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CASA OF MARYLAND AND THE BATTLE REGARDING HUMAN TRAFFICKING AND DOMESTIC WORKERS' RIGHTS

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At the November 2006 symposium presented by the *University of Maryland Law Journal of Race, Religion, Gender and Class*, the panelists discussed various issues regarding human trafficking. One entity at the forefront of the fight against human trafficking is CASA of Maryland. This article contains remarks originally made by the author that focused the topic of human trafficking on one particular group of workers: domestic workers. That particular group provides an interesting study because of the many race and gender issues that are wrapped up in the treatment of domestic workers under the law.

I. A CASE STUDY

The problems surrounding the rights of domestic workers can be illustrated through a recent CASA of Maryland trafficking case involving a domestic worker which will soon be filed in federal court; because it has not yet been filed, her name cannot be disclosed.¹ This is the case of a woman who was brought to the United States when she was in her late teens. She was brought from Tanzania, where she grew up in the countryside. She did not speak English; she spoke Swahili and another language. While in Tanzania, she moved to Dar Salaam, the capital, and started doing domestic work there. Through a relative, she received a job offer to come to work in the United States for a diplomat and his family. She saw a written contract for the job, which looked good: five days of work per week, forty hours of work each week, room and board, and the promised salary worked out to be a little bit over the minimum wage. It was a decent job offer, and based upon that offer, she took the job. She had never before met the diplomat, so she relied on this contract and trusted in it. The diplomat brought her to the United States on a special visa made available to diplomats specifically for the purpose of employing household help.

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1. The case was subsequently filed as *Mzengi v. Mazengo*, No.1:07-CV-00756 (D.D.C. filed Apr. 25, 2007).

The young woman came to the diplomat's house in the United States in 2000, and she left it in 2004. That is almost literally true, for in those four years, she only left the house when accompanied by the family, and that only happened on those occasions such as church when the family needed her help to supervise the children. The family had three children, one of whom was an infant when the woman came to the United States. She worked literally around the clock. That is, although she worked from about six A.M. to ten P.M. every day doing cleaning, cooking, and childcare (a sixteen hour shift), under the law² she actually worked twenty-four hours a day because she was sharing her bed with the baby. This boy was not her child, but she slept with him throughout his infancy. When he woke in the night, she got him his bottle and when he needed a new diaper in the middle of the night, she was the one who changed it. Under the law, she was therefore working twenty-four hours a day.

In addition to her around-the-clock workday, the equally important fact is that she was not paid a penny in four years. There are trafficking cases where people earn a dollar an hour or thirty-five cents an hour — one can be paid and still be a victim of trafficking. This particular woman, however, received *nothing* in four years.

The diplomat and his family kept the worker in this situation through coercion, some of it physical, some of it psychological, and all of it powerful. For instance, the diplomat's wife beat the worker. The wife also sent the worker out into the cold of January when she was only wearing a t-shirt and shorts and left her out there. The family totally isolated the worker. She met no one else after she came to the United States. They threatened her family in Tanzania, whom they knew, and they made threats against the worker as well. The family also neglected the worker by denying her medical care when she had an in-grown toenail. Although this does not sound terribly serious, after a year and a half the worker could not walk any more thanks to this untreated problem. Only then did the family take her to a doctor, who said that if they had waited much longer, he would have had to amputate the toe.

Fortunately, the worker eventually managed to escape and subsequently found her way to CASA of Maryland. With this worker's story setting the stage, however, we can already see some of the class and gender issues that affect domestic workers — issues that will be-

2. The Department of Labor has summarized the Fair Labor Standards Act's provisions on hours that constitute compensable time in an on-line fact sheet. See U.S. DEP'T OF LABOR, FACT SHEET #22: HOURS WORKED UNDER THE FAIR LABOR STANDARDS ACT (n.d.), available at <http://www.dol.gov/esa/regs/compliance/whd/whdfs22.htm>.

come even clearer as we briefly consider some of the legal impediments that domestic workers currently face in the United States.

II. LEGAL MEANS EMPLOYED TO RESPOND TO DOMESTIC WORKER CASES

CASA of Maryland has a variety of means of responding to the many domestic worker cases that it handles. One thing that all of these cases have in common is that the workers have not been paid their wages. One very obvious solution, therefore, is to go after the wages and CASA does that. The wage laws in Maryland are actually very good in this respect. For instance, although on the federal level domestic workers are excluded from some provisions of the Fair Labor Standards Act — most notably the overtime provisions for live-in domestic workers³ — that is not the case under Maryland law.⁴ Furthermore, there is a tremendously useful statute in Maryland, the Maryland Wage Payment and Collection Law,⁵ which allows for treble damages when a worker succeeds in proving to the judge or jury that they were denied correct, prompt and full payment of their wages.

The treble damages provision of the Maryland Wage Payment and Collection Law is meant to serve as a powerful disincentive to employers like the diplomat described above. Consider the domestic worker in that case study. She worked for four years without being paid, working extraordinary hours. She would therefore be entitled to regular and overtime pay, and could also seek treble damages. Arguing conservatively that she only worked during her waking hours, she worked a total of 112 hours per week (sixteen hours per day). The quick math, based on the minimum wage — which was \$5.15 per hour at the time she was working for the diplomat and his family — for forty hours a week equals roughly \$200 per week. She worked another seventy-two hours a week at the overtime rate of \$7.73, earning approximately another \$550.⁶ So she earned \$750 a week, which is \$39,000 per year. That works out to be \$156,000 for the four years that she worked for the diplomat, and it could be trebled by the court. That is a lot of money, representing a potentially powerful remedy available

3. 29 U.S.C. § 213(b)(21) (2000).

4. See generally Maryland Wage and Hour Law, MD. CODE ANN., LAB. & EMPL. §§ 3-401 to 431 (2007).

5. MD. CODE ANN., LAB. & EMPL. §§ 3-501 to 509 (2007).

6. If we considered that she actually worked 24 hours per day, with 168 hours per week, it would give her minimum wages and overtime in the amount of \$1,195.44 *per week*.

to any worker in this situation. Indeed, CASA goes after these wages and almost always wins in court.

It is vital to realize that even a domestic worker who labored in isolation has the power to win her case in front of a judge or a jury. Workers often worry that they have no proof, but their own testimony, when credible and consistent, can be enough, especially where an employer has failed to maintain records of the hours worked, as required under the Fair Labor Standards Act.⁷ Under *Anderson v. Mount Clemens Pottery*,⁸ when an employer has failed to maintain records — which is almost always the case for domestic workers — the employee's account of hours worked may be sufficient if reasonable. In that event, the burden then shifts to the employer to prove the falsity of the worker's account. This author is unaware of a single instance where an employer has been able to meet this burden in a domestic worker case. Domestic workers, therefore, have a significant possibility of getting justice through civil litigation.

Wages, however, are only one aspect of CASA's work; in trafficking cases, there is a lot more that CASA can do for exploited domestic workers. In terms of the immigration remedies discussed earlier in this panel, CASA has successfully applied for T-Visas for all of the workers it has identified as victims of trafficking. CASA also works with law enforcement when possible, both because it is a route to getting the T-Visa and because criminal prosecutions are a way to send a powerful message to perpetrators and would-be perpetrators that there are consequences for such actions. Unfortunately, it is becoming harder and harder to get that message out. This leads to the heart of the difficulties: the systemic problems CASA encounters when it represents domestic workers.

III. SYSTEMATIC PROBLEMS CONFRONTING DOMESTIC WORKERS

The first, most basic, and, in some ways, the most galling legal obstacle facing domestic workers is their historic exclusion — their very specific and deliberate exclusion — from almost any employment or labor law. The Fair Labor Standards Act,⁹ case in point, did not

7. Maryland's Wage and Hour Law, MD. CODE ANN., LAB. & EMPL. §§ 3-401 to 431, which provides for minimum wage and maximum hours, replicates the remedial purpose of the Fair Labor Standards Act, and courts have permitted Fair Labor Standards Act analysis in their rulings under the Maryland law. *See Friolo v. Frankel*, 819 A.2d 354, 361-365 (Md. 2003).

8. *Anderson v. Mount Clemens Pottery*, 328 U.S. 680, 687 (1946).

9. 29 U.S.C. § 201-219 (2000).

cover domestic workers at all until 1973 — about forty years after it was enacted. Then, in 1973, during the debate over including domestic workers, Senator Dominick said, and this is a paraphrase, “Well, here’s the trouble really, how are we going to determine the wages and hours of a domestic worker.”¹⁰ The language he actually used is as follows: “What do we do about the cleaning lady that comes in? She enjoys herself. She gets together with the family and has a Coke and a glass of milk.”¹¹ This is the testimony of a United States Senator; as captured in the legislative history of the Fair Labor Standards Act. Note, however, that this is all too often also the defense of employers — they do not see the workers as employees, they do not keep time records, and they claim bewilderment at the idea that they should have considered the worker as an employee. This utterly inadequate “defense” is always coupled with a cry of “she was just like a member of the family.” Such employers inevitably offer up their love for their domestic worker as part of their justification for why they should not pay her for all the time she spent working at the family’s behest; this moral blindness is one of the most offensive aspects of these cases.¹²

Congress eventually extended the minimum wage to domestic workers, but the 1973 amendments continued to exclude them from overtime laws.¹³ Around the same time, Congressional inability to see household work as employment struck again, in the Occupational Safety and Health Act (OSHA).¹⁴ When OSHA was enacted, it was designed to “assure so far as possible every working man and woman in the Nation safe and healthful working conditions,”¹⁵ a phrase that is suitably broad. A mere two years later, the Department of Labor decided that domestic workers did not fall into that definition of “every working man and woman.”¹⁶ They are excluded to this day. The National Labor Relations Act is another law that protects workers but

10. Fair Labor Standards Amendments, Pub. L. No. 93-259, 88 Stat. 55 (1974), *reprinted in* SUBCOMM. ON LABOR, COMM. ON LABOR AND PUB. WELFARE, U. S. SENATE, 94TH CONG., LEGISLATIVE HISTORY OF THE FAIR LABOR STANDARDS AMENDMENTS OF 1974 955 (Comm. Print 1976).

11. *Id.*

12. The use of gendered language is conscious. Although I have encountered cases of male domestic workers, the vast majority of domestic workers are female. Their gender increases their vulnerability to exploitation, as many of them experience debilitating sexual abuse, and/or comply with coercive work conditions out of fear of sexual abuse.

13. 29 U.S.C. § 213(b)(21) (2000).

14. 29 C.F.R. § 1975.6 (1972).

15. 29 U.S.C. § 651(b) (2000).

16. *Id.*

fails to include domestic workers in its ambit.¹⁷ It is not just domestic workers, however; both domestic workers and agricultural workers are systemically excluded from almost every law protecting our nation's workers.

This exclusion flows directly from the history of slavery in this country; field workers and house workers were the two work forces comprising the vast majority of slaves in the United States. The exclusion is therefore racism perpetuated through modern day labor laws, and as the problem of trafficking is discussed, it is very appropriate to remember that. Domestic work continued to be the almost exclusive domain of African-Americans through the 1970s, at which time the demographics shifted to poor immigrant women.¹⁸

A second systemic problem is the lack of law enforcement interest in prosecuting domestic worker cases. There is a perception that these are just single victim crimes — they are happening inside households, they are messy, they are difficult, and law enforcement is not interested as a result. Some of the same rationales that are used for excluding domestic workers from the different employment laws are filtering through the perception of law enforcement officers as well. The perception is that the home is not a workplace, domestic work is just what women do, we cannot regulate women inside the home, so what happens in the home may be unfortunate, but it is not really the focus of our interest. It is thus extremely difficult to get law enforcement to focus on any of these cases. Law enforcement agents from the State Department to the U.S. Attorney's Office have told CASA that law enforcement is concerned with broader scale abuses than with what is happening to domestic workers. This basically takes the situation that the domestic worker is in already — isolated and vulnerable — and turns it on its head. Law enforcement is saying that *because* you are isolated and vulnerable, we are going to do nothing for you. It is an extremely frustrating problem facing organizations such as CASA.

A third systemic problem is diplomatic immunity. The case study discussed earlier in this article was a diplomatic case. CASA has many of them. Because of immunity, CASA's hands are — many times — tied. When CASA goes to court and files complaints against

17. See 29 U.S.C. § 152(3) (2000) ("The term 'employee' shall include any employee . . . but shall not include any individual employed . . . in the domestic service of any family or person at his home.").

18. See, e.g., Elizabeth Beck, *The National Domestic Workers Union and the War on Poverty*, J. OF SOC. & SOC. WELFARE, Dec. 2001, 195, available at http://findarticles.com/p/articles/mi_m0CYZ/is_4_28/ai_83530637; Preeti Shakar, *Home is Where the Work Is: The Color of Domestic Labor*, RACE, POVERTY & THE ENV'T, Spring 2007, 51, available at <http://urbanhabitat.org/node/860>.

such diplomats, the first thing they do is raise immunity as an affirmative defense. They have full criminal and civil immunity under the Vienna Convention on Diplomatic Relations,¹⁹ so it is a big problem.

There is an exception to immunity called the commercial activities exception.²⁰ It sounds arcane, but it is really important. If diplomats are involved in some kind of private commercial activity, that activity is not covered by immunity. Unfortunately, the one case that was decided on this issue for domestic workers stated that making a contract with a domestic worker is not a commercial activity;²¹ the exception does not apply, so domestic workers are out of luck and diplomats are immune. That again is just emblematic of the problem of devaluing work that is done inside a house — it is not commercial work because it is inside a house, as though, by definition, what is inside a house is not commercial, when in fact it is somebody's labor, there is a contract, and it is in many ways a commercial activity unrelated to diplomatic status.

A fourth systemic problem is of a different nature, and it is simply that domestic workers suffer from a widespread lack of information about their rights as domestic workers. The workers do not know what laws apply to them and what laws do not apply to them. Complicating the problem is that they are very often terrified of approaching the police. Even when they are free of their "employment," they may be terrified of going to the courts because if they lack proper immigration status, they may fear that a court proceeding could jeopardize their ability to stay in the United States. This is often the case even if they do have proper immigration status, because they are nonetheless worried that something technical may be faulty and these days such technicalities are enough to have someone deported. It is thus a really big obstacle to getting justice for such workers.

IV. CASA'S FIGHT TO OVERCOME THE SYSTEMATIC PROBLEMS

CASA has several strategies for addressing some of these systematic issues. The first is education. CASA does a lot to inform domestic workers about their rights through written material, such as

19. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227 (Apr. 24, 1961).

20. *Id.* at art 31(c).

21. *Tabion v. Mufti*, 73 F.3d 535, 537 (4th Cir. 1996). Subsequent to the symposium, a case in the D.C. Circuit upheld the *Tabion* decision. See *Paredes v. Vila*, 479 F.Supp.2d 187, 193 (D.D.C. 2007). The amicus brief filed by CASA of Maryland, ACLU Women's Rights Project and Global Rights is available at http://www.aclu.org/pdfs/womensrights/Gonzalez_paredes_amicus_20070131.pdf.

workers' rights brochures. CASA also does worker-to-worker outreach, spear-headed by its women's organizer, Alexis de Simone, and its women's committee, *Mujeres Buscando Justicia*, or Women Seeking Justice. The committee goes to different sites where workers might congregate on their days off, such as churches, food courts, or fast food restaurants that are well known among domestic workers as popular locations to gather on Sundays. This work, of course, only reaches those workers who get days off. For trafficking victims, CASA must supplement this work with the use of the mass media — foreign language television and radio stations, newspapers, and so forth — which can be more effective. Furthermore, after Oprah Winfrey did a feature on this problem,²² but failed to note how workers could get help, CASA began to urge journalists to provide enough context in their stories for workers to know that help is available and where it can be found.

The second strategy, which is related to education, is litigation. CASA and other organizations like the ACLU's Women's Rights Project are doing impact litigation on some of these issues. The litigation includes such cases as a recent, large wage case that CASA and the law firm Skadden Arps recently won for an Ethiopian worker who was not paid for four years,²³ as well as the case of the Tanzanian worker discussed above. The hope in bringing such cases is that the verdicts themselves will send a ripple of fear among those people who are not paying their domestic workers. CASA also specifically litigates the diplomatic immunity issue, trying to find cases that force the courts to rethink their interpretation of the commercial activities exception.

Because this is a human rights issue, CASA is also using international human rights mechanisms. There are human rights bodies that will hear complaints from the workers. CASA brought workers to the Inter-American Commission on Human Rights, part of the Organization of American States, to complain about their lack of access to justice in the United States, and CASA will be doing more of that in the future. CASA is also trying to organize the workers. For example, through *Mujeres Buscando Justicia* and a large coalition of allies, CASA is working to pass a Domestic Worker Bill of Rights in Montgomery County, Maryland. In June 2007, moreover, at the United States Social Forum in Atlanta, activists are going to unite to develop a national campaign on domestic worker rights, which is very exciting;

22. *Oprah Winfrey Show: Atrocities Against Children* (ABC television broadcast July 15, 2004). For more information, see http://www2.oprah.com/tows/pastshows/200407/tows_past_20040715.jhtml.

23. *Wondimante v. Assefa*, No. 8:04-CV-03718 (D.Md. May 31, 2007).

it is the first time that that has happened in this country. It has happened in other countries, particularly in Latin America and India, but never in the United States. The hope is that workers can come together and really start changing the definitions, the terms and the perception of the work that they do, and thus start advocating for changes in the laws that currently exclude them.

CASA is hopeful that by approaching the problem in these different ways, it will have a real impact and move past many of the barriers that are currently preventing domestic workers from obtaining justice.