

WHO SPEAKS FOR THE WORKING POOR?:
A PRELIMINARY LOOK AT THE EMERGING
TETRALOGY OF REPRESENTATION OF
LOW-WAGE SERVICE WORKERS

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INTRODUCTION

This article will address a new pattern of worker representation that makes up one component of the emerging structure of low-wage, contingent work. This pattern, which has not previously been noted, is one in which low-wage service workers are represented by a tetralogy of interacting institutions: unions, government, legal advocacy groups, and ethnic groups.

While some contributions to this Symposium employ a broader definition of the new workforce, I will confine my remarks to low-wage service jobs—the only kind of job to grow numerically in the United States during the past decade or more.¹ While such jobs are sometimes referred to as “post-Taylorist,” this seems a mistake to me. On the contrary, their growth has been fueled by the discovery that service jobs may be as minutely subdivided and monitored as industrial jobs, thus permitting employers to fill them with contingent workers who will shortly move on to other jobs.

Consider, for example, the maid service for which Barbara Ehrenreich worked briefly, in which maids are required to carry four

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¹ See generally STEPHEN A. HERZENBERG, JOHN A. ALIC, & HOWARD WIAL, *NEW RULES FOR A NEW ECONOMY: EMPLOYMENT AND OPPORTUNITY IN POSTINDUSTRIAL AMERICA* (1998). I recently examined at length aspects of work by high-end workers who change jobs frequently in ALAN HYDE, *WORKING IN SILICON VALLEY: ECONOMIC AND LEGAL ANALYSIS OF A HIGH-VELOCITY LABOR MARKET* (2003).

rags, one placed in each of four pockets of their uniforms. This is classic Taylorist work organization. Ehrenreich shows that the methods of this company did not ensure particularly clean houses and, in fact, were quite ineffective at eliminating bacteria. However, this kind of minute work definition permits a company to control its existing workforce by eliminating any discretion in the worker and thus easily integrate a constant stream of new workers.²

The call center is the epitome of the new Taylorist service job. Perhaps 4.0 million workers in the United States alone, constituting 3.0 percent of the labor force, work on telephones answering customer requests and complaints and taking orders.³ These workers must employ prescribed scripts, and a call center worker who assists a customer without referring to the script is regarded as an organizational failure.⁴ Not surprisingly, these jobs, too, can thus accommodate an ever-changing workforce, and may also be easily shipped to India or elsewhere.

The growth of these short-term service jobs challenges our entire system of labor and employment law in ways that scholars (this author included) have only begun to explore. It is no exaggeration to say that our entire system of labor and employment law is premised on the pic-

² BARBARA EHRENREICH, *NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA* 70-119 (2001) (“When you enter a house, you spray a white rag with Windex and place it in the left pocket of your green apron. Another rag, sprayed with disinfectant, goes into the middle pocket, and a yellow rag bearing wood polish in the right-hand pocket. A dry rag, for buffing surfaces, occupies the right-hand pocket of your slacks.”).

³ The government does not collect data specifically on employees in call centers. I constructed a crude estimate by visiting the most recent news bulletin by the Bureau of Labor Statistics on Occupational Employment and Wages for 2003 (released Apr. 30, 2004), available at <http://www.bls.gov/news.release/pdf/ocwage.pdf>, and adding together data on the following categories of workers:

Telemarketers	404,150
Customer service representatives	1,902,850
Order clerks	303,320
Reservation and transportation clerks	165,990
Computer support specialists	482,990
Insurance claims clerks	234,580
Bill and account clerks	417,100
TOTAL:	3,910,980
Total US workforce:	127,567,910
Percent:	~3.0%

This figure includes some people who do not work in call centers, but leaves out others listed in other sectors (for example, health care) who do. By comparison, the same series listed a total of only 10.5 million production workers in the entire U.S. manufacturing sector. <http://www.bls.gov/oes/#overview>, “Latest Numbers” (May 2003 Survey).

⁴ SIMON HEAD, *THE NEW RUTHLESS ECONOMY: WORK AND POWER IN THE DIGITAL AGE* 87 (2003) (“Sharna F. Kahn, a senior project manager at KPMG Consultants defines a deficient [Customer Relations Management] software product as one that is so slow that ‘agents [come] up with their own solutions for the customer.’”) (quoting Sharna Kahn, *Redefining Call Center Metrics: The Quality Connection*, CCS (Jan. 1999) at 2, available at <http://www.tmcnet.com/articles/ccsmag/0199/0199kpmg.htm>.)

ture of a worker who works every day at the same place and for the same employer—a model increasingly at odds with reality. A stable workplace constructed of such workers can be the foundation for a “bargaining unit” in a labor law system that primarily defines the boundaries of workers’ rights to communicate with each other and to take group action. However, labor law does not recognize worker communities consisting of the people in a large geographic area or labor market who have been employed in a particular type of work for a number of different employers over a long period of time, such as in temporary office help or landscaping. The law of retirement benefits offers some tax incentives for employers to offer such benefits, but there are no incentives to offer them in the forms that are most secure for working people. Instead, the law focuses mainly on making promises of retirement benefits non-forfeitable after five or ten years, so vesting schedules are becoming increasingly irrelevant to a workforce in which the median worker has been with his or her current employer for barely three years.⁵ As a practical matter, anti-discrimination laws unintentionally apply mainly to incumbent employees, particularly those late in their careers. They do not effectively reach refusals to hire and thus have little relevance in industries structured to ensure that employees have few late-career employees.⁶

When the editors of this Symposium first asked me to discuss collective bargaining in the new economy, I responded that there wasn’t any. I was thinking of the fact that today’s low-wage, contingent jobs are usually not union jobs. Of course, most American jobs are not union jobs.⁷ In the 1990s, there were some significant union organizing successes in organizing low-wage service workers, including the Justice for Janitors campaign of the Service Employees International Union,⁸ the

⁵ The median US worker has been with his or her current employer for 4 years (3.5 years for private sector employees). At the turn of the decade, the figure was as low as 3.4 years, having dropped steadily since the government began measuring it in 1983. Many workers with low tenure have lost jobs or dropped out of the labor force altogether in the past few years. The decline is of particular interest due to the size of the aging baby-boom generation. An aging workforce would normally result in increased job tenures; instead, job tenures have been dropping. U.S. Bureau of Labor Statistics, *Employee Tenure in 2004*, available at <http://www.bls.gov/news.release/tenure.nr0.htm>.

⁶ *Id.*

⁷ About 12.9 percent of the U.S. workforce is now represented by a union (down from 13.3 percent in 2002); about 8.2 percent of the private sector workforce is represented by a union. U.S. Bureau of Labor Statistics, *Union Members in 2003*, USDL 04-53 (Jan. 21, 2004), available at <http://www.bls.gov/news.release/pdf/union2.pdf>.

⁸ Howard Wial, *The Emerging Organizational Structure of Unionism in Low-Wage Services*, 45 RUTGERS L. REV. 671, 693–98 (1993); Christopher L. Erickson et al., *Justice for Janitors in Los Angeles and Beyond: A New Form of Unionism in the 21st Century?*, in *THE CHANGING ROLE OF UNIONS: NEW FORMS OF REPRESENTATION* (Phanindra W. Wunnavia ed. 2004); Jesús Martínez Saldaña, *At the Periphery of Democracy: The Binational Politics of Mexican Immigrants in Silicon Valley* (1993) (unpublished Ph.D. dissertation, University of California, Berkeley).

same union's extraordinary campaign among home health care attendants in Los Angeles County which ended in the passage of new state legislation to create quasi-public bargaining authorities,⁹ and the successful campaign in the same county to organize dry-wall workers—the most numerically successful of the decade's campaigns among immigrant workers.¹⁰ The twenty-first century, however, has yet to bring successes on this scale. No doubt this partly reflects aspects of labor law that impede union organizing, both generally and among low-income service workers in particular.¹¹ Unions have also explored new organizational forms, such as operating their own temporary help agency in Silicon Valley¹² and supporting workers centers offering many services to immigrant workers.

This Article will cast a different light on this question by examining three recent cases of union advocacy among low-wage service workers in the New York City area: employees, almost entirely of Mexican origin, of Korean-owned greengrocers; deliverymen, mostly West African, for supermarkets and drug chains; and domestic workers of all races and nationalities. In all three cases, advocacy for these workers from traditional labor unions competed (or cooperated) with three alternative representational institutions: legal advocacy groups such as the National Employment Law Project (NELP) or law school clinics, ethnic or immigrant advocacy groups, and public entities such as the New York State Attorney General or New York City Council. While all three incidents were victories of sorts for the workers involved, none was a victory for traditional union representation. In all three, unions were either outmaneuvered or otherwise made to appear as unattractive alternatives, and

⁹ See Karl Klare, *The Horizons of Transformative Labour and Employment Law*, in *LABOUR LAW IN AN ERA OF GLOBALIZATION: TRANSFORMATIVE PRACTICES AND POSSIBILITIES* 20–23 (Joanne Conaghan et al., eds., 2002) (describing the campaign).

¹⁰ Michael Flagg, *Unions Get a Wake-Up Call as Drywallers Achieve an Unlikely Victory*, *LOS ANGELES TIMES*, Nov. 8, 1992, at D3; Ruth Milkman & Kent Wong, *Organizing the Wicked City: The 1992 Southern California Drywall Strike*, in *ORGANIZING IMMIGRANTS: THE CHALLENGE FOR UNIONS IN CONTEMPORARY CALIFORNIA* 169–98 (Ruth Milkman ed. 2000).

¹¹ Wial, *supra* note 8, at 706–38 (NLRB preference for small single-employer units over larger geographic units; restrictions on union ability to create geographic or multiemployer bargaining; weak protection for area standards picketing; restrictions on secondary pressure; limited use of joint employer liability; ease with which employers may withdraw from multiemployer units; absence of provisions for extension of collective bargaining agreements; weak privileges for worker associations that represent less than a majority); Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 *UCLA L. REV.* 519, 621–31 (2001) (bargaining units that exclude temporary workers, arbitration, secondary boycott restrictions, definition of employee, limited successor liability).

¹² Chris Benner & Amy Dean, *Labor in the New Economy: Lessons from Labor Organizing in Silicon Valley*, in *NONSTANDARD WORK: THE NATURE AND CHALLENGE OF CHANGING EMPLOYMENT ARRANGEMENTS* 361, 370–73 (Françoise Carré et al., eds., 2000) (describing Temporary Worker Employment Project); Hyde, *supra* note 1, at 175–

none of the resolutions reached did anything to strengthen future organizational representation, union or otherwise, of the workers involved.

The three examples described here may not represent a widespread trend, but that is not the aim of this article. The examples are offered in the interest of drawing attention to this emerging tetralogy of representation, combining unions, legal advocacy, ethnic or immigrant groups, and public officials.¹³ The pattern bristles with potential legal issues, some of which I will point out and many of which will be left to the reader and to future cases to develop.

I. MEXICAN WORKERS AT KOREAN GREENGROCERS¹⁴

Greengrocers in New York City, estimated to include some two thousand stores, are almost entirely owned by immigrants from Korea. Many in the generation that emigrated from Korea following reform of U.S. immigration laws in 1965 gravitated to small business ownership. In New York City, Korean immigrants began opening small greengroceries in the mid-1970s.¹⁵ Some 78% of these grocers had college degrees and had worked as engineers, schoolteachers, administrators, and in other occupations in Korea, while only 6% had owned small businesses there.¹⁶ In their early years, these businesses typically were family-run and employed few others. As family members developed other interests, they began to hire outside helpers, the vast majority of whom were immigrants from Mexico.

Korean grocers enjoyed a competitive advantage over similar businesses due in part in the long hours kept by the stores and worked by the owners. Reports soon surfaced of similar hours being demanded of employees—conduct that violated the Fair Labor Standards Act (FLSA).¹⁷ When the State Attorney General settled the first such violation, workers at two groceries were found to have worked an average 72 hours per week without overtime pay. Their weekly salaries of \$180–360 worked

¹³ The classical tetralogy, submitted for the prize in drama in Athens in the 5th pre-Christian century, consisted of three tragedies and a satyr play. J.A. CUDDON, *THE PENGUIN DICTIONARY OF LITERARY TERMS AND LITERARY THEORY* 962 (3d Ed. 1991). I do not mean to imply, however, that one of the institutions representing low-wage service workers will turn out to be a farce.

¹⁴ This section draws on research by Jung Kim, J.D., Rutgers 2003. See also Matthew T. Bodie, *The Potential for State Labor Law: The New York Greengrocer Code of Conduct*, 21 *HOFSTRA J. LAB. & EMP. L.* 183 (2003).

¹⁵ See generally ILLSOO KIM, *NEW URBAN IMMIGRANTS: THE KOREAN COMMUNITY IN NEW YORK* 112-21 (1981); Illsoo Kim, *The Koreans: Small Business in an Urban Frontier*, 21 *NEW IMMIGRANTS IN NEW YORK* 219-42 (Nancy Foner ed. 1987).

¹⁶ Ronald Takaki, *The Myth of the Successful Koreatown Grocer: Spike Lee's Camera Misses an Important Angle*, *LOS ANGELES TIMES* (Aug. 20, 1989), available at <http://modelminority.com/printout288.html>.

¹⁷ 29 U.S.C. § 201 *et seq.* The FLSA requires, one and a half times regular pay for hours beyond forty per week. 20 U.S.C. § 207(a)(1) (2004).

out to an hourly wage between \$2.80 and \$3.60 per hour at a time when the relevant statutory minimum was \$5.15 per hour.¹⁸

In May of 1998, two years prior to this settlement, Local 169, UNITE, began an organizing campaign among greengrocer workers.¹⁹ While this local had not traditionally represented workers in retail groceries, its leadership included many Latinos.²⁰ The campaign included boisterous sidewalk demonstrations (with mariachi bands) outside some prominently-positioned Manhattan groceries, creating some public pressure for resolution.²¹ Matters escalated as at least one grocery signed a union contract with a different union, creating rivalries among the groceries and increasing crowd levels.²²

A resolution of sorts came almost four years after the start of the union drive in the form of a peculiar agreement brokered by the Office of the New York State Attorney General who (as we shall see further) had taken an active role in representing low-wage workers.²³ Local 169 had reported violations of labor standards to that office, which had won back pay for some employees.²⁴ As part of this agreement, the Greengrocer Code of Conduct was announced on September 17, 2002.²⁵

The Code affects only greengrocers who voluntarily agree to abide by its provisions.²⁶ Those who do pledge to comply with federal and

¹⁸ Press release, Office of New York State Attorney General Eliot Spitzer, Greengrocers Settle Labor Abuse Charges (Aug. 30, 2000), available at http://www.oag.state.ny.us/press/2000/aug/aug30a_00.html.

¹⁹ UNITE stands for Union of Needletrades, Industrial and Textile Employees.

²⁰ Indeed, Local 169's claim of jurisdiction was controversial. Around the time of the adoption of the Greengrocer Code of Conduct in September of 2002, Local 169 had relinquished jurisdiction over greengrocers to Local 1500, United Food and Commercial Workers (UFCW). Telephone interview with Mike Donovan, Research and Education Director, Local 169, (February 20, 2004).

²¹ Andrew Jacobs, *Not a Horn of Plenty*, N.Y. TIMES (Sept. 27, 1998), at 14-4.

²² Tom Robbins, *The Sweetheart Union*, VILLAGE VOICE (March 27, 2001). The union was Local 1964 of the International Longshoremen's Association, a catchall local based in Ridgefield Park, NJ.

²³ See, e.g., Steven Greenhouse, *Waging War, from Wall Street to Corner Grocery: Beyond the High-Profile Cases, Spitzer Helps Low-Wage Workers*, N.Y. TIMES (January 21, 2004) at B1.

²⁴ See text *supra* accompanying note 21; see also Press Release, Office of New York State Attorney General Eliot Spitzer, Spitzer and Consul General Announce Settlement of Labor Abuse Cases Against Greengroceries (November 20, 2001) available at http://www.oag.state.ny.us/press/2001/nov/nov20a_01.html. The initial decision to invoke the State Attorney General was adventitious. The statute of limitations under the New York state labor standards law is three years longer than the corresponding federal statute. Seminar presentation, Kevin Finnegan, Esq., Assistant Director, Service Employees International Union State Council (formerly with Local 169, UNITE), February 23, 2004.

²⁵ GREENGROCER CODE OF CONDUCT, available at <http://www.oag.state.ny.us/workplace/workplace.html>.

²⁶ As of March 2004, some 200 greengrocers had voluntarily agreed. Seminar presentation, Jennifer Brand, Office of New York State Attorney General, March 30, 2004. There is no mechanism for imposing the Code on all members of the trade association, as would be true

state minimum wage and overtime standards and state and federal labor law.²⁷ The only new legal requirements imposed on employers by the Code is an agreement to provide employees with sick and vacation days,²⁸ attend educational training sessions on labor law, allow employees to attend similar sessions, and submit to monitoring of payroll records. The Code also creates a Code of Conduct Committee, comprised of employer and employee representatives and a representative selected by the Attorney General. The Attorney General is given further authority to monitor workplaces and payroll visits. However, grocers who sign an additional Assurance of Discontinuance are assured that the Attorney General's office "agrees to exercise its discretion to refrain from investigating civil violations of the minimum wage and overtime laws. . . which occurred prior to the signing of the Assurance."²⁹

In addition to the Attorney General, the Code was negotiated by the Korean American Association of Greater New York and Korean American Produce Association (representing employers), by representatives from the state AFL-CIO (but not either Local 169 or Local 1500), and by Casa Mexico (representing employees).³⁰ Its two most striking features are its weakness and its anomalous legal status, which are likely related. The unions appear to have obtained nothing from the agreement. In fact, the Code appears to have halted, rather than assisted, union organizing; no new greengrocers have recognized Local 1500 since the Code was signed.³¹ The employers agreed only to comply with laws that bound them anyway and to grant two sick days and a week of vacation. In exchange, they received effective immunity from prosecution for past violations. These prosecutions had previously resulted in settlements of over \$600,000 against just six greengrocers.

of normal multi-employer bargaining. *See generally* Douglas L. Leslie, *Multiemployer Bargaining Rules*, 75 VA. L. REV. 241 (1989).

²⁷ *Greengrocer Code of Conduct*, *supra* note 25, at Art. I.

²⁸ *Id.* at I.15 (at least two paid sick days to each employee who has worked for one year, and three to each employee after two years), I.16 (one workweek of paid vacation days to each employee who has worked for one year).

²⁹ *Id.* at IV.

³⁰ Steven Greenhouse, *Korean Grocers Agree to Double Pay and Improve Workplace Conditions*, N.Y. TIMES, Sept. 18, 2002, at B1; Press Release, Office of New York State Attorney General Eliot Spitzer, Landmark Code of Conduct to Improve Working Conditions in the Greengrocer Industry (September 17, 2002), available at http://www.oag.state.ny.us/press/2002/sep/sep17a_02.html.

³¹ Seminar presentation, Jennifer Brand, Office of New York State Attorney General, March 30, 2004. It is still not difficult to find Mexican immigrants who normally work in greengroceries an illegal 72-hour week for which they are paid \$200. The \$450 weekly wage for groceries complying with the Code of Conduct is pegged to the legal minimum wage and has not been increased since the effective date of the Code. Andrew Kennis, *Not All Greengrocer Workers Reap Fruits of Victory*, THE VILLAGER, April 7-13, 2004, at 12; Steven Greenhouse & Seth Kugel, *Labor Truce Wearing Thin for Koreans and Mexicans*, N.Y. TIMES, September 27, 2004, at B3.

What is the legal status of this agreement? It is not a collective bargaining agreement. Employees selected neither the union representatives from the state AFL-CIO nor Casa Mexico to represent them. While employers may voluntarily recognize a union as the exclusive representative of its workforce, they violate the National Labor Relations Act if that union does not in fact represent a majority of employees in the bargaining unit. None of the AFL-CIO, Casa Mexico, or the locals could make such a showing here.³² At the time the Code was promulgated, Local 169 reportedly represented workers at only seven groceries and, as mentioned, was in the process of withdrawing from that industry.³³ It is true that the grocers might lawfully have recognized the unions merely as representatives of their own members. However, the agreement applies to all employees, not just union members.³⁴ Under federal labor law, collective agreements are negotiated by a union with representatives that may be replaced at government-run elections, that must elect officers and otherwise observe internal democracy,³⁵ and that owes all those it represents a duty of fair representation.³⁶ The state AFL-CIO that signed the Code was not elected by greengrocer workers, cannot be replaced by them, faces no democratic control from any rank-and-file workers, and probably owes those workers no duty of fair representation.³⁷ It is not surprising, then, that they signed such an ineffective agreement in which the workers were effectively represented, albeit barely, by governmental officials and not unions.³⁸

³² Nat'l Labor Relations Act § 8(a)(2), 29 U.S.C. § 158(a)(2); *Int'l Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731 (1961) (finding that § 8(a)(2) contains no *scilicet* requirement and is violated when an employer recognizes a union that the employer believes, in good faith but mistakenly, represents a majority of the workforce).

³³ Greenhouse, *supra* note 30.

³⁴ Alan Hyde et al., *After Smyrna: Rights and Powers of Unions that Represent Less Than a Majority*, 45 RUTGERS L. REV. 637 (1993). It remains unclear whether such agreements between an employer and a union, as representative only of its members, are governed by state or federal law. *Id.* at 649 n.38. However, the Code of Conduct does not appear to be such a "members only" agreement.

³⁵ Labor-Mgmt. Reporting and Disclosure Act, 29 U.S.C. § 401 *et seq.*

³⁶ *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944) (creating duty); *Air Line Pilots Ass'n. v. O'Neill*, 499 U.S. 65 (1991) (standard for fair representation suits against union as contract negotiator).

³⁷ Hyde et al., *supra* note 34, at 651 n.42.

³⁸ Other entities that purported to speak for the grocery workers have an even more shadowy existence. I have not yet been able to interview anyone at Casa Mexico. A Google search reveals descriptions of it as an advocacy organization for Mexican immigrants but no additional examples of its representation of workers other than the Greengrocer campaign. One should also mention that the November 2001 settlement, cited *supra* at note 24, was also announced jointly with the Consul-General of Mexico. Such direct relations between foreign governments and American state or local government may be becoming more common and have suggested to some deeper changes in the effective Constitution as it concerns foreign affairs. *See, e.g.,* Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649, 692 n. 166 (2002).

II. THE DELIVERY WORKERS SETTLEMENT

Delivery personnel for some New York City supermarkets and drugstores have recently settled claims of labor standards violations, in which they were effectively represented solely by advocacy groups and the state Attorney General, and in which labor unions played a distinctly negative role.

In New York City, where people do not drive to the supermarket or the discount drugstore, delivery personnel or “walkers” deliver large orders to customers’ apartments or doormen. Until recently, most walkers, who tend to be immigrants from West Africa, were treated as if they were self-employed independent contractors, outside of labor or employment law.³⁹ Almost all walkers were referred by either City Express Delivery or Hudson Delivery Services or their alter egos. However, both of those companies, and of course the supermarkets themselves, denied being the legal employers of the walkers.⁴⁰ As the Southern District of New York found in a lawsuit involving walkers referred by Hudson to the large Duane Reade discount drug chain, the walkers, “despite working eight to eleven hours a day, six days a week, were paid a flat rate of between \$20-\$30 per day, well below minimum wage requirements.”⁴¹

A group of disgruntled walkers, some of whom had been bank tellers or other educated workers in their homelands (for most of them, Mali), held some demonstrations outside stores in October 1999. They had sought union support, but been rebuffed. The demonstrations were not effective. Independently, another walker (from Senegal) had contacted the National Employment Law Project (NELP), a legal advocacy group. NELP does not usually engage in class action litigation, preferring to work with organizations; however, after concluding that the walkers were nowhere near organizing, they decided that they had to do something and enlisted the assistance of the New York State Attorney General.⁴² Lawyers from NELP, joined by the State Attorney General, sued the delivery companies and retailers in January 2000.

The suit involved difficult legal questions about the employment status of the walkers and ended in victory for them on all the legal issues. The district court, applying the multi-factor “economic realities” test appropriate to the FLSA, held that the walkers were employees, not independent contractors.⁴³ The court further held that the owners of the

³⁹ *Ansoumana v. Gristede’s Operating Corp.*, 255 F. Supp. 2d 184, 187 (S.D.N.Y. 2003).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Seminar presentation, Catherine Ruckelshaus, National Employment Law Project (March 9, 2004).

⁴³ *Ansoumana*, 255 F. Supp. 2d at 188–92. The court found that: (1) the agencies controlled the workers; (2) the workers had no opportunities for investment, profit, or loss; (3) no independent initiative was required; (4) the permanence of the relationship was disputed; and

agencies were individually liable for FLSA violations⁴⁴ and that the Duane Reade drug store chain was a “joint employer” of the delivery personnel and so jointly liable for any FLSA violations.⁴⁵ Some eleven months after this decision, the drug stores and the remaining supermarket defendants settled plaintiffs’ claims for \$3.2 million.⁴⁶

While this was certainly effective representation of low-wage service workers by legal advocacy and governmental organizations, they were not able to institutionalize future representation for the delivery workers. Astonishingly, by then, they had a union. As the court found in March 2000, the delivery services had signed a collective bargaining agreement with Local 338, Retail, Wholesale and Department Store Workers Union (RWDSU/UFCW)—the union that had long served as the representative of supermarket workers in the city (and that had not conducted an organizing campaign in over thirty years).⁴⁷ The agreement provided that the delivery workers would be paid minimum wage (\$5.15 an hour), time and a half for overtime (the legal minimum), and credited \$1.65 an hour in presumed tips against the employer’s wage obligation.⁴⁸ The court’s holding and the settlement brokered by NELP and the Attorney General covered only the period before March 2000, since after that date, the workers had (and still have) a union, albeit one that seemed to provide little advantage over being unrepresented. Local 338 did not participate in the litigation and its sole function seems to have been to provide a date for terminating the employers’ responsibility.⁴⁹

Accounts like this might suggest that advocacy by government and legal advocacy groups might be superior to union representation. Despite the negative role played by the union in the delivery personnel case, I do not believe this conclusion is warranted. On the contrary, advocacy, no matter how effective, that is limited to advocacy groups and public officials has difficulty institutionalizing itself beyond a single advocacy

(5) the services performed by the workers were not merely integral to, but constitutive of, the business of the delivery services.

⁴⁴ *Id.* at 192–93. The individuals in question were founders, owners, and sole shareholders. Individual liability in general is much easier to establish under the FLSA, with its expansive definition of “employer,” than under other federal employment or labor statutes. *See United States Department of Labor v. Cole Enters., Inc.*, 62 F.3d 775, 778 (6th Cir. 1995).

⁴⁵ *Ansoumana*, 255 F. Supp. 2d at 193–96. *See Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947) (slaughterhouse and subcontractor are joint employers of meat boners hired by contractor); *Torrez-Lopez v. May*, 111 F.3d 633, 642–44 (9th Cir. 1997) (finding farm owner and labor contractor joint employer of harvest workers referred by contractor).

⁴⁶ Steven Greenhouse, *Gristede’s Deliverymen to Share in \$3.2 Million Wage Settlement*, N.Y. TIMES, Dec. 18, 2003, at B2.

⁴⁷ Seminar presentation, Catherine Ruckelshaus, *supra* note 42.

⁴⁸ *Ansoumana*, 255 F. Supp. 2d at 187–88.

⁴⁹ Local 338 did appear to oppose NELP’s application for attorneys’ fees. Seminar presentation, Catherine Ruckelshaus, *supra* note 42.

campaign. Our third case illustrates this point. Legal and government advocates in New York City have recently achieved passage of local legislation for domestic workers that effects little change, though it may turn out to be a rehearsal for more effective state legislation.

III. NEW YORK CITY LOCAL LAW 33 (2003): DOMESTIC WORKERS LEGISLATION

Workers in private homes—taking care of children, cleaning, and doing other household labor—have long fallen outside the scope of labor and employment laws.⁵⁰ They are expressly excluded from the National Labor Relations Act⁵¹ and, if they live in the home, the maximum hours requirements of the Fair Labor Standards Act.⁵² In 1950, domestic and household workers were added to the Social Security System, so payments into the fund are supposed to be made for them regardless of whether they are considered employees or self-employed.⁵³ For domestic workers who are employees, as opposed to self-employed, employers are also supposed to deduct income taxes from employee wages. However, household surveys reveal about 1.13 million employees in private homes, while only about three hundred thousand households report household wages to the taxing authorities.⁵⁴ Clearly, even with respect to household workers legally able to work, income is not reported, and payments to Social Security are not being made. Again, the reporting obligation pertains both to independent contractors and employees.⁵⁵ At

⁵⁰ See generally Peggie R. Smith, *Regulating Paid Household Work: Class, Gender, Race, and Agendas of Reform*, 48 AM. U.L. REV. 851 (1999) (reviewing attitudes of feminist and other social reformers towards domestic workers and illustrating their unreliable commitment to reform) [hereinafter “Smith, *Regulating*”]; Peggie R. Smith, *Organizing the Unorganizable: Private Paid Household Workers and Approaches to Employee Representation*, 79 N.C. L. REV. 45 (2000) (reviewing historical efforts at organizing these workers and improving their working conditions) [hereafter “Smith, *Organizing*”].

⁵¹ National Labor Relations Act §2(3), 29 U.S.C. §152(3) (2004) (excluding from the definition of “employee” “any individual . . . in the domestic service of any family or person at his home”).

⁵² Fair Labor Standards Act of 1938, 29 U.S.C. § 213(b)(21) (1938) (excluding from the statutory requirement of time and a half for hours over forty “any employee who is employed in domestic service in a household and who resides in such household”). Until 1974, domestic workers were entirely excluded from the FLSA, but amendments in that year brought them under the minimum wage provisions, and, for those who did not live in the home in which they worked, the maximum hours provision. Fair Labor Standards Act Amendments of 1974, Pub. L. No. 93–259, 88 Stat. 55, 62 (codified at 29 U.S.C. §§ 206(f) (minimum wage) & 207(1) (maximum hours)).

⁵³ EDWARD D. BERKOWITZ, *AMERICA’S WELFARE STATE* 58–60 (1991) (describing the process of incorporating domestic workers into Social Security).

⁵⁴ Smith, *Regulating*, *supra* note 50, at 921 n.428; David Cay Johnston, *Despite an Easing of Rules, Millions Evade ‘Nanny Tax’*, N.Y. TIMES, April 5, 1998, at 1.

⁵⁵ Smith, *Regulating*, *supra* note 50, at 921 n.428 (quoting Internal Revenue Service analysis). Before 1994, half a million households reported payments to household labor. *Id.* In that year, Congress simplified the reporting and payment requirements and added a line to

worst, some domestic workers are essentially kept in slavery, unable ever to leave the house and given no days off.⁵⁶

The leading player in current advocacy efforts is Domestic Workers United—a group funded with money from George Soros that began as a project of Asian advocacy organizations.⁵⁷ Organizers decided to attempt to achieve a legislative victory after having organized protest demonstrations against particular employers—interestingly, the same first act taken by the Mexican greengrocer and West African delivery employees. They enlisted the help of the Immigrants' Rights Clinic at New York University to draft legislation.⁵⁸ The New York City Council, overwhelmingly Democratic and liberal, was much more politically favorable terrain than state government, where Republicans controlled the state Senate and the Governorship. However, the legislative authority of the City Council, as of any municipal government, was limited by the local government law of the state. NYU students discovered that the City nevertheless did have jurisdiction to regulate employment agencies and had previously done so under its authority over consumer protection.⁵⁹ The result became Local Law 33 (2003), adopted by the City Council in May 2003 and signed by the Mayor in June 2003.⁶⁰

The law requires the City to prepare a statement of the rights of domestic workers and requires employment agencies to give one to each applicant for household employment and to the employer.⁶¹ Agencies

the standard report of income filed by individual taxpayers asking for the amount of taxes owed on wages paid to household help. Johnston, *supra* note 54. It was anticipated that this would lead to more reports of such wages. However, the changes had precisely the opposite effect, and now only around three hundred thousand households report paying such wages. *Id.*

⁵⁶ See, e.g., *Manliguez v. Joseph*, 226 F. Supp. 2d 377 (E.D.N.Y. 2002) (denying motion to dismiss suit under Alien Tort Claims Act); Jennifer Sinco Kelleher, *Domestic Workers Take a Stand: Rally in Support of 4-year-old Dispute*, *NEWSDAY*, Aug. 10, 2003, at A39.

⁵⁷ This paragraph is drawn largely from interviews with Councilmember Gale Brewer and Professor Michael Wishnie. Seminar presentation, Gale Brewer, New York City Councilmember (Feb. 17, 2004); Interview with Michael Wishnie, Professor, New York University School of Law (February 19, 2004).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ The full text of the law is available at http://www.council.nyc.ny.us/pdf_files/bills/law03033.pdf.

⁶¹ § 20-771 STATEMENT OF EMPLOYEE RIGHTS AND EMPLOYER OBLIGATIONS UNDER STATE AND FEDERAL LAW. a. Every licensed employment agency under the jurisdiction of the commissioner and engaged in the job placement of domestic or household employees shall provide to each applicant for employment as a domestic or household employee and his or her prospective employer, before job placement is arranged, a written statement indicating the rights of such employee and the obligations of his or her employer under state and federal law. Such statement of rights and obligations shall embody provisions of state and federal laws that pertain to domestic or household employees, both in their capacity as workers in New York State and the United States and in their capacity specifically as domestic or household employees in New York state and the United States. Such statement of rights and obligations shall include, but not be limited to, a general description of em-

must also give domestic workers a full job description and keep records. Violations of the statute may result in fines.⁶²

The statute is unlikely to accomplish much on its own terms.⁶³ The limitation on agencies is an artifact of the City Council's jurisdiction and severely circumscribes its effectiveness. No one seems to have any good idea of the percentage of household workers in the City referred by agencies, but it is undisputedly a minority.⁶⁴ Agencies were not accused of involvement in the horror cases amounting to slavery. In any case, the City Council did not think it had authority to mandate particular working conditions, so did not attempt to do so. At the time of the writing of this Article, it remains unclear whether the official statements of rights are in fact available at employment agencies.⁶⁵

Domestic Workers United did not regard the City legislation as a final accomplishment, but rather a first effort at the legislative process. Its next priority is state legislation, still in the planning stage. States retain the power to legislate particular terms of employment exceeding the federal minima.⁶⁶ Since domestic workers are excluded from the Na-

employee rights and employer obligations pursuant to laws regarding minimum wage, overtime and hours of work, record keeping, social security payments, unemployment insurance coverage, disability insurance coverage and workers' compensation. Such statement of rights and obligations shall be prepared and distributed by the commissioner to licensed employment agencies over which the commissioner has jurisdiction.

Local Law 33 of 2003, § 20-771 (2003).

⁶² §20-772 STATEMENT OF JOB CONDITIONS; RECORDS. a. Every licensed employment agency under the jurisdiction of the commissioner and engaged in the job placement of domestic or household employees shall provide to each applicant for employment as a domestic or household employee a written statement, in a form approved by the commissioner, of the job conditions of each potential employment position to which the agency recommends that the applicant apply. Each such statement shall fully and accurately describe the nature and terms of employment, including the name and address of the person to whom the applicant is to apply for such employment, the name and address of the person authorizing the hiring for such position, wages, hours of work, the kind of services to be performed and agency fee.

Id. at § 20-772.

⁶³ The principal function of having employers acknowledge in writing that they have read the statement of rights of domestic workers is to negate the defenses, commonly raised in litigation under the FLSA, of good faith (affecting liquidated damages) or that underpayment was not willful (which affects the statute of limitations). E-mail communication, Professor Michael Wishnie, March 1, 2004.

⁶⁴ The estimate of 40% by Domestic Workers United seems very high. See Daniela Gerson, *Union Is Seeking to Organize Child-Care Givers*, NEW YORK SUN, Oct. 31, 2003, at 1.

⁶⁵ Seminar presentation, Councilmember Gale Brewer, Feb. 17, 2004 (reporting complaints to her office, awaiting verification, that the statements of rights were not in fact available at employment agencies).

⁶⁶ Fair Labor Standards Act of 1938 §18(a), 29 U.S.C. §218(a) (1938) ("No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum workweek lower than the maximum workweek established under this chapter. . . .").

tional Labor Relations Act, states are also presumably free to legislate protection against retaliation for their organizational activity and, though this is harder to imagine, procedures for collective bargaining.⁶⁷ Domestic Workers United maintains a recommended employment contract for domestic employment on its web page.⁶⁸ One possibility under discussion is to try to make this contract mandatory through state legislation. For present purposes, its most interesting feature is one of omission: it says nothing about organizational activity or affiliation by domestic workers. It does not seek to provide organizational rights for Domestic Workers United or any other advocacy organization, or for any union that might become interested in organizing domestic workers at some future time—an organizing campaign that would be governed entirely by state law.⁶⁹

I would suggest that, as with the greengrocer workers, the weakness so far in substantive protection for domestic workers mutually reinforces the weakness in the organizational rights of their self-designated advocates. I say this precisely because of my high regard for the intelligence, honesty, and ability of these advocacy organizations. The historical experience of advocacy groups like Domestic Workers United is that it is difficult for them to sustain themselves.⁷⁰ This is not merely a problem for their self-interest but puts limits on their potential to achieve gains for those whom they claim to represent. They will be forced to accept crumbs from the legislative process as their only source of legitimacy.

⁶⁷ The exclusion of agricultural workers from the NLRA permits states to regulate their collective labor activity. See *United Farm Workers v. Arizona Agricultural Employment Relations Board*, 669 F. 2d 1249, 1257 (9th Cir. 1982); *Willmar Poultry Co., Inc. v. Jones*, 430 F. Supp. 573 (D. Minn. 1977). The same is true of teachers in parochial schools. *Christ the King Regional High School v. Culvert*, 815 F.2d 219 (2d Cir. 1987) (holding that the state labor board may assert jurisdiction over parochial schools excluded from NLRA). States, by contrast, are not permitted to regulate the collective labor activity of groups as to which Congress or one of its designated agencies has affirmatively desired an unregulated labor market, such as supervisors. Compare *Hanna Mining Co. v. District 2, Marine Engineers Beneficial Ass'n*, 382 U.S. 181 (1965) (states may enjoin organizational picketing by supervisors' organization) with *Beasley v. Food Fair of North Carolina, Inc.*, 416 U.S. 653 (1974) (states may not interfere with employer's federal privilege to discharge supervisors for union membership). The principle that explains all these results is elusive, to put it mildly. My opinion, based on the review of the exclusion of domestic employees in Smith, *Organizing*, *supra* note 50, at 62–64, is that they are more like agricultural workers and parochial school teachers. That is, they are excluded from the Act due to political considerations and doubts (in 1935 or later) about Congress's commerce power, not because Congress determined that their employers must be privileged to fire them if they join an advocacy organization.

⁶⁸ Available at http://www.caaav.org/downloads/Standard_Contract.pdf.

⁶⁹ Traditional unions were not involved in the legislative process in the New York City Council. The Service Employees International Union is attempting to maintain cordial relations with the movement of domestic workers, recently hosting a dinner for domestic workers. Seminar presentation, Councilmember Gale Brewer, *supra* note 57.

⁷⁰ See both articles by Peggie Smith, *supra* note 50, reviewing the long history but short lives of organizations representing domestic workers.

While these remarks are not the occasion to develop projects for the collective representation of home workers, some models are available. As noted above, collective bargaining already exists for some home workers and attendants paid with public money through programs like Medicare.⁷¹ Employers could be encouraged, by signing a standard agreement, to commit to periodic renegotiation of the agreement by representatives elected by employer groups and the domestic workers. At the very least, however, the growth of representation of domestic workers requires legal protection against retaliation for their joining groups like Domestic Workers United.

CONCLUSION

Most low-wage service jobs in the U.S. continue to be nonunion and involve nothing that can be described as collective bargaining. Among the small minority of such workers that have sought representation, many of the emerging bargaining processes differ substantially from traditional collective bargaining. At least four kinds of groups compete to represent low-wage service workers: unions, government, legal advocacy organizations, and ethnic advocates. Bargaining processes are complex, and the results for workers are so far tentative. Unions so far have played either a negative role (Local 338 RWDSU for drug store delivery personnel), have been passive (Local 1500's unwillingness to organize greengrocers despite winning jurisdiction; Local 169 UNITE's withdrawal), or have been cut out (or cut themselves out) of deals that are modestly favorable to workers but accord no rights to their organizations (such as the Greengrocer Code of Conduct, the existing New York City law, and the proposed state legislation on domestic workers).

While unions have been passive and ineffective in the recent New York campaigns, resolution has largely been driven by the alliance between legal or ethnic advocacy groups and governmental entities like the State Attorney General or City Council. The advocacy groups are self-designated. Nobody elected them and they are not responsible to anyone. They have no legal basis to compel their own recognition. Consequently, their legitimacy depends on their ability to extract benefits from government, and they often must accept relatively small amounts. The governmental entities, in turn, seem largely motivated by some public officials' desire for a favorable image as friends of poor workers. They have no institutional capacity or interest in creating or sustaining systems of representation that will survive the particular advocacy campaign in which they are involved. Indeed, for workers covered by the National Labor Relations Act—that is, delivery workers and grocery workers (but

⁷¹ Klare, *supra* note 9.

not domestic workers)—state and local governments are constitutionally preempted from creating or encouraging employee organization.⁷² Thus, the governments depend on the advocacy organizations to represent workers, as those organizations depend on government to provide benefits that give them legitimacy.⁷³ I am sorry to be so negative about the emerging tetralogy of representation, particularly since most low-wage workers in the U.S. have no one to speak for them at all. No doubt the dominance of advocacy and governmental organizations reflects the passivity of the unions in New York. From the unions' perspective, small shops like greengrocers, to say nothing of domestic workers, are expensive to organize and service. While this is true, it ignores the fact that just these workers, like the delivery workers whom the union has treated so poorly, are prominent in the public eye. Many New Yorkers of all classes, certainly children, see few other low-wage service workers as often as the household domestic, the assistant in the corner greengrocery, and the delivery man from the supermarket who comes to the apartment. They will form their opinion of unions by how they treat the most visible low-wage workers.

Writing in his diary in 1941, Bertolt Brecht was both fascinated and repelled by the lack of permanence of American theatrical production, in which he and other emigrés from fascism were then employed. Groups of theater professionals would gather to mount a production, disperse, and gather again. This fluidity, so unlike the German system of state theaters, made it easy for him and his colleagues to become part of the industry. Yet, he wrote, "it is nomadic theatre, by people on the move for people who are lost."⁷⁴

Today, the entire economy has become like the theater of Brecht's time (and ours). Certainly, its fluidity continues to permit it to integrate today's immigrants—not just German playwrights or Indian software engineers, but, as we have seen, Mexican grocery workers, West African delivery personnel, and nannies and housekeepers from all over the world. However, in thinking about how to prevent exploitation in this labor market, we may have to reverse Brecht's aphorism. Labor and employment law is now, increasingly, for people on the move. We who make it must be sure that we are not lost.

⁷² There do not appear to have been any recent attempts by states or local governments to create bargaining structures for workers covered by the NLRA. The conclusion that they would be preempted from doing so is a simple one from the basic principles of preemption set out in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).

⁷³ A representative of the Attorney General who spoke to my seminar referred to the alliance with advocacy organizations as their preferred "model" of litigation. Jennifer Brand, *supra* note 26.

⁷⁴ BERTOLT BRECHT, *JOURNALS* 166 (Hugh Rorrison trans., John Willett ed. 1993) (October 22, 1941).