

Reflecting on a Fissured World

by David Weil



David Weil became dean of the Heller School of Social Policy and Management at Brandeis University in the fall of 2017. He was appointed by President Barack Obama to be the Administrator of the Wage and Hour Division of the U.S. Department of Labor and led that agency from 2014 to January 2017.

Both as an academic researcher and as President Obama's head of the Department of Labor's Wage and Hour Division, the agency responsible for enforcing our nation's most basic labor standards, I have watched what I call the "fissured workplace" unfold. In geology, a fissure in a once solid rock both deepens and spreads. Once an activity like janitorial services or housekeeping is shed, the secondary businesses doing that work often deepen the fissure even further by shifting those activities to other businesses.

The farther down in the fissure one goes, the slimmer the profit margins and the greater the incentive to cut corners. At my former agency, we saw this fissuring result in the failure to pay janitors, cable installers, carpenters, housekeepers, home care workers, or distribution workers the basic wages and overtime they had earned.

A great deal of research is being done about the growth, impacts, and extent of the fissured workplace. In an important recent paper, Larry Katz and Alan Krueger have estimated the phenomenal growth in alternative work arrangements—centrally connected to

the fissured workplace—over the last decade, estimating that an astounding 94 percent of net employment growth between 2005 and 2015 arose in such arrangements (Katz and Krueger 2016).

Research papers by leading labor economists show that a substantial portion of the growth in earnings inequality arises from growing divergence *between* rather than *within* firm earnings, findings very consistent with a fissured workplace hypothesis (Barth et al. 2016; Card et al. 2013; Song et. al. 2015). And scholars are examining the fissured workplace not only in the United States but also in many other

countries: published papers now document how the fissured workplace is playing out in Australia, Brazil, Canada, China, France, Germany, Israel, Italy, Japan, Spain, South Korea, Taiwan, and the United Kingdom.

At one level, it is satisfying to see this work, which both lends support and deepens my own findings laid out in *The Fissured Workplace* (Weil 2014). It is also encouraging to see government agencies at the state level and abroad, worker advocacy

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and union organizations, and other civil society groups adopt approaches building on the policy prescriptions laid out in my book and pursued by the Wage and Hour Division.

At the same time, this scholarship and my experience at the Wage and Hour Division demonstrate the challenges and risks posed by the continued transformation of employment. Fissuring not only undermines compliance with basic labor standards, it also muddies responsibility for health and safety, raising the likelihood of injury, illness, and even death at the workplace. Even more, it unwinds the basis for social safety net policies that protect against the downside risks of the labor market such as workers' compensation and unemployment insurance.

When you work as an employee for a major business, decades of research shows your wages and benefits tend to get a bounce, regardless of whether that large employer is a union shop or not. But once cut off, you're no longer a member of the corporate family. Earnings fall significantly when a job is contracted out—even for identical kinds of work and workers. Opportunities for “climbing the ladder” fade because the person in the mailroom (or, more likely, at the IT service desk) is now a subcontractor without a pathway. That means not only lower wage growth and reduced access to benefits, but also diminished opportunities for on-the-job training, access to valuable social networks, and other pathways to upward advancement.

This makes it all the more troubling to see the Trump administration political leadership at the helm of the Department of Labor pulling away from dealing with the implications of the fissured workplace. A telling example happened in June of this year when the Labor Department removed two important guidance documents that were issued when I served as President Obama's Administrator of the

Wage and Hour Division. These guidance documents, called “administrator's interpretations,” deal with critical issues related to the fissured workplace: misclassification of workers as independent contractors and joint employment responsibility of employers in business organizations.

We issued those administrator's interpretations to help employers understand their responsibilities under the law. In response to frequent requests, we sought not only to clarify those responsibilities but also to provide multiple examples to clarify them and help apply them to specific circumstances. That, in our view, is what a responsible law enforcement agency does to achieve its mission of improving labor standards through increasing compliance (and, in that spirit, is why I have posted and made available both documents on my website, fissuredworkplace.net).

As the department's statement itself made clear, the documents were guidance and never represented new statements of policy. The underlying laws, regulations, and case law remain unchanged, and employers remain responsible for following them, because workers have a private right of action under the Fair Labor Standards Act.

But the administrator's interpretations were only a piece of our approach. During the Obama administration and under Secretary of Labor Thomas Perez's leadership, we sought to make sure that independent contractors were truly that and not simply misclassified employees.

We conducted investigations of businesses that sought competitive advantage by misclassification, often taking them to court and negotiating major settlements ensuring that they would correctly classify employees in the future. We worked with agencies in both red and blue states in charge of

workers' compensation, unemployment insurance, and tax revenue to fight misclassification by sharing information on problematic employers and industries, and by coordinating enforcement on companies that misclassified workers.

We also aimed to make sure that all parties affected by the fissured workplace understood their roles in assuring compliance. In many circumstances, we used the law and well-established court opinion to assert joint employment, ensuring that both motherships and satellites had responsibilities for their workers.

We did so with staffing agencies and the companies that hired them, and in rapidly

growing industries such as fracking, where—in keeping with its name—fissuring practices quickly spread. In these and many other industries we sought to get the businesses that determined much of the working relationship (e.g., shipbuilders hiring staffing agencies, retailers using logistics companies to run their distribution centers) to play their role in compliance.

But we also recognized that government cannot do it all. Many highly successful businesses have taken responsibility in picking partners in their supply chains, contracting networks, and franchise systems that comply with laws and often exceed their requirements. They may benefit from the flexibility afforded by fissured relationships, but they also understand their responsibilities as the center of gravity within those relationships.

The Wage and Hour Division and the Department of Labor had numerous partnerships with major companies that stood up and accepted their important roles in setting the table for all that happens around them, providing compliance assistance, providing training

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opportunities, and setting business relationships that allow all parties to do well—and do right by workers.

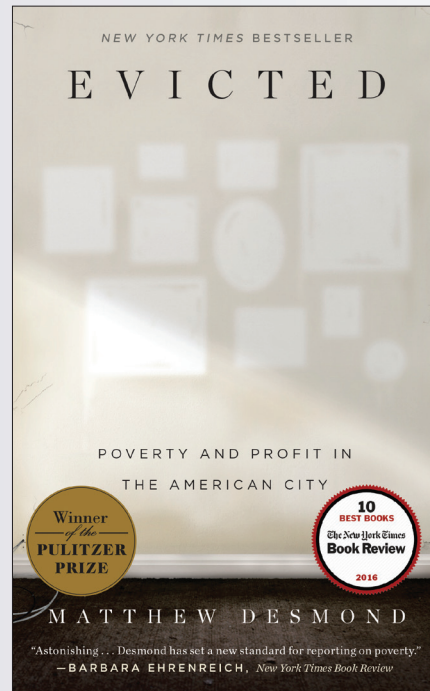
It remains to be seen whether removing guidance documents is a harbinger of a larger shift in policies. Deep cuts proposed by the Trump administration in the Department of Labor's budget—and the wider retreat from worker protection policies signaled by its stance toward the conflict of interest rule, numerous workplace safety initiatives, and most recently overtime regulations—provide little reason for optimism. Yet if the administration truly cares about the people left behind over decades that were a focus of the campaign and continuing rhetoric, it must address the fissuring forces that helped create today's inequality.

While we can't roll back economic history, we can seek ways to balance the benefits of new working arrangements with the interests of millions of workers who create enormous value each day for major businesses, their investors, and their customers. Otherwise, a growing part of the labor force will be left further behind.

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BOOK NOTICE



Evicted *Poverty and Profit in the American City*

Matthew Desmond (Crown Publishers, 2016)

From the publisher's description . . .

In this brilliant, heartbreaking book, Matthew Desmond takes us into the poorest neighborhoods of Milwaukee to tell the story of eight families on the edge. Arleen is a single mother trying to raise her two sons on the \$20 a month she has left after paying for their rundown apartment. Scott is a gentle nurse consumed by a heroin addiction. Lamar, a man with no legs and a neighborhood full of boys to look after, tries to work his way out of debt. Vanetta participates in a botched stickup after her hours are cut. All are spending almost everything they have on rent, and all have fallen behind.

The fates of these families are in the hands of two landlords: Sherrena Tarver, a former schoolteacher turned inner-city entrepreneur, and Tobin Charney, who runs one of the worst trailer parks in Milwaukee. They loathe some of their tenants and are fond of others, but as Sherrena puts it, "Love don't pay the bills." She moves to evict Arleen and her boys a few days before Christmas.

Even in the most desolate areas of American cities, evictions used to be rare. But today, most poor renting families are spending more than half of their income on housing, and eviction has become ordinary, especially for single mothers. In vivid, intimate prose, Desmond provides a ground-level view of one of the most urgent issues facing America today. As we see families forced into shelters, squalid apartments, or more dangerous neighborhoods, we bear witness to the human cost of America's vast inequality—and to people's determination and intelligence in the face of hardship.

Based on years of embedded fieldwork and painstakingly gathered data, this masterful book transforms our understanding of extreme poverty and economic exploitation while providing fresh ideas for solving a devastating, uniquely American problem. Its unforgettable scenes of hope and loss remind us of the centrality of home, without which nothing else is possible.