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A New Deal for a Right to Work: Confronting Racism and Inequality in the U.S.

James A. Gross
Cornell University

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ARTICLE

A NEW DEAL FOR A RIGHT TO WORK: CONFRONTING RACISM AND INEQUALITY IN THE U.S.

JAMES A. GROSS*

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* Professor Emeritus, Cornell University. B.S. La Salle University; MBA Temple University; Ph.D. University of Wisconsin.

This paper is intended to revive the discussion of the human right to work as it was originally intended: as a right to guaranteed, creative work for all. Using the rights violation-filled economic history of Black men and women in this country as a theme, the paper demonstrates that the human right to work in dignity is essential to the realization of other economic, political and social rights necessary to live a fully human life; it also elevates economic race discrimination from being a violation of civil rights to being a violation of human rights.

I am most grateful to William Herbert, Distinguished Lecturer, Hunter College CUNY and Executive Director of the National Center for the Study of Collective Bargaining; Lance Compa, Senior Lecturer Emeritus, Cornell University; Jeffrey Hilgert, Associate Professor, University of Montreal; my attorney son John Gross; and my Cornell colleagues Rhonda Clouse and Brigid Beachler for their commentary on earlier drafts and helpful suggestions. My thanks also to Ms. Brianna Chapa, Editor in Chief of the *Scholar*.

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INTRODUCTION

Whites have always controlled the country’s major economic and political institutions at all levels.¹ Starting with slavery, the enduring and pervasive dogmas of White superiority and Black inferiority, once openly asserted as “keeping Negroes in their place,” were also used to restrict Black men and women to subordinate “negro jobs.”² The vast riches of the United States “were available to all who had the enterprise to take them and the good fortune to be White.”³ This denial of the right to work in freely chosen endeavors continues to have immense consequences for Black men, women, and children in every aspect of their economic, political, and social rights.⁴

1. See generally *Racial Discrimination in the United States*, HUM. RTS. WATCH (Aug. 8, 2022), <https://www.hrw.org/report/2022/08/08/racial-discrimination-united-states/human-rights-watch/aclu-joint-submission> [<https://perma.cc/A7FF-L65V>] (documenting the historical power inequalities present in societal structures and systems and the impact they have on different racial relations in the United States).

2. *Id.*

3. HENRY STEELE COMMAGER, *THE AMERICAN MIND: AN INTERPRETATION OF AMERICAN THOUGHT AND CHARACTER SINCE THE 1880’S* 5 (1950) (emphasizing that opportunities for upward social and economic mobility in the United States were generally afforded only to White citizens).

4. See generally Valerie Wilson & William Darity Jr., *Understanding Black-White Disparities in Labor Market Outcomes Requires Models That Account For Persistent Discrimination And Unequal Bargaining Power*, <https://www.epi.org/unequalpower/publications/understanding-black-white-disparities-in-labor-market-outcomes/> [<https://perma.cc/497E-GHZN>] (detailing the

Here, the discussion intends to provide a new perspective on those violations, suggest remedies, and spark further discussion. The history of Black men and women in their struggles for work and justice, that is, for their economic, civil, and political rights, provides a deeper understanding and appreciation of the nature of those rights and the need for them—particularly the economic right to work. In turn, the principles underlying those rights constitute support for new programs and policies that achieve racial justice through work.

Authors of human rights declarations have set forth economic, civil, and political rights, but those participating in the struggle for work and struggling for everyday needs—are the best experts on what these abstract rights mean in their daily lives. The perspectives of those struggling against racial injustice reveal most clearly the inhumanity inherent in the White superiority doctrine as well as the vast and vital work that needs to be done but is not; the human potential and creativity that could be realized but are not; and the people and communities whose life experiences could be more human and fulfilling but are not.

Black men, women, and children have seen and experienced how inextricably intertwined work and justice are. Work can be “something momentous.”⁵ It can empower people to take control of their own lives by being able to choose a place and an activity, an occupation, or a job “where what they are and want to be is part and parcel with what they do.”⁶ Added to this self-development and self-realization is the opportunity to be an active member of community life and the ability to influence the decisions that affect people’s lives.⁷

The narrow economic definition of poverty as a “severe shortage of incomes and assets” ignores that poverty—including the absence of work—denies many fundamental rights, freedoms, capabilities, and opportunities needed to break free of dependence and to live a fully human

fact that Black workers are underrepresented in high-wage jobs and highlights disparities faced by Black Americans in education, employment, and other areas).

5. See David Wiggins, *Work, its Moral Meaning or Import*, in *THE RIGHT TO WORK: LEGAL AND PHILOSOPHICAL PERSPECTIVES* 11, 13 (Virginia Montouvalou, ed., Hart Publ’g, 2014) (identifying the material and non-material benefits work provides to individuals).

6. *Id.* at 14.

7. See Je Penner, *Aristotle, Arendt and the Gentleman: How the Conception of Remuneration Figures in our Understanding of a Right to Work and Be Paid*, in *THE RIGHT TO WORK: LEGAL AND PHILOSOPHICAL PERSPECTIVES* 87, 96–7 (Virginia Montouvalou, ed., Hart Publ’g, 2014) (discussing the impact that work can have on individuals and their community).

life.⁸ Consequently, although providing funds or “cash transfers” directly to poor people can help reduce poverty in the strictly economic definition, cash payments cannot replace work as a provider of self-realization, self-fulfillment, and community participation.⁹ Dr. Martin Luther King often called for a guaranteed income but consistently coupled the same with a call for guaranteed work.¹⁰

The history of Black men, women, and children in this country demonstrate the interdependence of economic rights and civil and political rights.¹¹ Although historically labeled as civil rights protests by outsiders, Black protest movements have never been only for civil rights; they have also advocated for economic rights (jobs).¹²

Although Dr. King understood and preached that “the human right to a decent house’ was as morally absolute as the right to vote,” his demands for economic rights and his support for unions have been consistently downplayed by those outside the Civil Rights movement.¹³ However, those struggling knew that civil rights were irrelevant, if not meaningless, without bread.¹⁴ Henry Steele Commager wrote of the interdependence of political liberty and economic security seventy years ago:

What did the right to vote mean to a Mississippi Negro; what did the privileges and immunities clause mean to Steinbeck’s Okies; what did the rights of free speech and assembly mean to CIO organizers in Jersey City? Of what value was the guarantee of due process of law to a Negro confronted by a white jury in a case involving the honor of a white woman? What was the price of freedom of worship to Jews who paid for orthodoxy by social ostracism? What did freedom of contract mean to a charwoman, except that she was permitted to work ten hours instead of eight and saved from the dangerous regimentation, implicit in a minimum wage? Clearly it was necessary...to supplement traditional freedoms adequate to a

8. See ROB JENKINS & JAMES MANOR, *POLITICS AND THE RIGHT TO WORK: INDIA’S NATIONAL RURAL EMPLOYMENT GUARANTEE ACT*, 11 (Oxford Univ. Press, 2017).

9. *Id.* at 11–13, 231, 236.

10. THOMAS F. JACKSON, *FROM CIVIL RIGHTS TO HUMAN RIGHTS: MARTIN LUTHER KING, JR. AND THE STRUGGLE FOR ECONOMIC JUSTICE* 247 (2007) (emphasizing Dr. King’s passion for achieving economic equality).

11. *Id.*

12. *Id.* at 245.

13. *Id.* at 244.

14. COMMAGER *supra* note 3, at 341.

pastoral society of the eighteenth century with new ones efficacious in the industrial society of the twentieth.¹⁵

However, the unfortunate reality in this country is that the only rights afforded to citizens are often classified as “negative rights,” meaning they are civil and political rights that defend individual freedom against government interference.¹⁶ There was a time when the United States and other countries internationally understood the right to work as a fundamental human right that supported life, freedom, and a fully human existence.¹⁷

In his January 11, 1944 message to Congress, President Franklin Roosevelt proposed an Economic Bill of Rights because, in his words, political and civil rights standing alone had not assured equality in the pursuit of happiness.¹⁸ Those rights were insufficient because individual freedom cannot exist without economic security and independence: “People who are hungry and out of a job are the stuff of which dictatorships are made.”¹⁹ Based on “self-evident economic truths,” Roosevelt proposed a Second Bill of Rights, the first of which was “the right to a useful and remunerative job in the industries or shops, or farms or mines of the Nation.”²⁰

At the end of World War II, an American Law Institute committee of lawyers and political scientists representing most of the world’s nations drafted a Statement of Essential Human Rights.²¹ Among the economic rights, the right to work is defined as “the provision of useful work for all” and described as holding “the central place among the social claims which the common man expects the economic system to satisfy.”²²

15. *Id.*

16. *See Guide to the Issues: Understanding the Difference Between Positive and Negative Rights*, ALA. POL’Y INST. 1.

17. *See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) (including the right to work as a fundamental human right).

18. *See generally* CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR’S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* 242–43 (2004) (describing President Roosevelt’s motivation to create the Bill of Rights).

19. *Id.* at 243.

20. *Id.* at 242–43.

21. *See* Am. L. Inst., *Statement of Essential Human Rights* 3–12 (1945) (introducing eighteen freedoms that are essential to human life including economic, civil, and political rights).

22. *See* C. Wilfred Jenks, *The Five Economic and Social Rights*, 243 *ANNALS AM. ACAD. POL. & SOC. SCI.* 40 (1946) (outlining the right to work as a central force in backing economic rights).

Clearly influenced by the leadership of Eleanor Roosevelt, the United Nations in December of 1948 issued a Universal Declaration of Human Rights (UDHR) which, although not a binding treaty, became the foundation for subsequent human rights covenants and conventions.²³ The UDHR sets forth economic rights as well as traditional civil and political rights including Article 23.1: “Everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment.”²⁴ Taken as a whole, the UDHR affirms the necessary interdependence of civil and economic rights.²⁵

These documents issued within a few years of each other, defined what was needed for people to live full human lives—not lives at levels of survival and basic minimums—but full human lives.²⁶ What was new, certainly for the United States, was the positing of economic rights and the assertion, as expressed by William Draper Lewis, Director of the American Law Institute: that “the rights to work, education, food, housing, and social security [are] essential to the freedom of the modern individual.”²⁷

At the same time as the issuance of these rights declarations, Karl Polanyi authored his classic, *The Great Transformation*, calling for society to regulate the market economy rather than the other way around.²⁸ Polanyi mentioned that “no mere declaration of rights can suffice.”²⁹ He called for institutions that would make those rights effective “headed by the right of the individual to a job under approved conditions, irrespective of his or her political or religious views, or of color and race.”³⁰

23. See generally G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

24. *Id.*

25. *Id.*

26. See Essential Human Rights, *supra* note 21, at 3–12 (establishing the historical significance of the first document meant to support a full human life); see also G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) (providing an example of the subsequent economic and civil right support developed after the Statement of Essential Human Rights).

27. See William Draper Lewis, *Human Rights in England and the United States*, 243 ANNALS AM. ACAD. POL. AND SOC. SCI. 60, 66 (1946) (proclaiming the novelty of recognizing the importance of the right to work as essential to modern freedoms).

28. See KARL POLANYI, *THE GREAT TRANSFORMATION* 264 (Paperback ed., Beacon Press) (1957) (shifting attention to an author who saw the importance of societal control in a market economy).

29. *Id.*

30. *Id.*

Despite the promising rights talk of the late 1940s, Congress decimated the only two legislative efforts to guarantee work. The first was the 1945 Full Employment Bill³¹ which, echoing Roosevelt, declared that “every American able to work and willing to work had the right to a useful and remunerative job.”³² The second was African-American Congressman Augustus Hawkins’ 1974 bill, which provided a legally enforceable federal government-guaranteed right to a job for all who wanted and could work.³³

Since then, human rights activists have also largely ignored or side-stepped the central “right to work” issue.³⁴ Discussions of the right to work have become discussions of “full employment” or “non-discriminatory” opportunities to look for work if work is available or conditions at work if employment is secured.³⁵ It is misleading to pretend that these discussions address a right to work.

Today in the United States, the “right to work” is commonly understood as prohibiting agreements that require union membership or the payment of union dues to obtain or retain employment.³⁶ The phrase has also been used to justify taking the jobs of striking workers.³⁷ By the end of 1947, fourteen states, mainly in the south and plains, passed “right to work” laws.³⁸ In 1947, Congress made an Orwellian change in the traditional meaning of the right-to-work part of the Taft-Hartley Act,

31. H.R. 2202 (1945) and *also* STEPHEN KEMP BAILEY, *CONGRESS MAKES A LAW: THE STORY BEHIND THE EMPLOYMENT ACT OF 1946*, at 227 (Columbia University Press) (1950) (describing the history and evolution of the Employment Act).

32. *See* BAILEY, *supra* note 31, at 47.

33. *See* H.R. 15476 (1974).

34. *See* James W. Nickel, *Giving Up on the Human Right to Work*, in *THE RIGHT TO WORK: LEGAL AND PHILOSOPHICAL PERSPECTIVES* 137 (Virginia Montouvalou, ed., 2014).

35. *See* Katherine V.W. Stone, *A Right to Work in the United States: Historical Antecedents and Contemporary Possibilities*, in *THE RIGHT TO WORK: LEGAL AND PHILOSOPHICAL PERSPECTIVES* 275, 284 (Virginia Montouvalou, ed., 2014) (noting the transition away from the right to work into the right to full employment).

36. *Id.*

37. Ray Stannard Baker, *The Right to Work: The Story of the Non-Striking Miners*, *MCCLURE’S MAG.*, Nov. 1902-Apr. 1903, at 324–35 (1903) (interviewing coal miners who experienced bullying by unionizers who forced them into thinking they did not have the right to work beyond the union’s permission).

38. *See* REUEL SCHILLER, *FORGING RIVALS: RACE, CLASS, LAW, AND THE COLLAPSE OF POSTWAR LIBERALISM* 85 (2015) (discussing southern states’ rights to work laws and how they attempted to better insulate businesses from union organizing).

reinforcing these state laws and authorizing other states to adopt such legislation.³⁹

Although supporters of these laws portrayed themselves as defenders of workers' rights, many of their most powerful were allies of southern segregationists determined to maintain a Jim Crow social order threatened by unions organizing Black and White workers.⁴⁰ This anti-union version of the right to work took root in part by exploiting White working-class racism and widespread racism in the labor movement itself.⁴¹

This movement not only changed the meaning of the right to work in the public mind but also undermined black protest movement mobilization.⁴² For example, Dr. King dreamed of a "Negro-Labor Alliance" for "democratic socialism" and a "legion of the deprived" uniting "organized and unorganized workers, the unemployed, welfare-reliant mothers, and the poor of all racial-ethnic groups."⁴³ At the 1961 AFL-CIO's Fourth Constitutional Convention, for example, Dr. King called the labor movement and the "Negro" freedom movement the "two most dynamic and cohesive liberal forces in the country."⁴⁴ He also warned of those who were exploiting weaknesses in the relationship, particularly the fact of racial discrimination in the labor movement.⁴⁵ Only the most progressive interracial unions stood by him—not the dominant forces in the AFL-CIO.⁴⁶

The reality is that profit-seeking employers in the so-called private sector of the economy are the major deciders of whether work is available,

39. *Id.*

40. *Id.* at 85–86.

41. *Id.* at 133.

42. *Id.* at 134–35.

43. See JACKSON, *supra* note 10, at 8 (expressing the hope had by activists in countering efforts to create right-to-work laws and form interracial unions).

44. See John Kugler, *Martin Luther King Holiday History Lesson... '...the Labor-Hater and Labor-Baiter is Virtually Always a Twin-Headed Creature Spewing anti-Negro Epithets from one Mouth and anti-Labor Propaganda from the Other Mouth...'*, SUBSTANCE NEWS (Jan. 17, 2014), <http://www.substancenews.net/articles.php?page=4740> [<https://perma.cc/X9DP-GL86>] (addressing the potential for a powerful political dynamic among social movements in the South).

45. *Id.*

46. See JACKSON, *supra* note 10, at 8 (listing meatpackers, hospital workers, and public employee unions as those who supported Dr. King).

the nature of that work, and the working conditions.⁴⁷ In other words, the profit motive of employers in the “free market” is a major determinant of what economic, civil, political, and social rights people can realize and exercise.⁴⁸ That explains why so many individuals cannot live full and meaningful lives.⁴⁹

Although the government is supposed to promote the public interest, its role as a job creator is limited to revitalizing the economy in times of crisis—such as the New Deal during the Great Depression—or facilitating maximum production in times of international crises—such as World War II.⁵⁰ This traditional governmental role as an adjunct to the private market system has helped cause and perpetuate the denial of economic and civil rights to many, particularly Black men, women, and children.⁵¹ The enormity and duration of this human tragedy demand the government’s permanent and continuous role in protecting its most vulnerable and creating conditions—including work—that will enable all to live fully human lives.

Not just any work is life-affirming. The lives of Black men and women, kept in their “Negro jobs” and in their “places” by public and private forces, provide shameful evidence of the denial of access to creative and life-affirming jobs freely chosen, but also their confinement to the worst life-denying jobs.⁵² Their lives were considered and are considered cheap, no discussion of work can ignore that. If the life-affirming potential of work is momentous, so is work’s potential to diminish life’s possibilities or even destroy human life.

It is time to revive the discussion started by those “right to work” and “right to human life” advocates during the 1940s and continued into the

47. See generally Christian E. Weller, *African Americans Face Systematic Obstacles to Getting Good Jobs*, CTR. AM. PROGRESS (Dec. 5, 2019), <https://www.americanprogress.org/article/african-americans-face-systematic-obstacles-getting-good-jobs/> [https://perma.cc/J5X4-GBAT].

48. See generally A. Philip Randolph, Int’l President, Excerpts from the Keynote Address to the Policy Conference of the March on Washington Movement (Sept. 26, 1942) (listing the goals of the Policy Conference at the March on Washington as economic, political, social, and racial equality).

49. See *id.*

50. See generally Helen Lachs Ginsburg, *Historical Amnesia: The Humphrey-Hawkins Act, Full Employment and Employment as a Right*, REV. BLACK POL. ECON. 121, 122 (2012).

51. *Id.* at 129.

52. See JOHN W. BUDD, *THE THOUGHT OF WORK* 10 (2011) (lamenting the harsh realities of modern slavery); see also BAILEY, *supra* note 31, at 27.

1970s by Augustus Hawkins.⁵³ Embedded in a clash of conflicting values are questions related to the right to work, ranging from the identification of public welfare with business success—in the words of former President Calvin Coolidge “the business of America is business”—to Martin Luther King’s call for a “radical revolution in values” a rapid “shift from a thing-oriented society to a person-oriented society.”⁵⁴ King added:

When machines and computers, profit motive and property rights are considered more important than people, the giant triplets of racism, extreme materialism and militarism are all incapable of being conquered.⁵⁵

Franklin Roosevelt posed the ultimate question in 1932 while campaigning for the presidency: “Whether individual men and women will have to serve some system of government or economics or whether a system of government and economics exists to serve individual men and women.”⁵⁶ The answer to that question depends on whether all people can exercise a right to work freely chosen.

I. A RIGHT TO WORK IN THE UNITED STATES

In the decades preceding the Great Depression, the United States was a businessman’s civilization.⁵⁷ Since the drafting of the Constitution, the federal government had intervened to promote business security and economic development in many areas: chartering corporations, enforcing “freedom of contract,” sponsoring canal and railroad building, all culminating in great corporate wealth and power. This enormous growth in the

53. See generally Ginsburg, *supra* note 50, at 121 (reviewing the historical context of employment legislation in the United States).

54. Compare COMMAGER *supra* note 3, at 45, with Martin Luther King, Jr., Beyond Vietnam: A Time to Break Silence, Address at Riverside Church, New York City (Apr. 4, 1967) (emphasizing the need to focus on people).

55. Martin Luther King, Jr., *supra* note 54.

56. Franklin D. Roosevelt, *Every Man Has a Right to Life*, in *NEW DEAL THOUGHT* 45, 46 (Howard Zinn, ed., 1966).

57. See generally *Rise of Industrial America, 1876 to 1900: Overview*, LIBR. OF CONG.: U.S. HIST. PRIMARY SOURCE TIMELINE, <https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/rise-of-industrial-america-1876-1900/overview/> [<https://perma.cc/EX5W-M6W9>] (providing background for how industrial growth in the late nineteenth century transformed the U.S.); see also *Progressive Era to New Era, 1900-1929: Overview*, LIBR. OF CONG.: U.S. HIST. PRIMARY SOURCE TIMELINE, <https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/progressive-era-to-new-era-1900-1929/overview/> [<https://perma.cc/Y9CA-5D4V>] (providing that the U.S. experienced continued economic growth and prosperity during the 1920s).

scale and power of private employers was portrayed, however, as consistent with traditional American values of a disappearing agrarian age: rugged individualism; the rewards of hard work; self-reliance; (ironically) distrust of government interference with private enterprise; and an unquestionable conviction that the United States was superior to all the other countries in the world.⁵⁸

It took a historic economic disaster—the Great Depression—to undermine people’s faith in prosperity-guaranteeing private enterprise and to bring about revolutionary changes in the public’s conception of economic rights and the government’s need to deal with the human consequences of business failures.⁵⁹ Franklin Roosevelt’s New Deal was the first time the federal government assumed the social and economic responsibility of mitigating the suffering of the victims of market system failures.⁶⁰ For many, the New Deal restored to some degree economic security through job-providing programs such as the Works Progress Administration, the Public Works Administration, the Civilian Conservation Corps, and other programs, as well as minimum wages and relief payments.⁶¹

However, the New Deal did not seriously address the right to work.⁶² Its programs created jobs, but as John Dewey wrote: “The positive problem of instituting a social-economic order in which all those capable of productive [and creative] work will do the work for which they are fitted remains practically untouched.”⁶³

Despite its accomplishments in those extraordinarily desolate times, the New Deal failed those most in need—particularly by not providing a guarantee of work.⁶⁴ Of course, the poorest of the poor were the four million formerly enslaved people and their descendants, who were still

58. See generally BAILEY, *supra* note 31, at 5–13 (overviewing the evolution of American ideals throughout the nineteenth century).

59. See Jerry D. Marx, *American Social Policy in the Great Depression and World War II*, VCU SOC. WELFARE HIST. PROJECT, <https://socialwelfare.library.vcu.edu/eras/great-depression/american-social-policy-in-the-great-depression-and-wwii/> [<https://perma.cc/K56D-2G7Q>] (emphasizing that by the time FDR took office, Americans who had stigmatized “poor relief” were now seeking relief for themselves).

60. *Id.*

61. *Id.*

62. Cf. Marx, *supra* note 59 (describing the governments approach in dealing with economic insecurity, except for addressing the right to work).

63. John Dewey, *The Old Problems are Unsolved*, in NEW DEAL THOUGHT 409, 410 (Howard Zinn, ed., 1966).

64. *Id.*

concentrated in southern agriculture but steadily moving to northern cities.⁶⁵

A. From Slavery to New Deal

After the Emancipation Proclamation, Congress created the Freedmen's Bureau to oversee a "deranged" labor market.⁶⁶ The Bureau was assigned the overwhelming obligation of persuading former slaves that they had to work, aiding them in finding employment, and protecting them against fraud and exploitation.⁶⁷ Although the Bureau had some limited accomplishments in this "deranged" labor market, it was more successful in establishing schools, providing medical assistance, and distributing food rations.⁶⁸ The overall effect was to make former slaves the wards of the federal government.⁶⁹

The withdrawal of federal troops solidified the decision to return the resolution of the "Negro Problem" to the southern states.⁷⁰ The South's determination of the "Negro's Place"—separation, disenfranchisement, relegation to the economic bottom, and denial of equality in all aspects of life—was accomplished through a system of laws, customs, and practices that became known as Jim Crow.⁷¹ As an illustration, the South Carolina code:

[P]rohibited textile factories from permitting laborers of different races from working together in the same room, or using the same entrances, pay windows, exits, doorways, stairways or windows [sic] at the same time, or the same lavatories, toilets, drinking water buckets, pails, cups, dippers or glasses at any time.⁷²

65. See PAUL SKEELS PEIRCE, *THE FREEDMEN'S BUREAU: A CHAPTER IN THE HISTORY OF RECONSTRUCTION* 139 (Univ. Vol. 3 1904) (documenting the diaspora of former slaves into various fields of labor-based work).

66. *Id.* at 138–39.

67. *Id.*

68. *Id.* at 86–94.

69. See W.E.B. DU BOIS, *THE FREEDMEN'S BUREAU*, *ATL. MONTHLY*, Mar. 1901, at 354, 357 (1901).

70. See VANN C. WOODWARD, *THE STRANGE CAREER OF JIM CROW*, 6 (3d. rev. ed. 1974) (declaring that this action abandoned the former slaves and left them at "the disposition of the dominant Southern white people").

71. *Id.* at 6–7.

72. *Id.* at 98.

White supremacy through segregation extended to every aspect of life: transportation; homes for the blind; recreation and sports; education; housing; elevators; restaurants; hospitals; orphanages; prisons; and even funeral homes, morgues, and cemeteries.⁷³

At the time of the Great Depression, the South's economy was still predominantly agricultural, and the "Southern Way of Life" had consigned Black farmers to being sharecroppers, tenant farmers, and low-wage laborers and domestics under White landowners' control.⁷⁴ The New Deal administration chose not to confront issues of segregation and, instead, compromised with southern Democrats in Congress who controlled key legislative and appropriations committees.⁷⁵

Those compromises resulted in, among other things, the exclusion of agricultural and domestic workers from the protection and benefits of major New Deal legislation such as the National Labor Relations Act, the Fair Labor Standards Act, and the Social Security Act.⁷⁶ Most harmful to Black farmers, White landlords had the authority to administer the New Deal's farm legislation—the Agricultural Adjustment Act (AAA).⁷⁷ As a result, without Black farmer representation, local boards used the AAA's acreage reduction program to lower the already low wages of Black farmers or force them off the land and into unemployment.⁷⁸

As one historian put it: "Most of the New Deal agency programs ran afoul of local laws and customs, and most of them capitulated on very practical grounds"—including the payment of relief (the "dole"),

73. *Id.*

74. See Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95, 100–01 (2011).

75. *Id.* at 98–99.

76. See *id.* at 100–02 (analyzing why and how Black workers were excluded from these major New Deal legislative acts); see generally National Labor Relations Act, 29 U.S.C. §§ 151–169 (establishing and defining the parameters of new national labor law); see generally Fair Labor Standards Act, 29 U.S.C. §§ 201–219 (setting the minimum threshold for national minimum wage); see generally Social Security Act, 42 U.S.C. §§ 301–1305 (authorizing baseline economic protections for specified subclasses of the population).

77. See generally Agricultural Adjustment Act, 7 U.S.C. §§ 602–624.

78. See John P. Davis, *The New Deal: Slogans for the Same Raw Deal*, in NEW DEAL THOUGHT 316, 317–19 (Howard Zinn, ed., 1966); see also Guy B. Johnson, *Does the South Owe the Negro a New Deal?*, in NEW DEAL THOUGHT 310, 316 (Howard Zinn, ed., 1966) (showing how the AAA left Black farm laborers to become unskilled agricultural workers, without income, and unable to find work).

assignment of work to relief jobs, Works Progress Administration (WPA) jobs, Civilian Conservation Corps jobs.⁷⁹

White supremacy denied Black men and women the right to work and work in “decent” jobs in addition to all other economic, civil, and political rights.⁸⁰ The New Deal did not change or challenge that shameful situation in any significant way.⁸¹

B. The National Resources Planning Board

In December 1941, the National Resources Planning Board (NRPB) submitted a comprehensive and progressive “Social Security” plan for *all* people.⁸² The NRPB explained that Social Security “is concerned with more than the ‘right to work’ or even with more than the prevention of unemployment;” its goal is to secure “freedom from want.”⁸³ In other words, the Board defined economic security as what was needed to live a fully human life:

Economic security is not to be interpreted narrowly nor regarded as an end in itself but as a condition which enables men to build on the secure basis of an assured standard of material well-being, a fuller, richer, and, above all, a freer life.⁸⁴

The NRPB asserted that the great economic changes caused by the growth of modern capitalism required the addition of new rights to the original Bill of Rights.⁸⁵ The Board set forth nine additions, seven of which were economic rights and the first of which was the right to work:

1. The right to work, usefully and creatively through the productive years.
2. The right to fair play, adequate to command the necessities and amenities of life in exchange for work, ideas, thrift, and other socially valuable services.
3. The right to adequate food, clothing, shelter, and medical care.

79. Leslie H. Fishel Jr., *The Negro in the New Deal Era*, WIS. MAG. HIST., 111, 113 (1964-65).

80. See Johnson, *supra* note 78, at 310–316 (demonstrating the South’s lasting efforts to “stack cards” against Black progress regarding civic, political, and economic affairs).

81. See *id.* at 316.

82. See NAT’L RES. PLANNING BD., NATIONAL RESOURCES DEVELOPMENT REPORT FOR 1942, at 109–12 (1942).

83. *Id.* at 109.

84. *Id.*

85. *Id.* at 3–4.

4. The right to security, with freedom from fear of old age, want, dependency, sickness, unemployment, and accident.
5. The right to live in a system of free enterprise, free from compulsory labor, irresponsible private power, arbitrary public authority, and unregulated monopolies.
6. The right to come and go, to speak or to be silent, free from the spying of secret political police.
7. The right to equality before the law, with equal access to justice in fact.
8. The right to education, for work for citizenship, and for personal growth and happiness; and
9. The right to rest, recreation, and adventure; the opportunity to enjoy life and take part in an advancing civilization.⁸⁶

The NRPB did not present the right to work as a legal right enforceable in court, but, as John Dewey had stated years before, it should be “enforceable” in the sense that society ensures that individuals will always “have something to do that is worthwhile—not breaking rocks in a stone yard or something else to get a soup ticket with, but some kind of productive work which a self-respecting person may engage in with interest and with more than pecuniary profit.”⁸⁷

The NRPB’s plan for the post-war United States was one of the fundamental changes that composed a drastically different charter for the nation’s economic and social institutions and values.⁸⁸ Yet, some called for a tenth freedom guaranteeing the NRPB’s nine rights “irrespective of race, color, or creed” because the right to work would be no more than a caste privilege if not made equal between Whites and Blacks.⁸⁹ In the words of one advocating for such equality: “The task is tremendous.”⁹⁰

By March 1943, when Roosevelt finally transmitted the NRPB report to Congress, the 1942 congressional elections in the Senate and House of

86. *Id.* at 3.

87. Norton E. Long, *The Right to Work Usefully and Creatively Through the Productive Years*, FRONTIERS OF DEMOCRACY 230 (1942).

88. *See* NAT’L RES. PLANNING BD., NATIONAL RESOURCES DEVELOPMENT REPORT FOR 1942 at 3 (1942).

89. *See generally* Long, *supra* note 87, at 230 (furthering the call for equality in the protection of social rights).

90. *Id.* at 231.

Representatives resulted in a swing to the political right.⁹¹ “For its prophetic ideas,” Congress killed the NRPB three months later by cutting its appropriations.⁹²

The Depression made it clear that economic security for all was subordinate to economic development and profit-making for some. Yet, there was justifiable concern that ingrained beliefs about poverty would still prevail, for example, “that a man who asks for security from others is not a full man and certainly not a good man. He has already become weak and soft . . . Hence, he is not a right-minded American.”⁹³

That was the theme of NRPB opponents in Congress and businesses who disparaged the Board’s report as a “cradle to the grave” public welfare or assistance program.⁹⁴ They maintained that its proposals were “too generous” and unaffordable and that “poor people did not deserve” the proposed help, and that the proposals “were repudiations of private enterprise and the opening wedges toward socialism.”⁹⁵

C. FDR’s Economic Bill of Rights and the 1945 Full Employment Bill

Although the NRPB report did not translate into legislation, it was a “powerful impetus” for developing the Full Employment Bill of 1945.⁹⁶ In 1944, in the midst of growing apprehension about the post-war economy, President Roosevelt called for an Economic Bill of Rights; the first and “most fundamental” on which the fulfillment of other economic rights depended was the “right to a useful and remunerative job.”⁹⁷ Liberals in Congress responded by drafting legislation intended, among other things, “to establish once and for all the principle of the ‘right to work’ and the federal government’s obligation to assure employment

91. See Arthur Herman, *The Midterm Election that Restored America*, Amer. Enterprise Inst. (Oct. 27, 2010), <https://www.aei.org/articles/the-midterm-election-that-restored-america/> [https://perma.cc/DPS6-MXPM].

92. See BAILEY, *supra* note 31, at 27.

93. Edward C. Lindeman, *The Right to Security and Freedom from Fear of Old Age, Want, Dependency, Sickness, Unemployment, and Accident*, 8 FRONTIERS OF DEMOCRACY 236 (1942).

94. See John W. Jeffries, *The “New” New Deal: FDR and American Liberalism, 1937-1945*, 105 POL. SCI. Q. 397, 399, 410, 413–14 (1990).

95. See MARION CLAWSON, *NEW DEAL PLANNING: THE NATIONAL RESOURCES PLANNING BOARD* 141 (1981).

96. See BAILEY, *supra* note 31, at 27 (illustrating that even though the efforts of the NRPB failed, it still influenced future legislation).

97. See SUNSTEIN, *supra* note 18, at 242–43 (2004).

opportunities for all those ‘able to work and seeking work.’”⁹⁸ The opening words of the 1945 Full Employment Bill, echoing Roosevelt, are a dramatic and unambiguous statement of that intent: “The Congress hereby declares that every American able to work and willing to work has the right to a useful and remunerative job in the industries, or shops, or offices, or farms, or mines of the nation.”⁹⁹

Congress, dominated by Republicans and southern Democrats, decimated the bill.¹⁰⁰ The National Association of Manufacturers (NAM), various Chambers of Commerce, and the American Farm Bureau provided powerful and active business opposition.¹⁰¹ They appealed to like-minded friends in Congress, claiming that a government guarantee of full employment and freedom were incompatible.¹⁰² The arguments were: it would lead to collectivist statism; result in paternalism and loss of initiative; inflation and loss of business confidence; and was “un-American” and “destructive of free enterprise.”¹⁰³

In sum, business sought to revive the pre-Depression belief that what is good for business is good for America.¹⁰⁴ The Farm Bureau wanted to avoid “losing cheap farm labor”—including Black tenant and share-cropping farmers.¹⁰⁵ Ultimately, the bill was “cut to pieces” by Congress.¹⁰⁶

Opponents of the Bill were committed to destroying what they called a “dangerous psychological underpinning,” namely, the right-to-work policy declaration.¹⁰⁷ Their success is evident in the watered-down version, now known as the Employment Act of 1946, which contains no reference to the right to work or even to full employment.¹⁰⁸ The thoroughness of the right-to-work defeat manifests in the Employment Act of 1946’s policy declaration, which states that it is “the responsibility of the Federal Government...with the assistance and cooperation of industry, agriculture, labor, and state and local governments...in a manner

98. See BAILEY, *supra* note 31, at 13.

99. *Id.* at 47.

100. *Id.* at 233–34.

101. *Id.* at 129.

102. *Id.* at 130.

103. *Id.* at 129–32.

104. *Id.* at 148.

105. *Id.*

106. *Id.* at 226.

107. *Id.* at 113, 119.

108. *Id.* at 233.

calculated to promote free competitive enterprise...to promote maximum employment, production, and purchasing power.”¹⁰⁹ The right-to-work guarantee changed to promoting better working conditions under which “useful employment for all those able, willing, and seeking to work” could be “afforded.”¹¹⁰

Many supporters of the original bill considered its remnants weak, toothless, and meaningless.¹¹¹ Some believed that the 1946 Act’s provisions requiring the President to submit an Annual Economic Report to Congress, creating a Council of Economic Advisors to the President and a Senate and House Committee on the Economic Report were important “first step[s] in the direction of coordinated and responsible economic planning in the federal government.”¹¹²

II. RACE AND WORK

A. Fair Employment Practices Committee

During these war years, nearly one million Black men and women migrated from the South to industrial cities, mainly in the North and West.¹¹³ Ironically, whereas it was widespread unemployment and economic depression that gave the federal government an unprecedented opportunity to ensure equal job rights for all, it was an expanding economy and a pressing need for war workers that provided the government with another extraordinary opportunity to support and enforce those rights.¹¹⁴

Rather than seizing the initiative to exploit the job situation in WWII, however, the federal government responded only when pressured and then inadequately.¹¹⁵ The most effective exertion of pressure was by A. Philip Randolph, President of the all-Black Brotherhood of Sleeping Car Porters Union.¹¹⁶ Randolph organized a March on Washington

109. *Id.* at 228.

110. *Id.*

111. *Id.* at 233–344.

112. *Id.*

113. See *The Great Migration (1910-1970)*, NAT’L ARCHIVES (June 28, 2021), <https://www.archives.gov/research/african-americans/migrations/great-migration> [<https://perma.cc/6VMP-A4RX>] (detailing the historical migration of African Americans into cities in the North and West of the United States from southern states).

114. *Id.*

115. See generally Fishel Jr., *supra* note 79, at 122–23.

116. *Id.* at 117.

Movement that would “stage a big march of a hundred thousand Negroes on Washington.”¹¹⁷ Randolph advocated the principle of mass action by Black people themselves:

The virtue and rightness of a cause are not alone the condition and cause of its acceptance. Power and pressure are at the foundation of the march of social justice and reform...power and pressure do not reside in the few, and intelligentsia, they lie and flow from the masses. Power does not even rest with the masses as such. Power is the active principle of only the organized masses, the masses united for a definite purpose.¹¹⁸

Randolph stated the definite purpose as “see[ing] to it that Negro men and women receive their appropriate consideration in every important field of American industry from which Negroes are generally barred.”¹¹⁹

This march never occurred, but the threat was enough to force an otherwise unwilling President Roosevelt to issue an order one week before the scheduled action on June 25, 1941.¹²⁰ Executive Order 8802 provided that is the, “policy of the United States that there shall be no discrimination in the employment of workers in defense industries or government because of race, creed, color, or national origin.”¹²¹ The Order stated that employers and labor organizations were duty-bound to comply with the non-discrimination policy.¹²²

The President’s Executive Order also created a Fair Employment Practices Committee (FEPC) to implement the Order.¹²³ Depending on one’s perceptions of the Freedmen’s Bureau, the FEPC was the first federal government agency responsible for implementing non-discrimination in employment.¹²⁴

117. See Randolph, *supra* note 48 (calling for action in demanding the right to work).

118. See James A. Gross, *Labor Conditions and Problems*, 28 *INDUS. & LAB. RELS. REV.* 168, 169 (1974) (reviewing JERVIS ANDERSON, *A. PHILIP RANDOLPH: A BIOGRAPHICAL PORTRAIT* (1972)).

119. March on Washington Movement, *PROCEEDINGS OF CONFERENCE HELD IN DETROIT, SEPTEMBER 26-27, 1942*, p. 10.

120. See generally Fishel Jr., *supra* note 79, at 117.

121. Exec. Order No. 8802, 6 C.F.R. 3109 (1941-1945).

122. See Fair Emp. Prac. Comm., *FINAL REPORT*, 98-99 (1947).

123. See Exec. Order No. 8802, 6 C.F.R. 3109 (1941-1945).

124. See *The Freedmen’s Bureau*, *THE NAT’L ARCHIVES* (1865), <https://www.archives.gov/research/african-americans/freedmens-bureau> [<https://perma.cc/D337-RAN2>] (summarizing the purpose of the Bureau when it was established); see also Exec. Order No. 8802, 6 C.F.R. 3109 (1941-1945) (outlining the general functions of the FEPC).

The Administration's sincerity, however, was questioned from the outset. The FEPC was created to confront deep-rooted and historically intractable racial discrimination and was composed of six part-time members who served without pay.¹²⁵ The members had no authority to subpoena witnesses, no regional offices, only the authority to recommend but not enforce, and a total budget of \$10,000.¹²⁶ One former FEPC Chair remembered the Committee's offices being "up the stairs of an abandoned fraternal hall on U street in the heart of Washington's Negro district."¹²⁷ A subsequent Executive Order in 1943 provided for a full-time Chair and enough funding to establish regional offices.¹²⁸

Under those constraints, the FEPC sought to resolve complaints through voluntary negotiations.¹²⁹ There were a series of public hearings in cities across the country such as Los Angeles, Chicago, New York, and Birmingham, to publicize its existence and emphasize "that discrimination was a barrier to war worker employment."¹³⁰ The FEPC used public hearings as a shaming device in "stubborn" cases that often included public expression of defiance by employers and unions.¹³¹

In its final report, the FEPC pointed out that "open disclosure through public testimony of discriminatory practices inspired considerable hostility against the Committee."¹³² Although noting its successes using "simple negotiation", the Committee concluded that compliance with the Federal Government's non-discrimination policy would occur "only when fair employment practice legislation has been adopted by the Congress"

125. See generally Exec. Order No. 8802, 6 C.F.R. 3109 (1941-1945) (emphasizing that President Roosevelt enacted the FEPC to combat discriminatory employment practices by federal agencies).

126. See *Fair Employment Practice Committee*, ENCYCLOPEDIAS.COM, <https://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/fair-employment-practice-committee> [<https://perma.cc/9KGG-LZSH>] (discussing factors that limited the effectiveness of the FEPC).

127. See MALCOLM ROSS, *ALL MANNER OF MEN*, 19 (Reynal & Hitchcock) (1948) (emphasizing the lack of resources held by the FEPC).

128. See Fair Emp. Prac. Comm., *FINAL REPORT*, 98-99 (1947) (demonstrating that the second FEPC was more successful when given proper resources).

129. See generally ROSS, *supra* note 127 (documenting the FEPC's dispute resolution process).

130. *Id.* at 21.

131. Fair Emp. Prac. Comm., *FINAL REPORT*, 8 (1947).

132. *Id.* at 2.

and steps were taken not only to promulgate that policy “but to enforce it as well.”¹³³

Instead, Congress, led by Southern Democrats, instructed the FEPC in July 1945 that its congressional appropriation was to be used “for completely terminating the functions and duties of the Committee.”¹³⁴ Congress gave no serious consideration to enacting anti-discrimination legislation to create a permanent FEPC.¹³⁵ The country did not seize grand opportunities to confirm and enforce economic rights that the crisis of World War II provided—sometimes deliberately, sometimes due to political faintheartedness.¹³⁶ “In the end, however, the FEPC’s inability to guarantee equal employment opportunities to the nation’s minorities was a function of the majority’s unwillingness to honor at home the democratic and egalitarian ideals for which Americans of every race, color, creed, and national origin were dying abroad.”¹³⁷

B. Brown v. Board of Education: Civil Not Economic Rights

The World War II era marked the issuance of the historical documents previously discussed—the Universal Declaration of Human Rights, President Roosevelt’s Economic Bill of Rights, and the American Law Institute’s Statement of Essential Human Rights.¹³⁸ Each document not only reaffirmed the importance of civil liberties but also affirmed economic rights, including the right to work as essential to human existence.

The history of African Americans in the U.S. in slavery, Jim Crow, and World War II provides living proof of how essential economic rights are to human life. Jim Crow demonstrated that it was a combination of state

133. *Id.* at v-vi.

134. *Id.* at ix-x.

135. *See* ROSS, *supra* note 127, at 304–05 (showing there was no serious intent to enact real, lasting, change).

136. *See generally id.* (commenting on how wartime political pressures effected or failed to effect economic rights).

137. CLETE DANIEL, *CHICANO WORKERS AND THE POLITICS OF FAIRNESS: THE FEPC IN THE SOUTHWEST, 1941-1945*, at 188–89 (1991).

138. *See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948); *see also The Economic Bill of Rights*, U.S. HIST. (1944), https://www.ushistory.org/documents/economic_bill_of_rights.htm [<https://perma.cc/X2ZZ-QQPS>]; *see also* W. E. BURGHARDT DU BOIS, *AN APPEAL TO THE WORLD: A STATEMENT ON THE DENIAL OF HUMAN RIGHTS TO MINORITIES IN THE CASE OF CITIZENS OF NEGRO DESCENT IN THE UNITED STATES OF AMERICA AND AN APPEAL TO THE UNITED NATIONS FOR REDRESS* (1947) (highlighting that work is an essential human right).

governments, private economic power (including employers) and communities and individual mores or “way of life” that denied Black men and women work, education, homes, and every other economic and social and political right necessary to live a fully human life.

One scholar marks A. Philip Randolph’s and other activists’ efforts to confront the racist public-private combination of forces compelled Roosevelt to establish the FEPC “as the inauguration of the modern civil rights movement in the United States.”¹³⁹ Randolph was convinced that “the biggest problem confronting Negroes today is economic, that is, getting work and wages to buy food, clothing and shelter.”¹⁴⁰ Randolph persisted in his pursuit of direct action aimed at securing the fundamental right to work.¹⁴¹

Despite the persistent call for direct action in pursuit of labor rights, post-War years witnessed a greater emphasis on legal challenges in the courts with National Association for the Advancement of Colored People (NAACP) attorneys representing economically and socially better off Blacks rather than the “masses” championed by Randolph.¹⁴² The NAACP achieved a historic Supreme Court civil rights victory in *Brown v. Board of Education* in 1954, which was celebrated too hastily as ending segregation in public schools.¹⁴³ The Supreme Court’s verdict in *Brown* unambiguously condemned the practice of segregation in public schools as fundamentally unequal.¹⁴⁴ The influence of white supremacy that *Brown* aimed to combat was not confined to segregation in public education, but instead imposed a range of “systematic disadvantage” on Black men, women, and children that pervaded every aspect of their lives.¹⁴⁵

139. See DANIEL, *supra* note 137, at 2.

140. *Id.*

141. See RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* 108–09 (2007) (recommending techniques to “gain the right to work”); see also WILLIAM P. JONES, *THE MARCH ON WASHINGTON: JOBS, FREEDOM, AND THE FORGOTTEN HISTORY OF CIVIL RIGHTS* (2013) (connecting race and economic rights from Randolph and others to Dr. King).

142. See generally GOLUBOFF, *supra* note 141, at 269 (“The abstracted notion of harm might well have looked odd from the perspective of the poor and the working-class African Americans who complained to the CRS and the NAACP about the problems they endured living and working in Jim Crow America.”).

143. See *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483, 495 (1954) (“We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place.”).

144. *Id.*

145. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1701, 1756 (1993).

Although the legal strategy that proved to be successful in *Brown* marked a significant milestone in civil rights, it did not improve the economic rights of Black workers.¹⁴⁶ Focusing solely on state-enforced segregation in public schools, *Brown* overlooked the significant impact of private actors and actions in upholding Jim Crow.¹⁴⁷ In addition, as Risa Goluboff has pointed out, by extracting “from the multilayered system of Jim Crow the psychological wounds such segregation inflicted” but not its economic harms “the due process right to work disappeared as a readily available constitutional resource in the case.”¹⁴⁸

The Supreme Court’s decision in *Brown* contained “no language about the fundamental right to work, the right to work as the right to live, or the centrality of work to American life.”¹⁴⁹ As Goluboff concludes, the subordination of the economic to the psychological “subordinated the problems most acute for working African Americans to those most acute for the more privileged of the race.”¹⁵⁰

The remedial course of action adopted by the Supreme Court in *Brown* was to delegate to lower courts in various jurisdictions the task of formulating effective strategies for achieving desegregation of public schools “with all deliberate speed.”¹⁵¹ That is reminiscent of the New Deal’s southern strategy in implementing its programs and policies with much the same result:

Although the Court was unwilling to give official sanction to legalized race segregation and thus required an end to “separate but equal,” it sought to do so in a way that would not radically disturb the settled expectations of whites that their interests—particularly the relative privilege accorded by their whiteness—would not be violated.¹⁵²

146. See GOLUBOFF, *supra* note 141, at 269.

147. *Id.*

148. *Id.* at 251.

149. *Id.*

150. *Id.* at 252.

151. See *Brown v. Bd. of Ed. of Topeka*, 349 U.S. 294, 301 (1955) (“[E]nter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases.”).

152. See generally Harris, *supra* note 145, at 1701, 1756 n. 194 (“Defining the problem of segregation in purely associational terms ignores the crucial fact that the system of white supremacy was built not merely to achieve race segregation, but also to construct systemic disadvantage.”).

C. Civil Rights Act of 1964

A decade after *Brown* and two decades after the FEPC, Congress—prioritizing only civil rights—enacted the Civil Rights Act of 1964.¹⁵³ This broad-based legislation aimed to combat discrimination based on race, color, religion, sex, or national origin in various domains such as employment, voting, education, and access to public accommodations.¹⁵⁴

Similar to Executive Order 8802, which established the FEPC, the Civil Rights Act of 1964 did not entail a right to work or a job creation agenda.¹⁵⁵ The act aimed to prevent employers from discriminating against individuals based on their race, color, religion, sex, or national origin during their job search and while employed.¹⁵⁶ Once again, the substantive right to work was submerged in an anti-discrimination approach to equal opportunity.

Similarly, Title VII of the Act created an Equal Employment Opportunity Commission (EEOC) to implement the law. Similar to the FEPC, the newly formed EEOC borrowed space for its offices, lacked autonomous enforcement power (until a 1972 amendment to the Act), and relied on conciliation and voluntary cooperation. The EEOC struggled with insufficient staff, an overwhelming case load, and inadequate budgets.¹⁵⁷

Organized protests by African Americans sought more than the end of discrimination; the protests demanded jobs and economic justice.¹⁵⁸ For example, the historic 1963 March on Washington was officially the “March on Washington for Jobs and Freedom”; yet a white press and many liberals ignored the economic justice goals and memorialized it only as the Reverend King’s “I Have a Dream” Speech for racial equality

153. See Anne Noel Occhialino & Daniel Vail, *Why the EEOC (Still) Matters*, 22 HOFSTRA LAB. & EMP. L.J. 671, 672 (2005) (recognizing the landmark omnibus bill aimed at “discrimination in employment, voting, education, and public accommodation”).

154. See generally Cheryl Bond-Nelms, *Boycotts, Movements and Marches*, AARP (Feb. 9, 2018), <https://www.aarp.org/politics-society/history/info-2018/civil-rights-events-fd.html> [<https://perma.cc/MN2X-RNV2>] (emphasizing the events that occurred after *Brown* to trigger this congressional action, including civil rights demonstrations and sit-ins, Rosa Parks, and the Montgomery bus boycott, and the 1963 March on Washington).

155. Cf. Occhialino & Vail, *supra* note 153, at 672 (exemplifying the lack of remedial action to create jobs).

156. *Id.*

157. *Id.* at 680, 683 (elaborating on the significant obstacles the EEOC faced).

158. See generally JACKSON, *supra* note 10, at 218.

and interracial brotherhood.¹⁵⁹ King crusaded constantly, however, for an Economic Bill of Rights that “would guarantee a job to all people who want to work.”¹⁶⁰ In 1968, his Southern Christian Leadership Conference (SCLC) demanded an economic and social bill of rights, the first of which was the “right of every employable citizen to a decent job.”¹⁶¹ A. Philip Randolph and others in 1966 proposed a “‘Freedom Budget’ For All Americans” that focused on jobs: “For the first time, everyone in America who is fit and able to work will have a job And that is freedom. For freedom from want is the basic freedom from which all others flow.”¹⁶²

III. RIOTS AND COMMISSIONS

Violence is inherent in any system of oppression, both in the enforcement of that system and in resistance to it.¹⁶³ In addition to slave rebellions, over thirty race riots, or what one sociologist called “major interracial disturbances,” occurred in the United States between 1900 and 1949.¹⁶⁴ The mid-1960s brought major race riots with over 250 black and white deaths in Harlem (1964), Chicago (1965), Watts (1965), Newark (1967), and Detroit (1967).¹⁶⁵

159. *Id.* at 246.

160. See Ginsburg, *supra* note 50, at 127 (reiterating that King advocated for jobs and an economic bill of rights); see also JACKSON, *supra* note 10, at 247 (expounding “King tried to fill Johnson’s gap between promise and program, advocating jobs, income support, and self-help.”).

161. See Ned Resnikoff, *Four Ways Martin Luther King Jr. Wanted to Battle Inequality*, MSNBC (Jan. 17, 2014, 12:07 PM), <https://www.msnbc.com/all/mlks-fight-against-economic-inequality-msna249526> [<https://perma.cc/V5TN-NZJQ>] (last updated Jan. 19, 2014, 3:15 PM).

162. See PHILIP RANDOLPH INSTITUTE, “A ‘FREEDOM BUDGET FOR ALL AMERICANS’ A SUMMARY” 7 (1967) (detailing what the Freedom Budget is and advocating for a plan to remove poverty from America); see also *In Honor of Dr. King: Exploring the Connection Between Homelessness, Employment, and Civil Rights*, NAT’L ALL. END HOMELESSNESS (Apr. 4, 2018), <https://endhomelessness.org/blog/honor-dr-king-full-employment-viable-solution-homelessness/> [<https://perma.cc/4E3G-J5F5>] (honoring Dr. Martin Luther King by expounding on his commitment to civil rights and the Freedom Budget proposal).

163. See generally Rick Rojas & Khorri Atkinson, *Five Days of Unrest that Shaped, and Haunted, Newark*, N.Y. TIMES (July 11, 2017), <https://www.nytimes.com/2017/07/11/nyregion/newark-riots-50-years.html> [<https://perma.cc/RG2Q-DQUS>] (arguing “it was a rebellion, the uprising of a long-oppressed community that finally had enough, and from that, a new sense of empowerment was born.”).

164. See ELLIOT RUDWICK, *RACE RIOT AT EAST ST. LOUIS 3* (The World Publishing Company Meridian Books) (1966).

165. See generally Rojas & Atkinson, *supra* note 163 (stating “[t]he unrest, which started on the night of July 2, 1967, and ended on July 17, came during a period when racial tensions were

On July 27, 1967, President Johnson appointed the National Advisory Commission on Civil Disorders.¹⁶⁶ At that time, many areas were destroyed, as Detroit remained in flames and controlled by the army, much of Newark was in ruins. During that period, the violence was nationwide reaching nearly forty cities from San Francisco to Buffalo were in uproar with police and lootings—overall, more than one hundred and fifty riots occurred during 1965 and 1968.¹⁶⁷

In its most memorable finding, the Commission held “white racism” responsible for the segregation and poverty that had created the explosive racial ghetto.¹⁶⁸ “White institutions created it, white institutions maintain it, and white society condones it.”¹⁶⁹ The Commission ranked “deeply held grievances” into levels of “relative intensity,” placing in the “first level of intensity” unemployment (more than double that of whites) and the concentration of those working “at the lowest end of the occupational scale.”¹⁷⁰

The Commission’s “basic conclusion” was that “our nation is moving toward two societies, one black, one white—separate and unequal”—which, of course, had been occurring for over 300 years.¹⁷¹ To avoid the “continuing polarization,” it set forth comprehensive recommendations at community, state, and federal levels to deal with employment, education, housing, and other issues.¹⁷² In what was effectively a challenge to the sincerity of those who could make these changes, the Commission emphasized its recommendations:

“Will require a commitment to national action—compassionate, massive and sustained, backed by the resources of the most powerful and the richest

exploding into violent conflagrations across the country: the Watts neighborhood in Los Angeles, Harlem, Detroit, and nearby New Jersey communities, including Plainfield.”).

166. See Elizabeth Cychosz, *Kerner Commission Established on this Day, 1967*, NAT’L UNDERGROUND R.R. FREEDOM CTR., <https://freedomcenter.org/voice/kerner-commission-established-day-1967/> [<https://perma.cc/HE6X-M54M>] (tracing the origins of the National Advisory Commission on Civil Disorders, also known as the Kerner Commission, composed of eleven members).

167. See NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, SUMMARY OF REPORT, N.Y. TIMES 9 (1968) (contending “White racism is essentially responsible for the explosive mixture which has been accumulating in our cities since the end of World War II.”).

168. *Id.*

169. *Id.* at 1.

170. *Id.* at 7.

171. *Id.* at 1.

172. *Id.* at 20–26.

nation on this earth. From every American, it will require new attitudes, new understanding, and, above all, new will . . . There can be no higher priority for national action and no higher claim on the nation's conscience."¹⁷³

Shamefully, just as in every other situation involving the violation of Black people's rights, there were hidden priorities and higher claims on the nation's consciousness.¹⁷⁴ As a Commission witness scholar, Kenneth Clark, a key figure in the *Brown* litigation, testified in reference to earlier riot commission reports:

"I read that report . . . of the 1919 riot in Chicago, and it is as if I were reading the report of the investigating committee on the Harlem riot of '35, the report of the investigating committee on the Harlem riot of '43, the report of the McCone Commission on the Watts riot.

I must again in candor say to you members of this Commission—it is a kind of Alice in Wonderland—with the same moving picture re-shown over and over again, the same analysis, the same recommendations, and the same inaction."¹⁷⁵

The result of the Kerner Commission was even worse than Kenneth Clark had lamented.¹⁷⁶ After a clash in the administration between civil rights and liberties supporters and J. Edgar Hoover's FBI belief in law and order and hardline crack-downs, Congress passed the 1968 Omnibus Crime Control and Safe Streets Act that emphasized, among other things, riot control training for police.¹⁷⁷ This is in the face of the Kerner Commission's concern with police brutality, racism, and the "abrasive relationship between the police and the Minority Communities."¹⁷⁸

The Kerner Commission told the nation that it had a hard choice to make. That choice was a choice for law and order through riot control, thanks to the Omnibus Crime Control and Safe Streets Act.¹⁷⁹ In the wake of the Poor People's March on Washington in 1968, Coretta Scott

173. *Id.* at 1–2.

174. *Id.* at 2.

175. *Id.* at 25.

176. *Id.*

177. *Id.* at 15.

178. *Id.* at 14.

179. *See generally* The Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3722 (1968).

King deplored the nation's obsession with violence by the oppressed.¹⁸⁰ She spoke of a more devastating violence — the violence inherent in white supremacy commonly not considered violence at all:

In this society, violence against poor people and minority groups is routine. I remind you that a starving child is violence; suppressing a culture is violence; neglecting school children is violence; punishing a mother and her child is violence; discriminating against a workingman is violence; ghetto housing is violence; ignoring medical needs is violence; contempt for equality is violence; even a lack of will power to help humanity is a sick and sinister form of violence.¹⁸¹

A. *The 1978 Humphrey-Hawkins Act*

Into the 1970s, there was still no enforceable right to work despite years of promising rights talk, including proposed right-to-work legislation; the creation of federal and state agencies to combat employment discrimination; government policies, commissions and recommendations; and national and local marches and other demonstrations, some peaceful and some not.¹⁸² Efforts continued, nonetheless.

In the 1960s and early 1970s, many education and job training programs were designed to aid unemployed individuals obtain employment.¹⁸³ Many of these programs, such as the Comprehensive Employment and Training Act (CETA) and the Equal Opportunity Act (Jobs Corps, Urban Corps) enabled chronically unemployed and poor individuals to pursue useful jobs in social services, senior care, conservation, and as teachers' aides.¹⁸⁴ These programs were important life-lines for many poor people, a way to reduce riots, and in essence, "a sophisticated form of public assistance."¹⁸⁵

180. See Clarence Hightower, *Opinion: New 'Poor People's Campaign' Revives Dr. King's Vision*, NNPA (May 26, 2018), <https://nnpa.org/essa/opinion-new-poor-peoples-campaign-revives-dr-kings-vision/> [<https://perma.cc/ND9X-7KYQ>].

181. *Id.*

182. See generally *Wage and Hour Division Historical Summary*, U.S. DEPT. OF LABOR, <https://www.dol.gov/agencies/whd/about/history> [<https://perma.cc/T3U3-YYJF>].

183. See Ginsburg, *supra* note 50, at 128–29 (describing job-creation programs and their method of operation).

184. *Id.* at 129.

185. See Alvin Kogut & Sylvia Aron, *Toward a Full Employment Policy: An Overview*, 7 J. SOCIO. & SOC. WELFARE 89, 89 (1980) (highlighting the importance the programs held for not just wages but also a reduction in violence and overall public assistance).

In June 1974, African American Congressman Augustus Hawkins, representing the Watts area of Los Angeles, submitted a bill that was not just another jobs program.¹⁸⁶ His bill provided for a legally enforceable, federally guaranteed right to a job for all who wanted and were able to work.¹⁸⁷ The Hawkins bill revived Franklin Roosevelt's Economic Bill of Rights and reaffirmed the conviction that civil and economic rights were inextricably interdependent.¹⁸⁸

After four years of negotiations and compromise, Hawkins' bill was enacted as the Humphrey-Hawkins Full Employment and Balanced Growth Act of 1978.¹⁸⁹ Hawkins' original bill was eviscerated not only by Republicans, conservatives, and business groups, but also by the fears of many Democrats, including President Jimmy Carter's opposition to many of the bill's provisions.¹⁹⁰ Consequently, the Hawkins bill was "stripped of its most important provisions."¹⁹¹ The 1974 right-to-work bill would become the last right-to-work bill ever submitted to Congress, and similar to the Full Employment Bill of 1945, was twisted to further solidify the status quo.¹⁹² Unfortunately, private employers would continue to decide who worked.

The Employment Act of 1946 compromise, went far beyond shifting emphasis—it changed the nature and purpose of the Hawkins Bill completely.¹⁹³ The core of the original bill—a guaranteed right to employment—was gone, along with the associated right to sue to enforce it.¹⁹⁴

186. See H.R. 15476, 93rd Cong. (1974) (naming Augustus Hawkins as a leading member of the Subcommittee on Equal Opportunities in creating the Equal Opportunity and Full Employment Act of 1976); see also Ginsburg, *supra* note 50, at 129 (highlighting the importance of the bill, and its ability to create change beyond the typical job program of this time).

187. See H.R. 15476, 93rd Cong. (1974); see also Ginsburg, *supra* note 50, at 130.

188. E.g., Patrick Andelic, "The Old Economic Rules No Longer Apply": The National Planning Idea and the Humphrey-Hawkins Full Employment Act, 1974-1978, 31 J. POL'Y HIST. 72, 80 (2019) (depicting Hawkins' original intent with the bill and reviving the Economic Bill of Rights in doing so).

189. See generally Full Employment and Balanced Growth Act of 1978, 15 U.S.C. 3101 (1978).

190. See Ginsburg, *supra* note 50, at 131.

191. See Andelic, *supra* note 188, at 76, 90 (recounting the attacks on the bill as it made its way through Congress).

192. See generally *id.* at 76 (acknowledging the downfall of the bill alongside its success).

193. See Ginsburg, *supra* note 50, at 121 (recognizing the Employment Act of 1946 as a full attack on the original intent of the Act).

194. See Harvey L. Schantz & Richard H. Schmidt, *The Evolution of Humphrey-Hawkins*, 8 POL'Y STUD. J. 368, 374 (1979).

Business interests were substituted for the rights of workers and those seeking work.¹⁹⁵ The Humphrey-Hawkins Act, for example, stressed that none of the Act's provisions be used to interfere with private sector production, employment, allocation of resources, wages, or prices.¹⁹⁶ It also emphasized the use of federal government policies to expand the private sector.¹⁹⁷ It provided that federally subsidized jobs be used to ameliorate unemployment, but only when the private sector provided inadequate opportunities.¹⁹⁸ Then, the Act provided that the "last resort reserve of federally-funded jobs" would be the lowest paying to discourage migration from the private to the public sector.¹⁹⁹

During the debates, the values underlying the Hawkins' bill, such as utilizing the labor of the then jobless to fulfill unmet social and human needs, were rejected; and the values of market economics were accepted and continue to be accepted.²⁰⁰ More specifically, avoiding inflation rather than the right to work dominated Congress—aptly called a shift "from people to prices."²⁰¹

Advocates of even just increasing employment had to confront the prevalent "trade-off" theory that higher unemployment brought lower inflation.²⁰² However, it was more than an abstract debate about the sanctity of the market and government power.²⁰³ The meaning of full employment was being decided.

In 1945, British economist Sir William Beveridge, in his influential book, *Full Employment in a Free Society*, defined full employment as

195. *See generally id.* at 371 (1979).

196. *Contra* Andelic, *supra* note 188, at 75.

197. *See generally* Gerhard Peters & John T. Woolley, *Full Employment and Balanced Growth Bill Statement by the President*, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/full-employment-and-balanced-growth-bill-statement-the-president> [https://perma.cc/QZQ8-PN5T] (establishing the federal government's intention to continue expanding the private sector).

198. *See* Ginsburg, *supra* note 50, at 125.

199. *See generally* Harvey L., Schantz & Schmidt, *supra* note 194, at 371–72.

200. *See* Ginsburg, *supra* note 50, at 121 (demonstrating Hawkins' beliefs on how full employment could impact society).

201. *Id.*

202. *See* Kogut & Aron, *supra* note 185, at 92.

203. *Id.* at 91–92.

there always being more vacant jobs than job seekers.²⁰⁴ In the gendered language of his day:

It means having always more vacant jobs than unemployed men, not slightly fewer jobs. It means that the jobs are at fair wages, of such a kind, and so located that the unemployed men can reasonably be expected to take them; it means by consequence, that the normal lag between losing one job and finding another will be very short.²⁰⁵

Professor Philip Harvey suggests that “non-economists might think of full employment as the ready availability of decent jobs at decent wages for everyone who wants to work,” whereas “professional economists think of full employment as the lowest level of unemployment consistent with the maintenance of price stability.”²⁰⁶ Given the 1.7 percent unemployment rate in the last three years of World War II, Harvey maintains that the phrases “right to work” and “full employment” were readily substituted for each other because they were synonymous.²⁰⁷

The terms were synonymous for Congressman Hawkins as well.²⁰⁸ He stated:

An authentic full employment policy rejects the narrow, statistical idea of full employment measured in terms of some tolerable level of unemployment—the percentage game—and adopts the more human and socially meaningful concept of personal rights to an opportunity for useful employment at fair rates of compensation.²⁰⁹

The Humphrey-Hawkins Act did set forth, however, what was intended to be an *interim* goal of reducing unemployment to four percent within five years.²¹⁰ Nothing in Humphrey-Hawkins links full employment to a targeted rate of unemployment.²¹¹ Over the years, however, this interim goal or some higher level of unemployment has become the

204. See generally Phillip Harvey, *What is Full Employment—and Why the Definition Matters*, UNIV. OF MISSOURI AT KANSAS CITY (Sept. 7, 2016).

205. *Id.* at 5–6.

206. *Id.* at 4–5.

207. *Id.* at 5.

208. *Id.*

209. Harvey L., Schantz & Schmidt, *supra* note 194, at 369.

210. See Ginsburg, *supra* note 50, at 121.

211. *Id.*

standard definition of full employment consistent with a non-inflationary economy.²¹²

Congressman Hawkins' original 1974 bill turned out to be the last attempt to enact a right to work into legislation.²¹³ In the years since, millions of men and women, disproportionately poor and black, have suffered the destructive economic, social, and personal consequences of unemployment not only in economic downturns but even in "full employment" economies.²¹⁴

Coretta Scott King and the civil rights organizations that supported the Hawkins bill found it an "unconscionable view—that the evils imposed by unemployment upon scores of millions of people whose breadwinners are unemployed are acceptable in the name of restraining inflation."²¹⁵ She added: "social and economic justice in America is far too important to be left to the economists."²¹⁶

IV. RESPONSIBILITY FOR THE PUBLIC INTEREST

Social and economic justice for all people is also far too important to be left to the private profit-making system. Even in the narrow economic sense in the boom year of 2018, where the unemployment rate was slightly below four percent, six million people still did not have jobs.²¹⁷ Except during the World War II years, the private sector economy has never come close to meeting Beveridge's definition with unemployment rates ranging usually between four and seven percent annually in the past seventy years.²¹⁸

Although it is *private* profit that determines the existence of jobs and the nature of those jobs, this private enterprise has serious and inevitable *public* consequences.²¹⁹ Employers, in what is still referred to as the private sector, have the power to determine the state of the nation's economy

212. *Id.*

213. *Id.*

214. *Id.*

215. See David Stein, *Why Coretta Scott King Fought for a Job Guarantee*, BOSTON REV. (May 17, 2017), <https://www.bostonreview.net/articles/david-stein-why-coretta-scott-king-fought-job-guarantee/> [<https://perma.cc/YN37-2BRK>].

216. *See id.*

217. See KIMBERLY AMADEO, UNEMPLOYMENT RATE BY YEAR SINCE 1929 COMPARED TO INFLATION AND GNP, U.S. BUREAU OF LABOR STATISTICS (2020).

218. *Id.*

219. See Kogut & Aron, *supra* note 185, at 92.

and, therefore, the welfare and well-being of the nation's people.²²⁰ That power is indistinguishable from the public power of government.²²¹ Private profit-making interests exercise the power of government.²²²

It is doubtful that the public-private distinction ever conformed to economic and social reality.²²³ The reality of large scale corporations with great economic and political power—with monopoly power sufficient to control or even ignore the market—at least blurred the distinction.²²⁴ Their actions unavoidably “shar[ed] the characteristics of each pole, as in the case of private businesses affected with a public interest.”²²⁵ It is what Roosevelt called “the power of the few to manage the economic life of the Nation.”²²⁶

From another perspective, the public-private distinction is ideologically-rooted and is “used to explain why the basic principles of democracy do not apply in the workplace.”²²⁷ Separating the public from the private is often used to explain away discrepancies between ideals and reality in the social context.²²⁸ As labor law scholar Karl Klare has written: “Despite overwhelming evidence to the contrary, the idea that the workplace is a ‘private place,’ is ‘private property,’ endures as a powerful cultural underpinning of the sovereignty of capital.”²²⁹

220. See Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, UNIV. OF PA. L. REV., 1349, 1351 (1982).

221. See Karl E. Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358, 1361 (1982).

222. See Kennedy, *supra* note 220, at 1352 (providing examples in which action by private entities has the same effect on society at large as action by a public entity).

223. *Id.*

224. *Id.*

225. *Id.* at 1351.

226. See Message from President Franklin D. Roosevelt to Congress on Curbing Monopolies (Apr. 29, 1938) (transcript on file with The American Presidency Project, University of California, Santa Barbara).

227. See Klare, *supra* note 221, at 1417 (discussing one way that the public-private distinction is used in the workplace to repress workers).

228. See Sanford S. Schram & J. Patrick Turbett, *The Welfare Explosion: Mass Society Versus Social Control*, 57 SOC. SERV. REV. 614, 615 (1983) (explaining that some scholars believe that making arbitrary distinctions between public and private entities is responsible for meteoric rise of dependence on public welfare).

229. Klare, *supra* note 221, at 121.

Power itself is not the problem. The question is to whom, if anyone, is that power responsible.²³⁰ Because in a market society, most people have to work to live, employers have the power to determine the kind of life people will be able to have.²³¹ Employers in the private sector in exercising their power, however, are responsible only to stockholders when it is relevant and to profit-making in any event—not to the public interest.²³² Government should be responsible for the public interest—the promotion and protection of the rights of its citizens, including the rights of the most vulnerable.²³³ The fundamental requirements to live a fully human life go well beyond what government may not take away—or protection against the government—to include what government is obliged to provide or enable people to attain—the protection of the people by the government.

As John Dewey wrote during the Great Depression, the problem of establishing the conditions for actual full employment “is not an easy one.”²³⁴

To face it would involve the problem of making a profit system into a system conducted not just . . . in the interest of consumption, important as that is, but also in the interest of positive and enduring opportunity for productive and creative activity and all that signifies for the development of the potentialities of human nature.²³⁵

Instead, an anti-regulatory and deregulatory free market doctrine most responsive to the needs of business has dominated the economic policies of Democrat as well as Republican administrations since the 1970s.²³⁶ This policy has had a disparate negative impact on the poor and vulnerable, especially those poor and vulnerable because of their race: freeing

230. See GRANT MCCONNELL, *PRIVATE POWER AND AMERICAN DEMOCRACY* 118 (Vintage Books) (1966) (asserting that the proper inquiry is who wields the power and to whom, or what, they are responsible).

231. See Klare, *supra* note 221, at 1419.

232. *Id.* at 1419–20.

233. See Sanford, Schram & Turbett, *supra* note 228, at 615–16.

234. See John Dewey, *The Old Problems are Unresolved*, in *NEW DEAL THOUGHT* 409, 411 (Howard Zinn, ed., Hackett Publ'g Co., 1966).

235. *Id.*

236. Andelic, *supra* note 188, at 76, 82, 85, 86 (discussing ambivalence by both Republican and Democratic presidential administrations towards passing legislation that would have granted government a significantly larger role in the regulation of private businesses).

property from state control does not free ordinary people from the tyranny of property or the tyranny of being left alone when in need of help.²³⁷

Inactive government also tolerates, if not encourages, gross inequalities of social status and wealth so that life, liberty, and the pursuit of happiness become not matters of justice and rights but of economic power and fortune. Because there can be no economy, market-driven or otherwise, without government, the issue is not whether there should be regulation but how much and what kind of regulation and who is benefited and burdened by that regulation.

Proponents of the private market system have always claimed a sharp distinction between public and private realms.²³⁸ This contention is made to sustain objections to government intrusions that, among other things, would distort the market's allegedly neutral and objective distribution of rewards.²³⁹ The experience of Black men and women in this country clearly belies the separation of public and private systems and the purported neutrality and objectivity of the market system's distribution of benefits and burdens. In combination, these systems by interaction and inaction, have denied self-determination—"the essence of humanity" to Black men and women.²⁴⁰

Over the years, the federal and some state governments have placed limits on employer power.²⁴¹ For example, one can see these limitations in laws regarding safety and health, minimum wage, unemployment insurance, abolition of child labor, and those protecting workers' right to organize.²⁴² Other safety net programs are in place to protect people from the harsh consequences of the labor market.²⁴³ As essential as limitations on employer power are to avoid extreme negative consequences, they

237. Francis Fox Piven and Richard Cloward, *The New Class War 75* (Pantheon Books, 1982).

238. See Klare, *supra* note 221, at 1359, 1361 (noting the insistence by many courts and scholars on drawing clear distinctions between private and public entities and actions).

239. Kennedy, *supra* note 220, at 1352.

240. See TERRY EAGLETON, *WHY MARX WAS RIGHT* 137 (2011).

241. See generally Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 UNIV. PA. J. LAB. & EMP. L. 65, 66 (2000) (introducing the idea of employer absolutism and measures taken to limit it).

242. *Id.* at 84–85.

243. See generally *id.* at 70–71 (noting the point in the 1970s when courts began carving out exceptions to employment at will to enhance employee protection).

merely touch the surface of the right to work and the potential for all to live fully human lives.

IV. OBSTACLES TO CHANGE

In themselves, massive deprivations and violations would seemingly provide the necessary motivation to bring them to ahalt.²⁴⁴ Declarations of rights violations alone do not prevent those violations or repair their consequences.²⁴⁵ Moreover, failure to act at all supports the status quo.²⁴⁶ Terry Eagleton said, “if you do not resist the apparently inevitable, you will never know how inevitable the inevitable was.”²⁴⁷

Racism is among the obstacles desperately needing change.²⁴⁸ This nation has experienced powerful social and economic movements for change, such as the labor, civil rights, and women’s rights movements.²⁴⁹ Civil rights organizations have made concerted efforts to advocate for the right to work and achieve jobs for all.²⁵⁰ These efforts, however, were episodic and have been of marginal significance in the forty-five years since Humphrey-Hawkins. There has yet to be sustained organized will to challenge private sector power to determine, based on profitability, if there will be work and the nature of that work. Why not? The answer is complex and incomplete but should be considered before making proposals for change.

Any searching for reasons, must acknowledge that the market economy has produced vast material achievements and benefits; however such achievements were “bought at the price of great harm.”²⁵¹ As demonstrated by the co-existence of great wealth and great economic inequality—among so many other inequalities—some individuals have benefited from the “free market” system while others have experienced its

244. See EAGLETON, *supra* note 240, at 137.

245. See *id.*

246. See *id.*

247. *Id.* at 6.

248. Ginsburg, *supra* note 50, at 130 (recalling a point in history where leaders of large groups, including women’s, civil rights, and faith-based, to name a few, came together to advocate for full employment).

249. *Id.*

250. *Id.* at 124.

251. See POLANYI, *supra* note 28, at 195 (emphasizing that the success seen in economic developments did not come without a price).

burden.²⁵² For individuals reaping systemic benefits, self-interest discourages them from risking what they have, particularly to help those who are not similarly seeing those benefits. Prosperity and comfortability can also lull people into complacency. Those who have benefitted are more likely to accept, rather than challenge, the source of their material well-being.²⁵³ That unquestioning acceptance easily transforms into dependence.

There are many reasons for the acquiescence of those unfortunately called the “less fortunate.” Most people face economic devastation if they lose their job.²⁵⁴ They do live paycheck to paycheck and, in the words of American poet Charlotte Perkins Gilman, the wolf is always at the door: “To work! To work! In Heaven’s name! The wolf is at the door!”²⁵⁵ The lesson for survival is to be thankful for whatever work you can get and do not make waves. Working people often have little to say about their own fate. Most people “are too preoccupied with keeping themselves afloat to bother with visions of the future.”²⁵⁶ This condition has the potential to diminish laborers to a status akin to that of children who yield considerable deference to authority.²⁵⁷

Often people blame themselves for their plight: “They say it again and again. ‘I’m sh*t’ or ‘I’m nothin’, I aint sh*t.”²⁵⁸ Their concept of personal freedom is reduced to gun ownership or “buying and squirreling away more meaningless junk.”²⁵⁹ “Unable to turn the tables on their antagonists,” they turn the tables on themselves or each other in various

252. *Id.* at 168.

253. *See generally* ROBERT N. BELLAH, *THE BROKEN COVENANT: AMERICAN CIVIL RELIGION IN TIME OF TRIAL* 135 (1975) (identifying the benefits of the economic system as prosperity, abundance, and wealth. Benefitting individuals are not likely to question why they are benefiting).

254. *See generally* JOE BAGEANT, *DEER HUNTING WITH JESUS: DISPATCHES FROM AMERICA’S CLASS WAR* 171 (2007) (addressing the economic plight of middle-and-lower-class Americans).

255. *See* Charlotte Perkins Gilman, *The Wolf at the Door*, in *THE CRY FOR JUSTICE* 200, 200–01 (Upton Sinclair ed., The John C. Winston Co., 1915).

256. EAGLETON, *supra* note 240, at 194.

257. *See* BAGEANT, *supra* note 254, at 171 (“they are good cogs and show great deference toward any type of authority”); *see also* GUY STANDING, *WORK AFTER GLOBALIZATION: BUILDING OCCUPATIONAL CITIZENSHIP* 18 (Edward Elgar Publishing) (2009) (“he recognized that in capitalism a worker is perpetually a child”).

258. EARL SHORRIS, *NEW AMERICAN BLUES: A JOURNEY THROUGH POVERTY TO DEMOCRACY* 219 (W.W. Norton & Company) (1997).

259. BAGEANT, *supra* note 254, at 115.

ways: “drug addiction, alcoholism, poor on poor crime” or withdrawal from society in “gangs, cults, homelessness, hypersexuality, violence, or depression.”²⁶⁰

Workers in a market system experience insecurity and fear of loss regardless of their status in the market.²⁶¹ The prospect of unemployment is a universal apprehension, and save for a few exceptions, each individual toils at the pleasure of their employer, thereby rendering them susceptible to being discharged at any given moment, without justification or explanation.²⁶² Clyde Summers called this the “Divine Right of Employers.”²⁶³ The doctrine, in its conception, regards the employment dynamic as that of master-servant rather than one grounded in mutual rights.²⁶⁴ Unemployment means loss of income and facing the economic (and other) calamities most feared.²⁶⁵ The wolf is *in* the house.²⁶⁶

The legal protections against racial discrimination limit employers to the extent that all employees are to be treated equally.²⁶⁷ However, members of protected classes “can be discharged without cause, paid less than a living wage, denied sick pay, paid holidays and vacation, and medical insurance.”²⁶⁸

This sovereign power leaves employees without any protection against losing their jobs, even unfairly.²⁶⁹ It coerces them into tolerating workplace abuses and concealing their employers’ unjust, unethical, or illegal actions.²⁷⁰

Equally destructive is the demoralization, humiliation, and fear that comes with the realization that one is no longer needed.²⁷¹ Unemployment, like other states of powerlessness and exclusion, also generates

260. SHORRIS, *supra* note 258, at 87.

261. *Id.* at 86.

262. *See* Summers, *supra* note 241, at 65 (defining at-will employment as that which allows an employer to fire their employees for good cause, no cause, or even unjust cause).

263. *Id.*

264. *Id.*

265. SHORRIS, *supra* note 258, at 86 (discussing the distress that can come from loss of employment).

266. Gilman, *supra* note 255, at 200–01.

267. *See* Summers, *supra* note 241, at 65.

268. *Id.*

269. *Id.* at 70–78.

270. *See* STANDING, *supra* note 257, at 19 (discussing the self-monitoring aspect of community building).

271. *Id.*

feelings of helplessness and fear of being trapped in joblessness.²⁷² This feeling of inadequacy results in mental illness, depression, domestic abuse, alcoholism, and suicide.²⁷³

Unemployment guarantees that unwanted workers are no longer contributing participants of society.²⁷⁴ This is why Karl Polanyi calls unemployment a “brutal restriction on freedom.”²⁷⁵ Although enforced “idleness”²⁷⁶ is inescapable in a market economy, unemployed individuals are stigmatized as “objects for restructuring and improvement” or as “scroungers rather than victims” thereby justifying efforts to limit compensation available to them.²⁷⁷

All of these economic, social, and personal consequences of unemployment are more severe for Black men and women. Since 1972, when the U.S. Bureau of Labor Statistics began to collect data on African-American unemployment, their rate of unemployment has been twice or more the white unemployment rate.²⁷⁸ From 1972 to 2019, the unemployment rate for Black individuals has been above 10% for about 70% in that timeframe, whereas for White individuals it has risen to 10% only 0.5% of the time.²⁷⁹ The unemployment gap that has lasted for fifty years is even greater in metropolitan areas such as the Nation’s Capital, “[where] the African American unemployment rate is six times higher than the [W]hite rate.”²⁸⁰

Stigmatizing the jobless is easier when the jobless are Black men and women. This idea focuses on the purported deficiencies of the excluded rather than on the defects and inequities of the market system that excludes them.²⁸¹ The unemployed individual now bears the blame, as well

272. See SHORRIS, *supra* note 258, at 86 (describing the panic which arises when one is jobless).

273. *Id.* at 87.

274. See generally STANDING, *supra* note 257, at 139 (describing the emotions felt by the underemployed and the presumption that they are underemployed to receive benefits is false).

275. See POLANYI, *supra* note 28, at 257.

276. See generally Dewey, *supra* note 63, at 411.

277. See STANDING, *supra* note 257, at 142.

278. Olugbenga Ajilore, On the Persistence of the Black-White Unemployment Gap, *Ctr. For AM Progress* (Feb. 24, 2020).

279. See *id.*

280. *Id.*

281. See generally *id.* (“Labor market policies need to focus on closing the unemployment gaps between whites and African Americans, rather than simply lowering unemployment. To accomplish this, solutions must focus on breaking down structural barriers”).

as the onus of overcoming the consequences of joblessness. It also ignores the on-going White superiority doctrine and its effects. Those effects continue to trap Black men and women in low status, low-paying jobs where they are most likely to be laid off.

In a racist society, neglect and exclusion leads to working “off the books” in an underground economy in order to survive, to feed the children, and to avoid eviction.²⁸² Although the underground economy can enable poor people and communities to survive, it can lead them to further exclusion from society:

For people in the ghetto communities, living underground largely means creating ties of dependency to other actors who are equally hard up. Poor people sharing with other poor people has its limits. Their resources run out at some point. The economy becomes predatory, and hustling shows its ugly side, not as creative and explorative, but as exploitive and punishing.²⁸³

Their silence, however, should not be seen as consenting to their situation.

V. POWER “SELLING” FREEDOM TO THE PEOPLE

Five hundred years ago, Niccolo Machiavelli, in *The Prince*, wrote about the importance of image-making and public relations:

A Prince has to have particular care that, to see and to hear him, he appears all goodness, integrity, humanity and religion, which last he ought to pretend to more than ordinarily. For everybody sees but few understand; everybody sees how you appear, but few know what in reality you are, and those few dare not oppose the opinion of the multitude, who have the majesty of their prince to defend them.²⁸⁴

Organized business groups have attempted “to reshape the ideas, images, and attitudes through which Americans understood their world.”²⁸⁵

282. See SUDHIR VENKATESH, *OFF THE BOOKS: THE UNDERGROUND ECONOMY OF THE URBAN POOR* 386 (Harvard Univ. Press 2009).

283. See *id.*

284. See UPTON SINCLAIR, ED., *THE CRY FOR JUSTICE: AN ANTHOLOGY OF THE LITERATURE OF SOCIAL PROTEST* 406 (The John C. Winston Co. 1915) (referring to the book *The Prince* to introduce the importance of public relations regarding unemployment).

285. See Elizabeth A. Fones-Wolf, *Beneath Consensus: Business, Labor, and the Post-War Order*, *UNIV. MASS AMHERST* 1, 422 (1990) (“Unions called for full employment, social planning,

At its core, the objective has always been “to turn back the central institutions and the reigning ideas of New Deal liberalism and revive an age of laissez-faire”—creating a universe “in which the corporation was the liberator and the state the real oppressor of the working class.”²⁸⁶

Part of that objective has been the attempt to cover up what business does and causes with idealistic creeds and values²⁸⁷ at the same time identifying “its own version of private enterprise with Americanism.”²⁸⁸ The goal is to have Americanism mean:

[A]n interconnected set of values in which freedom is the economic freedom of the entrepreneur; democracy is a governmental system that gives maximum protection to property rights; progress is economic growth; individualism means the right to use one’s property as one desires and to compete with others; and society is a market society that promotes and does nothing to interfere with the competition in which the fittest win out.²⁸⁹

Originating many years ago but in more subtle forms still utilized today, justifications for harsh economic reality were sought through the invocation and promulgation of inexorable laws of human nature, such as: (1) the survival of the fittest; (2) theological laws wherein wealth was a sign of God’s approval and blessing; and (3) unalterable gravity-like natural laws that governed the market economy.²⁹⁰ Whether ordained by God or the result of forces which no employer controlled, the market system and its outcomes therefore could not be just or unjust.²⁹¹

and the expansion of the welfare state, essentially a fundamental reconstruction of American society orchestrated through the continued growth of state power. The business community, however, set out to build agreement around an alternative agenda. In doing so it sought not only to recast the political economy of post-war America, but also to reshape the ideas, images, and attitudes through which Americans understood their world”).

286. See KIM PHILLIPS-FEIN, *INVISIBLE HANDS: THE BUSINESSMEN’S CRUSADE AGAINST THE NEW DEAL* ix, 114 (W.W. Norton & Co. 2010).

287. See COMMAGER *supra* note 3 at 413.

288. See *id.*

289. JAMES A. GROSS, *A SHAMEFUL BUSINESS: THE CASE FOR HUMAN RIGHTS IN THE AMERICAN WORKPLACE* 49 (ILR Press 2010).

290. See generally PHILLIPS-FEIN, *supra* note 286, at 116.

291. See generally GROSS, *supra* note 289, at 49 (“Every economic system also embodies value judgments about the individual person, law, private property, liberty, and the role of the government”).

Embedded in “freedom philosophy” is the promulgation of values and ideas promoting individual and societal freedom—a technique utilized in every communicative technique.²⁹² It was so widespread that it even reached school children in an effort to form business-oriented attitudes at the earliest age.²⁹³ The Council for Corporate and School Partnerships’ “Guiding Principles,” for example, call for educator-business leader partnerships “that build upon a shared understanding of values and culture to support mutual needs.”²⁹⁴ The Council for Corporate and School Partnerships recommends:

That decisions about partnership activities, such as whether a business should support curriculum materials, provide volunteers and mentors, offer products and services, or organize social events or other activities shall be made at the local level—and through collaboration between the schools, businesses and communities involved in developing those relationships.²⁹⁵

Mentoring and maintaining curriculum materials are ways that “shared understanding of [market] values” are instilled to transform state educational systems into promoting ideology rather than critical thinking skills.²⁹⁶ This is not new. For example, in 1942, a publication of the Progressive Education Association reported 50,000 free copies of illustrated text books were to be published and distributed to high school and college libraries.²⁹⁷ The underlying theme of these books: great American industry services and how they are performed.²⁹⁸ The attempts to influence values and attitudes of youth date back to Horatio Alger stories that told the poor that hard work and noble virtues (and a great deal of luck) would bring material gain.²⁹⁹

292. See PHILLIPS-FEIN, *supra* note 286, at 108.

293. See THE COUNCIL FOR CORP. & SCH. P'SHIPS., GUIDING PRINCIPLES FOR BUSINESS AND SCHOOL PARTNERSHIPS, 1 (2002).

294. *Id.*

295. *Id.*

296. See STANDING, *supra* note 257, at 132 (“This type of partnership is just one way by which state educational systems are being restructured as commercial enterprises promoting an ideology rather than critical social thinking”).

297. See William H. Kilpatrick, *Textbook Plans*, 8 FRONTIERS OF DEMOCRACY 197 (1942).

298. *See id.*

299. See generally Samantha M. Lentz, *The Narrative of the American Dream: Evaluating the Impact of Horatio Alger Jr. on America's Definition of Success*, UNIV. MICH. DEP'T. ENG. 15, 36 (2016) (“Many choose to believe that the path to a better life is as simple as Alger makes it

Workers are another crucial target. Regardless of title—employment management, personnel management, scientific management, welfare capitalism, human relations, human resource management, strategic human resource management—employers seek “to get employees to believe that their employer’s goals and interests and their goals and interests are one.”³⁰⁰ Increasing productivity, profit, and keeping management union free are some of these shared goals.³⁰¹ This “motivational management” that some see as manipulation because it ignores the imbalance of power at the workplace, “seeks to induce maximum effort, dedication, and loyalty from workers that employers treat as disposable and to whom they pledge no loyalty.”³⁰²

The development of these motivational systems was a collaborative effort between academic institutions and businesses.³⁰³ Some have ridiculed these academic efforts as research intended to reinforce employers’ authority.³⁰⁴ Guy Standing claimed that by early 2000, pro-market elitists captured the economics professions.³⁰⁵ It matters that Principles of Economics as taught in U.S. colleges and universities is always market economics.

More than 150 years ago, Henry David Thoreau challenged blind submission to the state.³⁰⁶ He believed that “the mass of men” serve the state “as machines with their bodies” but without the exercise of moral

seem. Whether you subscribe to it or not, “the American dream” is a phrase that dominates a great deal of rhetoric in the United States”).

300. Cf. GROSS, *supra* note 289, at 190 (“Respect for those human rights and workers’ exercise of them at their workplaces should not depend on an employer’s decisions to grant that respect or on some human resources best practice or employer production scheme that indicates that it would be good for the business to do so”).

301. *E.g., id.* (describing the manipulation tactics used by employers to maintain control over not only their employees and their jobs, but their way of thinking as well).

302. *See id.* at 191 (“Workplace manipulation violates workers’ human right to act and make personal choices in an autonomous, self-determining manner without being subjected to seductive behavior-influencing techniques . . .”).

303. *See id.*

304. *See* LOREN BARITZ, *THE SERVANTS OF POWER: A HISTORY OF THE USE OF SOCIAL SCIENCE IN AMERICAN HISTORY* 137–138 (1960) (“Though the emphasis on distribution was unusual, there were apparently to be no questions about whether workers should be adjusted to the status quo of industry, or about how the research results of industrial psychologists were to be controlled”).

305. STANDING, *supra* note 257, at 62.

306. *See* Sinclair, ed., *supra* note 284, at 630 (“Others—as most legislators, politicians, lawyers, ministers, and office-holders—serve the State chiefly with their heads”).

judgments.³⁰⁷ Others serving the State with their own heads rarely make distinctions of morality, rather, “they are as likely to serve the devil without intending it, as God.”³⁰⁸ Thoreau contended that very few individuals served the State with a conscience of their own, and thus necessarily resisted. Thoreau bestowed upon these servants titles such as heroes, patriots, and reformers, but warned that the state would treat them as enemies.

Thoreau’s concerns apply to any situation where people submit to power.³⁰⁹ Whether it is the state, private employers, or a combination, there is an obligation to resist and change whatever keeps all people from living fully human lives. It is necessary to question why any human being should submit to political tyranny or impersonal forces of the market. Perhaps any significant change—such as enforcing a right to work that is no longer dependent solely on employer profitability—is a losing proposition. To repeat Terry Eagleton, however, “if you do not resist the apparently inevitable, you will never know how inevitable the inevitable was.”³¹⁰

CONCLUDING THOUGHTS: A GUARANTEED WORK STRATEGY AND HUMAN RIGHTS FOR ALL

Nothing discussed in this paper was inevitable. Neither God, nature, nor iron laws of economics determines who has the power to do what and who is benefitted or burdened as a consequence.³¹¹ As Cass Sunstein has written: “When people starve, it is the result of social choices, not anything sacred or inevitable.”³¹²

There remains no right to work in the United States because the government refuses to recognize such an economic right. The lack of recognition of a right to work is often justified with pragmatic and ideological reasons. Claims that it is impractical or un-American to implement a

307. *See id.* at 630.

308. *See id.*

309. *See generally id.* (“A very few, as heroes, patriots, martyrs, reformers in the great sense, and men, serve the State with their consciences also, and so necessarily resist it for the most part; and they are commonly treated as enemies by it”).

310. *See* EAGLETON, *supra* note 240, at 6.

311. *See* SUNSTEIN, *supra* note 18, at 25 (quoting Roosevelt in accepting the Democratic nomination, that this nation “must lay hold of the fact that economic laws are not made by nature. They are made by human beings”).

312. *See generally id.*

right to work ignores American history. During the Great Depression and in World War II, there was a massive creation of work beyond the control of private sector employers along with the large-scale and complex planning that required. These experiences demonstrate that governmental planning to provide work is not impractical nor a foreign concept—it has been done before. Such experiences provide economic, political, and social evidence—both positive and negative—to guide and instruct efforts to implement the right to work.

The New Deal was an amalgam of many programs and agencies. Public work programs were the core of job creation effort. For example, the Civilian Conservation Corps (CCC) employed 250,000 and the Works Projects Administration (WPA) employed over 3,000,000.³¹³ The most remembered work opportunities involved genuine worthwhile projects of great social and economic value to the nation.³¹⁴ These job opportunities brought sewer systems, electricity, rural schoolhouses, airports, roads and bridges, sanitation and water purification, reading and writing, parks and playgrounds, forest conservation, tree planting, and hospitals to places across the country.³¹⁵

In 1933, Harry Hopkins, head of the WPA, predicted that this work—which enabled many to maintain at least the minimum needed to live—could provide employment “indefinitely.”³¹⁶ As Hopkins predicted, there is still a vast amount of this work to be done with no end in sight.³¹⁷ There is dignity inherent in the purpose of this work and how it improves the lives of all.³¹⁸

Furthermore, New Deal projects, such as the Public Works of Art Project, the Federal Writers’ Project, and the Federal Theater Project, sought

313. See HOWARD ZINN, *NEW DEAL THOUGHT* xxxix–xli (Hackett Publ’g Co., 1966).

314. See Harry L. Hopkins, *The War on Distress*, in *NEW DEAL THOUGHT* 151, 154 (Howard Zinn ed., Hackett Publ’g Co., 1966) (noting the doubts associated with undertaking genuinely worthwhile projects were groundless because “[f]ine projects of enduring benefits to the communities, states and the nation have been found everywhere”).

315. See *id.* (describing worthwhile projects that employed millions of individuals across the nation).

316. See *id.* at 151, 156, 157.

317. See *id.* at 151, 157 (describing work opportunities with the potential to extend “far beyond its present limits. . .”).

318. See *id.* (“Most important, is the fact that unemployed people want to work for what they get. They resent being asked to be a party to any subterfuge of a job as a means of getting relief”).

to develop the nation's "relatively untouched public resources."³¹⁹ Hallie Flanagan, who led the Federal Theater Project, saw her operation as "part of a great nation-wide work project:"

"[O]ur actors are one, not only with the musicians playing symphonies in Federal orchestras, with writers recreating the American scene, with artists compiling from the rich and almost forgotten past the Index of American Design, but they are also one with thousands of men building roads and bridges and sewers; one with doctors and nurses giving clinical aid to a million destitute men, women, and children; one with workers carrying traveling libraries into desolate areas; one with scientists studying mosquito control and reforestation and swamp drainage and soil erosion."³²⁰

Flanagan saw art as ways for people to illuminate and understand their own struggles, to think, reflect, and to develop an inquiring and critical spirit.³²¹ Art, in the broadest sense, was more than a private enterprise producing a private commodity for those who could afford a luxury good.³²² Art was considered a "public interest," because it created value outside of financial profits.³²³

For example, the Federal Theater Project satiated not only a physical hunger for many local artists but also generated a "hunger [in] millions of Americans for music, plays, pictures, and books."³²⁴ The Project's achievements were epitomized by the "drama of a hundred thousand children who never saw a play before."³²⁵

These Federal Projects allowed workers to exercise their own creativity and self-expression, and enabled audiences to experience fuller

319. See generally Lewis Mumford, *The Government Should Support Art*, in *NEW DEAL THOUGHT* 166, 166 (Howard Zinn, ed., Hackett Publ'g Co., 1966) (endorsing the immediate continuance of public art funding).

320. Hallie Flanagan, *The Drama of the Federal Theater Project (1939)*, in *NEW DEAL THOUGHT* 172, 178–79 (Howard Zinn, ed., Hackett Publ'g Co., 1966).

321. See HALLIE FLANAGAN, *ARENA: THE STORY OF THE FEDERAL THEATRE* 1, 129 (1st ed. 1969) (explaining that government sponsored plays kept the core of democracy protected against rhetoric of dictatorships overseas).

322. See generally *id.* at 12, 43.

323. See generally *id.* (believing that theatre could be a social and educative force).

324. See *id.* at 19 (providing work for many who worked in the theater industry and inspired the formation of local theaters across the country).

325. See Flanagan, *supra* note 321, at 178–79 (describing the type of crowds attended the Federal Theater).

lives.³²⁶ That was particularly true of the work afforded to Black men and women actors, writers, musicians, and technicians and the cultural experiences of the audiences.³²⁷

Through the Theater Project, Black artists created controversial plays such as *Turpentine*, which exposed the tyranny of the southern labor camp system.³²⁸ However, as was true of other New Deal programs, the Federal Theater Project, although pledged to operate without discrimination, did not challenge racial segregation directly.³²⁹ The Project had a “special program for Negro companies” a theater in Harlem “for the Negro Group;”³³⁰ a Negro Youth Theater.³³¹ One of the Projects’ major units was “the Negro theater” but that was placed under White leadership (John Houseman and Orson Wells) because “although Negroes had always been performers [they] had no previous means of learning direction and design.”³³²

Still, Flanagan wondered if her opponents were afraid of the Project because it made for better understanding across classes and races or because it gave Black and White actors the same opportunity to produce quality work.³³³

Today, in the United States only a tiny fraction of public funding is committed to arts and culture.³³⁴ Consequently, available funding depends largely on private donations from urban elites, corporations, smaller businesses, and institutional philanthropies.³³⁵ Over time, the

326. *See id.* at 19 (explaining that talented artists could be found in small towns across the country).

327. *See id.* (pointing out that the U.S. government enabled marginalized communities to participate in art through the Federal Theater Project).

328. *See id.* at 75.

329. *See id.* at 44 (explaining that all projects were supposed to operate without discrimination of race, creed, color, or political affiliation).

330. *See id.*

331. *Id.*

332. *See id.* at 63 (discussing Black theaters that were primarily under the control of White leadership).

333. *See id.* at 361 (exploring why Southern politicians felt threatened by the Federal Theater Project).

334. *See* Jo Livingstone, *Why Are Americans so Hostile to State-Funded Art?*, THE NEW REPUBLIC (May 26, 2017), <https://newrepublic.com/article/142925/americans-hostile-state-funded-art> [<https://perma.cc/KLH7-LRXF>] (citing the Trump administration’s request to Congress to completely close art funding).

335. *See id.* (describing a time when the arts were solely an activity for the wealthy people).

arts field engaged in commercial “marketization”—such as museums that charge admission and operate gift shops—to generate revenue.³³⁶

This decentralized, private, and unpredictable basis of funding is insufficient to support the vast amount of work that could be made available in the arts. The federal New Deal programs offered a glimpse of how the arts could benefit society as a whole instead of just an affluent few.³³⁷ The New Deal programs no longer exist, but they proved that the arts are essential to individual and communal growth.³³⁸

The arts join the ranks of other underdeveloped sectors of the United States, like education, healthcare, and ecology, and will not have its potential realized unless the work is funded. There is human potential and creativity that could be realized—but are not. People and communities whose life experiences could be humanizing and fulfilling but are not, demonstrate the consequence of making private profit the determinant of what work is to be done. This profit driven mindset leads to huge human rights violations. Neither the violations nor the waste is inevitable. Both are preventable.

A. *The Nature of Work and Human Life*

If the exercise of the right to work, in conjunction with other economic and civil rights, will enable people to live fully human lives, then the work that they do must be as Dewey emphasized, creative and dignifying work is useful to the community and freely chosen.³³⁹ Freely chosen means having the self-determination that is the essence of humanity; it is doing what a person aspires to do.³⁴⁰

There are all types of work performed in this country and around the world. Despite many changes in how work is performed, it remains essentially “wage work in specialized occupations outside the household complemented by unpaid caring work within it.”³⁴¹ This work includes:

manual laborers in factories, mines and construction; teachers; clerical workers; administrators; clerics; police officers and firefighters; nurses,

336. See *id.* <https://newrepublic.com/article/142925/americans-hostile-state-funded-art> [<https://perma.cc/KLH7-LRXF>].

337. See FLANAGAN, *supra* note 321, at 43.

338. *Id.*

339. See Dewey, *supra* note 63, at 411, 415.

340. See STANDING, *supra* note 257, at 19.

341. See BUDD, *supra* note 52, at 9.

nurses' aides, and doctors; lawyers; military personnel; managers of all sorts and levels; scientists; domestic workers; a "precariat" of casual workers; agency workers, often holding multiple part-time jobs; the unknown number of men and women euphemistically referred to as "informal" workers without protections of any sort such as prostitutes, street vendors, and food and drink sellers; and, also unprotected and unpaid mainly women caring for others.³⁴²

Most work is not creative, dignifying, or freely chosen. For many people, work does violence to their mind, body, and spirit, because they labor in environments that are unhealthy, dangerous, and life-threatening; and require mind-numbing submissiveness and demoralizing drudgery filled with daily humiliations.³⁴³ Human beings become commodities—factors of production and human resources: "the jobs most people are obliged to do are boring, restrictive, stressful and rarely 'freely chosen'" in great part because those jobs are not determined by workers.³⁴⁴ Employers determine the number of jobs, and design those jobs with the intent to make performance more productive, efficient, and cost-effective in the pursuit of profit.³⁴⁵ Therefore, the work most people do is work for someone else; work becomes a means to achieve someone else's purposes.³⁴⁶ Employers control work, enforced by their management authority to impose discipline including termination of employment.³⁴⁷

Still present today, hunger is the motivation to accept body and mind-destroying labor.³⁴⁸ As one truck driver explained: "Most of 'em are one paycheck away from the poorhouse."³⁴⁹ Others have "kids in school," house mortgages, and car payments.³⁵⁰ For others, the concern is less related to survival and more associated with job dissatisfaction and

342. See generally STANDING, *supra* note 257, at 19 (listing various types of work).

343. See generally BUDD, *supra* note 52, at 16 (indicating that some types of work lead to mental strain and undesirable psychological effects).

344. See STANDING, *supra* note 257, at 248.

345. See *id.*

346. See generally *id.*

347. See generally *id.* (describing the control that employers have over jobs).

348. See generally SINCLAIR, *supra* note 284, at 200–01.

349. See STUDD TERKEL, *WORKING: PEOPLE TALK ABOUT WHAT THEY DO ALL DAY AND HOW THEY FEEL ABOUT WHAT THEY DO* 291 (Ballantine Books 1972) (compiling stories from individuals working in various jobs).

350. See *id.* (recounting the story of a mother trying to keep up with all payments while having kids).

disillusionment.³⁵¹ In the words of one worker, “most of us have jobs that are too small for our spirit.³⁵² Jobs are not big enough for people.”³⁵³ Rather than change the structure of these jobs, too often employers manipulate workers to change their perceptions about their jobs.³⁵⁴ Such approaches to create job happiness without changing the job, including the use of “buzzwords and scientific euphemisms” are “exercises in sophistry that belittle speakers and listeners”.³⁵⁵

The ability to work in activities that develop and enhance people’s humanity is the key to the ability to live a fully human life. The history of “Negro jobs” puts a stark perspective on that right.³⁵⁶

B. The Nature of the Market

In the end, Franklin Roosevelt’s question persists: “Whether individual men and women will have to serve some system of government or economics or whether a system of government and economics exists to serve individual men and women.”³⁵⁷ Karl Polanyi said that the answer depends on whether economics and markets are embedded in society and operate for the benefit of society.³⁵⁸ In the United States, the market economy dominates society.³⁵⁹

A market is a place where things can be bought and sold.³⁶⁰ In a market system, prospective employees are worth only what they have to sell and will be hired only if employers find it profitable to buy what these job

351. *See id.* at xxix.

352. *Id.*

353. *Id.*

354. *See* STANDING, *supra* note 257, at 249.

355. *See id.* (noting that some “[e]fforts to induce more job commitment are almost exercises in deception”).

356. *See generally* Johnson, *supra* note 78, at 310 (describing the economic position of “the Negro” as a step removed from poverty due to the differential in wages, hours, kinds of work, and work conditions imposed by the “white South” to stop the Negro from getting ahead).

357. Roosevelt, *supra* note 56, at 46.

358. *See generally* POLANYI, *supra* note 28, at 254–56.

359. *E.g.*, STANDING, *supra* note 257, at 132.

360. *See* Joan Violet Robinson, *Market Economics*, BRITANNICA (Aug. 15, 2023), <https://www.britannica.com/topic/market> [<https://perma.cc/R8BM-6DK6>] (“Market, a means by which the exchange of goods and services takes place as a result of buyers and sellers being in contact with one another, either directly or through mediating agents or institution”).

seekers have to sell.³⁶¹ Such reality leaves people unemployed and desperately seeking work, leaving needed but unprofitable work undone.

The right to work is meaningless if it means only one's opportunity to offer performance as a commodity for sale in a labor market.³⁶² Understanding the right to work in the context in which it is asserted is critical.³⁶³ The 1940s proponents of the right to work saw work as foremost *among* other economic and civil rights needed to live lives of dignity, self-determination, self-respect, and to participate in community life in ways that can influence the decisions that affect those lives.³⁶⁴

The right to work is all-inclusive—people can engage in productive and creative activities regardless of whether that work is paid, unpaid, or unproductive in the market sense.³⁶⁵ However, the right to work is inconsistent with the nation's traditional private economy government role of acting as an adjunct to the market.³⁶⁶ As adjuncts to the market, governments at national and local levels, stimulate and save the private market from self-destruction; hypocritically using government when advantageous to do so while decrying “big government” as socialistic when disadvantageous.³⁶⁷

A strategy to achieve the right to work in its broadest meaning would require a different regulatory system. It would be a strategy that would allow all to exercise self-determination and self-expression, to live fuller and freer lives, and to participate in the decisions that affect their lives.³⁶⁸

In this country, it is not likely that the government will be the primary creator and supplier of work because the dominant market economy appears to be long-lasting. As previously discussed, a right to work is incompatible with a government role as promoter of “full employment” because that policy's anti-inflation goal requires substantial unemployment.

361. *See generally*, STANDING, *supra* note 257, at 10.

362. *See id.* (describing labor as commodified).

363. *See generally id.* at 10, 18.

364. *See id.* at 18 (describing the right to work embodied in the 1945 legislation as “progressive and idealistic” with the effect of “providing jobs to people who needed them, thus helping to keep millions out of poverty”).

365. *See generally id.* at 18–19.

366. *See generally id.* at 10.

367. *Compare* Roosevelt, *supra* note 56, at 51–52 *with* THE FUTURE OF FEDERALISM IN THE 1980S 71, 73 (Advisory Comm'n Intergovernmental Rel. 1981).

368. *See* STANDING, *supra* note 257, at 18 (describing an occupation as supplying “agent freedom” and providing an “image of individual able”).

As in the New Deal, the traditional limited government role, as an employer of last resort, restricts job creation and promotion to economic crises and perpetuates the current system.

Work is essential to the realization of human rights and requires the government to be a continuous employer of people for work in areas such as the arts, public education, health care, and other activities needed for public good and welfare. Objections that doing this would compete unfairly with private enterprise reaffirms the subservience of the government to the market. Making the right to work a reality involves work that is needed for the commonwealth, but this work is not being done. Completing this work might reduce some private employers' profits, but regardless this work needs to be done.

One approach to completing this work would be to re-embed the market economy into society.³⁶⁹ In the United States, Black men, women, and children experience exclusion in society and the market economy. Race remains a deciding factor in perpetuating inequality in the "labor market."³⁷⁰ Compared to whites, Black men and women still a poverty rate almost three times higher; double the unemployment rate; household incomes sixty percent less; higher concentration in low status, low-paying, and unstable jobs; and six times more likely to be in prison or jail.³⁷¹ President Lyndon B. Johnson responded to the brutal beating of civil rights demonstrators marching from Selma, Alabama to Montgomery by telling the nation that the issue of equal rights was an issue that laid "bare the secret heart of America itself."³⁷² President Johnson deemed the nation a failure if those equal rights were not respected and enforced even if every enemy was defeated our wealth was "doubled" and the stars "conquered"³⁷³ It is not too late to lay bare the secret heart of America—

369. POLANYI, *supra* note 28, at 60.

370. *See* Weller, *supra* note 47.

371. *See id.* (relaying economic data showing inequalities); *see also* Valerie Wilson, *50 Years After the Riots: Continued Economic Inequality for African Americans*, WORKING ECON. BLOG (Feb. 26, 2018, 2:11 PM), <https://www.epi.org/blog/50-years-after-the-riots-continued-economic-inequality-for-african-americans/> [<https://perma.cc/5ZJL-2HCE>] (linking poor job outcomes to increased rates of poverty for Black individuals).

372. *See* Lyndon B. Johnson, President of the United States, Special Message to the Congress: The American Promise (Mar. 15, 1965), in THE AM. PRESIDENCY PROJECT, at 1–2, <https://www.presidency.ucsb.edu/documents/special-message-the-congress-the-american-promise> [<https://perma.cc/X5AK-2P8D>].

373. *See id.* at 2.

including those immoral rights-violating choices made by many public and private individuals, groups and institutions—or to make the national commitment necessary to enable all people to live fully human lives.

Given the grievous nature of the crimes against the humanity of Black men, women, and children, there is no middle ground here: “Would one . . . seek to reconcile slaves and slave masters or persuade Native peoples to complain only moderately about those who are plotting their extermination?”³⁷⁴ What is the middle ground between racism and anti-racism?”³⁷⁵ It is not too late to take seriously the right to guaranteed work and its impact on people’s ability to live fully human lives in freedom and community.

This paper intends to revive discussion and suggest new perspectives on the right to work. Failing to reconsider the right to work maintains the status quo and guarantees that people’s lives remain dependent on private enterprises’ profits.

The economic, civil, and political rights of Black men, women, and children in this country have been ignored or violated. Rather than be-moan guaranteed, useful, creative work as a “losing proposition” or a “lost cause,” the human rights violation-filled history of black men, women, and children workers in this country demands and compels (or should compel) action at every level—from protest mobilization to legislation—to make useful and creative work available to all as a way to live more fully human lives. Denying human rights on racial grounds is within people’s control and can be addressed. Deliberate choices by public and private institutions cause the denial of human rights.³⁷⁶ The tenant farmer being bulldozed off his land in the *Grapes of Wrath* cries out, “We all got to figure. There’s some way to stop this. It’s not like lightening or an earthquake. We’ve got a bad thing made by men, and by God that’s something we can change.”³⁷⁷ The same is true today—shuttered storefronts, rubble-strewn lots, abandoned factories, boarded-up houses, extreme segregation, and high poverty rates in places where “almost all are people of color.”³⁷⁸

374. See EAGLETON, *supra* note 240, at 200.

375. See *id.*

376. E.g., *id.*, at 265 (“But to turn against regulation means to turn against reform”).

377. See JOHN STEINBECK, *THE GRAPES OF WRATH* 52 (Viking Press) (1939).

378. See THOMAS J. SUGRUE, *THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POST-WAR DETROIT* 3 (Princeton University Press 1996).

C. *The Nature of the Fight for Rights*

At their core, fights over rights are fights over power redistribution.³⁷⁹ Discussions of justice rarely give adequate attention to the fact of power. Power is needed to move justice from pious talk to action, where it can influence conduct and cause change. “Although might does not make right, it does take might to get right done.”³⁸⁰ Therefore, A. Philip Randolph’s instruction bears repeating here:

“The virtue and rightness of a cause are not alone the condition and cause of its acceptance. Power and pressure are at the foundation of the march of social justice and reform...power and pressure do not reside in the few, and intelligentsia, they lie and flow from the masses. Power does not even rest with the masses as such. Power is the active principle of only the organized masses, the masses united for a definite purpose.”³⁸¹

The problem here is greater, however, in that what is confronted is not only economic, political, and social power, but also the entrenched White superiority doctrine that has remained essentially impregnable since the beginning of the country.³⁸² It is White supremacy that has been required to give at most “an *if* and a *when* an a *maybe*.”³⁸³

In that same vein, anti-white superiority words and phrases such as “discrimination” and “equal opportunity” have become neutered or depicted as representing merely the grievances of another set of self-interest groups. The language of protest has been used to cover up or camouflage the enormity and true nature of the violations discussed in this article.

The exercise of Randolph’s conception of power, therefore, needs to be expressed in a language that raises understanding to a higher philosophical level, that is, an understanding that the race-based violations are far more than civil rights violations; they are violations of human rights.

379. See generally Joseph Fishkin & William Forbath, *How Progressives Can Take Back the Constitution*, THE ATLANTIC (Feb. 8, 2022), <https://www.theatlantic.com/ideas/archive/2022/02/progressives-constitution-oligarchy-fishkin-forbath/621614/> [https://perma.cc/7LU8-3DG2].

380. GROSS, *supra* note 289, at 21.

381. See *id.* at 169 (reviewing JERVIS ANDERSON, A. PHILIP RANDOLPH: A BIOGRAPHICAL PORTRAIT (1972)).

382. See AUGUST WILSON, RADIO GOLF 8–9 (Theatre Communications Group, 2007) .

383. See *id.* at 79 (portraying the continuation of the historical pattern of white people exerting power over black communities and erasing their cultural identity and preventing them from the “center”).

For example, shortly after the United Nations (UN) was established in the aftermath of Nazi genocidal pogroms, civil rights groups in the country—exercising thinking far ahead of their time—sought to expand the understanding of genocide.³⁸⁴ In 1946, the National Negro Congress petitioned the U.N. Secretary General to end the subjugation of Black Americans.³⁸⁵ A year later, the National Association for the Advancement of Colored People (NAACP) submitted a 95 page “Appeal to the World” petition to the UN.³⁸⁶ Under the editorial direction of W.E.B. Du Bois, the petition addressed violations of voting rights, employment, education, criminal justice, and health care.³⁸⁷ The “Appeal to the World” came a year before the adoption of the Universal Declaration of Human Rights³⁸⁸ in 1948 and was one of the first efforts to define race-based violations as human rights violations.³⁸⁹

In 1951, three years after the UN had adopted its Convention on the Prevention and Punishment of the Crime of Genocide, the Civil Rights Congress delivered to the UN its petition “We Charge Genocide.”³⁹⁰ In blunt terms, this petition presented a more nuanced definition of genocide particularly an understanding of “killing” far more expansive than the literal sense of Nazi mass murders.³⁹¹ For example, the Petition included a section on “Economic Genocide” citing conditions that in the words of the convention on Genocide were “deliberately inflicting on the group

384. See Alex Hinton, *70 Years Ago Black Activists Accused the U.S. of Genocide. They Should Have Been Taken Seriously*, POLITICO (Dec. 26, 2021, 7:00 AM), <https://www.politico.com/news/magazine/2021/12/26/black-activists-charge-genocide-united-states-systemic-racism-526045> [<https://perma.cc/JCS4-LJCZ>].

385. See *id.*

386. See BURGHARDT DU BOIS, *supra* note 138, at 94.

387. *Id.* at 6.

388. See G.A. Res. 217 (III)A, Universal Declaration of Human Rights (Dec. 10, 1948).

389. See Jamil Dakwar, *W.E.B. Du Bois’s Historic U.N. Petition Continues to Inspire Human Rights Advocacy*, ACLU (Oct. 25, 2017), <https://www.aclu.org/news/human-rights/web-du-boiss-historic-un-petition-continues> [<https://perma.cc/4QXF-CMCK>] (emphasizing the accountability the petition wanted the U.N. to acknowledge for the violations of basic human rights against African Americans).

390. G.A. Res. 260A (III), Convention of the Prevention and Punishment of the Crime and Genocide (Dec. 9, 1948).

391. See WE CHARGE GENOCIDE: THE HISTORIC PETITION TO THE UNITED NATIONS FOR RELIEF FROM A CRIME OF THE UNITED STATES GOVERNMENT AGAINST THE NEGRO PEOPLE 7 (William L. Patterson, ed. 1951) (arguing that the government’s treatment should be recognized as a genocide under international law).

conditions of life calculated to bring about its destruction in whole or in part.”³⁹²

The UN disregarded these petitions for many reasons including the opposition of the U.S. government during the Cold War to communist-supported notions such as economic rights being human rights. The point here, however, is to illustrate thinking that captures the life-destroying and human spirit-destroying consequences of White supremacy.

In the tradition of the genocide petitions, these inhuman acts, including the violations of economic rights, could and should be thought of and treated as crimes against humanity because they meet the evolving international standards for such violations.³⁹³ This is not an overstatement. They constitute crimes against humanity because they are odious offenses of long duration that attack human dignity and inflict grave humiliation or degradation on human beings.³⁹⁴ Despite its war crimes roots, the concept of crimes against humanity is constantly developing—why should the destruction and suppression of the humanity of Black men, women, and children by White supremacy in this country not be a necessary part of that development.

The striking Black sanitation workers in Memphis, championed by Dr. King before he was assassinated, carried the powerful message on their picket signs: “I AM A MAN.”³⁹⁵ That message from those Black workers elevated economic race discrimination in this country to being a violation of civil rights to being a violation of human rights.

As those sanitation workers knew, the right to work in dignity is essential to realizing the other economic, political, and social rights necessary to live a fully human life.

392. *See id.*

393. *See* Hinton, *supra* note 384.

394. *See* Rome Statute of the International Criminal Court, 1998 I.C.J. Acts & Docs. 4. Art. 7 (setting the standard of crimes against humanity as a jurisdiction under the International Criminal Court’s purview); *see also* REPORT OF THE PREPARATORY COMMISSION FOR THE INTERNATIONAL CRIMINAL COURT, PCNICC/2000/INF/3/Add.2, PREPARATORY COMMISSION FOR THE INTERNATIONAL CRIMINAL COURT 5, Art. 7(1)(k)(1) (2000).

395. *See* *Memphis Sanitation Workers’ Strike*, STANFORD UNIV. KING ENCYCLOPEDIA, <https://kinginstitute.stanford.edu/encyclopedia/memphis-sanitation-workers-strike> [https://perma.cc/T64J-ECMD] (recounting the strike by 1,300 Black Memphis sanitation workers after two Black men were crushed to death by a malfunctioning truck and the city did nothing in response).