

# Unionizing Subcontracted Labor

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*Subcontracting — the practice of using intermediaries to contract workers, whether through temp agencies, manpower agencies, franchise, or other multilayered contracting — is an increasingly popular pattern of employment worldwide. Whether justified from a business perspective or not, subcontracting has dire implications for workers' rights: it insulates the beneficiary of their labor from direct legal obligations to the workers' wages and working conditions and drastically reduces their ability to effectively unionize. This Article explores the impact of subcontracting on unionization of subcontracted labor. It argues that labor law in most postindustrial developing economies is structured around the Fordist model of production and employment and therefore provides insufficient protections to workers whose employment arrangements deviate from that model.*

*The Article maps the various hurdles subcontracting poses to unionization. It identifies three main challenges to the basic assumptions that animate traditional labor law: first, that a union has leverage and significant bargaining power vis-à-vis an employer; second, that the union and the employer are repeat players in negotiations, and that accordingly the labor contract is a relational contract in which both parties consider the short and the long term in their calculations; and third, that the bargaining unit represented by the union is relatively easily discernable and relatively stable. The Article argues that*

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*subcontracting disrupts all of these assumptions. Accordingly, in order to remain relevant to subcontracted workers, labor law requires adaptations. The Article sketches a preliminary list of existing and potential legal responses to subcontracting that better guarantee subcontracted workers' rights to unionize. Its main suggestion is to move away from a bilateral towards a multilateral structure of collective agreement bargaining in subcontracting situations. Finally, the Article questions whether law can provide a once-and-for-all solution to the problems posed by subcontracting, and explores the dynamic role of law and unionizing in this context.*

## INTRODUCTION

On December 4, 2014 fast food workers in 190 cities across the United States went on strike<sup>1</sup> and held protests as part of their fight for higher wages (fifteen dollars per hour) and improved working conditions. The workers swarmed the streets chanting “low pay is not OK” and “we need a union.” Their campaign, which is considered “one of the most broadly based and potentially the most successful labor movement in many years,”<sup>2</sup> is funded and backed by the Service Employee International Union (SEIU). Yet it is clear to all involved that unionizing the fast food industry is no simple task. One of the main reasons for that is the fact that the fast food industry is predominantly structured on franchises, and traditionally each individual franchise owner serves as the employee of his workers. The big fast food chains see the franchise owners as responsible for the working conditions of their employees. Accordingly, while theoretically a franchise-by-franchise unionization drive is possible, such a campaign would be difficult to achieve and would not have the same wide popular support and charisma that the current fast food worker campaign is enjoying.

Admittedly, in a dramatic turn of events in August 2015 the National Labor Relations Board (NLRB) issued a ruling,<sup>3</sup> according to which the previous

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1 This is the second strike in the fifteen-dollar campaign. The first took place on November 29, 2012, and included about two hundred workers from various fast food outlets in New York City. William Finnegan, *Dignity: Fast-Food Workers and a New Form of Labor Activism*, NEW YORKER, Sept. 15, 2014, <http://www.newyorker.com/magazine/2014/09/15/dignity-4>.

2 Kevin Fagan, *Fast-Food Workers' Strike Adds Momentum to Movement*, S.F. CHRONICLE, Dec. 5, 2014, <http://www.sfgate.com/bayarea/article/Fast-food-workers-walk-out-for-higher-pay-5935953.php> (quoting Prof. David Schultz).

3 Case 32-RC-109684, *Browning-Ferris Indus. of Cal., Inc.*, 362 NLRB No. 186 (Aug. 27, 2015).

“direct and immediate” control over working conditions test to determine joint employer status is replaced by an “indirect control test.” The ruling paves the way for legal determination that even if the franchise (or lead company, i.e., the ultimate client of the service, whether a company, brand or franchise) does not actively supervise the workers, it may be deemed joint employers with the franchisee (or contractor). This decision may allow unionized workers of a franchisee to negotiate an agreement not only with the owner of the branch they are employed in, but also with brand corporate headquarters. The decision, which was immediately attacked by business groups, includes a long and passionate dissent by two conservative members of the Board, and is likely to be challenged by large franchise corporations.<sup>4</sup> This ruling followed a July 2014 decision by the General Counsel of the NLRB that McDonald’s is a joint employer with its franchisees.<sup>5</sup> The decision was made in an internal unpublished advisory memorandum regarding forty-three cases of alleged violation of the rights of franchisee employees by McDonald’s franchisees and MacDonal’d’s itself. Both decisions will undoubtedly be further litigated.<sup>6</sup> However, even such important decisions do not foreshadow a clear-cut solution to the problem of unionizing the franchise-based fast food industry, since the exact application of the “indirect test,” and its scope in relation to collective bargaining is far from settled.

Fast food workers still face the challenge posed by the incompatibility of their employment structure with the one that predominantly stands at the center of existing labor law. They are not alone. An increasing number of workers in today’s global economy work in “nontraditional” subcontracted employment patterns, where the brand name outside the building they work in, or on their uniform, is different from the name of the entity who signs their paychecks and is considered their employer.<sup>7</sup> Indeed, the employer-employee relationship around which the world of employment law and labor law was

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4 Noam Scheiber & Stephnie Strom, *Labor Board Ruling Eases Way for Fast Food Unions’ Efforts*, N.Y. TIMES, Aug. 28, 2015, at A1.

5 Press Release, Nat’l Labor Relations Bd. (NLRB), NLRB Office of the General Counsel Authorized Complaints Against McDonald’s Franchisees and Determines McDonald’s, USA, LLC is a Joint Employer (July 29, 2014), <http://www.nlr.gov/news-outreach/news-story/nlr-office-general-counsel-authorizes-complaints-against-mcdonalds>.

6 Louis S. Chronowski, *NLRB Decision Shocks Franchise World: McDonalds a “Joint Employer” of Franchisee Employees*, METROPOLITAN CORP. COUNSEL, Oct. 2014, at 17.

7 The term subcontracting here is used to refer to the practice of using intermediaries to contract workers, whether through temp agencies, manpower agencies, franchises, or other multilayered contracting.

constructed is becoming less and less prevalent in labor markets around the world.<sup>8</sup> Employment arrangements are increasingly being restructured,<sup>9</sup> mainly through subcontracting. The term subcontracting here is used to refer to the practice of using intermediaries to contract workers, whether through temp agencies, manpower agencies, franchises, or other multilayered contracting.<sup>10</sup>

Some subcontracting endeavors may make perfect sense from a business perspective. Subcontracting can reflect the fact that another employer or employers enjoys a competitive advantage in producing the goods or services, and therefore be a story of maximizing the potential for innovation in the

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8 It is worth noting that the paradigmatic employment relationship was never prevalent in many developing countries, where informal labor is much more common. *See, e.g.*, INT'L LABOUR ORG. ET AL., *WOMEN AND MEN IN THE INFORMAL ECONOMY: A STATISTICAL PICTURE*, at xi-xii, 8-11 (2d ed. 2013), [http://www.ilo.org/wcmsp5/groups/public/---dgreports/---stat/documents/publication/wcms\\_234413.pdf](http://www.ilo.org/wcmsp5/groups/public/---dgreports/---stat/documents/publication/wcms_234413.pdf) (finding that “Informal employment comprises one half to three-quarters of non-agricultural employment in developing countries”); *see also* Supriya Routh, *Informal Workers' Aggregation and Law*, 17 THEORETICAL INQUIRIES L. 283 (2016).

9 Mick Marchington et al., *Employment Relations Across Organizational Boundaries*, in *THE FUTURE OF EMPLOYMENT RELATIONS* 47 (Keith Townsend & Adrian Wilkinson eds., 2009). Because of the variety of employment patterns it includes, it is difficult to measure the exact percentage of the labor force that is subcontracted labor. *See also* DAVID WEIL, *THE FISSURED WORKPLACE* (2014) (suggesting that defining subcontracting lies at the core of political and ideological debate); Guy Mundlak, *Contradictions in Liberal Reforms: The Labor Regulation of Sub-Contracting*, in *NEOLIBERALISM AS A STATE PROJECT: CHANGING THE POLITICAL ECONOMY OF ISRAEL* (Michael Shalev & Asa Maron eds., forthcoming 2016) (suggesting that there is no systemic attempt to measure the extent of subcontracting due to definitional difficulties).

10 The rise of independent contract work (that is sometimes referred to as “misclassification” by labor activists) is an important rising trend in labor markets worldwide as well. With respect to unionization, it raises a distinct problem: labor law protects employees and not independent contractors, and therefore this group cannot, by current definitions, be unionized. This Article focuses on a different set of unionization barriers associated with workers who are clearly employees covered by labor law, but whose unionization becomes particularly complicated due to layers of contractual relationship between them and their effective employer. Therefore, this Article brackets independent contractors and misclassification. For a fascinating historical and contemporary discussion of the distinction between the categories, see Veena Dubal, *Wage Slave or Entrepreneur? Contesting The Dualism of Legal Worker Identities* (Nov. 10, 2014) (unpublished manuscript) (on file with author).

chain. Yet at the same time, subcontracting is also often a story of labor-cost minimization — the use of such contractual strategies may enhance labor flexibility or reduce labor costs related to hiring, training, and compensation of permanent employees.<sup>11</sup> In some cases, subcontracting represents only labor-cost minimization: it is a strategy to distance employers from the legal obligations that accompany the employer status, including the “risk” of workers’ unionization. While some cases are clear-cut evasions of labor and employment laws, in many situations it is difficult to discern whether subcontracting is legitimate or illegitimate. As a result, subcontracting poses a serious regulatory challenge.

Whether justified or not, subcontracting has dire implications for workers’ rights: it insulates the beneficiary of their labor from direct legal obligations to the workers’ wages and working conditions and drastically reduces their ability to effectively unionize. Indeed, studies suggest that in many cases workers working under subcontracting arrangements — which I refer to as subcontracted labor — suffer from myriad employment law violations, including violations of minimum wage legislation, overtime compensation, family leave, and safety regulations.<sup>12</sup> Even where there are no per se violations, the working conditions and hourly wage in sectors characterized by extensive subcontracting are low. The median hourly wages of workers in commonly subcontracted sectors such as janitors, fast food workers, and homecare workers are particularly low, and subcontracted workers’ wages are usually lower than their non-contracted peers,<sup>13</sup> thus contributing to the growing income gaps and inequality in many postindustrial economies. In fact, such employment

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11 Danielle D. van Jaarsveld, *Overcoming Obstacles to Worker Representation: Insights from the Temporary Agency Workforce*, 50 N.Y.L. SCH. L. REV. 355, 355-56 (2006); Raphael Kaplinski, *Global Value Chains, Where They Come from, Where They Are Going, and Why This Is Important* 17 (IKD, Working Paper No. 68, 2013).

12 See, e.g., ILO, CONTRACT LABOR, REPORT V(1), 5TH ITEM ON THE AGENDA, 86TH ILC SESSION (1998). Despite wide agreement about the challenge posed by contract labor to workers’ rights, the proposed convention was never adopted due to disagreements over the definition of contract labor and the scope of its regulation.

13 CATHERINE RUCKELSHAUS ET AL., NAT’L EMP’T LAW PROJECT, WHO’S THE BOSS: RESTORING ACCOUNTABILITY FOR LABOR STANDARDS IN OUTSOURCED WORK 1 (2014) (stating that wage differences in the United States range from “a 7 percent dip in janitorial wages, to 30 percent in port trucking, to 40 percent in agriculture; food service workers’ wages fell by \$6 an hour.”).

structures may be “one of the central factors driving lower wages and poor working conditions in our economy today.”<sup>14</sup>

Employment law — specifically the legal doctrine set to ascertain who is an employer and who is an employee — is often insufficient to regulate subcontracting. While common law jurisdictions around the world have attempted to create a flexible test that captures the reality of the work relationship rather than merely formal contractual titles, case law suggests that it is very difficult to capture who is an employer in triangular or multilevel employment structures.<sup>15</sup> Even when courts manage to ascertain employers’ evasion strategies and determine the type of relationship at hand, their treatment is necessarily ex-post in the individual case being adjudicated. Moreover, it quickly turns into guidelines for companies how to avoid being “pulled” into the employer-employee relationship in the future.<sup>16</sup> Various doctrinal and legislative developments — such as the expansion of the “joint employer” doctrine to increase the accountability of more contractual entities for substandard working conditions — offer some promising pathways,<sup>17</sup> but these tend to create minimal obligations on the lead company, and affect certain industries more than others.<sup>18</sup> Because judicial and legislative responses appear to be limited in scope, worker unionization becomes a particularly important tool to allow context-sensitive negotiations between workers and employers on

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14 *Id.*

15 Simon Deakin, *The Changing Concept of the Employer in Labor Law*, 30 *INDUS. L.J.* 72 (2001); Marchington et al., *supra* note 9.

16 Jaarsveld, *supra* note 11, at 363.

17 See, for example, Illinois, Massachusetts, California, and other states hold lead companies jointly accountable along with contractors, including staffing firms, in certain industries; California requires responsible contracting in selected outsourced sectors. *CAL. LAB. CODE* § 2810 (2003); Day and Temporary Labor Services Act, 820 *ILL. COMP. STAT.* 175 (2000); Temporary Workers Right to Know Act, 2012 *Mass. Acts*, ch. 225.

18 For a review of the innovative use of the joint liability doctrine in the Netherlands and its unique combination of public and voluntary initiatives, see Jennifer Gordon, *Global Labor Recruitment in a Supply Chain Context* 27-28 (ILO, Fundamentals Working Paper, 2015). For a more detailed analysis of the Dutch doctrine, see MIJKE HOUWERZIJL & SASKIA PETERS, *LIABILITY IN SUBCONTRACTING PROCESSES IN THE EUROPEAN CONSTRUCTION SECTOR: NETHERLANDS* (2009), [http://www.eurofound.europa.eu/sites/default/files/ef\\_publication/field\\_ef\\_document/ef0887en7.pdf](http://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef0887en7.pdf). Finally, for a general discussion of the limited nature of joint employer liability in various jurisdictions, see Guy Davidov, *Joint Employer Status in Triangular Employment Relationships*, 42 *BRIT. J. INDUS. REL.* 727, 731-36 (2004).

the conditions of work in subcontracting situations. However, unionizing subcontracted labor is, as the fast food industry case mentioned above has begun to reveal, a particularly fraught endeavor.

This Article studies the impact of subcontracting on unionization of subcontracted labor. The definition of subcontracted labor I use here is wide. It aims to include all forms of “indirect” employment: crudely put, I refer to all contractual relations where “workers are employed by one organization whilst to some extent being managed by another.”<sup>19</sup> Accordingly, subcontracting includes situations in which the employer inserts an intermediary between itself and the workers and designates the intermediary as the workers’ employer — such is the case with temp and staffing agencies, as well as when certain functions are outsourced to “specialized” providers (such as the case of janitors, cleaners, security personnel). But subcontracting is wider than the insertion of intermediaries and includes, for example, franchises, outsourcing sections of the production chain to a third provider, or public contracting (also known as privatization), to name a few.<sup>20</sup> In a sense, this is a “catchphrase” for many different kinds of outsourcing activities which are so common in the economies of postindustrial economies, and therefore come in myriad manifestations.

The question this Article attempts to answer is whether all the abovementioned patterns of subcontracting may have commonalities in terms of their impact on workers’ unionization. I argue that the answer is a resounding “Yes” and that accordingly it is worthwhile to think about these varied phenomena together, as a pattern that is affecting the labor movement. Due to the wide swaths of economic activity this term covers, the description I offer in the following pages may not fit all forms of subcontracting in a similar manner. Clearly, more attention needs to be paid to the hurdles of unionization posed by each of these contractual patterns. However, I believe that considering them together, as part of a single phenomenon, can afford a powerful insight into the state of labor unionism as we have come to know it in the last decades.

Part I identifies the main mismatches between the basic assumptions that animate traditional labor law and subcontracting situations. It also maps the various hurdles subcontracting poses to unionization, using specific examples,

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19 Marchington et al., *supra* note 9, at 48.

20 I limit my discussion here to same-country subcontracting. While elements of the argument may apply in a similar manner to offshoring and transnational supply chains, the effects of such outsourcing on unionization then become heavily dependent on labor law in the countries along the supply chain, and the companies’ location in the supply chain. Due to these variations, I bracket global value chains from the scope of this Article.

drawn mostly from unionization attempts in Israel and the United States. Due to these mismatches, traditional labor protections are mostly ineffective in the unionization of subcontracted labor. In order to remain relevant to subcontracted workers, labor law requires adaptation. Part II sketches a preliminary list of existing and possible (though not necessarily politically viable) innovations in labor law that, if adopted, will better guarantee subcontracted workers' rights to unionize. Arguing that most existing strategies are partial at best, it suggests that what is needed is a move away from a bilateral towards a multilateral structure of collective agreement bargaining in subcontracting situations. The concluding Part considers whether law can provide a once-and-for-all *solution* to the problems posed by subcontracting, and explores the dynamic role of law and unionizing in this context.

## I. THE LEGAL CHALLENGES TO EFFECTIVE UNIONIZATION OF SUBCONTRACTED LABOR

Subcontracting disrupts three basic assumptions of traditional labor law, thus making it incompatible with the unionization of subcontracted labor.<sup>21</sup> The three assumptions are the following: first, that the union has leverage and significant bargaining power *vis-à-vis* the employer; second, that the union and the employer are repeat players in negotiations, and that the labor contract is therefore a relational contract in which both parties consider both the short and the long run in their calculations; and third, that the bargaining unit represented by the union is relatively easily discernable and quite stable. All three assumptions are challenged by subcontracting arrangements, thus making traditional labor law incompatible with the challenges facing the unionization of subcontracted labor. Naturally, the three are related since

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21 One important issue that this Article does not discuss is the effect of subcontracting on the union power of the “remaining” workers. It is clear that subcontracting, in some situations, weakens the power of the (now smaller) unionized workforce, if such exists, since it reduces the union’s leverage on the employer. In fact, that might be one justification for subcontracting from an employer perspective. See, e.g., Patrice Jalette & Robert Hebdon, *Unions and Privatization: Opening the “Black Box,”* 65 *INDUS. & LAB. REL. REV.* 17, 20-21 (2012); Charles R. Perry, *Outsourcing and Union Power*, 18 *J. LAB. RES.* 521, 527, 533 (1997). However, what I seek to interrogate here are the challenges to the unionization of subcontracted labor, rather than the overall effect on labor power. Accordingly, while that issue does linger in the background, and will come up later in the discussion of bargaining units, it will not be discussed separately.



they all affect bargaining power. Accordingly, while I discuss each element separately, all three share common elements.

### A. Bargaining Power

The main problems subcontracted labor faces when trying to effectively unionize stem from the incompatibility of traditional “Fordist” images of capital and labor relations and the labor law that was structured around them. Unionization, and its protection through labor law, aims to level the bargaining “playing field” between capital and labor. At its core stands the understanding that an individual worker’s dependency on the employer for economic survival is much greater than the employer’s dependency on practically any individual employee. While the individual worker might be dispensable from the employer’s standpoint, the whole workforce is not. The workers’ power, when united, stems from their ability to operate in unison and take collective action that ranges from strikes to collective agreements.<sup>22</sup>

For this “leveling” of the playing field to happen, employees’ collective action needs to pose a threat to the entity reaping the benefit of the workers’ labor — traditionally thought of as the employer. For this reason, important aspects of the protection of the freedom of association under labor law include the prohibitions on an *employer* to use replacement labor during a strike, to fire workers for their union work, or to fire striking workers.<sup>23</sup> These and other protections of a union’s power *vis-à-vis* the employer were designed with a Fordist-type production model in mind: an assumption that the direct contracting parties — employer and employee — are the only relevant actors to managing and setting labor standards in the workplace. Furthermore, such protections presume that any additional rent captured by unions through collective bargaining will predominantly affect the employers’ share of the profit. This model is no longer relevant in most subcontracting situations.

Subcontracted labor attempting to unionize and take industrial action against an employer might find themselves “barking up the wrong tree” since it is not their direct employer — the subcontractor — but a third entity, namely the service recipient or the franchise brand, that to a large extent determines their

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22 CLAUD OFFE, *DISORGANIZED CAPITALISM: CONTEMPORARY TRANSFORMATIONS OF WORK AND POLITICS* 170-220 (1985).

23 INT’L LABOUR ORG., *FREEDOM OF ASSOCIATION IN PRACTICE: LESSONS LEARNED: GLOBAL REPORT UNDER THE FOLLOW-UP TO THE ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK* 11, 84 (2008), [http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms\\_096122.pdf](http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_096122.pdf).

working conditions and exerts managerial power over the workplace. Let's take the example of a fast food franchise in the United States. According to a recent study of the National Employment Law Project,

[F]ranchise brands typically dictate the terms of agreements with their franchisees, including charging exorbitant fees for the right to operate their businesses. Lead companies can exert significant control over the day-to-day operations of their franchisees. The franchisors can dictate how many workers are employed at an establishment, the hours they work, how they are trained, and how they answer the telephone. While the brands claim that they have no influence over wages paid to workers, they control wages by controlling every other variable in the businesses except wages.<sup>24</sup>

Furthermore, news reports suggest that in some cases, such as the case of McDonald's, "the corporation exercises, through its standard contract, the most elaborate possible control over virtually every aspect of its franchisees' operations, and the pay and the treatment of workers are very largely determined by that control."<sup>25</sup> This translates directly to the workers' working conditions. For example, one franchisee told reporters that "McDonald's executives had advised her to 'pay your employees less' if she wanted to take home more herself."<sup>26</sup> And two former McDonald's managers recently publically confessed to systematic wage theft, claiming that pressure from both franchisees and the corporation forced them to alter time sheets and compel employees to work off the clock.<sup>27</sup> In cases like these, even workers who manage to overcome the hurdles listed below and achieve a union might find it difficult to capture rent, or significantly improve working conditions and benefits for their constituents, considering that their employer — the franchisee — has relatively limited control over their working conditions as well as over his own rent.<sup>28</sup>

Labor law in some jurisdictions actively hampers attempts to put pressure on relevant third parties due to the prohibition on secondary boycott.<sup>29</sup> Secondary pressures (or boycotts) are actions that target a party other than the direct or

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24 RUCKELSHAUS ET AL., *supra* note 13, at 11.

25 Finnegan, *supra* note 1.

26 *Id.*

27 *Id.*

28 For a similar analysis of the problem in the context of the Justice for Janitors campaign, see John Howley, *Justice for Janitors: The Challenge of Organizing in Contract Services*, 1 LAB. RES. REV. 61, 65-66 (1990).

29 KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 209-12 (2004) (explaining the detrimental effects of the prohibition on secondary boycotts on unions).

“primary” employer. Such third parties are considered “neutral” in the labor dispute and therefore exerting various forms of pressure on them — such as picketing — is considered unlawful in some jurisdictions.<sup>30</sup> This is particularly problematic in the context of subcontracting, since in this context the lead company is far from neutral in the labor dispute, and may be much more amenable to public pressure than the primary employer.<sup>31</sup>

This issue was of great concern in the Service Employee International Union’s “Justice for Janitors” campaign in Los Angeles and then throughout the United States in the 1990s. In that campaign janitors, working for subcontractors providing maintenance services mostly in office buildings, picketed outside the buildings themselves, hoping to pressure building owners as well as businesses in the buildings to demand that subcontracting agencies improve the janitors’ working conditions. Paradoxically, the threat of secondary boycott charges was eventually thwarted by a common employer antiunion tactic — hiring nonunion workers to replace the strikers. The fact that there were janitors working in the picketed buildings reduced the SEIU’s vulnerability to secondary boycott charges.<sup>32</sup>

Accordingly, unless labor law is reimagined and adapted to require participation of all contracting parties in collective bargaining, allowing for multi-employer bargaining in some instances, and guaranteeing the right to call secondary consumer boycotts in heavily subcontracted industries,<sup>33</sup> the unionization of such workers will bear little fruit for them, and may not be worth the effort. In fact, until that happens workers may have greater success with legislators increasing minimum wage legislation,<sup>34</sup> and with raising

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30 See, for example, in the United States: 29 U.S.C. § 158(b)(4) (1982) (the “secondary Boycott” provision of the Taft-Hartley Act), and David S. Dederick, *Labor Law*, 55 GEO. WASH. L. REV. 1012, 1026-28 (1986); in Australia: *Trade Practices Act 1974* (Cth) ss 45D-45E (Austl.), and D. Bruce Moore, *Industrial Action and Secondary Boycotts: The Industrial Relations Reform Act 1993*, 22 AUSTL. BUS. L. REV. 370 (1994); and in the United Kingdom: Employment Act 1990, c. 38 § 4 (UK).

31 Cynthia Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1607-08 (2002).

32 Christopher L. Erickson et al., *Justice for Janitors in Los Angeles: Lessons from Three Rounds of Negotiations*, 40 BRIT. J. INDUS. REL. 543 (2002); Howley, *supra* note 28.

33 See also Jennifer Gordon, *Law, Lawyers, and Labor: The United Farm Workers’ Legal Strategy in the 1960s and 1970s and the Role of Law in Union Organizing Today*, 8 PA. J. LAB. & EMP. 1, 71 (2005).

34 Since 2013 a number of cities in the United States raised their minimum wage legislation, bringing it much closer to the fifteen-dollars demanded by fast food

consumer awareness and exerting pressures that might produce “voluntary” employer action,<sup>35</sup> than through labor unionization. I discuss current existing attempts to address this issue, their shortcomings and potential for change in Part II below.

## B. Stability of Contracting Entities

A second great impediment to effective unionization of subcontracted labor is that the lead company can easily terminate the contract with the unionized contractor. This again stands in contrast to the basic assumptions of collective agreements. A premise of industrial relations in a unionized workplace and of labor law is that the parties to the agreement are repeat players, with a long-term relationship in mind, high levels of mutual dependency, and a mutual interest in the enterprise’s success. However, the subcontracting situation challenges these assumptions because the great unilateral power of a third, supposedly neutral and unrelated, party — the lead company — destabilizes the contractual relationship. As a result, the longevity and strength of any collective agreement depends on a third party who is not a side to it. Lead companies are well aware of this power and have no legal impediment to using it.

One example is the early stages of the Justice for Janitors campaign. At first some locals attempted to respond to the industry’s increasing reliance on

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workers. According to Finnegan, *supra* note 1, “[f]ast-food workers rightly took credit for having made plausible a minimum wage that, less than two years ago, sounded outlandish.” See SEATTLE, WASH., ORDINANCE 124,490 (June 3, 2014); S.F., CAL., ORDINANCE 140,687 (July 17, 2014); SAN DIEGO, CAL., ORDINANCE 20,390 (Aug. 18, 2014); SAN JOSE, CAL., MINIMUM WAGE ORDINANCE (Oct. 1, 2014); CHI., ILL., MINIMUM WAGE ORDINANCE (Dec. 2, 2014); WASH. D.C., MINIMUM WAGE AMENDMENT ACT OF 2013; OAKLAND, CAL., MINIMUM WAGE ORDINANCE (Apr. 3, 2014). See also the proposals in Los Angeles, James Rainey & Jean Merl, *Garcetti Calls for \$13.25 Minimum Wage by 2017*, L.A. TIMES, Sept. 1, 2014, <http://www.latimes.com/local/cityhall/la-me-garcetti-wage-20140902-story.html>; and in New York City, Christopher Mathias, *Mayor Bill de Blasio to Push for Major Minimum Wage Hike in New York City*, HUFFINGTON POST (Mar. 2, 2015), [http://www.huffingtonpost.com/2015/02/03/new-york-city-minimum-wage\\_n\\_6606682.html](http://www.huffingtonpost.com/2015/02/03/new-york-city-minimum-wage_n_6606682.html).

- 35 Indeed, the fast food workers’ campaign in the United States led McDonald’s to declare it will raise employee wages to an average of \$9.90 per hour, but only for the 90,000 workers in the 1500 outlets it owns and operates in the United States. The decision does not affect the 750,000 workers employed by franchises. See Stephanie Storm, *McDonalds to Raise Pay at Outlets It Operates*, N.Y. TIMES, Apr. 2, 2015, at B1.

subcontracting with building-by-building organizing. However, they soon learnt that this was an ineffective strategy since building owners quickly terminated contracts with unionized contractors.<sup>36</sup> Another anecdotal example is the case of cleaning workers in the Ben-Gurion University campus in Israel. In 2011, a group of low-wage workers, mostly immigrants, managed for the first time in the history of this sector in Israel to unionize, exert collective power through a strike, and eventually sign a collective agreement with the cleaning service provider that employed them.<sup>37</sup> However, what seemed like a great triumph for the workers and their union — Power to the Workers<sup>38</sup> — quickly turned out to be temporary and fragile. In 2011 the university terminated its relationship with the unionized subcontractor,<sup>39</sup> and a new subcontractor was chosen to provide cleaning services to the university. As a result of the successful lobbying of a coalition of students, professors and the union, the new firm was required to continue employing many of the same workers. However, under the new subcontractor the collective agreement became irrelevant. The union, aided by a supportive campus community who cared about the workers' fate, kept doing important work in representing individual workers *vis-à-vis* the university and their employer, but the workforce was disheartened and the chances of future collective action and a new collective agreement seem slim. Various activists working with the cleaners now seem to think that the best strategy is to pressure the university to directly employ the cleaners — without an intermediary — rather than to attempt a collective agreement with each successive cleaning service firm.<sup>40</sup>

The ability of the service recipient or lead company to end its relationship with a unionized subcontractor makes every effort to unionize subcontracted

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36 Howley, *supra* note 28, at 64.

37 Orna Amos & Tal Baharav, *The Unionization of Cleaning Workers at Ben-Gurion University of the Negev as a Test Case for Coping with Multi-Dimensional Institutional Oppression*, in *PRECARIOUS EMPLOYMENT: SYSTEMATIC EXCLUSION AND EXPLOITATION IN THE LABOR MARKET* 113, 115-19 (Daniel Mishori & Anat Maor eds., 2012).

38 ASSAF BONDY, ROSA LUXEMBURG FOUND., *A REVIVAL OF ORGANIZED LABOR IN ISRAEL — A NEW HORIZON FOR LEFT POLITICS* (2012).

39 *Current Events*, KOACH LA OVDIM [POWER TO THE WORKERS] (Nov. 13, 2011), <http://ben-guryon.workers.org.il/category/uncategorized/> (Isr.).

40 *See, e.g.*, Ohad Carni & Itay Svirski, *Chronicle of Exploitation Foretold: Outsourcing at Universities*, in *PRECARIOUS EMPLOYMENT*, *supra* note 37, at 105, 111; *see also* AVIA SPIVAK & MEIR AMIR, HA'ASAKA YESHIRA SHEL OVDOT HANIKAYON BE'UNIVERSITAT TEL AVIV [DIRECT EMPLOYMENT OF CLEANING WORKERS IN TEL AVIV UNIVERSITY] (2012), [http://meiramir.co.il/?dl\\_id=16](http://meiramir.co.il/?dl_id=16) (a study sponsored by the Tel Aviv University Student Council).

labor — a difficult and risky endeavor to begin with — seem even more perilous. Labor law currently offers no systemic protection against this obstacle to unionization.

### C. Determining the Bargaining Unit

An underlying assumption of traditional labor law is that the bargaining unit — the group of workers relevant for a unionization campaign — is quite easily discernable. While some complications may arise regarding various types of workers such as management, or specialized and differentiated units within the same business, generally the test in many jurisdictions is theoretically quite simple: it focuses on all the workers working for the same employer.<sup>41</sup> As a result of this rule, subcontracted labor is not considered part of the employer's bargaining unit. In fact, as mentioned above, one of the possible incentives to subcontract is the exclusion of workers from an existing bargaining unit,<sup>42</sup> or the prevention of the creation of an effective bargaining unit altogether, thus preventing unionization. This is, in fact, another root cause of the two obstacles discussed already: it reduces (or eliminates) the workers' bargaining power *vis-à-vis* the lead company, and it allows the lead company to terminate a contract with a unionized contractor without being seen as violating the workers' freedom of association.

Traditional labor law's construction of a bargaining unit, once again, poses a challenge to the unionization of subcontracted labor. If the idea of labor law was to level the playing field by allowing all employees that are part of the employer's enterprise to stand united and in solidarity, then subcontracting is an easy strategy for employers to prevent that. A case that makes abundantly clear how employers can use subcontracting as an antiunion strategy is the Hot Cable Communication Company case in Israel.<sup>43</sup> As part of the company's sale to a new owner, it became known to the workers that the new owner planned to outsource and subcontract elements of the company. They started a unionizing campaign with the union Power to the Workers. The

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41 Alexander Colvin, *Rethinking Bargaining Unit Determination: Labor Law and the Structure of Collective Representation in a Changing Workplace*, 15 HOFSTRA LAB. & EMP. L.J. 419, 427-31, 435-37 (1998).

42 One anecdotal example is the outsourcing of sanitation workers in many municipalities in Israel. Subcontracting these jobs ensured that one of the main tools used to pressurize local authorities during a strike — stopping garbage collection — was no longer available to unions.

43 File No. 11241-08-13 Labor Court (TA), *Koach La Ovdim Democratic Workers' Org. v. Hot Cable Commc'n Co.* (Sept. 11, 2014), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

workers' unionization efforts led the company to enhance its subcontracting processes, shrinking the bargaining unit swiftly within a short period of time, and ensuring that many of the workers that joined the union — especially the Technical Apparatus, that was not originally supposed to be subcontracted, and where the bulk of unionization was occurring — were no longer Hot employees, but rather employees of subcontractors.<sup>44</sup> The union's motion for a temporary injunction against the swift and extensive outsourcing was denied and the parties agreed to a court-suggested settlement, which included various restrictions on the manner in which outsourcing would occur.<sup>45</sup> As a result of the employers' antiunion campaign and outsourcing processes, and following a long legal battle over the determination of the size of the bargaining unit, the labor court determined that the union had failed to win exclusive representation.<sup>46</sup>

Another way in which traditional labor law's definition of a bargaining unit creates an obstacle to the unionization of subcontracted labor is in the case of markets dominated by a few (or a single) service buyers — particularly if the one de facto buyer is the state — and populated by many small service providers that are in intense competition with one another. This is, for example, the case in the in-home health aid sector in certain countries. While there are many aid recipients (individual elderly and disabled people and their families), care workers are often employed through subcontractors that themselves need to win a governmental tender to provide services in this field, which is often related to or partially funded by governmental long-term care benefits. In such cases unionization is particularly difficult for two reasons: one is seemingly technical — the difficulty to designate an employer; the second, however, is more substantive — in such markets wages, benefits, and to

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44 *Id.* ¶ 2.

45 File No. 47336-05-13 Labor Court (TA), *Koach La Ovdim Democratic Workers' Organization v. Hot Cable Communication Company* (May 26, 2013), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

46 File No. 11241-08-13, *Koach La Ovdim*. Following the opinion, the factual situation became more complicated when a competing union claimed exclusive representation over the bargaining unit. The issues arising from the competition between unions are currently still being litigated. *See* File No. 48339-07-14 National Labor Court *Histadrut Ha'ovdim Haklalit Hahadasha v. Histadrut Ha'ovdim Haleumit* (Oct. 29, 2014), Nevo Legal Database (by subscription, in Hebrew) (Isr.). Under the Collective Agreements Law, 5717-1957, SH No. 221 p. 63, arts. 2-4 (Isr.), for a trade union to gain the exclusive right of representation of workers in a single workplace it needs to show that one-third of the workers in the bargaining unit, and half of the unionized workers, are members of the union.

some extent working conditions are dictated by the tender and/or the welfare benefit level, leaving a small margin to bargain over, if at all. These markets are, in some sense, not fully “free” or “competitive,” and that paradoxically makes unionization impossible, since variable rents and competition are the environment effective collective bargaining can thrive in.

This, for example, was evident in an Israeli unionization drive of migrant care workers.<sup>47</sup> Migrant care workers are employed by individuals in need of care in combination with two subcontractors: a private employment bureau that is responsible for placements, and a care agency that produces paychecks for the part of the workers’ wage that comes from the Israeli social security’s long-term care benefit. In the labor court’s case law, the care receiver and/or his or her family are usually seen as the legal employers, although in some cases the court determined that the care agency should be viewed as a co-employer.<sup>48</sup> As part of a Power to the Workers organization drive of migrant care workers in Israel, they explored the option of organizing workers under one such subcontractor, under the understanding that this would provide them with labor law protections and the ability to take collective action as well as, eventually, sign a collective agreement.<sup>49</sup> However, they soon

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47 Guy Mundlak & Hila Shamir, *Organizing Migrant Care Workers: Industrial Citizenship and the Trade Union Option*, 153 INT’L LAB. REV. 93, 105-06 (2014).

48 See, e.g., File No. 110/08 National Labor Court, *Dalia v. Nat’l Ins. Inst.* (Mar. 12, 2009), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (asserting that the National Insurance Institute is not the care worker’s employer); File No. 660/06 National Labor Court, *Birger v. Katibog* (Jan. 23, 2008), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (asserting that the elderly person’s son is the employer); File No. 1423/04 National Labor Court, *Kastelio v. Tsitrinbaum* (Apr. 7, 2005), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (asserting that the care receiver is the employer). See also the following cases finding that the care agency, the care receiver and/or his family are co-employers: File No. 1038/06 Labor Court (Jer), *Ilandri v. Mahtaizada* (Feb. 11, 2009), Nevo Legal Database (by subscription, in Hebrew) (Isr.); and File No. 3174/04 Labor Court (BS), *Busca Stefania v. Strochotiano* (Feb. 18, 2007), Nevo Legal Database (by subscription, in Hebrew) (Isr.). But see the contradicting cases holding that the care agency is the employer: File No. 3709/09 Labor Court (Jer), *Postariya v. Berkovitch* (Mar. 14, 2010), Nevo Legal Database (by subscription, in Hebrew) (Isr.); and File No. 7214/04 Labor Court (TA), *Stoyolava v. Kazravrisky* (Apr. 11, 2006), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

49 The union sought to organize workers at the subcontractor level since collective action of a single care worker employed by one household is clearly impossible. This problem haunts the organization of in-home care workers — whether or not under a guest workers immigration regime — wherever it has been attempted. See, e.g., Eileen Boris & Jennifer Klein, *Organizing Home Care: Low-Waged*



discovered that finding workers in the bargaining unit for the objective of collective bargaining was technically difficult, since due to the multiplicity of subcontractors involved they were unable to find out who the agency's employees were, or how to reach them. Such mundane barriers eventually put a stop to the effort to pursue "traditional" union activity.<sup>50</sup> Moreover, care sector subcontractors in Israel operate in a seemingly partially environment; targeting one subcontractor instead of engaging in industry-wide collective action could therefore significantly degrade that establishment's competitiveness.

Such organizing attempts in other sectors of the Israeli labor market have encountered strong antiunion animosity, giving rise to union-busting strategies.<sup>51</sup> If such strategies are readily used in large industrial and service corporations that employ Israelis, they would have been much more forcefully used, one can imagine, against the organization of migrant care workers. While this failed unionization attempt features various anomalies which stem from particular aspects of Israel's guest worker regime, it may still represent some general tenets that characterize subcontracting.

The first barrier to unionization — the difficulty of identifying an employer to "unionize against," or, in other words, of manufacturing an employer for bargaining purposes — was solved in some jurisdictions by creative and innovative solutions. In California, the SEIU unionized home care workers, some of them employed by home healthcare agencies,<sup>52</sup> but mostly working as independent providers,<sup>53</sup> *vis-à-vis* a public authority. The public authority created by each county was designated as an "employer of record" for the purpose of collective bargaining.<sup>54</sup> The creation of these public authorities was made possible due to the establishment of a strong coalition between the SEIU and major senior citizens groups, and groups representing people with disabilities. The union together with these groups of service recipients advocated for the improvement of wages and benefits of home care workers

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*Workers in the Welfare State*, 34 POL. & SOC. 81 (2006); Mundlak & Shamir, *supra* note 47, at 110.

50 Mundlak & Shamir, *supra* note 47, at 105.

51 Guy Mundlak et al., *Union Density in Israel 1995-2010: The Hybridization of Industrial Relations*, 52 INDUS. REL. 78 (2013).

52 Kristin Jenkins Gerrick, *An Inquiry into Unionizing Home Healthcare Workers: Benefits for Workers and Patients*, 29 AM. J.L. & MED. 117, 121-22 (2003).

53 Patrice M. Mareschal, *Innovation and Adaptation: Contrasting Efforts to Organize Home Care Workers in Four States*, 31 LAB. STUD. J. 25, 27-28 (2006).

54 Boris & Klein, *supra* note 49, at 84, 93-94; Linda Delp & Katie Quan, *Homecare Worker Organizing in California: An Analysis of a Successful Strategy*, 27 LAB. STUD. J. 1, 8-11 (2002).

through the creation of a public authority.<sup>55</sup> However, even when an employer of record was created the second substantive problem mentioned above — related to the small margin unions can bargain over — still made it difficult for unions to improve workers' working conditions.<sup>56</sup>

In New York, where the agency model is a more common method of service delivery, the SEIU focused on legislative efforts to increase the state budget for home care programs, pressuring agencies to pass the increases along to the workers, and lobbying for the passage of legislation that benefits unionized care workers.<sup>57</sup> Simultaneously, the union also organized agency workers and managed to stage a 30,000 worker strike in 2004, which eventually led to collective agreements covering a majority of the city's subcontractors.<sup>58</sup> The New York and California examples suggest that in certain contexts, through innovative strategies backed up by strong coalitions that can inspire the required political will, some of these barriers can be overcome.

## II. UPDATING LABOR LAW TO THE REALITIES OF SUBCONTRACTING?

The three barriers to the organization of subcontracted labor discussed so far — low bargaining power, the instability of the contractual relationship, and the difficulty of identifying a bargaining unit — require rethinking basic premises of traditional labor law, and perhaps call for thinking about a plurality of labor *laws* — including a branch of labor law that deals specifically with subcontracting.<sup>59</sup> Some jurisdictions have experimented with addressing the vulnerabilities detailed in Part I, and designed reforms that aim to protect subcontracted labor workers' rights and increase their bargaining power. In the following pages I briefly discuss the main relevant strategies — sectoral bargaining, the joint employer doctrine and extension of a subcontractor's obligations to the lead company, continuity of collective agreement coverage in case of change of subcontractor, and the removal of secondary boycotts — and their shortcomings.<sup>60</sup>

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55 Mareschal, *supra* note 53, at 28.

56 Gerrick, *supra* note 52, at 129-30.

57 Mareschal, *supra* note 53, at 27-28, 38-40.

58 *Id.* at 38.

59 *See, e.g.*, Gordon, *supra* note 33, at 71.

60 In this Article I limit my discussion to possible legal solutions to barriers to unionization, and do not engage in normative justifications for such solutions. For a discussion of normative justifications to expand the liability of lead

One possible solution to the problems discussed in Part I is developing a sector-based collective agreement and extending it to all employees in the industry. This would increase workers' bargaining power since it avoids competition between employers on certain workers' rights issues, stipulated in the sectoral agreement; it would overcome the instability of the bargaining parties since a change in subcontractor will become irrelevant; and it would eliminate the problem of identifying the bargaining unit since all employees in the sector will be covered. However, sectoral agreements and extension orders are declining worldwide, and when in place tend to be less beneficial to the workers than enterprise bargaining.<sup>61</sup>

A second alternative is to recognize that the lead company is in fact a joint employer with the subcontractor, and as such is both responsible for any violations of the subcontracted workers' freedom of association, as well as required to be part of negotiations and a side to an eventual agreement. This may be the path paved in the United States by the NLRB decision discussed above, which adopted an "indirect control" test for determination of joint employer status, though the exact implications of this ruling for subcontracting are still far from clear.<sup>62</sup> While the growing responsibility assigned to lead companies in case law and new legislation in many countries recognizes the responsibility of

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companies, see Guy Davidov, *Indirect Employment: Should Lead Companies be Liable?*, 37 COMP. LAB. L. & POL'Y J. 5, 19-32 (2015).

- 61 OECD, OECD EMPLOYMENT OUTLOOK 2004, at 130 (2004), <http://www.oecd.org/employment/emp/34846881.pdf>; Richard Freeman & Robert Gibbons, *Getting Together and Breaking Apart: The Decline of Centralized Collective Bargaining* *Dirk*, in DIFFERENCES AND CHANGES IN WAGE STRUCTURES 345, 346 (Richard B. Freeman & Lawrence F. Katz eds., 1995); Harry C. Katz, *The Decentralization of Collective Bargaining: A Literature Review and Comparative Analysis*, 47 INDUS. & LAB. REL. REV. 3, 12 (1993); Dirk Antonzyck et al., *Rising Wage Inequality: The Decline of Collective Bargaining, and the Gender Wage Gap* (IZA Discussion Paper no. 4911, 2010), <http://ftp.iza.org/dp4911.pdf>.
- 62 Case 32-RC-109684, *Browning-Ferris Indus. of Cal., Inc.*, 362 NLRB No. 186 (Aug. 27, 2015). For an analysis of the decision, see Catherine Fisk, *Guest Post: N.L.R.B.'s Browning-Ferris Decision Could Reshape Contract and Franchise Labor*, ONLABOR: WORKERS, UNIONS, AND POLITICS (Aug. 28, 2015), <http://onlabor.org/2015/08/28/guest-post-n-l-r-b-s-browning-ferris-decision-could-reshape-contract-and-franchise-labor/>. Note that the Browning decision significantly extends the logic of the position taken by the NLRB in the McDonalds case. See Case 32-RC-109684, *Browning-Ferris Indus.* The NLRB's McDonalds ruling extended responsibility to the lead company, when the franchisee violated the workers freedom of association. Such a ruling was important but still puts no obligation on the lead company to take responsibility for its role in shaping subcontracted workers' working conditions. The Browning decision is the first

lead companies to protect the minimum rights of subcontracted workers, they so far do not *require* lead companies to be a party to collective bargaining.<sup>63</sup> The joint employer doctrine and legislation that regulates subcontracting and expands lead company responsibility towards subcontracted labor<sup>64</sup> mostly regard the lead company as responsible for making sure that the subcontractor protects the workers' *minimum* rights and, under certain conditions, fulfills its obligations towards the workers, if the subcontractor has failed to do so. They usually do not create independent duties that stem from the lead company's role in the employment of subcontracted labor, or extend obligations that stem from the lead companies' on-employment practices and collective agreements to the subcontracted labor. Such an extension of the obligations of the lead company towards subcontracted labor will only happen if the lead company is found to be the *de jure* employer of the workers.<sup>65</sup>

A third transformation in labor law that may assist subcontracted labor unionization efforts is attaching the collective agreement to the lead company rather than to the subcontractor. This reform could guarantee the stability of the contracting parties, since terminating a contract with the subcontractor would not invalidate the collective agreement. This solution causes various problems since it obligates any subcontractor the lead company contracts with to assume the collective agreement of its predecessor. This method of

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to signal an expansive view of the lead company's responsibility even to matters on which it has only indirect control.

63 Davidov, *supra* note 18.

64 To be clear, this category of legislation does not see the lead company as a joint employer. Rather, it seeks to incentivize lead companies to guarantee that subcontractors are in compliance with minimum protective employment laws. The legislation traditionally places direct responsibility on the lead company only in cases of employment law violations by the subcontractor.

65 One example is Israeli legislation, which adopted a solution common to that of some other postindustrial economies that attempted to tackle this. The legislation, which regulates only subcontracting in the cleaning and security sectors, places the responsibility for workers' minimum rights, as guaranteed by protective employment legislation, on the lead company only when the subcontractor fails to provide those minimum rights himself. *See* Act to Improve the Enforcement of Labor Laws 5772-2011, 2326 SH 62 (Isr.). For a discussion of this legislation, see Guy Davidov, *Special Protection for Cleaners: A Case of Justified Selectivity?*, 36 COMP. LAB. L. & POL'Y J. 219, 228-34 (2015); and Mundlak, *supra* note 9. For a discussion of similar legislative reforms in relation to subcontracted labor in Latin America, particularly Chile, Uruguay, and Mexico, see Graciela Bensusán, *Labour Law, Inclusive Development and Equality in Latin America*, in LABOUR LAW AND DEVELOPMENT (Shelley Marshall & Colin Fenwick eds., forthcoming 2016).

continuity of coverage has been adopted in certain circumstances under the EU directive regarding the safeguarding of employees' rights in the event of transfers of undertakings. This directive had in mind first and foremost the sale or transfer of an operating business to a new owner, and as a result its application to subcontracting is often partial and incomplete.<sup>66</sup> Until such solutions are tailored to address subcontracting situations, the lead company's ability to terminate the contract with the unionized subcontractor remains a *de facto* obstacle to effective collective action by unionized labor.

A fourth, highly watered down alternative, could be the removal of the ban on secondary boycott, in jurisdictions in which it exists, in relation to the lead company in subcontracting situations. This would relatively minimally expose the lead company to union activity since then unions would be able to pressure lead companies through picketing and direct interaction, but lead companies would still have no legal obligation to bargain collectively with a representative of their employees. An example of the effect of relaxing this restriction can be found in the U.S. construction industry, where legislation excludes from the general prohibition on secondary boycott agreements in the construction industry aimed at secondary objectives. As a result, unions in the construction industry can, and regularly do, agree with lead companies to restrict subcontracting at the job site to firms employing union workers.<sup>67</sup>

A fifth alternative is to rethink the definition of the bargaining unit in a subcontracting situation to include an inclusive option that combines the lead company's workers with the subcontracted labor. Under such an understanding of the bargaining unit, subcontractors would be covered by existing collective agreements and enjoy the representation by the union *vis-à-vis* the employer. In nonunionized workplaces, unionization drives would have to include both core workers and subcontracted workers, thus increasing the chances that the subcontracted workers' working standards and other concerns will be addressed in labor negotiations and in a resulting collective agreement.

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66 Council Directive 2001/23 of 12 March 2001 on the Approximation of the Laws of the Member States Relating to the Safeguarding of Employees' Rights in the Event of Transfers of Undertakings, Businesses or Parts of Undertakings or Businesses, 2001 O.J. (L 82) (EC), [http://europa.eu/legislation\\_summaries/employment\\_and\\_social\\_policy/employment\\_rights\\_and\\_work\\_organisation/c11330\\_en.htm](http://europa.eu/legislation_summaries/employment_and_social_policy/employment_rights_and_work_organisation/c11330_en.htm).

67 29 U.S.C. § 158(e) (2010) (section 8(e) of the National Labor Relations Act). *See, e.g.,* Richard Bock, *Secondary Boycotts: Understanding NLRB Interpretations of Section 8(b)(4)(b) of the National Labor Relations Act*, 7 U. PA. J. LAB. & EMP. L. 905, 916 (2005); Michael Dreeben, *Hot Cargo Agreements in the Construction Industry: Restraints on Subcontracting Under the Proviso to Section 8(e)*, 30 DUKE L.J. 141 (1981).

Here again myriad complications may result. Namely, recognizing a lead company as an employer for the purpose of collective bargaining, and for that purpose alone, is problematic when the lead company has only limited and partial control over the subcontractors' employment practices. Furthermore, lead companies often resort to subcontracting to ensure greater flexibility in hiring, retention and cost, in relation to part of the functions carried out in their business. Including subcontracted labor in the core bargaining unit will most likely introduce rigidity where employers seek flexibility. Such complications may impact the contractual relationship between the lead company and the subcontractor and make fuzzier the delineation of responsibilities between them.

A sixth option is the creation of a mechanism that encourages (or requires in certain circumstances) multi-employer bargaining in industries characterized by a multitude of small subcontractors, who closely compete with each other. However, there is a valid concern that such agreements, especially in low-skill labor sectors, may produce meager advances for the workers.<sup>68</sup> At least, in the Israeli case, it appears that legislation directly seeking to regulate labor sectors characterized by subcontracting and rampant workers' rights violations managed to achieve more than collective agreements did.<sup>69</sup> This example as well as examples from the unionization of subcontracted call center workers in Germany<sup>70</sup> remind us that some of the responsibility for the low unionization rates among subcontractors lies with trade unions, which at times benefit from

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68 See the Israeli example of sector-wide agreements in the temporary agency sector. Collective Agreement 7019/2007 on the Employment of Workers Through Temporary Work Agencies in the Private Sector (Feb. 16, 2004) (Isr.), extended by the Minister of Labor (YH — Government Records 5326, Sept. 1, 2004) (Isr.).

69 See Act to Improve the Enforcement of Labor Laws, 2326 SH 62; Act on the Employment of Workers through Temporary Work Agencies, 5756-1996, SH No. 1578 (Isr.); Law on Employment of Workers by Service Contractors in Security and Cleaning in Public Bodies, 5772-2013, SH No. 2406 (Isr.). Note, however, that the latter legislation was complemented by further improvement through collective agreements. See Collective Agreement for the Security Sector 7029/2014 (July 22, 2014), extended on Oct. 2, 2014 (YP 6899, Oct. 26, 2014); Collective Agreement for the Cleaning sector 7035/2013, extended on Feb. 5, 2014 (YP 6759, Feb. 19, 2014). For a detailed discussion of this dynamic, see Mundlak, *supra* note 9.

70 Eran Golan, *Social Change in the Shadow of the Tender Culture, Labor Commodification and Judicial Deprivation*, 3 MA'ASEI MISHPAT [TEL AVIV U. J.L. & SOC. CHANGE] 201, 203-04, 209-10, 215-17 (2010) (Isr.); Hajo Holst, *The Political Economy of Trade Union Strategies in Austria and Germany: The Case of Call Centres*, 14 EUR. J. INDUS. REL. 25, 32, 34 (2008).

the existence of subcontracted labor to stabilize the unionized labor force, and tend to invest less in their organization.

While all of these strategies provide some improvement on existing labor law, none of them is sufficient to solve the conundrum of the unionization of subcontracted labor. I would like to suggest that the most promising path would require a sharp departure from existing models of collective bargaining — a shift from bilateral to multilateral collective bargaining. In order to guarantee subcontracted labor's rights to effective collective bargaining, the lead company needs to be rethought of, not as merely a neutral party but as a joint employer in a thick sense. Unless the threat of workers' collective action is an effective threat to the lead company (the brand), as well as the subcontractor (or franchisee), collective bargaining and collective action will be almost meaningless. To this end, the bargaining model needs to be reimagined as a multilateral (lead company, employer and union) model, rather than the current bilateral (employer and union) model, in order to guarantee that the lead company will sit at the bargaining table. The lead company needs to be more than a residual bearer of obligations, asked to step in when the subcontractor fails to fulfil its minimum obligations, but reconceived as a party to collective bargaining and to an eventual collective agreement with direct obligations under labor law. Such a development may cause various complications to the lead company, including ones that may make subcontracting a less appealing option. A shift to multilateral collective bargaining may not necessarily be realistically achievable under the current neoliberal political climate in most jurisdictions, pushing for de-regulation, labor market flexibility, and reduced employer obligations, all in the name of efficiency and promoting "free markets." Yet, this alternative is worth considering if not for its feasibility, then in order to exemplify the ways in which current labor law is irresponsive to the main barriers to unionization that subcontracted labor faces.

A recent innovative attempt by a union to involve lead companies in collective agreements occurred in the Netherlands in relation to the cleaning sector. In this Dutch campaign, the Allied Industry, Food, Services and Transport Union (FNV Bondgenoten), reached an agreement with lead companies in relation to the working conditions of subcontracted cleaners.<sup>71</sup> Realizing the significant power of lead companies in determining the cleaners' working conditions, the FNV began a campaign to encourage lead companies to sign a code of

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71 Marianne Grünell, *Cleaners Win Pay Increase Following Strike Action*, EUR. OBSERVATORY OF WORKING LIFE (May 31, 2010), <http://46.105.61.53/observatories/eurwork/articles/industrial-relations-other/cleaners-win-pay-increase-following-strike-action>.

responsible market conduct, in which they commit to protecting the cleaning workers' rights. The provisions in the code of conduct are negotiated in a roundtable dialogue between unions, employers (subcontractors), workers, lead companies (customers) and the government. Once signed, the code is then included as an appendix to the sectoral collective agreement between the union and the cleaning companies (the subcontractors). The campaign was extended to the catering and security sectors, and as of the time of publication of this Article had been signed by 800 lead employers in these sectors.<sup>72</sup> This highly innovative structure seems to be reliant on the commitment to social dialogue in the Dutch labor market, and on the continued existence of sector-wide collective agreements in these sectors. While this innovation is based on "soft law" methods of voluntary action taken by corporations, it is uniquely promising because of the close involvement of a union. The inclusion of the code of conduct as an appendix to collective agreements offers the potential for more effective monitoring and enforcement mechanisms than with traditional voluntary codes of conduct. Such a legal innovation might be more difficult to implement in legal contexts that do not share the Netherlands' corporatist tradition. Regardless, even this highly innovative approach does not lead to a transformation in the basic structures of collective bargaining that obligate lead companies to take part in collective bargaining, but rather depends on their goodwill (and on the union's power to create such "goodwill") to sign the code of conduct.<sup>73</sup>

### III. CONCLUSION — THE ROLE OF LAW?

Even if some of the more minimal above strategies were to be adopted — which may be meaningful and in some cases quite effective — it remains questionable whether legal responses that do not significantly reimagine the structure of collective bargaining into a multi-lateral structure can *solve* the wide violations of workers' rights in multilayered contracting arrangements. Violations of workers' rights and barriers to unionization posed by subcontracted labor appear to be particularly acute in markets with an oversupply of labor, where there are abundant low-skilled workers competing for jobs despite substandard working conditions and low wages, as well as an oversupply of

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72 The FNV website is dedicated to the code of conduct campaign. See FEDERATIE NEDERLANDSE VAKBEWEGING, <http://www.codeverantwoordelijkmarktgedrag.nl/home/> (last visited June 30, 2015).

73 Guy Mundlak & Issi Rosen Tzvi, *Signaling Virtue? A Comparison of Corporate Codes in the Fields of Labor and Environment*, 12 THEORETICAL INQUIRIES L. 603 (2011).



subcontractors competing with each other over contracts with powerful lead companies.<sup>74</sup> The problem of oversupply of labor does not manifest itself only in subcontracting, but in developed economies subcontracted labor may be an important labor market manifestation of such oversupply. As a result, legal rules may provide a temporary solution but will not solve the problem of oversupply of labor altogether. Consequently, the reach of law may be limited in putting an end to the violation of workers' rights that are endemic in many current subcontracting arrangements. Even after the legal regime responds to the problems posed by subcontracting, other forms of nontraditional employment — distancing lead companies from the people who provide crucial services to them — may emerge.<sup>75</sup>

This became evident in Israeli law when in order to eliminate the long-term employment of temporary agency workers in substandard working conditions, the legislature passed the Act on the Employment of Workers Through Temporary Work Agencies.<sup>76</sup> The law, and its amendments, limited the employment of temporary workers to nine months, after which the workers are considered the lead company's employees, and required equalizing temporary workers' working conditions to those of permanent workers. The law had a strong impact on the Israeli labor market and significantly reduced — in fact, practically eliminated — the scope of long-term employment of temporary workers. However, the response in some sectors — particularly cleaning and security — was the “rebranding” of companies as subcontractors. As a result, now the same problematic patterns appear in the form of subcontracted labor. Recent legislation trying to improve the working conditions of those workers appears to hold some promise of guaranteeing workers' minimum rights, but it is not meant to be a path towards enabling workers' unionization.<sup>77</sup>

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74 DANIEL ALPERT, *THE AGE OF OVERSUPPLY: OVERCOMING THE GREATEST CHALLENGE OF THE GLOBAL ECONOMY* 125-26 (2013).

75 The rise of the “sharing economy” — mostly evident now in the ride sharing company Uber — is an example of such challenges to traditional employment law classifications. See Robert Sprague, *Worker (Mis)Classification in the Sharing Economy: Square Pegs Trying to Fit in Round Holes*, 31 ABA J. LAB. & EMP. L. (forthcoming 2015).

76 Act on the Employment of Workers Through Temporary Work Agencies, 5756-1996, SH No. 1578 (Isr.). See in particular sections 12(A) and 13. For a detailed description and analysis of the Israeli regulatory experience in relation to subcontracting, see Mundlak, *supra* note 9; and Davidov, *supra* note 60, at 9-18.

77 See Act to Improve the Enforcement of Labor Laws 5772-2011, 2326 SH 62 (2011) (Isr.); Employment of Employee by Service Contractors in Cleaning and Security Fields of Public Entities, 5772-2013, SH No. 2406 (Isr.). For a detailed

Moreover, in other labor sectors in Israel, and in some other jurisdictions, attempts to enhance the labor and employment rights of all workers, and of subcontracted labor, were met with the growth of independent contractors as another form of workers' rights evasion.<sup>78</sup> For example, one prediction in the United States suggests that by 2020 over forty percent of the U.S. workforce will be unprotected by labor law for this reason.<sup>79</sup> This trend, much like subcontracting, calls for a significant transformation of labor law, in order to maintain its relevance to the contractual realities of the labor market.<sup>80</sup>

This tale of cyclical transformation — regulation and/or unionization, and employer reaction — reminds us that the relationship between law and labor is a dynamic one, in which permanent solutions are elusive. Lobbying for a better fit between labor law and labor market realities to guarantee subcontracted workers' freedom of association, if successful, will have to be followed by equally powerful organizing campaigns in which unions will struggle to ensure enforcement and implementation. Furthermore, success may lead to backlash, which can manifest itself in a multitude of ways: employers' attempts to identify and make use of loopholes, takeover of the agency in charge of rulemaking and implementation, securing the nominations of pro-capital judges, or attempts to dismantle tribunals and courts that are seen as pro-union. It may very well be that due to changing market dynamics, employer counterstrategies, as well as inter-union competition, certain laws that are helpful at one moment in time may prove to be a barrier in later stages of the cycle. Accordingly, "good labor law" cannot necessarily provide a once-and-for-all solution.

The relationship between labor lawyering and the labor movement, in this context and many others, is better thought of as a cycle of law reform rather than a process of linear progress towards a better future. As Jennifer Gordon noted, the tools provided by good labor law should not be thought of as a jackhammer but rather

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description of these developments in Israeli employment law, see Mundlak, *supra* note 9.

78 For a general discussion of the problems of workers' rights evasion and employer power to restructure work into non-employment forms, see Noah Zatz, *Beyond Misclassification: Tackling the Independent Contractor Problem without Redefining Employment*, 26 ABA J. LAB. & EMP. L. 279, 283 (2011).

79 INTUIT, INTUIT 2020 REPORT: TWENTY TRENDS THAT WILL SHAPE THE NEXT DECADE 21 (2010), [http://http-download.intuit.com/http.intuit/CMO/intuit/futureofsmallbusiness/intuit\\_2020\\_report.pdf](http://http-download.intuit.com/http.intuit/CMO/intuit/futureofsmallbusiness/intuit_2020_report.pdf).

80 Dubal, *supra* note 10.

more like a pick, moving the process of change-making incrementally along much as the ice-climber stakes out a hold to pull herself up to the next ledge. Falls are inevitable. It is not always clear which way is up. There is no one point at which victory is declared and the climb is over.<sup>81</sup>

This does not mean that it is not worth the fight; it just requires an understanding that under advanced capitalism, the struggle for a more egalitarian distribution between workers and employers cannot be thought of in terms of “once and for all” solutions, but rather requires frequent reconfiguration and recalibration of unions, collective bargaining and other labor market institutions.<sup>82</sup>

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81 Gordon, *supra* note 33, at 72.

82 KATHLEEN THELEN, VARIETIES OF LIBERALIZATION AND THE NEW POLITICS OF SOCIAL SOLIDARITY 1-5, 195-207 (2014).

