

# Articles

## LABORING FOR CHILD CARE: A CONSIDERATION OF NEW APPROACHES TO REPRESENT LOW-INCOME SERVICE WORKERS

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### I. INTRODUCTION

The steady movement of women with children into the workforce has dramatically increased the demand for affordable, quality child care services.<sup>1</sup> Yet, while demand for care climbs, working conditions in the child care industry remain stagnant, and child care workers labor at the very bottom of the economic ladder. As a group, they are poor women who are disproportionately of color and who rarely receive job-related benefits such as health insurance, sick leave, vacation time, or retirement plans.<sup>2</sup> Although this state of affairs would seem to suggest that the child

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1. U.S. HOUSE OF REPRESENTATIVES, COMM. ON WAYS AND MEANS, THE 2004 GREEN BOOK (Section 9 Child Care) 9-1 (2004) [hereinafter GREEN BOOK], available at <http://waysandmeans.house.gov/media/pdf/greenbook2003/Section9.pdf>; RACHEL SCHUMACHER ET AL., UNTAPPED POTENTIAL? HOW STATES CONTRACT DIRECTLY WITH PROVIDERS TO SHORE UP CHILD CARE CHOICES FOR LOW-INCOME FAMILIES 18 (2003), available at [http://www.buildinitiative.org/docs/untapped\\_rpt.pdf](http://www.buildinitiative.org/docs/untapped_rpt.pdf).

2. THE CENTER FOR THE CHILD CARE WORKFORCE, CURRENT DATA ON CHILD CARE SALARIES AND BENEFITS IN THE UNITED STATES 5 (2002) [hereinafter CURRENT DATA ON CHILD CARE SALARIES], available at <http://www.ccw.org/pubs/2002Compendium.pdf>. See also *infra* notes 33–43 and accompanying text (discussing the economic status and working conditions of child care workers).

care industry is ripe for organizing, less than five percent of all child care workers in the United States belong to a union.<sup>3</sup>

Researchers have long recognized the difficulties of organizing low-income service occupations like child care. The tenuous labor arrangements of many low-income service workers, their employment at decentralized worksites, and the pervasive instability in low-wage service industries all frustrate efforts to mobilize workers and to bargain effectively on their behalf.<sup>4</sup> However, the recent success of unions, such as the Service Employees International Union (SEIU), in organizing home care workers, at a time when popular opinion regarded the work as unorganizable, indicates that these obstacles are not insurmountable.<sup>5</sup> Indeed, the organization of home care workers has been so successful that it represents the largest gain for the United States labor movement in more than six decades.<sup>6</sup>

SEIU's home care victory unfolded against a shifting economic landscape. As economic restructuring has transformed the workplace, replacing manufacturing jobs with service jobs,<sup>7</sup> the labor movement has increasingly recognized the limitations of traditional approaches to organizing and representing workers.<sup>8</sup> Conventional models of unionism,

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3. LEA GRUNDY ET AL., LABOR'S ROLE IN ADDRESSING THE CHILD CARE CRISIS 12 (1999), available at <http://www.laborproject.org/publications/pdf/wp1.pdf>.

4. See Dorothy Sue Cobble, *Union Strategies for Organizing and Representing the New Service Workforce*, 43 INDUS. REL. RES. ASS'N ANN. PROC. 76, 77-78 (1990) [hereinafter Cobble, *Union Strategies*] (describing how the employment relationship has changed over time and observing that despite such transformations, "the dominant model of unionism remains the industrial model"); Dorothy Sue Cobble, *Introduction: Remaking Unions for the New Majority*, in WOMEN AND UNIONS: FORGING A PARTNERSHIP 3 (Dorothy Sue Cobble ed., 1993) [hereinafter Cobble, *Remaking Unions*] (claiming that unions based on male, blue-collar factory workers are outdated, and arguing instead that a successful labor movement must take the needs of female workers into account); James Green & Chris Tilly, *Service Unionism: Directions for Organizing*, 1987 INDUS. REL. RES. ASS'N SPRING PROC. 486, 487-88 [hereinafter Green & Tilly] (discussing reasons why the traditional model of unionism does not work well for most service workers); Howard Wial, *The Emerging Organizational Structure of Unionism in Low-Wage Services*, 45 RUTGERS L. REV. 671 (1993) (discussing a model for structuring and organizing unions).

5. See *infra* notes 126-43 and accompanying text (discussing SEIU's home care campaign).

6. Stu Schneider, *Victories for Home Health Care Workers*, 249 DOLLARS & SENSE 25, 26 (2003). See *infra* notes 126-43 and accompanying text (discussing SEIU's home care campaign).

7. See Dorothy Sue Cobble, *The Prospects for Unionism in a Service Society*, in WORKING IN THE SERVICE SOCIETY 333, 338 (Cameron L. Macdonald & Carmen Sirianni eds., 1996) [hereinafter Cobble, *Prospects*] (stating that the vast majority of new job creation is in the service sector); Elizabeth Engberg, *Union Responses to the Contingent Workforce*, in WOMEN AND UNIONS: FORGING A PARTNERSHIP 162, 162 (Dorothy Sue Cobble ed., 1993) (discussing changes in the United States economy).

8. See, e.g., Janice Fine, *Community Unionism in Baltimore and Stamford: Beyond the Politics of Particularism*, 4 WORKING USA 59, 61 (2000) ("In this new era of high

which were crafted with a manufacturing economy in mind, have proved incapable of accommodating the realities of an increasingly service-oriented workforce.<sup>9</sup> Confronted with this reality and a continual decline in union membership,<sup>10</sup> segments of the labor movement have focused on developing new organizing models that can reach the many unorganized service sector workers.<sup>11</sup> As Dorothy Sue Cobble suggests, labor is coming to appreciate that low-wage service jobs are not unorganizable; instead, “they require different models of organization and representation.”<sup>12</sup> This Article examines how new models of unionism can usefully be applied to the organization and representation of the child care workforce, and how such models can both bolster the economic position of child care workers as well as improve child care quality by linking quality with decent working conditions.

Of course, achieving positive changes in the status of the child care workforce is hindered by the inability of many parents to afford quality child care. That inability commonly prompts commentators to demand increased public support of child care. However, as I have argued elsewhere, while a public commitment to child care is crucial to solving the current child care crisis, such a commitment will not magically ensure advantages for child care workers.<sup>13</sup> Far too frequently, enhanced funding for child care has privileged child care consumers while ignoring the child care workforce. The short-sightedness of this approach becomes apparent when one considers that “[p]oor compensation and working conditions in child care are the driving forces behind high turnover rates and mediocre care.”<sup>14</sup>

While unions are also not a magic elixir to solve the child care crisis, they are well positioned to press for the type of government policies that

worker mobility, organizing needs something more than a work site as a base. In labor markets that are overwhelmingly nonunion . . . firm-by-firm organizing is inadequate. . . . Just as they did in the early years of craft and industrial unionism, unions have concluded that they have to focus more on geographic or industrial strategies in order to take wages out of competition across a city, region, or industry.”)

9. Kate Bronfenbrenner & Tom Juravich, *It Takes More Than House Calls: Organizing to Win with a Comprehensive Union-Building Strategy*, in ORGANIZING TO WIN: NEW RESEARCH ON UNION STRATEGIES 19 (Kate Bronfenbrenner et al. eds., 1998); Green & Tilly, *supra* note 4, at 487.

10. See *Union Members in 2004*, U.S. DEP’T OF LABOR, BUREAU OF LABOR STATISTICS, Jan. 27, 2005, at 1, available at [http://www.bls.gov/news.release/archives/union2\\_01272005.pdf](http://www.bls.gov/news.release/archives/union2_01272005.pdf) (observing that in 2004, only 12.5% of wage and salary workers were union members, and reporting that the “union membership rate has steadily declined from a high of 20.1% in 1983”).

11. Bronfenbrenner & Juravich, *supra* note 9.

12. Cobble, *Prospects*, *supra* note 7, at 337.

13. Peggie R. Smith, *Caring for Paid Caregivers: Linking Quality Child Care with Improved Working Conditions*, 73 U. CIN. L. REV. 399 (2004) [hereinafter Smith, *Caring*].

14. *Id.* at 409.

can help ensure that child care workers do not continue to subsidize America's poorly funded child care system by working for substandard wages and few benefits. By marshaling the shared interests of children, parents, and workers, the labor movement has initiated child care campaigns across the country that recognize both the value of increased public support for child care and the need to link improved quality with decent job conditions. Although this inquiry focuses first and foremost on the potential effectiveness of unionization for child care workers, a secondary emphasis reveals the importance of state regulation to the labor movement's ability to organize those workers who lack rights under traditional collective bargaining statutes. As this Article demonstrates, an effective organizing strategy for home-based child care workers, who are usually treated as independent contractors, may require legislative intervention.

This analysis is structured as follows: to establish the case for unionization within the child care industry, Part II begins with a discussion of the child care market, examining the supply and demand for child care, the quality and costs of care, and the gendered nature of the work. This Part also highlights the connection between quality care on behalf of children and their parents, and improved working conditions on behalf of child care workers. Part III explores the limitations of worksite unionism, labor's traditional approach to collective bargaining, and Part IV examines three alternative unionizing models that are particularly well suited to represent the labor interests of low-income service workers: occupational unionism, geographical/occupational unionism, and public care unionism. Part V turns to a consideration of several unionizing campaigns to organize child care workers, including campaigns directed at center-based workers and home-based family child care providers.

## II. AN OVERVIEW OF THE CHILD CARE INDUSTRY: DEMAND, SUPPLY, COSTS, AND QUALITY

The growing demand of working parents seeking assistance in caring for their children highlights demographic transformations in the workplace. Consider that in 1947, the number of mothers in the labor force with children between six and seventeen years of age was just over 25%.<sup>15</sup> Many families with children conformed to the societal expectation that mothers would stay at home and care for their young children while fathers would work outside of the home for paid wages.<sup>16</sup> Yet today, that norm has

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15. GREEN BOOK, *supra* note 1, at 9-2.

16. See M. Rivka Polatnick, *Working Parents*, 80 NAT'L FORUM 38, 38 (2000) ("In 1940, only 10 percent of children under eighteen were living with an employed mother, but by 1995, that figure had climbed to 68 percent.").

largely gone by the wayside. In 2002, the labor force participation rate of mothers with young children was 64%.<sup>17</sup> This shift has impacted married women with young children as well as single mothers who rely more heavily on child care arrangements.<sup>18</sup> Between 1996 and 2000, the labor force participation rate of single mothers climbed from 65.9% to 75.5%.<sup>19</sup> That increase largely reflects the impact of welfare reform laws passed in 1996<sup>20</sup> that forced many poor mothers of young children into the workplace in order to receive public support for child care.<sup>21</sup>

Turning from the demand side to the supply side, official statistics indicate that there are 1.2 million paid child care workers in the United States whose job responsibilities include nurturing the social and educational development of children, supervising play, and helping them with bathing, feeding, and other personal hygiene.<sup>22</sup> While the majority of these workers labor in center-based settings, both for profit and non-profit centers, some 28% of child care workers are self-employed as family child care providers who work out of their own homes.<sup>23</sup> Because this latter group works within the private sphere and often goes undetected as a result, the actual number of child care workers is believed to be much higher than the official reports suggest.<sup>24</sup> For example, according to the Center for the Child Care Workforce, 2.3 million paid child care workers care for children ages zero to five.<sup>25</sup> In addition to center-based workers and family child

17. GREEN BOOK, *supra* note 1, at 9-2 (reporting the labor force participation rate of mothers with children under age six).

18. *Id.* at 9-5.

19. MARK LEVITAN & ROBIN GLUCK, *MOTHERS' WORK: SINGLE MOTHERS' EMPLOYMENT, EARNINGS, AND POVERTY IN THE AGE OF WELFARE REFORM* 6, 15 (2001).

20. The Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), enacted in 1996, drastically reformed the welfare system. 42 U.S.C. §§ 601-619 (Supp. 2002). Under the existing law, an individual must satisfy stringent work requirements in order to receive welfare. *Id.* § 607. For recent useful discussions of PRWORA, see the Welfare Symposium at 44 SANTA CLARA L. REV. (2004).

21. Bruce Fuller et al., *Welfare Reform and Child Care Options for Low-Income Families*, 12 THE FUTURE OF CHILDREN 97 (2002); ROBERT J. LEMKE ET AL., *CHILD CARE AND THE WELFARE TO WORK TRANSITION* 14-16 (Wellesley College Working Paper No. 2001-02, Mar. 13, 2001), available at [www.wellesley.edu/Economics/wkpapers/wellwp\\_0102.pdf](http://www.wellesley.edu/Economics/wkpapers/wellwp_0102.pdf); GREEN BOOK, *supra* note 1, at 9-5.

22. *39-9011 Child Care Workers*, U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, OCCUPATIONAL OUTLOOK HANDBOOK, STANDARD OCCUPATIONAL CLASSIFICATION (2002-03 ed.), available at [http://www.bls.gov/soc/soc\\_o9b1.htm](http://www.bls.gov/soc/soc_o9b1.htm).

23. CTR. FOR THE CHILD CARE WORKFORCE & HUMAN SERVS. POLICY CTR., *ESTIMATING THE SIZE AND COMPONENTS OF THE U.S. CHILD CARE WORKFORCE AND CAREGIVING POPULATION 2* (May 2002) [hereinafter *ESTIMATING CHILD CARE WORKFORCE*], available at <http://www.ccw.org/pubs/workforceestimatereport.pdf>.

24. *Id.*; GREEN BOOK, *supra* note 1, at 9-17.

25. See *ESTIMATING CHILD CARE WORKFORCE*, *supra* note 23, at 2 (commenting that of the 2.3 million caregivers, 24% work in center-based settings, "including private and public child care centers, Head Start programs, and pre-kindergarten programs"; 28% are family

care providers, the paid child care workforce includes au pairs and nannies, who provide care in the child's home.<sup>26</sup>

Although the United States Bureau of Labor Statistics lists child care as one of the "fastest growing occupations,"<sup>27</sup> the industry is extremely unstable. The child care job turnover rate far exceeds that of most other occupations, with one-third of all workers departing the field each year in search of better employment opportunities.<sup>28</sup> The industry's instability has fueled concerns about the quality of care because a plethora of evidence indicates that high job turnover rates lead to low quality care.<sup>29</sup> Studies show that child care centers marked by high job turnover have "classrooms with less developmentally appropriate environments and activities," and employ workers who "interact[] less sensitively and appropriately with children."<sup>30</sup> Children who attend centers with high turnover rates "lose the continuity and consistency of care which is essential to healthy growth and development."<sup>31</sup> By contrast, children cared for in stable child care settings demonstrate greater cognitive skills, enhanced social skills, and a more positive self-concept than their peers in centers with high turnover rates.<sup>32</sup>

child care providers; 35% "are paid relatives other than family child care providers"; and 13% are "paid non-relatives other than those working in centers or family child care programs (e.g., nannies)").

26. ESTIMATING CHILD CARE WORKFORCE, *supra* note 23, at 2; AMY GILLMAN, STRENGTHENING FAMILY CHILD CARE IN LOW-INCOME COMMUNITIES (2001).

27. See ESTIMATING CHILD CARE WORKFORCE, *supra* note 23, at 6 (observing that the "U.S. Bureau of Labor Statistics has named the category of 'child care workers' as among the fastest-growing occupations for the decade 1998–2008 . . . and has estimated that this category will need to grow by 26% during that period").

28. See Elizabeth E. Manlove & Jacqueline R. Guzell, *Intention to Leave, Anticipated Reasons for Leaving, and 12-Month Turnover of Child Care Center Staff*, 12 EARLY CHILDHOOD RES. Q. 145, 145 (1997) (estimating that turnover rates among child care workers ranges from 26% to 41%); CURRENT DATA ON CHILD CARE SALARIES, *supra* note 2, at 3 (pointing out high turnover rates in the child care industry); GREEN BOOK, *supra* note 1, at 9–20 (assessing the high turnover rates among workers in the field).

29. See, e.g., MARCY WHITEBOOK & DAN BELLM, TAKING ON TURNOVER: AN ACTION GUIDE FOR CHILD CARE CENTER TEACHERS AND DIRECTORS (1999) (describing the impact of high turnover on the quality of care); SUZANNE HELBURN ET AL., COST, QUALITY, AND CHILD OUTCOMES IN CHILD CARE CENTERS, PUBLIC REPORT 71–73 (1995) (discussing the factors in determining whether high quality care is administered); Carollee Howes & Claire E. Hamilton, *The Changing Experience of Child Care: Changes in Teachers and in Teacher-Child Relationships and Children's Social Competence with Peers*, 8 EARLY CHILDHOOD RES. Q. 15 (1993) (discussing challenges impeding quality home care).

30. Marcy Whitebook & Laura Sakai, *Turnover Begets Turnover: An Examination of Job and Occupational Instability Among Child Care Center Staff*, 18 EARLY CHILDHOOD RES. Q. 273, 275 (2003).

31. Deanna M. Deery-Schmitt & Christine M. Todd, *A Conceptual Model for Studying Turnover Among Family Child Care Providers*, 10 EARLY CHILDHOOD RES. Q. 121, 122 (1995).

32. See JENNIFER PARK-JADOTTE ET AL., BUILDING A STRONGER CHILD CARE WORKFORCE: A REVIEW OF STUDIES OF THE EFFECTIVENESS OF PUBLIC COMPENSATION INITIATIVES

The prevailing working conditions in child care readily explain the industry's difficulty in retaining workers. Industry wages are extremely low in absolute terms, as well as when compared with other occupations.<sup>33</sup> In 2001, the median hourly wage for all child care workers was \$7.71,<sup>34</sup> and on average, they earned an annual income of \$16,430.<sup>35</sup> The situation is far worse for family child care providers who, in 2001, earned only \$4.00 an hour.<sup>36</sup> By comparison, cafeteria cooks earned \$8.53 an hour, animal caretakers earned \$7.97 an hour, coatroom attendants earned \$7.90 an hour, and parking lot attendants earned \$7.75 an hour.<sup>37</sup>

In addition, evidence indicates that accumulated human capital—by way of experience, skill, and education—correlates weakly with wage increases for child care workers. While many workers lack child-care related training and education, workers who do possess these qualities are not financially rewarded.<sup>38</sup> Moreover, child care workers experience lower returns on productivity investments such as education relative to workers in

5, 8–9 (2002), available at <http://www.iwpr.org/pdf/CCW.pdf> (stating that higher retention rates lead to enhanced care); DAVE RILEY, CHILD CARE QUALITY: DOES IT MATTER AND DOES IT NEED TO BE IMPROVED? 2–3, (Jan. 16, 2002), available at <http://www.uwex.edu/ce/s/flp/ece/pdfs/childcare.pdf> (discussing the implications of a 40% turnover rate); HELBURN ET AL., *supra* note 29, at 29–33 (stating the findings that cognitive and social ability of children is related to the quality of the child-care experiences); Suzanne Helburn & Carollie Howes, *Child Care, Cost and Quality*, 6 FUTURE OF CHILD. J. 62 (1996).

33. HEIDI HARTMANN & DIANA PIERCE, HIGH SKILL AND LOW PAY: THE ECONOMICS OF CHILD CARE WORK 47–48 (1989). See also ESTIMATING CHILD CARE WORKFORCE, *supra* note 23, at 29 (describing women's lost wages as a result of working at home); MARCY WHITEBOOK, WORKING FOR WORTHY WAGES: THE CHILD CARE COMPENSATION MOVEMENT, 1970–2001 7 (2001, updated 2002), available at <http://www.iir.berkeley.edu/cs/cce/pdf/worthywages.pdf> (stating that salaries should be raised to competitive rates comparable to those of elementary educators).

34. 2001 NATIONAL OCCUPATIONAL EMPLOYMENT AND WAGE ESTIMATES, U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS (2001), available at <http://www.bls.gov/oes/2001/oes399011.htm>.

35. *Id.*

36. JUST ECONOMICS, LIFTING THE LID ON CHILD CARE WORKERS' WAGES 4 (2001), available at <http://laborcenter.berkeley.edu/trainings/childcarewages.pdf>. On the economic position of family child care providers, see generally MARY C. TUOMINEN, WE ARE NOT BABYSITTERS: FAMILY CHILDCARE PROVIDERS REDEFINE WORK AND CARE, 7–12 (2003) (describing reasons why women enter family child care work despite low wages).

37. 2001 NATIONAL OCCUPATIONAL EMPLOYMENT AND WAGE ESTIMATES, U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS (2001), available at <http://www.bls.gov/oes/2001/oes399011.ht>.

38. See David Blau, *The Quality of Child Care: An Economic Perspective*, in THE ECONOMICS OF CHILD CARE 145, 167 (David Blau ed., 1991) (observing that child care “[w]orkers with more education are not consistently paid higher wages than those with little education”); HARTMANN & PIERCE, *supra* note 33, at 30 (commenting that “there is little evidence that higher productivity providers actually are rewarded for their costly investments in higher productivity”).

other occupational sectors.<sup>39</sup> To illustrate, child care workers with a college or graduate degree earn less than half the earnings received by comparably educated women in other sectors.<sup>40</sup>

The disadvantages of child care extend beyond the job's paltry wages. Few child care workers receive benefits such as health care. To illustrate, in Washington state, only 55% of child care centers offer health care to workers, which is 15% less than the total of all workers in the state who receive job-related health insurance.<sup>41</sup> Moreover, even when child care workers have access to an employer's health care plan, few can afford the premiums.<sup>42</sup> Along with limited health insurance, workers in the field seldom receive other job-related benefits such as paid sick days, vacation time, or retirement plans.<sup>43</sup>

The discouraging working conditions in child care are due in part to the cost of quality care. While some families can afford to pay child care's true cost, a defining characteristic of the industry is that most families cannot, without support, finance the cost of high quality care, nor can they afford to pay child care workers decent wages.<sup>44</sup> As advocates have

39. See Manlove & Guzell, *supra* note 28, at 147 (observing that “[c]hild care workers are consistently found to have earnings near the bottom of the wage scale in spite of having higher than average levels of education”); David Blau, *The Supply of Child Care Labor*, 11 J. LAB. ECON. 324, 339 (1993) [hereinafter Blau, *Supply of Care Labor*] (reporting that “returns to education are lower for child care workers than for other sector workers”).

40. Peter Pitegoff, *Child Care Enterprise, Community Development, and Work*, 81 GEO. L.J. 1897, 1923–24 (1993) (reporting that child care workers “earn substantially less than comparably educated men or women in the work force,” noting, for example, that “child care workers with a college or graduate degree earned an annual average of \$11,603, compared with overall civilian labor force wages of \$26,066 for women and \$42,422 for men with the same education”). See also TUOMINEN, *supra* note 36, at 44 (suggesting reasons why the wages of child care workers are so low relative to other workers); DAVID BLAU, *THE CHILD CARE PROBLEM: AN ECONOMIC ANALYSIS* 31 (2001) (noting that “the wages of child care workers are low compared to the wages of other women”).

41. JEN BROWN, *HEALTH INSURANCE FOR EARLY CHILDHOOD EDUCATION WORKERS 1* (Economic Opportunity Institute Mar. 2002), <http://www.econop.org/Health-InsuranceForECEWorkers.pdf>.

42. DAVID H. BRADLEY & STEPHEN A. HERZENBERG, *PENNSYLVANIA CHILD CARE WORKERS FACE HEALTH INSURANCE CRISIS 2* (2001), available at <http://www.keystoneresearch.org/publications/childcare.php>. See also DAVID H. BRADLEY, *LOW CHILD CARE WAGES AND HIGH TURNOVER SHORTCHANGE PENNSYLVANIA CHILDREN: FINDINGS FROM SURVEYS OF CHILD CARE PROVIDERS IN ALLEGHENY COUNTY, SOUTHEAST PENNSYLVANIA, AND YORK COUNTY 11* (Oct. 2001) [hereinafter BRADLEY, *LOW CHILD CARE WAGES*], <http://www.keystoneresearch.org/publications/childcare.php> (requires registration) (discussing the high cost of premiums).

43. CURRENT DATA ON CHILD CARE SALARIES, *supra* note 2; MARCY WHITEBOOK ET AL., *WORTHY WORK, UNLIVABLE WAGES: THE NATIONAL CHILD CARE STAFFING STUDY, 1988–1997 20* (1998), available at <http://www.ccw.org/pubs/worthywork.pdf>.

44. DAN CLAWSON, *THE NEXT UPSURGE: LABOR AND THE NEW SOCIAL MOVEMENTS 69* (2003) (“Parents struggle to pay for child care even with the miserably low wages child care workers now receive . . . . As long as funding comes from parent fees, there’s no realistic



repeatedly observed, improving the wages of workers and improving the quality of care requires, at a minimum, a comprehensive policy of government support and funding for child care.<sup>45</sup>

Poor compensation for child care workers also stems from societal attitudes that regard the work as menial, unskilled labor that any woman can readily perform. Examining the link between paid child care and women's unpaid work in the home, scholars have shown that child care is frequently dismissed as a form of emotional work that lacks economic visibility and value.<sup>46</sup> Even though market-based child care is performed for pay, there exists a strong tendency to devalue the work on the theory that workers perform it "out of love." These perceptions have serious economic consequences. As Paula England has documented, child care workers suffer a wage penalty based on the job's perception as "women's work."<sup>47</sup>

### III. THE CHALLENGES OF ORGANIZING CHILD CARE WORKERS

In light of the poor working conditions in child care and the growing demand for such care, unionization should be considered as a vehicle to help foster the economic viability of child care work. Yet, less than 5% of the child care workforce is presently unionized.<sup>48</sup> Low union density, of course, is not limited to the child care industry; currently about 8% of

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way the centers used by working parents can pay higher wages."); BRADLEY, *LOW CHILD CARE WAGES*, *supra* note 42, at 15 ("Low compensation and high turnover in the Pennsylvania child care industry reflect low wages and benefits which, in turn, stem from working parents' inability to pay more."); HARTMANN & PIERCE, *supra* note 33.

45. See, e.g., ANNE L. ALSTOTT, *NO EXIT: WHAT PARENTS OWE THEIR CHILDREN AND WHAT SOCIETY OWES PARENTS* 66-68 (2004) (discussing the public goods argument for child care); SUZANNE W. HELBURN & BARBARA R. BERGMANN, *AMERICA'S CHILD CARE PROBLEM: THE WAY OUT* 3 (2002) (describing a number of different views on solving this problem and concluding that an expansive federal child care program is an appropriate course of action); BRADLEY, *LOW CHILD CARE WAGES*, *supra* note 42, at 15 (commenting that the state government of Pennsylvania must invest more in early care and education in order to "lower turnover, maintain and improve the education levels of the child care workforce, and raise the quality of child care for low-income workers"); NANCY FOLBRE, *THE INVISIBLE HEART: ECONOMICS AND FAMILY VALUES* 83-108 (2001) (outlining arguments for treating child care as a public good).

46. See, e.g., TUOMINEN, *supra* note 36, at 175 (discussing perceptions of family child care work); Deborah Rutman, *Child Care as Women's Work: Workers' Experiences of Powerfulness and Powerlessness*, 10 *GENDER & SOC'Y* 629, 630 (1996) (observing that the emotional labor in child care "is neither recognized nor valued, likely because it tends to be invisible"); HARTMANN & PIERCE, *supra* note 33.

47. Paula England et al., *Wages of Virtue: The Relative Pay of Care Work*, 49 *SOC. PROBS.* 455 (2002).

48. See GRUNDY, *supra* note 3, at 12 (discussing the organization of child care workers).

private-sector workers belong to a union.<sup>49</sup> While the labor movement must find ways to reverse this trend on all industrial fronts, to do so in the context of child care requires an appreciation of the peculiar difficulties of using traditional models of collective bargaining to organize low-wage service workers. Importantly, most jobs in the low-wage service sector vary drastically from the manufacturing jobs that unions have historically organized.

The National Labor Relations Act (NLRA)<sup>50</sup> is the basic federal statute that governs the relationship among labor unions, employees, and employers in the private sector.<sup>51</sup> Enacted in 1935, the NLRA rests on a theory of worksite unionism.<sup>52</sup> Worksite unionism reflects an organizing model that depends heavily on a work environment with the following attributes: the workplace is a fixed location that employees report to on a regular basis; the employees to be organized work at a common worksite for a single employer, such that both the employer and the bargaining unit are easily identifiable; the dominant labor arrangement consists of full-time employment; and employees have a relatively stable, long-term employment relationship with their employer.<sup>53</sup>

Labor scholars have cogently demonstrated that this model of unionism, which emerged in the 1930s and 1940s against the backdrop of large industrial worksites, is ill equipped to address the workplace

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49. See *Union Members in 2005*, News Release, U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, Jan. 20, 2006, available at <http://www.bls.gov/news.release/pdf/union2.pdf> (detailing union membership trends in 2005).

50. 29 U.S.C. §§ 151–169 (2000).

51. 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 (2000).

52. See Wial, *supra* note 4, at 681–82 (noting that the model of worksite unionism provides the template for NLRA caselaw); see also DOROTHY SUE COBBLE, *DISHING IT OUT: WAITRESSES AND THEIR UNIONS IN THE TWENTIETH CENTURY* 9 (1991) [hereinafter COBBLE, *DISHING*] (describing worksite unionism as "a form of unionism where rights and protections were linked to a particular worksite").

53. See Francoise Carré, Virginia duRivage & Chris Tilly, *Representing the Part-time and Contingent Workforce: Challenges for Unions and Public Policy*, in *RESTORING THE PROMISE OF AMERICAN LABOR LAW* 314 (Sheldon Friedman et al. eds., 1994) (discussing the workplace conditions upon which much union organizing is predicated); Green & Tilly, *supra* note 4 (showing similar trends); see also Kim Voss & Rachel Sherman, *Breaking the Iron Law of Oligarchy: Union Revitalization in the American Labor Movement*, 106 AM. J. SOC. 303, 310 (2000) (observing that conventional union organizing consisted of "organizing 'hot shops' . . . focusing primarily on economic issues, especially wages and benefits; conducting top-down campaigns from union headquarters, with minimal participation by bargaining-unit members; reaching out to workers through gate leafletting, letters, and similar kinds of nonpersonal contact; and dropping campaigns that did not develop quickly enough").

transformations that have occurred as the economic landscape has shifted from manufacturing jobs to service-oriented jobs.<sup>54</sup> The traditional workplace of old, while not completely gone, has become seriously eroded. Labor arrangements drastically differ in today's post-industrial world when compared with the blue-collar jobs that once dominated the economy.<sup>55</sup> As Cobble writes, the new service majority is concentrated in "decentralized workplaces with under fifty employees, and in jobs with less of a permanent, continuous attachment to a single employer."<sup>56</sup> The workplace, in effect, has become more "casual," populated by workers with non-standard working arrangements, whose "relationship with individual employers is brief, distant, and often mediated by a subcontractor or temporary agency."<sup>57</sup>

In order to respond effectively to these transformations, the labor movement must both allow for the growth of non-standard workplace relationships, and it must recognize that the new rank and file is heavily populated by women and people of color. Whereas worksite unionism developed in response to the needs of white male workers,<sup>58</sup> new models of unionism must be capable of representing a burgeoning service economy characterized by high levels of racial and gender segregation as well as increasing numbers of immigrant workers.<sup>59</sup>

To meet the challenges of the changing workplace as they affect the child care industry, unions must overcome several obstacles posed by the

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54. Cobble, *Prospects*, *supra* note 7, at 341; Green & Tilly, *supra* note 4, at 487.

55. Bronfenbrenner & Juravich, *supra* note 9; Cobble, *Remaking Unions*, *supra* note 4, at 4.

56. Cobble, *Remaking Unions*, *supra* note 4, at 4.

57. *Id.* at 14.

58. Cobble, *Prospects*, *supra* note 7, at 336. See also Marion Crain, *Between Feminism and Unionism: Working Class Women, Sex Equality, and Labor Speech*, 82 GEO. L.J. 1903, 1907 (1994) (commenting on "[u]nionism's historic association with the economic concerns of white male workers . . . and the corresponding invisibility of women in union practice and labor law doctrine"); Marion Crain, *Feminizing Unions: Challenging the Gendered Structure of Wage Labor*, 89 MICH. L. REV. 1155, 1160-71 (1991) (discussing the labor movement's historical exclusion of women); HERBERT HILL, *BLACK LABOR AND THE AMERICAN LEGAL SYSTEM: RACE, WORK AND THE LAW* (1985) (examining the labor movement's exclusion of African-Americans).

59. See ORGANIZING IMMIGRANTS: THE CHALLENGE FOR UNIONS IN CONTEMPORARY CALIFORNIA (Ruth Milkman ed., 2000) (exploring the role of immigrant workers in the labor movement, especially as it pertains to California); Christopher David Ruiz Cameron, *The Labyrinth of Solidarity: Why the Future of the American Labor Movement Depends on Latino Workers*, 53 U. MIAMI L. REV. 1089 (1999) (discussing the role of Latinos in the labor movement); Cobble, *Remaking Unions*, *supra* note 4, at 3 (detailing the relationship between women and the labor movement); Green & Tilly, *supra* note 4, at 488 (discussing particular characteristics of the service industry and observing that "women represent a much larger proportion of the workforce" relative to goods-producing industries, and that the service industry has a higher concentration of "minorities and undocumented workers").

traditional reliance on worksite unionism. First, as discussed earlier,<sup>60</sup> the child care market is characterized by exceedingly high turnover rates; on average, child care workers have a median job tenure of only 2.7 years.<sup>61</sup> Second, not only do child care workers lack enduring attachments with particular employers, many tend to work for small, independent child care agencies. High turnover rates and the prevalence of numerous small agencies make it difficult to reach and unify the child care workforce in the manner envisioned by worksite unionism, which presupposes long-term attachments, workplace stability, and centralized employment sites.<sup>62</sup> This difficulty is further exacerbated by the proliferation of family child care providers who are isolated from each other, and who lack a traditional employment relationship because they are regarded as self-employed.<sup>63</sup>

Third, worksite unionism embraces an adversarial approach to workplace relations that assumes “hostility and rigid demarcations between labor and management.”<sup>64</sup> Such an approach may prove counterproductive in the child care industry, where management is often closely aligned with labor. Even as child care directors and supervisors fare relatively better than child care workers, they too earn low wages and experience high turnover rates.<sup>65</sup> Fourth, the conventional “us versus them” view of workplace relations fails to capture the interpersonal dynamics that typify

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60. See *supra* notes 27–28 and accompanying text.

61. Deery-Schmitt & Todd, *supra* note 31, at 122. See also Whitebook & Sakai, *supra* note 30, at 274 (noting that turnover rate for child care jobs “is more than four times greater than the 7% rate found among elementary school teachers”); Manlove & Guzell, *supra* note 28, at 145 (estimating turnover rates among child care workers at 26% to 41%); Pitegoff, *supra* note 40, at 1924 (reporting that “seventy percent of child care workers interviewed [for a study] in 1988 had left their jobs by 1992”).

62. Green & Tilly, *supra* note 4, at 488 (observing that “[a] workforce where turnover is rapid, as in small shops, does not fit the traditional organizing model based on a stable workforce in a large plant”); DAN BELLM, *NEW APPROACHES TO ORGANIZING IN THE CHILD CARE INDUSTRY 6*, available at <http://www.laborproject.org/publications/pdf/bellm.pdf> (noting that “[t]he major obstacle to organizing childcare workers is that there are a large number of employers, each with very few employees, making it extremely costly to organize shop-by-shop”).

63. Peggie Smith, *Welfare, Child Care, and the People Who Care: Union Representation of Family Child Care Providers* (unpublished manuscript on file with the author).

64. Cobble, *Union Strategies*, *supra* note 4, at 81.

65. See Whitebook & Sakai, *supra* note 30, at 283–89 (reporting on salary trends and turnover rates in the child care industry); MARCY WHITEBOOK ET AL., *THEN AND NOW: CHANGES IN CHILD CARE STAFFING 1994–2000 36* (2001), available at [www.ccw.org/pubs/Then&Nowfull.pdf](http://www.ccw.org/pubs/Then&Nowfull.pdf) (finding that directors received notably low wages considering “their impressive experience and training”). In addition, as Cobble notes, in many service jobs, compared with manufacturing jobs, “the line between employee and employer is more indistinct” such that employment relations “may be personal and collaborative rather than adversarial, formalized, and highly bureaucratic.” Cobble, *Prospects*, *supra* note 7, at 338.

the provision of child care. Unlike most manufacturing jobs, but comparable to many service jobs, child care involves personal interactions with a customer or a client. Cobble insightfully comments that this “new third party . . . complicates and transforms the old dyad.”<sup>66</sup> Due to the personal dimension of service jobs, workers are often as concerned with issues of “product” quality as they are with bread-and-butter issues such as compensation levels and benefit packages.<sup>67</sup> In the child care industry, workers commonly form strong emotional and personal attachments with the children in their care.<sup>68</sup> This type of personal involvement does not comfortably fit with a model of unionism that embraces confrontation and opposition.

Fifth, the success of worksite unionism depends heavily on its ability to gain concessions from owners in order to make improvements in working conditions.<sup>69</sup> Owners in turn can commonly pass on the costs of a bargaining agreement to their customers.<sup>70</sup> However, this approach stands little, if any, chance of succeeding in the context of child care given that many parents are unable to afford quality child care.<sup>71</sup> Consequently, absent increased public funding for child care, parents cannot be expected to absorb the costs associated with enhanced wages or benefits for child care workers.

66. Cobble, *Remaking Unions*, *supra* note 4, at 14.

67. Dorothy Sue Cobble, *Making Postindustrial Unionism Possible*, in RESTORING THE PROMISE OF AMERICAN LABOR LAW 285 (Sheldon Friedman et al., eds. 1994); Dorothy Sue Cobble, *Organizing the Postindustrial Work Force: Lessons from the History of Waitress Unionism*, 44 INDUS. & LAB. REL. REV. 419 (1991) [hereinafter Cobble, *Organizing the Postindustrial Work Force*]; Green & Tilly, *supra* note 4, at 488, 490.

68. TUOMINEN, *supra* note 36; *see generally* JULIA WRIGLEY, OTHER PEOPLE'S CHILDREN: AN INTIMATE ACCOUNT OF THE DILEMMAS FACING MIDDLE-CLASS PARENTS AND THE WOMEN THEY HIRE TO RAISE THEIR CHILDREN (1995) (describing the relationship between child care workers and the children in their care).

69. *See, e.g.*, DAVID M. WINCH, COLLECTIVE BARGAINING AND THE PUBLIC INTEREST: A WELFARE ECONOMICS ASSESSMENT 66 (1989) (referencing the costs labor unions impose on employers in order to get employers to establish better conditions for workers); ALBERT REES, THE ECONOMICS OF TRADE UNIONS 100–09 (1962) (discussing the costs unions confer on employers in an attempt to improve standards of living for employees).

70. *See, e.g.*, RAYMOND HOGLER, EMPLOYMENT RELATIONS IN THE UNITED STATES: LAW, POLICY, AND PRACTICE 255 (2004) (noting that bargaining for higher wages leads to a higher cost of production, which employers can pass on to consumers); E. EDWARD HERMAN & ALFRED KUHN, COLLECTIVE BARGAINING AND LABOR RELATIONS 257 (1981) (observing that “[i]ncreased contract costs are often passed on to consumers as higher prices”); NEIL W. CHAMBERLAIN & JAMES W. KUHN, COLLECTIVE BARGAINING 391 (3d ed. 1986) (discussing the steel industry in the 1970s, where “employers concessions to the union [were] passed along to consumers through price increases”).

71. *See supra* notes 44–45 and accompanying text (discussing the importance of increased public support for child care in light of parents’ financial inability to afford quality care).

#### IV. ALTERNATIVE MODELS OF UNIONISM

The attributes of child care work described above underscore the need to fashion alternative organizing models that can accommodate the proliferation of workplace arrangements that do not adhere to traditional employment relationships. Labor scholars have studied a range of non-traditional organizing approaches to investigate their potential to advance the interests of workers with non-standard work arrangements.<sup>72</sup> Thus, before examining the partnerships that unions are forging with the child care workforce, it is instructive to first discuss labor's new union strategies to advance the economic well-being of low-wage service workers. Three models of unionism directed towards this group of workers hold particular relevance: occupational unionism, geographical/occupational unionism, and public care unionism.

##### A. *Occupational Unionism*

The work of Dorothy Sue Cobble is central to any serious examination of the challenge of advancing strategies that can secure representational rights for low-wage service workers. Cobble has articulated a model of "occupational unionism,"<sup>73</sup> as an alternative to worksite unionism, that draws on the labor history of waitresses and the experiences of the Hotel Employees and Restaurant Employees International Union (HERE) in organizing waitresses during the first half of the twentieth century.<sup>74</sup> Unlike worksite unionism, which pursues mobilization and unification of workers based on a shared worksite, occupational unionism organizes workers based on a common occupational identity and prioritizes

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72. Scholars whose work offers particular insight into organizing low-income service workers include Kate Bronfenbrenner, Dorothy Sue Cobble, Jennifer Gordon, Stephen Herzenberg, and Howard Wial. See, e.g., JENNIFER GORDON, *SUBURBAN SWEATSHOPS* (2005) (analyzing the successes and failures of efforts to organize immigrants in low wage jobs); STEPHEN HERZENBERG, ET AL., *NEW RULES FOR A NEW ECONOMY: EMPLOYMENT AND OPPORTUNITY IN POSTINDUSTRIAL AMERICA* xi (1998) (evaluating "the dynamics of today's service industries and jobs" in order to "map out a set of public policies that will benefit workers as well as businesses and consumers"); *ORGANIZING TO WIN: NEW RESEARCH ON UNION STRATEGIES* (Kate Bronfenbrenner et al. eds., 1998) (comparing, contrasting, and analyzing union organizing strategies); COBBLE, *DISHING*, *supra* note 52, at 9 (outlining "a new typology of unionism"); Cobble, *Organizing the Postindustrial Work Force*, *supra* note 67, at 420 (examining the history of occupational unionism); Wial, *supra* note 4, at 672-73 (arguing that "a new kind of union organizational structure is needed in order to enable low-wage service workers to organize and achieve effective representation").

73. Cobble, *Organizing the Postindustrial Work Force*, *supra* note 67, at 420.

74. See generally COBBLE, *DISHING*, *supra* note 52 (documenting the history of waitress unionism).

employment security over job security.<sup>75</sup> This approach was especially effective in organizing waitresses, who remained attached to waitressing as an occupation even as they often changed employers within the restaurant industry.<sup>76</sup>

Occupational unionism historically derived much of its strength from the operation of union-operated hiring halls that allowed workers to gain control over the supply of their labor.<sup>77</sup> For workers, hiring halls offer various benefits. The halls act as a placement service, providing workers with access to job opportunities without charging the often high rates associated with employment agencies.<sup>78</sup> Hiring halls can also accommodate the transient, highly mobile character of low-wage service workers.<sup>79</sup> By matching workers in need of jobs with employers in need of workers, hiring halls greatly reduce the need for workers to engage in time-consuming job searches. Finally, hiring halls provide a structure that enables workers at different worksites to unite as a group and to collectively press for job improvements that would be beyond the reach of individual workers.<sup>80</sup>

Occupational unionism is advantageous not only for workers but also for employers. Unions, utilizing "peer management" techniques, maintain occupational competency among workers and often upgrade workers' skills through the use of programs emphasizing job training.<sup>81</sup> In the context of waitressing, the hiring halls sponsored apprenticeship programs for relatively new waitresses that involved both classroom experience and on-the-job training.<sup>82</sup> Employers found the hiring hall device appealing because it gave them access to trained waitresses. In addition, the union accepted responsibility for monitoring the performance of the workers by, for example, screening workers to ensure that they had experience.<sup>83</sup> This type of commitment to standards promoted the mutual interests of waitresses and restaurant owners.<sup>84</sup>

Occupational unionism is relevant for child care workers on several fronts. By moving away from single-worksites unionism, it sets the stage

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75. COBBLE, DISHING, *supra* note 52, at 9, 137–40; Cobble, *Organizing the Postindustrial Workforce*, *supra* note 67, at 420–21.

76. COBBLE, DISHING, *supra* note 52, at 49.

77. *Id.* at 138–39.

78. *Id.* at 138.

79. Cobble, *Prospects*, *supra* note 7, at 350.

80. Cobble, *Organizing the Postindustrial Workforce*, *supra* note 67, at 425.

81. *Id.* at 426–27; Cobble, *Union Strategies*, *supra* note 4, at 80–81.

82. COBBLE, DISHING, *supra* note 52, at 141.

83. *Id.* at 70, 92; Cobble, *Organizing the Postindustrial Workforce*, *supra* note 67, at 429–30.

84. COBBLE, DISHING, *supra* note 52, at 146–47; Cobble, *Organizing the Postindustrial Workforce*, *supra* note 67, at 429.

for an organizing strategy that has the potential to bring together a diverse group of child care workers who labor at different worksites. This approach may match especially well with family child care providers who are otherwise isolated from each other. Aspects of the hiring hall structure that Cobble discusses persist today among low-wage service workers in the form of worker-run cooperatives.<sup>85</sup> Although cooperatives often lack the muscle to drastically alter working conditions,<sup>86</sup> they do serve an important first step in any organizing strategy—namely helping to identify and unify workers. In addition, cooperatives can provide child care workers with a shared collective space where they may be able to pool their resources to gain access to benefits that may otherwise be unattainable.

A second advantage of occupational unionism for child care workers stems from its emphasis on professional development. Cobble writes that this focus was especially striking among unionized waitresses who struggled to have their work regarded as “a real trade by which any girl might be proud to earn her living.”<sup>87</sup> Unionization provided a vehicle that allowed them to “raise their moral and social status by establishing their work as a distinct craft and themselves as skilled craftswomen.”<sup>88</sup> Child care workers are fighting a comparable battle to have their work deemed worthy of social and economic respect. Since child care is often stigmatized as unskilled “women’s” work,<sup>89</sup> strategies to upgrade the job can play an instrumental role in redefining the work as valuable, skilled labor. Importantly, professionalization—by way of improved training and education—will benefit not only child care workers but also children receiving care. As suggested earlier,<sup>90</sup> enhanced professionalization correlates strongly with high quality care and improved outcomes for children.

Despite these advantages, occupational unionism does pose some

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85. See, e.g., Peggie Smith, *Organizing the Unorganizable: Private Paid Household Workers and Approaches to Employee Representation*, 79 N.C. LAW REV. 45, 86–91 (2000) [hereinafter Smith, *Organizing*] (discussing the cooperative structure in the context of paid household workers); 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).

86. JOHN PENCAVEL, *WORKER PARTICIPATION: LESSONS FROM THE WORKER CO-OPS OF THE PACIFIC NORTHWEST* 27 (2002) (highlighting some of the shirking problems that can undermine the success of worker cooperatives); Smith, *Organizing*, *supra* note 85, at 91 (discussing the inability of cooperatives to gain sufficient control over labor markets in order to achieve wage increases for workers).

87. COBBLE, *DISHING*, *supra* note 52, at 120.

88. *Id.*

89. See *supra* notes 45–47 and accompanying text (commenting on the social and economic devaluation of paid child care).

90. See *supra* notes 28–32 and accompanying text (discussing the link between the stability and quality of child care and the well-being of children in child care).



limitations as applied to child care. First, and perhaps most importantly, a modified hiring hall—in the form of a cooperative—may prove counterproductive if used in the fashion envisioned by Cobble as a job-placement mechanism. As Cobble writes, the hiring hall structure is especially advantageous for “workers who desire mobility between employers and a variety of work experience”<sup>91</sup> as well as for workers whose need for flexibility prompts frequent movement from employer to employer.<sup>92</sup> Likewise, for employers, hiring halls offer a ready supply of temporary or short-term workers.<sup>93</sup> Yet, while the use of temporary or intermittent employees presents few, if any, adverse consequences in various fields, and indeed is desirable in some industries,<sup>94</sup> such cannot be said of child care. In child care, labor stability is extremely important to the quality of care. As discussed in Part II, much of the current concern about child care’s poor quality stems from high turnover rates among workers and the adverse impact of such instability on both children and the child care profession.<sup>95</sup> Consequently, from a quality perspective, the preferred staffing approach in child care is not to rely upon temporary workers but instead to assemble a well-trained and stable workforce that will best enable children to develop to their full potential and to feel secure in their attachments with others.<sup>96</sup>

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91. Cobble, *Union Strategies*, *supra* note 4, at 80.

92. *Id.* See also COBBLE, DISHING, *supra* note 52, at 139 (observing that waitresses supported the hiring hall concept because it gave them, rather than the employer, “control over when and how much they worked. As long as they maintained their union standing, waitresses could quit a job and ‘lay off’ for however long they chose; they could also work on a regular part-time basis simply by relying on extra jobs coming into the hall.”); Cobble, *Organizing the Postindustrial Workforce*, *supra* note 67, at 433 (commenting that the “worker-run employment agency . . . has the potential to offer workers flexibility in scheduling and overall worktime (since arrangements for qualified substitutes can be made through the union)”).

93. Cobble, *Prospects*, *supra* note 7, at 350–51 (“Hiring halls also facilitated organizing because they offered the employer a valuable service: a steady source of trained reliable labor.”).

94. *Id.* at 350 (describing the benefits of having temporary workers available). See also Cobble, *Union Strategies*, *supra* note 4, at 80 (citing the casual day-labor market as well as the health care sector, particularly nursing, as examples of job settings that are readily amenable to organization and representation through the use of a modified hiring hall).

95. See *supra* notes 27–29, 62 and accompanying text (discussing the high turnover rate in child care and its adverse consequences).

96. A further limitation of the traditional hiring hall structure is that, historically, much of the success of hiring halls turned on their use in conjunction with closed-shop agreements. Such agreements required all workers to join a union in order to be hired and further required that employers go through the union hiring hall in order to secure workers. See COBBLE, DISHING, *supra* note 52, at 138; Cobble, *Organizing the Postindustrial Workforce*, *supra* note 67, at 423–24 (explaining that the success of the hiring halls resulted from their control of the labor supply through closed shops and other restrictions); Wial, *supra* note 4, at 686 (explaining that “[e]mployers are required to maintain closed shops and

A second concern is that occupational unionism, by its very name, presupposes a strong identity to a particular occupation.<sup>97</sup> For example, as part of its waitress-based organizing campaign, HERE capitalized on the occupational consciousness of waitresses to secure portable workplace rights that followed the workers as they moved from restaurant to restaurant.<sup>98</sup> This type of intra-occupational mobility and attachment does not appear to exist in the child care industry. The discouraging labor conditions in child care cause many workers to leave and locate employment opportunities in alternative fields.<sup>99</sup>

### B. *Geographical/Occupational Unionism*

Howard Wial uses the term “geographical/occupational” unionism to refer to the organization of low-wage service workers who belong to “a loosely defined occupational grouping within a localized geographical area.”<sup>100</sup> This model of organizing aims to establish uniform working

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to hire only through the union’s hiring hall. Workers are prohibited from soliciting work outside of the hiring hall”). Used together, the hiring hall and the closed-shop agreements enabled unions to control the labor supply in a given geographical area. However, the hiring hall has lost much of its power to influence labor markets in the aftermath of the Taft-Hartley amendments to the NLRA, which prohibit closed-shop agreements. Section 8(a)(3) of the NLRA prohibits an employer from agreeing 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).

97. This strong occupational identity reflects occupational unionism’s roots in craft unionism. *See* COBBLE, DISHING, *supra* note 52, at 6 (observing that one of the practices long associated with craft unionism is an “emphasis on craft identity and specialization”); Cobble, *Prospects*, *supra* note 7, at 345 (observing that “[f]or waitresses, craft or occupational identity was one of the prime elements of their work culture and overall world view”).

98. Cobble, *Prospects*, *supra* note 7, at 348; Cobble, *Organizing the Postindustrial Workforce*, *supra* note 67, at 425.

99. While a focus on a shared occupational identity may not be beneficial as a technique to *unify* child care workers, one can imagine the value of portable rights if the workforce became stabilized. In the meantime, strategies should be pursued to create portable benefits that extend across occupational lines such that workers would not lose their health insurance, for example, if they switched from work in the food service industry to child care. *See, e.g.,* Eileen Silverstein, *Bringing Forth a New World From the Ashes of the Old*, 34 CONN. L. REV. 803 (2002) (discussing the “psychological contract” and its effect on temporary and permanent workers’ view of job security); Katherine V.W. Stone, *Legal Regulation of the Changing [Employment] Contract*, 13 CORNELL J. LAB. & PUB. POL. 563 (2004) (exploring the new relationship between employers and employees, which is primarily characterized as temporary); Katherine Elizabeth Ulrich, *You Can’t Take It with You: An Examination of Employee Benefit Portability and Its Relationship to Job Lock and the New Psychological Contract*, 19 HOFSTRA LAB. & EMP. L.J. 173 (2002) (analyzing the mobile job force in relation to employment benefits and potential “job lock” effects).

100. Wial, *supra* note 4, at 693.

conditions by using a master employment contract that would apply to most, if not all, industry employers in a given region.<sup>101</sup> Geographical/occupational unionism's goal of organizing workers within specific geographic areas is similar to occupational unionism, although—unlike occupational unionism—it is not predicated on workers having a strong occupational consciousness.<sup>102</sup> In addition, whereas occupational unionism influences wages and benefits by gaining control over the labor force through the use of a hiring hall, geographical/occupational unionism accomplishes the same by pushing for industry-wide, uniform standards.<sup>103</sup>

The SEIU's Justice for Janitors (JfJ) campaign nicely captures the vision of geographical/occupational unionism.<sup>104</sup> The campaign unfurled in response to the specific attributes of the building services industry, which is "disjointed, localized and very competitive."<sup>105</sup> As John Howley explains, the working arrangement between building owners and building service workers, such as janitors, has shifted over time:

Originally, these workers were direct employees of the building's owner or managing agent, and the union typically bargained with city-wide associations of owners and managers. Today, this arrangement persists in only a handful of cities where the union is very strong. Increasingly, the trend is for building management to contract-out building service work.<sup>106</sup>

The practice of contracting-out in the building services industry thwarted conventional organizing models whereby unions pushed for official recognition as the elected representative of a group of employees within the NLRA electoral framework. Assuming a union won an election with a building services contractor, the building owner could readily render the election a hollow victory by terminating the unionized contractor and hiring a non-unionized contractor.<sup>107</sup> Although the contractors were

101. *See id.* (explaining the structure of the geographical/occupational union).

102. *Id.* at 686 (observing that today's low wage service workers presently "lack the strong occupational consciousness that characterizes" the type of craft unionism that undergirds occupational unionism).

103. *See id.* at 693 (detailing how wage and benefit structure is established for an occupation within a specific region); *see also* Jennifer Middleton, *Contingent Workers in a Changing Economy: Endure, Adapt, or Organize?*, 22 N.Y.U. REV. L. & SOC. CHANGE 557, 611 (1996) (discussing Wial's geographical unionism and its strengths and weaknesses for low-wage workers).

104. *See* Wial, *supra* note 4, at 692 (citing Justice for Janitors as an example of the geographical/occupational union model).

105. Richard Hurd & William Rouse, *Progressive Union Organizing: The SEIU Justice for Janitors Campaign*, 21 REV. RADICAL POL. ECON. 70, 71 (1989).

106. John Howley, *Justice for Janitors: The Challenge of Organizing in Contract Services*, 15 LAB. RES. REV. 61, 62 (Spring 1990).

107. *See* Roger Waldinger et al., *Helots No More: A Case Study of the Justice for Janitors Campaign in Los Angeles*, in ORGANIZING TO WIN, *supra* note 9 (studying the

officially the janitors' employers, the contractors lacked power. The real power rested with the building owners who controlled wages and determined benefits, but who were unreachable under the NLRA because they were not regarded as the janitors' legal employers.<sup>108</sup> Consequently, the SEIU eschewed National Labor Relations Board (NLRB) elections with individual contractors and instead focused on organizing all contractors within a given labor market.<sup>109</sup>

Geographical/occupational unionism offers two noticeable benefits to child care workers. First, this approach demonstrates that unions can represent the interests of workers without going through the process of an NLRB election to become the official legal representative of the workers.<sup>110</sup> As explained by a JfJ advocate, this type of anti-NLRB representational approach entailed "acting union without a contract."<sup>111</sup> Second, and related, geographical/occupational unionism makes use of a multi-employer, master contract that sets terms and conditions that apply to employers across the industry.<sup>112</sup> Together, these two aspects of geographical/occupational unionism may advance the representational interests of the child care workforce, given the existence of many small individual child care agencies and the potential costs involved in trying to hold an NLRB election at each agency.<sup>113</sup> In lieu of pursuing such a costly strategy, unions may gain mileage from adopting geographical/occupational unionism, first, to organize sufficient numbers of child care workers across employers within a region so as to gain control of the

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creation and history of JfJ); Howley, *supra* note 106, at 65 (observing that the problem facing the janitorial industry stems from the contractor structure).

108. See Howley, *supra* note 106, at 65 (explaining how the NLRA was circumvented by the owners not actually being the janitors' employer); see also CLAWSON, *supra* note 44, at 99–100 (observing that "[t]echnically, janitors are employed by cleaning contractors, who typically operate on short-term (thirty-day) contracts").

109. See Alexander Colvin, *Rethinking Bargaining Unit Determination: Labor Law and the Structure of Collective Representation in a Changing Workplace*, 15 HOFSTRA LAB. & EMP. L.J. 419, 430 (1998) (pointing out the conflict that often occurs when different bargaining units do not fall under the NLRA and citing the JfJ campaign as an example of the successful resolution of this conflict); Waldinger, *supra* note 107, at 114 (describing JfJ's strategy to bargain with owners without utilizing traditional NLRB devices); Wial, *supra* note 4, at 693–94 (including JfJ as an example of geographical/occupational unionism); Howley, *supra* note 106, at 65–67 (recounting how JfJ organized janitors to exert pressure on building owners although technically employed by contractors).

110. See CLAWSON, *supra* note 44, at 91 (discussing the advantages of avoiding an NLRB election and noting the tactic's association with the civil rights movement).

111. Waldinger, *supra* note 107, at 115.

112. See Waldinger, *supra* note 107 (reporting the bargaining power exerted by the janitors through various strikes); Wial, *supra* note 4 (describing the mechanics of geographical unionism).

113. BELLM, *supra* note 62, at 4 (recounting the success of the United Child Care Union campaign).

labor market, and afterwards, to implement a master contract.

A potential disadvantage of the type of geographical/occupational unionism associated with JfJ is its strong reliance on highly confrontational “guerilla” tactics. Marches, demonstrations, and strikes were par for the course in the JfJ campaign, prompting one observer to describe it as a “fight in the gutter.”<sup>114</sup> While such militancy is not inherent to geographical/occupational unionism,<sup>115</sup> the use of “disruptive direct action”<sup>116</sup> to challenge employer union opposition has frequently characterized revitalized organizing approaches, particularly those that eschew the NLRB’s normal election procedures.<sup>117</sup> Given the paucity of organized child care workers at this point, it is unclear whether, and to what extent, they would be willing to engage in public and confrontational tactics, which may threaten the welfare of the children in their care.

To be sure, in a few areas of the country, child care workers have gone on strike. In New York City, unionized workers at more than 300 private child care centers that primarily serve low-income families went on strike in 2003 and again in 2004, disrupting the care of some 27,000 children.<sup>118</sup> That said, anecdotal evidence suggests that many child care workers may be reluctant to participate in highly confrontational tactics. As one commentator observed, “some child-care workers philosophically object to unions because they fear that a strike . . . would hurt the children they care for and alienate their parents.”<sup>119</sup> Of course, it is worth noting that

114. Waldinger, *supra* note 107, at 115. See also Ruben J. Garcia, *Across the Borders: Immigrant Status and Identity in Law and Latcrit Theory*, 55 FLA. L. REV. 511, 528 (2003) (commenting on the militancy of the JfJ campaign).

115. Other new approaches to organizing have also employed militant tactics. See Richard Hurd, *Learning from Clerical Unions: Two Cases of Organizing Success*, 14 LABOR STUDIES J. 30, 38–41 (1989) (discussing the use of militant tactics employed by the SEIU in organizing clerical staff at Columbia University and Harvard University).

116. Voss & Sherman, *supra* note 53, at 316. In addition to strikes, disruptive direct action includes “civil disobedience, large demonstrations, arrest actions, and regular picketing.” *Id.* at 318.

117. Writing in THE NEXT UPSURGE, Dan Clawson suggests that such militancy is often par for the course when the NLRA proves ineffective, thus enabling employers to thwart unionization. CLAWSON, *supra* note 44, at 98–99 (adding that unions have increasingly chosen militancy when faced with employer defiance and the inability to achieve results by relying on the conventional NLRB process).

118. See Leslie Kaufman, *Strike Today to Complicate Day Care for Poor*, N.Y. TIMES, June 9, 2004, at B4 (detailing another child care strike in New York); Steven Greenhouse, *Day Care Workers Stage a Daylong Strike Over Raises*, N.Y. TIMES, Feb. 13, 2003, at 6 (covering child care strike in New York); see also David Crary, *Child Care Workers in 2 Cities Organize, Reduce Staff Turnover Rates*, ASSOCIATED PRESS, May 5, 2002, at A05 (reporting on the month-long strike of child care workers in Connecticut).

119. Katherine Yung, *Child-Care Unions Build Forces*, DALLAS MORNING NEWS, Feb. 3, 2002, at 23A. See also JIM MORIN, TAKING MATTERS INTO OUR OWN HANDS: A GUIDE TO UNIONIZING IN THE CHILD CARE FIELD 15 (1991) (noting that a challenge to organizing is that “[c]hild care teachers often do not perceive themselves as the type who join unions”);

unionized public school teachers, who also work closely with children, have frequently used the power of the strike to advance their cause, notwithstanding their concern over the potential fallout a strike may have on students.<sup>120</sup> Yet, to date, most child care advocates seem careful to avoid the “s” word in organizing campaigns, opting instead to push for partnerships with owners of child care centers. This strategy likely reflects both a desire to avoid inconveniencing parents and disrupting the care of children as well as an appreciation that many center-based owners themselves lack the funds to dramatically improve working conditions. Thus, in the aforementioned New York City illustration, it is notable that the decision to strike occurred only after the union failed to persuade municipal legislators to increase child care funding to bolster the wages of center-based workers. The strike was thus directed, not at the centers, but at the city, and many of the parents, whose children attended the centers, supported the efforts of striking workers to pressure the government for increased funds.<sup>121</sup>

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Andrea Fine, *Child-Care Workers Begin to Nurture Fledgling Union*, CHRISTIAN SCIENCE MONITOR, July 14, 1998, at 3 (reporting that a union organizer in Philadelphia commented as follows about efforts to organize child care workers: “We go to visit people at their centers, at homes, wherever is necessary . . . . When they hear the word ‘union,’ one of the things that comes to mind is ‘strikes,’ but this is different. No one’s going to walk out on children.”); BELLM, *supra* note 62, at 3 (commenting that “[w]ariness and anti-union sentiments are common within this workforce, although there are signs of growing openness. Typical concerns include: Will unions go against my concern for the children and my relationships with families?”). Dan Clawson makes a similar observation in the context of organizing campaigns directed at home care workers. See CLAWSON, *supra* note 44, at 127 (commenting that “[b]ecause home care workers provide vital individualized care for people for whom they care deeply, a strike was not an option”).

120. See Susan Frelich Appleton, *Standards for Enjoining Teacher Strikes: The Irreparable Harm Test and Its Statutory Analogues*, 69 IOWA L. REV. 853, 853 (1984) (observing that teacher strikes “[f]requently . . . entail a number of secondary consequences: loss of day care for the school-age children of working parents, unavailability of free lunch programs, jeopardy of the state financial assistance to local education programs, and college admissions difficulties for high school seniors”). These and similar concerns have figured prominently in court decisions regarding the legality of teacher strikes. See, e.g., *Anchorage Educ. Ass’n v. Anchorage Sch. Dist.*, 648 P.2d 993, 996 (Alaska 1982) (observing that “[w]hile a teachers’ strike would not directly affect the public’s safety as would a police officers’ strike, nonetheless teachers can be considered indispensable to the daily functioning of society during the scheduled academic year”); *Bethel Park Sch. Dist. v. Bethel Park Fed’n of Teachers*, 420 A.2d 18, 19 (Pa. Commw. Ct. 1980) (observing that lower court’s order to end a teacher strike was supported given that the strike compromised “state subsidies, instructional days, vocational jobs, higher education and special education opportunities, counseling, social and health services, extracurricular enrichment programs, and employees’ work opportunities and wages”).

121. Stephen Greenhouse, *Labor Talks on Stage*, N.Y. TIMES, June 12, 2004, at B2 (observing that “[t]he day care centers are privately run, but the city provides almost all of their financing, so the day care workers are directing their appeals to the mayor because he indirectly pays their salaries”); Yael Kohen, *Day Care Workers Rally for Higher Pay*, N.Y.

### C. *Public Care Unionism*

The third type of unionism model of value to organizing child care workers is a variant of public sector unionism,<sup>122</sup> which I refer to as public care unionism. Unlike occupational unionism and geographical/occupational unionism, both of which gained popularity in private-sector job settings, public care unionism has emerged against the backdrop of industries that rely heavily on public funding. As such, a defining characteristic of this approach is labor's strong focus on political lobbying for increased public funds to support improved working conditions. Whereas private sector unions "seek to take wages out of competition by creating alliances among similar workers, often across many employers in the same labor market," public sector unions "typically ignore the labor market,"<sup>123</sup> focusing instead on "a single public organization."<sup>124</sup> The term *public care* unionism highlights the approach's evolution in the context of care-related occupations that are consumer-directed, most notably home care.<sup>125</sup>

As an organizing model, public care unionism is closely linked with the SEIU, specifically its home care campaign. In 1999, the SEIU successfully organized and won the right to represent 74,000 home care workers in Los Angeles county.<sup>126</sup> The success, which gained unprecedented national attention, marked the largest union victory in the

SUN, June 10, 2004, at 1 (reporting how private day care centers are funded by the government); Steven Greenhouse, *Day Care Workers Stage a Daylong Strike Over Raises*, N.Y. TIMES, Feb. 13, 2003, at 6 (observing that striking workers and their supporters carried signs that read: "This is not against children. This is against Bloomberg"); Edward Barrera & Frank Lombardi, *Day Care Walkout Threat Strikes Fear in Parents*, DAILY NEWS (NY), Feb. 8, 2003, at 10 (noting the support of parents on behalf of striking workers).

122. See generally PAUL JOHNSTON, *SUCCESS WHILE OTHERS FAIL: SOCIAL MOVEMENT UNIONISM AND THE PUBLIC WORKPLACE* (1994) (analyzing public sector unionism and describing its significance as a social movement).

123. *Id.* at 9.

124. *Id.*

125. Consumer-directed care refers to a caregiving model in which consumers maintain a level of decision-making authority about the nature of care and how it should be delivered even when the care is publicly funded. Most consumer-directed care occurs in the context of care for the elderly and disabled. See, e.g., Andrew I. Batavia, *A Right to Personal Assistance Services: "Most Integrated Setting Appropriate" Requirements and the Independent Living Model of Long-Term Care*, 27 AM. J. L. & MED. 17 (2000) (discussing the role of consumer-directed personal assistance care for individuals with disabilities and chronic conditions); Pamela Doty et al., *Consumer-Directed Models of Personal Care: Lessons from Medicaid*, 74 MILBANK Q. 377 (1996) (evaluating approaches to administer consumer-directed care arrangements funded by Medicaid).

126. See Linda Delp & Katie Quan, *Homecare Worker Organizing in California: An Analysis of a Successful Strategy*, 27 LAB. STUDIES J. 1 (2002) (analyzing the success in organizing California home care workers and describing it as the biggest union victory since the 1940s in terms of numbers).

United States since 1937.<sup>127</sup> The home care campaign is especially instructive in exploring strategies to organize child care workers because of the similarities between the two industries.

Home care workers assist the elderly and the disabled with a range of caregiving activities such as preparing meals, helping with bathing, dressing, and other personal hygiene tasks.<sup>128</sup> Similar to child care workers, the individuals who perform these tasks are overwhelmingly women and are disproportionately members of racial ethnic groups.<sup>129</sup> While demanding and difficult, the work enables the elderly and disabled to remain in their homes instead of having to relocate to a nursing facility or a residential care facility.<sup>130</sup> However, despite the vital contribution of home care workers, the work is frequently devalued and dismissed as “women’s work.”<sup>131</sup> Most workers labor exceedingly long hours for little pay and few benefits. In addition, workers often work on a part-time basis and industry turnover is rampant.<sup>132</sup>

Against this landscape, prevailing wisdom held that home care work was unorganizable. It seemed impossible to unify a group of workers who labored in isolation from each other and within the private sphere of individual clients’ homes. To further complicate matters, home care workers often provide services for more than one client.<sup>133</sup> Yet in the face

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127. Schneider, *supra* note 6, at 26 (reporting on the success of the California campaign); Delp & Quan, *supra* note 126, at 2 (examining the organizing tactics of the California home care campaign).

128. See Smith, *Organizing*, *supra* note 85, at 74 (listing tasks performed by home care workers).

129. See Delp & Quan, *supra* note 126, at 3 (providing statistics of home care workers); Immanuel Ness, *Organizing Health-Care Workers*, 3 WORKING USA 59, 69 (1999) (observing that the home care industry “predominantly consists of middle-aged minority women” and that “[i]n New York City, documented immigrants and naturalized citizens account for nearly 60 percent of all workers in the industry”); 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 9, at 71, 78 (explaining that most home care workers are women and members of minority groups).

130. See CANDACE HOWES, UPGRADING CALIFORNIA’S HOME CARE WORKFORCE: THE IMPACT OF POLITICAL ACTION AND UNIONIZATION (2004), available at <http://www.iir.ucla.edu/u/scl/pdf/scl2004ch3.pdf> (commenting that the elderly assisted by home care workers would otherwise need to be in a facility); Schneider, *supra* note 6 (explaining how home care workers’ assistance allows the elderly to remain at home).

131. Ness, *supra* note 129, at 67–68.

132. See Steve Dawson & Rick Surpin, *Direct Care Health Workers: You Get What You Pay For*, 25 GENERATIONS 23 (2001) (stressing the high turnover rates among home care providers); Jane Aronson & Sheila Neysmith, *You’re Not Just in There to Do the Work: Depersonalizing Policies and the Exploitation of Home Care Workers’ Labor*, 10 GENDER & SOCIETY 59 (1996) (explaining how home care workers are not given respect, which in turn impacts the level of care).

133. See Jessica Toledano, *Health Workers for Home-Bound To Vote on Union*, L.A. BUS. J., Feb. 8, 1999, 1999 WLNR 5466674 (describing the efforts of home health care



of naysayers, the SEIU mounted a labor intensive campaign to identify and contact the thousands of home care workers who were scattered throughout the County of Los Angeles. Whereas in manufacturing jobs, organizers usually can contact workers by leafleting outside of factory gates,<sup>134</sup> SEIU mobilized the home care workforce by engaging in a form of grassroots activism that relied on media outlets, public rallies, the distribution of leaflets and pamphlets in various languages, the canvassing of malls and shopping centers, and contacts with community-based organizations such as churches.<sup>135</sup> With time and patience, the workers came together.

Along with figuring out how to reach the workers, the SEIU confronted the task of identifying an employer. In California, as in most states, a combination of state and federal programs fund home care services, and the workers are usually paid directly by the state.<sup>136</sup> Because of this industry feature, the SEIU tried to convince the courts that the state employed the home care workers. The courts disagreed, however, and held that the workers were independent contractors.<sup>137</sup> This ruling was potentially devastating, given that federal antitrust law treats unionizing on the part of independent contractors as impermissible anti-competitive behavior.<sup>138</sup>

Thus it was critical for the union to create an employment relationship on behalf of the workers. To do so, SEIU pursued a political campaign in

workers to unionize).

134. Green & Tilly, *supra* note 4, at 487. See also Ness, *supra* note 129, at 73 (discussing the grassroots strategies that labor used to organize home health care workers in New York).

135. Schneider, *supra* note 6, at 25; Delp & Quan, *supra* note 126, at 6–8.

136. Smith, *Caring*, *supra* note 13, at 399; Schneider, *supra* note 6, at 25.

137. *Serv. Employees Int'l Union, Local 434 v. County of Los Angeles*, 225 Cal. App. 3d 761 (1990). See also Jonathan P. Hiatt, *Policy Issues Concerning the Contingent Work Force*, 52 WASH. & LEE L. REV. 739, 742 (1995).

Initially, [the home care workers] assumed their employer was the State, which gave them their paychecks each week. The State said, “not us, perhaps the County.” So the homecare workers looked to the County which assigned them to clients and set their hours. The County said, “not us, perhaps the clients themselves.” Three years of litigation later, with no entity willing to admit to being their employer, these minimum-wage Los Angeles homecare workers were told by the court that they were all “independent contractors” having no one to bargain with.

*Id.*

138. Wial, *supra* note 4. Under the Sherman Antitrust Act, 15 U.S.C. § 1 (2000), “[e]very contract, combination . . . or conspiracy” that unreasonably restrains competition is illegal. Regarded as independent contractors, family child care providers do not fall under the Clayton Act’s exemption to antitrust liability. 15 U.S.C. § 17 (2000) (stating that the “labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations . . .”).

coalition with a range of interest groups (including senior citizen groups, consumer advocacy groups, and disability activists)<sup>139</sup> that ultimately resulted in the California State Legislature enacting legislation that required each county in the state to establish a “public authority.”<sup>140</sup> Under the law, a public authority operates the home-care funding program in its county (known as In-Home Supportive Services),<sup>141</sup> and most importantly, serves as the “employer of record” for home care workers for purposes of state and federal collective bargaining laws.<sup>142</sup> Since the California campaign, the SEIU has successfully pursued a comparable organizing approach in Oregon and Washington and has won the right to represent almost 300,000 home care workers.<sup>143</sup>

Public care unionism offers several instructive lessons for organizing the child care workforce. First, it attests to the importance of forging alliances across community groups to press for change where public funds are at stake.<sup>144</sup> As discussed earlier, improvements in the child care industry hinge critically on increased public support for child care.<sup>145</sup> Second, public care unionism illuminates the value of linking quality care with enhanced compensation for workers. SEIU’s ability to build a strong coalition for the home care campaign rested on demonstrating that poor wages in the industry were undermining the level of care provided to clients.<sup>146</sup> A similar linkage is appropriate for child care given the

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139. See Delp & Quan, *supra* note 126, at 11–14 (discussing the value of coalition building to the California home care campaign).

140. CAL. WELF. & INST. CODE § 12302.25 (West 2005). On the history of public authorities in California, see generally CALIFORNIA STATE ASSOCIATION OF COUNTIES, IN-HOME SUPPORTIVE SERVICES: COUNTIES AT THE CROSSROADS (Nov. 2002), <http://www.csac.counties.org/legislation/IHSS.pdf>.

141. *See Serv. Employees Int’l Union, Local 434*, 225 Cal. App. 3d at 765 (holding that the county did not exercise sufficient control over the home health workers and therefore could not be considered the employer even under dual or special employer theories).

142. HOWES, *supra* note 130, at 71; Schneider, *supra* note 6, at 25.

143. Schneider, *supra* note 6, at 27.

144. *See Johnston*, *supra* note 122, at 40 (highlighting the importance of alliances in the public sector context).

145. *See supra* notes 44–45 and accompanying text. *See also* Ness, *supra* note 129, at 64 (observing that “[b]ecause public workers are legally constrained in ways that private-sector workers are not in the range of political behavior available to them, public-sector unions must defend and augment their power through building political coalitions and movements beneficial to their membership interest”).

146. *See* Cobble, *Prospects*, *supra* note 7, at 349 (noting that “[h]ome health-care groups reached out to the clients . . . making the case that raising wages for aides would help clients maintain quality service”). An emphasis on quality of service and professionalism also figured prominently in SEIU’s campaign to represent nurses at Boston City Hospital during the 1980s. As Green and Tilly report, SEIU stressed that “professionalism, above all, means a commitment to good patient care. Good patient care, in turn, depends on adequate staffing, supplies, and other resources . . .” Green & Tilly, *supra* note 4, at 490; *see also* Cobble, *Prospects*, *supra* note 7, at 344 (commenting that “[a] reconceived nurses

considerable evidence documenting the positive correlation between decent working conditions and quality child care.<sup>147</sup> Third, the type of grassroots activism that enabled the SEIU to reach the many home care workers should prove invaluable in mobilizing the child care workforce, particularly those workers who are home-based family child care providers. Fourth, the creation of an employer of record should assist union efforts to represent family child care providers, since they too are usually regarded as independent contractors.<sup>148</sup>

Public care unionism's potential drawback as a strategy to organize child care workers is that it usually strives to achieve formal union recognition under applicable labor laws. Unfortunately, the time and effort required to mobilize sufficient numbers of child care workers to vote in an election may readily undermine the attainment of this result. Another concern raised by public care unionism is that the model's success, as measured by the extent to which the economic status of workers is improved, rests on the ability to secure increased public funding. Yet in all fairness, while public care unionism perhaps highlights this issue more so than the other two models previously discussed, irrespective of which model one uses to organize the child care workforce, the inadequacy of public support for child care must be confronted.

All three unionism models embody elements that can prove beneficial in securing representational rights for child care workers. The models' most important shared attribute is that they depart from worksite unionism's attachment to single worksite organizing. Their capacity to mobilize workers within geographical regions and across different worksites means that the interests of both center-based child care workers and home-based family child care providers can be promoted.

Ultimately, the value of a given model depends on the type of child care workers at issue, the workers themselves, and the surrounding labor market. For example, while the confrontational tactics of geographical/occupational unionism may fare well in a large urban environment with many child care centers and with strong allies, such an approach will likely hold little appeal in a smaller community where confrontation may more readily threaten to harm social ties among community members.

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organization would concern itself with preserving the 'ethic of care' as well as the status of the occupation").

147. See *supra* notes 28–33 and accompanying text (discussing the connection between working conditions and child care quality).

148. Independent contractors are usually exempted from the protection of most employment laws. See *infra* notes 178, 192–96 and accompanying text (discussing the treatment of family child care providers who are usually regarded as independent contractors).

## V. REPRESENTING CHILD CARE WORKERS

While still few and far between, efforts to organize the child care workforce are emerging across the United States, often with the support of national unions, including the SEIU and the American Federation of State, County, and Municipal Employees (AFSCME).<sup>149</sup> To evaluate the potential effectiveness of unions to promote the economic interests of child care workers, this Part examines several child care organizing campaigns that involve center-based child care workers as well as family child care providers. Importantly, these campaigns have adapted elements from new unionism models to craft organizing approaches that fit the general attributes of the child care industry and the particular characteristics of a given workforce.

### A. *The Role of Vouchers*

At the outset, it is worth observing that the campaigns discussed below reflect the reliance of low and moderate income parents on public funding to help subsidize the cost of child care. An effective organizing campaign must allow for this often complex child care funding scheme. While a thorough discussion of that scheme falls outside the parameters of this Article, it bears commenting that a substantial portion of child care funding for parents who receive public subsidies occurs through vouchers.<sup>150</sup> Vouchers are certificates given by the state or local government to parents who qualify for subsidized child care.<sup>151</sup> The voucher enables a parent to purchase child care from a range of both center-based and home-based child care providers. A provider that cares for a child with a voucher is in turn reimbursed by the government at a rate largely set by the government.<sup>152</sup> In light of this arrangement, child care unions are attempting to secure enhanced public funds for child care as a general matter, and more specifically, they are pressing states to raise the

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149. MORIN, *supra* note 119, at 15; Smith, *Caring*, *supra* note 13, at 421–22. Other national unions involved in organizing child care workers are the American Federation of Teachers and the United Auto Workers. Crary, *supra* note 118, at A05.

150. See SCHUMACHER, *supra* note 1, at 1 (observing that “most states have moved to all-or majority-voucher systems for delivering child care assistance to low-income working families”).

151. See SCHUMACHER, *supra* note 1, at 7 (defining child care vouchers); LEMKE, *supra* note 21, at 6 (considering the impact of child care vouchers); Clare Huntington, *Welfare Reform and Child Care: A Proposal for State Legislation*, 6 CORNELL J.L. & PUB. POL’Y 95, 114 (1996) (explaining state and local voucher systems and state discretion over subsidized care).

152. SCHUMACHER, *supra* note 1, at 7; LEMKE, *supra* note 21, at 6; Huntington, *supra* note 151, at 114.

reimbursement rates paid to providers.<sup>153</sup>

*B. United Child Care Union (Philadelphia, Pennsylvania)<sup>154</sup>*

The United Child Care Union (UCCU) is the first union in the country dedicated solely to representing child care workers. A part of the National Union of Hospital and Health Care Employees which is affiliated with AFSCME, UCCU has its roots in a Philadelphia-based community development cooperative known as Childspace.<sup>155</sup> A worker-owned cooperative, Childspace provides affordable child care in low-income neighborhoods.<sup>156</sup> Childspace reflects aspects of peer management similar to those described by Cobble. As a cooperative, control of the organization largely rests in the hands of the workers who, as worker-owners, are responsible for establishing organizational policy on issues relating to wages, working conditions, and training standards.<sup>157</sup>

In 1998, Childspace helped to create UCCU. While worker ownership was an important step toward empowering workers, achieving durable improvements in the child care industry required a more comprehensive strategy than that provided by the creation of an individual cooperative.<sup>158</sup> UCCU achieved its first major victory in 2000 when it successfully organized workers at the Allegheny Child Care Academy, the largest for-profit child care provider in Pennsylvania.<sup>159</sup> The following year, UCCU

153. See Karen MacPherson, *Day Puts Focus on Plight of Child Care Workers*, PITTSBURGH POST-GAZETTE (Pennsylvania), May 13, 2001, at A-13 (observing that child care “unions generally are trying to avoid increased fees for parents, who already foot 60 percent of the national child care bill. Instead, they are lobbying for more federal, state and local government money for child care subsidies, teacher scholarships and health care benefits for child care workers”); Elizabeth Mehren, *Child-Care Workers Start to Take Care of Themselves*, L.A. TIMES, April 5, 2001, at E1 (highlighting political lobbying of child care workers to increase state funding for child care).

154. Since its initial formation and child care campaign in Philadelphia, UCCU has started efforts to organize child care workers in California and has expanded its focus to include family child care providers. Luchina Fisher, *Child Caretakers Push for Better Wages, Benefits*, IPS-INTER PRESS SERV., May 6, 2004.

155. Steve Callahan et al., *Rowing the Boat with Two Oars*, 5 NEIGHBORHOOD FUNDERS GROUP REPORT (1998), available at [www.nfg.org/reports/53page1.htm](http://www.nfg.org/reports/53page1.htm). For an excellent account of Childspace, see Pitegoff, *supra* note 40.

156. Pitegoff, *supra* note 40, at 1937–40.

157. *Id.* at 1937–38 (commenting that “the corporate culture and structure [of Childspace] places the workers in a central role of responsibility and mutual respect. The workers control the design and management of the centers’ operations, including responsibility for hiring and firing staff . . .”).

158. Callahan, *supra* note 155.

159. AFSCME ORGANIZE, ORGANIZING VICTORIES, available at <http://www.afscmeorganizers.org/win2000.htm>. See Fisher, *supra* note 154 (describing the expansion of the UCCU); see also David Whitford, *Child Care: The McDonald’s Model*, FORTUNE, Sept. 18, 2000, at 333 (discussing Allegheny’s pre-union approach to child care and noting its

signed a contract with Allegheny that included guaranteed work hours, a reduced probationary period, an increase in paid leave, the provision of paid service days for on-the-job-training, and a 17.5% guaranteed pay raise over five years.<sup>160</sup> Notably, while Allegheny initially launched an aggressive anti-union campaign against UCCU,<sup>161</sup> it has since formed a strong partnership with the Union that highlights the type of mutual interest approach associated with occupational unionism. As Cobble observes, for many low-income service workers, economic empowerment requires “more than animus against . . . [the] employer.”<sup>162</sup> Instead of animus, UCCU and Allegheny joined forces to help improve the profession through sponsorship of programs that focus on worker training and mentoring.<sup>163</sup> For Allegheny, the union contract has been offset by workers who are better trained and by a 20% reduction in turnover rates.<sup>164</sup>

UCCU’s approach to representing child care workers also reflects aspects of geographical/occupational unionism and public care unionism. As part of its goal to achieve industry-wide improvements on behalf of both workers and children, the Union pursued a model of geographical unionism that has thus far allowed it to organize and represent 22% of Philadelphia’s child care workforce.<sup>165</sup> Because its membership primarily serves the needs of low-income families, UCCU recognizes that parents will be unable to absorb the cost of improved working conditions.<sup>166</sup> Thus, it has taken a page from public care unionism, and in collaboration with parents and child care employers, it focuses much of its energy on pressing the state legislature for increased child care funding.<sup>167</sup>

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prominence in Pennsylvania’s child care industry).

160. Fisher, *supra* note 154.

161. BELLM, *supra* note 62, at 4.

162. Cobble, *Organizing the Postindustrial Workforce*, *supra* note 67, at 433. See also Cobble, *Prospects*, *supra* note 7, at 340 (commenting that “[u]nion campaigns based merely on an antiboss message may have little appeal”).

163. BELLM, *supra* note 62, at 4.

164. See Yung, *supra* note 119, at 23A (noting that Allegheny, after reaching a contract with UCCU, “has been trying to land more customers by stressing its unionized staff’s special training and stability” and quoting the owner of Allegheny who observed that “[t]he entire industry would benefit from a union workforce . . . [t]he effectiveness of grievance procedures for handling worker problems alone is a big advantage”). See also Fisher, *supra* note 154 (noting that Allegheny was able to improve working conditions at its centers “without raising fees for parents”).

165. BELLM, *supra* note 62, at 4.

166. Fisher, *supra* note 154.

167. Fine, *supra* note 119; Fisher, *supra* note 154; MacPherson, *supra* note 153.

### C. SEIU District 925 (Seattle, Washington)

In Seattle, Washington, many of the city's center-based child care workers belong to SEIU Local 925. The child care movement in Washington has a long history that grew out of the Worthy Wages Campaign, a grassroots movement that started in 1988 to heighten public awareness of the poor conditions in child care work and the need for affordable, quality care.<sup>168</sup>

Comparable to Philadelphia's child care movement, Seattle organizers understood that trying to organize each individual child care center in the city would be a daunting task given the presence of many small independent centers. Consequently, organizers adopted a model of geographical/occupational unionism that had as its goal the negotiation of a master contract with all of the child care centers in the city.<sup>169</sup> Such a strategy enabled the Union to promote region-wide labor standards with respect to wages, the provision of pensions, and the availability of paid time off.<sup>170</sup> As of 2001, the Union had used this approach to organize twelve centers that employed 150 child care workers.<sup>171</sup>

In 1999, Washington state developed one of the more impressive strategies to transform the child care industry in a fashion that would benefit child care workers as well as children receiving care. That year, a coalition of child care advocacy groups, spearheaded by SEIU, pursued a public care unionism approach when it persuaded the governor of the state to use public funds to establish an Early Childhood Education Career Development Ladder in the state. The Ladder was a state-wide pilot program that provided funding to child care centers if they agreed to adopt a progressive wage ladder based on education, job tenure, and job responsibilities.<sup>172</sup> The Ladder's key feature was that it predicated

168. Marcy Whitebook, *Child Care Workers: High Demand, Low Wages*, 563 ANNALS ACAD. POL. & SOC. SCI. 146 (1999).

169. Fred Brooks, *What Differences Unionizing Teachers Might Make on Child Care in the USA: Results from an Exploratory Study*, 32 CHILD & YOUTH CARE F. 3, 4 (2003); JOHN BURBANK & NANCY WIEFEK, THE WASHINGTON STATE EARLY CHILDHOOD EDUCATION CAREER DEVELOPMENT LADDER (2001), available at <http://www.econop.org/ECE-PolicyBrief2001-SupplySideSolution.htm>.

170. DEENA HEG & STEPHANIE SNYDER-CERDA, IMPROVING CHILD CARE WORKER COMPENSATION IN WASHINGTON STATE: A CASE STUDY (Washington, DC: The Urban Institute, 2002), available at <http://www.urban.org/advocacyresearch/WAreport.pdf>.

171. Labor Project for Working Families, *Unions and Child Care Workers—Linking Organizing and Advocacy*, 9 LABOR NEWS FOR WORKING FAMILIES 3 (2001), available at <http://www.laborproject.org/newsletter/summer01.html>.

172. JENNIFER MOON & JOHN BURBANK, THE EARLY CHILDHOOD EDUCATION CAREER AND WAGE LADDER: A MODEL FOR IMPROVING QUALITY IN EARLY LEARNING AND CARE PROGRAMS 2 (2004), available at <http://www.econop.org/ELC/ChildCare/Ladder/Ladder0704.pdf>; PARK-JADOTTE, *supra* note 32; BURBANK & NANCY WIEFEK, *supra* note 169; Joan

enhanced child care quality on the provision of a direct increase in the regular wages of child care workers.<sup>173</sup> Under the Ladder, workers were guaranteed a base wage and received pay increments of fifty cents an hour for each qualifying educational credential they achieved (beginning with a high school degree), “25 cents an hour for each year of service,” and “50 cents an hour for increased job responsibilities.”<sup>174</sup>

The positive impact of the Ladder was clear. In 2003, the average hourly wage for workers employed by centers participating in the Ladder was \$9.68, compared with an average wage of \$8.94 an hour for workers at non-participating centers.<sup>175</sup> Anecdotal accounts also testified to the Ladder’s value. In the words of one child care worker employed at a participating center:

This project has motivated not just me but most of the staff in our center to continue their education or go to more training. This has greatly improved the quality of care AND education that we all give to the children in our classes. The morale throughout the entire center has increased, and it seems that most of us are willing to go over and beyond the “call of duty” for our director and families. With the higher wages, we seem to all feel more appreciated.<sup>176</sup>

Yet despite evidence indicating that the Ladder was an effective tool to help improve quality and working conditions in the child care industry, the program ultimately fell victim to the state’s budget woes and was discontinued after the pilot period expired. Advocates are currently pushing for legislation to reinstate the program on a permanent basis.<sup>177</sup>

#### D. *Organizing Family Child Care Providers*

Organizing family child care providers, who operate day care centers within their own homes, presents its own unique obstacles. Such providers are generally regarded as self-employed independent contractors, and they

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Fitzgerald, *Caring for Children as a Career*, 13 AMER. PROSPECT 28 (2002).

173. MOON & BURBANK, *supra* note 172, at 6–7.

174. *Id.*

175. There were other significant differences in the provision of benefits between centers participating in the Ladder (pilot sites) versus those that did not (comparison sites).

At pilot sites, 75 percent of employees received paid sick leave, 96 percent received paid vacation, 91 percent received paid holidays, and 86 percent were provided health insurance. In contrast, 60 percent of staff at comparison sites received paid sick leave, 78 percent received paid vacation, 72 percent received paid holidays, and only 45 percent were offered health insurance.

*Id.* at 9–10.

176. MOON & BURBANK, *supra* note 172, at 7.

177. *Id.* at 18–19.



are largely hidden within the privacy of the family sphere.<sup>178</sup> In addition, many family child care providers care for children on an informal basis as part of an underground economy.<sup>179</sup> Thus, an effective organizing model must be able not only to identify and congregate providers but also to determine how to bargain on their behalf despite their perceived independent contractor status. While at first glance organizing these providers would seem to present a Herculean, if not impossible task, organized labor has demonstrated a blossoming and impressive commitment to mobilizing this segment of the workforce. While it is too early to ascertain the long-term effects that labor's involvement might produce, at this initial stage, two campaigns waged on behalf of family child care providers offer instructive insight into how a revitalized labor movement can position itself to push for the poorest of the poor.<sup>180</sup>

### 1. An Employer of Record Approach (Illinois)

In Illinois, the SEIU recently achieved the largest union election in the history of the state, and the largest child-care labor election in United States history, when it won the right to represent more than 49,000 family child care providers.<sup>181</sup> The election, held in April 2005, followed a decade-long organizing campaign by SEIU to mobilize Illinois providers, many of whom are exempted from state licensing requirements. License exempt providers in the state can care for up to three children and do not have to comply with various state laws regulating the provision of in-home child care such as home inspections.<sup>182</sup> Most of the providers, who care for children from low-income families that qualify for state child care subsidies, receive as little as \$9.48 a day for their work,<sup>183</sup> and a recent study by the Illinois Department of Human Resources reported that approximately 58% of all family child care providers earn less than

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178. Smith, *Caring*, *supra* note 13; TUOMINEN, *supra* note 36.

179. GILLMAN, *supra* note 26, at 1 (reporting on a study which found that "39 states have family child care providers who are legally exempt from fire and safety rules, criminal background checks and training requirements").

180. See TUOMINEN, *supra* note 36 and accompanying text (commenting on the economic status of family child care providers).

181. Mike Comerford & Nushin Huq, *Home Child-Care Workers Vote Overwhelmingly to Unionize*, CHI. DAILY HERALD, April 8, 2005, at 1; Barbara Rose, *Union for Child-Care Workers*, CHI. TRIBUNE, April 8, 2005, at C1.

182. STEVEN G. ANDERSON ET AL., ILLINOIS STUDY OF LICENSE-EXEMPT CHILD CARE: INTERIM REPORT 7-9 (May 2003), [http://www.dhs.state.il.us/newsPublications/plansReports/pdfs/dhs\\_plan\\_Reports\\_isleccir.pdf](http://www.dhs.state.il.us/newsPublications/plansReports/pdfs/dhs_plan_Reports_isleccir.pdf); DAN LESSER ET AL., SUPPORTING ALL OUR CHILDREN: CONFERENCE REPORT ON LICENSE-EXEMPT HOME CHILD CARE IN ILLINOIS (2002), <http://www.povertylaw.org/advocacy/documents/SupportingAllOurChildren.pdf>.

183. Rose, *supra* note 181.

\$11,000 a year.<sup>184</sup>

In considering the SEIU's victory, it is important to emphasize that the Union had the political backing of Illinois' Democratic governor. Although the providers are not regarded as state employees, the governor had earlier signed an executive order that allowed them to organize and to enter into collective bargaining agreements with the state.<sup>185</sup> The effect of the order is comparable to that achieved in the California home care campaign. The order effectively mandated that the state must act as a "pseudo employer" for the providers for purposes of collective bargaining.<sup>186</sup> While the political climate has thus far favored the organization of Illinois home-based child care workers, the SEIU's ability to deliver on its campaign promises to raise provider reimbursement rates and secure key benefits, such as health care, remains uncertain as the state grapples with budget constraints.<sup>187</sup>

## 2. Family Child Care Providers as Employees, Not Independent Contractors (Rhode Island)

In Rhode Island, family child care providers began coming together over fifteen years ago in association with the Day Care Justice Committee, a part of Direct Action for Rights and Equality (DARE), a non-profit community action group based in Rhode Island that focuses on empowering low-income minority communities.<sup>188</sup> Working with DARE, the Committee received its first major victory when it successfully lobbied the state to provide family child care providers with state health care

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184. Comerford & Huq, *supra* note 181.

185. Ill. Exec. Order No. 2005-1 (Feb. 18, 2005).

The State shall recognize a representative designated by a majority of day care home licensed and license exempt providers . . . as the exclusive representative of day care home providers . . . and engage in collective negotiations with said representative concerning all terms and conditions of the provision of services for day care home providers under the State's child care assistance program that are within the State's control.

*Id.*

186. Two years earlier, in 2003, the governor had signed a similar executive order that enabled the state's 20,000 home care workers to unionize and bargain with the state. See 20 ILL. COMP. STAT. 2405/3 (2004) ("The State shall engage in collective bargaining with an exclusive representative of personal care attendants and personal assistants working under the Home Services Program concerning their terms and conditions of employment that are within the State's control.")

187. Rose, *supra* note 181.

188. PEGGY HAACK, FAMILY CHILD CARE: PEER-TO-PEER EXCHANGE 6 (1998), available at <http://www.ms.foundation.org/user-assets/PDF/Program/fccptopex.pdf>; *Changemaker: Judy Victor*, THE FUND FOR COMMUNITY PROGRESS (Spring 2003), available at <http://www.fundcp.org/newsletters/2003-2>.

coverage.<sup>189</sup> More recently, DARE-associated providers formed the independent Day Care Justice Cooperative, which is affiliated with SEIU. The Cooperative's present goal, backed by the Union, is to obtain additional state funded job-related benefits.<sup>190</sup>

Because the majority of Rhode Island's family child care providers care for children who receive state subsidies, the state pays for the providers' services even as the state regards the providers as independent contractors. Yet the rate at which the state reimburses providers to care for subsidized children is appallingly low and far too inadequate to allow the providers to earn a living wage. Most of the providers, who are primarily Latina and African-American women, earn an average wage of \$2.76 an hour.<sup>191</sup>

To remedy this situation, SEIU is fighting for the legal right to represent Rhode Island's family child care providers. The current hurdle confronting SEIU is the same one that initially impeded the Union's efforts to bargain on behalf of home care workers in California and on behalf of family child care providers in Illinois; namely, the perception that the workers are independent contractors. In Illinois, SEIU essentially conceded this issue, and instead pressed successfully for legislation that allowed the providers to unionize.

In Rhode Island, however, SEIU launched a legal challenge to the state's insistence that the providers were independent contractors. Surprisingly, the Rhode Island Labor Board agreed with the Union, and in a four-to-three decision held that Rhode Island family child care providers who contract with the state are not independent contractors, but instead are state employees.<sup>192</sup> The decision appears to be the first of its kind in the country. While a court has previously held that home-based child care providers were employees of a private company,<sup>193</sup> no reported legal decision has previously regarded such providers as state employees. Under most federal and state collective bargaining laws, the test of whether a worker is an employee or independent contractor hinges largely, although not solely, on the right of the alleged employer to exercise control over the manner and the means by which the worker accomplishes her work.<sup>194</sup> The

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189. THE FUND FOR COMMUNITY PROGRESS, *supra* note 188.

190. HAACK, *supra* note 188.

191. THE FUND FOR COMMUNITY PROGRESS, *supra* note 188.

192. *In re State of R.I., Dep't of DCYF & DHS & New England Health Care Employees Union, Local 1199, SEIU, AFL-CIO* (Case No. EE-3671 Home Daycare Providers) 25, 28 (2004).

193. *Rosemount Ctr.*, 248 N.L.R.B. 1322, 1323 (1980). *But see* Cardinal McCloskey's Children's Family Serv., 298 N.L.R.B. 434 (1990) (concluding that family child care providers were independent contractors of a non-profit organization).

194. In deciding whether individuals are employees or independent contractors for purposes of both federal and state collective bargaining laws, courts often apply the

more control the alleged employer exercises, the more likely it is that the worker is an employee.<sup>195</sup>

Importantly, the Rhode Island decision may represent a burgeoning awareness of how state regulations governing child care can alter the nature of family child care work. No longer can one readily presume that family child care providers are independent contractors. Once archetypical small business owners, some family child care providers are losing control over how they conduct their business as a result of proliferating government regulations. As the Rhode Island Labor Board wrote, because of Rhode Island's pervasive regulations regarding the delivery of family child care, the state controls virtually every aspect of providers' jobs. The state controls who becomes a provider; providers' home and work environments; the number of children they may care for; what they may feed the children; daily routines with the children; methods of discipline; relationships with assistants, if any; and providers' relationships with parents.<sup>196</sup>

Although the decision has the potential to impact some 3000 family child care providers in Rhode Island, the victory may prove to be short lived as the state, worried about the financial implications of adding

common law agency test, which considers several factors:

[1] the hiring party's right to control the manner and means by which the product is accomplished[;] [2] the skill required; [3] the source of the instrumentalities and tools; [4] the location of the work; [5] the duration of the relationship between the parties; [6] whether the hiring party has the right to assign additional projects to the hired party; [7] the extent of the hired party's discretion over when and how long to work; [8] the method of payment; [9] the hired party's role in hiring and paying assistants; [10] whether the work is part of the regular business of the hiring party; [11] whether the hiring party is in business; [12] the provision of employee benefits; and [13] the tax treatment of the hired party.

*Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 750–52 (1989).

195. See, e.g., *C.C.E., Inc. v. NLRB*, 60 F.3d 855, 858 (D.C. Cir. 1995) (observing that “[w]hether a worker is an independent contractor or an employee is a function of the amount of control that the company has over the way in which the worker performs his job”). For critiques of the control test, see Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 361 (2001) (observing that the control test often leads to uncertainty); Mark Linder, *Towards Universal Worker Coverage under the National Labor Relations Act: Making Room for Uncontrolled Employees, Dependent Contractors, and Employee-like Persons*, 66 U. DET. L. REV. 555 (1989) (using the case of leased taxi drivers to evaluate how companies can readily manipulate the control test to deprive workers of collective bargaining rights); Nancy E. Dowd, *The Test of Employee Status: Economic Realities and Title VII*, 26 WM. & MARY L. REV. 75, 85 (1984) (criticizing the use of the control test and arguing that it often denies labor law protection to those workers who lack bargaining power vis-à-vis their contractual relationship with businesses).

196. *In re State of R.I., Dep't of DCYF & DHS & New England Health Care Employees Union, Local 1199, SEIU, AFL-CIO* (Case No. EE-3671 Home Daycare Providers) 25, 28 (2004).

thousands of additional workers to its payroll, has appealed the Board's decision.<sup>197</sup> Assuming the decision stands, the Union will likely proceed with an election under the procedures of Rhode Island's public sector collective bargaining law.<sup>198</sup> If such an election is successful, which all indicators suggest that it would be, the state would be compelled to bargain with a legal representative of the providers. In the event, however, that the decision is overturned, the Union may nevertheless gain the right to represent the providers by following in the footsteps of Illinois and California. Legislation has been introduced in the Rhode Island legislature that would essentially create a government entity, comparable to the public authorities that administer home care programs, to serve as an employer of record for the providers.<sup>199</sup>

Illinois and Rhode Island offer two very different blueprints to secure representational rights on behalf of family child care providers. The Illinois approach, which largely resembles organizational campaigns directed at home care workers, bypasses the question of whether family child care providers are independent contractors or employees. Instead, it focuses on mounting a political campaign to pressure the state to define the providers as employees for the limited purposes of collective bargaining laws. By contrast, the approach in Rhode Island is completely novel. It confronts head-on the perception that family child care providers are independent contractors. In the end, however, both approaches aim to give providers a voice in shaping the conditions under which they care for subsidized children.

### *E. The Relative Advantage of Organizing Family Child Care Providers*

In theory, it seems easier to represent the interests of center-based workers, as opposed to family child care providers; yet, the foregoing discussion suggests that the exact opposite may be true. To be sure, the

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197. Liz Anderson, *The Move to Unionize Daycare*, PROVIDENCE J. (Rhode Island), April 15, 2004, at A-01.

198. R.I. Gen. Laws §§ 28-9.4-10 (2004).

199. Liz Anderson, *Child-care Providers Closer to Unionizing*, PROVIDENCE J. (Rhode Island), Mar. 4, 2005, at A-01. The bill is known as the Family Child Care Providers Business Opportunity Act. *Id.* The bill is similar in structure to the Illinois legislation granting organizing rights to home health care workers in that it does not expressly mandate the creation of a public entity to serve as an employer of record. Instead, the proposed legislation provides that the relevant state agencies that currently coordinate the participation of FCCPs in the state's Child Care Assistance Program shall negotiate with a representative of the providers. H.B. 6099, 2005 Gen. Assem., Jan. Sess. (R.I. 2005); S.B. 855, 2005 Gen. Assem., Jan. Sess. (R.I. 2005). Importantly, the bill would exempt family child care providers from "federal antitrust laws that would otherwise prevent them, as market competitors, from banding together in pursuit of a common goal." Anderson, *Child-Care Providers Closer to Unionizing*, at A-01.

process of unifying center-based workers is relatively easy compared to family-based workers, because the former can be identified and contacted more readily. However, one must remember that mobilization is only a first step.

Achieving actual results on behalf of center-based workers may prove more challenging, especially for those workers employed by centers in the private sector. Importantly, these workers have a highly attenuated relationship with the government—the most critical source of child care funding. By contrast, many low-income family child care providers—those who most need the benefits of unionization—provide subsidized care and as a result, payment comes directly from the government. While advocating for wage and other job improvements on behalf of both center-based workers and family child care providers ultimately hinges on the availability of increased state funds, it may be easier to pass on potential increases to family child care providers because their connection with the state is not brokered by an intermediary in the form of a center-employer.

In addition, unions may be more inclined to organize family child care providers than center-based workers because, while bargaining for the former can occur with one government agency acting as an employer of record, bargaining on behalf of the latter will require unions to enter into a contract with each individual center-based owner. With the typical center employing twelve or fewer workers,<sup>200</sup> unions will have to exert considerable energy and finances to secure the right to represent center-based workers and then to negotiate contracts on their behalf. While the use of a master contract can reduce some of the costs associated with bargaining with many individual centers, unions must still convince individual employers to agree to the terms of a master contract. Consequently, it is no surprise that the labor movement's greatest child care victory thus far has occurred with respect to family child care providers.

## VI. CONCLUSION

All too frequently the debate over how best to resolve America's child care problem fails to appreciate that the problem is as much a labor issue for child care workers as it is an issue of affordability, availability, and quality for child care consumers. The two issues are different sides of the same poorly funded coin. Given the lack of industry regulation and the appalling working conditions, we should not be surprised by reports decrying the mediocre quality that characterizes large segments of the child care industry. As I have observed elsewhere, long-term improvements in

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200. ESTIMATING CHILD CARE WORKFORCE, *supra* note 23.

the delivery of child care services depend on the existence of a “stabilized child care labor market—characterized by improved wages, decent working conditions, and low turnover rates.”<sup>201</sup>

This Article has examined how a revitalized labor movement can help achieve this result on behalf of child care workers as well as children and their parents. While historically, the labor movement has ignored child care as an occupation and child care workers as a group, there is reason for optimism, as evidenced by labor’s growing focus on low-wage service workers in general, and child care workers in particular. Although it is too early to tell whether unions will be able to secure greater economic security for child care workers over the long term, the campaigns undertaken thus far reveal several key ingredients of an effective organizing approach. First, in order to improve the wages of child care workers, unions must affirmatively push for enhanced public support of child care. Second, such a push needs to emphasize the critical connection between quality care and decent working conditions. Third, unions need to unite a broad base coalition around the issue of child care that will clearly convey that child care is a matter of public concern. To this end, unions should look to forge partnerships with interested constituencies including parents, child care employers, and community groups.

Notably, union involvement in representing child care workers has not been limited to center-based workers but has extended to workers who provide care from within their own homes as family child care providers. The importance of this observation cannot be overstated, for it suggests the extent to which unions are beginning to shed assumptions that certain jobs are a priori unorganizable. Critical to the labor movement’s ability to represent the interests of child care workers has been a willingness to abandon its traditional reliance on a model of worksite unionism and to develop alternative organizing approaches that can respond to the needs of an increasingly service-oriented workforce. While the approaches examined—occupational unionism, geographical/occupational unionism, and public care unionism—bring different strengths and weaknesses to the table, and no one approach matches perfectly with the realities and needs of all child care workers, the three approaches together offer a useful blueprint for restructuring child care as a decent job that will attract and retain workers who are committed to providing high quality care.

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201. Smith, *Caring*, *supra* note 13, at 431.