

# WHEN THE SHOP FLOOR IS IN THE LIVING ROOM: TOWARD A DOMESTIC EMPLOYMENT RELATIONSHIP THEORY

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## INTRODUCTION

In the summer of 2010, nannies, housekeepers, and elder caregivers celebrated the passage of the New York Domestic Workers’ Bill of Rights, a landmark victory in a national campaign to reverse the exclusion of domestic workers from the protections of state and federal labor and employment laws.<sup>1</sup> This spring, the International Labor Organization (ILO), of which the United States is a member, voted to adopt a set of international standards that

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1. Domestic Workers’ Bill of Rights, ch. 481, 2010 N.Y. Sess. Laws 1315 (McKinney). On August 31, 2010, Governor David A. Paterson signed this bill into law. *Id.* The law went into effect on November 29, 2010. *Id.*

would extend to domestic workers the fundamental rights guaranteed to all workers by ILO nations.<sup>2</sup> While these are important steps for a nearly invisible, yet indispensable workforce subject to pervasive abuse that has struggled, at home and abroad, to have its labor recognized as “real work,” questions remain about the relationship between domestic workers and their employers and how that relationship should be regulated.<sup>3</sup> Should the work “that makes all other work possible”<sup>4</sup> be treated identically to all other work? Or should the particular realities of domestic employment shape workplace standards, the enforcement of those standards, and the contours of collective bargaining? Other questions include whether or not domestic employers should be compelled to reinstate a nanny following retaliatory discharge, the standard remedy in other industries. The differences between domestic work and all other work might make it inappropriate for a court to require reinstatement of an aggrieved caretaker or housecleaner into a private home. Likewise, given the logistical (and potential Fourth Amendment) obstacles to performing worksite inspections in private homes, new strategies must be developed to ensure compliance with, and vigorous enforcement of, workplace regulations. Ultimately, a comprehensive assessment of the differences and similarities between domestic work and all other work is necessary in order to improve

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2. Akito Yoshikane, *New ILO Convention Gives Domestic Workers Historic Labor Rights*, IN THESE TIMES (June 22 2011, 10:55AM), [http://inthesetimes.com/working/entry/11549/new\\_ilo\\_convention\\_gives\\_domestic\\_workers\\_historic\\_labor\\_rights/](http://inthesetimes.com/working/entry/11549/new_ilo_convention_gives_domestic_workers_historic_labor_rights/).

3. DOMESTIC WORKERS UNITED & DATACENTER, HOME IS WHERE THE WORK IS: INSIDE NEW YORK'S DOMESTIC WORK INDUSTRY 31 (2006) [hereinafter HOME IS WHERE THE WORK IS], *available at* <http://www.datacenter.org/reports/homeiswheretheworkis.pdf>; *see also* PIERRETTE HONDAGNEU-SOTELO, DOMÉSTICA: IMMIGRANT WORKERS CLEANING AND CARING IN THE SHADOWS OF AFFLUENCE 9–12 (2d ed. 2007) (describing the unique features of caring work). For a detailed report on the pervasive abuse experienced by domestic workers in the United States and arguments about why permitting this abuse violates Articles 2, 3, 7, 8, 9, 12, 17, 19, 21, 22, and 26 of the International Covenant on Civil and Political Rights, *see* STEFANI BONATO 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 (2006), *available at* <http://www.law.unc.edu/documents/clinicalprograms/domesticworkersreport.pdf>.

4. “Respect the work that makes all other work possible,” is one of the central organizing themes of Domestic Workers United, a central domestic worker advocacy organization. CLAIRE HOBDEN, WINNING FAIR LABOUR STANDARDS FOR DOMESTIC WORKERS: LESSONS LEARNED FROM THE CAMPAIGN FOR A DOMESTIC WORKER BILL OF RIGHTS IN NEW YORK STATE 20 (2010), *available at* [http://www.ilo.org/wcmsp5/groups/public/—ed\\_dialogue/—actrav/documents/publication/wcms\\_149488.pdf](http://www.ilo.org/wcmsp5/groups/public/—ed_dialogue/—actrav/documents/publication/wcms_149488.pdf).

working conditions, transform the relationship between domestic workers and employers, and challenge industry-wide structural inequality.

Various scholarly models of the employment relationship<sup>5</sup>—which could help answer these questions—do not address many of the issues unique to domestic work, such as the isolation of domestic workers, the intimate nature of the home as workplace, and the complicated emotional bonds that develop between domestic workers and their employers (or their employers' children or elderly parents). Nor do they explain the unprecedented movement by some domestic *employers* calling for stronger regulation of the domestic industry. United by a vision that values the dignity of domestic work, these employers do not fit neatly into standard industrial relations paradigms.<sup>6</sup>

This article seeks to reconcile employment relationship theory with the unique characteristics of the domestic work industry. Just as traditional employment relationship models have shaped the regulation of other industries, a new model for domestic work could help regulators, workers, advocacy groups, and employers create and enforce standards and transform the employment relationships upon which most domestic work is based.

Part I of this Article provides an overview of the domestic work industry, including recent legislative and organizing campaigns led by domestic workers and employers; Part II identifies the limitations of using the predominant employment relationship theories to understand the domestic work industry; Part III proposes a new theoretical framework with which to analyze, regulate, and improve the domestic employment relationship; and Part V considers the New York Domestic Workers' Bill of Rights in light of the proposed "Domestic Employment" theoretical model.

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5. See generally THEORETICAL PERSPECTIVES ON WORK AND THE EMPLOYMENT RELATIONSHIP (Bruce Kaufman ed., 2004) (collecting essays on employment relationship models).

6. See generally AI-JEN POO, DOMESTIC WORKERS UNITED, ORGANIZING WITH LOVE: LESSONS FROM THE NEW YORK DOMESTIC WORKERS BILL OF RIGHTS CAMPAIGN (2011), available at <http://www.domesticworkersunited.org/media/files/287/OrganizingWithLoveFinal.pdf> (charting the work of various non-profits that led the passage of the New York legislation).

I.  
THE DOMESTIC WORK INDUSTRY

A. *Industry Profile*

The domestic work industry is growing, fueled by changes in local and global economies and population demographics.<sup>7</sup> As all wage earners work more hours each week, and as women's participation in the paid workforce continues to expand, domestic workers, such as nannies, housekeepers, and elder caregivers, play a critical role in making that work possible.<sup>8</sup> As noted by socio-legal scholars, domestic workers support their employers' participation in the global economy while perpetuating the "illusion of a family in which two wage earners do[ ] it all."<sup>9</sup>

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7. Angela Charlton, *Study: Informal Employment at Record Levels*, ASSOCIATED PRESS FINANCIAL WIRE, Apr. 8, 2009, available at LEXIS, News Library, APFINL File; see also ANNETTE BERNHARDT, SIOBHÁN MCGRATH, & JAMES DEFILIPPIS, BRENNAN CTR. FOR JUST., UNREGULATED WORK IN THE GLOBAL CITY: EMPLOYMENT AND LABOR LAW VIOLATIONS IN NEW YORK CITY 61–62 (2007), available at [http://www.brennancenter.org/dynamic/subpages/download\\_file\\_49436.pdf](http://www.brennancenter.org/dynamic/subpages/download_file_49436.pdf); Donna E. Young, *Working Across Borders: Global Restructuring and Women's Work*, 2001 UTAH L. REV. 1, 8 (2001).

8. *Domestic Working Circumstances and Conditions: Hearing Before the Assembly Standing Comm. on Labor, Children & Families and Social Services*, 2008 Leg., 231st Sess. (N.Y. 2008) [hereinafter *Domestic Working Hearing*] (testimony of Susan Wefald, Executive Vice President and Chief Operating Officer, Ms. Foundation for Women). In 2006, the following statistics described working mothers:

Sixty-four percent of women with children under age 6, and 56 percent of women with infants (under age 1)— now work outside the home. A full seventy-seven percent of women with children age 6–17, and eighty-one percent of single women with children that age, are in the labor force. Seventy-six percent of employed mothers of children under eighteen work full time.

*Id.* (citing BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, CURRENT POPULATION SURVEY, EMPLOYMENT CHARACTERISTICS OF FAMILIES IN 2006, tbls. 5 & 6, available at [http://www.bls.gov/news.release/archives/famee\\_05092007.pdf](http://www.bls.gov/news.release/archives/famee_05092007.pdf)). The increasing use of domestic workers may explain the overwhelming success of Kathryn Stockett's novel, *THE HELP*, as well as the *New York Times*' placement of Barbara Ehrenreich's profile of Ai-jen Poo in the *Style Magazine*. Barbara Ehrenreich, *The Nannies' Norma Rae: Ai-jen Poo Fights for Domestic Workers' Rights*, THE N.Y. TIMES STYLE MAG. (Apr. 26, 2011, 9:00AM), <http://tmagazine.blogs.nytimes.com/2011/04/26/the-nannies-norma-rae/>; Marjorie Kehe, *With Book Sales Still Strong, 'The Help' Will Begin Filming*, CHRISTIAN SCIENCE MONITOR CHAPTER & VERSE BLOG (May 14, 2010), <http://www.csmonitor.com/Books/chapter-and-verse/2010/0514/With-book-sales-still-strong-The-Help-will-begin-filming>.

9. Teresa Carrillo, *The Best of Care: Latinas as Transnational Mothers and Caregivers*, in TECHNOFUTUROS: CRITICAL INTERVENTIONS IN LATINA/O STUDIES 191, 193 (Nancy Raquel Mirabal & Agustin Laó-Montes eds., 2007); cf. 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.

Although the exact number of domestic workers in the U.S. is unclear, the U.S. Census Bureau estimated that there were 1.3 million housekeepers and nannies nationwide in 2008,<sup>10</sup> a figure expected to increase at a rate of 11% between 2008 and 2018.<sup>11</sup> Further, as more older Americans (the first wave of “baby boomers” recently turned sixty-five) look to “aging in place” in their own homes,<sup>12</sup> many will require assistance with daily activities such as dressing, bathing, toileting, housekeeping, shopping, and visiting

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131, 165 (2002) (explaining that domestic workers are “often treated as [a] menial part of their employers” rather than as individuals). Though demographic information regarding domestic employers is scarce, most likely a majority or significant minority are dual income households with working mothers. NEW YORK STATE DEP’T OF LABOR, FEASIBILITY OF DOMESTIC WORKER COLLECTIVE BARGAINING 8 (2010) [hereinafter FEASIBILITY STUDY], available at [http://www.labor.ny.gov/sites/legal/laws/pdf\\_word\\_docs/domestic-workers/domestic-workers-feasibility-study.pdf](http://www.labor.ny.gov/sites/legal/laws/pdf_word_docs/domestic-workers/domestic-workers-feasibility-study.pdf). Unpaid or deeply discounted domestic work has been the cushion on which the entire economy rests. *GRITtv with Laura Flanders: Domestic Worker Roundtable* (GRITtv television broadcast Nov. 1, 2011) [hereinafter *Laura Flanders*], available at [http://blip.tv/file/984863/?utm\\_source=blip&utm\\_medium=site\\_search&utm\\_content=blip&utm\\_campaign=s\\_ab](http://blip.tv/file/984863/?utm_source=blip&utm_medium=site_search&utm_content=blip&utm_campaign=s_ab) (last visited July 12, 2011).

10. Nannies hired to care for children often perform housekeeping work as well, “two jobs for the price of one.” HONDAGNEU-SOTELO, *supra* note 3, at 5.

11. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK, 2010–11 EDITION, CHILD CARE WORKERS 3 (2010), available at <http://www.bls.gov/oco/pdf/ocos170.pdf>. Precise information about the size of the domestic work industry (or industries) is unavailable, in part because many domestic employment relationships are not reported to government entities. In a survey of 800 domestic employers in lower Manhattan and Brooklyn, 77% of respondents reported paying their nannies “off the books,” while 14% reported paying “part on/part off” the books, and 9% said they pay on the books. PARK SLOPE PARENTS, THE PARK SLOPES PARENTS NANNY COMPENSATION SURVEY 2010 15 (2010) [hereinafter 2010 NANNY SURVEY], available at [www.parkslopeparents.com/docs/NannySurvey2010.FINAL.pdf](http://www.parkslopeparents.com/docs/NannySurvey2010.FINAL.pdf); see also FEASIBILITY STUDY, *supra* note 9, at 7 (explaining that advocates’ estimates of the number of domestic workers in New York vary anywhere from 200,000 to 450,000). Domestic Workers United estimates the number of U.S. domestic workers to be 2.5 million. See Yoshikane, *supra* note 2.

12. NICHOLAS FARBER ET AL., NATIONAL CONFERENCE OF STATE LEGISLATURES & AARP PUBLIC POLICY INSTITUTE, AGING IN PLACE: A STATE SURVEY OF LIVABILITY POLICIES AND PRACTICES 1 (2011), available at <http://assets.aarp.org/rgcenter/ppi/liv-com/aging-in-place-2011-full.pdf>.

doctors.<sup>13</sup> For most, relying on family members, neighbors, or other informal strategies will be insufficient to meet those needs.<sup>14</sup>

Domestic work can take various forms. “Live-in” domestic workers reside in their employers’ homes and often perform more than one set of domestic tasks, such as cooking, cleaning, and child-care.<sup>15</sup> The majority of domestic workers, however, are likely hired exclusively for full-time child or elder care, or for a combination of cleaning, childcare, and elder care.<sup>16</sup> As a distinct group, housecleaners are typically hired for cleaning on a daily or weekly basis, often piecing together several jobs each week.<sup>17</sup> Au pairs and victims of trafficking are two other subgroups of domestic workers, each occupying an extreme position on either end of a continuum of legal protections and support.<sup>18</sup>

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13. See Catherine Ruckelshaus & Ai-jen Poo, *When Companionship Doesn't Pay*, THE HILL'S CONGRESS BLOG (July 13, 2011, 12:01PM), <http://thehill.com/blogs/congress-blog/labor/171207-when-companionship-doesnt-pay> (predicting that “[o]ver the next two decades, the U.S. population over the age of 65 will grow to more than 70 million” and that the higher life expectancy means that “the demand for caregiving is expected to grow significantly”). An estimated 27 million people will need direct care by the year 2050. *Id.*

14. Peggie R. Smith, *Aging and Caring in the Home: Regulating Paid Domesticity in the Twenty-First Century*, 92 IOWA L. REV. 1835, 1844–45 (2007). A recent survey found that 71 % of domestic employers agreed with the statement “[o]ur nanny is my employee whose work I greatly respect,” and 43% felt that “[o]ur nanny is like part of our family.” PARK SLOPE PARENTS, THE PARK SLOPE PARENTS NANNY COMPENSATION SURVEY 2008 48, 50 (2008) [hereinafter 2008 NANNY SURVEY], available at <http://test.parkslopeparents.com/images/Nanny%20Survey%20FINAL.pdf>. Fifty-one percent reported that “[t]here are many times that my nanny has more patience than I have with my children,” and 39% agreed that “[their] nanny has taught [them] ways to be a better parent.” *Id.* at 49–50. Thirty-seven percent believed that their family was stronger because of their nanny. *Id.* at 50.

15. BERNHARDT, McGRATH & DEFILIPPIS, *supra* note 7, at 61. In a survey of 1,100 domestic employers (parents employing nannies to care for their child(ren)) in the New York City area, 97% employed “live-out” nannies, while 3% hired “live-in” nannies. 2008 NANNY SURVEY, *supra* note 14, at 7.

16. See BERNHARDT, McGRATH, & DEFILIPPIS, *supra* note 7, at 61 (explaining that while accurate numbers for each segment of the domestic work population are unavailable, the demand for “live-out” domestic workers is growing). In addition to performing basic child-care duties, 82% of full-time nannies performed “light housekeeping,” 64% did the child(ren)’s laundry, 39% shopped for kid-related supplies (e.g., milk, diapers), and 10% performed “heavy housecleaning.” 2008 NANNY SURVEY, *supra* note 14, at 28. The percentage in each category was slightly less for part-time nannies. *Id.* Domestic workers also fill the unsung roles of “nurses, art teachers, counselors, tutors, assistants, and nutritionists.” Poo, *supra* note 6, at 2.

17. HONDAGNEU-SOTELO, *supra* note 3, at 70–71.

18. See BERNHARDT, McGRATH, & DEFILIPPIS, *supra* note 7, at 61 (explaining that while au pairs are “generally brought into the country with visas and are hired

Domestic workers are disproportionately low-income women of color, whose earnings place them near the bottom of the economic ladder.<sup>19</sup> Domestic work's association with voluntary caring roles and "women's work" has had tangible economic consequences: it is likely that half of all domestic workers' earnings are close to or below the poverty line.<sup>20</sup> The demographic profile of domestic work-

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exclusively for child care," victims of trafficking are "brought into the country . . . by professional traffickers . . . and live under conditions of servitude and imprisonment"). Only recently has the U.S. Department of Labor expressed a willingness to use its authority to help victims of trafficking and egregious wage and hour violations, including domestic workers, apply for special "U Visas" that would provide a pathway to permanent residency or citizenship. News Release, U.S. Dep't of Labor, US Labor Department to Exercise Authority to Certify Applications for U Visas (Mar. 15, 2010), *available at* <http://www.dol.gov/opa/media/press/opa/opa20100312.htm>. Au pairs, though not entirely protected from the workplace abuses experienced by many other domestic workers, do have a number of structural supports, and the congressionally sponsored program largely recruits middle-class women from Europe for "educational and cultural exchange" on J-1 visas. Joy M. Zarembka, *Migrant Maids and Modern Day Slavery*, in *GLOBAL WOMAN: NANNIES, MAIDS AND SEX WORKERS IN THE GLOBAL ECONOMY* 142, 149 (B. Ehrenreich & A. Hochschild eds., 2004). "Au pair" means "an equal" in French. *Id.* Formal check-ins and counseling are a regular part of the au pair employment relationship. *Id.* The domestic employment relationship model detailed herein would apply to both groups of workers (trafficked workers and au pairs). I do not specifically analyze how such an application would uniquely apply for each of those subgroups. Certainly the persistent abuse of domestic workers and their lack of formal legal protections enables the continued, often hidden, trafficking of domestic workers. Likewise, the establishment of more formal protections in the au pair industry indicates that such protections are possible in the context of domestic work, but the analysis contained in this paper does not explicitly address either of those implications.

19. HOME IS WHERE THE WORK IS, *supra* note 3, at 7, 16; *see also* Adam J. Hiller & Leah E. Saxtein, *Falling Through the Cracks: The Plight of Domestic Workers and Their Continued Search for Legislative Protection*, 27 HOFSTRA LAB. & EMPLOY. L.J. 233, 233-56 (2009). In 2008, domestic workers earned less per hour than workers employed as locker room and coatroom attendants. A survey of New York City domestic employers revealed that the average pay for live-in nannies is \$500-\$550 for a fifty-hour workweek. 2008 NANNY SURVEY, *supra* note 14, at 7. Full time "live-out" nannies caring for one child earned, on average \$12.75 an hour when paid weekly (employers paid \$2-\$3 more per hour for each additional child). *Id.* at 7, 31.

20. *See* Graunke, *supra* note 9, at 155 n.136 (finding domestic workers' wages to be "often below or near the minimum wage"); Peggy R. Smith, *Laboring For Child Care: A Consideration of New Approaches to Represent Low-Income Service Workers*, 8 U. PA. J. EMP. & LAB. L., 583, 591 (2006) (linking low pay for a job to the perception of the job as "women's work"); HOME IS WHERE THE WORK IS, *supra* note 3, at 16. A survey of hundreds of workers in Maryland found that 51% of those surveyed reported earning less than Maryland's minimum wage. GEORGE WASHINGTON UNIV. STUDENT RESEARCH TEAM (SPONSORED BY MONTGOMERY CNTY. COUNCIL COMM. ON HEALTH AND HUMAN SERVS.), *WORKING CONDITIONS OF DOMESTIC WORKERS IN MONTGOMERY COUNTY, MARYLAND* 8, 13 (2006), *available at*

ers reflects structural issues of racial discrimination and immigration policies.<sup>21</sup> A complex racial and ethnic hierarchy exists throughout the domestic work industry, which reflects macro issues of migration and opportunity. For example, early in the twentieth century, U.S. domestic workers were often young and single Irish or Scandinavian immigrant women, who performed “live in” domestic work.<sup>22</sup> As opportunities expanded for white immigrant or working class women to obtain factory or white-collar work, by the middle of last century, domestic workers became more likely to be married minority women performing “live out” day work.<sup>23</sup> Then, as affirmative action policies created opportunities for more women of color, and as more women overall entered the paid workforce, the demographics of domestic work changed again.<sup>24</sup>

Described as a “feminization of migration,” recent decades have seen a rising “push/pull” dynamic, as women from poor countries migrate to the U.S. and other developed nations in response to an increasing demand from those countries for paid domestic or care work.<sup>25</sup> Ninety-five percent of domestic workers in New York today are people of color, 93% in New York are women, and 17% across the nation lack the legal authorization to work in the U.S.<sup>26</sup>

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erycountymd.gov/content/council/pdf/REPORTS/domestic\_workers.pdf. Hila Shamir, in her work on the distributive effects of employment law in markets of care, notes that the exclusion of domestic workers from employment law distributes the cost of care to domestic workers themselves, who subsidize the cost of their work to primary market workers. Hila Shamir, *Between Home and Work: Assessing the Distributive Effects of Employment Law in Markets of Care*, 30 BERKELEY J. EMP. & LABOR L. 404, 453–454 (2009). Only 2% of domestic employers surveyed reported providing full medical benefits to their nannies, and another 4% reported helping with doctor bills. 2008 NANNY SURVEY, *supra* note 14, at 33. The most ubiquitous “benefit” offered was “the ability to eat what she wants out of our kitchen,” which 89% of surveyed employers reported providing. *Id.*

21. BERNHARDT, McGRATH, & DEFILIPPIS, *supra* note 7, at 61–62.

22. Christine E. Bose, *The Interconnections of Paid and Unpaid Domestic Work*, THE SCHOLAR & FEMINIST ONLINE (2009), [http://barnard.edu/sfonline/work/bose\\_01.htm](http://barnard.edu/sfonline/work/bose_01.htm).

23. *Id.*

24. *Id.*

25. *Id.*

26. HOME IS WHERE THE WORK IS, *supra* note 3, at 10; *see also* Anna Gorman, *Day Labor Centers See Some New Faces: Immigrant Women*, L.A. TIMES (June 11, 2007), <http://articles.latimes.com/2007/jun/11/local/me-mujeres11> (estimating that undocumented immigrants comprise 17% of the cleaning industry). In addition to the children they are hired to care for, domestic workers often have to raise their own children, and many are supporting families back in their own countries through remittances, creating an effective “triple charge” for domestic work. *Laura Flanders*, *supra* note 9 (interview with Marisa Franco, Domestic Workers United).

Domestic workers who report mistreatment by employers cite their race, immigration status, and language skills as significant factors contributing to the abuse.<sup>27</sup>

Domestic employers include “high-income families who hire live-in housekeepers and nannies,” “middle-class professionals who hire live-out domestic workers, either full-time or part-time,” and “immigrant employers, including diplomats, who hire domestic workers from their home country or region.”<sup>28</sup> But not all domestic employers are upper or middle-class homeowners; they also include single mothers, elderly people living on fixed incomes, college students, and apartment dwellers.<sup>29</sup>

Domestic work creates, and at times requires, exceptionally intimate relationships between employers and employees, which directly shape working conditions.<sup>30</sup> Domestic workers face a constellation of workplace challenges such as isolation, communication barriers, informal and inconsistent terms of employment, and complicated emotional attachments to the families for whom they work.<sup>31</sup>

The objection of some employers to more formal regulation of the industry is that such regulations are unnecessary because most employers are “generous,” and treat their employees “like one of the family.”<sup>32</sup> The testimony of domestic workers and surveys of do-

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27. BERNHARDT, McGRATH, & DEFILIPPIS, *supra* note 7, at 61. Of the workers who reported mistreatment, one-third (33%) felt that immigration status was a factor in their employer’s actions, one-third (32%) felt race was a factor, and 18% felt language played a role. HOME IS WHERE THE WORK IS, *supra* note 3, at 2.

28. BERNHARDT, McGRATH, & DEFILIPPIS, *supra* note 7, at 63. Third party intermediaries also play a role in the industry by placing workers with domestic employers. These include storefront employment agencies, domestic work temp agencies, professional traffickers, and day labor corners. *Id.* at 63; *see also* Elizabeth J. Kennedy, *The Invisible Corner: Expanding Workplace Rights for Female Day Laborers*, 31 BERKELEY J. EMP. & LAB. L. 126, 129, 137 (2010) (noting that female day laborers often seek work on open-air corners and through referral networks, websites like [www.craigslist.org](http://www.craigslist.org), and flyers).

29. HONDAGNEU-SOTELO, *supra* note 3, at 9.

30. As one domestic worker testified, “When a person goes to work in someone’s house, she doesn’t know what she’ll find.” *Domestic Working Hearing*, *supra* note 8 (statements of “Elizabeth,” a domestic worker in Manhattan). As detailed in the testimony of several nannies and housekeepers, “what she finds” includes husbands that sexually harass and intimidate, employers who ignore or disregard their concerns, and expectations that they will work additional hours or perform additional duties without additional compensation or negotiation. *See generally id.*

31. *See* Graunke, *supra* note 9, at 150–72 (documenting the various problems facing workers). *See generally* Hiller & Saxtein, *supra* note 19, at 233–56.

32. HONDAGNEU-SOTELO, *supra* note 3, at 10. Some employers may believe that the provision of “in kind benefits” offsets the low wages and lack of benefits

mestic employers contradict this putative familial status.<sup>33</sup> Pretending that employees are “part of the family” obscures the true power dynamics inherent in an employment relationship. A nanny who cares for a child over several years, and who develops “familial” type feelings for that child, has no legal rights to continue seeing that child should the employer choose to terminate that relationship. This is the paradox: domestic workers are denied basic employment rights because they are “like family,” yet denied basic family law rights because they are workers.

Even those employers who do understand and respect the obligations that come with being an employer of a domestic worker are often frustrated with the lack of publicly recognized domestic work standards. Many have resorted to “swapping notes” regarding pay, policies, and benefits, anxious that by failing to pay market rates or offer competitive benefits, they will be unable to retain qualified caregivers for their children or parents.<sup>34</sup> Annette Bernhardt, Policy Co-Director of the National Employment Law Project, described a recent online discussion among domestic employers regarding whether “financial belt tightening would (or should) impact the compensation of their domestic workers.”<sup>35</sup> Bernhardt explains the fact that these “novices . . . some well-intentioned, others not, without any legal background or information on what makes for a sufficiency wage in the city” were “making up standards on the spot”

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that characterize the industry. *See* 2008 NANNY SURVEY, *supra* note 14, at 10 (including a question about the donation of furniture to the domestic employee, presumably as evidence of other “in-kind” benefits provided to domestic employees). However, since the survey targeted only domestic employers, and not employees, it is unclear whether the recipient employees regarded such donations as benefits. *Id.*

33. One worker described being “made to wear a white uniform like Florence Nightingale,” push the employer’s dog in a stroller around Manhattan, and sleep next to the dog at night so that she could get up every four hours to put drops in the dog’s eyes. *Domestic Worker Hearing*, *supra* note 8 (statement of Jocelyn Gill-Campbell, Organizer, Domestic Workers United); *cf.* 2008 NANNY SURVEY, *supra* note 14, at 10 (listing benefits such as aiding nannies with school applications and giving their nannies furniture); 2010 NANNY SURVEY, *supra* note 11, at 11 (explaining the various benefits afforded to nannies by employers, including “open kitchen” policies, food allowances, and early dismissals with pay).

34. Speaking about the positive impact that a Domestic Worker Bill of Rights would have for domestic employers, Dara Silverman explained that the law would “give clarity to the relationship . . . . There have been informal attempts by moms in Park Slope Brooklyn to compare notes—how much do you pay? What’s your policy on vacation and sick days?” *Laura Flanders*, *supra* note 9 (interview with Dara Silverman).

35. *Domestic Working Hearing*, *supra* note 8 (statement of Annette Bernhardt, Ph.D., Policy Co-Director, National Employment Law Project).

demonstrates the very real consequences of the lack of industry regulation in the context of domestic work.<sup>36</sup>

The private home setting in which domestic work is performed also has a significant impact on working conditions.<sup>37</sup> Live-in workers are frequently isolated from the kinds of social networks that might otherwise help protect them from continued abuse or help them to escape dangerous employment.<sup>38</sup> Their workplaces are outside of public view and governmental inspection. Geographic isolation, as well as a lack of co-workers or a common employer, makes collective bargaining in the traditional sense hard to conceptualize (though not, as discussed below, impossible).<sup>39</sup> Moreover, the endemic inequality in bargaining power between domestic workers and employers and a dearth of industry standards undercuts one-on-one negotiations.<sup>40</sup> As Ai-jen Poo, a domestic worker organizer, explains, “When individual workers try to bargain with their employers, termination is the standard result since employers can simply hire another worker.”<sup>41</sup>

*B. The Limitations of Employment Law in Regulating  
the Domestic Work Industry*

Traditional theories about the nature of the employment relationship “presuppose[ ] a world in which workers leave the confines of their private homes and travel to public workspaces.”<sup>42</sup> What, then, of the domestic worker who labors in her employer’s private home? When the workplace is a private home, the traditional work-

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36. *Id.*

37. See Graunke, *supra* note 9, at 132–33 (arguing that the home setting makes domestic workers more vulnerable to abuse); Hiller & Saxtein, *supra* note 19, at 244.

38. Chelsy Castro, *Dying to Work: OSHA’s Exclusion of Health and Safety Standards for Domestic Workers*, 4 MOD. AM. 3, 4 (2008); see also NELP IMMIGRANT & NONSTANDARD WORK PROJECT, NAT’L EMP’T LAW PROJECT, HOLDING THE WAGE FLOOR: ENFORCEMENT OF WAGE AND HOUR STANDARDS FOR LOW-WAGE WORKERS IN AN ERA OF GOVERNMENT INACTION AND EMPLOYER UNACCOUNTABILITY 9 (2006), [http://nelp.3cdn.net/95b39fc0a12a8d8a34\\_iwm6bhbv2.pdf](http://nelp.3cdn.net/95b39fc0a12a8d8a34_iwm6bhbv2.pdf) (showing the poor conditions faced by workers); Graunke, *supra* note 9, at 132–33 (explaining that workplace harassment becomes “domesticized,” since it occurs in “the privacy of the home”); *Swarna v. Al-Awadi*, 622 F.3d 123, 129 (2d Cir. 2010) (listing the allegations by plaintiff against her former employer, a Saudi Arabian diplomat, including trafficking, fraud, seizure of her passport, forced labor, and sexual abuse).

39. FEASIBILITY STUDY, *supra* note 9, at 15.

40. POO, *supra* note 6, at 4; see also Smith, *supra* note 13, at 1841.

41. POO, *supra* note 6, at 8.

42. Smith, *supra* note 14, at 1841.

place law regimes must adapt to the changing need for, and implementation of, workplace regulation.

Although domestic employers largely view themselves as benevolent, the industry thrives by maintaining a vulnerable workforce and perpetuating a characterization of domestic work as unregulated and informal.<sup>43</sup> The history of employment laws, legal decisions, legislative history, and supporting documents evinces a socio-legal construction of domestic work viewed as separate from nearly all other kinds of work.<sup>44</sup> In 1905, one newspaper writer observed that “it is unusual to think of any question of law as between the housewife and the lady who condescends to do her cooking and general work.”<sup>45</sup> The idea that the relationship between domestic employer and employee should be subject to the same legal parameters as all other employment was, and in many ways remains, “unusual.”

However, as those (predominately of northern European descent) “ladies who condescend” found jobs in the industrial sector during the first half of the 20th century, domestic service became synonymous with black women, who came to comprise roughly 50% of the workforce.<sup>46</sup> State-sanctioned racial discrimination effectively precluded black women from attaining most of the work that was newly available to white women, and legislative efforts to regulate the domestic employment relationship received limited public support.<sup>47</sup> In blocking the extension of federal New Deal labor legislation to domestic and agricultural workers, Southern Democrats acted to preserve racial subjugation and cheap supplies of labor.<sup>48</sup>

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43. BERNHARDT, McGRATH, & DEFILIPPIS, *supra* note 7, at 61. In a recent report on Domestic Work, the International Labour Office notes that in drafting its proposed convention concerning decent work for domestic workers, it “modified the text so as to avoid any discriminatory characterization of women as inherently ‘vulnerable.’” INTERNATIONAL LABOUR OFFICE, DECENT WORK FOR DOMESTIC WORKERS 3 (2011), available at [http://www.ilo.org/wcmsp5/groups/public/@ed\\_norm/@relconf/documents/meetingdocument/wcms\\_143337.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_143337.pdf).

44. See Smith, *supra* note 14, at 1855.

45. *Id.* at 1851.

46. *Id.* at 1857. As one student writer notes, “The forces of racism and patriarchy have shaped the legal landscape surrounding domestic workers. In the southeastern United States, the work has historical roots in slavery and in the southwest, in colonization and genocide.” Terri Nilliasca, Note, *Some Women’s Work: Domestic Work, Class, Race, Heteropatriarchy, and the Limits of Legal Reform*, 16 MICH. J. RACE & L. 377, 381 (2011). Today, domestic work is less associated with black women than it is with immigrant women of color. *Id.* at 385.

47. Smith, *supra* note 14, at 1857.

48. *Domestic Working Hearing*, *supra* note 8 (statement of Premilla Nadasen, Associate Professor of History, Queens College, City University of New York)

The legacy of racism is preserved in several key pieces of federal workplace legislation. The National Labor Relations Act (NLRA), which guarantees employees the right to organize a union and bargain collectively with their employers, specifically excluded domestic workers from its definition of “employee,”<sup>49</sup> an exclusion that persists today. Until 1974, the Fair Labor Standards Act (FLSA) completely excluded domestic workers from coverage for minimum wage rates, maximum hours, and overtime compensation.<sup>50</sup> Today, “casual” employees such as “babysitt[ers]” and “companions” for the sick or elderly, categories which include many domestic workers, remain excluded from FLSA coverage.<sup>51</sup> Furthermore, in the first reported case to address the scope of the companionship-services exemption, *McCune v. Oregon Senior Services Division*, the Ninth Circuit held that the exemption applied to a group of home-care workers who “live[d] with their clients at a near poverty level providing around-the-clock care.”<sup>52</sup> The workers were paid by various public entities, including the state of Oregon, to care for elderly and infirm clients.<sup>53</sup> The court found that the workers were “domestic service” employees, but it nevertheless excluded them from FLSA coverage because their work qualified as “companionship services.”<sup>54</sup> While some states do include home care workers within

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(describing New Deal-era concessions demanded by Southern congressmen). According to Rachel McCullough, organizer with Jews for Racial and Economic Justice, the response of some legislators to the demands by domestic workers for industry standards has been, “Why are we going to give special protections to this workforce?” To which the campaign’s response has been, “If you thought we were ‘special’ enough to exclude all these years . . .” Telephone Interview with Rachel McCullough, Organizer, Jews for Racial and Economic Justice (Apr. 14, 2011).

49. 29 U.S.C. § 152(3) (2006). Even some legislators are unaware of this exemption, as evidenced by the position some New York State legislators took in response to legislation proposing paid time off and other benefits for domestic workers that they “form a union and collectively bargain like other workers.” Poo, *supra* note 6, at 8.

50. Smith, *supra* note 14, at 1860.

51. 29 U.S.C. § 213(a)(15) (2006); *see also* HOME IS WHERE THE WORK IS, *supra* note 3, at 4. Furthermore, live-in domestic workers, unlike most other employees in the U.S., cannot get overtime under the FLSA. 29 U.S.C. § 213(b)(21). Under New York state law, while domestic workers who do not live in their employer’s home are entitled to overtime at a rate of one-and-a-half times their regular rate after forty hours of work in a week, live-in domestic workers are only entitled to overtime at a rate of one-and-a-half times the minimum wage, and then only after forty-four hours of work in a week. N.Y. COMP. CODES R. & REGS, tit. 12, § 142-2.2 (2010).

52. *McCune v. Or. Senior Servs. Div.*, 894 F.2d 1107, 1110 (9th Cir. 1990).

53. *Id.* at 1108.

54. *Id.* at 1108, 1110.

their wage and hour regulations, most states follow the Ninth Circuit's broad application of the companionship exemption for home care workers.<sup>55</sup>

Not only are domestic workers denied protections under the FLSA, but regulations promulgated under the Occupational Safety and Health Act explicitly exclude domestic workers "[a]s a matter of policy."<sup>56</sup> Despite the fact that domestic workers directly support the continued participation of their employers in the paid workforce, they are not considered under the law to be "employed in a business of [their employer] which affects commerce."<sup>57</sup> Since domestic employers are typically homeowners with minimal or non-existent safety or health training, or supplies like gloves or non-toxic cleaning products, this exclusion leaves domestic workers vulnerable to exposure to toxic chemicals, unsafe appliances, unsanitary conditions, and other risks related to poorly maintained homes, including poor lighting and decrepit stairs.<sup>58</sup> Sixty-three percent of domestic workers surveyed in California "considered their jobs hazardous, citing concentrated exposure to toxic cleaning chemicals and human contagions, risk of injury from cleaning high or difficult-to-reach places, and heavy lifting."<sup>59</sup> Seventy-five percent had not received from their employers "any protective gear such as facemasks or gloves to prevent workplace injuries," and 86% had not received "training in job safety or workplace injury preven-

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55. PAUL K. SONN, CATHERINE RUCKELSHAUS & SARAH LEBERSTEIN, NATIONAL EMPLOYMENT LAW PROJECT, FAIR PAY FOR HOME CARE WORKERS: REFORMING THE U.S. DEPARTMENT OF LABOR'S COMPANIONSHIP REGULATIONS UNDER THE FAIR LABOR STANDARDS ACT 2 (2011), available at <http://www.nelp.org/page/-/Justice/2011/FairPayforHomeCareWorkers.pdf?nocdn=1> (explaining that twenty-one states have given labor law protections to domestic workers).

56. 29 C.F.R. § 1975.6 (2009).

57. *Id.*

58. See RICK NEITZEL & NOAH SEIXAS, DEP'T OF ENVTL. & OCCUPATIONAL HEALTH SCIS., UNIV. OF WASH., DAY LABOR SAFETY AND HEALTH INITIATIVE REPORT 2 (2005) (describing generally poor working conditions, high injury rate, and lack of employer responsibility); see also HOME IS WHERE THE WORK IS, *supra* note 3, at 23 ("[N]ot only are new immigrants less likely to complain about job hazards, but they also tend to return to work quickly despite potentially serious job-related injuries and illnesses." (quoting AFL-CIO, IMMIGRANT WORKERS AT RISK: THE URGENT NEED FOR IMPROVED WORKPLACE SAFETY AND HEALTH POLICIES AND PROGRAMS 10 (2005), available at [http://www.aflcio.org/aboutus/laborday/upload/immigrant\\_risk.pdf](http://www.aflcio.org/aboutus/laborday/upload/immigrant_risk.pdf))); Megan Tady, *Unprotected by Laws, Domestic Workers Face Exploitation*, THE NEW STANDARD (Mar. 14, 2007), <http://www.indybay.org/newsitems/2007/03/20/18380387.php>; Smith, *supra* note 14, at 1873-74.

59. MUJERES UNIDAS Y ACTIVAS ET AL., BEHIND CLOSED DOORS: WORKING CONDITIONS OF CALIFORNIA HOUSEHOLD WORKERS 6 (2007), available at <http://www.datacenter.org/reports/behindcloseddoors.pdf>.

tion.”<sup>60</sup> Nearly one-third had suffered “an injury or illness requiring medical attention” in the year prior to being surveyed, yet two-thirds of those injured did not receive medical attention, since they were neither able to afford treatment nor received employer-provided health care.<sup>61</sup> Testifying before the New York State Assembly Committee on Labor, the daughter of a domestic worker described a “particularly mischievous child” that tripped her mother on the stairs, “seriously injuring her already fragile knees, and breaking her front teeth.” Eight years later, her daughter is still struggling to pay back her mother’s medical loans.<sup>62</sup>

Likewise, although domestic workers report widespread discrimination on the basis of sex and race, including sexual harassment, Title VII of the Civil Rights Act applies only to employers with 15 or more employees, which excludes most domestic workers.<sup>63</sup> For the same reason, most domestic workers cannot seek relief under the Americans with Disabilities Act,<sup>64</sup> or the Age Discrimination in Employment Act,<sup>65</sup> each of which prohibits workplace discrimination.

In addition to these exclusions at the federal level, most states do not extend to domestic workers rights to overtime, sick time, vacation, health care, or workers’ compensation.<sup>66</sup> Moreover, domestic workers often encounter significant barriers to asserting the

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60. *Id.*

61. *Id.*

62. *Domestic Working Hearing*, *supra* note 8 (statement of Priscilla Gonzalez, Organizer, Domestic Workers United).

63. 42 U.S.C. § 2000e(b) (2006). Title VII prohibits discrimination on the basis of race, color, religion, sex, or national origin. *See, e.g., Domestic Worker Hearings*, *supra* note 8 (statements of various domestic workers) (presenting accounts of abusive workplace behavior, all of which occurred in environments with fewer than fifteen employees). One domestic worker recounts, “How can I forget the numerous times when I resigned from a fulltime housekeeping position to avoid malicious sexual harassment of male employers?” *Id.* (statement of Monica Ledesma, Member, DAMAYAN Migrant Workers Association).

64. 29 U.S.C. § 630(b) (2006) (restricting the definition of “employer” to those who employ twenty or more employees).

65. 42 U.S.C. §§ 12111(5)(A) (2006) (restricting the definition of “employer” to those who employ fifteen or more employees).

66. Smith, *supra* note 14 at 1852. Of the twenty-six states with minimum wage laws in 1940, only Wisconsin had enacted a specific minimum-wage order applicable to domestic service. *Id.* Montgomery County, in Maryland, passed a Domestic Workers’ Law that provides, among other things, a requirement that certain employers of domestic workers living in the county enter into a written employment contract that specifies the terms and conditions of employment. MONTGOMERY COUNTY, MD., CODE ch 11, § 11-4B (2010), *available at* <http://www.montgomerycountymd.gov/content/ocp/domestic/pdfs/Law.pdf>.

limited rights they do possess, including a lack of knowledge about existing employment and labor laws,<sup>67</sup> insufficient information regarding where to report violations,<sup>68</sup> collateral immigration consequences,<sup>69</sup> and, for domestic workers who lack the legal authorization to work in the U.S., the fear of being deported and separated from their families.<sup>70</sup>

Domestic workers are particularly vulnerable to misclassification as “independent contractors,”<sup>71</sup> which can further strip them of legal protections otherwise guaranteed by minimum wage standards, workers’ and unemployment compensation laws, and Social

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67. See NELP IMMIGRANT & NONSTANDARD WORK PROJECT, *supra* note 30, at 10 (finding that 61% of day laborers do not know their rights).

68. Laura Dresser, *Cleaning and Caring in the Home: Shared Problems? Shared Possibilities?*, in ANNETTE BERNHARDT ET AL., *THE GLOVES-OFF ECONOMY* 119 (2008); cf. NELP IMMIGRANT & NONSTANDARD WORK PROJECT, *supra* note 38, at 10 (finding that 80% of day laborers do not know where to report workplace abuses). As one housekeeper recounted, “My employer . . . did not allow us to sit down or talk to other people. During lunchtime, we were not allowed to use their utensils. We were supposed to use disposable plates, spoons, forks and cups. After using them, we were supposed to put them in the dishwasher and use them again. She yelled for no reason. She insisted on scrubbing the carpet on my knees. Every time she came into the room, I was supposed to stand. When she would pass by, I’d have to stand aside and not look at her. She always made me feel stupid.” HOME IS WHERE THE WORK IS, *supra* note 3, at 21–22.

69. BONATO, *supra* note 3, at 9 (“Because domestic workers’ visas are tied to their employment, if an employer fires his worker for reporting a violation, the worker could face deportation or may economically be unable to stay in the United States if she can not obtain work authorization.”).

70. See, e.g., *Rivera v. NIBCO*, 364 F.3d 1057, 1064–65 (9th Cir. 2004) (agreeing that “most undocumented workers are reluctant to report abusive or discriminatory employment practices” because they fear criminal prosecution and deportation), *cert. denied*, 544 U.S. 905 (2005); cf. NELP IMMIGRANT & NONSTANDARD WORK PROJECT, *supra* note 38, at 9 (finding that 67% of day laborers fear being reported to the INS). This article uses the term “unauthorized” workers to describe immigrant workers who do not have the legal authorization to work under U.S. laws, and who are distinguishable from “undocumented” workers, or a subset of the immigrant population that is unauthorized to work.

71. Domestic workers are considered household employees regardless of whether they are paid on an hourly, daily or weekly basis, or by the job, or whether they are hired through an agency, so long as the employer can control how the work is done. DEP’T OF TREAS., I.R.S. PUBL’N 926, HOUSEHOLD EMPLOYER’S TAX GUIDE 2–3 (2011), available at <http://www.irs.gov/pub/irs-pdf/p926.pdf>. Self-employed independent contractors generally supply their own cleaning equipment and materials; if provided by the employer, the domestic worker is more likely to be an employee, not an independent contractor. *Id.*

Security and disability benefits.<sup>72</sup> While they often work “independently,” without direct supervision, domestic workers’ testimonials about their workdays paint a very different picture of independence and control. Parents and homeowners may sometimes dictate with extreme specificity the manner in which the house is to be cleaned, how child or parent is to be cared for, and what supplies will be used.<sup>73</sup> Many domestic workers occupy a legal no man’s land: neither protected by workplace laws, nor possessing self-employed independent contractors’ control over their work. While other countries, such as Canada, provide for such workers using a “dependent contractor” classification, U.S. employment and labor law lacks such a classification.<sup>74</sup>

Domestic workers have spent decades trying to upend the attitude that because domestic work is unlike all other work it is therefore unsuitable for formal regulation. It is important, however, to recognize the ways in which domestic work can legitimately be distinguished from other occupations, and the ways in which the relationship between domestic employers and employees is unique, in order to more effectively regulate the industry.

### C. *Distinguishing Domestic Work*

What is it about domestic work that relegates domestic workers to a second-tier status? As discussed in the previous sections, the gendered association of the work, patterns of global migration and immigration policies, and race-based discrimination, combined with the charged, private setting of the home and intimate nature of the work, all serve to set domestic work apart from most other types of paid employment.<sup>75</sup> In addition to the unique qualities of

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72. Katherine V. W. Stone, *Legal Protections for Atypical Employees: Employment Law for Workers Without Workplaces and Employees Without Employers*, 27 BERKELEY J. EMP. & LAB. L. 254, 279–80 (2006).

73. See, e.g., Tady, *supra* note 58 (explaining how one domestic recounts of an employer who “made her wash her hands with ammonia before starting work,” a practice that “burned [her] hands”). Most employers in one survey in the Brooklyn area reported some kind of restrictions on the discretion of their nannies. See 2008 NANNY SURVEY, *supra* note 14, at 29. Only half of surveyed parents agreed with the statement, “Our nanny has her own style and we accept that she won’t do things exactly like we would.” *Id.* at 49.

74. See Elizabeth J. Kennedy, Comment, *Freedom from Independence: Collective Bargaining Rights for “Dependent Contractors”*, 26 BERKELEY J. EMP. & LAB. L. 143, 148–49, 153 (2005).

75. POO, *supra* note 6, at 4; DOMESTIC WORKERS UNITED ET AL., DOMESTIC WORKERS AND COLLECTIVE BARGAINING: A PROPOSAL FOR IMMEDIATE INCLUSION OF DOMESTIC WORKERS IN THE NEW YORK STATE LABOR RELATIONS ACT 7 (2010) [hereinafter DWU REPORT], available at <http://www.urbanjustice.org/pdf/publications/>

domestic work and those who perform it, domestic *employers* are in many ways “fundamentally different” from their counterparts in other industries.<sup>76</sup> They hire nannies and housekeepers not as part of their primary business, but in addition to (and so that they may maintain) their own jobs.<sup>77</sup> Employers themselves (many of whom are also women) are experiencing the economic strain of the Great Recession, as well as the elimination of a social safety net that could otherwise help manage the costs of child and elder care.<sup>78</sup> These men and women are, in large part, reluctantly thrust into employer roles. They often regard themselves as consumers of domestic services, not as employers of domestic workers, and do not view their private homes as workplaces.<sup>79</sup> Rather than provide their employees with direct instruction, domestic employers often shy away from engaging in the kind of negotiation and communication required. In the context of housekeeping, many even prefer to be out of the house when the work is performed.<sup>80</sup> However, treating domestic employees like contractors or one-time service providers has consequences for both parties. An employment *relationship* is, under most

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Domestic\_Workers\_and\_Collective\_Bargaining.pdf (“As compared to other workplaces, the home is a charged, sensitive space often lacking the emotional distance necessary for negotiation to take place.”); Jennifer Steinhauer, *City Nannies Say They, Too, Can Be Mother Lions*, N.Y. TIMES (July 16, 2005), <http://www.nytimes.com/2005/07/16/nyregion/16nanny.html?scp=1&sq=%22brunilda+tirado&st=nyt> (explaining that “[m]utual suspicions and resentment” arise, since a baby sitter may “know every inch of her employer’s home,” while “many parents never set foot in their nanny’s neighborhood, let alone her home”).

76. FEASIBILITY STUDY, *supra* note 9, at 2.

77. 2008 NANNY SURVEY, *supra* note 14, at 8.

78. Based on survey data collected by the Park Slope Parents organization, the economy has caused four in ten, or 39% of, domestic employers to make changes to the employment relationship they have with their nanny, including cutting back the number of hours worked and increasing “nanny sharing” with another family. 2010 NANNY SURVEY, *supra* note 11, at 15. Survey data also revealed a pattern of decreased pay rates, and well as fewer and smaller raises than were reported by the same organization in 2008. *Id.* As described by a domestic employer organizer, domestic employers are experiencing “an assault on their way of life, the elimination of the social safety net, an assault on working mothers, an assault on the ability of these women to be professional and be a mother [sic] at the same time.” Interview with Rachel McCullough, *supra* note 48.

79. While speaking at a Human Rights Tribunal organized by DWU, one domestic employer relayed the following:

The first time I heard Debbie—our son’s caregiver—refer to me as her boss, I was taken aback. The word seemed too formal. I had hopes for the kind of intimacy I’d known other parents and nannies to experience, and I wanted Debbie to relate to me as someone other than her employer.

POO, *supra* note 6, at 14.

80. HONDAGNEU-SOTELO, *supra* note 3, at 47.

of the existing models, just that: a relationship. And one that, like any other, requires investments of resources and a commitment to communication in order to ensure that the relationship is mutual, sustainable, and successful. Hiring a contractor to replace your hot water heater requires no such investment by either party, and yet many domestic employers regard their employees in that light. Moreover, skilled craftsmen and contractors who perform work in private homes typically do not suffer the kind of abuse endemic to domestic work and are protected by state and federal laws.

Even when domestic employers recognize the additional responsibilities that attach to employers, as opposed to consumers, of domestic work, few are able (while struggling to balance the needs of their own families and their work responsibilities) to take on additional administrative and human resource roles.<sup>81</sup> Unlike most other employers, they “cannot pass on the costs of domestic worker salaries or benefits to consumers.”<sup>82</sup> In addition, because of a complicated set of emotions related to the need for paid care work,<sup>83</sup> domestic employers often feel awkward discussing terms and conditions of that work.<sup>84</sup> An informal hiring process, in which workers

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81. See 2008 NANNY SURVEY, *supra* note 14, at 52–53. Only 17% of employers entered into a “Nanny contract” with their nanny, and only 35% of employers reported having conducted a “review” with the nanny in which they had discussed the nanny’s work (almost the same percentage that had “shown up unexpectedly in order to verify that a nanny is doing a good job”). *Id.* at 4, 52–53. Seventy-two percent reported at least one instance when they had not let their nanny know that something was bothering them, 35% had come home later than expected without notice, and 21% had failed to pay their nanny on time, a cognizable violation of wage and hour law. *Id.* at 53. One domestic employer, speaking in support of the Domestic Workers Bill of Rights, confessed the following:

[M]y resistance to seeing myself as an employer meant that it took too long for Debbie [her son’s nanny] to be treated like an employee. Rather than signing a contract and agreeing to the terms of work on day one, we talked about benefits casually, after she’d already started work. I would not have tolerated such lack of professionalism in my own job.

Poo, *supra* note 6 at 14.

82. FEASIBILITY STUDY, *supra* note 9, at 16. Some domestic employers report providing raises that are tied to the raises that they or their spouse received; raises tended to be \$1 an hour, per year. 2008 NANNY SURVEY, *supra* note 14, at 38.

83. Describing many domestic employers, an organizer with Jews for Racial and Economic Justice explained, “I’ve learned so much from the women we organize about the shame and guilt they feel from not being able to spend enough time with their own children. Their own lives [are] more precarious, they worry about layoffs, budget cuts.” Telephone Interview with Rachel McCullough, *supra* note 47.

84. FEASIBILITY STUDY, *supra* note 9, at 15. In her testimony before the New York State Assembly Committee on Labor, Annette Bernhardt, Policy Co-Director of the National Employment Law Project, described a recent online discussion among domestic employers regarding whether “financial belt tightening would (or

are hired largely through word-of-mouth referrals and few enter into formal employment agreements, is perpetuated by a lack of publicly available data on salaries, benefits, and policies in the industry.<sup>85</sup> Operating in such a vacuum, 78% of employers felt they paid their employee an average or above average salary.<sup>86</sup>

Another reason for the persistent lack of domestic workplace regulation is the “home as castle” doctrine, which structures the relationship between governments and individuals within many different contexts, including search and seizure prohibitions,<sup>87</sup> the use of self-defense,<sup>88</sup> and tort law.<sup>89</sup> The labor performed by domestic workers inside private homes is also performed by workers who en-

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should) impact the compensation of their domestic workers” and noted that the fact that these “novices . . . some well-intentioned, others not, without any legal background or information on what makes for a sufficiency wage in the city” were “making up standards on the spot” demonstrates the very real consequences of the lack of industry regulation in the context of domestic work. *Berhardt Statement*, *supra* note 35, at \*3. When asked, “What do you do,” most domestic employers probably would not include their role as an employer of a nanny, housekeeper, or elder caregiver. *See supra* note 32 and accompanying text. The work of sociologist Pierrette Hondagneu-Sotelo explores in depth domestic employers’ reluctance to view themselves as employers and their homes as work sites, citing ambivalence, embarrassment, uncomfortable associations with feudalism and slavery, and guilt. HONDAGNEU-SOTELO, *supra* note 3, at 10–11, 139. Moreover, since domestic worker employers, in contrast to many service sector employers, are “the ultimate consumers of their employees’ services,” a conversation about such services is “an even more delicate issue.” FEASIBILITY STUDY, *supra* note 9, at 15.

85. 2008 NANNY SURVEY, *supra* note 14, at 4, 45. “Through a friend” is the number one way respondents found their Nannies. *Id.* at 4. Only 17% of employers enter into a “Nanny contract” with their employees. *Id.* Seventy-eight percent of employers of full-time nannies believe that they pay their nannies either about the same or more than most people. *Id.* at 45. Only 13% believe that they paid less than other people. *Id.*

86. *Id.* at 45.

87. *See* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 642–43 (1999) (noting that at common law, the home was accorded sacrosanct legal protection under the castle doctrine; for example, intrusions into the home required a judicial warrant). While contemporary law extends the Fourth Amendment to all privately held property, it does still recognize that one’s home—one’s castle—is entitled to special protection. *See, e.g.,* *Kyllo v. United States*, 533 U.S. 27, 34 (2001) (holding that the use of thermo-imaging technology to detect the presence of narcotics in a home constituted a “search” for Fourth Amendment purposes).

88. *See* *Weiand v. State*, 732 So. 2d 1044, 1049 (Fla. 1999) (explaining that one need not retreat “to the wall” in one’s home from an intruder to claim self-defense).

89. Linda C. McClain, *Inviolability and Privacy: The Castle, the Sanctuary, and the Body*, 7 YALE J.L. & HUMAN. 195, 202–203 (1995) (“The home as castle appears in defenses of privacy rights sounding in tort law.”).

joy very different regulatory protections and negotiate wages in very different economic markets. For example, daycare center employees, nursing home aides, hotel housekeepers, and restaurant line cooks are all entitled by statute to safe working conditions, to the right to form unions, and to workplaces free from sexual harassment. While employers enjoy some modicum of privacy, many employment laws are enforced, at least in part, through a system of workplace inspections.<sup>90</sup> Such a system would be exceedingly difficult to reproduce in the domestic work industry, given the practical limitations (including the lack of a centralized database needed to locate domestic workers within thousands of individual workplaces), as well as Fourth Amendment limitations and public opposition to the regulation of private, home-based activity.<sup>91</sup>

Domestic employers, and their children or parents, often develop emotional bonds that distinguish domestic work from most other employment relationships. As an illustration, *The New York Times* recently reported on the “bewilderment” of rescue workers upon discovering that the child for whom a woman risked her life to save in the wake of a collapsing building (screaming, “My baby! My baby!”) was not, in fact, the child’s mother.<sup>92</sup> She was the infant’s nanny. The *Times* also reported the “surprise[ ] by the surprise,” felt by fellow domestic workers. One explained, “These children are your babies because you are their parents all day,” and another remarked, “We didn’t make them . . . [b]ut they’re ours and we love them dearly, dearly.”<sup>93</sup> These emotional attachments cut both ways—they can cause a domestic worker to tolerate conditions she might not in another workplace, but they can also make it less likely that she would be arbitrarily terminated, since she is much less fungible than she might be in another workplace.

However, as the New York State Department of Labor notes, in distinguishing domestic work from other industrial or service indus-

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90. The Fourth Amendment protects individuals against unreasonable governmental intrusion into their homes, and, on a more limited basis, protects employers against such intrusions into workplace in the public sphere. For an interesting examination of Fourth Amendment issues in the context of ICE enforcement strategies, see Marisa Antos-Fallon, Note, *The Fourth Amendment and Immigration Enforcement in the Home: Can ICE Target the Utmost Sphere of Privacy?*, 35 *FORDHAM URB. L.J.* 999 (2008).

91. See *supra* note 87–90 and accompanying text; see also Smith, *supra* note 14, at 1857–58 (explaining that early objections to regulating domestic work stemmed from the perception that home life should not be bound by the rigid market transactions of the public sphere).

92. Steinhauer, *supra* note 75.

93. *Id.*

tries, these relationships often have a “presumptive end point: in the case of childcare . . . when the children enter elementary school; and in the case of elder care . . . when an elderly person goes into a nursing home or dies.”<sup>94</sup> And yet, any presumed duration of employment is not normally a consideration for whether or not labor and employment law protections should apply.<sup>95</sup> For domestic workers, however, collective bargaining and other labor and employment rights remain elusive.

*D. Building Power Through Alliances: Domestic Workers United*

Over the past decade, domestic workers have organized dozens of affinity groups and developed legislative campaigns. In New York City, Domestic Workers United (DWU) has organized thousands of predominately Caribbean, Latina, and African nannies and elder caregivers.<sup>96</sup> In addition to improving working conditions and building power and respect for domestic workers, DWU’s mission is to build a broader movement for social change.<sup>97</sup> To do this, DWU has developed a coalition of allies that includes domestic employers, the children of employers, communities of faith, and the larger labor movement.<sup>98</sup> Those alliances proved critical to advancing a statewide legislative campaign and creating pathways for domestic employers to voluntarily improve conditions for domestic workers in their homes.<sup>99</sup>

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94. FEASIBILITY STUDY, *supra* note 9, at 15.

95. *See* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751 (1989) (stating that duration plays a role as part of an eleven part test in determining employment status but “no one of these factors is determinative”).

96. DWU REPORT, *supra* note 75, at 1; *see also* DOMESTIC WORKERS UNITED, <http://www.domesticworkersunited.org>.

97. PAM WHITEFIELD, SALLY ALVAREZ, & YASMIN EMRANI, CORNELL UNIV. ILR SCH., IS THERE A WOMAN’S WAY OF ORGNIZING? GENDER, UNIONS, AND EFFECTIVE ORGANIZING 12 (2009), *available at* <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1025&context=reports>. With the help of the Urban Justice, City University of New York Immigrant and Redugee Rights Clinic, and other legal partners, DWU has helped domestic workers recover over \$450,000 in stolen wages. POO, *supra* note 6, at 5. In 2002, DWU successfully campaigned to compel domestic worker employment placement agencies to educate workers and employers about basic labor rights. *Id.* Additionally, DWU offers ESL training, GED classes, and a Nanny Training Program in association with Cornell Labor Studies. The Nanny Training Program teaches domestic workers basic pediatrics and negotiation skills. WHITEFIELD, ALVAREZ, & EMRANI, *supra* note 94, at 21.

98. POO, *supra* note 6, at 6. Thousands of New Yorkers took action in support of domestic workers, demonstrating the relevance of domestic work relationships to the lives of so many different people, including the children of domestic workers and the children cared for by domestic workers. *Id.* at 7.

99. *Id.* at 2.

DWU was able to create these unlikely alliances between workers and employers, in part by focusing their campaign on common issues of structural inequality that affect domestic workers and many employers. These include the devaluation of women's work, the widening income inequality, and a shrinking social safety net that places stress on domestic workers and employers alike.<sup>100</sup> Thus, without glossing over the stark racial and economic inequities between domestic workers and their employers, DWU was able to develop strategic alliances with domestic employers who wanted to be fair employers—working mothers supporting other working mothers.<sup>101</sup>

Likewise, the emotional bonds generated between nannies and children were recast by DWU as further justification for equal rights. In the summer of 2009, DWU organized a march down Broadway led by the children of domestic workers and children of domestic employers, demanding the passage of the New York Domestic Workers' Bill of Rights.<sup>102</sup> Following the march, children spoke about the role that domestic workers had played in their own lives. As one child related, "[My nanny] raised me—which is not the same thing as being paid to do a job. She taught me, she accepted me, and if I had not known her, if she had not supplied those things, I don't know what I'd be now, or who."<sup>103</sup>

In building a broad base of allies, DWU sought to change individual relationships between domestic workers and their employers, as well as make structural changes within the industry. The campaign brought together labor, religious, and community groups united by the idea that "every one of us has needed care, provided care, or relied upon someone else for care at some point in our

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100. *Id.* at 11. Recognizing that many domestic workers are mothers, as are many domestic employers, Moms Rising, an advocacy organization based in New York was enlisted as another ally in the campaign. *Laura Flanders, supra* note 9 (interview with Deirdre Schiefeling, Center for Working Families).

101. *Poo, supra* note 6, at 13. This sentiment is shared by the organizers of high-road domestic employers as well. Explains Rachel McCullough, "We want to build a consciousness in which women can be in the same boat, without blurring real issues of privilege, racism, class, what it feels like to employ an immigrant woman of color, why don't we want to talk about it? . . . Our organizing model needs to analyze these relations of power in a new way. Those who fall under the label of employers have a stake in justice for all workers, building up the left and building up the percentage of workers who have access to collective bargaining." Telephone Interview with Rachel McCullough, *supra* note 48.

102. *Pictures from June 14th's Children and Families March*, DOMESTIC WORKERS UNITED (June 24, 2009, 10:21PM), <http://domesticworkersunited.blogspot.com/2009/06/pictures-from-june-14th-children-and.html>.

103. *Poo, supra* note 6, at 12.

lives.”<sup>104</sup> DWU bet, successfully, that if they framed the campaign around values, “people will choose fairness and love even when it cuts against their immediate self-interest.”<sup>105</sup>

## II. EMPLOYMENT RELATIONSHIP THEORY AND DOMESTIC WORK

Industrial relations and legal scholars conceptualize the employment relationship in various ways, using contract theory, neoliberal economic paradigms, human resources and pluralistic models, and models based on social norms. Central to almost every paradigm is the assumption that the relationship contains conflicts of interest between employers and their employees.<sup>106</sup> Each of the predominant theories and how they might frame the domestic employment relationship will be addressed in turn.

Contract theorists use a “norms versus contracts” framework to determine whether employers and employees have structured their relationship in ways that maximize their economic self-interests.<sup>107</sup> Viewed through that lens, employers and employees rely heavily on a combination of social norms and legal contracts, which either are “self-enforcing,” or require “judicial enforcement.”<sup>108</sup> Contract law

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104. *Id.* at 13.

105. *Id.*

106. See Christopher T. Wonnell, *The Influential Myth of a Generalized Conflict of Interests Between Labor and Management*, 81 GEO. L.J. 39, 39 (1992).

107. Michael L. Wachter, *Theories of the Employment Relations: Choosing Between Norms and Contracts* 1, 6 (Scholarship at Penn Law, Paper 70, 2005), available at [http://lsr.nellco.org/cgi/viewcontent.cgi?article=1074&context=enn\\_wps](http://lsr.nellco.org/cgi/viewcontent.cgi?article=1074&context=enn_wps).

108. See *id.* at 28 (acknowledging that in the context of employment regulations, certain protections are left to “judicial enforcement,” while others are left to a firm’s “hierarchical governance mechanism outside the purview of judicial review”). Informal norm governance is most effective in “repeat-play” situations, in which an aggrieved party can leverage the frequency of the employee-employer interaction to sanction and deter bad faith action. *Id.* The degree to which norms are relied upon more strongly than contract terms, or the extent to which such contracts require third party enforcement, depends on the nature of the employment, the employee, and the employer. *Id.* at 2. For example, in a unionized workplace, it is assumed that the collective bargaining agreement has been negotiated in order to maximize the economic self-interests of employees and employers. In the nonunion firm, employees and employers more heavily rely on norms to guide their behavior and resolve disputes. Enforcing contracts through litigation is “expensive and wastes resources”; therefore, even contracts that require judicial enforcement are considered most effective when they deter breach, rather than remedy breaches through judicial enforcement. *Id.* at 24. Contracts protect the interest of each party only to the extent that the contract contains terms that accomplish the goals of each party, and only to the extent that both parties expect

is considered to be an efficient tool for shaping the contours of an employment relationship only when workers voluntarily enter into their relationship and negotiate an agreement that has few, if any, mandatory terms.<sup>109</sup> This model treats issues of fairness and unequal bargaining power as issues of “opportunistic behavior and asymmetric information,” to be corrected by market forces.<sup>110</sup> The labor contracting literature is helpful when examining how domestic employees and employers resolve problems arising from the employment relationship, and how they integrate the four central elements of industrial organization theory: (1) match-specific assets, (2) asymmetric information, (3) risk-aversion, and (4) transaction costs.<sup>111</sup> In analyzing a particular employment relationship and determining whether norms or contract law should govern, contract theorists ask how the terms of the employment relationship work to protect the parties’ agreement with respect to these four elements. Do the terms of the contract maximize mutual interests? Are the mechanisms used to enforce the contract adequate?<sup>112</sup>

Under contract theory, employers are deterred from acting opportunistically because once the labor market discovers the poor conduct, they suffer reputational losses that outweigh any potential gains. Such an employer would face higher labor costs in the long run, since it would eventually be forced to pay higher wages to induce new workers to join the firm.<sup>113</sup> In the case of domestic workers, however, workers have to negotiate the terms of their employment individually, day-by-day, house-by-house, in situations where they lack any real bargaining power.<sup>114</sup> Very few domestic workers negotiate formal, written agreements regarding their employment.<sup>115</sup> Instead, domestic working conditions are often unilat-

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that the contract can and will be enforced. *Id.* Statutory protections, such as the NLRA, are justified by labor contract scholars based on the perceived vulnerability of most workers in their dealings with employers. When parties omit terms to a contract, “the courts fill the gaps with the default terms of contract law.” *Id.* at 22. Moreover, “there is widespread agreement that when a contract is inadvertently incomplete, the court should and, in fact, does fill the gap by adopting the term that the parties themselves would have written had they appreciated the contingency.” *Id.*

109. *Id.* at 31.

110. *Id.* at 3–7.

111. *Id.* at 6. The term “match-specific assets” refers to job-specific productivity an individual brings to his or her work, based on experience or training. *Id.* at 7.

112. *Id.* at 6–7.

113. *Id.* at 21.

114. POO, *supra* note 6, at 13.

115. 2008 NANNY SURVEY, *supra* note 14, at 4.

erally based on informal, non-standard, gendered, and race-based social norms and cultural values.<sup>116</sup>

Simply grafting contract principles onto the domestic employment relationship disregards the range of relational interests that are at the heart of that relationship.<sup>117</sup> For example, caring work, like most domestic work, requires attachment, affiliation, intimate knowledge, patience, and listening.<sup>118</sup> However, most models of employment relationship are based on concepts derived from the manufacturing sector, which focus on inputs, outputs, efficiency, and productivity. While not wholly inapplicable, the utility of contract theory, or any of the following prevailing theoretical models, in guiding regulation of the domestic workplace is inadequate.<sup>119</sup>

Neoclassical “egoist” economic models emphasize the role of the market in mediating those conflicts and balancing the inherently oppositional interests between employer and employee.<sup>120</sup> This paradigm makes the assumption that employers and employees act according to their own self-interest, within perfectly competitive labor markets.<sup>121</sup> The economic treatment of labor as a commodity considers domestic work to be “nonproductive,” since it is, in economic parlance, “immediately consumed” by the family.<sup>122</sup>

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116. Cf. Bruce E. Kaufman, *The Future of Employment Relations, Insights in Theory* 5 (W.J. Usery Workplace Research Group Paper Series, Working Paper No. 2010-1-3, 2010), available at [http://aysps.gsu.edu/usery/files/UWRG\\_10-1-3\\_Kaufman.pdf](http://aysps.gsu.edu/usery/files/UWRG_10-1-3_Kaufman.pdf) (“[T]he employment relationship creates an asymmetrical control and power relationship in the organization, moderated to various degrees by market forces, employment laws, social norms, and cultural values.”).

117. Graunke, *supra* note 9, at 158.

118. HONDAGNEU-SOTELO, *supra* note 3, at 10.

119. Cf. POO, *supra* note 6, at 9 (explaining that the DWU campaign is built on an organizing model that rejects a narrow definition of “material self-interest”—“the historical assumption on which a great deal of organizing models are based”—and envisions the possibility of more transformative relations between domestic employer and worker—“a campaign that mobilized many different communities of people based on an expanded sense of self-interest that acknowledged our relationships and our interdependencies”—than the more narrow conflict-driven approach of all of the existing theoretical models).

120. George R. Boyer & Robert S. Smith, *The Development of the Neoclassical Tradition in Labor Economics*, 54 *INDUS. & LAB. REL. REV.* 199, 210 (2001) (noting the determination of the neoclassical labor economist “to find maximizing behavior and equilibrium outcomes throughout the labor market”).

121. John W. Budd, *Fairness at Work, and Maybe Efficiency but Not Voice*, 29 *COMP. LAB. L. & POL’Y J.* 477, 479–480.

122. Smith, *supra* note 14, at 1855; see also POO, *supra* note 6, at 18 (“[B]ecause women’s work in the home has never been factored into national labor statistics, it is difficult to quantify the economic contributions of the domestic workplace.”).

Because it isn't considered to "build capital," domestic work has been persistently undervalued by mainstream economic theory.<sup>123</sup>

Another influential theoretical model is *Human Resource Management* (HRM), which takes a "unitarist"<sup>124</sup> view of the employment relationship as a long-term "partnership" between employers and employees who share certain interests.<sup>125</sup> The HRM model assumes that these interests may be harmonized simply by implementing the appropriate workplace policies and procedures.<sup>126</sup> To be sure, in the rhetoric over regulation, the shared interests of domestic workers and their employers (for example, safe workplaces and the well-being of a child or parent) are frequently overlooked, discounted, or ignored. However, the focus on the more formal approach of human resource policies is incongruous in the context of domestic work, since domestic employers often lack the time, resources, or experience necessary to develop a series of policies and practices that would apply, in most cases, to one employee only.

Alternatively, the pluralist model frames the employment relationship as a negotiated exchange between stakeholders in a democratic society.<sup>127</sup> Under this paradigm, the economic interests of employers and employees are both shared (such as the continued success of business) and competing (such as individual wages), and workers are entitled to human rights.<sup>128</sup> The pluralist model comes closest to capturing the particular dynamics of the domestic employment relationship. Strains of pluralism resound in the rationale for regulating domestic work, which includes the need to establish a level playing field so that domestic workers can assert basic

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123. See Peggie R. Smith, *Regulating Paid Household Work: Class, Gender, Race, and Agendas of Reform*, 48 AM. U. L. REV. 851, 899 (1999) ("Situated within the family sphere and outside the purview of capital, paid household labor, similar to unpaid household labor, was understood to involve the creation of simple use-values, i.e., those values that the employing family consumed immediately and thus were thought never to enrich capital.")

124. So called for its emphasis on the unity of interests among employees and their employers.

125. See David R. Hannah & Roderick D. Iverson, *Employment Relationships in Context: Implications for Policy and Practice*, in THE EMPLOYMENT RELATIONSHIP: EXAMINING PSYCHOLOGICAL AND CONTEXTUAL PERSPECTIVES 332, 337-343 (Jacqueline Coyle-Shapiro et al. eds., 2004) (explaining the relationship of inducements and contributions to the employer-employee dynamic).

126. Budd, *supra* note 121, at 480.

127. *Id.*

128. *Id.* See generally Bruce E. Kaufman, *The Social Welfare Objectives and Ethical Principles of Industrial Relations*, in THE ETHICS OF HUMAN RESOURCES AND INDUSTRIAL RELATIONS 23-59 (John W. Budd & James G. Scoville eds., 2005).

human rights of safety, security, and dignity.<sup>129</sup> However, the pluralist model does not adequately capture the unique conflicts and common ground that lie at the heart of the domestic employment relationship. While employees in a traditional firm may share an interest with their employer in the ongoing operation of the business, the failure of that business has economic, rather than emotional, ramifications. Categorizing domestic employers and employees as “stakeholders” in the pluralist tradition, presumes that each has a different stake in the same game. Yet, in the context of domestic employment, the privacy concerns of employers and the emotional bonds of employees distinguish the relationship from those found in most other industries, and the pluralist model is insufficient in explaining those differences.

Lastly, *Critical Industrial Relations* theory views the employment relationship as fundamentally unequal, and inseparable from systemic inequalities throughout the socio-political-economic system.<sup>130</sup> Under the critical model, the interests of employers and employees are inherently, interminably, in conflict.<sup>131</sup> This model best captures the perspective of some in the domestic work movement regarding the nature of labor relations more broadly, but the vision of Domestic Workers United and other labor advocacy organizations diverges on the question of whether common ground is reachable by domestic workers and those for whom they care.<sup>132</sup>

As set forth in Table 1, each of the models (other than contract theory) considers the need for regulation of the employment relationship differently. Mainstream economic (“egoist”) theory, which assumes perfectly competitive markets and self-interested workers and employers, considers workplace regulation necessary only in exceptional circumstances.<sup>133</sup> In the context of domestic work, this approach ignores factors that impel domestic workers and employ-

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129. Domestic Workers’ Bill of Rights, ch. 481, §1, 2010 N.Y. Sess. Laws 1315 (McKinney).

130. See Samuel Bowles & Herbert Gintis, *Contested Exchange: New Microfoundations for the Political Economy of Capitalism*, 18 POL. & SOC. 165, 177–82 (1990); see also Paul Thompson & Kirsty Newsome, *Labor Process Theory, Work, and the Employment Relationship*, in THEORETICAL PERSPECTIVES ON WORK AND THE EMPLOYMENT RELATIONSHIP 133, 135–36, 147 (Bruce E. Kaufman ed., 2004).

131. Budd, *supra* note 121, at 480; see also Kaufman, *supra* note 113, at 12 (“The essence of the employer-employee relationship under capitalism, from a Marxist perspective, is domination, control and exploitation of labor in order to provide profit so firms can further accumulate capital.”).

132. See Telephone Interview with Rachel McCullough, *supra* note 48 (explaining that while DWU educated the domestic workers themselves, JFREJ’s focus has been on outreach to employers).

133. Budd, *supra* note 121, at 480.

<b>Models of the Employment Relationship and Government Regulation</b>				
<b>Model</b>	<b>View of Labor</b>	<b>View of Labor Markets</b>	<b>View of Employee-Employer Objectives</b>	<b>Resulting View of Government Regulation</b>
<b>Egoist</b>	A commodity; a rational self-interested economic agent.	Perfectly competitive.	Emphasis is on self-interest; exchanges occur when self-interest align.	Minimal. Fix market failures only when regulation does not do more harm than good.
<b>Unitarist</b>	A psychological being.	Imperfectly competitive.	Emphasis is on shared employer-employee interests; alignment occurs with effective human resource policies.	Low. Promote cooperation and prevent destructive competition.
<b>Pluralist</b>	An economic and psychological being; a democratic citizen with rights.	Imperfectly competitive.	Emphasis is on a mixture of shared and conflicting interests.	Essential. Establish safety nets and equalize bargaining power to balance efficiency, equity, and voice.
<b>Critical</b>	An economic and psychological being; a citizen with democratic rights.	Imperfectly competitive; part of broader, unequal institutional structure.	Emphasis is on inherent conflicts of interest; power differentials lead to exploitation.	Mixed. Important for protecting employees. Inadequate because of systemic imbalances inherent in capitalism.

Table 1

ers to act contrary to their self-interest (such as immigration status, emotional bonds, language barriers, and lack of alternative care options). The unitarist model emphasizes workplace-specific human resource policies over more expansive regulation.<sup>134</sup> Under that

134. *Id.*

model, regulation is needed only to thwart “destructive competition” (for example, immigration reform, minimum wage, and safety standards), and to cover those few employers that do not understand the value of cooperation.<sup>135</sup> The pluralist approach considers regulation essential to protecting basic democratic rights, by establishing the conditions necessary for workers to negotiate fair terms and conditions of their employment.<sup>136</sup> This model would support more detailed, expansive, and holistic regulation of domestic work, and is designed to correct the imbalance of power experienced by domestic workers in one-on-one negotiations. Lastly, while critical models take a view similar to that taken by the pluralists that government regulation is necessary, critical scholars do not believe that regulation itself is capable of fully mitigating the pervasive socio-political-economic inequalities in the domestic work industry.<sup>137</sup>

### III. DOMESTIC EMPLOYMENT MODEL

A “Domestic Employment” model that acknowledges the differences inherent in domestic work, without allowing those differences to perpetuate a second-tier status of rights, could help shape regulation of the industry. For example, the close bonds formed between a nanny or elder caregiver and the family members for whom she cares should be seen as a core *asset* of the employment relationship, not as a justification for its continued exclusion from workplace safety laws. Likewise, the privacy concerns of domestic employers should not be wholly discounted when considering ways of enforcing domestic workplace rights within the confines of an individual’s home.

Integrating this Domestic Employment model into the existing table of theoretical frameworks (see Table 2, *infra*), the Domestic Employment model’s view of labor and labor markets is substantially similar to that of the pluralist and critical paradigms. Domestic workers possess fundamental human and democratic rights, and the labor markets in which they work are not perfectly competitive. Broader, unequal institutional structures continue to serve as barri-

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135. *Id.*

136. *Id.* at 482; see also Bruce E. Kaufman, *The Social Welfare Objectives and Ethical Principles of Industrial Relations*, in *THE ETHICS OF HUMAN RESOURCES AND INDUSTRIAL RELATIONS* 23, 43–56 (John W. Budd & James G. Scoville eds., 2005).

137. Budd, *supra* note 121, at 482; Kaufman, *supra* note 116, at 12 (“The essence of the employer-employee relationship under capitalism, from a Marxist perspective, is domination, control and exploitation of labor in order to provide profit so firms can further accumulate capital.”).

ers to domestic workforce in attaining and asserting equal rights—including, but not limited to, immigration laws, racism, unequal access to education, a dismantling social safety net, and gender-based discrimination.

The objectives of domestic employers and employees are a mix of shared and conflicting interests. Domestic employers, most of whom are paying domestic workers out of the wages they earn in their primary occupations, have an interest in keeping the cost of care down. But they also have an interest in ensuring the quality of care provided by the domestic worker to their child, their parent, or their home. That interest frequently overlaps with the interest of domestic workers, many of whom have developed emotional connections with the children or parents of their employers in providing quality care. But the domestic worker, who often has her own childcare, elder care, and other economic and non-economic needs, certainly has an interest in maximizing her compensation. The intersection of these interests provides opportunities for creating a more transformative employment relationship, and one that can be regulated in two ways: with industry regulations that establish a “floor” of workplace standards, and with regulations that incentivize employers and employees to negotiate terms and conditions that exceed those standards.

Domestic Employment Relationship and Government Regulation				
Model	View of Labor	View of Labor Markets	View of Employee-Employer Objectives	Resulting View of Government Regulation
<b>Domestic Employment</b>	An economic and psychological being; a citizen with democratic rights.	Imperfectly competitive; part of broader, unequal institutional structure.	Mixture of shared and conflicting interests; power differentials lead to exploitation; opportunities for transformative relationship through shared interests.	Essential. Establish core industry standards, collective bargaining rights, co-regulatory regimes. Larger issues of immigration, institutional discrimination.

Table 2

*A. The Domestic Employment Relationship*

In framing the domestic employment relationship, it is necessary to recognize the differences in the nature of domestic work (for example, privacy concerns, emotional bonds, and isolation) without allowing those distinctions to perpetuate the industry's "second-tier" status and regulatory void. This new model recognizes opportunities for transformative organizing around shared interests (including the well-being of a child or elderly person, inequities experienced by working women generally, and the shrinking social safety net). In some ways, the lack of an existing regulatory regime in the domestic work industry (the result of enduring racism, sexism, and anti-immigrant animus) offers workers and high-road employers an opportunity to restructure their relationship.

The campaign to pass the Domestic Workers Bill of Rights revealed opportunities that had previously been viewed only as limitations. DWU led a campaign that mobilized many different communities of people, based on a more expansive and inclusive sense of "self-interest," which acknowledged the interdependence created by the domestic employment relationship. As Ai-jen Poo, writing on behalf of Domestic Workers United explains, "We learned that the historical assumption on which a great deal of organizing models are based—that we need to build our campaigns based on people's material self-interest—is not the whole story."<sup>138</sup>

One natural intersection of interests lies in the well being of the child or elderly person cared for by both the domestic worker and employer. As one domestic employer explains, "A lot of [working parents] want to make sure that their children are well taken care of and that the person caring for their child is happy, feels valued, feels well paid. That has a direct impact on how she cares for my daughter."<sup>139</sup> While "happy employees" are considered by HRM and unitarist theories as engines of productive workplaces, in the case of domestic work, the employer's self-interest in ensuring that the domestic workers he or she employs is difficult, if not impossible, to quantify using standard economic metrics.

Another intersection of interests in regulating the home as workplace is safety. While the type of home-based inspections traditionally under workplace health and safety laws such as OSHA have traditionally been dismissed because of the complicated privacy issues that arise when the workplace is in a private home, the Domes-

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138. Poo, *supra* note 6 at 9.

139. Laura Flanders, *supra* note 9 (Interview with Dara Silverman, Jews for Racial and Economic Justice).

tic Employment model takes into account benefits incurred by employers as a result of such regulation. For example, standards regarding the toxicity of cleaning products or lifting requirements benefit the employee (by reducing the employee's exposure to toxic chemicals, and reducing the chance of injury from falls or strain), as well as employer (by reducing the employer's exposure to toxic chemicals, and reducing the chance of injury to possessions from being dropped). When the home is the workplace, safety standards benefit everyone in the home, including domestic employers and their families.<sup>140</sup>

As partners in the effort to transform the domestic work industry, high-road domestic employers have had to "explain to themselves, their neighbors, and their community why peace, justice, dignity, and respect in one's home [is] in their interest."<sup>141</sup> Likewise, a broader definition of "self-interest" helped to motivate and embolden domestic workers to organize the campaign for the New York Domestic Workers' Bill of Rights. Explains DWU organizer Aijen Poo, "They didn't only talk about bigger paychecks or days off for themselves. [T]hey talked about their mothers and their grandmothers who had done this work before, and they talked about their children for whom they wanted the opportunity to choose different futures."<sup>142</sup>

In regulating the domestic employment relationship, these broader, more inclusive self- and mutual-interests must be a part of a framework that undergirds a structure of core workplace standards, dignity, and respect. This approach provides a voice for domestic workers, both individually in the workplace, and collectively within the industry. Most importantly, it includes methods of enforcing standards that are responsive to the particular realities of domestic work.

### *B. Regulating the Domestic Employment Relationship*

The Domestic Employment model relies upon a tripartite regulatory framework: employee voice, core industry standards, and pragmatic enforcement. Each leg is interdependent. The direct participation of domestic workers (their "voice") is critical to the development of meaningful, relevant, and enforceable industry

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140. See Poo, *supra* note 6, at 11 (explaining that "[s]tandards benefit everyone" was one of the DWU campaign slogans in support of the Domestic Workers' Bill of Rights to highlight the "interconnectedness" between all people); see also Smith, *supra* note 14, at 1843.

141. Telephone Interview with Rachel McCullough, *supra* note 48.

142. Poo, *supra* note 6, at 10.

standards. These regulatory priorities are not unique to the Domestic Employment model, and are central to other pluralistic and critical models as well. However, the unique nature of domestic work, and the relationships that such work engenders, require a new approach to achieving each of these regulatory goals. Pluralist models bring us closer to an understanding of how the domestic work industry should be regulated than do neoliberal economic models that rely entirely on free market assumptions, or do contract theories that ignore fundamental inequalities of bargaining power between domestic employers and employees. However, such models do not go far enough in balancing the rights of domestic workers with the practical realities and privacy issues that arise when the workplace is a private home, nor do they recognize the complicated set of emotions between workers and employers, and workers and employers' loved ones. The Domestic Employment model further refines the pluralist stakeholder approach and, in its assessment of employee voice, core industry standards, and pragmatic enforcement, it incorporates many of the structural considerations embedded in the critical models.

### 1. Employee Voice and Collective Representation

Promoting and protecting the right of domestic workers to negotiate for better working conditions is a necessary and feasible means of raising standards across the domestic work industry.<sup>143</sup> While collective bargaining is hard to imagine in the domestic work industry in which isolated workers negotiate individually with employers, it is not unprecedented. Workers in a range of similarly isolated industries have surmounted these obstacles, including residential building superintendents, musicians, writers, and home healthcare workers.<sup>144</sup> The recent successes of Domestic Workers United dispel the myth that isolation and intimidation are insurmountable obstacles to organizing domestic workers.<sup>145</sup> Describing

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143. DWU REPORT, *supra* note 75, at 10–11 (outlining a four-step plan for pursuing collective bargaining rights on behalf of domestic workers).

144. *Id.* at 13.

145. For example, unions across the country have used innovative approaches to overcome obstacles to organizing child-care workers. AFSCME, SEIU, the United Auto Workers, and The Association of Community Organization for Reform Now (ACORN) have successfully organized low-wage child-care providers in New York, Illinois, Massachusetts, Seattle, Pennsylvania, and Los Angeles. Paul F. Brooks, *New Turf for Organizing: Family Child Care Providers*, 29 LAB. STUD. J. 45, 45–48 (2005). For a detailed account of the historical exclusion of domestic workers from mainstream labor unions, see DOROTHY SUE COBBLE, *THE OTHER WOMEN'S MOVEMENT: WORKPLACE JUSTICE AND SOCIAL RIGHTS IN MODERN AMERICA*

these obstacles in the context of the New York campaign, one organizer explained, “There were potentially many employer-families who could be moved. And there were certainly many workers who could be organized.”<sup>146</sup> Through these campaigns, domestic workers, employers, and their allies have developed an innovative, transformative organizing model aimed at “improving domestic workers’ whole lives as workers, parents, caregivers, and community members.”<sup>147</sup> Any system of collective representation for domestic workers would require cross-workplace employee organizations and, for purposes of collective bargaining, multi-employer units.<sup>148</sup> Indeed, DWU has recommended the development of collaborative, community-based mechanisms for enforcing standards within the industry.<sup>149</sup>

Contemplating a system of collective representation in the absence of NLRA sanctioned bargaining is not unique to the domestic work industry. Professor Cynthia Estlund, the Catherine A. Rein Professor of Law at New York University School of Law, has developed a model of “co-regulation” that seeks to improve and enforce

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(2004) and Smith, *supra* note 14, at 1853–1855 (noting the exclusion of domestic service from developing labor standards). Smith further observes that in the context of home health care, workers often care for clients who rely on public funds for health care, giving rise to two models of third party arrangements, traditional agency-based care or consumer-directed care:

Under the agency-based care model, a home-care agency hires, trains supervises, and assigns workers to provide publicly funded services to eligible clients. In such a scenario, the agency qualifies as the worker’s employer. The second approach to delivering publicly funded home care is based on a consumer-directed care model that delegates to the client some responsibility for recruiting, hiring, training, and supervising the worker. Because clients often exercise considerable control over workers under this model, the clients may qualify as employers. Under the consumer-directed care model, however, third-parties—including public agencies that may administer publicly funded home-care services—may qualify as “joint employer” such that the law regards both the individual client and the agency as the workers’ employers.

Smith, *supra* note 14, at 1862–1863.

146. POO, *supra* note 6, at 13.

147. WHITEFIELD, ALVAREZ & EMRANI, *supra* note 97, at 28. The formation of the “Excluded Worker Congress” at the 2010 U.S. Social Forum reflects a growing movement to organize all “excluded workers,” those who by law or policy are denied the right to organize and other fundamental labor rights, including (but not limited to) farm workers, guest workers, day laborers, domestic workers, and workers in Right to Work states. See EXCLUDED WORKERS CONGRESS, UNITY OF DIGNITY: EXPANDING THE RIGHT TO ORGANIZE TO WIN HUMAN RIGHTS AT WORK 3 (2010), [http://www.excludedworkerscongress.org/images/stories/documents/EWC\\_rpt\\_final4.pdf](http://www.excludedworkerscongress.org/images/stories/documents/EWC_rpt_final4.pdf).

148. See generally WHITEFIELD, ALVAREZ & EMRANI, *supra* note 97, at 37–47.

149. *Id.* at 39.

workplace standards even in the absence of formal union representation.<sup>150</sup> Under a system of co-regulation, employee voice in workplace decisions is supported by internal employee committees and protected through independent, external monitors. The Domestic Employment model builds upon this framework by acknowledging that high road domestic employers can, and should, play a slightly different role in “co-regulation,” because the domestic employment relationship is unlike most other employment relationships. Estlund’s framework contemplates “internal employee committees” that would balance presumed employer authority structures, including management hierarchies and human resource departments. It also envisions a workplace that is larger than that of most domestic workers, for whom employee voice must potentially be fostered and protected at two levels: at the level of the individual relationship between the domestic employee and employer, and at a collective level in multi-employer standard setting and negotiations. Moreover, it is difficult to determine where high-road employers might fit in the co-regulatory model. They are neither employee insiders, nor truly independent outside monitors. The Domestic Employment model reconciles the co-regulatory model with the unique qualities of domestic work.

A critical step toward developing an effective system of co-regulation in the domestic work industry is the extension of collective bargaining rights to domestic workers. Recent state-based attacks on the collective bargaining rights of public sector workers suggest that an extension of those rights to domestic workers, in the current political climate, would require a tough battle. However, even in the absence of formal collective bargaining rights, domestic workers and “high road” employers—those who strive to meet or exceed industry standards—can pursue a system of workplace governance. Multi-employer domestic worker committees, perhaps organized geographically, can work together with domestic employers to hash out collective standards. By convening meetings of domestic employers and workers in particular neighborhoods, both groups have the opportunity to engage in conversations about wages and benefits that can, on an individual basis, feel awkward or imbalanced. Workers can talk more freely about the need for paid sick

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150. CYNTHIA ESTLUND, *REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION* 21–23 (2010). Prof. Estlund’s model emerges in light of the “bleak prospect” for “reviving and dramatically extending” the New Deal models of collective bargaining and standard setting in the U.S., and recognizes that the employer-driven move toward self-regulation has coincided with the drastic decline in unionization. *Id.* at 21–22.

leave or higher wages, and employers can share concerns about privacy and the quality of child or elder care, in an environment less fraught with fear or trepidation. Through these discussions, domestic workers and employers can establish standards—5 days paid sick leave, for example—based on a commitment to mutual respect, rather than based on word-of-mouth speculation. Enforcing those agreed upon standards is a separate, but equally important, component of the Domestic Employment model.

Until recently, the voices of domestic workers in setting standards and holding employers accountable to those standards has been largely piece-meal. Domestic workers are best positioned to determine how the work should be done, and how standards could be enforced. And yet, for all the reasons discussed above, domestic workers have found it difficult to assert their voices, either individually in negotiation with employers, or collectively to establish industry-wide standards. *Shalom Bayit*, a project of the New York City-based Jews for Racial and Economic Justice (JFREJ), has developed campaigns aimed at radically transforming that dynamic.<sup>151</sup> The campaign aims to bring together progressive domestic employers and the broader Jewish community to support domestic workers' rights, drawing on traditional Jewish values and progressive unionism. JFREJ and DWU have proposed neighborhood-based standard-setting negotiations among organizations of domestic workers and high road employers. The Domestic Employment model acknowledges the role that high road employers, like those organized by JFREJ, can play in helping to transform this industry.

Because the domestic employment relationship has been marked, historically, by a stark imbalance of power, domestic working conditions would improve with the building of power by domestic workers. Nonetheless, the work of JFREJ and DWU suggest that, at least in the case of high road employers, better working conditions may also be attained through more effective, open communication between domestic employees and employers about certain workplace issues. By legitimizing employer concerns surrounding privacy, autonomy (especially as relates to discipline and termination), and emotional attachments, the Domestic Employment model is capable of bringing together domestic employers and employees not as purely adversarial parties or co-equal "stakeholders," but as two groups of people whose unique concerns set them apart

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151. *About the Shalom Bayit: Justice for Domestic Workers Campaign*, JEWS FOR ECONOMIC & SOCIAL JUSTICE, <http://www.jfrej.org/shalom-bayit-campaign> (last visited Feb. 7, 2012). "Shalom Bayit" means "peace in the home," in Hebrew. REUBEN ALCALAY, *THE COMPLETE ENGLISH-HEBREW DICTIONARY* 1776, 2674 (1959).

from most other employer-employee pairings. The Domestic Employment model contemplates the inclusion of high road employers in collaborative, community-based conversations, negotiations, and public awareness campaigns, in order to strengthen the voices of domestic workers individually and collectively.

## 2. Core Industry Standards

Given the persistent exclusion of domestic work from local, state, and federal labor and employment laws, any regulation of the industry must include a statutory floor of rights and protections, such as minimum wages and overtime, safety standards, paid sick leave, and protections against discrimination and harassment. Professor Estlund uses the term “responsive regulation,” to describe a regulatory approach that incentivizes employers to comply with or even exceed standards, while sanctioning abusive employers.<sup>152</sup> While much of the litigation and press surrounding domestic work has focused on so-called “low-road employers” who take advantage of the isolation and vulnerability of their domestic employees, less attention has been paid to the role of high road domestic employers.<sup>153</sup> Indeed, several organizations of domestic employers were among the most vocal supporters of the New York Domestic Workers’ Bill of Rights, and can help establish core industry standards that protect the rights of domestic workers, while taking into account the unique concerns (such as privacy) of domestic employers.<sup>154</sup> The Domestic Employment model builds upon Estlund’s co-regulatory framework, and sets even higher expectations for high road employers to not only comply with or exceed standards, but indeed, to help establish those standards in the first place.

Through organizing a network of domestic employers, JFREJ is helping to accomplish this leg of the Domestic Employment model; its members have established best practices across the industry and

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152. ESTLUND, *supra* note 150, at 217.

153. Moreover, formal trade associations of domestic employers do not exist to protect their rights; in other industries, these types of organized associations can help educate their members about applicable laws. NEW YORK STATE DEP’T OF LABOR, REPORT ON OUTREACH EFFORTS FOR DOMESTIC WORKERS LEGISLATION 1 (2010), available at <http://www.labor.ny.gov/legal/laws/pdf/domestic-workers/report-to-governor-outreach.pdf>. For an example of a call for a high road approach in the care sector industries like child care, see generally Nancy Folbre, *Demanding Quality: Worker/Consumer Coalitions and “High Road” Strategies in the Care Sector*, 34 POL. & SOC’Y 11 (2006).

154. POO, *supra* note 6, at 13–16.

serve as role models within their broader communities.<sup>155</sup> JFREJ has developed an outreach and education program through which domestic employers encourage their peers to make concrete improvements in their employment practices by first taking stock of the standards they have set, and then taking “one step up” (for example, by providing five paid holidays instead of three, or by entering into a written contract rather than verbal, ad hoc, agreements).<sup>156</sup> On the national level, “Hand in Hand” is an employers’ association that is helping domestic employers understand the New York Domestic Workers’ Bill of Rights, and that advocates for the passage of similar legislation in other states.<sup>157</sup> Through employer questionnaires, surveys, handbooks, and personal conversations, Hand in Hand hopes to formalize and “professionalize” the domestic employment relationship.<sup>158</sup>

Members of JFREJ’s “Employers for Justice” network are also expected to speak out publicly when egregious cases of violence and abuse are revealed in the industry. In that way, JFREJ helps to set and enforce these core industry standards, by speaking out to say, “There is another way. I am an employer, and I am an employer for justice.”<sup>159</sup> Certainly employers across a broad spectrum of in-

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155. *About the Shalom Bayit: Justice for Domestic Workers Campaign*, *supra* note 151.

156. See Jews for Economic & Social Justice & Hand in Hand, *Take One Step Up with Hand in Hand*, HAND IN HAND: THE DOMESTIC EMPLOYERS ASSOCIATION, available at [http://domesticemployers.org/wp-content/uploads/2011/04/2010\\_One\\_Step\\_Up\\_Form.pdf](http://domesticemployers.org/wp-content/uploads/2011/04/2010_One_Step_Up_Form.pdf) (last visited July 27, 2011).

157. See *Who We are*, HAND IN HAND: THE DOMESTIC EMPLOYERS ASSOCIATION, <http://domesticemployers.org/who-we-are/> (last visited Jan. 31, 2012).

158. A questionnaire developed by Hand in Hand includes questions for domestic employers like, “Have you clearly defined your employee’s responsibilities in the form of a contract or written agreement, so that both parties understand their obligations and responsibilities?” Jews for Economic & Social Justice & Hand in Hand, *supra* note 156. Additional “one step up” questions follow, such as, “Do you have a defined schedule for evaluation that includes a review of employer and employee expectations and experience and a plan of action to respond to any concerns?” The questions themselves appear to set market standards, with questions covering “fair wages” (e.g., severance and the living wage of \$15–\$18), benefits (e.g., insurance coverage and two weeks’ paid vacation), and advocacy (e.g., conversations about workers’ rights that have led to change in employment practices and communicating with legislators about these rights). See Jews For Economic & Social Justice & Hand in Hand, *Take One Step Up with Hand in Hand*, HAND IN HAND: THE DOMESTIC EMPLOYERS ASSOCIATION, available at [http://domesticemployers.org/wp-content/uploads/2011/04/2010\\_One\\_Step\\_Up\\_Form.pdf](http://domesticemployers.org/wp-content/uploads/2011/04/2010_One_Step_Up_Form.pdf) (last visited July 27, 2011).

159. See *generally Justice for Domestic Workers*, JEWS FOR ECONOMIC & SOCIAL JUSTICE, available at <http://www.jfrej.org/shalom-bayit-campaign> (last visited Feb. 11, 2012).

dustries believe in fair working conditions, access to justice, and other tenets of corporate social responsibility. What is unique about the Domestic Employment model, however, is that it requires domestic workers be leaders and active participants in the process of establishing core industry standards, setting those standards through a combination of statutory minimums and collective negotiations with domestic employers.

### 3. Pragmatic Enforcement

Enforcing core standards in the domestic work industry will require the same level of engaged, direct participation by domestic workers, as well as a reflexive, creative, and vigorous monitoring system. The nature of the workplace as the private home, discussed in greater detail above, makes the traditional means of enforcing statutory standards and labor agreements (pickets, strikes,<sup>160</sup> and unannounced inspections<sup>161</sup>) difficult, if not impossible.

At minimum, any regulation of the domestic work relationship must include independent domestic worker organizations as part of the enforcement framework, as described in both the “voice” and “collective standards” sections, *supra*. Just as with standard setting, such organizations would ideally be permitted by law to engage in collective bargaining. Yet even in the absence of formal collective bargaining rights, such organizations can play a vital enforcement role.<sup>162</sup> By educating domestic workers and employers about indus-

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160. In *State v. Cooper*, the Minnesota Supreme Court heard the case of a domestic worker, arrested and charged with disorderly conduct for picketing in front of his former employer's home to protest his recent termination. 285 N.W. 903, 904 (Minn. 1939). In that case, the court held that the chauffeur was not protected by state labor law protecting workplace picketing, even though the home was his place of employment, because “the home is a sacred place for people to go and be quiet and at rest and not bothered with the turmoil of industry[.]” *Id.* at 905 (internal quotation marks and citation omitted). It is “a sanctuary of the individual and should not be interfered with by industrial disputes.” *Id.* at 904–905 (internal quotation marks and citation omitted). For a further discussion of *State v. Cooper*, see Peggie R. Smith, *Organizing the Unorganizable: Private Paid Household Workers and Approaches to Employee Representation*, 79 N.C. L. REV. 45, 103–109 (2000).

161. Student writer Terri Nilliasca aptly points out that the protections afforded to the “private home” are not race-neutral. Nilliasca, *supra* note 44, at 381. In fact, the private homes (whether owned or rented) of poor people of color are frequently, and disproportionately, subject to public inspection, either through police searches or in connection with welfare benefits. *Id.* at 392.

162. See ESTLUND, *supra* note 150, at 148–49 (arguing for a new form of employee representation beyond formal union structures). Prof. Estlund warns that without assurance that courts and regulators are capable (or willing) to distinguish real from cosmetic compliance, co-regulation can devolve into a “thinly disguised form of deregulation.” *Id.* at 17.

try standards and legal protections, helping workers to report violations of such standards, and uniting an inherently decentralized and dispersed group of workers, independent domestic worker organizations can help domestic workers build the collective strength and individual confidence necessary to enforce and advance domestic workplace standards. Rooted in communities of low-wage, immigrant workers, many domestic worker cooperatives, collectives, and worker centers have already helped to enforce evolving industry standards through formal and informal mediation and litigation, and by providing domestic workers with leadership training and organizing opportunities.<sup>163</sup>

For example, members of the San Francisco-based *La Colectiva* (“Organized Labor for an Organized Home”) receive \$70 for a minimum of three hours of labor, and \$15 for each additional hour.<sup>164</sup> The women meet weekly to develop strategies for improving workplace safety (such as through the use of non-toxic cleaning products and ergonomics), and they develop advocacy, communication, and leadership skills through a set of classes on English, computer training, and workplace rights.<sup>165</sup> In order to establish and enforce mutual expectations and industry standards, *La Colectiva* developed an employer’s handbook.<sup>166</sup> Designed using an aesthetic likely to appeal to the progressive, Bay Area professional milieu, the “conscientious cleaning service on a mission” helps guide conversations between domestic workers and employers about their relationship.<sup>167</sup> Artsy illustrations of appliances, furniture, and cleaning supplies, in both English and Spanish, are to be used in setting cleaning priorities.<sup>168</sup> Explicit pricing structures and policies on non-toxic cleaners are also included.<sup>169</sup>

Similar “eco-friendly” housecleaning co-ops have emerged in other cities,<sup>170</sup> including New York, where the Brooklyn-based

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163. See generally Janice Fine, *Worker Centers: Organizing Communities at the Edge of the Dream*, 50 N.Y.L. SCH. L. REV. 417 (2005) (documenting the efforts of various worker centers).

164. LA COLECTIVA, EMPLOYER HANDBOOK 6, available at <http://lacolectivasf.org/brochure.pdf>.

165. Preeti Shekar, *Day Labor Program Unites Politics and Services Urban Habitat*, 14 RACE, POVERTY & THE ENV'T 42, 42–43 (2007), available at <http://www.urbanhabitat.org/node/1183>.

166. LA COLECTIVA, *supra* note 164.

167. *Id.* at 10.

168. *Id.* at 3–7.

169. *Id.* at 6–7.

170. Other such co-ops include UNITY Housecleaners Cooperative in Long Island, N.Y., and Las Senoras of St. Mary in Staten Island, N.Y. Vanessa Bransburg, *The Center for Family Life: Tackling Poverty and Social Isolation in Brooklyn with Worker*

Center for Family Life supports the *Si Se Puede!* (Yes We Can!) Cleaning Cooperative, as well as child-care, interior painting, and elder care co-ops.<sup>171</sup> Co-op members operate as individual businesses, and have the flexibility to work as much or as little as they would like.<sup>172</sup> By organizing together, however, the women have been able to increase their wages from an average of \$7 to \$8 an hour, to an average of \$20 an hour, as a result of several interwoven factors.<sup>173</sup> First, by marketing themselves as a co-op, the members were able to tap into a market of middle-class, progressive clients that are sympathetic to the goals of the immigrant-run co-op.<sup>174</sup> By developing a standard contract, members are able to confidently assert a set of rates and standards (subject, in some cases, to negotiation).<sup>175</sup> Third, the women are able to enforce those standards, often informally, by refusing to work for clients who refuse to comply; and the success of the co-op's marketing tactics gives the members greater autonomy in turning down work, given the more consistent stream of new business.<sup>176</sup> In creating the *Si Se Puede!* Co-op, organizers looked to Women's Action to Gain Economic Security (WAGES), another San Francisco Bay Area organization, which "incubat[es]" worker owned "green cleaning co-ops."<sup>177</sup> For over five years, WAGES has partnered with Seventh Generation, a manufacturer of "eco-friendly cleaning products," which has garnered resources and expertise for co-op members, and public acclaim for Seventh Generation's commitment to social equity.<sup>178</sup>

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*Cooperatives*, 2 GRASSROOTS ECON. ORGANIZING 13 (2011), available at <http://geo.coop/node/636>. The *Si Se Puede!* Co-op has been in existence for five years, and provides cleaning services to over 1,000 households and offices; members of the coop have more than doubled their hourly wage, from \$7-\$8/hour at their previous jobs, to \$20/hour for work they secure through co-op referrals. *Id.* at 14.

171. Members of the Beyond Care Childcare Cooperative use a contract adapted from a model developed by Domestic Workers United. *Id.* at 15. The contract clearly sets out work duties, vacation days, sick days, overtime, cancellation fees, and an acknowledgment that the "[c]lient understands that labor laws, regardless of race, gender, immigration status, age, sexual orientation or religion, protect members." *Id.*

172. Telephone Interview with Vanessa Bransburg, Cooperative Coordinator, Center for Family Life (July 19, 2011).

173. *Id.*

174. *Id.*

175. *See id.* ("[The contract] is standardized, and from that the member has the confidence to say 'I'm not going to accept work that doesn't meet these standards.'").

176. *Id.*

177. Hilary Abell, *WAGES Model and the Value of Partnerships*, 2 GRASSROOTS ECON. ORGANIZING 27 (2011), available at <http://geo.coop/node/635>.

178. *Id.*

Under the Domestic Employment model, co-ops and collectives can function as an important, alternative vehicle for enforcing workplace standards in the largely unregulated and undervalued domestic work industry. Such organizations help domestic workers reduce the effects of isolation, inconsistent schedules, and one-on-one negotiations. By pooling resources, domestic workers can develop marketing strategies and strategic partnerships (for example, Seventh Generation, UC Berkeley Center on Occupational Health), needed to sustain the co-op ability to enforce such standards over the long haul. However, developing a co-op, collective, or worker center requires a tremendous amount of up-front resources. And, even when successful, the scale is limited, at least initially. Participation in a co-op or collective is often transformational for the individual domestic worker-members, but a transformation of the domestic work industry requires solutions that can be applied industry-wide. The Domestic Employment model, therefore, views high road employers and local government as key partners in developing effective enforcement strategies that do not necessarily require the resources and organizational prowess required for a successful co-op or collective.

#### IV. THE DOMESTIC WORKER BILL OF RIGHTS: A RELATIONSHIP BASED ANALYSIS

As a general premise, the stated objectives of any particular piece of workplace legislation should be aligned with the drafters' conception of the particular employment relationship being regulated (for example, a pluralist's vision for workplace regulation should, ideally, be reflected in legislation that is inclusive of various stakeholder perspectives). Such legislation should, in turn, be implemented in such a way that the regulation achieves those stated goals.<sup>179</sup> A sponsor's draft of the Domestic Workers' Bill of Rights paints a pluralistic picture of a vulnerable workforce that needs legislation to protect basic human rights, explaining that "many domestic workers fall through the cracks of U.S. government," and

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179. Budd, *supra* note 121, at 478. Advocating for greater transparency by public policymakers about the assumptions upon which workplace laws are based, Stephen F. Befort and John W. Budd have proposed a framework to analyze individual pieces of workplace legislation. *See generally id.* This framework requires three separate inquiries: (1) an analytical undertaking that asks whether the regulation is coherent and consistent with the objectives of that legislation; (2) a normative assessment of the goals of the legislation; and (3) a pragmatic appraisal that asks whether the legislation will work as intended. *See generally id.*

must thus shoulder the burden of ensuring that employers comply with basic workplace standards and human rights.<sup>180</sup> And because many domestic workers are “isolated, exploited and psychologically abused by their employers,” legislation is necessary to protect employees working in homes.<sup>181</sup> Using the pluralist model of employment relationship, the New York Domestic Workers’ Bill of Rights helps improve working conditions for domestic workers, while considering different stakeholders.<sup>182</sup> In order to determine whether this pioneering legislation is likely to be effective given the conception of the employment relationship articulated by the Domestic Employment model, we must evaluate whether the law (i) fosters employee voice, (ii) establishes core industry standards, and (iii) contains pragmatic means of enforcement.

*Does the regulation foster genuine employee voice?* As described above, the Domestic Employment model builds upon the pluralistic “co-regulatory” approach of Estlund’s model, which requires that domestic workers have the “ability to provide meaningful input[,] individually and collectively,” into workplace decisions, industry standards, and enforcement.<sup>183</sup> Although the voices of domestic workers (and high road employers) were critical to the passage of the New York Domestic Workers’ Bill of Rights,<sup>184</sup> the version of the law that was finally enacted did not include the right to collectively bargain with employers.<sup>185</sup> This omission denied to domestic workers one of the most direct means of raising their voices, shaping

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180. S. 2311E, 2009 Leg., 232nd Sess. (N.Y. 2009), *available at* <http://open.ny.senate.gov/legislation/bill/S2311E-2009>.

181. *Id.*

182. Domestic Workers’ Bill of Rights, ch. 481, §1, 2010 N.Y. Sess. Laws 1315 (McKinney).

183. Budd, *supra* note 121, at 484.

184. Kicking off the campaign, DWU held a “Having Your Say” Convention, which brought together hundreds of domestic workers, from over a dozen countries. Poo, *supra* note 6, at 5. Despite the lack of a common language, the domestic workers “found a common voice as they shared their experiences of laboring without respect or basic labor standards.” *Id.* The convention’s emcee, a domestic worker from the Caribbean, opened the program by stating, “Ladies, we are making history here today. You have a voice, and together we are going places.” *Id.*

185. In passing the law without that provision, the New York State Assembly directed the New York State Department of Labor to prepare a report on the feasibility of collective bargaining in the domestic work industry. Domestic Workers’ Bill of Rights § 10. The New York Labor Law itself declares it as the state’s public policy “to encourage the practice and procedure of collective bargaining, and to protect employees in the exercise of full freedom of association, self-organization and designation of representatives of their own choosing for the purposes of collective bargain, or other mutual aid and protection, free from the interference, restraint or coercion of their employers.” N.Y. LAB. LAW § 700 (McKinney 2011).

their working conditions, and transforming their employment relationship.<sup>186</sup> The completed feasibility study commissioned by the state legislature did find that collective bargaining was a feasible option for domestic workers and cited several industries in which unionization is not hampered by barriers such as multiple workplaces and employers, or isolated workers.<sup>187</sup> To date, however, the legislature has not taken the next step in amending the state labor laws to permit domestic workers to form unions.

Formal union representation is not, however, the only means of fostering genuine employee voice and collective participation. Co-regulation, for example, envisions a combination of internal employee committees and external independent monitors.<sup>188</sup> In its report “Feasibility of Domestic Worker Collective Bargaining,” the New York State Department of Labor proposed several alternatives for collective representation, including voluntary recognition, single person collective bargaining units, hiring halls and cooperatives, mandatory employment contracts, and continued outreach to workers and employers.<sup>189</sup> However, none of these proposals explicitly includes the voices of high road employers, a critical component of the Domestic Employment model.

While the New York State Domestic Workers’ Bill of Rights did not go far enough in fostering employee voice or collective participation, the various frameworks proposed in the state’s Feasibility Study do have the potential to do so. DWU and JFREJ have proposed a series of voluntary, collective negotiations among domestic workers and neighborhood-based employer associations.<sup>190</sup> This in-

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186. Section 8 of the proposed legislation would have eliminated the domestic worker carve-out to the New York State Labor Law. S. 2311D, 2009 Leg. 232d Sess. (N.Y. 2009), *available at* <http://open.nysenate.gov/legislation/bill/S2311D-2009>. Closing this gap would require amending Section 701(3) of the State Labor Relations Act (SLRA) to eliminate the following language from the definition of “employees”:

[B]ut shall not include any individual employed by his parent or spouse or in the domestic service of and directly employed by his parent or spouse in the domestic service of and directly employed, controlled and paid by any person in his home, any individual whose primary responsibility is the care of a minor child or children and/or someone who lives in the home of a person for the purpose of service as a companion to a sick, convalescing or elderly person or any individual employed only for the duration of a labor dispute[.]

N.Y. LAB. LAW § 701(3) (McKinney 2011).

187. FEASIBILITY STUDY, *supra* note 9, at 3.

188. *See* ESTLUND, *supra* note 150, at 162 (arguing that both employee voice and the support of regulators and enforcers are critical).

189. FEASIBILITY STUDY, *supra* note 9, at 17–28.

190. Telephone Interview with Rachel McCullough, *supra* note 48.

initiative falls squarely within the proposals offered by the Feasibility Study, which acknowledges that “although it is unclear which approach to organizing will emerge as the most effective strategy, [extending collective bargaining rights to domestic workers] provides the opportunity for domestic workers and employers to begin the process of exploring these various approaches in an effort to ultimately achieve more harmonious labor relations. *Both domestic workers and their employers must determine their best form of organization.*”<sup>191</sup>

*Does the regulation establish core industry standards?* Reversing a legacy of underpayment, either legally by virtue of a lack of minimum standards for domestic work, or illegally through rampant “wage-theft” in the domestic work industry, the New York Domestic Workers’ Bill of Rights is one step toward a more efficient, productive, and mutually beneficial domestic work industry. The core gains achieved by the Bill of Rights were the expansion of minimum wage coverage to “companions” employed solely by households;<sup>192</sup> a higher rate of overtime pay for live-in domestic workers and live-out companions;<sup>193</sup> mandatory time off of work and paid vacation (one unpaid day of rest every calendar week, and three paid days of vacation after one year of employment);<sup>194</sup> protection from sexual harassment and other forms of workplace discrimination;<sup>195</sup> and temporary disability benefits for part-time and full-time domestic workers.<sup>196</sup>

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191. FEASIBILITY STUDY, *supra* note 7, at 29 (emphasis added).

192. Domestic Workers’ Bill of Rights, ch. 481, §2, 2010 N.Y. Sess. Laws 1315 (McKinney). One criticism of the New York Domestic Workers’ Bill of Rights, however, has been that the legislation preserved the “companionship services” exclusion in the newly created definition of “domestic worker,” further perpetuating the exclusion of certain domestic workers from protection under this, and any future, domestic work regulation. *See, e.g.*, Nilliasca, *supra* note 46, at 399–400.

193. Prior to the passage of the New York Domestic Workers’ Bill of Rights, “live-in” domestic workers were entitled to overtime pay, but only at one and a half times the state minimum wage (not their negotiated hourly wage, which may have been higher), and only after they worked forty-four hours in a week. DWU REPORT, *supra* note 75, at 2. Today, those workers are entitled to one and a half times their regular rate of pay. *Id.*

194. Domestic Workers’ Bill of Rights §7.

195. The New York Domestic Workers’ Bill of Rights amends the New York Human Rights Law’s definition of employer to expand coverage to domestic workers, and prohibit sexual harassment and harassment based on race, religion, or national origin aimed specifically at “domestic workers.” Domestic Workers’ Bill of Rights §§ 2–3.

196. A person is considered a domestic worker under the law if they work in another person’s home to care for a child; serve as a companion for a sick, convalescing, or elderly person; do housekeeping; or perform any other domestic service purpose. N.Y. LABOR LAW § 2.16 (McKinney 2011); N.Y. EXEC. LAW § 296-b (Mc-

The final version of the bill did not include other proposed benefits, such as paid sick days, paid personal days, advance notice of termination, and severance pay.<sup>197</sup> While it is true that other private-sector workers are not guaranteed those benefits by statute, most other workers have important means of obtaining them. Workers who enjoy those benefits often do so as the result of collective bargaining—either as direct beneficiaries of union contracts, or indirectly from market pressures that such agreements place on non-union competitors. However, as discussed in greater detail above, the New York State Legislature chose not to extend collective bargaining rights to domestic workers, opting instead to defer the decision pending a “feasibility study.”<sup>198</sup>

Overall the New York State Domestic Workers’ Bill of Rights did create a set of minimum standards and legal protections for domestic workers. Including elder caregivers in the state’s minimum wage framework will result in tangible economic gains, especially because the New York state minimum wage has historically been higher than the floor set at the federal level. Higher overtime rates, mandatory days of rest (paid and unpaid), and protection from harassment are all very basic standards enjoyed by most other workers, yet constitute an unprecedented legislative victory for domestic workers. What is lacking under the Domestic Employment model, however, is an opportunity for domestic employers to engage in structured dialogue with domestic workers and their advocates about the issues of privacy, autonomy, and emotional attachment in order to find common ground on those issues.

*Does the regulation include pragmatic strategies for enforcement?* The New York Domestic Workers’ Bill of Rights requires the Commissioner of Labor to report to the Governor and Speaker of the Assembly about how to best provide easily accessible educational and informational material on workplace laws covering domestic workers.<sup>199</sup> Soon after the bill’s passage, the Commissioner of Labor met with advocacy groups, community-based organizations, employee and employer representatives, and state agencies to discuss with

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Kinney 2011). However, a person performing companionship services as an employee of an agency without additional domestic work such as cleaning services is not subject to the overtime and day of rest rules. NEW YORK STATE DEP’T OF LABOR, FACT SHEET: LABOR RIGHTS AND PROTECTIONS FOR DOMESTIC WORKERS, *available at* <http://www.labor.ny.gov/legal/laws/pdf/domestic-workers/facts-for-domestic-workers.pdf>.

197. DWU REPORT, *supra* note 75, at 3.

198. *Id.*

199. Domestic Workers’ Bill of Rights §10.

stakeholders the optimal means for reaching out to this isolated group of workers.<sup>200</sup>

Because neither domestic workers nor their employers are likely to have much experience with wage, employment, tax, or other laws, the state has developed materials in “plain language” that “avoid jargon or overly technical language.”<sup>201</sup> Posting notice of applicable laws in “visible location[s] in the workplace” might seem awkward in a personal home, so the state created a “small card that will not intrude on a home setting yet will include required information.”<sup>202</sup> Included in the planned efforts for reaching domestic employers are “[p]arenting blogs and list-serves, such as *Park Slope Parents*, *Urban Baby*,” and through the Chamber of Commerce (with the assumption that many of its members are also employers of domestic workers).<sup>203</sup>

Enforcing workplace standards in private homes will remain a challenge for the New York State Department of Labor, but continued collaboration with domestic workers and their advocates is critical to ensuring such efforts are successful. Through such collaboration, the Labor Department may develop pragmatic enforcement methods that could be replicated in other jurisdictions for the enforcement of workplace protections within many different industries of lower-wage workers.

### CONCLUSION

*“We are enacting a culture shift in which progressive employers in a given community will collectively take action and say, ‘No, in our homes we employ dignity; this isn’t a factory, this isn’t going to be like other employment.’”*<sup>204</sup>

As we’ve seen, the domestic workplace and the relationship between domestic workers and their employers is unique. But what sets domestic work apart—physical isolation, private home workplaces, emotional attachment, and a legacy of race and gender discrimination—should not perpetuate the disparate treatment of domestic work by regulators, employers, and other industry stakeholders. Instead, regulation of the domestic industry should be developed in partnership with domestic workers, and should not only

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200. NEW YORK STATE DEP’T OF LABOR, *supra* note 153, at 1.

201. *Id.*

202. *Id.* at 3. Domestic Workers’ Rights Poster, P713-Spanish-English, N.Y. STATE DEP’T OF LABOR, *available at* <http://www.labor.ny.gov/formsdocs/wp/P713-english-spanish.pdf>.

203. NEW YORK STATE DEP’T OF LABOR, *supra* note 153, at 4.

204. Telephone Interview with Rachel McCullough, *supra* note 46.

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take into account those differences that make regulation and enforcement difficult, but should also acknowledge the unique features of the domestic employment relationship. The Domestic Employment model should be used to assess legislative and policy proposals to regulate domestic work, in order to ensure that such regulation includes core industry standards and effective systems of enforcement (including collective bargaining, domestic worker co-ops, neighborhood-based bargaining, external public monitoring, and enforcement).

The need for care—childcare, elder care, house cleaning—cuts across race, class, and gender lines. The strong—if complicated—bonds that form between workers, employers, and those receiving care, and the issues of structural inequality, gender-discrimination, and a disappearing social safety net that affect both domestic workers and their employers, reflect opportunities for improving, if not transforming, the domestic employment relationship.

