

## Working to Death

### *Labor Law and Collective Voice in the 100-Year Life*

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The premise of this volume – that human beings will soon regularly live to be well over 100 years old – seemed quite plausible just a few years ago. But in the time since Linda Gratton and Andrew J. Scott published *The 100-Year Life* in 2016, the unprecedented COVID-19 pandemic ravaged the globe, increased morbidity, and, for a period of time, significantly reduced human lifespans. Even assuming we have emerged from this public health debacle with the 100-year life once again a possibility, the pandemic has exposed the extent to which any promise of extended life is likely to be defined by deep inequities. Working-class people, and workers of color in particular, are the least likely to enjoy extended lifespans. And if they do live longer, they are unlikely to enjoy a leisurely retirement in which they decide how they spend their extra years. Instead, they are likely to face more toil and precarity.

This chapter imagines a different future. It asks: What would the 100-year life look like if working people had a greater hand in shaping it? What would a legal regime look like that gave working people power to affect decisions about how work is structured and how resources are distributed in the era of the 100-year life? How might we reimagine labor law for a more just and equitable 100-year life?

#### 9.1 WORKING TO DEATH

For many Americans, work is characterized by low wages, long hours, little autonomy, and deep precarity. The pandemic also made work life-threatening. While highly paid professionals retreated to computer screens and home offices, low-wage service workers risked their lives, with few rewards. Those who were in unions were able to negotiate greater protective equipment, safety precautions, hazard pay, and leaves of absence for individuals most at risk. Yet the vast majority of US workers lacked such collective representation. And the vast majority were employed at will, subject to dismissal for any reason or no reason at all (save legally proscribed reasons like discrimination). Against this background, most workers were fearful of reporting violations of workplace safety and health

standards that put them, their coworkers, and their communities at risk of infection.<sup>1</sup> Indeed, when workers requested protective equipment like masks and gloves, some employers retaliated, even barring workers from speaking out about weak COVID-19 workplace safety standards.<sup>2</sup> For older workers, for whom the risks of COVID-19 were vastly increased, the lack of a collective organization and resulting lack of power to negotiate were particularly consequential. Some quit their jobs; others risked their lives. Racial inequities intertwined with these class and age inequities: Working-class Black and Latino males faced the largest decrease in life expectancy as a result of the pandemic, while workers of color were hit the hardest by rising unemployment. These dynamics meant that millions of workers, already on the brink, faced eviction, food shortages, and mental health crises.<sup>3</sup>

Even after the pandemic began to subside, age, gender, and racial inequalities in the labor market persisted. As the job market recovered, older workers had more difficulty reentering the labor market than their younger counterparts; women, too, failed to reenter the job market at the same rate as similarly educated men.<sup>4</sup> The pandemic highlighted and increased the amount of care work that people, particularly women, performed without compensation or acknowledgment. And although the unemployment rate for people of color bounced back to prepandemic levels, the racial unemployment and wage gaps remained “high and widespread.”<sup>5</sup>

In short, the pandemic and its aftermath left little doubt that, if our political economy remains unchanged, the 100-year life, if not elusive, will bring only more years of arduous work for the vast majority of workers, particularly low-income workers, workers of color, and women workers.

<sup>1</sup> See Kate Andrias & Alexander Hertel-Fernandez, *Ending At-Will Employment: A Guide for Just Cause Reform*, ROOSEVELT INSTITUTE (Jan. 19, 2021), <https://rooseveltinstitute.org/publications/ending-at-will-employment-a-guide-for-just-cause-reform/>.

<sup>2</sup> Josh Eidelson, *COVID Gag Rules at U.S. Companies Are Putting Everyone at Risk*, BLOOMBERG (Aug. 27, 2020), <https://www.bloomberg.com/news/features/2020-08-27/covid-pandemic-u-s-businesses-issue-gag-rules-to-stop-workers-from-talking>.

<sup>3</sup> Center on Budget and Policy Priorities, *Tracking the COVID-19 Economy's Effects on Food, Housing, and Employment Hardships* (2021), <https://www.cbpp.org/research/poverty-and-inequality/tracking-the-covid-19-recessions-effects-on-food-housing-and>.

<sup>4</sup> Richard B. Freeman, *Planning for the “Expected Unexpected:” Work and Retirement in the United States after the COVID-19 Pandemic Shock*, in *OVERTIME: AMERICA'S AGING WORKFORCE AND THE FUTURE OF WORKING LONGER* 91, 100 (Lisa F. Berkman & Beth C. Truesdale eds., 2022); Richard Fry, *Some Gender Disparities Widened in the U.S. Workforce during the Pandemic*, PEW RSCH. CTR. (Jan. 14, 2022), <https://www.pewresearch.org/fact-tank/2022/01/14/some-gender-disparities-widened-in-the-u-s-workforce-during-the-pandemic/>.

<sup>5</sup> Christian Weller, *A Hot Labor Market Is Not Enough for Racial Equality*, FORBES (Sep. 12, 2022), <https://www.forbes.com/sites/christianweller/2022/09/12/a-hot-labor-market-is-not-enough-for-racial-equality/>.

## 9.2 THE NEED FOR WORKER POWER

How, then, to think about reforming workplace law in the event of the 100-year life? Two other chapters in this volume focus on employment law. Professor Kenji Yoshino considers the pressing problem of how the law can effectively protect against age discrimination in an era in which workers live longer. He argues for unmooring the age discrimination paradigm from the traditional civil rights model, and for the law to take into account the distinctive fears that older individuals conjure about their own mortality. Professor Cynthia Estlund's chapter tackles a related problem: ensuring workers' retirement security over the course of longer lifespans – a problem made more challenging by the fact that most workers already lack adequate pensions and retirement savings. Estlund concludes that it will be necessary to extend work in order to approach a sustainable ratio of workers to retirees, and of work years to retirement years. She also considers how to address the problems of intergenerational competition and integration at work in a world with transformative new technologies and longer lifespans. Noting that a longer life could increase employers' tendency to dismiss or refuse to hire aging workers, she renews calls not only to strengthen antidiscrimination protections but also to limit American law's adherence to employment at will. In an earlier work, Professor Anne Alstott argued for enhancing and revising the Social Security program and delinking benefits from paid work to increase portability and part-time feasibility.<sup>6</sup>

Alstott, Estlund, and Yoshino are all correct that finding new ways to fund retirement, delinking social benefits from employment, rethinking age discrimination law, and protecting workers from unjust termination are all critical policy reforms in an era of extended lifespans. But those reforms are unlikely to be achieved or sustained in ways that address the fundamental inequities that will characterize work in the 100-year life without also addressing the problem of collective voice among workers. That is, if workers are to enjoy longer lifespans and a more dignified and remunerated work life during their expanding lifespans, the law must also include a framework that gives them greater *power* over decisions about the shape of work and the political economy.

## 9.3 THE DECLINE OF UNIONS – AND THE FAILURE OF US LABOR LAW

In the aftermath of the New Deal and World War II, more than a third of US employees belonged to unions. With workers able to exercise collective power in the workplace, the economy, and the halls of government, inequality was at an all-time low. Labor unions not only fought for higher wages and better working conditions but also backed early state efforts to establish social insurance programs, lobbied for a

<sup>6</sup> Anne Alstott, *Law and the Hundred-Year Life*, 26 ELDER L.J. 132, 142–144 (2018).

comprehensive federal retirement bill, and supported the eventual Social Security Act of 1935.<sup>7</sup> Social Security, in particular, proved to be a crucially important program, lifting millions of seniors out of poverty.

But the goal of an enduring collective voice for working-class people in the US was not achieved. From the outset, at the insistence of southern legislators, millions of workers, primarily African Americans, were explicitly excluded from labor law – as domestic workers and agricultural workers – or worked in sectors and regions of the country that were, in practice, largely unorganized. And unions soon came under significant attack. The 1947 Taft-Hartley Act curtailed numerous labor rights and excluded yet more workers from coverage. Moreover, although the left-leaning industrial unions in the 1930s and 1940s pushed for a social democratic system of universal health care and other social benefits delinked from employment, by the 1950s they had lost this fight. Retirement benefits, as well as health insurance, became closely tied to employment, and unions themselves became more bureaucratic and inward-facing.<sup>8</sup>

By the 1970s, US companies had adopted a position of intense resistance to unions: They globalized and fissured their employment relationships, eliminating union jobs while ramping up their antiunion practices against new organizing efforts. Meanwhile, the Supreme Court interpreted the National Labor Relations Act (NLRA) in ways that limited the ability of workers to bargain and strike in the changing economy.<sup>9</sup> Union membership declined precipitously. Today, while the rate of unionization is on the rise, it stands at about 6 percent among workers in the private sector and only about 10 percent among workers overall.<sup>10</sup>

Economic inequality is now at its highest point since the Gilded Age, when unionization rates were similarly low.<sup>11</sup> And as workers have lost economic power, they have also lost political power. Wealthy individuals and corporations spend vast sums to influence elections and legislative and administrative processes, while workers have largely lost their collective organizations that enable them to engage effectively in politics. Not surprisingly, studies suggest that elected officials are almost entirely unresponsive to the concerns of the poor and working class – at least when their preferences diverge from those of the wealthy.<sup>12</sup>

<sup>7</sup> David Montgomery, *Labor and the Political Leadership of New Deal America*, 39 INT'L REV. SOC. HIST. 335, 347–349 (1994).

<sup>8</sup> Nelson Lichtenstein, *From Corporatism to Collective Bargaining: Organized Labor and the Eclipse of Social Democracy in the Postwar Era*, in *THE RISE AND FALL OF THE NEW DEAL ORDER, 1930–1980* 122 (Steve Fraser & Gary Gerstle eds., 1989).

<sup>9</sup> See, e.g., Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 25–27 (2016).

<sup>10</sup> Bureau of Labor and Statistics, *Press Release: Union Members – 2024* (Jan. 28, 2025), <https://www.bls.gov/news.release/pdf/union2.pdf>.

<sup>11</sup> THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 31 (2014).

<sup>12</sup> See, e.g., LARRY M. BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* 2, 285 (2008); MARTIN GILENS, *AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA* 73–85 (2012).

Meanwhile, although state and federal employment laws, which proliferated in the 1960s, provide a host of protections to workers as individuals, many rights go unenforced or underenforced. Wage theft, health and safety violations, and sexual harassment are rampant in many workplaces.<sup>13</sup> Individual workers, lacking bargaining power, are frequently forced to sign away their rights to go to court and even to proceed collectively in arbitration.<sup>14</sup> Unlike most advanced industrial democracies, the U.S. does not guarantee workers health insurance; nor do most workers receive compensation for the important labor they perform caring for their children or their elderly relatives. Retirement security is, for many, elusive: Just 15 percent of private sector workers had access to a defined benefit plan in 2020,<sup>15</sup> while Social Security benefit cuts are still being implemented from reforms in 1983.<sup>16</sup>

Meanwhile, millions of the most vulnerable workers, predominantly people of color, remain excluded altogether from both collective labor law and individual employment law as independent contractors, domestic workers, or agricultural laborers. These exclusions are particularly relevant for seniors who are more likely to work as independent contractors than younger workers.<sup>17</sup> And one in five workers in their fifties and early sixties work in jobs that lack health or retirement benefits, making it much harder to prepare for retirement.<sup>18</sup> In fact, seniors often take on these jobs specifically to supplement inadequate retirement savings.<sup>19</sup> And while workers in nontraditional jobs are vulnerable due to these statutory exclusions, the ability to work longer to finance a comfortable retirement is already stratified by income: Higher-income workers tend to retire later than lower-income workers, who are more likely to exit the labor market at a younger age due to health issues, caregiving responsibilities, or job loss.<sup>20</sup>

<sup>13</sup> Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities*, NAT'L EMP. L. PROJECT (2009), <https://s27147.pcdn.co/wp-content/uploads/2015/03/BrokenLawsReport2009.pdf>.

<sup>14</sup> See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621–1622 (2018); Samuel R. Bagenstos, *Consent, Coercion, and Employment Law*, 55 HARV. C.R.-C.L. L. REV. 409, 414; Alexander J. S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POL'Y INST. (Sep. 27, 2017), <https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration/>.

<sup>15</sup> US Bureau of Lab. Stat., *67 Percent of Private Industry Workers Had Access to Retirement Plans in 2020* (Mar. 1, 2021), <https://www.bls.gov/opub/ted/2021/67-percent-of-private-industry-workers-had-access-to-retirement-plans-in-2020.htm>.

<sup>16</sup> Eric Kingston & Monique Morrissey, *Can Workers Offset Social Security Cuts by Working Longer?* ECON. POL'Y INST. (May 30, 2012), <https://www.epi.org/publication/bp343-social-security-retirement-age/>.

<sup>17</sup> Katharine G. Abraham, Brad Hershbein & Susan N. Houseman, *Contract Work at Older Ages*, 20 J. PENSION ECON. & FIN. 426, 432, 444–446 (2020).

<sup>18</sup> Alicia H. Munnell, Geoffrey T. Sanzenbacher & Abigail N. Walters, *How Do Older Workers Use Nontraditional Jobs?* CENTER FOR RETIREMENT RESEARCH: BOSTON COLLEGE (Oct. 4, 2019), <https://crr.bc.edu/working-papers/how-do-older-workers-use-nontraditional-jobs/>.

<sup>19</sup> Caroline Bruckner & Jonathan B. Forman, *Women, Retirement and the Growing Gig Economy Workforce*, 38 GA. ST. U. L. REV. 259, 265 (2022).

<sup>20</sup> Jacob S. Hacker & Paul Pierson, *The Biased Politics of "Working Longer,"* in OVERTIME: AMERICA'S AGING WORKFORCE, *supra* note 4, at 276, 280.

On the positive side, a host of recent organizing efforts among workers, from Amazon warehouse workers to healthcare workers, from Uber and Lyft drivers to journalists, have drawn attention to these problems. These workers seek tangible improvements in their jobs; they also seek basic dignity at work. As one Amazon worker involved in a unionization campaign observed, “You’re running at a consistent, fast pace . . . You ain’t got time to look around. You get treated like a number. You don’t get treated like a person. They work you like a robot.”<sup>21</sup>

Meanwhile, seniors have remained organized and politically engaged on issues related to retirement. Notwithstanding the national decline in membership in unions and other civic organizations, the AARP – an organization devoted to organizing and advocating for retirees – maintains a membership of nearly 40 million. The AARP has played a key role in opposing various efforts to erode retirement benefits. For example, in 2021, the AARP lobbied against the TRUST Act, which would empower congressional “rescue committees” to make changes to Social Security and Medicare. While Republican legislators have recently floated both the idea of “sunsetting” the Social Security Act and a federal budget plan that would cut benefits, AARP’s political power suggests that these efforts will not go very far.

Though the problems that workers will confront in any future 100-year life are palpable and the interest in organizing to solve such problems is significant, the existing legal frameworks are of little utility. About 70 percent of Americans approve of unions, yet obstacles to achieving unionization among workers even in the traditional labor force are substantial.<sup>22</sup> The law permits employers to engage in a wide range of efforts to persuade workers not to organize while excluding union organizers from the workplace. Moreover, when employers resort to illegal tactics such as threatening or firing workers for organizing, they incur virtually no penalties. Meanwhile, the law does not only exclude independent contractors, agricultural, and domestic workers, but it altogether lacks a framework for retirees and unemployed workers to organize into unions or for unions to bargain to address many problems facing retirees. That is, the law mandates only that employers negotiate with unionized employees about wages, benefits, and working conditions at a single workplace. It does not set up a system for sectorwide bargaining in order to raise wages and benefits throughout the industry, nor does it create a system for bargaining about broader social programs.

<sup>21</sup> Steven Greenhouse, “We Deserve More.” *An Amazon Warehouse’s High-Stakes Union Drive*, GUARDIAN (Feb. 23, 2021), <https://www.theguardian.com/technology/2021/feb/23/amazon-bessemer-alabama-union>.

<sup>22</sup> Justin McCarthy, *U.S. Approval of Labor Unions at Highest Point since 1965*, GALLUP (Aug. 30, 2022), <https://news.gallup.com/poll/398303/approval-labor-unions-highest-point-1965.aspx>. On obstacles to organizing see, e.g., Andrias, *supra* note 9, at 44; Paul Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351, 362–363 (1984).

One proposed legislative reform – the Protecting the Right to Organize (PRO) Act – would better protect traditional workers in the process of organizing, bargaining, and striking, including by increasing penalties when employers attempt to coerce or retaliate against employees for unionizing.<sup>23</sup> The PRO Act would also extend employee status to many workers now classified as independent contractors, like gig workers, FedEx drivers, and many more. These reforms could prove extremely helpful in enabling workers to exercise more voice at work.

However, even with these important reforms, US labor and employment law would not be well designed to give workers a voice in how to structure work and the broader political economy during the 100-year life. This is because even the improved law would lack a framework for retirees and unemployed workers to organize (while still excluding domestic and agricultural workers), and it would lack a system for sectoral or social bargaining. That is, even if the PRO Act passed, US labor law would continue to channel organizing and bargaining to individual worksites, between traditional employees and single firms, without giving worker organizations power to negotiate sectoral standards or broader social benefits. Yet, in a world in which employees, over the course of a lifetime, work for many different firms, move in and out of the workforce over a longer lifespan, spend more years working a reduced load as they age, or spend more years in retirement or caregiving, a labor law system organized solely around worksite-by-worksite bargaining for private benefits makes little sense.

#### 9.4 ALTERNATIVE APPROACHES TO WORKER VOICE AND POWER

The US approach sharply differs from many European systems that are better positioned to enable worker voice over the course of an extended lifespan, though their systems too face significant limitations. For example, in Germany, the union federations participate in basic decisions concerning national wage policy and policies relating to employment, economic growth, and social insurance.<sup>24</sup> Meanwhile, collective bargaining occurs on a regional basis to set wage scales that cover all workers, at least in manufacturing sectors; those agreements then provide a floor above which local bargaining may occur.<sup>25</sup> Many German workers also have a voice at their worksite through statutorily guaranteed works councils.<sup>26</sup> Such works

<sup>23</sup> Protecting the Right to Organize Act of 2021, H.R. 842, 117th Cong. (2021).

<sup>24</sup> See Clyde W. Summers, *Worker Participation in the U.S. and West Germany: A Comparative Study from an American Perspective*, 28 AM. J. COMPAR. L. 367, 385–388 (1980); STEVEN J. SILVIA, *HOLDING THE SHOP TOGETHER: GERMAN INDUSTRIAL RELATIONS IN THE POSTWAR ERA* 38–41 (2013).

<sup>25</sup> KATHLEEN THELEN, *VARIETIES OF LIBERALIZATION AND THE NEW POLITICS OF SOCIAL SOLIDARITY* 58 (2014).

<sup>26</sup> Michael Oberfinchtner & Claus Schnabel, *The German Model of Industrial Relations: (Where) Does It Still Exist?* 239 J. ECON. & STAT. 5, 10, 21 (2019). (While workers at companies

councils are granted codetermination rights on topics such as health and safety and working hours.<sup>27</sup> They also are entitled to information and consultation rights on topics such as the introduction of new work methods and technologies – an especially important right in a time of rapid technological change. Additionally, workers at large companies have an automatic voice through representation on corporate boards.<sup>28</sup>

In Denmark, unions have played an even more active role in negotiating social policy. Unions and employers have, for example, collectively negotiated national policies on worker training and parental leave. Moreover, union bargaining in Denmark often builds on statutory entitlements. For example, while older workers and workers with disabilities had statutory protections against age discrimination, social partners expanded these protections through collective bargaining such that workers now have the right to be placed in “light jobs” if they are unable to perform their positions.<sup>29</sup>

And in Norway, unions, employers, and the state have joined together to bargain for policies that improve working conditions so that older workers can remain in the workplace.<sup>30</sup> This bargaining produced the Inclusive Workplace Agreement, which aims to reduce the use of sick and disability leave, extend workers’ working lives, and recruit more workers with disabilities and other vulnerable groups.<sup>31</sup> The social partners also serve on the board of the government-funded Centre for Senior Policy, which performs research regarding senior workers and works with companies to improve their policies.<sup>32</sup>

In France, the political organization of unions enables them to mobilize on issues regarding retirement. For example, in 2023, in response to President Emmanuel Macron’s proposal to reform the pension system by raising the legal age of retirement from sixty-two to sixty-four, France’s eight largest labor unions coordinated nationwide strikes across multiple sectors, including transportation, education, and energy.

with five or more employees can form works councils, they are predominantly found at larger companies.).

<sup>27</sup> Eur. Trade Union Inst., *National Industrial Relations: Germany*, <http://www.worker-participation.eu/National-Industrial-Relations/Countries/Germany> (accessed Mar. 12, 2021).

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

<sup>29</sup> THELEN, *supra* note 25, at 65–67.

<sup>30</sup> Toms Feifs et al., *Role of Governments and Social Partners in Keeping Older Workers in the Labour Market*, EUROFOUND (2013), <https://www.eurofound.europa.eu/system/files/2021-05/EF13231EN.pdf>.

<sup>31</sup> Tore Langeland, *Impact of the More Inclusive Working Life Agreement*, EUROFOUND (Nov. 13, 2011), <https://www.eurofound.europa.eu/publications/article/2011/impact-of-the-more-inclusive-working-life-agreement>.

<sup>32</sup> Bjørn Halvorsen & Asmund Lunde, *Policy Measures to Support Older Workers in Norway*, NORWEGIAN MINISTRY OF LABOUR AND SOCIAL AFFAIRS (2015), <https://ec.europa.eu/social/BlobServlet?docId=14785&langId=en>.



These systems are by no means perfect. Workers' power in these countries has also declined in the face of globalization and neoliberalism.<sup>33</sup> However, a viable framework exists to set fair standards for all workers and to enable senior workers and retirees to exercise their collective voice.

The US lacks any comparable framework. To be sure, the law does facilitate workers' political voice in important ways. Section 7 of the NLRA has been interpreted to protect workers' concerted activity that occurs through political channels – even for nonunion workers, as long as such activity relates to employment issues.<sup>34</sup> In addition, unions, like other organizations, may engage in electoral politics and lobby government officials. Many unions spend a great deal of energy and money on political activity, with significant effect. They have helped enact legislation that protects all workers, from the Fair Labor Standards Act and the Occupational Safety and Health Act to the Family and Medical Leave Act and the Affordable Care Act. But US law does little to facilitate a voice for working people in the various decisions that affect senior workers or that will be posed by the putative 100-year life.

### 9.5 A NEW LABOR LAW FOR THE 100-YEAR LIFE

What might a different system look like, one that builds on the current regime but gives workers – who may soon enjoy longer lifespans and many different stages of work – greater power over decisions about the shape of work and the political economy?

First, as in the industrial democracies discussed earlier, the law should provide for sectoral bargaining so that collective bargaining agreements apply to workers throughout a region or sector, effectively forming the basis for employment policy in those sectors, while at the same time providing for worker voice at the worksite and firm level through works councils, local unions, and corporate board representation.<sup>35</sup> Such a model would enable workers to move between firms more easily over time and limit risks of leaving and entering the workforce. More generally, research suggests that where sectoral bargaining is combined with worksite

<sup>33</sup> Todd E. Vachon et al., *Union Decline in a Neoliberal Age: Globalization, Financialization, European Integration, and Union Density in 18 Affluent Democracies*, 2 *SOCIUS* (July 2016), at 1, 13–14.

<sup>34</sup> *Eastex, Inc. v. Nat'l Lab. Rels. Bd.*, 437 U.S. 556, 564 (1978).

<sup>35</sup> Kate Andrias & Brishen Rogers, *Rebuilding Worker Voice in Today's Economy*, ROOSEVELT INST. (2018), <https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI-Rebuilding-Worker-Voice-201808.pdf>; Sharon Block & Benjamin Sachs, *Clean Slate for Worker Power: Building a Just Economy and Democracy*, <https://clje.law.harvard.edu/clean-slate-for-worker-power-building-a-just-economy-and-democracy/> (accessed Oct. 1, 2023); Mark Barenberg, *Widening the Scope of Working Organizing*, ROOSEVELT INST. (2015), <https://rooseveltinstitute.org/publications/widening-the-scope-of-worker-organizing/>.

organization, racial and gender wage gaps decrease and unions can exercise more economic and political power.<sup>36</sup>

Second, the law should also give organizations of workers a formal role in developing social benefits and policies that will be critical for expanding lifespans, for example, through administrative processes at the local, state, and/or federal levels of government.<sup>37</sup> Beyond simply permitting group participation, as notice-and-comment rule-making currently does, the law could give worker organizations a formal seat at the table in negotiating retirement, disability, family leave, and childcare benefits, and, perhaps, eventually job guarantees, basic income, and more.

Third, to make such social bargaining effective for workers at every stage in the 100-year life, the law should encourage or facilitate new forms of worker organizations that encompass a broader range of working-class people, including those unemployed, engaged in paid and unpaid caregiving, and retired.<sup>38</sup> Examples of such nontraditional worker organizations exist within our own system, past and present. For example, following the Great Depression, unemployed workers organized in large numbers.<sup>39</sup> The movement of the unemployed originated in local communities, with protests and marches demanding – and sometimes winning – public relief funding from local and state governments. Members of unemployed worker groups also banded together and entered relief offices demanding immediate relief for individuals denied aid. A national federation called the Workers Alliance was later formed, consisting of most of the large organizations of unemployed workers. This federation prioritized lobbying for national relief programs over direct action in localities; ultimately, it was unable to win passage of its prioritized legislation for expanded direct relief, higher pay on federal Works Progress Administration projects, and a permanent public works program, and its local organizing diminished as well. Still it provided an important voice for unemployed workers through a critical period.

Welfare organizing of the 1960s provides another example of a nontraditional working-class organizing effort. During this period, welfare recipients, the majority of them Black women, began to organize to change local welfare policies, overturn

<sup>36</sup> See, e.g., Jonas Pontusson & David Rueda, *Comparative Political Economy of Wage Distribution: The Role of Partisanship and Labour Market Institutions*, 32 BRITISH J. POL. SCI. 381, 289–290, 301 (2002); Andrias, *supra* note 9, at 94; Guy Mundlak, *We Create Spots from Which We Shine to Others*, 38 COMPAR. LAB. L. & POL'Y J. 301 (2017).

<sup>37</sup> For existing and historical examples of such administrative initiatives, see Kate Andrias, *An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act*, 128 YALE L.J. 616 (2019); K. Sabeel Rahman, *Policymaking as Power-Building*, 27 S. CAL. INTERDISC. L.J. 315, 340–350 (2017).

<sup>38</sup> Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L.J. 546 (2021).

<sup>39</sup> FRANCES FOX PIVEN & RICHARD A. CLOWARD, *POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED AND HOW THEY FAIL* 41, 50–60, 68–91 (1978).

benefit denials for members, and win special grants for welfare recipients to cover household furnishings and clothing.<sup>40</sup>

Numerous examples of organizations engaging workers in nontraditional employment exist in the contemporary landscape. For example, home-care organizing has engaged hundreds of thousands of low-wage, formerly isolated workers in collective organization, even without the existence of a central worksite or single employer, helping raise wages and improve funding for caregiving.<sup>41</sup> The Freelancers Union represents independent workers, offering insurance benefits and other resources to various types of freelancers and advocating for legislative protections on their behalf. The Domestic Workers Alliance has succeeded in winning domestic workers' bills of rights in numerous states; the bills provide employment protections such as paid time off and overtime rights. Many Hollywood writers work independently, but through their membership in the Writers Guild of America, they are guaranteed minimum pay levels, residuals, and retirement and health coverage. And community-based worker centers across the nation have organized to combat wage theft, co-enforce workplace protections with state and local governments, and advocate for increased pay and protections.

In a different vein, several organizations already organize retirees. AARP provides individual benefits to members and advocates on behalf of older and retired Americans. The Alliance for Retired Americans is sponsored by unions and aims to mobilize retired union members, seniors, and community activists to advocate for various political causes such as Social Security expansion and reducing prescription drug prices. Several unions also have their own retiree chapters and organizations.

More examples exist abroad. As Professor Katherine Stone has detailed, Japan has seen an explosion of nontraditional forms of labor organizations: City unions have pressured employers in an entire metropolitan area around work-related concerns; women's unions have organized to further the interests of women workers; and ethnically specific unions have asserted pressure on behalf of ethnic groups.<sup>42</sup> In Europe's most progressive social democracies, not only are traditional unions engaged in defining social programs that benefit all workers, but nontraditional worker and retiree organizations exist as well, working to advance policy concerning issues such as social security, pensions, and health treatment among retirees.<sup>43</sup>

<sup>40</sup> Premilla Nadasen, *Expanding the Boundaries of the Women's Movement: Black Feminism and the Struggle for Welfare Rights*, 28 *FEMINIST STUD.* 271, 275–277 (2002); PIVEN & CLOWARD, *supra* note 39, 286–287, 297–300.

<sup>41</sup> For a history of care worker organizing, see generally EILEEN BORIS & JENNIFER KLEIN, *CARING FOR AMERICA: HOME HEALTH WORKERS IN THE SHADOW OF THE WELFARE STATE* (2015).

<sup>42</sup> Katherine Van Wezel Stone, *Green Shoots in the Labor Market: A Cornucopia of Social Experiments*, 36 *COMPAR. LAB. L. & POL'Y J.* 293, 319–320 (2015).

<sup>43</sup> Ferpa, *The History of Ferpa*, <https://ferpa.org/history-of-ferpa/> (accessed Mar. 5, 2021); see also Eurofound, *Retirement*, <https://www.eurofound.europa.eu/topic/retirement> (accessed Mar. 5, 2021); AGE, *About AGE*, <https://www.age-platform.eu/about-age> (accessed Mar. 5, 2020).

These kinds of nontraditional but democratic organizations can be nurtured and expanded with supportive legal frameworks.<sup>44</sup> For example, law can facilitate the growth of organizations by enabling the aggregation of resources, by allowing access to workers, information, and free spaces to organize, and by effectively protecting workers from retaliation for organizing and engaging in concerted action. In addition, by granting organizations a role in negotiating social benefits in administrative processes, as discussed earlier, the law can give the organizations greater legitimacy, aiding their organizing efforts. Government programs can also partner with democratic membership organizations that represent underrepresented constituencies, giving them grants to provide and administer benefits. For example, under the Ghent system, unions operate unemployment insurance funds and provide benefits to unemployed workers.<sup>45</sup> US policymakers could extend this model to provide portable benefits, training, and increased workplace enforcement to workers across the span of the 100-year life.<sup>46</sup>

## 9.6 CONCLUSION

As Anne Alstott has written, the predicted “leap in longevity is likely to challenge many of our expectations about work” and could “revolutionize” many of our relationships.<sup>47</sup> But without a fundamental change in the way work is organized, the leap in longevity will also augment and extend existing power dynamics that define the lives of many workers in America, making inequalities and indignities even more acute. To avoid that result, workers – of all kinds and backgrounds – must have a voice in the decisions about what work looks like over the course of the 100-year life.

Of course, one might worry that the reforms suggested above are fanciful or impossible to achieve. Indeed, past experience highlights the difficulty of labor law reform, even in times of unified democratic control of government.<sup>48</sup> Yet the obstacles have been overcome in the past and can be overcome again.<sup>49</sup> COVID-19 made the economic plight of poor and working-class Americans politically salient, as illustrated by the massive, redistributive economic stimulus enacted in March of 2021 and subsequent legislation like the Infrastructure Investment and Jobs Act of

<sup>44</sup> See Andrias & Sachs, *supra* note 38, at 555.

<sup>45</sup> Matthew Dimick, *Labor Law, New Governance, and the Ghent System*, 90 N.C. L. REV. 319, 329–336 (2012); Jochen Clasen & Elke Viebrock, *Voluntary Unemployment Insurance and Trade Union Membership*, 37 J. SOC. POL’Y 433, 437–438 (2008).

<sup>46</sup> David Madland & Malkie Wall, *American Ghent: Designing Programs to Strengthen Unions and Improve Government Services*, CTR. FOR AM. PROGRESS (2019), <https://www.americanprogress.org/issues/economy/reports/2019/09/18/474690/american-ghent/>.

<sup>47</sup> Alstott, *supra* note 6, at 147, 148.

<sup>48</sup> Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1530–1531 (2002).

<sup>49</sup> See Andrias & Sachs, *supra* note 38, at 631–637.

2021 and the Inflation Reduction Act of 2022. The resurgence of organizing among workers, tenants, and debtors that has occurred in the wake of the pandemic has only increased this salience. Meanwhile, the federal structure of our government creates openings for legislative change at the state and local levels, even when federal change is impossible. Ultimately, even if the more ambitious reforms discussed earlier are not possible in the near term, incremental, achievable reforms can get us closer to a world in which workers are not working to death but rather have a collective voice in the 100-year life.