HOME AS NON-WORKPLACE

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ABSTRACT

Individuals have worked, are working, and will work in homes. During the COVID-19 pandemic, the home was once the most common workplace. However, work law does not consistently treat the home as a workplace by default. Judges, politicians, and other lawmakers continue to entrench an ideological intuition that characterizes home as less coercive, less productive, less visible, and, by extension, a space that the state can and should regulate less than institutional workplaces. This vision legally constructs the home as lacking legal "workplace-ness" or possibly the opposite of a workplace. It not only results in substandard labor rights for workers who labor in homes and the systematic undervaluation of their work but also marginalizes their reality of work in conceptualizing workplace harms and protection. Naming this ideology "home as non-workplace," this Article comprehensively traces current work law's spatial bias, challenges its validity, and envisions a framework to normalize the home workplace in work law.

This Article critically examines the home as non-workplace ideology in the following ways. First, it restores the ideology to its contested historical particularity by tracing the rise, contestations, and partial fall of the home/workplace dichotomy in work law from the pre-New Deal era to contemporary times. Second, it maps the various inconsistencies across different bodies of work law's approach to home-based work, including both domestic service and work-from-home white-collar work. Third, it challenges the most entrenched rhetoric opposing labor regulation in the home—family privacy—with the reality of employers' extra surveillance of home-based work that the law enables and, in some cases, mandates. Finally, this Article proposes a framework that puts the home workplace at the center of work law discussion, including its conceptualization of workplace harms and regulation enforcement.

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The material transformation of home and work has laid the foundation for law and legal consciousness to see the home as just another workplace, if not the default workplace.

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INTRODUCTION

Individuals conduct many economic activities in homes of their own or others, some of which the law treats as "work." During the exceptional time of the COVID-19 pandemic, home was arguably the most common and mainstream workplace.[1] However, home continues to occupy a peculiar space in work law. Work law doctrines and consciousness continues an ideological intuition that characterizes home as less coercive, less productive, less of a site of the labor market, and by extension, a space that the state can and should regulate less as a workplace than institutional ones. This vision projects, presumes, and constructs the home as a less "public" space and as lacking legal "workplace-ness," even when work happens in it. I call this ideology "home as non-workplace."

This intuition of home-as-non-workplace is entrenched in the contemporary legal consciousness. For example, in *National Federation of Independent Business v. Department of Labor*,[2] when the Supreme Court decided whether the Occupational Safety and Health Administration ("OSHA") had the constitutional power to mandate COVID-19 vaccines, both the majority and dissent invoked the intuition of home as non-workplace for opposing stances. In arguing that COVID-19 is not an occupational hazard, the majority contrasted home with the workplace: "Although COVID-19 is a risk that occurs in many workplaces, it is not an *occupational* hazard in most. COVID-19 can and does spread at home, in schools, during sporting events, and everywhere else that people gather."[3] Arguing for the opposite, the dissent invoked the same distinction: "OSHA has issued, and applied to nearly all workplaces, rules . . . even though the dangers prevented by those rules arise not only in workplaces but in many physical facilities (*e.g.*, stadiums, schools, hotels, *even homes*)."[4] While disagreeing on OSHA's scope, the Justices shared the same intuitive image of what the material space of the workplace consists of, and that space is not a sports stadium, not a school, and especially not a home. As the majority argued, while a workplace is for work, home is the place for "daily life" where people are not "on the clock."[5] Ironically, the Justices had recently spent over a year hearing oral arguments, deliberating, and writing opinions in their homes.[6] The presumption of home as the quintessential legal non-workplace is precisely what this Article unveils and questions.

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[1] Nicholas Bloom, *How Working from Home Works Out*, STAN. INST. FOR ECON. POL'Y RSCH. (June 2020), https://siepr.stanford.edu/publications/policy-brief/how-working-home-works-out [https://perma.cc/6BQC-G644] (finding that 42% of U.S. workers worked from home full time in May 2020).

[2] 595 U.S. 109 (2022).

[3] *Id.* at 118.

[4] *Id.* at 133 (Breyer, J., dissenting) (emphasis added).

[5] *Id.* at 118.

[6] *Fair Courts E-Lert: U.S. Supreme Court Announces Return to In-Person Oral Arguments*, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/our-work/research-

This ideological image of home as less workplace-like has been constantly mobilized to constrain work law rights for home-based workers.[7] In the past three years, California's Democratic Governor Gavin Newsom vetoed two bills to bring domestic workers into the coverage of the state's Occupational Safety and Health Act, reasoning that "the places where people live cannot be treated in the exact same manner as a traditional workplace or worksite from a regulatory perspective."[8] Newsom is not wrong in noting that a home is not the same as an office for regulatory purposes—there are indeed different sets of competing interests and policy considerations in the home, and a worker's relationship with a home might stretch beyond their work. Nevertheless, Newsom's reasoning also relies on the uncontested idea that the home is not a "traditional" workplace. At best, homes are seen as exceptional workplaces, and at worst, the polar opposite of workplaces, which leaves the safety and health hazards of home workplaces unaddressed.

This spatial presumption of the "workplace" manifests in work law in three interrelated dynamics. First, it results in contingent and substandard work law rights for home-based workers. Outstandingly, domestic workers continue to battle with the notorious home-related exemptions in major work law legislations.[9] Work-from-home ("WFH") white-collar workers' entitlement to work law protections is also more tenuous than their counterparts in institutional offices.[10] Second, the default association of home with "non-work" results in a different politics of work time that often leads to the undervaluation of home-based work: because workers are perceived to be "on their own time" in their own or even others' homes, employers—enabled or required by law—perform closer surveillance to verify that work has happened in the home.[11] Third, current work law conceptualizes workplace harm and work law rights on the basis of institutional workplaces. Some of these labor rights need adaptation to be relevant for home-based workers. For example, the National Labor Relations Act ("NLRA") protects the employees' right to solicit and distribute labor-

reports/fair-courts-e-lert-us-supreme-court-announces-return-person-oral [https://perma.cc/T6E9-6VBY] (last updated Sept. 24, 2021) (reporting Supreme Court would resume in-person oral arguments in October 2021 for the first time since May 2020).

[7] Peggie R. Smith, *The Pitfalls of Home: Protecting the Health and Safety of Paid Domestic Workers*, 23 CAN. J. WOMEN & L. 309, 309 (2011).

[8] Letter from Gavin Newsom, Governor, California, to Members of the California State Senate (Sept. 29, 2020), https://www.gov.ca.gov/wp-content/uploads/2020/09/SB-1257.pdf [https://perma.cc/UBJ2-EMS3].

[9] For a list of exclusion of domestic workers from work law legislations in the United States, see Peggie R. Smith, *Work like Any Other, Work like No Other: Establishing Decent Work for Domestic Workers*, 15 EMP. RTS. & EMP. POL'Y J. 159, 177-94 (2011); and *infra* Section I.D.

[10] *See infra* Section II.C.

[11] V.B. Dubal, *The Time Politics of Home-Based Digital Piecework*, CTR. FOR ETHICS J., 2020, at 1, https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=2819&context=faculty_scholarship.

organizing-related materials during "non-work time" in "non-work areas."[12] The doctrine heavily relies on the spatial border of the institutional workplace to construct the boundary of labor rights. This same boundary is less definite for home-based workers. In the meantime, harms disproportionate to home workplaces, such as isolation and the lack of clear boundaries around working time, remain unaddressed by work law.[13] As a result, work law protections and regulations may seem inaccessible for domestic workers (especially outside blue states), and irrelevant for WFH white-collar workers.

Home-based workers bear the burden of laboring in spaces that the law does not treat as a workplace by default. In one abhorrent example, home health aides in New York City were assigned to work twenty-four-hour shifts to enable elders in need of full-time care to reside in homes. Federal and state labor regulations allowed their employers to deduct meals and sleeping hours, yielding only thirteen hours of pay.[14] In a less extreme example, employers impose stringent productivity surveillance on WFH white-collar workers to ensure they are working and dock payments for minutes of "idle" time—which was once unimaginable for office workers.[15] In both scenarios, the rationale behind the employers' behaviors—not counting all onsite, work-related time as compensable work—originates from the intuition that the home is a lesser workplace. Moreover, work law—through a combination of explicit regulatory exemptions, judicial decisions, and lack of state actions—confirms this intuition.

Thus, this Article argues for a comprehensive re-examination of the ideology of home as non-workplace and its various manifestations in work law. The present political moment, when the home workplace is either a reality or a very recent memory for the mainstream white-collar workforce,[16] comes after generations of contestations from labor and feminist groups and domestic workers have successfully established labor regulation of home workplaces in

[12] Eastex, Inc. v. NLRB, 437 U.S. 556, 572 (1978); *see also* NLRB, EMPLOYEE RIGHTS UNDER THE NATIONAL LABOR RELATIONS ACT (2011), https://www.nlrb.gov/sites/default/files/attachments/pages/node-251/employee-rights-under-the-nlra-poster-11-x-17-version-pdf_0.pdf [https://perma.cc/SEY5-AZ5C] (summarizing employee rights to organize and collectively bargain under NLRA).

[13] *See infra* Section IV.B.

[14] Andryeyeva v. N.Y. Health Care, Inc., 33 N.Y.3d 152, 164 (N.Y. 2019); *see also infra* Section II.D.

[15] Jodi Kantor & Arya Sundaram, *The Rise of the Worker Productivity Score*, N.Y. TIMES (Aug. 14, 2022), https://www.nytimes.com/interactive/2022/08/14/business/worker-productivity-tracking.html.

[16] Ben Wigert & Sangeeta Agrawal, *Returning to the Office: The Current, Preferred and Future State of Remote Work*, GALLUP (Aug. 31, 2022), https://www.gallup.com/workplace/397751/returning-office-current-preferred-future-state-remote-work.aspx [perma.cc/28N2-S9RG].

specific instances.[17] Despite some rollbacks of remote work by the federal government and big tech firms, WFH, either full-time or hybrid, remains much more common than during pre-pandemic times.[18] Thus, for work law's continued relevancy for a significant portion of today's workforce, we—work law scholars—must ponder what rights, protections, and regulations would be meaningful for home workspaces and for work that is increasingly dispersed outside "traditional" workplaces.

This Article's analysis takes a convergent approach to home workplace and home-based work and emphasizes the shared struggles of laboring in a space that is exceptionalized in work law. This by no means erases the significant differences between the two primary constituencies of the home-based workforce: domestic workers and WFH white-collar workers. The former usually works in others' homes while the latter often in their own. This results in two different regimes of control and power dynamics even though the two may share a parallel marginal position to work law under the same ideology of home as non-workplace.

The Article critically and comprehensively examines this ideology of home as non-workplace in the following ways.

Part I traces the rise of this spatial presumption of the workplace in law. Home was once the default workplace in the pre-industrialization legal order of employment. The home/workplace dichotomy—a self-perpetuating proposition that work happens outside the home and activities at home are not legal work—

[17] *See, e.g.*, Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 YALE L.J. 1073, 1075 (1994); Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 72-79 (1996); Peggie R. Smith, *The Publicization of Home-Based Care Work in State Labor Law*, 92 MINN. L. REV. 1390, 1392-98 (2008); Premilla Nadasen, *Citizenship Rights, Domestic Work, and the Fair Labor Standards Act*, 24 J. POL'Y HIST. 74, 77-81 (2012); EILEEN BORIS & JENNIFER KLEIN, CARING FOR AMERICA: HOME HEALTH WORKERS IN THE SHADOW OF THE WELFARE STATE 130 (2012); ADELLE BLACKETT, EVERYDAY TRANSGRESSIONS: DOMESTIC WORKERS' TRANSNATIONAL CHALLENGE TO INTERNATIONAL LABOR LAW 6 (2019). For a summary of these roll back efforts, see *infra* Part I.D.

[18] Kate Gibson, *Trump Orders Federal Workers Back to Office 5 Days a Week*, CBS NEWS, https://www.cbsnews.com/news/trump-orders-all-federal-workers-back-to-office-5-days-a-week/ [https://perma.cc/6XYN-6C3Q] (last updated Jan. 21, 2025, 4:13 PM); Bryan Robinson, *Hybrid and Remote Work Still on the Rise, Despite Misconceptions, Study Shows*, FORBES (Sept. 26, 2024, 12:00 PM), https://www.forbes.com/sites/bryanrobinson/2024/09/26/hybrid-and-remote-work-still-on-the-rise-despite-misconceptions-study-shows/ (reporting Amazon's rollback of remote work policies and the continuing prevalence of remote work within white-collar sector); Kate Gibson, Alexander Bick, Adam Blandin, Aidan Caplan & Tristan Caplan, *Trends in Work from Home in the U.S.: Insights from Six Datasets*, FED. RSRV. BANK OF ST. LOUIS (Dec. 20, 2024), https://www.stlouisfed.org/on-the-economy/2024/dec/trends-work-from-home-us-insights-six-datasets (providing statistical analysis demonstrating WFH rate stayed higher than pre-COVID times, despite decrease from COVID-era peak).

arose during industrialization when the predominantly male industrial workers left home for factories. Its peak was cemented in home-related exemptions from New Deal work law legislations, which constructed the home as a work law black hole.

Part II maps work law's current inconsistent and divided approach to regulating home-based work, which falls short of reversing the default of home as non-workplace. For domestic workers, labor and feminist groups have developed a patchwork approach to successfully contest some of the home-related regulatory exemptions at federal, state, local, and international levels. Meanwhile, in reaction to the shock of the mass transition to WFH under COVID-19, policymakers have adopted a haphazard, reactive approach by limitedly recognizing home offices as workplaces for select regulatory purposes. Despite the differentiation in specific rules, both domestic workers and WFH white-collar workers continue to bear the costs of laboring in a legally exceptionalized workplace in terms of substandard rights and systematic undervaluation.

Part III challenges the overarching, discursive justification for preserving the home as a non-workplace or an exceptional workplace—family privacy. It highlights the paradox between the vigilante resistance to state labor inspection and the pervasive tolerance of heightened employer surveillance and general state regulation of homes. On the one hand, the often-unsubstantiated fear of labor inspectors has been repeatedly invoked to oppose extending work law rights to home-based workers. On the other hand, activities inside home workplaces require an extra layer of scrutiny to count as work. The state enables and, in some cases, mandates employers' digital surveillance to ensure productivity or secure public funding, making the home digitally visible. The home's unprecedented digital visibility and connectedness warrant a reconstruction of the idea of privacy and labor enforcement.

The last Part envisions a framework to normalize the home workplace in law. Normalizing the home workplace does not necessarily mean treating it precisely the same as group offices or factories. Instead, it needs to take into consideration the worker's potentially multifaceted relationship with the space of home. It also goes beyond de-exceptionalizing homes in labor regulation—selectively extending the institution-based work law rights and enforcement tools to homes. Thus, I call for putting the home workplace at the center of work law discussions about workplace harm and possible state actions. Practicing this approach, I discuss work-related harms disproportionate to working inside homes, such as isolation and lack of boundaries, and enforcement tools suitable for the home, such as digital and community-based enforcement.

The material transformation of home and work has laid the foundation for work law and legal consciousness to normalize the home workplace, to see the home as a common workplace, if not *the* workplace, both for those recently pushed toward it and those who have always been laboring in it.

I. THE RISE OF THE HOME/WORKPLACE DICHOTOMY

Individuals have worked, are working, and will continue to work inside homes.[19] Whether and how the law treats home as a workplace has fluctuated through material and ideological reconstructions of work and home as well as the changing demographic composition of the home-based workforce. The legal system did not always regard home as a non-workplace. Indeed, the household—and home as its material space—was the default workplace in the pre-industrial legal order. A dichotomy between home and workplace in legal ideology has risen during the era of industrialization when the predominantly male industrial workers moved into factories. The law also contributed to the home-workplace separation through moving industrial work outside the home and categorizing activities in homes as non-work. At the pinnacle of this home-workplace dichotomy, New-Deal and mid-century labor legislation carved out various home-related exclusions, constructing the home as a black hole in work law. This Part traces the rise of the home as non-workplace ideology.

A. *When Home Was the Default Workplace*

In Blackstone's Commentaries on English Law, the employer-employee (or master and servant) relationship is one of the three "private economical relations," along with husband-wife and parent-child.[20] Spatially, servants were presumed to live and work inside their master's home, along with wives and children. This was true of the most common type of servant—also called "*intra moenia* (within the walls), or domestics."[21] For day/week laborers, the Commentaries had to specify that they "do not live *intra moenia*, as part of the family," deviating from the default where the servant's residence and workplace were integrated into the employer's household.[22] Even if day laborers did not reside in their employer's household, most of them still presumably worked in or around the employer's homes. The master-servant relationship was a hierarchical, economic, private axis that was different but comparable to the husband-wife relationship as part of the legal household.[23] The mutual yet hierarchical private law obligations between master and servant governed the relationship, excluding the household from much state intervention.[24] In other words, home was the default workplace, and the law governing this default

[19] *See generally* Eileen Boris, *Home-Based Labor*, *in* OXFORD RESEARCH ENCYCLOPEDIA OF AMERICAN HISTORY (2023), https://oxfordre.com/americanhistory/display/10.1093/acrefore/9780199329175.001.0001/acrefore-9780199329175-e-243.

[20] 1 WILLIAM BLACKSTONE, COMMENTARIES *422 (emphasis removed).

[21] *Id.* at *425.

[22] *Id.* at *426-27.

[23] Janet Halley, *What Is Family Law?: A Genealogy Part I*, 23 YALE J.L. & HUMANS. 1, 2 (2011).

[24] *Id.*

workplace recognized a more absolute master's prerogative than the employer's prerogative today.[25]

This legal default that the workplace was the master's home was embedded in the social reality of early industrialized England and antebellum America when men and women performed most economic activities of the time—farming, producing and distributing clothes and food, making and repairing tools and industrial components, raising children and livestock—in or around the households where masters and servants, husbands and wives, and parents and children lived and worked.[26]

B. *The Construction of Home/Workplace Dichotomy*

The home/workplace dichotomy rose during industrialization. Indisputably, the majority of paid work and paid workers moved out of the home—both of the masters' and the workers' own homes—due to the material transformation of labor during this time. Homes also shrank in size and number of household members. However, the law contributed to the erection of this dichotomy by both squeezing industrial work out of workers' homes and categorizing residual economic activities in homes—mostly care work—as non-work, making the home as non-workplace proposition a self-fulfilling prophecy. In this process, home and especially economic activities at home increasingly became siloed for women, especially for working-class women and women of color, who were "left behind" in homes.

1. Moving Work Outside Home

Working-class women in the industrialization era participated in various income-generating activities in their or others' homes, such as doing laundry, taking in boarders, working as live-in maids and cooks, and so on.[27] One significant type of work that they performed inside their own homes was industrial "outwork," where factory employers outsourced garment and other manufacturing tasks at low piecemeal rates to mostly married women in rural houses and urban tenements.[28] Rather than an organic leftover from the pre-industrial economy, industrial home work emerged symbiotically with the factory system in the United States.[29]

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[25] Gali Racabi, *At Will as Taking*, 133 YALE L.J. 2257, 2285-86 (2024).

[26] JEANNE BOYDSTON, HOME AND WORK: HOUSEWORK, WAGES, AND THE IDEOLOGY OF LABOR IN THE EARLY REPUBLIC 11-12 (1990); CAROLYN STEEDMAN, MASTER AND SERVANT: LOVE AND LABOUR IN THE ENGLISH INDUSTRIAL AGE 66 (2007).

[27] BOYDSTON, *supra* note 26, at 88-89 (noting various ways working-class women earned money).

[28] CHRISTINE STANSELL, CITY OF WOMEN: SEX AND CLASS IN NEW YORK 1789-1860, at 106-19 (1987).

[29] EILEEN BORIS, HOME TO WORK: MOTHERHOOD AND THE POLITICS OF INDUSTRIAL HOMEWORK IN THE UNITED STATES 9-10 (1994).

As labor historian Eileen Boris records, industrial home work provoked a wide range of policy concerns throughout the Progressive and New Deal eras, many of which surrounded the home workplace.[30] Progressive-era middle-class women reformers were deeply concerned with how industrial home work undermined the supposedly peaceful, nurturing, social, and noneconomic space of the home, as well as ideal gender roles for both men and women. They castigated industrial home work as an evil for children who grew up next to manufacturing equipment and often engaged in industrial work at home.[31] Trade unionists saw home as a space to evade any efforts to raise the wage floor in the industry, which ultimately dissolved enforcement efforts of any progress they had reached on the factory shop floors.[32] Similarly, New Dealers saw industrial home work, which disturbed both the division of labor in the family and fair competition in the market, as an obstacle to achieving the ultimate goal of the New Deal—a family living wage for (male) workers.[33] Further, they argued that home work was a structurally wasteful organization of production that should be abolished for a more efficient capitalist economy.[34]

This gendered conceptualization of home as an unregulable, substandard, and inefficient workplace where women—seen as morally imperfect mothers and economically inferior workers—engaged in half-hearted work underlay legal efforts in the first half of the twentieth century to move work outside the home.[35] Correspondingly, the regulation of home-based industrial work occurred mainly in the form of its prohibition advocated for by groups other than home workers themselves for interests other than home worker welfare. In *Gemsco, Inc. v. Walling*,[36] in which the Supreme Court ruled that the Department of Labor had the authority to prohibit industrial home work in the embroidery industry to effectively enforce the minimum wage, the Justices framed the issue as a tradeoff between the home worker and the employer's right "to be free from the prohibition" and "the right of the much larger number of factory workers to receive the minimum wage."[37] Under such framing, home workers had an adversarial relationship with labor regulation. As Boris observed, an alternative approach would have been a regulatory regime driven by bottom-up, worker-

[30] *Id.* at 6.

[31] *Id.* at 84-85, 94.

[32] *Id.* at 54-55.

[33] *Id.* at 201-04.

[34] *Id.* at 289-90.

[35] *Id.* at 14 (describing how "the gender of homeworkers transform[ed] the language of the marketplace" spoken by reformers).

[36] 324 U.S. 244 (1945).

[37] *Id.* at 252.

driven initiatives to improve home-based work conditions, rather than abolishing the trade.[38]

The ideology of home's normative incompatibility with work not only maintains a grasp on contemporary work law consciousness but also structures the contemporary regulation of residential and working spaces. The strict licensure regime for home-based work, single-use zoning, and sprawling federal housing policies lays the legal infrastructure for a spatial arrangement where work is not only not inside the home but also far away from it.[39] A second legacy of industrial home work laws is the paradox between regulation and prohibition. While the presumed impossibility of regulating wages and hours in homes has justified a mostly prohibitive licensure regime for industrial home work, the licensure regime itself relies on intricate regulations to assign permission and prohibition. For example, New Jersey's industrial home work law (still active today) conditions the home work license on compliance with a set of specific requirements about space, time, commodity, recording, and distribution, enforced through a home inspection.[40] Finally, the garment work squeezed out from tenements and moved to factories further and further away from homes and, ultimately, overseas, a significant portion of which has arrived in the homes of women in the Global South who are protected by, at most, a nebulous network of supply-chain responsibility regulations.[41]

2. Categorizing Activities in Home as Non-Work

Unlike industrial manufacturing work that the law physically moved out of homes, other activities, such as childcare and housekeeping, for monetary or other economic exchanges, continued inside homes. However, society and the legal system stopped seeing these activities as "work."

Categorizing economic activities at home as non-work involved a process of ideological "unseeing." As historian Jeanne Boydston finds, men in the industrialization era did not completely deny the value of housework wives performed inside homes but represented the domestic tasks as "rejuvenating," "ordering," and nurturing, natural manifestations of their womanhood that were realized through their mere presence at home rather than their active, laborious, skilled efforts.[42] This process involved "unseeing" the physically demanding

[38] BORIS, *supra* note 29, at 14-15 (arguing labor unions' struggle against tenement home work revealed "the roads not taken," like cooperatives, unionization, and community organizing, as alternatives to state regulation).

[39] Katharine B. Silbaugh, *Women's Place: Urban Planning, Housing Design, and Work-Family Balance*, 76 FORDHAM L. REV. 1797, 1821-29 (2007).

[40] The Home Work Law, N.J. STAT. ANN. §§ 34:6-120 to -136 (West 2024).

[41] *See, e.g.*, HOMENET S. ASIA, WORKING IN GARMENT SUPPLY CHAINS: A HOMEWORKER'S TOOLKIT (2020), https://www.wiego.org/wp-content/uploads/2020/09/HNSA-Toolkit-Hi-res-sept2020.pdf [https://perma.cc/HPJ8-28WR].

[42] BOYDSTON, *supra* note 26, at 144-53.

side of housework and the coercion and harm inside the home.[43] Male authors from the nineteenth century narrated the wife's role as making the home happy with a pleasant smile, graceful style, and a little wash and cook here and there, which was not only not burdensome and tiring, but also a vehicle of good health and spirit.[44] This, of course, left out what women at that time actually did inside homes, such as installing and fixing furniture and medically treating children and domestic animals—tasks that even their contemporaries would regard as legal work if they had occurred outside the space of home.[45]

The process of making housework non-work demanded making invisible the work as well as the workers. For families with means, as critical race feminist Dorothy Roberts reminds us, making wives non-workers was made possible by allocating the "menial" side of housework to Black enslaved women inside other people's houses, and making their work invisible through a racialized legal order.[46]

The historical process of categorizing housework as non-work also constructed the home as the quintessential non-workplace by contrasting it with the emerging default workplace, the factory.[47] While the factory was an "odious, cruel, unjust and tyrannical system" that "compels the operative [m]echanic to exhaust his physical and mental powers," home provided "the calm and quiet retreat of domestic life [in which] relaxation from toil is obtained."[48] In other words, the ideological reconstruction of home as non-workplace constituted the "gendered definition of labor."[49]

The cultural and legal categorizing of activities inside the home as "idle" non-work faced constant contestations from women's advocates in the nineteenth century.[50] For example, the Civil-War-era activist Antoinette Brown Blackwell made it the top of her agenda that "[t]he good, faithful mother is not an idler, and though she may not be herself a money-maker, yet as partner in the matrimonial firm, she is justly fully entitled to an equal share in all profits."[51] Legal historian Reva Siegel finds that feminists both before and after the Civil War advocated for wives to have joint rights in marital property because their labor performed inside their homes counted as work with economic value to their family.[52]

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[43] *Id.*

[44] *Id.*

[45] *Id.* at 148.

[46] Dorothy E. Roberts, *Spiritual and Menial Housework*, 9 YALE J.L. & FEMINISM 51, 68 (1997) (highlighting that for Black women, work outside of their home was a form of racial subordination).

[47] BOYDSTON, *supra* note 26, at 120-22.

[48] *Id.* at 152.

[49] *Id.* at 55.

[50] *Id.* at 9-10.

[51] *Id.* at ix.

[52] *See generally* Siegel, *supra* note 17.

Despite these contestations, the legal system continued to treat unpaid housework as non-work and paid housework as less-than-standard work. This ideology's pinnacle was a set of work law exclusions to be discussed in the next Section. In addition, as Professor Katharine Silbaugh has shown, the legal system perpetuates the status of unpaid housework as non-work in disciplines outside of work law, including criminal law, family law, torts, tax law, and so on.[53] Meanwhile, what the law regards as work or non-work also structures who performs such tasks. For example, late nineteenth-century juvenile institutions sent children taken away from their birth parents to work as domestic servants and agricultural help in or around others' homes, which was seen not as burdensome work, but as educational in nature.[54] Paradoxically, some of these children were taken from their birth parents on the grounds that the families involved them in street vending, begging, or similar income-generating activities in public, which the law categorized as harmful work that amounted to child abuse.[55]

C. *Home After the Exodus of "Work"*

Through a critical feminist lens, the home/workplace dichotomy is the spatial manifestation of the "separate sphere" ideology.[56] This perceives the economic, competitive, rational, productive, and public market as separated and dichotomized from the noneconomic, altruistic, loving, reproductive, and private family.[57] The two spheres are undoubtedly gendered: the market is the sphere for the man, and the family is the woman's space.[58] The gendered spatial distinction is also not equal: the market law of contract and its presumption of individualistic and rational actors became the general law governing economic transactions while family law and its presumption of noneconomic, altruistic sharing is the exception.[59] Reflecting this ideology, work law exclusively

[53] Silbaugh, *supra* note 17, at 3.

[54] *See* Laura Savarese, *The Origins of Family Rights and Family Regulation: A Dual Legal History*, 78 STAN. L. REV. (forthcoming 2026).

[55] *Id.*

[56] Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1498-99 (1983).

[57] *Id.* (explaining that work for the family and economic work within the market are separate "spheres"); VIVIANA A. ZELIZER, THE PURCHASE OF INTIMACY 6 (2005) (describing the "separate spheres" ideology regarding the relationship between intimacy and economic activity).

[58] Olsen, *supra* note 56, at 1499 (stating that, within the separate sphere ideology, the market/public economic sphere is associated with men while the home/private family sphere is associated with women).

[59] Halley, *supra* note 23, at 3.

governs market labor.[60] Meanwhile, paid work inside homes is the exception to an exception. Its continuous existence in the space of the family makes it too often likened and associated with the family rather than the labor market, and thus falls outside the work law.[61]

Feminists have long critiqued this conceptualization of home as outside the economy and the labor inside it as noneconomic.[62] As Professor Silbaugh has identified, regarding housework, the law has set up "a dichotomy between the language of economic productivity and the language of emotions."[63] The lack of an economic understanding regarding housework in the legal system not only under-acknowledges housework's economic value, but also denies the material security of those who perform such labor, leading to gender inequality issues.[64] The other side of the "separate sphere" ideology is also alive in the work law system—the presumption that workers are separated from their home-related conditions and the norms that they cannot and should not bring their family responsibilities into the workplace.[65]

After the material and ideological exodus of work, home has also become the quintessential private sphere, a space that should be shielded from state intervention and any form of public gaze.[66] Congruent to this process is the rise of privacy rights. The ideology of family privacy and state-nonintervention is, of course, full of contradictions, which I will further explore in Part III.[67] As a result, the hearth of privacy is the home, where privacy is conceptualized mainly as the absence of state regulation.[68] As legal scholar Jeannie Suk Gerson remarks, the de-economization and feminization of the home also lead to its sexualization in legal imagination.[69] When the Supreme Court heard a case about the legality of police using thermal cameras to detect cannabis growing in homes in 2001, the Justices' deliberation about privacy in homes hinged on the image of "the lady of the house tak[ing] her daily sauna and bath," which thermal

[60] *See generally* Noah D. Zatz, *Does Work Law Have a Future if the Labor Market Does Not?*, 91 CHI.-KENT L. REV. 1081 (2016) (establishing the exclusive connection between labor market and work law).

[61] Silbaugh, *supra* note 17, at 82.

[62] *See generally* Siegel, *supra* note 17 (discussing feminist criticism of widespread failure to acknowledge economic value of domestic labor throughout U.S. history).

[63] Katharine Silbaugh, *Commodification and Women's Household Labor*, 9 YALE J.L. & FEMINISM 81, 82 (1997).

[64] Silbaugh, *supra* note 17, at 5-6.

[65] JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 2 (2001).

[66] Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835, 837 (1985) (discussing the ideology of state non-intervention within family law).

[67] *See infra* Part III.

[68] JEANNIE SUK, AT HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING PRIVACY 105-08 (2009).

[69] *Id.* at 109 (describing sexual themes in the home-privacy debate).

imaging technology might expose.[70] Under this conceptualization of privacy, state regulation of economic activities inside homes amounts to voyeurism.

As legal ideology embraced the home/workplace dichotomy and placed the home outside of state regulation, the demographics of the home-based workforce also dramatically changed. Mechanics and manufacturing moved into factories. Farming and livestock husbandry shrank to a small population. Left behind in the home was both paid and unpaid care work, mostly done by women. Those laboring for pay inside others' homes were primarily working-class Black women, immigrant women, and women of other marginalized identities.[71] Home-based work and the workforce became siloed, invisible in mainstream economic policy as well as the mainstream labor movement.[72] In other words, at the same time that the home became a woman's place and especially a poor woman's workplace, legal ideology treated it as a non-workplace.[73]

D. *Home as a Work Law Black Hole*

The pinnacle of the home/workplace dichotomy in the legal system can be found in a set of home-related exemptions that excluded home-based blue-collar workers, mostly domestic workers, from almost all significant pillars of federal labor legislation. As labor law scholar Peggie Smith concludes, "[t]he legal history of domestic service is one of exclusion."[74] Although the exclusions of domestic service were also justified by the characteristics of the employers and of the work, the spatial imagination of the "home" was present both in the texts and the deliberations of these legislations. This set of home-related exemptions left the predominantly minority female domestic workforce under-protected, and cumulatively, sealed the construct of the home as a black hole for labor regulation, a legal non-workplace.

The exclusion of home-based work began with the National Recovery Administration, which played a fundamental role in structuring New Deal legal reforms and did not recognize paid domestic service as work.[75] For example, the

[70] Kyllo v. United States, 533 U.S. 27, 38 (2001) (discussing the constitutionality of using thermal imaging to search homes through exterior walls).

[71] *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 how women with marginalized identities were not supported by the passing of the NLRA).

[72] Nadasen, *supra* note 17, at 77-78 (stating how home work is not considered as "real work" in the calculation of GDP).

[73] *Id.*

[74] Peggie R. Smith, *Aging and Caring in the Home: Regulating Paid Domesticity in the Twenty-First Century*, 92 IOWA L. REV. 1835, 1851 (2007).

[75] HARMONY GOLDBERG, INT'L LABOUR OFF., THE LONG JOURNEY HOME: THE CONTESTED EXCLUSION AND INCLUSION OF DOMESTIC WORKERS FROM FEDERAL WAGE AND HOUR PROTECTIONS IN THE UNITED STATES 8, 9 (2015) (discussing the exclusion of domestic service in the National Recovery Administration).

head of the National Recovery Administration responded to the requests for the protection of domestic workers: "The homes of individual citizens cannot be made the subject of regulations or restrictions and even if this were feasible, the question of enforcement would be virtually impossible."[76] The already entrenched ideology of home as a private non-workplace contributed to this outcome.[77]

Not recognizing domestic service as work and home as workplace then led to its total exclusion from all New-Deal legislation. The Social Security Act of 1935 exempted "domestic service in a private home" from its definition of employment.[78] The National Labor Relations Act of 1935 ("NLRA") categorically excludes individuals "in the domestic service of any family or person at his home."[79] As legal scholar Juan Perea has excavated, the exclusions in these two statutes can be traced back to the explicitly racist motivation of Southern Democrats, who were part of the New-Deal coalition to exclude from federal labor law Black workers performing work previously done by enslaved people.[80] In other words, the demographic composition of the home-based workplace and the legal construct of the home's workplace-ness mutually constituted each other.

The Fair Labor Standards Act of 1938 ("FLSA") had a more paradoxical relationship with paid work inside homes. After a deliberative legislative debate, the FLSA included industrial home work in its regulatory scope, but with the explicit goal of eliminating such work.[81] Secretary of Labor Frances Perkins categorically supported abolishing industrial home work, rooted in this idea of home as eluding labor standard enforcement.[82] The law finally settled on extending minimum wage and overtime payment provisions to the home industrial trade in order to avoid unfair competition with factory work covered by the FLSA.[83] However, the 1938 FLSA left out other groups of home-based workers.[84] Restricted to only regulating workers engaged in "inter-state commerce," the original FLSA did not include most service jobs and, as a result, disproportionately left out female workers compared to male ones.[85] Given the perception of home as local and separated from commerce, not to mention

[76] *Id.* at 10 (quoting PHYLLIS M. PALMER, DOMESTICITY AND DIRT: HOUSEWIVES AND DOMESTIC SERVANTS IN THE UNITED STATES, 1920-1945 (1989)).

[77] *See id.*

[78] 42 U.S.C. § 410(a)(3)(B).

[79] 29 U.S.C. § 152(3).

[80] Perea, *supra* note 71, at 98.

[81] BORIS, *supra* note 29, at 274-76.

[82] *Id.* at 275.

[83] *Id.* at 276-78.

[84] *See generally* BORIS, *supra* note 29.

[85] GOLDBERG, *supra* note 75, at 7.

interstate commerce, the protections of the FLSA seemed distant for domestic workers at the time.[86]

In the Occupational Safety and Health Act of 1970 ("OSH Act"), the exemption criteria moved from home-based industry to home-related employer. The Department of Labor ("DOL") regulation implementing the OSH Act excludes individuals employing other persons for "ordinary domestic household tasks" in "their own residences" from its covered employer.[87] This switch from industry to employer as a basis for exclusion extended protection to domestic workers hired through intermediary agencies but left out those hired by private households.[88] State statutes from the period often have similar or even broader home exemptions. For example, the California OSH Act of 1973 ("California OSH Act") defines employment broadly, with its one and only exception being certain forms of "household domestic service."[89]

COVID-19-era public-health measures regulated vaccine and PPE distribution through OSH Act regulations, further testifying to the unexpected pitfalls for an outsider status to the OSH Act.[90] Falling outside public health regulations linked to the OSH Act, domestic workers were neither required to take a vaccine nor entitled to PPE provided by their employer.[91] The state's initiative to equip healthcare workers with PPE during the peak of COVID-19 similarly left out home healthcare workers, who had to find PPE at their own expense.[92] Again, home was seen as a hazard-free space when staying at home was the most effective measure against COVID-19 spread. However, since domestic workers, including home care workers, commuted from home to home for their work, they turned out to be more, not less vulnerable to COVID-19 than the average population, resulting in both workplace and public health concerns.[93]

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[86] Smith, *supra* note 74, at 1851.

[87] 29 C.F.R. § 1975.6 (1970) (describing how this group "shall not be subject to the requirements of the Act with respect to such employment").

[88] Smith, *supra* note 7, at 6 (explaining that the OSH Act covered agency-hired domestic workers but excluded household-hired ones).

[89] CAL. LAB. CODE § 6303 (West 2024).

[90] *See* Madeline R. Sterling et al., *Experiences of Home Health Care Workers in New York City During the Coronavirus Disease 2019 Pandemic: A Qualitative Analysis*, 180 JAMA INTERNAL MED. 1453, 1459 (2020) (describing how "inadequate PPE in the home increases transmission risks for not only the home health worker and care recipient but also other household members and visitors").

[91] *See id.* at 1457 (highlighting negative effects of "shortages in PPE").

[92] *Id.* at 1456 (describing how home health care workers "reported that they lacked adequate PPE from their agencies").

[93] U.C. DAVIS ENV'T HEALTH SCIS. CTR., COVID-19 & DOMESTIC WORKERS 2 (2021), https://environmentalhealth.ucdavis.edu/sites/g/files/dgvnsk2556/files/inline-files/Copy%20of%20COVID-19%20%26%20Domestic%20Workers%20FINAL%20DATA%20v8.pdf [https://perma.cc/A84Z-SVE9] (highlighting how domestic workers "suffered triple the risk of getting COVID-19 compared with the general population in California").

Beyond legislative exemptions that exclude "home" in their texts, other common work law exemptions, including the exemptions of small employers, farm work, independent contractors, and family members, in a wide range of work law legislations, such as FMLA, Title VII, ADA, and NLRA, disproportionately exclude workers laboring in homes.[94] Moreover, the outsider status of domestic workers to work law also goes beyond exclusion from work law legislation. In practice, the highly informal nature of the domestic work market exacerbates the lawlessness associated with working in the home. A 2021 survey of domestic workers shows that only 16% have a written contract with their employer, leaving them outside the scope of contractual protections or even the clarity of employment terms and conditions.[95] Labor law scholar Adelle Blackett argues that paid domestic work, positioned outside the state's formal law, is often governed by "the law of the household workplace"—a set of informal norms perpetuating servitude and subordination as well as worker resistance rather than state legality.[96]

In summary, for workers left behind in the home after the formation of the home/workplace dichotomy in legal ideology, the home has become a work law black hole, while the prototype workplaces—factories and offices—have become increasingly subject to state regulation and worker protections.

II. THE EXCEPTION OF HOME AS WORKPLACE

Despite this ideology of a home-workplace dichotomy, home-based work continues to expand, especially in the last decade. Work law has also gradually come to recognize home as workplace in some circumstances. However, work law as a whole takes an inconsistent and divided approach to regulate home as a workplace as an exception, falling short of revoking the default that associates home with non-work. This Part maps this inconsistent landscape of home in work law.

On the one hand, despite resistance, pro-labor groups and feminists have worked out a patchwork approach to successfully contest some of the exclusions at local, state, federal, and international levels. On the other hand, in reaction

[94] *See, e.g.*, Family and Medical Leave Act, 29 U.S.C. § 2611(2)(B) (excluding "any employee of an employer who is employed at a worksite at which such employer employs less than 50 employees"); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(b) ("The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees . . . ."); Americans with Disabilities Act, 42 U.S.C. § 12111(5)(A) ("The term 'employer' means a person engaged in an industry affecting commerce who has 15 or more employees . . . ."); National Labor Relations Act, 29 U.S.C. § 152(3) (excluding "any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home").

[95] NAT'L DOMESTIC WORKERS ALL., DOMESTIC WORKERS BILL OF RIGHTS: SURVEYS AND STORIES (2021), https://www.domesticworkers.org/wp-content/uploads/2021/07/Domestic-Workers-Bill-of-Rights-Fact-Sheet-Survey-Data-2021.pdf [https://perma.cc/U9XW-G3JW].

[96] BLACKETT, *supra* note 17, at 49-55 (highlighting how household workplace is "where subordination meets servitude").

reaction to the shock of massive transition to "work from home" white-collar work during COVID-19, policymakers worked out mostly haphazard approaches to regulate some aspects of home offices, the legal construct of which often operates through its connection to an institutional office. Despite the differentiation in specific legal rules, both domestic workers and WFH white-collar workers bear the costs of laboring in legally exceptionalized workplaces in terms of partial, contingent, and substandard work law rights and under-recognition for their work time.

A. *The Proliferation of Home-Based Work*

Two structural changes in the past few decades have massively transformed the landscape of home-based work: the expansion of paid care work and the explosion of home offices. Especially the latter has not only expanded the number but also diversified the demographics of home-based workers, mainstreaming the experiences of working inside homes.

Low-income minority and immigrant women have always provided paid (or forced) care work in homes throughout U.S. history.[97] The demographic changes, along with women's massive entry into the labor market, in the past half century have further made paid care work a rapidly expanding sector of the labor market.[98] For example, home health aide is the fastest growing occupation across the nation as well as the largest occupation group in some major cities such as New York.[99] *Vox* declares the sector "the future of work," especially for the low-income workforce.[100]

The explosion of home office is a more recent and more dramatic story. As early as the 1950s, women started doing white-collar jobs such as typing and bookkeeping inside their own homes for firms outside their households.[101] Teleworking white collar jobs exploded with the advancement of communication technologies in the late twentieth century.[102] At the time, this workforce was once predominantly middle-class women in clerical roles, especially mothers of young children who sought a "work/family" solution

[97] EVELYN NAKANO GLENN, FORCED TO CARE: COERCION AND CAREGIVING IN AMERICA 141 (2010).

[98] Soo Oh, *The Future of Work Is the Low-Wage Health Care Job*, VOX (July 3, 2017, 10:00 AM), https://www.vox.com/2017/7/3/15872260/health-direct-care-jobs [https://perma.cc/6HPJ-PN45] (describing how the health care sector is "projected to add 2.3 million jobs between 2014 and 2024, the most out of any group of occupations").

[99] Yiran Zhang, *The Care Bureaucracy*, 99 IND. L.J. 1241, 1247 (2024) (describing the rapid growth in the home care sector).

[100] *See* Oh, *supra* note 98.

[101] BORIS, *supra* note 29, at 306.

[102] Michelle A. Travis, *Equality in the Virtual Workplace*, 24 BERKELEY J. EMP. & LAB. L. 283, 292 (2003) ("By 1994, over 70 per cent of large employers offered some employees a telecommuting option, including one-third to one-half of all Fortune 500 firms." (footnote omitted)).

outside the institutional workplace.[103] Teleworking had also become a possible reasonable accommodation for workers with disabilities who faced structural obstacles in centralized workplaces.[104] The demographic composition left this workforce highly siloed from the mainstream workforce and marginalized in the firms hiring them despite their relatively high educational attainments compared to domestic workers.[105] Even when performing similar jobs, teleworking employees suffer systematic devaluation in income and promotion potentials.[106] Many were legally categorized as "independent contractors" without receiving many of the protections and benefits associated with employment.[107]

The landscape of teleworking flipped in March 2020, when the COVID-19 pandemic put a halt on centralized offices, driving billions of white-collar workers into "the largest global experiment in telecommuting in human history."[108] According to a Gallup poll, 62% of American workers worked from home in April 2020.[109] Home became the mainstream workplace in an exceptional time. A second dimension of the flipping, unlike previous times when home-based workers were marginalized, working from home was a class and industry privilege during the pandemic: computer programmers were able to work from home while "essential workers" in the service and transportation industries were not.[110] Even since the end of the pandemic, working from home, at least as part of hybrid office work, is here to stay. Gallup data from November 2024 shows that of the remote-capable workforce (half of the total workforce), 81% were working entirely or partially from home.[111] The workers also desire the home office trend: the same poll showed that 60% of the workforce preferred hybrid work, 33% exclusively remote work, and only 7% preferred fully on-site

[103] *Id.* at 291, 297.

[104] *Work at Home/Telework as a Reasonable Accommodation*, U.S. EEOC (Feb. 3, 2003), https://www.eeoc.gov/laws/guidance/work-hometelework-reasonable-accommodation [https://perma.cc/RN2D-824V].

[105] BORIS, *supra* note 29, at 213.

[106] Travis, *supra* note 102, at 343 ("[E]mployers often use telecommuting to casualize female-dominated jobs (by increasing performance quotas and reducing pay, benefits, training, job security, and promotion opportunities) . . . .").

[107] BORIS, *supra* note 29, at 279.

[108] Dimitris Papanikolaou & Lawrence D.W. Schmidt, *Working Remotely and the Supply-Side Impact of COVID-19*, 12 REV. ASSET PRICING STUD. 53, 59 (2022).

[109] Megan Brenan, *U.S. Workers Discovering Affinity for Remote Work*, GALLUP (Apr. 3, 2020), https://news.gallup.com/poll/306695/workers-discovering-affinity-remote-work.aspx [https://perma.cc/LB6A-CBEX].

[110] Papanikolaou & Schmidt, *supra* note 108, at 54 ("[O]ccupations vary immensely in the proportion of workers who report that they are able to telecommute—ranging from 3% for transportation and material moving to 78% for computer programmers.").

[111] *Hybrid Work*, GALLUP, https://www.gallup.com/401384/indicator-hybrid-work.aspx [https://perma.cc/MK2C-MR8C] (last visited Apr. 8, 2025).

work.[112] The poll declared that "[f]ully on-site work is expected to remain a relic of the past."[113]

Putting this trend in historical context, the material transformation of work has made home a normal rather than exceptional workplace for both the middle-class and low-income workforce, for the first time since pre-industrialization times. This mainstreaming of home-based further provides the material foundation to question any work law ideology that fails to recognize home as a regular workplace, if not *the* workplace.

B. *A Patchwork Approach to Include Domestic Workers*

Labor feminists, service worker unions, and labor and community activists have worked out patchwork efforts to extend standard labor rights to domestic workers through federal legislative and regulatory amendments, special legislations in state and city laws, and international labor treaties. In the post-patching status quo, the home is legally like a latticework—porous coverage with numerous cracks for domestic workers.

1. Federal

The most important patches at the federal level are found in the legislative and regulatory amendments that have gradually included most domestic workers in the FLSA's minimum wage and overtime protections.

As labor historian Premilla Nadasen records, in the 1960s and 1970s, a coalition of mostly Black domestic workers and liberal professional female domestic employers, through organizations such as the National Committee on Household Employment, advocated for the stance that domestic work was work and deserved the same rights as other workers laboring outside homes, a discourse that won them a broader alliance with labor unions as well as other women's groups.[114] In 1974, their advocacy won a congressional amendment that expanded the FLSA's definition of covered employees to any person who "is employed in domestic service in one or more households," along with other groups of previously excluded service and retail workers.[115]

Sharply opposing views of the home workplace fueled congressional debate over this 1974 amendment.[116] Legislators opposing the inclusion invoked the association between home and leisure in social consciousness to negate the categorization of home-based activities as full work.[117] One member of Congress opposing the amendment read a letter from a constituent who employed a caregiver:

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[112] *Id.*

[113] *Id.*

[114] Nadasen, *supra* note 17, at 78-80.

[115] Fair Labor Standards Act, 29 U.S.C. § 206(f)(2)(A) (1974).

[116] *See* GLENN, *supra* note 97, at 141 (citing CONG. REC. S14012-29 (1973)) (describing opposing views of legislators).

[117] *Id.* (highlighting leisure activities that go on in the home).

> Even if the salary is not $2 an hour—for the small amount of work required in my apartment, the leisure time spent there watching TV, reading, relaxing, visiting with my mother, using my telephone, eating me out of 'house and home' . . . I consider that my domestic has a 'good deal' going for her.[118]

In contrast, legislators supporting the amendment emphasized the economic value of all women's labor inside homes.[119] One senator said:

> [I]t is the housewife who is entrusted with our most valuable resources and our most valuable material possession, our children and our home. . . . Considering the current wage for domestics, it would mean that we are placing an $.80 an hour value on the work done by every housewife in America. This hardly seems reasonable.[120]

Although the domestic-work-is-work side won the 1974 amendment, it carved out three significant exemptions: (1) workers who "on a casual basis . . . provide babysitting services"; (2) those who "provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves";[121] and (3) employees who are "employed in domestic service in a household and who reside[] in such household" were covered by minimum wage requirements but exempted from overtime protection.[122] All three statutory exemptions stand intact today.[123]

However, the most contested interpretation of the "companionship exemption" provided another channel to vastly narrow the exclusion through regulatory changes.[124] Soon after the 1974 amendment, the DOL promulgated several regulations that adopted a broad interpretation of the "companionship exemption": first, it adopted a broad definition of "home" that included some assisted living facilities and group housing.[125] Second, the DOL regulation allowed private agency employers, in addition to private households, to claim the companionship exemption.[126] Third, the regulation defined companionship service as "fellowship, care, and protection," and included "household work related to the care of the aged or infirm person such as meal preparation, bed

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[118] *Id.*

[119] *Id.* (citing CONG. REC. S14012-29).

[120] *Id.* at 140-41.

[121] Fair Labor Standards Act, 29 U.S.C § 213(a)(15).

[122] *Id.* § 213(b)(21).

[123] *See supra* text accompanying notes 121-22 (describing statutory exemptions); 29 U.S.C. §§ 213(a)(15), (b)(21).

[124] PAUL K. SONN, CATHERINE K. RUCKELSHAUS & SARAH LEBERSTEIN, NAT'L EMP. L. PROJECT, FAIR PAY FOR HOME CARE WORKERS: REFORMING THE U.S. DEPARTMENT OF LABOR'S COMPANIONSHIP REGULATIONS UNDER THE FAIR LABOR STANDARDS ACT 7 (2011), https://s27147.pcdn.co/app/uploads/2015/03/FairPayforHomeCareWorkers.pdf [https://perma.cc/Q6RD-QQ85] (describing the "regulatory rollback of coverage").

[125] *See* GLENN, *supra* note 97, at 143-44.

[126] *See id.* at 144.

making, washing of clothes, and other similar services."[127] Combined, the DOL's interpretation excluded almost all home care workers from FLSA.[128]

The DOL interpretation was widely criticized and challenged by home care workers, unions, and other public interest groups.[129] In 2007, in *Long Island Care at Home, Ltd. v. Coke*,[130] the Supreme Court rejected a home care worker's challenge of the DOL's interpretation.[131] After this setback, a coalition of worker advocacy groups such as the National Employment Law Project and unions such as Service Employees International Union ("SEIU") convinced the Obama Administration to consider revising the regulation.[132] After a few years of public debate and then gaining support from organizations representing disability and elder groups who received care from this workforce, the DOL changed its regulatory interpretation in 2013.[133] The new rule prohibits agency employers from claiming any of the three exemptions mentioned above and vastly narrows the scope of tasks that count as "companionship service" for FLSA purposes.[134]

Despite the victory in patching up the federal companion exception, many home care workers continue to live in the shadow of underenforcement. Multiple lawsuits and DOL investigations suggest that pervasive wage theft persists in home-based care work, even following the regulatory change.[135] Furthermore,

[127] 40 Fed. Reg. 7405 (Feb. 20, 1975).

[128] SONN ET AL., *supra* note 124, at 8 ("Under the current companionship regulations, the nation's roughly 1.7 million home care workers are excluded from federal minimum wage and overtime protections under the FLSA.").

[129] GLENN, *supra* note 97, at 144-45.

[130] 551 U.S. 158 (2007).

[131] *Id.* at 160-61.

[132] *See, e.g.*, *Wage & Hour Protections for Home Care Workers Take Effect*, NELP (Oct. 14, 2015), https://www.nelp.org/wage-hour-protections-for-home-care-workers-take-effect/ [https://perma.cc/U7WY-YGPH].

[133] 78 Fed. Reg. 60454, 60455 (Oct. 1, 2013) (codified at 29 C.F.R. § 552) (highlighting the changes to the regulatory interpretation).

[134] *Id.*

[135] *See, e.g.*, *AARP Foundation and Public Justice Center File Class Action Lawsuit Against Maryland Home Care Agency, Alleging Wage Theft*, AARP PRESS ROOM (Nov. 16, 2023), https://press.aarp.org/2023-11-16-AARP-Foundation-Public-Justice-Center-Class-Action-Lawsuit-Maryland-Home-Care-Agency-Wage-Theft [https://perma.cc/LJ6R-ZY6E] (announcing class action lawsuit on behalf of home care aides alleging their employer failed to pay overtime); *Connecticut Homecare Provider Pays $92K in Back Wages, Liquidated Damages to 107 In-Home Caregivers After Federal Court Enters Consent Order*, U.S. DOL, http://www.dol.gov/newsroom/releases/whd/whd20231101-0 [https://perma.cc/M5QW-7TVU] (last updated Jan. 20, 2025) (reporting award of backpay to domestic caregivers after employer willfully withheld overtime pay); *The New York State Department of Labor Announces $113,000 Wage Recovery for Home Health Care Employees*, N.Y. STATE DEP'T OF LAB. (Aug. 1, 2023), https://dol.ny.gov/news/new-york-state-department-labor-announces-113000-wage-recovery-home-health-care-employees [https://perma.cc/R9EW-94VQ] (announcing settlements with two employers that failed to pay overtime wages and provide adequate sleep time on twenty-four hour shifts).

efforts to reform other home-related exemptions in federal laws, such as the NLRA and OSH Act, remain stagnant.

2. (Blue) States and Cities

Domestic worker advocates and service unions have successfully induced legal reforms in blue states and cities, even while under the shadow of relatively stagnant federal reform efforts. These state- and local-level reforms can be grouped into four categories: domestic workers bills of rights, model contract mandates, government subsidized unionization of home-based care workers, and the emerging model of adapted sector bargaining. Combining all of these legal reforms, domestic workers in these locales nominally enjoy the same or somewhat thinner versions of most work law rights.

The predominant type of reform is legislation that extends a set of work law rights enjoyed by standard workers in federal law to the entire sector of domestic workers, or a "Domestic Workers Bill of Rights."[136] Promoted by the antecedents of the now National Domestic Worker Alliance ("NDWA")—a national alliance of worker centers serving domestic workers—this model first gained success in New York and has since been enacted in twelve states, two major cities, and the District of Columbia.[137] This model extends the right to a minimum wage, overtime, protection from harassment, paid sick days, notice of severance, and so on to millions of domestic workers.[138]

Nevertheless, the appeal of domestic-workers-bill-of-rights legislation has limitations. One is the common omission of safety and health protections and the right to organize.[139] Other than the D.C. and Virginia law, no other state or city's Domestic Workers Bill of Rights extends a right to workplace health and safety.[140] No Domestic Workers Bill of Rights extends to domestic workers a full set of rights that are equivalent to NLRA rights. The New York State legislation directed the state to study the "practicality of allowing domestic workers to organize for the purposes of collective bargaining,"[141] which never resulted in an actual legislative reform. While this model of state legislation brings domestic workers out of the shadow of invisibility, it leaves their workplace less regulated than others.

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[136] *See Domestic Workers Bill of Rights*, NAT'L DOMESTIC WORKERS ALL., https://www.domesticworkers.org/programs-and-campaigns/developing-policy-solutions/domestic-workers-bill-of-rights/ [https://perma.cc/84JG-TX7R] (last visited Apr. 8, 2025).

[137] *Id.*

[138] *See id.*

[139] *See id.*

[140] *See id.*; D.C. CODE ANN. §§ 32-1101, 1107 (West 2025).

[141] N.Y.S. DEP'T OF LAB., FEASIBILITY OF DOMESTIC WORKER COLLECTIVE BARGAINING 5 (2010), https://www.ilo.org/dyn/migpractice/docs/147/Feasibility.pdf [https://perma.cc/XT84-M8AF] (directing Commissioner of Labor report to the Governor, Speaker of the Assembly, and the Temporary President of the Senate on the feasibility and practicality of permitting collective bargaining between domestic workers and their employers).

Predating the Domestic Workers Bill of Rights reforms, commentators and activists promoted the broader use of written contracts, first through drafting a contract template and later, in some locales, government mandates.[142] Some locales, such as Massachusetts, mandate the use of written contracts for certain domestic work employment as part of their Domestic Workers Bill of Rights legislation,[143] while others, such as Chicago, have passed a stand-alone law to mandate the provision of a written contract.[144]

These two integrated models of patching share the same limitation in that enforcement depends on the state's resources and community engagement to support the new rights. Without enough worker engagement, not many workers are aware of their rights, let alone able to advocate for them.[145] Changing legal texts without an accompanying norm change will fall short of changing employers' behavior. For example, even after the contract mandate took effect in Chicago, most domestic workers continued to find it difficult to get a contract out of their employer.[146]

On a third front, unions representing service and healthcare workers focused on unionizing home care workers and home-based childcare workers who were funded at least partially by government programs.[147] Practically, public funding makes it more feasible to find a counterpart entity—the state—to collectively bargain with.[148] Legally, public funding enables the state to establish itself as a joint employer of the worker and then, through legislation or executive order, to authorize collective bargaining between the state government and the elected union under the state's public-sector labor law instead of the federal NLRA.[149] Since this model's first success in unionizing home care workers in Los Angeles in the 1990s, the public-funding-based model has unionized home care in eleven

[142] *See, e.g.*, Smith, *supra* note 9, at 176-77.

[143] *See* MASS. GEN. LAWS ANN. ch. 149, § 190(l) (mandating that employers provide domestic workers who work more than sixteen hours per week with the terms of their employment); 940 MASS. CODE REGS. 32.04(3) (2025) (requiring that the terms of employment must be provided by a written agreement in a language easily understood by both the employer and the employee).

[144] CHI., ILL., CODE § 6-120-020 (2024) ("All employers of Domestic Workers . . . shall provide a written contract to the Domestic Worker, setting forth the wage . . . and the Work Schedule . . . agreed upon between the employer and the Domestic Worker.").

[145] *See* Andrew Elmore, *Collaborative Enforcement*, 10 NE. U. L. REV. 72, 86-87 (2018) (arguing worker protections are underenforced because workers are often unaware of violations and come to expect poor working conditions).

[146] Esther Yoon-Ji Kang, *Chicago Says Employers Should Give Contracts to Domestic Workers, but That's Not Happening*, WBEZ CHI. (Sept. 5, 2023, 7:00 AM), https://www.wbez.org/stories/chicago-domestic-workers-are-without-contracts/8c334a50-d1e2-4c55-af43-52cdd7444482.

[147] *See* Smith, *supra* note 17, at 1390-91.

[148] *See id.* at 1400-03.

[149] *See id.* at 1403-13.

states.[150] This model has an especially meaningful reach for long-term home care since public funding (especially Medicaid) pays for more than 70% of the whole sector.[151] Its reach into home-based childcare workers, mostly providing care in their own homes, is much more constrained because government funding has a more limited share of the childcare market.[152]

This wave of unionization has led to tangible benefits such as significant wage increases and healthcare coverage for a large portion of domestic workers in these states.[153] Recently, the union representing California home-based childcare workers has won unprecedented retirement benefits, expanding this model's potential to empower home-based care workers.[154] Nevertheless, this model has major gaps, falling short of totally reversing the home-related exclusions from the NLRA. First, this wave of unionization only reached home care workers and home-based childcare providers who participated in government programs, leaving behind domestic workers hired with private funding.[155] Second, none of the state programs fully construct subsidized home-based care workers as public-sector employees for all purposes. Instead, the states have adopted a variety of public-private partnership models to construct the workers as jointly hired by the state and the client or a private agency.[156] As a result, the scope of their collective bargaining rights is commonly restrained to items related to government subsidies, such as hourly wages.[157] As the government is a joint employer together with the patient or household receiving care, dimensions of employment falling under the latter's control, such as hiring and firing and disciplinary actions, are beyond the scope of collective bargaining.[158]

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[150] *See id.* at 1390-91; CHRISTIAN COLLINS & ALEJANDRA LONDONO GOMEZ, CTR. FOR L. & SOC. POL'Y, UNIONIZING HOME-BASED PROVIDERS TO HELP ADDRESS THE CHILD CARE CRISIS 5 (2023), https://www.clasp.org/wp-content/uploads/2023/04/4.3.2023_Unionizing-Home-Based-Providers-to-Address-the-Child-Care-Crisis.pdf [https://perma.cc/LR8S-WNWZ] ("Eleven states have collective bargaining policies in place for home-based care workers, including those providing child care . . . .").

[151] Zhang, *supra* note 99, at 1247 ("Medicaid and other public programs pay for 71% of paid home care, while private insurance and out-of-pocket payments fund the rest.").

[152] *See* Yiran Zhang, *Subsidizing the Childcare Economy*, 34 STAN. L. & POL'Y REV. 67, 90-94 (2023) (reviewing various childcare subsidy programs and the targeted providers).

[153] *See* Smith, *supra* note 17, at 1413.

[154] *See* Daisy Nguyen, *In California, Child Care Providers Unionized for Better Pay and Retirement Benefits*, MARKETPLACE (Oct. 31, 2023), https://www.marketplace.org/2023/10/31/california-child-care-union-wins-pay-benefits/ [https://perma.cc/2W2Y-Q9CM].

[155] *See* GOLDBERG, *supra* note 75, at 18.

[156] *See* Kyle Bigley, Note, *Between Public and Private: Care Workers, Fissuring, and Labor Law*, 132 YALE L.J. 250, 278-80 (2022) (describing the patchwork of state and federal ballot initiatives, legislation, and executive orders that have recognized home care provider unions); Zhang, *supra* note 99, at 1249.

[157] *See* Bigley, *supra* note 156, at 278-80.

[158] *See id.*

Third and most ironically, anti-union groups exploit the image of home care workers as less-than-standard workers—precisely what this unionization wave intended to challenge—and successfully dilute the rights of public sector unions through the judiciary.[159] In *Harris v. Quinn*,[160] the National Right to Work Legal Defense Foundation, an anti-union group, had represented a few home care workers who challenged Illinois' classification of personal care providers as "public employees" for the purposes of union organizing.[161] Justice Alito, writing for a bare five-four majority, held that home care workers fall short of being "full-fledged public employees" and used the public-private funding of the care programs to support this finding.[162] As a result, the majority distinguished them from standard public-sector workers, such as teachers, and ruled that their union could not constitutionally mandate union dues under the Court's public-sector labor law precedent.[163] In other words, the image of home-based workers as less than standard workers, which the state programs have internalized in their limited extension of labor rights, has been used to constrain union rights of all public-sector workers by conservative groups.

In the most recent attempt, blue states and cities such as Nevada[164] and Seattle have established sectoral boards to conduct quasi-sectoral bargaining and discuss enforcement of standard regulations, further experimenting with interventions to counter-balance domestic workers' weak protection under traditional work law.[165] For example, the Seattle Domestic Workers Standards Board incorporates the interests of employers, workers, and local government in a deliberative body that "sets sector-wide terms and conditions of employment and provides for the enforcement of such terms and conditions."[166] The once

[159] *See* Peggie R. Smith, *The Conservative Challenge to Caring for Compensated Caregivers*, 62 WASH. U. J.L. & POL'Y 131, 138-40 (2020).

[160] 573 U.S. 616 (2014).

[161] *See* Complaint-Class Action, Harris v. Quinn, 2010 WL 4736500 (N.D. Ill. Nov. 12, 2010) (No. 10CV2477); Harris v. Quinn, *Supreme Court Case: Illinois Homecare Providers Challenge Unionization Scheme*, NAT'L RIGHT TO WORK LEGAL DEF. FOUND., https://www.nrtw.org/harris-v-quinn-supreme-court-case-illinois-homecare-providers-challenge-unionization-scheme/ [https://perma.cc/J2NL-7QPZ] (last visited Apr. 8, 2025).

[162] *See Harris*, 573 U.S. at 638-43.

[163] *See id.* at 639-42, 645-46 (citing Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977), *overruled by* Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 585 U.S. 878 (2018)).

[164] *See* David Madland & Sachin Shiva, *Industry Standards Boards Are Delivering Results for Workers, Employers, and Their Communities*, CAP (Nov. 21, 2024), https://www.americanprogress.org/article/industry-standards-boards-are-delivering-results-for-workers-employers-and-their-communities/ (explaining recent raise in minimum wage for domestic workers was the product of the Nevada Home Care Employment Standards Board recommending regulations to state Department of Health and Human Services).

[165] César F. Rosado Marzán, *Quasi Tripartism: Limits of Co-Regulation and Sectoral Bargaining in the United States*, 90 U. CHI. L. REV. 703, 717 (2023).

[166] *Id.*

left-behind worker group is now at the forefront of what labor law scholar Kate Andrias calls the "new labor law" of the United States.[167]

Other than patching over previous exclusions, these new state laws are also more inclusive of domestic workers by consciously not exceptionalizing the home workplace, providing useful lessons in normalizing the home workplace. Many such paid leave laws have set up mechanisms to cover domestic workers.[168] For example, in New York City's Earned Safe and Sick Time Act, domestic workers accrue safe and sick leave at the rate of one hour for every thirty hours worked, up to a maximum of forty hours per year, and domestic workers receive the same coverage as employees working for employers with five or more employees.[169]

3. International

The last site of active patching is the International Labour Organization ("ILO"), which has resulted in some global norm changes.

From a global perspective, the work law black hole surrounding the home workplace extends across countries. An ILO report in 2010 found that a "significant number of countries wholly or partially excludes domestic workers" from labor legislation or provide fewer protections compared to other workers.[170] After participatory deliberation among diverse stakeholders, the ILO adopted the Domestic Worker Convention and an accompanying Recommendation in 2011, laying the new international standard of decent work for a globally overlooked workforce.[171] Through the notion that domestic work is "'work like any other' and 'work like no other,'" the Convention formally included domestic workers in international labor treaties and added specific regulations addressing the particular vulnerabilities of domestic workers, such as specific regulation for migrant domestic workers and minimum weekly rest days.[172]

The Convention successfully created momentum to include domestic workers in standard employment law in numerous countries. Some countries have ratified the Convention, while others, such as Singapore, have provided more labor rights to the domestic workforce without formally ratifying the

[167] *See* Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 45-46 (2016).

[168] Deborah A. Widiss, *Equalizing Parental Leave*, 105 MINN. L. REV. 2175, 2206 (2021).

[169] N.Y.C., N.Y., ADMIN. CODE § 20-913 (2025).

[170] *See* INT'L LABOUR OFF., DOMESTIC WORKERS ACROSS THE WORLD: GLOBAL AND REGIONAL STATISTICS AND THE EXTENT OF LEGAL PROTECTION 46 (2013), https://www.ilo.org/sites/default/files/wcmsp5/groups/public/%40dgreports/%40dcomm/%40publ/documents/publication/wcms_173363.pdf.

[171] *See* BLACKETT, *supra* note 17, at 20-34.

[172] *See id.* at 19, 119, 123.

Convention.[173] More expansively, as international labor law scholar Adelle Blackett found, the Convention cultivates an environment for norm changes beyond the written law that bring dignity and visibility to the household workplace.[174] Nevertheless, the breadth and depth of its reach are constrained by various structural factors, such as the ILO's relatively limited ability to enforce treaties.

Generations of successful efforts from various pro-labor forces have incrementally corrected the total negation of home as a regulable workplace in New-Deal-era work law. Due to these successes, home-based blue-collar workers, especially domestic workers, have work law rights but inconsistently so, differing based on locale, employer, and the specific set of rights. While all these interventions successfully attack the ideology of home as non-workplace and provide various models to de-exceptionalize the home workplace, each has its limitations and all of them combined still fall short of a complete remedy.

C. *A Haphazard Approach to Regulate Work-from-Home*

Policymakers have come up with a highly haphazard, reactive approach to limitedly regulate the home office. The extension of work law to work offices often bypasses the home/workplace dichotomy through the home's legal connection with an institutional workplace. In general, WFH white-collar workers have more work law rights and face less resistance to coverage than domestic workers. Nevertheless, the "workplaceness" of home offices is inconsistent across different work laws and the work law rights come with contingencies and limitations, such as less regulation and/or an additional burden of proving work-relatedness. This Section groups these regulation extensions by their different approaches to the space of home.

1. Space-Neutral Regulation of Home-Based Office Work

FLSA does not exceptionalize the home office. According to DOL's FLSA regulation regarding hours worked, work "not requested but suffered or permitted is work time."[175] This work time definition equally applies to "work performed away from the premises or the job site, or even at home," as long as the employer "knows or has reason to believe that the work is being performed."[176] According to a memorandum that the DOL published in 2023,

[173] *See 2012: A Year of Progress for Domestic Workers*, HUM. RTS. WATCH (Jan. 10, 2013, 2:30 PM), https://www.hrw.org/news/2013/01/10/2012-year-progress-domestic-workers [https://perma.cc/ET4Y-C5AQ] ("During the year, 8 countries moved to ratify the Domestic Worker Convention."); Yiran Zhang, *Rethinking the Global Governance of Migrant Domestic Workers: The Heterodox Case of Informal Filipina Workers in China*, 36 GEO. IMMIGR. L.J. 963, 1003-10 (2022) (discussing Singapore's regulation prohibiting labor-abusive behaviors despite not ratifying Domestic Worker Convention).

[174] BLACKETT, *supra* note 17, at 114-16.

[175] Fair Labor Standards Act, 29 C.F.R. § 785.11 (2024).

[176] *See* 29 C.F.R. § 785.12.

the same rules for breaks and mealtime apply to WFH workers.[177] The same basis for the employer's obligation to compensate—the employer's actual or constructive knowledge—applies to hours worked at home, institutional offices, and other worksites.[178] Notably, even the employer's more spatially-related duties under the FLSA—such as providing breastfeeding employees a non-bathroom place "shielded from view and free from intrusion from coworkers and the public" to pump breast milk—extends to the home workplace.[179] In the space of a home workplace, the employer's duty is to shield the employee from "observation by any employer-provided or required video" while expressing milk.[180] In other words, although institutional work can take place in various spaces, the employer has the same set of privacy-related duties across workplaces with different spatial characteristics. This regulation also recognizes the employer's certain prerogative over the home office without physically controlling it.

2. Regulating Home as an Extension to the Institutional Office

A second route to regulating the home office is via negating its legal workplace-ness and constructing it as an extension to the institutional one.

The connection of a home office to an institutional workplace differentiates it from the in-home worksite of domestic workers in the Family and Medical Leave Act ("FMLA"). The spatial dimension of FMLA's eligibility criteria is that the employer employs "50 or more employees" within "75 miles of that worksite."[181] The DOL interprets this to mean that an employee's personal residence is not a worksite for FMLA eligibility purposes when employees work at home under the concept of "flexiplace or telecommuting."[182] Instead, the office "to which they report and from which assignments are made" is the legal worksite.[183] Paradoxically, through this legal construction, the home is not designated the workplace despite its being actual physical space of work;

[177] U.S. DOL, FIELD ASSISTANCE BULLETIN NO. 2023-1 (2023).

[178] U.S. DOL, FIELD ASSISTANCE BULLETIN NO. 2020-5, at 1 (2020) ("An employer is required to pay its employees for all hours worked . . . including work performed at home. . . . An employer may have actual or constructive knowledge of additional unscheduled hours worked by their employees . . . ." (citation omitted)).

[179] *FLSA Protections to Pump at Work*, U.S. DOL, https://www.dol.gov/agencies/whd/pump-at-work [https://perma.cc/VBU7-FHUJ] (last visited Apr. 8, 2025). Employers are required to provide ample break time to nursing employees, and FLSA rules regarding breaks apply to all employees regardless of workplace. *See supra* notes 177-78 and accompanying text (discussing applicability of break and mealtime rules to employees with home workplace); *Frequently Asked Questions – Pumping Breast Milk at Work*, U.S. DOL, https://www.dol.gov/agencies/whd/nursing-mothers/faq [https://perma.cc/U9F3-EDRK] (last visited Apr. 8, 2025).

[180] *Frequently Asked Questions – Pumping Breast Milk at Work*, *supra* note 179.

[181] 29 U.S.C. § 2611(2)(b)(ii).

[182] 29 C.F.R. § 825.111(a)(2) (2024).

[183] *Id.*

instead, the DOL interprets online communication as "commuting" to a group office, which makes WFH workers eligible for FMLA.

The same connection to an institutional worksite also provides the spatial foundation for some state work laws rights to extend into the home workplace of some skilled workers. For example, California's new healthcare minimum wage law includes "a patient's home" in the definition of "covered health care facility" but only when "health care services are delivered by an entity owned or operated by" a hospital.[184] Thus, the law recognizes hospital-affiliated home health nurses as part of the state's healthcare workforce but leaves out the state's largest health-adjacent workforce in homes—in-home long-term care workers.[185]

3. Regulating Home as a Contingent Workplace

The more contested realm for home office regulation involves issues more closely associated with the physical space of "workplace," such as workplace injuries and the right to work equipment. Overall, WFH workers are covered by these work laws but to a lesser extent, either with less enforcement or additional requirements to prove an activity or incident's work-relatedness.

The home office first came into the sight of OSH Act regulations in the early 2000s when the Occupational Safety and Health Administration ("OSHA") posted a letter that the OSH Act would apply to the employees' home offices if an employer permitted workers to "telecommute" and that the employers were responsible for home office compliance with safety and health standards.[186] The letter received wide condemnation from business leaders and policymakers for "raising the specter of Big Brother coming into people's homes to inspect the angle of their desk chairs."[187] OSHA later issued guidance clarifying that it would not inspect home offices, expect employers to inspect home offices, or make any interventions other than informal disclosure when it received complaints about home office conditions.[188] This remains OSHA's stance on inspecting home offices today. Even for industrial work in homes, OSHA would only conduct onsite inspections in exceptional circumstances, such as evidence about imminent danger, like "reports of a work-related fatality."[189] Consistent with this approach of lesser regulation, the COVID-19 vaccine and mask mandates, as an emergency OSHA standard, exempted WFH workers because

[184] CAL. LAB. CODE § 1182.14(b)(3A)(vi) (West 2025).

[185] PHI, CALIFORNIA'S DIRECT-CARE WORKFORCE 2 (2010).

[186] Smith, *supra* note 74, at 1875.

[187] David Leonhardt, *Who's the Boss? Who's a Worker?*, N.Y. TIMES (Feb. 16, 2000), https://www.nytimes.com/2000/02/16/jobs/who-s-the-boss-who-s-a-worker.html.

[188] U.S. DOL, OCCUPATIONAL HEALTH & SAFETY ADMIN., CPL 2-0.125: HOME-BASED WORKSITES (2000) ("OSHA will not conduct inspections of employees' home offices.").

[189] *Id.*

their chance of COVID-19 exposure "through a work activity" was negligible.[190] Home was seen as the ultimate shield from work-related public health hazards.

The other side of safety is injury. What counts as a "workplace injury" inside home offices has inconsistent standards among federal OSHA regulations and worker's compensation laws in different states. According to a DOL regulation, for an injury inside the home to qualify as a "work-related injury" under the OSH Act, the injury or illness must occur during the performance of work for pay, and the injury must be "directly related to the performance of work" and have nothing to do with "the general home environment or setting."[191] For example, dropping a box of work documents on the foot is a work-related injury, while tripping on a family dog while rushing to answer a work call is not since the dog is a hazard intrinsic to the home environment.[192] The employer has a duty under the OSH Act to record and report the former but not the latter.[193] In other words, the injury needs to be not only related to work but also unrelated to home to qualify as work-related.

A similar issue discerning an injury's relationship to home and work arrives at state workers' compensation boards, where insurers or employers contest whether an injury sustained while working from home or between home offices and other places, is within the "scope of employment," or whether the injury arises "both out of and in the course" of employment.[194] Here, different states have applied different standards for work-relatedness, some of which also differ from the federal OSHA's definition.

Take the example of tripping over a dog during work activities—a common hazard in home offices—and look to state law application of this situation. Similar to federal OSHA's reasoning, Florida courts have found this hazard not work-related because the risk of the dog existed whether "the claimant [was] at home working or whether she [was] at home *not* working" and the employer did not contribute to the risk of tripping over the dog.[195] However, if the same injury happened in an institutional, dog-friendly office or the worker tripped over their handbag—personal property—the injury would be logically work-related under both the OSH Act and state workers' compensation law. Thus, Florida law and many similar state programs take the stance that injuries in home offices, distinct from institutional offices, must be "directly caused by" working rather than incident to employment to qualify as work-related.[196] In contrast, in a minority approach, a New York court found that injury in an almost identical fact pattern

[190] COVID-19 Vaccination and Testing: Emergency Temporary Standard, 86 Fed. Reg. 61402 (Nov. 5, 2021) (exempting remote workers from requirements).

[191] 29 C.F.R. § 1904.5(b)(7) (2025).

[192] *Id.*

[193] 29 C.F.R. § 1904.0.

[194] Docking v. Lapp Insulators LLC, 116 N.Y.S.3d 440, 441 (N.Y. App. Div. 2020).

[195] Sedgwick CMS v. Valcourt-Williams, 271 So. 3d 1133, 1134 (Fla. Dist. Ct. App. 2019).

[196] *Id.* at 1144 (Bilbrey, J., dissenting).

qualifies as "work-related" because its counterpart in an institutional office would fall under the scope of employment and that "a regular pattern of work at home" renders the home office a workplace as much as "any traditional workplace maintained by the employer."[197]

The last space-related work right is the employee's right to work equipment. Federal law only applies when the cost of work equipment to employees brings their compensation under minimum wage, and is so far ambiguous if it applies to the cost of setting up home offices or home cleaning supplies for hourly workers.[198] Some states, such as California, impose a duty on employers to reimburse employees for expenses incurred as a direct consequence of their work duties.[199] Several cases have arisen where employers disputed their duty to reimburse the costs of equipping the home office, arguing that the transition to WFH was caused by the mandate of the government, not that of the firm.[200] California courts have ruled that the employer has the duty of reimbursement as long as the employee works in the home under the employer's direction, not by their own voluntary will.[201] An element of coercion defines the home's workplace-ness, whether the source of that coercion is the government, a global pandemic, or the employer.

In general, home offices are more contingently regulated than institutional workplaces, but recent developments hold promise to reduce the contigency.

D. *The Residue of Legal Non-Work in Homes*

Despite the patchwork legislative victories in de-exceptionalizing paid domestic work from some workplace regulations and the haphazard extension of some labor protection to home offices, the legal default that associates home with non-work remains powerful. Most significantly, a vast number of activities with economic value inside homes remain unpaid, unregulated, and not legally recognized as work or not legally recognized at all.

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[197] Capraro v. Matrix Absence Mgmt., 132 N.Y.S.3d 456, 456 (N.Y. App. Div. 2020).

[198] *Fact Sheet #16: Deductions From Wages for Uniforms and Other Facilities Under the Fair Labor Standards Act (FLSA)*, U.S. DOL, https://www.dol.gov/agencies/whd/fact-sheets/16-flsa-wage-deductions [https://perma.cc/S4RU-YF5Q] (last updated July 2009) ("If the employer requires the employee to bear the cost, it may not reduce the employee's wage below the minimum wage of $7.25 per hour effective July 24, 2009.").

[199] *See* CAL. LAB. CODE § 2802 (West 2016) (stating employers are responsible for "necessary expenditures or losses incurred by . . . employee[s]" that directly result from work).

[200] *See generally*, Williams v. Amazon.com Servs., LLC, No. 22-cv-01892, 2022 WL 1769124, at *1 (N.D. Cal. June 1, 2022) ("Amazon contends that any expenses Williams incurred were the result of government stay-at-home orders, not any action by Amazon. But even if true, that does not absolve Amazon of liability."); Thai v. Int'l Bus. Machs. Corp., 93 Cal. App. 5th 364, 372-73 (Cal. Ct. App. 2023) (rejecting contention that "an employer is not liable under [California labor law] for expenses imposed by an intervening government mandate").

[201] *See Thai*, 93 Cal. App. 5th at 374.

Take the example of long-term home care. According to a 2020 estimate by the American Association of Retired Persons ("AARP"), 41.8 million Americans—that is one in six adults—had provided unpaid care to an adult age fifty or older in the prior twelve months.[202] 89% of surveyed unpaid caregivers took care of relatives.[203] 12% of these relative caregivers took care of a spouse.[204] Setting aside the normative question of whether the law of marriage should enforce unpaid care between spouses, the majority of the 41.8 million caregivers are providing unpaid care labor in homes to people to whom they owe no legal duty, voluntarily incurring various health and financial harms associated with long-term caregiving without any legal protections.[205]

The work law system partially recognizes and reinforces this residue of legal non-work in homes. In the case of unpaid family caregivers, various public care programs provide a pathway to compensate some, but not all, of their care if the recipient is income eligible. The public care programs follow a complicated, bureaucratic, professionally-run procedure to certify the medical and economic value of some parts of this care, generate a "care plan," and authorize the state to pay for the work according to the care plan.[206] The DOL's interpretation of the FLSA relies on this care plan to draw the boundary between regulated work and legal non-work. In its FLSA fact sheet, the DOL clarifies that the service described in the state-made care plan is covered by an FLSA employment relationship with minimum wage and overtime protections, while the residue of care, including other care from the same caregiver, falls into the realm of "natural supports" to be governed by a familial or household relationship outside the work law.[207]

The spatial non-workplaceness of the home, intersecting with other non-work elements, again, plays an important role in defining care as non-work. The DOL clarifies that the above-discussed interpretation of the FLSA only applies to caregivers with a household relationship with the recipient, under a reasonable care plan, and "in or about a private home."[208] In a related example, the home space shapes the law's treatment of home care workers sleeping in their patients' homes. The DOL regulation claims that a domestic employee living on the

[202] *See* AARP & NAT'L ALL. FOR CAREGIVING, CAREGIVING IN THE U.S. 9 (2020), https://www.aarp.org/content/dam/aarp/ppi/2020/05/full-report-caregiving-in-the-united-states.doi.10.26419-2Fppi.00103.001.pdf [https://perma.cc/L5XA-ZXYJ].

[203] *Id.* at 16 fig.13.

[204] *Id.*

[205] *See* Allison K. Hoffman, *Reimagining the Risk of Long-Term Care*, 16 YALE J. HEALTH POL'Y, L., & ETHICS 147, 154 (2016).

[206] *See* Zhang, *supra* note 99, at 1279.

[207] *Fact Sheet #79F: Paid Family of Household Members in Certain Medicaid-Funded and Certain Other Publicly Funded Programs Offering Home Care Services Under the Fair Labor Standards Act (FLSA)*, U.S. DOL, https://www.dol.gov/agencies/whd/fact-sheets/79f-flsa-publicly-funded-programs [https://perma.cc/5ULL-JHR9] (last updated June 2014) (applying federal program rules to publicly funded programs regarding home care services).

[208] *Id.*

employer's premises for more than 120 hours per week "is not necessarily considered working all the time . . . on the premises" for FLSA purposes.[209] The employer may exclude sleep time if they provide private quarters in a "homelike" environment.[210] For other workers with shifts of twenty-four hours or more, the employer can exclude up to eight hours of sleep time from working hours if the employee can get at least five hours of uninterrupted sleep and pay for any interruption to sleep time.[211]

State work laws and welfare policies further reinforce elusive boundaries between work and non-work in the home, exacerbating the systematic undervaluation of home-based workers' labor. New York State, for example, has allowed the employers of home care workers to pay thirteen hours of wage for a twenty-four-hour shift, deducting three hours of meal breaks and eight hours of sleep time.[212] The state Medicaid programs only reimburse thirteen hours for twenty-four-hour care shifts.[213] This rule may appear facially reasonable, assuming such workers are actually afforded three one-hour meal breaks and eight hours of sleep. In practice, however, it places the burden on the worker to prove their sleep was interrupted, placing thousands of paid home care workers—mostly low-income immigrant women—in a powerless situation facing unreasonably long work time as well as rampant wage theft.[214] In one case, some workers stayed alone in a care recipient's home with a patient needing twenty-four-hour care for up to ninety-six hours; although gaining little meaningful sleep in this situation, the workers only received compensation for fifty-two hours of labor.[215] Workers report various forms of coercion while working inside these homes—the home care agency's threat of "black-listing," the potential criminal punishment for abandoning a dependent patient, the lack of a real bed in overcrowded urban homes, the patient's nonstop demands for attention, and so on.[216] Workers have shared their experiences of chronic insomnia years after working twenty-four-hour shifts.[217] Nevertheless, the DOL and other law makers continue to associate a "homelike" environment with less

[209] *Fact Sheet #79D: Hours Worked Applicable to Domestic Service Employment Under the Fair Labor Standards Act (FLSA)*, U.S. DOL, https://www.dol.gov/agencies/whd/fact-sheets/79d-flsa-domestic-service-hours-worked [https://perma.cc/3KF4-SXXB] (last updated Apr. 2016).

[210] *Id.*

[211] *Id.*

[212] Andryeyeva v. N.Y. Health Care, Inc., 33 N.Y.3d 152 (N.Y. 2019).

[213] *Id.*

[214] *See Worker's [sic] Testimonials*, AIN'T I A WOMAN?!, https://www.aintiawoman.org/testimonials (last visited Apr. 8, 2025) (compiling testimonials describing experiences of home care workers losing continuous sleep to care for patients throughout night).

[215] *Id.*

[216] DAVID A. LEE, THE NONPROFIT WAR ON WORKERS: PART 1, at 92-98 (2021), https://assembly.state.ny.us/write/upload/member_files/040/pdfs/20220104_0100283.pdf [https://perma.cc/QH2K-649Y].

[217] *Id.*

coercion and less harm, and that characterization of the space justifies legally defining a significant portion of their time inside this space as non-work.

To conclude, the recent, inconsistent expansion of work laws to some work and workers in certain home workplaces, largely consisting of low-income domestic workers and white-collar WFH workers, has established that the home can be a workplace, partially collapsing the once-paramount home/workplace dichotomy. Nevertheless, the legal default associating the home with non-work remains strong in legal rules and consciousness.

III. THE PRIVACY PARADOX OF THE HOME WORKPLACE

The through-line justification for treating the home as a non- or lesser-workplace is family privacy—a narrative that this Part complicates. The home/workplace dichotomy that Part I has traced also constructs the private home as the prototypical space of privacy shields. This results in a persistent resistance to labor inspections of homes and the notion of home as unregulable, which justifies the home as a place of no or less labor regulation. Meanwhile, in the home workplace, both domestic workers and WFH white-collar workers often face extra surveillance from their private and public employers, making the home workplace more visible on some dimensions than its institutional counterpart. Without a spatial marker of work and non-work, employers are enabled or even required by the state to employ precise metrics and various digital surveillance tools to surgically negate the presumption of "idleness" associated with a home. This Part exposes this privacy paradox arising from the home workplace's descriptive and normative visibility.

A. *Resistance to Labor Inspection*

Throughout various historical debates about work law's inclusion or exclusion of home-based workers at all levels, the opponents to their inclusion constantly invoke the image of home as private and shielded from the state's eyes. This claim questions and even ridicules the possibility of enforcing any labor regulation in homes.

Historically, concerns about family privacy in the "women's sphere" of the home also justified the impossibility of counting working hours for domestic workers.[218] As historian Premilla Nadasen records, when legislators in Congress in the 1970s debated the coverage of domestic workers in the FLSA's minimum wage protection, one legislator opposing the coverage argued that such a provision amounted to "bringing the federal bureaucracy into the kitchen of the American housewife."[219] The concerns about spatial privacy were integrated with those about the employer—very often, doubting the capability of American housewives to interact with state regulations. The then-Secretary of Labor

[218] Nadasen, *supra* note 17, at 81-82.

[219] *Id.* at 81.

argued that "[h]omemakers are not engaged in business in the traditional sense with experience in maintaining business records."[220]

Similarly, the prohibition against regulating the home space was related to the activities happening in it. The committee report that supported the exemption of live-in domestic workers from overtime stated: "Ordinarily such an employee engages in normal private pursuits such as eating, sleeping, and entertaining, and has other periods of complete freedom. In such a case it would be difficult to determine the exact hours worked."[221] The state's perceived inability to properly see into homes, combined with the fact that non-work activities can also happen in these spaces, led to a policy decision that the economic value of paid labor in this space is incalculable and ultimately deflated compared to other low-income work.

It was a similar set of discursive concerns about the voyeur state that dominated the discussion about the OSH Act and home offices at the turn of the century. The fearmongering image of "Big Brother coming into people's homes to check the angle of their desk chair" successfully pushed OSHA to retreat from any enforcement of worker safety regulations in homes without the employer's cooperation.[222] California Governor Gavin Newsom's vetoing the extension of state-level protections to domestic workers, raised in the Introduction, is yet another recent addition to this line of rhetorical resistance to regulation of the home workplace. "Many individuals to whom this law would apply . . . lack the expertise to comply with these regulations," such as the duty to "create an injury prevention plan."[223] The investigation process and the prospect of inspection—even highly limited by procedural protections—is "onerous and protracted" for private homeowners and tenants.[224] These criticisms fall under one central concern about the bill failing to adequately address the "privacy of an individual's private residence."[225]

Speculation about the invasiveness of states' labor inspection, even when unsubstantiated or simply incorrect, continues to justify the opposition to including domestic workers in work law. In the most recent state-level Domestic Worker Bill of Rights debate in Virginia, a conservative state senator opposing the bill reasoned that "setting up a system where if you have someone who performs childcare in your home or cleans at your home, now the government is going to be able to come in to inspect that residence" even though the bill itself, as the sponsoring congresswoman repeatedly clarified, did not authorize state

[220] *Id.* at 82.

[221] GLENN, *supra* note 97, at 142.

[222] Leonhardt, *supra* note 187.

[223] Letter from Gavin Newsom to Members of the California State Senate, *supra* note 8, at 1.

[224] *Id.*

[225] *Id.*

inspection without employer's consent.[226] For some policymakers, the discursive speculation about state inspection alone amounts to a successful political narrative to not recognize rights for workers in the home workplace.

Undoubtedly, an ideological continuity exists between the resistance to labor regulation in the home out of family privacy concerns and the resistance, usually from the right, to inspection or labor regulations in any workplace based on the employer's property rights.[227] However, the notion of family privacy shields the home workplace more so than other workplaces, prompting regulatory resistance not only from the right but also the usual supporters of labor regulation, including the Democrat governor of California, one of the most progressive states.

B. *Extra Surveillance from Private and Public Employers*

At the same time, however, the current work law regime enables and, in some cases, mandates employers' extra surveillance of work inside homes. Working inside a by-default non-workplace—home—is subject to a different politics of time from that used when working inside institutional workplaces.[228] Generally, workers are presumed to be "working" at an institutional workplace, independent of what specific physical or mental activity they engage in on-site. In contrast, the perception that associates home with "idleness" and non-work remains powerful. Thus, employers—private and public, of care workers and WFH white-collar workers—tend to closely surveil their workers' productivity, carefully isolating units of compensable time from the presumption of non-work. I will discuss two examples of this distinct time politics: the Electronic Visitation Verification ("EVV") system for publicly funded home care workers and productivity tracking software for WFH white-collar workers.

1. The Care Bureaucracy Version

Home-based care work may happen in the home of the care worker, the care recipient, or a shared home. It commonly calculates payment by hour. The amount of time employed in care work in homes has long been seen as "boundaryless" and raises challenges for regulating working time.[229] Nevertheless, in the past few years, the public home care system has installed a task-based, digital-surveillance system to calculate and monitor home-based long-term care—one of the fastest growing labor market sectors.

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[226] Hunter Britt, *Virginia 10th State to Pass Domestic Worker Protections*, 29 NEWS, https://www.nbc29.com/2021/03/03/virginia-th-state-pass-domestic-worker-protections/ (last updated Mar. 2, 2021, 7:21 PM).

[227] *See, e.g.*, Cedar Point Nursery v. Hassid, 594 U.S. 139, 141 (2021) (finding California state labor law authorizing union representative's access rights to farmworkers violated Takings Clause of the Fifth Amendment).

[228] Dubal, *supra* note 11, at 9.

[229] BLACKETT, *supra* note 17, at 116.

Federal Medicaid regulations set the close digital surveillance of the home workplace as a condition for participating in Medicaid-funded programs, which constitute the majority of the home care market.[230] A 2016 federal law—the 21st Century Cures Act—mandated that all Medicaid-funded home care programs must furnish an EVV system.[231] A state's failure to install or retain a certain participation rate would result in a reduction of its federal Medicaid funding.[232] Federal regulations enforcing this statute require the EVV system to verify the type of task, date, location, recipient, provider, and starting and ending time of the service before each payment to the care worker.[233] Through various EVV systems, the home care worker has to verify their GPS location every few hours, log every care task, and sometimes upload pictures or videos of themselves with the care recipient for each visit.[234] The mandate of EVV does not apply to workers in Medicaid-funded institutional care settings.[235] In reality, the digital surveillance of nursing homes, unlike home care, responds more to concerns about consumer welfare rather than funding conditions and is more often subject to negotiation among consumers, their families, and care workers.[236]

Here, suspicion about work being conducted inside the home cannot be separated from the identity of the home-based workforce. This state-mandated surveillance of the home worksite primarily aims to combat welfare fraud in the public care system rather than protect the well-being of the care recipient or the worker.[237] The pervasive concern about fraud, as well as the political choice of digital surveillance as the anti-fraud enforcement tool, arise out of a political economy where the means-tested social service programs perpetuate a pervasive distrust in low-income care recipients as well as the predominantly low-income,

[230] LINA STEPICK & BROOKE ADA TRAN, FED. RSRV. BANK OF S.F., THE RAPIDLY GROWING HOME CARE SECTOR AND LABOR FORCE PARTICIPATION 12 (2022), https://www.frbsf.org/wp-content/uploads/rapidly-growing-home-care-sector-and-labor-force-articipation-sffed-cdrb-2022-02.pdf [https://perma.cc/RFN9-5D28] (finding that public funding covers about 71% of all home health care nationally).

[231] 21st Century Cures Act, 42 U.S.C. § 1396b(l).

[232] *Id.*

[233] *Id.*; Frequently Asked Questions: Section 12006 of the 21st Century Cures Act, U.S. DEP'T HEALTH & HUM. SERVS. 4 (May 16, 2018), https://www.medicaid.gov/federal-policy-guidance/downloads/faq051618.pdf [https://perma.cc/GV6K-29GT].

[234] *See* ALEXANDRA MATEESCU, DATA & SOCIETY, ELECTRONIC VISIT VERIFICATION: THE WEIGHT OF SURVEILLANCE AND THE FRACTURING OF CARE 6 (2021), https://datasociety.net/wp-content/uploads/2021/11/EVV_REPORT_11162021.pdf [https://perma.cc/2YDK-M7X7]; Alexandra Mateescu, *Working Against the Clock: Digital Surveillance in US Medicaid Homecare Services*, 60 J. SOCIO. 560, 561-62 (2024).

[235] *See* 42 U.S.C. § 1396b(l)(5)(A) (limiting application of electronic visit verification requirements to "personal care services" and "home health care services").

[236] Karen Levy, Lauren Kilgour & Clara Berridge, *Regulating Privacy in Public/Private Space: The Case of Nursing Home Monitoring Laws*, 26 ELDER L.J. 323, 361 (2018).

[237] *See* Zhang, *supra* note 99, at 1244-45.

minority women home care force.[238] In addition, the isolation of the home where the care recipient and the care worker are left alone, away from supervision by professionals, exacerbates suspicion of fraud and strengthens the motivation for digital surveillance.[239]

The extra scrutiny of home-based care work also leads the Medicaid-funded care program to adopt a finely cut, task-based approach to define and measure the economic value of such care work—which is equated with medical necessity in the public healthcare program.[240] This system cuts care down to the units of physical movements such as feeding and dressing the patient, and scrutinizes and even litigates by the unit of movement whether the need for each task is sufficient enough to amount to compensable "work."[241] For example, when an aspiration pneumonia patient requested an additional fifteen minutes per meal of paid time from the care worker, he had to litigate with the state Medicaid agency whether the activity of waiting for a patient to chew slowly for medical reasons was an active task of assistance with eating or a passive non-task of supervision.[242] The entrenched default that activities inside homes do not have economic value and a worker is "idle" inside home unless proven otherwise, combined with the public care system's disciplinary bureaucracy, leads to this meticulous policing the boundary of work time.

The installation of this task-based, digital surveillance tool into relational work inside homes was not free from struggle and resistance. Patient advocacy groups expressed concerns about the system's intrusion into their privacy and restraint on their life autonomy, while unions, representing home care workers, also reported the workforce's concerns about workplace autonomy.[243] As the delivery of care work often responds to spontaneous needs that cannot be accurately predicted by a task list or captured by digital data, the system relies on unpaid care work to mitigate the tension between the patient's demands and the payment system.[244] These concerns are more acute in states like California, where the majority of home care workers are family members and some live in the same homes as the patients.[245]

Nevertheless, from the state's perspective, privacy concerns of patients, workers, and other third parties inside these homes do not outweigh the need to

[238] *Id.* at 1245.

[239] *Id.*

[240] *Id.* at 1275.

[241] *Id.* at 1276.

[242] Medha Makhlouf, *Addressing the Harms of Bureaucratization in the Public Home Care System*, HEALTH L. JOTWELL (Sep. 15, 2023), https://health.jotwell.com/addressing-the-harms-of-bureaucratization-in-the-public-home-care-system/ [https://perma.cc/GGU3-BSTJ].

[243] Zhang, *supra* note 99, at 1279-81.

[244] *Id.* at 1278.

[245] Zoom Interview with Stasha Lampert, SEIU Analyst, SEIU Local 2015 (Oct. 24, 2023) (transcript on file with author).

impose extra surveillance on homes when the integrity of public funding is the concern. Thus, despite these concerns, the state has successfully installed a surveillance infrastructure in the homes of home care patients.

2. The Corporate America Version

The market norm for white-collar workers is not an hourly wage but a monthly salary, which usually entails a less specific calculation of working time. Yet, similar to hourly paid care workers, employers surveil WFH white-collar workers' mental activity down to the unit of single movements.[246] The home workplace, associated with "idleness," triggers the employer's perceived need to enforce the close surveillance of productivity even for the more privileged white-collar workforce.

The abrupt transition to WFH during the COVID-19 pandemic led to a drastic increase in employers' usage of laptop surveillance software. The dissolution of the shared physical space motivated employers to utilize digital surveillance to make sure that employees were actually working at home.[247] In April 2020, online searches for "how to monitor employees working from home" increased by 1,705%, and sales of digital surveillance software skyrocketed.[248] Technology development has enabled employers' digital surveillance capacity to an extent that was once unimaginable. The basic laptop surveillance software, Hubstaff, "constantly records the worker's keyboard strokes, mouse movements, and websites visited."[249] A program that goes further than Hubstaff takes videos of users' screens and can even take pictures via webcam every ten minutes to check that employees are at their computers.[250] The most tech-savvy program uses machine learning to measure how employees complete different tasks and

[246] *See* Danielle Abril & Drew Harwell, *Keystroke Tracking, Screenshots, and Facial Recognition: The Boss May Be Watching Long After the Pandemic Ends*, WASH. POST (Sept. 24, 2021), https://www.washingtonpost.com/technology/2021/09/24/remote-work-from-home-surveillance; *cf.* Nicholas Bloom, Ruobing Han & James Liang, *How Hybrid Working from Home Works Out* 16 (Nat'l Bureau of Econ. Rsch., Working Paper No. 30292, 2022), https://www.nber.org/system/files/working_papers/w30292/w30292.pdf [https://perma.cc/RZZ9-9LAL].

[247] Tammy Katsabian, *The Telework Virus: How COVID-19 Has Affected Telework and Exposed Its Implications for Privacy*, 44 BERKELEY J. EMP. & LAB. L. 141, 167 (2022) (noting that in the home-office, "the only way the employer has to verify that the worker is actually working is by using tracking programs").

[248] Chase Thiel, Julena M. Bonner, John Bush, David Welsh & Niharika Garud, *Monitoring Employees Makes Them More Likely to Break Rules*, HARV. BUS. REV. (June 27, 2022), https://hbr.org/2022/06/monitoring-employees-makes-them-more-likely-to-break-rules [https://perma.cc/6D6U-Z4BU] (reporting that Floridan company installed software on employees' computers that screenshots their desktop every ten minutes, and Amazon tracks smartphone data for its delivery drivers to monitor their efficiency).

[249] Katsabian, *supra* note 247, at 158.

[250] *Id.* at 159.

assigns productivity scores to each worker.[251] In practice, all of the laptop tracking software can be combined with old-school cellphone location data to verify the worker's physical engagement with work.[252]

In fact, digital surveillance technology not only makes the worker's home visible to the employer, but also in some aspects, it makes the home more visible than institutional workplaces. As tech law scholar Tammy Katsabian pointed out, the surveillance of home offices also infringes on the privacy of a worker's family members.[253] As a self-experiment, a *New York Times* journalist shared the surveillance materials generated from an employee-monitoring software, in which there is footage of the journalist playing with his children, as well as all the work and non-work emails in his inbox, his background music, and the recipe website he browsed between work tasks.[254] This is just a vivid example of how the surveillance of WFH fails to distinguish between the work and non-work activities it records.

Granted, digital surveillance technology can apply to white-collar workers in all types of spatial settings beyond just the home, and undoubtedly, some employers, such as Amazon, are notorious for their minute-by-minute tracking of their employees regardless of the type of work or location.[255] In this way, the heavily-surveilled home workplace might be a prelude to the future of work in general rather than an exceptional practice.[256] On the other hand, the employer's and society's suspicion of productivity and work inside the home leads to more prevalent and intense scrutiny of work inside the home workplace. For many knowledge workers, the digital surveillance practice arrived with the massive transition to WFH.[257] For workers who were already being surveilled in institutional workplaces, transitioning to WFH brought stricter surveillance

[251] *Id.* at 160.

[252] Bobby Allyn, *Your Boss Is Watching You: Work-from-Home Boom Leads to More Surveillance*, NPR (May 13, 2020, 5:00 AM), https://www.npr.org/2020/05/13/854014403/your-boss-is-watching-you-work-from-home-boom-leads-to-more-surveillance [https://perma.cc/MRL5-BF8P] (reporting employee's experience of being ordered by her employer to download a location-tracking cellphone app called TSheets).

[253] Katsabian, *supra* note 247, at 174 (noting that activities of workers' family members, who may use the same technological device on which the tracking program was installed, may be documented and exposed to the employer).

[254] Adam Satariano, *How My Boss Monitors Me While I Work from Home*, N.Y. TIMES, https://www.nytimes.com/2020/05/06/technology/employee-monitoring-work-from-home-virus.html (last updated May 7, 2020).

[255] Kantor & Sundaram, *supra* note 15.

[256] On digital surveillance of spatially diverse workplaces, see KAREN LEVY, DATA DRIVEN: TRUCKERS, TECHNOLOGY, AND THE NEW WORKPLACE SURVEILLANCE (2023); and BRISHEN ROGERS, DATA AND DEMOCRACY AT WORK: ADVANCED INFORMATION TECHNOLOGIES, LABOR LAW, AND THE NEW WORKING CLASS (2023).

[257] Allyn, *supra* note 252 (discussing companies' increased use of employee surveillance software, such as Time Doctor, in response to pandemic-era remote work surge).

mechanisms, such as mandatory sharing of productivity points.[258] Employers also use digital surveillance records for immediate employment decisions, such as payment docks for work inside the home workplace.[259] For example, UnitedHealth calculates a remote employee's daily salary based on the tracked "idle time" on their laptop, prompting its managers to remind workers to jiggle mice during meetings and training sessions.[260] In other workplaces, such as New York's Metropolitan Transportation Authority, a public-sector workplace, the employee's consent to full-time productivity monitoring is a condition to obtain the employer's permission to WFH.[261] These practices of extra employer surveillance trace back to the root intuition that the home is a less productive, idle, non-workplace space, despite conflicting research on the actual productivity effect of moving work into homes.[262]

Like the care bureaucracy's version of work calculation, digital surveillance systematically makes mistakes since it uses the physical movements of keyboard strokes and sitting in front of the webcam as tokens for measuring work activity.[263] More often than not, workers bear the costs of such mistakes. Time spent on offline activities such as reading printouts, thinking, or communicating with clients may get categorized as "idle" or non-work.[264] As a result, the worker, not the employer, bears the costs of this rebuttable presumption of home as non-workplace.

This practice of extra employer surveillance is enabled by a legal regime where workers, especially those in the private sector, largely do not have a right to privacy in the workplace, including the home workplace.[265] According to the

[258] Kantor & Sundaram, *supra* note 15 (noting that Allina Health was already tracking productivity, but implemented stricter procedures including software that tracked the number of "productivity points" a worker received).

[259] *Id.* (describing how an employer used a monitoring system for remote workers and paid them only for the minutes when the system detected active work).

[260] *Id.*

[261] *Id.*

[262] *Compare* Nicholas Bloom, James Liang, John Roberts & Zhichun Jenny Ying, *Does Working from Home Work? Evidence from a Chinese Experiment*, 130 Q.J. ECON. 165, 169 (2015) (finding that the performance of home-based workers went up dramatically and increased by 13% due to a reduction in breaks, time off, and sick days taken by home workers), *with* Natalia Emanuel & Emma Harrington, *Working Remotely? Selection, Treatment, and the Market for Remote Work*, 16 AM. ECON. J.: APPLIED ECON. 528, 530 (2024) (suggesting that remote work's negative productivity effects would be outweighed by the savings in reduced office space and lower worker turnover), *and* Thiel et al., *supra* note 248 (finding that monitored employees were substantially more likely to take unapproved breaks, disregard instructions, and work at a slower pace).

[263] Kantor & Sundaram, *supra* note 15 (reporting that UnitedHealth social workers were marked idle for lack of keyboard activity while they were counseling patients).

[264] *Id.* (describing how any snapshot from the surveillance technology in which a worker had paused or momentarily stepped away could cost them ten minutes of pay).

[265] Katsabian, *supra* note 247, at 166.

Restatement (Second) of Employment Law, "the employee seemingly does not have a right to privacy in regard to 'information that is relevant to the company's business needs.'"[266] As long as the employer notifies the employee that she is being supervised, the employer has a right to monitor her actions in the workplace, including the home workplace.[267] Even recent state legislation relating to work laws, which intends to protect workers' digital privacy, does not impose on the employer any duty beyond providing the employee a written notice about their monitoring practice.[268] The employer's uncomfortably close surveillance of employees' movements is justified by the employer's business need to verify that the employee is actually working during the paid hours under the current employment law.[269] Furthermore, the federal Electronic Communications Privacy Act of 1986 that prohibits intentional interception of electronic communications has a broad workplace exception that permits employers to monitor business-related communications, other communications by consent, and access employee emails stored by the employer.[270]

To conclude, the legal system permits the employer's close surveillance of all kinds of workspaces, extending very minimal privacy rights to employees, regardless of whether they are in institutional or home workplaces. However, the widespread, not necessarily substantiated, skepticism toward work in homes motivates private and public employers to impose extra surveillance on the home workplace.

3. Time Politics in the Home Workplace

Underlying both the punctilious task-list for care work calculations and the digital productivity tracker for knowledge workers is the revived connection between the home workplace and piecemeal compensation. For some low-skill and home-based tech work, the piecemeal system has long been explicit. For example, Amazon Mechanical Turk pays individual workers by the aggregate piece of data-related microtasks they complete.[271] Similarly, when UnitedHealth pays its WFH employees by the duration of active keyboard strokes, or Medicaid calculates the paid care hours by summing up the physical tasks, one cannot help

[266] *Id.* at 167 (quoting Restatement (Second) of Emp. § 7.04(c)(ii) (2015)).

[267] *Id.* at 166 (noting that under Restatement (Second) of Employment Law, "the right to privacy in the workplace mainly requires notifying the employee that she is supervised," and it does not require the employee's "genuine" agreement to such intrusion).

[268] *See, e.g.*, N.Y. CIV. RIGHTS LAW § 52-c (McKinney 2022) ("Any employer who monitors or otherwise intercepts telephone conversations or transmissions, electronic mail or transmissions, or internet access or usage of or by an employee . . . shall give prior written notice upon hiring to all employees who are subject to electronic monitoring.").

[269] Katsabian, *supra* note 247, at 167.

[270] Electronic Communications Privacy Act of 1986, 18 U.S.C. § 2511(2)(d) (providing that it is not unlawful for a person to intercept a wire, oral, or electronic communication, where "one of the parties to the communication has given prior consent to such interception").

[271] Dubal, *supra* note 11, at 2-3.

but see the similarity in their mode of compensation to the piecemeal garment workers in 1920s tenements.

As work law scholar Veena Dubal observes, one shared concept of various workers in home workplaces is that they are working "on their 'own' time" because of the blurred boundary between work and other activities.[272] As workers in the home can do other activities with no economic value to their employers, such as caring for their own child, doing yardwork, watching TV, or simply resting, the default use of time inside the home is non-work. Work in the home thus requires independent corroboration.

C. *Privacy in a Digitally Visible Home Workplace*

Feminist scholars have long raised the paradox of family privacy and the accompanied rhetoric of "state non-intervention" in family life.[273] One critique focuses on the notion's internal incoherence: as the state inevitably makes political choices that impact the power dynamics in the family, the idea of family or home life as protected from state intervention is not possible.[274] Another important critique focuses on race and class dimensions. As Khiara Bridges shows in her book *The Poverty of Privacy Rights*, the state has exerted pervasive surveillance over the family life of poor, Black, single mothers, unrestrained by concerns for family privacy.[275] Nor is the notion of family privacy unchangeable. For example, feminists' decades-long advocacy has profoundly reshaped the state's reaction against domestic violence, which was once shielded under "family privacy."[276]

The proliferation of paid work in the home and the new digital visibility of the home workplace warrants yet another revisit of the notion of "state non-intervention" and its implications for labor regulation. Even outside the work context, nanny cameras, home security systems, social media contents, and more have exposed many aspects of the home to different entities for various purposes. This electronic communication infrastructure also makes the home more connected with the outside world than ever before. To some extent, the home is no longer exceptionally invisible as compared to other social spaces. As family law scholar Clare Ryan argues, the increasing digital interconnectedness

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[272] *Id.* at 5.

[273] *See generally* Olsen, *supra* note 66 (arguing that the private family is an incoherent ideal because the state is allowed to intervene to correct inequality or prevent abuse in the family).

[274] *See id.* at 842.

[275] KHIARA M. BRIDGES, THE POVERTY OF PRIVACY RIGHTS 126 (2017) (arguing that child protective agencies assume character and behavioral deficiencies in poor mothers and intervene to fix perceived flaws in the mothers).

[276] *See generally* SUK, *supra* note 68 (discussing how the call for the criminalization of domestic violence is a characteristic goal of legal feminism, and the recognition of domestic violence as a public issue is manifest in law reform aimed at treating domestic violence as a crime).

of the home makes it a public/private space, which demands a new legal basis for the law of the parent/child relationship.[277]

A parallel shift is warranted for work law too. In the work law context, it is the public and private employers' extra surveillance that has made the home workplace more digitally visible than ever before. In a legal system that enables and even mandates such employer surveillance, it is at least inconsistent and perhaps hypocritical to stick to the discursive stance that state inspection for workers' welfare, or even the threat of it, is enough to veto the workers' rights to labor regulations and protection.

This new material context of the home workplace does not mean that privacy is no longer a legal or policy concern. Quite the opposite, the fact that at least some of us feel disturbed by some of the home surveillance tools directly speaks to the need to protect privacy in the home and in other workplaces. Nevertheless, it testifies to an understanding of privacy that some privacy scholars state: privacy is not merely a right shielding individual interests from the rest of the world, but a value and concept embraced and advanced by a community, and thus, it should be constantly renegotiated by such a community along with the technological and other material changes related to visibility.[278]

Indeed, the state already inspects the home workplace for various purposes other than enforcing workers' rights. For example, many states' licensure laws for home-based childcare providers mandate inspections (including unannounced visits) of the providers' homes for safety and health compliance.[279] Such inspections may extend to the residential space of the home and to other family members residing in the home, who do not participate in the paid childcare operations.[280] The U.S. Securities and Exchange Commission has also installed a set of permanent regulatory rules for remote inspections of brokers' home offices.[281] Recent regulations regarding the H-1B work visa also allows federal immigration law agents to conduct visa compliance reviews at immigrant workers' home workplaces to detect visa fraud.[282] Seemingly, the state has the power and the means to inspect the home as a workplace for the purposes of

[277] Clare Ryan, *The Public/Private Home*, 110 CORNELL L. REV. (forthcoming 2025) (stating that social media documentation of home life has made the home a "public stage," which challenges the traditional conceptualization of family privacy).

[278] Katsabian, *supra* note 247, at 164 (explaining how privacy is understood as being important for the community and that a community must embrace the concept of privacy to protect the community's existence as a moral and democratic entity).

[279] Zhang, *supra* note 152, at 78-79.

[280] *Id.* at 79.

[281] Miriam Rozen, *SEC Blesses Relaxed Rules for Supervising Brokers Working from Home*, ADVISORHUB (Nov. 20, 2023), https://www.advisorhub.com/sec-blesses-relaxed-rules-for-supervising-brokers-working-from-home/ [https://perma.cc/E3KX-RUQ2].

[282] Andrew Kreighbaum, *Biden H-1B Visa Rules Give Trump More Power to Police Fraud*, BLOOMBERG L. (Dec. 20, 2024, 5:00 AM), https://www.bloomberglaw.com/product/blaw/bloomberglawnews/daily-labor-report/BNA%2000000193-db43-d49e-a9b7-dbc372ab0001.

child welfare, fair stock dealings, and immigration visa integrity. Thus, the updated notion of privacy in the digitally visible home workplace is at least compatible with some labor regulations and should no longer unconditionally deter any labor inspection.

The reality of enhanced digital visibility of home for work and non-work reasons moves the question from "whether" to "how": how will inspection and regulation operate in various workplaces given the new reality of work?

IV. NORMALIZING THE HOME WORKPLACE

The last Part suspends the ideological presumption of home as a lesser or non-workplace and envisions a pathway forward to normalize the home workplace in law. Normalizing the home workplace does not necessarily mean that a home should be treated the same as an institutional office. A worker's interest in the home workspace may be multi-fold and informed by their multiple relationships with the space. As the history of industrial home work regulations informs us, a top-down regulatory approach without workers' participation can lead to policies that are not in the interests of workers.[283] Rather, I contend that normalizing the home workplace demands a spatial shift of work law to center on the specific home workplace in determining what work law rights and regulations are relevant to a substantial portion of today's workforce, who spend at least some part of work life inside a home or home-like space.

Normalizing the home workplace includes, but goes beyond, "de-exceptionalizing" the home workplace, an approach that extends all existing work law rights and regulations—often legislated on the basis of harms and vulnerabilities associated with institutional workplaces—to all workers laboring in homes and then enforces such rights through a selection of institution-based enforcement tools compatible with home-based work. This approach inevitably leads to a compromise of fewer work law rights for home-based workers and can perpetuate inequality between home and other workplaces.[284] Rather, normalizing the home workplace demands materially evaluating the harms associated with working at home, including those shared with institutional workplaces and those unique or outstanding to home workplaces. Normalization also requires innovative enforcement measures for home workplaces, including existent and creative ones that may be more suitable for homes, such as community-based enforcement. In other words, home workplaces can be regulated differently than institutional ones, but the difference should be based on the material conditions of the work, not the ideological intuition about the workplace. The rest of this Part is meant to be a provocative rather than exhaustive discussion under this approach.

[283] *See supra* Part I.B. *See generally* BORIS, *supra* note 29.

[284] BLACKETT, *supra* note 17, at 79.

A. *Separating Harm from Enforcement*

The first step of normalizing the home workplace is to separate regulation-triggering workplace harms from the question of what state enforcement is plausible in the home workplace. The potential enforcement challenges do not erase concerns about workplace harm. As mentioned, Californian domestic workers' struggle to gain state OSH Act protection offers a counterexample to this approach where the two questions are flattened into one, resulting in the continuing non-regulation of home as workplace.

California's OSH Act of 1973 applies a stricter health and safety standard than its federal counterpart to almost all private and public workers in the states, with the only industry-based exception being "household domestic service."[285] More expansive than analogous state laws, the California OSH Act addresses some specific workplace hazards, such as high-rise window cleaning, and requires more prevention programs, such as one addressing repetitive motion injury.[286] The law also criminalizes violations and authorizes labor inspectors and investigators to enter the workplace during working hours, removing a major obstacle blocking domestic workers' pathway to inclusion.[287]

The California Domestic Workers Coalition, among other organizations, has long advocated for health and safety rights as part of the efforts to patch the work law black hole for domestic workers.[288] Health and safety rights were in the first

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[285] CAL. LAB. CODE § 6303 (West 2024) (excepting "household domestic service" from relevant definition of "employment"). Since the time of writing, Governor Newsom signed into law Senate Bill 1350, which nominally included "household domestic service" into the definition of employment, but retained the exception for three broad classes of household domestic workers on which this Article has focused: (1) "[h]ousehold domestic service that is publicly funded," (2) "[e]mployment in family daycare homes," and (3) individuals who, in their own homes, privately employ persons to perform "ordinary domestic household tasks, including housecleaning, cooking, and caregiving." *See* S.B. 1350, 2023-2024 Leg., Reg. Sess. (Cal. 2024). The National Domestic Workers Alliance applauded this legislative victory for agency-hired workers, but recognized that "this is just one step toward achieving true equality and justice for this critical workforce." *See National Domestic Workers Alliance Applauds Governor Newsom's Signature of SB 1350*, *Protecting Over 175,000 Agency-Hired Domestic Workers*, NAT'L DOMESTIC WORKERS ALL. (Sept. 30, 2024), https://www.domesticworkers.org/press-releases/national-domestic-workers-alliance-applauds-governor-newsoms-signature-of-sb-1350-protecting-over-175000-agency-hired-domestic-workers/ [https://perma.cc/H96B-J9PZ]. This change goes into effect July 1, 2025. Cal. S.B. 1350.

[286] Virginia McCormick, *Cal/OSHA vs. Federal OSHA*, NES, https://nes-ehs.com/ehs-compliance/cal-osha-vs-federal-osha/ [https://perma.cc/E7TK-29TE] (last visited Apr. 8, 2025).

[287] CAL. LAB. CODE § 6314 (West 2025) (authorizing investigators to inspect any place of employment during working hours); CAL. LAB. CODE § 6423 (West 2025) (imposing penalties for violations of labor provisions, including misdemeanor conviction).

[288] CAL. DOMESTIC WORKERS COAL., https://www.cadomesticworkers.org [https://perma.cc/WL5N-F694] (last visited Apr. 8, 2025).

version of the state Domestic Worker Bill of Rights that passed the legislature but was vetoed by then-Governor Jerry Brown.[289] A thinner version of the bill took effect in 2013 without the health and safety rights.[290] In support of including domestic workers in the state OSH Act, multiple research and advocacy institutions conducted research about the prevalence of workplace safety and health hazards for domestic workers.[291]

In 2020, the California legislature passed a bill (S.B. 1257) that erased the "household domestic service" exemption in the state OSH Act law, de-exceptionalizing the home workplace.[292] Not unaware of the public aversion toward state actors inspecting homes, the bill introduced a special procedure for investigating residential dwellings that mandates telephone notice and obtaining employer consent or a search warrant before entering the home and provides extra privacy protection during onsite inspection.[293] The only exception to these procedures is the circumstance of severe injury or death.[294] The bill also mandated the creation of an advisory committee made up of domestic service workers and employers "who represent diverse stakeholders" to promulgate industry-specific regulations.[295] Despite these carve-outs, Governor Newsom vetoed the bill. His veto message recognized domestic workers have a justified right to labor regulations but refused to bring residential dwellings into the jurisdiction of California division of Occupational Safety and Health ("Cal/OSHA"), arguing that the proposed inspection procedure was too onerous for domestic employers.[296]

In the aftermath of the 2020 veto, the legislature passed a law to convene an advisory committee to make voluntary industry guidelines for domestic employers and fund community-based organizations ("CBO") to conduct outreach and education programs.[297] In 2023, the legislature reintroduced the

[289] H.R. 11, 2011 Leg., Reg. Sess. (Cal. 2011).

[290] Domestic Worker Bill of Rights, ch. 374, 2013 Cal. Stat. 3425 (2013) (codified at CAL. LAB. CODE §§ 1450-54 (West 2025)) (enacting final version of labor standards for domestic work employees).

[291] *See, e.g.*, UCLA LAB. OCCUPATIONAL SAFETY & HEALTH PROGRAM, HIDDEN WORK, HIDDEN PAIN: INJURY EXPERIENCES OF DOMESTIC WORKERS IN CALIFORNIA (2020), https://losh.ucla.edu/wp-content/uploads/sites/37/2020/06/Hidden-Work-Hidden-Pain.-Domestic-Workers-Report.-UCLA-LOSH-June-2020-1.pdf [https://perma.cc/R33J-JX6R].

[292] Employment Safety Standards: Household Domestic Services, S.B. 1257, 2020 Leg., Reg. Sess. (Cal. 2020).

[293] *Id.* § 3.

[294] *Id.*

[295] *Id.* § 2.

[296] Letter from Gavin Newsom to Members of the California State Senate, *supra* note 8, at 1 ("In short, a blanket extension of all employer obligations to private homeowners and renters is unworkable and raises significant policy concerns.").

[297] Employment Safety Standards: Advisory Committee: Household Domestic Services, S.B. 321, 2021 Leg., Reg. Sess. (Cal. 2021) (establishing employment safety standards for

bill to remove the same exemption. This time, building on the success of CBOs' outreach efforts and voluntary guidelines, the bill proposed to routinize the programs and transform the voluntary guidelines into industry regulations. Without authorizing any form of inspection, the 2023 bill leaned much more heavily on employer consultation and voluntary correction to improve health and safety conditions.[298] Despite these efforts to soften the regulatory scheme, Governor Newsom vetoed the 2023 bill again, reasoning that removing the domestic service exemption may subject private households to unexpected OSH Act obligations and that the bill did not explicitly specify voluntary correction as the exclusive enforcement mechanism.[299]

In this back-and-forth legislative process, the question of workplace safety and health concerns for domestic workers has transformed into whether any, or all of, the existing Cal/OSHA enforcement tools can be used in homes. As the existent rules and legal imagination have largely been promulgated based on institutional workplaces, they include inspection and other punitive measures. Consideration of the enforcement question centers on inspection even though workplace safety and health standards—like other labor standard statutes—is primarily enforced through worker complaints, rather than state inspection. Nevertheless, the prospect of any regulatory inspection from the state—even a softened and consent-based version—into private homes amounts to a politically distasteful state intervention. This process leads to the denial of rights to domestic workers laboring in the space of the home and leaves the harm they face in their workplaces legally unrecognized. To some extent, the ideological intuition that home is incompatible with labor regulation is—again—self-fulfilling.

To meaningfully address the concerns about workplace harm and appropriate enforcement demands separating the two in policy-making processes. Deliberating both questions also demands moving away from the "de-exceptionalizing" framing, which has considered whether and how much of the status quo regulatory regime can be extended to homes. Rather, the questions should be: is there some workplace harm in the specific home workplace that warrants state intervention, and what state enforcement is possible and appropriate for this specific home workplace? The broader question is: what should work law look like if the home is the default workplace?

household domestic workers, including education initiatives about hazards and injury prevention for employers and employees).

[298] Domestic Workers: Occupational Safety, S.B. 686, 2023 Leg., Reg. Sess. (Cal. 2023) (amending California labor code to improve occupational safety standards for household domestic workers through employer participation and agency).

[299] Letter from Gavin Newsom, Governor, California, to Members of the California State Senate (Sept. 30, 2023), https://www.gov.ca.gov/wp-content/uploads/2023/09/SB-686-Veto-Message.pdf [https://perma.cc/ZW2S-RNFZ].

B. *Harms in the Home Workplace*

Centering the material conditions of the home workplace in re-imagining work law protections exposes the harms that justify labor regulation, some shared with institutional workplaces and others distinct or outstanding for homes.

1. The Shared Harms

Labor feminists have repetitively refuted the belief that work inside the home is less harmful or risky compared with jobs outside it, or that employers inside the home workplace are somehow more generous or amicable so their workers do not need state protection.[300] Labor law scholar Peggie Smith has recorded the safety and health harms associated with domestic work. Workers cleaning homes are exposed to the same health risks arising from toxic chemicals in cleaning products, unsafe appliances, and as much muscle exhaustion from the workplace as workers cleaning hotels.[301] Exposure to toxic cleaning products leads to a heightened risk for asthma, chronic bronchitis, and other respiratory symptoms.[302] In fact, house cleaners face a heightened risk of such harm because of their lack of training and knowledge about toxic chemicals.[303]

A 2020 report published by UCLA Labor Occupational Safety & Health Program against the background of California OSH Act debates also shows that housecleaners and care workers share similar workplace hazards, such as repetitive motions, lifting of heavy objects, and exposure to chemical and biological hazards and the same type of musculoskeletal injury as nurses in hospitals and cleaners in hotels and offices.[304] Workplace injuries arising out of these hazards can result in medical bills, inability to work, and financial stress on the workers' families, just as they do to other workers. In addition, the report finds that many domestic workers are not able to access workers' compensation due to their employer's non-contribution, which makes the same workplace injury more burdensome to domestic workers than workers in more formal jobs.[305] The report also finds that the same set of regulatory protections of the California OSH Act can prevent many of these injuries, as it does for counterpart workers in institutional settings.[306]

Some employers of domestic workers may share health and safety risks with their employees when they perform unpaid care work for their own family, which is hidden under the same ideology that activities at home are amateur and

[300] Smith, *supra* note 7, at 313-18.

[301] *Id.* at 318-19.

[302] *Id.* at 318 (citing 2003 study finding link between exposure to cleaning materials and increased risk of respiratory illnesses).

[303] *Id.* at 319 (citing 2009 study finding knowledge of cleaning products, and therefore knowledge of harm mitigation, was related to domestic workers' training levels).

[304] UCLA LAB. OCCUPATIONAL SAFETY & HEALTH PROGRAM, *supra* note 291, at 1.

[305] *Id.* at 11.

[306] *Id.* at 1.

do not demand training or protection.[307] The safety and health training that new laws could obligate the employer to provide may indeed improve the domestic employer's knowledge about the hazards of toxic cleaning products. Thus, labor regulation has the potential to benefit those beyond the paid domestic workforce, further challenging the ideological view of home as harm-free. Similarly, some occupational health issues associated with office work, such as carpal tunnel syndrome and other diseases resulting from repeated movements, also exist in home offices.

The shared harms between home and institutional workplaces justify an inclusion of home into the existing work law despite the challenges of enforcement.

2. The Heightened Harms of Isolation and Overwork

Centering the material conditions of the home workplace in re-imagining work law protections also reveals some harms that are disproportionately, though not uniquely, associated with working inside a private home. These harms can warrant work law protection, or at least a discussion about it. Some harm is less pronounced in group workplaces and, consequently, very rarely considered in the status quo work law. This Section will discuss two examples: isolation and union access rights, and the lack of a work boundary and work time regulations.

In her famous essay that critiques housework, work law scholar Vicki Schultz lists several negative qualities of unpaid housework that offset the perceived benefits of work: "isolation from peers, the inherent monotony and repetitious quality . . . and a lack of control that comes from feeling that one is always 'on call.'"[308] This last factor—the absence of boundaries—is so uniquely harmful that, according to Schultz, "[i]f one compares housework to paid work, it becomes apparent that full-time homemaking is the only job in which the worker is expected to be on duty twenty-four hours a day."[309] While Schultz's critique is towards unpaid labor of housewives, two of the three negative qualities she raised are still relevant to most paid jobs—including care work or WFH white-collar work—inside home workplaces: isolation from peer workers and a lack of work/nonwork boundary.

Workers laboring full-time in private homes are systematically more isolated from peer workers than their counterparts in group workspaces. For example, a poll of remote workers shows that 50% of them feel less connected to colleagues.[310] A six-month study of more than 60,000 Microsoft workers also

[307] Smith, *supra* note 7, at 316-17 (refuting perceptions of housework as safe and healthy for employees and employers).

[308] Vicki Schultz, Essay, *Life's Work*, 100 COLUM. L. REV. 1881, 1910 (2000).

[309] *Id.*

[310] Roy Maurer, *Remote Workers Experiencing Burnout*, SHRM (May 29, 2020), https://www.shrm.org/hr-today/news/hr-news/pages/remote-workers-experiencing-burnout.aspx [https://perma.cc/K6XS-5NAE].

found that remote work leads to a more siloed collaboration network and less communication across different parts of the workforce.[311]

The spatial and social isolation of workers in home workplaces may raise concerns for labor organizing and workers' rights under the NLRA. As *Washington Post* columnist Megan McArdle writes from her own experience as a home-based worker, "a lot of organizing happens through the social networks that form at the coffee machine and the company picnic," from which WFH workers are left out.[312] Systematic spatial isolation also makes home-based care workers a workforce notoriously hard for organizers to reach. As a former SEIU organizer Johnnie Kallas recalled about his organizing efforts in Ohio, it was so impossible to locate home-based healthcare workers due to their dispersed workplace that the organizers had to resort to a "dumpster dive" behind the home healthcare agency, hoping to obtain some deserted files containing a list of workers' names.[313]

NLRA rights can and must be re-interpreted to stay relevant for home workplaces. On the one hand, the current NLRA access and distribution rights for employees apply to "nonworking areas" during "nonworking hours," temporal and spatial distinctions that are almost irrelevant to home-based workers.[314] On the other hand, informational isolation suffered by workers in home workplaces can potentially justify heightened union access rights even under current jurisprudence. In the 1992 case *Lechmere, Inc. v. NLRB*,[315] the Supreme Court held that non-employee union organizers do not have any labor law rights to access the employer's property unless "the location of the employer's place of business and the living quarters of the employees place the employees beyond the reach of [the union's] reasonable efforts to communicate with them."[316] The employees' right of self-organization under the NLRA depends "in some measure on [their] ability . . . to learn the advantages of self-organization from others."[317] Thus, the Supreme Court carved out an exception for non-employee access to employer's property to protect the "§ 7 rights of those employees who, by virtue of their employment, are isolated from the

[311] Longqi Yang et al., *The Effects of Remote Work on Collaboration Among Information Workers*, 6 NATURE HUM. BEHAV. 43, 49 (2022).

[312] Megan McArdle, Opinion, *Unions Are Making Remote Work a Contract Issue. Could That Backfire?*, WASH. POST (Sep. 22, 2022), https://www.washingtonpost.com/opinions/2022/09/22/unions-oppose-return-office/.

[313] Interview with Johnnie Kallas, Former Organizer, SEIU (Oct. 4, 2023) (discussing challenges unions now face in reaching and organizing home-based workers).

[314] Eastex, Inc. v. NLRB, 437 U.S. 556 (1978).

[315] 502 U.S. 527 (1992).

[316] *Id.* at 542 (White, J., dissenting) (summarizing majority's balancing of property and organizational rights under NLRA).

[317] *Id.* at 532 (majority opinion) (citing NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956)).

ordinary flow of information that characterizes our society."[318] In *Lechmere*, the fact that the employees did not reside on the employer's property generated the presumption that they were not "beyond the reach."[319] Despite the constraining impact of the more-recent decision in *Cedar Point Nursery v. Hassid*,[320] where the Supreme Court eliminated a comparable union access right under a California labor law for agricultural workers, *Lechmere*'s holding on the NLRA access rights remains good law.[321]

Undoubtedly, residential homes are not logging camps or mountain resort hotels, the classic examples that the *Lechmere* majority confirms as satisfying the access exception.[322] Depending on the employment relationship, the home workplace might be the property of the employer, the employee, or a third party. But the same set of considerations that *Lechmere* lays out apply to many home-based workers. Because of the nature and location of their employment, they are "isolated from the information flow" of the peer workforce and cannot realize their ability "to learn the advantages of self-organization from others."[323] This is especially true for care workers inside homes.[324] Union organizers' desperate resort to techniques like dumpster diving for old files in order to access home care workers testifies to the fact that "the location of [the employer's place of business] and the living quarters of the employees"—private homes dispersed in residential areas—indeed place them "beyond the reach of reasonable union efforts to communicate with them."[325] In addition, some workers, like live-in care workers, indeed satisfy the "beyond reach" assumption. Even care workers who reside in a non-employer client's home are similar to those in ski resorts and logging mines from an information flow perspective, despite the different property rights considerations.

The labor law concerns of isolation are less pronounced but not nonexistent for WFH white-collar workers. Although WFH workers are connected to the electronic communication infrastructure that enables WFH in the first place, WFH does lead to a reduction in or disappearance of intercolleague social contact as well as legally protected communication spaces.[326] The spatial transformation of work also challenges the labor law to protect the same rights by adapting the spatial imagination of access and distribution rights.

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[318] *Id.* at 540.

[319] *Id.*

[320] 594 U.S. 139, 157 (2021).

[321] *Id.* (holding California's union access regulations effected physical takings in violation of the Constitution).

[322] *Lechmere*, 502 U.S. at 539 ("Classic examples include logging camps, mining camps, and mountain resort hotels." (citations omitted)).

[323] *Id.* at 540, 542.

[324] For legal construction that transcends the exclusions, see Bigley, *supra* note 156.

[325] *Lechmere*, 502 U.S. at 539.

[326] *See* William "Rick" Crandall & Longge Gao, *An Update on Telecommuting: Review and Prospects for Emerging Issues*, SAM ADVANCED MGMT. J., Summer 2005, at 30, 32.

Thus, the reasoning and policy goals per *Lechmere* support at least the possibility of heightened union access rights in the case of some home workplaces. Again, having extra union access rights does not necessarily lead to the right of non-employee organizers to physically enter the home. The next Section will discuss cyber access as a potential vindication of this right.

The second outstanding concern about the home workplace is the boundarylessness between work and non-work. Contrary to widespread employer concerns, the lack of boundaries inside homes does not always lead to underwork or to the detriment of the employer's interest.[327] In fact, a human resources survey with 800 large employers found that productivity was the same or higher when moving to remote work during the COVID-19 pandemic.[328] On the other hand, working from home does not naturally solve time-related constraints of work generally, such as work/family balance.[329] Rather, it often creates a paradox between autonomy and self-exploitation, raising a different series of time-related workplace concerns deserving policy attention.[330] When the workers are seemingly "on their own time" inside homes, every hour could be a working hour, and actually becomes so.

The home workplace is often associated with the self-exploitation of long and irregular working hours. Historian Eileen Boris finds a common trend of self-exploitation among various types of home-based work across historical stages and industries.[331] Even though workers in home workplaces gain more flexibility in hours compared to counterparts in institutional workplaces, they tend to work long hours with a diminished economic reward for their extra working hours.[332] Pre-pandemic management research about mobile email devices finds that the omnipresent communication tools—which are meant to enable workers' autonomy over time and space of work—enact a norm of continual connectivity and accessibility, which eventually diminishes their autonomy over work

[327] Wen Fan & Phyllis Moen, *Working More, Less or the Same During COVID-19? A Mixed Method, Intersectional Analysis of Remote Workers*, 49 WORK & OCCUPATIONS 143, 169-72 (2022) (finding that increased work hours during pandemic resulted from blurred boundaries between work and home, increased distractions during the day, staff shortages, and more).

[328] Roy Maurer, *Study Finds Productivity Not Deterred by Shift to Remote Work*, SHRM (Sept. 16, 2020), https://www.shrm.org/hr-today/news/hr-news/pages/study-productivity-shift-remote-work-covid-coronavirus.aspx [https://perma.cc/8M6J-PX56] (reporting that 94% of surveyed employers indicated that productivity had stayed the same or increased during the pandemic).

[329] Duanyi Yang, Erin L. Kelly, Laura D. Kubzansky & Lisa Berkman, *Working from Home and Worker Well-Being: New Evidence from Germany*, 76 ILR REV. 504, 507 (2023).

[330] *Id.* at 508 ("[W]orking from home is understood as a negotiated accommodation or perk so workers may feel obligated to do more work in exchange." (citations omitted)).

[331] Boris, *supra* note 19, at 12.

[332] *Id.* at 11 (finding that the shift to "outwork" for women in the early textile industries led to increased hours yet reduced wages).

time.[333] A larger-scale version of this phenomenon emerged during COVID-19. Various surveys during the COVID-19 era showed that WFH workers were working for longer hours, outside their regular hours, and experienced burnout as a result, compared to in-person work.[334] Various pre- and post-pandemic research suggests the same trend of longer hours for WFH workers.[335] Research about remote work during the COVID-19 pandemic also reveals that a significant part of the work done in homes occurs outside of regular work hours, which causes a series of negative worker well-being consequences, such as lower psychological well-being and higher work/family conflicts.[336]

The time politics for domestic workers have the additional twist that they are not necessarily "on their own time" despite perceptions to the contrary. They have to respond to not only the employer's and sometimes the state's time discipline, but also the sometimes urgent or life-threatening needs of the person they are taking care of. The explicit coercion from others can coincide with and reinforce the tendency to work outside working hours.

One shared root issue beneath all these time-related symptoms is the lack of an effective boundary of work. When the mainstream presumption of home as the spatial barrier against the encroachment of work loses meaning, the home workspace, as it stands, does not provide any meaningful buffer from work itself and the stress from the potentiality of work.[337] Vicki Schultz's diagnosis of housewives' unique issue, a sense of noncontrol from the feeling of always being "on call," now applies to paid care workers as well as lawyers, computer engineers, data analysts, and many others working in the home workplace.[338]

The current work law offers very limited solutions to this issue. The employer has a duty under the FLSA to provide a reasonable recording mechanism for

[333] Melissa Mazmanian, Wanda J. Orlikowski & JoAnne Yates, *The Autonomy Paradox: The Implications of Mobile Email Devices for Knowledge Professionals*, 24 ORG. SCI. 1337, 1341-43 (2013) (reporting narrative data describing the compulsive checking of mobile email devices by professional workers).

[334] Roy Maurer, *Remote Employees Are Working Longer Than Before*, SHRM (Dec. 16, 2020), https://www.shrm.org/hr-today/news/hr-news/pages/remote-employees-are-working-longer-than-before.aspx [https://perma.cc/X2ZM-UZS9] (finding that 70% of remote workers work during weekend and 45% work longer than before remote work, leading to burnout, lower connectedness, and reduced productivity); Maurer, *supra* note 328 (reporting that remote workers work three more hours than before the pandemic).

[335] *See* Daniel de Visé, *Remote Employees Work Longer and Harder, Studies Show*, HILL (July 24, 2023, 5:30 AM), https://thehill.com/business/4110598-remote-employees-work-longer-and-harder-studies-show/ (citing multiple studies showing that remote workers work longer and generate higher productivity).

[336] Yang et al., *supra* note 329, at 506, 521.

[337] Schultz, *supra* note 308, at 1910 (comparing full-time homemaking to working-class traditional employment and explaining the stressors associated with being "on call" twenty-four hours per day as a homemaker).

[338] *Id.*

workers to report working hours in various workspaces.[339] The FLSA also extends the right to overtime payment for workers in all workspaces, with the relevant exemption of managerial workers and live-in workers.[340] A more thorough enforcement of the current law can solve a portion of the time-related workplace harm for domestic workers. However, the FLSA envisions the cause of overwork as direct coercion from the employer and applies overtime payment as a financial incentive against such tendency.[341] It does not address the time-related harm from a different dynamic: a lack of work/non-work boundary that results in an over-exploitation, either imposed by workers themselves for various reasons or internalized due to employer coercion.

This Section by no means provides an exhaustive discussion of home-related workplace harm. Nor does it argue that the harm discussed exists in every home workplace or exclusively exists in home workplaces. It only means to provoke such discussions by centering the home workplace when reimagining work law protections.

C. *Home-Workplace Centered Enforcement*

The last Section discusses work law enforcement in the home workplace. As various discourses resisting the regulation of the home workplace have rightly identified, the vast majority of homeowners or renters, who can be the employer, the employee, or a third-party beneficiary, are not ready to subject their homes to mandatory, undisclosed, physical visitation of labor inspectors.[342] Some other enforcement tools in institutional employer settings, such as large financial penalties, are probably not practical for domestic workers either. Yet, it does not mean that no enforcement is possible in the home workplace. A lot of traditional enforcement tools can apply to home workplaces, with or without modification. In addition, the material transformation of homes and recent developments in labor enforcement open new enforcement possibilities for homes, such as digital technology and community-based labor enforcement. This Section's discussion will focus on domestic workers since enforcement is a particular concern in this context.

The expansion of work law rights to domestic workers has already expanded the repertoire of enforcement tools for home workplaces. Some tools, such as

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[339] U.S. DOL, FIELD ASSISTANCE BULLETIN NO. 2020-5, at 3 (2020) (noting that employers must "establish[] a reasonable process for an employee to report uncompensated work time" under the FLSA).

[340] *See supra* Sections I.D and II.B (analyzing the treatment of overtime pay under the FLSA, particularly the 1974 amendment which included domestic workers).

[341] Fair Labor Standards Act, 29 U.S.C. § 207(a)(2) (mandating that employers provide overtime compensation to employees).

[342] *See supra* Section IV.A (discussing the challenges associated with enforcing regulations in domestic service and describing California's attempt to address these concerns). Other work law scholars advocating for domestic workers agree on this point too. *See* Smith, *supra* note 74, at 332-33; BLACKETT, *supra* note 17, at 25-26.

recordkeeping duties that members of Congress in 1974 simply did not believe domestic employers were capable of, are enforced across states today.[343] They may create some administrative burden on domestic employers but have proved to be entirely feasible. Some of the other enforcement channels, such as civil litigation and administrative claims, also apply to domestic workers without any legal obstacles even though their actual impacts are limited by the access barriers that domestic workers, like other low-income workers, suffer from.[344]

A sliding scale alteration provides a way to adapt benefits as well as penalty enforcement for domestic workers. One recent example is New York City's Paid Sick Leave Law, which specifies that domestic workers accrue safe and sick leave at the rate of one hour for every thirty hours worked, up to a maximum of forty hours per year.[345] This proportionality approach adapts to the particularity of a domestic employment relationship without denying domestic workers equal access to work benefits. Similarly, a sliding scale based on employer size, duration of employment, and other capacity-related characteristics can easily apply to penalties as an enforcement tool.

The digital visibility of homes for work and non-work reasons opens various possibilities to use digital technologies to enforce work law rights. One possible enforcement tool for the isolation-related labor rights, as discussed in the last Section, can be additional labor rights for home-based workers in cyber space. Recent NLRB decisions concern workers' rights to distribute union materials on employer-operated email systems.[346] In *Caesars Entertainment* (2019), the Republican majority Board ruled that employees do not have a Section 7 right under the NLRA to distribute union materials over the employer's email system unless employees would otherwise be deprived of reasonable means of communication.[347] Even if this decision holds, the isolation of the home workplace should be recognized as an "unreasonable impediment to the exercise of the right to self-organization," justifying the use of employer-operated email systems by remote workers to distribute union materials. In addition, the isolation of the home workplace, especially for care workers and the lack of direct communication among them, may further justify additional cyber access rights for non-employee organizers under *Lechmere*.[348] For example, the non-

[343] EILEEN BORIS, MERITA JOKELA & MEGAN UNDÉN, ENFORCEMENT STRATEGIES FOR EMPOWERMENT: MODELS FOR THE CALIFORNIA DOMESTIC WORKER BILL OF RIGHTS tbl.1 (2015), https://escholarship.org/content/qt7q25m73q/qt7q25m73q.pdf?t=nxp6sn [https://perma.cc/ER6Y-N48K].

[344] *Id.*

[345] *Paid Safe and Sick Leave Law: Frequently Asked Questions*, NYC CONSUMER AND WORKER PROT. 7, https://www.nyc.gov/assets/dca/downloads/pdf/about/PaidSickLeave-FAQs.pdf [https://perma.cc/V5ZB-HWM9] (last updated Sept. 26, 2024).

[346] A Democrat-majority Board ruled for such rights in *Purple Communications*, 361 N.L.R.B. 1050 (2014), which was reversed by a Republican-majority Board in *Caesers Entertainment*, 368 N.L.R.B. 143 (2019).

[347] Caesars Ent., 368 N.L.R.B. 143, 5.

[348] Lechmere v. NLRB, 502 U.S. 527, 539 (1992).

employee organizer might have a right to distribute unionization-related information in employer-owned virtual workspace tools. Or the employer of workers isolated in home workplaces might have a legal duty to disclose union-related information to their employees and/or disclose contact information of the non-employee organizer to counter the informational isolation.

Digital technology may also open the possibility of remote inspection for working time or other working conditions inside the home. The fact that the state can mandate the digital surveillance of the EVV system for Medicaid-funded home care workers also makes it both technologically and legally plausible to promote and even mandate certain digital software for pro-labor time regulations. For example, informational scientists use virtual reality and digital communication technologies to facilitate training and professionalization for home care workers and connect them into the circle of healthcare provision.[349] Similar technologies can easily be used for training for the workers' workplace safety and health. Some worker groups are also experimenting with digital software for domestic workers to record and report wage theft and other workplace violations.[350]

To take a step further beyond self-reporting, some form of mandatory remote inspection is not unimaginable. Some state labor agencies have already adopted remote investigation and evaluation procedures in non-home contexts.[351] Remote inspection, with some procedural safeguards, can be extended to homes with much less privacy concerns in comparison to physical inspection. In addition, if the employer has already created surveillance materials for other work-related reasons, such as a productivity tracker or nanny camera surveilling the care worker, the work law can also extend a right to the worker to demand disclosure of such materials to the worker or to labor agencies for work law compliance—with all possible confidentiality protections. Since this process does not create any new surveillance materials, it shall not be an unlawful privacy violation if the creation of the original surveillance material with or without the employee's consent is not an unlawful invasion into the privacy of the home.

However, even intentionally pro-worker digital enforcement technologies do not necessarily avoid privacy and autonomy concerns. It is precisely the

[349] Susan Kelley, *Overlooked, Undervalued: Cornell Research Seeks to Elevate Home Care Workers*, CORNELL CHRONICLE (June 16, 2022), https://news.cornell.edu/stories/2022/06/overlooked-undervalued-cornell-research-seeks-elevate-home-care-workers [https://perma.cc/M4SK-T75J].

[350] Joy Ming, *Data Advocacy for Visibility of Home Care Workers*, CSCW '23 COMPANION, Oct. 14-18, 2023, at 444, 445, https://dl.acm.org/doi/pdf/10.1145/3584931.3608922 (combatting the invisibility of home care workers by creating "design provocations" that could identify and act on wage theft).

[351] SB 321 ADVISORY COMM., CAL. DEP'T OF INDUS. RELS., SB 321 COMMITTEE POLICY RECOMMENDATIONS TO PROTECT THE HEALTH AND SAFETY OF HOUSEHOLD DOMESTIC SERVICES EMPLOYEES 7 (2022), https://www.dir.ca.gov/dosh/documents/Policy-Recommendations-SB-321.pdf [https://perma.cc/5KP7-DNSZ].

widespread use of digital technology that is intended to surveil and monitor workers for non-labor reasons that can sow the seed of suspicion among workers, creating resistance even when the digital technology comes from a benevolent policy motivation.[352] In her ethnographic book studying the ultra-surveillance tools enforcing traffic safety of truck drivers—workers in dispersed workplaces of automobiles—sociologist Karen Levy finds a wide-spread animus against such technology and the destructively demoralizing effect of the surveillance technology in reducing workplace autonomy—a value the workforce dearly values.[353] This reminds us that even well-intentioned tools in any workplaces—including homes—can be counter-productive without meaningful worker participation.

This turns us to the promise of community-based enforcement—where home and residential communities can become a potential source of labor standard-building. The first domestic worker bill of rights in New York was born out of different community organizations' coalition-building and organizing efforts, rather than the traditional labor union model.[354] A crucial part of the coalition includes community-based organizations of labor-justice-minded domestic employers that were born out of meetings at these employers' homes.[355] Not too surprisingly, these community-based organizations have also become the main channels to enforce the new labor rights that they have organized to gain.[356]

The recently emergent co-enforcement model where state labor agencies collaborate with worker centers and other community groups to improve compliance with employment standards can be well suited for home workplaces that are more embedded in the community than institutional workplaces.[357] For example, California's Domestic Worker and Employer Education and Outreach Program, funded by the state, ran a successful pilot program for domestic

[352] Kelley, *supra* note 349.

[353] *See* LEVY, *supra* note 256, at 333-34.

[354] Ai-jen Poo, *A Twenty-First Century Organizing Model: Lessons from the New York Domestic Workers Bill of Rights Campaign*, 20 NEW LAB. F. 51, 54 (2011).

[355] Jahmila Tahirah Vincent, New York Domestic Workers: Non-Profits, Urban Community Organizing and the Implementation of the Domestic Workers' Bill of Rights 72-74 (Aug. 9, 2013) (M.A. thesis, Fordham University) (ProQuest).

[356] Harmony Goldberg, *"Prepare to Win": Domestic Workers United's Strategic Transition Following Passage of the New York Domestic Workers' Bill of Rights*, *in* NEW LABOR IN NEW YORK: PRECARIOUS WORKERS AND THE FUTURE OF THE LABOR MOVEMENT 266, 267 (Ruth Milkman & Ed Ott eds., 2014).

[357] Seema N. Patel & Catherine L. Fisk, *California Co-Enforcement Initiatives that Facilitate Worker Organizing*, HARV. L. & POL'Y REV. (Nov. 11, 2017), https://journals.law.harvard.edu/lpr/wp-content/uploads/sites/89/2017/11/Patel-Fisk-CoEnforcement.pdf [https://perma.cc/6D6D-A6NU] ("The goal of these co-enforcement programs is to improve compliance and enforcement by training worker and community groups in the law and using their networks and cultural and linguistic competence, along with their years of base-building and member organizing, to improve outreach . . . .").

workers and employers on safety and health issues.[358] The program relies on and funds community-based organizations to conduct education, outreach, and trainings that are accessible, participatory, and beneficial for workers and employers.[359] This community-based approach also moves the compliance burden from the individual worker or employer to a publicly funded collective. In her article about domestic workers' workplace regulations, Peggie Smith argues that worker-led collective efforts have the most promising results for enforcing work standards for domestic workers in a context where the individual employer or employee is not sufficiently motivated or resourced to advance the effort.[360] The public funding part certifies the state's and society's interest in maintaining a safe and healthy workplace for all workers and makes such a collective effort sustainable in the long run. Furthermore, the community-based enforcement process may provide a collective space that, in itself, addresses some of the workplace harm caused by isolation. Beyond concrete legal measures, certain residential neighborhoods are also experimenting with neighborhood standard boards as a norm-building platform to enhance labor standards for domestic workers in the locale above the legal minimum.[361]

While all these enforcement tools and efforts open up new opportunities to bring the home workplace fully into the realm of work law, all of them undeniably have significant drawbacks that limit their reach and effects within the current system. This provocative, not exhaustive, discussion centering the home workplace is meant to confirm the plausibility of enforcing labor regulations in homes and reveals shared and distinct harms associated with working inside home that a contemporary work law should at least consider addressing.

CONCLUSION

Home is once again a common workplace for a significant portion of the workforce. However, work law and legal consciousness still carry an entrenched intuition against treating home as the default workplace. Under this ideology, the law still carries the presumption of home as non-workplace and adopts an inconsistent approach to selectively regulating home-based work as an

[358] *Domestic Worker Rights Education and Outreach*, HAND IN HAND, https://domesticemployers.org/campaigns/domestic-worker-rights-education-and-outreach-program/ (last visited Apr. 8. 2025) (describing the grants and initiatives utilized by outreach programs in California for training and education of domestic workers).

[359] *Id.*

[360] Smith, *supra* note 74, at 321.

[361] *See, e.g.*, *Care Forward*, CARROLL GARDENS ASS'N, https://www.carrollgardensassociation.com/current-campaigns/care-forward [https://perma.cc/B4BZ-7WWS] (last visited Apr. 8, 2025); *'Care Forward" Aims to Raise Standards, Enforce Rights for Domestic Workers in Park Slope*, NEWS 12 BROOKLYN (Sept. 26, 2021, 5:51 PM), https://brooklyn.news12.com/care-forward-aims-to-raise-standards-enforce-rights-for-domestic-workers-in-park-slope [https://perma.cc/HS2S-QLCG].

exception, structurally siloing and disadvantaging workers laboring in homes. The material transformation of home and work as well as generations of labor feminist and home-based worker advocates have laid the foundation for reversing this default. This Article comprehensively and thoroughly re-examines and rebuts this ideology and sets the stage for a new work law framework normalizing and centering the home workplace. Such a transformation of work law is not only possible in this current moment, but also necessary to make it relevant and meaningful for the contemporary and future workplace.