Union Power, Soul Power: Intersections of Race, Gender and Law

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COMMENT

UNION POWER, SOUL POWER:¹
INTERSECTIONS OF RACE,
GENDER AND LAW

I. INTRODUCTION

During the past thirty years, American intellectuals have become increasingly disillusioned with the labor union as an instrument of social change.² This disillusionment occurs

¹ "Union power" and "soul power" were commonly coupled as the call words designating Local 1199's strategy to join union and community support. UPHEAVAL IN THE QUIET ZONE 129 (Fink & Greenberg eds., 1989) [hereinafter "UPHEAVAL"]; See also, PHILIP FONER, ORGANIZED LABOR AND THE BLACK WORKER 395 (1974) [hereinafter "FONER"]; Raskin, A Union with 'Soul', N.Y. TIMES, Mar. 22, 1970, § 6 (Magazine), at 24 [hereinafter "Raskin"]. Local 1199 is the union representing health care workers in Charleston, South Carolina and the focus of this article. See infra Sections II-IV for further discussion of Local 1199.

² UPHEAVAL, supra note 1, at 128. See, CHARLES B. CRAVER, CAN UNION'S SURVIVE? (NYU Press 1993) (stating that union influence in the private sector will be negligible by the year 2000 unless organized labor commits more resources to organizing new members, especially those members who are women or minorities) [hereinafter "Craver"]; Unions Must Change Course, Professor Says, 142 Labor Rel. Rep. (BNA) 417 (Apr. 12, 1993) (interviewing Professor Charles B. Craver of George Washington University). See also, Marion Crain, Feminism, Labor, and Power, 65 S. CAL. L. REV. 1819 (arguing that debate rages in scholarly publications about the future relevance of labor unions) [hereinafter "CRAIN I"]; Paul Weiler, Hard Times For Unions: Challenging Times for Scholars, 58 U. CHI. L. REV. 1015, 1029-32 (1991) (stating that empirical evidence corroborates his contention that employer reprisals have been a significant reason for the private sector decline in union representation); Theodore J. St. Antoine, Federal Regulation of the Workplace in the Next Half Century, 61 CHI.-KENT L. REV. 631, 661-62 (1985) (concluding that government intervention is unavoidable if unions continue to decline); Julius Getman, Is Labor Law Doing Its Job?, 15 STETSON L. REV. 93, 93-94 (1985) (reporting widespread disillusionment with labor law in the academic community); Karl E. Klare, Workplace Democracy & Market Reconstruction: An Agenda
against the backdrop of a sharp decline in the unionized sector of the labor force and, more recently, mounting industrial defeats and political setbacks.\(^3\) Despite their current status, labor unions continue to represent a viable vehicle for social reform.\(^4\) Alternatively, a social movement itself may present a union with the opportunity to draw from a larger pool of support.\(^5\)

An especially useful example of how a pressing labor issue and a national social movement can meet in such a way as to further the ends of both causes is presented in the Charleston hospital workers’ strike of 1969.\(^6\) The Charleston strike was one of the liveliest and stormiest labor disputes in American history primarily because the strike was able to intersect its labor dispute with the major social movements of the era.\(^7\) This intersection added to the power and effectiveness of the

\(^{3}\) See Crain, supra note 2, at 1819 and n.2. See also, Union Membership Unchanged at 16.1 Percent in 1991, Daily Lab. Rep. (BNA) No. 28, at B-1 (Feb. 11, 1992) (reporting that over the past 37 years, the percentage of the work force belonging to unions has dropped from 34.7% (in 1954) to 16.1% (in 1991)); The bulk of the decrease in the percentage of the total work force who are union members has occurred during the last 16 years: Union membership as a percentage of employed workers was 28.9% in 1975, compared with 16.1 in 1991. U.S. DEPT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 408 (1987); Marvin J. Centron, Into the Twentieth Century, The Futurist, July-Aug. 1988, at 29, 35.

\(^{4}\) Union membership in the private work force is even lower: In 1995, nine out of ten private sector workers were not unionized, and unions are struggling to simply save their membership rosters after a decade of declining membership. Asra Q. Nomani, Shaken Solidarity; Struggling to Survive, Unions Battle Unions To Build Memberships, WALL ST. J., Oct. 25, 1995, at 1. In 1991, only 11.9% of employees in the private sector were union members, a significant drop from the 25% who were members in 1973. Union Membership Unchanged at 16.1 Percent in 1991, supra; Union Coverage of Private Workforce Predicted to Fall Below 5 Percent by 2000, 3 Lab. Rel. Wk (BNA), at 1185 (1989). The forecast for the next decade is even darker. For example, two labor economists have predicted that the percentage of the private sector work force that is unionized may fall below five percent by the year 2000. Id.

\(^{5}\) See infra Sections III and IV for further discussion.

\(^{6}\) The experience of Local 1199 affords encouraging evidence that a racially integrated approach within existing institutions can redistribute power and thus begin to satisfy the yearning of those in the cellar of opportunity for self-direction toward a place in the sun. Raskin, supra note 1, at 24.

\(^{7}\) Id. at 25, 38. See also infra Section II for specific details of the Charleston strike.
strike, allowing it to gather an extraordinary momentum that flowed from both the hospital workers of Charleston and from the larger civil rights movement of the time. 8

Because momentum is essential to any successful strike, 9 a law that undercuts momentum will necessarily undercut a union’s ability to effect meaningful change. Nevertheless, Congress enacted just such a law when it passed the 1974 Health Care Institution Amendments (hereinafter “Amendments”) to the National Labor Relations Act (hereinafter “NLRA”), thereby creating a 10-day strike notice provision for health care workers. 10

The Amendments created rules ostensibly aimed at protecting both the unique status of the patient and the arrangement of “continuity of patient care.” 11 The amended rules, however, place a tremendous burden on health care unions by deflating their important, initial momentum without allowing for reasoned exceptions. 12 The importance of this initial momentum becomes even clearer when viewed through the eyes of a union consisting mainly of women and people of color. 13 It is these traditionally excluded groups 14 who need the addi-

8. The union and the social reform movement effectively came together in Charleston for three reasons. First, the union actively tapped into the changing social climate and consciousness of the labor force itself. Second, the union created a connection to a larger dynamic of public sector collective bargaining. Third, the conflict quickly spilled out beyond the workplace into a community-wide political issue. UPHEAVAL, supra note 1, at 128.
9. See infra Section IV for further discussion of the importance of momentum in successful strikes.
10. Section 8(g) of the NLRA provides:
   A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention . . . The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.
12. See infra Section IV for discussion of the burden the amended rules place on health care unions.
13. See infra Section II.
tional strength which a social movement can give them, and
the added strength which the law currently denies them.15

This Comment will cover three main topics. First, this
Comment will tell the story of the Charleston strike and the
individual women involved.16 Second, this Comment will ex­
amine, through the eyes of those individuals, the unique ways
in which race and gender come together to create unique cir­
cumstances that deserve legal consideration.17 For both of
these sections, I use the women's own voices to illustrate and
reinforce substantive points.18 Third, this comment will de­
scribe the 10-day strike notice provision, examining how it
would have affected the Charleston workers had it been enact­
ed in 1969 during the time of the strike.19 Finally, in light of
those observations concerning race and gender, I will propose
an exception to the 10-day strike notice provision.20 This pro­
posed exception to the 10-day strike notice provision is particu­
larly important to women because they are more likely to work
as a health care providers and therefore are more likely to be
affected by health care legislation.21

33 B.C. L. Rev. 481, 482 (1992) [hereinafter “Crain II”].
15. See infra Sections III and IV.
16. See infra Section II.
17. See infra Section III.
18. Recent feminist and legal scholarship has begun to recognize the important
role personal narrative plays in understanding how people behave and how the
law could better respond to personal and cultural differences. See, Margaret E.
Montoya, Mascara, Trenzas, Y Grenas: Un/Masking the Self While Un/Braiding
Latina Stories and Legal Discourse, 17 HARV. WOMEN'S L.J. 185 (1994) [hereinafter
“Montoya”]. See also, Angela P. Harris, Race and Essentialism, 42 STAN. L. REV. 1
(1988) (finding that “in order to energize legal theory, we need to subvert it with
narratives and stories, accounts of the particular, the different, and the hitherto
silenced.”) [hereinafter “Angela Harris”]; Carol Gilligan, IN A DIFFERENT VOICE:
PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT, 147 (1982) (pointing out that
an insistence on more facts and on a more contextualized understanding of dilem­
mas helps the actor to appreciate the social contingencies of legal problems) [here­
inafter “Gilligan”].
19. See infra Section IV for further discussion of what effect the strike notice
provision would have had on the Charleston strikers.
20. See infra Section IV.C. for a more detailed analysis of this proposal.
21. The fact that women have been the classic caretakers spills over into the
health care system—more than 75 percent of health care workers are women, and
more than 85 percent of hospital health workers are women. Kathy Maeglin,
Women’s Double Burden Now Norm; Home, Job Can Cause Overload, THE CAPITAL
TIMES, Sept. 14, 1995, § Savvy at 2F. See, Janelle M. Rettler, Women’s Work:
Finding New Meaning Through a Feminist Concept of Unionization, 22 GOLDEN
II. THE STORY OF CHARLESTON AND LOCAL 1199

On March 20, 1969, approximately 500 nonprofessional employees (e.g., nurses’ aides and orderlies) and members of Local 1199B National Organizing Committee of Hospital & Nursing Home Employees began picketing the Medical College of South Carolina in Charleston to protest the discharge of twelve employees who had been engaged in organizational activities on behalf of the Union and their fellow nonprofessional employees. The picketing was also an attempt to inform the public about the abominable wages and working conditions that existed at the Hospital, as well as to gain recognition for the Union as the bargaining representative of the employees. Their protest was the inevitable result of

GATE U. L. REV. 751, n. 4 (1992) (stating generally that women are more likely to hold positions as nurses and hospital aides). [hereinafter “Rettler”]. Others report that female sex segregated jobs include nursing aides of which 88% of the workers are female. In 1983, women accounted for 96% of registered nurses. Vicki Schultz, Telling Stories About Women and Work: Judicial Interpretation of Sex Segregation in the Workplace in Title VII cases raising the Lack of Interest Argument, 103 HARV. L. REV. 1749, 1751 (1990) [hereinafter “Schultz”]. See also, Rettler, supra note 21, at 751 n. 1 and 752.

There are conflicting statistics regarding the actual number of strikers involved. Raskin reports the number as 500. Raskin, supra note 1, at 38. Eugene G. Eisner and Philip Sipser report the number as 400. Eugene G. Eisner & I. Philip Sipser, The Charleston Hospital Dispute: Organizing Public Employees and the Right to Strike, 45 ST. JOHN’S L. REV. 254 (1970) [hereinafter “Eisner & Sipser”].

This local union was chartered by Local 1199, Drug and Hospital Union, (RWDSU), AFL-CIO, which represented more than 30,000 hospital workers in the metropolitan New York area. Late in 1969, Local 1199B became one of the charter locals of a new nationwide division of hospital and nursing home employees. Eisner & Sipser, supra note 22, at 254.

The major dispute concerned hospital employees, almost all black, and almost all female, employed by the Medical College. Although it was not widely reported at the time, some 100 nonprofessional employees, again almost all black and female, employed by the Charleston County Hospital, were also involved in the controversy. Although many of the problems encountered during the protracted strike were the same in both hospitals, that portion of this article dealing with the legal problems in the dispute in Charleston will refer to those at the State Medical College [hereinafter “the Hospital”]. Id.

The women were paid $1.30 an hour or less. Eisner & Sipser, supra note 22, at 255.

The women repeatedly complained about sexual harassment, but their concerns were dismissed and no grievance procedures existed by which they could make formal complaints. FONER, supra note 1, at 394.

Id.
years of frustration and discrimination; all 500 strikers were black and all but twelve of them were women.28

As early as 1968, black workers in Charleston’s hospitals, with the help of some groups in the black community, began to hold meetings to organize.29 In September of 1968, the workers attempted to talk with Dr. William McCord, president of the medical college and director of its hospital, about union recognition or, if that was not possible, the establishment of a grievance committee.30 They were denied an opportunity to meet.31 Finally, in March of 1969, after many more requests, Dr. McCord agreed to meet with a delegation representing Local 1199B.32

The meeting was never held.33 When the five hospital workers selected for the delegation arrived at the director’s office, they were informed that he had called off the meeting.34 When they returned to their duties, they learned that they and seven union members had been fired for allegedly leaving their posts without permission.35

Not less than forty-eight hours after the dismissal, the 500 women walked out.36 Within the week, ninety workers at the Charleston County Hospital walked out in sympathy.37

A. A SOUTHERN SETTING

The cultural and economic fire into which the strike soon spread was the result of a well documented history of racial mistreatment. The State of South Carolina was not generally known for its progressive nature.38 Moreover, the state had a

28. Raskin, supra note 1, at 40.
29. FONER, supra note 1, at 388.
30. Id.
31. Id.
32. Id.
33. Id.
34. FONER, supra note 1, at 388.
35. Id.
36. Id. See also, Raskin, supra note 1, at 25.
37. FONER, supra note 1, at 388. See also, Eisner & Sipser, supra note 22.
38. Eisner & Sipser, supra note 22, at 255.
reputation for antiunionism because it had induced low wages and given tax abatements to Northern industry.39

Charleston in particular was noted for its racial discrimination and lack of civil rights.40 The city, where older black males still doffed their caps to white passersby, seemed to fall well within Robert Colses's characterization of the entire state in 1968: "No southern state can match South Carolina's ability to resist the claims of Black people without becoming the object of national scorn."41 Furthermore, Charleston had essentially escaped trade unionism and, consequently, the workers were steadily growing restless.42

B. COMMUNITY SUPPORT

The strikers had the added loyalty of the black community, a loyalty based in part upon their need to support one another given the racist environment of the South. Thousands of Charleston's black citizens turned out regularly for marches along routes lined with police, state troopers and National Guardsmen with fixed bayonets.43 In fact, the black community had assisted the hospital workers from the beginning, aiding in the initial organization of 1199B.44 Later, the black community supported the strike by actively participating in the boycotts45 and marches.46 When Coretta King addressed one rally, 7500 people, nearly thirty percent of Charleston's black population, packed a local church to hear her support the strikers.47

Finally, the hospital workers were fueled by the positive example of the recent successful Memphis sanitation strike in which a predominately black union had been supported by

39. Id.
40. FONER, supra note 1, at 386.
41. UPHEAVAL, supra note 1, at 131.
42. FONER, supra note 1, at 286.
43. Eisner & Sipser, supra note 22, at 255.
44. FONER, supra note 1, at 388.
45. See supra note 1, at 143. See also, WILLIAM HAMILTON HARRIS, THE HARDER WE RUN 176 (1982) [hereinafter "HARRIS"]; FONER, supra note 1, at 389, 391.
46. Id.
47. FONER, supra note 1, at 389.
both the black community\textsuperscript{48} and the larger national civil
rights movement.\textsuperscript{49}

C. THE SUPPORT OF THE CIVIL RIGHTS MOVEMENT

As the Memphis strike had shown, the civil rights move­ment had the power to strengthen strikes.\textsuperscript{50} The Charleston
strike acknowledged this power and strengthened its own com­munity by involving the major figures of the civil rights move­ment.\textsuperscript{51} Coretta King, Martin Luther King, Jr.'s newly wid­owed wife, often addressed the strikers' rallies\textsuperscript{52} in which she
stated “[i]f my husband were alive today he would be right here with you tonight.”\textsuperscript{53} Eventually, Mrs. King was named
Honorary Chairman of National Organizing Committee of
Hospital and Nursing Home Employees.\textsuperscript{54}

\textsuperscript{48} Id. at 380. In Memphis, sanitation workers went on strike against their
employer, the City of Memphis. The strikers were predominately black men pro­testing unsafe working conditions, racial discrimination and wages which earned them only $53-$60 a week. In retaliation, the City issued injunctions, called in the
National Guard, and the Mayor publicly denounced the strikers. Id.
However, the black community came to the strikers' aid. Negro ministers
helped raise funds for food and clothing for strikers' families; an estimated total of
$100,000 was contributed by the black community alone. Leaders of the black
community formed committees to visit landlords, utility companies, loan companies,
and retail stores. They succeeded in pressuring those organizations, by threatening
a boycott, into promising that no evictions would take place for the duration of
the strike and that a moratorium would be declared on the collection of all debts
from the strikers. When the strike ended on April 16, 1968, sixty-five days after it
had begun, the workers had won all of their key issues and returned to work on
April 17. Id.

\textsuperscript{49} Id. The strikers won the support of the Memphis NAACP; the Unity
League, another Negro organization; most of the city's black ministers; and the
AFL-CIO Labor Council. A Committee of Concerned Citizens, uniting the black
community (with some white liberals) behind the strikers, and a Citizens' Commit­
tee to Aid the Public Works Employees, composed of labor unions, black and
white, was established. The Reverend Harold Middlebrooks, a black minister, stat­
ed that, "The strike has united us as nothing has before . . . I've lived here all
my life and never seen anything like it. A Movement has begun." Id.

\textsuperscript{50} See supra notes 48 and 49 for a more detailed discussion of the Memphis
strike.

\textsuperscript{51} For example, Coretta King was actively involved in the strike. UPHEAVAL,

\textsuperscript{52} Id.

\textsuperscript{53} See, UPHEAVAL, supra note 1, at 144. See also, FONER, supra note 1, at
391.

\textsuperscript{54} Id. at 395.
Furthermore, the national heads of nine civil-rights organizations and five elected black officials issued a joint statement in support of the strike. They stated that the struggle in Charleston was "more than a fight for union rights. It is part of the larger fight in our nation against discrimination and exploitation—against all forms of degradation that results from poverty and human misery."

D. RESOLUTION

When the dust settled, the strike had lasted a total of 100 turbulent days, bringing the city of Charleston to its knees as a result of almost daily marches, rallies and boycotting of schools and downtown merchants. The strike also resulted in citywide curfews, injunctions, and the arrests and jail-
ing of over 1000 participants.  

Mass arrests took place when the governor called in the National Guard, a common tactic used by employers preying on the public's perception of the violent nature of strikes. The Charleston press applauded the governor for these arrests, stating that he had taken "the only action the black strikers would understand." Ashley Cooper, a columnist of the Charleston News and Courier, wrote: "It seems—at least to me—that the only way the illegal uprising can be stopped is by force. That may have the ring of fascism—which I hate—but honestly, what other conclusion is there?"

The entire situation was finally resolved without resort to the courts. The Department of Health, Education and Welfare (hereinafter "HEW") conducted an investigation of the hospital, placing it at risk to lose over twelve million dollars in federal grants. HEW found thirty-seven civil rights violations and formally recommended the rehiring of the twelve union workers whose dismissal had touched off the strike. As might be expected, the financial pressure implied by the HEW findings immediately triggered new moves toward a settlement. Furthermore, businessmen, complaining that the marches, boycotts and curfews were ruining both their trade and the tourist business in general, pressed the state government into raising

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61. By the end of the first week of the strike, 100 strikers were in jail. Foner, supra note 1, at 388. By the end of the strike, over 1000 arrests had taken place. Raskin, supra note 1, at 38.
62. Upheaval, supra note 1, at 154 (photograph); Raskin, supra note 1, at 38. Governor McNair also sent 600 state troopers in addition to the National Guardsmen. Foner, supra note 1, at 389.
63. Interview with Maria Ontiveros, Professor of Law, Golden Gate University, in San Francisco, CA, specializing in employment and labor law (Apr. 2, 1995). See generally, Cases on Labor Law, University Case Book Series, (11th ed. 1990). In fact, female workers are more likely than their male counterparts to participate in peaceful strikes. Crain I, supra note 2, at 1883 (arguing that much of female militance is difficult for male unionists to recognize because it does not take the conventional form of bursts of violence).
64. Foner, supra note 1, at 389.
66. Foner, supra note 1, at 392.
67. Upheaval, supra note 1, at 152.
68. Upheaval, supra note 1, at 152-53.
the state minimum wage by thirty cents an hour to $1.60. 69

In the end, the fight of the women strikers and many others resulted in a $1.60 pay floor. 70 They also won wage increases from 30 to 70 cents an hour. 71 Additionally, they won the establishment of a credit union and grievance procedures. 72 Finally, all workers were reinstated. 73 Although Local 1199B did not win union recognition, 74 almost every other similarly situated union after the Charleston strike who fought for union recognition did win recognition. 75 In other cities, white unions began to recruit black members because of the reputation gained in the Charleston strike. 76 More importantly, however, the strike had changed the lives of the women who led the strike. 77 The women had a newly found solidarity forged in the common experience of oppression across race and gender. 78

70. Id. at 394. See also, Eisner & Sipser, supra note 22, at 255.
71. FONER, supra note 1, at 394. See also, Eisner & Sipser, supra note 22, at 255.
72. Id.
73. Id.
74. Id.
75. A similar realization on the part of many Baltimore hospital workers helped bring 7,500 nonprofessional employees there under union contract after the Charleston triumph. Raskin, supra note 1, at 38.
76. FONER, supra note 1, at 396.
77. See infra Section III for further discussion.
78. Marion Crain, a legal scholar, suggests that modern labor law must build on such a form of solidarity based on race, gender and class. Crain II, supra note 17, at 535. Gillian Lester also suggests that successful campaigns share the overarching strategy of promoting personal empowerment and women's gaining control of their lives. Gillian Lester, Toward the Feminization of Collective Bargaining Law, 36 McGill L.J. 1181, 1201 (1991) [hereinafter "Lester"].
III. RACE, GENDER AND LAW: INTERSECTIONS

Given the unique makeup of the Charleston strikers, it is important to examine what characteristics made the women strikers and their union so effective. Their intersections are important for two reasons. First, the workers' intersections provide support for the recent trend in legal scholarship which recognizes the importance of cultural connections among workers. Second, viewing intersections points out the practical way in which common bonds work together to create a greater strength.

A. THEORETICAL GROUNDING IN FEMINIST JURISPRUDENCE

Feminist legal theory draws from the experiences of women and from critical perspectives developed within other disciplines to offer powerful analyses of the relationship between law and gender and to offer new understandings of the limits of, and opportunities for, legal reform. This theory, as a body, represents one of today's most significant challenges to contemporary law and legal institutions. Finally, feminist jurisprudence provides hope to working women whose experiences within the legal system have often been negative.


80. Ernestine Bryant, one striker, proves the union's awareness of issues of “intersections” when she said, “We deserve respect regardless of age, race or creed.” AMERICA'S WORKING WOMEN 360 (Baxandall et al. eds., 1976) [hereinafter "WORKING WOMEN"].

81. See, Crenshaw, supra note 82 and Iglesias, supra note 84. See also, Montoya, supra note 21; Maria Ontiveros, Three Perspectives on Workplace Harassment of Women of Color, 23 GOLDEN GATE U. L. REV. 817 (1993) [hereinafter “Ontiveros”].

82. See infra notes 115-43 and accompanying text for examples of how common bonds contribute to group strength.


84. Id.
Much of feminist jurisprudence focuses on challenging legal systems based solely on precedent, arguing that such a system ignores the experiences of marginalized groups. Instead, feminist legal theory argues for a broad re-definition of legal problems. Feminist jurisprudence examines women's workplace problems, defining them both as women's problems and as legal problems. If legal problems are not broadly defined, feminist jurisprudence argues, the law risks marginalizing the real problems that women face daily.

Also at the core of most feminist jurisprudence is the assumption that men and women do not start out on equal footing; women often need to pass through more barriers in
order to reach the same status that men may automatically achieve.\textsuperscript{90} Moreover, the race barrier creates an equally complicating barrier for many working women.\textsuperscript{91}

One feminist legal scholar, Kimberle Crenshaw, argues that dominant conceptions of discrimination incorrectly condition us to think that disadvantage occurs along only a single categorical axis.\textsuperscript{92} By this, Crenshaw means that most legal theory assumes that discrimination occurs because of a person's sex or race, but not that a special form of discrimination exists that is based on both sex \textit{and} race. Crenshaw believes, however, that the intersection of disadvantages is greater than the sum of racism and sexism.\textsuperscript{93}

\textit{DER: TRANSFORMING THE DEBATE ON SEXUAL INEQUALITY} (Yale Univ. Press 1993) (criticizing the 1980's theorists for reproducing the lenses of gender polarization and biological Essentialism and for espousing the politically dangerous idea that vast "natural" differences exist between men and women).


\textsuperscript{91} Other factors such as homosexuality may further contribute to compounded discrimination. When a homosexual seeking protection of the law is also a member of a racial minority, the problems of stigmatization and prejudice are often enhanced and may even serve to negate free-standing allegations of racial discrimination. Katharine T. Bartlett, \textit{Gender and Law: Theory, Doctrine, Commentary} 454 (Little, Brown & Company eds., 1993). For example, in Williamson v. Edwards & Sons, Inc., 876 F.2d 69 (8th Cir. 1989), \textit{cert. denied}, 493 U.S. 1089 (1990), the Eighth Circuit Court of Appeals affirmed the dismissal of a race discrimination claim by a gay black male on grounds that the harassment of which plaintiff complained was based on his homosexuality, not his race. Although the opinion provides too few facts for detailed analysis, the court appears to assume that the plaintiff's complaint had to be one either of race discrimination or of discrimination based on the plaintiff's homosexuality. Such an assumption can blind a court to the form of discrimination that arises because the person is both a member of a minority racial group and a homosexual. \textit{Id.}

\textsuperscript{92} Crenshaw, \textit{supra} note 79.

\textsuperscript{93} Crenshaw, \textit{supra} note 79, at 58. The recent O.J. Simpson trial is a recent example of how race and gender can collide, often creating guilt and mixed loyalty. One newspaper reporter aptly described the problem faced by the jury:

Undeniably, there were assumptions about this jury. They were mostly women. And there was a presumption that they could be sympathetic to the female condition in today's America . . . At the same time, the O.J. Simpson jury was mostly black, and subject to the split allegiance of black women everywhere—loyal to their gender and yet also loyal to black men.

Elizabeth Fernandez and Annie Nakao, \textit{Jury's black women: Caught in Conflict; Did Race, Gender, Loyalties Collide?}, S.F. CHRON., Oct. 4, 1995, at A1 and A10 (hereinafter "Fernandez & Nakao").
Similarly, Professor Maria Ontiveros argues that the elements of a sexual harassment case of women of color are different and more onerous than those in a purely sexual harassment case.\textsuperscript{94} For although a supervisor might not discriminate against black men or white women, he might nonetheless discriminate against black women. Treating these cases as sexual harassment, Ontiveros maintains, "not only misstates the dynamic, but also further disadvantages these women."\textsuperscript{95}

Katharine T. Bartlett and Roseanne Kennedy take a similar approach to the intersection of race and gender.\textsuperscript{96} Bartlett and Kennedy describe the problems women face in the workplace with their concept of a "top-down" structure whereby victims of discrimination must establish their claims according to categories that fail to recognize the relationships between race and sex.\textsuperscript{97} Thus, when black women are treated in ways different from either black men or white women, their discrimination claims will not be recognized on the basis of either race or sex.\textsuperscript{98} Consequently, the danger of discrimination increases when race and gender combine.\textsuperscript{99}

As well as attacking conventional notions of discrimination, Bartlett and Kennedy target the strict notion of precedent.\textsuperscript{100} Bartlett and Kennedy contend that since standards of

\textsuperscript{94} See Ontiveros, \textit{supra} note 81.
\textsuperscript{95} \textit{Id.} The women of Charleston were disadvantaged on multiple levels. For example, Mrs. Brown, one striker, noted the common female problem of dealing with children who were often left alone because of her fight, and a husband who complained at having to help at home. \textit{Working Women, supra} note 80, at 360.
\textsuperscript{96} Feminist Legal Theory, \textit{supra} note 83.
\textsuperscript{97} \textit{Id.} at 6.
\textsuperscript{98} \textit{Id.}
\textsuperscript{99} Drucilla Ramey, executive director and general counsel of the San Francisco Bar Association voiced her own opinion of the problems created when race and gender combine:

\begin{quote}
Women of color feel torn apart by loyalty issues. They honestly don't know if they are discriminated against because they're black, because they're women or both. Because of this country's disgraceful history of racism and what it has done to black men and black women, I think that it is very, very difficult for black women to be put in a position of having to choose between whether race should predominate over gender.
\end{quote}

\textit{Fernandez & Nakao, supra} note 93, at A10.

\textsuperscript{100} Precedent, or \textit{stare decisis}, means that an adjudged case or decision of a
what is rational only reflect the interests of those who currently hold power, the law's insistence on precedent has constrained feminist agendas to the extent to which it has insisted upon arguments it deems rational and coherent. Therefore, new doctrines are often considered extreme, and the status quo is preserved; this situation further perpetuates the exclusion of marginalized groups. Moreover, under a precedential system, even irrational and incoherent arguments must be accepted and followed.

Elizabeth Iglesias, another feminist legal scholar, agrees that the precedential system is based upon a decidedly masculine power structure. Iglesias invokes the concept of "structural power."
tural violence" to examine how legal interpretation constructs institutional power, thereby creating a false reality based on a distinctly male perspective. Iglesias further argues that women have a difficult time liberating themselves from these relations of oppression, these socially constructed categories of race and gender, because the current organization of institutional power is so well entrenched.

In addition to challenging conventional concepts of equality, scholars have begun to make constructive suggestions for change. Katherine Bartlett suggests that one solution to compounded discrimination is to “ask the woman question.” This method is designed to expose how the substance of law may silently and without justification submerge the perspectives of women and other excluded groups. Secondly, Bartlett suggests expanding traditional notions of legal relevance to make legal decision making more sensitive to the features of a case not already reflected in legal doctrine. Bartlett’s third method, consciousness-raising, offers a means of testing the validity of accepted legal principles through the lens of the personal experience of those directly affected by those principles.

among conservative female judges such as Justice Sandra Day O’Connor, who is characterized by a focus on abstract and universal principles rather than civic republicanism which is focused on responsibility and human interdependence).

106. Id.
107. Iglesias, supra note 79, at 397. Edrena Johnson, a striker who was jailed for nine days, kept a diary during that time in which she wrote, “We want to be recognized, not because of our race but because we are human beings. FONER, supra note 1, at 389-90.
108. Feminist Legal Theory, supra note 83, at 371. Carol Gilligan similarly points out that the more feminine approach to insisting on more facts and on a more contextualized understanding of dilemmas would increase appreciation of the social contingencies of problems. GILLIGAN, supra note 18.
110. Id.
111. Similarly, Patricia Cain emphasizes the importance of real life experiences in creating a more equal legal system. Although Cain’s main focus is the invisibility of lesbians in the law, her arguments have wider implications since Cain believes that current feminist legal theory is deficient and impoverished because it has not paid sufficient attention to the real life experiences of women who do not speak the “dominant discourse.” She urges that feminist law teaching ought to include “listening to difference” and “making connections”; she urges the same for feminist legal scholarship. Patricia A. Cain, Feminist Jurisprudence, 4 BERKELEY WOMEN’S L.J. 191 (1989-1990) [hereinafter “Cain”].
Each of these affirmative suggestions and methods is designed to force people to recognize problems and begin to ask the right questions. Tactically accepting the values and beliefs of a given political or legal agenda, feminist jurisprudence argues,\textsuperscript{112} distorts reality.\textsuperscript{113} Once the definition of legal problems is expanded and the correct questions are asked, the current legal system can begin to step toward true equality, a main goal of all feminist legal scholarship.\textsuperscript{114}

B. PRACTICAL APPLICATION OF INTERSECTIONS

Although the law, through feminist jurisprudence, has taken some steps toward change,\textsuperscript{115} the steps have been

\begin{itemize}
\item \textsuperscript{112} In asking and answering questions, feminist legal theorists point out that every practice has its theoretical assumptions, whether or not they are explicitly acknowledged. Only those who agree with the implicit assumptions, values, and beliefs of a given political or legal agenda can afford to disregard theory, since failing to identify and challenge these assumptions makes them appear all the more natural and inevitable. BARTLETT, supra note 83, at 4.
\item \textsuperscript{113} Catharine MacKinnon argues that a male reality defines most aspects of society. CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 34-36 (1987). Although Drucilla Cornell would not agree to a purely gender-based, constructed reality, she does recognize the validity of social constructions:

\begin{quote}
[The "reality" of woman cannot be separated from the fictions in life and in theory for which she is embodied. This does not deny the reality of a constructed world, but only reminds us that reality is constructed through the metaphors in which it is given body. Therefore, there is no rigidly designated reality, even that of gender hierarchy.]
\end{quote}

\item \textsuperscript{114} John Stuart Mill, the leading spokesman for nineteenth-century liberalism, describes the subordination of women and explains his feminist goals:

\begin{quote}
[The principle which regulates the existing social relations between the two sexes—the legal subordination of one sex to the other—is wrong in itself, and now one of the chief hindrances to human improvement; . . . it ought to be replaced by a principle of perfect equality, admitting no power of privilege on the one side, nor disability on the other.]
\end{quote}

\item \textsuperscript{115} For example, some courts have recognized discrimination claims of black females as a distinct, protected subgroup. See, Prince v. Commissioner, U.S. Immigration & Naturalization Serv., 713 F. Supp. 984 (E.D. Mich. 1989); Hicks v. Gates Rubber Co., 833 F.2d 1406 (10th Cir. 1987). The Hicks court stated that:
\end{itemize}
small ones, and women are far from achieving true equality. This failure of legal reform to secure lasting, fundamental change in hierarchical gender relationships demonstrates the inseparability of legal theory and practice. This section will show that the strikers' "intersections" of race and gender created a greater sense of community and solidarity, enabling them to speak with a larger and stronger voice. This section will show how these intersections work in practice, developing how the female strikers' "disadvantages" actually aided them in their organization.

As discussed earlier in Section II, Local 1199B was disadvantaged not merely twofold through race and gender, but threefold with the addition of class. First, the union consisted of people of color. Second, the workers were mainly women. Third, the workers were extremely poor. For this reason, Local 1199B was not a "normal" union. In

Hicks introduced evidence that her supervisor, Gleason, had made serious racial slurs against blacks. Such evidence should be considered on remand to determine whether there was a pervasive discriminatory atmosphere, combining the racial and sexual harassment evidence. Evidence on racial treatment should be considered for this combined purpose here with the sexual harassment evidence.

Id. at 1416-17.
117. See infra notes 119-43 and accompanying text for further discussion.
118. See infra notes 119-43 and accompanying text for further discussion.
119. See infra Section II for further discussion.
120. FONER, supra note 1, at 390. Raskin, supra note 1, at 25.
121. Id.
122. All of the strikers suffered from the fact that they were poor; most workers lived on $38 per week. UPHEAVAL, supra note 1, at 145. Also, the workers had not attained high education levels. Dr. William McCord, the president of the hospital, remarked to a Business Week reporter: "I am not about to turn over the administration of a 5-million dollar institution to people who never had a grammar school education." FONER, supra note 1, at 389.
123. Local 1199B was not a normal union in part because their leaders and workers were not white males. William B. Gould, Black Power in the Unions: The Impact Upon Collective Bargaining Relationships, 79 YALE L.J. 46, 47 (1969). Blacks are excluded from most leadership positions in both craft and industrial unions and have a disproportionately small representation at the staff level. Id. See also, Steelworkers Debate Black Representation 91 MONTHLY LAB. REV. 16 (1968); Owens, UAW Blacks Seek Power, DETROIT FREE PRESS, September 30, 1968 at 3; N.Y. TIMES, February 27, 1967, at 16, col. 1; Raskin, supra note 1, at 40; Lester, supra note 66, at 1206.
Charleston, all of the original 500 strikers were black and all but twelve of them were women.\textsuperscript{124} Moreover, the women held the jobs of nurses and nurse aides,\textsuperscript{125} jobs commonly referred to as “women’s work.”\textsuperscript{126} Gender became an especially difficult problem for the workers because it was combined with race which increased the likelihood of discrimination.\textsuperscript{127}

Yet despite their “disadvantages,” the women were ultimately successful because of their commitment to their group, the union. Miss Virgie Lee Whack’s comments reiterated the positive union rhetoric of “soul power” which she said had “opened her eyes to a new strength.”\textsuperscript{128} “I pray I never fall into the same old routine but that I be as new born.”\textsuperscript{129} This positive aspect of intersections is suggested in Gillian Lester’s observation that successful campaigns share the overarching strategy of promoting personal empowerment and women’s gaining control of their lives.\textsuperscript{130} The newly found sense of community enabled the women find the strength to open their eyes to see how to effectuate change.

Marion Crain suggests that modern labor law must build

\begin{footnotes}
\item[124.] Raskin, \textit{supra} note 1, at 40.
\item[125.] Eisner & Sipser, \textit{supra} note 22, at 254.
\item[126.] Blumrosen, \textit{Wage discrimination, Job Segregation and Title VII of the Civil Rights Act of 1964}, 12 U. MICH. J.L. REF. 397 (1979). The concept of “women’s work” has a long historical tradition dating back to the beginning of the industrial age when women factory workers held jobs that were specifically identified as “women’s jobs.” The concept of “women’s work” in the industrial age dates back to the New England textile mills which had segregated jobs for the young women who lived and worked at the mill. Rettler, \textit{supra} note 21, at 751, n. 4.
\item[127.] Some courts have recognized that these groups face unique problems. See, \textit{Prince}, 713 F. Supp. at 984. The court in \textit{Prince} stated:
Prince’s claim of continuing discrimination does not fail merely because there is evidence that the persons who were hired in her place are members of one or two, but not all three, protected groups (i.e., blacks, females, and persons over 40 years of age) of which she was a member. Thus, it cannot be said that the hiring of one or more employees from a protected group whose members complain of disparate treatment absolves the employer of liability for continuing discrimination against a member of that group who was not hired.
\item[128.] \textit{Working Women}, \textit{supra} note 80, at 362.
\item[129.] \textit{Id}.
\item[130.] Lester, \textit{supra} note 78, at 1201.
\end{footnotes}
on just such a form of solidarity based on race and gender.\textsuperscript{131} This solidarity did postively affect the Charleston strikers since the women worked in combination with the community and participated in boycotts and marches. Much of what the strikers later related further proved that community had been a significant factor in the striker’s success. Mary Ann Moultrie, the 27 year old president of Local 1199B,\textsuperscript{132} acted as a bridge between the women, the black community and the civil rights leaders.\textsuperscript{133} In fact, Coretta King compared her to Harriet Tubman, Sojourner Truth, Rosa Parks and Fannie Lou Hamer.\textsuperscript{134}

Moultrie took pride in the fact that the strikers were fighting an entire power structure.\textsuperscript{135} And that power structure was not one to be taken lightly since it was the same structure that civil rights leaders were actively fighting. In fact, the Charleston strike had reached from the government run hospital\textsuperscript{136} to Senator Strom Thurmond\textsuperscript{137} and, ultimately, even as far as the federal cabinet officers and members of the

\textsuperscript{131} Crain II, supra note 14, at 535. Mrs. Bessie Polite, one striker, is proof of such solidarity. She noted how much strength the union had given her: “We needed something that would help support us . . . we could go to our union.” WORKING WOMEN, supra note 85, at 359. She talked of how the women had “walked and talked and sang and everything. Id. But then again, she noted, “we were women—we didn’t have any weapons.” Id. See also, Lester, supra note 83, at 1198, standing for the proposition that the moral framework of collective bargaining is based on masculine social sterotypes of combat, access to “weapons” and the struggle of clashing powers.

\textsuperscript{132} Moultrie’s simple and poignant goal was to allow her people to enjoy what others have always been given. Moultrie told one reporter:

\begin{quote}
In the hospital they have white workers doing the same work as blacks. You know, they might have a white nurse’s aid and a black nurse’s aid yet the white side earns more money than the black. I want union recognition. I want to see that my people are able to enjoy something better than what they have been enjoying.
\end{quote}

WORKING WOMEN, supra note 80, at 360.

\textsuperscript{133} WORKING WOMEN, supra note 80, at 360. UPHEAVAL, supra note 1, at 136.

\textsuperscript{134} See, UPHEAVAL, supra note 1, at 145. See also, FONER, supra note 1, at 390.

\textsuperscript{135} Id.

\textsuperscript{136} Id.

\textsuperscript{137} Id. Senator Strom Thurmond reportedly prevailed upon HEW secretary Robert Finch to postpone his threatened fund cutoff to the hospital “pending a personal investigation” after he returned from a planned vacation in the Bahamas. This federal about-face was evidence of a larger conflict within the Nixon administration over civil rights enforcement. UPHEAVAL, supra note 1, at 153.
White House Staff. Nevertheless, through strength as a group, the women forced a deaf hospital administration and a disinterested legal community to listen and acknowledge them.

As the strikers proved, their commitment and pride had strengthened them, despite their opponents' strength and size. Alma Harden, a hospital aide and co-chairman of the 1199B chapter, saw many benefits from the strike; it had let her meet "a lot of people of importance. I've seen interesting places." She enjoyed the sense of community and she prided herself that "Charleston would never be the same." But although the women did enact changes, they could not have made those changes without the strength they gained from each other and the community. They were able to successfully strike only because their momentum lifted them beyond the barriers placed before them.

And in this way, their "disadvantages," borne of a history of abuse, converged at a unique moment in time to become invaluable to their organization of a successful strike. It was a time that Mrs. Brown called "the hardest and most important period of my life." From this shared outsider status which enhanced their collective identity, their traditionally excluded group gained a strength and a voice. If this community spirit had been destroyed, their efforts might not have been successful. For this reason, the law should not prevent similar workers from building such a strength based upon similar support and momentum.

138. HARRIS, supra note 45, at 176.
139. WORKING WOMEN, supra note 80, at 363.
140. WORKING WOMEN, supra note 80, at 362.
141. UPHEAVAL, supra note 1, at 145. See also, WORKING WOMEN supra note 85, at 363.
142. The experience of Local 1199 affords encouraging evidence that a racially integrated approach within existing institutions can redistribute power and thus begin to satisfy the yearnings of those in the cellar of opportunity for self-direction toward a place in the sun. Raskin, supra note 1, at 24.
143. WORKING WOMEN, supra note 80, at 361.
IV. THE DOCTRINE: THE 10-DAY STRIKE NOTICE PROVISION

Strike steward Claire Brown had declared in her speech “I am Somebody”: “If I didn’t learn but one thing it was that if you are ready and willing to fight for yourself, other folks will be ready and willing to fight for you.” She was right, of course, but too often, the outcome of a political fight just as surely depends upon timing and location. Given timing’s importance, the law needs to look more closely at the troubling problem that the current strike notice provision creates for striking health care workers.

Currently, the Health Care Amendments provide that that health care workers must give ten days notice of any intention to strike. Despite the drafters’ good intentions, the rules, as amended, place a tremendous burden on health care unions by deflating their important, initial momentum without allowing for reasoned exceptions. The importance of this initial momentum becomes especially apparent when viewed through the eyes of a union consisting mainly of women or people of color. These traditionally excluded groups need additional help in organizing successful unions and strikes. This is a strength which currently only a social momentum can give them, and it is a need that the law should recognize.

144. UPHEAVAL, supra note 1, at 158.
145. Id. For the general proposition, see Maryellen Fullerton, Hijacking Trials Overseas: The Need for an Article III Court, 28 WM & MARY L. REV. 1, 12 (1986).
147. See infra notes 154-56 and accompanying text for further discussion.
148. See infra notes 152-98 and accompanying text for further discussion of the burden the amended rules place on health care unions.
149. See supra Section II for further discussion.
150. Schultz, supra note 21 (finding that “Working-class women have shared the experience of being marginalized at work, but being unable to opt out.”).
151. See infra Sections III and IV for further discussion.
A. CURRENT LAW

In 1974, the NLRA was amended to give the National Labor Relations Board (hereinafter “NLRB”) jurisdiction over public health care facilities. Section 8(g) of the NLRA, added by the Amendments, requires that a union which intends to engage “in any strike, picketing, or concerted refusal to work at any health care institution” must notify the institution and the Federal Mediation and Conciliation Service (hereinafter “FMCS”) at least ten days prior to instituting the picketline.

The stated reason for this rule is the unique role that a health care institution plays and a concern about the welfare of patients whose very life could be affected by a major disruption in services. The strike notice provision also gives the Board an opportunity, if charges are filed after the notice is received, to determine the legality of the strike or picketing before it has a perhaps avoidable and unjustified detrimental effect on the health care institution.

However, these stated reasons for the strike notice provision are unfair in both theory and practice. First, such a strike notice requirement is unfair in theory because applies only to health care workers, workers who are predominately women. The federal labor codes bind no other industry with similar

153. Section 8(g) provides:
A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention . . . The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.
strike notice provisions. Although private agreements between employers and employees may provide for contractually based strike notification, the federal government imposes statutorily mandated conditions only on workers in the health care field.

Secondly, the health care industry's strike notice provision is unfair in practice because statutory exceptions are routinely denied these workers, even when the law provides for an exception. Currently, the law allows only one exception to the ten day notice provision. When there has been a "serious" or "flagrant" unfair labor practice, the union's failure to give advance notice of picketing or strike activity will be overlooked. However, legislative history indicates that the notice requirement will be excused only in "very limited situations," where an employer's unfair labor practice is so aggravated that a no-strike clause will be rendered unenforceable or ineffectual.

In practice, however, this narrow exception for unfair labor practices itself has rarely been found applicable, even though it is commonly regarded as a valid exception. One recent court even went so far as to state that:

[W]e are somewhat hesitant to give this legislative history effect, because it not so much guides

157. States also have the right, under the police power, to regulate or prohibit strikes or lockouts in the enterprises or fields of endeavor directly affecting public health, safety, or welfare. Fairview Hospital Ass'n v. Public Bldg. Service and Hosp. and Inst'l Emp. Union Local No. 113, 64 N.W.2d 16 (Minn. 1954). Such regulation could apply not only to strikes affecting hospital care, but also to strikes that effect the flow of heat, light, power, sanitation, transportation, communication, or water. State v. Traffic Tel. Workers' Federation of N.J. 66 A.2d 616 (N.J. 1949). However, the fact remains that no such steps have been taken except with regard to the health care field in a federal context.


159. See supra notes 160-77 for a further discussion of exceptions to the 10-day strike notice provision.


161. Id.

162. Feheley, supra note 11, at 253.
interpretation... but rather creates a significant exception. We do not find it so clear, as the drafters of the Senate report did, that the exception should, or was meant to, apply in the section 8(g) context. 163

The fact that this court consciously disregarded express legislative intent in order to deny health care workers an accepted exception shows that the "recognized" exception has not been truly recognized by courts. 164

Furthermore, this exception is never applied to striking for reasons other than unfair labor practices; in situations such as sympathy picketing, no exceptions are given. 165 For example, District 1199 v. National Union of Hospital Employees held that if nurses at hospital A are striking and the nurses at hospital B wish to sympathy picket, the workers at hospital B must give new notice to hospital A, even though hospital A is completely aware of the ongoing strike and the new notice would not change the effect on continuing services. 166 The

163. NLRB v. Mental Health Council, 897 F.2d 1238 at 1247-48 (2nd Cir., 1990). That court stated that:

Even if unfair labor practices could excuse compliance with statutory requirements for advance notice prior to health care employees strikes, and unfair labor practices of employers were considered sufficiently flagrant to fall within the scope of excuse document, advance notice of strikes would not be excused.

Id.

164. Id. Other cases have followed this line of thought. West Lawrence Care Center Inc. et al, 1992 WL 259406 (NLRB) (Wash. D.C. 1991).

165. Feheley, supra note 11, at 252-3.

166. 222 N.L.R.B. 212 (1976). In District 1199, a local union gave notice of its intention to strike upon the expiration of its collective-bargaining agreement. Fifteen days later, four members of District 1199 joined the picket line. The NLRB had to address the issue of whether failing to give notice and subsequently engaging in sympathy picketing at a health care institution which already had notice of an ongoing strike would violate Section 8(g). Although the Administrative Law Judge concluded that no notice was required, the Board read Section 8(g) more literally. The board stated:

In our opinion, the 8(g) notice requirement is clear and absolute. First, it is mandatory... Second, it applies regardless of the nature of the picketing involved... Finally, Section 8(g) is devoid of any modifying language respecting the character of the picketing, its objectives, or the type of economic pressures generated. In the face of this language, Respondent cannot rely upon the earlier
dissent aptly criticized this holding on the ground that the second union's actions did not change the character of the strike. As a result of District 1199, the "flagrant unfair labor practice exception" is of no use to the union except in unique and rare circumstances. Therefore, the exception does not provide the predominately female health care workers any true relief.

The Board has also ruled that even purely informational picketing (picketing solely designed to inform the public that the employer does not recognize the picketing union), where the pickets expressly disavowed any intention to interfere with access to the hospital, constituted picketing within the meaning of Section 8(g). Although the dissent characterized the picketing as mere handbilling, the majority held that any picketing required the ten day notice, even where there was no intent to create a work stoppage. The potential disruption inherent in any act of the picketing was sufficient, the majority reasoned, to require a strict interpretation of section 8(g).

notice given by another labor organization as a basis for fulfilling its own statutory obligations . . . As examples, this subsection would apply to recognition strikes, area standard strikes, secondary strikes, jurisdictional strikes, and the like.

Accordingly, the board found that the sympathy picketers of District 1199 had violated Section 8(g). Id.

167. Id.
168. Feheley, supra note 11, at 254.
169. The District 1199, RWDSU court stated:
    Local 1115's contention is that because the picketing was of such a limited duration, the alleged violation should be considered de minimus. While the picketing did not go on for more than 45 minutes, I cannot say that this constituted a de minimus action, especially as there was no assurance given that there would not be any recurrences.

170. Id.

In another case, picketing by a construction union to protest the presence of a non-union plumbing company at a construction project on the premises of an operative health care institution, although it was not directed at any of the hospital's employees and caused no interruptions of deliveries to the hospital or work stoppages by the hospital employees, was held to be within the 8(g) proscription of picketing "at any health care institution"
This decision, however, seems to have forgotten that the public policy behind the notice rule is the unique nature of hospitals where patients' lives take precedence. This decision seems to have given no weight to the fact that there was no threat of interruption in services. The senseless extension of this rigid application has even led to one decision which held that a walkout by a mere three workers for thirty minutes required a ten day notice; in that case, there was no danger of a disruption of patient care of any kind.\textsuperscript{172}

Traditionally, the board has stated that new exceptions would be too complex to deal with,\textsuperscript{173} especially in cases claiming an exception for no disruption of services.\textsuperscript{174} One court rejected the argument that exceptions to section 8(g) were justified on the grounds that there was no disruption of the health care institution, concluding that instituting such an exception would mean that in many future strike cases, a complex fact-finding process would be necessary to determine whether any disruption had occurred.\textsuperscript{175} This literal approach\textsuperscript{176} is an uncompelling reason in light of the reality without proper notice to the hospital. In the General Counsel's view, the picketing represented a potential inducement to employees of both the hospital and its suppliers to engage in work stoppages, which could have a disruptive and debilitating effect on effective patient care.  

173. One court rejected the argument that an exception to section 8(g) was justified on the grounds that there was no disruption of the health care institution, concluding that instituting such an exception would mean that in many future strike cases a complex fact-finding process would be necessary to determine whether any disruption had occurred. Shepard, supra note 161, at 10.  
175. Id. In Plumbers, a hospital hired a construction company to expand and renovate its facilities. After a contract dispute, the construction company picketed the hospital. Although the picketing was visible, hospital employees did not use the picketed entrance, and hospital workers were not required to cross the picket line in order to gain access. No hospital employees engaged in work stoppage or other refusal to work, and there was no disruption of any of the services offered by the hospital. Nevertheless, because the construction company did not give notice of its intent to strike, the majority found that the construction company had violated Section 8(g). Id.  
176. Plumbers, 219 N.L.R.B. 212. See also, Feheley, supra note 11 at 249;
of the need for the exception, especially when the union is comprised of traditionally marginalized groups.

Although the board has never explicitly stated that its intention is to break strike momentum, the strike notice provision is likely to produce that effect since it deflates the initial momentum that successful strikes require. Given the inflexibility of the board, if the strikers are required to give a ten day notice, regardless of the nature of the strike and regardless of the number of workers involved, there is no chance for any momentum gain because all striking would be prohibited.

B. OTHER THREATS TO STRIKE MOMENTUM

The Courts have also used injunctions when attempting to break strike momentum. When upholding injunctions, the Supreme Court has explicitly stated its intent to curb momentum, even where picketing might be wholly peaceful. In

Shepard, supra note 152, at 10.

177. In Plumbers, the minority disagreed with the finding that a construction company had violated Section 8(g) when it picketed a hospital over a contract dispute. The majority had found that the fact that no disruption of services had occurred had no bearing on the analysis. However, the minority found two fundamental flaws in the majority's opinion: First, while the majority suggests a "literal" reading of Section 8(g) requires the result reached, we do not believe a truly literal reading of Section 8(g) has been undertaken. Second, and more important, even if the majority is correct in its literal reading of Section 8(g), such a reading does not compel the result reached if Section 8(g) was not intended by Congress to reach that result and we do agree with the majority's evaluation of that congressional intent.


178. The workers, of course, would be allowed to help with union issues while not on work time, but they would not be able to publically show their displease, the main purpose of the strike.

179. The Charleston workers were not spared the injunction, either. The segregationist Judge Singletary limited picketing to ten people at a time, twenty yards apart and no closer than eight blocks from the hospital. Harris, supra note 48, at 176. The injunction was used as a government tool in the Memphis strike as well. See, supra note 51 for a further discussion of the use of injunctions in the Memphis strike.

180. Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U.S. 287 (1941). In Milk Wagon, the Supreme Court upheld a generalized injunction against picketing where there had been past violence because "it could justifiably be concluded
fact, in *Local Union No. 10, United Assn. of Journeymen*, the Court stated that it intended to curb any momentum caused by picketing because it was a potentially effective and practical means of putting pressure on an employer.¹⁸¹

Justice Douglas' dissent, however, noted that "picketing is a form of free speech—the workingman's method of giving publicity to the facts of industrial life."¹⁸² He further added that it is the very fact that speech incites action that makes its protection so necessary.¹⁸³ Justice Douglas wrote, "[f]or it is the aim of most ideas to shape conduct."¹⁸⁴ Justice Douglas' words are especially applicable to modern health care unions whose predominately female workforce deserves the opportunity to build a voice through the momentum gained by striking.

Further threatening health care unions are business leaders who recently increased their opposition toward union organizational activities.¹⁸⁵ When the Supreme Court recently sustained the authority of the Labor Board to promulgate rules defining the bargaining units for health care institutions,¹⁸⁶ the American Hospital Association immediately pledged to

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¹⁸¹. 345 U.S. 192 (1953) (Douglas, J., dissenting). In Local 10, the court stated that there was a reasonable basis in the evidence in that case for the state court's finding that the picketing was for a purpose in conflict with a state statute, since the immediate results of the picketing demonstrated its potential effectiveness as a practical means of putting pressure on the general contractor to eliminate from further participation all nonunion men or all subcontractors employing nonunion men on the project. *Local Union*, 345 U.S. at 197-201.

¹⁸². *Id* (dissenting opinion).

¹⁸³. *Id*.

¹⁸⁴. *Id*. Similarly, Max Weber, an early twentieth century German sociologist and economist wrote:

> Not ideas, but material and ideal interests, directly govern men's conduct. Yet very frequently the 'world images' that have been created by 'ideas' have, like switchmen, determined the tracks along which action has been pushed by the dynamic of interest.


fight union organizing efforts on all fronts. 187 In fact, one prominent management attorney suggested that “employers should use every waking moment to assess their vulnerability to organizing and beginning the process of ‘hardening the target.’” 188 Given this antagonistic environment, modern labor unions will have to devise novel methods of countering such management tactics, appealing to workers who might be contemplating collective action in order to retain their current strength and build a foundation from which to grow. 189

It is somewhat ironic that the health care workers thought that the 1974 Amendments were a breakthrough for hospital workers’ rights. The workers believed in the Amendments because they specifically allowed public employees of health care facilities to strike, 190 a more recently granted right which the Charleston strikers were never allowed. 191 In reality, however, if the Charleston workers had been subject to the 10-day strike provision, it is all too possible that the mounting momentum would have died since the Charleston nurses walked out within forty-eight hours of the dismissal 192 and the ninety workers who walked out in sympathy did so within the week, 193 well before the ten day notice would have allowed them to show their support.

It is possible that the board might have excused the failure to give notice under the exception by finding a “flagrant” unfair labor practice. For although the workers had no statutory right to strike at that time, 194 they nevertheless had the constitutional right to organize. 195 However, in 1969, the hos-

188. Id.
189. Craver, supra note 2, at 73.
191. South Carolina had no legislation which permitted or forbid collective bargaining by public employees. Therefore, at that time, the Charleston workers had no statutory right to strike. Eisner and Sipser, supra note 17, at 261. In fact, fewer than ten states at that time had laws which firmly guaranteed hospital workers the rights to join unions, hold representation elections and bargain collectively, rights that most workers won over sixty years ago. Where there were no such laws, hospital administrators had generally interpreted their absence as a prohibition on dealing with unions. Raskin, supra note 1, at 38.
192. Raskin, supra note 1, at 25.
193. Foner, supra note 1, at 388.
194. See supra note 191 and accompanying text.
195. The workers had the right to organize because the Constitution grants
hospital had no duty to recognize their organization. Therefore, it is unlikely that the court would have found a "flagrant" unfair labor practice. This is especially true given courts' extreme reluctance to use the exception as well as the fact that the presiding court would have been located in the South, the very locus and cause of so many of the workers' problems. For these reasons, the ten day notice provision could have killed what went on to become a symbol for both labor and civil rights.

C. A PROPOSED EXCEPTION

As a response to both the unique characteristics of the non-traditional unions and the battles they face in organizing simple protests, a new exception to the ten day notice provision should be created. Health care workers should be allowed to strike without a ten day notice unless the facility can affirmatively show that patient health care will be seriously undermined. Therefore, if only one or two people strike, or if temporary replacements are ready to step in, a strike would be permissible.

Courts or hospital administrators may counter that a group of one or two protesters could easily grow to include more strikers, thereby increasing the risk to patients. However, the hospital would still have notice of the strike and potential jeopardy to patient care, which is all that the notice provision intends. Furthermore, a hospital should not believe that it

them the freedom to associate. The First Amendment provides, "Congress shall make no law ... abridging the right of the people peaceably to assemble." U.S. CONST. amend. I. The freedom of association is made applicable to the states under the Due Process Clause of the Fourteenth Amendment of the United States Constitution which provides that the State shall not "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV. See also, NAACP v. Alabama, 357 U.S. 449 (1958) ("It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the 14th Amendment, which embraces freedom of speech.").

196. Id.
197. See supra Section II for further discussion.
198. "Local 1199 is for American labor what 1776 is for American history: a bright and morning star." UPHEAVAL, supra note 1 (book cover quoting Studs Terkel).
could ever have a guarantee of how many workers would strike since under the current provisions, the workers are not required to indicate the number of workers who will strike when they give notice to the hospital administration. Finally, if temporary replacements are available, patient care would not be compromised. Given this, the health care strike notice provision acts more as a method for punishing protesting workers rather than as a patient protector.

Furthermore, this burden shift would allow for most sympathy and informational picketing because such picketing would not normally disrupt patient care. If workers merely intend to inform hospital patrons of problematic working conditions but do not intend to prevent hospital access or cease work, the workers would not be prevented from exercising their free speech rights under this proposal.

Such an exception is especially important to health care workers who are predominantly female and largely black. These excluded groups should not be denied the momentum they can gain from drawing on community support. Consequently, the law must expand its notion of what constitutes a legal problem, recognizing that these groups face unique problems. If the law refuses to recognize these important factors, the law will have conceded to placing precedent above reason.

Finally, to deny, even temporarily, a union one of its only effective bargaining tools is to create a major power imbalance between workers and employers. Such a power imbalance encourages greater industrial strife because it fuels resentment between health care workers and their employers. It is especially important that the NLRA not foster such an imbalance since it was that very danger that the NLRA was created to

199. Purely informational picketing is picketing which lacks an object of recognition or organization. Local Jr. Exec. Bd. of Hotel Employees, 130 N.L.R.B. 570 (1961).

200. See infra notes 86-88 and accompanying text for a more detailed discussion.

201. Id.

202. See supra note 85 and 100-7 and accompanying text.

203. Id. See also, CRAVER, supra note 2 at 26.
prevent. My proposed exception would allow a more just result because it would encourage public support of these working class issues while still keeping within the spirit of the law.

V. CONCLUSION

In conclusion, an exception to the ten day strike notice provision should be recognized. This is especially true of an exception which is squarely in keeping with the policy behind the rule. Such an exception is especially important when the strikers are disadvantaged by race and gender. As feminist jurisprudence has shown, these marginalized groups have little

204. Section 1 of the NLRA (originally known as the Wagner Act) was enacted specifically to maintain power balances and to reduce industrial strife. Thus, Section 1 of the Wagner Act states:

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce . . . Experience has probed that protection by law of the right of employees to organize and bargain collectively safeguards commerce . . . by restoring equality of bargaining power between employers and employees.

. . .

It is declared to be the policy of the United States to eliminate . . . obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

power in a traditional union. Accordingly, they need the added strength gained from momentum, the very momentum that the ten day strike notice provision robs them of.

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