Some Women's Work: Domestic Work, Class, Race, Heteropatriarchy, and the Limits of Legal Reform

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This Note employs Critical Race, feminist, Marxist, and queer theory to analyze the underlying reasons for the exclusion of domestic workers from legal and regulatory systems. The Note begins with a discussion of the role of legal and regulatory systems in upholding and replicating White supremacy within the employer and domestic worker relationship. The Note then goes on to argue that the White feminist movement's emphasis on access to wage labor further subjugated Black and immigrant domestic workers. Finally, I end with an in-depth legal analysis of New York's Domestic Worker Bill of Rights, the nation's first state law to specifically extend legal protections to domestic workers. The Note discusses many provisions of the bill and draws on the experiences of organizers involved in the passage of the bill to provide critical analysis of the limitations of legal reform. With this Note, I hope to provide organizers, activists, and legal practitioners with additional critical tools crafting solutions, legal reforms, and narratives in the struggle to end the oppression of domestic workers.

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The silence of office buildings after they are closed, that's what I loved as a child. I remember accompanying my mother's best friend on her job. It seemed like she had keys to a secret world; a world of empty cubicles, family pictures on walls, and half-written memos. While she cleaned, scrubbed, and dusted, her children and I ran down the empty hallways and posed in front of bathroom mirrors. This Note attempts to shed light on the world of domestic workers, the Black and immigrant women who are paid to toil in that work, and the legal framework that continues to deny these women the fruit of their labors.

INTRODUCTION

In 1937, the Supreme Court of Minnesota upheld the arrest for disorderly conduct of a domestic worker who protested his termination by standing quietly in front of the employer's home with a three-foot banner for less than two hours. The court stated that an employee did not have the right to picket peacefully in front of an employer's home, even when the work took place in the home. The court reasoned that the state's labor laws did not apply because the home is not industrial in nature, but rather it is a "sacred place," a "sanctuary of the individual."

In 1993, it was revealed that Zoe Baird, President Clinton's nominee for Attorney General, hired an undocumented immigrant woman to

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2. State v. Cooper, 285 N.W. 903, 904 (Minn. 1939).

3. Id.
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provide childcare for her child. The White feminist response was to criticize the double standard—male nominees were never questioned about their childcare arrangements. Black and immigrant domestic workers and their struggles never entered the public debate. Lillian Cordero, the nanny working for Zoe Baird, was immediately deported, with no word of protest from White feminists.

In 2007, Evelyn Coke, a Black woman, was denied overtime pay by the United States Supreme Court after laboring for twenty years as a home health care aide. She often worked three consecutive twenty-four hour shifts, and regularly worked seventy hours a week for the poverty wages of seven dollars an hour. Again, White feminists were mainly silent.

In 2010, the nation's first Domestic Worker Bill of Rights was passed by the New York legislature and was signed into law by the Governor. The bill was the culmination of years of coalition building, organizing of domestic workers, and lobbying. The question arises, however, whether the bill can adequately address the forces of racism, heteropatriarchy, immigration, and structural neoliberalism that all contribute to the subjugation of domestic workers.


12. Angela P. Harris, From Stonewall to the Suburbs?: Toward a Political Economy of Sexuality, 14 Wm. & MARY BILL RTS. J. 1539, 1541 (2006) (The author defines neoliberalism as the dominating policy in the current U.S. economy, characterized by substantially deregulated markets, dramatic increase in disparities in wealth, and the dismantling of state regulation and institutions in favor of the "private" market. Additionally, neoliberalism includes a "culture war," which defines marginalized populations like immigrants, Blacks, queers, liberals, and feminists as drains on the U.S. state and at odds with the "innocent yet victimized, taxpaying, suburban good citizen." Id. at 1542.)
These discrete moments in domestic worker history highlight the intertwining forces of race, gender, and class that impact domestic workers. Critical race theorists, feminist women of color, queer critical theorists, and Marxist social scientists developed theories which help to analyze the reasons underlying the exclusion of domestic workers from any protections under the legal system and provide a foundation to this Note's analysis.

Domestic work is a global, generally unregulated industry. First-world capitalist economies such as those in the United States rely on a steady supply of immigrant women workers who labor with little to no protections under the law. Furthermore, the economies of third-world nations rely on the flow of remittances sent by immigrant women back to their home country.

Historically, domestic workers have been denied the legal protections that have been extended to most workers in the United States. Domestic workers (and agricultural workers) were expressly excluded from the definition of “employee” under the National Labor Relations Act of 1935 and the Social Security Act of 1935. The total exclusion of domestic and agricultural workers from New Deal Era labor legislation was completed with the passage of the Fair Labor Standards Act (FLSA) in 1938. FLSA specifically excluded agricultural workers, and the Court interpreted domestic service also to be exempt from the protections of

13. Glenda Labadie-Jackson, Reflections on Domestic Work and the Feminization of Migration, 31 Campbell L. Rev. 67, 72-77 (2008); see also Human Rights Watch, Slow Reform: Protection of Migrant Domestic Workers in Asia and the Middle East (2010) (detailing the global migration of millions of women, domestic workers into the Middle East and Asia and the legal systems in these countries which, in general fail to protect these workers).


15. Bacon, supra note 14, at 75.

Domestic workers are also excluded from the protections of the Occupational Safety and Health Act (OSHA).

Part IIA will discuss how legal structures uphold and replicate White supremacy and reproduce White privilege between White employers and their children on the one hand and Black and immigrant domestic workers on the other. 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.

Early in the history of the United States, domestic work became indelibly attached to slavery and servitude, creating a system in which women became divided along race and class lines, so that middle and upper-class White women benefited from the continual subjugation of Black women as domestic workers. Today, domestic workers are primarily immigrant women of color. This section will conclude with an analysis of how changes have occurred in the logics of White supremacy as the forces of racism and patriarchy have shifted from a slave economy to one dependent on colonization and war.

Part IIB will discuss heteropatriarchy and the gendered role of domestic work. Under capitalist and patriarchal structures, the reproduction

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17. FLSA Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 (1974). This was the first time certain domestic workers were expressly included under FLSA coverage. However, certain household workers continue to be excluded from overtime pay requirements. Household workers that provide “companionship services for individuals who (because of age and infirmity) are unable to care for themselves” are unable to claim overtime pay. 29 U.S.C. 213(a)(15) (West 1998 & Supp. 2000); Coke, 551 U.S. at 175-76 (2007) (holding the overtime exception applied to domestic workers employed by a third party agency, as well as private individual employers); Peggie Smith, Organizing the Unorganizable: Private Paid Household Workers and Approaches to Employee Representation, 79 N.C. L. REV. 45, 57 nn.49-54 (2000) (detailing legislative history and discussing subsequent amendments to FLSA which extended coverage to agricultural workers and domestic workers).

18. 29 C.F.R. § 1975.6 (2001) (“As a matter of policy, individuals who, in their own residences, privately employ persons for the purpose of performing for the benefit of such individuals what are commonly regarded as ordinary domestic household tasks, such as house cleaning, cooking, and caring for children, shall not be subject to the requirements of the Act with respect to such employment.”).


21. Domestic Workers United & DataCenter, supra note 1, at 10 (noting that three-fourths of the domestic workers surveyed in New York City are not U.S. citizens).

of labor became unpaid women’s work separated from the market and unrecognized as work by legal regulatory structures. The social construction of a “private” and “public” sphere further contributes to the subjugation of domestic workers. This is codified into law, with regulatory schemes that protect the “private” sphere of the White employer while simultaneously regulating the home and labor sites of Black and immigrant women domestic workers. Thus, debates about the need for childcare assume a “private” problem and solution as opposed to a “public” solution, such as government subsidized childcare. The primary goal of the regulatory system impacting domestic workers is the creation of a system of unencumbered access to domestic workers by a White middle- and upper-class. This gendered division of work facilitates the neoliberal system. The private commodification of the reproduction of labor, along with the global labor surplus created by unequal international trade policies, is siphoned into a transnational domestic service industry. This enables first-world economies to sustain themselves while at the same time stabilizing potential rebellions against the new world order in struggling third-world economies through the flow of remittances to the home countries.


25. See infra pp. 20–21.

26. Romero, supra note 5, at 1062; see also Tamar Lewin, *Laws Often Disregarded for Household Workers*, N.Y. Times (Jan. 15, 1993), http://www.nytimes.com/1993/01/15/news/laws-often-disregarded-for-household-workers.html?scp=24&sq=zoe+baird&st=nyt&pagewanted=print (“Accountants and lawyers say the system for reporting income paid to domestic workers is so cumbersome, and the supply of household workers so saturated with illegal aliens, that hundreds of thousands of Americans, and maybe millions, are probably flouting the law.”); see also Jong, supra note 5 (stating that “... what we need is more legal childcare workers.”).

27. Smith, supra note 24, at 882, 913.

28. Joan Fitzpatrick & Katrina Kelly, *Gendered Aspects of Migration: Law and the Female Migrant*, 22 Hastings Int’l & Comp. L. Rev. 47, 60 (1998) (“The international maid trade similarly arises from structural economic disparities between sending and receiving countries.”); see also Bacon, supra note 14, at 51–77 (detailing the displacement and forced migration of Mexican workers caused by free trade agreements such as the North American Free Trade Agreement and structural adjustment programs imposed by the World Bank and International Monetary Fund, and the subsequent cheap labor source for the U.S. economy and the stabilizing force of remittances in Mexico); see also Human Rights Watch, supra note 13, at 8 (“In 2008, international migrants sent home an estimated US$444 billion, of which US$338 billion went to developing countries. Labor-sending countries often actively promote out-migration to relieve underemployment and to generate foreign exchange. For example, although data disaggregating the contribution..."
Part IIIB will illustrate that the White feminist women’s movement, with its framing of White women’s liberation as “freedom from housework” and subsequent focus on removing legal and social barriers to women entering into wage labor, has further cemented the racial and class divide between women of color and White women and contributed to the former’s continuing subjugation. Historically, the labor of Black women as enslaved domestic workers allowed White women “mistresses” to maintain and elevate their status within the confines of heteropatriarchy, while White men continued to be the head of the heteropatriarchal household. After emancipation, White women continued to elevate their status within heteropatriarchy by supervising and regulating the labor of Black women. The complicity of White women in the oppression of Black and immigrant women is reflected in the 1930s movement to reform domestic work, in the early White feminist movement of the 1960s and 1970s, and currently in the muted response of White feminists to the plight of domestic workers and White women’s acceptance of their role as supervisors of domestic workers. The “White feminists’ view of work as resistant to motherhood and a liberating force for women does not account for Black women’s experiences.” White women’s reliance on the labor of Black and immigrant women has meant an ability to seek fulfillment in the workforce without the burden of challenging traditional patriarchal notions of family and gender roles.

Finally, Part III will examine the newly passed Domestic Worker Bill of Rights. This groundbreaking piece of legislation was signed into law in 2010 by both houses of the New York State Legislature, and has been hailed as a major victory for domestic workers. Within this section, various provisions of the bill will be analyzed and compared to the current

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of domestic workers are not available, Filipino migrants sent home US$19 billion in 2008, 11.4 percent of the country’s gross domestic product.” (footnotes omitted)).


30. Id. at 21.

31. Smith, supra note 24, at 851.

32. Roberts, supra note 20, at 20–21.

33. Robson, supra note 10, at 411 (“Domestic workers, despite the fact that they are overwhelmingly women, seem to continue to fall outside the ambit of mainstream feminist concerns.”).

34. Roberts, supra note 20, at 20–21.

35. Id. at 21.


37. Albor Ruiz, Domestic Workers Bill of Rights Law Finally Grants Protection for Over 200,000 People, N.Y. DAILY NEWS, (Sept. 2, 2010), http://www.nydailynews.com/ny_ local/brooklyn/2010/09/02/2010-09-02_finally_domestic_worker_rights_law.html (quoting Governor Paterson at the signing ceremony of the DWBR) (“Today we correct a historic injustice by granting those who care for the elderly, raise our children and clean our homes the same essential rights to which all workers should be entitled.”).
regulations and laws that impact domestic workers. This discussion raises questions about the strategy of legislative reform and its meaning within a transformative model of organizing. Activists and critical thinkers have long debated and discussed the use of legal reform strategies in creating transformative change. Adding to this discussion, I raise several key concerns presented by the legislation and reflect on their meaning within the broader social justice movement.

I. DOMESTIC WORK AND THE REPRODUCTION OF WHITE SUPREMACY

Domestic workers are disproportionately women of color. During slavery and post-emancipation, domestic workers were primarily Black women. The link between domestic service and slavery is key to understanding the conditions of their labor and resistance. Many social scientists and legal scholars have documented the link between domestic work and slavery. W.E.B. Du Bois wrote: "In the United States, the problem is complicated by the fact that for years domestic service was performed by slaves, and afterward, up till today, largely by Black freedmen—thus adding a despised race to a despised calling." Household work—the work of food preparation, laundry, childcare, even breastfeeding—was work for enslaved Black women. The image of "Mammy" embodies the racist link of domestic service and Black women. Mammy is the ever faithful domestic servant to White women, and, as such, her image is deemed acceptable in White supremacist culture. In fact, Mammy is not judged by how well she raises her own children, but rather how well she raises the children of the dominant race.

38. PALMER, supra note 19, at 7-13 (providing historical, statistical numbers about who was a domestic worker from the 1800s to 1945); Smith, supra note 24, at 878-82 (discussing a short period of time when Irish immigrant women were associated with domestic work, but noting that Irish immigrant women left domestic work as they developed "white identity" and sought to distance themselves from such low status work).

39. Roberts, supra note 20, at 21 ("In the early twentieth century, nearly two-thirds of all employed Black women in the North were domestic servants or laundresses.").

40. DILL, supra note 19, at 12 ("For Black women in the U.S., the occupation carried with it the legacy of slavery and they became, in essence, 'a permanent service caste in the nineteenth and twentieth century.' " (quoting DAVID M. KATZMAN, SEVEN DAYS A WEEK: WOMEN AND DOMESTIC SERVICE IN INDUSTRIALIZING AMERICA 85 (1978)).


42. PALMER, supra note 19, at 6.


44. Id. at 33.
Today, the majority of domestic workers are immigrant women of color from formally colonized nations;\(^4\) therefore, the link between domestic work and colonization and displacement is also essential to this analysis. In 2008, there was a conservative estimate of 8.3 million undocumented, migrant workers in the United States.\(^4\) In the state of New York, there are approximately 200,000 women employed as domestic workers, the majority of whom are immigrant women of color.\(^4\) With the passage of time, the popular image of domestic workers has changed from that of Black women to that of immigrant women of color.\(^4\)

Given this shift, it is useful to examine domestic work through a new lens of forced migration, colonization, neoliberalism and domestic immigration policies in the United States. Andrea Smith asserts that White supremacy does not operate as a uniform system.\(^4\) She suggests that White supremacy operates and functions differently within “separate and distinct, but still interrelated, logics.”\(^4\) She offers three different “pillars” or foundations of White supremacist thought: “Slavery/Capitalism,” “Genocide/Colonialism,” and “Orientalism/War.”\(^4\) She employs this analysis to counter frameworks based on the presumption that White supremacy operates in the same manner regardless of different, historical backgrounds. Smith’s alternative framing of White supremacy is essential to understanding the impact of racism on diverse communities of color. Under the pillar of Slavery/Capitalism, Smith posits that the White supremacist logic that all Black people are property and inherently “slaveable” can be applied to understand the foundations of the prison-industrial complex.\(^4\) The second pillar of White supremacy is Genocide/Colonialism. Under this framework, genocide of indigenous people must be justified in order to make way for the colonizing force to steal land, culture, and resources as their own.\(^4\) The third pillar, Orientalism/War, takes its name from Edward Said’s theory that the West has defined itself as a superior, advanced civilization in opposition to the construction of an “exotic” but inferior “Orient.”\(^4\) Smith explains that, under the logic of

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45. DOMESTIC WORKERS UNITED & DATACENTER, supra note 1, at 10 (noting that three-fourths of the domestic workers surveyed in New York City are not U.S. citizens).
47. DOMESTIC WORKERS UNITED & DATACENTER, supra note 1, at 1–2.
48. Mary Romero, Nanny Diaries and Other Stories: Imagining Immigrant Women’s Labor in the Social Reproduction of American Families, 52 DEPAUL L. REV. 809, 825–28 (2003) (giving examples such as Latina domestic workers on the television shows Will and Grace (Rosario) and Dharma and Greg (Celia)).
49. Smith, supra note 22, at 67.
50. Id.
51. Id. at 67–69.
52. Id. at 67–68.
53. Id. at 68.
54. Id. at 68–69.
Orientalism/War, certain peoples, nations, or civilizations are considered permanent threats to the power and hegemony of the American empire.\textsuperscript{55} This framework allows the “United States to defend its logics of slavery and genocide, as these practices enable the United States to stay 'strong enough' to fight these constant wars.”\textsuperscript{56}

Using this framework, we see how the different systems of regulation and control operate to condition domestic work through the norms of orientalism and war. Under the logic of Orientalism/War, immigrants are “marked as perpetual foreign threats to the U.S. world order,” and are therefore subject to state violence through the immigration system.\textsuperscript{57} While the historic link to slavery still continues to operate as a backdrop in the subjugation of domestic workers, now the immigration regulatory regime has moved to the forefront as a system of control in the lives of domestic workers. Donna Young asserts that “domestic, regional, and international laws and policies, in the era of globalization interact to make available to Western employers an easily exploitable supply of laborers from the large pool of third-world women.”\textsuperscript{58}

In fact, one of the earliest laws that addressed domestic workers allowed for the importation of domestic workers while simultaneously banning the importation of other “foreign” labor.\textsuperscript{59} Mary Romero suggests that the three visas that exist to formally regulate the importation of domestic workers into the United States reflect the state’s continuing desire to allow employers access to the labor of immigrant women while simultaneously affording no legal protections to domestic workers.\textsuperscript{60} The A-3 visa, G-5 visa, and the B-1 visa are all visas primarily given to third-world women, which allow certain privileged employers to import and employ domestic workers in their home.\textsuperscript{61} According to Human Rights Watch, these special visas perpetuate abuse and subordination of domestic workers due to lack of enforcement and monitoring of employment contracts for domestic workers by U.S. immigration agencies and the exclusion of these workers from U.S. labor law protection.\textsuperscript{62} Furthermore, immigration laws facilitate the employer's total control over working con-

\textsuperscript{55.} \textit{Id.}
\textsuperscript{56.} \textit{Id. at 69.}
\textsuperscript{57.} \textit{Id.}
\textsuperscript{58.} Young, \textit{supra} note 14, at 10.
\textsuperscript{59.} Alien Contract Labor Act, ch. 164, § 5, 23 Stat. 332 (1885).
\textsuperscript{60.} Romero, \textit{supra} note 48, at 841–44.
\textsuperscript{61.} \textit{Id. at 841–43.}
\textsuperscript{62.} \textsc{Human Rights Watch, Hidden in the Home: Abuse of Domestic Workers with Special Visas in the United States} 1 (2001), \textit{available at} http://www.hrw.org/legacy/reports/2001/usadom/usadom0501.pdf (“Ironically, their special visas exacerbate their vulnerability to abuse. Because they have employment-based visas, if these domestic workers leave their sponsoring employers, regardless of how abusive, they not only lose their jobs, like undocumented workers, but also their legal immigration status in the United States.”).
ditions and wages because domestic workers rely on the special visa for legal status to remain in the United States. In reality, many domestic workers work without these visas, and are in constant fear of deportation due to lack of formal "legal" status.

In addition, the Trafficking Victims and Protection Act (TVPA) falls far short of providing meaningful protection to domestic workers. Under the TVPA, an immigrant who has been deemed to be a trafficking victim under the law can apply for two different forms of visas: a continued presence visa, which allows temporary immigration relief and may allow work authorization for potential victims who are also potential witnesses in an investigation or prosecution, and a T nonimmigrant status or "T visa," which generally allows for legal immigration status for up to four years for victims who cooperate with law enforcement in the investigation or prosecution of the accused trafficker.

In 2009 only 319 T-visas were granted and fewer than 300 potential witnesses were granted "continued presence" visas. In the fiscal year of 2009, only twenty-one individuals were prosecuted for labor trafficking and twenty-two for sex trafficking. Clearly, only a relatively small number of domestic workers can avail themselves of the protections offered by the TVPA.

Using the Orientalism/War framework, we can see that the global commodification of labor reproduction is a product of continuous colonization and economic warfare that reinforces the wealth of first-world nations and the subjugation of third-world nations. The labor of the super-exploited immigrant domestic workers provides greater wealth to the middle- and upper-class families; it allows both parents to enter into wage labor, which gives access to government provided benefits such as Social Security and unemployment compensation. In addition, the labor of domestic workers permits White professional women to continue to pursue careers without the burden of domestic responsibilities. Furthermore, on an international scale, the remittances earned by domestic workers stabilize third-world nations that otherwise would not be able to provide for basic needs of their citizens due to free trade agreements and structural

63. Id. at 1–2; Romero, supra note 48, at 842–44.
64. Human Rights Watch, supra note 62, at 1–2.
65. See Kevin Shawn Hsu, Masters and Servants in America: The Ineffectiveness of Current United States Anti-Trafficking Policy in Protecting Victims of Trafficking for the Purposes of Domestic Servitude, 14 Geo. J. on Poverty L. & Pol'y 489 (2007) (describing the problems with TVPA: linking protection from deportation based on the victim's willingness to assist in prosecution; if the domestic worker is deemed to have "consented" to being smuggled into the U.S. illegally, then she is not protected; forced labor is not automatically considered a "severe form of trafficking" under the TVPA).
67. Id.
68. Id. at 339.
69. Romero, supra note 48, at 835; Domestic Workers United & DataCenter, supra note 1, at 1.
adjustment programs imposed by and for the benefit of first-world economies. In addition, the forced migration of large segments of a nation’s population creates havoc in home countries, where families are separated and important social ties are lost.

The raw materials of this global industry are the labor and lives of immigrant women of color from formally colonized nations, countries like the Philippines and regions like Latin America and the Caribbean. Thus, Mary Romero argues, “[t]he globalization of domestic service contributes to the reproduction of inequality between nations in transnational capitalism and cases reported of domestic service is increasingly characterized as global gender apartheid.”

II. THE HOME IS A CASTLE AND HETEROPATRIARCHY THE FOUNDATION

“Heteropatriarchy is the building block of U.S. Empire.”

Domestic work is women's work. The Industrial Revolution led to a restructuring of the family that required a new, gendered division of work. Work dealing with the reproduction of labor such as childcare, food preparation, household maintenance, and elder care was relegated to the “private” unpaid sphere. In 2000, one million domestic workers were employed in the United States, 95% of whom were women. On a global

70. Bacon, supra note 14, at 60 (explaining that “[b]eginning around 1980, the World Bank and the IMF [International Monetary Fund] began exposing a one-size-fits-all formula for development, called structural adjustment programs. These required borrowing countries to adopt a package of economic reforms, such as privatization, ending subsidies and price controls, trade liberalization, and reduced worker protection.”).

71. See id. at 61; Domestic Workers United & DataCenter, supra note 1, at 9.

72. Interview with Analiza Caballes, Overall Coordinator, Damayan Migrant Workers Ass’n, in N.Y., N.Y. (June 18, 2010).

73. Romero, supra note 48, at 814.

74. Id. at 839.

75. Smith, supra note 22, at 71. Much of the following discussion assumes a heterosexual family. Smith, in her essay, posits that the heterosexual, patriarchal family is the foundation for systems of dominion, colonization, and violence.

76. Dill, supra note 19, at 5; Silbaugh, supra note 23, at 7.

77. Lise Vogel, Woman Question: Essays for a Materialist Feminism 49–65 (1995) (The author discusses in detail the evolution of feminist Marxist theory and the foundation for the theory that domestic work is appropriated surplus labor. The term reproduction of labor refers to the maintenance of the worker. A worker must have food and shelter in order to continue working. In addition, actual reproduction provides future workers for the capitalist system under this theory. The work of women in the home is essential to the capitalist class because this work reproduces and maintains labor); id. at 57 (citations omitted)(“The woman is the slave of a wage slave, and her slavery ensures the slavery of her man . . . And that is why the struggle of the woman of the working class against the family is crucial.”).

78. Smith, supra note 17, at 52.
scale, this gendered division of work is referred to as the "feminization of migration." Legal scholar Glenda Labadie-Jackson explains,

The emergence of a growing international trade of domestic workers can be attributed, in part, to the fact that developing countries have become more dependent on the immigrants to perform household responsibilities and care giving. Female immigrants are increasingly becoming indispensable in the supply of cheap labor in the capitalist global economy.

The Industrial Revolution marked a movement from a subsistence- and agriculture-based economy to one based on wage labor. In this new economy, only labor outside the home became compensated by a wage, rendering housework as unpaid labor. As a market economy developed, families became dependent on a male wage earner and home labor became increasingly devalued. The "cult of domesticity" arose in the first half of the nineteenth century, solidifying boundaries between the "public" and the "private" home sphere. The heterosexual family became sanctified as a respite from the competitive industrial world, and women became responsible for the creation of that sanctuary. The resulting regulatory and legal frameworks furthered this social construction, treating "housework as indistinguishable from other private family matters while treating paid labor as relevant to legal doctrine."

A. Domestic Work and Structural Liberalism

Angela Harris provides the following definition of structural liberalism:

(1) the separation of family, market, state and civil society into separate and independent 'spheres' which should in principle be governed differently; and (2) a commitment to the ideal of a self-governing subject, through which individuals and groups deemed incapable of self-government may be subjected to kinds of regulation that would otherwise be deemed incompatible with liberty.

79. Labadie-Jackson, supra note 13, at 72–74.
80. Id. at 75.
81. Silbaugh, supra note 23, at 23.
82. Id.
83. Id.
84. Id.
85. Id. at 26.
86. Harris, supra note 12, at 1542.
In the case of domestic workers, the exclusion of domestic labor in regulatory regimes designed to protect and support workers gives White middle- and upper-class people unfettered access and power over the labor and bodies of domestic workers, the majority of whom are Black or immigrant women. This is accomplished through a refusal to regulate the employer while simultaneously over-regulating the domestic worker. The construction of the private and public work sphere furthers this subjugation.

In 1935, Congress passed the National Labor Relations Act, also known as the Wagner Act. The primary objective of the Act was to promote "industrial peace" in the face of enormous worker resistance. The legislative history notes that over a two-year period, thirty-two million working days were lost to strikes. Thus, the Act endeavored to protect workers’ attempts to act collectively and bargain collectively not out of concern for workers, but for the purpose of avoiding costly strikes. The second stated objective of the bill was to equalize bargaining power between the solitary wage earner and the large industrialist, in order to avoid strikes and the resulting disruption of the national economy.

In the thousands of pages of legislative history of the NLRA, the domestic worker is barely mentioned (excluding the many drafts of the bill with the unchanged language excluding domestic workers from the definition of employee). While the exemption of agricultural workers was debated at a hearing, it appears that the decision to exclude domestic workers from labor protections did not warrant a hearing at all. The only reason given in the legislative history for the decision to exclude domestic workers from the Act is the administrative difficulty of extending coverage

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87. See Palmer, supra note 19, at 4–6; Smith, supra note 24, at 916–17.
88. See State v. Cooper, 285 N.W. 903, 905 (Minn. 1939) ("The home is an institution, not an industry."); Smith, supra note 24, at 903, 906.
90. Id.
91. Id.
92. Id. at 2302–03.
94. 1 NLRB, Topical Index of Legislative History of the National Labor Relations Act, 1935, at XXII (1985) (only one hearing is listed under the topic of definition of employee, excluding domestic workers or individual employed by his parent or spouse, but this hearing is actually concerning agricultural workers); Labor Disputes Act: Hearings on H.R. 6288 Before the H. Comm. on Labor, 74th Cong. (1935) (statement of James Rorty, Newspaper Correspondent, Westport, Conn.), reprinted in 2 NLRB, Legislative History of the National Labor Relations Act, 1935, at 2508 (1985).
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to domestic workers.\textsuperscript{95} However, the stated difficulty of creating a system that would permit the regulation of domestic labor relations in a private setting is undermined by the extensive amount of state regulation inside the homes of poor people of color.\textsuperscript{96} When viewed in light of the link to slavery and patriarchy, the exclusion of domestic workers can be framed as a refusal to limit White employers' access to the labor and bodies of women of color working as domestic workers. In fact, the legal history of domestic work has been one of exclusion from protection and recognition.\textsuperscript{97}

The 1885 Alien Contract Labor Act serves as an additional example where Congress explicitly declined to limit the employer's access to domestic workers.\textsuperscript{98} Entitled "[a]n act to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States, its territories, and the District of Columbia," the stated purpose of the Act was to prevent the influx of cheap, unskilled labor and resulting depression of wages in the labor market.\textsuperscript{99} However, the importation of domestic workers was still permitted under the Act; "domestic servants" were expressly exempted from the Act's prohibition against foreign labor.\textsuperscript{100} Apparently, Congress did not want to limit access to domestic workers, nor did it want to protect domestic workers from a depression in wages. In \textit{Holy Trinity Church v. United States}, the Court stated that another purpose of the Act was to prevent the further importation of immigrants from the "lowest social stratum" who threaten to "degrade American labor."\textsuperscript{101} However, the domestic servants who were being imported for service within wealthy White homes were likely to be of the same class as those immigrants that the court refers to with such disdain.


\textsuperscript{96} FRANCES Fox PIVEN & RICHARD A. CLOWARD, REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE 147-77 (1971) (providing a lengthy analysis of the state's regulation of the poor through the welfare system, including a discussion of the punitive practices of the state welfare agency). Common practices in the 1960s included "man of the house rules," under which benefits were denied if a case worker found a man in the house of the recipient, case workers routinely asked invasive questions about the sex life of the recipient, and night raids were conducted in the homes of recipients. \textit{Id.} at 166-67. \textit{See also}, Wyman v. James, 400 U.S. 309 (1971) (articulating a lower right to privacy for poor people receiving welfare benefits.)


\textsuperscript{98} Alien Contract Labor Act, ch. 164, 23 Stat. 332 (1885).


\textsuperscript{100} Alien Contract Labor Act, ch. 164, § 5, 23 Stat. 332.

\textsuperscript{101} \textit{Holy Trinity Church}, 143 U.S. at 457.
This paradox is explained by the regulation of the domestic worker in the home, which renders the state’s role as regulator unnecessary. Assuming the purpose of the NLRA was to facilitate industrial peace and regulate the relations between the wage earner and the large capitalist, the exclusion of domestic workers on the premise that their work did not need to be regulated by the state facilitates the continued devaluation of domestic labor. Private regulation prevents domestic workers from accessing entitlements provided by state-regulated systems under FLSA, NLRA, Social Security, or OSHA. As Angela Harris discusses, the creation of the idea of two spheres, private and public, is integral to a structural liberalism framework that continues to redistribute wealth and power upwards. The creation of a private sphere that should be free from government intervention is at the heart of the continued subjugation of domestic workers. It is a distinction invented by White supremacy and heteropatriarchy, and codified into law in key locations that facilitate the exploitation of Black and immigrant women.

When taking into account the racism and White supremacy inherent in the mistress/servant relationship, it becomes clear that, under the law, the White middle-class family is sanctified and protected. In contrast, as Roberts discusses, the Black family is continually subjected to interference and dominance from a White, racist state. She asserts that the foster care system, which disproportionately denies parental rights to Black families, is an extension of slavery. The permeability of home space for all kinds of racialized law enforcement activities has been codified by law and confirmed in jurisprudence. The Supreme Court, in *Wyman v. James*, reaffirmed the proposition that Black families can be legally subjected to more state intervention when it held that the acceptance of welfare benefits meant Fourth Amendment protection against “unreasonable search and seizure” did not apply and allowed for greater intrusion into the home of a poor woman of color. As the dissent aptly stated, the holding of the majority allowed the state to “use welfare benefits as a wedge to coerce ‘waiver’ of 4th Amendment rights.” The majority’s view in *Wyman* of a welfare recipient’s home stands in stark contrast to the *Cooper* court’s view of the home of an employer of a domestic worker.

The White employer’s home is an idealized sanctuary from industrial work. This notion is reflected in the holding of *State v. Cooper* (highlighted at the beginning of this section). The *Cooper* court’s holding

104. *Id.*
106. *Id.* at 344 (Marshall, J., dissenting).
ignored the home as a workplace for domestic workers and reaffirmed the home of the middle- or upper-class employer as a location free from state regulation. This also serves to explain the policy behind the exclusion of domestic workers from OSHA regulations; the White employer’s home must be free of regulation that would place legal limitations on the labor of women of color domestic workers.

B. Between “Us” Women: Gender, Race, and Class Divides

Within the gendered roles of the heteropatriarchal family, it is the White woman who is the primary regulator of the work of women of color, allowing the White male husband to continue to fully participate in wage labor without the encumbrance of domestic work, including childcare. With the near total absence of legal or regulatory systems governing domestic work, White women are free to determine the wages and terms and conditions of domestic workers’ labor. White women employing domestic workers are willing participants in their roles as supervisors and overseers of Black and immigrant women and are thus complicit in the exploitation and subjugation of Black and immigrant women, even while being confined within oppressive heteropatriarchal systems. The unique nature of domestic work (the workplace is the employer’s home) means an intimate level of interaction between the White woman employer and Black or immigrant worker who cares for the home, child, or aging parent of the White family.

During slavery, the labor of Black women facilitated the ability of White women to live up to an idealized standard of femininity, one in which a White woman was able to fulfill the gendered division of work without actually getting her hands dirty. In the Southeast United States, it was the enslaved African woman’s labor that enabled the aristocratic

110. Id. at 905; see also George Blum, Validity, Construction, and Operation of Statute or Regulation Forbidding, Regulating, or Limiting Peaceful Residential Picketing, 113 A.L.R. 5TH 1 (2003) (discussing conflicting court decisions, including cases where statutes limiting peaceful residential picketing have been upheld as constitutional and other cases where similar statutes have been struck down as a violation of First Amendment Free Speech rights).

111. 30 C.F.R. § 1975.6 (2001).

112. See Smith, supra note 24 at 861–63 (discussing middle-class women as the supervisors of domestic workers); see also Roberts, supra note 20 at 20–22 ("[W]hite middle class women gained entry to the male public sphere by assigning female domestic tasks to Black women, rather than my demanding fundamental change in the sexual division of labor.").

113. Smith, supra note 24, at 922 ("In the end, many employers freely disregard their legal obligations to their household workers and often do so with little fear of reprisal."); Romero, supra note 48, at 1048.

114. Smith, supra note 24, at 863, 901–03.
White woman's lifestyle. Thus, true womanhood was defined as "virtuous, pure, and white," and proper Black womanhood was defined as service to the creation of that White woman ideal. Domestic service was part of the racial caste system, such that no "self-respecting, native born Southern white woman" would take such a job. Many White women accepted and perpetuated this racist division of labor in order to elevate their status in heteropatriarchy. The creation of the racist stereotype of Mammy is the quintessential embodiment of the ideal of the Black woman in service to the White woman. Mammy gladly raised White children as her own and in sacrifice of her biological Black children. This controlling image of acceptable Black womanhood stands in sharp contrast to the socially unacceptable "welfare queen" image of a Black woman who remains home and takes care of her own children rather than work in the service of White women and their children.

Peggie Smith asserts that efforts to reform domestic work in the 1930s were attempts by White women to gain access to the bodies and labor of Black women. The reformers envisioned the woman as head of her home and supervisor of domestic workers within the home, and analogous to her husband as head of his factory or industrial workers. Of course, working-class White women would not draw the same analogy because their husbands were not running factories. This shift mandated that the White middle- or upper-class woman replace her husband as the patriarchal head of the home and supervise and regulate the work of Black women. Consequently, the status of the White woman was raised within the heteropatriarchal framework. This is also reflected in the 1930s reform movement's embrace of voluntary contracts between the White employer and the Black worker. White women were reluctant to advocate for mandatory regulations set by the state, finding more comfort with contracts that they could voluntarily negotiate and enter into with domestic workers. The commitment of White reformers was "first and

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115. Palmer, supra note 19, at 6.
116. Roberts, supra note 20, at 12.
119. Id. at 12.
120. Id.; see also Neubeck & Cazenave, supra note 43, at 32–33.
122. Smith, supra note 24, at 882; id. at 912 ("Amey Watson, the first director of the National Committee on Household Employment (NCHE), formed in 1928 as a reform movement for the domestic service industry stated, ‘Every man and woman likes to think of his or her home as a place where he can express his own individuality, his castle where he has the right to his own way and to do as he pleases.’").
123. Id. at 882.
124. Id. at 902–03.
125. Id. at 903–04.
126. Id.
foremost about the needs and demands of white middle-class families.\textsuperscript{127} The complicity of White middle- and upper-class women in heteropatriarchy also figures heavily into the regulation, or lack thereof, within the area of domestic work.\textsuperscript{128}

For example, in 1939, several bills were backed by the New York Women's Trade Union to improve working conditions for domestic workers in ways that would, from the perspective of White employers, limit access to domestic workers' labor.\textsuperscript{129} All three bills included a maximum of a sixty hour work week, state worker compensation coverage for disability, and application of the state minimum wage law to all homes that employed two or more domestic workers.\textsuperscript{130} All three bills failed, however, because of the perception of White middle- and upper-class women that "such laws would interfere with the way they want to manage their home."\textsuperscript{131}

Presently, domestic work such as childcare, food preparation, and house cleaning has remained women's responsibility.\textsuperscript{132} Even as White middle-class women entered the workforce, they remained responsible for the bulk of domestic work.\textsuperscript{133} Indeed, today, most wage work continues to be structured as if the worker has no children to raise or home to maintain.\textsuperscript{134}

Dorothy Roberts contends that White feminism has meant the continuation of White supremacy because the movement of White women into the workforce has been accomplished through the shifting of domestic responsibility onto Black and immigrant women as opposed to the challenging of heteropatriarchal gender roles within their family structures.\textsuperscript{135} Early White feminists rejected housework and "domesticity,"\textsuperscript{136} and their demands centered around access to the paid workforce. In doing so, they implicitly ignored the struggles and oppression of Black women domestic workers. Legal struggles of White feminists centered on formal equality, gender based discrimination in wage labor, and abortion rights.\textsuperscript{137}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{127} Id. at 905.
\item \textsuperscript{128} Roberts, supra note 20, at 22.
\item \textsuperscript{129} Dill, supra note 19, at 130.
\item \textsuperscript{130} Id.
\item \textsuperscript{131} Id.
\item \textsuperscript{132} Silbaugh, supra note 23, at 9–10.
\item \textsuperscript{133} Silbaugh, supra note 23, at 9–10; Roberts, supra note 20, at 21–22.
\item \textsuperscript{134} Roberts, supra note 20, at 17.
\item \textsuperscript{135} Id. at 22–25.
\item \textsuperscript{136} See Betty Friedan, The Feminine Mystique (1963).
\end{enumerate}
\end{footnotesize}
Roberts argues that many White women were able to enter the workforce through the shifting of “their” domestic responsibilities (as defined under heteropatriarchy) onto Black and immigrant women.138

The failure of White women to link their experiences and fate to that of their Black and immigrant nannies and caregivers continues today. In 1992, President Bill Clinton nominated Zoe Baird as Attorney General.139 Under Congressional questioning about her child care arrangements, it became known that she employed an undocumented immigrant woman to take care of her child.140 Mary Romero discusses how the subsequent national debate centered around Zoe Baird and her choices and dilemmas as a White working mother, as opposed to the working conditions and lives of Black and immigrant domestic workers.141 White feminists decried the double standard of a woman nominee being asked questions about her childcare arrangements when male nominees are not asked the same question.142 The majority of White feminist discourse failed to discuss the working conditions of the immigrant woman employed by Zoe Baird, nor did it raise a cry of protest when the worker was immediately deported.143 Furthermore, national discourse continued to discuss the childcare “crisis” in terms of a private problem: the discussion focused on the lack of available legal nannies, as opposed to discussing public solutions like government sponsored daycare.144

According to the feminist legal scholar Ruthann Robson, the life and struggle and resistance of Evelyn Coke is another example of the failure of the White women’s movement to advocate for Black and immigrant domestic workers.145 Evelyn Coke was a Black immigrant woman who worked for twenty years, providing care to Long Island suburban residents.146 As a home care worker, she worked for seven dollars an hour, seventy hours a week, with no overtime pay.147 FLSA explicitly ex-

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142. Id. at 1057, 1059.
143. Id. at 1059.
144. Id. at 1062; Jong, supra note 5.
145. Robson, supra note 5.
146. Martin, supra note 9.
147. Id.
empts the overtime pay requirement for those workers who provide "companionship services," and the Department of Labor has interpreted this to apply to even those workers who work for third-party agencies.\textsuperscript{148} The U.S. Supreme Court upheld the Department of Labor's interpretation of the Fair Labor Standards Act, denying protection to Evelyn Coke and the other 1.4 million home healthcare workers in the United States.\textsuperscript{149} Robson points out the telling silence of feminist Supreme Court Justice Ruth Bader Ginsberg and the silence of feminist blog sites.\textsuperscript{150} Ginsberg's silence in Coke is especially deafening when compared to her soaring feminist rhetoric in \textit{United States v. Va.}\textsuperscript{151} In that case, the court struck down the males only policy at the Virginia Military Institute. Justice Ginsburg, writing for the majority, stated, "[S]uch classifications may not be used, as they once were . . . to create or perpetuate the legal, social, and economic inferiority of women."\textsuperscript{152} Yet, when a job classification effectively condemned more than a million Black and immigrant women to working in poverty, Justice Ginsburg raised no objections.\textsuperscript{153}

\section*{III. N.Y. Domestic Worker Bill of Rights and The Limits of Legal Reform}

\subsection*{A. The Domestic Worker Bill of Rights: A Legal Analysis}

On July 1, 2010, both houses of the New York State Legislature passed the Domestic Worker Bill of Rights (DWBR), which extended minimal legal protections to the estimated 200,000 domestic workers in the state; several months later, Governor Paterson signed it into law.\textsuperscript{154} The DWBR is the nation's first bill to address specifically the rights of domestic

\begin{itemize}
\item \textsuperscript{148} Application of the Fair Labor Standards Act to Domestic Service; Subpart B; Interpretations; Third Party Employment, 40 Fed. Reg. 7407 (Feb. 20, 1975) (codified at 29 C.F.R. \$ 552.109).
\item \textsuperscript{149} Long Island Care at Home Ltd. v. Coke, 551 U.S. 158 (2007); Robson, \textit{supra} note 10, at 410.
\item \textsuperscript{150} Robson, \textit{supra} note 10, at 410–11.
\item \textsuperscript{151} \textit{See United States v. Va.}, 518 U.S. 515 (1996).
\item \textsuperscript{152} \textit{Id.} at 534.
\item \textsuperscript{153} \textit{Id.}; U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, \textit{OCCUPATIONAL OUTLOOK HANDBOOK} 2 (2010–2011 ed.), http://www.bls.gov/oco/ocos326.htm (stating that there were approximately 1.7 million home health aides in 2008).
\item \textsuperscript{154} An act to amend the labor law, the executive law and the workers' compensation law, in relation to establishing regulations regarding employment of domestic workers including hours of labor, wages and employment contracts, S. S2311E, 2009–2010 Reg. Sess. (N.Y. 2010), \textit{available at} http://open.nysenate.gov/legislation/bill/S2311E; Nicholas Confessore & Anemona Hartocollis, \textit{Albany Approves No Fault Divorce and Domestic Workers' Rights}, N.Y. TIMES, July 2, 2010 at A21 (detailing the passage of the bill in the Senate and the House); Ruiz, \textit{supra} note 37 (covering the signing of the law by Gov. Paterson).
\end{itemize}
workers. This is also the first time any state has legislated work conditions, such as paid vacation for a specified group of workers, normally found in a collective bargaining agreement. After almost a century of exclusion from legal structures and protections, domestic worker advocates are celebrating the passage of a bill bringing the domestic work industry out of the shadows of the private home and into the public sphere of regulation and discourse. However, the version of the signed bill is very different than the original one proposed, and even in the last hours several provisions had to be dropped for the bill to survive both houses.

A majority of the proposed bill was left on the legislative floor in Albany. Several sacrifices were made to pass the legislation. For example, provisions that required employers to give termination notice, severance pay, and paid holidays were cut from the final version of the bill. In addition, the signed bill lacks any mention of sick leave and explicitly includes the companionship services exception that was used to deny Evelyn Coke and other home health care aides years of overtime pay.

The recent passage of the Domestic Worker Bill of Rights in New York presents an opportunity to reflect on the use of legislative strategies to address systemic oppression. The recent formation of the National Domestic Workers Alliance and the launching of a similar campaign for a Domestic Worker Bill of Rights in California indicate a significant moment in domestic worker organizing and an opportunity to build a strategic approach to the change that domestic workers seek. The role legislative advocacy can have in winning that transformation is an important question for this struggle.

Social movement activists and scholars have long debated what role legal reform can and should have in creating transformative change. This

155. Confessore & Hartocollis, supra note 154.
156. Telephone Interview with Ai-jen Poo, Dir., Nat'l Domestic Workers Alliance (Jul. 10, 2010) (Ai-jen was the lead organizer for DWU from 2000–2009).
157. Confessore & Hartocollis, supra note 154, (The authors detail the final process of reconciling the Assembly and the Senate version of the bill. Proponents of the bill agreed to reduce the amount of paid vacation to three paid vacation days after a worker has worked a full year in stark contrast to the six paid holidays and six paid vacation days a year that had been in the Senate version of the bill. Workers also lost the right to sue their employers under criminal law, and the requirement that employers give two weeks notice before termination).
158. Id.
161. California Domestic Workers' Bill of Rights, supra note 160.
section poses the question whether the decision to invest organizing resources, time, and money into a legal reform strategy is worth the minimal gains achieved by the DWBR and the potential legitimization of an oppressive system. First, this section examines a majority of the DWBR’s provisions, the state and federal law impacting domestic workers before the passage of the DWBR, and the subsequent regulatory changes created by the new bill.

Within this discussion, I address two key concerns about the DWBR and reflect on their relationship to the broader question of the role of law reform in social change. The first concern is that many of the legal “gains” appear to be merely symbolic and duplicative of legal rights that had already been codified into law but most domestic workers are unable to enforce. The second concern is that the DWBR has created and codified into state law an exclusionary definition of “domestic worker,” denying some of the most vulnerable domestic workers the new legal protections of the DWBR. Highlighting these concerns, I question whether legal reform strategies emerging from professionalized non-profit centered resistance are the most effective method for achieving the change that domestic workers want and need. Finally, I end with questions and criteria for domestic workers and their allies in evaluating the use of a legal reform strategy.

1. New Definition, Same Exclusion

As discussed previously, domestic workers gained coverage under FLSA in 1974, but remain excluded through the definition of “employee” under the National Labor Relations Act. Before the passage of the DWBR, under New York law, full-time domestic workers were already included in the definition of “employee,” while part-time domestic workers and workers the court defines as providing companionship services remain excluded.

The DWBR adds the category “domestic worker” to New York labor law. The DWBR broadly defines a domestic worker to be “a person

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164. N.Y. LAB. LAW § 2(16) (McKinney 2010) (effective Nov. 29, 2010) (amending N.Y. LAB. LAW § 2, to “domestic worker” does not include any individual (a) working on a casual basis, (b) who is engaged in providing companionship services, as defined in paragraph fifteen of subdivision (a) of section 213 of the Fair Labor Standards Act of 1938, and who is employed by an employer or agency other than the family or household using his or her services”).
employed in a home or residence for the purpose of caring for a child, serving as a companion for a sick, convalescing or elderly person, housekeeping, or for any other domestic service purpose.\textsuperscript{6} However, the definition contradicts itself by excluding workers who provide "companionship services" as defined under FLSA.\textsuperscript{6} Thus, people like Evelyn Coke, the Black immigrant woman who labored for twenty years in Long Island living with and caring for the elderly and infirm, are not covered. This exclusionary definition of "domestic worker" happened as a result of lobbying and organizing efforts made by domestic workers, advocates, and allies. This definition impacts who is covered under the various provisions of the DWBR. Since the exclusion is embedded in the new definition for "domestic worker," every time the DWBR refers to "domestic worker," the exclusion is triggered.

Furthermore, the creation of a legal category of "domestic worker" in New York labor law can be described as a symbolic victory. Low-wage workers such as restaurant or hotel workers, while already being defined as workers under state and federal labor law, are systemically exploited and effectively excluded from most labor protections through multiple vectors of oppression, systemic racism, a violently anti-union industry, gender oppression, and a weakened labor movement.\textsuperscript{167} In addition, many would point out that inclusion under current labor laws can restrict workers' attempts to organize; for example, labor law restricts the use of secondary boycotts (boycotts and/or picketing of customers of the employer) as an organizing tactic.\textsuperscript{168}

2. Overtime

According to a survey of domestic workers conducted by Domestic Workers United, 41\% of workers earn low wages, 26\% make below minimum wage, and 67\% do not receive overtime for their hours worked.\textsuperscript{169} Under the FLSA, domestic workers who live outside the employer's home are entitled to overtime at one and a half times the worker's regular

\begin{footnotesize}
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\item 165. \textit{id.}
\item 166. \textit{id. But see Poo Interview, supra note 156 (stating that there is an expectation that the Department of Labor will reexamine the definition of companionship services under FLSA, so as to eliminate the exclusion); but see, Interview with Shirley Lung, Professor of Rights of Low Wage Workers, CUNY School of Law, in Flushing, N.Y. (July 24, 2010) ("There is no indication that the federal laws concerning the exclusion will be amended or changed anytime soon. There would need to be a huge grassroots, organizing movement to make that happen.").}
\item 167. \textit{Annette Bernhardt et al., Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities (2009), available at http://www.unprotectedworkers.org/brokenlaws (detailing the rampant labor law violations in several different industries).}
\item 169. \textit{Domestic Workers United & DataCenter, supra note 1, at 2.}
\end{itemize}
\end{footnotesize}
rate of pay after forty hours worked in a week; domestic workers who live inside the home are not entitled to overtime pay at all.\textsuperscript{170} Furthermore, domestic workers such as those who provide care and labor for the sick, elderly, or the infirm are also denied overtime under the FLSA, including workers like Evelyn Coke, who performed these services while employed by third-party agencies.\textsuperscript{171}

New York law, prior to the passage of the DWBR, provided slightly more protection to domestic workers than federal law. In New York, domestic workers who lived in the home of the employer were entitled to overtime pay, but only at one and a half times the state minimum wage and only after they worked forty-four hours in a week.\textsuperscript{172} Generally, New York courts have held that the FLSA companionship services exception also applied under New York's overtime laws.\textsuperscript{173} However, prior to the passage of the DWBR, New York case law gave domestic worker advocates a small window to argue that the FLSA companionship services exception did not apply in New York.\textsuperscript{174}

The DWBR has now codified the FLSA companionship exception through its addition in the definition of domestic worker. The section of the bill referring to overtime employs the term "domestic worker," thus eliminating home health care aides and other domestic workers who fall within the companionship services exception from the state overtime provisions.

However, the DWBR does expand overtime coverage for some domestic workers. Under the DWBR, live-in domestic workers are now entitled to one and a half times their regular rate of pay for overtime, rather than at the state's minimum wage.\textsuperscript{175} The other overtime provision in the new bill mirrors what is currently guaranteed under the FLSA: entitling domestic workers to one and a half times their normal rate of pay after forty hours a week if the workers live outside the employer's home.\textsuperscript{176} Significantly, current regulations entitling workers to overtime fail to protect domestic workers. A survey by Domestic Workers United

\textsuperscript{170} 29 U.S.C.A. § 207(l) (West 2010).
\textsuperscript{171} 29 U.S.C.A. § 213(b)(2) (West 2010); 29 C.F.R. § 552.109 (2010) (interpreting the exclusion to apply to domestic workers who work for third-party agencies).
\textsuperscript{172} N.Y. COMP. CODES R. & REGS. tit. 12, § 142-2.2 (2010).
\textsuperscript{174} Settlement Home Care, Inc. v. Indus. Bd. of Appeals of Dep't of Labor, 151 A.D.2d 580, 581–82 (N.Y. App. Div. 1989) (holding that the court will read NY minimum wage law broadly and consider legislative intent, and thus cover sleep-in home attendants who were employed by a third-part agency).
\textsuperscript{175} N.Y. LAB. LAW § 170 (McKinney 2010) (effective Nov. 29, 2010).
\textsuperscript{176} 29 U.S.C.A § 207(l) (West 2010) ("No employer shall employ any employee in domestic service in one or more households for a workweek longer than forty hours unless such employee receives compensation for such employment in accordance with subsection (a) of this section.").
revealed that 67% of workers "sometimes or never receive" overtime pay, and that of those who do receive overtime pay, 34% do not receive time and a half but rather only their usual wage. In fact, the standard practice in this informal industry is for employers to pay a flat rate per week "for unpredictable and sometimes unlimited hours of work." While the new language in the DWBR reflects an increase in standards for domestic workers who labor and live inside the home of their employer, it is unclear how a new law will address the problems of enforcement and exploitation cited in the Domestic Workers United report. Thus, other than the change for live-in workers, the overtime provisions under the Bill of Rights appear mainly to be a reiteration of current legal rights that domestic workers already have, but are unable to enforce.

3. Minimum Wage

Prior to the passage of the Domestic Workers Bill of Rights, under both the FLSA and New York law, domestic workers were covered under the minimum wage laws. However, New York law excluded those domestic workers who worked as a "part time baby sitter in the home of the employer; or someone who lives in the home of an employer for the purpose of serving as a companion to a sick, convalescing or elderly person, and whose principal duties do not include housekeeping." The DWBR narrows the exclusion by adding the words "on a casual basis" to the exception and eliminating the exclusion of workers who provide companionship services. Significantly, the amendment of the minimum wage law does not use the new "domestic worker" definition and so avoids the reiteration of the companionship exception.

Thus, under the amended New York minimum wage law, those employed on a non-casual basis as a babysitter in a home and those workers who live in the home of and provide care to the elderly and infirm (home health care workers) are now included in the definition of employee and thus are entitled to the state minimum wage. This represents a significant

177. DOMESTIC WORKERS UNITED & DATA CENTER, supra note 1, at 17.
178. Id.
181. N.Y. LAB. LAW § 651 (5)(a) (McKinney 2010) (effective Nov. 29, 2010) ("Employee" includes any individual employed or permitted to work by an employer in any occupation, but shall not include any individual who is employed or permitted to work: (a) on a casual basis in service as a part time baby sitter in the home of the employer").
gain for domestic workers, because, while New York state's minimum wage is currently equal to the federal minimum wage, historically the state minimum wage has been higher than the federal minimum wage.182

4. Anti-Discrimination and Sexual Harassment

As previously discussed, the private nature of the worksite, the immigration status of the worker, the gendered nature of the work, and the legacies of slavery and White supremacy are all vectors of oppression that come to bear on domestic workers. Therefore, it is not surprising that one-third of domestic workers report abuse from their employer based on race, language, or immigration status.183 In addition, due to the gendered nature of the work and the location of the work in the employer's home, many women domestic workers suffer gender-based sexual harassment.184

Under federal law, most domestic workers are not covered under Title VII protection, as it is only extended to employees of enterprises with at least fifteen employees.185 In addition, before the passage of the DWBR, domestic workers were effectively excluded from the New York Human Rights Law, which defined an unlawful discriminatory practice to occur when an employer, with more than four employees discriminated on the basis of "age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, marital status, or domestic violence victim status."186 Under both regulations, domestic workers are effectively excluded, as the majority of employers only employ one or two domestic workers in their household.

DWBR amends the New York Human Rights Law's definition of employer.187 The amendment will expand coverage of the New York Human Rights Law to "domestic workers" (as defined in the Act) as well as adding to the list of prohibited discriminatory practices the acts of sexual harassment and harassment based on race, religion, or national origin aimed specifically at "domestic workers."188 Once again, the reliance on

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182. Lung Interview, supra note 166.
183. DOMESTIC WORKERS UNITED & DATACENTER, supra note 1, at 20.
184. Caballes Interview, supra note 72.
186. N.Y. EXEC. LAW § 292(5) (McKinney 2010) (defining employer as having four or more workers); N.Y. EXEC. LAW 296(a) (McKinney 2010) (defining discriminatory practices).
188. Under the New York Human Rights Law as amended, the following discriminatory practices are prohibited:

It shall be an unlawful discriminatory practice for an employer to: (a) engage in unwelcome sexual advances, requests for sexual favors, or other verbal or
the "domestic worker" definition signals the exclusion of home health care aides and other similar workers from this provision of the DWBR.

5. Mandatory Day of Rest and Paid Vacation

Domestic workers are effectively excluded from the federal Family Medical Leave Act, and so are often unable to take days off to care for themselves or their families when they are sick. The DWBR fails to address this and lacks any mention of sick days. However, for those defined as "domestic workers" under the Act, the DWBR mandates a consecutive twenty-four hour unpaid day of rest every calendar week (with overtime if the worker decides to work on that day), and three paid days of vacation after working for an employer for one year. Again, the use of the newly crafted definition of "domestic worker" signals the continuing exclusion of home health care aides and similar workers from this provision.

Yet, these provisions are a legal precedent—no other category of workers has three days paid vacation days guaranteed under a state regulatory regime. Furthermore, the passage of legislation that mandates greater work benefits for primarily Black and immigrant women is significant when viewed in the context of a current economic climate of workers being laid off and unions making concessions in worker benefits.

physical conduct of a sexual nature to a domestic worker when: (i) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;

Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or (iii) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, or offensive working environment.

(b) subject a domestic worker to unwelcome harassment based on gender, race, religion or national origin, where such harassment has the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, or offensive working environment.


191. Cf. N.Y. Lab. Law § 161(1) (McKinney 2010) (enumerating a myriad of different classifications of workers that are guaranteed the mandatory day of rest).

In the end, the Domestic Worker Bill of Rights creates a minimal floor of protections for domestic workers. The expansion of the New York minimum wage law to include domestic workers who provide labor for the infirm and elderly is a real gain for domestic workers given the fact that historically, the New York minimum wage has been higher than the federal minimum wage. Overtime pay at the worker’s regular rate of pay rather than minimum wage has been extended to domestic workers who live in the home of their employer, but the overtime provisions for workers who live outside of the employer’s home was already codified under the FLSA. The mandatory day of unpaid rest, the three paid days of rest after a year of work, and the anti-sexual harassment and anti-discrimination clauses represent benefits never before legislated for a specific group of workers.

However, the DWBR has no provisions to address a path towards legalization or protection from punitive immigration regulatory schemes. The inclusion of the companionship services exclusion in the very definition of “domestic worker” means that home health care aids and caregivers to the elderly and infirm will continue to be excluded from most of the provisions of the new bill, unless the FLSA is amended. Overall, the Domestic Worker Bill of Rights establishes a very low floor of protections and yields limited concrete benefits for the Black and immigrant women who labor as paid caregivers.

**B. Legal Reform, Tactics and Pitfalls on the Road to Transformative Organizing**

“The law’s ultimate client in a liberal regime is structural liberalism.”

The decision to spend seven years lobbying and organizing for a “Bill of Rights” is a decision to invest in formal equality within the neoliberal system, and the question remains as to the value of that decision. Several radical lawyers and activists offer different tools and techniques with which to evaluate the use of legal reform in organizing campaigns and campaigns for transformational change. The question for activists and allies is whether the legislative campaign and the corresponding cost in time, funding and organizing efforts address the stated goal of ending the subjugation of domestic workers.

Angela Harris states that “[l]aw by its very nature is conservative, and when calls for change that threaten to destabilize existing distributions of material and symbolic power are made, change through law will occur in ways that preserve existing distributions to the greatest extent possible.”

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193. Harris, supra note 12, at 1543.
194. Id. at 1542.
Harris warns that emancipatory claims can be absorbed in structural liberalism and transformed through legal systems which will act to preserve existing inequality. Therefore, the danger is that legislative reform within the neoliberal framework will not end the subordination of domestic workers, but will instead lead to a legal system that transforms itself to maintain the current unequal distribution of wealth and power.

In addition, Rickke Mananzala and Dean Spade, in their essay *The Nonprofit Industrial Complex and Trans Resistance* present a cautionary note for activists working within the non-profit structure. They identify several key concerns that are applicable in the context of analyzing the use of a legal reform strategy. One concern addresses the tendency for most non-profit groups to hire primarily White college-educated staff, and the resulting concentration of power and decisionmaking in the hands of people with class and often race privilege who are not directly suffering the oppression themselves. As Mananzala and Spade point out, this often results in a perspective and decisions that do not reflect the reality of those actually experiencing the oppression, and replicates oppressive structures based on class and race. The authors then raise the issue of decision-making models that are centered in the hands of the people with education, wealth, and class privilege. This is applicable in analyzing the DWBR because legislative strategies often entail back room compromises, and decisions are usually made by lawyers and other people with economic and educational privilege.

The authors then focus on how, in the non-profit context, funding is often channeled away from political education and leadership development of the membership into “policy work” and “service work” mainly controlled by lawyers, social workers, and other educated elite. Legislative reform has the danger of becoming driven by funding organizations, and the passage of “something” to please the funders is a common pitfall of legislative strategies.

Eric Mann gives the following definition of “transformative organizing”:

Transformative organizing transforms the system itself and is in revolutionary opposition to the power structures of colonialism, patriarchy, white supremacy, and capitalism in its current form, which is imperialism. Transformative organizing transforms the consciousness of people who participate in the process of building organizations, struggles, and movements.

195. *Id.* at 1565.
197. *Id.* at 57.
198. *Id.* at 58.
199. *Id.* at 57.
Transformative organizing transforms the organizers themselves as they stand up to the Right, reach out to the people, and take on the system.\textsuperscript{200}

Hence, the success of a strategy or tactic must be measured by the transformation of consciousness of the people directly affected by the reform and the infrastructure of the organizations leading the strategy (whether the campaign distributed power down and out vertically to the members and the workers or upward and concentrated among a few elite decision makers) rather than the amount of legal reform won within the neoliberal system. In \textit{Methodologies of Trans Resistance}, Dean Spade offers several questions when evaluating a chosen tactic or strategy. He proposes that activists utilize the following questions in evaluating a chosen strategy or campaign:

1. What effect would this campaign or action have on the most vulnerable individuals in our community or constituency?

2. Does anyone suffer exclusion if we pursue this goal or strategy? Is any portion of our community marginalized by this strategy, framing, or rhetoric?

3. How does it fit into the overall vision of what we want the world to look like or what we want the specific system that this campaign engages with to look like? In this question we examine the reform/revolution question: Is this strategy legitimizing an oppressive system? If so, is that concern offset by immediate gains in terms of survival and political participation for our constituency, such that making the reform is worthwhile because it will significantly strengthen the ability of our most vulnerable community members in leading change that more deeply opposes the oppressive institution in question?\textsuperscript{201}

I offer additional questions in light of the specific conditions of domestic workers. Do these tactics weaken the legal construction of the protected private sphere of the employer? Given the pitfalls of working within the non-profit industrial complex iterated earlier in this Note, it is important to also ask questions related to funding and infrastructure. How does the chosen strategy affect funding within the non-profit industrial

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\textsuperscript{201} Dean Spade, \textit{Methodologies of Trans Resistance}, in \textit{A Companion to Lesbian, Gay, Bisexual, Transgender, and Queer Studies} 237, 256 (George E. Haggerty & Molly McGarry eds., 2007).
\end{flushleft}
complex? Does the chosen strategy funnel funding away from efforts to build organizations that are led by domestic workers?

I do not offer answers to these questions, but rather pose them to the organizers and activists who developed and implemented the campaign to pass the Domestic Worker Bill of Rights. Did the campaign distribute power from middle-class, college-educated professional organizers to domestic workers? How did the decision to compromise on sections of the Bill get made? Was it through a difficult, shared decision making process or through backroom deals with lawyers and politicians? Did the considerations of funding and funders drive the final decision to accept a watered down version of the original DWBR?202 Does the campaign for legislation divert funding and resources from smaller, more grassroots domestic worker organizations? If so, have you attempted to address this? In the evaluation of the alliance work, did one group become the spokesperson for all the groups in the alliance? Did the alliance work help the individual groups grow stronger, or was funding channeled away from the smaller grassroots groups and towards the group that was advocating for legislative reform?203

Finally, the DWBR cannot be evaluated only through the legal gains and losses it represents. In the campaign to win the DWBR, the organizing efforts by domestic workers, coalition work, the building of a worker-led movement, the political education of Black and immigrant women, the alliance work in the campaign and the discourse in the mainstream and progressive media must all be considered.204

202. Domestic Workers United & DataCenter, supra note 1, at 35-36 (The original proposal was drafted with extensive input from domestic workers and was comprehensive: with a minimum wage at fourteen dollars an hour, health care provisions, paid holidays, paid vacation, requirement of notice of termination and severance pay).

203. Interview with Dean Spade, Assistant Professor of Law, Seattle Law University School of Law, in Flushing, N.Y. (May 3, 2010) (Interviewee describes his alliance work as founder of Sylvia Rivera Law Project. He discussed the decision to turn down funding and encourage funders to instead support the grassroots organizing work of alliance organizations. He also discussed the funders' predisposition to give to a legal organization with a charismatic White founder as opposed to other queer organizations led by people of color that did not use legal reform strategies).

204. Poo Interview, supra note 156 (describing the goals of the bill to be more than reformation of the law and noting that the goals of the campaign included: winning recognition of domestic workers under state labor law; making the political point that domestic work makes all other work possible; creating media visibility; and shifting public consciousness).
CONCLUSION: THE WORK THAT MAKES ALL WORK POSSIBLE

Every day in the United States a Black or immigrant woman enters and works inside the home of a White middle or upper-class employer. Globally, immigrant women are economically displaced due to the imposition of structural adjustment programs and unequal trade agreements. These women are forced to leave behind their families to take care of children, the elderly, and the infirm of the first-world. The remittances of immigrant women help to maintain and stabilize third-world economies, thus quelling rebellions against the global, economic system.

Within the heteropatriarchal family, women remain the primary caregivers of children, the elderly, and the infirm. Therefore, it is primarily White women who act as the supervisors and regulators of the labor of Black and immigrant women. The White feminist movement’s focus on the entry of women into wage labor implicitly ignored the wage labor of Black and immigrant women in the homes of White families. Many White women have been able to increase their social status and economic independence through the exploited labor of Black and immigrant domestic workers.

The legal landscape surrounding domestic workers is uniquely shaped by heterosexism and racism. This Note posits that regulatory regimes act to facilitate access to the labor and bodies of Black and immigrant women primarily for White first-world employers. Thus, one finds a regime that heavily regulates the lives of Black and immigrant women while simultaneously creating a legally private sanctuary free from regulation in the home of the White employer.

The Domestic Worker Bill of Rights is the latest attempt to organize and advocate for domestic workers within the legal system. For those committed to transformational organizing, the decision to use legal reform is one fraught with tension and contradiction. I offer questions and criteria in evaluating the decision to advocate for legal reform in order for organizers and domestic workers to critique the strategies that are used in the future.

As this Note demonstrates, we must be extremely cautious when employing legal strategies. The DWBR does little to change the actual conditions of domestic workers, while at the same time lending credibility to the legislative and legal regime. In its creation of the category of


206. Ruiz, supra note 37 (quoting Governor Patterson at the signing ceremony of the DWBR) (“Today we correct a historic injustice by granting those who care for the elderly,
“domestic worker” with a built-in exclusion, the DWBR harmed one class of workers while providing minimal legal gains for another set of workers. In addition, the question is unanswered as to the effect of funding on smaller grassroots organizations that choose not to focus on a legal reform strategy but instead on other forms of resistance. Workers and their advocates must utilize a wide variety of tools to resist oppression and work towards transformational organizing. Domestic workers, as the Black and immigrant women who raise the children and care for the elderly of the White middle and upper-class families of the first-world, have a unique role to play in challenging the current capitalist system. From studying workers’ individual sites of resistance, to critiquing legal strategies and alliance work, and studying the history of domestic workers in the United States, we can move towards a model of transformational organizing that brings about systemic change.