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A Greedy Institution: Domestic Workers and a Legacy of Legislative Exclusion

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NOTE

A GREEDY INSTITUTION: DOMESTIC WORKERS AND A LEGACY OF LEGISLATIVE EXCLUSION

James Lin *

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INTRODUCTION

Over the past several decades, the US domestic labor force has experienced a surge in low-wage work, owed partly to the economic downturns of the late 1980s and 2000s.¹ Domestic

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1. DAVID AUTOR, THE POLARIZATION OF JOB OPPORTUNITIES IN THE U.S. LABOR MARKET: IMPLICATIONS FOR EMPLOYMENT AND EARNINGS, fig. 1 (2010), http://www.americanprogress.org/issues/2010/04/pdf/job_polarization.pdf (detailing a surge in low-wage during 1989–99, and then even more so during the 1999–2007 period); HEATHER BOUSHEY ET AL., UNDERSTANDING LOW-WAGE WORK IN

household services, the segment of service work characterized as remunerated household-related labor, is one industry that has been affected by this labor market shift.² Commonly, individuals in this sector include cleaners, cooks, housekeepers, and nannies.³ The household domestic services industry has grown considerably as a result of this labor market shift, fueled by an influx of low-wage workers from non-US countries in the Caribbean, Latin America, and Southeast Asia.⁴ The trend is likely to continue.⁵

THE UNITED STATES, fig. 3 (2007), available at <http://www.inclusionist.org/files/lowwagework.pdf> (depicting a polarization of low-wage and high-wage work starting in the 1990s); see also BUREAU OF LABOR STATISTICS, LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY: WORKING POOR, available at <http://www.bls.gov/cps/earnings.htm#workpoor> (providing yearly historical reports with detailed statistics of shares of the “working poor” in the United States since 1996, which refers to individuals who, despite holding either part-time or full-time work, nevertheless have resided below the official poverty level for twenty-seven weeks or more during the year).

2. See Laura Dresser, *Cleaning and Caring in the Home: Shared Problems? Shared Possibilities?*, in THE GLOVES OFF ECONOMY: WORKPLACE STANDARDS AT THE BOTTOM OF AMERICA'S LABOR MARKET 116 (Annette Bernhardt et al. eds., 2008) (pointing out that “personal and home care aide employment is projected to grow by 41 percent by 2014; the base of home health aides will expand some 56 percent, making it the fastest-growing occupation in the economy.”); Gordon H. Hanson et. al., *Immigration and the U.S. Economy: Labor-Market Impacts, Illegal Entry, and Policy Choices*, in IMMIGRATION POLICY AND THE WELFARE STATE: A REPORT FOR THE FONDAZIONE RODOLFO DEBENEDETTI 200, tbl.10.4 (Tito Boeri et al. eds., 2002) (noting that household services as the second fastest-growing industry in California among immigrant workers); INT'L LABOUR ORG., 4 PREVENTING DISCRIMINATION, EXPLOITATION AND ABUSE OF WOMEN MIGRANT WORKERS: AN INFORMATION GUIDE 10 [hereinafter PREVENTING DISCRIMINATION] (explaining that female migrant workers tend to find work in jobs that “tend to be extensions of the female traditional role of care giving and housework,” in contrast to male migrant workers who “migrate for a variety of jobs ranging from low to high-skilled jobs”).

3. The terms “household worker” and “domestic worker” are used interchangeably in this Note. In either case, they refer to workers who work within the domestic services industry, such as cooks, maids, butlers, and caretakers.

4. Hanson et al., *supra* note 2, 180 tbl.2.2 (studying the pattern of domestic labor flows around the world); Peggie Smith, *Organizing the Unorganizable: Paid Household Workers and Approaches to Employee Representation*, 79 N.C. L. REV. 45, 52 (2000) [hereinafter Smith, *Organizing the Unorganizable*] (noting the evolving demographic composition of domestic workers).

5. See PREVENTING DISCRIMINATION, *supra* note 2, at 11 (“The demand for women migrant workers, in particular those going into domestic service, is often high and sustained, since they represent a form of ‘replacement mobility’ for female nationals who are freed from their household and care responsibilities to take up other—better—positions in the labour market.”). See also MEGAN GAYDOS ET AL., A HEALTH IMPACT ASSESSMENT OF CALIFORNIA ASSEMBLY BILL 889: THE CALIFORNIA DOMESTIC

Notably, this group of individuals falls outside the ambit of several important pieces of legislation that could otherwise offer them workplace protections.⁶ For example, the National Labor Relations Act (“NLRA”), one of several important laws created during the New Deal era, protects an employee’s right to collectively bargain with her employer by shielding her from certain workplace practices intended to discourage or handicap bargaining activity.⁷ However, domestic workers are not similarly protected.⁸ As a result, they are left with a veritable handicap should they attempt to voice their concerns regarding the employer-employee relationship.⁹

This Note focuses on the development of the US domestic services industry and examines the reasons for this legislative exclusion. Consequently, this Note is largely an historical inquiry that seeks to understand the context for the exemption and questions the legitimacy of its continued exclusion. Part I explores the unique challenges that the domestic services industry faces, and it discusses the range of legislative protections—both domestic and international—that are potentially available to address them. Part II details the historical pedigree that influenced the current state of legislative protections for the industry in the United States. Finally, Part III argues that existing reasons to uphold these legislative exclusions are both inadequate and anachronistic.

I. A LEGISLATIVE VACUUM

Domestic workers face notable challenges within the workplace, unlike any other group of workers in the United

WORK EMPLOYEE EQUALITY, FAIRNESS, AND DIGNITY ACT OF 2011, 27 (2011) (explaining that current issues facing domestic workers will grow as immigration trends continue).

6. As this Note discusses further in Part I.C, significant New Deal Era legislation such as the Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (1935) (codified as amended in scattered sections of 42 U.S.C. (2006)), the Fair Labor Standards Act, 29 U.S.C. § 201–219 (2006), and the National Labor Relations Act, 29 U.S.C. §§ 151–169 (2006), all excluded domestic workers.

7. 29 U.S.C. §§ 151–169.

8. *Id.* § 152(3) (explaining that the term, “employee” does not include independent contractors, agricultural or domestic workers, employees hired by a parent or spouse, managers, and workers already covered by the Railway Labor Act).

9. *See infra* Part I.C (explaining the handicap domestic workers face without these legislative protections).

States.¹⁰ Part I.A provides an overview of the industry and notes that domestic workers stand in a unique position that render them particularly vulnerable relative to other groups of service workers. Next, Part I.B discusses international labor protections available to domestic workers. Finally, Part I.C details relevant legislation in the United States, including a detailed discussion of the domestic worker exclusion within the NLRA.

A. “*The lowest rung of legitimate employment*”¹¹

Historically, domestic work in the United States has been the employ of the poor and the disenfranchised.¹² Owing in large part to the nature of the job, it has never occupied a coveted position within the American social hierarchy.¹³ Not only did domestic workers mop floors and clean toilets, but they were also expected to dedicate a significant portion of their time in doing so.¹⁴ Sociologist Lewis Coser pointed out a growing trend during the New Deal era, where the responsibilities for jobs of similar work required a near-total commitment from the worker herself.¹⁵ Dubbed “greedy institutions,” these occupations were those that did not “rest content with claiming a segment of the time, commitment, and energy of the servant,”

10. See *infra* Part I.A (detailing the unique circumstances that domestic workers face).

11. EVELYN NAKANO GLENN, ISSEI, NISEI, WAR BRIDE: THREE GENERATIONS OF JAPANESE AMERICAN WOMEN IN DOMESTIC SERVICE 165 (1986) (citation omitted).

12. PEGGIE R. SMITH, *Regulating Paid Household Work: Class, Gender, Race, and Agendas of Reform*, 48 AM. U. L. REV. 851, 854–55 (1999) [hereinafter Smith, *Regulating Paid Household Work*] (describing the historical roots of domestic work in the United States); see generally NANCY Z. BYRD, *The Dirty Side of Domestic Work: An Underground Economy and the Exploitation of Undocumented Workers*, 3 DEPAUL J. FOR SOC. JUST. 245 (2010) (noting the historical pedigree of modern domestic workers).

13. See GLENN, *supra* note 11, at 146 (citation omitted) (describing the historical roots of domestic work in the United States); see also BYRD, *supra* note 12, at 260 (2010) (noting the historical pedigree of modern domestic workers).

14. See DOMESTIC WORKERS UNITED & DATACENTER, HOME IS WHERE THE WORK IS: INSIDE NEW YORK'S DOMESTIC WORK INDUSTRY 15 (2006) [hereinafter HOME IS WHERE THE WORK IS], available at <http://www.datacenter.org/reports/homeiswheretheworkis.pdf> (explaining that half of all workers who work overtime work more than fifty to sixty hours a week).

15. See LEWIS A. COSER, *Servants: The Obsolescence of an Occupational Role*, 52 SOC. FORCES 31, 32 (1973).

but instead demanded “full-time allegiance.”¹⁶ This is as true today as it was nearly a hundred years ago, when the enactment of such important New Deal legislation, like the NLRA, afforded new and unprecedented protections for US workers.

Across the United States, ninety-five percent of the estimated 1.8 million domestic workers are women, are not born in the United States, or are persons of color.¹⁷ When narrowed to specific geographic areas within the country, this proportion becomes even more stratified.¹⁸ For instance, in New York City, ninety-three percent of the estimated 200,000 domestic workers are women,¹⁹ but ninety-five percent are racial minorities, and ninety-nine percent are from countries other than the United States.²⁰ An extensive study in San Francisco reflects this trend as well, finding that ninety-nine percent of domestic workers were non-American immigrant workers.²¹ Ninety-four percent of this portion were Latina, and all but two percent of the domestic worker population was female.²² The trend repeats itself in other areas of the country like Chicago and Los Angeles.²³

16. See *id.*; see also Erna Magnus, *The Social, Economic, and Legal Conditions of Domestic Servants*, 30 INT'L LAB. REV. 190, 196 (1934) (“[T]he duties of a [live-in] servant are indefinite.”).

17. See HOME IS WHERE THE WORK IS, *supra* note 14, at 10 (describing a disproportionate representation of minorities and women within the industry); ANDOLAN ORG. S. ASIAN WORKERS ET AL., DOMESTIC WORKERS’ RIGHTS IN THE UNITED STATES: A REPORT PREPARED FOR THE U.N. HUMAN RIGHTS COMMITTEE IN RESPONSE TO THE SECOND AND THIRD PERIODIC REPORT OF THE UNITED STATES 3 (2005), available at <http://www.law.unc.edu/documents/clinicalprograms/domesticworkersreport.pdf> (summarizing general statistics about the domestic worker industry in the United States).

18. See HOME IS WHERE THE WORK IS, *supra* note 14 (surveying domestic workers in New York City); see also GAYDOS ET AL., *supra* note 5, at 29 (surveying domestic workers in San Francisco).

19. HOME IS WHERE THE WORK IS, *supra* note 14, at 1–2 (presenting findings on an extensive survey of New York City domestic workers).

20. See *id.* at 10 (describing the demographic composition of New York City domestic workers).

21. See GAYDOS ET AL., *supra* note 5, at 29 (illustrating the demographic trend of domestic workers in San Francisco, California).

22. *Id.* (noting that domestic workers in San Francisco are disproportionately female minorities).

23. See EXCLUDED WORKERS CONG., UNITY FOR DIGNITY: EXPANDING THE RIGHT TO ORGANIZE TO WIN HUMAN RIGHTS AT WORK 18 (2010) [hereinafter UNITY FOR DIGNITY] (comparing similar findings among different cities); see also LAUREN D. APPELBAUM, UCLA INST. FOR RESEARCH ON LABOR AND EMP’T, WHY A DOMESTIC

Importantly, however, this distribution reflects the pattern around the world, as scholars and advocates estimate that close to 100 million women and young girls earn their living through some form of domestic work.²⁴

What more, the employers who typically hire domestic workers seldom adhere to lawful labor practices.²⁵ A survey conducted throughout New York City, Chicago, and Los Angeles found that forty-one percent of domestic workers were not paid the minimum wage, as required by state and federal law.²⁶ Eighty-three percent of home health care workers and ninety percent of child care workers worked past the standard work week without overtime compensation.²⁷ The yearly earnings for every one of four domestic workers in New York City were not enough to meet the poverty line.²⁸

WORKERS BILL OF RIGHTS? 6–7 (2010) (comparing New York and California legislation).

24. INT'L LABOUR ORG., GLOBAL AND REGIONAL ESTIMATES ON DOMESTIC WORKERS 6 (2011) (estimating the global population of domestic workers); Press Release, Int'l Labour Org., 100th ILO Annual Conference Decides to Bring an Estimated 53 to 100 Million Domestic Workers Worldwide Under the Realm of Labour Standards (June 16, 2011) [hereinafter ILO Press Release] (introducing the June 2011 International Labour Organization ("ILO") Domestic Worker Convention that covers workers worldwide).

25. See N.Y. DEP'T OF LABOR, FEASIBILITY OF DOMESTIC WORKER COLLECTIVE BARGAINING 15 (2010) [hereinafter FEASIBILITY STUDY], available at <http://www.labor.ny.gov/legal/laws/pdf/domestic-workers/domestic-workers-feasibility-study.pdf> ("[M]any individuals who employ domestic workers are ambivalent about their role as the employer . . ."); see also UNITY FOR DIGNITY, *supra* note 23, at 24 (2010) (noting the pervasiveness of employer abuses within the industry); see generally DOMESTIC WORKERS UNITED ET AL., DOMESTIC WORKERS AND COLLECTIVE BARGAINING: A PROPOSAL FOR IMMEDIATE INCLUSION IN THE NEW YORK STATE LABOR RELATIONS ACT 6 (2010) [hereinafter DOMESTIC WORKERS AND COLLECTIVE BARGAINING], available at <http://www.domesticworkers.org/sites/default/files/pdfs/collectivebargaining.pdf> (documenting incidents of employer abuses).

26. ANNETTE BERNHARDT ET AL., BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES (2009) (highlighting the results of a comprehensive survey that found systematic trends among major cities where employers were violating basic wage and hour laws).

27. *Id.* at 34 (noting that violations of overtime laws are also common occurrence); CLAIRE HOBDEN, INT'L LABOUR ORG., WINNING FAIR LABOUR STANDARDS FOR DOMESTIC WORKERS: LESSONS LEARNED FROM THE CAMPAIGN FOR A DOMESTIC WORKER BILL OF RIGHTS IN NEW YORK STATE 8 (2010), available at http://www.ilo.org/actrav/what/pubs/WCMS_149488/lang-en/index.htm.

28. See HOME IS WHERE THE WORK IS, *supra* note 14, at 15–18 (summarizing wages for domestic workers in New York City); see also DOMESTIC WORKERS AND COLLECTIVE BARGAINING, *supra* note 25, at 5 (providing data on domestic worker wages).

Employer abuses in the industry are common because safeguards like grievance procedures, review committees, and appeals boards do not exist within a household.²⁹ Reports indicate that one-third of the 15,000 to 20,000 annual victims of labor trafficking in the United States are domestic workers.³⁰ Oftentimes, the only options for a worker in that position are to either accept the abuse or quit altogether.³¹ Labor scholars have described this as modern day institutionalized slavery that, in unregulated corners of the world, can bear little discernible distinction between legitimate employment and servitude.³²

Domestic workers' experiences in the United States are part and parcel of a global narrative.³³ The International Labour Organization ("ILO"), the United Nations agency tasked to oversee international labor issues, reports a shifting trend in

29. See FEASIBILITY STUDY, *supra* note 25, at 15–16 (describing the limited means through which domestic workers can address employer abuses); Ai-jen Poo & E. Tammy Kim, *Organizing to Transform Ourselves and Our Laws: The New York Domestic Workers Bill of Rights Campaign*, 44 CLEARINGHOUSE REV. 577 (2011) (summarizing difficulties for domestic workers due to the private nature of their workplace).

30. U.S. DEPT. OF HEALTH & HUMAN SERVS. ET AL., THE FUTURE SUPPLY OF LONG-TERM CARE WORKERS IN RELATION TO THE AGING BABY BOOM GENERATION 38 (2003), available at <http://aspe.hhs.gov/daltcp/reports/lcwork.pdf> (describing the prevalence of abuse within the household services industry); Paul Vitello, *From Stand in Long Island Slavery Case, a Snapshot of a Hidden U.S. Problem*, N.Y. TIMES, Dec. 3, 2008, at B1 (reporting the account of one New York couple that faced criminal charges for their abuse of two domestic workers and further noting widespread issue of abuse of domestic workers). Primarily due to the private nature of the work environment, reliable statistics that shed light on the incidence of abuses in the domestic worker industry are difficult to obtain. See UNITY FOR DIGNITY, *supra* note 23, at 18 (explaining that accurate statistics on the industry are difficult to obtain due to the nature of work in the household services industry); see generally José Maria Ramírcz-Machado, *Domestic Work, Conditions of Work and Employment: A Legal Perspective* (Int'l Labour Org. Working Paper), available at http://www.ilo.org/travail/whatwedo/publications/WCMS_TRAVAIL_PUB_7/lang-en/index.htm (noting that estimates of the industry are difficult to determine due to the lack of data).

31. See FEASIBILITY STUDY, *supra* note 25, at 16 (explaining that limited means of redress often leave workers with no choice but to quit their jobs altogether); see also Poo & Kim, *supra* note 29, at 578–79 (describing instances in which domestic workers were fired or forced to quit); DOMESTIC WORKERS AND COLLECTIVE BARGAINING, *supra* note 25, at 70 (summarizing the “insecurity and instability of domestic employment”).

32. See generally Byrd, *supra* note 12 (explaining the inadequate regulation to prevent abuse against domestic workers).

33. ADELLE BLACKETT, MAKING DOMESTIC WORK VISIBLE: THE CASE FOR SPECIFIC REGULATION 22 (1998) (comparing patterns of domestic worker treatment across countries); Donna E. Young, *Working Across Borders: Global Restructuring and Women's Work*, 2001 UTAH L. REV. 1, 27 (2001) (describing abuses against domestic workers in non-US countries).

female migrant labor where, increasingly, women are migrating not to join their partners, but instead for better employment opportunities otherwise unavailable in their home countries.³⁴ To facilitate their passage, there has been a proliferation of illegal and unlicensed employment recruiters that operate in the shadows of regulated labor practices.³⁵ Incidents of labor trafficking are common among these recruiters, who exploit unsuspecting female migrants seeking employment abroad.³⁶ This is significant because domestic workers, in particular, comprise the largest group of female migrant workers.³⁷

In Malaysia, for example, some employment recruiters explicitly advise employers to retain the worker's passport and to forbid them "to talk or converse with others, walk alone, open the door to anyone, especially when they are alone in the house."³⁸ The onus for enforcing workers' employment contracts falls on both the domestic worker and the employer.³⁹ Employers hiring domestic help must place a monetary security bond to guarantee the worker's labor permit.⁴⁰ That bond is forfeited in the event that the worker leaves the employer.⁴¹ Consequently, the bond "can have the effect of encouraging employers who do not want to lose their money to place heavier restrictions on the personal freedoms of migrant domestic workers."⁴² These restrictions include confining the worker to

34. See INT'L. LABOUR ORG., 1 PREVENTING DISCRIMINATION, EXPLOITATION AND ABUSE OF WOMEN MIGRANT WORKERS: AN INFORMATION GUIDE 10 (pointing to the growing trend of female migrants around the world).

35. See INT'L. LABOUR ORG., 3 PREVENTING DISCRIMINATION, EXPLOITATION AND ABUSE OF WOMEN MIGRANT WORKERS: AN INFORMATION GUIDE 12 (noting a growth of illegal recruiters, often as a result of restrictive, complicated, time consuming, or costly procedures involved in legal labor recruitment).

36. *Id.* at 17–18 (remarking on the high incidence of abuse associated with unregulated employment agencies).

37. See PREVENTING DISCRIMINATION, *supra* note 2, at 11 (pointing out that "domestic work is the single largest employment category for women migrants").

38. *Id.* at 26–27 (citations omitted).

39. See *id.* at 26 (noting that employers must post a security bond to "serve as a deterrent so that migrant workers do not abscond on their employment contracts").

40. See *id.* (noting that in Singapore, the bond is SGD\$5,000, and is RM\$500 in Malaysia).

41. *Id.* at 13 (identifying discriminatory employer conduct through mandatory pregnancy testing).

42. *Id.* at 26.

the home, and giving her little rest to minimize the opportunity she can have to communicate with others.⁴³

Employers in Japan and South Korea likewise institute pseudo-importation schemes to circumvent domestic laws that set workplace standards for pay, hours, and benefits.⁴⁴ The practice largely revolves around labeling foreign domestic workers as “trainees,” rather than as bona fide employees, in order to exploit a loophole in labor laws that would otherwise require employers to adhere to higher labor standards.⁴⁵ As a trainee, the average foreign domestic worker in South Korea receives sixty to seventy percent less pay than a similarly situated South Korean citizen.⁴⁶ She also does not receive any compensation for overtime work.⁴⁷

Most notably, employment is often brokered through an “onward managing agency,” a middle man that periodically takes a portion of the worker’s earnings as exchange for its services in securing her employment.⁴⁸ These countries join an international community that explicitly excludes domestic workers from respective national legislation—countries that include, but are not limited to, Costa Rica, Croatia, Grenada, Norway, Japan, Jordan, Korea, and Malaysia.⁴⁹ That the United States also suffers from shortcomings for domestic workers protections is symptomatic of a global norm.

B. *International Protections*

Several important international treaties address workplace protections for domestic workers, and, in theory, place a floor

43. *Id.* at 26–27.

44. *See id.* at 34 (explaining legislation in Japan and South Korea); *see generally* PEGGIE W.Y. LEE & CAROLE J. PETERSEN, UNIV. OF H.K. CTR. FOR COMPARATIVE & PUB. LAW, FORCED LABOUR AND DEBT BONDAGE IN HONG KONG: A STUDY OF INDONESIAN AND FILIPINA MIGRANT DOMESTIC WORKERS (2006), available at <http://www.law.hku.hk/ccpl/pub/Documents/16-LeePetersen.pdf> (describing abusive fee structures in employment agencies).

45. *See* PREVENTING DISCRIMINATION, *supra* note 2, at 34 (explaining that Japanese law, for example, undermines protections for domestic workers).

46. *Id.* (noting that discriminatory labor laws lead to significant wage disparities between foreign domestic workers and host country nationals).

47. *Id.* (noting that overtime compensation is a rarity).

48. *Id.* (explaining that employment agencies exacerbate the vulnerabilities domestic workers face).

49. *Id.* at 12.

on permissible employer conduct.⁵⁰ Part I.B.1 discusses the International Covenant on Civil and Political Rights (“ICCPR,” or the “Covenant”) and how it relates to the state of domestic worker protections in the United States.⁵¹ Part I.B.2 then discusses the Convention Concerning Decent Work for Domestic Workers (“Domestic Worker Convention,” or the “Convention”) and addresses what the new Convention would mean for domestic workers.⁵²

1. International Covenant on Civil and Political Rights

ICCPR Article 2 obligates States to undertake steps “necessary to give effect to the rights” to assemble and associate.⁵³ Under this understanding, labor practices within the United States not only run counter to Article 2, but also Articles 21 and 22 because carve-outs within the NLRA deliberately exempt domestic workers from unionizing protections.⁵⁴ Among other things, Article 2 obligates State parties to legislate where necessary, to give full effect to the rights recognized within the Covenant.⁵⁵ It also obligates State parties to protect those rights

50. See generally International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 175 (entered into force Mar. 23, 1976) [hereinafter ICCPR]; Int’l Labour Org., Convention Concerning Decent Work for Domestic Workers, June 16, 2011, 100 ILO C189 [hereinafter Domestic Worker Convention], available at http://www.ilo.org/ilc/ILCSessions/100thSession/reports/provisional-records/WCMS_157836/lang-en/index.htm.

51. See *infra* Part I.B.1.

52. See *infra* Part I.B.2.

53. See ICCPR, *supra* note 50, art. 2(1) (“[E]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals . . . the rights recognized in the present Covenant . . .”); see also *id.* art. 2(2) (“[E]ach State Party to the present Covenant undertakes to take the necessary steps . . . to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.”).

54. See *id.* art. 21 (“The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary . . . in the interests of national security[,] . . . safety, public order[,] . . . health[,] morals[,] and] the . . . rights and freedoms of others.”); see also *id.* art. 22(1) (“Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.”); *id.* art. 22(2) (“No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary . . . in the interests of national security[,] . . . safety, public order[,] . . . health[,] morals[,] and] the . . . rights and freedoms of others.”).

55. *Id.* art. 2(2).

“without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”⁵⁶ The Covenant goes on to enumerate specific rights, such as of peaceful assembly (Article 21) and freedom of association (Article 22).⁵⁷ The Human Rights Committee, the UN body that monitors the ICCPR’s implementation, has interpreted similar language in other treaties as obligating the State to take both affirmative and negative actions toward protecting those enumerated rights.⁵⁸ Similarly, the European Court of Human Rights interpreted the scope of the right to peaceful assembly and the right to freely associate broadly, as including trade unions within their contexts.⁵⁹

But though particular ICCPR violations may well occur within the United States, a consequent problem remains with enforcement. The United States has placed a declaration on the Covenant restricting its enforceability within the domestic sphere.⁶⁰ Because the treaty is not self-executing, an employer found in violation of any of its provisions would not be subject to jurisdiction in any US court.⁶¹ For the same reason, the ICCPR does not create an automatic private cause of action on behalf of domestic workers who are denied associational rights, or any other rights enumerated within the ICCPR.⁶² Consequently, the ICCPR is a strong instrument with enforceable provisions in the

56. *Id.* art. 2(1).

57. *Id.* arts. 21, 22.

58. U.N. Human Rights Comm., *General Comment No. 03: Implementation at the national level (Art. 2)* (July 7, 1981), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1, at 4 (1994) (noting that parties to the International Covenant on Civil and Political Rights (“ICCPR”) are obligated to fulfill the terms of the treaty, particularly because “constitutional or legislative enactments . . . in themselves are often not *per se* sufficient”).

59. See, e.g., *Sidiropoulos v. Greece*, App. No. 26695/95, 27 Eur. H.R. Rep. 633 (1998); *United Communist Party of Turk. v. Turk.*, App. No. 19392/92, 26 Eur. H.R. Rep. 121 (1998) (interpreting the rights under international instruments as including protections to collectively bargain).

60. 138 Cong. Rec. S4781-84, art. III (daily ed. April 2, 1992).

61. *Id.* (recognizing that international treaties are not domestically binding unless the declaration from execution is removed). Treaties that are self-executing are those that are automatically enforceable in the domestic context. In practice, however, almost all modern treaties in the United States include declarations that prevent self-execution.

62. *Id.* (recognizing that the ICCPR is not self-executing).

international arena, but the existence of non-self-executing provisions plagues its enforcement within US courts.⁶³

2. Convention Concerning Decent Work for Domestic Workers

Discussed above, domestic workers around the world share many of the same traits as do domestic workers in the United States.⁶⁴ In June 2011, the ILO adopted the Convention Concerning Decent Work for Domestic Workers,⁶⁵ a historic set of international standards intended to place a floor on minimum working conditions for millions of domestic workers worldwide.⁶⁶ Though official estimates place the number of global domestic workers at 53 million, the prevalence of undocumented workers engaged in informal labor economies raises that estimate closer to nearly twice that, 100 million.⁶⁷ In some developing countries, the concentration of domestic workers within the workforce can be significant, where nearly twelve percent of all workers work within a household in one form or another.⁶⁸ Estimates suggest that over half of domestic workers worldwide do not work with maximum weekly hour limits; forty-five percent are not given any time off during the week; and over a third of female workers have no legal entitlements to maternity leave.⁶⁹

63. See *id.* (explaining the limitations associated with enforcing ICCPR provisions).

64. See *supra* Part I.A.

65. *About the Office*, INT'L LABOUR ORG., <http://www.ilo.org/washington/about-the-office/lang-en/index.htm> ("The primary goal of the ILO today is to promote opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and human dignity.").

66. Domestic Worker Convention, *supra* note 50. Notably, the International Labour Organization ("ILO") estimates that four out of every five domestic workers in the world are female. See ILO Press Release, *supra* note 24 (describing the demographic characteristics of domestic workers worldwide).

67. See ILO Press Release, *supra* note 24 (noting that current estimates are limited, and are likely under-representations of the true figure).

68. *Id.* (noting the disparity in developing countries).

69. *Questions and Answers on the Convention Concerning Decent Work for Domestic Workers*, INT'L LABOUR ORG. (June 21, 2011), http://www.ilo.org/ilc/ILCSessions/100thSession/media-centre/articles/WCMS_158371/lang-en/index.htm (acknowledging that where domestic workers are common, oftentimes, compensation is extremely limited).

The Convention aims to correct these disparities. For instance, countries that ratify the Convention are obligated to enforce employment contracts to specify certain wage and hour restrictions on a domestic worker's labor.⁷⁰ If, in a particular country, a minimum wage exists for other low-wage workers generally, the Convention requires that wage floor to apply for households hiring domestic workers also.⁷¹ Additionally, the Convention limits the maximum hours of work per day, enacts new protections against child labor practices, and obligates Convention parties to create appropriate enforcement mechanisms.⁷² Country delegates at the June 2011 ILO conference voted in favor of the Convention, passing it with 396 votes in favor, and 16 votes against, sending a strong global voice in support of these measures.⁷³

Both of these international treaties—the ICCPR and the Domestic Worker Convention—offer opportunities to increase labor protections to domestic workers. At a minimum, they evidence a strong international push to recognize the need to address problems in a growing segment of low-wage work. Of course, national governments still hold considerable discretion in deciding how to approach those problems in accordance with the methods they see fit. But, these treaties lend valuable guidance to governments in informing them of the prevailing labor standards within international community.

C. *A Legislative Vacuum*

While domestic workers in the United States comprise a substantial portion of the low-wage services sector, the US legislature has been slow to afford them the same protections it does to other occupations. Given the unique position of this

70. Domestic Worker Convention, *supra* note 50 (noting that the convention would be binding upon ratifying parties).

71. *Id.* art. 11 (specifying the relevant wage floor).

72. *Id.* art. 4 (prohibiting child labor); *id.* art. 10 (restricting working hours); *id.* art. 17 (noting further than domestic laws within the country would have to be realigned with the aims of the treaty).

73. See ILO Press Release, *supra* note 24 (noting the overwhelming support that states have given in support of the Convention); Hui Min Neo, *ILO Passes Landmark Treaty to Protect Domestic Workers*, INQUIRER GLOBAL NATION (La Paz, Philippines) (June 16, 2011), <http://globalnation.inquirer.net/4318/ilo-passes-landmark-treaty-to-protect-domestic-workers>.

group of workers, one might expect that Congress would be receptive to regulate against abuses in much the same way it has to prevent child labor, set minimum wages, and legislate workplace discrimination.⁷⁴ In fact, though, legislative movement toward greater equality on this front has been nearly non-existent.⁷⁵ This Part details the absence of legislative protection in this area.

The New Deal era of the mid-1930s was arguably the most transformative period for labor rights in the United States.⁷⁶ Growing alarm over the Great Depression, a period of extreme economic turmoil within the United States, spurred Congress to enact legislation to stave off economic collapse.⁷⁷ As part of the national plan, Congress was quick to enact legislation to bolster workplace protections for laborers like steel, telephone, and textile workers.⁷⁸

Importantly, however, these pieces of legislation all excluded certain groups of workers from their coverage.⁷⁹ Some of these groups included railroad and airline workers,

74. See, e.g., 29 U.S.C. § 212 (2006) (prohibiting child labor); 29 U.S.C. § 206 (setting a minimum wage).

75. Catherine B. Allen, *Legislation for Household Workers*, in FAIR AND CLEAR IN THE HOME 56, 58–59 (Carol Biba & Dorothy P. Wells eds., 1936) (noting the sparse legislation for domestic workers in the United States); AMERICAN RIGHTS AT WORK, THE HAVES AND THE HAVE-NOTS: HOW AMERICAN LABOR LAW DENIES A QUARTER OF THE WORKFORCE COLLECTIVE BARGAINING RIGHTS 2 (2008) [hereinafter THE HAVES AND THE HAVE-NOTS], available at http://www.americanrightsatwork.org/dmdocuments/ARAWReports/havesandhavenots_nlracoverage.pdf (describing that legislation protecting domestic workers is minimal).

76. See Scott D. Miller, *Revitalizing the FLSA*, 19 HOFSTRA LAB. & EMP. L.J. 1, 2 (2001) (describing legislation during the New Deal); Smith, *Regulating Paid Household Work*, *supra* note 12, at 885–89 (recounting the rapid reforms during the New Deal); see generally Michael E. Parrish, *The Great Depression, the New Deal, and the American Legal Order*, 59 WASH. L. REV. 723 (1984) (describing rapid transformations in labor-related legislation during the New Deal era). The New Deal era refers to the period during the mid-1930's in the United States, and is marked by a brief period of sweeping Congressional action that, among other things, conferred significant labor protections to workers. See *id.* at 736.

77. See Miller, *supra* note 76, at 23 (identifying particular New Deal legislation); Parrish, *supra* note 76, at 731–22 (discussing the urgency in passing New Deal legislation in light of the United States' economic circumstances); Smith, *Regulating Paid Household Work*, *supra* note 12, at 887 (describing the purposes of New Deal legislation).

78. See, e.g., National Labor Relations Act, 29 U.S.C. §§ 151–169 (2006); Fair Labor Standards Act, 29 U.S.C. § 201–219 (2006).

79. 29 U.S.C. § 152(3).

independent contractors, and, notably here, domestic workers.⁸⁰ In 1933, Congress passed the National Industrial Recovery Act (“NIRA”) to regulate market standards and promote fair competition when securing both minimum wages and maximum working hours among different industries.⁸¹ Two years later, it passed the Social Security Act (“SSA”), the precursor to the system of social welfare and insurance programs in place in the United States today.⁸² In 1938, Congress passed the Fair Labor Standards Act (“FLSA”) to set a national minimum wage and to mandate elevated wage rates for overtime hours.⁸³ As originally passed, none of these pieces of legislation included domestic workers in its purview.⁸⁴

Notably, Congress passed the National Labor Relations Act (“NLRA”) in 1935 to confer protections on workers engaging in collective bargaining and unionizing activity.⁸⁵ The ability to form unions was a powerful tool for workers who were unable to successfully lobby their employers for greater workplace benefits and protections on their own.⁸⁶ The US labor union movement granted millions of workers such benefits as federal anti-discrimination laws and employee health insurance coverage.⁸⁷ The federal statute offered a vehicle through which individual

80. *Id.*

81. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (ruling that Title I of the National Industrial Recovery Act, formerly codified at 15 U.S.C. § 703 (1933), was unconstitutional).

82. The Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (1935) (codified as amended in scattered sections of 42 U.S.C. (2006)).

83. 29 U.S.C. § 206.

84. Though Congress would later amend the Fair Labor Standards Act to include domestic workers, that change did not come until forty years after its original enactment. *See* Fair Labor Standards Amendments Act, Pub. L. No.93-259, §§ 9(b)(1), 23(b)(1), 88 Stat. 63, 69 (amended 1974).

85. 29 U.S.C. §§ 151–169.

86. *See* LAWRENCE MISHEL & MATTHEW WALTERS, ECON. POL’Y INST., HOW UNIONS HELP ALL WORKERS 2 (2003), *available at* <http://www.epi.org/page/-/old/briefingpapers/143/bp143.pdf> (enumerating the benefits from workers’ abilities to unionize); *see generally* Richard B. Freeman, *Longitudinal Analyses of the Effects of Trade Unionism*, 2 J. LAB. ECON. 1 (1984) (explaining the effect of unions on the labor economy).

87. *See generally* David S. Lee & Alexandre Mas, *Long-Run Impacts of Unions on Firms: New Evidence from Financial Markets, 1961–1999* (Nat’l Bureau of Econ. Research, Working Paper No. 14709, 2008) (identifying several labor market benefits that have arisen from increased unionization protections); *see also* Freeman, *supra* note 86, at 20 (explaining the effect of unionization on the domestic labor market).

workers were allowed a seat at the bargaining table, giving them the opportunity, then, to voice their concerns regarding the employer-employee relationship.⁸⁸

Like the many landmark pieces of legislation passed during the New Deal era, however, the NLRA also excluded domestic workers from its purview.⁸⁹ This legislative exclusion gave the employer wide latitude when responding to a domestic worker who asserted her right to organize for better wages or overtime compensation.⁹⁰ For example, the exclusion permitted an employer to terminate a domestic worker, even if done in direct retaliation for participating in union activity.⁹¹ As a result, the exclusion effectively took away the domestic worker's right to unionize because without these protections, the cost of unionizing was far too high.⁹² Consequently, exclusion had the effect of disincentivizing workers from voicing their protest over inadequate standards and protections in the workplace.⁹³

Today, federal workplace protections for domestic workers remain meager.⁹⁴ FLSA, for example, had initially written out

88. See Mishel & Walters, *supra* note 86, at 11 (describing the immediate purpose of workers' unionizing rights).

89. 29 U.S.C. § 152(3).

90. See 29 U.S.C. §§ 151–169.

91. *Id.* (offering legislative protection only for individuals who fall within the ambit of the statute). State statutes have followed the example set by the National Labor Relations Act ("NLRA") and excluded domestic workers from coverage within unionization provisions. See DOMESTIC WORKERS AND COLLECTIVE BARGAINING, *supra* note 25, at 3 (noting, for example, that the New York state statute "protects workers' right to collectively bargain with their employers and prohibits employers from engaging in 'unfair labor practices,' such as interfering with unionization, blacklisting, or monitoring workers who organize together," but that domestic workers are currently excluded).

92. See DOMESTIC WORKERS AND COLLECTIVE BARGAINING, *supra* note 25, at 8 (quoting an employer as explaining that there was no discussion of benefits because "there [was] a lot of fear. [The domestic worker did not] want to lose the job, and there [was] a lot of anxiety").

93. See Lee & Mas, *supra* note 87 (explaining that workers without legislative protections for unionizing activity are less inclined to assert their rights against employers); see also Freeman, *supra* note 86 (describing how a legislative absence disincentivizes workers from reporting employer abuses).

94. See Allen, *supra* note 75, at 58–59 (noting that since states often follow the language in federal statutes, state legislation protecting domestic workers' rights are equally lacking). Though state legislatures are able to create their own laws to fill the gaps left in the NLRA, many choose not to do so. Instead, states often mirror the language in the NLRA and consequently deny domestic workers both state and local fora to litigate an employer's uncompetitive, union-hostile conduct. See RONNIE

domestic workers from its coverage by using the same language that was used in the NLRA.⁹⁵ Though it was amended in 1974, the statute continues to exclude large portions of the domestic worker industry.⁹⁶ This comes mostly from FLSA's outdated "companionship" exemption that excludes domestic workers who provide companionship services to individuals who are unable to care for themselves.⁹⁷ The Occupational Safety Health Act, a landmark piece of legislation that set federal standards for health and workplace safety in the federal government and the private sector, similarly excludes domestic workers entirely from its purview, "[a]s a matter of policy."⁹⁸ Lastly, domestic workers are excluded from federal civil rights laws, like Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Age Discrimination in Employment Act.⁹⁹ These laws only cover businesses that employ a certain minimum number of employees.¹⁰⁰ Because very few household employers meet these jurisdictional minimums, they are rarely considered employers for the purposes of these civil rights statutes.¹⁰¹

Domestic workers remain excluded from the NLRA even now, nearly eighty years later.¹⁰² Under current laws, for instance, attempts to unionize not only run the risk of losing a job, but often also mean losing hope for permanent immigrant

STEINBERG, WAGES AND HOURS: LABOR AND REFORM IN TWENTIETH-CENTURY AMERICA 95–106 (1982) (explaining that state protections are equally lacking because the language in state statutes typically mirror the language in federal statutes).

95. Fair Labor Standards Act, 29 U.S.C. § 201–219 (2006).

96. Fair Labor Standards Amendments, Pub. L. No. 93-259, §§ 9(b)(1), 23(b)(1), 88 Stat. 63, 69 (amended 1974).

97. 29 U.S.C. § 213(1)(13). Live-in domestic workers who physically reside within the home of their household employers are not allowed overtime pay for any hours worked over forty hours per week. 29 U.S.C. § 213 (b)(12).

98. 29 C.F.R. § 19.75.6 (2012).

99. Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§12101-12213 (2006); 29 U.S.C. §§ 621–634 (2006)).

100. 42 U.S.C. § 12111(2); 29 U.S.C. § 630(b) (noting that for the Americans with Disabilities Act to apply, an employer must have at least fifteen or more employees, and further noting that the minimum number of employees is twenty or more for the Age Discrimination in Employment Act to apply).

101. 42 U.S.C. § 12111(2); 29 U.S.C. § 630(b).

102. *See supra* note 90 (limiting coverage only to those individuals enumerated within the ambit of the statute); *see also* FEASIBILITY STUDY, *supra* note 25, at 3 (highlighting the importance of collective bargaining protections, as in the case of the New York State Labor Relations Act).

status within the United States.¹⁰³ Given this, a domestic worker may well be less willing to voice her right to unionize.¹⁰⁴

The NLRA excludes domestic workers from its protections primarily in two ways. First, it does so explicitly within its statutory language.¹⁰⁵ Its definition of “employee” excludes “any individual . . . in the domestic service of any family or person at his home.”¹⁰⁶ Second, the National Labor Relations Board (“NLRB”), the federal agency created by the NLRA to enforce the statute, excludes domestic workers by enforcing the NLRA’s purview discretionally.¹⁰⁷ Though it does not place a jurisdictional minimum on the number of employees that an employer must have—as does the FLSA or OSHA—it does limit its power only to “cases involving enterprises whose effect on commerce is substantial.”¹⁰⁸ Household employers who hire

103. Relatedly, another concern is losing remittances to family members back home. In 2008, estimates placed the flow of remittances worldwide at US\$338 billion, although “the true size of flows, including unrecorded flows . . . is even higher.” DILIP RATHA, SANKET MOHAPATRA & ANI SILWAL, *MIGRATION AND REMITTANCE TRENDS 2009: A BETTER-THAN-EXPECTED OUTCOME SO FAR, BUT SIGNIFICANT RISKS AHEAD 1* (2009), available at <http://siteresources.worldbank.org/INTPROSPECTS/Resources/334934-1110315015165/MigrationAndDevelopmentBricf11.pdf>. In fact, so substantial are remittances to the national economy of some countries that those national governments encourage workers to move abroad to developed nations for the purpose of sending remittances back home. See, e.g., RHACEL SALAZAR PARREÑAS, *THE FORCE OF DOMESTICITY: FILIPINA MIGRANTS AND GLOBALIZATION 2* (2008) (explaining that Sri Lanka, the Philippines, Indonesia, and Vietnam “promote the labor migration of women”).

104. See *infra* Part III (detailing the consequences of this legislative absence for domestic workers).

105. 29 U.S.C. § 152(3) (2006) (specifying the types of workers covered under the NLRA).

106. *Id.*

107. NAT’L LABOR RELATIONS BD., *A GUIDE TO BASIC LAW AND PROCEDURES UNDER THE NATIONAL LABOR RELATIONS ACT 54* (1997) [hereinafter *NLRA GUIDE*] (noting discretionary jurisdictional limitations present in NLRA enforcement). Under this refined definition, the National Labor Relations Board places a jurisdictional amount on enumerated commercial bodies such as, to name a few, nonretail businesses with sales of at least US\$50,000, office buildings with annual revenues of over US\$100,000, retail enterprises with annual revenues of at least US\$500,000, and public utilities with at least US\$250,000 in total annual revenue. See *id.* at 54; see also *DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT BUREAU OF NATIONAL AFFAIRS* (Patrick Hardin et al., eds., 1992) [hereinafter *DEVELOPING LABOR LAW*] (describing the set amounts).

108. See *NLRA GUIDE*, *supra* note 107, at 53–54 (describing jurisdictional requirements); see also *DEVELOPING LABOR LAW*, *supra* note 107 (cautioning that the National Labor Relations Board would only undertake action against employers who met certain jurisdictional amounts).

domestic workers are not included within the enumerated limitations, and as a result, neither are domestic workers.¹⁰⁹ Consequently, even if the language in the NLRA were tweaked so that domestic workers were no longer explicitly excluded, advocates would still have to jump over the NLRB's discretionary hurdle.¹¹⁰ Given these considerations, the legislative obstacles on the federal plane are substantial.

II. *EXCLUSION AND THE NLRA*

Despite developments in the international arena, little has changed in the United States to improve working conditions for domestic workers. In much the same way domestic workers were excluded from New Deal protections eighty years ago, they remain similarly unprotected today.¹¹¹ The reasons for these exclusions have been the subject of much scholarship.¹¹²

This next Part provides a historical analysis of the development of domestic work in the United States and discusses two substantive issues that factored prominently into the legislative debate during the New Deal era. First, it discusses the emergence of a new social status quo—a new cultural yardstick that insulated and reshaped the home arena into a private sphere that legislators felt was unsuitable for external regulation.¹¹³ Second, it explains that the emerging middle class affected the domestic work industry through the proliferation and reinforcement of an idea that household work had no

109. See NLRA GUIDE *supra* note 107, at 54 (noting the typical employers who were able to satisfy the jurisdictional amount); see also DEVELOPING LABOR LAW, *supra* note 107 (setting different jurisdictional amounts for different employers).

110. See NLRA GUIDE, *supra* note 107, at 54 (delineating the discretionary jurisdictional minimums that complement the statutory hurdle contained within § 152(3)).

111. See Allen *supra* note 75, at 58–59 (explaining that over half a century later, the federal statute still has not recognized those rights for domestic workers, though it has for other workers); see also THE HAVES AND THE HAVE-NOTS, *supra* note 75 (explaining that the exemptions contained within both federal and state legislation continue).

112. See, e.g., Smith, *Organizing the Unorganizable*, *supra* note 4 (positing solutions to the NLRA domestic worker exemption); Reyna Ramoleta Hayashi, *Empowering Domestic Workers Through Law and Organizing Initiatives*, 9 SEATTLE J. SOC. JUST. 487 (2010) (describing problems that arose from the NLRA exemption).

113. See *infra* Part II.A (discussing a perception of separate spheres that contributed toward legislative exclusion for domestic workers).

productive, economic value.¹¹⁴ In all, considerations of gender played a tacit but pervasive role in an industry that has historically been cast away from certain legislative protections.

A. *The Private Sphere in a New “Social Status Quo”*

To understand why the sharp divisions along gender lines still persist within the domestic worker industry today, it is helpful to examine how the history of domestic workers in the United States contributed to the current legislative debate. To start, the conceptualization of the home began to change in the decades following the Civil War.¹¹⁵ Feeding off the growing prosperity of a bustling industrial economy in the North and a bountiful agricultural economy in the South, the United States began to witness the emergence of a new class of citizens.¹¹⁶ Specifically, the late nineteenth and early twentieth centuries saw the creation and expansion of a new middle class.¹¹⁷ Families who had previously been required to tend to their own homes were, for the first time ever, finding themselves in a position to hire out that work to others vis-à-vis remunerated domestic work.¹¹⁸ This prosperity eventually led to a regime where certain groups of individuals were relegated to the “lowest rung of legitimate employment.”¹¹⁹ Growing household wealth was, in sum, a necessary contributing factor, since the rising prosperity that catapulted antebellum American families into an emerging middle class finally allowed them to afford domestic help.

114. See *infra* Part II.B (detailing the legislative effect created by the perception of household work as non-economically productive work).

115. See FAYE E. DUDDEN, *SERVING WOMEN: HOUSEHOLD SERVICE IN NINETEENTH CENTURY AMERICA* 104 (1983) (describing a changing socioeconomic trend in the American fabric).

116. See DUDDEN, *supra* note 115, at 107 (analyzing the social phenomenon of an emerging middle class in the United States); RUSSELL LYNES, *THE DOMESTICATED AMERICANS* 163 (1963) (noting the growth of the middle class); Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 *Nw. U. L. REV.* 1, 22–23 (1996) (describing the inception of the American middle class).

117. See DUDDEN, *supra* note 115, at 108 (noting a shifting social landscape); see LYNES, *supra* note 116, at 163 (explaining the emergence of an American middle class).

118. See DUDDEN, *supra* note 115, at 108 (identifying household wealth as a catalyst for domestic labor); LYNES, *supra* note 116, at 163–64 (elucidating that greater household wealth led to families’ abilities to hire out household labor).

119. GLENN, *supra* note 11, at 165.

This new “social status quo” that accompanied the new norms of middle class American life rested at the forefront of the movement toward hired hands within the home.¹²⁰ Hiring domestic work became the end goal itself because it symbolized a socioeconomic separation from the lower class.¹²¹ It was a status symbol, and so prevalent was this conceptualization of the new bourgeois that middle-class families began to consider a domestic worker within the home as a hallmark that legitimized their entrance into a new, distinct, and elevated class.¹²²

The effect that this new social status quo had on the household was fundamentally transformative. Far from the setting of spartan functionality as it was previously, the American home became the epicenter of creature comforts.¹²³ It opposed the harsh capitalist environment that lay beyond its doors and demanded an absence of economic activity altogether.¹²⁴ The

120. See DUDDEN, *supra* note 115, at 108 (identifying that the new middle class lifestyle accompanied higher standards of living); see also Smith, *Regulating Paid Household Work*, *supra* note 12, at 861–62 (identifying the standards of a “new bourgeoisie”).

121. See JUDITH ROLLINS, *BETWEEN WOMEN: DOMESTICS AND THEIR EMPLOYEES* 35 (1985) (noting that the mistress’s use of domestic worker labor within the household itself symbolized class separation); see also Smith, *Regulating Paid Household Work*, *supra* note 12, at 861–62 (explaining that rising household wealth spurred the emergence of a separate social class that adopted, *inter alia*, domestic help partly as a status symbol distinguishing it from the lower class).

122. See ROLLINS, *supra* note 121, at 104–06 (discussing that white women saw servants within the household as confirmation of a middle class social status); see also Smith, *Regulating Paid Household Work*, *supra* note 12, at 861–62 (arguing that households that hired a domestic worker validated the middle class’s entrance into a higher socioeconomic group).

123. See Smith, *Regulating Paid Household Work*, *supra* note 12, at 900 (“In the pre-industrial era, agrarian-centered households served as the primary site of economic activity, encompassing a diverse range of tasks from the making of bread and the spinning of textiles for clothes, to the harvesting of food items and the transformation of leather into shoes.”); see also Silbaugh, *supra* note 116, at 22 (“Before the Industrial Revolution, most production was home-based; small farming existence and cottage industry fueled by both men’s and women’s labor sustained most American families. Though sex-segregation was not unusual in household productive tasks, both men and women met the material needs of the family in the same way: through production for private consumption without exchanging labor for wages.”).

124. See CHRISTOPHER LASCH, *HAVEN IN A HEARTLESS WORLD: THE FAMILY BESIEGED* 6 (1977) (identifying that the household was a private sphere); Silbaugh, *supra* note 116, at 22 (explicating that societal norms viewed the home as unsuitable for capitalistic endeavors); see also NANCY F. COTT, *THE BONDS OF WOMANHOOD: “WOMAN’S SPHERE” IN NEW ENGLAND, 1780–1835*, at 64 (1977) (contrasting the private household sphere with the sphere outside the home).

home setting was a haven in which business and markets had no role.¹²⁵ Families adopted a requisite set of characteristics to attain this ideal of the home as a safe and sterile sanctuary¹²⁶ that included standards concerning, for instance, cleanliness and cooking.¹²⁷ In turn, the demands of middle class living exacted a considerable toll on the new bourgeois housewife.¹²⁸ Caught between the competing demands of traditional responsibilities and the high standards of the new social status quo, housewives found themselves playing roles that were both burdensome and inconsistent.¹²⁹ While the social norms at the time commanded husbands to venture forth from the home to wrestle the day-to-day of business and industry, for wives, it was to care for the family and to maintain the home in his absence.¹³⁰ Refining the appearance of the household required the housewife to exude the notions of purity and delicacy inconsistent with the vision of her soiling her own hands.¹³¹ Thus, looking to domestic work was a fitting solution because it served the dual function of easing the burden on women's domestic responsibilities, while

125. See Silbaugh, *supra* note 116, at 22 (articulating that economic activity was unsuitable in the home); see also LASCH, *supra* note 124, at 6 (noting the new middle class household was "an emotional refuge in a cold and competitive society").

126. See DUDDEN, *supra* note 115, at 135-54 (describing the hallmarks of a new socio-economic class); see also Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1504 (1983) (explaining that the home was the "sanctuary of privacy into which one can retreat").

127. See generally LYDIA RAY BALDERSTON, *HOUSEWIFERY: A MANUAL AND TEXT BOOK OF PRACTICAL HOUSEKEEPING* 240-317 (Benjamin R. Andrews ed., 1924) (identifying the standards that were required for the new American middle class); see also DUDDEN, *supra* note 115, at 109 (listing the number and variation of the new middle class).

128. See PHYLLIS M. PALMER, *DOMESTICITY AND DIRT: HOUSEWIVES AND DOMESTIC SERVANTS IN THE UNITED STATES, 1930-1945*, at 138 (1989) (describing the competing demands placed upon the middle class housewife); Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 AM. U. J. GENDER & L. 1, 16-17 (1993) (noting that those demands were at times contradictory).

129. See PALMER, *supra* note 128, at 138 (1989) (describing how housework is often dirty and therefore, inconsistent with the idealized housewife who is pure); Roberts, *supra* note 128, at 16-17.

130. See GLENN, *supra* note 11, at 146 (noting the physical rigor in routine tasks for a domestic worker); see also Roberts, *supra* note 128, at 16-24 (asserting that a woman's role in the middle class household was relegated to the home).

131. See PALMER, *supra* note 128, at 138 (explaining that women associated with dirt were of a diminished social status); see also CHRISTINE STANSELL, *CITY OF WOMEN: SEX AND CLASS IN NEW YORK, 1789-1860*, at 159 (1987) ("[B]eing a lady meant . . . not doing certain kinds of housework.").

also separating the middle-class housewife ideal from work associated with filth and degradation.¹³² It is not surprising, then, that, given the ever-increasing demands of bourgeois domesticity, wives looked toward domestic workers to keep step with the requirements of middle-class living.

These historical considerations suggest that the stride toward domesticating the home was, from the very beginning, an assertion of the house as a private sphere that was appropriate for female labor only.¹³³ The feverish pitch of that sentiment was no better reflected than in *Bradwell v. Illinois*, involving a woman and her attempt to secure a license to practice law.¹³⁴ The Illinois Supreme Court in 1869 refused to grant Myra Bradwell a law license on the basis of her gender.¹³⁵ In his opinion, Justice Lawrence urged Ms. Bradwell to reexamine her professional decisions, as the “hot strifes of the bar, in the presence of the public, and with momentous verdicts the prizes of the struggle, . . . [might] tend to destroy the deference and delicacy with which it is the pride of [the] ruder sex to treat her.”¹³⁶ On appeal to the United States Supreme Court, Justice Bradley wrote in concurrence, with whom Justices Swayne and Field joined, that:

[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman’s protector and defender. The natural and proper timidity

132. See PALMER, *supra* note 128, at 138 (describing an economic force that pushed middle-class households toward hired domestic help); see also ROLLINS, *supra* note 121, at 200 (“[T]he female employer preferred the presence of another woman whose appearance, as well as other attributes, was inferior to her own.”); Barbara Welter, *The Cult of True Womanhood*, 18 AM. Q. 151, 153 (1966) (explaining that “true womanhood” dictated housewives to abstain from menial task such as chores). See generally Smith, *Regulating Paid Household Work*, *supra* note 12.

133. Kristi L. Graunke, “Just Like One of the Family”: *Domestic Violence Paradigms and Combating On-the-Job Violence Against Household Workers in the United States*, 9 MICH. J. GENDER & L. 131, 149 (2002) (explaining that “[r]ationales surrounding privacy and sanctity of the home were key in justifying the continued exclusion of domestic workers from protective labor and employment regulation”).

134. *Bradwell v. Illinois*, 83 U.S. 130, 142 (1873) (deciding that the Privileges and Immunities Clause of the Fourteenth Amendment did not create a right for a woman to obtain a license to practice law in the state).

135. *In re Bradwell*, 55 Ill. 535, 542 (1869) (rejecting the appellant’s suit for equitable relief).

136. *Id.*

and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.¹³⁷

Justice Bradley's reflection on gender roles serves as just one prominent example illustrating the idea that the home setting was both physically and ideologically distinct from the outside world.¹³⁸

Several courts echoed the *Bradwell* sentiment and were wont to recognize the home as a private sphere where they were reluctant to intrude.¹³⁹ One of the earlier cases explicitly recognizing this distinction was *State v. Cooper*, where the court explained that the:

[H]ome [was] not an industrial or a business enterprise; nor [was] it acquired or maintained for pecuniary gain or profit; but [was], rather, an institution used and maintained as a place of abode [The home was the] abiding place of the affections, esp. [sic] domestic affections; as [t]he social unit formed by a family residing together in one dwelling, and as an organized center of family life.¹⁴⁰

The Court was persuaded that its decision should take into consideration the special function of the home setting.¹⁴¹

Indeed, *Cooper* seemed to borrow from the idea set forth by the National Recovery Administration ("NRA"), the New Deal agency tasked to regulate economic competition within the domestic market. General Hugh Johnson of the NRA wrote, "Ever since the establishment of this [NRA] administration, we have received numerous communications concerning the status of household help. While we are in full sympathy, there is no possible way we can take direct action in their behalf. The homes of individual citizens cannot be made the subject of

137. *Bradwell*, 83 U.S. at 141 (Bradley, J., concurring).

138. *See supra* Part II.A.

139. *See, e.g.*, *State v. Cooper*, 285 N.W. 903 (Minn. 1939) (distinguishing between two separate realms where one was inside the home and the other was outside, and refusing to extend statutory protections in part on this basis).

140. *Id.* at 903–05 (internal quotation marks omitted).

141. *Id.* at 905.

regulations or restrictions.”¹⁴² These historical antecedents illustrate a sharp separation of the American lifestyle into two distinct spheres: the public sphere outside of the home where the abrasiveness of industry was fit only for male gruffness and bravado, and the private sphere inside the home that was amenable to the delicacies of womanhood of the new social status quo.¹⁴³

B. *Housework as Nonproductive Work*

During the New Deal era, housework was generally perceived as lacking economic, or productive value. This perception marginalized household work and presumed that household work did not deserve legislative protection.¹⁴⁴ The origin of this idea grew concurrently out of the evolving class and gender norms during the late nineteenth and early twentieth centuries. As discussed above, the post-Industrial period was a radically transformative time in the history of the American family.¹⁴⁵ This cultural transformation cultivated a

142. PALMER, *supra* note 128, at 120 (quoting Letter from A.R. Forbush, Correspondence Division, to Eva Bulkely (Jan. 31, 1934) (on file with the federal government at NA RG9, Mctal File 622, Box 65)).

143. See generally Susan G. Ridgeway, *Loss of Consortium and Loss of Services: A Legacy of Separate Spheres*, 50 MONT. L. REV. 349 (1989) (describing the division between the home setting and the industrial setting); see also Welter, *supra* note 132 (expounding in great detail upon the “separate spheres” idea and its use to reinforce values that women were pure, submissive, and domestic).

144. See Silbaugh *supra* note 116, at 22–24 (1996) (noting that women’s work was marginalized and relegated to the household); see generally Erna Magnus, *The Social, Economic, and Legal Conditions of Domestic Servants*, 30 INT’L LAB. REV. 190 (1934) (marking the gendered distinction between male and female work).

145. See *supra* Part II.A. Rising household wealth created the beginnings of a new social status quo vis-à-vis a new middle class. *Id.* In turn, that new middle class took steps to assert itself as both socially and ideologically distinct from the lower class by recalibrating the function of the home and the housewife’s responsibility within it. *Id.* Much of the impetus came from within the home, as families’ entrances into the middle class exerted a pressure to excise any traces of industry from the domestic sphere. See Smith, *Regulating Paid Household Work*, *supra* note 12, at 862 (noting that the entrance into the American middle class required adherence to certain social and cultural norms, not the least of which included the upkeep and maintenance of the household: “[f]or almost every standard imaginable—from personal hygiene and silverware polishing to the dangers of house dust—there was an expert on the subject and a manual advising housewives how best to refine the private sphere in conformity with the tenets of capitalist bourgeoisie”).

perception of housework as lacking economic value.¹⁴⁶ As the Supreme Court of Iowa concluded in 1927, there was “no tangible, commercial product of domestic service, [since] it minister[ed] only to the necessity, comfort, and convenience of the employer.”¹⁴⁷ Raising children, cooking, cleaning, and the general tasks of homemaking were placed fully within the roles and responsibilities of the middle-class housewife or her domestic worker.¹⁴⁸ But the public did not perceive such work as “real” work, in the way that the coal miner was elicited this image: blackened and sullied, for example, from working a ten-hour shift forty feet underground.¹⁴⁹ Because it did not “smack of industrialism,” legislators were reluctant to view it as the kind of work that deserved their scrutiny.¹⁵⁰

Though it is a much different time now, the formulation of the home as both socially and ideologically unique still endures nearly eighty years later. The statutory provisions of the NLRA remain unchanged today.¹⁵¹ They still exempt household domestic workers from protections that are afforded to more than three-quarters of the US workforce.¹⁵² And though not as overt as Bradley’s reflection in *Bradwell*, evidence of this notion regarding the unique status of housework still appears in matters relating to women’s obligations within the home.

In 1968, for example, the North Carolina Court of Appeals ruled on the question of whether a wife could enter into a contract with her husband for the value of housework she contributed toward the family.¹⁵³ The court held that the contract was unenforceable because it was against public

146. See Silbaugh, *supra* note 116, at 22–26 (explaining that prevailing norms transformed the way society viewed household work); see also Smith, *Regulating Paid Household Work*, *supra* note 12, at 898–901 (identifying that in particular, household work did not carry economic value in the way work outside the home did).

147. *Tumicliiff v. Bettendorf*, 214 N.W. 516, 518 (Iowa 1927).

148. See Silbaugh, *supra* note 116, at 22–26 (describing the public perception of housework).

149. See Smith, *Regulating Paid Household Work*, *supra* note 12, at 898–901.

150. See *id.* at 893 (explaining that the perception of domestic work was one of the root reasons for legislative stagnation); see also I.M. Rubinow, *Household Service as a Labor Problem*, 3 J. HOME ECON. 131, 133–35 (1911).

151. 29 U.S.C. §§ 151–169 (2006).

152. See *supra* notes 86–93 and accompanying text (explaining the limitations of the NLRA’s reach).

153. *Matthews v. Matthews*, 162 S.E.2d 697, 698 (N.C. Ct. App. 1968).

policy.¹⁵⁴ Moreover, it elaborated that in any case, the contract lacked consideration because the contractual terms notwithstanding, “a husband has the right to the service of his wife as a wife, and this includes his right to her society and her performance of her household and domestic duties.”¹⁵⁵

Later, in 1973, the Georgia Court of Appeals made a similar assertion in holding that a husband was entitled to the work his wife put toward “ordinary household duties,” such as cooking and cleaning.¹⁵⁶ These cases reflected the sentiment that household work did not deserve recognition as having its own independent economic value.

As recently as 1994, the Minnesota Court of Appeals confronted the issue of whether housework and caring for children could be considered “employment” for the purpose of granting work-release privileges in the appellant’s home in lieu of a ninety-day prison sentence.¹⁵⁷ The appellant argued that housework should be considered employment because she would be paid an hourly wage, and her work provided a tangible benefit to the household.¹⁵⁸ She further argued that there should not be a distinction between her role as a housewife and that of a hired domestic worker.¹⁵⁹ In denying her relief, the Court stressed the importance of the home setting. It stated that the home was “a sacred place for people to go and be quiet and at rest and not be bothered with the turmoil of industry, and that as such it [was] a sanctuary of the individual and should not be interfered with by industrial disputes.”¹⁶⁰ Though the appellant’s work contract would have been valid “employment” in any other setting, in the home, it was not.

In opposition, scholar Selma James was one of the first prominent individuals to raise the counterpoint.¹⁶¹ Women’s

154. *Id.* at 699 (refusing to enforce the contract).

155. *Id.* at 698.

156. *Dep’t of Human Res. v. Williams*, 202 S.E.2d 504, 507 (Ga. Ct. App. 1973).

157. *State v. Bachmann*, 521 N.W.2d 886, 887 (Minn. Ct. App. 1994).

158. *Id.* (noting that plaintiff’s husband agreed to pay her US\$1.50 per hour to care for her four children and perform other homemaking services).

159. *Id.* at 887–88 (arguing that because her work within the household was paid, it was similar in character to domestic work).

160. *Id.* at 888 (quotations omitted).

161. *See generally* SELMA JAMES, *THE POWER OF WOMEN AND THE SUBVERSION OF COMMUNITY* (1972) (arguing that household work indeed held inherent productive value).

unpaid labor, she argued, was societal action that misappropriated women's capital contributions.¹⁶² Such labor, notwithstanding its domestic character, was "crucial to the functioning of the capitalist system, []should be recognized as part of the base chain of productivity, and [should] receive monetary reward."¹⁶³

This same idea has resonated in other areas of law. In a tort action for example, the Minnesota Supreme Court echoed James' position when it rendered a decision in favor of the plaintiff who filed suit to claim against her insurance company for non-payment.¹⁶⁴ There, the claimant suffered a debilitating injury from an automobile accident and sought to recover for her inability to perform household work.¹⁶⁵ The insurance company tried to limit its liabilities by arguing that such work was not compensable.¹⁶⁶ The Court, however, disagreed and explained that her inability to perform housework and care for her family "most definitely result[ed] in an *economic* loss to the family unit."¹⁶⁷

In still other areas of the law, the sentiment that female labor lacked economic contribution seems to have fallen out of favor. In matrimonial proceedings, for example, some courts have moved away from factoring in only monetary contributions when reaching equitable asset settlements between disputing parties. In *Haugan v. Haugan*, the Wisconsin Supreme Court interpreted its state divorce statute to include a consideration of all factors in order to arrive at an equitable remedy.¹⁶⁸ To this end, the Court took into account the wife's contributions as homemaker and mother during the period of the couple's marriage.¹⁶⁹ Similarly in *Simmons v. Simmons*, the Connecticut

162. *See id.* at 16–17 (arguing that refusing to recognize the economic value inherent in household work was disingenuous to women's true contributions to an overall productive economy).

163. JANET FLOYD & LAUREL FORSTER, *THE RECIPE READER: NARRATIVES, CONTEXTS, TRADITIONS* 160 (2003).

164. *Rindahl v. Nat'l Farmers Union Ins.*, 373 N.W.2d 294, 297 (1985) (involving a personal injury for which the claimant sought to recover front pay).

165. *Id.* at 295–96 (detailing the economic injuries that the claimant suffered as a result of her accident).

166. *Id.* at 296–97 (presenting the insurance company's defense).

167. *Id.* (emphasis added).

168. *Haugan v. Haugan*, 343 N.W.2d 796, 800–03 (Wis. 1984).

169. *Id.* at 805.

Supreme Court considered the wife's supportive role in the home in reaching an equitable settlement between her and her husband.¹⁷⁰ These courts recognized that household contributions were not captured simply in wages, and as a result, such wage-only accounting is disingenuous and often results in a windfall for one party at the expense of the other. Rather, they recognized that any accurate accounting should also include the value that accrues from non-monetary sources. In this case, it is through a homemaker's labor contributions. Recalibrating the factors that contribute to a household's productive output, these courts recognized that domestic work held inherent economic value.

III. *DOMESTIC WORKERS: WHAT LIES AHEAD*

This Note argues that the rationale that courts and legislators relied upon to exclude domestic workers from New Deal protections is undeniably inappropriate today, and continued reliance on those justifications perpetuates a line of reasoning that was questionable even eighty years ago. The two complementary ideas discussed above are at odds with actions that legislatures have subsequently taken in regulating separate, but similar, areas of the law. First, this Part looks critically toward the justifications for creating and upholding these legislative exclusions.¹⁷¹ Second, it evaluates the potential for change through the recent ILO Convention.¹⁷²

A. *A Troubling Legacy*

The argument that legislatures simply could not enact statutes like the NLRA to regulate the domestic services industry because it would intrude upon the private sphere of the home is not persuasive.¹⁷³ This is because legislatures across the country had, during the same time of the NLRA's passage, already found it fitting to journey well into this arena.

170. *Simmons v. Simmons*, 708 A.2d 949, 960 (Conn. 1998).

171. *See infra* Part III.A.

172. *See infra* Part III.B.

173. *See supra* Part II.A (explaining that the justifications set forth to preserve the exclusion are contradicted by other pieces of legislation enacted at the same time).

First, for example, they had little problem regulating the private sphere through the use of decency laws. For example, during the time of the NLRA's passage, every single state had anti-sodomy laws on its books regulating the kinds of sexual acts were appropriate within the privacy of the bedroom.¹⁷⁴ This legislative intrusion continued until 1961, when Illinois became the first state to adopt recommendations to abolish consensual sodomy from its criminal code.¹⁷⁵ Even then, though, legislatures were slow to remove themselves from the private sphere. It was not until another forty years later that the remaining states followed suit after the Supreme Court in *Lawrence v. Texas* struck down such decency laws as unconstitutional.¹⁷⁶

In sum, state and local governments have declined to legislate into the home to protect domestic workers, but yet found it appropriate to do so to regulate intimate human conduct.¹⁷⁷ If privacy were the yardstick that determined whether regulation would be appropriate, arguably few settings are more private than one's bedroom, and few acts more private than those that occur within it.¹⁷⁸ It took over sixty years before anti-sodomy laws were struck down as unconstitutional.¹⁷⁹ It is a curious facet of the legal system that finds that the employment relationship between a domestic worker and her employer falls too far within the private setting of the home to escape regulation, but a consensual sexual relationship in the bedroom does not.

Second, legislatures have found it fitting to legislate into the home in cases of domestic violence, but not for abuses within the domestic services industry, even though patterns of

174. See *Lawrence v. Texas*, 539 U.S. 558, 572 (2003) (internal quotation marks omitted) (noting that although the American Law Institute revised the Model Penal Code in 1955 with amended language that "made clear that it did not recommend or provide for criminal penalties for consensual sexual relations conducted in private," these changes were not adopted by any state until 1961).

175. And arguably even later, until 1962, since the statute did not come into effect until a year after its adoption. See *id.* (describing the progress of state legislatures in abolishing consensual sodomy prohibitions).

176. *Id.*

177. See *id.*

178. *Id.*

179. See *id.* (noting the slow legislative and judicial movement toward banning such decency laws).

abuse in both settings are remarkably similar.¹⁸⁰ Laws specifically intended to promote safe and fair labor practices continue to single out and exclude domestic workers.¹⁸¹ The result is lax enforcement of existing criminal statutes and high incidences of abuse within the industry.¹⁸²

By the late twentieth century, many state and national laws had ventured into the home to criminalize spousal abuse and domestic violence. Scholar Kristi Graunke pointed to the kinds of abuse within the household work industry and how remarkably similar they were to incidents of domestic violence.¹⁸³ For this reason, she argues, there should be lesser legislative resistance to regulate the employment relationships that exist within household services.¹⁸⁴ The patterns of abuse and mistreatment in domestic violence cases are very similar to those that domestic workers also experience. First, the household employer commonly exploits the dependency that grows between the domestic worker and the employer.¹⁸⁵ The dependency oftentimes manifests itself, for example, in the form of the employer withholding work visas, passports, or plane tickets home.¹⁸⁶ Other times, it could be less explicit, in that the domestic worker may feel herself dependent on her employer's sponsorship for eventual legal immigrant status.¹⁸⁷ Second, employer abuses against domestic workers often use isolation as a mechanism to exert power and control.¹⁸⁸ Such isolation could be physical, but more often it is psychological.¹⁸⁹ Third, both

180. *See infra* notes 189–91 and accompanying text (introducing the similarities between abuses within the domestic services industry and those between domestic partners).

181. *See supra* Part I.C (noting the exclusion within the NLRA).

182. *See id.* (detailing patterns of abuse within the domestic services industry).

183. *See* Graunke, *supra* note 133, at 156–60.

184. *Id.* at 178.

185. *Id.* at 158.

186. *United States v. Sanga*, 967 F.2d 1332 (9th Cir. 1992) (illustrating an example of severe domestic worker abuse within the employer-employee relationship).

187. *Id.* at 1334–35 (describing how the employer stole the domestic worker's return air ticket and passport).

188. *See* Graunke, *supra* note 133, at 160–63.

189. *See Bought and Sold* (NBC News Television Broadcast, Mar. 18, 2001); *see also* JoAnn Grbach, *Gaithersburg Man Sentenced for Enslaving Brazilian Woman*, *GAZETTE* (Gaithersburg, Md.) (Aug. 16, 2000), <http://www.gazette.net/20033/gaithersburg/news/22199-1.html> (last visited Nov. 5, 2011) (discussing a live-in worker who was unpaid).

incidents of abuse share a constant physical proximity between the victim and the abuser.¹⁹⁰ Scholars point to the common patterns shared between domestic abuse and abuse within the domestic worker industry as an opportunity for legislators to reconsider the exclusions barring domestic workers from coverage.

Further, the view that domestic work lacks economic value and as such is not deserving of legislative protections is equally troublesome. Discussed above, this view grew out of a perception that because it occurred within the home, it did not share “industrial” qualities that would meaningfully contribute to a productive economy.¹⁹¹ Justifications that deny domestic workers labor protections rest on ideas that their labor contributes little, if at all, to a productive society.¹⁹² However, the law should be even more willing to recognize productive value in the domestic worker industry because the work there is couched in an employer-employee relationship, rather than a marital one.¹⁹³ General housekeeping work certainly has economic value, and society owes it an accounting for its contribution toward a prosperous economy.¹⁹⁴ One need not venture far to recognize that even without payrolls or punch cards, raising children and keeping the home confers a tangible benefit to those who live within it.

A smattering of recent decisions seem to indicate a changing tide in this view. *Rindahl v. National Farmers Insurance*, *Haughn v. Haughn*, and *Simmons v. Simmons* are just a few examples of a judicial shift toward recognizing the inherent

190. See Graunke, *supra* note 133, at 163–71.

191. See *supra* Part II.B (discussing the perception that household-related labor was non-economical).

192. *Id.* (explaining the economic value placed on household work).

193. *Id.* (describing areas in which household work was seen as non-economical, commonly found in the marital setting, much less in the employment setting).

194. Ann Chadeau, *What is Households' Non-Market Production Worth?*, 18 OECD ECON. STUD. 85, 97 (1992) (estimating that the economic value of household work in the United States ranges from thirty-two to sixty percent of the national economy); see also UNITED NATIONS DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 1995, at 97 (1995), available at <http://hdr.undp.org/cn/reports/global/hdr1995/chapters> (reporting that women's unpaid labor at is valued at US\$11 trillion worldwide, out of a global economy worth US\$39 trillion).

value in household work.¹⁹⁵ But statutory protections such as the NLRA remain meager.¹⁹⁶ Whatever monetary value may be placed upon the work, courts are beginning to evidence a willingness to recognize that household work does indeed have economic value.

B. *An International Solution?*

Most recently, the United States' movement toward official support of the ILO Convention on Domestic Workers is undeniably a positive step in granting domestic workers unionizing protections. But, without more, it is mostly symbolic. As an instrument to erode the exemptions present in the NLRA, the Convention will have to dodge a number of obstacles, any of which could potentially render the Convention unviable.

Potential movement in the international arena seems to undergird the sense that equal protections might eventually become available for millions of domestic workers around the world.¹⁹⁷ However, the unique treatment that the United States gives to international law presents a significant obstacle toward enacting comprehensive legislative protections. The US Senate may use a common treaty device, the reservation, to render Article 3 of the Convention unenforceable to the extent that it ran counter to the NLRA.¹⁹⁸ Article A3(2)(a) of the Convention grants domestic workers the freedom to associate with others, including the "effective recognition of the right to collective bargaining."¹⁹⁹ If a declaration were attached to it such that, for instance, any portion of it that conflicted with federal statutes would be rendered null and void, A3(2)(a) would then become

195. See *supra* notes 164–70 and accompanying text (discussing limited instances where courts recognized an inherent economic value in household work).

196. See *supra* Part I.C (reporting the legislative vacuum in this area of law for domestic workers).

197. See *supra* Part I.B (discussing both the ICCPR and the Convention as potential vehicles to provide domestic worker protections in the United States).

198. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE US § 313 (1987) (explaining the legal function of a treaty reservation) [hereinafter RESTATEMENT (THIRD) OF FOREIGN RELATIONS]; see also Vienna Convention on the Law of Treaties, art. 21, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention] (declaring that a reservation "modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation").

199. See Domestic Worker Convention, *supra* note 50, art. 3(2)(a).

unenforceable within the domestic sphere as a result.²⁰⁰ The possibility of such declarations to potentially attach to the Convention is a significant one because even if the Convention were able to move through the ratification process relatively unaltered (an unlikely situation), a simple declaration such as the one described above could close this avenue completely for greater unionization protections for domestic workers.²⁰¹

Moreover, the United States has the ability to place the same kind of declaration that it had on the ICCPR—a non self-executing clause that limits domestic applicability of the Convention in the absence of express Congressional authorization.²⁰² This is significant because even if the Convention is able to successfully navigate past the appropriate legislative hurdles, the United States may nevertheless place a self-executing clause in it, which would render it inapplicable in a domestic setting. Domestic workers in the United States would then still not be able to take advantage of the treaty through private rights of actions for household employer violations of it.²⁰³ Assuming that Congress had expressly authorized the treaty to apply domestically, there could still be potential problems relating to the other types of declarations that could attach to the Convention.

Optimistically, though, there appears to be a growing movement that is campaigning for greater labor protections for domestic workers. Organizations like Domestic Workers United in New York, Mujeres Unidas y Activas in San Francisco, CASA de Maryland in Washington, D.C., and the Florida Immigrant Advocacy Center in Miami have lobbied vehemently to get union protections on the books for domestic workers.²⁰⁴ In 2010,

200. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 198, § 313 (discussing treaty reservations as a procedural device); see also Vienna Convention, *supra* note 198, art. 21 (explaining the implications of reservations placed on a treaty).

201. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 198, § 313.

202. See *id.*

203. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 198, § 313 (explaining the significance of Senate reservations placed on a treaty despite its ratification).

204. See generally CASA DE MARYLAND, <http://www.casademaryland.org> (last visited Oct. 24, 2012) (lobbying for local legislation to protect domestic workers in the Washington, D.C. metropolitan area); DOMESTIC WORKERS UNITED, <http://www.domesticworkersunited.org/index.php/en/our-work/campaigns> (last visited Oct. 24, 2012) (pushing for an greater set of minimum protections for New York

New York State became the first state in the country to adopt a comprehensive set of rights aimed specifically at the State's nannies, maids, children's caregivers, cooks, and the like.²⁰⁵ Even so, it fell short of filling in the NLRA exclusion to confer unionizing protections to domestic workers.²⁰⁶ Instead, the State created an exploratory committee to determine strategies for domestic worker unionization, with the possibility of revisiting the issue in the future.²⁰⁷ A separate campaign in California also tried to enact a similar piece of legislation to set workplace regulations within the home. Though the campaign was not successful, advocacy groups in California continue to lobby for increased domestic worker protections.²⁰⁸ In so doing, they join sister campaigns across the country that are trying to remove from the national consciousness a long-standing but misguided notion that household work is somehow less deserving of legislative protections.

CONCLUSION

The movement toward overturning NLRA exclusions is slow, but the gradual trend might not be too surprising given the historical legislative pedigree for domestic worker labor in this country. Yet as some courts are now recognizing, the reasons to exclude domestic workers from labor protections are mired in inadequate and anachronistic notions of gender roles in this country. Whatever relevance such a line of reasoning might have had eighty years ago during the NLRA's passage, that reasoning is unsatisfying today and is an insufficient justification for either

City domestic workers); FLA. IMMIGRANT ADVOCACY CTR., <http://ajjustice.org/policy-advocacy> (last visited Oct. 18, 2012) (campaigning for worker rights in Miami); MUJERES UNIDAS Y ACTIVAS, <http://www.mujeresunidas.net/english/community/community.html> (last visited Oct. 24, 2012) (campaigning for a similar set of increased protections).

205. Domestic Workers Bill of Rights Act, A. 1470-B, 2009 Leg., 233d. Sess. (N.Y. 2010) (noting the passage of the New York State Domestic Worker Bill of Rights).

206. *Id.* (detailing the limitations of the Domestic Workers Bill of Rights).

207. *Id.* (noting that while the legislation created many new protections for domestic workers living in New York, the state legislature kept the option open to explore bolstering collective bargaining rights).

208. *Id.* (discussing the difficulties that these campaigns had in bolstering legislative protections for domestic workers).

the judiciary or the legislature to deny equal protections to a group of people that arguably deserves them most.

