

## THE NEW YORK DOMESTIC WORKERS' BILL OF RIGHTS: JUSTICE AT THE DOOR

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### *Introduction*

Inside a Long Island family home, for a period of more than five years, a shocking and appalling case of involuntary domestic servitude was committed against two migrant domestic workers.<sup>1</sup> A family that certainly could have afforded to pay for domestic help chose instead to take advantage of two Indonesian women who spoke no English and had minimal education by luring them to the United States under false promises and holding them captive in their home by using both physical and psychological means of coercion.

For the first three years, Samirah, a fifty-three year old woman at the time, was forced to work in the large family home doing all of the cooking, cleaning, laundry, and other chores. She was deprived of basic necessities, never given an adequate amount of food, provided with shabby clothes—made from rags and sometimes leaving her exposed, forced to sleep on a mat in the kitchen, and often required to bathe several times in row—sometimes with her clothes on and then required to work wearing the same wet clothes. Samirah was subjected to physical and psychological abuse as punishment and as a way of deterring her from leaving. For example, scalding hot water was poured on her body, she was beaten with household objects, cut with a knife on her face and other parts of her body, her ears were repeatedly pulled leaving infected scabs and scars, and she was forced to eat large amounts of hot chili peppers until she became violently ill. She was told that if she

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<sup>1</sup> United States v. Sabhnani, 599 F.3d 215, 224-31 (2nd Cir. 2010).

objected, retaliated, or tried to escape she and her children in Indonesia would be harmed or killed.

When a second woman, forty-seven year old Enung was brought into the home, she also became a victim of harsh punishments, for example, she was made to walk up and down the stairs numerous times, stand in place for ten hours at a time, and was struck with fists, hit in the face with a metal spoon, and once with a glass dish. In addition, she was forced to watch as Samirah was abused and in some cases the two were made to hurt each other.

Both Samirah and Enung's travel documents were kept from them in a locked cupboard, both came on short-term visas and remained illegally in the country after their expiration. Neither woman was ever paid. Samirah was promised \$200 a month and was told it was being sent to her daughter in Indonesia, when in reality only \$100 per month was the being sent and the rest was never seen.

The language barrier, fear of retaliation, and lack of documentation kept these women from seeking help or attempting to leave. It was not until after a particularly bad series of beatings, when Samirah, fearing most for her life, ran away. She went to a nearby restaurant and in the few words of English she had learned, attempted to explain what had happened to her. The police were called and she was taken to the hospital where she was treated and diagnosed as having been subjected to multiple physical abuses. Shortly thereafter the home was investigated and Enung was discovered. Sufficient evidence was found in order to indict the husband and wife, Mahender and Varsha Sabhnani, for multiple counts of forced labor, conspiracy, peonage, and the document servitude of both women.

Appalling cases like this make it crucial for laws to be in place so that victims like Samirah and Enung may have the chance to be rescued. Because domestic work has been considered a private matter, there has been limited intrusion into the household affairs of those that employ domestic help. The beginning of the end of this antiquated practice has arrived. In recent years, both the general public and governments alike have turned their attention to the plight

of domestic workers.<sup>2</sup> The focus has not only been on the inherent risks in the industry, but also on the void in protection for this work force. This attention has prompted discussions about why domestic workers were, and continue to be, excluded from certain labor protections and what can be done to modernize these laws.<sup>3</sup> A new domestic law and an international treaty are the first step toward the solution and domestic workers are beginning to receive long-awaited labor protections.

In the United States, New York took the lead in July 2010 when it enacted the Domestic Workers' Bill of Rights (the New York Bill or the Bill) providing the first legislation of its kind to offer comprehensive labor protections for domestic workers.<sup>4</sup> The requirements for employers impose a definitive list of minimum standards to apply in almost all domestic worker employment scenarios.<sup>5</sup> Each condition presents law enforcement and attorneys with a tool to measure compliance. Proof, or the lack thereof, of a condition provides evidence to support or deny an allegation of

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<sup>2</sup> The popularity of the bestselling novel and motion picture release of Kathryn Stockett's *The Help* focused national attention on the state of affairs in the United States in the 1960's for domestic workers in the South. See generally KATHRYN STOCKETT, *THE HELP* (The Penguin Group, 2009). The controversy between the fictional and historical representations of domestic work brought about discussions of the reality for domestic workers today. See *Melissa Harris-Perry: 'The Help' Doesn't Help Domestic Workers* (NBC television broadcast Feb. 25, 2012) available at <http://video.msnbc.msn.com/melissa-harris-perry/46523913#46523913>. Similarly, the campaigns in support of both the International Labor Organization's Convention concerning decent work for domestic workers and the New York Domestic Workers' Bill of Rights have put governments on notice of shortcomings in labor laws.

<sup>3</sup> See generally Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95 (2011) (discussing the origin of the exclusion of agricultural and domestic workers from labor protections).

<sup>4</sup> See generally Domestic Workers' Bill of Rights, 2010 N.Y. Sess. Laws 1313 (McKinney) (codified at N.Y. Exec. Law §§ 292, 296-b; N.Y. Lab. Law §§ 2, 160, 161, 170, 651; N.Y. Workers' Comp. § 201). The law took effect November 29, 2010.

<sup>5</sup> In New York there remain exemptions for individuals who work on a casual basis, provide companionship services, or are a relative of the employer. N.Y. Lab. Law § 2. Similar federal exemptions apply. See discussion *infra* Part III.A.1.a-b.

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noncompliance. Domestic workers, who previously had little to no leverage to negotiate contract terms now have a minimum basis of protection to depend upon and a means of reporting violations.

This set of legislation is an important step in providing labor protections for domestic workers who have been improperly excluded in the United States since the onset of labor protections in the 1930's.<sup>6</sup> Modern-day societal norms are not in line with the discriminatory impact of excluding domestic workers (and agricultural workers) from protections that employees in other industries are afforded.<sup>7</sup> Exploitation of domestic workers is a problem of global scale; while monumental that New York State has enacted legislation, it is important that domestic workers everywhere are protected; accordingly, laws need to be amended or introduced to cover domestic workers nationwide. Learning from the lessons of New York, similar and even more comprehensive laws can be enacted throughout the country.<sup>8</sup> In fact, California recently proposed legislation (the California Bill) that models the New York Bill. As such laws become commonplace and readily enforced, it will become easier to discern cases of abuse and prosecutors will have the tools to fully prosecute violators.

Part I of this comment will begin with an overview of the intersection between domestic work and involuntary domestic servitude to show how the lack of protection for domestic workers can lead to exploitation and domestic servitude. Part II will compare the claims of domestic workers, employers, and civil society in terms of the costs and benefits of enacting protective domestic worker

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<sup>6</sup> Domestic workers have been excluded from the definition of employee in many federal labor laws. *See* discussion *infra* Part III.A.1.a.

<sup>7</sup> The National Labor Relations Act defines what an "employee" is and includes the following provision: "[an employee] shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home...." National Labor Relations Act, 29 U.S.C. §§ 151-169, § 152(3) (2006).

<sup>8</sup> California has proposed a resolution, which was approved by the state legislature in August 2010. Lauren D. Applebaum, *Why a Domestic Workers Bill of Rights?* UCLA INST. RES. LABOR & EMP.: RES. & POL'Y BRIEF 6 1 (Dec. 2010), available at <http://www.irle.ucla.edu/pdfs/ResearchBrief6.pdf>. The resolution is modeled after the New York law. *Id.*

legislation. Part III will set out the legal distinction between domestic workers and domestic servitude by providing an overview of the federal and New York State sources of labor protections and how they have historically excluded domestic workers. It will also describe the federal and international human trafficking laws utilized to protect victims of domestic servitude, and how the courts have interpreted them, as well as delineate the provisions of the New York legislation. Part IV will predict the impact of the New York law and the proposed California Bill. Part V will offer recommendations for national coverage of labor protections for domestic workers, amendments to relevant federal laws, and treaty ratification.

*I. Intersection between Domestic Work and  
Involuntary Domestic Servitude*

The statistical data regarding the number of victims of domestic servitude are extraordinarily difficult to obtain with any amount of accuracy. The informal nature of the work, taking place inside the home, leaves the actual numbers of domestic workers, including those subject to exploitation nearly impossible to decipher. The International Labor Organization (ILO) in its most recent estimates, indicate that throughout the world between 52.6 and one hundred million people over the age of fifteen make domestic work their principal job.<sup>9</sup> Yet only recently, with the adoption of the ILO Convention Concerning Decent Work for Domestic Workers, has an international document focused exclusively on providing rights and protections to domestic workers.<sup>10</sup> Subsequently, a growing number

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<sup>9</sup> International Labor Organization, Decent Work for Domestic Workers: C189 & R201 at a glance, 6 (June 2011), *available at* [http://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/travail/documents/publication/wcms\\_170438.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/travail/documents/publication/wcms_170438.pdf); U.S. Dep't of State, Office to Monitor and Combat Trafficking in Persons, *Government Action to Address Involuntary Domestic Servitude* (June 2011), *available at* <http://www.state.gov/documents/organization/167442.pdf>. This is an estimated range of domestic workers and is not meant to presume that all domestic workers are also victims of domestic servitude, but only to provide a basis for the amount of people who could be at risk.

<sup>10</sup> *See generally* International Labor Organization, Decent Work for Domestic

of countries have begun working to implement relevant laws for the protection of domestic workers into their legal systems.<sup>11</sup> Similarly, with the enactment of the New York Bill and the proposed California Bill, this large and continuously growing labor force is gaining recognition in the United States as a legitimate form of employment for which its employees are entitled to, at a minimum, protection equal to the level afforded employees in other industries.

It is also the nature and setting of the work that has led to the historic exclusion of domestic work from labor protections.<sup>12</sup> A domestic worker is employed to work in a private home, primarily to act as a housekeeper, nanny, or caregiver to the sick or elderly.<sup>13</sup> It is not rare for a domestic worker to be asked to take on additional roles, such as a professional assistant, nurse, teacher, tutor, counselor, and/or nutritionist.<sup>14</sup> Some workers commute to and from work while others are asked to reside in the employer's home. A

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Workers, June 16, 2011, 100 ILOLEX C189.

<sup>11</sup> For example, the Abu Dhabi Dialogue, a meeting between labor ministers from nineteen Asian and Middle Eastern countries, met to devise a framework for migrant workers that would decrease abuse of migrant workers, among other things. The objective of this regional consultation between "labor-sending" and "labor-receiving" countries was to develop "domestic, bilateral, and multilateral measures to increase the benefits of international labor migration." HUMAN RIGHTS WATCH, *ASIA/MIDDLE EAST: INCREASE PROTECTIONS FOR MIGRANT WORKERS* (Apr. 16, 2012) available at <http://www.hrw.org/news/2012/04/15/asiamiddle-east-increase-protections-migrant-workers>.

<sup>12</sup> The societal resistance to treating domestic workers as a group entitled to labor protections stems from the notion that domestic work is "home" or "women's" work, disconnected from the formal economy. Janie A. Chuang, *Achieving Accountability for Migrant Domestic Worker Abuse*, 88 N.C. L. REV. 1627, 1632 (2010) (explaining why international and national laws have been resistant to recognizing domestic work as form of labor entitled to worker protection).

<sup>13</sup> Peggy R. Smith, *Work Like Any Other, Work Like No Other: Establishing Decent Work for Domestic Workers*, 15 EMP. RTS. & EMP. POL'Y J. 159, 162-63 (2011) (describing the effect of the United States ratification of the ILO Convention Concerning Decent Work for Domestic Workers).

<sup>14</sup> Ai-jen Poo & Tammy Kim, *Advocacy Note: Organizing to Transform Ourselves and Our Laws: the New York Domestic Workers Bill of Rights Campaign*, 44 CLEARINGHOUSE REV. 577, 577 (2011) (providing background information into the domestic work industry in New York and explaining the advocacy process for the New York Bill).

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domestic worker is often tasked with intimate and important aspects of the family's lives, such as caring for children, the elderly, or disabled. The relationship that ensues between the workers and these individuals often results in an emotional bond that is not common in other employment positions and can cause bias, affecting personal decision-making capabilities.<sup>15</sup>

Data from a survey of domestic workers conducted by domestic workers in New York uncovered a workforce that is underpaid, overworked, and undervalued.<sup>16</sup> More than half of those surveyed were the primary income earner for their family but a large percentage of the total earn low wages, below a livable standard.<sup>17</sup> Additionally, while most workers worked overtime they rarely received overtime pay.<sup>18</sup> An unfortunate reality for over ninety percent of the domestic workers surveyed is that they were not

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<sup>15</sup> A domestic worker recounted her experience working for a family with small children, in which she was regularly working six days a week, sixteen hours a day, and the parents would sometimes ask her to stay longer so that they could have an evening out. Her love for the children resulted in her staying, only to find herself outside at 2:30 in the morning with no option for transportation other than a cab, but no money to pay the fare. *Melissa Harris-Perry: 'The Help' Doesn't Help Domestic Workers* (NBC television broadcast Feb. 25, 2012) available at <http://video.msnbc.msn.com/melissa-harris-perry/46523913#46523913>.

<sup>16</sup> The study is the result of a survey of 547 domestic workers conducted between 2003 and 2004. DOMESTIC WORKERS UNITED, HOME IS WHERE THE WORK IS: INSIDE NEW YORK'S DOMESTIC WORK INDUSTRY 1-2 (2006), available at <http://www.domesticworkersunited.org/index.php/en/component/jdownloads/finish/3/4> [hereinafter HOME IS WHERE THE WORK IS].

<sup>17</sup> At the time the survey was conducted the New York minimum wage was \$5.15/hr. *Id.* at 2. The federal poverty line in 2004 for a family of four was \$18,850 per year and low wages are considered one and a half times the poverty line. *Id.* Forty-one percent earned a low wage (\$8.98-\$13.46), eighteen percent earned below the poverty line (\$5.15- \$8.97), and eight percent earned less than minimum wage. *Id.* Fifty-nine percent were the primary income providers for their family. *Id.* As a result of low wages many were unable to afford their rent or mortgage payments, pay their phone and utility bills, and in some cases did not have enough money for food. *Id.*

<sup>18</sup> Of the workers living out of the home, forty-eight percent worked overtime, of those living in the home, sixty-three percent work overtime, and sixty-seven percent sometimes or never receive overtime pay. *Id.*

provided with access to healthcare or health benefits.<sup>19</sup> Moreover, the risk of abusive treatment by their employer was documented and ranged from being made to feel uncomfortable to verbal and physical abuse.<sup>20</sup>

A domestic worker becomes a victim of involuntary domestic servitude when she or he has been forced to work and is restrained from leaving, or the use of some threat has induced a fear of leaving.<sup>21</sup> For this reason, the term modern-day slavery has been coined to describe the various methods used to enslave and exploit victims encompassing forced labor, bonded labor, and involuntary domestic servitude.<sup>22</sup> Some illustrations of the abuses a victim of domestic servitude may be subject to are “confiscation of travel documents, withholding of wages, confinement, no time off, isolation from the community and all family and friends, physical and sexual abuse, degrading treatment, and threats of harm, including the threat of arrest, and summary deportation as an undocumented migrant.”<sup>23</sup>

Adding another dimension of vulnerability to the industry is the fact that the majority of domestic workers around the world are women and girls migrating from developing countries throughout Asia, Africa, and Latin America.<sup>24</sup> In New York, of the estimated 150,000-200,000 domestic workers in the state, ninety-nine percent

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<sup>19</sup> HOME IS WHERE THE WORK IS, *supra* note 16. Thirty-six percent were unable to afford healthcare when they needed it. *Id.*

<sup>20</sup> *Id.* Thirty-three percent surveyed experienced at least one of the listed abusive treatments. *Id.*

<sup>21</sup> William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 § 222, Pub. L. 110-457, 122 Stat. 5044 (2008).

<sup>22</sup> U.S. DEP’T OF STATE, Office to Monitor and Combat Trafficking in Persons, *Trafficking in Persons Report: What is Modern Slavery* <http://www.state.gov/g/tip/what/index.htm> (last visited Mar. 4, 2012).

<sup>23</sup> U.S. Dep’t of State, Office to Monitor and Combat Trafficking in Persons, *Involuntary Domestic Servitude* (June 14, 2010), *available at* <http://www.state.gov/documents/organizations/144601.pdf>.

<sup>24</sup> U.S. Dep’t of State, Office to Monitor and Combat Trafficking in Persons, *Government Action to Address Involuntary Domestic Servitude* (June 2011), *available at* <http://www.state.gov/documents/organization/167442.pdf>.



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are foreign born.<sup>25</sup> Migrating to a foreign country to work in a private home makes the worker extraordinarily susceptible to abuse. Some of the contributing factors are: lack of knowledge of the local language, traditions, culture, and laws; verbal agreements instead of written employment contracts; the power imbalance between worker and employer, resulting from factors such as the stigma attached to the work,<sup>26</sup> dependency on the employer because of a precarious legal status, or the inability to change employers;<sup>27</sup> and factors related to workers living in the home because the worker is beholden to the employer for accommodations and food, making it difficult to distinguish between working and rest hours and inhibiting the workers private life.<sup>28</sup> The millions of women worldwide that make domestic work their occupation are driven by push and pull factors propelling them to leave their own country in pursuit of better opportunities in another.<sup>29</sup> Many of these women use recruitment

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<sup>25</sup> Lorelei Salas, Acting Deputy Commissioner for Worker Protection, N.Y. State Dep't of Labor, Address at the St. Thomas University School of Law LL.M./J.S.D. Program in Intercultural Human Rights, Human Trafficking Academy, and INTERCULTURAL HUMAN RIGHTS LAW REVIEW Symposium: Justice at the Door: Ending Domestic Servitude (Jan. 27, 2012).

<sup>26</sup> See Smith, *supra* note 13, at 161-63.

<sup>27</sup> Diplomatic personnel are allowed to apply for a visa to bring a domestic worker from their home country to their destination country for one to three years. Chuang, *supra* note 12, at 1643. The visa is connected only to that employer and the workers' legal status is only valid with that employer. ORGANIZATION FOR SECURITY AND COOPERATION IN EUROPE [OSCE], Office of the Spec. Rep. and Coordinator for Combating Trafficking in Human Beings, 16 *Unprotected Work, Invisible Exploitation: Trafficking for the Purpose of Domestic Servitude* (2010), available at [http://www.childtrafficking.com/DOCS/osce\\_10\\_unprotected\\_work\\_0411.pdf](http://www.childtrafficking.com/DOCS/osce_10_unprotected_work_0411.pdf). [hereinafter OSCE]. This enhances the vulnerability of abuse because the employer has immunity from the domestic laws, and therefore, from prosecution and punishment, leaving the worker in an even more difficult situation because they are restricted from leaving if abused. *Id.*

<sup>28</sup> OSCE, *supra* note 27, at 16.

<sup>29</sup> Chuang, *supra* note 12, at 1630. The push factors encouraging migrants to leave their home country include: extreme poverty, cultural traditions (misconceptions that perceive women and children as commodities), and countries suffering from war or civil unrest. The pull factors that draw migrants to a destination country include: a growing middle class demand for cheaper domestic labor and child care, globalization, and the presence of internationals and expatriates which creates a new market for exploited labor through enhanced

agencies to facilitate the process, but there are unforeseen risks of exploitation and accumulation of debt to be repaid putting them in a more precarious situation.<sup>30</sup> Children are frequently trafficked and global estimates determine that domestic work is the “largest form of employment for girls under the age of sixteen.”<sup>31</sup> Cultural practices are behind a significant portion of the children being trafficked for domestic servitude.<sup>32</sup> Moreover, the risks for women and children

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economic disparity between the haves and the have-nots. Roza Pati, Professor of Law, Human Trafficking Law and Policy Course Lecture (2011).

<sup>30</sup> Chuang, *supra* note 12, at 1632. Recruitment agencies will pay the workers’ initial costs and make arrangements with employers to deduct these costs as well as potentially extravagant recruitment fees from the wages. *Id.* This may create a situation of debt bondage among migrant laborers when illegal costs and debts are imposed in the source country. U.S. DEP’T OF STATE, Office to Monitor and Combat Trafficking in Persons, *Trafficking in Persons Report: What is Modern Slavery* <http://www.state.gov/g/tip/what/index.htm> (last visited May. 17, 2012). In some cases, recruitment agencies place workers in “holding centers” before deployment. Chuang, *supra* at 1633. The holding period can last for several months and workers are forced to work with little or no pay, and are unable to leave the facilities. *Id.*

<sup>31</sup> Usen Suleimenov, *Welcome and Opening Remarks at the Tenth Alliance Against Trafficking In Persons Conference in UNPROTECTED WORK, INVISIBLE EXPLOITATION: TRAFFICKING FOR THE PURPOSE OF DOMESTIC SERVITUDE 40-41* (June 17-18, 2010) available at [http://www.childtrafficking.com/DOCS/osce\\_10\\_unprotected\\_work\\_0411.pdf](http://www.childtrafficking.com/DOCS/osce_10_unprotected_work_0411.pdf).

<sup>32</sup> For example, the Haitian practice of *restavek*, from the French phrase *rester avec*, meaning to stay with, began as a support system to allow families to send their children away to stay with trusted individuals who could provide better care, on a temporary basis in return for domestic help. The Jean R. Cadet Restavek Organization, *Case Studies*, <http://jeanrcadet.org/casestudy.aspx> (last visited May 19, 2012). Unfortunately, the practice has turned into a situation that has placed hundreds of thousands of children into domestic servitude. W. Warren H. Binford, *Saving Haiti’s Children From Hell*, 6 INTERCULTURAL HUM. RTS. L. REV. 11, 14-15 (2011) (explaining the international legal protections for children in times of disaster and how they were violated after the earthquake in January 2010). What frequently results is that the child is seen as subservient to other children in the home, he or she is responsible for all of the household chores, works long hours, receives little food, kept from attending school, isolated from family, and subjected to mental, physical, or sexual abuse, while receiving no pay. Cadet, *supra*. The United Nations Special Rapporteur on contemporary forms of slavery “considers the *restavek* system a contemporary form of slavery, based on the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery.” Special Rapporteur on Contemporary Forms of

are especially high when they are brought into a foreign country to work for a diplomatic worker because of the immunity granted to the diplomat.<sup>33</sup>

Without adequate labor protections this vulnerable sector of the workforce is too easily subjected to abuse and exploitation. The arguments for exclusion, e.g. the work taking place inside private homes, employers being unaware of their legal obligations, etc., are the very reasons why domestic workers are in great need of protection. Without standards and accountability for violating them, employers can easily cross the line and abuse the rights of their domestic workers; furthermore, those with the intention of holding their workers in servitude are less likely to be found out and held liable for the crimes they have committed.

## *II. Costs and Benefits of Enacting Labor Protections for Domestic Workers*

Many arguments can be made to support the need for laws to protect domestic workers and provide fair labor standards. But most good arguments have a valid counter-argument and this scenario is no different. The process of getting new legislation passed can be complex, time-consuming, and involve multiple parties. The costs and benefits to the parties must be balanced and the ripple effect of the legislation must be considered. Accordingly, the New York Domestic Workers' Bill of Rights involved a lengthy process initiated by the advocating efforts of civil society non-governmental organizations with the help and support of certain government officers, employers of domestic workers, and domestic workers

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Slavery, Including its Causes and Consequences, Rep. on Mission to Haiti (June 1-10, 2009), Human Rights Council, 2 U.N. Doc. A/HRC/12/21/Add.1 (Sept. 4, 2009).

<sup>33</sup> See Vienna Convention on Diplomatic Relations art. 31(1), Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95. The article stipulates, “[a] diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving state. He shall also enjoy immunity from its civil and administrative jurisdiction.” *Id.* While there are some exceptions, none apply directly to situations involving domestic servitude. *Id.*

themselves.<sup>34</sup> The viewpoints of these groups are reflective of the complexity of the issue at hand and illuminate how the costs were ultimately outweighed by the benefits, resulting in the enactment of the law.

#### A. *Domestic Workers*

The roots of domestic work in the United States can be traced back to the days of slavery where African Americans, primarily in the South, were bought and sold by the white settlers to be used as slaves; the men to work the land and the women to work the land as well as cook, clean, and care for the children.<sup>35</sup> After the abolition of slavery, African American women needed to earn income and were left with little option outside of domestic work.<sup>36</sup> Although slavery was no longer tolerated, people's perceptions about race and inequality had not changed, thus the power imbalance remained strong. In the North, invoking parallel ideals albeit with a different race, the predominant class of domestic workers were white immigrant women.<sup>37</sup> As with today's migrant domestic workers, the majority of these women lived with their employer. These interplays are the foundation for today's domestic worker and illuminate why the work is performed by those perceived to be of "low status."<sup>38</sup>

Going beyond righting a wrong that has been prevalent since the onset of labor protections in the United States, this type of legislation has the ability to empower the many immigrant domestic workers who feel beholden to their employer by providing them with tools to enforce their rights.<sup>39</sup> Without a mechanism for complaining

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<sup>34</sup> See generally Poo & Kim, *supra* note 14.

<sup>35</sup> See HOME IS WHERE THE WORK IS, *supra* note 16, at 11.

<sup>36</sup> 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, 140-41 (2002) (providing an overview of the similarities between historical slavery and modern domestic servitude).

<sup>37</sup> *Id.* at 138.

<sup>38</sup> Chuang, *supra* note 12, at 1634.

<sup>39</sup> See discussion *infra* Part III.B.

to authorities, domestic workers are only left with the possibility of going to the police; although, for the many undocumented workers this would not be a realistic choice.<sup>40</sup> The fear of losing their jobs and being deported would prohibit most people from taking action leaving them with little choice but to remain in the situation. The New York Bill provides a way to report mistreatment without fear of retaliation.<sup>41</sup> The extra protection also provides the opportunity for more stability in the workplace by setting minimum standards for employers.<sup>42</sup> As a result, domestic workers have a greater chance of maintaining a work-life balance and avoiding exploitative situations.

The domestic workers clearly have the most to gain from enactment of legislation like the New York Bill and its passing is an achievement that brings hope and the ability to pursue their careers with confidence that their rights will be upheld. The Bill sends the message that there are people who are willing to put an end to the cycle of injustice toward domestic workers.

### B. Employers

The impact of the New York Bill on the employers of domestic workers is probably the most contentious aspect of the legislation. It is debatably the reason behind the original exclusion from all of the federal labor acts.<sup>43</sup> There are definable reasons why enforcing labor protections for domestic workers can create hardships for the employer, ranging anywhere from lack of awareness of appropriate standards to financial constraints.

One of the subtlest aspects of the domestic work industry that can have a greatly detrimental impact on the worker comes from the fact that most employers don't consider themselves employers at all.

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<sup>40</sup> Donna E. Young, *The Constitutional Parameters of New York State's Domestic Workers Bill of Rights: Balancing the Rights of Workers and Employers*, 74 ALB. L. REV. 1769, 1780 (2010-2011) (discussing the constitutional concerns with enforcing the New York Bill).

<sup>41</sup> See discussion *infra* Part III.B.

<sup>42</sup> See discussion *infra* Part III.B.

<sup>43</sup> See generally Perea, *supra* note 3, at 95.

The well-intentioned employer may prefer to see their domestic worker as a part of the family, not an employee. They may intend to be fair but the result is often a lack of communication that leaves the worker without definable expectations and little bargaining power.<sup>44</sup> Furthermore, employers may be unaware of the employment standards and the consequent legal obligations. Because the work takes place inside the employer's private home and revolves around the most personal aspects of their lives, it may not be instinctual to handle the employment aspects of a domestic worker the way it would be handled in a formal workplace, not to mention that some of these employers are not employees themselves and have no familiarity with the formalities of employment.<sup>45</sup>

The Bill poses a financial threat to many employers of domestic workers, especially in the present economy where dual-wage earning families are often necessary. In exchange for both adults working, a domestic worker may be needed to assist with housework and child rearing. The financial constraints on the family may make it difficult to pay minimum wage, overtime, taxes, and insurance, all of which are required under the new law.<sup>46</sup> If the financial burden is too great, those with the most need may be unable to get the help or care they need.

The concerns of the employers of domestic workers are legitimate. Understanding which laws apply, where to find them, and how to abide by them can be confusing, especially for lay people and those who have never been an employer. Additionally, the costs of full time help are certain to increase. But for those who value their domestic workers and want to treat them with respect and dignity, the extra hurdles and cost involved would seem worth the effort.<sup>47</sup>

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<sup>44</sup> See HOME IS WHERE THE WORK IS, *supra* note 16, at 31-33.

<sup>45</sup> For example, having an employment contract, keeping records of hours worked and money paid, deducting taxes, paying for health insurance, workers' compensation coverage, and disability benefits may not seem important.

<sup>46</sup> See discussion *infra* Part II.B. See also Decent Work for Domestic Workers, *supra* note 10.

<sup>47</sup> Employers who wanted to be fair joined Domestic Workers United in their campaign for the New York Bill. Poo & Kim, *supra* note 14, at 579. "There was

### C. *Civil Society*

The success of the New York Bill can be attributed to the efforts of a six-year campaign initiated by two prominent non-profit organizations, Domestic Workers United (DWU) and New York Domestic Workers Justice Coalition.<sup>48</sup> It was the organization of these New York domestic workers, with diverse cultural backgrounds, advocating for their rights that convinced other civil organizations, in some cases employers of domestic workers, and eventually the government to recognize the gap in protection and support their efforts and the Bill.<sup>49</sup>

For civil society, specifically organizations like DWU, its members receive the direct benefit of the law. Enactment of the Bill is a triumph and a remarkable credit to the work of all involved. It seems difficult to imagine a counterargument to advocating for this type of legislation. Where the rights of the advocates themselves are in jeopardy, a fight to the finish line would seem inevitable. The result was a success for the domestic workers, not only because of the enactment of the Bill, but also because of the direct impact the campaign had on the individuals themselves, the stories that were shared and the relationships that ensued.<sup>50</sup>

There were some shortcomings; however, the Bill, for instance, did not include paid sick days, notice of termination, severance pay, or the right to collectively bargain.<sup>51</sup> This leaves

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virtually no organized opposition from employers.” (footnotes omitted) Young, *supra* note 40, at 1771.

<sup>48</sup> Poo & Kim, *supra* note 14, at 577. *See also* Domestic Workers United, <http://www.domesticworkersunited.org/index.php/en/>, and New York Domestic Workers Justice Coalition, <http://www.domesticworkers.org/>.

<sup>49</sup> There was a huge amount of support from both human and labor rights organizations such as: the New York Civil Liberties Union, the New York Immigration Coalition, the Greater New York and Capital District Labor Religion Coalitions, the Public Employees Federation, and the Service Employees International Union. N.Y. Bill Jacket, 2010 A.B. 1470, Ch. 481, 233<sup>rd</sup> Leg., Reg. Sess. (N.Y. 2010).

<sup>50</sup> Poo & Kim, *supra* note 14, at 580.

<sup>51</sup> *Id.* The Legislature did require the NYSDOL to complete a study on domestic worker collective bargaining to help determine the practicality and

room for improvement and opportunities to continue advocating in New York and beyond. Nationally, the National Domestic Workers Alliance has taken up similar actions seeking comparable legislation throughout the states.<sup>52</sup> As a result of the enactment of the Bill in New York, the civil society actors that advocate for domestic workers and equality in labor rights have a strong foundation from which to build campaigns nationwide. It will be arguably more difficult for states to oppose legislation now that one state has shown that exclusion from labor rights will no longer be tolerated.

### *III. Legal Trends in Defining Domestic Work and Domestic Servitude*

#### *A. Legal Distinction between Domestic Workers and Domestic Servitude*

##### *1. Domestic Workers*

The modern trend toward dual wage earning families has resulted in an increased demand for domestic workers.<sup>53</sup> The increase can be viewed positively in many respects; for instance, it drives the economy by offering more opportunities for family members to participate in economic and leisure activities outside of the home.<sup>54</sup> It also provides more opportunities for individuals who lack the requisite education or training to earn a living.<sup>55</sup> In some ways domestic work has become “vital for the sustainability and function of the economy outside the household.”<sup>56</sup> For those who hire domestic workers, their value is clear. It is that very value that so often leads to overwork and abuse. If the employers cannot or

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feasibility of providing these rights. *Id.*

<sup>52</sup> Poo & Kim, *supra* note 14, at 580.

<sup>53</sup> OSCE, *supra* note 27, at 12.

<sup>54</sup> Smith, *supra* note 13, at 160.

<sup>55</sup> Einat Albin & Virginia Mantouvalou, *The ILO Convention on Domestic Workers: From the Shadows to the Light*, 41 *INDUS. L.J.* 67, 68 (2012) (introducing the ILO Convention and Recommendation).

<sup>56</sup> Albin & Mantouvalou, *supra* note 55, at 68.



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will not treat their employees fairly, a need arises for adequate standards to be put in place, not only for the domestic workers but also for the continual growth of the economy.

Domestic work, while a seemingly simple concept, has no commonly accepted definition, which can lead to disagreements about what it involves.<sup>57</sup> With no clear delineation, attempting to formulate regulations can be problematic and can result in leaving many people unprotected. In June 2011, when the ILO adopted the Convention Concerning Decent Work for Domestic Workers, it became the first treaty to recognize domestic workers in a holistic, human rights manner.<sup>58</sup> The Convention provides a definition of

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<sup>57</sup> When the Fair Labor Standards Act was amended to include certain domestic workers within its protections it failed to include a definition of domestic worker, however the legislative history states that:

The generally accepted meaning of domestic service related to services of a household nature performed by an employee in or about a private home of the person by whom he or she is employed. The domestic service must be performed in a private home which is a fixed place of abode of the individual or family....Generally domestic service in and about a private home includes services performed by persons employed as cooks, butlers, valets, maids, housekeepers, governesses, janitors, laundresses, caretakers, handymen, gardeners, footmen, grooms, and chauffeurs of automobiles for family use.

Donna E. Young, *Working Across Borders: Global Restructuring and Women's Work*, 2001 UTAH L. REV. 1, 29 (2001); H.R. REP. NO. 93-913, at 35, 36 (1974) (discussing the exclusion of domestic workers from state and federal labor laws).

<sup>58</sup> Albin & Mantouvalou, *supra* note 55, at 67. There are a multitude of human rights and labor instruments that could encompass domestic workers but none that specifically recognize their need for protection. The most relevant international laws are the ILO Conventions "relating to freedom of association and collective bargaining, forced labor, non-discrimination, and child labor—all of which apply to undocumented workers." Chuang, *supra* note 12, at 1638. Additionally, there are ILO Conventions that relate to migrant workers specifically but offer less protection for undocumented workers, as well as the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, which similarly provides protections for migrant workers but less protection to undocumented workers. *Id.* at 1639. There are also a number of human rights instruments that are relevant to protecting the rights that are violated when a person is subject to domestic servitude, such as: the Universal Declaration of Human Rights, The International Covenant on Civil and Political Rights, The

domestic work and domestic worker; the broad definition states, “‘domestic work’ means work performed in or for a household or households.”<sup>59</sup> Similarly, a domestic worker is “any person engaged in domestic work within an employment relationship.”<sup>60</sup> These definitions are vast and allow for ample coverage, which is vital to preventing the exclusions that have left so many domestic workers defenseless. The Convention has not yet entered into force; however, with time and ratifications, these definitions may become internationally recognized and provide a standard for domestic legislation.<sup>61</sup>

*a. Domestic Worker Exclusion from Federal Protections*

The predominant federal labor statutes governing the workplace, the National Labor Relations Act (NLRA), the Occupational Safety and Health Act (OSHA), and Title VII of the Civil Rights Act of 1964 (Title VII) implicitly or explicitly exclude domestic workers from their protection. Until its amendment in

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International Covenant on Economic, Social, and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, and the Convention on the Rights of the Child. The ILO has also maintained a slavery convention since 1930 when it adopted the Forced Labor Convention, Convention 29. Forced Labor Convention, ILO Convention 29, June 28, 1930, 39 U.N.T.S. 55. It further supplemented the convention in 1957 with Convention 105. Abolition of Forced Labor Convention, 1957 (C105), June 25, 1957, 320 U.N.T.S. 291.

<sup>59</sup> Decent Work for Domestic Workers, *supra* note 10, at art. 1(a).

<sup>60</sup> *Id.* at art. 1(b).

<sup>61</sup> Uruguay is the first country to ratify the Convention. HUMAN RIGHTS WATCH, URUGUAY, FIRST TO RATIFY DOMESTIC WORKERS CONVENTION (May 1, 2012) available at <http://www.hrw.org/news/2012/05/01/uruguay-first-ratify-domestic-workers-convention>. “The president issued an executive decree ratifying the convention on April 30.” *Id.* On August 6, 2012, the Philippines became the second country to ratify the Convention. HUMAN RIGHTS WATCH, DOMESTIC WORKERS CONVENTION: LABOR RIGHTS TREATY TO TAKE EFFECT (Aug. 6, 2012) available at <http://www.hrw.org/news/2012/08/06/domestic-workers-convention-labor-rights-treaty-take-effect>. The treaty will enter into legal force one year after the date of the Philippines ratification. *Id.*

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1974, the Fair Labor Standards Act (FLSA) excluded all domestic workers; but now provides some of the same protections.<sup>62</sup> These federal exclusions indicate the government's reluctance to consider domestic work real work, worthy of regulation; however, "as long as there is an employer and an employee, the state has an interest in regulating the relationship so as to uphold common workplace standards and prevent exploitation."<sup>63</sup>

Unchanged since its enactment in 1935, the NLRA excludes in its definition of employee, "any individual employed. . . in the domestic service of any family or person at his home."<sup>64</sup> The Act guarantees the right to organize and bargain collectively. Due to this exclusion, domestic workers have never been given the right to organize, effectively denying them the right to work together to improve their wages, benefits, hours, and working conditions.

OSHA, the act that provides safe and healthy working conditions, limits its protections to "an employee of an employer who is employed in a business of his employer which affects commerce."<sup>65</sup> As a matter of policy, employers of domestic workers are not subject to the requirements of the Act.<sup>66</sup> However, the home is not without safety hazards and the denial of this privilege leaves workers to deal with the risks and potential consequences on their own.

Employment discrimination based on "race, color, religion, sex, or national origin" is prohibited under Title VII.<sup>67</sup> However, the

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<sup>62</sup> National Labor Relations Act, 29 U.S.C. §§ 151-169, § 152(3) (2012); Occupational Health and Safety Act, 29 U.S.C. §§ 651-678, § 652(6) (2009); Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e(b), (f) (2012); Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (2012).

<sup>63</sup> Young, *supra* note 57, at 20.

<sup>64</sup> 29 U.S.C. § 152(3).

<sup>65</sup> 29 U.S.C. § 652(6). OSHA sets out the following standard: "Each employer: (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees; (2) shall comply with occupation safety and health standards promulgated under this chapter. 29 U.S.C. § 654.

<sup>66</sup> Occupational Safety and Health Standards, 29 C.F.R. § 1975.6 (2009).

<sup>67</sup> 42 U.S.C. § 2000e.

requirement that an employer be engaged in an industry affecting commerce with fifteen or more employees implicitly excludes domestic workers who are most often the only employee, leaving them without a remedy when they are harmed as a result of discrimination.<sup>68</sup>

Since 1974, domestic workers have been protected under FLSA in regards to minimum wage laws and in some cases maximum hours and overtime compensation.<sup>69</sup> The law still excludes casual employees and companions to the sick or elderly from all of its protections,<sup>70</sup> while live-in domestic workers are excluded from overtime compensation.<sup>71</sup>

In summary, the only federal labor protection offered to domestic workers is under FLSA, but even these protections are limited by the exclusions discussed above. Domestic workers are not afforded the right to organize and collectively bargain, and they are not protected from occupational dangers or discrimination. The legal meaning of the term employee and/or employer under these Acts excludes domestic workers from most labor protections guaranteed to other employees. But federal exclusions are not the end of the line; states have the opportunity to make more extensive laws by including domestic workers in their definitions of employees or by dedicating specific laws to their protection.

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<sup>68</sup> 42 U.S.C. §§ 2000e(b), (f).

<sup>69</sup> *See* 29 U.S.C. §§ 201-219. Prior to the 1974 amendment all domestic workers were excluded from the FLSA standards.

<sup>70</sup> 29 U.S.C. §§ 201-219, § 206(f), 207(1) (2012) (providing minimum wage and maximum hours for domestic workers); 29 U.S.C. § 213(a)(15) (2012) (excluding babysitters employed on a casual basis and those providing companionship services to the aged or infirm). In December 2011, the Department of Labor proposed a rule to revise the FLSA regulations, specifically those pertaining to the exemption of companionship workers. *See* Application of the Fair Labor Standards Act to Domestic Service, 76 Fed. Reg. 81,190 (Dec. 27, 2011) (to be codified at 29 C.F.R. § 552).

<sup>71</sup> 29 U.S.C. § 213(b)(21). The FLSA proposed rule amendment would also impose more stringent record keeping for live-in domestic workers, currently there is no standard for record-keeping but employers are required to pay minimum wage for all hours worked. Application of the Fair Labor Standards Act to Domestic Service, 76 Fed. Reg. 81,190 (Dec. 27, 2011) (to be codified at 29 C.F.R. § 552); 29 C.F.R. § 552.102 (2012).

*b. Domestic Worker Exclusion from New York State Laws*

Generally speaking, state legislatures have failed to provide more extensive labor protections to domestic workers than the federal government and, in some cases, provide less.<sup>72</sup> New York, however, is considered a progressive state and even before the Bill was enacted it offered more protections than most other states.<sup>73</sup> For instance, New York's labor regulations were similar to the FLSA, such that domestic workers were entitled to the state minimum wage and those that did not live in the employer's home were entitled to overtime pay at one and a half times the regular rate after forty hours of work, while those that did live in the home were entitled to one and a half times the minimum wage after forty-four hours of work.<sup>74</sup> The minimum wage law was enforced by statute but the overtime rule was only a regulation, which created ambiguity and resulted in inconsistent enforcement.<sup>75</sup> In furtherance of New York's credibility as a state that prioritizes the rights of its citizens, the New York City Nanny Bill was passed in 2003 setting out additional criteria for employment agencies that place domestic workers, such as requiring them to provide information to the employees about their rights.<sup>76</sup>

On the other hand, New York's private sector employees are covered under the federal OSHA and therefore domestic workers are likewise excluded from its protections.<sup>77</sup> In the same way, New York State's Labor Relations Act explicitly excludes domestic workers from the right to bargain collectively.<sup>78</sup> The New York

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<sup>72</sup> See Young, *supra* note 57, at 29-36.

<sup>73</sup> Salas, *supra* note 25.

<sup>74</sup> HOME IS WHERE THE WORK is, *supra* note 16, at 8.

<sup>75</sup> Salas, *supra* note 25.

<sup>76</sup> HOME IS WHERE THE WORK is, *supra* note 16, at 8. Such employment agencies are required to provide employers with a "code of conduct" explaining existing labor laws. *Id.* The agencies must also inform the workers of their rights and give them a description of their work responsibilities. *Id.*

<sup>77</sup> U.S. Dep't of Labor, Occupational Safety and Health Admin., <http://www.osha.gov/osmdir/ny.html> (last visited Aug. 15, 2012).

<sup>78</sup> N.Y. Lab. Law § 701(3)(a) (McKinney 2010). The definition of employee:

State Division of Human Rights (DHR) defines employer to “not include any individual employer with fewer than four persons in his or her employ,” and employee “does not include any individual employed. . .in the domestic service of any person.”<sup>79</sup> This exclusion had prevented domestic workers from a distinct protection offered in New York that prohibits discrimination in the ability to obtain employment based on “age, race, creed, national origin, sexual orientation, military status, sex, marital status, or disability.”<sup>80</sup>

## 2. *Victims of Involuntary Domestic Servitude*

The laws concerning involuntary domestic servitude in the United States primarily fall under the federal Trafficking Victims Protection Act (TVPA) which was enacted concurrently with the relevant international convention, the Protocol to Prevent, Suppress, and Punish Trafficking In Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Crime (Palermo Protocol).<sup>81</sup> The Palermo Protocol sets forth a definition for the trafficking in persons, naming the elements of the crime, and requires all parties to the convention to

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shall not include any individual employed...in the domestic service of and directly employed, controlled and paid by any person in his home, any individual whose primary responsibility is the care of a minor child or children and/or someone who lives in the home of a person for the purpose of serving as a companion to the sick, convalescing, or elderly person.

*Id.*

<sup>79</sup> N.Y. Exec. Law § 292(5), (6) (McKinney 2011).

<sup>80</sup> N.Y. Exec. Law § 291 (McKinney 2010). New York is the first state to enact a human rights law, “which affords every citizen ‘an equal opportunity to enjoy a full and productive life.’ This law prohibits discrimination in employment, housing, credit, places of public accommodations, and non-sectarian educational institutions.” N.Y. State Div. of Human Rights, <http://www.dhr.ny.gov/mission.html> (last visited Aug. 15, 2012).

<sup>81</sup> *See* Protocol to Prevent, Suppress, and Punish Trafficking In Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Crime, Nov. 15, 2000, 2237 U.N.T.S. 319.

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implement domestic legislation to criminalize these actions.<sup>82</sup> The TVPA differentiates human trafficking crimes into categories and defines each separately.<sup>83</sup> For instance, involuntary domestic servitude is defined as,

a condition of servitude induced by means of (A) any scheme, plan, or pattern intended to cause a person to believe that, if that person did not enter into or continue in such condition, that person or another person would suffer serious harm or physical restraint; or (B) the abuse or threatened abuse of the legal process.<sup>84</sup>

It is a crime punishable by fine, imprisonment, or both.<sup>85</sup>

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<sup>82</sup> The Palermo Protocol defines trafficking in persons as:

[T]he recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

*Id.* at art. 3(a).

<sup>83</sup> Human trafficking consists of forced labor, sex trafficking, bonded labor, debt bondage among migrant laborers, involuntary domestic servitude, forced child labor, child soldiers, and child sex trafficking. U.S. DEP'T OF STATE, Office to Monitor and Combat Trafficking in Persons, *Trafficking in Persons Report: What is Modern Slavery* <http://www.state.gov/g/tip/what/index.htm> (last visited Aug. 16, 2012).

<sup>84</sup> Victims of Trafficking and Violence Prevention Act of 2000 § 103(5), Pub. L. No. 106-386, 114 Stat. 1464, Division A (2000).

<sup>85</sup> Victims of Trafficking and Violence Prevention Act, *supra* note 84, *amending* 18 U.S.C. § 1589. The statute states:

Whoever knowingly provides or obtains the labor or services of a person (1) by threats of serious harm to, or physical restraint against, that person or another person; (2) by means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical

The enactment of the TVPA in 2000 changed the way courts interpreted involuntary domestic servitude cases. Prior to the enactment, the standard for determining whether a crime rose to the level of involuntary servitude was set out in *United States v. Kozminski*.<sup>86</sup> The involuntary servitude statute at the time was implicated when a person “knowingly and willfully holds to involuntary servitude. . . any other person for any term.”<sup>87</sup> The U.S. Supreme Court held in *Kozminski* that a conviction under the statute requires evidence that the “victim [was] forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use of coercion through law or the legal process.”<sup>88</sup> This narrow reading of the statute only allowed a conviction when there was evidence of use or threatened use of physical or legal coercion, and it excluded psychological coercion. The enactment of the TVPA purported to expand the statute to allow for convictions based on psychological coercion, resulting in greater protection for victims by increasing the amount of cases that could be successfully prosecuted under the statute.<sup>89</sup>

At the international level, the courts have not had many opportunities to address the issue of domestic servitude; however, there has been cause to take up the issue of slavery and its relevance to human trafficking. In 2002, the International Criminal Tribunal

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restraint; or (3) by means of the abuse or threatened abuse of law or the legal process, shall be fined under this title or imprisoned not more than 20 years, or both. If death results from the violation of this section, or if the violation includes kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to kill, the defendant shall be fined under this title or imprisoned for any term of years or life, or both.

*Id.*

<sup>86</sup> See generally *United States v. Kozminski*, 487 U.S. 931 (1988). The case involved two mentally challenged men found working on a farm seven days a week, seventeen hours a day with little to no pay. *Id.* at 931. Both men suffered threatened and actual abuse as well as various forms of psychological coercion to keep them on the farm. *Id.*

<sup>87</sup> 18 U.S.C. § 1584 (1996).

<sup>88</sup> *Kozminski*, 487 U.S. at 952.

<sup>89</sup> See 18 U.S.C. § 1589(a) (2008).



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for the former Yugoslavia (ICTY),<sup>90</sup> in *Prosecutor v. Kunarac et al.*,<sup>91</sup> renewed the international community's attention to slavery and highlighted its likeness to human trafficking.<sup>92</sup> The ICTY defined slavery as a "crime against humanity in customary international law consist[ing] of the exercise of any or all of the powers attaching to the right of ownership over a person."<sup>93</sup> The case is significant because the ICTY set out a list of factors satisfying the "any or all powers" of ownership language of the definition, which could constitute a conviction of enslavement.<sup>94</sup> Consequently, the concept

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<sup>90</sup> The United Nations Security Council established the ICTY in 1993 to "prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991." Statute of the Int'l Crim. Trib. for the Former Yugoslavia, S.C. Res. 827, art. 1, U.N. Doc. Doc. S/RES/827 (May 25, 1993).

<sup>91</sup> *Prosecutor v. Kunarac*, Case No. IT-96-23-T & IT-96-23/1-T, Trial Court Judgment (Feb. 22, 2001) (A leader of the Bosnian Serb armed forces was convicted of enslavement, among other things, for detaining Muslim girls, ordering them to cook and do household chores, reserving one of the girls exclusively for himself, keeping them at his constant disposal, allowing them to be raped, and denying them all control over their lives).

<sup>92</sup> See Roza Pati, *States' Positive Obligations with Respect to Human Trafficking: The European Court of Human Rights Breaks New Ground in Rantsev v. Cyprus and Russia*, 29 B.U. INT'L L.J. 79, 130 (2011) (discussing the significance of the *Rantsev* decision to the international interpretation of human trafficking as a form of slavery).

<sup>93</sup> *Kunarac*, IT-96-23-T & IT-96-23/1-T at 192. ¶ 539.

<sup>94</sup> The Tribunal set forth the following list of factors that indicate enslavement:

Elements of control and ownership, the restriction or control of an individual's autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator. The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim's position of vulnerability; detention or captivity; psychological oppression or socio-economic conditions. Further indications of enslavement include exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking.

*Id.* at 193, ¶ 542.

of slavery was expanded from a crime involving ownership to one in which exercising one or more of the powers in connection to the ownership will satisfy the elements of the crime. The similarities between this definition of slavery and the crime of human trafficking are apparently similar and have provided a foundation for future prosecutions of human trafficking crimes.<sup>95</sup>

In 2005, the European Court of Human Rights (ECtHR)<sup>96</sup> heard the case of *Siliadin v. France*.<sup>97</sup> Siliadin alleged a violation of Article Four of the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, providing that, “[n]o one shall be held in slavery or servitude,” and “[n]o one shall be required to perform forced or compulsory labour.”<sup>98</sup> Although allegations of slavery were made, the ECtHR did not follow the lead of the ICTY’s analysis and conclusion in regards to the definition of slavery, and instead used the definition set forth in the Slavery Convention.<sup>99</sup> Consequently, the ECtHR did not find the slavery definition applicable because the perpetrators did not “exercise a genuine right of legal ownership” over Siliadin.<sup>100</sup> What the ECtHR

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<sup>95</sup> Pati, *supra* note 92, at 130.

<sup>96</sup> The European Court of Human Rights is a regional court established in 1959 to rule “on individual or State applications alleging violations of the civil and political rights set out in the European Convention on Human Rights. European Court of Human Rights, *The Court in Brief* available at [http://www.echr.coe.int/NR/rdonlyres/DF074FE4-96C2-4384-BFF6-404AAF5BC585/0/Brochure\\_en\\_bref\\_EN.pdf](http://www.echr.coe.int/NR/rdonlyres/DF074FE4-96C2-4384-BFF6-404AAF5BC585/0/Brochure_en_bref_EN.pdf). The Court monitors the rights of the forty-seven members of the Council of Europe who have ratified the Convention. *Id.*

<sup>97</sup> *Siliadin v. France*, App. No. 73316/01 (Eur. Ct. H.R. 2005) (involving a fifteen-year old girl from Togo sent by her father to work for a family in France).

<sup>98</sup> Eur. Consult. Assoc. *Convention on Action Against Trafficking in Human Beings*, art. 4, May 16, 2005, C.E.T.S. No. 197.

<sup>99</sup> The 1926 Slavery Convention set forth a definition that has been recognized as customary international law. *Kunarac*, IT-96-23-T & IT-96-23/1-T at 178, ¶ 520. It defines slavery as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.” Slavery Convention art. 1, Sept. 25, 1926, T.S. 778, 60 L.N.T.S. 253, *amended* by Slavery Convention Protocol, *opened for signature* Dec. 7, 1953, 7 U.S.T. 479; *Siliadin*, App. No. 73316/01, ¶ 122.

<sup>100</sup> *Siliadin*, App. No. 73316/01, ¶ 122. Some of the factors that the ECtHR took into consideration in making the determination of whether or not Siliadin had been enslaved were her allegations that “her freedom to come and go had been

did do was interpret Article Four to impose on governments positive obligations to adopt criminal legislation punishing practices involving the offenses listed in the Article and to apply them. The ECtHR further concluded that Siliadin had been subjected to servitude, thus holding that she was a victim of forced labor within the meaning of Article Four of the Convention.<sup>101</sup>

The most recent case to regard human trafficking as synonymous with slavery was the 2010 ECtHR decision in *Rantsev v. Cyprus and Russia*.<sup>102</sup> This landmark decision addressed the issue of a violation of Article Four, as noted above, among other things, based on allegations that Russia and Cyprus failed to protect the victim from being trafficked and neglected to investigate the circumstances of her arriving and working in Cyprus.<sup>103</sup> The Court reevaluated its decision in *Siliadin* and considered the holding in *Kunarac*, “that the traditional concept of slavery, closely linked to the right of ownership, had now evolved to include a range of contemporary forms of slavery, exercising one or more powers attached to the right of ownership.”<sup>104</sup> The result was the decision that human trafficking is a form of slavery that falls within the protections of Article Four.<sup>105</sup> As for what that means, the court emphasized a comprehensive approach and obligated states to take

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limited, her passport had been taken away from her, her immigration status had been precarious before becoming illegal, and she had also been kept by [the perpetrators] in a state of fear that she would be arrested and expelled.” *Id.* at ¶ 94.

<sup>101</sup> *Siliadin*, App. No. 73316/01, ¶¶ 89, 129.

<sup>102</sup> *Rantsev v. Cyprus*, App. No. 25965/04 (51 Eur. Ct. H.R. 2010) (Case brought to the ECtHR by the father of a Russian girl who had traveled to Cyprus on an “artiste” visa to work in a cabaret who was found dead on the street outside the cabaret owner’s apartment, allegedly having fallen from the balcony on the fifth floor less than one month after arriving). Many allegations were made under the European Convention on Human Rights and Fundamental Freedoms including violations of Article Two, the right to life, Article Three, freedom from torture, inhuman and degrading treatment, Article Four, freedom from slavery, servitude, forced and compulsory labor, and Article Five, right to liberty and security of person. *Id.*

<sup>103</sup> *Id.* at ¶ 253.

<sup>104</sup> *Pati*, *supra* note 92, at 94; *see also Rantsev v. Cyprus*, App. No. 25965/04 (51 Eur. Ct. H.R. 2010).

<sup>105</sup> *Rantsev*, App. No. 25965/04 at ¶ 282.

positive measures to protect victims and potential victims, it mandated special training for law enforcement and immigration officials, and gave states a duty to investigate potential situations of human trafficking, as well as to cooperate with other states when borders are crossed.<sup>106</sup>

The *Rantsev* decision put a great deal of importance on the crime of human trafficking. The significance of Article Four protections is that they are non-derogable rights; rights that cannot be taken away even in times of emergency.<sup>107</sup> This series of international cases illustrates the connection between slavery and human trafficking, illuminating the magnitude of the problem and the necessity for protections. With the new ILO Convention, countries have the opportunity to become a party to and build a foundation of legislation protecting domestic workers from becoming victims of domestic servitude.

#### *B. The New York Domestic Workers Bill of Rights*

The New York Bill was proposed to establish regulations of wages, hours of work, and employment contracts for domestic workers by amending the labor, executive, and workers' compensation laws. The State Assembly passed a version of the bill in 2009, and, the Senate, after adding additional provisions, passed it in June 2010.<sup>108</sup> The two bills were reconciled and Governor David A. Paterson signed the final product into law; it went into effect on November 29, 2010.<sup>109</sup>

One of the most pressing concerns for New York governmental entities, particularly the Division of the Budget, was the cost allocation necessary to support the enforcement of the law. At the time of the proposal, neither the New York State Department of Labor (NYSDOL) nor the Division of Human Rights (DHR) had the budget to support the law and the Bill did not provide

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<sup>106</sup> *Rantsev*, App. No. 25965/04 at ¶¶ 286-88.

<sup>107</sup> Pati, *supra* note 92, at 95.

<sup>108</sup> Poo & Kim, *supra* note 14, at 580.

<sup>109</sup> *Id.*

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any resources.<sup>110</sup> It was estimated that the NYSDOL would need \$504,000 to hire five additional investigators and one additional clerical worker to implement the proposed labor standards.<sup>111</sup> Similarly, the DHR would require additional resources to handle the increase in complaints and to disseminate the information and educate the public.<sup>112</sup> On the other hand, the Division of the Budget supported the Bill for its value in addressing the inequities of the original laws and the precedent it would make as the first bill of its kind.<sup>113</sup> The Division of the Budget ultimately opposed the Bill but the DHR and the NYSDOL were both strong supporters.<sup>114</sup>

The New York Legislature was also concerned about the hardship on employers both in regards to their ability to fill the role of employers and the financial burden placed on them during an already weak economy.<sup>115</sup> The enforcement aspect of the Bill was also controversial, particularly in overcoming privacy issues concerning the workplace being a private home. The government is traditionally more cautious about intervening in employee and employer disputes that take place in a private home.<sup>116</sup> The right to privacy is a right implied from the U.S. Constitution.<sup>117</sup> Without obtaining consent, it would be difficult to inspect a private home

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<sup>110</sup> Memorandum from the Dep't of the Budget to the Governor of N.Y. (2010) (N.Y. Bill Jacket, 2010 A.B. 1470).

<sup>111</sup> *Id.*

<sup>112</sup> Memorandum from the N.Y. State Div. of Human Rights to the Governor of N.Y. (Aug. 6, 2010) (N.Y. Bill Jacket, 2010 A.B. 1470).

<sup>113</sup> Memorandum from the Dep't of the Budget to the Governor of N.Y. (2010) (N.Y. Bill Jacket, 2010 A.B. 1470).

<sup>114</sup> *Id.*; Memorandum from the N.Y. State Div. of Human Rights to the Governor of N.Y. (Aug. 6, 2010) (N.Y. Bill Jacket, 2010 A.B. 1470); Memorandum from the N.Y. Dep't of Labor (Aug. 10, 2010) (N.Y. Bill Jacket, 2010 A.B. 1470).

<sup>115</sup> See discussion *supra* Part II.B.

<sup>116</sup> Young, *supra* note 40, at 1772.

<sup>117</sup> Although the U.S. Constitution does not offer an express right to privacy, a fundamental right to privacy has been implied. See generally *Olmstead v. United States*, 277 U.S. 438 (1928). "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness.... They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." *Id.* at 478.

prior to any accusation of wrongdoing. On the other hand, once an abuse has been alleged, it could be possible to obtain a warrant to gain access to the private home.

The concerns of the New York Legislature are sure to be similar to those faced by other states but, despite the obstacles, the New York Bill was strongly favored and was passed by a large majority of the Assembly and a smaller yet strong percentage of the Senate.<sup>118</sup> Some of the success of the Bill can be attributed to the many legislators who felt a connection either because their mother or grandmother worked as a domestic worker or because of the relationship they had with their caregiver as a child.<sup>119</sup>

The innovative Bill further engrains some protections already granted by the state and implements new rights that have never been seen before. The Bill covers most domestic workers but, consistent with federal exclusions, the coverage does not extend overtime and a required day of rest to those who work as companions to the sick or elderly, and completely excludes those who work on a casual basis, such as babysitters, and those working for relatives.<sup>120</sup>

The law provides that domestic workers are entitled to the labor protections of the New York minimum wage,<sup>121</sup> overtime at a rate of one and a half times the regular rate of pay after forty hours of work for those who live-out of the residence and one and a half times the regular rate of pay after forty-four hours of work for those who live-in, and one paid day of rest per week.<sup>122</sup> In addition, the Bill

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<sup>118</sup> The Bill was passed by a vote in the Assembly of 104 in favor and 39 opposed. N.Y. Bill Jacket, 2010 A.B. 1470, Ch. 481, 233<sup>rd</sup> Leg., Reg. Sess. (N.Y. 2010). The Senate passed the Bill with 35 in favor and 26 opposed. *Id.*

<sup>119</sup> Poo & Kim, *supra* note 14, at 579-80. The then president of the American Federation of Labor and Congress of Industrial Organizations, John Sweeney, was a strong supporter of the Bill primarily because his mother had been a domestic worker for more than forty years. *Id.* at 579. Many of the legislators also told stories of their relationship to domestic workers. *Id.* at 580.

<sup>120</sup> N.Y. Lab. Law § 2(16) (McKinney 2011).

<sup>121</sup> The current minimum wage is \$7.25 per hour. U.S. Dep't of Labor, Labor Standards, <http://www.labor.ny.gov/workerprotection/laborstandards/workprot/minwage.shtm> (last visited Aug. 16, 2012).

<sup>122</sup> N.Y. Lab. Law § 651 (McKinney 2010); N.Y. Lab. Law § 170 (McKinney 2010); N.Y. Lab. Law § 161 (McKinney 2010).

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added a groundbreaking provision entitling domestic workers to three paid days of rest after one year of work for the same employer.<sup>123</sup>

Workers who work more than forty hours a week are entitled to Workers' Compensation Insurance in case they are hurt on the job and Disability Benefits Insurance if they are injured or become ill outside of work and as a result miss more than seven days of work.<sup>124</sup> Additionally, the DHR protects domestic workers from workplace harassment, including sexual harassment and harassment based on gender, race, religion, or national origin.<sup>125</sup> The DHR provides a mechanism for filing complaints within one year of the alleged act and prohibits employers from retaliating against any employee who files such a complaint.<sup>126</sup>

Employers have obligations under the Bill and can face civil and criminal consequences in the case of a violation.<sup>127</sup> First, they must provide the benefits discussed above in regards to minimum wage, overtime, days of rest and paid days off, as well as provide Workers' Compensation Insurance coverage and Disability Benefit Insurance coverage when applicable. Second, employers are required to provide written notices of the policies regarding sick leave, vacation, personal leave, holidays, hours of work, regular amount of pay, overtime rates, and the regular payday.<sup>128</sup> No pay

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<sup>123</sup> N.Y. Lab. Law § 161. This is the only provision of its kind in New York and no other type of employee is provided with this benefit. Salas, *supra* note 25.

<sup>124</sup> N.Y. Workers' Comp. § 201 (2010).

<sup>125</sup> N.Y. Exec. Law §§ 292, 296-b (2010).

<sup>126</sup> N.Y. STATE DIVISION OF HUMAN RIGHTS, PROTECTION OF DOMESTIC WORKERS FROM HARASSMENT UNDER THE NYS HUMAN RIGHTS LAW, *available at* <http://www.dhr.ny.gov/pdf/trifold-domestic-workers.pdf>.

<sup>127</sup> N.Y. Lab. Law §§ 214, 215 (2011). Stating that employers are prohibited from retaliating against an employee for filing a complaint. *Id.* § 215. If the court finds a violation, the employer can be charged not less than \$1,000 but not more than \$10,000, as well as being enjoined from the conduct, paying liquidated damages, and either reinstating the employee to the former position or payment of lost compensation. *Id.* Any person may also be prosecuted for any criminal violation of the state laws. *Id.* § 214.

<sup>128</sup> See N.Y. STATE DEP'T OF LABOR, FACTS FOR EMPLOYERS, *available at* <http://www.labor.ny.gov/legal/laws/pdf/domestic-workers/facts-for-employers.pdf>.

deductions may be withheld without authorization and detailed payroll and timekeeping records must be retained.<sup>129</sup> All employers must abide by tax obligations, including the requirement to file and pay unemployment taxes for their employee.<sup>130</sup> Lastly, no retaliation is permitted against an employee who files a complaint with the DHR, NYSDOL, or the courts for an alleged violation of any of these labor practices.<sup>131</sup> Taking these labor protections even further, all of the above mentioned rights and obligations apply regardless of the immigration status of the worker.<sup>132</sup>

During the first year after enactment, in order to evaluate the law, the NYSDOL expedited all complaints filed under the Bill.<sup>133</sup> There were between twenty-five and thirty complaints filed, and about five to ten were resolved.<sup>134</sup> The complaints concerning wages and overtime disputes were mostly settled and/or resulted in awards of back pay and penalties, ranging from \$5,000 to \$100,000.<sup>135</sup> Some of the cases were quite severe, in one such case a woman was forced, by use of threats to her family, to work seventy-two hours a week while being paid only \$580.00 per month.<sup>136</sup> Cases are likely to continue to increase as awareness spreads, but because of the short period of time since the enactment, reported cases specifically addressing domestic workers in New York and the provisions of the Bill are difficult to find. Therefore, it will take time before the Bill's

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<sup>129</sup> See N.Y. STATE DEP'T OF LABOR, FACTS FOR EMPLOYERS, *supra* note 128.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> Salas, *supra* note 25. The cases were handled almost immediately. *Id.*

<sup>134</sup> *Id.* The NYSDOL receives between 7,000 and 10,000 complaints every year and they have about 100 investigators to handle the claims. *Id.*

<sup>135</sup> Sharon Lerner, *The "Help" Gets its Due*, SLATE, Feb. 22, 2012, [http://cdp-ny.org/media2/slate\\_22feb12.pdf](http://cdp-ny.org/media2/slate_22feb12.pdf).

<sup>136</sup> Lerner, *supra* note 135. The court found that the woman was coerced to work by threats of harm to her family in Chile based on the reputation of power the family maintained in Chile. *Id.* The court did not determine whether the case rose to the level of trafficking, however, it did issue her a U visa, which allows an "alien who has suffered substantial physical or mental abuse as a result of having been a victim of criminal activity." *Id.*; Immigration and Nationality Act, 8 U.S.C.A. §§ 1101-1537, § 1101(a)(15)(U) (2011).



true impact can be realistically assessed.

#### *IV. Predictions*

The success of the New York Bill in terms of reducing exploitation is still to be determined. But simply having the law in place and a government willing to enforce it is a step in the right direction. The state is faced with the challenges of educating the public about the new laws and with monitoring and enforcing them.

Getting the word out to both domestic workers and their employers can be a challenging process as the traditional means for outreach are not applicable.<sup>137</sup> New York is probably faced with the largest hurdle because they are the first to enact such laws. Prior to the enactment of the Bill, the NYSDOL prepared an outreach plan to disseminate the information as widely as possible.<sup>138</sup> In order to get the information to current and potential employers and employees the materials were designed to be in easy to understand plain language and then translated into a number of different languages, easily printable and accessible online, and in three different forms: a short summary of the key facts, more detailed descriptions of the new and existing laws, and a small card to be posted in all homes where a domestic worker is employed, as required by the Bill.<sup>139</sup> To disseminate the information, the materials were emailed and in some cases sent through the postal system to a number of different groups

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<sup>137</sup> The traditional approach to outreach is through unions and trade associations. N.Y. STATE DEP'T OF LABOR, REPORT ON OUTREACH EFFORTS FOR DOMESTIC WORKERS LEGISLATION 2 (Dec. 30, 2010), *available at* <http://www.labor.ny.gov/legal/laws/pdf/domestic-workers/report-to-governor-outreach.pdf>. There are neither unions nor trade associations for domestic workers and the largest formal organization, Domestic Workers United, has only 4,000 members, representing a small percentage of the domestic workers in the state. *Id.*

<sup>138</sup> *See generally id.*

<sup>139</sup> N.Y. STATE DEP'T OF LABOR, REPORT ON OUTREACH EFFORTS FOR DOMESTIC WORKERS LEGISLATION, *supra* note 138, at 2-3. The fact sheet is currently translated into the following languages: Chinese, French, Haitian-Creole, Hindi, Nepali, Spanish, and Tagalog. U.S. Dep't of Labor, Legal, <http://www.labor.ny.gov/legal/domestic-workers-bill-of-rights.shtm> (last visited Aug. 23, 2012).

likely to have contact with domestic workers and employers.<sup>140</sup> This outreach effort in New York was a good attempt at making a focused impact on the relevant individuals. It is likely, however, that there remain uninformed employers and employees and efforts will need to continue through the same medium as well as others, like media and personal contact, until the Bill becomes common knowledge in the state.

For the State to monitor compliance with the Bill, the privacy concerns discussed above become relevant. Generally speaking, the ability to enter a private home would not be hindered as long as there is a viable complaint. The viability of the complaint could be measured by first conducting interviews with the complainant to determine if further investigation is necessary, which would require inspection of the home. It can also be expected that violations will continue to occur without the victim putting anyone on notice, thus the ability to conduct impromptu inspections would be a valuable tool in the State's ability to monitor overall compliance. South Africa, for example, allows labor inspectors to inspect private homes without a formal complaint after applying to the court for permission.<sup>141</sup> In practice, the inspectors have targeted specific areas, gotten court approval, contacted the households to inform them of their impending inspection, and conducted the inspections in

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<sup>140</sup> To reach domestic workers—consulates, employment agencies, organizations such as Domestic Workers United, libraries, and foreign language media were selected to be contacted. REPORT ON OUTREACH EFFORTS FOR DOMESTIC WORKERS LEGISLATION, *supra* note 137, at 3-4. To reach employers information was slated to be posted on parenting blogs, parenting newspapers and magazines, Chambers of Commerce; and the NYSDOL proposed to communicate with condo associations, organizations that work with the elderly, the New York Bar Association, the American Accounting Association, and other relevant agencies. *Id.* at 4. To target both audiences, information was proposed to be communicated to schools, daycares, pediatrician offices, places of worship, and through Public Service Announcements, and mailings by elected officials. *Id.* at 4-5.

<sup>141</sup> INT'L LABOR ORG., EFFECTIVE PROTECTION FOR DOMESTIC WORKERS: A GUIDE TO DESIGNING LABOUR LAWS 100 (May 23, 2012), available at [http://www.ilo.org/travail/areasofwork/domestic-workers/WCMS\\_173365/lang-en/index.htm](http://www.ilo.org/travail/areasofwork/domestic-workers/WCMS_173365/lang-en/index.htm).

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the homes.<sup>142</sup> The idea of inspection is likely to prompt employers to implement proper procedures for their domestic worker in order to avoid penalties or further punishment. In situations of exploitation where the worker is intentionally kept isolated the worker may not have an opportunity to discover the new laws and their employer is not likely to be concerned with following them. For this reason in particular, general and/or random inspections are important for their potential of uncovering cases of involuntary servitude that would have otherwise gone unnoticed. Another possibility for monitoring compliance would be to require a relevant governing body to maintain records. Employers would be responsible for submitting employment contracts and the body could reach out to both the employers and employees for further supervision of the working conditions.<sup>143</sup>

The Bill provides a checklist of items to identify when inspecting a home or investigating a claim. Each element under the labor and workers' compensation laws can be proven through documentation, or the lack thereof. The anti-discrimination law requires further investigation into the individual circumstances but, with the ability to access the home, finding evidence of violations

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<sup>142</sup> INT'L LABOR ORG., EFFECTIVE PROTECTION FOR DOMESTIC WORKERS: A GUIDE TO DESIGNING LABOUR LAWS, *supra* note 141. Labor inspectors in South Africa have been carrying out such investigations since 2005. *Id.* Hundreds of homes are visited during the specified period. The inspections include questionnaires for the employees. *Id.* Those that are not in compliance with the laws are subsequently followed up on. *Id.*

<sup>143</sup> *See Id.* at 98. The ILO sets out the requirements for implementing labor inspections in Article Seventeen of the Convention:

- (1) Each member shall establish effective and accessible complaint mechanisms and means of ensuring compliance with national laws and regulations for the protection of domestic workers;
- (2) Each member shall develop and implement measures for labour inspection, enforcement and penalties with due regard for the special characteristics of domestic work, in accordance with national laws and regulations;
- (3) In so far as compatible with national laws and regulations, such measures shall specify the conditions under which access to household premise may be granted, having due respect for privacy.

Decent Work for Domestic Workers, *supra* note 10, at art. 17.

may be more readily available. These measures of compliance are tools that can be utilized in proceedings so that, in the case of violations, the worker can be compensated and the employer can be penalized or properly punished. The hope is that the more penalties and prosecutions that occur, the more people will be deterred from breaking the laws; thus inferring that the domestic work industry will become a safer and more sustainable employment option for the many that make it their lives work.

Momentum has been gaining in the fight for domestic workers rights with a growing national movement of organizations and cities in support of state and federal laws to protect domestic workers.<sup>144</sup> California is primed to be the next state to enact such laws. The California Bill is modeled after the New York Bill and is intended to remove the exclusion of domestic workers from all of the rights afforded to other California workers as well as provide industry-specific protections.<sup>145</sup> The California Domestic Workers Coalition would also like to see the Bill go beyond the New York Bill's protections by providing annual living wage increases and advanced notice of termination or severance pay.<sup>146</sup> The California Bill has been passed by the State Senate and now awaits the governor's signature.<sup>147</sup> If passed it will be another great achievement for domestic workers.

The adoption of the ILO Convention was "a historical

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<sup>144</sup> Applebaum, *supra* note 8, at 7. "Three years ago there were thirteen organizations fighting for the rights of domestic workers in six cities around the U.S. Today there are thirty-three such organizations in seventeen cities." *Id.*

<sup>145</sup> Office of Assemblymember Tom Ammiano, AB 889 (Ammiano & V.M. Perez) Domestic Workers Bill of Rights (2011). The proposed resolution includes domestic workers within meal and rest break standards, overtime pay, reporting time pay (pay despite arriving at work and the employer canceling), and workers compensation as well as the right to an uninterrupted eight hours of sleep for live-in workers and the right to use the kitchen to prepare personal food after working for more than five hours. *Id.*

<sup>146</sup> Applebaum, *supra* note 8, at 7.

<sup>147</sup> See Shwanika Narayan, *Basic Rights Calif.'s Domestic Workers a Signature Away*, NEW AMERICA MEDIA, Sept. 1, 2012, <http://newamericamedia.org/2012/09/basic-rights-for-califs-domestic-workers-a-signature-away.php>.

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milestone in the struggle for the recognition of rights and dignity, even for the most disadvantaged.”<sup>148</sup> The Convention provides specific protection to domestic workers by setting out basic rights and principles that each state party is responsible for implementing into their domestic legislation.<sup>149</sup> The Convention itself is a commitment upon ratification to put into effect nationally all of the obligations in the Convention.<sup>150</sup> Along with the Convention, the ILO also adopted the Domestic Workers Recommendation No. 201,<sup>151</sup> which is not open for ratification, but offers practical guidance for implementing the principles in the Convention.<sup>152</sup>

The increased interest on domestic workers rights makes the New York Bill seem destined to make an impact. It may take time to see results but having the laws on the books provides a source for measuring compliance, holding employers accountable for employment practices, and giving employees a starting point for negotiating employment contracts. For the domestic workers themselves, knowing their rights empowers them to ask for no less when starting a new job, and to fight for those rights when they have been abused. Employers are held accountable beyond their

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<sup>148</sup> Albin & Mantouvalou, *supra* note 55, at 77.

<sup>149</sup> The Convention provides protections for domestic workers, consisting of generally applicable and human rights provisions as well as migrant specific and child specific protections. Decent Work for Domestic Workers, *supra* note 10, at arts. 7, 10, 11, 12, & 13. Some key generally applicable provisions include: ensuring the terms and conditions of work are clearly described; work hours, including overtime pay, daily rest, weekly rest periods, and annual time off; payment, requiring minimum wage, payment to the worker at regular intervals; and the right to healthy and safe working environments. *Id.* The human rights dimension of the ILO Convention works to promote and protect the human rights of all domestic workers by protecting the fundamental principles of the right to work, freedom of association, freedom from discrimination, and the right not to be abused, harassed, or subjected to violence. *Id.* at pmbl, arts. 3, 4, 5, & 11.

<sup>150</sup> International Labor Organization, *Convention No. 189, Decent Work for Domestic Workers* (June 2011), available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---travail/documents/publication/wcms\\_161104.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_161104.pdf).

<sup>151</sup> See generally International Labor Organization, Recommendation Concerning decent Work for Domestic Workers, June 16, 2011, 100 ILOLEX R201.

<sup>152</sup> *Convention No. 189, Decent Work for Domestic Workers*, *supra* note 150.

household and can be penalized for not abiding by the laws. Additionally, the monitoring aspect has great potential to lead to discoveries of intentional and extreme situations of servitude that until the passage of the Bill would have been impossible.

### *V. Recommendations*

“Trafficking is one of the most serious transnational threats to security, especially to the safety and human rights of each individual, and to the state of health of our economies and democratic institutions.”<sup>153</sup> The noted domestic, federal and international attention to human trafficking and domestic work has raised awareness and drawn attention to the inherent risk of enslavement for domestic workers. Domestic servitude, although not as frequently reported as other categories of human trafficking, is an important subset that risks the freedom of millions of domestic workers worldwide.<sup>154</sup> Protections are in place to prevent and protect victims of domestic servitude; but without special laws for domestic workers, those victims are more likely to be outside the reach of the protections.

Since the enactment of the TVPA, cases have come before the courts under claims of both labor and trafficking violations.<sup>155</sup>

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<sup>153</sup> Marc Perrin de Brichambaut, Secretary General, OSCE, Welcome and Opening Remarks at the Tenth Alliance Against Trafficking In Persons Conference (June 17-18, 2010) *available at* [http://www.childtrafficking.com/DOCS/osce\\_10\\_unprotected\\_work\\_0411.pdf](http://www.childtrafficking.com/DOCS/osce_10_unprotected_work_0411.pdf).

<sup>154</sup> UNITED NATIONS OFFICE ON DRUGS AND CRIME, GLOBAL REPORT ON TRAFFICKING IN PERSONS 6 (2009), *available at* [http://www.unodc.org/documents/human-trafficking/Executive\\_summary\\_english.pdf](http://www.unodc.org/documents/human-trafficking/Executive_summary_english.pdf). Sexual exploitation is the most commonly identified at seventy-nine percent, followed by forced labor at eighteen percent. *Id.* This data may be biased due to the visibility of sex trafficking and the likelihood that domestic servitude, among other forms, is underreported. *Id.* See discussion *supra* Part I.

<sup>155</sup> See e.g., *Gurung v. Malhotra*, No. 10 Civ. 5086(VM), 2012 WL 983520 (S.D.N.Y. Mar. 16, 2012). Plaintiff brought claims under FLSA regarding minimum wage requirements, overtime and spread of hours violations under New York labor laws, as well as claims of emotional distress as a result of human trafficking and forced servitude, amongst others. The court found violations of

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These cases provide further recognition of the fact that domestic workers can not only be underpaid and overworked, but also at risk of exploitation and servitude. Data shows that the number of human trafficking prosecutions and convictions worldwide has steadily increased since 2008.<sup>156</sup> Although not broken down into categories of trafficking, countries have particularized cases of labor trafficking and, despite the number of labor trafficking prosecutions decreasing from 2010 to 2011, the number of convictions has been on the rise.<sup>157</sup> This tends to prove that the TVPA and the Palermo Protocol have begun to take hold and countries are reacting by enacting appropriate laws, enforcing them, and prosecuting the perpetrators.

The TVPA, while a thorough and good law, has potential to provide greater protection against the occurrence of domestic servitude with some additional amendments. A reauthorization was proposed for 2011 but has not yet passed either the House of Representatives or the Senate.<sup>158</sup> Some of the provisions in the reauthorization have the potential to make a significant impact and prevent domestic servitude from occurring; in particular, the proposition to make it a crime to confiscate or destroy immigration documents by anyone who solicits or hires an alien from outside the

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each and awarded damages accordingly. In regards to the overtime compensation, the court noted that because the claimed violations occurred before the enactment of the New York Bill, Plaintiff was only entitled to one and a half times the minimum wage for hours worked over forty-four in a week, instead of one and a half times the regular rate of pay that would have been applicable had the violations occurred after November 29, 2012. *Id.* at 5; *U.S. v. Sabhnani*, 599 F.3d 215 (2nd Cir. 2010) & *Samirah v. Sabhnani*, 772 F.Supp.2d. 437 (E.D.N.Y. 2011). Between the two cases, claims were brought under the FLSA for overtime and rest period violations, New York State labor laws for minimum wage, overtime, and spread of hours violations, as well as under the TVPA for forced labor, involuntary servitude and peonage, document servitude, and harboring illegal aliens. *Id.*

<sup>156</sup> U.S. DEP'T OF STATE, Office to Monitor and Combat Trafficking in Persons, *Trafficking in Persons Report: Global Law Enforcement Data* <http://www.state.gov/j/tip/rls/tiprpt/2012/192361.htm> (last visited Aug. 21, 2012). In 2008 there were 5,212 prosecutions and 2,983 convictions; in 2011 there were 7,206 prosecutions and 4,239 convictions. *Id.*

<sup>157</sup> *Id.* In 2010 there were 607 prosecution and 237 convictions compared to 2011 in which there were 508 prosecutions but 320 convictions. *Id.*

<sup>158</sup> See Trafficking Victims Protection Reauthorization Act of 2011, S. 1301, 112th Cong. (2011).

country by making false promises or defrauding the alien about their employment in the United States.<sup>159</sup> While document servitude is already a criminally punishable offense, the proposal includes those who conduct or intend to conduct fraud in foreign labor contracting on the list of criminals that can be prosecuted for confiscating immigration documents.

Imposing stricter regulations on foreign labor recruiters is similarly important in preventing a legitimate way to migrate from one country to another for work from turning into an opportunity for human traffickers to exploit migrants. Strict regulations should be imposed and enforced on recruitment agencies, such as, but not limited to, requiring all agencies that send workers to the United States to register with the DOL; prohibiting fees from being allocated to the workers, rather than the employer; and there should be mandatory disclosures in English and the migrant's native language indicating, for example, the terms of the employment contract, the type of visa they have obtained, along with the relevant terms and conditions, and their legal rights in the United States as a migrant worker. Since the use of labor recruiters is gaining popularity and there is a known association with human trafficking, it is important to react quickly to reduce the occurrences of exploitation.

Another important step in preventing aliens from being trafficked is building awareness of the risks involved in migrating and the rights and resources available to them upon arrival in the destination country. An informational video providing this information to aliens, in addition to the already mandated pamphlet, to be played in embassy and consular waiting rooms that have a high concentration of aliens applying for visas, particularly employment or education based nonimmigrant visas, is likely to draw more attention than a flyer and therefore may have a greater impact.<sup>160</sup> This proposed amendment is significant because it is a preventative measure, such that someone could see the video and use the knowledge that has been imparted to avoid becoming a victim of

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<sup>159</sup> Trafficking Victims Protection Reauthorization Act of 2011 § 201.

<sup>160</sup> See *id.*, *supra* note 158, § 107. The proposed section would amend § 202 of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, 8 U.S.C. § 1375b (2008).



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trafficking. Such person may see danger that they had not previously perceived and choose not to leave, or that person may continue with their pursuit but they will be better informed of their rights and what to do if those rights are violated.

Unlike any other law in the United States, legislation like the New York Bill may turn out to be an essential step on the path to eradicating domestic servitude and such laws need to become more widespread. In the United States, federal laws could be amended to include domestic workers. At a minimum, the DOL should add the proposed amendment to the FLSA to include companions for the sick and elderly in the definition of domestic worker and to impose more stringent record keeping in regards to wages paid and hours worked. As follows, New York would then need to amend its Bill to include the same.

State legislation could use the New York Bill as a starting point and go on to add greater protections. One example could be to require a notice of termination, or in the alternative, severance pay. This can make a big difference for the livelihood of employees faced with losing their jobs. The consequences to the employee of being let go without any notice or temporary pay can be devastating. Having some time to make arrangements for another job provides a sense of security and limits the risk of financial instability during the job search. It would also be interesting to see some states provide collective bargaining rights to the domestic work industry. The findings in the New York study on its feasibility were positive and if New York decided to amend the State Employment Relations Act to include domestic workers in the definition of employee, and used the Feasibility Study as a guide for implementation, other states may be more receptive to the idea, especially if the results are positive.<sup>161</sup> Lastly, at a minimum, each state could amend its individual employment laws to include domestic workers in the definition of employee so that these individuals can have the same rights as other employees in the state. These laws have the ability to help a

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<sup>161</sup> See generally N.Y. STATE DEP'T OF LABOR, FEASIBILITY OF DOMESTIC WORKER COLLECTIVE BARGAINING (Nov. 2, 2012), available at <http://www.labor.ny.gov/legal/laws/pdf/domestic-workers/domestic-workers-feasibility-study.pdf>.

considerable amount of domestic workers have a healthier, safer, and more productive work life; they also have a genuine ability to aid in the discovery and liberation of indefinite numbers of victims of domestic servitude.

Recognizing the problem and initiating laws favoring the rights of domestic workers is undoubtedly a step in the right direction. Domestically, I would like to see the proposed 2011 reauthorization to the TVPA passed, as well as the proposed FLSA amendment, and more states enacting legislation like the New York Bill. It is also my hope that the ILO Convention will become widely ratified and, in furtherance of the Convention, countries will adopt and enforce laws to include domestic workers within the realm of labor protections. While the United States is unlikely to ratify the Convention, the actions taken by the federal government, and states like New York and California show awareness of the issues faced by domestic workers and concern for protecting their rights; and regardless of ratification of the treaty, it seems likely that laws will continue to evolve and bring about greater protections.<sup>162</sup>

### *Conclusion*

No one should be forced to live as another's slave. From a moral perspective there is no justification for allowing these incidences to occur in today's society and those who willingly take advantage of the vulnerabilities of others should not go unpunished. Involuntary domestic servitude is an antiquated and deplorable status that never should have been tolerated and should have disappeared with the abolition of slavery. The fact that it occurs with such frequency in both developing and developed countries does not show

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<sup>162</sup> "The US has not ratified any international human rights treaties since December 2002, when it ratified two optional protocols to the Convention on the Rights of the Child." HUMAN RIGHTS WATCH, UNITED STATES RATIFICATION OF INTERNATIONAL HUMAN RIGHTS TREATIES (July 24, 2009) available at <http://www.hrw.org/news/2009/07/24/united-states-ratification-international-human-rights-treaties>. Arguably, U.S. laws are fundamentally consistent with the provisions contained in the treaties and the failure to ratify does not tend to show a lack of interest in human rights.

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much societal progress. Despite the modern trend towards protecting fundamental rights and ensuring people live in a world where they can count on their most basic freedoms, many gross violations go unnoticed. These days are hopefully coming to an end. The international attention and the trend toward enacting new laws is the beginning of a transformation in domestic workers labor protections, which will likely reduce the number of victims of involuntary domestic servitude and constitute a step toward the ultimate eradication of this appalling form of human trafficking.