other low-wage sectors, whether that be in retail or other service sectors. As discussed more fully below, I believe this strategy offers limited hope for improving the lives

¹ Samuel Tyler Research Professor, George Washington University Law School. I am grateful for the invitation to participate in this Symposium, and from comments I have received at workshops held at the law schools at Marquette University, Wake Forest, and Wayne State.

² See David Leonhardt, *Casualties of the Recession*, N.Y. TIMES, Mar. 4, 2009, at B1 (“Unlike the last two recessions – earlier this decade and in the early 1990s – this one is causing much more job loss among the less educated than among college graduates.”)

³ See Bureau of Labor Statistics, Regional & State Employment and Unemployment Summary, Mar. 11, 2009 (reporting figures for Jan. 2009).

of most low-wage workers, although I also believe it is a strategy that should be pursued so long as it is not the exclusive focus on policy decisions, or the exclusive focus of progressive policy suggestions.

The alternative approach, one that I will promote in this paper, is designed to improve the labor prospects of low-wage workers so that they can move onto better, higher wage, jobs. This strategy emphasizes education, or human capital investments, as a labor strategy, as the means by which low-wage workers will best improve their labor market position. Currently less than one-third of the labor force has a college degree, a percentage that has largely stagnated over the last two decades, and another third of the labor force has attended college without obtaining a degree.⁴ These figures suggest a tremendous opportunity for substantially improving the human capital of a significant portion of the workforce and I will suggest that the emphasis should be on community colleges as the most effective means for enhanced educational investments. At the high school level, I will also discuss several promising developments, including the return to vocational education, though one that is designed to prepare students for today's jobs that require significant technical skills, and charter schools that have offered new opportunities and hope to students around the country.

This paper will proceed in three parts. First, I will define low-wage work, and also explore who low-wage workers are so that we can better understand the reality of low-wage work. I will then discuss, and critique, the likelihood that the union movement can be revived as a means of organizing large numbers of low-wage workers. As suggested above, I believe an emphasis on union organizing offers, at best, a limited strategy for improving low-wage work, and I will then turn to the third part of the paper, which explores the merits of a human capital approach with a particular emphasis on community colleges and recent educational reforms implemented at the high school level.

II. DEFINING LOW WAGE WORKERS.

A. Definitions of Low-Wage Work.

When we talk about low-wage workers, there is a tendency to discuss the group in a generic way without focusing on just who low-wage workers actually are, or equally important, how we define low-wage work. Most commonly, low wage workers are associated with minimum wage workers, but that latter group forms only a segment of the low-wage labor market. Approximately two million individuals work at minimum wage jobs, or 2 % of the workforce,⁵ while low wage workers are often defined to include the bottom twenty-percent of the labor force. Moreover, approximately one-quarter of minimum wage workers are teenagers,

⁴ This issue is discussed at length in section III.B, and is influenced by the recent important work by Claudia Goldin and Lawrence Katz that traces the importance of education to labor market improvements. *See* CLAUDIA GOLDIN & LAWRENCE F. KATZ, *THE RACE BETWEEN EDUCATION AND TECHNOLOGY* (Harv. Univ. Press 2008).

⁵ *See* Bureau of Labor Statistics, *Characteristics of Minimum Wage Workers: 2007*, available at <http://data.bls.gov/cgi-bin/print.pl/cps/minwage2007.htm>

many of whom work part-time.⁶ While all workers deserve to make a decent wage, teenagers and those voluntarily working part-time have less of a claim on any policy interventions as they are most likely to be able to exit low-wage work for better paying jobs. Indeed, a primary concern with low wage workers should be their mobility to higher wage jobs, and teenagers, at least many of them, should have greater mobility than other low-wage workers.⁷

Looking beyond minimum wage workers, many different definitions of low-wage work have been advanced. One common approach defines low-wage workers as those who are earning poverty level wages or less, which translates to just below minimum wage for year-round full-time workers without a family, or \$10,294, and nearly double, or \$20,614, for a family of four.⁸ The figure for a family of four translates into a wage that is roughly \$10 an hour, well above minimum wage but significantly below the median wage, which is approximately \$15 per hour.⁹ One advantage to an approach based on poverty-level wages is that it captures the actual living conditions of workers rather than focusing solely on their hourly wage. The recent increases in the minimum wage seemed to have reduced the working poor modestly, as in 2006 there were 7.4 million individuals who had been in the labor force for at least half the year and were living in poverty, down from 7.7 million the prior year.¹⁰ Of those who were working and living in poverty, eighty percent worked the entire year, and more than half (52%) worked full-time.¹¹

Focusing on those who are earning poverty-level wages is probably the best measure of low-wage workers, and is generally what has come to be defined as the working poor, a term that has gained widespread usage in the last decade.¹² At the same time, equating low-wage work with poverty level wages may offer too narrow a definition. Those who are working full-time,

⁶ *Id.*

⁷ Despite the American myths, the data on income mobility are not encouraging, though at an individual level there appears to be significant movement among classes, enough, it seems, to keep the myth alive. For discussions of mobility with a focus on the upward mobility of low-wage workers see Brett Theodos, *Earnings Mobility and Low-Wage Workers In the United States*, 129 Monthly Labor Review 34, July 2006, at 45(focusing on the period 1995-2001 finds that “27.03 percent saw their earnings status improve, 60.86 percent had a neutral status, and 12.11 percent saw their earnings status worsen”); Heather Boushey, *No Way out: How Prime-Age Workers Get Trapped in Minimum-Wage Jobs*, 8 WorkingUSA 659, 662 (2005)(“Nearly half of workers without a high-school degree (48.8 percent) were still in low-wage jobs three years later, while only one-in-five (20.3 percent) had moved to a job paying above low wages.”).

⁸ This is the definition used by the government in their annual surveys of workers who are living in poverty, and it also seems to be the underlying definition for what is commonly referred to as the working poor. See, e.g., United States Department of labor, Bureau of Labor Statistics, *A Profile of the Working Poor, 2006*, Report 1006 (August 2008), available at <http://www.bls.gov/cps/cpswp2006.pdf>.

⁹ In 2005, the wage at the fiftieth percentile was \$14.29 an hour. See Lawrence Mishel et al, *THE STATE OF WORKING AMERICA 2006/2007*, at Table 3.4, p. 121 (2007).

¹⁰ See United States Department of Labor, Bureau of Labor Statistics, *A Profile of the Working Poor, 2006*, Report 1006 (August 2008), available at <http://www.bls.gov/cps/cpswp2006.pdf>.

¹¹ *Id.* at Table 1.

¹² The general acceptance of the term is reflected in the successful book DAVID SHIPLER: *THE WORKING POOR: INVISIBLE IN AMERICA* (2004); see also KATHERINE S. NEWMAN, *NO SHAME IN MY GAME: THE WORKING POOR IN THE INNER CITY* (1999).

year round, should not be living in poverty no matter where they fall on the wage scale. From this perspective, individuals who earn above poverty-level wages should also be defined as low-wage workers, particularly when the concern is how best to improve the economic status of such workers. Another approach defines low-wage status on a relative basis, either as some percentage of the workforce such as the bottom quintile or against a median or poverty basis.¹³ The Urban Institute, for example, has used a measure that defines low-wage work as 200% of the minimum wage.¹⁴ With the recent increases in the minimum wage, this figure is likely too high, as it will soon approach the median wage, but it still provides a useful reminder that many workers who receive well above minimum wage are unable to achieve an economically fulfilling middle-class life.

B. Who Are Low Wage Workers?

More important than settling on a particular wage criteria as a means of defining low-wage work is identifying who low-wage workers actually are. It makes a difference, for example, if low-wage workers are primarily teenagers, students, or others who may be temporarily holding low-wage jobs while pursuing non labor market activities. Similarly, for those who may be more permanently entrenched in low-wage work, who the particular individuals are, and their skill set, is critical to understanding what kind of policies might improve their life course. Indeed, the various definitions of low-wage work primarily affect the size of the population that is defined as low-wage rather than its demographic composition. No matter how low-wage workers are defined, three demographic groups are disproportionately represented among low-wage workers: immigrants and single mothers comprise the largest categories, not in terms of absolute numbers but in terms of their disproportionate representation, with African Americans also disproportionately represented among the low-wage population. Moreover, as discussed further below, more than anything else, education levels define low wage workers.

Hispanics comprise a disproportionately large percentage of the low-wage group. According to the Pew Hispanic Center's analysis of census data, 30.5% of Hispanic full-time workers earn less than \$20,000 a year, compared to 11.9% of white workers who are not Hispanic and 20.5% of black workers who are not Hispanic.¹⁵ Much of the overrepresentation of Hispanic workers is attributable to undocumented workers, who typically occupy the lowest economic rungs. As of 2005, there were an estimated 12 million undocumented individuals in the United States with just over 7 million in the workforce.¹⁶ While it is often difficult to specify the wages of undocumented workers, there is little question that they are concentrated in low-

¹³ For a discussion of the various means of defining low-wage workers see Peter Schochet & Anu Rangarajan, *Characteristics of Low-Wage Workers and Their Labor Market Experiences: Evidence from the Mid-to Late 1990s* (2004), available at <http://aspe.hhs.gov/hsp/low-wage-workers04>.

¹⁴ Urban Institute, *A Profile of the Low-Wage Immigrant Workforce*, at 2 (Nov. 2003).

¹⁵ See Pew Hispanic Center, *Statistical Portrait of Hispanics in the United States*, 2006, at Table 30.

¹⁶ See Jeffrey S. Passel, *The Size and Characteristics of the Unauthorized Migrant Population in the U.S.: Estimates Based on the March 2005 Current Population Survey*, Pew Hispanic Center Research Report, Mar. 7, 2006, at 1.

wage jobs. Undocumented workers account for nearly one quarter of agricultural workers and 17% of cleaning workers,¹⁷ with thirty percent of undocumented workers in the service industry, typically at the bottom rung of service jobs.¹⁸

As touched on above, it is not just undocumented Latinos who often toil in low-wage jobs, but foreign-born Latinos who are in this country lawfully are also disproportionately found in low-wage sectors. Defining low-wage work to include workers earning less than 200 percent of their state's prevailing minimum wage, the Urban Institute estimates that nearly half of all foreign-born workers held low wage jobs, compared to 32% of native workers.¹⁹ The Bureau of Labor Statistics notes that Hispanic workers more generally – those who were born both in and outside the United States – are twice as likely than whites to work at poverty level wages.²⁰ More than ten percent of Hispanic workers were at or below the poverty level compared to 4.6 percent of whites.²¹

The other group that is most heavily overrepresented among low-wage workers is women, in particular single mothers who are approximately twice as likely as their male counterparts to be among the working poor.²² The problem is even more acute in rural areas where finding suitable transportation and childcare can prove particularly difficult for single mothers.²³

Undocumented workers and single mothers provide serious challenges for policy intervention. While it may be tempting to simply call for higher wages, raising for example the minimum wage, this strategy would likely prove inadequate to address the real needs of immigrants and single mothers. Although the issue is debated vigorously, the evidence seems clear that, at some point, raising wages will lead to lower employment levels among low-wage workers. This is for two distinct reasons, one of which is often neglected in the debate. The first reason, which is generally the issue that receives the most attention, is that employers will be forced to lower their employment levels if wages are raised. The well-known study of New Jersey fast-food establishments conducted by economists David Card and Alan Krueger casts

¹⁷ *Id.* at 11.

¹⁸ *Id.* This latter figure disputes the often held position that undocumented workers are concentrated in agriculture. While it is true that many agricultural workers are undocumented, it is not the case that most undocumented workers are found in agriculture. *See, e.g.,* Gordon H. Hanson, *Illegal Migration from Mexico to the United States*, 44 J. ECON. LIT. 869, 882 (2005) (“Over time, Mexican immigrants have shifted out of agriculture as a main industry of U.S. employment . . .”). This is important because agricultural workers are excluded from the National Labor Relations Act, and agriculture offers some of the worst working conditions.

¹⁹ Urban Institute, *A Profile of the Low-Wage Immigrant Workforce*, at 2 (Nov. 2003). It should be noted that the Urban Institute's measure defines more than a third of the workforce (43 million) as low-wage, a much broader definition than is typically used.

²⁰ U.S. Bureau of Labor Statistics, *A Profile of the Working Poor*, 2003, at 1 (Mar. 2005).

²¹ *Id.* at Table 2.

²² U.S. Bureau of Labor Statistics, *A Profile of the Working Poor*, 2003, at 1 (Mar. 2005).

²³ *See* Lisa R. Pruitt, *Missing the Mark: Welfare Reform and Rural Poverty*, 10 J. GENDER RACE & J. 439, 450 (2007) (“Female-headed families with children are the most likely to be poor, and they are twice as likely to be living in poverty as their suburban counterparts.”).

substantial doubt on this theory, and the traditional argument that raising the minimum wage would necessarily lower employment levels by a given amount has certainly been thrown into question not only by the Card and Krueger study but by others as well.²⁴ But a number of other studies have demonstrated some employment losses attributable to raising the minimum wage, and it seems fair to assume that, while not every wage increase will lead to job losses, there is a point at which the increased wages will do so.²⁵ This might be a worthy tradeoff, and I strongly believe that, as a society, we should be moving towards creating a living wage, but this is not an issue that can be either discounted or ignored.

The other reason employment levels among low-wage workers might drop is that as wages rise, employers might be able to substitute higher wage workers for the tasks previously performed by low-wage workers.²⁶ Employers might, in other words, be able to substitute one class of workers for another, assuming there are skill differences among the different groups. This is another issue that needs to be confronted, namely that low-wage workers tend to have lower marketable skills.

Within the legal literature, the differential skills of low-wage workers is subject that is typically avoided, and most of the scholarly attention is on how we might make the bad jobs low-wage workers currently hold better. But the reality is that most low-wage workers do not have the necessary skills that would enable them to pursue better high-wage jobs. Indeed, one group that is substantially overrepresented among low-wage workers, again no matter how the group is defined, are those who do not have a high school degree. I will return to this issue below, but it is important to emphasize that in today's economy – and that of the foreseeable future -- those with limited education will face limited opportunities. There will be exceptions, of course, but those exceptions are likely to diminish with each passing year.

The importance of education to labor market success and mobility poses a particular problem for undocumented workers, and to a lesser extent, single mothers. Undocumented workers typically come to this country with limited education, and most do not pursue education

²⁴ The study was originally published as an article, and later expanded into a book that included responses to their critics. See DAVID CARD & ALAN B. KRUEGER, MYTH AND MEASUREMENT: THE NEW ECONOMICS OF THE MINIMUM WAGE (1995); David Card & Alan B. Krueger, *Minimum Wages and Employment: A Case Study of the Fast-Food Industry in New Jersey and Pennsylvania*, 84 AMER. ECON. REV. 487 (1994). The authors studied fast food restaurants in New Jersey after a state increase in the minimum wage and found that most of the costs were either absorbed by employers or passed on with very little worker displacement.

²⁵ The various studies are discussed in David Neumark & William Wascher, *Minimum Wages and Low-Wage Workers: How Well Does the Reality Match the Rhetoric?*, 92 MINN. L. REV. 1296 (2006). The authors explain: “[O]ur survey indicates that the bulk of the research conducted in the past two decades finds negative employment effects for low-skilled workers [from higher minimum wages]. In particular, about two-thirds of the studies in our survey, and more than eighty percent of the studies we view as most credible, give a consistent indication of negative employment effects. In contrast, only eight studies consistently find a positive effect of the minimum wage on employment, and most of these were case studies of the effects of a specific minimum wage increase on employment in a narrowly defined industry.” *Id.* at 1310-11.

²⁶ See Neumark & Wascher, *supra* note --, at 1311.

while in the United States.²⁷ As a result, one of the most important paths out of low-wage work is not readily open to these workers, and instead, focusing on education is primarily a way to improve the lives of their children, many of whom attend school. Single mothers are also likely to struggle with pursuing further education, though the barriers are less severe than is the case for undocumented workers. This again highlights the importance of identifying who low-wage workers are, and problems that attend to their circumstances, rather than treating low-wage workers in a more generic sense.

III. STRATEGIES FOR LOW-WAGE WORKERS.

Defining low-wage workers in other than a generic way will help identify policies and strategies that might improve the lives of low-wage workers. For example, the fact that so many low-wage workers are immigrants with limited education and single mothers means that we cannot separate the plight of low-wage workers from immigration issues or childcare and other issues that are critical to single mothers. One study, for example, concluded that allowing mothers to have some modest flexibility with their schedules made a substantial difference to allowing them to maintain and perform their jobs.²⁸ It also means that we might have to rethink traditional strategies as we think more deeply about the needs of particular low-wage workers. In addition to raising wages, two traditional strategies have emerged to improve the condition of low-wage workers: (1) unionization and (2) education. I will discuss both of these strategies below and will suggest that there is little reason to believe that unions will provide a substantial benefit to low-wage workers, or perhaps that they will provide any greater benefit in the future than they currently do. Education, I believe, is a more promising strategy, but given the makeup of the low-wage workforce, it, too, will likely prove inadequate, at least for some significant portion of low-wage workers.

A. *The Hope of Unionization.*

Within liberal circles, there is still a great hope for the revival of unions as a lifeboat, particularly for low-wage workers. And a revival is what it would take. As is widely known, union membership peaked in 1953 with approximately 35% of the nonagricultural workforce unionized, and it has been decreasing every year since with particular acceleration after the 1970s.²⁹ As of 2008, less than 8% of the private workforce was unionized, and despite a friendly

²⁷ See, e.g., Karina Fortuny et al., *The Characteristics of Unauthorized Immigrants in California, Los Angeles County and the United States*, at 14, report of the Urban Institute, Mar. 2007 (“Unauthorized immigrants in California are less likely than legal immigrants and far less likely than natives to have high school diplomas At the lowest end of the educational spectrum, the vast majority of adults age 25-64 with less than 9th grade educations are immigrants: 92 percent in California and 94 percent in Los Angeles.”).

²⁸ See Susan J. Lambert, *Lower-Wage Workers and the New Realities of Work and Family*, 562 ANNALS OF AMER. ACADEMY OF POLI. & SOC. SCI. 174, 177 (1999) (noting that “a little flexibility –being able to be a few minutes late to work – went a long way toward helping cleaning personnel arrange for childcare.”).

²⁹ Data on union membership is available at Barry Hirsh & David McPherson, *Union Membership and Coverage Database*, available at unionstats.gsu.edu (last visited Feb. 13, 2009). The database goes back to 1973, when 24.6% of the private non-agricultural workforce was unionized. Union membership reached its highest point in 1953, when

Democratic Administration through much of the 1990s, during that time period unions failed to increase their membership.³⁰ Indeed, for every member the unions gained, they lost one or more, finishing the decade in negative territory.³¹

It is often emphasized that unionization rates in the public sector are much higher than they are in the private sector; indeed, more than a third of public employees belong to unions, and the public sector is the one bright spot for increasing unionization over the last few decades.³² Nevertheless, public sector union density can be misleading for several reasons. While the number of public sector employees has increased as the public sector has grown, union density has actually been relatively flat since 1979. Between 1979 and 2008, the percentage of public sector employees who were union members has fluctuated between 36 and 38%.³³ Moreover, unionization within the public sector can have many different meanings. For example, many public sector employees – particularly teachers, police officers and firefighters – do not enjoy the right to strike, thus depriving those workers of a central bargaining weapon.³⁴ Some unions do not have bargaining rights, and most public employees are protected by civil service systems that typically provide due process protections that would otherwise be supplied by unions. This is, in fact, one reason that unions are not so fiercely resisted in the public sector. In the context of low-wage workers, it is also worth noting that most public sector employees are not low-wage workers, though there is little question that moving low-wage workers into the public sector would provide immediate, and often drastic, improvements in their lives.

Within the private sector, however, there is very little reason to expect that unions will return to their post-war levels, or even that they will substantially increase their membership in the future. If we could point to one cause of union decline, it might be possible to alter the pattern of union representation, but the decline of unions is the product of a complicated agglomeration of factors. The issue is far too complicated to explore in depth in this paper, but a brief review of the factors should demonstrate just how difficult it would be to reverse the decline of union membership in any substantial way.

union members constituted 35% of the private workforce. See NELSON LICHTENSTEIN, STATE OF THE UNIONS at 52 (2002).

³⁰ In 2007, union members were 7.5% of the private non-agricultural labor force, which was up slightly from the prior year when union members were 7.4 % of the workforce. See Hirsch & McPherson, *supra* note __. The modest increase for 2007, and again in 2008, still left the unionized sector well below the 8.0% level that existed in 2005.

³¹ When Bill Clinton took office in 1992, there were 9.7 million union members and by the time he left office, there were only 9.1 million members. *Id.*

³² See U.S. Dept. of Labor, Bureau of Labor Statistics, Union Members in 2008, at Table 3. In 2008, 36.8% of the public sector was unionized, up from 35.9% a year earlier, with the strongest concentration in the local sector, where 42.2% of the employees were union members.

³³ See GARY CHAISON, UNIONS IN AMERICA, Table 2.6, at 55 (2006).

³⁴ See Clyde Summers, *Public Sector Bargaining: A Different Animal*, 5 U. PA. J. LAB. & EMP. L. 441, 450 (2003) (“In private sector bargaining, the right to strike is fundamental . . . In the public sector, the starting assumption is quite the opposite: that public employees have no right to strike . . . Even though most states provide by statute for public employee collective bargaining, most states still prohibit employees from striking when their demands are rejected.” See also Martin H. Malin, *Public Employees’ Right to Strike: Law and Experience*, 26 U. MICH. J. L. REFORM 313 (1993).

Within legal discussions, the law is seen as the primary impediment to union growth.³⁵ Union elections take too long, impose unnecessary and burdensome requirements, and have toothless enforcement mechanisms that allow employers to engage in unfair tactics, often illegal, with no substantial penalty. These issues are well documented, and all are true, the only question is how much of a difference it would make if the law were changed to enable workers to unionize more readily.

Currently, much hope has been invested in the Employee Free Choice Act, which is designed to allow employees to unionize once a majority of the employees sign cards expressing their desire for a union, a process that is known as card check.³⁶ This procedure would displace, when the employees desired, the current election procedure, which calls for secret ballots and various post-election challenges that often drag out the process so long, in fact, that employers can then challenge the original election because so many of the original employees who voted for the union may have left. These are all real and serious problems and fixing them would undeniably make it easier for unions to organize. But we should not expect a massive revitalization of union strength.

The idea that the Employee Free Choice Act will substantially increase union membership turns on the assumption that there is a large mass of employees who could be organized if only the process was simpler. Yet, even under current rules, employees win about one-half of union election drives, as they have done for many years. For the Fiscal Year 2007, unions won 55.7% of the 1,905 elections conducted by the NLRB, organizing a total of 83,764 workers.³⁷ The average size of the bargaining unit in successful elections was 111 workers, while the average size of losing drives was just 53 employees.³⁸ Based on these figures, if unions had won every election conducted that year, they would have added only an additional 43,000 members. These figures account only for the elections that are completed, and do not include elections that are involved in legal challenges or that are abandoned along the way. It is

³⁵ See, e.g., Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527 (2002); James Gray Pope, *How American Workers Lost the Right to Strike and Other Tales*, 103 MICH. L. REV. 518 (2004); CHARLES J. MORRIS, *THE BLUE EAGLE AT WORK: RECLAIMING DEMOCRATIC RIGHTS IN THE AMERICAN WORKPLACE* (2005). Legal reforms have been advocated by legal scholars for many years. See Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983) (advocating significant reforms including "quickie" elections); Theodore St. Antoine, *Federal Regulation of the Workplace In the Next Half Century*, 61 CHI. KENT. L. REV. 631, 647-54 (1985) (proposing reforms including permitting secondary boycotts); Theodore St. Antoine, *A Touchstone for Labor Board Remedies*, 14 WAYNE ST. L. REV. 1039 (1968) (advocating stronger remedial authority for NLRB).

³⁶ S. 1041, 110th Cong. (2007). Labor unions, which heavily supported President Obama, have made passage of the Employee Free Choice Act their top priority. See Michael E. Fletcher, *Labor Seeks Election Rewards: Union Organizing Rights Could be an Early Obama Test*, WASH. POST., Nov. 6, 2008, at D1 ("Labor's top priority is passage of legislation that would make it easier to organize unions . . . [t]he Employee Free Choice Act . . .").

³⁷ Seventy Second Annual Report of the National Labor Relations Board for Fiscal Year Ended Sept. 30, 2007, at 11.

³⁸ *Id.* Traditionally, unions have had greater success in smaller bargaining units. See Henry S. Farber, *Union Success in Representation Elections: Why Does Unit Size Matter?* 54 IND. & LAB. RELS. REV. 329 (2001) (documenting significantly higher success rates in smaller bargaining units). It may be that the average size of 111 employees is sufficiently small to have nullified the typical size advantage.

not clear how many more employees fall within these categories, but even if adding these employees doubled (or quadrupled) the number of new members it would not likely make a significant difference. It should be noted that although the union success rate has been relatively stable over the last 25 years, the number of elections conducted by the NLRB has declined significantly, even over a short period of time. In 1998, there were 4,000 elections,³⁹ and going back further, in the 1970s there were typically about 9,000 elections handled each year.⁴⁰

With this in mind, the problem is not that the unions lose too many elections under the current procedures, it is instead, that they are seeking to organize too few workers both within and outside the NLRB process. Indeed, a significant number of workers are organized through card check and neutrality agreements – the procedures that would be sanctioned under the Free Choice Act – in addition to NLRB supervised elections.⁴¹ As a result, in order to substantially increase union membership, there must be a group of employees who the unions would seek to organize if reform were implemented but not under the existing procedures. To be clear, this is not a group that currently loses elections, rather this is a group that the unions are not now trying to organize, either because the employer will not consent to a card check procedure or the prospects of success under the election procedures are poor. It is not at all clear who this group might be and it is even less clear that whatever workers might fall into this organizable category would be low-wage workers.

The industries in which low-wage workers dominate are also sectors with low unionization rates, and in some instances, extremely low. Agriculture has the highest concentration of low-wage workers and one of the very lowest unionization rates, as only 2.8% of agricultural workers are union members.⁴² The retail sector, which also accounts for a disproportionate share of low-wage jobs, has a unionization rate of only 5.3%.⁴³ These figures might suggest an opportunity for organizing but the reasons why these industries have such low unionization rates will likely hinder further organizing efforts even under the more liberal rules. Indeed, the Employee Free Choice Act would not apply to agriculture workers – the Act only amends the National Labor Relations Act from which agriculture workers are excluded.⁴⁴ Organizing retail service is difficult under the best of circumstances since many of the employees are part-time and transient, and many employers have developed effective organizations for

³⁹ NLRB Annual Report, *supra* note --, at 13.

⁴⁰ See GARY CHAISON, UNIONS IN AMERICA at 67, Figure 2.4 (2006).

⁴¹ A recent study suggested the number of workers organized through card check procedures is less than often asserted, though still a significant number. See Rafael Gely & Timothy D. Chandler, *Card Check Recognition: New House Rules for Union Organizing*, 35 FORDHAM URB. L.J. 247 (2008). Studies have consistently demonstrated greater success rates with card check and neutrality agreements. See Adrienne E. Eaton & Jill Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 INDUS. & LABOR REL. REV. 42 (2001).

⁴² United States Dept. of Labor, Bureau of Labor Statistics, Union Members in 2008, at Table 3 (2009).

⁴³ *Id.*

⁴⁴ See 29 U.S.C. §152(3) (defining employee so as to exclude “any individual employed as an agricultural laborer.”)

opposing union drives.⁴⁵ Those organizations are likely to remain effective even in the face of card check procedures.⁴⁶

This does not mean that there would not be some new union members as a result of the more liberal procedures, and it may be that the long-standing efforts to organize some Wal-Mart locations would succeed. But unless all of Wal-Mart's one million employees became unionized, the increase would not likely be substantial, although it is also important to emphasize that the unions would almost certainly improve the lives of many low-wage workers if Wal-Mart or other large retailers were organized.

The other area where there are substantial numbers of low-wage workers is in the hotel restaurant sector; but here, unions have already been successful in their organizing efforts. In 2006, most nationwide chains signed union contracts under card check and neutrality agreements, and many of the remaining hotels are independent hotels, and lower-end chains, that would be difficult to organize.⁴⁷ Similarly, Las Vegas is the most heavily unionized city in the country, but beyond these successes there are no obvious, or substantial, inroads to be made.⁴⁸ Perhaps some of the large restaurant chains would be ripe for organizing, and it may be that formalized card check procedures would significantly aid those drives. But beyond these chains it is difficult to see how unions might organize local independent restaurants.

In the last decade, unions have made significant inroads into some low-wage jobs. The Janitors-for-Justice campaign, which began in California, and later stretched around the country, has resulted in organizing thousands of janitors, and in many cases transformed what were low-paying difficult jobs into jobs that can now provide an entrée into the middle-class.⁴⁹ Similarly,

⁴⁵ For a discussion of the many difficulties that arise in organizing low-wage work, with some proposed reforms, see Howard Wial, *The Emerging Organizational Structure of Unionism in Low-Wage Services*, 45 *Rutgers L. Rev.* 671 (1993).

⁴⁶ See Gely & Chandler, *supra* note --, at 271 (arguing that even if EFCA passes employers are likely to shift their avoidance tactics to earlier stages in the organizing process).

⁴⁷ In 2006, UNITE organized an extremely effective national campaign to organize national hotels and to ensure that contracts expired simultaneously around the contract. For articles describing the strategy see Charles V. Bagli, *Major Hotels Reach Contract With Union, But Two Hiltons Hold Out*, N.Y. TIMES, June 17, 2006, at B3; George Raine, *A High Stakes Labor Card Game: Organizing Strategy Has Hotel Workers Avoid Secret Ballot*, S.F. CHRON., Mar. 28, 2006, at D1; Roger Vincent, *Union Aims to Build Momentum as It Prepares for National Hotel Talks*, L.A. TIMES, Feb. 17, 2006, at C1. Most, if not all of the hotels, were organized through card check procedures, often with neutrality agreements in place.

⁴⁸ The UNITE local in Las Vegas has organized most of the major hotels in the Las Vegas strip, and has created training schools that allow workers to move up from some of the lower wage jobs. See Mark Z. Barabek, *He Helps Give Labor the Edge: In Las Vegas, the head of the Culinary Union Gets Results with His Blue-Collar Style*, L.A. TIMES, July 12, 2007, at A1; Harold Meyerson, *Las Vegas as a Workers' Paradise*, AM. PROSPECT, Jan. 1, 2004, at 38.

⁴⁹ See Steven Greenhouse, *Union Claims Texas Victory With Janitors*, N.Y. Times, Nov. 28, 2005, at A1. The article notes that in Houston unorganized janitors usually worked part-time for \$5.25 an hour, while unionized office building janitors in New York City averaged \$20 an hour, and \$13.30 in both Chicago and Philadelphia. The Justice for Janitors movement has been widely chronicled, for one such discussion see Catherine Fisk et al., *Justice for Janitors in Los Angeles and Beyond: A New Form of Unionism in the 21st Century?* IN THE CHANGING ROLE OF UNIONS: NEW FORMS OF REPRESENTATION (P. Wunnava ed. 2004).

unions have had considerable success in organizing home health aides in many states.⁵⁰ This is a growing field where wages have been extremely low, where Latinos and single mothers predominate, and is thus, precisely the kind of group unions should target for organizing. At the same time, the organizing has been less successful in improving the lives of home health aides, for whom wages remain low and a federal provision excludes them from obtaining overtime pay, which would add substantially to their economic well-being.⁵¹ Nor has unionization improved the status or the promotional opportunities available to janitors, home health aides, maids or other low-status, low-wage jobs. While unionization has certainly improved the nature of the jobs, it has not made them particularly desirable.

As such, it is difficult to see how changing the law will substantially increase unionization rates among low-wage workers, who are typically the most difficult to organize since they are frequently transient employees with the lowest amount of bargaining power. It also seems clear that the past era of good union jobs for high school graduates is not likely to return. Employment levels in all of the most heavily unionized sectors have dropped dramatically over the last twenty years, and unionization rates have also declined sharply in every sector with a substantial union presence. And there is no reason to believe these jobs will return. The auto industry bailout discussion in 2008 highlighted the anachronistic nature of long-term union jobs. Virtually all of the new automobile plants, owned typically by foreign manufacturers, that have opened in the last decade are non-union, even though they often pay competitive union wages. The steel industry has also retooled into smaller, typically non-union manufacturers,⁵² and the resurgent mining industry is now only 25 percent union, down from more than 60% as recently as 1983.⁵³

Even with the Employee Free-choice Act, we have clearly entered a post-union labor market. Global competition, and the ability to shift some jobs outside of the country, has tempered the ability of unions to ensure significant wage premiums. Unions also lost their own momentum when they entered a stage beginning in the 1970s when they were primarily concerned with servicing existing members rather than organizing new members.⁵⁴ Sometimes

⁵⁰ See Peggie R. Smith, *The Publicization of Home-Based Care in State Labor Law*, 92 MINN. L. REV. 1390 (2008) (discussing organizing strategies for home health aides and home-based childcare workers).

⁵¹ Unionization typically raises wages substantially – anywhere from 20 – 35% -- but wages remain relatively low, typically at or below \$10 per hour. See Smith, *supra* note --, at 1413. The Supreme Court recently upheld a statutory provision that excludes home health care workers from the overtime provisions of the Fair Labor Standards Act. See *Long Island Care at Home, Ltd. v. Coke*, 127 S.Ct. 2239 (2007). I discuss the case and its implications in *The Supreme Court's 2006-2007 Term Employment Law Cases: A Quiet But Revealing Term*, 11 EMPLOYEE RTS. & EMPLOY. POL'Y J. 219, 238-47 (2007).

⁵² Once the largest industry in the United States, the steel industry fell on hard times in the 1970s and 1980s, but has since retooled itself into smaller, typically non-union, mini-mills that provide specialized products. See, e.g., CHRISTOPHER G. L. HALL, *STEEL PHOENIX: THE FALL AND RISE OF THE U.S. STEEL INDUSTRY* (1997).

⁵³ Unions in 2008, *supra*, at Table 3.

⁵⁴ See, e.g., RICK FANTASIA & KIM VOSS, *HARD WORK: REMAKING THE AMERICAN LABOR MOVEMENT* (UNIV. OF CALIF. PRESS 2004) (noting that during the 1970s, large unions moved away from organizing to concentrate on servicing existing members).

this led to choosing sides on matters such as sexual harassment or affirmative action that limited their appeal to growing demographic groups of women and minorities, and when the union movement sought to reverse course, it proved too late to make substantial inroads.⁵⁵ When John Sweeney became President of the AFL-CIO in 1995, he pledged to devote substantially more resources to union organization.⁵⁶ Despite largely fulfilling his pledge, union membership has continued to decline during his entire tenure while an inordinate amount of resources have been devoted to various internal political struggles that have not resulted in any material benefit to workers.⁵⁷ The struggle over control of the unions highlights an often neglected feature of unions, namely that they are large bureaucratic organizations that are not immune from the excesses of power that plague all large organizations.

There is, however, this single curious fact that keeps hopes for a union revival alive. When asked, workers consistently state a preference for unions. Anywhere from one-third to as high as 60% of non-union workers indicate they would like to have union representation,⁵⁸ and despite some of the common perceptions, unions retain a high favorability rating with the public.⁵⁹ If this unmet desire for union representation can be satisfied, union membership would likely increase dramatically, and perhaps reach thirty percent or more of the private workplace or the levels that were achieved after World War II.

⁵⁵ Professor Marion Crain has written extensively about the ways unions have confronted gender issues and how unions frequently subordinated those issues to protect the rights of male union members. *See, e.g.*, Marion Crain and Ken Matheny, “*Labor’s Divided Ranks*”: *Privilege and the United Front Ideology*, 84 CORNELL L. REV. 1542 (1999); Marion Crain, *Women, Labor Unions and Hostile Work Environment Sexual Harassment: The Untold Story*, 4 TEX. J. WOMEN AND LAW 9 (1995).

⁵⁶ *See* Jack Fiorito, *Union Organizing in the United States* 191, 194-95, in *UNION ORGANIZING: CAMPAIGNING FOR TRADE UNION RECOGNITION* (Gregor Gall, ed., Routledge 2003).

⁵⁷ In 2005, ten years after John Sweeney was first elected the head of the AFL-CIO, the head of the successful Service Employees’ Union (John Sweeney’s former union) ran a contentious campaign to take over leadership of the AFL-CIO. When his effort failed, Stern created a new labor organization comprised of seven large unions and, clumsily named Change-to-Win. *See* Aaron Bernstein, *Struggle for the Soul of the AFL-CIO: Two Union Honchos Battle Over Reform, Power, and Turf on the Eve of the Convention*, BUS. WK., July 25, 2005, at 54. From the outset, the struggle appeared to be primarily about power and personality rather than tangible gains for workers, and recently the unions have been discussing reuniting. *See* Steven Greenhouse, *Unions Face Obstacles in Effort to Reunite*, N.Y. TIMES, Mar. 9, 2009, at A11. For an assessment of the effects of the split see David Moberg, *Has the Change Led to Wins?*, IN THESE TIMES, Nov. 2007, at 26 (answering the question as “not yet” but suggesting some planned changes).

⁵⁸ The enthusiasm for union membership is generally traced to the survey conducted by Richard Freeman and Joel Rogers where they found that nearly all union members approved of unions and nearly a third (32%) of nonunionized workers would like to join unions. *See* RICHARD B. FREEMAN & JOEL ROGERS, *WHAT WORKERS WANT* 89-90 (1999). The authors have recently updated their survey and found that, despite declining union presence, workers’ desire for unions had increased over time. *See* Richard B. Freeman, *Do Workers Still Want Unions? More than Ever*, Economic Policy Briefing Paper #182, Feb. 22, 2007, available at www.epi.org. The update also recounts various polls some of which report even greater enthusiasm for union membership.

⁵⁹ A Gallup poll conducted in 2005 found that 58% of respondents approved of unions, a figure that was largely consistent with polls going back to the 1960s. *See, e.g.*, Gallup Poll, *Shift in Public Perceptions About Union Strength and Influence*, Aug. 23, 2005, available at <http://poll.gallup.com/content/default.aspx?ci=18040>. *See also* Freeman, *supra* note --, discussing public approval ratings of unions.

Yet, given our experiences over the last two decades, there is little reason to expect this stated preference to be translated into substantially higher membership levels. Indeed, the preference for union membership has been steady for many years, and although there has been an increase over the last decade, there has been a long-standing unmet need based on the Freeman and Rogers survey. If the law were the barrier, then changing the law along the lines discussed above, might allow many workers to pursue their preferences but the law does not seem to be the primary barrier to more organization drives. Moreover, the poll questions are generally inadequate to capture true worker sentiment. Generally, the polls simply ask whether the employees would like to have unions and they do not ask the more important question of whether they are willing to work towards union representation or make the trade-offs that come with a union presence.

I want to be clear that unions remain an important vehicle for improving the lives of workers, especially low-wage workers. The work unions are currently doing in the hotel and restaurant industry, with janitors, home health care aides, child care workers, nurses and others is important work that unions must continue. With changes in the law, they might be able to move more aggressively into other industries, particularly the retail industry which has otherwise been resistant to substantial union penetration. But we should not expect any great union resurgence, and, as a policy matter, it is important to conceive of strategies that go beyond union organizing.

B. Education and the Road to Better Jobs.

With a resurgence of labor unions offering only limited promise of improving the lives of low-wage workers, I now want to turn to exploring whether education can provide a better route to a middle-class life. Focusing on education is often referred to as a human capital approach because it emphasizes the investments individuals make to enhance their labor market value, most commonly in the form of education and experience.⁶⁰ While many things are debated about the labor market, a universally accepted principle is that it values more education. How much it values education, or why it does may be contested but improving one's educational profile almost always leads to greater labor market rewards, and as discussed further below, this is particularly true for low-wage workers who tend to have high school degrees or less.

The underlying reason why education pays such a high dividend has been studied and theorized about at great length. Certainly some of the premium is attributable to the acquisition of desirable market skills, as evidenced by the fact that some college degrees, like engineering and computer science, yield higher salaries than a degree like philosophy.⁶¹ It may also be that those who pursue higher education have qualities that make them better workers, what is often

⁶⁰ For an excellent though often technical overview SEE *INEQUALITY IN AMERICA: WHAT ROLE FOR HUMAN CAPITAL POLICIES* (B. FRIEDMAN ED. 2003).

⁶¹ See, e.g., John W. Graham and Steven Smith, *Gender Differences in Employment and Earnings in Science and Engineering in the United States*, 24 *ECONS. OF EDUC. RVW.* 341 (2005); Linda Loury, *The Gender Earnings Gap Among College Educated Workers*, 50 *INDUS. & LABOR RELS. RVW.* 580 (1997).

thought to be motivation and determination, and part of the pull of education may be a status factor given that education has always been a marker of elite society. As economist Michael Spence hypothesized long ago, education may serve primarily as a signaling function, signaling to employers desirable skills that are difficult to measure but that are captured by the presence of a degree.⁶² More recently, but in a similar vein, James Heckman has emphasized the importance of what he terms non-cognitive skills – determination, social skills, etc. – that are important to labor market outcomes and might also be reflected in educational investments.⁶³ In the aggregate, the labor market almost always values more education, regardless of its specific content, to less education.

This is one area where the data are remarkably consistent and clear: there is a significant wage premium for each ladder up the education rung one moves, a premium that has grown over the last several decades. Based on 2005 data, high school graduates had median annual earnings of \$31,500, while those who held four-year degrees earned \$50,900, or 60% more. Those without high school degrees fared significantly worse, earning only \$23,400, or 34% less than a high school graduate, with substantially higher levels of unemployment as well.⁶⁴ Equally significant, the gap based on education has increased substantially over the last two decades, indicating that those with a high school education or less are falling farther behind their more educated counterparts.⁶⁵ From a policy perspective, the most interesting statistic is embedded in the category of those who have “some college,” in other words those who have attended college but failed to obtain a degree. Until recently, this group comprised the largest segment of the workforce at 32% and even today it is roughly equivalent to the group that has a college degree, now the largest workforce group with 31.8% of the labor force.⁶⁶ Individuals with “some college” receive a boost in pay compared to those who never attend college, but a boost that falls far behind those who obtain a degree – they earn approximately 18% more than high school

⁶² SEE MICHAEL A. SPENCE, MARKET SIGNALING: INFORMATIONAL TRANSFER IN HIRING & RELATED SCREENING (CAMBRIDGE: HARV. UNIV. PRESS 1974); Michael A. Spence, *Job Market Signaling*, 87 QUARTERLY J. ECON. 355 (1973).

⁶³ See James J. Heckman, Jora Stixrud, Sergio Urzua, *The Effects of Cognitive and Noncognitive Abilities on Labor Market Outcomes and Social Behavior*, 24 J. LABOR ECON. 411 (2006); see also Christopher R. Taber, *The Rising College Premium in the Eighties: Return to Unobserved Ability*, 68 REVIEW OF ECON. STUDIES 665 (2001).

⁶⁴ See Sandy Baum & Jennifer Ma, *Education Pays: The Benefit of Higher Education for Individuals and Society* at 9 (2007). See also LAWRENCE MISHEL, ET AL., THE STATE OF WORKING AMERICA 2006/2007, at Table 3.17 (2007) (reporting the differences in hourly rates).

⁶⁵ See CLAUDIA GOLDIN & LAWRENCE F. KATZ, THE RACE BETWEEN EDUCATION & TECHNOLOGY, AT -- (CAMBRIDGE: HARV. UNIV. PRESS 2008) (documenting the rise in wage premium by education level).

⁶⁶ CLAUDIA GOLDIN & LAWRENCE F. KATZ, THE RACE BETWEEN EDUCATION & TECHNOLOGY, TABLE L3 3.1, P. 96 (CAMBRIDGE: HARV. UNIV. PRESS 2008). The calculations are based on different data sets, which may explain some of the discrepancy. Based on the Census data, 32% of the workforce had some college in 2000 making that group the largest labor market contingent, while the 2005 Current Population Survey data showed 28.9% of the workforce with some college, and 31.8% as college graduates.

graduates, and those who obtain an Associate Arts degree received salaries that are 29% higher than high school graduates.⁶⁷

Although education clearly provides a sizable wage premium, many still question whether investments in college are cost effective, given its high costs and the delayed labor market entry of college graduates. Over the last decade, college costs have increased at more than double the rate of inflation, with tuition averaging more than \$23,000 annually at private colleges and \$6,000 at public colleges.⁶⁸ These figures do not include fees and other costs, which typically add more than \$10,000 at public and private schools.⁶⁹ Community colleges remain a bargain at just over \$2,000 in tuition per year.⁷⁰ Despite these escalating costs, there still remains a substantial lifetime wage gain for college graduates, and those who obtain a two-year degree, taking into account the educational debts students incur.⁷¹ There are also substantial additional benefits to obtaining a college degree that may not have a direct financial payoff. College-educated workers are much more likely to find themselves in positions that offer health insurance and pension benefits, both of which are critical assets to workers.⁷² They will also typically have greater mobility and flexibility in their careers, and there is little question that obtaining a college degree will, on average, pay substantial benefits that will exceed both the financial and opportunity costs of the investments.

The data also suggest that students need not attend the most expensive schools in order to obtain significant wage gains and greater labor market mobility. Although there are generally additional financial benefits associated with higher quality schools, measured primarily on the school's selectivity, the benefits are significant across-the-board. Researchers have long sought to determine whether students who attend elite schools fare well following graduation because of what the school brings to the student or what the student brings to the school. An important study sought to measure the effect of elite schools by analyzing the earnings of students who had

⁶⁷ These figures are based on the College Board's recent analysis of census data, cited in note [61] *supra*, which are consistent with other studies. See also Thomas J. Kane & Cecelia Elena Rouse, *The Community College: Educating Students at the Margin Between College and Work*, 13 J. OF ECON. PERSP. 63, 76 (1999) ("Completing an associate's degree appears to be associated with a 15 to 27 percent increase in annual earnings.").

⁶⁸ These figures are taken from the College Board's annual survey Trends in College Pricing (2008), at 2, available at <http://professionals.collegeboard.com/profdownload> (last visited Feb. 2, 2009).

⁶⁹ *Id.* At public schools, total costs, including tuition, fees and room and board averaged \$14,333, or more than double the tuition figure. Total charges for private universities were \$34,132 or roughly \$9,000 more than tuition alone.

⁷⁰ *Id.* (noting that average published tuition at two-year public schools averaged \$2,402).

⁷¹ These data are taken from an annual report published by the College Board that is designed to demonstrate the value of a college education. See Sandy Baum & Jennifer Ma, *Education Pays: The Benefit of Higher Education for Individuals and Society* (2007). The latest data reported by the U.S. Bureau of Labor Statistics provides comparable measures based on weekly wages. For example, High School graduates without college earned \$620 weekly or 18% less than those who had some college or an Associates Arts Degree. See U.S. Bureau of Labor Statistics, Economic News Release, Table 4, July 17, 2008.

⁷² See, e.g., Alec Levenson, *Trends in Jobs and Wages in the United States Economy*, at 96, in *AMERICA AT WORK: CHOICE AND CHALLENGES* (E.E. LAWLER III & J.O. TOOLE EDS. 2006) (noting that 60.2% of college educated workers had pension coverage compared to 40.9% of high school graduates).

applied to, and been accepted by, a comparable set of institutions but who chose to attend a wide array of schools, including non-elite schools. By analyzing this particular group, the researchers were able to control student input and measure the effect of school selectivity for which they found only modest effects for most students, raising questions about the importance of attending a highly selective school at least in terms of future labor market rewards.⁷³ Importantly, they also found that students from disadvantaged families received the highest returns from elite schools, a finding that has been replicated on a number of occasions in the contentious affirmative action battles.⁷⁴ This study suggests that students need not attend the most expensive or most elite school they are admitted to in order to maximize their human capital.

Although the benefits to college degrees are clear, the patterns of college attendance are less encouraging as they have flattened over the last two decades.⁷⁵ In 2005, nearly seventy percent (68.2%) of the students who completed high school went on to attend college, with about one-third attending two-year colleges and the rest beginning at four-year institutions.⁷⁶ This rate has been steady over the last three decades; in fact, the percentages of white males aged 23-29 who have college degrees has increased only two percent between 1976 and 2006, from 29 to 31%.⁷⁷ Black males have seen a slightly higher increase with some significant yearly fluctuations, while the percentage for Latino males has actually fallen, presumably because of increased immigration since immigrants tend to arrive with low levels of education.⁷⁸ Broad societal changes have led to a substantial increase in the college completion rates of women, which increased from 21.6% to 37.2% for white women, 13.9% to 21.7% for black women and from 7.3% to 12.8% for Hispanic women.⁷⁹ Yet, even for the group with the highest college attendance rates, white women, more than sixty percent of the population does not have a four-year degree, and most of this group has attended college without attaining a diploma, as is true for all of the various demographic groups. The chances of an individual obtaining a degree are significantly higher if the person attends a four-year institution where it is estimated that

⁷³ See Stacy Berg Dale & Alan B. Krueger, *Estimating the Payoff to Attending a More Selective College: An Application of Selection on Observables and Unobservables*, 117 Q. J. OF ECON. 1491 (2002). Other studies have demonstrated a significant payoff to attending selective schools, though all of the studies find a benefit to any higher education. For a study emphasizing the importance of quality see Liang Zhang, *Do Measures of College Quality Matter? The Effect of College Quality on Graduates' Earnings*, 28 RVW. OF HIGHER EDUC. 571 (2005).

⁷⁴ *Id.* at 1502. See also BOWEN & BOK, *THE SHAPE OF THE RIVER* at 138-39 (1998).

⁷⁵ An exhaustive recent study concluded, "After increasing nonstop for the first three quarters of the twentieth century, educational attainment among the native-born population slowed considerably during the last quarter of the century." CLAUDIA GOLDIN & LAWRENCE F. KATZ, *THE RACE BETWEEN EDUCATION AND TECHNOLOGY* -- (HARV. U. PRESS 2008).

⁷⁶ See National Center for Education Statistics, *The Condition of Education 2007*, at Tables 25.2 & 25.3 (2007).

⁷⁷ *Id.* at Table 27.3.

⁷⁸ *Id.* In 1976, 12.0% of black males had a bachelor's degree or higher, and by 2006 the percentage was 15.2%. However, in 2000, the percentage was 18.4% and has decreased since then, as has also been true for white males though to a lesser extent (32.3% in 2000 and 31.4% in 2006). In 1976, 10.3% of Latino males had a bachelor's degree or higher, while in 2006, the percentage was 6.9%. *Id.* Based on 2005 data, 17% of the foreign born population had fewer than 9 years of education compared to only 1% of the native born population. See Goldin & Katz, *supra* note --, at 309.

⁷⁹ National Center for Educ. Statistics, *supra* note --, at Table 27.3.

approximately sixty percent of students will obtain a bachelor's degree within six years.⁸⁰ Although the United States is widely thought to have the strongest higher education system in the world, our college completion rates place us roughly in the middle of comparable countries.⁸¹

1. *Community Colleges and the Low-Wage Worker.*

Even within discussions that focus on enhancing human capital, four-year institutions receive the majority of attention, not to mention a majority of funding. Yet, with the above figures in mind, if we want to improve the human capital of workers so as to enable them to compete for better jobs, we could likely make the most impact by devoting more attention to the two-year colleges. Probably the most efficient means of improving the labor market position of young adults would be to ensure that individuals leave college with at least the two-year Associate of Arts Degree.⁸²

When community colleges receive attention, it is often critical both for their graduation rates and their mission. Graduation rates at community college tend to be significantly lower than at four-year institutions. Most students attend community colleges on a part-time basis, and when viewed in the aggregate, only 38% of the community college student body will ultimately obtain an Associate of Arts degree.⁸³ Those who transfer to four-year institutions do not fare much better: one study recently indicated that only 20% of the students who started at a community college full-time with the hope of transferring to a four-year institution had received a bachelor's degree within six years.⁸⁴ This latter issue is likely not so relevant for the concerns of low-wage workers since the assumption here is that most of this group would be obtaining a two-year degree as opposed to a four-year degree. Even so, the data on the harms of beginning at a community college can be misleading because it is difficult to find comparable populations to analyze. On this question, the real issue is whether someone who chose to begin at a community college rather than a four-year institution would be worse off than if they had commenced their education at the four-year institution. To get at this question, it is necessary to take into account the differences in students who choose between the two institutions, and when those factors are taken into account, the differential graduation rates drop significantly, largely

⁸⁰ See National Center for Education Statistics, *Placing College Graduation Rates in Context: How 4-Year College Graduation Rates Vary With Selectivity and the Size of Low-Income Enrollment*, at 34 (2006).

⁸¹ Golden & Katz, *supra*, at 326.

⁸² For a thorough discussion of the economic benefits of a two-year degree see W. Norton Grubb, *Learning and Earning in the Middle, part I: National Studies of Pre-Baccalaureate Education*, 21 *ECON. OF EDUCATION RVW.* 299 (2002). See also Kane & Rouse, *supra* --.

⁸³ See National Center for Education Statistics, *Community College Students: Goals, Academic Preparation and Outcomes* (June 2003). Part-time enrollment proves particularly difficult for older students, who have a significantly lower graduation rate than students entering college directly from high school. See Hiromi Taniguchi & Gayle Kaufman, *Degree Completion Among Nontraditional College Students*, 86 *SOCIAL SCI. Q.* 912, 924 (2005).

⁸⁴ William R. Doyle, *Community College Transfers and College Graduation: Whose Choices Matter Most*, *CHANGE*, May/June 2006

because community college students begin with lower qualifications than those who choose four-year colleges.⁸⁵

The fact that so many students attend community colleges without obtaining any degree is more problematic, but graduation rates at community colleges can be difficult to measure or evaluate. Students attend community colleges with a wide range of interests and intentions. Many students begin with a desire to transfer to a four-year college, and about half of those students ultimately end up transferring, while twenty-five percent of students who began their college experiences without a specific intent to transfer eventually do so.⁸⁶ Studies indicate that there is no financial penalty for beginning at a community college -- the payoff for students who transfer from community colleges are the same for those who initially enroll at the four-year institution.⁸⁷

To many, focusing on enhancing the community college experience may seem misguided, given their low-graduation rates and lower status. For many years, the focus both within high schools and in policy debates, has been on increasing attendance and graduation at four-year colleges, indeed, community colleges have frequently been left out of that debate. This is now starting to change, and for good reason. Community colleges serve a diverse population, not just in terms of race and ethnicity, but also in terms of the needs and interests of students. Some of the students rely on community colleges as a gateway to four-year colleges, and even though this may have been their original mission, students seeking to transfer to a four-year college constitute just over half of the student body and many students today are seeking particular training or skills for which a degree may not be necessary.⁸⁸ Some are older students returning to school either to finish a program or as a means of retraining after having been displaced from older economy jobs; and others drift in without any particular intention, perhaps as a way of preserving some governmental benefit or to see if higher education might be the right path.⁸⁹ The broad diversity of students and their interests highlights one of the controversies that

⁸⁵ The difficulties of assessing graduation rates for community colleges, and the penalty many students face by initially beginning at a community college are discussed in Mariana Alfonso, *The Impact of Community College Attendance on Baccalaureate Attainment*, 47 RESEARCH IN HIGHER EDUC. 873 (2006).

⁸⁶ The figures are provided by the Association of Community Colleges and available at www2.aacc.nche.edu/research/index_students.htm. See also National Center for Education Statistics, Community Colleges: Special Supplement to the Condition of Education 2008, at Table SA-25 (Aug. 2008).

⁸⁷ See Andrew M. Gill & Duane E. Leigh, *Do the Returns to Community Colleges Differ Between Academic & Vocational Programs*, 38 J. HUMAN RESOURCES 134, 138 (2003). As noted previously, although the issue remains contested, there does appear to be a negative effect on graduation among those who begin at community colleges and later transfer to four-year institutions. See Alfonso, *supra* note --, at 882-83.

⁸⁸ See Andrew M. Gill & Duane E. Leigh, *Do the Returns to Community Colleges Differ Between Academic & Vocational Programs*, 38 J. HUMAN RESOURCES 134 (2003) (discussing different interests and economic payoffs for community college students).

⁸⁹ Community colleges tend to serve an older population, and older students have lower graduation rates, often because they are pursuing training rather than a degree program. See Juan Carlos Calcagno, et al., *Stepping Stones to a Degree: The Impact of Enrollment Pathways and Milestones on Community College Student Outcomes*, 48 RESEARCH IN HIGHER EDUC. 775, 776 (2007) (noting that “60 percent of older first-time community college students, compared with 40 percent of younger first-time students, did not earn any credential or transfer after 6

plagues community colleges and has often limited their impact. As the demand among employers for education beyond a high school degree has increased, community colleges have moved away from their original mission of providing a foundational education that would lead to four-year colleges, and have instead become more like a vocational school but without abandoning their original goals. The multiple missions community colleges must fulfill are not necessarily incompatible but they compete for resources, which in turn can contribute to campus battles and dissension leaving all programs weaker. And because the four-year institutions are what attract national and political attention, community colleges end up starved for resources to satisfy all of the competing demands.⁹⁰

Community colleges, however, are likely to remain the primary means of improving human capital for most workers. When all of students are added together, as opposed to focusing only on recent high school graduates, community colleges educate just over half of the nation's higher education students and larger percentages of minority students than are found in four-year institutions.⁹¹ Returning to the focus on low-wage workers, single mothers and Latinos are substantially more likely to attend a community college than a four-year institution.⁹² The skyrocketing costs of education, and the tightening credit markets, might further deter more students from attending college, or perhaps steer more towards the relatively inexpensive community colleges.⁹³ There are at least two other important reasons that four-year colleges offer a more limited option for most workers.

As many commentators have emphasized, there is a serious question of just how many college graduates the labor market could optimally absorb. Substantially increasing the number of individuals with bachelor degrees may leave many individuals underemployed and we would also likely find a significant decrease in the market value of an education if it became less of a precious commodity. What the optimal level of college graduates might be is, of course, difficult to predict but most of the emerging jobs in today's economy require technical skills rather than

years.”). The study also found that, when factors related to student ability were accounted for, older students actually had a higher probability of graduating. *Id.* at 796.

⁹⁰ See Jane V. Wellman, *The Higher Education Funding Disconnect: Spending More, Getting Less*, 40 CHANGE 18 (2008); Kevin J. Dougherty, *The Uneven Distribution of Employee Training by Community Colleges: Description and Explanation*, ANNALS OF AMER. ACADEMY OF POLI. & SO. SCI., 586, p. 62 (Mar. 2003).

⁹¹ See National Center for Education Statistics, Profile of Undergraduates in U.S. Postsecondary Education Institutions 2003-04, at 2 (2004). Community colleges educate significantly more African Americans, Hispanics, American Indians, single parents, older students, those whose parents did not go to college and part-time students. *Id.*

⁹² *Id.* at 2 (twice as many single parents attended community college and significantly more Latinos).

⁹³ The current economic crisis has driven up interest in community colleges. See Tony Barboza & Gale Holland, *Slow Economy Leads to a Boom at Community Colleges: Enrollments surge as Folks Seeking Training Join First-Time Students*, L.A. TIMES, Sept. 7, 2008, at B1 (“Recent high school graduates and mid-career adults are flocking to community colleges this fall as California campuses report enrollment jumps tied to the weak economy.”).

the need for a college degree. This is particularly true with health care jobs, an area that will produce the largest number of middle-class jobs over the next few decades.⁹⁴

The other reason we should not focus exclusively on four-year colleges relates to students. Just as it is not clear that there is an unlimited supply of jobs for college graduates, it is also true that many students are not equipped to obtain a four-year degree. This is not simply because many students lack the requisite skills or background to succeed because some of that deficiency could be compensated for by remedial courses and a different focus in college. Rather, many students do not have the interest or the desire to spend four years of their life in college, and without that interest or desire to finish, emphasizing four-year colleges may simply lead us back to where we are today – where a sizable portion of the labor market has attended college but failed to obtain a degree.

Students who need to work to finance their education are also likely to find a more conducive environment at the community college level, where schedules are more flexible and large numbers of students attend part-time. By ensuring better guidance, particularly with respect to credit hours, we could also likely significantly increase the number of students who obtain associate of arts degrees, and also those students who successfully transfer to four-year colleges. A recent study found that perhaps the most significant reason transfer students drop out of their four-year institution is that so many of the community college credits fail to transfer, requiring students to effectively repeat a year's worth of school.⁹⁵

2. *The High School Level*

So far my analysis has focused on those who attend college but this leaves out the group that is perhaps most in need of assistance, and certainly the group that is the worst off in the labor market, namely those who either do not graduate from high school or who fail to go beyond their high school degree. In today's economy, these individuals are consigned to limited career paths with diminishing prospects each and every year, and this is also where we find significant racial effects, particularly when we focus on those who fail to finish high school. As discussed previously, this is also where we tend to find low-wage workers, who tend to have relatively low levels of education. Is there a way to provide better opportunities for this group?

Certainly one way to improve the labor market prospects of high school graduates is to get these individuals to attend, and ideally to finish, a community college. We might do this by emphasizing the importance of obtaining education and skills that go beyond a high school

⁹⁴ See Arlene Dohm & Lynn Shniper, *Employment Outlook: 2006-16*, MONTHLY LABOR RVW., Nov. 2007. Of the fastest growing occupations, all require either a college degree or some college. *See id.*

⁹⁵ William R. Doyle, *Community College Transfers and College Graduation: Whose Choices Matter Most*, CHANGE, May/June 2006, at 4.

degree. But this is also an area where I depart from conventional liberal analyses as I believe that many individuals who fail to finish or advance beyond high school should be held responsible for their choices. Holding them responsible does not mean that we should neglect these individuals but it does mean that we should not center our labor policies around those who may have simply made short-sighted or bad choices, so long as they had equal opportunities to make better choices. This is, of course, the most important and difficult question, namely how to differentiate those who make bad choices from those who did not have the same access, or resources that would enable them to make different and better choices. My point here is that we should not assume that individuals who fail to invest sufficiently in education are all the product of circumstances. Some certainly are, but it is important to keep in mind that not all are and that, as a matter of social policy, it will likely be near impossible to provide meaningful work to those who fail to complete, or move beyond, high school.

It would be virtually impossible for anyone who has grown up or lived in the United States over the last twenty years to believe that a high school degree, or less, would produce the kind of middle-class life that was available to their parents, or more accurately to their fathers. The steel mill jobs, the unionized automobile plants, or many of the established trades are simply no longer available, at least on anything approaching the scale they once were. When those jobs are available, employers often prefer college graduates or those who have at least attended college.

Nevertheless, there remains a strong tendency to bemoan the lost jobs of an earlier era,⁹⁶ but it is important to remember that those jobs were not good in the sense that they were stimulating, utilized worker strengths, or offered paths for career advancement – they were monotonous and generally offered limited routes for promotion. As Ruth Milkman found in her analysis of an automobile plant closing in New Jersey, very few of the men, and they were almost all men, held any nostalgia for their lost jobs. “However much it fascinated some left-wing intellectuals,” she writes, “workers themselves never romanticized the assembly line – instead they mostly yearned to escape its relentless and dehumanizing rhythms.”⁹⁷ Those lost jobs were good because they paid high wages and offered good benefits with generally stable employment. These features, good wages and stable employment, even if through multiple employers, are still available today, but they are generally found in different industries -- health care, financial services, and technology -- and the most desirable jobs are available to those with higher education.

When the focus is on those who fail to either graduate from high school or attend college, we should be primarily concerned about those who do not have the opportunities that

⁹⁶ For the most recent installment see STEVEN GREENHOUSE’S, *THE BIG SQUEEZE* (N.Y. Alfred A. Knopf 2008).

⁹⁷ RUTH MILKMAN, *FAREWELL TO THE FACTORY: AUTO WORKERS IN THE LATE TWENTIETH CENTURY*, at 12 (Univ. Calif. Press 1997).

would enable them to invest more heavily in education. From a perspective grounded in justice, this is an area that demands attention given that high school graduation rates are skewed heavily in favor of white affluent students and against African Americans and Latinos. Although graduation rates are surprisingly difficult to measure, and often prove controversial, no matter what measure is chosen, the graduation rates of African Americans and Latinos fall far behind their white counterparts, with particularly low rates among Latinos in many large cities. The dropout rate for Hispanics is nearly three times as high as that for white students: 22.4% compared to 6.9%.⁹⁸ In some larger cities, such as Houston and Los Angeles, the drop out rate among Hispanics can approach 50%.⁹⁹ These rates are often criticized as misleading for the Hispanic population because many of those defined as drop outs are recent immigrants who have never been enrolled in school.¹⁰⁰ But no matter how one looks at the figures, they are deeply problematic and suggest that many Latinos may miss out on the better job opportunities that will be created in the future. African Americans also have lower completion rates than whites and much as is true for the Latino population upwards of half of the African-American students fail to graduate in some of the larger school districts. As a general matter, about twice as many African Americans are dropouts compared to whites.

Many of those who drop out of high school subsequently obtain a degree, and some even go onto college. Indeed, it is estimated that more than sixty percent of those who drop out of high school obtain a high school diploma or alternative credential within a few years, and 40% of those students advance to postsecondary education.¹⁰¹ The bulk of the credentials obtained by high school dropouts are GED degrees, which researchers have suggested offer little market value, or significantly less so than a high school degree.¹⁰²

In some ways, the individuals who fail to obtain a high school degree may appear to be the wrong population to target since pushing these individuals to graduate from high school will still leave them near the bottom of the economic ladder unless they then go on to college. In contrast, it may make more sense to focus on the large group of individuals who currently

⁹⁸ This is the figure utilized by the federal government, and as noted below, can prove controversial because of the difficulties that arise in measuring drop-out rates. See National Center for Education Statistics, *The Condition of Education 2007*, at Table 23-1 (2007).

⁹⁹ See Roy & Mishel, *supra* note --, at 24.

¹⁰⁰ Drop-out rates typically measure all of those who are not enrolled in school, including those who have never been in school. For some of the controversy and recent reports see Education Research Center, *Cities in Crisis: A Special Analytic Report on High School Graduation* (April 2008); Gary Orfield et al., *How Minority Youth Are Being Left Behind by the Graduation Rate Crisis*, *Urban Inst.*, Feb. 25, 2004; Joydeep Roy & Lawrence Mishel, *Using Admin. Data to Estimate Graduation Rates: Challenges, Proposed Solutions and their Pitfalls*, 16 *Educ. Policy Analysis* (June 2008).

¹⁰¹ National Center for Education Statistics, *Educational Attainment of High School Dropouts 8 Years Later*, Table 2 (Nov. 2004).

¹⁰² Of the 63% of the survey population that obtained a subsequent credential, 44% obtained a GED certificate. On the limited value of the GED see James J. Heckman & Paul LaFontaine, *Bias Corrected Estimates of GED Returns*, 24 *J. LABOR ECON.* 661 (2006); James J. Heckman & Yona Rubinstein, *The Importance of Noncognitive Skills: Lessons from the GED Testing Program*, 91 *AMER. ECON. REV.* 145 (2001).

graduate from high school but fail to pursue a college education. At the same time, it is this group at the bottom of the economic ladder that should command our attention, particularly given the great disparities that exist based on race, ethnicity and income. The fact that the disparities breakdown on these lines highlights the deep inequities of the existing system. Indeed, if those who drop out of high school, or those who fail to go on to college, were evenly distributed among demographic groups we might be more inclined to see this entire group as simply burdened by bad choices.

The tricky balance in all of this is finding ways to acknowledge all of the various realities rather than seeking stereotypical and predictable responses. We are certainly not going to cure poverty by implementing changes in our labor policy, though it may go some distance to eradicating some of the inequality we currently experience. We may also be able to alleviate some of the injustice that inflicts the working poor as no one who works full-time should be consigned to a life of poverty. But changes to our labor policy will always be only one step in what should be a multifaceted approach to poverty, and the suggestions I offer here are only a partial answer to a much more complicated problem.

Certainly one reason for the limited expectations of policy changes is that trying to alleviate some of the educational disadvantages of the poor presents an enormous task and one for which there appears to be a lack of political will. Like most of our complex societal problems, no single policy solution will yield anything like a comprehensive solution. We could begin with the disparities of our educational system, and if we were truly committed to a system of justice, we would have to overhaul the system in its entirety. No one could plausibly claim that the current system in which the wealthiest children have access to the best schools – best in the sense of resources, teachers, class size, and test scores -- has any grounding in fairness or justice, or even effective social policy since we are simply providing the most resources to those who need them the least. Similarly, the way we currently fund our educational system is fundamentally at odds with what an enlightened policy would seek to accomplish or what our national aspirations emphasize. Education has always been defined as the gateway to opportunity, even though we know that resources and results skew heavily in favor of the wealthy. It is still the case that the strongest indicator of whether someone is likely to attend college is whether their parents attended college, with family income serving as the next strongest predictor. Fortunately we have made some inroads into equalizing school funding across school districts, in large part as a result of extensive litigation challenging the equity of school financing.¹⁰³ A number of states now supplement property-taxed based systems with

¹⁰³ Over the last three decades, many lawsuits have been filed challenging the means by which public schools are funded, and many of those lawsuits have produced significant changes in school financing. For discussions see Goodwin Liu, *The Parted Paths of School Desegregation and School Finance Litigation*, 24 *LAW & INEQ. J.* 81 (2006); Molly S. McUsic, *The Law's Role in The Distribution of Education: the Promises and Pitfalls of School Finance Litigation*, in *LAW & SCHOOL REFORM* 88 (Jay P. Heubert ed. 1999); James E. Ryan & Thom Saunders,

general outlays so as to ensure some parity in the funding that schools from varied economic districts receive.¹⁰⁴

The bad news side of these changes is that money is often not much of a solution, and most educational analysts would concede that we know too little about how to improve or even equalize schools.¹⁰⁵ Smaller class sizes can help, particularly in the earlier years, better teachers can also be of great importance, longer school days, shorter summers, and more resources are always better than fewer.¹⁰⁶ Nevertheless, without focusing on overhauling the educational system in its entirety, there are a number of policy changes that could be implemented with an eye towards providing more marketable skills to those individuals struggling to finish high school.

One possibility, that has shown some recent success through small-scale experiments, is a return to vocational education designed for today's economy. This might be seen as bringing the market to students rather than bringing the students to the market and when successful these programs should enhance the value of a high school degree by providing practical training necessary for many of today's jobs. Assuming that one reason students drop out of high school is because they do not see the value of a high school degree, providing more vocational programs may also be a way to keep those children in school, some of whom might then choose to go on to college. Indeed, there is some evidence that well-structured vocational programs reduce high school drop-out rates.

Foreward to Symposium on School Finance Litigation, Emerging Trends or New Dead Ends? 22 YALE L. & POL'Y REV. 463 (2004).

¹⁰⁴ See, e.g., John Dayton & Anne Dupre, *School Funding Litigation: Who's Winning the War?* 57 VAND. L. REV. 2331 (2004) (discussing reform efforts spawned by school finance litigation).

¹⁰⁵ The literature on the efficacy of school reform is enormous, though it also seems to be the case that a consensus has emerged on some issues, including that more money is not the solution. For an excellent overview of the literature see TIMOTHY A. HACSI, *CHILDREN AS PAWNS: THE POLITICS OF EDUCATION REFORM* (Cambridge: Harvard Univ. Press 2002). See also Richard J. Murnane, *Educating Urban Children*, NBER Working Paper 13791, Feb. 2008.

¹⁰⁶ As is true with economic inputs, there is an extensive literature assessing virtually every aspect of the educational system. Much of the literature is reviewed in Hasci and Murnane cited in note __ *supra*. Recently considerable focus has been placed on the importance of high quality teachers, and some of that literature contrasts teacher quality with smaller class sizes. See, e.g., Steven G. Rivkin, Eric A. Hanushek & John F. Kain, *Teachers, Schools and Academic Achievement*, 73 ECONOMETRICA 415 (2005) (based on data from Texas found that teacher quality was significantly more important than smaller class sizes for student achievement). See also Andrew J. Wayne & Peter Youngs, *Teacher Characteristics and Student Achievement Gains: A Review*, 73 REV. OF EDUC. RESCH. 89 (2003). Smaller class sizes have also been demonstrated to benefit students in early primary grades but with less demonstrable impact in later years. See Jeremy D. Finn & Gina M. Pannozzo, *The "Why's" of Class Size: Student Behavior in Small Classes*, 73 REV. EDUC. RESCH. 321 (2003) (finding that smaller class sizes alters student behavior in early grades). Finally, studies indicate that students from lower income families lose ground during the summer months. See Alan B. Krueger, *Inequality, Too Much of a Good Thing?*, at 32, in *INEQUALITY IN AMERICA: WHAT ROLE FOR HUMAN CAPITAL POLICIES* (B. Friedman, ed., 2003) ("Children from poor families enter school with a gap in achievement . . . But the entire subsequent increase in that gap results from periods when school is out of session.").

Around the country experiments with new forms of vocational education have been implemented typically on a small scale, often a single program in a school district. In Chicago, local manufacturing plants have partnered with a low-performing high school in a poor part of the city to provide training for the high-skilled jobs the plants now require, many of which are located near the school.¹⁰⁷ The school, which opened only last year, requires its students to take four years of pre-engineering and offers internships in dozens of manufacturing plants as machinists, programmers and engineers. The jobs all offer good middle-income wages that require training in electronics and computers. One interesting aspect of these plants is that several decades ago they provided many more lower-wage manual labor jobs, whereas today they provide fewer, but better, jobs with skill training that should be more broadly applicable to other employers. Similar programs have arisen around the country. In Lowell, Massachusetts, for example, students are being trained for green technology, and have been placed in many of the surrounding ecologically sound businesses.¹⁰⁸

In a related trend, many charter schools have arisen around the country with a focus on serving students who are at-risk of failing to graduate from high school, and while the programs are still too new to evaluate comprehensively, many offer strong hope for their students. Indeed, several charter schools can boast of sending all of their students to college, and this among a population that was unlikely to attend college at all. For example, a charter school operated by the University of San Diego is restricted to students whose parents have not gone to college and it has had tremendous success with its student body.¹⁰⁹ In Boston, the MATCH charter school has a student body that is 93 percent black and Hispanic, more than 70% of whom are from low-income families, and in its first four years, the school sent 99 percent of its student on to college.¹¹⁰ Similar programs have arisen around the country providing access to opportunities that likely did not exist previously. These programs remain small, and there is certainly an element of self-selection to the student body, and their families, that may explain their success. At the same time, there is little question that school districts need to move away from their misplaced focus on test scores to provide room for innovative schools and dedicated teachers to break free of the constraints of uniformity. It is worth reemphasizing that most of these experimental programs have been implemented on a relatively small scale, and if anything is clear in the current environment it is that we do not yet know how to make significant improvements on a district-wide basis. New Orleans and Washington, D.C. are both embarking on comprehensive overhauls of their systems with a particular concentration on charter schools,

¹⁰⁷ See Ezra Klein, *Inner-City Futurism: A New Kind of High School in Chicago's Inner City Will Train Its Students for High-Tech, High-Pay Manufacturing*, AMER. PROSPECT, July 12, 2007; Joe Barrett, *Transforming Inner-City Schools to Train Tomorrow's Work Force*, WALL ST. J., June 5, 2008.

¹⁰⁸ See Christine McConville, *Vocational Students Learning a Green Trade: Schools are Teaching to Latest in Eco-Friendly Technologies*, BOSTON GLOBE, Oct. 25, 2007, at 1.

¹⁰⁹ Information on the Preuss School can be found at <http://preuss.ucsd.edu>.

¹¹⁰ See Jason Beerman, *Charter School Makes Grade, MATCH Ranked Among the Best*, BOSTON GLOBE, Jan. 13, 2008, at C10.

and these ambitious reform efforts may provide us with some indication of the kinds of programs that can be implemented more widely.¹¹¹

The charter school debate has been highly contentious and the extreme partisanship has marred much of even the scholarly research. What is now the charter school movement began as a concerted effort by conservatives to bring competition to public schools. Part of this initial push was related to the Regan administration emphasis on privatizing governmental services, and there was also a related desire to use vouchers to increase government support for religious education.¹¹² Vouchers, which are distinct from charter schools, provide individuals with public funds that they can then be used to pay for tuition in private schools. Because the vouchers tend to be of limited value, they are primarily used to pay tuition at religious schools, something the Supreme Court approved a few years ago.¹¹³

This desire to inject competition and religion into public schools was often motivated by concerns other than improving the performance of public schools. But many of the original advocates sincerely believed these efforts would lead to significant improvements in schools, which otherwise could coast along given the absence of meaningful alternatives for most parents. If schools had to compete for students and funds, many might begin to focus more on educational outputs and other factors that were important to parents who would be making the choices.

If conservative advocates of vouchers and charter schools were often motivated by non-educational concerns, liberal opponents of charter schools did not fare much better. From the outset, teacher unions have strongly opposed any effort to diminish the monopoly of public schools, and their concerns have often been more about the power and influence of teachers than the education of children.¹¹⁴ As was true with conservative positions, there were some sincere concerns embedded in the liberal opposition to vouchers and charter schools. One such concern was that the most desirable students – those who were the easiest to educate – would be skimmed from the public schools, leaving the less desirable students and their likely lower test scores to the public system. This would likely increase pressure on the public schools while providing additional support for expanding the alternative programs, which in turn, would lead to fewer funds devoted to public schools.

¹¹¹ The overhaul of the New Orleans' school district, which is moving to a district made up primarily of charter schools, was recently chronicled in Paul Tough, *A Teachable Moment*, N.Y. TIMES MAG., Aug. 14, 2008.

¹¹² See Neal Devins, *Religion in the Public Square: Social Meaning and School Vouchers*, 42 WM. & MARY L. REV. 919, 933 (2001) (“Reagan’s call for school vouchers appeared part and parcel of his embrace of religious interests.”).

¹¹³ See *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

¹¹⁴ See Martin H. Malin & Charles Taylor Kerchner, *Charter Schools and Collective Bargaining: Compatible Marriage or Illegitimate Relationship*, 30 HARV. J. L. & PUB. POL’Y 885, 886 (2007) (noting that “the teacher union response [to charter schools] ranges from outright opposition to reluctance and qualified acceptance.”).

Despite the partisan rancor, something quite unusual, even remarkable, has occurred; indeed, this might be one of those rare moments when good triumphs over self-interested politics. A movement of dedicated professionals have coalesced around charter schools, and today there are more than 4500 in 40 states, and the District of Columbia.¹¹⁵ These schools are far from perfect, and the credible evidence to date suggests that, on average, charter schools do not fare any better than public schools in various performance measures. They also do not fare any worse; indeed, one careful recent examination of existing data found that there was no measure on which charter schools performed worse than public schools.¹¹⁶ Rather than improve the quality of education, what Charter schools have done is provided diverse learning environments and opportunities for students around the country. Charter schools are certainly not a panacea for the many ills that plague our educational system, but, in the long run, they offer a revitalized model and commitment to improve -- and make meaningful -- the educational experience for many students who might otherwise lose their way in a sterile bureaucratic system.

One common objection to the focus on successful charter schools is that they tend to take the best students out of the public schools, thus diminishing the hardworking students from the public schools and making it easier for the charter schools to flourish. This is a difficult issue with undoubtedly some truth behind it but two aspects of the charter school success are worth noting here. First, if the schools are only taking the students who would otherwise succeed in public schools, then we ought to be skeptical about the impact of the charter programs. However, there seems to be evidence that these schools are succeeding with a different population – students who were at risk of failing, or being neglected, in the public schools, in which case these are the students who should be targeted for intervention. Recent studies from California and Chicago have found little evidence of student skimming, at least with respect to demographic factors.¹¹⁷ Consistent with these findings, there is also no substantial evidence that the increased competition has resulted in tangible improvements within public schools.

This leads to the second point, which is that different student populations may need different options and opportunities. While it can be problematic to track students into technical programs, while channeling others into college preparatory classes, making such programs available to interested students within a high school setting can provide an option that may produce the best labor market results down the line. As a policy matter, what we should be focusing on is providing opportunities that will improve the life prospects of the students rather than trying to move them all in the same direction without regard to particular needs or interests.

¹¹⁵ The statistics are maintained by the Center for Education Reform and are available at www.edreform.com.

¹¹⁶ See Jack Buckley & Mark Schneider, *CHARTER SCHOOLS: HOPE OR HYPE?* at 272 (Princeton Univ. Press 2007) (“[O] every one of the numerous comparisons we conducted throughout our research, charter schools never fared worse than the traditional public schools – and they quite often did better.”).

¹¹⁷ See Kevin Booker, et al., *Achievement & Attainment in Chicago Charter Schools*, Rand Corp. Technical Report (2008); Ron Zimmerman, et al., *Charter School Operation & Performance: Evidence from California*, Rand Corp. (2003). See also Natalie Lacireno-Paquet, et al., *Creaming Versus Cropping: Charter School Enrollment Practices in Response to Market Incentives*, 24 *Educ. Evaluation & Policy Analysis* 145, 155 (2002) (study of D.C. Charter schools found no evidence of skimming though market-oriented schools seemed to avoid special needs students).

In many ways, this is what we have learned from the charter school movement – innovation can work though, like our financial markets, they also require substantial and meaningful oversight. The early years of charter schools in many cities, particularly Washington, D.C., witnessed the opening of many unqualified schools that offered limited education and produced considerable dislocation for students, especially once the schools were closed.¹¹⁸ But today we can see a whole range of opportunities and innovative offerings that are making a difference in the lives of young people who will soon be job seekers. These programs are imperfect – ideally we might want to provide outstanding college preparation for all students, or if that was not possible, to a random group of students rather than relying on self-selection or tracking. At the same time, these new programs offer the best opportunities we have seen in decades, and while imperfect, they are an essential part of any human capital based labor strategy.

3. *What about those already in the workforce?*

Those who have been in the workplace for many years and suddenly lose their job pose a different, and in many ways far more difficult, issue. For this group of workers, emphasizing the importance of education and building human capital may be of little practical value. Workers in their fifties or sixties may not have the time or attention span to return to school for training. This is certainly not true for all workers, and some may be able to transition to similar jobs without undergoing a substantial change in their standard of living, and others may return to school, most likely at the community college level, to tailor their skills to more contemporary jobs. Nevertheless, without some assistance, others – and this might be the largest cohort – may find themselves applying for low-level service jobs, and indeed, these individuals can be found at any Staples, many Wal-Marts and Home Depots, and occasionally at McDonalds marking what is, for most of them, a sad end to a lengthy and productive work career.

Others find their way, and those with skills and established work habits often prosper in new environments. Ruth Milkman’s study of workers who had been laid off from a large automobile factory in New Jersey documented that most of the workers found jobs that preserved their standard of living. A large number of the workers ended up as independent contractors in one field or another, but what was perhaps most revealing in her study, very few workers regretted leaving their old jobs even though many had held those jobs for more than twenty years.¹¹⁹

Currently, there are a number of established training programs designed to ease the transition into different careers, but for those who have made their lives in automobile factories, or steel mills, or those who might have worked in a General Electric plant, there is no easy

¹¹⁸ In the early years of its Charter program, about 15% of the schools in Washington D.C. closed, often without any significant notice. See Buckley & Schneider, *supra* note --, at 279.

¹¹⁹ MILKMAN, *supra* note --, at --.

transition since there are few equivalent jobs in today's economy. Many employers are also reluctant to take on older workers because they might command higher salaries, be more set in their ways, or generate higher health care expenses, thus making any transition all the more difficult. Indeed, workers who have put in a substantial career pose some of the most difficult policy issues, and raise the question of what we as a society owe workers. We might be tempted to treat the decisions of these workers to invest in a long-term career like any other investment decision that fails to pay off, or we might see the plight of these workers as more akin to those who made what appeared to be a reasonable decision at the time but one that turned out to have dire long-term consequences that could not have been foreseen when the decisions were made. We might also see these workers as deserving of a generous social safety net simply because they have devoted so much of their life to a particular industry and are now left with too few alternatives. After all, it is difficult to blame anyone for not having the foresight to see changes in the global economy that most professionals failed to predict. That is why the problem of established workers is so much more difficult than new entry workers who should have no expectation that a high school degree will secure any kind of meaningful long-term work.

As noted, here there are no easy solutions. We cannot will the jobs back, and creating business incentives to recreate the lost jobs will be insufficient since to make such incentives effective on a broad scale would entail enormous costs. At the same time, there is no reason why we should give tax breaks to businesses that move factory jobs overseas, and there would be some solace in ensuring that companies are not rewarded for doing so by repealing existing tax breaks. But that solace will be indirect, and eliminating the current tax breaks will not have a significant effect on job creation. It is, however, a start, just as ensuring the age discrimination laws are enforced will make a difference to many older workers who might be laid off unlawfully. We can also provide more tax credits for education, provide more training assistance, and ensure that pension obligations are fulfilled, an issue I will return to in a later chapter. None of these will be sufficient, and a strong argument can be made that long-term workers deserve more than these limited programs. But staying in the realm of the practical, these programs are the strongest we are likely to implement and offer some means of easing the transition to new economy jobs.

III. CONCLUSION.

The world of low-wage work has changed, and not necessarily for the better. It is important to acknowledge the change, in particular that unions are not likely to be the source of good middle-class jobs for most of those who now occupy low-wage work. We should, of course, seek to improve the material conditions of low-wage workers, and unions will be part of that strategy. But, as I have argued in this paper, we also need to think more deeply about education as a labor strategy, and how we can enable individuals to maximize their human capital by providing more meaningful, and more equal, education that is relevant to the jobs workers should want to strive for.