



UNC
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 79 | Number 1

Article 4

12-1-2000

Organizing the Unorganizable: Private Paid Household Workers and Approaches to Employee Representation

Peggie R. Smith

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

Recommended Citation

Peggie R. Smith, *Organizing the Unorganizable: Private Paid Household Workers and Approaches to Employee Representation*, 79 N.C. L. REV. 45 (2000).

Available at: <http://scholarship.law.unc.edu/nclr/vol79/iss1/4>

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

ORGANIZING THE UNORGANIZABLE: PRIVATE PAID HOUSEHOLD WORKERS AND APPROACHES TO EMPLOYEE REPRESENTATION

PEGGIE R. SMITH*

In this Article, Professor Smith argues that private paid household workers can and should organize even as they have been excluded from the National Labor Relations Act and most state collective bargaining statutes. Drawing upon historical and contemporary organizing efforts among paid household workers, as well as innovative organizing drives to mobilize the expanding low-wage service workforce, she examines the ability of both union and nonunion structures to accommodate the one-on-one character of the household employment relationship and the job's location within the private sphere of the home. The Article argues that the framework of the worker-run cooperative offers a promising approach to representing the interests of this group of workers, including the many undocumented immigrant women who labor as private domestics. She concludes the Article by exploring the potential conflict between the interests of paid household workers in pursuing collective action and the interests of household employers in maintaining familial privacy.

INTRODUCTION	46
I. PRIVATE PAID HOUSEHOLD WORK: AN OVERVIEW.....	52
II. THE EXCLUSION OF DOMESTIC SERVICE WORKERS FROM COLLECTIVE BARGAINING STATUTES	58
A. <i>The National Labor Relations Act: Legislative History and Doctrinal Interpretation.....</i>	58
B. <i>State Collective Bargaining Laws and Domestic Service.....</i>	60
C. <i>Reflections on the Exclusion</i>	62

* Assistant Professor of Law, Chicago-Kent College of Law, Illinois Institute of Technology. J.D., Harvard Law School, 1993; M.A., Yale University, 1990; B.A., Yale University, 1987. I am indebted to a number of people who gladly gave of their time and intellectual energy during the writing of this Article, including Katherine Baker, Evelyn Brody, Marion Crain, Rafael Gely, Alan Hyde, Harold Krent, Martin Malin, Sheldon Nahmod, and Dan Tarlock.

	D. <i>The Distinct Characteristics of the Domestic Service Workforce: Implications for Organizing</i>	68
III.	FORGING AN ALTERNATIVE VISION.....	71
	A. <i>The Service Employees International Union's Home-Care Campaign: The Public Face of Domestic Service</i>	73
	B. <i>Occupational Unionism</i>	80
	1. <i>Worker-Run Employment Agencies: The Hiring Hall Gains New Life</i>	81
	2. <i>Peer Management</i>	82
IV.	REPRESENTING DOMESTIC SERVICE WORKERS.....	83
	A. <i>Jane Street and the Domestic Workers' Industrial Union</i>	84
	B. <i>Domestic Service Cooperatives</i>	86
	C. <i>Fortifying the Cooperative Structure</i>	96
	D. <i>Encouraging Employer Participation</i>	99
V.	TAKING IT TO THE STREETS: ON PICKETING AND PRIVACY.....	100
	A. <i>The Diminished Privacy Rights of Paid Household Employers</i>	105
	B. <i>Domestic Service: "Not Properly Industrial in Character"</i>	107
	CONCLUSION	109

INTRODUCTION

Domestic workers, seeking to organize, face more serious obstacles than do workers in almost any other industry or trade. Working apart from one another, each dealing with his or her own separate employer, it is difficult for them to contact each other as workers in large factories can do.¹

Jean Collier Brown, 1938

Regarded in the 1970s as an obsolete occupation,² private paid household work is resurging as a new generation of women, many of whom are undocumented immigrants, find work cleaning homes and caring for children of families not their own.³ This revival coincides

1. Jean Collier Brown, *Domestic Workers and Unions*, 45 AM. FEDERATIONIST 477, 477 (1938).

2. Lewis A. Coser, *Servants: The Obsolescence of an Occupational Role*, 52 SOCIAL FORCES 31, 31-32 (1973) (arguing that the servant role is obsolete in modern society).

3. See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, 2000-01 OCCUPATIONAL OUTLOOK HANDBOOK: PRIVATE HOUSEHOLD WORKERS 355-57 (2000), available at <http://stats.bls.gov/oco/ocos175.htm> [hereinafter OCCUPATIONAL

with the continued entry of women into the paid labor force.⁴ For some women, domestic service is a viable alternative to help balance paid work and domestic responsibilities. Yet while the demand for private domestic service workers appears on the upswing, the conditions that prevail in the job remain stagnate. Low wages, a lack of benefits, and a lack of standardization are enduring traits of the domestic service industry.⁵

Remedying these systemic ills has proven difficult. Because domestic service is the archetypical form of “women’s work,”⁶ it has rarely attracted the attention of organized labor,⁷ a force that could potentially aid paid household workers in improving their labor conditions. The one-on-one relationship between household employer and employee, combined with the job’s location within the private sphere of the home and its casual nature, have led many to regard domestic service as an occupational oddity that defies organization. When compared to the traditional employment arrangement of permanent, full-time employment with a single employer, domestic service is clearly out of step. Yet, it no longer seems so anomalous when considered against the shifting economic landscape. As service jobs proliferate and replace manufacturing

OUTLOOK HANDBOOK]; see also Doreen J. Mattingly, *Job Search, Social Networks, and Local Labor-Market Dynamics: The Case of Paid Household Work in San Diego, California*, 20 URB. GEOGRAPHY 46, 52 (1999) (noting the recent expansion of domestic service, much of which has occurred “off the books”); Carole Turbin, *Domestic Service Revisited: Private Household Workers and Employers in a Shifting Economic Environment*, 47 INT’L LAB. & WORKING CLASS HIST. 91, 91 (1995) (noting the increase in the percentage of women in domestic service since the late 1980s). There are many women who perform domestic work in institutional settings, such as hospitals and hotels, or who are employed by commercial businesses, such as cleaning companies. This Article, however, focuses primarily on private domestics who labor within the private sphere of the household and who are employed directly by a household member to perform a range of domestic activities, including cleaning, laundering, and cooking. Unlike private domestics, workers who perform domestic service for companies or in institutional settings are not excluded from the National Labor Relations Act (NLRA). See *infra* notes 60–66 and accompanying text (discussing the exclusion of private domestics from the NLRA).

4. Howard N. Fullerton, Jr., *Labor Force Participation: 75 Years of Change, 1950–98 and 1998–2025*, 122 MONTHLY LAB. REV., Dec. 1999, at 3, 6 (reporting that among women age sixteen and over, the labor force participation rate was 33.9% in 1950, compared with 59.8% in 1998); Howard V. Hayghe, *Developments in Women’s Labor Force Participation*, 120 MONTHLY LAB. REV., Sept. 1997, at 41, 41 (noting that the labor force participation rate of women grew from 46% to 59% between 1975 and 1996).

5. See *infra* notes 28–32 and accompanying text (discussing labor conditions in domestic service).

6. See *infra* notes 46–48 and accompanying text (noting the association between paid household work and women’s unpaid housework).

7. See *infra* notes 100–07 and accompanying text (noting the labor movement’s disinterest in the plight of domestic service workers).

jobs, alternative work arrangements have expanded. Today increasing numbers of individuals are “contingent workers” whose work relationships diverge from the traditional employment arrangement.⁸ In a workplace world replete with part-time employees, independent contractors, home workers, temporary employees, leased employees, and a variety of other forms of contingent employment,⁹ the work lives of private paid household workers have become somewhat normalized.

The growing presence of these alternative work arrangements, particularly among low-wage service workers,¹⁰ has provoked considerable discussion on the need to rethink conventional approaches to employee representation.¹¹ Commentators point out

8. See, e.g., Sharon R. Cohany, *Workers in Alternative Employment Arrangements*, 119 MONTHLY LAB. REV., Oct. 1996, at 31, 31; Clyde Summers, *Contingent Employment in the United States*, 18 COMP. LAB. L. J. 503, 504–05 (1997). See generally RICHARD S. BELOUS, *THE CONTINGENT ECONOMY: THE GROWTH OF THE TEMPORARY, PART-TIME AND SUBCONTRACTED WORKFORCE* (1989) (examining the growth of employment relationships that depart from full-time, regular employment).

9. See, e.g., Karl E. Klare, *Toward New Strategies for Low-Wage Workers*, 4 B.U. PUB. INT. L.J. 245, 256–57 (1995) (defining the contingent workforce to include part-time work; subcontracting, leasing, or independent contractor arrangements; temporary work; day-labor; seasonal work; and illegal work relationships); Anne E. Polivka, *Contingent and Alternative Work Arrangements, Defined*, 119 MONTHLY LAB. REV., Oct. 1996, at 3, 3 (observing that the term contingent work has been applied to a range of employment practices, including part-time work, temporary-help service employment, employee leasing, self-employment, contracting out, employment in the business services sector, and home-based work); Steven L. Willborn, *Leased Workers: Vulnerability and the Need for Special Legislation*, 19 COMP. LAB. L. & POL'Y J. 85, 86 (1997) (commenting that contingent work has been used to include “part-time workers, temporary workers, on-call workers, leased workers, independent contractors, [and] home workers”).

10. See Klare, *supra* note 9, at 259 (observing that “[t]he rapid increase of contingent employment is an important factor contributing to the expansion of low-wage work”); Deborah Maranville, *Changing Economy, Changing Lives: Unemployment Insurance and The Contingent Workplace*, 4 B.U. PUB. INT. L.J. 291, 292 n.5 (1995) (noting that “the contingent worker and low-wage worker categories . . . overlap significantly”).

11. See, e.g., CHARLES C. HECKSCHER, *THE NEW UNIONISM: EMPLOYEE INVOLVEMENT IN THE CHANGING CORPORATION* 155–91 (1988) (arguing that a system of representation must coordinate social trends in employee rights, multilateral negotiation, and associational unionism); ORGANIZING TO WIN: NEW RESEARCH ON UNION STRATEGIES 8–15 (Kate Bronfenbreener et al. eds., 1998) [hereinafter ORGANIZING TO WIN] (discussing the need for more qualitative and quantitative research on organizing strategies of labor unions to aid in halting the decline of labor membership and power); Dorothy Sue Cobble, *Organizing the Postindustrial Work Force: Lessons from the History of Waitress Unionism*, 44 INDUS. & LAB. REL. REV. 419, 419–20 (1991) [hereinafter Cobble, *Organizing the Postindustrial Work Force*] (examining “occupational unionism” as an alternative to “mass production unionism” to account for the growing numbers of women and minorities working in service industries); Matthew W. Finkin, *The Road Not Taken: Some Thoughts on Nonmajority Employee Representation*, 69 CHI.-KENT. L. REV. 195, 195–202 (1993) (discussing the possibilities of nonmajority

that traditional organizing strategies developed pursuant to the National Labor Relations Act (NLRA)¹² have historically privileged the interests of white male manufacturing workers to the disadvantage of the burgeoning population of low-wage service workers,¹³ many of whom are white women and people of color.¹⁴ In

representation of employees and “members only” representation); Michael H. Gottesman, *In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers*, 69 CHI.-KENT L. REV. 59, 67–76 (1993) (arguing that federal or state laws are needed to protect non-organized, individual employees to allow them to negotiate their employment contract with their employer without the fear of reprisal); Alan Hyde, *Employment Law After the Death of Employment*, 1 U. PA. J. LAB. & EMP. L. 99, 109–11 (1998) (discussing new developments of formal and informal organization of employees through the use of the Internet, e-mail, professional associations, and special interest groups designed to promote employee benefits); Joel Rogers, *Reforming U.S. Labor Relations*, 69 CHI.-KENT L. REV. 97, 97–100 (1993) (arguing that the labor relations system that arose out of the New Deal is no longer suited to deal effectively with present day problems due to social and industrial changes).

12. 29 U.S.C. §§ 151–169 (1994).

13. *E.g.*, Dorothy Sue Cobble, *Introduction: Remaking Unions for the New Majority to WOMEN AND UNIONS: FORGING A PARTNERSHIP* 3, 4–6 (Dorothy Sue Cobble ed., 1993) [hereinafter Cobble, *Remaking Unions*] (observing that unions continue to follow the “industrial model of employee representation” that catered to the blue-collar male worker even as the labor movement “no longer automatically privileges the needs of white, male workers”); Marion Crain, *Between Feminism and Unionism: Working Class Women, Sex Equality, and Labor Speech*, 82 GEO. L.J. 1903, 1944 n.212 (1994) (noting that “traditional organizing techniques geared toward white male manufacturing workers are ill-suited to organizing the predominantly female service sector”); Marion Crain & Ken Matheny, “*Labor’s Divided Ranks*”: *Privilege And The United Front Ideology*, 84 CORNELL L. REV. 1542, 1544 (1999) (arguing that the “image of a white, male, manufacturing-based working class shapes union praxis and public perception of the labor movement, excluding and alienating those who now collectively comprise the majority of the U.S. workforce: women, racial and ethnic minorities, and service workers”); Charles B. Craver, *Why Labor Unions Must [and Can] Survive*, 1 U. PA. J. LAB. & EMP. L. 15, 25 (1998) (commenting that the “labor movement historically has derived its organizational strength from white, male, blue-collar employees residing in northern states”); Molly S. McUsic & Michael Selmi, *Postmodern Unions: Identity Politics in the Workplace*, 82 IOWA L. REV. 1339, 1344 (1997) (stating that the model worker targeted by unions reflected the image of white, married, male industrial workers); Dorian T. Warren & Cathy J. Cohen, *Organizing at the Intersection of Labor and Civil Rights: A Case Study of New Haven*, 2 U. PA. J. LAB. & EMP. L. 629, 632–33 (2000) (observing that the traditional model of organizing, which focused mainly on the concerns of white men, poses a challenge for organizing the disproportionate numbers of racial ethnic groups and women in the service sector workforce).

14. *E.g.*, Stephen Bingham, *Replace Welfare for Contingent Workers with Unemployment Compensation*, 22 FORDHAM URB. L.J. 937, 941 (1995) (observing that women and people of color are disproportionately represented among the contingent workforce); Ann Bookman, *Flexibility at What Price? The Costs of Part-time Work for Women Workers*, 52 WASH & LEE L. REV. 799, 803 (1995) (“Contingent employment relationships affect workers of all kinds, particularly women, people of color, and the young.”); Maria L. Ontiveros, *A Vision of Global Capitalism that Puts Women and People of Color at the Center*, 3 J. SMALL & EMERGING BUS. L. 27, 33 (1999) (“People of color are the most contingent, commodified, and dehumanized workers. Women and people of

response to that disconnect, labor leaders in recent years have displayed an increased sensitivity to the concerns of these groups, sparking a labor “renaissance” of sorts¹⁵ by developing new strategies in the push to organize the burgeoning low-wage service workforce.¹⁶

color are most often the ones laboring in contingent arrangements.”); Eileen Silverstein & Peter Goselin, *Intentionally Impermanent Employment and The Paradox of Productivity*, 26 STETSON L. REV. 1, 10 (1996) (stating that “[a]lthough the hard statistics on some aspects of contingent work elude us, one thing that is clear is the predominance of women”).

15. E.g., Steven Greenhouse, *Gains Put Unions At Turning Point, Many Expert Say*, N.Y. TIMES, Sept. 1, 1997, at A1 (noting factors contributing to the labor renaissance); Michael Hade, *Organized Labor Influence Grows*, STATE JOURNAL-REGISTER (Springfield, Ill.), Aug. 2, 1998, at 14, LEXIS, The State Journal-Register (Springfield, IL) File (describing the resurgence of organized labor as a labor renaissance); Eve Tahmincioglu, *Labor's Next Recruits*, ST. PETERSBURG TIMES, Mar. 15, 1999, Business Times, at 10 (characterizing labor’s attempt to recruit women and minorities who dominate the lower-paid rungs of the health care business as a labor renaissance). Other commentators, however, are more skeptical as to whether labor’s recent successes represent a long-term trend. See, e.g., Marion Crain, *Feminizing Unions: Challenging the Gendered Structure of Wage Labor*, 89 MICH. L. REV. 1155, 1157 (1991) [hereinafter Crain, *Feminizing Unions*] (noting that despite labor’s efforts to target women workers, they continue to be underrepresented on union membership rolls); Mary Rosenthal, *Leadership Is Critical to Resurgence*, 22 LAB. STUDIES J. 43 (1998), 1998 WL 12331560 (suggesting that in order to achieve a labor renaissance, labor must forge strong ties with community groups); Roy J. Adams, Book Review, 47 INDUST. & LAB. REL. REV. 710, 710 (1994) (reviewing THE CHALLENGE OF RESTRUCTURING: NORTH AMERICAN LABOR MOVEMENTS RESPOND (Jane Jenson & Rianne Mahon eds., 1993)) (citing Richard Freeman’s observation that dramatic reforms in labor policy are necessary in order to bring about a significant labor renaissance).

16. The 1999 victory of the Service Employees International Union to unionize home-care workers in Los Angeles attests to the movement’s new focus on recruiting such workers. See *infra* Part III.A (examining the home-care campaign in California); see also Fernando Gapasin & Michael Yates, *Organizing the Unorganized: Will Promises Become Practices?*, MONTHLY REV., Jul.–Aug. 1997, at 46, 46–48, 51 (noting the decline of unions and opportunities to increase union density through organizing service workers). The labor movement’s recent focus on organizing low-wage service workers has focused more generally on women. Indeed, last year, women accounted for more than sixty-two percent of the 266,000 United States workers who joined unions. Lornet Turnbull, *Ohio’s Working Women Say They Feel Good About Jobs, Benefits*, COLUMBUS DISPATCH, Mar. 10, 2000, at 1E, LEXIS, The Columbus Dispatch File. See generally James Hansen, *Organized Labor’s Secret Weapon for Next Millennium*, DENVER ROCKY MOUNTAIN NEWS, May 17, 1998, at 5B, LEXIS, Denver Rocky Mountain News File (describing the importance of female membership in unions); Kieran Murray, *Dwindling Labor Unions Reluctantly Recruit Women*, CHI. TRIB., Sept. 20, 1998, Womanews 2, 1998 WL 2897910 (observing that unions are increasingly turning their attention to women to help rejuvenate the labor movement); Stephanie Salter, *Labor Day Marks Gains for Women in Unions*, S.F. EXAMINER, Aug. 31, 1997, at B9, <http://www.sfgate.com/cgi-bin/article.cgi?file=/examiner/archive/1997/08/31/EDITORIAL1390.dtl> (on file with the North Carolina Law Review) (citing increases in wages and union membership for women). On the relationship between organized labor and women, see generally WOMEN AND UNIONS: FORGING A PARTNERSHIP, *supra* note 13; Marion Crain, *Feminism, Labor, and Power*, 65 S. CAL. L. REV. 1819 (1992) [hereinafter Crain, *Feminism*]; and Crain,

This Article assesses the strengths and weaknesses of these emerging strategies with the goal of helping to ensure that women who perform housework for pay—some of America’s lowest paid service workers—are included in this labor “renaissance.” Although collective bargaining statutes exclude private paid household employees from coverage,¹⁷ and these workers are not likely to gain bargaining rights in the near future, this Article argues that it remains possible to attain meaningful concerted action within the domestic service industry. Drawing upon historical and contemporary organizing efforts among paid household workers, this Article examines the adaptability of both union and nonunion structures to organizing domestic service. While there are no easy answers, the worker-run cooperative offers a promising approach to organizing paid household workers.¹⁸ Importantly, the cooperative structure can facilitate the organization of workers even as they have been denied rights under the NLRA.¹⁹ Similar to other new and proposed forms of employee organizations, the domestic service cooperative foretells of a time in the not-too-distant future when increasing numbers of workers may look to improve their economic lot through means that “owe nothing to governments or employers.”²⁰

The remainder of this Article is divided into five parts. Part I provides an overview of paid household work, highlighting occupational characteristics and transformations. Part II discusses the exclusion of paid household workers from collective bargaining statutes, examining both the legal and structural impediments to organizing domestic service workers as well as lingering cultural and social biases toward the job that have frustrated organizing efforts. Part III draws from the Service Employees International Union’s recent success organizing home-care workers²¹ and the work of Professor Dorothy Sue Cobble on occupational unionism²² to outline two alternative models to traditional unionism. Part IV discusses the

Feminizing Unions, *supra* note 15.

17. See *infra* Part II.A; see also Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 74–76 (1996) (discussing the exclusion of domestic service from the NLRA).

18. See *infra* Part IV.B.

19. See *infra* Part IV.B.

20. Alan Hyde, *Employee Organization in High Velocity Labor Markets*, Presented to the New York University 50th Annual Conference on Labor (May 29–30, 1997), <http://andromeda.rutgers.edu/~hyde/org.html> (on file with the North Carolina Law Review).

21. See *infra* Part III.A.

22. See *infra* Part III.B.

relevance of these models to domestic service, focusing on worker-owned domestic service cooperatives. Part V explores the question of whether residential demonstrations by groups of organized paid household workers represent an unacceptable intrusion into the privacy of employing households.

I. PRIVATE PAID HOUSEHOLD WORK: AN OVERVIEW

To appreciate why paid household workers need to organize, a brief overview of both the work and the workers is required. Labor statistics indicate that there are approximately one million domestic service workers in this country today,²³ ninety-five percent of whom are women.²⁴ Not reflected in that official count, however, is an influx of undocumented immigrant domestics, many of whom hail from Mexico, Central America, and various parts of the Caribbean.²⁵ In

23. OCCUPATIONAL OUTLOOK HANDBOOK, *supra* note 3, at 356 (reporting that there were 928,000 paid household workers in 1998 and observing that “[j]ob opportunities for people wishing to become private household workers are expected to be excellent through 2008, as the demand for these services continues to far outpace the supply of workers willing to provide them”).

24. Bureau of Labor Statistics, U.S. Dep’t of Labor, *Household Data Annual Averages*, EMP. & EARNINGS, Jan. 2000, at 166, 180 tbl.11.

25. Barbara Vobejda, *America’s Homes Hide an Underground Economy: U.S. is Forced to Confront Pervasive Hiring Violations*, WASH. POST, Feb. 14, 1993, at A1 (observing that “Americans illegally employ more than 2 million undocumented workers, many for household work”); see also Merle English, *Caribbeans’ Fight To Breathe Free Endure Low Pay, Prejudice*, NEWSDAY, July 19, 1989, at 8, 1989 WL 3391413 (noting the prevalence of undocumented domestics from the Caribbean in New York City); Cathy Singer, *Immigrants Wait Years for Legal Status*, N.Y. TIMES, Feb. 23, 1992, 12 (Long Island Weekly), at 1 (same); Rhonda M. Williams, *A Crime That Enriches the Middle Class*, STAR TRIB. (Minneapolis, Minn.), Feb. 16, 1993, at 9A (noting the prevalence of undocumented domestics from the Caribbean, Central America, and South America).

The paid household workforce does not lend itself easily to statistical quantification because underreporting is widespread and facilitated by the informal nature of domestic service work. JUDITH ROLLINS, *BETWEEN WOMEN: DOMESTICS AND THEIR EMPLOYERS* 56 (1985) (stating that census figures on the number of paid household workers are misleading because of underreporting); Cecilia Garza, *Foreign Domestics: The Use and Abuse of Undocumented Household Workers*, 4 RACE, GENDER & CLASS: AN INTERDISCIPLINARY & MULTICULTURAL JOURNAL 57, 58 (1997) (copy on file with the North Carolina Law Review) (commenting on the movement of undocumented workers into domestic service and noting the difficulty of measuring the extent of that movement). Consequently, quantitative accounts of the actual number of paid household workers, including those who are undocumented, are not easily ascertainable. Underreporting in paid household work reflects both the entry of undocumented workers into the occupation as well as legal workers who are disinclined to report their earnings because of tax-related concerns and fear about the impact of earnings on eligibility for government benefits. *Proposals to Simplify and Streamline the Payment of Employment Taxes for Domestic Workers: Hearings Before the Subcomm. on Social Security and the Subcomm. on Human Resources of the House Comm. on Ways and Means*, 103d Cong. 4, 39 (1993) [hereinafter *Hearings*] (statement of Marshall V.

New York City alone, an estimated 250,000 to 450,000 undocumented immigrants work in domestic service.²⁶ As a group, domestic service workers are disproportionately poor women of color.²⁷ Earning a mean annual wage of \$15,160,²⁸ they experience greater levels of poverty than do workers in any other occupation.²⁹ In light of their meager earnings, domestic service workers often lead a hand-to-mouth, paycheck-to-paycheck existence.³⁰ Job-related benefits such as medical coverage, health insurance, paid holidays, paid vacation, or paid sick leave are largely unheard of within the field of domestic service.³¹ As one worker observed, “The worst thing about domestic

Washburn, Compliance 2000 Executive, Internal Revenue Service).

26. English, *supra* note 25; see also Mattingly, *supra* note 3, at 47 (observing the dominance of immigrant women, many of whom are undocumented, in the San Diego market for domestic service); Stuart Silverstein, *Domestics: Hiring the Illegal Hits Home*, L.A. TIMES, Oct. 28, 1994, at A1 (noting that in California, 1990 figures indicate that one in three domestics were undocumented).

27. Based on 1999 statistics, ninety-five percent of all private household workers are women, fifteen percent are Black, and twenty-nine percent are Hispanic. Bureau of Labor Statistics, U.S. Dep’t of Labor, *Household Data Annual Averages*, EMP. & EARNINGS, Jan. 2000, at 166, 180 tbl.11; see also MARY ROMERO, MAID IN THE U.S.A. 71 (1992) (observing that “[m]inority and immigrant women are overrepresented in [domestic service]”). For insightful works that examine the historical predominance of women of color in domestic service, see generally ELIZABETH CLARK-LEWIS, LIVING IN, LIVING OUT: AFRICAN AMERICAN DOMESTICS IN WASHINGTON, D.C., 1910–1940 (1994) (examining the experiences of Black household workers who migrated from the South to work in Washington, D.C. during the 1910s and 1920s); EVELYN NAKANO GLENN, ISSEI, NISEI, WAR BRIDE: THREE GENERATIONS OF JAPANESE AMERICAN WOMEN IN DOMESTIC SERVICE (1986) (studying the twentieth century history of Japanese immigrant and Japanese-American household workers in the San Francisco Bay Area); and BONNIE THORNTON DILL, ACROSS THE BOUNDARIES OF RACE AND CLASS: AN EXPLORATION OF WORK AND FAMILY AMONG BLACK FEMALE DOMESTIC SERVANTS (1994) (documenting the experiences of Black women who worked as paid household workers during the 1940s and 1950s).

28. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, 1998 NATIONAL OCCUPATIONAL EMPLOYMENT AND WAGE ESTIMATES, at <http://stats.bls.gov/oesnl/oes67002.htm> (on file with the North Carolina Law Review).

29. Bureau of Labor Statistics, U.S. Dep’t of Labor, *Service Farm Workers Have Highest Poverty Rates*, MONTHLY LAB. REV.: THE EDITOR’S DESK, Sept. 7, 1999 (reporting that the poverty rate for private household workers in 1997 was 22.3% compared with a poverty rate of 13% among all other workers in service occupations, such as waiters and waitresses, dental assistants, janitors, and beauticians), at <http://stats.bls.gov/opub/ted/1999/sept/wk2/art01.htm> (on file with the North Carolina Law Review).

30. ROLLINS, *supra* note 25, at 77; ROMERO, *supra* note 27, at 148.

31. According to a 1974 study of paid household workers, eighty percent receive no paid vacation, ninety percent receive no paid holidays, and ninety-one percent receive no paid sick leave. LINDA MARTIN AND KERRY SEGRAVE, THE SERVANT PROBLEM: DOMESTIC WORKERS IN NORTH AMERICA 151 (1985). More recent investigations confirm that those figures remain the norm rather than the exception. In her 1989 study of domestics in Boston, sociologist Judith Rollins found that they did not have any form of

work is that there are no benefits You're not covered for any unforeseen emergency. You're not even covered for tomorrow'³²

The structure of domestic service has exacerbated the economic difficulties confronting paid household workers and impeded efforts to organize them. Historically, the dominant structure was live-in service, whereby workers resided with their employers.³³ The live-in arrangement significantly hindered the transformation of the domestic service relationship into a modern employment relationship. For example, at a time when the labor movement was attaining a shorter workday for most wage workers, the residential character of domestic service compromised the ability of paid household workers to pursue autonomous lives.³⁴ Isolated from each other, domestic service workers rarely had an opportunity to forge a sense of solidarity or to develop a collective consciousness about ways to improve their labor conditions. The potential for organizing was further compromised by the fact that the job was all-consuming,³⁵ leaving domestics with little free time. Permitted only one or two free evenings a week,³⁶ few live-in domestics were willing to devote such precious time to organizing for change.

job-related medical coverage or sick leave; "if they were unable to make it to work, they forfeited their pay." ROLLINS, *supra* note 25, at 76 (examining the relationships between Black household workers and their white employers in the Boston area). Chicana domestics living and working in Denver in 1992 report comparable experiences. See ROMERO, *supra* note 27, at 7, 12. Evidence suggests that employers are more likely to afford benefits and comply with regulations when domestics work full-time. David Chaplin, *Domestic Service and Industrialization*, 1 COMP. STUDIES IN SOC. 97, 109 (1978).

32. ROLLINS, *supra* note 25, at 76.

33. GLENN, *supra* note 27, at 141 (noting that live-in service was the most common pattern of domestic service prior to World War I); see also DAVID KATZMAN, SEVEN DAYS A WEEK: WOMEN AND DOMESTIC SERVICE IN INDUSTRIALIZING AMERICA 177 (1978) (noting that the movement away from live-in service occurred at about the time of World War I); PHYLLIS PALMER, DOMESTICITY AND DIRT: HOUSEWIVES AND DOMESTIC SERVANTS IN THE UNITED STATES, 1920-1945, at 68 (1989) (noting that day work began to replace full-time service during the 1920s).

34. GLENN, *supra* note 27, at 141 (observing that residential domestic service left domestic workers with little time for their own families or outside social relationships); KATZMAN, *supra* note 33, at 112-13 (discussing the lack of quality time enjoyed by live-in domestics); Peggie Smith, *Regulating Paid Household Work: Class, Gender, Race, and Agendas of Reform*, 48 AM. U. L. REV. 851, 871 (1999) (noting that employers demanded full-time allegiance from live-in workers, expecting them to work around the clock).

35. See Coser, *supra* note 2, at 32 (describing domestic service as a "greedy institution," one that demanded "full-time allegiance" of workers); see also *supra* note 34 (citing long hours that prevail in domestic service work).

36. In general, domestics were granted half a day off on Sunday and one day during the week, typically on Thursday. See PALMER, *supra* note 33, at 77. But see CLARK-LEWIS, *supra* note 26, at 125 (observing that "[l]ive-in domestics were rarely given Sunday

Beginning in the 1920s, increasing numbers of domestic workers made the transition from live-in service to live-out service.³⁷ This new arrangement gave domestics an opportunity to create and nurture a space of their own.³⁸ Today, the most common patterns of domestic service are day work and job work.³⁹ As a day worker, a domestic performs housework for several different employers and is paid by the hour, typically reporting to each employer on a weekly or bi-weekly basis.⁴⁰ In job work, domestics also work for many employers but instead of being paid by the hour, they receive a certain amount of money in consideration for performing specified tasks.⁴¹ The transition from live-in service to day work and job work represents a positive step toward autonomy and independence for many domestic service workers.⁴²

To some extent, however, the informality and tenuousness of the domestic service relationship has overshadowed that transition. In order to survive, most domestics must secure multiple sources of employment such that they are constantly engaged in the job search process.⁴³ When jobs are secured, the terms and conditions of

off”).

37. KATZMAN, *supra* note 33, at 177; PALMER, *supra* note 33, at 68; ROLLINS, *supra* note 25, at 54.

38. See PALMER, *supra* note 33, at 68 (commenting that day work allows domestics “time for social connections with friends and kin, especially participation in neighborhood churches”); see also GLENN, *supra* note 27, at 143 (examining the impact of day-work on the lives of Japanese-American domestics).

39. Pierrette Hondagneu-Sotelo, *Latina Immigrant Women and Paid Domestic Work: Upgrading the Occupation*, 12 CLINICAL SOC. REV. 257, 261 (1994) [hereinafter Hondagneu-Sotelo, *Latina Immigrant Women*].

40. KATZMAN, *supra* note 33, at 90–91 (discussing the work patterns of domestic day workers); see also CLARK-LEWIS, *supra* note 27, at 131–34, 147–59 (discussing the impact that day work had on the lives of Black women).

41. Pierrette Hondagneu-Sotelo, *Regulating the Unregulated?: Domestic Workers' Social Networks*, 41 SOC. PROBS. 50, 51 (1994) [hereinafter Hondagneu-Sotelo, *Regulating the Unregulated?*]; see also GLENN, *supra* note 27, at 163 (discussing how Japanese American domestics used task or job work to achieve autonomy).

42. See CLARK-LEWIS, *supra* note 27, at 156 (commenting on the significance of the shift to day work: “For the first time in their careers, household workers could dictate their own pace, set their own priorities for the tasks, and complete assigned chores as they saw fit.”); ROMERO, *supra* note 27, at 64 (“Day work changed the structure of domestic service by placing boundaries on the labor arrangement, increasing autonomy, providing the means to leave oppressive working conditions, and establishing a trend toward an eight hour day.”); Hondagneu-Sotelo, *Regulating the Unregulated?*, *supra* note 41, at 51–52 (observing that job work and day work both are advancements over live-in domestic situations).

43. See, e.g., Hondagneu-Sotelo, *Regulating the Unregulated?*, *supra* note 41, at 53; Julianne Malveaux, *From Domestic Worker to Household Technician: Black Women in a Changing Occupation*, in BLACK WOMEN IN THE LABOR FORCE 85, 87 (Phyllis Wallace ed., 1980); Mattingly, *supra* note 3, at 59–62; Leslie Salzinger, *A Maid By Any Other*

employment that are agreed upon usually take the form of verbal discussions consisting of vague oral promises that leave workers vulnerable to abuse and subject to the whims of employers. And while the informal sharing of information among workers helps to standardize job terms,⁴⁴ the final negotiation between employer and employee typically occurs “without the benefit of guidelines established by government, unions, employment agencies or private firms.”⁴⁵

The precariousness of the paid household relationship also reflects the invisibility of domestic labor.⁴⁶ On a physical level, the domestic service relationship is invisible because it takes place within the private sphere of the home. Economically, the relationship is invisible because—similar to women’s unpaid household labor—it defies market exchange terms. Situated inside the home and outside the purview of capital, domestic service is frequently regarded as unproductive labor based on the theory that it does not produce surplus value for capital.⁴⁷ Because of its close association with women’s unpaid household labor, and its connection with the intimacies of family life, domestic service has often been devalued as a form of real work.⁴⁸

The failure to conceptualize domestic service as a legitimate occupation has profound implications for the treatment of paid household workers within the law of employment relationships. Historically, domestic service workers were excluded from the labor

Name: The Transformation of ‘Dirty Work’ by Central American Immigrants, in ETHNOGRAPHY UNBOUND: POWER AND RESISTANCE IN THE MODERN METROPOLIS 139, 143 (Michael Burawoy et al. eds., 1991).

44. Garza, *supra* note 25, at 64; Hondagneu-Sotelo, *Regulating the Unregulated?*, *supra* note 41, at 58.

45. Hondagneu-Sotelo, *Regulating the Unregulated?*, *supra* note 41, at 53.

46. See Evelyn Nakano Glenn, *From Servitude to Service Work: Historical Continuities in the Racial Division of Paid Reproductive Labor*, 18 *SIGNS* 1, 2 (1992) (observing that because household labor “takes place mostly outside the market, it is invisible, not recognized as real work”); see also ROMERO, *supra* note 27, at 21 (exploring how women’s household labor has been devalued as a form of “real” work).

47. HARRY BRAVERMAN, *LABOR AND MONOPOLY CAPITAL* 411–12 (1974) (“Nor is the [domestic] servant a productive worker, even though employed by the capitalist, because the labor of the servant is exchanged not against capital but against *revenue*. The capitalist who hires servants is not making profits, but spending them.”). See generally Nancy Folbre, *The Unproductive Housewife: Her Evolution in Nineteenth Century Economic Thought*, 16 *SIGNS* 463 (1991) (providing a historical account of the conception of housework as unproductive); Margaret Bernstein, *The Political Economy of Women’s Liberation*, *MONTHLY REV.*, Sept. 1969, at 13 (giving feminist analyses of housework and its relationship to the productive process).

48. See ROMERO, *supra* note 27, at 21.

standards regime forged during the Progressive Era and the New Deal. They were denied workplace rights under the Fair Labor Standards Act (FLSA),⁴⁹ the National Industrial Recovery Act (NIRA),⁵⁰ and the Social Security Act (SSA),⁵¹ as well as the NLRA.⁵² While today's paid household workers have been brought under the aegis of some of these laws—most notably the SSA⁵³ and the FLSA⁵⁴—legal progress has been tempered by a culture of non-compliance and under-enforcement. Many household employers fail to regard themselves as employers or to perceive their homes as workplaces,⁵⁵ and the private character of the work leads

49. The Fair Labor Standards Act (FLSA) of 1938, 29 U.S.C.A. §§ 201–219 (West 1998 & Supp. 2000) (entitling covered employees to minimum wages and overtime pay).

50. Although not explicitly excluded from the National Industrial Recovery Act (NIRA) of 1933, ch. 90, 48 Stat. 195 (enabling industries to establish codes of fair competition to regulate the wages and hours of workers in those industries and giving employees the right to organize and engage in collective bargaining) (held unconstitutional in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529–51 (1935)), the National Recovery Administration concluded that the Act did not reach domestic service workers. Letter from Allen Bennett Forsberg, Control Division, National Recovery Administration, to Benjamin R. Andrews, Professor of Household Economics, Teachers College, Columbia University (Sept. 13, 1933) (Watson Papers, Folder 1.24, Catherwood Library, Cornell School of Industrial and Labor Relations) (on file with the North Carolina Law Review) (explaining that because domestic service was not considered a trade or an industry, a code could not be established for paid household workers under the NIRA).

51. Social Security Act of 1935, 42 U.S.C. §§ 301–1397f (1994 & Supp. 1998) (creating a series of entitlement programs including unemployment insurance, old age pensions, and aid to dependent children).

52. The National Labor Relations Act of 1935, 29 U.S.C. §§ 151–169 (1994) (granting covered employees the right to organize and engage in collective bargaining).

53. Provisions of the Social Security Act were extended to paid household workers in 1950. Social Security Act Amendments of 1950, Pub. L. No. 81-734, 323, 64 Stat. 477, 495 (codified at 42 U.S.C.A. § 410(a) (West 1998 & Supp. 2000)).

54. Paid household workers were brought under coverage of the FLSA in 1974. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 6(a)(1), § 3(d), 88 Stat. 55, 58 (codified as amended at 29 U.S.C.A. § 203(e)(2)(A) (West 1998 & Supp. 2000)). However, certain domestic service workers continue to be exempted from the Act's overtime pay provision, which requires employers to pay employees overtime pay at the rate of one and one-half times the regular wage for hours worked in excess of forty in any single work week. 29 U.S.C. § 207(a)(1) (1994 & Supp. IV 1998). This overtime pay requirement does not apply to an “employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by the regulations of the Secretary [of Labor]).” 29 U.S.C.A. § 213(a)(15) (West 1998 & Supp. 2000). Similarly, “any employee who is employed in domestic service in a household and who resides in such household” is exempt from the overtime provisions of the FLSA. *Id.* at § 213(b)(21).

55. *Hearings, supra* note 25, at 18 (statement of Rep. Meek) (observing that the reason many employers of paid household help do not comply with various employment laws is that they “do not see themselves as employers”).

commentators to challenge the extension of labor laws to the household employment relationship.⁵⁶

Against that backdrop, unions as well as community groups can play a pivotal role in assisting domestic service workers in the creation of collective strategies to redefine the work as skilled, valuable labor that merits corresponding treatment. The organization of domestic service workers is vital if they are to achieve and sustain a meaningful voice in determining the terms and conditions under which they sell their labor power. As a first step toward that goal, their exclusion from collective bargaining statutes must be examined.

II. THE EXCLUSION OF DOMESTIC SERVICE WORKERS FROM COLLECTIVE BARGAINING STATUTES

A. *The National Labor Relations Act: Legislative History and Doctrinal Interpretation*

The NLRA gives employees the right to organize and to join a union.⁵⁷ The scope of the Act is expansive, extending to almost any person within the common meaning of the term “employee.”⁵⁸ That

56. See STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* 179–82 (1994) (suggesting that the government may violate the privacy of employing families by requiring paid household employers to report a worker’s wages to the Internal Revenue Service and to ascertain the immigration status of a worker); David Lerner, *Illegal Help? The Law Is the Cheat*, *NEWSDAY*, Feb. 9, 1993, at 89, 1993 WL 11352999 (contending that when the government intervenes in the household employment relationship, it oversteps its bounds into family privacy).

57. Section 7 of the NLRA, the Act’s most crucial provision, states: “Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .” 29 U.S.C. § 157 (1994).

58. See, e.g., *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 90–92 (1995) (observing that the ordinary dictionary definition of “employee” is consistent with the phrasing of the NLRA). The Act defines “employee” as:

Any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

29 U.S.C. § 152(3) (1994) (citation omitted).

said, the Act does not reach all workers. Importantly, while the Act does not extend to some workers as a matter of interpretation and labor policy,⁵⁹ domestic service employees are one of the few groups that the Act expressly excludes by its terms.⁶⁰ The exclusion was predictable considering the status of paid household workers under labor legislation enacted prior to the NLRA. The short-lived NIRA⁶¹ and virtually all state labor laws⁶² likewise excluded them.

59. Workers who are not expressly excluded from the NLRA's definition of "employee" but who otherwise have been denied coverage under the Act include managers, *see* NLRB v. Bell Aerospace Co., 416 U.S. 267, 289 (1974) (stating that management is excluded because workers need protection from management); confidential employees, *see* NLRB v. Hendricks County Rural Elec. Membership Corp., 454 U.S. 170, 177–92 (1981) (approving the Board's denial of protection to confidential employees who satisfy the "labor nexus" test); some full-time faculty members of private universities, *see* NLRB v. Yeshiva Univ., 444 U.S. 672, 686 (1980) (holding that teaching faculty was "managerial" and excluded from the NLRA "employee" category because faculty had almost complete control over academic matters); and workers whose employment does not impact interstate commerce, *see infra* notes 81–85 and accompanying text (noting the Act's limitation to activities that impact interstate commerce).

60. 29 U.S.C. § 152(3) (defining "employee" to include any employee except agricultural laborers, domestics, employees hired by a parent or spouse, independent contractors, supervisors, and workers covered by the Railway Labor Act). *See generally* ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 26–28 (1976) (detailing statutory exclusions from the NLRA's coverage).

Notably, when the labor relations bill was introduced before the Senate Education and Labor Committee in March 1935, "employee" was broadly defined to reach domestic service workers. *See* Michael H. LeRoy & Wallace Hendricks, *Should "Agricultural Laborers" Continue To Be Excluded from the National Labor Relations Act?*, 48 EMORY L.J. 489, 505 n.75 (1999) (noting that "the initial version of Senate Bill 2926 defined employee as 'any individual employed by an employer' and created a very narrow exclusion for 'an individual who has replaced a striking employee' " (quoting S. 2926, 73d Cong. § 3(3) (1934) (statement of Dr. Gus W. Dyer, Professor of Economics, Vanderbilt University), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 2 (1985))). Yet a few months later, when the bill was reported from committee in May, the definition was narrowed, eliminating these workers from coverage. *Id.* at 505. The exclusion followed on the heels of criticism from opponents of the original bill who denounced its broad definition of "employee." In testimony against the bill, a critic expressed his disapproval and observed that the bill gave the labor board the authority to punish any employer who may violate the proposed law, including "every man or woman who employs a servant, and every farmer who keeps a cook or hired man." *Id.* at 506 (quoting *To Create a National Labor Board: Hearing on S. 2926 Before the Senate Comm. On Education and Labor*, 73d Cong. 901–02 (1934) (statement of Dr. Gus W. Dyer, professor of economics at Vanderbilt University), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 683, 940 (1985)). "[T]he revised bill specifically excluded 'any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his father, mother, or spouse.'" *Id.* (emphasis added) (quoting S. 2926, 73d Cong. § 2(3) (1935), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 1070, 1086 (1985)).

61. Ch. 90, 48 Stat. 195 (1933) (held unconstitutional in *A.L.A. Schechter Poultry*

Although the NLRA does not define the scope of the "domestic service" exemption, it clearly reaches "individuals whose employment falls within the commonly accepted meaning of the term 'domestic servant.'"⁶³ The National Labor Relations Board (NLRB or the "Board") has interpreted that meaning to apply to " 'employment on an individual and personal basis,'"⁶⁴ so as to deny collective bargaining rights to workers employed by private households who work within the confines of those households. In contrast, the Board has held that the exemption does not apply to individuals engaged in domestic service who are employed by a corporation in the business of providing personal care and housekeeping services⁶⁵ or by a cooperative housing corporation.⁶⁶

B. State Collective Bargaining Laws and Domestic Service

The NLRA's exclusion of domestic service workers from coverage arguably does not preclude protection under state laws.⁶⁷

Corp. v. United States, 295 U.S. 495, 529-51 (1935)). Enacted in 1933, the NIRA enabled industries to establish, with approval from the government, codes of fair competition to regulate the wages and hours of workers in those industries. Despite its short life-span, the Act left a lasting mark on American labor policy. The codes, which at one point covered more than twenty-two million industrial workers, paved the way for the forty-hour work week. See generally IRVING BERNSTEIN, *A CARING SOCIETY* 117-45 (1985) (describing the origins of the NIRA and subsequent legislation).

62. See, e.g., 1938 Ky. Acts, ch. 105, § 2(e); 1933 N.H. Laws, ch. 87, § 1(V); 1933 N.J. Laws, ch. 152, § 1(f); 1937 Pa. Laws, No. 248, § 2(6); 1936 R.I. Acts & Resolves, ch. 2289, § 2(f); see also Smith, *supra* note 34, at 854 (noting that paid household workers were generally excluded from state labor laws enacted during the Progressive Era and the New Deal).

63. S. REP. NO. 73-1184, at 1, 3 (1934), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 1099, 1102 (1985) ("As now drafted, the bill does not relate to employment as a domestic servant . . . [The word 'employee' is] so defined as to exclude from the operation of the act domestic servants . . .").

64. 30 Sutton Place Corp. & Local 32B-32J, Service Employees Int'l Union, 240 NLRB Dec. (CCH) 752, 753 n.6 (1979) (quoting *Success Village Apartments, Inc. v. Local 376, UAW*, 397 A.2d 85, 87 (Conn. 1978)).

65. See *Ankh Serv., Inc. & Local 50, Service Employees Int'l Union*, 243 NLRB Dec. (CCH) 478, 480 (1979).

66. *Success*, 397 A.2d at 87 (noting that the meaning of "domestic service" under the NLRA "cannot be enlarged to include a maintenance crew or a clerical staff for a 924-unit housing complex"). As the court in *Ankh* observed, the exemption has been applied based "on the principals to whom the employer-employee relationship . . . runs and not merely on the undisputably 'domestic' nature of some of the services rendered." *Ankh*, 243 NLRB Dec. (CCH) at 480.

67. The issue of whether the NLRA preempts state regulation of the labor activities of domestic service workers is a novel question. However, the preemption issue has arisen with respect to other classes of workers excluded under the NLRA, including agricultural workers and supervisors. See *Beasley v. Food Fair of N.C., Inc.*, 416 U.S. 653, 662 (1974) (holding that North Carolina's right-to-work law could not prevent an employer from

Consider, for example, the fact that agricultural laborers, who are also excluded from the NLRA,⁶⁸ have gained protection under a number of state collective bargaining statutes.⁶⁹ State laws also offer the added benefit of not being limited by a jurisdictional dollar amount, as is true of the NLRA. For example, a nonretail business is subject to NLRB jurisdiction if it has interstate sales or purchases of at least \$50,000 annually.⁷⁰ Thus, even if the NLRA did cover domestic service, it is likely that the overwhelming majority of all private household employers would fall below the Board's jurisdictional thresholds.

Yet while state legislation can be an important source of protection for domestic service workers, most state collective bargaining statutes have followed the NLRA, explicitly excluding these workers from coverage.⁷¹ California is an exception to this

discharging supervisory workers because of their membership in a union); *Willmar Poultry Co., Inc. v. Jones*, 430 F. Supp. 573, 577 (D. Minn. 1977) (holding that the NLRA's exclusion of agricultural workers did not preempt Minnesota's regulation of their labor activities). In those instances, courts have stressed the need to examine congressional intent in determining the preemption question. Thus, in *Beasley*, the Court concluded that application of the North Carolina law would clearly contravene the congressional objective, as expressed in section 14(a) of the Act, to free employers from any compulsion, whether derived from federal or state law, to treat supervisors as employees. 416 U.S. at 657. Quoting the lower court decision, the Court reasoned that, as a matter of national labor policy, employers should have the ability to discharge supervisors for membership in a union. *Id.* at 657-58 (quoting 193 S.E.2d 911, 918, 282 N.C. 530, 541 (1973)). In *Willmar*, by contrast, the court was unable to find any expression of a national labor policy that required the labor relations of agricultural workers to be free of all regulation and "left to the unrestrained interplay of economic forces in the market place." 430 F. Supp. at 577. As the court wrote, the legislative history of the NLRA seems to demonstrate that neither Congress nor virtually anyone else was much concerned with the problems of agricultural labor. *See id.* at 577-78. The same can also be said of paid household workers. There is no legislative history to suggest that Congress, in excluding these workers from coverage, intended to prohibit states from regulating the activities of paid household workers as well.

68. 29 U.S.C. § 152(3) (1994); *supra* note 58 (noting that the NLRA's definition of employee excludes agricultural workers).

69. *See generally* LeRoy & Hendricks, *supra* note 60 (examining the exclusion of agricultural workers from the NLRA). States that regulate aspects of the agricultural collective-bargaining relationship include California, New Jersey, Wisconsin, Massachusetts, Oregon, and Arizona. *Id.* at 494-95. LeRoy and Hendricks conclude, however, that most state provisions offer agricultural workers only piecemeal protection, with California being the exception. *Id.*

70. *See* NLRB, A GUIDE TO BASIC LAW AND PROCEDURE UNDER THE NATIONAL LABOR RELATIONS ACT 43-44 (1991) (listing the Board's jurisdictional standards for various enterprises). Congress explicitly approved of the Board's discretionary policy in the Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959. 29 U.S.C. § 164(c)(1) (1994).

71. *See, e.g.*, Colorado Labor Peace Act, COLO. REV. STAT. ANN. § 8-3-104(11)(a) (West 1998); Connecticut Labor Relations Act, CONN. GEN. STAT. ANN. § 31-101(6)

trend.⁷² Section 923 of the state's labor law code⁷³ provides for the organizational rights of workers in the private sector, and recognizes the rights of "the individual workman [to] have full freedom of association, self-organization, and designation of representatives of his own choosing."⁷⁴ In *Annenberg v. Southern California District Council of Laborers and its Affiliated Local 1184*,⁷⁵ the California Court of Appeal held that the California Labor Code extended to domestic service employees, including those employed by a private household.⁷⁶ Including private paid household workers within the coverage of state collective bargaining statutes, while by no means a miracle panacea,⁷⁷ should be a part of an overall strategy that will enable workers to participate actively in shaping their work experiences.

C. Reflections on the Exclusion

The exclusion of domestic service workers from state and federal collective bargaining statutes admits of several explanations. As regards the NLRA in particular, the Act's legislative history indicates that the exclusion sprang in part from administrative difficulties.⁷⁸ Conceived with trade workers in mind who labor for a common

(West 1997); Hawaii Employment Relations Act, HAW. REV. STAT. 377-1(3) (West 1992); MASS. ANN. LAWS ch. 150A § 2(3) (Law. Co-op. 1999); Minnesota Labor Relations Act, MINN. STAT. ANN. § 179.01(4) (West 1993); New York State Labor Relations Act, N.Y. LABOR LAW § 701(3) (McKinney 1988); North Dakota Labor-Management Relations Act, N.D. CENT. CODE § 34-12-01(2) (1987); OR. REV. STAT. § 663.005(3)(c) (1997); PA. STAT. ANN. tit. 43, § 211-3(d) (West 1992); Rhode Island State Labor Relations Act, R.I. GEN. LAWS § 28-7-3(3) (1995); S.D. CODIFIED LAWS § 60-9A-1(3) (Michie 1993); UTAH CODE ANN. § 34-20-2(4)(b) (1997); Vermont State Labor Relations Act, VT. STAT. ANN. tit. 21 § 1502(6)(c) (1987); W. VA. CODE § 21-1A-2(3) (1996); Wisconsin Employment Peace Act, WIS. STAT. ANN. § 111.02(6)(c) (West 1997).

72. California appears to be the only state with a state collective bargaining statute governing private employees that does not exclude private domestic service workers.

73. CAL. LAB. CODE § 923 (1998).

74. *Id.*

75. 38 Cal. App. 3d 637 (1974).

76. *Id.* at 646; *see also infra* Part V (discussing the privacy implications of *Annenberg*).

77. *See supra* Part II.D (recommending the inclusion of private paid household workers in existing collective bargaining statutes, but maintaining that such inclusion will be of limited value because the model of organizing that undergirds the collective bargaining process cannot readily accommodate the structure of domestic service).

78. The Senate Report on the bill that became the original National Labor Relations Act, notes that "[f]or administrative reasons, the committee deemed it wise not to include under the bill agricultural laborers, persons in domestic service of any family or person in his home, or any individual employed by his parent or spouse." SENATE COMM. ON EDUCATION AND LABOR, S. REP. NO. 74-573, at 7 (1935), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT OF 1935, at 2306 (1985).

employer and at a common work site,⁷⁹ the Act recognizes that collective rather than individual action is necessary for workers to have an effective voice at the workplace. Domestic service, however, sharply counters the collective ideology of the NLRA as well as the Act's concerted action requirement.⁸⁰ Most domestic service workers labor in one-on-one employment relationships in isolation from each other. Juxtaposed against the backdrop of industrial jobs, the thought of applying collective bargaining legislation to the field of domestic service was no doubt a daunting proposition.

The domestic service exemption may also have reflected congressional concern regarding the constitutionality of its commerce power.⁸¹ The NLRA covers only those workers whose employment affects interstate commerce.⁸² In light of Supreme Court rulings invalidating the NIRA on commerce grounds,⁸³ legislators

79. See Howard Wial, *The Emerging Organizational Structure of Unionism in Low-Wage Services*, 45 RUTGERS L. REV. 671, 681-82 (1993) (noting that the model of worksite unionism provides the template for NLRA caselaw).

80. Section 7 of the NLRA guarantees employees the right to engage in "concerted activities." 29 U.S.C. § 157 (1994). The relevant portion states that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities, for the purpose of collective bargaining or other mutual aid or protection." *Id.* Although the collective conduct of several employees most readily qualifies as concerted activity, the conduct of a single employee may also constitute concerted activity. *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 831-35 (1984); see also *Mobil Exploration & Producing U.S., Inc. v. NLRB*, 200 F.3d 230, 238 (5th Cir. 1999) (noting that an individual employee may be engaged in concerted activity when he "intends to induce group activity" and when he "acts as a representative of at least one other employee"); *Compuware Corp. v. NLRB*, 134 F.3d 1285, 1288 (6th Cir. 1998) (stating that the relevant question in determining whether the actions of an individual employee constitute concerted action is "whether the employee acted with the purpose of furthering group goals"); *Ontario Knife Co. v. NLRB*, 637 F.2d 840, 845 (2d Cir. 1980) (stating that action taken by an individual must be "'looking toward group action'" in order to qualify as protected concerted activity (quoting *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964))).

81. See 29 U.S.C. § 151 (1994) (stating, in section 1 of the NLRA, that "[i]t is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce"); see also 79 CONG. REC. 9721 (expressing congressional concern about whether agricultural labor fell under the label of "interstate commerce"). The constitutionality of the NLRA was ultimately upheld in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937).

82. See *Jones & Laughlin Steel Corp.*, 301 U.S. at 31 (holding that the NLRA is constitutional because it "purports to reach only what may be deemed to burden or obstruct" interstate or foreign commerce).

83. In holding that the NIRA was unconstitutional, the Supreme Court concluded that the Act was an improper delegation of congressional commerce power. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 550 (1935). The Court also held that the Act burdened intrastate commerce, with only an indirect effect on interstate commerce, thus constituting an improper use of congressional power. *Id.* at 550-51.

understandably would have opposed regulating domestic service, an occupation that most people so clearly regarded as a private matter between employer and employee.⁸⁴ As a Senate Report explained years later in the context of the FLSA, to conclude that domestic service workers were engaged in interstate commerce would expand the commerce clause “ ‘to include every aspect of American life.’ ”⁸⁵

A belief that domestic service workers simply did not need the protections afforded by the NLRA also explains the exemption. In the words of one court, domestics had been exempted because in domestic service “there never would be a great number suffering under the difficulty of negotiating with the actual employer and there would be no need for collective bargaining and conditions leading to strikes would not obtain.”⁸⁶ That view rests on an assumption that domestic service is easy, stress-free work and “that the private home furnishes a safe, moral, healthful environment in which to work; requires a less restrictive and less tense type of activity than industry; and assures the employer’s interest in the welfare of the employee because of their personal relation.”⁸⁷ Conceptualizing domestic service in this fashion bolsters the perception that the home shielded paid household workers from the ills associated with industrial life such that they did not require collective bargaining rights.

However, prevailing work conditions throughout the late nineteenth and early twentieth centuries told a different story. Low wages⁸⁸ and extraordinarily long hours, combined with excessive

84. See Smith, *supra* note 34, at 906–12 (discussing the perception of the domestic service relationship as a matter of family privacy).

85. Patricia Mulkeen, Note, *Private Household Workers and the Fair Labor Standards Act*, 5 CONN. L. REV. 623, 631–32 (1973) (quoting S. REP. NO. 92-842 at 98 (1972)).

86. North Whittier Heights Citrus Ass’n v. NLRB, 109 F.2d 76, 80 (9th Cir. 1940). According to the court, three exemptions under section 2(3) of the Act—domestic service workers, agricultural workers, and individuals employed by a parent or spouse—could be explained on this basis. *Id.*

87. Leila Doman, *Legislation in the Field of Household Employment*, 31 J. HOME ECON. 90, 93 (1939) (describing and evaluating employment legislation as applied to domestics).

88. Early reports on the conditions of domestic service concluded that wages paid in the occupation were higher than those paid in factories and shops. See Gail Laughlin, *Domestic Service: A Report Prepared Under the Direction of the Industrial Commission*, in 14 U.S. INDUSTRIAL COMMISSION, 57TH CONG., REPORT ON THE RELATIONS AND CONDITIONS OF CAPITAL AND LABOR 739, 757 (1st Sess. 1901) (stating that domestic service paid higher wages relative to the wages paid in factory and service jobs); LUCY MAYNARD SALMON, *DOMESTIC SERVICE* 93 (London, MacMillan Co. 1897) (noting that “[t]he wages received in domestic service are relatively . . . higher than the average wages received in other wage-earning occupations open to women”). Bettina Berch, however, argues that these reports were flawed because they failed to account for the relatively longer hours of work performed by domestic service workers. Bettina Berch, *The Sphinx*

employer demands, social inferiority, and isolation, stigmatized domestic service as an occupation desperately in need of reform.⁸⁹ Workers gave witness to that need through frequent acts of individual protest, including work slowdowns, work stoppages, fabricated illnesses,⁹⁰ and, of course, quitting either to find a better domestic situation or, as was often the case, to locate work in the expanding industrial sector.⁹¹ Collective acts of resistance often supplemented these individual strategies and became particularly pronounced in the years following the Great Depression.⁹² Faced with deteriorating working conditions, paid household workers joined forces to determine under what conditions their labor would be performed.

In New York City in 1936, workers formed the Domestic Workers Alliance backed by the National Negro Congress.⁹³ One year later in Washington, D.C., where the 1930 census indicated that eighty-five percent of all domestics were Black, workers organized the Domestic Worker's Union.⁹⁴ Other cities that proved fertile

in the Household: A New Look at the History of Household Workers, 16 REV. RADICAL POL. ECON. 105, 112–16 (1984); see also FAYE DUDDEN, *SERVING WOMEN* 220–22 (1983) (noting the problems with early investigations into the wages of domestic service and suggesting that domestic workers did not share the view that the work was well paid).

89. LAUGHLIN, *supra* note 88, at 756–60 (discussing the disadvantages of domestic service).

90. See JACQUELINE JONES, *LABOR OF LOVE, LABOR OF SORROW* 131–32 (1986) (documenting various tactics used by Black domestics to resist unbearable labor demands of employers); see also DILL, *supra* note 27, at 90–96 (discussing tactics used by Black domestics to resist the control of white employers); KATZMAN, *supra* note 33, at 197–98 (commenting on how Black domestics engaged in work slowdowns by using white-held stereotypes to their advantage to reduce employer demands); DONNA L. VAN RAAPHORST, *UNION MAIDS NOT WANTED: ORGANIZING DOMESTIC WORKERS 1870–1940*, at 213 (1988) (discussing forms of worker control, including theft and sabotage).

91. KATZMAN, *supra* note 33, at 228 (noting that women took jobs in areas other than domestic service when industrialization created new job openings).

92. See JEAN BROWN, *WOMEN'S BUREAU, U.S. DEP'T OF LABOR, BRIEF ON HOUSEHOLD EMPLOYMENT IN RELATION TO TRADE UNION ORGANIZATION* 13 (1938) [hereinafter BROWN, *BRIEF ON HOUSEHOLD EMPLOYMENT*] (observing that “ever since the depression and the [passage of the] N.R.A., with its stress on collective bargaining, there has been a mushroom growth of domestic workers' clubs, unions and associations”); BRENDA CLEGG GRAY, *BLACK FEMALE DOMESTICS DURING THE DEPRESSION IN NEW YORK CITY, 1930–1940*, at 105–08 (1993) (discussing activities of domestic service unions in New York City in the 1930s).

93. See GRAY, *supra* note 92, at 105.

94. See *Why is the Household Employee so Heavily Out-Weighed in the Scale of Security?* HOUSEHOLD OCCUPATION IN THE DISTRICT OF COLUMBIA (Wash. League of Women Shoppers, Wash., D.C.) [n.d.], at 8 (Watson Papers, Folder 6.40, Catherwood Library, Cornell School of Industrial Labor Relations) [hereinafter *Household Employee in the Scale of Security*] (on file with the North Carolina Law Review). But see BALTIMORE AFRO-AMERICAN, Oct. 10, 1936, reprinted in 6 *THE BLACK WORKER: THE ERA OF POST-WAR PROSPERITY AND THE GREAT DEPRESSION, 1920–1936*, at 184, 184–

ground for domestic service unions included Milwaukee, Chicago, Philadelphia, Oakland, and Newark.⁹⁵ Although most of these groups were short-lived,⁹⁶ they pressed for a similar objective: to regulate domestic service so as to provide household workers with the same protections afforded workers in other labor settings.⁹⁷ To that end, domestic service unions “advocated minimum wage and fixed hours for domestics, workmen’s compensation, social security and old age

85 (Philip S. Foner & Ronald Lewis eds., 1981) (stating that the Domestic Worker’s Union organized in 1935).

95. BROWN, BRIEF ON HOUSEHOLD EMPLOYMENT, *supra* note 92, at 14; *Household Employee in the Scale of Security*, *supra* note 94, at 8.

96. See GRAY, *supra* note 92, at 107 (referencing the lack of communication, financial support, and administrative difficulties as factors in the inability of domestic service unions to sustain longevity); Rosalyn Terborg-Penn, *Survival Strategies Among African-American Women Workers: A Continuing Process*, in WOMEN, WORK, AND PROTEST 139, 145 (Ruth Milkman ed., 1985) (attributing the short lifespan of domestic service unions to the lack of power among Black women and the oversupply of paid household workers, particularly during the Depression); *Household Employee in the Scale of Security*, *supra* note 94, at 8 (noting that paid household workers have limited bargaining power and little time to devote to organizing).

97. See DILL, *supra* note 27, at 7 (noting the efforts of domestic service unions to “make their labor ‘contract’ more comparable to that of an industrial worker”); Jean Collier Brown, *Household Employees Join the CIO*, 35 J. HOME ECON. 265, 266 (1943) [hereinafter Brown, *Household Employees Join the CIO*] (describing one objective of a domestic service union as placing “household employment on the same dignified occupational plane with other skilled jobs”). In an attempt to attract more women into domestic service, household reformers likewise argued in favor of placing the job on a footing comparable to that of industrial occupations. See C. HÉLÈNE BARKER, WANTED A YOUNG WOMAN TO DO HOUSEWORK: BUSINESS PRINCIPLES APPLIED TO HOUSEWORK 13-15 (1917); IDA TARBELL, WHAT A FACTORY CAN TEACH A HOUSEWIFE 1-2 (Comm’n on Household Employment, Young Womens Christian Ass’ns, Bulletin No. 3, n.d.) (reprinted from ASSOC. MONTHLY, Nov. 1916) (YWCA National Board Archives, New York, Records File Collection, Sophia Smith Collection) (on file with the North Carolina Law Review); Dorothy P. Wells, *Raising Standards of Household Employment*, EMPLOYMENT SERVICE NEWS, Aug. 1935, at 10. Most reformers, however, eschewed unionization, preferring instead to encourage the use of voluntary, standardized employment contracts to improve the conditions in domestic service. See Smith, *supra* note 34, at 883-86, 903-06. As Palmer observes, the reliance by reformers on a voluntary approach to improve the labor conditions in domestic service underscored the fault line separating the interests of middle-class and working-class women:

[R]eformers had divided interests on the issue of domestic labor. They recognized the needs of domestic servants as workers who deserved the same protections as other women workers. But as middle-class women, they felt union with other women of their class who desired to have enough household help so that they could participate in public life. Instead of advocates, reformers became mediators on the issue of domestic work.

PALMER, *supra* note 33, at 112-13; see also BROWN, BRIEF ON HOUSEHOLD EMPLOYMENT, *supra* note 92, at 12 (noting that the “employer approach” to improving domestic service, which relied upon voluntary agreements, was inadequate and did “not represent a real bargaining process between employers and employees”).

insurance, holiday and vacation pay, and unemployment insurance.”⁹⁸ Unions also served as arbitrators between domestic workers and employers to help resolve disputes over unpaid wages.⁹⁹

Although a few domestic service unions had the support of trade unionists,¹⁰⁰ the labor movement largely ignored the many women who performed household work for pay,¹⁰¹ despite the fact that they accounted for more wage-earning women than any other occupation.¹⁰² Unlike female shop and factory workers, paid household workers posed no competitive threat to male workers; there was no fear that work in the home, performing domestic chores and caring for children, would undercut wages for working men.¹⁰³ Domestic service epitomized the belief among trade unionists that the labor of a woman “‘should be only of a domestic nature.’”¹⁰⁴ From

98. GRAY, *supra* note 92, at 106; *see also* BROWN, BRIEF ON HOUSEHOLD EMPLOYMENT, *supra* note 92, at 15–16 (describing activities of domestic service unions); Terborg-Penn, *supra* note 96, at 146 (noting that the United Domestic Workers’ Union, a Baltimore based union, demanded that domestic workers receive benefits comparable to those extended to industrial workers).

99. *See* GRAY, *supra* note 92, at 106; *see also* PALMER, *supra* note 32, at 126 (referencing efforts of unions to act as intermediaries in wage conflicts between paid household workers and employers); Brown, *Household Employees Join the CIO*, *supra* note 97, at 267 (noting that domestic service unions fulfill the function of handling grievances between workers and employers).

100. *See infra* notes 192–204 and accompanying text (discussing the Domestic Workers Industrial Union, which was formed as a local of the Industrial Workers of the World); *see also* Brown, *Household Employees Join the CIO*, *supra* note 97, at 265 (describing the first CIO-charted union of paid household workers in Baltimore).

101. *See* Lars Christiansen, *The Making of a Civil Rights Union: The National Domestic Workers Union of America 60–61* (1999) (unpublished Ph.D. dissertation, Florida State University) (on file with the North Carolina Law Review) (highlighting the exclusion of paid household workers from the agenda of various labor organizations); *see also* PALMER, *supra* note 33, at 127 (observing that domestic service “was not a high priority for unions” and reporting the comment of a labor official who felt that the concerns of domestic service workers would be dealt with after the labor movement had organized other women workers); VAN RAAPHORST, *supra* note 90, at 238–39 (noting the efforts of paid household workers to form their own unions in the face of disinterest from organized labor).

102. JANET HOOKS, *WOMEN’S BUREAU, U.S. DEPT OF LABOR, BULLETIN NO. 218, WOMEN’S OCCUPATIONS THROUGH SEVEN DECADES 52* (Zenger Publishing Co. 1978) (1947) (providing statistics which indicate that, from 1870 to 1940, more wage-earning women worked in the field of “domestic service” than in any other occupation); KATZMAN, *supra* note 33, at 228.

103. *See* ALICE KESSLER-HARRIS, *OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES 201–04* (1982) (discussing the various motivations that led trade unionists to support protective labor legislation for women factory workers). *See generally* JUDITH BAER, *THE CHAINS OF PROTECTION: THE JUDICIAL RESPONSE TO WOMEN’S LABOR LEGISLATION* (1978) (examining protective labor legislation for women).

104. PHILIP S. FONER, *WOMEN AND THE AMERICAN LABOR MOVEMENT: FROM*

the perspective of most trade unions, the labor movement did not have a role to play in aiding a group of workers who were women,¹⁰⁵ disproportionately Black,¹⁰⁶ unskilled,¹⁰⁷ and whose one-on-one employment patterns were the antithesis of concerted activity.

D. The Distinct Characteristics of the Domestic Service Workforce: Implications for Organizing

Against this historical backdrop, and in light of the contemporary economic difficulties confronting paid household workers, it is tempting to offer a quick-fix solution; namely, rectify the past by bringing these workers within the scope of collective bargaining statutes. While this rectification should be encouraged, it may achieve little from a practical standpoint. Such is the case, in part, because domestic service—as a form of low-wage service work—does not fit easily into the model of industrial or worksite unionism that undergirds the collective bargaining process in this country. Designed with manufacturing jobs in mind, industrial unionism has been most effective when applied to “male, full-time workers in mass production industries.”¹⁰⁸ That approach is badly out of step with the rise of service sector jobs, particularly low-wage service work.¹⁰⁹

THE FIRST TRADE UNIONS TO THE PRESENT 17 (1982) (quoting a committee report on female labor presented at the convention of the National Trades' Union in 1836).

105. See, e.g., Cobble, *Remaking Unions*, *supra* note 13, at 5–6 (providing an overview of the labor movement's discriminatory treatment of women); Crain, *Feminizing Unions*, *supra* note 15, at 1160 (discussing the AFL's “ambivalence” toward organizing women); Ruth Milkman, *New Research in Women's Labor History*, 18 *SIGNS* 376, 385 (1993) (documenting the labor movement's resistance to organizing women).

106. See Herbert Hill, *Black Workers, Organized Labor, and Title VII of the 1964 Civil Rights Act: Legislative History and Litigation Record*, in *RACE IN AMERICA: THE STRUGGLE FOR EQUALITY* 263, 277, 283–84, 298 (Herbert Hill & James E. Jones, Jr. eds., 1993) (discussing the extent to which Black were excluded from unions prior to the 1964 Civil Rights Act); see also FONER, *supra* note 104, at 364 (observing that even when trade unions became more responsive to the needs of women after World War II, Black women remained excluded from many unions).

107. See JONES, *supra* note 90, at 147 (“As blacks, females, and unskilled workers, the vast majority of southern black women had no role to play in trade unions dominated by white men.”); *id.* at 168 (“As a trade union, the American Federation of Labor had no interest in the fate of unskilled wage earners.”); see also FONER, *supra* note 104, at 99–100 (observing that women workers generally, because they were considered unskilled relative to men, did not fit into the agenda of the American Federation of Labor (AFL)).

108. Judith Gerson, *Clerical Homeworkers: Are They Organizable?*, in *WOMEN AND UNIONS: FORGING A PARTNERSHIP*, *supra* note 13, at 226, 243; see also Cobble, *Remaking Unions*, *supra* note 13, at 4 (observing that “the majority of unions . . . remain wedded to an industrial model of employee representation [that emerged] primarily in response to the needs of blue-collar male workers”).

109. The disconnect between the NLRA and the proliferation of new workplace arrangements is, of course, not limited to low-wage service workers. Unions have also

Scholars have identified several characteristics of low-wage service work that clash with the conventional organizing model and that are exacerbated in the context of domestic service work. First, many service jobs entail personal service, with workers interacting directly with clients, patients, or customers.¹¹⁰ The presence of these third parties complicates the conventional “us-them” view of workplace relations.¹¹¹ The personal dimension of low-wage service jobs often leads service workers to be equally, if not more, concerned with issues of “product” quality as with the bread-and-butter issues—i.e., favorable working conditions, benefits, wages, and the like—that dominate traditional union strategies.¹¹² This observation holds particular relevance for domestic service given that the very nature of the work revolves around personal service, entailing considerable direct contact between household employees and employers. More importantly, household employers are the final consumers of the services provided, which adds a layer of complication rarely seen in most workplace relations. Personalism pervades the paid household relationship with workers often becoming privy to the most intimate details of their employers’ affairs.¹¹³ To quote one commentator, “[i]n no other field does labor become so emotionally involved with management.”¹¹⁴ The conventional “us-them” organizing strategy

been unable to accommodate the needs of many skilled and professional workers. See Alan Hyde, *Employee Caucus: A Key Institution in the Emerging System of Employment Law*, 69 CHI.-KENT L. REV. 149, 151 (1993) (noting the need for labor law reform if unions are to reach “white collar, professional, managerial, and technical workers”).

110. See, e.g., James Green & Chris Tilly, *Service Unionism: Directions for Organizing*, 1987 INDUS. REL. RES. ASS’N SPRING PROC. 486, 488 (noting that “service workers have a different relation to the product and the customer than do most goods-producing workers”); Wial, *supra* note 79, at 676 (noting that service workers often tend to be concerned with the quality of the service that they provide because their jobs entail a degree of personal contact with the “final consumer”).

111. Dorothy Sue Cobble, *Union Strategies for Organizing and Representing the New Service Workforce*, 43 INDUS. REL. RES. ASS’N ANN. PROC. 76, 81 (1990) [hereinafter Cobble, *Union Strategies*] (observing that “in many workplaces, the older ‘us against them’ model that assumes hostility and rigid demarcations between labor and management no longer suits workers or their bosses”); Green & Tilly, *supra* note 110, at 488 (observing that because service workers often come into direct contact with the customer, they “have a greater feeling of accountability”).

112. See Green & Tilly, *supra* note 110, at 488; Wial, *supra* note 79, at 676.

113. See, e.g., GLENN, *supra* note 27, at 154 (stating that “[e]mployers are concerned with the worker’s total person—her moral character and personality, as well as her work skills” and that workers have “access to the most intimate regions of the household and might become privy to family secrets”); ROMERO, *supra* note 27, at 105–06 (applying Arlie Hochschild’s work on the commercialization of emotional labor to domestic service).

114. Ron Chernow, *All in a Day’s Work*, MOTHER JONES, Aug. 1976, at 11, 12.

does not begin to capture the interpersonal dynamics that define many paid household relationships.

Second, because there is very little union density among service sector jobs,¹¹⁵ service workers are less familiar with organizing and its advantages relative to their manufacturing counterparts.¹¹⁶ Since domestic service is one of the least organized industries, it is not surprising that paid household workers, perhaps more so than most service workers, have had extremely limited exposure to unions. Even during the 1920s and the 1930s, the heyday of union activity among domestic service workers, many workers were unfamiliar with organizing. For example, in her study of domestic service work in New York City during the Depression, Brenda Gray reports that none of the women she interviewed, all of whom had worked as paid household workers, had heard of domestic service unions.¹¹⁷ That lack of familiarity undermines traditional union strategies that are based on the presumption that workers have knowledge of and experience with unions.¹¹⁸

Third, traditional organizing depends heavily on a group of workers employed at a common job site for a single employer, such that both the employer and the bargaining unit are easily identifiable.¹¹⁹ This type of identification—exceedingly difficult in the

115. See Gapasin & Yates, *supra* note 16, at 51 (noting the extremely low union density in the service industries). The decline in union membership among service industries is part and parcel of a more general decline in union membership. See, e.g., Henry S. Farber, *The Recent Decline of Unionization in the United States*, 238 SCIENCE 915, 915 (1987) (observing that union membership has declined dramatically since the mid-1970s); Leo Troy, *The Rise and Fall of American Trade Unions: The Labor Movement from FDR to RR*, in UNIONS IN TRANSITION 75, 82 tbl.3 (Seymour Martin Lipset ed., 1986) (noting that union representation of the private sector nonagricultural workforce declined from 35.7% in 1953 to 26.6% in 1973 and 17.8% in 1983).

116. See Wial, *supra* note 79, at 677 (noting that “[w]orkers in occupations or industries that have low union densities and no tradition of union organization may be unfamiliar with unions and have little sense that a union would be appropriate for them”).

117. GRAY, *supra* note 92, at 108. This finding is not surprising; domestics labor in isolation from each other and have limited time or energy to foster social connections. See *supra* note 36 and accompanying text (describing the historical lack of free time enjoyed by most domestic service workers). The same remains true among current domestic workers. See Victor Narro, *Home Is Where the Union Is: Los Angeles Domestic Workers Find Innovative Ways to Exercise Their Rights*, 5 THIRD FORCE, Jan.–Feb. 1998, at 18, 19 (on file with the North Carolina Law Review); Tracy Wilkinson, *To Protect Those Who Must Serve*, L.A. TIMES, Feb. 12, 1992, at A1.

118. See Green & Tilly, *supra* note 110, at 487. This presumption is evident when unions target so-called “hot shops”—work forces that evince their interest in unionization by calling a union in their area. *Id.*

119. John Howley, *Justice for Janitors: The Challenge of Organizing in Contract Services*, LAB. RES. REV., Spring 1990, at 61, 64–65.

service industry where workers “are employed at smaller and more geographically decentralized worksites”¹²⁰—becomes almost impossible in domestic service because of the one-on-one character of the private household employment relationship. Fourth, industrial unionism envisions the organization of workers on an employer-specific basis. Many low-wage service workers, however, pose a challenge to this strategy because they frequently lack long-term attachments with particular employers.¹²¹ The considerable turnover that occurs within the domestic service industry highlights this observation; faced with extremely low wages, a lack of benefits, and unpredictable employment situations, household workers are constantly looking for new jobs.¹²² Finally, unions historically have privileged the needs of white male workers, while according only scant attention to the interests of other groups.¹²³ This may hinder effective organizing within the service industry as women and minorities are disproportionately represented among low-wage service jobs.¹²⁴ And, as noted earlier, domestic service includes a disproportionate number of women of color,¹²⁵ a group that has long existed on the margin of organized labor’s agenda.¹²⁶ The differences that exist between private paid household work and more traditional forms of work highlight the need to develop organizing strategies that can accommodate the diversity of workplace relationships.

III. FORGING AN ALTERNATIVE VISION

The distinct features of low-wage service sector jobs have spawned the advancement of creative organizing strategies to accommodate the proliferation of alternative work arrangements and to improve the economic position of low-wage service workers. Encompassing both union and nonunion structures, these strategies

120. Wial, *supra* note 79, at 678; *see also* Howley, *supra* note 119, at 65 (noting that in the building services industry a given contractor can have a thousand employees located at numerous sites in one city).

121. Wial, *supra* note 79, at 679.

122. *See supra* note 43 and accompanying text (discussing the need among paid household workers to engage in a constant job search).

123. *See supra* note 13 and accompanying text.

124. *See supra* notes 13–14 and accompanying text (noting the concentration of women and people of color in contingent work and questioning the ability of traditional organizing methods to respond to the needs of these workers); *see also* Gapasin & Yates, *supra* note 16, at 59 (noting that “a reborn labor movement must be absolutely committed to racial and gender equality”).

125. *See supra* note 27 and accompanying text.

126. *See supra* notes 105–06.

include organizing outside of the NLRA framework,¹²⁷ community-based organizing,¹²⁸ central labor councils,¹²⁹ employee caucuses,¹³⁰ and worker cooperatives.¹³¹ This Part explores the relevance of some of these approaches for organizing private paid household work. Part III.A examines the Service Employees International Union's (SEIU) campaign to organize home-care workers in California. Part III.B draws from the work of Professor Dorothy Sue Cobble¹³² to evaluate

127. The SEIU's Justice for Janitors campaign best illustrates the organization of workers outside of the NLRA structure. *See, e.g.,* Wial, *supra* note 79, at 693–94; *see also* Gapasin & Yates, *supra* note 16, at 54 (“It is possible to organize unions outside of the NLRA electoral framework, through more direct mass actions which force the employer(s) to recognize the union. This has become increasingly common, and it is estimated that some seventy thousand workers were organized without elections in 1996.”); Richard Hurd & William Rouse, *Progressive Union Organizing: The SEIU Justice for Janitors Campaign*, REV. RADICAL POLITICAL ECON., Fall 1989, at 70 *passim*.

128. Community-based institutions can prove particularly effective in helping to organize contingent and immigrant workforces. Howley, *supra* note 119, at 69–70; Ruth Needleman, *Building Relationships for the Long Haul: Unions and Community-Based Groups Working Together To Organize Low-Wage Workers*, in ORGANIZING TO WIN, *supra* note 11, at 71, 79–80. As Ruth Needleman suggests, the value of a community-based organizing strategy is its ability to address the totality of problems that often shape the lives of low-income workers. Needleman, *supra*, at 71–74; *see also* Jennifer Gordon, *We Make the Road By Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407, 428–32 (1995) (describing the Workplace Project, a community-based worker center in Long Island, N.Y., dedicated to organizing immigrant workers); Immanuel Ness, *Organizing Immigrant Communities: UNITE's Workers Center Strategy*, in ORGANIZING TO WIN, *supra* note 11, at 87, 88–92 (describing a community-based organizing approach in New York City's garment industry).

129. Central labor councils (CLCs) are voluntary associations of AFL-CIO locals that operate on a regional, city, or county level. Gapasin & Wial, *The Role of Central Labor Councils in Union Organizing in the 1990s*, in ORGANIZING TO WIN, *supra* note 11, at 54, 54. Although the primary activities of CLCs revolve around electoral politics and political lobbying, in recent years they have become an important force in helping to organize workers. *Id.* at 56; *see also* Gapasin & Yates, *supra* note 16, at 55–57 (discussing characteristics of CLCs successful in organizing labor forces).

130. Alan Hyde encourages the organization of employees into voluntary caucuses as an alternative to the formal structure of a union. *See* Alan Hyde, *Employee Caucus: A Key Institution in the Emerging System of Employment Law*, 69 CHI.-KENT L. REV. 149 *passim* (1993). Included among the types of employee caucuses he identifies are those structured around identity groups along ethnic, racial, gender, or sexual preference lines. *Id.* at 149. As described by Hyde, employee caucuses would be limited to the employees of a particular employer. *Id.* at 158. Consequently, this form of employee representation is of questionable applicability to workers like paid household workers who labor in isolation from each other and do so for several different employers.

131. *See infra* Part IV.B (discussing worker-run domestic service cooperatives); *see also* Jennifer Middleton, *Contingent Workers in a Changing Economy: Endure, Adapt, or Organize?*, 22 N.Y.U. REV. L. & SOC. CHANGE 557, 611–13 (1996) (discussing use of the cooperative model as a means to organize contingent workers).

132. *See* DOROTHY SUE COBBLE, *DISHING IT OUT: WAITRESSES AND THEIR UNIONS IN THE TWENTIETH CENTURY* (1991) [hereinafter, “COBBLE, DISHING IT OUT”];

the merits of occupational unionism, an organizing model that unites workers according to occupation, not worksite.

A. *The Service Employees International Union's Home-Care Campaign: The Public Face of Domestic Service*

In February 1999, the SEIU successfully organized 74,000 home-care workers in Los Angeles, achieving the largest union victory in the United States since 1937.¹³³ The result of a decade-long battle, the campaign was hailed as indicative of organized labor's "new commitment . . . to focus on women, minorities, and low-wage workers."¹³⁴ The SEIU's victory is particularly instructive because of the close connection between home-care services and paid household work. Similar to domestic service, home-care work exists as a form of women's work that employs disproportionate numbers of women of color.¹³⁵ Both types of work occur within the privacy of individual homes and involve a range of personal service activities necessary for maintaining people on a daily basis. In paid household work, these activities include preparing and serving food, laundering and repairing clothing, and maintaining furnishings and appliances. Home-care work encompasses many of these same activities,¹³⁶ but, as

Cobble, *Organizing the Postindustrial Work Force*, *supra* note 11; Cobble, *Remaking Unions*, *supra* note 13; Cobble, *Union Strategies*, *supra* note 111.

133. Nancy Cleeland, *Union Ranks Up In '99, Led By California*, L.A. TIMES, Jan. 20, 2000, at A1; Steven Greenhouse, *In Biggest Drive Since 1937, Union Gains A Victory*, N.Y. TIMES, Feb. 26, 1999, at A1. The SEIU is sponsoring similar drives in other parts of the country. See Daniel B. Wood, *A New Union Wave Gathers Momentum in California*, CHRISTIAN SCI. MONITOR, Mar. 15, 1999, at 2 (noting the SEIU drives to organize home-care workers in other states, including Washington, Oregon, New York, Illinois, and Connecticut). For general information on the SEIU and its efforts to organize home-care workers, see <http://www.seiu.org>.

134. Michael White, *Health-Care Workers Vote To Unionize: Landslide Victory*, NAT'L POST, Feb. 27, 1999, at D9.

135. See Bureau of Labor Statistics, U.S. Dep't of Labor, *Household Data Annual Averages*, EMP. & EARNINGS, Jan. 2000, at 166, 181 tbl.11 (reporting that, in 1999, 80.5% of health aides, except nursing aides, were women, 25% were Black, and 10% were of Hispanic origin); see also Glenn, *supra* note 46, at 29-30 (characterizing home care work as a subset of aide work and observing that aide work "continues to be a specialty of racial-ethnic women"); Cleeland, *supra* note 133 (noting that home-care workers in California are mainly Black women and Latinas).

136. See *Service Employees Int'l Union, Local 434 v. County of Los Angeles*, 225 Cal. App. 3d 761, 765 n.2 (1990). The California Court of Appeal noted in *Service Employees* that available services under California's statutory provisions include the following:

[D]omestic services (e.g., sweeping, changing bed linen); heavy cleaning to remove hazardous debris or dirt; preparation of meals, meal cleanup and planning of menus; laundry services; food shopping and other shopping or errands; nonmedical personal services; transportation to and from appointments with physicians, dentists and other health practitioners, or transportation

an occupation that primarily serves disabled and elderly clients, it entails more personal hygiene care, such as helping individuals with bathing and dressing.¹³⁷ As Judith Rollins notes, home-care services are a “disguised [form of] domestic work.”¹³⁸ The primary distinction between the two is that home-care workers are employed through an agency, whereas private household workers are employed directly by household members.¹³⁹

Home-care work also closely resembles paid household work in terms of labor conditions. Most home-care workers receive minimum wages and work on a part-time, contingency basis.¹⁴⁰ Benefits such as health insurance and pensions are rare.¹⁴¹ Not surprisingly, these conditions promote tremendous turnover.¹⁴² In California, for example, the turnover rate is forty percent annually.¹⁴³

To combat these trends, the SEIU initiated efforts to organize the home-care workers in Los Angeles in 1987.¹⁴⁴ In some respects, the campaign proceeded along traditional lines; most notably, it was pursued within the NLRA framework, with the aim of organizing workers under NLRB-election procedures.¹⁴⁵ In other respects,

necessary for fitting health related appliances, devices and special clothing; [and] yard hazard abatement.

Id. (citing CAL. WELF. & INST. CODE § 12300; Cal. Reg. 30-757).

137. See Laura Freeman, *Home-sweet-home Health Care*, MONTHLY LAB. REV., Mar. 1995, at 3, 4 (describing services provided by home health care workers).

138. ROLLINS, *supra* note 25, at 57.

139. See Jennifer Bickham Mendez, *Of Mops and Maids: Contradictions and Continuities in Bureaucratized Domestic Work*, 45 SOC. PROBS. 114, 118 (1998) (noting that “[t]he crucial difference between ‘traditional’ and bureaucratized domestic work is the addition of an agency”).

140. See Needleman, *supra* note 128, at 78 (detailing the work patterns of home-care workers in California); Alex Pham, *Many Aides Thrive on the Intangible Rewards*, BOSTON GLOBE, Oct. 7, 1997, at A16 (noting that seven out of ten home-care workers in Boston work part-time); John Seeley, *Under Powered: Home-Care Workers Form Uneasy Alliance with Their Disabled Clients*, L.A. WEEKLY, Dec. 27, 1996, at 11, LEXIS, LA Weekly File (noting that eighty percent of home-care workers in California work less than forty hours and forty-six percent of them report being unable to find steady full-time employment).

141. Needleman, *supra* note 128, at 78; see also Cleeland, *supra* note 133 (noting the lack of benefits received by home-care workers); Donna Huffaker, *In-home Workers to Vote on Union Contract, Raise*, DAILY NEWS OF L.A., July 10, 1999, at N3, LEXIS, The Daily News of Los Angeles File (same).

142. Needleman, *supra* note 128, at 78 (observing that the turnover rate is “legendary” among home-care workers); Pham, *supra* note 140 (noting that the high turnover rate among home-care workers is a reflection of low wages).

143. Wood, *supra* note 133, at 2.

144. Greenhouse, *supra* note 133.

145. Needleman, *supra* note 128, at 79–80 (discussing the SEIU’s efforts to get home-care workers to sign authorization cards and the ensuing election in which workers voted for the SEIU to represent them).

however, the campaign relied upon novel approaches tailored to the unique structural attributes of government-funded, home-care services.¹⁴⁶ In California, for example, such services are administered by the state's In Home Support Services Program ("Program" or "IHSS Program"), which in turn is implemented by each county.¹⁴⁷ Under the Program, county officials decide whether a client qualifies for a home-care worker and assess the type of assistance required.¹⁴⁸ Thus, for starters, the SEIU had to determine who employed the workers: Was it the state, the county, or perhaps the individual client? Although the state pays the worker directly and the counties implement the Program, each client decides issues relating to hiring, supervising, and possibly terminating the worker. If the clients were the employers, the SEIU would be left with a situation analogous to that which exists in the private paid household workers industry: a large dispersed pool of individual employers and workers who typically labor for more than one client.¹⁴⁹

Faced with that intimidating possibility, the SEIU targeted the county as the employer and commenced legal action to compel Los Angeles to negotiate with it as a representative of the county's home-care workers.¹⁵⁰ In response, the county denied that it was the employer¹⁵¹ and suggested instead that the workers were independent contractors, or alternatively, that if they were employees, they were in fact employed by the individual clients.¹⁵² In ruling against the SEIU, the California Court of Appeal emphasized the lower court's holding that:

146. Title XIX of the Social Security Act of 1965, popularly referred to as the Medicaid Act, authorizes grants to States to provide medical and rehabilitative assistance to the poor, elderly, and disabled. 42 U.S.C. § 1396 (1994). The Omnibus Budget Reconciliation Act of 1990 amended the Medicaid Act to include personal care services as part of the home health services benefits authorized by this statute. Pub. L. No. 101-508, § 4721, 104 Stat. 1388, 1388194; *see also Omnibus Budget Reconciliation Act of 1993 Public Law 103-66*, 15 HEALTH CARE FINANCING REV. 177 (1993), LEXIS, Medical and Health Materials Combined, All File (observing that while section 13601 of the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312, 612-613 repeals the provision that made personal care services a mandatory Medicaid service, it allows states to offer such services as an optional Medicaid Service).

147. *See Service Employees Int'l Union, Local 434 v. County of Los Angeles*, 225 Cal. App. 3d 761, 765 (1990).

148. *Id.*

149. *See Jessica Toledano, Health Workers for Home-Bound To Vote on Union*, L.A. BUS. J., Feb. 8, 1999, 1999 WL 11382115 ("Rather than working at a single site for a single employer, . . . home-care workers are spread throughout the region, many of them working several hours a week for several different clients.").

150. *See Service Employees Int'l Union*, 225 Cal. App. 3d at 764.

151. *Id.*

152. *See Greenhouse, supra* note 133.

[t]he county exercises no supervisory control over [home-care] providers. The manner in which the provider's tasks are performed is determined by the recipient, as are the hours when such services are performed. The provider is free to terminate his or her services without notice to the county; likewise, a recipient may discharge a provider at any time without notice to the county.¹⁵³

Left with no one employer for purposes of collective bargaining, the SEIU in 1992 successfully lobbied the California State Legislature to pass a law that allowed each county to create "public authorities" to operate local IHSS Programs.¹⁵⁴ The law regards the public authorities as the employers of record for home-care workers and subjects these agencies to state and federal labor laws.¹⁵⁵ To date, six California counties have established such public authorities, including Los Angeles.¹⁵⁶

With an easily identifiable agency serving as the employer, the SEIU then had to figure out how to target and mobilize the individual workers. As noted in Part II.D, the traditional model of organizing envisions a process whereby both the employer and the bargaining unit are readily identifiable. In manufacturing jobs, organizers can often contact workers by standing in the factory owner's parking lot or at the factory gate. Such an approach, however, has limited value in the home-care industry. Working in clients' individual homes and with no one workplace in common, home-care workers are hidden and scattered,¹⁵⁷ similar to the paid household workforce. Trying to unify such a diffuse group of workers is a daunting¹⁵⁸ but not

153. *Service Employees Int'l Union*, 225 Cal. App. 3d at 766.

154. CAL. WELF. & INST. CODE § 12301.6 (West Supp. 2000); see Jennifer Bjorhus, *Labor Rights in the Family: Unions Recruit Home-Care Workers*, S.F. CHRONICLE, Sept. 14, 1994, at A1 (describing the creation of the public authorities in California).

155. See CAL. WELF. & INST. CODE § 12302.25(a) (West Supp. 2000).

156. The counties are San Mateo, Alameda, San Francisco, Santa Clara, Contra Costa, and Los Angeles. Kathy Robertson, *Home-care Workers Near Organizing Goal*, SACRAMENTO BUS. J., Aug. 6, 1999, 1999 WL 23256551. Workers voted to unionize in each of the six counties, with the biggest victory occurring in Los Angeles. While the SEIU has yet to negotiate a contract on behalf of the home-care workers in Los Angeles, a successful contract negotiated in San Francisco provides workers in that county with health insurance benefits and increases their pay from the minimum wage to seven dollars an hour. Andrew L. Stern, *Paying a Living Wage; Bill Would Raise Pay for Home-Care Workers*, S.F. CHRONICLE, Mar. 23, 1999, at A19. Under California law, each county must establish an employer of record for home-care workers on or before January 1, 2003. CAL. WELF. & INST. CODE § 12302.25(a).

157. See Bjorhus, *supra* note 154 (observing that the fundamental challenge of organizing home-care workers is unifying the workers, given that they work in the homes of clients).

158. See Toledano, *supra* note 149 ("It has been a logistical nightmare," commented

insurmountable task. The SEIU's solution has been a type of "bus stop" activism, with organizers searching for workers by going door-to-door, combing residential neighborhoods and shopping malls, contacting churches, and waiting at bus stops.¹⁵⁹

The type of "bus stop" activism utilized by the SEIU to help organize home-care workers can also prove effective in reaching out to paid household workers. In Los Angeles, for example, the Domestic Workers Association (DWA)¹⁶⁰ has employed "bus stop" activism to mobilize a largely immigrant domestic service population. Sponsored by the Coalition for Humane Immigrant Rights of Los Angeles (CHIRLA), the DWA began modestly with a handful of CHIRLA staff members engaged in aggressive outreach.¹⁶¹ Confronted with a workforce dispersed throughout Los Angeles,¹⁶² they patrolled the city, frequenting bus stops in search of domestics en route to work and visiting parks where domestics often gather while watching over children in their care.¹⁶³ CHIRLA's most tangible success in recruiting members came when the project ran public-service announcements on Los Angeles Spanish-language radio and television stations.¹⁶⁴

The experiences of the SEIU's home-care campaign and groups like the DWA illustrate the need to develop innovative approaches to organizing low-income service workers. Importantly, while the fragmentation that characterizes domestic service and home-care work reflects the structure of these jobs, labor market decentralization increasingly affects other job sectors as the number of contingent workers proliferates.¹⁶⁵ When it comes to organizing,

one home-care organizer. "It takes weeks to find workers and once you get to their door they have quit or been fired. There is 40 percent turnover in this business, so it is not easy to keep a running list of people.")

159. See Greenhouse, *supra* note 133; Wilkinson, *supra* note 117.

160. Thomas Carney, *Labor Day: LA's Nannies and Domestic Workers Form a More Perfect Union*, L.A. MAG., May 1999, at 32 (on file with the North Carolina Law Review).

161. See Narro, *supra* note 117, at 19.

162. See *id.* (noting that "[t]he size and layout of Los Angeles is also a factor [in organizing]: thousands of domestics are scattered throughout rich and modest dwellings").

163. Wilkinson, *supra* note 117.

164. See Narro, *supra* note 117, at 19 (noting the need to rely upon creative tactics to reach a nontraditional workforce such as domestic workers); see also Gordon, *supra* note 128, at 434 (referencing the Workplace Project's use of Spanish-language media to inform immigrant workers of their rights).

165. See Cobble, *Union Strategies*, *supra* note 111, at 77 (noting the "proliferation of smaller workplaces and the decentralization of production" among service work as well as some types of industrial work); Wial, *supra* note 79, at 678 (discussing the complications posed by decentralized work sites); see also *supra* notes 8-10 and accompanying text

the involvement of community-based groups in areas where these workers reside can often mean the difference between success and failure. Organizations such as religious institutions, advocacy groups, and cultural centers often have established networks that can help facilitate contact with workers who are dispersed throughout a community.¹⁶⁶ While this process is extremely labor-intensive when compared with a model of industrial unionism, it seems vital to improving the economic status of marginalized and contingent workers.

The SEIU's home-care campaign marks a useful starting point for considering how aspects of labor's new commitment to low-wage service workers can be transferred to private paid household work. Most notably, it highlights strategies to overcome the dispersed organization of workers in the domestic service industry. That said, the home-care campaign admittedly offers only a rough blueprint. While the two occupations share much in common, there remain critical distinctions in the structure of home-care work and paid household work. Importantly, the establishment of the California public authorities enables home-care workers to fit into the NLRB's traditional model of employee representation. Following a NLRB-election, the SEIU is now in the process of bargaining with these "straw-employers."¹⁶⁷ It would perhaps be ideal if paid household employers were organized collectively in some fashion, or else had a representative, such that organized groups of private household workers also had an identifiable entity with which to bargain. However, the prospects of this happening are slim as household employers seem content negotiating their interests on an individual basis. Thus, at the end of the day, the issue that the SEIU happily avoided in the California home-care campaign must be confronted in the context of domestic service: the employer is the individual

(discussing the growth of the contingent workforce).

166. See Needleman, *supra* note 128, at 81 (discussing the SEIU's reliance on advocacy and community groups to facilitate contact with home-care workers); Ness, *supra* note 128, at 91 (noting the importance of community-based organizing strategies to deal with the dispersment of workers in the garment industry); Steve Proffitt, Interview with Andrew Stern, *Jumping Into the Health-Care Fray as the Voice of the Medical Classes*, L.A. TIMES, July 4, 1999, at M3, LEXIS, Los Angeles Times File (describing an interview with the SEIU's director Andrew Stern, who stressed the need to build strong alliances within community organizations in order to communicate with workers who, lacking a common job site, are located throughout a community).

167. See, e.g., Marc B. Haefele, *Health Care for Saints*, L.A. WEEKLY, Dec. 17, 1999, at 20, available at LEXIS, LA Weekly File.

employing household, and there are virtually as many household employers as there are household workers.¹⁶⁸

Can groups of domestic service workers effectively “bargain” with so many different employers? The short answer is that they cannot, at least not in the manner contemplated by the NLRA. Imagine for the moment that a group of domestics joined together and designated a union as their representative, and that the household employers of those workers were legally obligated to bargain with the union. What would such a bargaining model look like? How many workers would constitute an appropriate bargaining unit?¹⁶⁹ Because the workers would most likely work for different employers, would the union have to bargain for a separate agreement for each worker? Moreover, because most domestics work for several households simultaneously, would a given worker have different, potentially conflicting agreements depending on the particular employer? Given that the household employment relationship is tenuous, often lasting for short time periods, would the union have to constantly negotiate new agreements as the workers acquire situations with new employers? What would constitute good faith bargaining on the part of the employer?¹⁷⁰ Would the

168. See Rae L. Needleman, *Are Domestic Workers Coming of Age*, 46 AM. FEDERATIONIST 1070, 1073 (1939); see also *Domestic Workers and Legislation* 1 (Feb. 1941) (Watson Papers, Folder 6.19, Catherwood Library, Cornell School of Industrial and Labor Relations) (on file with the North Carolina Law Review) (noting the “difficulty of enforcing laws applying to almost as many employers as workers”).

169. Pursuant to section 9(b) of the NLRA, the NLRB is authorized to determine the appropriate composition of bargaining units. 29 U.S.C. § 159(a) (1994). Section 9(a) provides in pertinent part:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment

Id. See generally JOHN E. ABODEELY ET AL., *THE NLRB AND THE APPROPRIATE BARGAINING UNIT* (rev. ed. 1981) (discussing the determination of the bargaining unit). For an insightful analysis of some of the difficulties that the requirement of an appropriate bargaining unit presents to organizing low-wage service workers, see Wial, *supra* note 79, at 708–12.

170. Sections 8(a)(5) and 8(b)(3) of the NLRA obligate both the employer and the union to bargain in good faith. 29 U.S.C. §§ 158(a)(5), 158(b)(3) (1994); see also *McClatchy Newspapers v. NLRB*, 131 F.3d 1026, 1031 (D.C. Cir. 1997) (noting union acts which constituted a per se violation of the union’s 8(b)(3) duty to bargain in good faith); *Grondorf, Field, Black & Co. v. NLRB*, 107 F.3d 882, 887 (D.C. Cir. 1997) (observing that section 8(a)(5) imposes a duty on employers to bargain in good faith); *Fieldcrest Cannon v. NLRB*, 97 F.3d 65, 83 (4th Cir. 1996) (describing a violation of section 8(a)(5) as a “breach of the duty to bargain in good faith”); *West Coast Sheet Metal, Inc. v. NLRB*, 938 F.2d 1356, 1359 (D.C. Cir. 1991) (observing that sections 8(a)(5) and 8(b)(3) require good

government monitor the quality of each negotiation to determine whether each individual household is bargaining in good faith? Finally, if an employer were legally compelled to negotiate, would not the employer most likely turn instead to a “maid-for-hire” commercial agency? These questions reveal that trying to squeeze domestic service into the existing bargaining model would be impractical and financially prohibitive.¹⁷¹ Moreover, there is very little that is “concerted” about an organization pressing individual household employers on behalf of individual workers even if the workers have joined together in a group.

In the long run, the intense fragmentation that exists in domestic service with respect to both household employees and household employers may prove insurmountable. That said, in light of the present and growing numbers of women performing housework for pay,¹⁷² it is desirable to press forward in exploring strategies that could accommodate the unique labor arrangements of these workers. More specifically, one must consider how groups of paid household workers, once mobilized, can operate to improve the labor conditions in the domestic service industry. The next section engages that task by examining occupational unionism.

B. Occupational Unionism

In her work on the labor history of waitresses,¹⁷³ Professor Dorothy Sue Cobble articulates a model of “occupational unionism.”¹⁷⁴ In contrast to industrial unionism, which unites workers based on a common employer or a common work site, occupational unionism cultivates solidarity among workers premised on a shared

faith bargaining). Section 8(d) also requires the parties to meet and confer at reasonable times and to bargain in good faith. 29 U.S.C. § 158(d).

171. See generally Gottesman, *supra* note 11, at 87–89 (highlighting the difficulty of proposals compelling employers to bargain with individual workers or small groups of workers).

172. See *supra* note 3 and accompanying text (observing an increase in the number of women performing paid household work for pay).

173. See COBBLE, *DISHING IT OUT*, *supra* note 132, at 137; Cobble, *Organizing the Postindustrial Work Force*, *supra* note 11, at 432–35.

174. See COBBLE, *DISHING IT OUT*, *supra* note 132, at 9. As Wial observes, Cobble’s model of occupational unionism incorporates elements of traditional craft unionism. Wial, *supra* note 79, at 685 n.42. Both occupational and craft unionism share a number of common features, including an organizing strategy tied to the occupational identity of workers, the extension of rights and benefits to workers based on their occupational identity as opposed to their affiliation with a particular employer or company, an emphasis on employment security over job security, and control of the labor supply within the occupation through use of closed shops and hiring halls. Cobble, *Organizing the Postindustrial Work Force*, *supra* note 11, at 421; Wial, *supra* note 79, at 685–86.

occupational identity.¹⁷⁵ This model proved effective in organizing waitresses because, like many of today's low-wage service workers, they frequently moved from employer to employer; yet, they remained attached to waitressing over time.¹⁷⁶ In light of this intra-occupational mobility, waitress unionists advocated for portable workplace rights and benefits that workers could carry from one employer to another.¹⁷⁷ Cobble highlights two features of occupational unionism that coincide strongly with the interests of low-wage service workers and could prove especially useful in representing the interests of private paid household workers: worker-run employment agencies and peer management techniques.¹⁷⁸ Part IV briefly describes each of these two features and then examines the relevance of each for paid household work.

1. Worker-Run Employment Agencies: The Hiring Hall Gains New Life

The success of occupational unionism hinges on a union's ability to gain control over the supply of labor through the use of union-operated hiring halls.¹⁷⁹ The hiring hall functions as an employment referral mechanism, serving as a clearinghouse for jobs and bringing together workers in search of jobs with employers in need of workers.¹⁸⁰ The hiring hall structure is particularly advantageous to workers in industries where jobs are temporary and irregular.¹⁸¹ By using the halls, job-seekers can avoid time-wasting searches in

175. Wial, *supra* note 79, at 685–86.

176. COBBLE, *DISHING IT OUT*, *supra* note 132, at 49 (“[R]ather than move in and out of the industry, waitresses, like construction workers, kept within their line of work and sought other jobs waitressing.”).

177. *Id.* at 139; *see also* Wial, *supra* note 79, at 686 (observing that the “portability of worker rights and benefits between employers is ideally suited to workers who change employers frequently”).

178. Cobble, *Remaking Unions*, *supra* note 13, at 16.

179. Cobble, *Organizing the Postindustrial Work Force*, *supra* note 11, at 423.

180. *Local 357, Int'l Bhd. of Teamsters v. NLRB*, 365 U.S. 667, 672 (1961) (observing that the hiring hall helps to “eliminate wasteful, time-consuming, and repetitive scouting for jobs by individual workmen and haphazard uneconomical searches by employers’”) (quoting *Mountain Pac. Chapter*, 119 N.L.R.B. 883, 896 n.8 (1957)). *See generally* GORMAN, *supra* note 60, at 642–43 (observing that the hiring hall is a prehiring employee referral system in industries, such as the maritime, longshore, and construction industries, in which most jobs are short term).

181. GORMAN, *supra* note 60, at 664 (noting the benefit of the hiring hall in industries that offer temporary and sporadic employment opportunities); *see also* COBBLE, *DISHING IT OUT*, *supra* note 132, at 139 (noting that through the hiring halls, unions “provided members employment security and flexibility in a highly transitory, unstable sector of the economy”).

unstable labor markets and, by coming together as a group, position themselves to demand more favorable working conditions than they might procure individually.¹⁸² Coupled with that, the halls promote employment security among workers by distributing jobs evenly among job-seekers based on a rotating allocation system.¹⁸³ Another advantage of many union-operated hiring halls is that they provide services to workers free of charge, unlike employment-agencies that charge exorbitant fees.¹⁸⁴ Although the courts have declared that some aspects of traditional hiring halls violate the NLRA,¹⁸⁵ core aspects of the basic scheme remain viable. Low-wage workers across the country use modified-versions of the hiring hall, such as worker-run employment agencies and worker cooperatives,¹⁸⁶ as organizing vehicles to increase wages and secure benefits.

2. Peer Management

The hiring hall's use of peer management techniques is the second aspect of occupational unionism that can help represent the interests of paid household workers. Peer management stresses worker control over and responsibility for the development, maintenance, and enforcement of occupational standards.¹⁸⁷ A key component of peer management is job training programs that give workers an opportunity to acquire new skills and maintain existing skill levels. Union-sponsored waitress hiring halls, for example, operated apprenticeship programs for inexperienced waitresses that

182. COBBLE, DISHING IT OUT, *supra* note 132, at 138–39.

183. *Id.*

184. *Id.*

185. See *infra* notes 252–56 and accompanying text (discussing closed-shop agreements and the Taft-Hartley Act).

186. Middleton, *supra* note 131, at 611–13 (surveying the use of “[c]ooperatively-owned, worker-run employment agencies” to improve the working conditions of contingent workers); see also David Ellerman & Peter Pitegoff, *The Democratic Corporation: The New Worker Cooperative Statute in Massachusetts*, 11 N.Y.U. REV. L. & SOC. CHANGE 441, 460–61 (1983) (describing the worker cooperative corporate form as an application of normative principles of democracy to the economic sphere); Peter Pitegoff, *Organizing Worker Cooperatives*, 7 LAW & POL’Y 45, 45–49 (1985) (describing various worker cooperatives and the role of lawyers in organizing such worker-owned businesses). See generally WHEN WORKERS DECIDE: WORKPLACE DEMOCRACY TAKES ROOT IN NORTH AMERICA (Leon Krimerman & Frank Lindenfeld eds., 1992) (examining a range of worker cooperatives in various economic sectors); WILLIAM FOOTE WHYTE & KATHLEEN KING WHITE, MAKING MONDRAGON: THE GROWTH AND DYNAMICS OF THE WORKER COOPERATIVE COMPLEX (2d ed., rev. 1991) (examining the success of the Mondragon worker cooperative located in the Basque region of Spain); WORKER COOPERATIVES IN AMERICA (Robert Jackall & Henry M. Levin eds., 1984) (exploring the resurging growth of worker cooperatives).

187. COBBLE, DISHING IT OUT, *supra* note 132, at 142.

combined classroom experience and on-the-job training.¹⁸⁸ Peer management also benefits employers by providing trained, competent labor in highly unstable job markets backed by the union's willingness to be held accountable for the performance of its members.¹⁸⁹ The shared commitment to quality on the part of both union and employer helps to eliminate much of the adversarial tension that so frequently characterizes labor-management relationships.¹⁹⁰

IV. REPRESENTING DOMESTIC SERVICE WORKERS

The experiences of paid household workers striving to achieve economic empowerment through collective means suggest that occupational unionism may indeed prove instrumental in enabling them to secure better working conditions. Importantly, paid domestics, both past and present, have relied upon the hiring hall structure and peer management techniques to assert their interests. The first half of this Part draws from several domestic service organizations to evaluate the potential for these features to help represent the needs of paid household workers. Part IV.A goes back in time to examine the Domestic Workers' Industrial Union (DWIU),¹⁹¹ a Progressive Era predecessor of contemporary hiring hall strategies among paid household workers. Part IV.B travels forward again and explores the promise and pitfalls of cooperatives among today's domestic service workforce. This latter Subpart also highlights some of the difficulties confronting immigrant domestics. The second half of this section begins in Part IV.C by outlining proposals to facilitate alternative forms of employee representation and assessing their relevance for domestic service cooperatives. Afterwards, Part IV.D identifies potential advantages that the cooperative approach can provide to household employers.

188. *Id.* at 141.

189. *Id.* at 146; Dorothy Sue Cobble, *Making Postindustrial Unionism Possible*, in *RESTORING THE PROMISE OF AMERICAN LABOR LAW* 285, 293 (Sheldon Friedman et al. eds., 1994) [hereinafter Cobble, *Making Postindustrial Unionism Possible*]; Cobble, *Organizing the Postindustrial Work Force*, *supra* note 11, at 426–30; Cobble, *Union Strategies*, *supra* note 111, at 80–81.

190. COBBLE, *DISHING IT OUT*, *supra* note 132, at 147.

191. See FONER, *supra* note 104, at 199–203; MEREDITH TAX, *THE RISING OF THE WOMEN: FEMINIST SOLIDARITY AND CLASS CONFLICT, 1880–1917*, at 134–35 (1980); Letter from Jane Street to Mrs. Elmer F. Buse (1917), reprinted in *"We Have Got Results": A Document on the Organization of Domestics in the Progressive Era*, 17 *LAB. HIST.* 103, 103–04 (Daniel T. Hobby ed., 1976) [hereinafter Letter from Jane Street].

A. *Jane Street and the Domestic Workers' Industrial Union*

Originating in Denver, Colorado, the DWIU launched one of the more effective organizing initiatives among domestic service workers during the early twentieth-century. Led by Jane Street, a former domestic, members of the DWIU organized in 1916 as a local of the Industrial Workers of the World.¹⁹² Street abhorred the caste dynamic between mistress and servant and was determined to shift the balance of power within the paid household relationship in favor of the workers. As she explained it, the time had arrived to “‘remov[e] the degradation from domestic service by teaching . . . employers to look upon the hands that feed them and wash for them, and scrub for them with respect or fear and humility.’”¹⁹³ Similar sentiments echoed across the country as domestic service workers bitterly condemned the labor practices of household employers as well as “employment sharks,” agencies that charged workers excessive fees.¹⁹⁴

To gain control over the domestic service labor market and simultaneously displace the sharks, the DWIU established an employment office through which the union maintained a card file of all domestic jobs advertised in Denver newspapers.¹⁹⁵ During this time period, both household employers and employees frequently relied upon newspaper help-wanted advertisements.¹⁹⁶ With a file that grew to include more than 6000 jobs, the DWIU’s employment office posed a formidable threat to the employment sharks.¹⁹⁷

Union members also used the card file to win concessions from employers. When a prospective employer advertised for a domestic in a newspaper, the DWIU would place the advertisement in the card file and then dozens of union members would respond, all demanding the same wage until the requested rate became the going rate.¹⁹⁸ As Street described it, the success of the employment office boiled down to a combination of newspapers, an office equipped with a phone, and a group of very determined women working together:

192. TAX, *supra* note 191, at 134–35.

193. *Id.* (quoting Jane Street, *Denver’s Rebel Housemaids*, SOLIDARITY, Apr. 1, 1916).

194. KATZMAN, *supra* note 33, at 35; *see also* DUDDEN, *supra* note 88, at 79–83 (discussing practices of employment agencies during the latter part of the nineteenth century); SALMON, *supra* note 88, at 115 (criticizing employment agencies for extorting fees from domestic employees and employers).

195. Letter from Jane Street, *supra* note 191, at 105.

196. KATZMAN, *supra* note 33, at 99.

197. TAX, *supra* note 191, at 136.

198. *Id.*

For a number of housegirls to simply own, collectively, a telephone and to use it systematically is to raise wages all over a city. For instance, if you want to raise a job from \$20 to \$30 You can have a dozen girls answer an ad and demand \$30,—even if they do not want work at all. Or, it can be done in an easier way. Call up the woman and tell her you will accept the position at \$20, that you will be sure to be out. Then she will not run her ad the next day. Don't go. Call up the next day and ask for \$25, and promise to go and do the same thing over again. On the third day she will say, Come on out and we will talk the matter over. You can get not only the wages, but shortened hours and lightened labor as well.¹⁹⁹

Through the establishment of the DWIU, Denver's domestic population succeeded in manipulating the system to their own advantage, achieving concrete gains by way of increased wages and shorter hours.²⁰⁰ Excluded from the emerging labor law regime and left to fend for themselves,²⁰¹ they pressed for and achieved self-regulation. The threat that the DWIU posed to Denver's domestic service market is borne out by the fact that the employing class formed their own group, the Housewives' Assembly, in the hopes of regaining control over their relationships with household workers.²⁰² Employment bureaus also felt the pressure of the union and experienced a dramatic decline in business as a result of the union-sponsored employment office.²⁰³ Although legislators and economists dismissed the value of domestic service to an industrialized society,²⁰⁴ the impact of the DWIU's strategy revealed that such work was

199. Letter from Jane Street, *supra* note 191, at 105.

200. KATZMAN, *supra* note 33, at 235. Although praising the DWIU and acknowledging its success, Katzman ultimately questions the impact that the union had on the Denver market. *Id.*

201. Smith, *supra* note 34, at 893–94 (noting the exclusion of domestic service workers from protective wage and hour legislation).

202. TAX, *supra* note 191, at 136–37.

203. *Id.* To curb the influence of the DWIU, employment agencies orchestrated a theft of the union's card file. *Id.*

204. SALMON, *supra* note 88, at 1–5 (exploring the reasons why domestic service has received short shrift from economists and government labor bureaus); Dr. Erna Magnus, *The Social, Economic, and Legal Conditions of Domestic Servants: I*, 30 INT'L LAB. REV. 190, 198 (1934) (observing that the exclusion of domestic service from labor legislation reflects the view that domestic service is not productive labor); Amey E. Watson, *The Reorganization of Household Work*, 160 ANNALS AM. ACAD. POL. & SOC. SCI. 165, 165–66 (1932) (suggesting that economists and sociologists dismiss domestic service as a socio-economic problem because they fail to regard the field of household employment as an industry).

essential to the smooth functioning of America's expanding middle-class.

B. Domestic Service Cooperatives

The type of hiring hall approach pursued by the DWIU lives on today in the form of worker-run, domestic service cooperatives.²⁰⁵ By working collectively through a cooperative structure, paid household workers can better protect their interests even as the class of household employers remain dispersed. While the cooperatives vary according to the particular perspective of each organization, they share common features. Most involve loose-knit associations of workers and function as employment agencies by providing members access to a pool of jobs without having to pass on a significant percentage of their salaries to an intermediary.²⁰⁶ In terms of the services provided, domestic cooperatives tend to focus solely on housekeeping to the exclusion of child-care services.²⁰⁷ Similar to the modest setup of the DWIU, they are often located in church basements and community centers.²⁰⁸ Members usually rotate staffing the cooperative and typically pay dues to cover administrative costs.²⁰⁹ To attract prospective employers, cooperatives engage in aggressive outreach, by distributing flyers and advertising in newspapers and the

205. See, e.g., Norma Chincilla & Nora Hamilton, *Negotiating Urban Space: Latina Workers in Domestic Work and Street Vending in Los Angeles*, 22 HUMBOLDT J. SOC. REL. 25, 29-30 (1996) (discussing Listo, a housecleaning cooperative of Mexican and Central American immigrant women); Scott L. Cummings, *Developing Cooperatives as a Job Creation Strategy for Low-Income Workers*, 25 N.Y.U. REV. L. & SOC. CHANGE 181, 191-94 (1999) (discussing the origins and formation of a domestic cooperative based in Los Angeles); Salzinger, *supra* note 43, at 142-50 (reporting on two domestic cooperatives in the Bay Area of California); *Freedom's Promise at Work*, L.A. TIMES, Oct. 11, 1998, at B14 (reporting on the Miracle Workers cooperative in the San Fernando Valley); Wilkinson, *supra* note 117 (referencing the house cleaners cooperative in San Francisco).

206. Salzinger, *supra* note 43, at 143.

207. Various reasons help explain the disinclination of domestic cooperatives to offer child-care services. Most importantly, because paid household work is often performed as job work for a few hours at a time, it allows workers greater flexibility than does child care. Flexibility is important because many paid household workers have children of their own and no access to affordable child care. Chincilla & Hamilton, *supra* note 205, at 29. In addition, and ironically, child care pays less than housework. OCCUPATIONAL OUTLOOK HANDBOOK, *supra* note 3, at 357 (reporting that, as among private household workers, the median weekly earnings for cleaners and servants in 1998 was \$235 per week compared with median weekly earnings of \$204 per week for child-care workers). It is of course possible to use the cooperative structure to facilitate the organization of child-care workers. See Peter Pitegoff, *Child Care Enterprise, Community Development, and Work*, 81 GEO. L.J. 1897, 1937-43 (1993) (advocating community-based, worker-owned cooperative child-care centers).

208. Cummings, *supra* note 205, at 191; *Freedom's Promise at Work*, *supra* note 205.

209. Chincilla & Hamilton, *supra* note 205, at 30.

Yellow Pages.²¹⁰ Jobs secured through the cooperative are assigned to members based on a mutually-agreed upon system.²¹¹

Marketing plays a crucial role in the strategy of most cooperatives as members attempt to tap into a “white-middle class rhetoric” to appeal to households in the top tier of the domestic service market—dual-career couples and single, elite professionals.²¹² Consider, for example, the approach taken by “Choices,” a cooperative comprised of Latina domestic service workers located in California’s San Francisco bay area.²¹³ The organization’s ads present the group as a domestic service employment agency, but do not reference the ethnic background of workers.²¹⁴ Leslie Salzinger explains that when prospective employers respond to the ads and call the cooperative, a staff member

mentions that all of the workers are Latina women, but makes it clear that anything the employer needs to communicate can be communicated through her. . . . From the employer’s point of view, . . . the group could easily be any one of a number of for-profit cleaning agencies, run by Anglos, that hire Latina women to do the actual work. This sense of worker connection to a white agency is enhanced by the fact that every worker takes an envelope from the office to each new job. The envelope contains [a business] card, a bilingual household task sheet, a list of appropriate cleaning products, and an evaluation form to be filled out by the employer and mailed to the office.²¹⁵

This strategy enables cooperatives to compete with the proliferation of “maid-for-hire” cleaning companies.²¹⁶ Other cooperatives attempt

210. See Cummings, *supra* note 205, at 196 (noting that cooperatives distribute fliers and use other outreach means to publicize their services); Salzinger, *supra* note 43, at 144, 146–47 (discussing cooperative use of flyers and newspaper ads to attract clients).

211. See Cummings, *supra* note 205, at 196 (describing the use of a point system for allocating incoming jobs to workers); Salzinger, *supra* note 43, at 148 (noting that the cooperative “Choices” uses an “elaborate point system” to distribute jobs to cooperative members).

212. Salzinger, *supra* note 43, at 150.

213. *Id.* at 145–50. This discussion of “Choices” draws from Salzinger.

214. *Id.* at 147.

215. *Id.*

216. In recent years, there has been a proliferation of maid-for-hire companies. Mendez, *supra* note 139, at 114. In theory, the defined, contractual employment arrangements that exist in these companies represent an advancement over the unregulated, highly affective relationships that characterize private household work. *Id.* at 117. In addition, commercial cleaning agencies can potentially facilitate the organization of domestics given that workers usually labor for a readily identifiable common employer. Yet the “modernization” of domestic service work has not necessarily resulted in improved working conditions. *Id.* at 118–19. In her study of women who had worked both

to appeal to prospective employers by emphasizing that they were “organized to promote economic justice for low-income immigrant women, and that its goal [is] to provide a living wage for the members.”²¹⁷

The professional persona that cooperatives seek to present to prospective employers is more than just an image. A strong emphasis on skill acquisition and upgrading domestic service justifies the professional tone that pervades the marketing tactics used by cooperatives. That emphasis lends credence to Cobble’s observation that many of today’s service workers desire organizations that can assist them “in improving the image of their occupation, in achieving professional recognition, and in performing their work to the best of their abilities.”²¹⁸ The need for such assistance is especially acute among paid household workers as they struggle to resist the image of domestic service as a form of servile, unskilled, menial labor that any woman can innately perform. Domestic cooperatives are pushing to redefine the work as a skilled, socially valuable occupation. Their efforts continue an on-going project to professionalize domestic service that dates back to the late-nineteenth and early-twentieth centuries when reform groups led the movement to promote recognition of “housekeeping [as] a science and housework [as] a trade.”²¹⁹

Choices’ contribution to the professionalization of domestic service stresses the types of peer management techniques that define occupational unionism. Members participate in training sessions that

as private domestics and for maid-for-hire companies, Mendez found that women preferred private work because it gave them “greater control over the work process, higher pay, and more flexible work hours.” *Id.* at 130. Relative to commercial cleaning agencies, the self-governed nature of a domestic service cooperative can aid women in gaining control over the work while at the same time providing a forum whereby members can collectively fight for improved working conditions.

217. See Cummings, *supra* note 205, at 193–94.

218. Cobble, *Union Strategies*, *supra* note 111, at 81.

219. School of Housekeeping, Comments of the Press (n.d.) (Arthur and Elizabeth Schlesinger Library on the History of Women in America, Radcliffe College) (on file with the North Carolina Law Review) (describing a project sponsored by the Boston-based Women’s Educational and Industrial Union in 1900); see also Henrietta I. Goodrich, *The School of Housekeeping*, 3 J. HOME ECON. 366, 366–67 (1911) (outlining the objectives of the School of Housekeeping). See generally KATZMAN, *supra* note 33, at 251–57 (reporting on the efforts of the household reform movement to introduce scientific management principles into the household employment relationship in an attempt to attract more women workers to domestic service); JULIE A. MATTHAEI, AN ECONOMIC HISTORY OF WOMEN IN AMERICA 157–67 (1982) (describing attempts to view homemaking as a profession and applying current economic and labor theory to the labor involved).

cover general cleaning standards and that provide instruction on the use of nontoxic cleaning products.²²⁰ The cooperative also tests members on the standards to help ensure worker competence.²²¹ The focus on skills acquisition serves to empower workers, providing them with a greater sense of autonomy. As one member commented:

“It’s good to have training. Sometimes an employer says, ‘Don’t do it that way, that way won’t work,’ and then I can say, ‘Yes it will. I know because I have training.’ ‘Oh,’ they say Once I worked for this very rich woman and I told her I had had training, and so she started asking me all these questions and I answered them all, and then she was very impressed and left me alone.”²²²

This interaction demonstrates that knowledge of the occupation can play a key factor in enabling paid household workers to assert their independence and to dispel the perception that domestic service is unskilled labor.

A cooperative-based organizing approach can also help foster respect for paid household workers. An emphasis on respect and dignity has been a central feature of organizing efforts targeted toward service workers.²²³ Such a focus is absolutely crucial in the context of paid household labor. The one-on-one structure of domestic service and its location within the family sphere make it all too easy for household employers to disregard the interests of workers as employees. Many household employers, observes Bonnie Thornton Dill, tend to believe that “anyone doing domestic work is so downtrodden that she would be willing to do anything in order to keep her job.”²²⁴ A cooperative provides workers with a setting wherein they can develop a collective strategy to resist intolerable or

220. Salzinger, *supra* note 43, at 147; *see also* Chincilla & Hamilton, *supra* note 205, at 29–30 (reporting on training sessions of a domestic service cooperative known as Listo); Cummings, *supra* note 205, at 192–93 (describing training sessions of a domestic service cooperative that focused on cleaning techniques).

221. Salzinger, *supra* note 43, at 147.

222. *Id.* at 149.

223. Green & Tilly, *supra* note 110, at 491; *see also* Crain, *Feminism*, *supra* note 16, at 1872 (discussing the emphasis on “power, self-respect, [and] dignity” in the organization of clerical workers at Harvard University). In his study of immigrant workers in Los Angeles, Hector Delgado also highlights the importance of an organizing campaign that accords centrality to issues of dignity. *See* HECTOR L. DELGADO, *NEW IMMIGRANTS, OLD UNIONS: ORGANIZING UNDOCUMENTED WORKERS IN LOS ANGELES* 17, 29 (1993) (suggesting that dignity may be a more important factor in organizing than bread-and-butter issues).

224. Bonnie Thornton Dill, “*Making Your Job Good Yourself: Domestic Service and the Construction of Personal Dignity*,” in *WOMEN AND THE POLITICS OF EMPOWERMENT* 33, 43 (Ann Bookman & Susan Morgen eds., 1988).

unrealistic demands. Choices, for example, advises its members to let the job go—as “[t]here are other jobs”—if employers persist with requests that run counter to the standards developed by the group.²²⁵ That stance arguably may not be economically viable in some domestic service markets. Yet, strategies that promote respect for the work and the workers must be pursued in order to advance the claim that domestic service is valuable and should be treated accordingly.

The cooperative structure offers an additional advantage over individual domestic arrangements by helping to distance workers from many of the highly personalistic and often abusive aspects of the negotiating process.²²⁶ When acting solo, paid household workers are typically at a disadvantage when establishing the terms of their employment arrangement. Given their precarious economic position, domestics frequently find themselves accepting terms unilaterally imposed by employers. Communication skills can further complicate the negotiation process for immigrant domestics.²²⁷ A cooperative, however, can greatly diminish the potential for employers to exploit workers. Instead of negotiating terms of the employment relationship with the individual worker, prospective employers negotiate with an intake person from the cooperative.²²⁸ Similarly, dissatisfied customers are encouraged to take their complaints not to the worker but to the cooperative.²²⁹

Cooperatives can also greatly reduce the stress associated with the job search process. The volatility of the domestic service market means that household workers must constantly locate new jobs. Gaining access to new employers can be an extremely difficult task, and “few women reach the point of having the maximum number of jobs they could handle.”²³⁰ A cooperative, on the other hand, brings prospective employers to its members. And while members do participate in securing jobs by way of passing out pamphlets to attract customers and the like, once established, the cooperative can offer

225. Salzinger, *supra* note 43, at 148.

226. Chincilla & Hamilton, *supra* note 205, at 29 (noting that cooperatives can mediate problems between employers and employees).

227. See, e.g., Martha Davis, *Domestic Workers: Out of the Shadows*, HUMAN RIGHTS, Spring 1993, at 14, 14 (citing limited English-speaking ability as one of many problems confronting immigrant domestics); Hondagneu-Sotelo, *Latina Immigrant Women*, *supra* note 39, at 266 (observing that a lack of English skills can adversely impact negotiations over terms and conditions of work); Mattingly, *supra* note 3, at 63 (observing that English ability can influence domestics' job searches and wage negotiation processes).

228. Salzinger, *supra* note 43, at 147–48.

229. See Chincilla & Hamilton, *supra* note 205, at 29; Salzinger, *supra* note 43, at 147–48.

230. Hondagneu-Sotelo, *Regulating the Unregulated?*, *supra* note 41, at 56.

members a reliable customer pool. Finally, the collective structure of a cooperative enables domestics not only to demand higher wages but also to realistically pursue benefits that no one individual worker could typically purchase alone, such as health insurance and retirement benefits.²³¹

Although the cooperative approach holds promise as a framework for representing domestic service workers, the informality and fluidity of the domestic service labor market present obstacles to sustaining the organization of paid household workers along a model of occupational unionism. Importantly, the extent to which a cooperative can positively influence a given labor market for domestics depends on its ability to attract and retain members. That ability is compromised by workers who stray from the cooperative or bypass it all together and negotiate jobs on terms and conditions that undermine the standards established by the cooperative.

The difficulty of achieving and sustaining worker loyalty may be especially acute in labor markets heavily populated by immigrants. Strategies to transform domestic service into a skilled occupation may hold little appeal for many workers and may prompt particular disinterest among immigrants who entered this country to work in order to send money back to their home countries, and who themselves do not plan to stay here permanently. Cooperatives typically require workers to make a significant investment in the organization by way of job training sessions and involvement in the on-going operation of the organization.²³² Workers whose primary goal is securing as many jobs as possible, irrespective of quality, may not regard such an investment as worthwhile.²³³

Even more problematic is that immigrants, especially those without legal documentation, are often “willing to work for low wages and put up with poor conditions out of desperation.”²³⁴ The fear of losing a much needed job and the fear of deportation have

231. Gottesman, *supra* note 11, at 79–80 (providing a general discussion of some of the problems that unorganized workers confront in trying to obtain collective goods).

232. See Cummings, *supra* note 205, at 192 (observing that prior to the formation of a domestic cooperative as a Limited Liability Company (LLC), the members spent a year participating in a training program dedicated to general business education and cooperative development).

233. See Salzinger, *supra* note 43, at 143–44 (discussing “Amigos,” a housekeeping cooperative that de-emphasized wages and instead pursued a strategy that enabled it “to undercut other workers by entering the market at the bottom”).

234. Wilkinson, *supra* note 117; see also Davis, *supra* note 227, at 14 (noting that domestic workers in “dangerous or abusive situations are rarely able to complain or even leave, due to their precarious legal and financial situations”).

traditionally compromised attempts to organize immigrant workers.²³⁵ In addition, some women turn to domestic work in order to secure employer sponsorship in hopes of obtaining an Alien Registration Card,²³⁶ more commonly known as a "green card." So-called "sponsor jobs" create a heightened sense of dependency on the part of the worker who is consequently less likely to engage in acts that may jeopardize her chances of obtaining permanent residency status.²³⁷

While there is clearly cause for concern, the immigrant status of workers need not preclude all types of collective action. An undocumented domestic who refuses to participate in collective acts that will bring her into direct confrontation with a current employer can still benefit from an organizing model that seeks to improve the economic and social status of paid household workers. The Domestic Workers Association of Los Angeles (DWA), for example, assists a largely immigrant workforce, including many undocumented women, by educating members about their rights and teaching them how to negotiate salaries and benefits with employers.²³⁸ The DWA also

235. See, e.g., Garza, *supra* note 25, at 64, 67 (noting undocumented domestics' concerns about the possibility of deportation); Gordon, *supra* note 128, at 439-40 (commenting on the risks involved for immigrant workers who seek to organize); J. Craig Jenkins, *The Demand for Immigrant Workers: Labor Scarcity or Social Control?*, 12 INT'L MIGRATION REV. 514, 529-30 (1978) (commenting that "[a]s long as illegals are vulnerable to deportation they will be ultimately impossible to organize into viable unions"); Cory Fisher, *When a House Is Not a Home: Domestic Workers on the Westside Band Together to Preserve Their Rights*, L.A. TIMES, Dec. 31, 1999, (Westside Weekly), at 1 (on file with the North Carolina Law Review) (noting that "[m]any undocumented domestics choose not to speak out regarding their mistreatment because they and their families could face deportation"). But see DELGADO, *supra* note 223, at 132-33 (1993) (suggesting that undocumented workers' fear of deportation is often mitigated by the ease with which they can reenter the country). See generally L.A. COUNTY FEDERATION OF LABOR, AFL-CIO, THE IMPACT OF THE IMMIGRATION REFORM AND CONTROL ACT ON ORGANIZED LABOR IN LOS ANGELES 18-19 (1992) (discussing the extent of discrimination against immigrant workers and the effects of discrimination on the ability of unions to organize and bargain for such workers).

236. A resident alien card grants immigrants lawful permanent resident status. See 8 U.S.C. § 1101(a)(20) (1994).

237. See Shellee Colen, "Housekeeping" for the Green Card: *West Indian Household Workers, the State, and Stratified Reproduction in New York*, in AT WORK IN HOMES, HOUSEHOLD WORKERS IN WORLD PERSPECTIVE 89, 98-99 (Roger Sanjek & Shellee Colen eds., 1990); Shellee Colen, "With Respect and Feelings": *Voices of West Indian Child Care and Domestic Workers in New York City*, in ALL AMERICAN WOMEN: LINES THAT DIVIDE, TIES THAT BIND 46, 48 (Johnnetta B. Cole ed., 1986).

238. See Carney, *supra* note 160; see also Davis, *supra* note 227, at 28 (reporting the DWA's efforts to educate domestic workers about their rights and to provide counseling on job search issues and wage negotiations). In Long Island, New York, the Workplace Project offers similar services to a largely immigrant population. In addition to organizing members of Long Island's immigrant community, the Project engages in aggressive

provides counseling services relating to health care, family counseling, and immigration.²³⁹

Ultimately, organizers must begin to explore ways to challenge directly the vulnerable status of undocumented household workers. While domestic service cooperatives tend to be informal, establishing a cooperative as a formal legal entity can enhance the job security of workers. Toward this end, lawyers committed to community economic development strategies are evaluating the ability of various corporate structures to accommodate the goals of worker-run cooperatives.²⁴⁰ The structure of the limited liability corporation (LLC) appears especially promising as a vehicle that can help address the precariousness that plagues many undocumented immigrant workers.²⁴¹ A relatively new legal entity organized under state law,²⁴² an LLC combines the features of a partnership and a corporation; the structure has the status of a partnership for federal tax purposes while also offering its owners the limited liability protection of a corporation.²⁴³ For undocumented workers, a key advantage of forming a domestic cooperative as an LLC is that it allows members

outreach to provide workers with information about their legal rights. Gordon, *supra* note 128, at 433-34.

239. Narro, *supra* note 117, at 19; *see also supra* notes 160-64 and accompanying text (discussing the DWA's efforts to organize paid household workers).

240. Pitegoff, *supra* note 186, at 45-49 (describing the role of lawyers in organizing worker cooperatives). For analysis of the legal profession's contributions to community economic development, see Susan R. Jones, *Small Business and Community Economic Development: Transactional Lawyering for Social Change and Economic Justice*, 4 CLINICAL L. REV. 195, 202-08 (1997); Daniel S. Shah, *Lawyering For Empowerment: Community Development and Social Change*, 6 CLINICAL L. REV. 217, 231-34 (1999); and Ann Southworth, *Business Planning for the Destitute? Lawyers as Facilitators in Civil Rights and Poverty Practice*, 1996 WIS. L. REV. 1121, 1140-47 (1996).

241. A worker cooperative can be structured legally to resemble other entities, including corporations and unincorporated associations. Lewis D. Solomon & Melissa B. Kirgis, *Business Cooperatives: A Primer*, 6 DEPAUL BUS. L.J. 233, 236 (1994). *See generally* David Ellerman, *Workers' Cooperatives: The Question of Legal Structure*, in *WORKER COOPERATIVES IN AMERICA* 257 (Robert Jackall & Henry M. Levin eds., 1984) (providing a detailed examination of cooperative legal structures).

242. In 1977, Wyoming was the first state to enact a statute allowing LLCs as an alternative entity to the traditional corporation or partnership. Wyoming Limited Liability Company Act of 1977, ch. 158, 1977 Wyo. Sess. Laws 537-49 (codified at WYO. STAT. ANN. §§ 17-15-101 to 17-15-144 (Michie 1999)). In 1988, the Internal Revenue Service finally gave its approval for an LLC to be taxed as a partnership. *See* Rev. Rul. 88-76, 1988-2 C.B. 360. *See generally* Susan Pace Hamill, *The Limited Liability Company: A Possible Choice for Doing Business?*, 41 FLA. L. REV. 721, 771 (1989) (predicting the LLC's popularity).

243. *See, e.g.,* Craig J. Langstraat & K. Dianne Jackson, *Choice of Business Tax Entity After The 1993 Tax Act*, 11 AKRON TAX J. 1, 5 (1995); Larry E. Ribstein, *Possible Futures for Unincorporated Firms*, 64 U. CIN. L. REV. 319, 319 (1996).

to bypass the creation of an employer-employee relationship and the attendant legal complications that might arise under immigration laws.²⁴⁴ Under the LLC structure, households contract with the cooperative and not the individual worker.²⁴⁵ Given that some households are reluctant to employ undocumented domestics for fear of violating immigration laws,²⁴⁶ this arrangement may enable immigrants to increase their client pool and in turn increase their earnings potential.²⁴⁷

Forming an LLC can also help reduce the vulnerability of undocumented domestics. As described by Scott Cummings:

It often happened that [household] clients would take advantage of a worker's vulnerable legal and economic status by refusing to pay for services rendered. Clients did this because they knew that the workers—many of whom were undocumented—would be unlikely to pursue the matter in court. A legally structured cooperative business would minimize or eliminate this risk, since clients would be contractually obligated to the business (as opposed to an individual domestic worker), which could sue clients for nonpayment.²⁴⁸

Although a cooperative structured as an LLC may offer undocumented workers the ability to become effective market participants despite their immigration status, the advantage of such a structure is less clear for legal domestics who may want to retain the benefits of the employer-employee relationship. Of course, undocumented workers are also entitled to the protection of some employment laws,²⁴⁹ yet, as Cummings suggests, their vulnerable

244. See Cummings, *supra* note 205, at 207–08.

245. Of course, the question remains as to whether the worker would qualify as an employee of the LLC. Although there is no case law addressing the treatment of LLC members under Immigration Reform and Control Act (IRCA) of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended at 8 U.S.C. § 1324 (1994 & Supp. IV 1998)), court interpretations of other federal employment statutes suggest that “as long as members of an LLC have a ‘proprietary’ interest in the business . . . they should not be considered ‘employees’ of the LLC.” Cummings, *supra* note 205, at 208.

246. IRCA bars the hiring of undocumented workers. 8 U.S.C. § 1324. The Act imposes civil and criminal sanctions upon employers who knowingly hire undocumented persons and requires employers to verify that workers are authorized to work in the United States. See *id.* § 1324.

247. Cummings, *supra* note 205, at 194.

248. *Id.*

249. Undocumented workers are protected by the FLSA. See, e.g., *Alvarez v. Sanchez*, 482 N.Y.S.2d 184, 184 (N.Y. App. Div. 1984) (holding that an undocumented worker from Mexico can recover underpaid and unpaid wages for work as a domestic service employee under the FLSA). See generally Susan Charmsky, Comment, *Protection for*

status often means that such protection exists in name only.²⁵⁰ Hence, some undocumented workers are understandably willing to forgo this theoretical protection in hopes of improving their economic position by relying on an LLC-structured cooperative. This trade-off may or may not appeal to legal domestics.

Structured as an LLC or as a more informal arrangement, a cooperative can serve as a useful vehicle that will enable individual paid household workers to join together in a collective effort to improve their working conditions. Importantly, the cooperative framework does not depend on the existence of a group of household employers with whom workers can bargain. Even as household employers remain dispersed, workers can still use a cooperative to advance their labor interests. The effectiveness of any given cooperative will necessarily depend on a variety of factors, including the members, their goals and resources, and the particular labor market. Yet as the discussion in the next section demonstrates, there are measures, both legal and non-legal, that can potentially bolster the overall effectiveness of the cooperative approach.

Undocumented Workers Under the FLSA: An Evaluation in Light of IRCA, 25 SAN DIEGO L. REV. 379 (1988) (arguing that application of the FLSA to undocumented workers is consistent with the goals of the IRCA); L. Tracy Harris, Note, *Conflict or Double Deterrence? FLSA Protection of Illegal Aliens and the Immigration Reform and Control Act*, 72 MINN. L. REV. 900 (1988) (arguing that applying the FLSA to undocumented workers will aid the goals of the IRCA by deterring employment of such workers and by protecting wage standards for all workers). They also have the right to organize under the NLRA. See, e.g., *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 894–95 (1984) (holding that reporting undocumented workers to the Immigration and Naturalization Service in retaliation for participating in union activities is an unfair labor practice under the NLRA). See generally Myrna A. Mylius Shuster, Note, *Undocumented Does Not Mean Unprotected: The Status of Undocumented Aliens Under the NLRA Since the Passage of the IRCA*, 39 CASE W. RES. L. REV. 609 (1989) (arguing that the NLRB's recognition of undocumented alien workers as "employees" is consistent with the IRCA). Finally, undocumented workers are protected under Title VII from employment discrimination. See *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 95 (1973) ("Title VII was clearly intended to apply with respect to the employment of aliens inside any State."); *Rios v. Enter. Ass'n Steamfitters Local 638*, 860 F.2d 1168, 1173 (2d Cir. 1988) (noting that the Title VII protections extend to undocumented workers as long as such protection does not conflict with immigration laws); *EEOC v. Switching Sys. Div. of Rockwell Int'l Corp.*, 783 F. Supp. 369, 374 (N.D. Ill. 1992) (noting that the EEOC "plainly is correct that Title VII's protections extend to aliens who may be in this country either legally or illegally"); *EEOC v. Tortilleria La Mejor*, 758 F. Supp. 585, 587–88 (E.D. Cal. 1991) (holding that an undocumented worker may maintain a claim for sex-discrimination under Title VII).

250. See Cummings, *supra* note 205, at 193; see also Davis, *supra* note 227, at 14 (observing that legal protections for undocumented workers are "useless as a practical matter").

C. Fortifying the Cooperative Structure

Cobble argues that existing labor law hinders the potential for worker-run employment agencies, such as hiring hall cooperatives, to represent effectively the interests of low-wage service workers.²⁵¹ Historically, union-operated hiring halls relied upon the closed-shop device to help gain control over the distribution of jobs.²⁵² A closed-shop provision obligated employers to obtain all personnel through the hall and to dismiss any workers who relinquished union membership.²⁵³ Workers, likewise, had to join the union in order to obtain jobs through the hall.²⁵⁴ This arrangement enabled unions to diminish significantly the ability of employers and nonunion employees to undermine the effectiveness of the hiring hall. Because the Taft-Hartley amendments to the NLRA prohibit closed-shop agreements,²⁵⁵ commentators contend that modifications to the law may be necessary if more inclusive models of unionism are to succeed.²⁵⁶

Yet it is unclear whether domestic service workers stand to benefit from legal modifications that would once again permit the use of the closed-shop agreement. Because the NLRA excludes paid

251. Cobble, *Making Postindustrial Unionism Possible*, *supra* note 189, at 298–99 (noting legal changes necessary to promote the use of worker-run employment agencies); *see also* Wial, *supra* note 79, at 720–21 (outlining legal reforms necessary to facilitate occupational unionism among low-wage service workers).

252. *See* ARCHIBALD COX ET AL., *LABOR LAW: CASES AND MATERIALS* 1094 (12th ed. 1996) (observing that “[t]he union-operated hiring hall . . . frequently went hand-in-hand with the closed shop”); CHARLES HANSON ET AL., *THE CLOSED SHOP: A COMPARATIVE STUDY IN PUBLIC POLICY AND TRADE UNION SECURITY IN BRITAIN, THE USA AND WEST GERMANY* 169 (1982) (noting that “[h]iring halls have traditionally been associated with the closed shop”); Jerome D. Fenton, *Union Hiring Halls Under the Taft-Hartley Act*, 9 *LAB. L.J.* 505, 506 (1958) (observing that the “hiring hall at times has been a useful adjunct to the closed shop”); *see also* COBBLE, *DISHING IT OUT*, *supra* note 132, at 138 (discussing how, through the use of the closed shop agreement, hiring halls controlled the labor supply for waitresses).

253. GORMAN, *supra* note 60, at 641–42.

254. *See id.*; *see also* COBBLE, *DISHING IT OUT*, *supra* note 132, at 138 (discussing the use of a “100 percent” closed-shop agreement requiring that “all employees . . . join the union before being hired and that employers obtain all personnel through the union hiring hall”); Wial, *supra* note 79, at 686 (describing the closed-shop agreement).

255. 29 U.S.C. §§ 158(a)(3), 158(b)(2) (1994). Section 8(a)(3) of the NLRA prohibits an employer to agree to a closed shop, and section 8(b)(2) forbids a union to attempt to force an employer to do so. *See generally* THE DEVELOPING LABOR LAW 40–45 (Charles Morris ed., 2d ed. 1983) (discussing the Taft-Hartley changes to the NLRA).

256. Cobble, *Making Postindustrial Unionism Possible*, *supra* note 189, at 294–302 (outlining legal changes necessary to accommodate alternative forms of employee representation); Wial, *supra* note 79, at 706–20 (discussing current labor law limitations to organizing service workers).

household workers and these workers are establishing hiring halls outside of the collective bargaining process, there is no legal prohibition against a domestic service cooperative engaging in closed-shop activity. That said, inclusion of paid household workers within the scope of collective bargaining statutes could theoretically enhance the effectiveness of domestic service cooperatives. Consider, for example, a scenario in which household workers in a given geographical region organized into a hiring hall styled cooperative. Assume also that the organization maintained a closed-shop to the extent that it predicated employment on cooperative membership. At its best, the organization would implement a program to train household workers and would bring together sufficient numbers of workers so as to control the supply of labor in the specified area and to establish area-wide job standards such as wages. However, the success of the organization in restricting competition might likely spell its demise under antitrust laws.²⁵⁷ This is where inclusion within the NLRA could prove useful, because certain types of anti-competitive behavior under the Act are immunized from antitrust challenges.²⁵⁸

Of course, this discussion at present is largely academic in view of my underlying premise—i.e., the presence of a cohesive group of paid household workers capable of exercising control over a given labor market for domestic services. The isolation of workers, immigration-related complications, sponsorship concerns, and the self-interest of individual workers are just some of the factors strongly weighing against the likelihood of paid household workers achieving the type of labor solidarity required to exercise monopolistic power in a given area.²⁵⁹ At the moment, most domestic service cooperatives are modest endeavors, charting largely unexplored terrain.

257. The Sherman Antitrust Act, 15 U.S.C. §§ 1–7 (1988), and the Clayton Act, 15 U.S.C. §§ 12–27 (1988), prohibit monopolies and attempts to monopolize.

258. Section 6 of the Clayton Act immunizes labor organization activities designed to carry out the “legitimate” purposes of labor unions from claims under the antitrust laws. 15 U.S.C. § 17 (1988). In addition, federal labor legislation often preempts state antitrust laws. *See, e.g.*, *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 635–37 (1975) (holding that the NLRA preempts application of state antitrust law when application of the state law would frustrate federal labor policy); *A & D Supermarkets, Inc. v. United Food & Commercial Workers, Local Union 880*, 732 F. Supp. 770, 777–79 (N.D. Ohio 1989) (holding that the NLRA preempts Ohio antitrust law with respect to picketing).

259. Wial makes a relevant point about the existence of such an organization for janitors that is equally applicable in the domestic service context. Wial, *supra* note 79, at 701–02. He suggests that because it is unlikely that the organization, in this case a union, would be able:

To help build their momentum and appeal, domestic service cooperatives should look to forge ties with organized labor. Although paid household workers cannot bargain traditional union contracts, for the aforementioned legal and structural reasons, unions can play an important role in facilitating their organization and representing their interests by way of an associate membership arrangement.²⁶⁰ This relatively new arrangement allows workers who are not part of an organized bargaining unit to join a union as an individual.²⁶¹ In exchange for annual dues payment, an associate member is entitled to a number of benefits, including participation in the Union Privilege Benefit Program.²⁶² Established in 1986 by the AFL-CIO, the program offers members of affiliated unions as well as associate members direct benefits such as health and life insurance at rates below those normally offered to consumers.²⁶³ An associate membership may provide the means by which a domestic service cooperative can most effectively help its members obtain these benefits. Through such programs, unions might also aid cooperatives in educating members about their legal rights under employment laws and in providing strategies to lobby for legislation beneficial to domestics.²⁶⁴

to maintain a permanent monopoly on the ability to train high-skill workers, there would eventually emerge a group of high-skill workers who, if excluded from union membership, would be willing to underbid union workers. Employers would actively seek out such workers. The result would be an end to the union's monopoly over the labor supply and an erosion of the union's ability to maintain area-wide standards, as well as the creation of a group of workers who were hostile to the union.

Id. at 702.

260. See Paul Jarley & Jack Fiorito, *Associate Membership: Unionism or Consumerism?*, 43 INDUS. & LAB. REL. REV. 209 *passim* (1990) (providing an overview of the associate membership program and also criticizing its equation of unionism with consumerism); see also Kathleen E. Christensen, *Reevaluating Union Policy Toward White-Collar Home-based Work*, in WOMEN AND UNIONS, *supra* note 13, at 246, 254-55 (encouraging the use of associate membership arrangements as a way to provide education and benefits to self-employed home-based workers); Green & Tilly, *supra* note 110, at 494-95 (noting the ability of associate memberships to help organize service workers); Ness, *supra* note 128, at 93-94 (discussing the use of associate membership programs in organizing garment workers).

261. Joe Ward, *Unions Lure Associate Members with Insurance, Legal Benefits*, GANNET NEWS SERVICE, Oct. 24, 1990, LEXIS, Gannett News Service File (documenting low union density as an impetus for the program and outlining various benefits under the program).

262. Jarley & Fiorito, *supra* note 260, at 210.

263. *Id.* at 210, 216-17 (stating that other benefits include credit cards, auto insurance, legal aid, travel services, job counseling, job search information, and day care programs).

264. See *id.* at 216-17 (highlighting services that might be provided by an associate membership program, including legal services and lobbying efforts for legislation

D. Encouraging Employer Participation

To this point, the discussion in this Part has focused on the advantages of collective action for the paid household worker, and appropriately so. All too frequently, the interests of the employing class dictate labor policies with regard to domestic service, usually to the disadvantage of the workers.²⁶⁵ That said, the potential success of worker cooperatives depends not only on worker loyalty but also on employer participation. What is the appeal of such organizations to household employers? Why would a prospective employer forgo hiring a domestic through informal channels, and potentially for less money, and instead turn to a modified hiring hall and all that it might entail? A strong focus on peer management techniques provides part of the answer. Both the experiences of unions organizing service workers and those of domestic service cooperatives suggest that an organizing agenda that emphasizes job training and professionalism appeals not only to workers but also to employers. The proliferation of commercial cleaning agencies highlights the existing demand for professionalized personal services, particularly among the new middle class.²⁶⁶ Against that reality, cooperatives are positioning themselves within the larger market for skilled domestic workers, with the hopes of competing over time with for-profit agencies.

Another advantage of using a cooperative may rest in the willingness of the organizing institution to facilitate compliance with various labor laws. Although many domestic service relationships are conducted under the table, household employers may need to comply with a number of tax obligations, including Social Security and Medicare taxes, federal and state unemployment taxes, and advanced payment of the earned income tax credit for eligible employees.²⁶⁷ In

beneficial to workers). UNITE's involvement in worker centers for immigrant and minority garment workers in areas such as New York City and San Francisco offers a good example of the type of positive collaboration that an associate membership program can help forge between unions and unorganized workers. Through the centers, UNITE gives workers access to skills training and English classes, and provides the foundation for workers to acquire the knowledge necessary to become organized. Ness, *supra* note 128, at 93-95. Gottesman has taken the idea of a Union Privilege Benefit Program a step further and envisions an industry of union-affiliated service providers that can offer expert advice to individual workers about their legal rights. Gottesman, *supra* note 11, at 81.

265. See Smith, *supra* note 34, at 859 (arguing that when paid household workers are discussed in the context of labor policies, "such conversations are likely to be driven by the interests of the employing class").

266. See, e.g., Mendez, *supra* note 139, at 118-19; Salzinger, *supra* note 43, at 155.

267. See generally INTERNAL REVENUE SERVICE, HOUSEHOLD EMPLOYER'S TAX GUIDE, PUBLICATION 926 (Rev. 1999) (outlining various federal and state tax requirements for employers of household workers).

addition, some states require household employers to provide workers' compensation insurance for their domestic employees.²⁶⁸ The problem of non-compliance with these regulations has received national attention in the last decade, particularly with respect to social security taxes.²⁶⁹ Conservative estimates indicate that less than twenty-five percent of all household employers comply with applicable provisions of the Social Security Act on behalf of their workers.²⁷⁰ Various reasons have been advanced to explain the lack of compliance, including the "administrative headache" of complying with so many different laws.²⁷¹ An organization that both provides competent workers and shoulders the paperwork responsibility of these various laws may hold considerable appeal to households that take their legal obligations as employers seriously. In the case of a cooperative structured as an LLC, the obvious benefit to households is that it allows them to form a contractual relationship with the business and not the individual worker. From the perspective of households, the complete avoidance of an employment relationship with a household worker is perhaps the greatest advantage to using a cooperative.

V. TAKING IT TO THE STREETS: ON PICKETING AND PRIVACY

The preceding Part emphasized the importance of pursuing an organizational strategy that will appeal to both paid household workers and employing households. Yet the reality is that domestic

268. See generally NOW LEGAL DEFENSE AND EDUCATION FUND, OUT OF THE SHADOWS: STRATEGIES FOR EXPANDING STATE LABOR AND CIVIL RIGHTS PROTECTIONS FOR DOMESTIC WORKERS app. B (1997) (on file with the North Carolina Law Review) (describing the treatment of domestic service workers under state labor laws, including workers' compensation); see also Christine Dugas, *Liability Insurance: A Crash Course*, USA TODAY, July 23, 1997, at 3B (listing states that require workers' compensation coverage for both full-time and part-time domestic service employees).

269. See generally *Hearings*, supra note 25 passim (discussing the problem of household employer non-compliance with social security regulations and proposing solutions). Much of the debate was sparked by President William Jefferson Clinton's 1993 nominee to the position of Attorney General, Zoë Baird, who together with her husband failed to pay Social Security taxes on behalf of their domestics. See David Johnston, *Clinton's Choice for Justice Department Hired Illegal Aliens for Household*, N.Y. TIMES, Jan. 14, 1993, at A1 (reporting that Baird employed two Peruvians living illegally in the United States); see also Douglas Martin, *After Wood and Baird, Illegal-Nanny Anxiety Creeps Across Many Homes*, N.Y. TIMES, Feb. 15, 1993, at A13 (discussing the pros and cons of illegally hiring a nanny); Claudia Wallis, *The Lessons of Nannygate*, TIME, Feb. 22, 1993, at 76 (discussing changes in the Clinton Administration's policy toward potential judicial appointees in the aftermath of the Zoë Baird scandal).

270. See *Hearings*, supra note 25, at 38 (citing Marshall V. Washburn, Compliance 2000 Executive, Internal Revenue Service).

271. *Id.* at 15-17 (statement of Rep. Meek) (discussing reasons for non-compliance).

service cooperatives may hold little, if any, sway with many employers. This observation raises the question: What economic pressure can paid household workers exert on household employers? In work settings that have traditionally relied upon hiring halls or comparable structures, workers often pursue a carrot-and-stick approach to garner the support of employers.²⁷² When appeals based on improved quality of services and principles of fairness fail, workers have at their disposal a number of devices to exert pressure upon employers, including pickets, boycotts, and strikes.²⁷³ This Part explores the potential relevance of such devices to the organization of paid household workers.

Although paid household workers do engage in acts of resistance to improve their economic situation,²⁷⁴ they seldom resort to confrontational acts in the form of pickets or strikes. The most noted example of such a confrontation comes from Black washerwomen in Atlanta.²⁷⁵ In 1881, Atlanta washerwomen organized the “Washing Society” and called a strike to enforce their demand for higher wages for their services.²⁷⁶ The strike lasted for three weeks and grew from twenty to three thousand strikers and supporters, attracting cooks, child nurses, and other domestic workers.²⁷⁷ When confronted by city officials who threatened to impose an exorbitant business tax upon each member of the society,²⁷⁸ the strikers refused to be intimidated and vowed to continue the strike until their demands had been met.²⁷⁹ The acts of these women not only boldly contradicted the image of paid household workers “as passive victims of racial, sexual, and class

272. See, e.g., Cobble, *Union Strategies*, *supra* note 111, at 80 (noting that “[s]ome employers sought out hiring halls because they provided the best source of skilled, reliable labor; others used union workers only after pressure from recognitional picketing, secondary and customer boycotts, and strikes over closed shop and preferential hiring agreements”).

273. *United States v. Hutcheson*, 312 U.S. 219, 233 (1940) (holding that a union strike, picket, and attempted boycott were protected labor activity); see also FELIX FRANKFURTER & NATHAN GREENE, *THE LABOR INJUNCTION* 30 (1930) (observing that “[t]he means by which organized labor exerts economic pressure reduce themselves, in the main, to the strike, the picket and the boycott, in their various manifestations”).

274. See *supra* notes 90–99 and accompanying text (documenting early efforts of paid household workers to resist economic exploitation).

275. TERA W. HUNTER, *TO ‘JOY MY FREEDOM: SOUTHERN BLACK WOMEN’S LIVES AND LABORS AFTER THE CIVIL WAR* 88–97 (1997). Other strikes of Black washerwomen occurred in Jackson, Mississippi in 1866 and Galveston, Texas in 1877. See *id.* at 74–75.

276. See *id.* at 88.

277. *Id.* at 91.

278. See *id.* at 92.

279. *Id.* at 93; see also VAN RAAPHORST, *supra* note 90, at 200 (discussing the Atlanta washerwomen strike).

oppression,"²⁸⁰ they also "revealed an astute political consciousness by making women's work carried out in private households a public issue."²⁸¹

Similar protests among today's paid household workers may likewise help mobilize public awareness of the deleterious labor conditions that prevail within the domestic service industry.²⁸² When aimed at individual households, however, demonstrations such as pickets raise concerns about the privacy interests of employers. Courts confronting residential picketing cases must decide how best to accommodate the privacy interests of homeowners²⁸³ and the free speech interests of picketers.²⁸⁴ In balancing these conflicting interests, courts consider whether state restrictions on residential picketing are acceptable time, place, and manner regulations.²⁸⁵ Relevant to this inquiry is the availability of reasonable alternative avenues of communication by which the picketers can express their views.²⁸⁶ In the case of labor disputes, the view prevails that the proper sphere for picketers to protest is not a residential area but the situs of employment. Thus, in instances in which picketing is removed from the actual workplace and occurs instead at a private residence, courts have readily concluded that the right to privacy in the home outweighs the right to picket.²⁸⁷ Yet, what is the proper

280. Tera W. Hunter, *Domination and Resistance: The Politics of Wage Household Labor in New South Atlanta*, 34 LAB. HIST. 205, 206 (1993).

281. HUNTER, *supra* note 275, at 94.

282. See *supra* notes 28-32 and accompanying text (summarizing labor conditions in paid household work).

283. See *Frisby v. Schultz*, 487 U.S. 474, 485-86 (1988); *Carey v. Brown*, 447 U.S. 455, 471 (1980); *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978); *Gregory v. Chicago*, 394 U.S. 111, 125-26 (1969) (Black, J., concurring).

284. Peaceful picketing has been recognized as constitutionally protected. See *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 98 (1972); *Shuttlesworth v. Birmingham*, 394 U.S. 147, 155 (1969); *Cox v. Louisiana*, 379 U.S. 536, 546 (1965); *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963); *Thornhill v. Alabama*, 310 U.S. 88, 100-01 (1940).

285. See, e.g., *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *United States v. Grace*, 461 U.S. 171, 177 (1983); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *Carey*, 447 U.S. at 460-63.

286. See, e.g., *Renton*, 475 U.S. at 47; *Clark*, 468 U.S. at 293; *Grace*, 461 U.S. at 177; *Perry*, 460 U.S. at 45-46.

287. See *Zeeman v. Amalgamated Retail Employees*, 26 L.R.R.M. (BNA) 2422, 2424 (Cal. 1950) (finding that picketing an employer's private residence was against the public policy of the state of California and that picketing should occur instead where the place of business is actually located); *K-T Marine, Inc. v. Dockbuilders Local Union 1456*, 597 A.2d 563, 566 (N.J. Super. Ct. 1990), *aff'd*, 597 A.2d 540 (N.J. Super. Ct. 1991) (holding that a union could not set up an "informational" picket in front of home of a company president in a residential area far removed from the job site); *Pipe Machinery Co. v. De More* 76 N.E.2d 725, 727 (Ohio Ct. App. 1947) (observing, in enjoining workers from

balance between an employer's right to privacy and an employee's right to picket when the home and the workplace are the same, as is the case in paid household employment?

Although there is little case law on point, two cases do offer relevant analyses, *State v. Cooper*²⁸⁸ and *Annenberg v. Southern California District Council of Laborers*.²⁸⁹ The domestic employee in *Cooper*, who worked as a chauffeur and performed various house cleaning tasks, was a member of the Private Chauffeurs and Helpers Union.²⁹⁰ When discharged from his position after sixteen years of employment, he consulted with the union, which arranged to picket the home of the employer.²⁹¹ After peacefully picketing the employer's home for slightly more than two hours, the defendant was arrested and charged with disorderly conduct.²⁹² The question presented on appeal before the Minnesota Supreme Court was whether an employee of a private residence could peacefully picket the residence to secure labor demands.²⁹³

The court held that the unqualified answer was no, reasoning that "[t]he home is an institution, not an industry" or a business enterprise conducted for profit and as such cannot be picketed by an

picketing private residences, that "[t]he allowable area of economic conflict should not be extended to an invasion of the privacy of the home" but should instead be confined to the area of industry within which the dispute arose); see also *Walinsky v. Kennedy*, 404 N.Y.S.2d 491, 497 (N.Y. 1977) (analogizing to labor disputes and observing, in enjoining defendants from picketing the plaintiff's home to protest the plaintiff's opposition to a gay-right's bill, that "[i]n labor disputes the lawful place for defendants' picketing operations is at the site of the employment where are located the working conditions to which the strikers object"). The notion that picketing of private residences should be prohibited for the purposes of confining disputes, labor or otherwise, to places where they are most immediately related finds support in the case of *Carpenters & Joiners Union v. Ritter's Cafe*, 315 U.S. 722, 723-28 (1941). In *Carpenters*, the owner of a restaurant engaged a contractor to construct a building that was wholly unconnected with the restaurant. When the contractor employed nonunion labor on the construction project, members of the carpenters' and painters' unions began to picket the restaurant. In affirming the lower court's decision to enjoin the picketing, the Court observed that "[r]estriction of picketing to the area of the industry within which a labor dispute arises leaves open to the disputants other traditional modes of communication." *Id.* at 727-28. For a general discussion of residential picketing, see Sylvia Arizmendi, *Residential Picketing: Will the Public Forum Follow Us Home?*, 37 HOW. L.J. 495, 524-48 (1994); Alfred Kamin, *Residential Picketing and the First Amendment*, 61 NW. U. L. REV. 177, 198-205 (1966); and Daniel M. Taubman, Comment, *Picketers at the Doorstep*, 9 HARV. C.R.-C.L. L. REV. 95, 99-105 (1974).

288. 285 N.W. 903 (Minn. 1939).

289. 113 Cal. Rptr. 519 (Cal. Ct. App. 1974).

290. 285 N.W. at 904.

291. *Id.*

292. *Id.*

293. *Id.*

employee to protest a labor dispute.²⁹⁴ Such picketing, continued the court, interfered with the privacy rights of the employing household: “ [T]he home is a sacred place for people to go and be quiet and at rest and not bothered with the turmoil of industry”²⁹⁵ It is “ a sanctuary of the individual and should not be interfered with by industrial disputes.”²⁹⁶

Annenberg yielded a contrary result to that reached in *Cooper*. The defendant union represented fifteen private domestics employed by the plaintiff as gardeners and initiated a strike, complete with pickets, in front of the entrance to the plaintiff’s home.²⁹⁷ In response, the plaintiff sought and received a preliminary injunction enjoining the picketing.²⁹⁸ The trial court granted the injunction on the grounds that the picketing violated the homeowner’s privacy rights and that California’s Labor Code, which recognizes the organizational rights of workers in the private sector,²⁹⁹ did not extend to domestic employees.³⁰⁰ In short, the trial court held that “no domestic employee has a right to picket the private home of his employer.”³⁰¹

In reversing that decision, the California Court of Appeal stressed the need to adopt a case-by-case analysis that carefully weighed the interests of both the employee and the employer.³⁰² In the instant case, the court concluded that the domestic service employees had a right to peacefully picket the home of their employer.³⁰³ In reaching that conclusion, the court addressed two central questions glossed over by the *Cooper* court. First, is a

294. *Id.* (quoting *Barres v. Watterson Hotel Co.*, 244 S.W. 308, 309 (Ky. 1922)).

295. *Id.* at 905 (citation omitted).

296. *Id.* (citation omitted). In *Gregory v. Chicago*, Justice Black’s concurrence articulated a line of reasoning similar to *Cooper*: “I believe that the homes of men, sometimes the last citadel of the tired, the weary, and the sick, can be protected by government from noisy, marching, tramping, threatening picketers and demonstrators bent on filling the minds of men, women, and children with fears of the unknown.” 394 U.S. 111, 125–26 (1969) (Black, J., concurring) (agreeing with the Court to overturn the conviction of activist Dick Gregory for picketing the home of then Chicago Mayor Richard Daley, Justice Black observed).

297. *Annenberg v. Southern Cal. Dist. Council of Laborers*, 113 Cal. Rptr. 519, 521 (Cal. Ct. App. 1974).

298. *Id.*

299. See *supra* notes 71–74 and accompanying text (noting the California collective bargaining statute’s coverage of workers in the private sector and its application to private paid household workers).

300. *Annenberg*, 113 Cal. Rptr. at 521.

301. *Id.* at 526.

302. *Id.*

303. *Id.*

household employer entitled to the same level of privacy as a household that does not employ domestics? Second, and related, should a paid household worker be denied the right to engage in collective action because the employment relationship for private domestic service is not the typical industrial relationship?

A. *The Diminished Privacy Rights of Paid Household Employers*

On the issue of whether a residential demonstration interferes with a homeowner's right of privacy, *Cooper* and *Annenberg* concur. In the words of the latter, "any picketing . . . , no matter how peaceful, or how well controlled, is an intrusion into the privacy of the home. One placard-carrying picket walking silently on the sidewalk or street in front of a man's home is an invasion into the privacy of the home."³⁰⁴ In *Cooper*, that observation essentially ends the analysis.³⁰⁵ Yet, the very act of employing a paid household worker arguably weakens the employer's expectation of privacy. This observation rests on "the assumption that expectations of privacy in the home vary according to one's own role in society."³⁰⁶ By employing a domestic, the homeowner not only invites a stranger into the home but also becomes a market actor, crossing the ideological divide between the private family and the public market³⁰⁷ and subjecting the perceived solitude of the former to some of the vagaries that attend the latter. *Annenberg* describes that deterioration of familial privacy this way:

304. *Id.*

305. For criticism of the *Cooper* decision, see Irving Robert Feinberg, *Picketing, Free Speech and "Labor Disputes,"* 17 N.Y.U.L.Q. 385, 394 (1940) (questioning why "an employee should be deprived of his right to picket merely because his place of employment is the home") and Kamin, *supra* note 287, at 207 (suggesting that a state statute which restricted labor picketing to the site of the dispute might lead to a different decision in *Cooper*).

306. Taubman, *supra* note 287, at 121 ("[A] homeowner's [right to] privacy . . . should be a function of the individual's . . . contact with the public in his occupation or other activities. The greater the contact, the greater should be the interference with his normal life necessary to support an action for the invasion of his right of privacy.") Taubman proposes that residential picketing cases should be analyzed by distinguishing among "different categories of homeowners according to the extent of their dealings with the public." *Id.* He concludes that a private individual should have the highest expectation of privacy. *Id.* at 122. However, he does not consider the occasion of a private individual who is also a household employer. *Contra* Arizmendi, *supra* note 287, at 544-45 (suggesting that dictum in the Supreme Court's decision in *Frisby v. Schultz*, 487 U.S. 474 (1988), supports the proposition that homeowners who use their residences for purposes other than as homes should be deemed to have "waived" their residential privacy).

307. For an insightful analysis of the ideology of the private family and the public market, see Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1499-528 (1983).

The isolation of the household has to a certain extent been stripped away. The householder has become an employer and with that status takes on certain social responsibilities not present in the vast number of households which do not use domestic help. When one hires someone else to mow his lawn, wash his dishes or drive his car, he exposes himself to the economics of the labor market.³⁰⁸

A household that decides to employ domestic help, and effectively transforms a place of residence into a place of employment for someone else, should no longer be entitled to the same level of protection from labor regulations on the theory that such regulations interfere with the sanctity of the home. Indeed, if this theory were accepted, then arguably paid household employers should be exempted from any number of labor regulations that may threaten the perceived tranquility of the home by introducing elements of industrial life into the family sphere. Yet, clearly there needs to be some attempt to balance the privacy interests of the employer with the economic and free speech interests of the worker. The fact that paid household employment is situated within the privacy of the home should not give homeowners the right to disregard the interests of those in their employ.³⁰⁹

As I have argued elsewhere,³¹⁰ opposition to applying labor laws to domestic service partially reflects a belief that the paid household relationship is a purely personal matter between employee and employer that does not require outside involvement from the state.³¹¹ Yet while the services rendered in paid household work are personal in nature, the employment relationship should not be treated as such. Unlike a more traditional worker, who can picket at a location remote to the employer's home, "the only place [domestic service workers] could exercise the right to picket, that would have any relatedness to the controversy, is where they were employed."³¹²

308. *Annenberg*, 113 Cal. Rptr. at 526.

309. Stephen Carter makes a similar observation in the context of the application of Social Security provisions to paid household employers. *CARTER*, *supra* note 56, at 181. Although Carter contends that the government interferes with the privacy rights of household employers by requiring them to report a worker's wages to the Internal Revenue Service and to ascertain the immigration status of a worker, he acknowledges that an employer's privacy interest should not trump the domestic's interests in receiving Social Security protection. *Id.* (concluding that the economic interests of domestics would likewise outweigh the privacy interests of household employers with respect to minimum-wage and maximum-hour laws).

310. See Smith, *supra* note 34, at 911-12.

311. See *id.*

312. *Annenberg*, 113 Cal. Rptr. at 522-23 (quoting *City of Wauwatosa v. King*, 182

This fact should figure prominently in attempts to reconcile the interests of domestic service workers and their employers.³¹³ The ability to conduct peaceful residential picketing affords domestic service workers a measure of leverage in their collective efforts to improve their economic status.

*B. Domestic Service: "Not Properly Industrial in Character"*³¹⁴

In rendering its decision, the *Cooper* court reasoned that the employment relationship for private domestic service is not the typical industrial relationship,³¹⁵ a pointed reminder that the right to engage in collective acts emerged in the wake of industrialization, and against images of men mining for coal and working on railways.³¹⁶ For many late nineteenth and early twentieth century commentators, it was unthinkable that labor standards developed in response to the tensions of an industrialized society held any relevance for domestic service, an occupation that was situated within the confines of the home and that remained firmly anchored to feudalistic notions.³¹⁷ In

N.W.2d 530, 538 (1971)).

313. See *Carey v. Brown*, 447 U.S. 455, 479 (1980) (Rehnquist, J., dissenting) (suggesting that a complete ban on residential picketing might run afoul of the Constitution if applied to situations where "a resident has voluntarily used his home for nonresidential uses in a way which reduces the resident's privacy interest, and the person seeking to picket the home has no alternative forum for effectively airing the grievance because it relates to the nonresidential use of the home"); *Hibbs v. Neighborhood Org. to Rejuvenate Tenant Hous.*, 252 A.2d 622, 624 (1969) (Roberts, J., concurring) (noting that "residential picketing is permissible where no other alternative is available").

Some state statutes recognize that residential labor picketing may be appropriate when conducted at a residence located at the situs of a labor dispute. See, e.g., HAW. REV. STAT. § 379A-1 (1985) (prohibiting residential picketing but making an exception for "picketing in any lawful manner, during a labor dispute, of the place of employment involved in such labor dispute"); see also Taubman, *supra* note 287, at 102 n.46 (collecting statutes). At least two state statutes that provided an exception for situs-related residential picketing have been held unconstitutional under the First and Fourteenth Amendments as impermissible content-based regulations. See *Carey*, 447 U.S. at 461; *French v. Amalgamated Local Union 376*, 526 A.2d 861, 868 (Conn. 1987). The validity of Hawaii's statute is uncertain in light of these holdings.

314. HELEN L. SUMNER, U.S. DEP'T OF LABOR, HISTORY OF WOMEN IN INDUSTRY IN THE UNITED STATES: REPORT ON CONDITION OF WOMEN AND CHILD WAGE-EARNERS IN THE UNITED STATES 177 (1910) (discussing domestic service despite the fact that it was "not properly industrial in character").

315. *State v. Cooper*, 285 N.W. 903, 905 (Minn. 1939).

316. See generally IRVING BERNSTEIN, A HISTORY OF THE AMERICAN WORKER 1933-1941: TURBULENT YEARS 217-317 (1970) (detailing the industrial strife precipitating the enactment of the NLRA).

317. See Smith, *supra* note 34, at 875-82 (examining the feudalistic underpinnings of the domestic service relationship).

the words of *Cooper*, “the home is an institution, not an industry.”³¹⁸ To be sure, because of its location within the home and its perception as “woman’s work,” domestic service historically stood in total opposition to industrial work. Yet even as one appreciates the traditional distinctions between family and market,³¹⁹ it is not clear that such distinctions should serve to justify a refusal to treat labor relationships within the home in a manner comparable to relationships within the industrial sector.

Lurking beneath the holding in *Cooper* is likely a belief similar to that articulated by the court in *North Whittier Heights Citrus Ass’n v. NLRB*,³²⁰ namely, that domestic service workers do not need the protection of collective bargaining rights, as their interests will be protected adequately by the employing household.³²¹ Such a view rests on a feudalistic image of domestic service and references a time when employing families were either legally obligated to provide for their domestic workers³²² or did so based on custom.³²³ That antiquated view, however, is out of sync with the economic realities confronting today’s paid household workers as well as the modern understanding of the employment relationship.³²⁴ A domestic should not have to rely upon individual acts of kindness and goodwill for her well being.

The fact that domestic service is not properly industrial in character does not diminish the needs of paid household workers relative to those of industrial workers.³²⁵ The *Annenberg* court recognized this:

The food bill of a greenskeeper or maid on the plaintiff’s estate is the same as the food bill of a greenskeeper working

318. *State v. Cooper*, 285 N.W. 903, 904 (Minn. 1939).

319. *See generally* Olsen, *supra* note 307 (exploring the legal implications of the dichotomy between the private family and the public market).

320. 109 F.2d 76 (9th Cir. 1940).

321. *See supra* notes 86–87 and accompanying text

322. ROBERT J. STEINFELD, *THE INVENTION OF FREE LABOR* 154 (1991).

323. *See, e.g.*, KATZMAN, *supra* note 33, at 197–98 (describing the custom of the food basket, in which workers carried home leftover food); ROLLINS, *supra* note 25, at 78 (observing that employer gifts of clothes, leftover food, used furniture, and the like are a reflection of the occupation’s feudalistic roots); I.M. Rubinow, *The Problem of Domestic Service*, 214 J. OF POLITICAL ECON. 502, 515–16 (1906) (arguing against the practice among employing households to compensate domestics through meals).

324. STEINFELD, *supra* note 322, at 154–56 (discussing the evolution of the labor relationship from a state of dependency to autonomy).

325. Indeed, as *Annenberg* points out, there are other occupational settings that are not industrial in character, but that are covered under collective bargaining statutes. *See Annenberg v. Southern Cal. Dist. Council of Laborers*, 113 Cal. Rptr. 519, 525 (Cal. Ct. App. 1974).

at the nearby Thunderbird Country Club or a maid working at a Hilton Hotel. The price of a can of beans is the same for each. When one accepts employment as a maid, gardener, chauffeur, housekeeper or babysitter in a private home, he does not thereby become some kind of a second class working person. *To put it bluntly, a domestic employee can get as hungry as can an employee of an industrial giant.*³²⁶

Of course, as a practical matter, pickets aimed at individual households would exert little direct pressure on employers, as many can readily substitute the work of a domestic by performing the work themselves or by turning to a commercial enterprise.³²⁷ That said, residential demonstrations can help garner public support on behalf of domestics as well as call attention to employers that have engaged in exploitative conduct.³²⁸ Domestic service workers should have the legal right to undertake such demonstrations without fear of prosecution.³²⁹

CONCLUSION

When Congress enacted the NLRA, it explicitly recognized the inequality of bargaining power between employees and employers and the need for employees to join forces as a means to balance that inequality. Although the Act excluded private paid household workers from coverage, they, perhaps more than many groups of workers, sharply illustrate the need for solidarity. Laboring in isolation within the private sphere of family and home and performing a job that is socially and economically devalued, paid household workers are especially vulnerable to exploitation. For the many immigrant domestics, that tenuous position is all the more precarious.

326. *Id.* at 526 (emphasis added).

327. See, e.g., Julianne Malveaux, *From Domestic Worker to Household Technician*, in *BLACK WOMEN IN THE LABOR FORCE* 85, 95 (Phyllis A. Wallace et al. eds., 1980) (noting that commercial agencies have sufficiently commodified household services such that "laundry can be sent out, and meals purchased at restaurants"); see also Margaret Talbot, *The Next Domestic Solution: Dial-A-Wife*, *NEW YORKER*, Oct. 20 & 27, 1997, at 196, 196-202 (discussing the proliferation of companies engaged in domestic outsourcing).

328. See Athima Chansanchai, *Maid in the U.S.A.*, *VILLAGE VOICE* (N.Y.), Oct. 7, 1997, at 49 (documenting picketing strategies by South Asian domestics in New York City to protest the withholding of wages by household employers).

329. The court's decision in *Cooper*, for example, upheld the lower court's judgment convicting the defendant of disorderly conduct under the provisions of a city ordinance. The court acknowledged that the acts of the defendant did not create any disorder, but nevertheless held that the picketing was unprotected and thus in violation of the city ordinance. *State v. Cooper*, 285 N.W. 903, 905-06 (Minn. 1939).

Against that backdrop, this Article argues that paid domestics should organize, but it also acknowledges that the structure of the private paid household relationship is fundamentally at odds with the vision of collective action undergirding the NLRA. Yet the same observation now holds true to varying degrees for many workers, and therein lies the potential for success. As the labor movement devises alternative approaches to represent the interests of the workforce of the future, domestic service workers must tap into those initiatives to develop an organizing model that can accommodate their job structure and particular needs.

Achieving solidarity among paid household workers will not occur overnight. It requires a new vision of organizing, a commitment and willingness from individual workers, some degree of statutory reform, a change in our cultural climate that values the work of family and home, and support from community groups, legal practitioners, and organized labor. It is a difficult road to walk, to be sure, but it is one that holds promise for ensuring that paid household workers can actively participate in shaping the terms and conditions of their work experiences.