Crisis After Dole: The Plight Of Modern Homeworkers

Laura Helene Gonshorek
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I. INTRODUCTION

On December 7, 1989, in ILGWU v. Dole¹, the District Court for the District of Columbia rescinded the ban that had barred homeworkers from producing certain goods within their own homes² and replaced it with a certification system.³ A homeworker is defined generally as “someone working in or from the home for an employer or contractor who supplies the work . . .”⁴ though often homeworkers work within their own homes.⁵ The Dole court was concerned with those homeworkers involved in seven specific apparel-related industries⁶ because those industries are ones laden with prior employer

². Dole, 729 F. Supp. at 888.
³. Dole, 729 F. Supp. at 885. This system requires employers who use homeworkers to register with the Department of Labor. Id. The renewal time is every two years. Id. Among the requirements for this system are lists of employees to be given to the Department of Labor, handbooks used for records, and written certificates which ensure that the employer will abide by regulations and the system’s processes. Id.
⁵. A more general definition is that found in statutes. A homeworker is “any employee employed or suffered or permitted to perform industrial homework for an employer.” 29 C.F.R. § 530.1 (b)(1989). “Industrial homework’ . . . means the production by any person in or about a home, apartment, tenement, or room in a residential establishment of goods for an employer . . . .” 29 C.F.R. § 530.1 (c)(1989).
⁶. See Dole, 729 F. Supp. at 878. The seven industries are: women’s apparel, “nonhaz-
violations. Another concern of the *Dole* court was that homeworkers usually belong to one or more of the following categories and are consequently easily exploited: poor or lower-class; female; minorities; undocumented aliens; and/or residents of rural areas of the United States. Nevertheless, the *Dole* court held that the overall ban on these industries was to be replaced by the certification system, believing it to be the only "reasoned decision" to an overall ban on the existence of these workers.

Unions and feminists believe that the lifting of the ban will diminish the power of these workers as part of the workforce and as part of society, as well as frustrate any efforts to achieve improved working conditions for regular workers. Unions fear that these non-unionized workers, often working for below-minimum wages, will greatly undermine any collective bargaining agreements which the union may seek with an employer. Also, unions realize that employers use these homeworkers "as a buffer against fluctuations in demand . . . [and] as a means of cutting overheads, saving factory space, and improving competitiveness." Consequently, the Department of Labor (hereinafter "DOL") may have inadvertently persuaded employers to comply with the certification system not so that the homeworkers may enjoy both the convenience of work in their homes and the DOL's supervision, but so that the employers may capitalize on the opportunity presented by these workers who help to
Modern Homeworkers cut many overhead costs and who provide the cheap labor which many employers so easily exploit. This loss of influence in the workforce is deplored by feminists, who believe that women as homeworkers perpetuate their own inferior roles not only in the workforce, but in the societal and domestic spheres as well.\textsuperscript{13}

A strong resistance to these arguments are those shared by the Reagan Administration in the 1980's, which spurred on the inception of the certification system and its popular place as the only alternative to an otherwise unpopular ban on homeworkers. Though the federal government of the 1940's was responsible for the original passing of the Fair Labor Standards Act\textsuperscript{14} (hereinafter "FLSA"), an act designed to protect homeworkers,\textsuperscript{15} the federal government of the 1980's believed it could better promote free enterprise and lively competition,\textsuperscript{16} as well as revitalize an innocent "cottage industry,"\textsuperscript{17} if the bans were lifted. The workers themselves are often advocates of the certification system by claiming that, if they choose to work under certain fixed conditions and rates, then they deserve to be paid the agreed-upon amount and to be left alone.\textsuperscript{18} Consequently, the conflict is three-fold and lies at the very heart of all labor laws and policies: the right of the employer to continue in a free enterprise system versus the protection of workers against employer violations, both limited by the social policies which attempt to accommodate the workforce but also to protect the workplace.

The \textit{Dole} decision, and the survival of the certification system as the alternative to a complete ban on homeworkers, are best explained and interpreted as the inevitable result of a long chain of preceding judicial decisions, legislative enactments, and public policies which popularized this system and presented it as the only ac-

\begin{enumerate}
\item See, e.g., McGrath, \textit{supra} note 11, at 40 (claiming that many homeworkers must use child care in order to complete work at home, and those workers who do not have child care often work exhaustive overtime hours to remain on their proper work schedules); Boris, \textit{supra} note 6, at 28 (stating that homework "pushes both parts of the double day into the home without relieving women of childcare or housework."). \textit{Contra} Boris, \textit{supra} note 6, at 28 (quoting a homeworker who received above minimum-wages and saved everyday work expenses while simultaneously caring for her family and still earning money).
\item See infra notes 58-62 and accompanying text.
\item See Boris, \textit{supra} note 6, at 28 (suggesting that the government believes that the system will release capitalism and great business competition).
\item See Boris, \textit{supra} note 6, at 28. The cottage industry is "an industry based upon the family unit as a labor force in which workers using their own equipment at home process goods . . . ." \textit{Webster's Third International Dictionary} (3d ed. 1986).
\item See McGrath, \textit{supra} note 11, at 38. "If someone's satisfied, no matter how much they're making, the government shouldn't be able to come in and say they can't have the job and then take the jobs from us." \textit{Id.} (quoting a seamstress-homeworker).
\end{enumerate}
ceptable judicial outcome of this conflict. The demise of the FLSA itself, a statute wrought with good intentions but always troubled by bureaucratic inadequacy and a decreasing workforce, was an ever-failing statute that enabled the legislature to avoid strict enforcement of the FLSA’s original protective laws. Following this legislative demise, tax courts took affirmative steps to actually encourage certain homeworkers, especially poor and single mothers, to work for lower wages, accept the pay, and remain silent. The demise of the FLSA and the new tax laws of the 1980’s created the snowball effect that was perpetuated by incomplete health and safety acts, which fail to protect homeworkers against employer negligence and hazards in the workplace. It is no wonder that the certification system survived; the legislature and judiciary destroyed all other alternatives.

This Note aims to analyze the developments of the 1980’s which created the illusion that the certification system was the most effective answer to the plight of the homeworkers. This Note will analyze the Dole decision and the certification system that is a result of this case. The Note will then investigate the FLSA, a law originally meant to protect homeworkers but deemed ineffective by the mid-1980’s. Tax laws which came about during the 1980’s will also be analyzed to see their influence upon this system. Moreover, this Note will look at health statutes and the FLSA’s language to determine why homeworkers are bereft of any regulation save for the certification system. Finally, an attempt will be made to reform the system so that, if the certifications must survive, their existence becomes effective and positive.

II. THE DOLE DECISION

A. The National Industrial Recovery Act as a Prelude to the FLSA

The background of the Dole decision actually began in the 1930’s with the enactment of the National Industrial Recovery Act of 1933 (hereinafter “NIRA”). “Under the [NIRA], codes of fair competition were drawn up for 556 industries, and provisions for

19. See infra parts III-VI.
20. See McGrath, supra note 11, at 39 (stating that, regardless of decades of regulations at both state and federal levels, homework in the seven apparel-related industries could not be sufficiently regulated, and thus the FLSA could not be enforced).
21. See infra notes 94-147 and accompanying text.
22. See infra notes 148-63 and accompanying text.
regulation or prohibition of homework were included in 118.” 24 Although Franklin D. Roosevelt believed that the demise of the NIRA would “spell the return of industrial and labor chaos . . .” 25 the NIRA was ultimately declared unconstitutional by the Supreme Court in A.L.A. Schechter Poultry Corp. v. United States. 26 The Court held that “the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country . . . is an unconstitutional delegation of legislative power.” 27

Thereafter, the FLSA 28 was enacted, in part to alleviate the intense pressure that erupted to keep homework banned. 29 The FLSA in part, established a piece-rate system. 30 However, this system continued to present results of only mere wage-approximations, 31 and the system continued to be especially damaging to individual homeworkers. 32 Ultimately, the Administrator of the Wage and Hour Division drew upon a prohibition of seven industries, 33 and issued primitive homework certificates to a selected unit of workers. 34

B. The Certification System’s Development as a System for Homeworkers

Not until 1981 did a judicial problem arise with respect to the ban on the seven industries. In 1981, the Secretary of Labor at-
tempted to lift the ban on knitwear, a trade originally banned from the home. Nonetheless, the Court termed the Secretary’s action “arbitrary and capricious” and denied this effort to lift the ban on knitwear. In 1984, however, the DOL successfully issued the rule for knitted outerwear, which allowed homeworkers to work in the knitwear industry as long as their employers complied with a certification system. Moreover, the DOL followed a substantial social policy to enforce the regulation of this system. Nonetheless, early investigations insinuated that violations run rampant when legal safeguards within an industry do not exist.

The decision in ILGWU v. Dole allowed the certification system to extend to five separate industries other than the knitwear industry, a reaffirmation and extension of the 1984 ruling. Following the decision in ILGWU v. Donovan, the DOL was careful in its attempts to modify the certification system and to be sure that the system was supported by procedure and reason.

35. See Donovan, 722 F.2d at 828.
36. Donovan, 722 F.2d at 826-28. This effort arose in part because the DOL used data from Vermont knitters, who made more than minimum wage and clearly did not represent the normal demographics of homeworkers. Donovan, 722 F.2d at 818-19.
38. Id.
39. “Since 1981 . . . the Department has given priority to investigating all complaints received involving homework, has followed up on all leads regarding employment of homeworkers, and has actively sought to ensure that homework activity, wherever it occurs, is in compliance with the FLSA.” 53 Fed. Reg. 45707 (1989). Also, there were 1,928 investigations of employers using homeworkers between October 1981 and September 1987. Id.
40. 1,183 of those violations found as a result of investigations were in unrestricted industries. Id.
42. See Dole, 729 F. Supp. at 888. The five industries are: gloves and mittens, handkerchiefs, buttons and buckles, “nonhazardous” jewelry, and embroideries. Id. at 878. See also 29 C.F.R. § 530.2. “No work in the industries defined in paragraphs (d) through (j) of § 530.1 shall be done in or about a home, apartment, tenement, or room in a residential establishment unless a special homework certificate issued and in effect pursuant to this part has been obtained for each homeworker . . . .” Id.
43. See supra note 37.
44. 722 F.2d at 828.
45. “The Department believes that the homework ban has fostered an underground economy beyond government control and that the certification program in knitted outerwear improved FLSA enforcement . . . .” Dole, 729 F. Supp. at 881 (citing from 53 Fed. Reg. 45715 (1989)). This caution was acknowledged also by the Dole court itself, which stated that the Department had to conclude whether “certification for firms that come forward and meet the requirements, accompanied by continuation of the ban for all other firms, is superior to the total ban.” Dole, 729 F. Supp. at 883.
C. The Modern Certification System

The certification system as it currently exists was created in part as a response to the concerns regarding homework which have existed since the 1940's. Certification begins when the employer voluntarily applies for certification.46 This system places the employer onto a list from which the DOL knows that the employer is using homeworkers.47 Consequently, certification enables the homeworkers to be identified.48 Handbooks are also required to be kept by both the employer and the homeworker to enable accurate record keeping and knowledge of wage-hour regulations.49 "The new certification program also requires employers to establish, through time studies or other methods, 'piece rates' to better determine whether homeworkers paid by the item are receiving the hourly minimum wage."50 Finally, the employer's certification can be revoked for one to three years upon discovery of a violation,51 and new regulations include civil monetary penalties52 and the posting of "assurance" bonds.53

Although the system appears substantial, the loopholes found

47. Id.
48. The employer must supply "[t]he name and address of each such agent, distributer, or contractor through whom homework is distributed of collected and the name and address of each homeworker. . . ." 29 C.F.R. § 516.31(b)(2)(1989).
49. [A] separate handbook (to be obtained by the employer from the Wage and Hour Division and supplied by such employer to each worker) shall be kept for each homeworker. The employer is required to insure that the hours worked and other information required therein is entered by the homeworker when work is performed and/or business-related expenses are incurred.
29 C.F.R. § 216.31(c)(1989). The employer must then record the hours worked and compute the wages earned that day by each homeworker. Id. Furthermore, these handbooks call for time sheets and were created to allow the DOL an accurate and efficient procedure by which they may monitor employers and employees. 53 Fed. Reg. 45709 (1989). These handbooks will be distributed according to certificates, which must be renewed every two years, and to lists which must specify the names, addresses, and languages spoken by these workers. Id. See 29 C.F.R. §516.31(c)(1989); 53 Fed. Reg. 45722 (1989) (to be codified at 29 C.F.R. § 530.102).
51. See Dole, 729 F. Supp. at 886. See also 29 C.F.R. § 530.7 (1989). "Violation of any provision of the [FLSA] shall be sufficient grounds for revocation of all certificates issued to an employer, in which event no certificates shall be issued to the offending employer for a period of one year." Id. See 53 Fed. Reg. 45723 (1989) (to be codified at 29 C.F.R. § 530.205(b)).
52. The new rules establish penalties for all violations (except child labor cases which have their own penalties) and are assessed according to "the number of homeworkers affected, the history of prior violations, whether a violation was intentional or knowing, whether a violation was substantial . . . and any mitigating or extenuating circumstances." 53 Fed. Reg. 45711(1989).
53. The DOL requires a bond to be posted when it has reasonable doubt that the employer will comply with the FLSA. Dole, 729 F. Supp. at 886. This bond is to assure back pay to an employee who is a victim of a FLSA violation. Id. See 53 Fed. Reg. 45723 (1989)(to be codified at 29 C.F.R. § 530.104(a)).
within the certification system, and the reasons given to answer these loopholes, fail to save the system from remaining incomplete and ineffective.\(^4\) A decreasing DOL workforce must continuously control an increasing number of violations,\(^5\) and the record-keeping remains inaccurate.\(^5\) Where the nature of the homework industry requires workers to stay away from such public places as factories or warehouses, the individual aspect of the work may encourage a homeworker’s own isolation and the inefficiency of the certification system.

III. THE FLSA AND ITS DEMISE AS A HAVEN FOR LABOR

A. The FLSA’S Inception

Though the overturn of the NIRA\(^6\) would appear otherwise to be the end of protected labor, the FLSA\(^6\) gathered its objectives from the defeated NIRA. The FLSA was enacted primarily to “achieve, in those industries within its scope, certain minimum labor standards,”\(^6\) and to confront problems of child labor,\(^6\) minimum

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54. It is argued that the Final Rule creates the incentive for employers to provide the government with a list of homeworkers, as well as with a list of employers who fail to comply with this system. 53 Fed. Reg. 45719 (1989). Nonetheless, falsification of information is always possible. \textit{Id.}

55. The DOL claims that twenty new employees have been added to monitor homeworkers. 53 Fed. Reg. 45720 (1989). Nonetheless, the DOL’s staff had been cut by 11% by 1980. McGrath, \textit{supra} note 11, at 39.

56. There remains the inconvenience to the homeworkers of accurate record-keeping, even with incentives. 53 Fed. Reg. 45710 (1989).

57. See \textit{supra} note 26 and accompanying text.


\begin{itemize}
\item [(a)] \textit{The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce. That Congress further finds that the employment of persons in domestic service in households affects commerce.}
\end{itemize}


60. See Nordlund, \textit{supra} note 24, at 721. “At the time the Act [FLSA] was passed, only sixteen states had 16 years as the minimum age for factory employment. In three, the minimum was 15, in twenty-four it was 14, while eight states still permitted exceptions to be made in the case of children under 14.” Nordlund, \textit{supra} note 24, at 721 (quoting Lumpkin, “The Child Labor Provisions of the Fair Labor Standards Act”, \textit{Law and Contemporary Problems}, Duke University Law School, Summer, 1939, p. 10).
wages,\textsuperscript{61} and overtime.\textsuperscript{62}

Nonetheless, a virtual ban with highly restrictive exceptions was placed onto the homework industry due to the FLSA’s inability to protect certain homeworkers. By 1943, seven apparel-related industries\textsuperscript{63} were areas “in which homework was most prevalent and in which violations of the Fair Labor Standards Act had been a problem . . . .”\textsuperscript{64} Additionally,

\begin{quote}
one of the impediments to enforcement of minimum wages was the difficulty of ascertaining the identity of homeworkers . . . [and] [e]ven when workers could be identified, it was difficult to obtain accurate records of the number of hours each employee had worked, necessarily burdening efforts to ensure compliance with minimum wage, maximum hours, and overtime provisions of the Act.\textsuperscript{65}
\end{quote}

As a result, homework was banned except in situations that involved the handicapped or disabled.\textsuperscript{66} Consequently, the FLSA was a flailing statute only years after its inception.

\section*{B. Amendments Change the Language and Original Protection of the Act}

Gradually, the FLSA lost most of its effectiveness\textsuperscript{67} as the gov-

\begin{itemize}
\item \textsuperscript{61} Nordlund, \textit{supra} note 24, at 721 (stating that the law proposed a 25-cent minimum wage for those industries falling under its jurisdiction).
\item \textsuperscript{62} Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate . . . . 29 U.S.C. \S 207(a)(1)(1988).
\item \textsuperscript{63} See \textit{supra} note 6.
\item \textsuperscript{64} \textit{Donovan, 722 F.2d} at 801 (quoting the \textit{BRANCH OF RESEARCH \& STATISTICS, WAGE \& HOUR \& PUBLIC CONTRACTS DIV., DEPT OF LABOR, EMPLOYMENT OF HOMEWORKERS UNDER THE [FLSA] 15, 19 1959, reprinted in II J.A. 489, 493).
\item \textsuperscript{65} \textit{Donovan, 722 F.2d} at 802. There existed four substantial barriers to the enforcement of FLSA. \textit{Dole, 729 F. Supp.} at 879. The impediments were “the difficulty in identifying homeworkers . . . [of] securing accurate records of hours worked at home . . . [of] detecting and remedying FLSA violations with respect to homeworkers . . . [and] the lack of sufficient resources to enforce the FLSA with respect to homeworkers.” \textit{Id.}
\item \textsuperscript{66} McGrath, \textit{supra} note 11, at 39. The reason that the Department of Labor allowed these exceptions was because these persons were home-bound and could receive special certification to work at home. \textit{Id.}
\item \textsuperscript{67} Between 1938 and 1987, there were over 2.6 million actions taken by the Wage and Hour Division to investigate on-site violations, and between 1951 and 1987, more than 6.6 million violations were found to exist because of minimum wage illegalities. Nordlund, \textit{supra} note 24, at 727. Furthermore, “[Congress] chose to rely on information and complaints received from employees seeking to vindicate rights claimed to have been denied. Plainly, effec-
government repeatedly amended the statute to meet the specific needs of special employers, employees, and the present societal policies. Since 1938, there have been six amendments to the FLSA.\(^6\) "Concurrent with these initiatives there has been a persistent effort to limit coverage and single out industry segments or special categories of workers for special consideration."\(^6\) Congress enacted the 1961 amendment to section 17, prohibiting "the restraint of any withholding of payment of minimum wages or overtime compensations found by the court to be due to employees under this chapter \ldots ."\(^7\) However, the restraint was enacted more to prevent a violator from receiving accruals in his favor than to award the workers for lost compensation, and to protect employers who comply with the FLSA from those who do not.\(^7\) Thus, the FLSA was changed by Congress from an Act for the people to an Act for employers.

In addition, section 16's amendment strips an employee of his rights to sue for unpaid wages if the Secretary of Labor files and seeks relief under section 217,\(^7\) taking away a right of the employee who was supposedly protected under the Act. Finally, though section 202 strives to protect workers and their families by maintaining "the minimum standard of living necessary for health, efficiency, and general well-being of workers,"\(^7\) later sections were added over the years to ensure the well-being of the employers who follow its terms.\(^7\) No longer an act created specifically for homeworkers, the

tive enforcement could thus only be expected if employees felt free to approach officials with their grievances." \cite{Mitchell, 361 U.S. at 292.}

\(^6\) Nordlund, supra note 24, at 724. Raising the minimum wage and changing the parameters of the FLSA's coverage are two primary reasons for the amendments. Id.

\(^6\) Id. Furthermore, the Act could then inconsistently cover one employer and not another, due to their locations of business, etc. S. Rep. No. 145, 87 Cong., 1st Sess., 2-3 (1961) [hereinafter S. Rep. No. 145].


\(^7\) See S. Rep. No. 145.

\(^7\) "The right provided by this subsection \ldots shall terminate upon the filing of a complaint by the Secretary of Labor in an action under Section 217 in which restraint is sought \ldots ." 29 U.S.C. § 216(b)(1988).


\(^7\) See Hodgson v. Quezada, 498 F.2d 5 (9th Cir. 1974). The Hodgson court, in discussing the section 17 restraint, claims that section 17 "serves to increase the effectiveness of the Act by depriving a violator of any gains resulting from his violation, and it protects those employers who comply with the Act from unfair competition by those who do not comply." Hodgson, 498 F.2d at 6 (emphasis added). See also Wirtz v. Malthor, Inc., 391 F.2d 1 (9th Cir. 1968). The Wirtz district court believed that, because the violating business was small and payment of back wages would have produced financial hardship, and because an injunction served to protect against any future violations by this business, the repayment of back wages was unnecessary. Wirtz, 391 F.2d at 2-3. Though the circuit court disagreed, its decision to order back wages was based upon the fact that it is the employer who complies with the Act
FLSA created no serious statutory impediment to lifting the ban on homeworkers.

Moreover, by promoting free enterprise, the government assured the DOL's victory. The government relied upon the FLSA's ambiguous language that made it ineffective as early as 1943 and weak against the big businesses of the 1980's; in effect, the government took advantage of a vague and confusing statute by using the FLSA to assert that a certification system is a better alternative than a total ban and thus sent out the first signal that the homeworkers' ban was subject to demise. The Act's original policy was to correct exploitative labor conditions that were detrimental to commerce. The Act then states in part that "[i]t is declared to be the policy of this chapter . . . to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power." These two sections are mutually exclusive, because any attempt to correct domestic service will intrude upon a boss' earning power, as employers may use fewer workers if forced to pay higher wages, and any enhancement of commerce will perpetuate the attempts of employers to keep costs down in order to produce more goods. Secondly, Congress repeatedly found that the language of the Act created numerous ambiguities and inconsistencies. Hence, the demise of the FLSA has proven to be the first stepping stone for the DOL in its advocacy of the certification system as the only reasoned alternative to a total outlaw of homeworkers.

who should be protected. Id. at 3.

75. See supra note 16.

76. Judge Gesell, when speaking of the Dole decision, stated that "[t]he evidence is strong that the conditions present in the 1940's regarding the exploitation of homeworkers have not disappeared . . . [but] the regulations represented a 'reasoned' approach requiring companies seeking to institute homework to come forward and seek certification . . . ." NY Times, Dec. 8, 1989, at A33, col. 1. Furthermore, the Dole court followed the DOL's belief that "the homework ban has fostered an underground economy beyond control and the certification program in knitted outerwear improved FLSA enforcement . . . ." Dole, 729 F. Supp. at 881.

77. See supra note 59.


79. See S. Rep. No. 145. Congress claims that, because the groups of employees covered under the Act remain relatively unchanged, the earnings of those workers covered by the Act is much lower than those workers not covered. S. Rep. No. 145 at 6. Also, the Senate believes that the Act does not cover the broad range of employees it could have otherwise covered if its protection had extended beyond those employees involved with interstate commerce or in the production of goods used for commerce. Id. The Senate report's amendment of 1961 attempted to extend this coverage. Id. at 25.
IV. Section 280A of the I.R.C. Proves to be a Justification for the Certification System

A. History and Background

Recent developments among the tax laws, particularly through the emergence of tax deduction section 280A, have supported the image of the American homeworker as a worker who needs little, if any, governmental protection. Specifically, the trend in tax laws, from Internal Revenue Code (hereinafter “I.R.C.”) section 162 to I.R.C. section 280A, has been to allow certain workers to deduct from their taxes, maintenance that is applicable to a home office. However, the homeworker is banned from doing so due to the language of the I.R.C., perpetuating the judicial inference of the 1980’s that the homeworker does not maintain a home-office which requires supervision.

Throughout the 1950’s and early 1960’s, professors and other professionals could deduct home office expenses through I.R.C. section 162(a). The Internal Revenue Service, (hereinafter “IRS”) countered with I.R.C. section 262 which states in part that “[e]xcept as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living or family expenses.”

Though the language of the I.R.C. sections appears to be at a dichotomy, cases emerged which would seem to enhance a homeworker’s claim that the residence is a workplace both deserving of a home-office deduction and of governmental supervision. In Newi v. Commissioner, the petitioner claimed in part, business deductions for a room utilized as a business tool in his job as an outside salesman. In this room, the petitioner studied, researched and con-

81. See infra notes 94-112 and accompanying text.
84. See I.R.C. § 162(a)(1988). “There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business . . . .” Id. See also I.R.C. § 280(c)(1)(1988)(stating that an exception to the general no-deduction rule is an exception allowed when the expense is allocable to an area of the taxpayer’s residence used exclusively and regularly as a place of business).
85. 26 I.R.C. § 162(a)(1988). The Code allows all deductions for money spent for “ordinary and necessary expenses” in the continuation of one’s business. Id.
88. See infra notes 103-112 and accompanying text.
89. 28 T.C.M. (CCH) 686 (1969), aff’d. 432 F. 2d 998 (2d Cir. 1970).
90. Newi, 28 T.C.M. (CCH) at 686.
ducted other business-related activities. The Court held that these expenses were deductible under I.R.C. section 162, and that “the term ‘necessary’ [of I.R.C. section 162] imposes only the minimal requirement that the contested expenditure be ‘appropriate and helpful’ to the taxpayer’s business.” Consequently, a homeworker need only prove that her residence is appropriate and helpful to the performance of her work to win this deduction.

B. Developing Tax Law of the 1980’s and the Non-recognition of the Home as a Workplace

Unfortunately, more recent decisions which have been decided by an interpretation of the Tax Reform Act of 1976 have allowed certain white-collar professionals to deduct maintenance expenses while setting up new restrictions which prevent a homeworker from claiming the same. As a general rule, “in the case of a taxpayer who is an individual or an S corporation, no deduction otherwise allowable under this chapter shall be allowed with respect to the use of a dwelling unit which is used by the taxpayer during the taxable year as a residence.” The implications of this rule is that a homeworker would never be granted a deduction because her workplace is her residence. However, an exception is made if the unit is “the principal place of business for any trade or business of the taxpayer . . . .” Thus, if homeworkers were granted these deductions, their residences would be deemed workplaces and thus deserving of more monetary protection than a certification system would ever supply; the certification system does not call for monetary compensation for depreciating machinery.

Nonetheless, the intricate language of the Code fails the homeworker in her quest to label the home a workplace. The exception found in section 280A of the I.R.C. applies only if the place of business and its exclusive use is for the “convenience of [the] em-

91. Id. at 688. The Court made special note of the fact that the room was never used for the family’s personal use. Id.
92. Id. (citing Commissioner v. Tellier, 383 U.S. 687, 689 (1966)).
93. This “appropriate and helpful” test is directly against the prior Revenue Ruling 62-180, which set up restrictive guidelines for when a deduction may be claimed. See Rev. Rul. 62-180, 1962-2 C.B. 52. Some of the conditions were that the home-office would be a condition of employment and that it be used only for that purpose. Id. at 53.
Thus, homeworkers remain at a distinct disadvantage in using this law because, though the homeworkers' positions result in the employer's convenience by allowing the employer to operate at lower costs, a more convincing argument may always be introduced that the homeworkers are at home voluntarily and for their own convenience. Also, homeworkers must overcome the arduous argument that expenses cannot be deducted because their homes operate only as "residences," and thus are deserving of deductions only under some very strict guidelines.

Because tax laws continue in their non-recognition of the home as a complete workplace, and because the judiciary insinuates that the homeworkers do not require a total ban on their work, the certification system emerges as a less-restrictive alternative to the complete abolition of this work. In contrast, the deductions under I.R.C. section 280A are being made readily available to white-collar professionals, suggesting that this professional work differs clearly from domestic service which doubles as paid employment. Though professionals have been traditionally unsuccessful with this deduction, recent decisions have demonstrated that the courts are now allowing such deductions. In Weissman v. Commissioner, a college professor attempted to obtain a home-office deduction. The circuit court stated that one's principal place of business "depends on the nature of his business activities, the attributes of the space in which such activities can be conducted, and the practical necessity of using a home office. . . ." In finding that Weissman deserved the

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99. See supra note 11.
100. See I.R.C. § 280A(d)(1)(A)(1988) (stating that a residence is such if used for personal purposes for a number of days exceeding 14 days); see also I.R.C. § 280A(d)(2)(A)(1988) (stating that the unit will have personal purposes if, for any part of the day, it is used for such or by any other member of the family for this purpose).
101. Aside from the general restrictions set up by the language of the Code, other limitations exist which impose hardship on this quest for a deduction. See, e.g., I.R.C. § 280A(d)(2)(1988) (commenting that it is the Secretary's decision to judge what constitutes continuous repairs and maintenance in regards to personal use for purposes of the Code).
103. See generally Weightman v. Commissioner, 45 T.C.M. (CCH) 167 (1982) (holding that, because the university offered the professor an office where work could be conducted, and although his home office was exclusively relegated to schoolwork, the court could not conclude that it was his principal place of business); Newi v. Commissioner, 28 T.C.M. (CCH) 686 (1969) (holding that certain personal expenses, such as tips, cab fares, and office maintenance could not be deducted though spent in the course of business).
104. 47 T.C.M. (CCH) 520 (1983), rev'd, 751 F.2d 512 (2d Cir. 1984).
105. Weissman, 751 F.2d at 514.
106. Id.
deduction, the circuit court held that the convenience-of-employer test\textsuperscript{107} was satisfied because the cost of the office was \textit{additional} to living expenses, and its use was \textit{necessary} as practicality dictated.\textsuperscript{108} So, although these professionals find relief in I.R.C. section 280A, homeworkers will find it nearly impossible to separate any working area from living area,\textsuperscript{109} and to prove that depreciation of home supplies is due to employee-related work and not to normal domestic wear and tear.

Finally, the tax courts often consider whether the individual uses the office area exclusively as an office,\textsuperscript{110} a privilege not shared by the rural homeworker; she often shares the workplace with children and a spouse.\textsuperscript{111} More importantly, I.R.C. section 280A has often been used for home-office deductions and not as a route through which domestic services can be deducted. It is evident why the court in \textit{Dole} did not persist to keep the ban on homeworkers so strictly enforced; historic tax laws do not regard the homeworker's places of business, mainly their residences, as official American workplaces.\textsuperscript{112}

\section{AFDC Grants Continue to Perpetuate the Homeworker's Status}

\subsection{Background}

In contrast to I.R.C. section 280A,\textsuperscript{113} grants known as Aid to Families with Dependent Children (hereinafter “AFDC”)\textsuperscript{114} are provided to those families that may easily include a homeworker as a member.\textsuperscript{115} Unlike I.R.C. section 280A, AFDC is directly applicable to homeworkers.\textsuperscript{116} Unfortunately, the new laws and case decisions

\footnotesize{\begin{itemize}
  \item \textsuperscript{107} \textit{See supra} note 98 and accompanying text.
  \item \textsuperscript{108} \textit{Weissman}, 751 F.2d at 516 (emphasis added).
  \item \textsuperscript{109} The homeworker generally works within her own home and usually does not have a formal office within.
  \item \textsuperscript{110} \textit{See}, e.g., Meiers v. Commissioner, 49 T.C.M. (CCH) 136 (1984), rev'd, 781 F.2d 75, 79 (7th Cir. 1986) (listing factors relevant to this issue as pertaining to a home office, and not just a place to work as a matter of convenience); Fiorelli, \textit{The Home Office Deduction After Weissman: New Hope for Faculty?}, 24 Am. Bus. L.J. 377, 401 (1986) (claiming that the \textit{Meiers} court looked at factors such as length of time in the home office and its business necessity to conclude that the taxpayer deserved a deduction).
  \item \textsuperscript{111} \textit{See supra} note 109.
  \item \textsuperscript{112} \textit{See supra} notes 90-112 and accompanying text.
  \item \textsuperscript{113} 26 I.R.C. § 280A (1988).
  \item \textsuperscript{114} 42 U.S.C. § 602 (1988).
  \item \textsuperscript{115} \textit{See} McGrath, \textit{supra} note 11, at 39 (including as homeworkers many mothers and rural residents).
  \item \textsuperscript{116} \textit{See} 42 U.S.C. § 602(a)(1988) (describing AFDC as a plan to supply benefits to needy families with children).
\end{itemize}}
concerning these grants perpetuate the recipients’ poverty and encourage many homeworker-recipients to remain silent about both their jobs and income derived from that position. In 1981, 34.6 percent of all households headed solely by a woman were at a poverty level, while only 10.3 percent of those homes headed solely by a man were at this level. More importantly, 81.8 percent of AFDC grants were received by female-headed households, a distinguishing characteristic shared by many families which include a homeworker as a member.

Recent legislative amendments concerning the amount of money deducted from the AFDC grant prove detrimental to any encouragement extended to these homeworkers to seek higher-paying, safer jobs. In 1981, the Omnibus Budget Reconciliation Act (hereinafter “OBRA”) was passed. In effect, this Act states that those receiving AFDC grants must disregard from their earned income “the first $75 of the total of such earned income for such month...” and shall disregard from earned income any care for a dependent child that does not exceed $160. Thus, the “OBRA successfully reduced the benefits paid to many AFDC recipients... by placing a statutory ceiling on the amount of work-related expenses which may be excluded from AFDC recipients’ reported income.” The effect of the OBRA will dissuade many poorer family members, and many homeworkers, from seeking a better job because these individuals wish to maintain the maximum benefit of their respective AFDC grants. Any increase in reported income earned by a former homeworker raises the risk that a grant will be reduced or terminated altogether, and forces such workers to remain in their present working conditions.

117. See infra notes 135-43 and accompanying text.
119. Id.
120. Id.
121. McGrath, supra note 1, at 39.
125. Note, supra note 118, at 309.
126. Before the enactment of OBRA, an AFDC recipient could deduct “all work-related expenses, child care expenses, mandatory payroll deductions, and an additional work incentive deduction” from his income total that was reported to determine if he possessed the criteria to receive aid. Note, supra note 118, at 310. OBRA then severely limited these deductions from one’s earned income and consequently lowered the number of workers eligible for the AFDC grant. See 42 U.S.C. § 602 (1988).
B. Court Decisions Encourage Public Policy of Employment and thus Discourage Homeworkers from Seeking Better Jobs

Court decisions following the enactment of the OBRA demonstrate the courts’ willingness to further the legislative goal of encouraging people to work and dissuading the use of welfare as a means of income;\(^{127}\) to enable more people to work, the certification system must be allowed to prevail over the possibility that all homeworkers would otherwise be unemployed and be back on welfare as their only income. In *Turner v. Prods*,\(^ {128}\) the court for the ninth circuit originally went against a trend "to reduce significantly the benefits payable to working AFDC recipients by penalizing poor women for receiving income which they never see . . ."\(^ {129}\) and held that "‘income’ for AFDC purposes does not include mandatory payroll withholding for items such as local, state, and federal income taxes, FICA, state disability, and equivalent governmental programs."\(^ {130}\)

This decision was critical, because if the state were to consider mandatory payroll deductions as a work expense, a monthly $75 cut-off would be calculated, instead of a total deduction, and the aid to these families would then be greatly reduced.\(^ {131}\) Nevertheless, the *Turner* decision was overruled by the Supreme Court in *Heckler v. Turner*,\(^ {132}\) where the Court based its decision in part on the theory that "the risk of creating disincentives to employment that would lead to increased expenditures down the road did not trouble the OBRA Congress."\(^ {133}\) Consequently, the Supreme Court believed that to allow decreased expenditures would be an inexcusable intrusion into clearly-stated legislative policy.\(^ {134}\)

Other courts have held that the mandatory payroll deduction is

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127. See *Ram v. Blum*, 564 F. Supp. 634 (S.D.N.Y. 1983). One policy that encouraged Congress to enact OBRA was to create "incentives to AFDC recipient families to obtain employment in lieu of continued reliance on AFDC benefits." *Ram*, 564 F. Supp. at 646.


129. Note, supra note 118, at 310.

130. *Turner*, 707 F.2d at 1124.

131. *Turner*, 707 F.2d at 1111-12. If a woman earned $576.20 per month, and had $59.52 deducted for taxes, her actual available income would be $516.68. *Id.* Then, she would have still $75.00 left to deduct for work expense, giving her almost $442 as income. *Id.* This amount would then be subtracted from an overall benefit level, and the remainder would be her AFDC grant. *Id.* However, if the *Turner* court did not rule as it did, the recipient's grant would have been calculated as $576.00 minus a mandatory $75.00 to leave $501.00. *Id.* Then the recipient would have only $15.00 for work expense, the rest taken from her personal pocket, and the $501.00 is subtracted from the state benefit level, resulting in an AFDC grant much lower than the *Turner* circuit court could allow. *Id.*


133. *Heckler*, 470 U.S. at 206.

134. *Id.*
not part of "income" to determine AFDC grants and have steadily tightened the hold of the homeworkers' plight by significantly lowering the grants available to AFDC families. In James v. O'Bannon, the court for the third circuit faced the same dilemma as was found in Turner. In the James case, however, the court stated that "[t]he AFDC program is designed to provide financial assistance to needy dependent children and the parents or relatives who live with and care for them," and "to help such parents or relatives 'to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection.'" The James court further stated that Congress' original policy of helping recipients to gain self-sufficiency and creating an incentive to work has given way to a more modern policy to reduce welfare benefits to those not as needy as others, and to make jobs available as an alternative to aid. Consequently, the government's departure from overall aid, and its movement towards a limited monetary system, serve to foster a situation where a worker may not seek more income so that as much aid can be received.

Furthermore, the fourth circuit in Bell v. Massinga agreed with the third circuit in James and held that "AFDC eligibility and benefits on the basis of income [are to be determined] before taxes, except to the extent that such taxes may be included in a statutory 'disregard' of $75 per month." Also, the Bell court agreed to remain in line with the policies of Congress. Inevitably, a homeworker's existence relies in part on the income derived from working in the home that would otherwise be impossible to earn, and the AFDC grants serve to enhance a homeworker's low-income status.

It is apparent that the movement, in the mid-1980's, towards treating work expenses as part of a payroll, continues to perpetuate the dire situation of the homeworkers and clearly indicates how the courts and Congress perceive an outright ban to homeworkers as a

136. James, 715 F.2d at 808 (quoting Shea v. Vialpando, 416 U.S. 251, 253 (1984)).
137. Id., at 808 (quoting Shea, 416 U.S. at 253 (citing 42 U.S.C. § 601)).
138. See James, 715 F.2d at 808.
139. Id. at 809.
141. Bell, 721 F.2d at 132.
142. Id. at 133. "[I]t was the intent of Congress in enacting OBRA that henceforth gross income was to be the starting point for determining AFDC eligibility and benefits . . . ." Id.
Modern Homeworkers viable threat to their policies of better employment and self-sufficiency. A worker who earns below-minimum wage, or just barely so, is not likely to agree that the mandatory $75 cut-off is for her personal benefit and is a sufficient incentive to seek other work. What the courts have done is to respond to a growing number of recipients who require a proportionally decreasing amount of aid, and allow Congress to influence their holdings of who is the neediest. Homeworkers will not search for better employment, when outside work expenses they may encounter, such as travel money, food money, and child care would not be taken into account when the needed AFDC grant is calculated. Clearly at a disadvantage, poor homeworkers on AFDC grants will not leave the home now that expenses may not be repaid. So, if courts regard these workers as self-sufficient in their present condition, the Dole Court cannot be faulted for following Congressional policy and believing that these workers, who are employed and demonstrate the government's goal of employment, are also so sufficient as not to require a complete ban on the work they accomplish.

VI. THE OCCUPATIONAL SAFETY AND HEALTH ACT, AND THE FLSA, LEAVE NO DOUBT THAT THE CERTIFICATION SYSTEM IS THE ONLY EXISTING LEGAL PROCEDURAL REGULATION

A. OSHA Fails as a Safety Net

Due to the changing policies of the courts and Congress, the homeworker is thrust into a situation where she lacks legal standing to sue under numerous health and safety acts. Consequently, the certification system arises as the only "reasoned approach" to the lack of statutes affecting the homeworkers. For example, homeworkers lack the legal recourse to sue under the Occupational Safety and Health Act (hereinafter "OSHA"). Upon its inception, OSHA reinforced the notion that an implicit right of refusal existed for all non-unionized individual employees to work in an unsafe environ-

144. An outright ban on homeworkers could potentially result in thousands of more individuals requesting governmental aid. As Congress and the courts interpret OBRA, they consistently adhere to legislative histories of self-sufficiency and hard work. See supra notes 127-39 and accompanying text.

145. See supra note 10 (discussing the average wage of homeworkers).
146. See, e.g., Ram v. Blum, 564 F. Supp. 634, 646 (S.D.N.Y. 1983) (discussing the policies of the 97th Congress and inferring that courts should adhere to these policies in their decision-making process).
147. See James, 715 F.2d at 797-98.
ment. OSHA thus reinforced the trend of the National Labor Relations Board (hereinafter "NLRB") "to include the isolated acts of individual employees in both the unionized and nonunionized workplace . . ." within the protective realm of the National Labor Relations Act (hereinafter "NLRA"). The references to "interstate commerce" and "every working person" also infer that OSHA reflects the language of the Fair Labor Standards Act and presents the possibility that homeworkers may sue under OSHA to seek relief. Moreover, the judicial trend throughout the 1970's appeared to pave the way finally for homeworkers to seek relief from exploitative employers, declaring that a collective bargaining agreement was deemed irrelevant to the safety issue of a worker.

Numerous problems have arisen, however, regarding the OSHA and its applicability to homeworkers. One such problem is the Board's decision in Meyers Industries, Inc. v. Prill. In Meyers, the Board overruled the Alleluia Cushion Co. case and declared that the NLRA protects only concerted activity, and that an individual's actions must be on behalf of fellow employees in order to be protected. Thus, the Board rejects the notion that section 7 of the NLRA was intended to protect individual action, even where an employee refuses to work in favor of his own safety as was the issue in Meyers. A homeworker now cannot seek redress for unsafe conditions, as a homeworker most likely would not be acting on the be-

149. OSHA states in pertinent part that "Congress finds that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce . . ." OSHA, 29 U.S.C. § 651(a)(1988). Furthermore, "[t]he Congress declares it to be its purpose and policy . . . to assure so far as possible every working man and woman in the Nation safe and healthful working conditions . . ." 29 U.S.C. § 651(a)(1988).


152. See supra note 59.

153. See Alleluia Cushion Co., 221 N.L.R.B. 999 (1975). "[T]he Board turned to [OSHA] and similar legislation at the state and local level which indicated that safety was a concern common to all employees and found the existence or nonexistence of a collective bargaining agreement to be immaterial." Note, supra note 150, at 218 (citing to Alleluia Cushion, 221 N.L.R.B. at 1000).


158. In Meyers, the petitioner was afraid to drive a vehicle he believed to be damaged. Meyers, 268 N.L.R.B. at 27,295. Thereafter, the employee was discharged. Id.
half of fellow homeworkers.\textsuperscript{159}

In addition to court decisions, the language of the OSHA and the NLRA severely hampers the ability of homeworkers to sue for safer conditions, without fear of discharge or recrimination. Through the OSHA, an employee cannot be discharged for filing a complaint derived from this statute.\textsuperscript{160} However, homeworkers do not appear to fall within the definition of “employee” under the NLRA\textsuperscript{161} or under the OSHA. Thus, homeworkers arguably are not protected by the Board, and may fear recrimination without the protection of union representation, a strong bargaining position, or the supervision of the Board. Even assuming that the OSHA’s definition of “employee” need not correspond to that of the NLRA, and the OSHA does offer homeworkers protection as employees, homeworkers may prove to be dangerously unknowledgeable of the OSHA rules. Consequently, when OSHA allows thirty days to file a complaint,\textsuperscript{162} “[t]here is a danger that unwary nonunion employees . . . may lose valuable time, and may find themselves outside the limitations period.”\textsuperscript{163} In a situation where the Secretary of Labor investigates a wrong under the rules for the certification system, a homeworker may not know that this thirty-day limit has begun. If the Secretary does not find a wrong after using the certification system’s procedure, the homeworker may have already forfeited her right to sue under the OSHA because the statute of limitations has already run out. Again, the certification system emerges as the only decisive procedural method in which a homeworker may find legal haven.

\textsuperscript{159} The homeworker’s actions are often personal and are a result of remaining at home to care for children, etc. Boris, supra note 6, at 30.

\textsuperscript{160} See OSHA, 29 U.S.C. § 660 (1988). “No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or cause to be instituted any proceeding under or related to this chapter . . . .” 29 U.S.C. §660(c)(1)(1988).


The term ‘employee’ . . . shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice . . . . but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person . . . or any individual having the status of an independent contractor . . . .

29 U.S.C. § 152(3)(1988). Many homeworkers are in a domestic service and are often classified as independent contractors, declassifying them as “employees” under the Act.


\textsuperscript{163} Note, supra note 150, at 227.
B. FLSA and its Zone of Interest Leave Homeworkers Without Any Legal Recourse Other Than Certification

In being left devoid of any legal recourse by which to sue, homeworkers remain classified as workers whose dire situation is greatly exaggerated and whose work is neither dangerous nor a requisite for Congressional regulation. Nowhere is the advocacy for the certification system better exemplified than through the ever-changing language of the FLSA. Under the FLSA, manufacturers, their associations, and labor organizations are allowed to bring suit, all three of these categories falling within FLSA’s “zone of interest.” Moreover, the FLSA’s protective targets have been expanded to include not only homeworkers but their employers as well. In this ambiguous and legal conflict, the Secretary of Labor must insure that “any competing interests of these parties are resolved . . . in a rational manner, and that the Act is rationally enforced . . . .” Finally, as homeworkers struggle to maintain a legal safety net, the FLSA again takes away their power by allowing the Secretary to preempt an employee’s suit if the case is related to overtime wages, but does not preempt a case brought by an employer. It appears that the FLSA misleadingly insinuates that it is readily available to homeworkers as a defense against wrongful employers; in reality, the FLSA has been expanded to accommodate management and has squeezed out homeworkers who were meant to originally benefit from the act. In turn, the certification system emerges as a way to regulate an area that has been swept from the FLSA’s reach.

As a consequence of these legislative changes and the relaxation of the FLSA’s “zone of interest,” the certification system has be-

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164. See Donovan, 722 F.2d at 810.
165. See Donovan, 722 F.2d at 809-10 (holding that the FLSA’s zones of interests include those people disadvantaged by any action which comes within the FLSA’s meaning).
166. “In contrast, it is clear that the Fair Labor Standards Act was intended to protect compliant employers and their employees as well as underpaid employees.” Donovan, 722 F.2d at 810 n. 23.
167. Id.
168. 29 U.S.C. § 216 (1988). “The right provided by this subsection to bring an action by or on behalf of any employee . . . shall terminate upon the filing of a complaint by the Secretary of Labor in an action . . . in which restraint is sought of any further delay in the payment of unpaid minimum wages . . . .” 29 U.S.C. § 216(b) (1988).
169. See supra notes 164-69 and accompanying text.
170. See generally Cooper & Brass Fabricators Council, Inc. v. Department of Treasury, 679 F.2d 951, 954 (D.C. Cir. 1982)(holding that the Supreme Court often rejected objections to a plaintiff’s lack of standing though, if used, the zone of interest test would have proved otherwise); Control Data Corp. v. Baldridge, 655 F.2d 283, 289 (D.C. Cir.), cert. de-
come the inevitable "reasoned approach" to a total ban on homeworkers, as this system is the only regulatory system that has not been modified and undermined by the courts and legislature. For the zone of interest, "[t]he Supreme Court cases require no more than a showing that there is a 'substantial likelihood' that the relief requested will redress the injury,"[172] though the "[p]laintiff need not prove that granting the requested relief is certain to alleviate the injury."[172] Homeworkers may argue rightfully that they are covered by the FLSA, but the relief requested cannot be higher wages or better conditions because the piece-rate given for their work is often fixed before employment,[173] and their own homes manifest their working conditions. In effect, the relief that would most likely redress their wrongs would be a certification system, because this system would subject employers to the discipline of the DOL[174] and would identify homeworkers as its sole targets to protect. The court system again has produced a way in which both homeworkers' concerns and their employers' actions are answerable only to this system set up by the Department of Labor.

VII. CONCLUSION

The snowball effect that began with the demise of the FLSA must be abruptly halted. To do so, the courts must reassess their stances on the certification system, a system that has survived years of speculation and abuse.

Perhaps due to its tenacity to survive, the certification system may be a positive idea that can be salvaged with needed changes. Instead of a voluntary certification, the employer's registration should be made mandatory. With the money that the employer undoubtedly saves by not paying overhead, etc., the certification should be accompanied with a payment to each homeworker that would aid this worker with child care or work-related expenses; this payment would seldom be a burden to these employers. Furthermore, the piece-rate system that often results in unbelievably low wages[176]

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nied, 454 U.S. 881 (1981) (holding that the test's changing nature makes its application challenging and an interpretation somewhat impossible).


173. See McGrath, supra note 11, at 38 (claiming that, even with overtime and persistent effort, a homeworker's wages remained at a piece-rate wage).


175. See, e.g., McGrath, supra note 11, at 38 (explaining that at piece-rate, a worker may receive $2.25 per shirt and $2.00 per pants, but that sewing full-time still only yields
should be replaced with a standard minimum wage, payable per hour, because the quantity and type of work should not determine the wages received, and it is these options created for the employer which create the opportunity for abuse.

Without these changes, the decision in \textit{ILGWU v. Dole} is certain to be just another effect within a snowballing set of changes.

"Most significantly, homework as it currently exists is the symptom, not the cause, of economic exploitation."\textsuperscript{176} More specifically, "home work is a device that severs benefits from jobs, lowering the overall wage bill."\textsuperscript{177} Not surprisingly, in 1988, there were nine states that still lacked a minimum wage program\textsuperscript{178} and most were rural states and were recipients of many of the nation's immigrants and minorities. This situation is clearly indicative of the economic exploitation that will persist as long as the job market cannot accommodate workers,\textsuperscript{179} and the courts and government insist that a certification system is better than no homework at all. Evidently, the arguments against a ban were destroyed by an avalanche of judicial decisions and Congressional acts\textsuperscript{180} which created the misleading image that a ban would be counterproductive to a situation whose wrongs were exaggerated by lobbyists (feminists, unions, etc.).\textsuperscript{181} Moreover, though homeworkers are great in number,\textsuperscript{182} their plight may soon be overshadowed by the plight of technical and clerical homeworkers,\textsuperscript{183} thus leaving homeworkers without any regulation at all, save for the certification system. When the FLSA is practically deemed obsolete and recent amendments only protect employers, when the courts create a system by which homeworkers cannot sue readily for their own health and safety, and when tax courts insinuate that these people need an incentive to work and are self-sufficient due to this

\begin{footnotes}
\footnotetext[176]{Boris, supra note 6, at 30.}
\footnotetext[177]{Id.}
\footnotetext[178]{See Nordlund, supra note 24, at 715 n.1 (listing Alabama, Arizona, Florida, Iowa, Louisiana, Mississippi, Missouri, South Carolina, and Tennessee as states devoid of minimum wage laws).}
\footnotetext[179]{A recent investigation brought up 7,000 cases of children working in illegal environments. N.Y. Times, March 16, 1990, at A16. Also, these children are often working in sweatshop atmospheres and are completing work normally done by adults. N.Y. Times, Feb. 5, 1990, at B1. Though those individuals exploited are children, these environments and lack of protection parallel those found within the homeworker setting.}
\footnotetext[180]{See supra parts II to V and accompanying text.}
\footnotetext[181]{See supra notes 10-13.}
\footnotetext[182]{See McGrath, supra note 11, at 38 (stating that a conservative estimate of homeworkers equals nearly 150,000 in the United States).}
\footnotetext[183]{These workers could total ten million by the early 1990's. McGrath, supra note 11, at 41.}
\end{footnotes}

http://scholarlycommons.law.hofstra.edu/hlelj/vol8/iss1/4
work, a judge would have no choice but to follow this domino effect and allow the certification system to prevail.

Laura Helene Gonshorek