

Domestic Workers and Their Right to be Heard: Residential Picketing Makes Visible the Invisible

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I. Introduction

The right of domestic workers to peacefully picket and protest¹ is guaranteed by the First Amendment, and has been recognized in numerous jurisdictions as a protected right.² Peaceful protest in response to oppressive working conditions and unlivable wages is usually considered to be residential picketing for a lawful purpose. However, some courts have held that peacefully picketing in a

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¹ Thornhill v. Alabama, 310 U.S. 88 (1940).

² See *infra* notes 46-47 and accompanying text.

residential zone requires the consideration of particular circumstances, also known as time, place and manner restrictions. Courts have considered whether prohibiting such picketing – in this case for domestic workers - would restrict freedom of speech or assembly under the First Amendment.

This paper addresses the nature of domestic workers' work as both gendered and racialized. It also highlights the distinction between the relationship domestic workers' have with their employer/homeowner from the absence of this relationship in traditional residential picketing situations. Examples of historically condemned picketing sites include when employees—who have a separate work site—opt to picket their employer's home, or when citizens in protest of a particular policy picket a public official's home, or march through the official's residential neighborhood. Modern-day domestic workers who are immigrant women of color are emphasized in this paper, as is the intersection between race, class, gender, and immigration status and how the convening of these statuses have produced a group of workers that have historically been exploited. In addition, I analyze the restrictions on residential picketing related to the right to privacy of the employer/homeowner and how that privacy right has historically disenfranchised and burdened women. Lastly, I suggest that should the right to picket an employer's home be limited or removed under time, place, and manner restrictions, domestic workers' speech will be chilled, and workers will likely withdraw from seeking alternative venues to challenge their oppression.

II. Invisible Work(er): No Recognition or Protection for Women of Color Domestic Workers

A. *Domestic Work is "Women's Work"*

Perhaps the most significant challenge domestic workers in the United States face in seeking protection under the law is the blatant denial of their work as labor.³ Domestic work emerged

³ See DRUCILLA K. BARKER & SUSAN F. FEINER, *LIBERATING ECONOMICS: FEMINIST PERSPECTIVES ON FAMILIES, WORK, AND GLOBALIZATION* 24 (4th ed. 2007) (“Unpaid household labor was women's work and that women's work was not work at all.”).

from slavery⁴ and involuntary servitude, and has a long history of being compelled and gendered in the United States.⁵ “Since housewives traditionally performed domestic work for no pay, domestic work has little or no economic value. It ‘takes place outside the boundary of the world’s economy as men see it.’”⁶ This is undoubtedly because of how domestic labor emerged from the roots of slavery, where both the work and the workers were deemed valueless and invisible.⁷ Domestic Workers United in New York City highlighted the fact that the lack of labor protections stem from the economic and social hierarchy in which domestic work is placed – as gratuitous and expected of women within a household.

“The struggle of domestic work is to be recognized as ‘real work’ - its historical roots in slavery, its association with women’s unpaid household labor, its largely immigrant and women of color workforce and exclusion from legal protections devalue their work.”⁸

⁴ Kristi L. Graunke, “Just Like One of the Family”: *Domestic Violence Paradigms and Combating On-the-Job Violence Against Household Workers in the United States*, 9 MICH. J. GENDER & L. 131, 165 (2002).

⁵ Ruthann Robson, *A Servant of One’s Own: The Continuing Class Struggle in Feminist Legal Theories and Practices: Mrs. Woolf and the Servants: An Intimate History of Domestic Life in Bloomsbury* by Alison Light, 23 BERKELEY J. GENDER L. & JUST. 392, 403 (2008) (reviewing Alison Light’s book on Virginia Wolfe’s cruel relationship with her own servants and noting that the “gendered perception of domestic service continued to thwart attempts at organizing for legal and social rights.”).

⁶ Taunya Lovell Banks, *Toward a Global Critical Feminist Vision: Domestic Work and the Nanny Tax Debate*, 3 J. GENDER RACE & JUST. 1, 6 (1999) (citing Reva B. Siegel, *Home As Work: The First Woman’s Rights Claims Concerning Wives’ Household Labor, 1850-1880*, 103 YALE L.J. 1073 (1994) & (citing Peter Pitegoff, *Child Care Enterprise, Community Development, and Work*, 81 GEO. L.J. 1897, 1921 n.131 (1993).

⁷ JUDITH ROLLINS, *BETWEEN WOMEN: DOMESTICS AND THEIR EMPLOYERS* 21-24, 59 (1985). Rollins goes on to say that “The fact that domestic service is one of the two forms of work historically accepted as ‘women’s work’ (the other being prostitution), that it has an ancient and modern association with slavery and is manual and dirtying, makes this occupation one universally despised and those who do it universally dehumanized.”

⁸ *Home Is Where the Work Is: Inside New York’s Domestic Work Industry*, DATA CENTER RESEARCH FOR JUSTICE (July 14, 2006), <http://www.datacenter.org/wp-content/uploads/homeiswheretheworkis.pdf>.

Dismissing domestic work as valueless is a central point to this analysis because the Framers of the Constitution undoubtedly did not imagine the inclusion of women, slaves, or even workers among the classes of persons whose rights to protest labor conditions were protected by the First Amendment.⁹ At the time the Fourteenth Amendment was drafted, women did not work outside the home¹⁰ or vote,¹¹ much less support a family solely on their income,¹² as is often the case today. Dismissing domestic labor from its origins as unpaid “women’s work” fails to take into

⁹ See *State v. Maynard*, 5 P.3d 1142, 1189 (Or. Ct. App. 2000) (Landau, P.J., dissenting) (arguing against the originalist approach of the majority, stating “it bears recalling in that regard that many of the framers of the constitution believed that individuals of color could be owned as property [and] that women could not participate in governmental affairs...”); See also Mark S. Stein, *Originalism and Original Exclusions*, 98 KY. L.J. 397, 407-408 (2009) (comparing the moral legitimacy of the Constitution in the era of the Framers and the Constitution of today, noting women were excluded from voting on the Constitution. In a critique of originalism, Stein goes on to cite Justice Thurgood Marshall as saying “‘We the People’ no longer enslave, but the credit does not belong to the framers.”); See also Christine L. Jones, *Affirmative Action And Land-Grant Universities In The Millennium: When Will We Fulfill The Original Promise?*, 10 UDC.L. REV. 1, 2 (2007) (further quoting Justice Marshall as saying “the Founding Fathers expressly excluded...women from the language “We the People” in the Constitution's preamble. These provisions of the original Constitution...failed to grant voting rights to both ‘Negro slaves’ and women.”); See also Adam Lamparello, *A New Method To Guide Constitutional Interpretation: Introducing “Negative Originalism”*, 18 U. FLA. J.L. & PUB. POL’Y 383, 408 (2007) (citing critics of originalism as saying “there's pretty much no originalist support for the general idea that the Constitution protects women from discrimination by Congress or by state legislatures.”).

¹⁰ For commentary on originalist intent of the Fourteenth Amendment (almost 100 years after the First Amendment) and how women were viewed, See Dawn Johnsen, *Lessons from the Right: Progressive Constitutionalism for the Twenty-First Century*, 1 HARV. L. & POL’Y REV. 239, 253-4 (2007) (noting the dissenters of key abortion-rights’ cases could have been “because the framers of the Fourteenth Amendment did not contemplate any such liberties for women in 1868 and, indeed, believed women's ‘natural’ role as mothers justified laws that excluded women from public life, including paid work and self-government.”).

¹¹ The Nineteenth Amendment to the U.S. Constitution granting women’s suffrage was not ratified until 1920. See generally Adam Winkler, *A Revolution Too Soon: Woman Suffragists and the “Living Constitution”*, 76 N.Y.U. L. REV. 1456, 1458 (2001) (detailing how “suffragists argued that the text of the Constitution should be construed to keep up with the cultural and legal changes in the status of women, and . . . how they mixed this evolutionary method with a forceful critique of originalism.”).

¹² Dorothy Roberts, *Spiritual and Menial Housework*, 9 YALE J.L. & FEMINISM 51, 59. (1997); see also DeAnne K. Hilfinger Messias, *Transnational Perspectives on Women’s Domestic Work: Experiences of Brazilian Immigrants in the United States*, 33 WOMEN & HEALTH, 2 (2001) available at www.cas.sc.edu/wost/images/Messias%20Brazilian.pdf.

account the shifting realities of the women who no longer perform such duties within their own home, but instead seek employment to perform those same services in other people's homes. Women have primarily been seen as responsible for unpaid domestic work within their own homes which has conceptually facilitated society's expectation of women to outsource their work for pay and perform those same duties for another, albeit minimal. This notion of domestic work as "women's work"¹³ has resulted in it being discounted, dismissed, and devalued. It also exposes how society has placed a higher value on those seeking pay for labor performed outside of the house, even if it is for the same duties one would ordinarily engage in at home.¹⁴

The law's refusal – as reflective of society's will – to recognize domestic work as valuable labor perpetuates patriarchy and sexism. The denial of domestic work, and thus domestic workers, as valuable, create ripe conditions for exploitation and abuse. The care work of women has been deeply engrained in the cultural fabric and social conscience of society as "women's work", which assumes women's place is exclusively in the home. Such assumptions have created social isolation at home and have fostered the coercion of domestic violence.¹⁵ The isolating conditions and invisibility of domestic work have left little recourse for challenging the sexist foundations upon which domestic gendered norms have been constructed and have rendered domestic workers invisible to legal protections.

¹³ See generally Kathryn Branch, *Are Women Worth as Much as Men?: Employment Inequities, Gender Roles, and Public Policy*, 1 DUKE J. GENDER L. & POL'Y 119 (1994) (for a discussion about the lack of value placed on domestic work and how such work has historically been seen as "women's work," and thus women are sociologically groomed to assume such roles).

¹⁴ See Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 GEO. L.J. 567, 593 (2010) (offering critiques of the social citizenship movement that bases citizenship on work, given that domestic work is predominately done by women and goes unrecognized); Sabaa A. Khan, *From Labour of Love to Decent Work: Protecting the Human Rights of Migrant Caregivers in Canada*, 24 NO. 1 CAN. J.L. & SOC'Y 23, 31 (2009) (quoting that domestic work is "ideologically invisible as a form of real work. . . even when it is paid for."); Dana Neacsu *The Red Booklet on Feminist Equality. Instead of a Manifesto*, 30 WOMEN'S RTS. L. REP. 106, 140 (2008) (noting a feminist critique that capitalism refuses to account for work in the private sphere, i.e. women's domestic work, which renders work that women and men do as "inherently unequal").

¹⁵ David Bollier, *Unpaid Work as a Form of Social Wealth*, ON THE COMMONS (Dec. 5, 2005), <http://onthecommons.org/content.php?id=710>.

B. *Domestic Workers: The Unnoticed Work of Immigrant Women of Color*

While European immigrant women were domestic workers in many parts of the country in the early twentieth century, the industry became further racialized¹⁶ in the mid part of that century¹⁷ with the emergence of the feminist movement, and the choice white women made to enter the regulated, paid labor market outside of their homes.¹⁸ In response to the influx of white women into the labor force, the need for domestic workers to provide services that their middle class families depended upon became critical. Many white women soon had the ability to remain in the workforce by ensuring that their domestic work at home was provided for by women of color.¹⁹ During the slavery

¹⁶ PIERRETTE HONDAGNEU-SOTELO, *DOMÉSTICA: IMMIGRANT WORKERS CLEANING AND CARING IN THE SHADOWS OF AFFLUENCE* 14 (2nd ed. 2007) (“With few exceptions, domestic work has always been reserved for poor women, for immigrant women, and for women of color”).

¹⁷ Evelyn Nakano Glenn, *Cleaning Up/Kept Down: A Historical Perspective on Racial Inequality in “Women’s Work”*, 43 *STAN. L. REV.* 1333, 1339-1344 (1991) (for a thorough breakdown of how white women relegated domestic work onto women of color rather than challenge the underlying sexism that structures gender roles). Glenn goes on to say that “domestic service has played a critical role in the distinct oppression of women of color. Paid domestic service expropriates and exploits their ‘social reproduction’ labor . . . This kind of labor, which has historically been women’s work, has also historically been divided by race.”

¹⁸ Robson, *supra* note 6, at 419 (“Because gender roles make women responsible for domestic work, professional - including feminist - women hire others [usually women] to accomplish this work, freeing themselves for more ‘important’ and ‘rewarding’ work.”).

¹⁹ Andrea Cristina Mercado & Ai-jen Poo, *Domestic Workers Organizing in the United States*, *THE COMMUNICATION INITIATIVE NETWORK* 1, 2 (Jan. 1, 2009), [http://www.comminet.com/redirect.cgi?m=3f93d84b129c76ffa9dec6a10f43188c.](http://www.comminet.com/redirect.cgi?m=3f93d84b129c76ffa9dec6a10f43188c;); Colwick M. Wilson, *Domestic Work in The United States of America: Past Perspectives and Future Directions*, *UNJOBS.ORG* 1 (2000), at 1 (stating that “by the mid-20th century, domestic work was almost exclusively done by women, specifically immigrants from Europe and native born blacks. Native-born white women were turning to other endeavors, including factory work and teaching. Thus, the demand for domestic workers was filled by ‘recent immigrants and migrants from rural society and members of subordinate racial-ethnic groups.’”), *available at* <http://www.rcgd.isr.umich.edu/prba/perspectives/winter2000/cwilson.pdf>; Dorothy E. Roberts, *Spiritual and Menial Housework*, 9 *YALE J.L. & FEMINISM* 51, 55, 59 (1997) (noting that “women may delegate housework’s menial tasks to others while retaining their more valuable spiritual duties . . . [this] fragmentation fosters a hierarchy among women because the menial aspects of housework are typically delegated by more

and post-civil war era, domestic workers in the United States were predominately Black women.²⁰ Over time, this population has changed to include more immigrant women of color who have taken domestic jobs as nannies and housekeepers, perceiving these roles as the only jobs available to them.²¹ They are “increasingly the sole wage earners for their families, [and] often have their own children and household to care for after a long day of cleaning other people’s homes.”²²

privileged women to less privileged ones.” Later, she adds that “delegating the menial household chores enabled privileged women to live up to the spiritual ideal of womanhood.”); See also Janet Jakobsen *Queer Relations: A Reading of Martha Nussbaum on Same-Sex Marriage*, 19 COLUM. J. GENDER & L. 133, 165 (2010) (asking whether women are really autonomous if they’ve relegated familial labor work to paid domestic workers); Banks, *supra* note 7, at 9 (noting that “by the late twentieth century, increasing numbers of middle-class women with children moved out of the home and into the job market, often at the expense of other women.”); Evelyn Nakano Glenn, *From Servitude to Service Work: Historical Continuities in the Racial Division of Paid Reproductive Labor*, in *Working in the Service Society*, 18 SIGNS: J. WOMEN AND CULTURE IN SOC’Y 1, 17 (1992) (“Rather than challenge the inequity in the relationship with their husbands, white women pushed the burden onto women with even less power. They could justify this only by denying the domestic worker’s womanhood, by ignoring the employee’s family ties and responsibilities.”) available at <http://www.jstor.org/stable/3174725?seq=1>.

²⁰ Dorothy Roberts, *Spiritual and Menial Housework*, 9 YALE J.L. & FEMINISM 51, 78 n.155 (1997) (“Contemporary Black feminists have criticized the mainstream women’s movement for gaining entry into the male work world by assigning female domestic tasks to Black women, rather than by demanding fundamental change in the sexual division of labor and restructuring of the workplace.”).

²¹ See, e.g. Katharine Silbaugh, *Commodification and Women’s Household Labor*, 9 YALE J.L. & FEMINISM 81, 112 (1997) (“Paid domestic laborers are historically and presently overwhelmingly women of color, immigrants, or both.”); Dorothy Roberts, *Spiritual and Menial Housework*, 9 YALE J.L. & FEMINISM 51, 61 (1997) (comparing the stratification of the market to domestic work in the home: “[r]acial-ethnic women are employed to do the heavy, dirty, ‘back-room’ chores of cooking and serving food in restaurants and cafeterias, cleaning rooms in hotels and office buildings, and caring for the elderly and ill in hospitals and nursing homes, including cleaning rooms, making beds, changing bed pans, and preparing food. In these same settings white women are disproportionately employed as lower-level professionals [e.g., nurses and social workers], technicians, and administrative support workers to carry out the more skilled and supervisory tasks.”); See generally Preeti Shekar, *Home Is Where the Work Is: The Color of Domestic Labor*, RACE, POVERTY & THE ENVIRONMENT, Spring 2007, at 51, available at <http://urbanhabitat.org/node/860>.http://www.urbanhabitat.org/filesfilesfilesnode/860filesfiles/RPE14-1_Shekar-s.pdf.

²² Tracy Wilkinson, *To Protect Those Who Must Serve*, L.A. TIMES, Feb. 12, 1992, A1, available at http://articles.latimes.com/1992-02-12/news/mn-1547_1_domestic-work; See also Roberts, *supra* note 20, at 63-64 (quoting a West Indian domestic worker commenting on the lack domestic employers’ lack of inquiry into domestic workers’

As has historically been the case since the turn of the twentieth century, today most domestic workers are immigrants.²³ According to the most recent estimates by the United States Census Bureau, there are 1.5 million domestic workers in the United States, not including undocumented workers.²⁴ For domestic workers who have migrated here as undocumented immigrants, fear of being deported looms large.²⁵ This also holds true for domestic workers who have been trafficked here and forced into labor under incredibly abusive conditions.²⁶ Trafficked workers often end up in the immigration system as undocumented workers, marked for deportation back to the countries from which they were trafficked, and where the circle of exploitation begins anew.²⁷ For domestic workers who migrate “voluntarily,” they

childcare needs, saying “[it’s] O.K. for them to ask me to stay extra time because they have their family together, but what about me? . . . They don’t think that I have my family waiting for me.”); *see generally* GRACE CHANG, *DISPOSABLE DOMESTICS: IMMIGRANT WOMEN WORKERS IN THE GLOBAL ECONOMY* (2000).

²³ *See* Roberts, *supra* note 20, at 59; *see also* DeAnne K. Hilfinger Messias, *Transnational Perspectives on Women’s Domestic Work: Experiences of Brazilian Immigrants in the United States*, 33 *WOMEN & HEALTH* 1/2, 2 (2001) available at www.cas.sc.edu/wost/images/Messias%20Brazilian.pdf.

²⁴ 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. & EMP. L.J.* 233, 233 (2009).

²⁵ Wilkinson, *supra* note 22, at A1.22. *See also* Peggie R. Smith, *Organizing the Unorganizable: Private Paid Household Workers and Approaches to Employee Representation*, 79 *N.C. L. REV.* 45, 91-92 (2000); *U.S. v. Alzanki*, 54 F.3d 994, 999 (1st Cir. 1995) (This is also true for women who have been brought over by legal means, but then upon arrival have their passports and documentation stripped from them, rendering them essentially undocumented).

²⁶ *See e.g.* *Baoanan v. Baja*, 627 F. Supp. 2d 155 (S.D.N.Y. 2009) (denying a motion to dismiss by defendants, former diplomats, who conspired to lure a woman from the Philippines with false promises of employment as a nurse in the United States, but once she arrived, forced her to work as a domestic servant in their home); *U.S. v. Sabhnani*, 566 F.3d 215 (2d Cir. 2008) (convicting two defendants who harbored, starved, beat and tortured domestic workers in their home); *See generally* GLOBAL RIGHTS 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*, available at http://www.globalrights.org/site/DocServer/Domestic_Workers_report-FINAL.pdf?docID=5503.

²⁷ *See, e.g.*, Della Bahan & Puja Batra, “Seeking Justice for Trafficked Domestic Workers in American Courts,” Presentation at IWPR’s Eighth International Women’s Policy Research Conference: When Women Gain, So Does the World, (June 2005) available at www.iwpr.org/PDF/05_Proceedings/Bahan_Della.pdf (commenting that

often do so under the most economically depressed conditions that amount to economic coercions and leave them few choices for survival or free choice.²⁸

Immigrant female domestic workers face additional barriers that limit their ability to fully advocate their rights. Often English language capacity and immigration status concerns inhibit workers from advocating for themselves.²⁹ Workers with low levels of education may be even more hesitant to speak out against abusive employers or conditions out of economic fear, particularly in an unforgiving economy where the conditions that lead women to seek domestic work can also lead to their exploitation. In addition, domestic workers often live in isolated conditions where there are few, if any, people aware of the conditions under which they live and are able to render assistance. In the privacy of their employer's homes, much can go on unnoticed, including being denied food, heat, and wages. Because they live under the dominion of another person or family, domestic workers' ability to access and interact with the outside world is limited and sometimes non-existent, resulting in extremely isolated conditions.³⁰ Workers "for the most part, work within an informal economy, and consequently have no health insurance, disability compensation or other benefits . . . They form a transitory work force and live with the belief that they can be replaced easily, leaving them reluctant to challenge the system."³¹

Despite their oppressive conditions, many immigrant women still turn to domestic work as an opportunity to rise out of poverty

trafficked domestic workers "become" undocumented once their traffickers confiscate the worker's passport and other travel documents upon arrival).

²⁸ See generally GENDER, MIGRATION AND DOMESTIC SERVICE (Janet Henshall Momsen ed., 1999) (exploring the tensions that arise internationally as a result of global migration patterns for domestic workers); see also RHACEL SALAZAR PARREÑAS, SERVANTS OF GLOBALIZATION: WOMEN, MIGRATION, AND DOMESTIC WORK (2001) (discussing the global demands for labor that cause Filipina women to abandon their own families to travel to first world countries seeking employment as domestic workers).

²⁹ Premilla Nadasen, "Tell Dem Slavery Done": *Domestic Workers United and Transnational Feminism*, S&F Online, Fall 2009 at 2, available at http://www.barnard.columbia.edu/sfonline/work/nadasen_01.htm, reprinted in NEW SOCIAL MOVEMENTS IN THE AFRICAN DIASPORA: CHALLENGING GLOBAL APARTHEID (Leith Mullings ed., 2009).

³⁰ Wilkinson, *supra* note 22.

³¹ *Id.*

and to build a path toward permanent resident status. For some women, domestic work can provide discrete employment where legal work papers are not required. “Housecleaning also provides an employment opportunity for unskilled women, and maids who develop several clients can develop a good business. For some live-in maids, their jobs give them better food and a better place to live than they would otherwise expect.”³² Additionally, “some women turn to domestic work in order to secure employer sponsorship in hopes of obtaining [a green card].”³³ However, such jobs may cause the worker to feel beholden to her employer and she may be less likely to speak out for fear of jeopardizing her chance of obtaining residency.³⁴ The intersection of race, class, and immigration status creates a subset of workers who have been historically—and are still currently—oppressed under sexist and racist cycles of exploitation. Immigrant women workers of color are also extremely vulnerable to abuse based on their total economic dependency on their employers for wages and well-being, combined with the absence of available ways to assert their economic rights via traditional labor resistance mechanisms such as picketing. It is in this context where the worker’s right to protest such conditions at their place of employment, the employer’s home, becomes essential.³⁵

C. Why Domestic Workers Need to Organize and the Challenges for Organizing Them

The government’s failure to recognize domestic work as labor that should be regulated has placed domestic work beyond the scope of the majority of statutory protections and beyond the original intent the Framers had for the First Amendment of the U.S. Constitution.³⁶ The First Amendment was passed during a time where women were not paid for their domestic labors – either because they were slaves, indentured servants, or housewives who were simply expected to undertake that work because their gender dictated so. However, evolutive theorists

³² *Id.*

³³ Smith, *supra* note 25, at 92.

³⁴ *Id.*

³⁵ Andrea Cristina Mercado & Ai-jen Poo, *Domestic Workers Organizing in the United States*, THE COMMUNICATION INITIATIVE NETWORK 1, 2 (Jan. 1, 2009), available at <http://www.comminet.com/redirect.cgi?m=3f93d84b129c76ffa9dec6a10f43188c>.

³⁶ U.S. CONST. amend. I.

would point out that First Amendment protections should be extended to domestic workers because women currently are not just leaving their homes, but their countries, to seek out employment as domestic workers and in many cases are receiving payment for their services. While some live on-site with their employers, many do not and they return home to their residence after working a full day, just like most other employed persons who receive constitutional protections.

Because this article advocates that domestic work is not only labor, it is arduous and strenuous labor from which all of society reaps benefits, First Amendment protections for freedom of speech and assembly should extend to domestic workers protesting horrific working conditions. Without that right, domestic workers remain vulnerable to exploitation, leaving them little recourse to fight back against egregious violations of basic human dignity.

Organizing has become one of the most powerful and effective tools workers have at their disposal for holding their employers accountable for human rights violations. Organized labor has not always been effective at reaching out to domestic workers;³⁷ however unions are now actively trying to organize this group of workers. In 1997, there were a reported 1,748,300 workers, most of them women,³⁸ who performed private household work by cleaning homes, providing childcare³⁹ and home health care.⁴⁰ Amongst women who provide housecleaning services, 51% were Black or Hispanic.⁴¹ In New York State alone, “over 200,000

³⁷ Jose de Paz of the California Immigrant Workers Association commented that “generally, immigrant women working as domestics have been dismissed or ignored both by organized labor and other reform-minded movements, left to languish as one of the most disenfranchised groups in the United States.” Wilkinson, *supra* note 22.

³⁸ *Id.* Women constituted 96.3% of the 691,000 private household workers in two of the three categories, performing cleaning and childcare services.

³⁹ For a comparison of the value placed on the work by childcare providers and other industries, see Bharati Sadasivam, *Widening Women's Choices: The Case for Childcare in the Era of Globalization*, in *HARNESSING GLOBALISATION FOR CHILDREN: A REPORT TO UNICEF* 1, 26 (2001), available at <http://www.unicef-icdc.org/research/ESP/globalization/chapter15.pdf>. (“In the United States, childcare workers, 98 per cent of whom are women, earn on average only \$6.12 an hour – less than parking lot and gas station attendants, vehicle washers and pest controllers.”).

⁴⁰ Silbaugh, *supra* note 21, at 112.

⁴¹ *Id.* at 112-13. Noting that “a substantially disproportionate number of private household workers overall are Black or Hispanic (nearly forty-four percent).

women work as nannies, companions and housekeepers.”⁴² Although domestic workers make up a substantial constituency, this particular group of low-wage workers does not have a strong union membership.⁴³ Despite the obstacles to organizing, some labor union representatives have been intent on educating domestic workers about their rights, including how to negotiate salaries and benefits.⁴⁴ Additionally, some labor unions have responded to the vulnerable economic and social status of these workers by providing them with needed social services such as counseling, health care, and immigration-related services.⁴⁵

III. The Right to Picket v. The Right of Privacy

*“Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society.”*⁴⁶

The right to peacefully picket has long been recognized as constitutionally protected by the U.S. Supreme Court.⁴⁷ This has

⁴² Domestic Workers United, <http://www.domesticworkersunited.org/media.php?show=69>.

⁴³ See Wilkinson, *supra* note 22; Smith, *supra* note 25, at 93; See also Shireen Ally, *Caring about Care Workers: Organising in the Female Shadow of Globalisation*, Center for Global Justice’s 2005 “Women & Globalization” Conference Papers, available at http://www.globaljusticecenter.org/papers2005/ally_eng.htm.

⁴⁴ Peggie R. Smith, *Organizing the Unorganizable: Private Paid Household Workers and Approaches to Employee Representation*, 79 N.C. L. REV. 45, 92 (2000).

⁴⁵ *Id.* at 93.

⁴⁶ *Thornhill v. Alabama*, 310 U.S. Mosley 88, 104 (1940).

⁴⁷ See *Police Dep’t of Chi. v.*, 408 U.S. 92, 94 (1972) (holding city ordinance prohibiting all picketing within 150 feet of a school unconstitutional because it makes an impermissible distinction between labor picketing and other peaceful picketing); *Shuttlesworth v. Birmingham*, 394 U.S. 147, 155 (1969) (holding an ordinance prohibiting picketing and parading by African-Americans unconstitutional); *Cox v. Louisiana*, 379 U.S. 536, 546 (1965) (holding a defendant’s constitutional rights to protest and picket could not be denied simply because of hostility to the exercise of such a right as contained in the Fourteenth Amendment); *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963) (holding that the state infringed upon defendant’s rights of free speech, free assembly and freedom to petition for a redress of grievances as guaranteed by the First Amendment and protected by the Fourteenth Amendment from invasion by the States); *Garner v. Louisiana*, 368 U.S. 157, 185 (1961) (Harlan, J. concurring in judgment) (finding no evidence to support civil rights protestors sitting-in at all-white restaurants had disturbed the peace, either by outwardly boisterous conduct or by passive conduct likely to cause a public disturbance); *Thornhill*, 310 U.S. at 88 106 (holding the danger of breach of the peace or serious invasion of rights of property

been particularly upheld in the context of labor disputes where picketing and striking have been some of the only available tools for workers to highlight their oppressive work environment and to achieve increased bargaining power in negotiating wages, benefits, and working conditions. In *Thornhill v. Alabama*, Justice Murphy balanced the competing interests of an employer's right to privacy while articulating the right of workers to picket:

The power and the duty of the State to take adequate steps to preserve the peace and to protect the privacy, the lives, and the property of its residents cannot be doubted. But no clear and present danger of destruction of life or property, or invasion of the right of privacy, or breach of the peace can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute involving the latter.⁴⁸

However, the right to picket has arisen in the context of employees picketing on their employer's work sites. While numerous cases have upheld the right to picket, many of those cases dealt with labor disputes in non-residential employment settings. The question for domestic workers then becomes: What about when your work site is your employer's residence?

or privacy at the scene of a labor dispute is not sufficiently imminent in all cases to warrant prohibition of peaceful picketing in a labor dispute); *Chauffeurs, Teamsters & Helpers Local Union 795 v. Newell*, 356 U.S. 341 (1958) (reversing a Kansas Supreme Court decision that found a paragraph of injunction enjoining labor union from any and all acts or conduct designed to boycott employer's business was not to be construed as having any application to primary boycott, but rather to apply to secondary boycott only); *Amalgamated Food Emp. v. Logan Valley Plaza*, 391 U.S. 308, 314-315, 88 S.Ct. 1601, 1606-07 (1968); *Gregory v. City of Chicago*, 394 U.S. 111, 112 (1969) (holding a peaceful march fell well within the sphere of conduct protected by the First Amendment).

⁴⁸ *Thornhill*, 310 U.S. at 105.

A. *The Right to Privacy: Time, Place, and Manner Restrictions*

Picketing outside of a residential setting, even when the residence is the place of employment, triggers privacy concerns. The right to privacy is deemed a fundamental right by the Supreme Court but it is usually construed in the context of private civilians, not employers who have entered the labor market by hiring employees.⁴⁹ The First Amendment's free speech clause is also seen as limiting this right. In weighing First Amendment rights of freedom of speech and assembly (as applied to the states via the Fourteenth Amendment) with employer/homeowner rights of privacy, the court considers whether state restrictions on such rights are acceptable given the time, place, and manner of regulation.⁵⁰ Time, place, and manner (TPM) restrictions of speech are constitutional if they are justified without reference to the content of regulated speech (i.e. content neutral), the regulations serve a significant or substantial government interest, and the regulations are narrowly tailored to serve that interest.⁵¹ TPM restrictions do not necessarily need to be the least restrictive means the government utilizes, but they may not substantially burden more speech than is necessary and they must leave open ample alternative channels of communication.⁵²

Numerous state cases have found that picketing outside an employer's home where the home is not the site of the labor dispute violates the employer's right to privacy, which outweighs any First Amendment rights picketers may claim.⁵³ One highly-

⁴⁹ See *Griswold v. Connecticut*, 381 U.S. 479 (1965); accord *Roe v. Wade*, 410 U.S. 113 (1973); See also *Breard v. City of Alexandria, La.*, 341 U.S. 622 (1951); *Kovacs v. Cooper*, 336 U.S. 77 (1949); *Rowan v. United States Post Office Dep't*, 397 U.S. 728 (1970) for a discussion of how the right of privacy has been protected in opposition to First Amendment rights.

⁵⁰ See George L. Blum, Annotation, *Validity, Construction, and Operation of Statute or Regulation Forbidding, Regulating, or Limiting Peaceful Residential Picketing*, 113 A.L.R.5th 1 (2003).

⁵¹ *Ward v. Rock Against Racism*, 491 U.S. 781, 798-99 (1989).

⁵² *Id.*

⁵³ See *Zeeman v. Amalgamated Retail Employees*, 26 L.R.R.M. (BNA) 2422, 2424 (Cal. 1950) (holding that residential picketing of an employer's home was contrary to the public policy of California and that it should instead occur where the place of business is actually located); *K-T Marine, Inc. v. Dockbuilders Local Union 1456*, 597A.2d 563, 566 (N.J. Super. Ct. Ch. Div.1990), *aff'd*, 597 A.2d 540 (N.J. Super. Ct. App. Div. 1991) (holding that a union could not set up a picket line in front of the

cited case is the Minnesota Supreme Court decision in *State v. Cooper*, where the court held that an employee working in a private residence located in a residential district could not peacefully picket such residence to enforce economic demands because “[t]he home is an institution, not an industry.”⁵⁴ The court held that employees who work in a home must seek out alternative venues for bargaining for economic rights because the home cannot be classified as a place where the “carrying on of an industrial or a business enterprise” takes place.⁵⁵

This case should be viewed, however, in its historical period in an era during which domestic workers in many parts of the country were primarily Black women⁵⁶ or immigrant women whose work was still not seen as labor.⁵⁷ This decision was handed down 25 years before the Civil Rights Act of 1964, not long after women were granted the right to vote⁵⁸ and shortly after the Minnesota legislature stated that minimum wage laws should not apply to domestic workers.⁵⁹ It was a decision that reflected the courts’ unwavering adherence to privacy rights where domestic work was not seen as labor, but as household chores.

company president’s residence in an area far removed from the work site); *Pipe Machinery Co. v. De More* 76 N.E.2d 725, 727 (Ohio Ct. App. 1947) (enjoining workers from picketing private residences, citing “[t]he allowable area of economic conflict should not be extended to an invasion of the privacy of the home” but should instead be confined to the site where the dispute arose); *see also* *Walinsky v. Kennedy*, 404 N.Y.S.2d 491, 497 (N.Y. Sup. Ct. 1977) (enjoining defendants from picketing the plaintiff’s home to protest opposition to a gay-rights bill, noting that “[i]n labor disputes the lawful place for defendants’ picketing operations is at the site of the employment where are located the working conditions to which the strikers object.”)

⁵⁴ *State v. Cooper*, 285 N.W. 903, 904 (Minn. 1939).

⁵⁵ *Id.*

⁵⁶ *See e.g.* Roberts, *supra* note 20, at 59. *See generally* SUSAN TUCKER, TELLING MEMORIES AMONG SOUTHERN WOMEN: DOMESTIC WORKERS AND THEIR EMPLOYERS IN THE SEGREGATED SOUTH (Louisiana State University Press, 2002).

⁵⁷ *See Home Is Where the Work Is: Inside New York’s Domestic Work Industry, supra* note 9, at 3.

⁵⁸ U.S. CONST. amend. XIX (1920).

⁵⁹ *See* United States Department of Labor, Women’s Bureau, *Domestic Workers and Legislation* 15 (1941) (“In Minnesota the attorney general held in 1933 that the legislature did not intend the minimum-wage law to apply to household employees.”) (on file with author and the Boston Public Library).

B. *The Rights and Restrictions of Residential Picketing*

*“As a means of communicating the facts of a labor dispute peaceful picketing may be a phase of the constitutional right of free utterance.”*⁶⁰

After the *Cooper* decision, other state high courts (including New Jersey, Ohio, California, and New York) returned similar decisions—that employees who wish to picket an employer’s home must respect the employer’s privacy rights and are subsequently enjoined from picketing residences when alternative sites more appropriate to airing labor grievances exist.⁶¹ In *K-T Marine, Inc. v. Dockbuilders Local Union*, the New Jersey Supreme Court found that not only were informational protests already occurring at the actual employment site where the labor disputes arose, but that the plaintiff company did not even employ workers of the defendant union, making any residential picketing even further unsupported in the eyes of the court. Ohio’s high court granted an injunction in *Pipe Machinery Co. v. DeMore* to prevent striking protestors from picketing the homes of eight fellow non-striking employees who “crossed the picket line” while shouting “scab” in a loud voice.⁶² The U.S. Supreme Court agreed with this principle in *Carpenters & Joiners Union v. Ritter’s Café*, where it held that “restriction of picketing to the area of the industry within which a labor dispute arises leaves open to the disputants other traditional modes of communication.”⁶³

Both the *Carpenters* case and the state cases are distinguishable, however, from the situation of domestic workers who have no alternative venue in which to protest working conditions because their employment site is also the employer’s home, an issue left unaddressed by the state court decisions. The majority of cases concerned workers who have exercised their right to picket at their employer’s home instead of choosing their actual job site, or in the case of *Pipe Machinery* were not even picketing their employer but fellow workers.⁶⁴ Theoretically,

⁶⁰*Carpenters & Joiners Union Local 213 v. Ritter’s Cafe*, 315 U.S. 722, 727 (1942).

⁶¹ See *supra* note 53 and accompanying text.

⁶² *Pipe Machinery Co. v. De More* 76 N.E.2d 725, 725 (Ohio Ct. App. 1947).

⁶³ *Carpenters & Local 213 Union*, 315 U.S. at 727-28.

⁶⁴ See *Annenberg v. Southern Dist. California District Council of Laborers*, 113 Cal. Rptr. 519, 642 (Cal. App. 1974) (referring to other state court decisions and noting that

workers could have chosen alternate venues to protest in, including their employment site. Domestic workers have no such choice.

When the employer's residence is also the workplace of their employees, courts have not been clear as to how much weight is given to the employee's right to picket.⁶⁵ Most states have not actually considered the narrow question of whether domestic workers have a right to picket their employers' homes to both air labor disputes and as a tool of protest.⁶⁶ The California Supreme Court did rule, however, almost 40 years after *Cooper*, that domestic service employees *do* have a right to peacefully picket the home of their employer.⁶⁷ The court analyzed the same issues the *Cooper* court did, but went further in addressing two central questions: 1) is a household employer entitled to the same level of privacy as a household that does not employ domestics, and 2) should a paid household worker be denied the right to engage in collective action because the employment relationship for private domestic service is not the typical industrial relationship?⁶⁸ The *Annenberg* court held that where the defendant union wanted access to the public streets adjacent to plaintiff's home to engage in peaceful picketing, such a purpose was upheld by the First Amendment.⁶⁹ The court distinguished *Cooper*, noting that three justices concurred based on the fact that there was no conclusive labor dispute that existed at the time.⁷⁰ Additionally the issue was phrased as the right to picket a residence used exclusively as a home, not as a site of employment. While the *Annenberg* court upheld the defendant workers' right to picket their employer's residence, the court did reserve the right to place restrictions on

“[i]n each case, the picketing was at a situs removed from the actual scene of confrontation between employer and employee—the business or industry—and the courts have uniformly held that when picketing activities are carried into the community under these circumstances, the right to privacy must prevail. However, none of these cases involve the right of a domestic employee to picket the private home of his employer.”)

⁶⁵ Smith, *supra* note 25, at 103.

⁶⁶ See *Annenberg*, 113 Cal. App. at 641-42 (“Strangely enough, the issue of the right of domestic employees to picket the homes of their employers has presented itself but fleetingly in the plethora of reported cases to be found in the abundantly litigated field of labor-management relations.”)

⁶⁷ See *id.* at 526-27.

⁶⁸ Smith, *supra* note 25, at 105.

⁶⁹ *Id.*

⁷⁰ See *Annenberg*, 113 Cal. App. at 642-643.

time, place, and manner on the picketers (including restricting picketing to public streets, limiting number and location of pickets, and restraining their activities to ensure peaceful picketing and a minimal intrusion into privacy of the home).⁷¹ The court's holding provided a narrow victory for domestic workers and their advocates, refraining from granting the right to picket to all workers, and insisted the balancing of rights be done on a case-by-case basis.⁷²

C. *Home vs. Business: Privacy Rights and the Welfare of Women*

While several courts have found that the personal nature of tasks and the relationship between the employer and employee in a residence should not be subject to regulation, this paper argues that employment of another person in the home shifts the nature of the home to one of industry and that domestic employers should not be beyond the reach of regulation. Peggie Smith states that the “very act of employing a paid household worker arguably weakens the employer’s expectation of privacy.”⁷³ When homeowners become employers of domestic workers, they have welcomed strangers into their home and crossed the line from the private realm to the public realm by entering the market economy.⁷⁴ As an employer, the right to privacy is compromised because the home has been transformed into a worksite for presumably non-family members who are being paid to be there and perform services. The *Annenberg* court held as much, finding:

⁷¹ See *id.* at 645.

⁷² See *id.* at 648.

⁷³ Smith, *supra* note 25, at 105. Smith finds support in her argument from the Wisconsin Supreme Court, which found that:

Where the householder makes his home or residence a place of employment for someone else, for as long as it is such place of employment, he waives the protection of the ordinance as to disputes related to such fact and place of employment. Where a householder employs a maid or building service workers, in the event of dispute, the only place such employees could exercise the right to picket, that would have any relatedness to the controversy, is where they were employed . . . We view the exception not as denying, but as assuring, equal protection by limiting the ban on picketing the home to picketing it as a home, and permitting picketing of it as a place of employment whenever it is also that. *City of Wauwatosa v. King*, 182 N.W.2d 530, 538 (Wis., 1971).

⁷⁴ See Tera W. Hunter, *TO JOY MY FREEDOM: SOUTHERN BLACK WOMEN’S LIVES AND LABORS AFTER THE CIVIL WAR* (Harvard University Press; 1st edition 1997).

[T]he household [that hires domestic workers] enters in a limited degree into the economic marketplace. The isolation of the household has to a certain extent been stripped away. The householder has become an employer and with that status takes on certain social responsibilities not present in the vast number of households which do not use domestic help. When one hires someone else to mow his lawn, wash his dishes or drive his car, he exposes himself to the economics of the labor market. Having done so, he faces the unpleasant fact of life that the economic needs of his domestic employee are identical with those of the industrial employee.⁷⁵

The homeowner as employer should be subject to regulations of labor and their home should be treated as a worksite as it pertains to the employer's duties and the employee's rights.

This point is particularly crucial when considering how the privacy of the home, and the court's continuous declaration of its sanctity, has historically served to forbid state regulation and intervention into dangerous situations for women. The idea that a house was a man's castle and should not be invaded by the state, or, in this case, by peaceful picketing of private citizens, guaranteed minimal intervention for activities that happened in the house, including domestic violence. For many women, home is not where they experienced shelter or refuge⁷⁶ and the court's refusal to regulate certain activities of the home have placed them at peril.⁷⁷ Ruth Gavison notes that:

⁷⁵ *Annenberg*, 113 Cal. App. Rprt. at 647.

⁷⁶ See Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1, 1 (1992) ("For women the measure of the intimacy has been the measure of the oppression.").

⁷⁷ See *id.* at 35 (stating that law enforcement is often hesitant to respond to allegations of domestic violence given the privacy concerns of intervening in a residential dispute.) See e.g. Catherine MacKinnon, *TOWARDS A FEMINIST THEORY OF THE STATE*, 194 (1989) ("The legal concept of privacy can and has shielded the place of battery, marital rape, and women's exploited labor."); JEANNIE SUK, *AT HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING PRIVACY* 11 (Yale University Press, 2009) ("The rhetoric of privacy has worked in our legal history to justify nonintervention in the home.").

For [women], the intimate and the realm of family life is neither a realm of freedom, nor a haven in which the dignity of self-direction can be cultivated. To the contrary, in private, women are exploited and abused with impunity. Women should, therefore, recognize that invocations of the value of privacy are a means of perpetuating their oppression by creating the false impression that the protection of privacy is good for women, by isolating them, and by depoliticizing their struggle.⁷⁸

Domestic workers--particularly immigrant female workers--engage in picketing as one of the few available means for exposing sub-human working conditions and treatment. This has been a truism since 1881 when black washer women went on strike revealing “an astute political consciousness by making women’s work carried out in private households a public issue – exploding the myth of the separation between private (family and household) and public (business and economic) spheres.”⁷⁹ Without First Amendment protections of free speech and assembly, most domestic workers are left without means to bring attention to their isolating conditions.

Domestic workers labor in isolation “behind closed doors.” They often have little contact with the outside world, work in a highly unregulated area, have very few unions to help organize them,⁸⁰ and are highly vulnerable to exploitative and abusive conditions.⁸¹ Many female workers may have arrived at domestic work by coercive means – misinformed about working conditions and susceptible to abuse.

⁷⁸ Gavison, *supra* note 76, at 36.

⁷⁹ Hunter, *supra* note 74, at 94.

⁸⁰ See Megan Tady, *Unprotected by Laws, Domestic Workers Face Exploitation*, THE NEW STANDARD, ar.ch 14, 2007), <http://newstandardnews.net/content/index.cfm/items/4487> (noting in an interview with one domestic worker that “the isolation of the job made her more at risk for mistreatment.”).

⁸¹ For a discussion on the exploitation and abuse of domestic workers employed by diplomats, see ACLU, WOMEN’S RIGHTS PROJECT, TRAFFICKING AND EXPLOITATION OF MIGRANT DOMESTIC WORKERS BY DIPLOMATS AND STAFF OF INTERNATIONAL ORGANIZATIONS IN THE UNITED STATES (2007), <http://www.aclu.org/womens-rights/trafficking-and-exploitation-migrant-domestic-workers-diplomats-and-staff-international>.

“Undocumented immigrant domestic workers find it more difficult to resist and avoid sexual, physical, and economic exploitation because they are afraid that if they complain...they will face deportation... Moreover, most immigrant domestic workers, whether undocumented or not, are in situations of strong economic coercion which can limit their abilities to resist and escape abuse.”⁸²

The potential for abuse is more pronounced for workers who have limited English proficiency, which can also limit their access to both direct and legal services.⁸³ The privacy of their employer’s home has equaled an unrestrained license for abuse in many cases, beyond the purview of the state. Thus, when a court is balancing the privacy interests of an individual, it is, in very real terms, prioritizing the interests of men (and, for the past half century, white women middle-class workers)⁸⁴ who are economically stable and wish to keep not the sanctity of the home private but the oppression of it.⁸⁵

⁸² Graunke, *supra* note 4, at 154; *see also* U.S. v. Sangha, 967 F.2d 1332, 1335 (9th Cir. 1992) (recognizing how economic coercion of domestic workers makes them involuntary subjects of abuse).

⁸³ *See generally* Jill Borak, *Women Migrant Workers: Embracing Empowerment Over Victimization*, Presented at “When Women Gain, So Does the World,” IWPR’s Eighth International Women’s Policy Research Conference 20 (June 2005), *available at* http://www.iwpr.org/PDF/05_Proceedings/Borak_Jill.pdf.

⁸⁴ For a look at how women employers also contribute to the abuse and oppressive working conditions of domestic workers, *see* Joy M. Zarembka, *America’s Dirty Work: Migrant Maids and Modern Day Slavery*, in *GLOBAL WOMAN: NANNIES, MAIDS AND SEX WORKERS IN THE NEW ECONOMY* 142-144 (Barbara Ehrenreich & Arlie Russel Hochschild eds., 2002). For a discussion of how middle class women can use their privilege and advocacy in the anti-violence movement to focus on the brutal realities of domestic workers, *see* Graunke, *supra* note 4, at 134 (“More privileged women, who are often primary employers of domestic workers and are likely to supervise and communicate with them, have a substantial role to play in the prevention of sexual, physical, and other abuse of domestic workers.”).

⁸⁵ For a critique of mainstream feminists’ response to the *Long Island Care at Home Ltd. v. Coke* decision, *see* Robson, *supra* note 5, at 410-411 (noting that “[d]omestic” workers, despite the fact that they are overwhelmingly women, seem to continue to fall outside the ambit of mainstream feminist concerns.”); *See also* Tracey E. Higgins, *Democracy and Feminism*, 110 HARV. L. REV. 1657, 1676 (1997) (“At least a good deal of the time, in the name of guaranteeing constitutional protection of individual freedom, the Constitution also aggressively protects the very hierarchies of wealth, status, race, sexual preference, and gender that facilitate those practices of subordination. [Some feminists] focus on the protection of familial privacy as potentially undermining women’s liberty.”).

IV. Availability of Reasonable Alternative Avenues of Communication and the Chilling Effect

The lack of available remedies for domestic workers to assert their rights against their employers makes the right to peacefully picket even more imperative. “Domestic workers are excluded from labor laws that protect other workers, including protection from discrimination and the right to bargain collectively.”⁸⁶ They are “explicitly exempted from coverage under the National Labor Relations Act,⁸⁷ the Occupational Safety and Health Act (OSHA), and almost all Workers' Compensation statutes.”⁸⁸ Some workers, such as those who provide companionship services,⁸⁹ are not entitled to minimum and overtime wages under the Fair Labor Standards Act.⁹⁰ These workers are also typically excluded from

⁸⁶ NY Domestic Workers Bill of Rights, *Statistics on Domestic Workers in New York State*, DOMESTIC WORKERS UNITED, (last visited Sept 29, 2010), <http://www.domesticworkersunited.org/media.php?show=69>.

⁸⁷ The National Labor Relations Act explicitly excludes domestic workers from organizing and bargaining collectively. 29 U.S.C. § 152(3) (2010).

⁸⁸ Silbaugh *Supra* note 21, at n.130 (1997) (noting that the exception to some statutes is that “some workers' compensation laws apply to domestic workers when two or more are employed full-time at the same site. Those states, however, do not have that limitation on other employees who work as sole employees outside the home).

⁸⁹ 29 C.F.R. § 552.6.

⁹⁰ Fair Labor Standards Amendments of 1974 (1974 Amendments), Pub. L. No. 93-259, §§ 7(b)(1)-(3), (2), 88 Stat. 62 (1974) (adding 29 U.S.C. § 206(f)). *See also* Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 162 (2007) for a discussion by Justice Breyer on FLSA's coverage of companionship workers (“In 1974, Congress amended the Fair Labor Standards Act of 1938...to include many ‘domestic service’ employees not previously subject to its minimum wage and maximum hour requirements (internal citations omitted). When doing so, Congress simultaneously created an exemption that *excluded* from FLSA coverage certain subsets of employees ‘employed in domestic service employment,’ including...companionship workers.”) (emphasis in original). For commentary on the plaintiff, Evelyn Coke, and the implications of the decision on her own life as a home healthcare worker, *see* Robson, *supra* note 5, at 408-410. The 1974 Amendments also excluded any employees who resided in a household where they were employed which has become the growing majority of immigrant and migrant women, and when violence is more prone to happen given the control employers have over the workers' freedom of movement. *See generally* Graunke, *supra* note 4, at 164 (“Many cases of employer abuse of domestic workers, particularly the more severe ones, occur when a domestic worker lives in the household in which she works.”). However, a decision by the 9th Circuit offered a promising interpretation of the Amendment. In the case, two Indonesian women who were live-in domestic workers for five years were found not to have “resided” in the household per the definition

Title VII of the Civil Rights Act of 1964, which governs employment sites with at least 15 workers.⁹¹ As a whole, federal legislation fails to protect even the most basic civil and human rights of domestic workers by taking an explicit hands-off approach to regulating employment that takes place in the home.⁹² This is largely because this work is not viewed as labor; thus, there is no perceived need to offer these workers the analogous labor protections offered to their industrial counterparts.

The exclusion of domestic workers from congressional conscience is also reflective of what Charles Lawrence calls “unconscious racism.”⁹³ Just as women and people of color were excluded from the original intent and understanding of the First Amendment, domestic women workers of color and their labor force as a whole are invisible⁹⁴ to lawmakers, leaving them

because they were not provided the type of “home-like environment as contemplated by the regulation.”; *U.S. v. Sabhani*, 539 F. Supp. 2d 617 (E.D.N.Y. 2008).

⁹¹ 42 U.S.C. § 2000e(b) (2006).

⁹² See Hiller, *supra* note 24, at 234 (“[D]omestic workers do not reap the benefits of employee protection statutes: the Fair Labor Standards Act (“FLSA”) fails to provide live-in domestic workers overtime pay, the National Labor Relations Act (“NLRA”) explicitly limits its definition of “employee” from including domestic workers, the Occupational Safety and Health Act (“OSHA”) fails to protect individuals employing persons engaging in ordinary domestic household tasks, and Title VII of the Civil Rights Act of 1964 (“Title VII”) fails to afford domestic workers the right to claim violations of sex, race or national origin discrimination.”); See Graunke, *supra* note 4 (showing the lack of legislative consideration for domestic workers and how they never received the benefit of New Deal era protections); see also Susan B. Mettler, *Federalism, Gender, & the Fair Labor Standards Act of 1938*, 26 POLITY 635, 644-47 (1994) (adding that FDR said “no law ever suggested intended a minimum wages and hours bill to apply to domestic help.”).

⁹³ Charles Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 342-343 (1987).

⁹⁴ See Fatma E. Marouf, *The Emerging Importance of “Social Visibility” in Defining a “Particular Social Group” and its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender*, 27 YALE L. & POL’Y REV. 47, 100 (2009). Marouf comments on the invisibility of both the worker and the work:

Individuals engaged in domestic services remain tucked away in private homes and are veiled from view “by a series of practices that enable and enhance tropes of invisibility...[I]mmigrant women are the caregivers par excellence because both they and their work are often rendered invisible.” Since domestic workers often live in complete isolation from the public view, become personally invisible within the domestic sphere, and perform work that society erases as a form of labor, they remain socially invisible on multiple levels. (Internal citations omitted).

remediless under the majority of all employment-related statutes. The lack of applicable regulations and laws is indicative of the government's held-over originalist view that domestic work was simple "women's work"⁹⁵, and these workers did not merit the same level of protection given to men who went outside the home to work (despite the fact that domestic workers have, in fact, left their home to do this work).⁹⁶ Professor Premilla Nadasen notes that domestic workers are primarily "poor women of color who lack political clout, which is why they have been marginalized and excluded from provisions of labor law."⁹⁷

Workers also find little redress in the form of criminal prosecution against employers who have held them in involuntary servitude, committed physical or sexual assault against them, or other crimes.⁹⁸ Legal remedies are scarce for a domestic worker who braves risking her immigration status, income and well-being to confront abuse head on.⁹⁹ Human Rights Watch found that:

⁹⁵ See discussion *supra* section II.A.

⁹⁶ See *supra* note 76 at 23.

⁹⁷ Hiller, et al., *supra* note 24, at 254. (Nadasen goes on to offer additional reasons for the lack of legislative protections of domestic workers, including that:

[T]heir exclusion from labor laws has a racial underpinning arising out of the New Deal era, when southern congressmen would only support the New Deal package if black agricultural and domestic workers were not included. [Also] since domestic work occurs within the private realm of the home, it has not been deemed "real work." Lastly, unlike other workers, domestic workers work alone and thus are particularly vulnerable. Realistically, there is little opportunity for domestic workers to organize and voice their concerns. Employers wield a great deal of power over their employees in these situations.)

⁹⁸ See GLOBAL RIGHTS 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, at 3, available at http://www.globalrights.org/site/DocServer/Domestic_Workers_report-_FINAL.pdf?docID=5503. See also Bahan & Batra *supra* note 27, at 3 (for a discussion on isolating conditions of private homes in which domestic servants work and how there are:

[F]ew, if any witnesses, to the crimes committed against them, little documentary evidence regarding the terms of their employment and the manner in which they entered the United States, the often subtle forms of coercion used to prevent the domestic worker from leaving the home, and limited prosecutorial resources, criminal prosecution is extremely unlikely in the case of the trafficked domestic worker.)

⁹⁹ See INTERNATIONAL ORGANIZATION FOR MIGRATION, *The Feminine Face of Migrants*, (Summer 2004), available at <http://www.iom.int/unitedstates/Fact%20Sheets/PDF/Female%20migrant%domestic%2>

[I]f a domestic worker does not leave her employer and assert her rights through a civil complaint or criminal allegations; it is unlikely that her rights will be protected. Agents of the governmental institutions responsible for protecting her are not likely to enter her workplace independently. The domestic worker labors in what has traditionally been referred to as the private sphere, a domain not historically scrutinized by government and often outside the reach of governmental enforcement mechanisms structured to protect workers in the public sphere.¹⁰⁰

The overwhelming lack of legislative protection for domestic workers only augments the need for domestic workers to utilize their remaining protection – the ability to picket. “[T]he right to picket peacefully and truthfully is one of organized labor's lawful means of advertising its grievances to the public, and as such is guaranteed by the Constitution as an incident of freedom of speech.”¹⁰¹ The court in *Carpenters* stated that, “Whenever state action is challenged as a denial of ‘liberty,’ the question always is whether the state has violated ‘the essential attributes of that liberty.’”¹⁰² For domestic workers, when the state prohibits them from peacefully picketing at their site of employment, the state is essentially stripping them of the liberty to protest, speak and assemble as needed.

Whether reasonable alternatives for highlighting oppressive work conditions exist for domestic workers is both an unnecessary analysis for upholding their right to peacefully protest and an unrealistic expectation for immigrant low-wage workers. After briefly reciting potential alternatives for domestic workers to air their grievances, the *Annenberg* court ruled that “The fact of the existence of alternatives is not a controlling issue where the

0workers.pdf (“For those workers that do pursue legal protection and remedy, there is a high likelihood that they will be deported prior to the conclusion of their case.”).

¹⁰⁰ HUMAN RIGHTS WATCH, HIDDEN IN THE HOME: ABUSE OF DOMESTIC WORKERS WITH SPECIAL VISAS IN THE U. S., UNITED STATES 1 (June 2001), <http://www.hrw.org/reports/2001/usadom/>.

¹⁰¹ *Annenberg*, 113 Cal. Rptr. at 523 (citing *Hughes v. Superior Court*, 32 Cal.2d 850, 854).

¹⁰² *Carpenters*, 315 U.S. at 726.

defendants demand only the right to use the public streets for picketing purposes.”¹⁰³ Yet, if the alternatives the court raised are seriously considered, one they are found to be idealistic options at best for disclosing the unlawful and inhumane working conditions suffered by domestic workers. All of the forms mentioned – mail, telephone, newspapers, radio, and television – require resources, organized efforts,¹⁰⁴ and the potentially undocumented worker’s willingness to publicize their face.

For domestic workers who have been trafficked or have come to the U.S. without securing legal paperwork, the conditions that create and support their isolation¹⁰⁵ also make it nearly impossible for them to reach out for assistance, beyond their immediate circumstances, to press issues like their safety and wellbeing.¹⁰⁶ When they do press these issues, they should have unrestricted means of utilizing one of the few remaining and viable options of protest that is allowed to them – peaceful picketing. While workers may not have time, money, familiarity with available resources and services, or even a secure means of participating in an alternative means to protest (such as filing a legal claim), the ability to stand in front of their work place – the employer’s home – and raise their voice peacefully against their abuser can be the most powerful and effective tool for an industry of workers whose voices have been silenced through this nation’s preferred venue for resolving disputes – our judicial system.

¹⁰³ *Annenberg*, 113 Cal. Rptr. at 525.

¹⁰⁴ See discussion *supra* part II.C for a discussion on the challenges of organizing domestic workers. See also Smith, *supra* note 25, at 93; see also Shireen Ally, *Caring about Care Workers: Organising in the Female Shadow of Globalisation*, Center for Global Justice’s 2005 “Women & Globalization” Conference Papers, available at http://www.globaljusticecenter.org/papers2005/ally_eng.htm.

¹⁰⁵ For insight and an overview into the isolating conditions of domestic workers’ lives and what they risk when they speak out against their employers, see John Enriquez Andres, *The Raiding Of The Pearl: The Effects Of Trade Liberalization On Philippine Labor Migration, And The Filipino Migrant Worker's Experience*, (“Many employers [of domestic workers] have created an atmosphere of constant fear, perpetually filling the air with threats of physical or sexual violence, threats of reporting them to authorities, or threats to further burden them with inescapable debt.”).

¹⁰⁶ See generally *Mesfun v. Hagos*, No. CV 03-2182 MMM (RNBx), 2005 WL 5956611, at *1 (C.D.Cal. Feb. 22 2005) (admitting expert testimony on behalf of the plaintiff “concerning the effects that linguistic barriers, lack of familiarity with United States laws, customs and norms, little or no access to information or support outside the employer's family, and physical isolation have on the behavior of migrant domestic workers.”).

V. Conclusion

The underwhelming credence given to domestic work and domestic workers, as reflected in societal attitudes, as well as division of labor and federal statutory and regulatory protections, leaves domestic workers with little recourse for exposing and challenging inhumane and unfair working conditions. Left with the right to organize (but not bargain collectively) and to protest, it becomes imperative that workers be allowed to raise their voice in front of the very site of their dispute – their employer’s home and place of employment. Without the ability to do so, they are left with almost no practical alternatives besides continuing to suffer abusive work environments or risk deportation, lost wages, loss of employment, and the consequences of poverty. Federal legislation completely fails to protect these workers from employment, civil, and human rights abuses, and instead, has made them the target for exploitation and mistreatment. The right to picket peacefully means nothing if it cannot be done. For domestic workers this means their constitutional right to protest must outweigh the silencing right of the employer’s privacy. To decide otherwise is to continue to willfully ignore the faces of immigrant women and women of color who are raising our children, cleaning our homes, and, most of all, seeking justice.