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## K-12 Nontraditional Bargaining in a Time of COVID-19: Building Solidarity Between Movements through Shared Grievances

Ben Waldron & Richard Bales

By focusing on shared community grievances related to the conditions created by the coronavirus disease (COVID-19) pandemic, teachers today can replicate their successes<sup>1</sup> in the 2018–2019 teachers’ strikes using similar labor tactics. The 2018–2019 strikes started with teachers demanding better funding for public education,<sup>2</sup> but then expanded as teachers advocated for increases in public services beyond the classroom and supported concurrent social justice movements like Black Lives Matter (BLM) and movement organizations like Fight for \$15.<sup>3</sup> These broader demands highlighted shared grievances with teachers’ communities at the intersection of poverty, race, and labor. By framing their grievances as shared community grievances, teachers changed the semiotic meaning of those grievances to build solidarity with their communities and gain popular support. These strikes were often “wildcat” actions<sup>4</sup> and short in duration,

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<sup>1</sup> See Kelsey Vlamis, *Why US teachers have been walking out of schools nationwide*, BBC NEWS (Oct. 31, 2019), <https://www.bbc.com/news/world-us-canada-50233474> [<https://perma.cc/J3J6-X2CP>].

<sup>2</sup> *Id.*

<sup>3</sup> See, e.g., *Endorsements*, BLM AT SCH. (2018), <https://www.blacklivesmatteratschool.com/endorsements.html> [<https://perma.cc/96EX-3CDQ>].

<sup>4</sup> A “wildcat” strike is a strike undertaken by union members without authorization of the union. See DENNIS R. NOLAN ET AL., *LABOR LAW: COLLECTIVE BARGAINING IN A FREE SOCIETY* 646 (7th ed. 2018).

which eased buy-in and increased teacher participation. “Sickouts,”<sup>5</sup> which are wildcat actions unwittingly bolstered by the Families First Coronavirus Relief Act, are seemingly tailored to the conditions of the COVID-19 pandemic and can be used by teachers to gain bargaining leverage.

The COVID-19 pandemic has emphasized stark inequality in society. Existing social justice movements and movement organizations have experienced new barriers, existing grievances have been inflamed, and society will need new social justice movements and movement organizations to address these various concerns. By highlighting the intersection of the teaching community’s COVID-19-related grievances and labor, teachers can work with new and invigorated social justice movements and make demands beyond the classroom to resolve these shared grievances and increase solidarity with their communities. In short, teachers have a unique opportunity to use old tactics to make a difference in this new situation.

Part I of this article discusses the current state of labor law, its alienation from its social justice roots, and the current state of labor law for teachers. Part II explores how shared grievances can facilitate social mobilization and change through solidarity. Part III describes the 2018–2019 teachers’ strikes, including how teachers highlighted shared grievances and supported social justice movements to better control the semiotic meaning of their own social movement and create solidarity with their communities. Part IV draws parallels between the issues motivating the 2018–2019 teacher strikes and issues emanating from COVID-19. Part V discusses Right to Recovery, a Chicago-based campaign advocating for a comprehensive COVID-19

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<sup>5</sup> A sickout is an organized absence of work by employees who are not sick. The claim of sickness is made in an attempt to avoid the action being deemed an illegal or contract-violative strike. See *Trade Dispute TD 60: Initial Work Stoppage Action*, CA EMPLOYMENT DEV. DEP’T, [https://www.edd.ca.gov/uibdg/Trade\\_Dispute\\_TD\\_60.htm](https://www.edd.ca.gov/uibdg/Trade_Dispute_TD_60.htm) [<https://perma.cc/QG8G-TYPD>].

recovery package,<sup>6</sup> as a model for policy that teachers can support in the time of COVID-19 to create solidarity with the community as well as social justice movements. Finally, Part VI discusses sickouts and why they are a potent tool in teachers' arsenals during the COVID-19 pandemic.

## I. CURRENT STATE OF LABOR LAW

The National Labor Relations Act (NLRA) grants employees working for private employers the right to form or join unions.<sup>7</sup> Section 7 of the NLRA states that “Employees shall have the right . . . to engage in other concerted activities for the purpose of collective bargaining or other mutual aid protection[.]” and Section 13 states that “Nothing in this act . . . shall be construed so as either to interfere with or impede or diminish in any way the right to strike . . . .”<sup>8</sup> However, the NLRA does not apply to teachers or other public employees, agricultural laborers, independent contractors, or supervisors.<sup>9</sup> Generally, state laws define the collective bargaining rights of teachers. Thirty-four states permit teachers to unionize and collectively bargain, ten states permit optional collective bargaining in which the school district is not obligated to engage in bargaining, and seven states—Alabama, Arizona, Georgia, North Carolina, South Carolina, Texas, and Virginia—explicitly forbid teachers from participating in collective bargaining.<sup>10</sup>

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<sup>6</sup> See *Right to Recovery*, THE ACTION NETWORK, <https://actionnetwork.org/campaigns/right-to-recovery> [<https://perma.cc/U3JU-7CMS>].

<sup>7</sup> National Labor Relations Act, 29 U.S.C. § 157; *Frequently Asked Questions*, NLRB, <https://www.nlr.gov/resources/faq/nlr> [<https://perma.cc/CL55-QM9M>].

<sup>8</sup> *The Right to Strike*, NLRB, <https://www.nlr.gov/strikes> [<https://perma.cc/P7YH-AL37>].

<sup>9</sup> *Frequently Asked Questions*, *supra* note 7.

<sup>10</sup> Kency Nittler, *Collective bargaining and teacher strikes*, NAT’L COUNCIL ON TEACHER QUALITY (Mar. 28, 2019), <https://www.nctq.org/blog/Collective-bargaining-and-teacher-strikes> [<https://perma.cc/4FAQ-4PS2>].

Additionally, whether teachers are permitted to strike is generally a matter of state law.<sup>11</sup> Teacher strikes are legal only in thirteen states: Alaska, California, Colorado, Hawaii, Illinois, Louisiana, Minnesota, Montana, Ohio, Oregon, Pennsylvania, Utah, and Vermont.<sup>12</sup> However, this has not stopped teachers outside of these states from striking using wildcat tactics such as walkouts and sickouts.

Modern labor law particularizes rather than generalizes the shared grievances of workers.<sup>13</sup> By confining grievances between employee and employer alone, labor law makes it more difficult to build large scale solidarity between workers across employers, as well as solidarity with the general public.<sup>14</sup> Intentionally or not, labor law “privatizes and depoliticizes” shared grievances<sup>15</sup> and “limits the scope of the relevant collective.”<sup>16</sup> Employment law also focuses on the individual, stifling efforts to assert collective rights.<sup>17</sup>

This depoliticization has facilitated the separation of unionism from its social justice roots.<sup>18</sup> The Knights of Labor and the Industrial Workers of the World, two early labor unions, envisioned a “cooperative commonwealth” in which workers received the full benefit of their labor.<sup>19</sup> Some scholars argue that the NLRA slowly eroded the political goals of unionism in the United States. These loftier goals were abandoned for goals

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<sup>11</sup> See *id.* (Case law regarding the permissibility of teacher strikes exists in twelve states, while the issue is not addressed by statute or case law in South Carolina or Wyoming).

<sup>12</sup> *Id.*

<sup>13</sup> George Feldman, *Unions, Solidarity, and Class: The Limits of Liberal Labor Law*, 15 BERKELEY J. EMP. & LAB. 187, 194 (1994).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 194.

<sup>16</sup> *Id.* at 201.

<sup>17</sup> Marion Crain & Ken Matheny, *Beyond Unions, Notwithstanding Labor Law*, 4 U.C. IRVINE L. REV. 561, 562 (2014).

<sup>18</sup> Marion Crain & Ken Matheny, *Labor Unions, Solidarity, and Money*, 22 EMP. RTS. & EMP. POL’Y J. 259, 263 (2018).

<sup>19</sup> *Id.* at 265.

that were deemed more practical, which over time has led to business unionism and increasingly lower levels of union participation.<sup>20</sup>

NLRA-covered labor organizations are those which “deal[] with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.”<sup>21</sup> Section 8 of the NLRA “imposes a bargaining obligation [on employers] with respect to wages, hours, and other terms and conditions of employment.”<sup>22</sup> Section 7 protects employees only when they are engaged in activity concerning the “mutual aid or benefit” of a bargaining unit—often workers working for the same employer—which leaves no room for employees to build solidarity by bargaining on behalf of conditions relating to the communities their work affects.<sup>23</sup> For example, striking to demand better conditions for public transit passengers, or to protest healthcare outcomes for patients at an understaffed hospital, is not a protected activity and workers participating in this action can be fired.<sup>24</sup> Labor law does not protect the jobs of employees striking to address community grievances, even when their employer is the cause of, and thus the only entity that can remedy, those grievances.<sup>25</sup>

However, labor and employment law are not dead ends, and both are necessary components for reconstructing a robust labor movement in the United States. Vice Provost Marion Crain at the Washington University School of Law argues:

The best hope for a revived labor movement appears to lie with new actors such as workers’ centers, community and occupational groups, and identity caucuses that can work in partnerships with established unions; class action plaintiffs’ firms dedicated to

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<sup>20</sup> Crain & Matheny, *supra* note 17, at 562.

<sup>21</sup> Crain & Matheny, *supra* note 18, at 270–71.

<sup>22</sup> *Id.* at 271.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 272.

<sup>25</sup> These types of strikes are not protected by either the NLRA or state law.

enforcing workplace rights; and government agencies and attorneys general . . . <sup>26</sup>

[W]e should embrace a different vision of solidarity rooted in bottom-up mobilization, traditions of participative democracy, and appeals that engage the community.<sup>27</sup>

Although the authors of this article agree with Vice Provost Crain in this respect, the breadth of this article is narrower and will focus on self-identified “movements”—organized efforts affiliated with some of the entities listed by Professor Crain—such as #RedforEd, Fight For \$15, and Right to Recovery, as well as social justice movements such as Black Lives Matter. Movement organizations, which focus on political grievances rather than traditional labor grievances, have helped workers organize in ways that American labor unions do not. These movements can be used to build worker solidarity, and teachers and other workers have and can further combine the labor movement with social justice movements in general to strengthen collective bargaining power by increasing solidarity with and within labor.

The legal distinction between these types of movement entities and “labor organizations” that fall under the NLRA is not always clear, but these entities have existed for over a decade now, and inarguably have helped increase solidarity during that time.<sup>28</sup> For example, Fight for \$15 is financially supported in part by the Service Employees International Union (SEIU), but the SEIU is careful to distance itself publicly from the organization’s activity to avoid falling under the umbrella of the NLRA.<sup>29</sup> Although the legal future of such movements is in flux, these organizations are here today, have contributed to advances in labor, and can continue to

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<sup>26</sup> Crain & Matheny, *supra* note 17, at 564.

<sup>27</sup> Crain & Matheny, *supra* note 18, at 263.

<sup>28</sup> Crain & Matheny, *supra* note 17, at 585.

<sup>29</sup> Crain & Matheny, *supra* note 18, at 273.

do so.<sup>30</sup> They have successfully organized labor actions that would not be protected activity under the NLRA, and unions have been able to distance themselves from the consequences of these actions.

## II. GRIEVANCES

Shared grievances can often become a mobilizing force for social movements and social change.<sup>31</sup> Grievances, defined here broadly as shared phenomena that members of a social movement wish to change, take on different meaning in different times and places.<sup>32</sup> Traditionally, sociologists have focused on the relative severity of deprivations caused by the sources of shared grievances as the explanation for social mobilization and political resistance.<sup>33</sup> Under this view, social mobilization is primarily a function of the harm a grievance causes a social movement; once society reaches an unknown tipping and a grievance has harmed a group beyond what it is willing to tolerate, the social movement mobilizes towards change to

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<sup>30</sup> Worker centers have filled a similar role in labor. The most recent worker center movement has attracted backlash. For example, the Center for Union Facts, an anti-union non-profit advocacy group established in 2006, funded in large part by the Lynde and Harry Bradley Foundation, has criticized worker centers as “labor union front groups that protest and organize for higher wages, labor mandates, and larger benefits packages.” See *What are Worker Centers?*, WORKER CTRS., <https://workercenters.com/what-are-worker-centers/> [<https://perma.cc/7N7L-LZD6>]; *About the Center for Union Facts*, CTR FOR UNION FACTS, <https://www.unionfacts.com/article/about-us/> [<https://perma.cc/Y6PH-B73P>]. Charles Murray, author of *The Bell Curve: Intelligence and Class Structure in American Life*, a book criticized by the Southern Poverty Law Center as proposing a “fundamentally eugenic argument,” was the recipient of the 2016 Bradley Prize. See CHARLES MURRAY, <https://www.splcenter.org/fighting-hate/extremist-files/individual/charles-murray> [<https://perma.cc/S2BV-6V6H>]; Charles Murray, THE BRADLEY PRIZES, <https://www.bradleyfdn.org/prizes/winners/charles-murray> [<https://perma.cc/HB5J-PWGW>]. Those fighting against the labor movement understand the intersection between race and class. Within these movements exists shared grievances which the labor movement largely ignores.

<sup>31</sup> Erica Simmons, *Grievances do matter in mobilization*, 43 THEORY & SOC’Y 513, 514 (2014).

<sup>32</sup> *Id.* at 513.

<sup>33</sup> *Id.*



remedy the grievance.<sup>34</sup> However, the traditional model's focus on relative deprivations does little to account for solidarity as a mobilizing force for social change.

More recently, scholars have explored the semiotic meaning of social movements to explain social mobilization.<sup>35</sup> Grievances invoke ideas and goals that depend heavily on the context of the time and place of the social movement. For example, the context of the feminist movement in Victorian-era England was much different than the ideas and goals of Fourth Wave Feminism in the United States today,<sup>36</sup> which itself differs from the ideas and goals of modern Islamic Feminism in many Muslim-majority countries.<sup>37</sup> The labor movement today is not the labor movement of Emma Goldman, Eugene V. Debs, or Cesar Chavez, although the current labor movement shares many of the same past grievances. The semiotic meaning attached to those grievances has changed and continues to change.<sup>38</sup>

The modern model of social mobilization better accounts for solidarity. When one of two concurrent social movements experiences a relative

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> For example, Victorian feminism was principally concerned with educational and employment opportunities for women, whereas fourth-wave feminism focuses on sexual harassment, body shaming, and rape culture. See, e.g., Lynn Abrams, *Ideals of Womanhood in Victorian Britain*, BBC HIST. (Sept. 18, 2014), [https://www.bbc.co.uk/history/trail/victorian\\_britain/women\\_home/ideals\\_womanhood\\_02.shtml](https://www.bbc.co.uk/history/trail/victorian_britain/women_home/ideals_womanhood_02.shtml) [<https://perma.cc/PC6C-ETG6>]; *The fourth wave of feminism*, BRITANNICA, <https://www.britannica.com/topic/feminism/The-fourth-wave-of-feminism> [<https://perma.cc/3ZML-CSZZ>].

<sup>37</sup> Rachelle Fawcett, *The reality and future of Islamic Feminism* (Mar. 28, 2013), <https://www.aljazeera.com/opinions/2013/3/28/the-reality-and-future-of-islamic-feminism> [<https://perma.cc/4SK2-LR4H>].

<sup>38</sup> Any reader who has ever had a job that forces its employees to watch anti-union videos as part of their annual training will understand the expense that private industry invests in controlling the semiotic meaning of shared grievances. See CHAD PEARSON, REFORM OR REPRESSION: ORGANIZING AMERICA'S ANTI-UNION MOVEMENT (2017) (an extensive review of the history of the anti-union movement from the perspective of its participants).

change in the severity of deprivations it experiences from the source of a shared grievance, the other social movement may mobilize without any change in the relative severity of deprivations it experiences. The more relatively harmed social movement imbues semiotic meaning into the shared grievance, and although the other social movement does not experience any additional harm, it may mobilize to address the harm caused to the first social movement.<sup>39</sup> This model of one movement building on an earlier movement accounts for social mobilization as a function of solidarity.

Moreover, this model suggests that the labor movement should return to its roots by attaching itself to social justice movements. By working with social justice movements, labor can combine powers and mobilize a much larger social movement for collective bargaining purposes. An example is the teacher's union affiliated the 2018–2019 teachers' strikes with the #RedforEd movement, which focused on traditional topics of collective bargaining and issues that affected students and the community at large.<sup>40</sup> Solidarity is a two-way street. As a result of the teacher's union's affiliation with the #RedforEd movement, students and communities mobilized on behalf of teachers.<sup>41</sup>

To be successful, the labor movement needs to adopt new tactics geared toward winning the long game. Seemingly different grievances that appear materially distinct may develop similar meanings over time.<sup>42</sup> The #RedforEd movement connected the grievances of teachers, students, and

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<sup>39</sup> "An injury to one is an injury to all." See Adam Turl, *An Injury to One is an Injury to All*, SOCIALIST WORKER (Aug. 20, 2009), <https://socialistworker.org/2009/08/20/an-injury-to-one-is-an-injury-to-all> [<https://perma.cc/A9MM-YA76>].

<sup>40</sup> Eric Blanc, *Red for Ed: The Movement Strengthens and Continues*, RETHINKING SCHS., <https://rethinkingschools.org/articles/red-for-ed-the-movement-strengthens-and-continues/> [<https://perma.cc/759A-NRYN>] (a key highlight of the movement was the intersection of education and racial justice).

<sup>41</sup> *Id.*

<sup>42</sup> Simmons, *supra* note 31, at 515.

the communities they serve.<sup>43</sup> Such grievances included housing insecurity, hunger, and the allocation of tax dollars: housing insecurity makes it more difficult for teachers to work with students consistently; hunger makes it more difficult for students to focus when learning; and tax dollars diverted from public schools make teaching more difficult, while depriving students of quality education.<sup>44</sup> Focusing the demands made by teachers on these grassroots topics can change the symbolic meaning of labor, build solidarity between teachers and voters, and pressure school districts and politicians to remedy shared grievances. This is not a new idea; sociologists and critical legal scholars have explored the intersection between education, race, class, sex, and labor for generations.<sup>45</sup>

Some political conservatives criticized the 2018–2019 teachers’ strikes as opportunistic or outright socialist.<sup>46</sup> However, President Obama<sup>47</sup> was criticized on similar grounds, despite the federal minimum wage remaining stagnant through the Obama administration<sup>48</sup> and the Obama

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<sup>43</sup> See, e.g., Michigan Education Association, *#RedForEd Rally Brings Noise to Quiet Capitol* (June 26, 2019), <https://mea.org/redfored-rally-brings-noise-to-quiet-capitol/> [<https://perma.cc/X8JZ-XCKG>].

<sup>44</sup> *Id.*; see also Carinne Deeds, *Food for Thought: How Food Insecurity Affects a Child’s Education*, AM. YOUTH POL’Y FORUM (Aug. 24, 2015), <https://www.aypf.org/blog/food-for-thought-how-food-insecurity-affects-a-childs-education/> [<https://perma.cc/P89Z-P66J>].

<sup>45</sup> See ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT: ANOTHER TIME, A GREATER TASK* (1986) (discussing critical legal studies as a program to reconstruct a more just society).

<sup>46</sup> See, e.g., Michael Patrick Leahy, *#RedforEd Founder Promoting ‘Teacher Agency’ in Politics to Academia*, BREITBART (Jan. 12, 2020), <https://www.breitbart.com/politics/2020/01/12/redfored-founder-promoting-teacher-agency-in-politics-to-academia/> [<https://perma.cc/BP5N-FAP6>]; Rebecca Friedrichs, *#RedforED: Grassroots movement or union propaganda?*, ORANGE CNTY. REG. (Jan. 12, 2019), <https://www.ocregister.com/2019/01/12/redfored-grassroots-movement-or-union-propaganda/> [<https://perma.cc/4HUV-XFTZ>].

<sup>47</sup> See, e.g., Joel B. Pollak, *Obama: What, Me Socialist?*, BREITBART (Nov. 20, 2013), <https://www.breitbart.com/politics/2013/11/20/obama-what-me-socialist/> [<https://perma.cc/8VEG-CNUJ>].

<sup>48</sup> Jana Kasperkevic, *After nine years of no change, is the federal minimum wage irrelevant?*, MARKETPLACE (Jan. 15, 2018),

Administration's decision not to prosecute the architects of the subprime mortgage crisis.<sup>49</sup> Socialists undeniably criticize Obama's presidency, yet labeling any movement that is left of conservative as "socialist" is the go-to criticism of conservative media.<sup>50</sup> This criticism should not be taken very seriously and is seemingly always the reaction when labor makes any demand.<sup>51</sup> And, as Millennials age and seem to be more open to the idea of democratic socialism than ever, with 70% stating that they would vote for a socialist candidate, the criticism has lost its symbolic meaning.<sup>52</sup> Millennials now outnumber Baby Boomers, which makes their views on democratic socialism all the more important.<sup>53</sup> Regardless of what teachers do to organize collectively, they will face this criticism from the right. They may as well benefit from solidarity with other movements that face the same criticism.

It is not opportunistic for teachers to make demands on behalf of students and their communities because shared grievances<sup>54</sup> are the basis for these issues. Students and the community experience the effect these social

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<https://www.marketplace.org/2018/01/15/minimum-wage-hike-trump-history/>  
[<https://perma.cc/Q9ZA-JEK5>].

<sup>49</sup> Glenn Greenwald, *The Untouchables: How the Obama administration protected Wall Street from prosecutions*, PBS FRONTLINE (Jan. 23, 2013), <http://www.pbs.org/wgbh/frontline/film/untouchables/> [<https://perma.cc/3HMM-XHV5>].

<sup>50</sup> See, e.g., Jake Bittle, *Red Herrings: The conservative media's delirious efforts to conjure up a socialist nightmare*, THE NEW REPUBLIC (Mar. 10, 2019), <https://newrepublic.com/article/153815/red-herrings> [<https://perma.cc/FNB9-DLH5>] ("Conservatives have long stoked fears of socialism to drive moderates from the Democratic Party...").

<sup>51</sup> *Id.*

<sup>52</sup> Stef W. Kight, *70% of millennials say they'd vote for a socialist*, AXIOS (Oct. 28, 2019), <https://www.axios.com/millennials-vote-socialism-capitalism-decline-60c8a6aa-5353-45c4-9191-2de1808dc661.html> [<https://perma.cc/K3GS-7YRB>].

<sup>53</sup> Richard Fry, *Millennials overtake Baby Boomers as America's largest generation*, PEW RSCH. CTR. (Apr. 28, 2020), <https://www.pewresearch.org/fact-tank/2020/04/28/millennials-overtake-baby-boomers-as-americas-largest-generation/> [<https://perma.cc/KYL8-U7FG>].

<sup>54</sup> See, e.g., *Endorsements*, *supra* note 3 (noting that harsh disciplinary policies push both Black teachers and Black students out of schools).

phenomena have on teachers as well.<sup>55</sup> Teachers calling out these issues in their strikes focuses the lens of labor more intently on these relevant shared grievances.<sup>56</sup> The conditions created by the COVID-19 pandemic are unique in that the effects permeate every facet of life. This is a unique opportunity for labor to mobilize many different social movements for the mutual benefit of all movements involved.

The COVID-19 pandemic has exposed the severity of the inequalities in society. Different social justice movements are key to effectively mitigating these inequalities, and teachers are in a unique position to spearhead crucial actions to this effect. Teachers can use these movements as a vehicle to push forward their shared grievances, as the grievances of educators will likely intersect with the issues these COVID-19-related movements will address.

### III. 2018–2019 TEACHERS’ STRIKES

Teacher strikes can backfire, and teachers must always consider that risk when organizing.<sup>57</sup> Organizers can mitigate this risk by building community

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<sup>55</sup> *Id.*

<sup>56</sup> See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980). Derrick Bell, a critical race scholar, argued that “[t]he interests of [B]lack in achieving racial equality will be accommodated only when it converges with the interests of whites.” If this Afro-pessimist view is correct, when considering the semiotic meaning of shared grievances and the ability to change that meaning over time, the labor movement can highlight its shared grievances with the social justice movement to address shared grievances for the mutual benefit of both movements. This proposal makes materialists uncomfortable because it addresses the semiotic meaning of shared grievances rather than the deprivations created by grievances. But even strict Marxists can appreciate that people can use “false consciousness” to benefit of workers. See Albert Bergesen, *The Rise of Semiotic Marxism*, 36 SOCIO. PERSP. 1 (1993) (intentionally or not, one can view Bergesen’s work as an explanation of how people invert materialism as a method of control of the working class in capitalist society).

<sup>57</sup> Strikes may not garner enough sympathy with the public, which encourages school boards to deny the demands of teachers. Community solidarity makes sympathy more likely with teachers’ strikes, and without it, teachers may lose support for even very innocuous and reasonable demands. In addition to this obvious risk, Professor Diana

support before striking. During the 2018–2019 teachers’ strikes, teachers made demands not only on behalf of their own organizations, but on behalf of the community at large.<sup>58</sup> These demands greatly increased support within their communities for teacher strikes.

In 2018, for example, teachers in Arizona, Colorado, Kentucky, North Carolina, Oklahoma, and West Virginia—states which do not legally permit teacher strikes—often called their action a “walkout” rather than a strike.<sup>59</sup> They did not frame these actions as traditional strikes, which involve teachers striking against their employers for more favorable terms of employment. Instead, these walkouts were framed as protests against state and local policies that negatively impacted the students and communities that teachers serve.<sup>60</sup> While teachers risked alienating parents by going forward with these “walkouts,” they were able to make significant gains

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D’Amico Pawlewicz of the University of North Dakota worries that focusing the demands of teachers on community issues may reinforce the idea that teachers are self-sacrificing public servants rather than highly educated professional workers. Diana D’Amico Pawlewicz, *How teachers advocating for their students could backfire*, WASH. POST (Dec. 11, 2019, 6:00 A.M.), <https://www.washingtonpost.com/outlook/2019/12/11/how-teachers-advocating-their-students-could-backfire/> [<https://perma.cc/BR52-NF3G>]. Professor D’Amico Pawlewicz believes that the historical pathway towards the professionalization of teaching as a vocation deviated from that of other professions such as doctors and attorneys. DIANA D’AMICO PAWLEWICZ, *BLAMING TEACHERS: PROFESSIONALIZATION POLICIES AND THE FAILURE OF REFORM IN AMERICAN HISTORY* 1–5 (2020). Rather than respecting the autonomy of teachers as the professionals best situated to guide policy in their vocation, policy makers viewed teachers as ancillary actors towards the ultimate goal of educating children, and professionalization of the vocation became more focused on the control of teachers as public servants. *Id.* According to Professor D’Amico Pawlewicz, focusing teachers’ demands on community issues risks reinforcing the very ideas that policy makers have constructed to rationalize low wages for teachers in the first place. *Id.*

<sup>58</sup> See, e.g., *#RedForEd Rally Brings Noise to Quiet Capitol*, MICHIGAN EDUC. ASS’N (June 26, 2019), <https://mea.org/redfored-rally-brings-noise-to-quiet-capitol/> [<https://perma.cc/AX7K-YNK3>].

<sup>59</sup> See, e.g., Dana Goldstein, *Teacher Walkouts: What to Know and What to Expect*, N.Y. TIMES (Apr. 3, 2018) <https://www.nytimes.com/2018/04/03/us/teacher-walkouts-strikes.html> [<https://perma.cc/5QE4-ANHA>]; see also Crain & Matheny, *supra* note 18.

<sup>60</sup> Goldstein, *supra* note 59.

because of the wide support for their actions.<sup>61</sup> These gains included teachers winning wage increases for teachers and other school staff, gaining better healthcare benefits, and securing increased school funding.<sup>62</sup> These demonstrations influenced a shift in the political climate in some states. For example, in part because of the teachers' strikes, Missouri voters rejected right-to-work legislation, and the often-ignored education platforms of the candidates in Colorado's governor's race became a media focal point during these demonstrations.<sup>63</sup>

As previously mentioned, these actions are not without risks, which is why many of them are relatively short in duration. However, there are benefits to proceeding forward with these short strikes. For example, quick strikes better ensure success by reducing the risk of teachers being replaced during the action.<sup>64</sup> These actions also seem to catch the media's attention. An important feature of these types of demonstrations is that they give participants a smaller window to frame the semiotic meaning of their demands.<sup>65</sup> This window is likely more beneficial for teachers because they can frame strikes around student safety and community issues. Strikes can also build solidarity; short strikes limit the sacrifices made by both participants (making participation easier for teachers) and parents (who often must scramble to find or provide childcare when a school unexpectedly closes).<sup>66</sup> Furthermore, with such a small window to frame the issue in a short strike, anti-union backlash struggles to control the media narrative.

Moreover, teachers can use wildcat strikes to make demands that might otherwise be unattainable under the current system.<sup>67</sup> Making demands to

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<sup>61</sup> Crain & Matheny, *supra* note 18.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 259.

<sup>64</sup> See Michael M. Oswalt, *Short Strikes*, 95 CHI.-KENT L. REV. 67, 81 (2020).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 85 n.156.

reputation-sensitive public officials, in conjunction with grassroots community building, can be more beneficial than making demands to the courts.<sup>68</sup> Arguably, labor law has become more favorable to employers over time, and unions have lost political power.<sup>69</sup> Protests and social media campaigns can apply pressure to grievances that labor law cannot reach.

An example of a successful strike occurred in February of 2018, when all teachers in West Virginia's fifty-five counties went on strike.<sup>70</sup> The focus of the strike was to protect public schools from the encroachment of for-profit charter schools.<sup>71</sup> Strikes by public employees are forbidden in West Virginia, but that did not stop the strikes, which were successful due to strong public support for teachers generally and for the demands these particular teachers were making.<sup>72</sup> Teachers and other public education employees won a 5% raise and better health benefits.<sup>73</sup> Before participating in these wildcat strikes, teachers first built public support for their movement by making demands on behalf of students.<sup>74</sup> They demanded more funding for textbooks and school supplies, and higher pay and healthcare to prevent brain drain.<sup>75</sup> Teachers framed their grievances as a matter of public concern, not simply the financial concern of teachers.<sup>76</sup> The

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<sup>68</sup> *Id.*

<sup>69</sup> RICHARD BALES & CHARLOTTE GARDEN, *THE CAMBRIDGE HANDBOOK OF U.S. LABOR LAW FOR THE TWENTY-FIRST CENTURY* 5–6 (2020).

<sup>70</sup> Crain & Matheny, *supra* note 18, at 289.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 290.

<sup>73</sup> *Id.*

<sup>74</sup> See, e.g., Benjamin Wallace-Wells, *The New Old Politics of the West Virginia Teachers Strike*, *THE NEW YORKER* (Mar. 2, 2018), <https://www.newyorker.com/news/news-desk/the-new-old-politics-of-the-west-virginia-teachers-strike> [<https://perma.cc/3CEZ-J6LK>].

<sup>75</sup> See, e.g., Stan Karp & Adam Sanchez, *The 2018 Wave of Teacher Strikes*, *RETHINKING SCHOOLS*, <https://rethinkingschools.org/articles/the-2018-wave-of-teacher-strikes/> [<https://perma.cc/886C-AQJC>](describing social media posts by Oklahoma teachers of broken chairs and tattered textbooks, and posts by Baltimore teachers of burst water pipes and students wearing winter coats indoors).

<sup>76</sup> *Id.*



social media hashtag “#55Strong” assisted them in controlling the media narrative, and the working conditions and wages of teachers were framed as issues where the interests of teachers and the public intersected.<sup>77</sup> This helped to build a grassroots movement to facilitate solidarity through shared grievances.<sup>78</sup> The West Virginia Education Association (affiliated with the National Education Association), which consists of teachers and other school employees such as custodians and bus drivers, helped to coordinate and mobilize teachers’ pickets and rallies across the state, including famously at its capitol building in Charleston.<sup>79</sup> The Governor initially agreed to a 5% raise for teachers only, which was soundly rejected by the demonstrators.<sup>80</sup> The wildcat strike continued for another six days until the Governor agreed to a 5% raise for all school workers, not just teachers.<sup>81</sup>

The greatest success of the 2018 West Virginia teachers’ strike was that it inspired other teachers in states that similarly forbade teacher strikes to use wildcat actions to address their shared grievances.<sup>82</sup> West Virginia teachers reframed public perception of teacher strikes and ultimately changed their semiotic meaning. They made the argument for labor more convincing. Instead of strikes involving “greedy teachers,” the argument was framed around improving communities to facilitate better learning outcomes for students.<sup>83</sup> This reframing enabled the teachers’ cause to unify

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<sup>77</sup> See, e.g., JESSICA SALFIA ET AL., EDS., *55 STRONG: INSIDE THE WEST VIRGINIA TEACHERS’ STRIKE* (2018).

<sup>78</sup> Crain & Matheny, *supra* note 18, at 290–91.

<sup>79</sup> *Id.* at 291.

<sup>80</sup> *Id.* at 290–91.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 292.

<sup>83</sup> See, e.g., Ryan Powers, *Educators Tell the Story of #55strong*, SOCIALISTWORKER (Oct. 24, 2018), [https://socialistworker.org/2018/10/24/educators-tell-the-story-of-55strong#:~:text=Ryan%20Powers%20reviews%20a%20new,wave%20of%20red%20state%20walkouts.&text=55%20Strong%20is%20a%20compilation,for%20nine%20days%20in%20February.\[https://perma.cc/M3U2-CMNW\]](https://socialistworker.org/2018/10/24/educators-tell-the-story-of-55strong#:~:text=Ryan%20Powers%20reviews%20a%20new,wave%20of%20red%20state%20walkouts.&text=55%20Strong%20is%20a%20compilation,for%20nine%20days%20in%20February.[https://perma.cc/M3U2-CMNW]) (describing an example in which West Virginia rejected an offer to return to work for a 5% raise until all state employees won the same raise).

the community rather than alienate it, thus better ensuring success for the teachers and improvement in conditions for all. Unions and movement organizations emphasized the link between political issues that are not generally traditional areas of collective bargaining and how those issues can intersect with other social ills, such as hunger and housing insecurity.<sup>84</sup>

The demand by teachers for better communities goes beyond strikes within schools to issues affecting the whole community. Teachers' unions and associations such as the NEA, United Teachers Los Angeles, and the Chicago Teachers Union (CTU) endorsed and participated in the Black Lives Matter at School Week of Action in 2018 and 2019.<sup>85</sup> The movement, which began in Seattle in 2016, has since spread across the country.<sup>86</sup> Teachers played a role both outside and inside the classroom during this movement; for example, during the week of action, thousands of teachers around the country wore BLM shirts and discussed structural racism and intersectionality with their students.<sup>87</sup> Teachers and communities held protests and forums to demand the hiring of more teachers of color and supported mandated Black history and ethnic studies in K-12 education.<sup>88</sup> The legacy of segregation in the United States is still felt by students of

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<sup>84</sup> Wallace-Wells, *supra* note 74; see also Erik Hazard, *The Teachers' Strike and the Food System*, FOOD FIRST (Mar. 30, 2018), <https://foodfirst.org/the-teachers-strike-and-the-food-system/> [<https://perma.cc/4HL6-ZEB3>] (describing the West Virginia teachers' strike and noting the linkage among their demands for better wages, food security, and housing security).

<sup>85</sup> *About, BLM AT SCH.*, <https://www.blacklivesmatteratschool.com/about.html> [<https://perma.cc/Y969-VNQC>]; Ronnie Almonte, *Black Lives Matter and the Teacher Strike Wave*, SOCIALISTWORKER (Feb. 22, 2019), <https://socialistworker.org/2019/02/22/black-lives-matter-and-the-teacher-strike-wave> [<https://perma.cc/2FMD-5AHM>].

<sup>86</sup> See, e.g., *Black Lives Matter at School Week of Action*, TEACHING FOR CHANGE, <https://www.teachingforchange.org/blm-at-school-week-of-action-2021> [<https://perma.cc/AN8Q-YT4N>].

<sup>87</sup> *Id.*

<sup>88</sup> Almonte, *supra* note 85.

color today through inequality in public schools.<sup>89</sup> Highlighting these shared grievances facilitates solidarity with the community and the teachers' movement.

Moreover, teachers in both Tennessee and Chicago have organized recent actions. In 2018, for example, teachers in Tennessee protested outside the local immigration intake office after an Immigration and Customs Enforcement (ICE) raid led to the arrest of nearly 100 employees at a meat packing plant, some of whom were parents of students.<sup>90</sup> Educators across the country are learning how to respond to the needs of students who have been traumatized by the deportation of a parent.<sup>91</sup> Similarly, during the Chicago Teachers Union strikes in 2019, the CTU bargained with management to put sanctuary school language into its contract.<sup>92</sup> Management agreed; ICE agents are not permitted to enter Chicago public schools without a warrant, school personnel cannot be asked to collect immigration status information about students, and Chicago public schools

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<sup>89</sup> Kimberly Jade Norwood, *Racial Inequality in Public Schools*, AM. BAR ASS'N, [https://www.americanbar.org/groups/young\\_lawyers/publications/tyl/topics/access-to-education/racial\\_inequality\\_public\\_schools/](https://www.americanbar.org/groups/young_lawyers/publications/tyl/topics/access-to-education/racial_inequality_public_schools/) [https://perma.cc/6CEF-NDK6].

<sup>90</sup> Adrienne van der Valk, *Educators Resist East Tennessee ICE Raid*, LEARNING FOR JUST. (Apr. 11, 2018), <https://www.tolerance.org/magazine/educators-resist-east-tennessee-ice-raid> [https://perma.cc/FCV9-MRPC].

<sup>91</sup> Lisa Button, *How teachers are helping students affected by deportations*, THE HECHINGER REP. (Feb. 7, 2019), <https://hechingerreport.org/how-teachers-are-helping-students-affected-by-deportations/> [https://perma.cc/3KWM-PAWJ]; Plyler v. Doe, 457 U.S. 202 (1982) (holding that undocumented children have a constitutional right to education in the United States); see UNION OF PROFESSIONALS, IMMIGRANT AND REFUGEE CHILDREN (2016), [https://www.aft.org/sites/default/files/im\\_uac-educators-guide\\_2016.pdf](https://www.aft.org/sites/default/files/im_uac-educators-guide_2016.pdf) [https://perma.cc/8C8M-857W] (however, the constitutional right to education does not protect children or their families from deportation. In 2016, the American Federation of Teachers published a guide for educators and school support staff to assist teachers in preparing and responding to the aftermath of ICE raids that increased in frequency and intensity under the Obama administration).

<sup>92</sup> Adriana Cardona-Maguigad, *Chicago Teachers Union Wants More Sanctuary Schools*, NPR (June 28, 2019), <https://www.npr.org/local/309/2019/06/28/736690907/chicago-teachers-union-wants-more-sanctuary-schools> [https://perma.cc/UN8C-QSH5].

have been declared sanctuary spaces.<sup>93</sup> Charter school teachers in Chicago also won similar language in their school charters.<sup>94</sup>

However, not all of these actions led to permanent change. The West Virginia legislature still passed legislation letting charter schools expand much faster and created a broad non-public-school voucher program.<sup>95</sup> The net effect was the diversion of money from public schools.<sup>96</sup> The Supreme Court of Arizona has questioned the constitutionality of progressive school funding initiatives.<sup>97</sup> Some teachers in California returned to the classroom empty-handed.<sup>98</sup> Additionally, because these actions were often illegal, the striking teachers were in constant danger of losing their jobs.<sup>99</sup>

#### IV. SIMILAR DEMANDS ARE APPROPRIATE IN THE TIME OF COVID-19

The grievances and issues at the center of the 2018–2019 teachers’ strikes, such as teacher pay and the general underfunding of public

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<sup>93</sup> Linda Perales, *The movement behind sanctuary contract wins*, CHI. TEACHERS UNION (Dec. 27, 2019), <https://www.ctulocal1.org/chicago-union-teacher/2019/12/the-movement-behind-sanctuary-contract-wins/> [https://perma.cc/P4VG-2E35].

<sup>94</sup> Mike Scott-Rudnick, *Why Chicago Charter Teachers Like Me Are Ready to Strike*, JACOBIN (Oct. 13, 2019), <https://jacobinmag.com/2019/10/passages-charter-school-teachers-strike-chicago> [https://perma.cc/L9CV-L7FG].

<sup>95</sup> See Ryan Quinn, *Beyond charters, vouchers: The lesser-known WV education bills that did, and didn’t pass this session*, CHARLESTON GAZETTE-MAIL (Apr. 13, 2021), [https://www.wvgazetteemail.com/news/education/beyond-charters-vouchers-the-lesser-known-wv-education-bills-that-did-and-didnt-pass-this/article\\_f549cdc0-3d2c-5c8a-b7f7-d8d7b3dc72c0.html](https://www.wvgazetteemail.com/news/education/beyond-charters-vouchers-the-lesser-known-wv-education-bills-that-did-and-didnt-pass-this/article_f549cdc0-3d2c-5c8a-b7f7-d8d7b3dc72c0.html) [https://perma.cc/9WVX-JQYX].

<sup>96</sup> *Id.*

<sup>97</sup> Laura Gómez, *Despite court ruling, education advocates say Prop. 208 can have a ‘long life’*, AZMIRROR (Aug. 26, 2021), <https://www.azmirror.com/2021/08/26/despite-court-ruling-education-advocates-say-prop-208-can-have-a-long-life/> [https://perma.cc/ZB7K-ZAEV].

<sup>98</sup> Eric Blanc, *Red for Ed: The Movement Strengthens and Continues*, RETHINKING SCHS., <https://rethinkingschools.org/articles/red-for-ed-the-movement-strengthens-and-continues/> [https://perma.cc/MB53-XUGQ].

<sup>99</sup> Steven Greenhouse, *Making Teachers’ Strikes Illegal Won’t Stop Them*, N.Y. TIMES (May 9, 2018) <https://www.nytimes.com/2018/05/09/opinion/teacher-strikes-illegal-arizona-carolina.html> [https://perma.cc/ARX4-QQTE].

education, are unfortunately even more relevant today under the economic uncertainty of COVID-19. Teachers would likely gain more support under these conditions if they made social justice demands similar to previous strikes, as well as additional demands specific to the COVID-19 crisis, on behalf of their students and communities.

### *A. Housing Insecurity and Unemployment*

Unemployment during the COVID-19 pandemic was a major issue. In October 2020, unemployment in New York City was 9.2%, up from 3.7% in October 2019.<sup>100</sup> Peak unemployment in 2020 during the pandemic hit 20.4% and 19.5% in New York City and Los Angeles, respectively.<sup>101</sup> An eviction crisis is unfolding as this article goes to press.<sup>102</sup>

Further, nearly 21% of families with children owe back rent.<sup>103</sup> Evictions will likely prevent distance learners from accessing a stable internet connection, and education will inevitably suffer as a consequence of the eviction crisis.<sup>104</sup> The Supreme Court struck down the eviction moratorium, causing significant increases in eviction filings.<sup>105</sup> Back rent will eventually become due, families will not have the funds to pay their debts, and evictions will follow. Children will pay a steep price.

The disadvantages of housing insecurity follow a student through college, if they are lucky enough to make it that far. For example, housing-

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<sup>100</sup> *State Labor Department Releases Preliminary October 2020 Area Unemployment Rates*, N.Y. DEP'T OF LABOR (Nov. 24, 2020), <https://dol.ny.gov/system/files/documents/2021/03/press-release-2-october-2020-final.pdf> [<https://perma.cc/ZFY9-H4MY>].

<sup>101</sup> Greg Iacurci, *A second Great Depression? Unemployment crisis hits big cities hard*, CNBC (July 22, 2020, 1:58 PM), <https://www.cnbc.com/2020/07/21/some-big-cities-are-hitting-great-depression-unemployment-levels.html> [<https://perma.cc/5CWQ-X46B>].

<sup>102</sup> Sophie Kasakove, *With Cases Piling Up, an Eviction Crisis Unfolds Step by Step*, N.Y. TIMES (Nov. 7, 2021), <https://www.nytimes.com/2021/11/07/us/evictions-crisis-us.html> [<https://perma.cc/W2VH-ZEEQ>].

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

insecure students in Minnesota do worse with standardized testing in reading and math, and they have lower ACT scores.<sup>106</sup> Only 52% of Minnesota's housing-insecure students graduate from high school compared to 76% of housing-secure students.<sup>107</sup> After high school, of those 52% housing-insecure students that graduate, only 67% enroll in college compared to 90% of housing-secure students.<sup>108</sup> Of those students who make it to college, only 25% graduate, which means that less than one in twelve housing-insecure students become college graduates.<sup>109</sup>

In 2019, striking CTU teachers demanded affordable housing for Chicago students.<sup>110</sup> At minimum, this demand raised awareness of housing insecurity for students and forced politicians to respond to media questions.<sup>111</sup> The CTU did not make this demand alone; it joined forces with the Lift the Ban Coalition, a Chicago-based organization advocating the removal of the ban on rent control.<sup>112</sup> The CTU's work increased solidarity with other Chicagoans in the community by highlighting shared grievances. Ultimately, the CTU's efforts led management to agree to hire "community representatives" at schools with large numbers of housing-

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<sup>106</sup> MEREDITH FERGUS ET AL., MINN. OFF. OF HIGHER EDUC., *THE IMPACT OF HOUSING INSECURITY ON EDUCATIONAL OUTCOMES* (2018), [https://www.ohe.state.mn.us/pdf/Impact\\_Housing\\_Insecurity\\_&\\_Educational\\_Outcomes.pdf](https://www.ohe.state.mn.us/pdf/Impact_Housing_Insecurity_&_Educational_Outcomes.pdf) [<https://perma.cc/R5K2-SZKP>].

<sup>107</sup> *Id.*

<sup>108</sup> Among them are students who do not receive free or reduced priced lunch assistance. *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> Kim Bellware, *Chicago teachers say they will go on strike. They are demanding affordable housing for students.*, WASH. POST (Oct. 16, 2019, 8:26 PM), <https://www.washingtonpost.com/education/2019/10/16/chicago-teachers-strike-demands-include-push-affordable-housing-help-homeless-students/> [<https://perma.cc/882E-9ZMY>].

<sup>111</sup> *Id.*

<sup>112</sup> CTU Housing Committee, *The fight for housing stability*, CHI. TEACHERS UNION (June 12, 2019), <https://www.ctulocal1.org/chicago-union-teacher/2019/06/the-fight-for-housing-stability/> [<https://perma.cc/K76M-RAR7>].

insecure students to assist families in finding resources.<sup>113</sup> Teachers can make similar demands today. As the COVID-19 crisis continues to unfold, grievances compound.<sup>114</sup> Teachers can work with local tenant advocacy groups as well to increase solidarity in their communities.

### *B. Racial Inequality*

Housing insecurity intersects with race for housing-insecure students. In Minnesota, students of color comprise 67% of housing-insecure students.<sup>115</sup> Teachers can continue to increase their involvement with racial justice movements to build solidarity within their communities.

Moreover, the effects of COVID-19 have not been experienced equally. Black, Latinx, and Native American citizens have disproportionately died or been hospitalized because of COVID-19 compared to white non-Hispanic persons.<sup>116</sup> When a parent dies, children are twice as likely to drop out of school.<sup>117</sup> Unequal COVID-19 death rates across race intersect with education issues. Among numerous explanations for this phenomenon, the fact that Black Americans are more likely to be poor has a direct effect on the healthcare Black Americans can access during a viral pandemic.<sup>118</sup> By

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<sup>113</sup> Sara Freund, *An unexpected win in 11-day teachers' strike? Help for homeless students*, VOX MEDIA (Oct. 31, 2019), <https://chicago.curbed.com/2019/10/31/20942664/chicago-teachers-strike-homeless-students-resources> [https://perma.cc/LS3Z-RZKG].

<sup>114</sup> For example, in Chicago, teachers struck again in January 2022. See Amir Ver et al., *Chicago public school students will return to classroom Wednesday after teachers union suspends work action, mayor says*, CNN (Jan. 10, 2022), <https://www.cnn.com/2022/01/10/us/chicago-schools-teacher-union-mayor-monday/index.html> [https://perma.cc/U92R-NT4P].

<sup>115</sup> MEREDITH FERGUS ET AL., *supra* note 106.

<sup>116</sup> *Risk for COVID-19 Infection, Hospitalization, and Death by Race/Ethnicity*, CTBS. FOR DISEASE CONTROL & PREVENTION (Nov. 22, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-race-ethnicity.html> [https://perma.cc/N9QB-QR4A].

<sup>117</sup> Paul Gertler et al., *Schooling and Parental Death*, 86 REV. ECON. & STATS. 211 (2004).

<sup>118</sup> Shanoor Seervai, *Why Are More Black Americans Dying of COVID-19?*, THE COMMONWEALTH FUND (June 26, 2020),

fighting for quality education, teachers can also fight for better health outcomes for students of color during future viral pandemics.

### C. Immigration

More than 46.7 million immigrants live in the United States.<sup>119</sup> The effects of COVID-19 are felt disproportionately by all impoverished communities, but the unique conditions immigrants often live under increase the likelihood they will suffer under COVID-19 more than other impoverished populations.<sup>120</sup> For example, 37.2% of immigrants in Texas are undocumented, and 32% of them are uninsured.<sup>121</sup> When the undocumented parent of a student is sick with COVID-19, it is likely the parent will not have access to healthcare and may fear deportation upon seeking treatment.<sup>122</sup>

As of March 2021, ICE confirmed over 10,000 cases of COVID-19 among detainees within its detention facilities nationwide.<sup>123</sup> In addition to fearing about their parents' safety in detention centers and after deportation, students with undocumented parents must now also worry about their parents' health. More than 450 deportation flights occurred in August 2020, 180 of which came from COVID-19 hotspot states.<sup>124</sup> Despite ICE's

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<https://www.commonwealthfund.org/publications/podcast/2020/jun/why-are-more-black-americans-dying-covid-19> [<https://perma.cc/H958-KXLM>]; see also Dallan Flake, *Lifesaving Discrimination*, Part II, <http://dx.doi.org/10.2139/ssrn.3769325> [<https://perma.cc/M2MD-N995>] (discussing the myriad reasons persons of color lack access to quality healthcare).

<sup>119</sup> Clark et al., *Disproportionate Impact of the COVID-19 Pandemic on Immigrant Communities in the United States*, 14 PLOS NEGLECTED TROPICAL DISEASE (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7357736/> [<https://perma.cc/V5AY-QLZ2>].

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Immigration Detention: ICE Efforts to Address COVID-19 in Detention Facilities*, U.S. GOV. ACCOUNTABILITY OFFICE (June 30, 2021), <https://www.gao.gov/products/gao-21-414> [<https://perma.cc/2QA7-6EK8>].

<sup>124</sup> *Id.*



assurances that it carefully screens passengers and does not deport anybody with COVID-19,<sup>125</sup> nearly a dozen Latin American and Caribbean countries reported that people who were deported from the U.S. tested positive for COVID-19.<sup>126</sup>

In the U.S. alone, the terribly poor conditions created by ICE are likely responsible for at least a quarter-million cases of COVID-19.<sup>127</sup> ICE detention centers have become COVID-19 hotbeds, and surrounding communities have experienced increased COVID-19 prevalence.<sup>128</sup> “The United States has a long history of scapegoating immigrants for the spread of infectious diseases, yet medical evidence suggests that punitive immigration enforcement—such as packing detention facilities or scaring immigrants away from accessing medical care—is the true threat to public health,” warned Georgetown University School of Medicine professor Dr. Ranit Mishoria.<sup>129</sup> In August 2020, infection rates inside immigration detention centers were thirteen times higher than the rest of the United States.<sup>130</sup>

Housing insecurity and racial inequality intersect with immigration, which intersects with education. Latinx students are now the largest minority group in public schools in the U.S.<sup>131</sup> Therefore, support from

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<sup>125</sup> *ICE Guidance on COVID-19*, U.S. IMMIGR. AND CUSTOMS ENF’T, <https://www.ice.gov/coronavirus#wcm-survey-target-id> [<https://perma.cc/L4PJ-T8AF>].

<sup>126</sup> *COVID-19 Escalating in ICE Detention Centers as States Hit Highest Daily Records – and ICE Deportation Flights Into Norther Triangle Continue*, INT’L RESCUE COMM. (Aug. 3, 2020), <https://www.rescue.org/press-release/covid-19-escalating-ice-detention-centers-states-hit-highest-daily-records-and-ice> [<https://perma.cc/BVA8-JX2K>].

<sup>127</sup> John Washington, *ICE Mismanagement Created Coronavirus “Hotbeds of Infection” In and Around Detention Centers*, THE INTERCEPT (Dec. 9, 2020), <https://theintercept.com/2020/12/09/ice-covid-detention-centers/> [<https://perma.cc/4ASS-GLJM>].

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> Grace Chen, *White Students Are Now the Minority in U.S. Public Schools*, PUB. SCH. REV. (Oct. 14, 2019), <https://www.publicschoolreview.com/blog/white-students-are-now-the-minority-in-u-s-public-schools> [<https://perma.cc/F9N7-2HVC>].

Latinx-Americans will likely make or break the labor movement for teachers. While most Latinx people believe in American ideals and wish to feel at home in America,<sup>132</sup> many find assimilation difficult because of racist beliefs about immigrants.<sup>133</sup> As Latinx communities grow as a proportion of the U.S. population,<sup>134</sup> and while student demographics shift in public education, teachers can highlight shared grievances and support Latinx social movements to build solidarity with labor.

## V. LABOR AND SOCIAL JUSTICE: THE RIGHT TO RECOVERY

The social justice movement is currently growing in the United States. This can be beneficial for labor. For example, in 2018, McDonald's workers made modest gains by attaching their demands to the #MeToo movement. With support from Fight for \$15, McDonald's workers in eight different states filed fifteen Equal Opportunity Commission (EEOC) complaints.<sup>135</sup> The associated social media public awareness campaign exposed another injustice faced by low wage workers and created solidarity with women who had experienced sexual harassment across class.<sup>136</sup> In the not-so-distant past, sexual harassment awareness campaigns largely focused

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<sup>132</sup> Lopez et al., *Latinos Are More Likely to Believe in the American Dream, but Most Say it is Hard to Achieve*, PEW RSCH. CTR. (Sept. 11, 2018), <https://www.pewresearch.org/fact-tank/2018/09/11/latinos-are-more-likely-to-believe-in-the-american-dream-but-most-say-it-is-hard-to-achieve/> [<https://perma.cc/738H-2TMF>].

<sup>133</sup> Suzanne Gamboa, *Racism, Not the Lack of Assimilation, Is the Real Problem Facing Latinos in America*, NBC NEWS (Feb. 26, 2019), <https://www.nbcnews.com/news/latino/racism-not-lack-assimilation-real-problem-facing-latinos-america-n974021> [<https://perma.cc/6GB7-ZA2X>].

<sup>134</sup> William H. Frey, *The nation is diversifying even faster than predicted, according to new census data*, BROOKINGS (July 1, 2020), <https://www.brookings.edu/research/new-census-data-shows-the-nation-is-diversifying-even-faster-than-predicted/> [<https://perma.cc/2PDZ-SVYB>].

<sup>135</sup> Michael M. Oswalt, *Short Strikes*, 95 CHI.-KENT L. REV. 67, 85 (2020).

<sup>136</sup> Erica Simmons, *Grievances Do Matter in Mobilization*, 43 THEORY & SOC'Y 513 (2014).

on higher earning women in professional industries.<sup>137</sup> Even today, the grievances of poorer women with less social and political power are sometimes ignored.<sup>138</sup>

The #MeToo movement has expanded the semiotic meaning of sexual harassment awareness. It is much more difficult for lower earning, unskilled workers to find recourse for sexual harassment claims.<sup>139</sup> Women in many industries face potential backlash and the loss of their job when reporting sexual harassment, but unskilled and lower wage workers often cannot accept that risk and sometimes instead are forced to accept sexual harassment as a condition of their employment.<sup>140</sup> The #MeToo movement has seemed to increase solidarity among women across class and has made more higher-earning women aware of their shared grievances with lower-earning women. Similarly, teachers have attached their demands to social justice movements during COVID-19, thereby increasing solidarity with their demands.

### *A. Right to Recovery*

The Right to Recovery campaign illustrates how various movements and organizations can join efforts to effectuate change. The campaign was orchestrated by over thirty community and labor organizations in Chicago, including the Chicago Teachers Union (CTU), United Working Families, and several local politicians.<sup>141</sup> Throughout April to June of 2020, the

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<sup>137</sup> See Derek Dahlsad, *Sexual Harassment PSA, 1995*, YOUTUBE (Sept. 16, 2018), <https://youtu.be/VQSz1vr82Y0>.

<sup>138</sup> Alana Semuels, *Low-Wage Workers Aren't Getting Justice for Sexual Harassment*, THE ATLANTIC (Dec. 27, 2017), <https://www.theatlantic.com/business/archive/2017/12/low-wage-workers-sexual-harassment/549158/> [<https://perma.cc/UU4P-3449>].

<sup>139</sup> *Id.*

<sup>140</sup> A. Elaine Lewis, *Who is at Highest Risk of Sexual Harassment?*, ACLU (Jan. 18, 2018), <https://www.aclu.org/blog/womens-rights/womens-rights-workplace/who-highest-risk-sexual-harassment> [<https://perma.cc/42E3-WAFX>].

<sup>141</sup> See *Right to Recovery*, ACTION NETWORK, <https://actionnetwork.org/campaigns/right-to-recovery> [<https://perma.cc/897A-8M7P>].

campaign advocated for a comprehensive COVID-19 recovery package at the state and local level.<sup>142</sup>

During the campaign, the CTU advocated for the following: free internet access and devices for students to ensure that distance learning works for every student; food support so students who relied on school-provided meals would not go hungry; support for homeless students; and additional resources for English language learners.<sup>143</sup> Low-income students, who as a population disproportionately include students of color, are less likely to have consistent internet access for distance learning due to lack of resources.<sup>144</sup> The relief that the CTU supported acknowledged the intersection of the needs of teachers and the grievances of students and their families across race and class.<sup>145</sup>

During the COVID-19 pandemic, the CTU has supported distance learning and other traditional safety-focused measures that would make schools safer for teachers and students alike.<sup>146</sup> It also supported utility and eviction moratoriums to create more stability for students in a distance learning environment.<sup>147</sup> As these efforts were collaborative, it is difficult to

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<sup>142</sup> Brandon Johnson, *Everyone Deserves the Right to Recover, but Our Families Also Need the Means to Thrive After the Pandemic Subsides*, CHI. TEACHERS UNION (May 7, 2020), <https://www.ctulocal1.org/chicago-union-teacher/2020/05/right-to-recovery/> [https://perma.cc/E4SX-4THC].

<sup>143</sup> *Id.*

<sup>144</sup> See *New Data Shows How Digital Inequality Affects Lower-Income Students And Their Families*, CARNEGIE (July 8, 2021), [https://www.carnegie.org/topics/topic-articles/family-community-engagement/new-data-shows-how-digital-inequality-affects-lower-income-students-and-their-families/#:~:text=The%20new%20data%20from%20a,have%20limited%20devices%20to%20share.\[https://perma.cc/7Z2E-TTAJ\].](https://www.carnegie.org/topics/topic-articles/family-community-engagement/new-data-shows-how-digital-inequality-affects-lower-income-students-and-their-families/#:~:text=The%20new%20data%20from%20a,have%20limited%20devices%20to%20share.[https://perma.cc/7Z2E-TTAJ].)

<sup>145</sup> Johnson, *supra* note 142.

<sup>146</sup> See, e.g., Glenn Marshall et al., *CTU votes in favor of remote learning for CPS; classes canceled Wednesday*, WGN9 (Jan. 5, 2022), <https://wgntv.com/news/coronavirus/ctu-to-vote-tuesday-on-remote-learning/> [https://perma.cc/9X6F-JRK9].

<sup>147</sup> See, e.g., Christel Williams-Hayes, *Resolution to address homelessness, foreclosures, and evictions*, CHI. TEACHERS UNION (Oct. 6, 2021),

parse out just how much the CTU affected the enactment of the policies it supported, but it undoubtedly gained some good will in Chicago by supporting such policies.

Increased solidarity in Chicago is demonstrated by a variety of new initiatives. Chicago schools implemented distance learning for the 2020–2021 school year.<sup>148</sup> Meals are now available for students to pick up at more than 450 meal sites.<sup>149</sup> More than 100,000 Chicago Public Schools students enrolled in the Chicago Connected program, enacted during the summer of 2020, which provides free high speed internet access to low-income students.<sup>150</sup> School districts also pushed back standardized testing for English language learners through March of 2021, which allowed students from immigrant families more time for test preparation.<sup>151</sup> Some Chicago utility companies voluntarily froze utility shut offs, though no official government order required this.<sup>152</sup> Additionally, Illinois officially enacted a statewide eviction moratorium that was extended through October 2021.<sup>153</sup> Whether the CTU truly pressured the legislature into enacting these relief

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<https://www.ctulocal1.org/posts/resolution-homelessness-foreclosures-evictions/> [<https://perma.cc/U6BF-9KSM>].

<sup>148</sup> See *Remote Learning*, CHI. PUB. SCHS., <https://www.cps.edu/school-reopening/remote-learning/> [<https://perma.cc/75V8-KEHK>].

<sup>149</sup> *School Meals and Nutrition*, CHI. PUB. SCHS., <https://www.cps.edu/services-and-supports/school-meals-and-nutrition/> [<https://perma.cc/EZU5-RVWN>].

<sup>150</sup> Matt Masterson, *100,000 CPS Students to Get Free Internet Through \$50M 'Chicago Connected' Program*, WTTW (June 25, 2020), <https://news.wttw.com/2020/06/25/cps-students-get-free-internet-chicago-connected-program> [<https://perma.cc/BNT5-S3KS>].

<sup>151</sup> Rebecca Martinez, *Standardized Testing Pushed Back for Illinois*, CHI. TEACHERS UNION (Dec. 18, 2020), <https://www.ctulocal1.org/posts/standardized-testing-pushed-back-il/> [<https://perma.cc/V4GZ-QTD4>].

<sup>152</sup> Pioneer Press Staff, *State senators from north, northwest suburbs call for state to formally halt utility shutoffs amid pending winter, COVID-19 pandemic*, CHI. TRIB. (Dec. 8, 2020, 12:15 PM), <https://www.chicagotribune.com/suburbs/buffalo-grove/ct-bgc-senators-utility-cutoff-moratorium-tl-1210-20201208-mlldqcarvf5lom2jnhhlvkua-story.html> [<https://perma.cc/9597-HS5H>].

<sup>153</sup> *Housing issues during the Covid-19 pandemic*, ILL. LEGAL AID ONLINE, <https://www.illinoislegalaid.org/legal-information/housing-coronavirus-and-law> [<https://perma.cc/Q69F-GHT4>].

efforts is inconsequential. Teachers supported the policy to improve the lives of not only students, but also their families; the result has been increased solidarity among students, teachers, and the public.<sup>154</sup>

The CTU also supported bolder proposals that were not adopted in any recovery package.<sup>155</sup> It supported not only a rent moratorium, but also housing for the homeless.<sup>156</sup> In addition to a utility shutoff moratorium, it supported waiver of late fees for late utility payments.<sup>157</sup> It also called for an end to ICE check-ins and closure of detention centers to protect families, \$750 weekly payments to all families with school children and laid-off workers, and grocery or boxed meal delivery for all seniors and people with disabilities.<sup>158</sup> Although these measures cannot be approved by any school board, teacher support likely increased solidarity with the communities affected by these grievances, and any support generated by teacher involvement increased the likelihood that these policies would come to fruition.

The CTU supported these policies, but these are not the types of policies unions can bargain for collectively under the NLRA or state law.<sup>159</sup> Any union-organized strike to address these grievances would be unlawful.<sup>160</sup> However, these are the types of demands that movement organizations can and do strike over, legal or not.

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<sup>154</sup> *Id.*

<sup>155</sup> Brandon Johnson, *The Right to Recovery*, CHI. TEACHERS UNION (May 7, 2020), <https://www.ctulocal1.org/chicago-union-teacher/2020/05/right-to-recovery/> [<https://perma.cc/Y7UB-LCCZ>].

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> See *The Right to Strike*, NAT'L LABOR RELATIONS BOARD, [https://www.nlr.gov/strikes#:~:text=Section%208\(g\)%20prohibits%20a,Federal%20Mediation%20and%20Conciliation%20Service.](https://www.nlr.gov/strikes#:~:text=Section%208(g)%20prohibits%20a,Federal%20Mediation%20and%20Conciliation%20Service.) [<https://perma.cc/4MP5-6PC4>].

<sup>160</sup> *Id.*

## VI. THE USE OF SICKOUTS

A sickout is often organized by employees as a wildcat action, without the support of employees' representative union.<sup>161</sup> Sickouts typically involve large numbers of employees simultaneously feigning illness.<sup>162</sup> A sickout is unprotected activity when employee dishonesty is involved, and an employee feigning illness to miss work can be disciplined as if the employee had feigned illness to go fishing.<sup>163</sup> As described above, strikes (or sickouts) over matters not directly related to the workplace are unprotected and subject an employee to discipline.<sup>164</sup> If a union has called for a sickout, the union may be in violation of a no-strike clause and the sickout may be enjoined.<sup>165</sup>

The effects of sickouts closely resemble partial and intermittent strikes. During a sickout, employees use the employer's attendance policy to their advantage and circumvent the procedural requirements of a lawful strike, ignoring any no-strike clause or state law forbidding teacher strikes.<sup>166</sup> Although this is not authorized under the current law, it can be difficult to prove employee dishonesty about suspected illness during a viral pandemic.

For good or ill, publicity alone has the potential to increase or decrease solidarity with workers and simultaneously silence detractors or supporters. Skeptics criticize short strikes such as walkouts and sickouts as "publicity strikes."<sup>167</sup> But as Michael Oswalt writes, "that's their best feature."<sup>168</sup> Social media gives those participating in these wildcat actions better control

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<sup>161</sup> See Sickout definition, *supra* note 5.

<sup>162</sup> See *id.*

<sup>163</sup> *Id.*

<sup>164</sup> See *supra* Part II.

<sup>165</sup> See, e.g., CAL. LAWYERS ASS'N, CALIFORNIA PUBLIC SECTOR LABOR RELATIONS § 11.07 (2018).

<sup>166</sup> Michael H. LeRoy, *Creating Order Out of Chaos and Other Partial and Intermittent Strikes*, 95 NW. U. L. REV. 221, 255 (2000).

<sup>167</sup> Michael M. Oswalt, *Short Strikes*, 95 CHI.-KENT L. REV. 67, 90 (2020).

<sup>168</sup> *Id.*

over the framing of their grievances.<sup>169</sup> Many workers have in their possession, in the form of a smartphone, access to a public forum in which their voice has the potential to reach more listeners than the communications of any public relations firm.<sup>170</sup> Research suggests that “peripheral allies” are not readily willing to support a social movement unless they first witness others in their social circle supporting the movement.<sup>171</sup> And if a critical mass of supporters virtually drowns out dissenters to their shared grievances, they create a negative feedback loop that discourages the communications of detractors.<sup>172</sup> For example, the SEIU-affiliated Fight for \$15 movement leverages social media influencers in spreading its message.<sup>173</sup> This has helped shape the semiotic meaning of wage justice beyond union membership and has helped increase solidarity with low wage workers generally.<sup>174</sup>

#### *A. Sickouts During the Time of COVID-19*

In August 2020, teachers in Arizona did not have enough personal protective equipment (PPE) or sanitizing supplies, prompting them to demand remote learning for the school year.<sup>175</sup> The J.O. Combs Unified School District school board ignored the recommendations of state health officials and voted 3–2 to order teachers and students back into schools.<sup>176</sup>

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<sup>169</sup> See *id.*

<sup>170</sup> *Id.* at 93–94.

<sup>171</sup> *Id.* at 91–92.

<sup>172</sup> *Id.* at 94.

<sup>173</sup> *Id.* at 92.

<sup>174</sup> *Id.*

<sup>175</sup> Jessica Swarner, *Arizona Teachers Contractually Unable to Quit, Forced to Return to School Without Enough PPE*, COPPER COURIER (Sept. 21, 2020), <https://coppercourier.com/story/arizona-teachers-speak-out-on-reopening-arizona-schools-fail-health-benchmarks/> [https://perma.cc/RBJ2-DZGA].

<sup>176</sup> Mary Ellen Flannery, *Afraid But United, Arizona Teachers Stage Sickout to Stop Reopening*, NEA NEWS (Aug. 19, 2020), <https://www.nea.org/advocating-for-change/new-from-nea/afraid-united-arizona-teachers-stage-sickout-stop-reopening> [https://perma.cc/84J3-MMBC].



Teachers met via Zoom and decided that rushing back to class was too dangerous for their students and families. They organized and used their own medical leave, and medical leave provided by the Families First Coronavirus Response Act (FFCRA), to engage in a sickout.<sup>177</sup> To control the meaning of this action, Dave Nelson, president of the NEA-affiliated J.O. Combs Education Association, stated in an interview that “[t]here are legitimate challenges with remote learning, but I would rather deal with those than the fear of who’s sick and who’s on a ventilator.”<sup>178</sup> The first three days of classes were cancelled due to the sickout, which led the school board to reverse its decision in a 4–1 vote.<sup>179</sup> The teachers’ demand for distance learning was granted just a mere three days into the wildcat action.<sup>180</sup>

The NEA worked diligently to control the framing of the issue. At an August 12, 2020, press conference, NEA President Lily Eskelsen García stated, “Educators and parents want nothing more than to return to in-person instruction, yet the Trump administration has provided no real plan to educators, school administrators, parents, and students on how to reopen school buildings safely and equitably.”<sup>181</sup> COVID-19 undercuts the usual critique of teacher strikes. The anti-union narrative generally posits that teachers are simply greedy and will endlessly demand more at the taxpayers’ expense.<sup>182</sup> However, COVID-19 has required conservatives to adopt less-effective anti-union narratives. Instead of propounding the usual

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<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> Staci Maiers, *Trump has failed to lead at every step of pandemic, economic crisis*, NEATODAY (Aug. 12, 2020), <https://www.nea.org/about-nea/media-center/press-releases/trump-has-failed-lead-every-step-pandemic-economic-crisis> [<https://perma.cc/XH27-7KQC>].

<sup>182</sup> Jackson Potter, *What Unions Everywhere Can Learn From the Chicago Teacher’s Strike’s Win*, IN THESE TIMES (Nov. 26, 2019), <https://inthesetimes.com/article/chicago-teachers-strike-2019-labor-victory> [<https://perma.cc/ZGC2-R5SM>].

anti-labor criticism, Laura Ingraham of Fox News criticized teachers for “stealing face-to-face education [from students].”<sup>183</sup> Additionally, Breitbart News criticized demands for distance learning as “hysteria,” and cited studies suggesting that children are less-effective viral vectors than adults as evidence of government overreaction to COVID-19.<sup>184</sup> To summarize, many conservatives are philosophically opposed to labor unions in general and will always find reasons to critique any demands made by labor. But COVID-19 has altered the political landscape, and conservative media is struggling to build an effective offense against demands for the safety of children. The old fallback of invoking the image of the greedy teacher is not as effective during a viral pandemic.

Additionally, with groups like #RedForEd fighting for larger social justice issues like homelessness and child hunger, criticism from conservative sources such as Breitbart News and the *Epoch Times* is more conspiratorial-sounding and laden with dog-whistle racism than ever. Conservative criticism of the labor movement has long accused labor of being a backdoor for socialists to gain political power,<sup>185</sup> so this is nothing inherently new. But fevered criticism warning the public about the dangers of impending socialism is difficult to take seriously when teachers are asking that children be given a nutritious breakfast.

Many parents have now experienced remote learning and the difficulty of teaching their own children on a full-time basis. While distance learning

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<sup>183</sup> Charles Creitz, *Laura Ingraham knocks teachers unions for ‘ludicrous,’ ‘reckless’ demands for reopening schools*, FOX NEWS (July 8, 2020), <https://www.foxnews.com/media/laura-ingraham-democrats-teachers-unions-ludicrous-reckless> [https://perma.cc/DG5J-MUV].

<sup>184</sup> Michael Patrick Leahy, *#RedforEd Movement, Teachers’ Union Push to Delay Arizona School Openings*, BREITBART (July 20, 2020), <https://www.breitbart.com/politics/2020/07/20/redfor-ed-movement-teachers-union-push-delay-arizona-school-openings/> [https://perma.cc/JL2G-CL86].

<sup>185</sup> See, e.g., Brian Dijkema, *Labor’s Conservative Heart*, AM. COMPASS (Sept. 8, 2020), <https://americancompass.org/essays/labors-conservative-heart/> [https://perma.cc/GX9N-L9L9].

may be inconvenient for parents, it seems to have increased the public's appreciation of teachers overall.<sup>186</sup> This suggests that teachers can increase public support for their own pay and safety by advocating for more effective tools for distance learning such as internet access and laptops or tablets.

In response to a lot of these issues in education brought on by the COVID-19 pandemic, the group Educators for a Safe Reopening organized a sickout on thirty-five campuses in Houston in October 2020.<sup>187</sup> The group protested class sizes, air filtration systems, and lack of PPE for teachers, staff, and students.<sup>188</sup> Understandably, most of the 150 participating teachers wished to remain anonymous.<sup>189</sup> Teachers continued to request distance learning to little avail.<sup>190</sup> Students returned to campus. By day two of in-person classes, HISD closed sixteen Houston schools due to confirmed cases of COVID-19.<sup>191</sup> Temporary school closures occurred for "deep cleaning," followed by a hybrid model of in-person learning which

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<sup>186</sup> See Emma García, *The pandemic sparked more appreciation for teachers, but will it give them a voice in education and their working conditions?*, ECON. POL'Y INST. (May 7, 2020), <https://www.epi.org/blog/the-pandemic-sparked-more-appreciation-for-teachers-but-will-it-give-them-a-voice-in-education-and-their-working-conditions/> [https://perma.cc/F7QN-TLPL].

<sup>187</sup> Jason Miles, *Some Houston ISD teachers stage 'sick out' to highlight COVID-19-related concerns*, KHOU (Oct. 22, 2020, 3:17 PM), <https://www.khou.com/article/news/education/some-houston-isd-teachers-stage-sick-out-to-highlight-covid-19-related-concerns/285-ee35ae31-11cc-4809-b10e-a8555b514922> [https://perma.cc/5YSM-2W33].

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> Janel Forte, *Houston ISD students return to campus for the first time in 7 months*, KHOU (Oct. 19, 2020), <https://www.khou.com/article/news/local/houston-isd-students-back-at-school/285-9f93b0f5-1f86-4a86-a145-8310f9c885de> [https://perma.cc/R2GA-2J3Q].

<sup>191</sup> Davis Land, *16 Houston Schools Close Over COVID-19 Concerns On 2nd Day of In-Person Learning*, HOUS. PUB. MEDIA (Oct. 20, 2020), <https://www.houstonpublicmedia.org/articles/news/education-news/2020/10/20/384281/3-schools-close-with-covid-19-cases-on-second-day-of-in-person-learning/> [https://perma.cc/7CV4-NYWU].

would go virtual if the region reached a certain threshold COVID-19 rate.<sup>192</sup> HISD changed that threshold rate after reaching it to keep schools open during the pandemic.<sup>193</sup>

On December 15, 2020, Houston teachers from sixty campuses in eight Greater Houston school districts staged a second sickout to protest the Texas Education Agency's decision to hold standardized tests during the 2020–2021 school year.<sup>194</sup> Teachers timed the sickout to give their students more time to prepare for standardized testing, so the sickout was partially successful by design, but it only delayed plans for standardized testing.<sup>195</sup> As shown through these various examples, teachers in Texas have not gained much ground with sickouts, but this may change. Shortly after the December 2020 attempted sickout, Texas hospitals reached record occupancy during the COVID-19 crisis.<sup>196</sup> Face-to-face learning has become a much more important issue as the pandemic crisis has unfolded over 2021 and in the early months of 2022, especially given the Omicron variant's rapid infection rate.<sup>197</sup>

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<sup>192</sup> *Id.*

<sup>193</sup> Laura Isensee, *HISD Again Changes School Closure Protocols After Reaching Critical Limit*, HOUS. PUB. MEDIA (Oct. 26, 2020), <https://www.houstonpublicmedia.org/articles/news/education-news/2020/10/26/384869/hisd-changes-its-covid-protocols-to-close-schools/> [<https://perma.cc/H37B-9CF6>].

<sup>194</sup> Jason Miles, 'It's time for the public to start listening to teachers': Second sick-out in as many months draws attention to COVID concerns, KHOU (Dec. 15, 2020), <https://www.khou.com/article/news/health/coronavirus/second-sick-out-in-as-many-months-draws-attention-to-covid-concerns/285-9018e4cd-6fa3-4fef-b921-e8d94c72bca8> [<https://perma.cc/7XX4-4WQV>].

<sup>195</sup> *Id.*

<sup>196</sup> Eline de Bruijn, *COVID-19 updates: North Texas hospital region reports highest-ever occupancy rate with 18%*, WFAA (Dec. 20, 2020), <https://www.wfaa.com/article/news/health/coronavirus/covid-19-updates-dallas-county-reports-30-new-deaths-1143-new-cases/287-8329c341-2a8c-4221-be93-95a6054a5f5d> [<https://perma.cc/G5EY-3S8X>].

<sup>197</sup> See Kate McGee, *Omicron's swift emergence tests Texas public schools as a new semester begins*, TEXAS TRIBUNE (Jan. 4, 2022), <https://www.texastribune.org/2022/01/04/texas-schools-omicron/> [<https://perma.cc/8QMW-3YVA>].

Teachers are not receiving much support from their unions for these wildcat actions. Teachers in Lincoln, Nebraska, a state that does not permit teachers to strike, planned a sickout in October 2020.<sup>198</sup> The Lincoln Education Association (LEA), the union representing Lincoln Public Schools (LPS), sent a letter to teachers assuring them that the LEA was working with LPS administration to address their safety concerns.<sup>199</sup> The letter also included threatening language and cited a Nebraska law that forbids teacher strikes.<sup>200</sup> The Nebraska sickout did not occur, and the letter did nothing to improve morale.<sup>201</sup> Teachers were similarly warned by teachers' associations in 2018 in Texas, but those warnings were ignored in 2020.<sup>202</sup> For example, Paul Tapp, managing attorney for the Association of Texas Professional Educators, warned Texas teachers that participating in a strike could result in revocation of Texas teaching certificates and state pension benefits.<sup>203</sup>

It will likely be difficult for a school board to prove with any certainty that a teacher participating in a sickout was asymptomatic, or not concerned about spreading illness to students during a viral pandemic. As teachers in Arizona demonstrated, the FFCRA has potentially made it easier for teachers to participate in sickouts.<sup>204</sup>

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<sup>198</sup> Alex Lantz, *Lincoln Education Association warns teachers against participating in 'sick-out,'* LINCOLN J. STAR (Oct. 24, 2020), [https://journalstar.com/news/local/education/lincoln-education-association-warns-teachers-against-participating-in-sick-out/article\\_18e288b8-f7e3-5f67-8084-7609d0f4e9dc.html](https://journalstar.com/news/local/education/lincoln-education-association-warns-teachers-against-participating-in-sick-out/article_18e288b8-f7e3-5f67-8084-7609d0f4e9dc.html) [https://perma.cc/A5GV-NQKK].

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> Alex Samuels, *Teachers in other states are striking. Texas teachers can't do that*, THE TEX. TRIB. (Apr. 5, 2018), <https://www.texastribune.org/2018/04/05/texas-public-school-teachers-strike-union-oklahoma/> [https://perma.cc/Z3XM-JU8W].

<sup>203</sup> *Id.*

<sup>204</sup> See Flannery, *supra* note 176.

### *B. The Families First Coronavirus Relief Act*

The FFCRA, which expired December 31, 2020, required certain employers, including public employers, to provide employees with up to two weeks of sick leave for listed COVID-19-related events.<sup>205</sup> For example, if a teacher was advised by a health care provider to self-quarantine due to COVID-19, or if a teacher was experiencing any “substantially similar condition as specified by the Secretary of Health and Human Services” as a symptom of COVID-19, the teacher would qualify for sick leave with up to two weeks of full pay.<sup>206</sup>

Some teachers may have used the FFCRA during the 2020 sickouts.<sup>207</sup> Paid sick leave makes it easier for teachers to participate in sickouts, and the FFCRA made it easy for covered employees to qualify for paid sick leave. Covered employees only require a healthcare provider to advise them to quarantine.<sup>208</sup> Healthcare providers have advised patients to quarantine if they experience not only objective symptoms such as cough or fever, but also subjective symptoms such as tiredness or difficulty breathing.<sup>209</sup> Although it would be fraudulent for teachers to feign illness to receive sick leave under the FFCRA, it would be difficult to prove, without explicit confession, that a teacher did not experience subjective symptoms such as tiredness or difficulty breathing.

The FFCRA was not extended into 2021 and expired at the end of 2020.<sup>210</sup> Instead, employers may decide if they will continue to provide paid

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<sup>205</sup> U.S. DEP’T OF LAB., *Families First Coronavirus Response Act: Employer Paid Leave Requirements* (2020), <https://www.dol.gov/agencies/whd/pandemic/ffcr-employer-paid-leave> [https://perma.cc/P83J-6YFS].

<sup>206</sup> *Id.*

<sup>207</sup> See Flannery, *supra* note 176.

<sup>208</sup> U.S. DEP’T OF LAB., *supra* note 205.

<sup>209</sup> *Self-Quarantine: Who Needs It?*, UC HEALTH (Mar. 26, 2020), <https://www.uchealth.com/en/media-room/covid-19/self-quarantine-who-needs-it> [https://perma.cc/T2R9-YHVM].

<sup>210</sup> See U.S. DEP’T OF LAB., *U.S. Department of Labor publishes guidance on expiration of paid sick leave and expanded family and medical leave for coronavirus* (Dec. 31,

leave in exchange for payroll tax credit eligibility.<sup>211</sup> However, new legislation may emerge, at both the state and federal level, and mandated paid sick leave may again be available to teachers during the COVID-19 pandemic and thereafter.

## VII. CONCLUSION

If teachers push for non-traditional bargaining demands and frame their grievances as shared grievances with the community at large, they can increase solidarity with their labor movement and potentially make significant gains. One of the more successful anti-union talking points suggests that teachers are attempting to pass costs onto parents. When teachers bargain on behalf of their communities, that argument is weakened.

This article does not suggest that all other labor tactics should be abandoned. This article intends to highlight one arrow in labor's quiver. Community building by addressing shared grievances with the social justice movement is an underutilized tactic that has been successful for teachers in recent years. Some may call this tactic opportunistic, but that is the same criticism labor has always faced. The consequences teachers will face for uniting with social justice movements are the same consequences they will face regardless. Uniting with other social justice movements gives teachers an unprecedented opportunity to effect social change not only in public schools, but throughout society.

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2020), <https://www.dol.gov/newsroom/releases/whd/whd20201231-1> [<https://perma.cc/AC3Z-YG4K>].

<sup>211</sup> Husch Blackwell LLP, *Congress Passes Legislation With FFCRA Variations Effective January 1, 2021*, JDSUPRA (Dec. 24, 2020), <https://www.jdsupra.com/legalnews/congress-passes-legislation-with-ffcr-90881/> [<https://perma.cc/LVL5-6RJR>].