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'And Ain't I a Woman?': Feminism, Immigrant Caregivers, and New Frontiers for Equality

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“AND AIN’T I A WOMAN?”: FEMINISM, IMMIGRANT CAREGIVERS, AND NEW FRONTIERS FOR EQUALITY

SHIRLEY LIN*

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INTRODUCTION

*The bare walls are a reminder that America . . . wants our labor but not our lives.*¹

* Attorney, Outten & Golden LLP. Affiliation for identification purposes only. This Article was presented on March 6, 2015 at the 8th Annual Feminist Legal Theory Conference, “Feminism at Work,” organized by the Center on Applied Feminism at the University of Baltimore School of Law. Many thanks to Margaret E. Johnson, Nancy M. Modesitt, and Elizabeth Keyes of the University of Baltimore School of Law for the opportunity to participate. I am indebted to Shirley Lung and Elizabeth Keyes for their invaluable feedback and insights on earlier drafts of this Article, and to the editors of the Harvard Journal of Law & Gender for their thoughtful comments, in particular Article Editor Helen Rave. This article is dedicated to Luna Ranjit, Narbada Chhetri, Raji Pokhrel, and the staff of Adhikaar. Their vision and leadership on behalf of immigrant women required tremendous acts of courage that may never be fully known, but continue to shape the lives of so many.

¹ AMITAVA KUMAR, PASSPORT PHOTOS 200 (2000). In exploring the experiences of South Asian immigrants, Kumar describes the bare, impersonal living spaces of migrant workers as emblematic of the laws that constrict their abilities to be with family, move

Immigration laws and policies have serious consequences for family unity, workplace equality, and freedom from violence and abuse. Nevertheless, only a few scholars have advocated for the application of feminist legal theory to immigration, much less to the dilemma of the ever-widening gulf between the rights afforded to citizens and non-citizens.² In recent years, major political contests affecting immigrant women have included workplace reforms and comprehensive immigration reform, but no systematic analysis of immigration, gender, and class has emerged to capture the complexity of their lived experiences and the strict legal constructs that bind their mobility. This Article seeks to broaden feminist analysis by proposing a multidimensional framework to examine the mutually reinforcing effects of immigration status, gender, and class in recent groundbreaking developments involving immigrant domestic workers and caregivers. Throughout this Article, I endorse and adhere to the following principles of Critical Race Theory as central tenets for future feminist legal jurisprudence: antisubordination, intersectionality, anti-essentialism, and an appraisal of material cause and effect, particularly to contextualize legal systems that are otherwise facially neutral with respect to race, citizenship, gender, and class.³

Although nearly 60% of the U.S. immigrant population is comprised of women and children,⁴ and immigrant women now occupy significant or predominate roles within domestic work and caregiving work nationally,

freely within the labor market, travel, or otherwise establish their lives through their labor.

² Shirley Lung, *The Four-Day Work Week: But What About Ms. Coke, Ms. Upton, and Ms. Blankenship?*, 42 CONN. L. REV. 1119, 1125 (2010); see also Terri Nilliasca, Note, *Some Women's Work: Domestic Work, Class, Race, Heteropatriarchy, and the Limits of Legal Reform*, 16 MICH. J. RACE & L. 377, 385–88 (2011); see generally Maria L. Ontiveros, *Female Immigrant Workers and the Law: Limits and Opportunities*, in THE SEX OF CLASS: WOMEN TRANSFORMING AMERICAN LABOR 235 (Dorothy S. Cobble ed., 2007) [hereinafter *Female Immigrant Workers and the Law*] (examining the intersection of gender, immigration and labor); Maria L. Ontiveros, *Lessons from the Fields: Female Farmworkers and the Law*, 55 ME. L. REV. 158 (2002) (examining the experiences of immigrant farmworking women in California through class, gender, race, and immigration status).

³ Athena Mutua has described antisubordination as the definitive stance of Critical Race Theory [hereinafter CRT] and highlighted CRT's emphasis upon material harms caused by systems of subordination such as race and gender. CRT prioritizes antiessentialist critiques and coalition-building praxis through intersectionality analysis. See Athena D. Mutua, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, 84 DENV. U. L. REV. 329, 336, 340, 369–70 (2006); see also *infra* note 6. Mutua has identified the main goal of CRT as “the liberation of minorities and other socially subordinated people,” *id.* at 336, which critical legal scholars have generally interpreted as a commitment to identifying and combating inequalities arising from the powers and privileges exercised by social groups or institutions through laws, policies, and social conduct, *id.* at 337.

⁴ *Age-Sex Pyramids of U.S. and Native-Born Populations, 1970-Present*, MIGRATION POLICY INST., <http://www.migrationpolicy.org/programs/data-hub/charts/age-sex-pyramids-immigrant-and-native-born-population-over-time?width=1000&height=850&i-frame=true> [<http://perma.cc/S67Y-UVMU>] (summarizing data on demographics of foreign-born women and children).

feminist movements have largely remained silent about laws that have institutionalized inequality for immigrants and fostered abuses by state and private actors. Feminist voices addressing workplace equality and freedom from violence are also absent from the bruising debate over whether and how to legalize the status of undocumented immigrants and make much-needed changes to our immigration laws. Instead, demands for legal protections for the most vulnerable women in our workforce have come from organizers and labor advocates whose work has been intersectional, but historically marginalized within feminist agendas that have focused on abortion and reproductive health, domestic violence, and gender equality in workplaces outside the home.⁵

There are several possible explanations for why feminist legal scholarship, in turn, has not included any systematic examination of immigrant women workers or the dimensions of citizenship. Feminist legal theory is influenced by the mainstream feminist movement’s emphasis on gender—rather than race and class, immigration status, or other overlapping dimensions of human experience—as the main component of women’s identity,⁶ leaving white, middle- or upper-class women with citizenship as the normative premise for discussion. Secondly, the term “immigration” refers to a conglomeration of subjects that includes affirmative and defensive immigration relief, family law, constitutional law, employment law, administrative law, and criminal law. Finally, the diverse experiences among non-citizens may pose a barrier to systematic discussion of immigrant women’s experiences. Legal discussions about immigration often splinter into narrow sub-topics, particularly if one distinguishes the situations of the undocumented, immigrants with visas, and legal permanent residents, all of whom are non-citizens. Practically speaking, however, all non-citizens face considerable barriers that citizens do not, such as the risk of deportation, and have limited recourse in challenging violations of their rights, leading to further disenfranchisement.⁷

⁵ See, e.g., Julia Preston, *Women’s Groups Rally for Immigration Reform*, N.Y. TIMES, Sept. 12, 2013, at A17 (describing the National Organization for Women and 9to5 as “women’s groups that have not been prominent in pushing Congress for a path to citizenship for millions of immigrants in the country” while immigrant groups have been organizing protests, and noting that “[l]eaders of the liberal women’s organizations said they were embracing immigration in a bid to expand their following among immigrant and Latina women, both fast-growing populations”).

⁶ See Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 586–90 (1990) (criticizing the exclusive focus on gender); ELIZABETH FOX-GENOVESE, *FEMINISM WITHOUT ILLUSIONS: A CRITIQUE OF INDIVIDUALISM 2* (1991) (noting much of the rhetoric of feminism revolves around sexuality, abortion, and gender-based identity). By contrast, CRT and Latino/a Criticism [hereinafter “LatCrit”] have examined the relationship between race/ethnicity and nativism, and race/ethnicity and nationalism, Mutua, *supra* note 3, at 351, which Mutua attributes to CRT’s commitment to antisubordination as “the principle upon which racial justice, particularly equality, [would] be understood and practiced,” *id.* at 354.

⁷ See discussion *infra* Parts I.B, III.

This Article argues that feminist and other critical legal theories can address the profound inequalities that immigrant workers face. Part I draws from a body of feminist, political, and social science theories regarding social reproduction to assess the situation of immigrant domestic workers and their recent efforts to claim inclusion in workplace laws and protections.⁸ It locates the increasingly carceral dynamics that are expressed in the law and in state infrastructure and continuously undermine immigrant women's economic and social stability, as explained in further detail in Parts I.A and I.B.2, *infra*.⁹ Unbeknownst to many, the present period is the most dangerous for an undocumented immigrant worker in history. Deportations have crescendoed to record highs after a decade-long investment in sophisticated detection, detention, and deportation apparatuses by two Presidential administrations.¹⁰ Conversely, statutory rights—e.g., the right to minimum and overtime wages, the right to organize, and the right to be free from sexual abuse or harassment—are largely unenforced as a result of ongoing contradictions in our labor and immigration laws, the currently irremediable power dynamics between non-citizen workers and their employers, and the low societal priority for allocating resources to combat these abuses.¹¹

Part II examines the importance of immigrant women workers in the United States and their disproportionate share in the “feminization” of low-wage work at a time when society's critical social-reproductive work has been shifted to them. Over the past decade, immigrant women workers have organized state-by-state campaigns to improve the domestic work industry, and have steadily built political power by allying with labor unions.¹² In 2013, intense lobbying by the same organizers brought about the first-ever inclusion of an immigrant visa for caregivers of the elderly and disabled in S.744, the last major immigration reform bill to pass the Senate.¹³ But those workers, who are predominantly in-home employees and overwhelmingly female, have been denied minimum wage and overtime protections for more than seventy-five years; newly enacted regulations to bring them within those protections were halted before they were to take effect in 2015, in a

⁸ See discussions *infra* Parts I.A, II.B.

⁹ Carceral dynamics are economic and social policies, state actors, and market forces that “contain” and “manage” tensions and contradictions, locking individuals into unequal social relations and limiting their social mobility and life choices.

¹⁰ See *infra* notes 96–100 and accompanying text.

¹¹ See discussion *infra* Part I.B.1.

¹² Harold Meyerson, *Labor at a Crossroads: The Seeds of a New Labor Movement*, THE AM. PROSPECT (Oct. 30, 2014), <http://prospect.org/article/labor-crossroads-seeds-new-movement> [<http://perma.cc/KQQ9-MU2T>]; George Rede, *Oregon's Domestic Workers Gain Labor protections as Gov. Kate Brown Signs New Law*, THE OREGONIAN (June 20, 2015, 11:14 AM), http://www.oregonlive.com/business/index.ssf/2015/06/oregons_domestic_workers_gain.html [<http://perma.cc/5FEF-8K47>] (reporting Oregon as the fifth state, after New York, California, Hawaii, and Massachusetts, to enact a Domestic Worker's Bill of Rights extending labor protections to domestic workers).

¹³ Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (as passed by Senate, June 27, 2013).

power play by the \$90 billion caregiver industry.¹⁴ Employers today continue to marginalize, devalue, and capitalize upon the labor of immigrant women in ways similar to those previously used for women’s labor in the nineteenth and twentieth centuries.

Part III analyzes the resurgent organizing of immigrant and minority caregivers nationwide for “rights, respect, and recognition,” with the understanding that including immigrant women in the body politic is critical to challenging the increasingly harsh policies that impair their safety daily. A feminist practice supporting socially just laws and practices for “all” women cannot remain apathetic to the role of the state and its laws in subordinating entire populations of women in the workforce, or selectively support neoliberal policies such as proposals to import female immigrant caregivers from abroad simply because “they” can do this work for “us.” To do so denies the status-, race-, class-, and gender-based devaluation of social reproductive work, with privileged U.S. women desiring the labor but not the lives of other women. Because our nation’s immigration system is now inextricably bound up with carceral forces, including detention, deportation, and local law enforcement, feminist analysis must broaden its reach beyond traditional assumptions of citizenship and the legal status quo.

While this Article is far from a comprehensive account of immigration status as a dimension of experience, by analyzing domestic workers and caregivers as a case study, I suggest a new role for feminist legal theory and critical legal studies to elevate the discourse surrounding immigrants’ rights in future rounds of the immigration reform debate. Just as Sojourner Truth challenged women and men by asking, “And ain’t I a woman?” to connect the abolitionist and feminist causes in 1851, we must today situate feminism to “include those that are not white and not privileged”¹⁵ and address issues of immigration and citizenship. Immigrant caregivers’ growing campaign for “rights, respect and recognition” invite feminists to engage in a twenty-first century discussion about non-citizen women’s rights.

I. FEMINIST LEGAL THEORY AT THE CROSSROADS: IMMIGRANT WOMEN CAREGIVERS AND THE CARCERAL MATRIX

Feminist legal theory has long recognized that gender inequality in the U.S. labor market results in women receiving unequal pay and experiencing sexual harassment, hostility to pregnancy or family responsibilities, and discriminatory hiring, promotion, or job segregation. Some feminist scholars and commentators have also examined the class stratification created by the

¹⁴ Eileen Boris & Jennifer Klein, *History Shows How 2 Million Workers Lost Rights*, TIME (Jan. 13, 2015), <http://time.com/3664912/flsa-home-care-history> [<http://perma.cc/7UBS-TCXS>] [hereinafter *How 2 Million Workers Lost Rights*].

¹⁵ Cheryl I. Harris, *Finding Sojourner’s Truth: Race, Gender, and the Institution of Property*, 18 CARDOZO L. REV. 309, 315 (1996).

entry of women into middle- and upper-class jobs and their reliance upon domestic workers to perform previously uncompensated, devalued work in the home.¹⁶ Absent from feminist scholarship, however, is a systematic and in-depth gender analysis of significant developments in immigration, including but not limited to the overt criminalization of migration and unprecedented expansion of employment-based migration.

In this Part, I provide an overview of how immigrant women workers are excluded from traditional discussions regarding workplace fairness, including equality doctrines, social mobility, and workplace safety. The unique dynamics of immigration status have been relatively unexplored, and this Article proposes to do so by assessing the challenges immigrant women workers face within an increasingly carceral set of laws designed to channel and remove immigrant workers at the convenience of employers. The exploitation of immigrant women workers during the current enforcement-first era of U.S. immigration policy has been increasingly documented.

In 2007, Angelica Hernandez was hired by a well-to-do Manhattan couple to work as their housekeeper and nanny for their newborn.¹⁷ The wife and husband simultaneously retained two white nannies, but gave those nannies more breaks, rest time, and freedom to leave the apartment than they permitted Ms. Hernandez,¹⁸ a dark-skinned Latina.¹⁹ Because the employers paid Ms. Hernandez a fixed sum regardless of the number of hours she worked, her hourly pay fell below the minimum wage.²⁰ The couple also cheated Ms. Hernandez by refusing to pay overtime wages, even though on some days they required her to work throughout the night to nurse the infant and until 4:00 p.m. the next day.²¹ One day, after Ms. Hernandez attended a know-your-rights presentation organized by the advocacy group Domestic Workers United, the wife demanded to see the materials distributed.²² She called the materials “stupid,” told Ms. Hernandez that she did not have any rights, and began assaulting Ms. Hernandez, ultimately pulling her hair, slapping her face, and punching her arm.²³ The wife threatened to call the

¹⁶ See, e.g., Martha T. McCluskey, *How Equality Became Elitist: The Cultural Politics of Economics from the Court to the “Nanny Wars,”* 25 SETON HALL L. REV. 1291, 1301–06 (2005) (critiquing cultural commentary regarding largely white, affluent employers of domestic workers as a gender issue purportedly devoid of racial and class dimensions); Peggie Smith, *Regulating Paid Household Work, Class, Gender, Race and Agendas of Reform*, 48 AM. U. L. REV. 851, 899 (1999) (“Situated within the family sphere and outside the purview of capital, paid household labor, similar to unpaid household labor, was understood to involve the creation of simple use-values, i.e., those values that the employing family consumed immediately and thus were thought never to enrich capital.”) (citations omitted).

¹⁷ Complaint at 1, *Hernandez v. Torresblanco*, No. 08 Civ. 999 (S.D.N.Y. Jan. 31, 2008).

¹⁸ *Id.* at 6–7.

¹⁹ *Id.* at 6.

²⁰ *Id.*

²¹ *Id.* at 3.

²² *Id.* at 7.

²³ *Id.* at 8.

police, ostensibly to arrest Ms. Hernandez, and told her that she was “born to be a servant.”²⁴ She fired Ms. Hernandez without paying her the wages she owed her.²⁵ Ms. Hernandez’s subsequent lawsuit alleged racialized disparate compensation and non-payment of wages, but was silent regarding her immigration status. Such abuses against immigrant workers, however, are predictable as the logical result of current laws and increasingly reported by workers to advocates.²⁶

A few years ago, I represented K., an immigrant who was employed as both a domestic worker and in-home health worker by a well-to-do couple. The wife and husband made K. endure a grueling schedule and verbal abuse for nearly two years. One day, K. told the wife that she was going to quit, as she had previously done, and asked her employer for the back pay that she was owed. The wife refused to pay her wages and chose to retaliate against K. by physically assaulting her and falsely claiming that K. had stolen jewelry worth tens of thousands of dollars. The accusation is a felony and thus a deportable offense for K., who as a non-citizen could lose her status as a legal permanent resident. Weeks later, the state prosecutor could not be convinced of the truth: the state’s resources were being misused to further unspeakable retaliation against an immigrant worker.

By resorting to carceral measures to punish Ms. Hernandez and K., both (female) employers “policed” the lines of class by preventing both workers from enforcing a legal minimum of rights, particularly with regard to their wages. These employers were likely also motivated by immigration status, as employers of household workers are required to confirm that everyone they employ is authorized to work by virtue of their immigration status.²⁷ For Ms. Hernandez and K., what analysis can feminist legal theory provide to prevent replication of this abuse? What is the state’s role in fostering this kind of abuse, and what are its obligations to prevent its recurrence? These questions, scarcely raised in the context of gender and class except in passing, are no less urgent than other feminist concerns, particularly when legal infrastructure and ideology empower employers to bind immigrant workers, deny them sustainable pay in the form of overtime wages, and rele-

²⁴ *Id.*

²⁵ *Id.* at 7–8.

²⁶ See EUNICE H. CHO & REBECCA SMITH, NAT’L EMP’T LAW PROJECT, WORKERS’ RIGHTS ON ICE: HOW IMMIGRATION REFORM CAN STOP RETALIATION AND ADVANCE LABOR RIGHTS 6 (Feb. 2013), <http://www.nelp.org/page/-/Justice/2013/Workers-Rights-on-ICE-Retaliation-Report.pdf> [<http://perma.cc/L6QP-7KVL>] (“Anecdotal reports show that in recent years, employers who seek to retaliate against immigrant workers have increasingly filed reports with local law enforcement agencies, in addition to direct reports to federal immigration officials.”) [hereinafter WORKERS’ RIGHTS ON ICE]. This reported trend is consistent with my experiences advocating for and representing U.S. immigrant workers for more than ten years, in conjunction with colleagues through the National Employment Law Project’s national network, the National Employment Lawyers Association, and the Low Wage Worker Task Force in New York City.

²⁷ See discussion *infra* Part I.B.1.

gate them to a subjugated immigrant status for the long term have recently converged, largely unremarked, to shape the lives of millions of women.

A. *Feminism, Economic Insecurity, and Social Reproduction:
Gender Equity in Context*

*That man over there says that women need to be helped into carriages, and lifted over ditches, and to have the best place everywhere. Nobody ever helps me into carriages, or over mud-puddles, or gives me any best place! And ain't I a woman? Look at me! Look at my arm! I have ploughed and planted, and gathered into barns, and no man could head me! And ain't I a woman?*²⁸

Many immigrant women workers are not able to reap the benefits of traditional labor and employment laws. These laws were drafted with workplace norms that do not account for marginalized work. Feminist legal discourse has emphasized formal equality between male and female workers, often to the exclusion of gender-based economic stratification. Foundational anti-discrimination statutes such as Title VII²⁹ and the Equal Pay Act³⁰ were designed to allow women greater access to jobs previously held by men. Accordingly, the focus of U.S. laws and governmental enforcement priorities has been on achieving pay equity for women vis-à-vis men or work under the same conditions as men, whatever those conditions may be. But immigrant women are often employed in worksites where, by virtue of their immigration status and the pro-immigration-enforcement disposition of executives and legislators, employers subject them to economic exploitation, coercion, and even violence with impunity.

As Marion Crain has previously urged, a feminist jurisprudence that does not account for the role of class in women's economic subordination signals "a larger reluctance to question the economic order."³¹ By focusing primarily on existing legal enforcement frameworks, feminist discourse on

²⁸ Sojourner Truth, Address at the 1851 Women's Rights Convention, *reprinted in* HISTORY OF WOMEN SUFFRAGE: 1848-1861 VOLUME 1 (Elizabeth Cady Stanton, Susan B. Anthony & Matilda Joslyn Gage eds., 1881) (speech originally printed in dialect).

²⁹ 42 U.S.C. §§ 2000e to 2000e-17 (2012).

³⁰ 29 U.S.C. § 206(d) (2012).

³¹ Marion Crain, *Between Feminism and Unionism: Working Class Women, Sex Equality, and Labor Speech*, 82 GEO. L.J. 1903, 1905 (1994). Relative to feminist legal theory, CRT and LatCrit have gone further in addressing issues of class, and also immigration:

While much of CRT scholarship seems focused on discourse, race as a function of ideas, and race as culture, individual CRT and LatCrit scholars have consistently focused on the class/materialist elements of race, such as John Calmore's focus on housing, Enrique Carrasco's focus on development, and Kevin Johnson's focus on immigration. . . . However, a systematic analysis of class, particularly as a product of economic ordering, as well as its relationship to race has not yet emerged, even though race scholars have argued for years that the class system in the U.S. mutually constructs race, gender, and other forms of oppression.

formal gender equality at the individual or local (worksites) level risks ignoring broader stratifications in the workforce overall. Workplaces in which immigrants are concentrated are rife with abuse and exploitation, and rarely subject to state enforcement of wage, safety, and non-discrimination laws, as discussed below.³² Rather than a shift in emphasis, however, feminist critiques should be contextualized more broadly under the framework of economic insecurity, social reproduction, and how legal and other governmental forces shape them.

The U.S. domestic worker and home health industries are the starkest examples of the stratification of women in relation to each other along the lines of class, race, and immigration status. From 1870 until 1940, domestic service was the largest employer of women among all industries.³³ During the Progressive Era, domestic work became racially stratified. Between the 1890s and 1920s, more than half of all black women nationwide, and between 84% and 91% of black women in northern cities were employed as domestic workers.³⁴

Lawmakers continued to treat domestic work as something other than legitimate work requiring regulation, and excluded domestic workers in private homes from the rights established under the National Labor Relations Act of 1935,³⁵ the Social Security Act of 1935,³⁶ the Fair Labor Standards Act of 1938,³⁷ and the Occupational Safety and Health Act of 1970.³⁸ It was during the regulatory era of the New Deal, between 1930 and 1940, when “domestic service became synonymous with Black women” and little support existed for treating it as productive work on par with other compensated labor.³⁹ The exclusion of agricultural workers and live-in domestic

Mutua, *supra* note 3, at 378–79 (emphasis omitted) (footnotes omitted); see generally Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, 72 L. & CONTEMP. PROBS. 1 (2009) (arguing that race and class considerations have actively shaped immigration law and immigration enforcement through the present day, particularly with respect to Latino and black immigrants).

³² See discussion *infra* at Part I.B.1.

³³ Smith, *supra* note 16, at 854.

³⁴ See TERESA AMOTT & JULIE MATTHAEI, RACE, GENDER, AND WORK: A MULTICULTURAL ECONOMIC HISTORY OF WOMEN IN THE UNITED STATES 160–61 (rev. ed. 1996); THOMAS DUBLIN, TRANSFORMING WOMEN’S WORK: NEW ENGLAND LIVES IN THE INDUSTRIAL REVOLUTION 238 (1994).

³⁵ 29 U.S.C. § 152(3) (2012) (excluding agricultural laborers and individuals employed “in the domestic service of any family or person at his home”). The exclusion of agricultural workers and live-in domestic workers from wage protections was a compromise to secure the critical votes of Southern politicians to pass the National Labor Relations Act and other New Deal legislation. Through this racist compromise, whites in the South thereby solidified their ability to exert economic domination over these workers, who were overwhelmingly black. See Peggie R. Smith, *Aging and Caring in the Home: Regulating Paid Domesticity in the Twenty-First Century*, 92 IOWA L. REV. 1835, 1857 & n.109 (2007) [hereinafter *Aging and Caring in the Home*].

³⁶ Social Security Act of 1935, 42 U.S.C. §§ 301–1397 (2012).

³⁷ 29 U.S.C. §§ 201–219 (2012).

³⁸ 29 C.F.R. § 1975.6 (2014) (applying OSHA to exclude domestic workers “as a matter of policy”).

³⁹ *Aging and Caring in the Home*, *supra* note 35, at 1855, 1857.

workers from wage protections was the result of a political compromise to secure the critical votes of Southern politicians to pass the National Labor Relations Act and other New Deal legislation.⁴⁰ Through this racist pact, whites in the South solidified their ability to exert economic domination over these workers, who were overwhelmingly black, not long after the abolition of slavery.⁴¹

Today, 95% of domestic workers are women, and approximately half (46%) were born abroad.⁴² Employment of immigrant women within domestic work increased dramatically as of the 1970s, after African American women mainly exited the profession following the Civil Rights Era.⁴³ Earlier scholarship by Peggie Smith and others has addressed the roles of race and class in the economic subordination of domestic workers,⁴⁴ but the additional dimension of immigration law and policy with respect to in-home workers' immigration status has yet to be explored systematically. The U.S. caregiving economy's roots in a racist legacy of slavery provided the legal and social underpinnings for the caste-like system we have today, one actively shaped through state-based acts and omissions that fortify class and immigration status distinctions among women (discussed in Parts I.B and II *infra*, as events in recent decades have shown.

Home care workers, whose work is similar to that of domestic workers with respect to caregiving responsibilities and their location within private homes, were prevented from receiving minimum wage and overtime protections forty years ago, and may continue to be excluded despite remedial efforts by the Department of Labor in 2013 to correct the historic injustice (discussed in Part II.A, *infra*). Ninety percent of in-home health care workers are women, and 56% are women of color—in another parallel with the domestic work industry—and although immigrants are 28% of this

⁴⁰ 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, 96, 117 (2011); see *Aging and Caring in the Home*, *supra* note 35, at 1857 & n.109.

⁴¹ See *supra* note 35, at 1857 & n.109.

⁴² LINDA BURNHAM & NIK THEODORE, NATIONAL DOMESTIC WORKERS ALLIANCE, HOME ECONOMICS: THE INVISIBLE AND UNREGULATED WORLD OF DOMESTIC WORK 11 (2012), <http://www.domesticworkers.org/homeeconomics/download> [<http://perma.cc/DZR9-26F3>] [hereinafter HOME ECONOMICS].

⁴³ TERESA AMOTT & JULIE MATTHAEI, RACE, GENDER AND WORK: A MULTICULTURAL ECONOMIC HISTORY OF WOMEN IN THE UNITED STATES 179 (1991).

⁴⁴ See generally *Aging and Caring in the Home*, *supra* note 35 (discussing race and gender in home care industry); Smith, *supra* note 16 (discussing race and gender in domestic work industry); Note, Kristi L. Graunke, "Just Like One of the Family": Domestic Violence Paradigms and Combating On-the-Job Violence Against Household Workers in the United States, 9 MICH. J. GENDER & L. 131 (2002) (discussing women in domestic work through immigration, race and gender); Nilliasca, *supra* note 2 (analyzing the role of race and class in a discussion of the domestic workers).

workforce overall, in several metropolitan areas their representation ranges from 69% to 83%.⁴⁵

The emergence of a class of women in the United States who can afford to hire someone else to perform domestic or home health work has created a demand for women to perform this caregiving and household work. By default, these workers receive less pay than what their employers are earning outside of the household, or else the economic incentive for the employer to work outside the home disappears. In many instances, domestic workers receive a few dollars above the minimum wage, and in some cases, lower than the minimum wage. This hierarchy creates class divisions nationwide and across national boundaries, as many domestic workers are non-citizens.⁴⁶ Despite this massive structural shift in the U.S. workforce, the government has declined to address the tension between meeting the demands of work outside the home and performing the work of social reproduction.

Social reproduction refers to the labor required for the day-to-day and generational maintenance of the population, and is “organized by families in households and by the state through health, education, welfare and immigration policies.”⁴⁷ State support for social-reproductive work can take many forms, including child care tax credits, subsidized or free day care, or universal requirements for paid parental or family medical leave. When the state withdraws (or fails to provide) financial support or infrastructure for social reproductive work within families, both the domestic worker and her employer are faced with structural subordination. The class, race, and now immigration status-based hierarchical differences between domestic workers and their largely female employers in the U.S. replicate the gendered power dynamics that existed for centuries in patriarchal households where household labor and the women (mothers, daughters, and other family) who performed it were devalued in private relationships and by government.⁴⁸ In a 2011 study, mothers spent double the time on providing child care each week than fathers; they also performed 2.6 times more hours of paid work than they did in 1965,⁴⁹ illustrating that U.S. women still shoulder a “second

⁴⁵ CYNTHIA HESS & JANE HENRICI, INST. FOR WOMEN’S POLICY RESEARCH & CARING ACROSS GENERATIONS, INCREASING PATHWAYS TO LEGAL STATUS FOR IMMIGRANT IN-HOME CARE WORKERS 5 (2013), http://www.iwpr.org/publications/pubs/increasing-pathways-to-legal-status-for-immigrant-in-home-care-workers/at_download/file [<http://perma.cc/YXP7-U2DA>]; see *infra* note 169, and accompanying text.

⁴⁶ HOME ECONOMICS, *supra* note 42, at 12.

⁴⁷ Judy Fudge, Visiting Leverhulme Professor, Kent Law Sch. and Professor and Lansdowne Chair, Univ. of Victoria, Commodifying Care Work: Globalization, Gender and Labour Law, The Inaugural Labour Law Research Network Conference 3 (June 13, 2013), www.upf.edu/gredtiss/_pdf/2013-LLRNConf_Fudge.pdf [<http://perma.cc/V7MZ-3AAC>].

⁴⁸ Graunke, *supra* note 44, at 188–90.

⁴⁹ KIM PARKER & WENDY WANG, PEW RESEARCH CTR., MODERN PARENTHOOD: ROLES OF MOMS AND DADS CONVERGE AS THEY BALANCE WORK AND FAMILY 1 (2013), http://www.pewsocialtrends.org/files/2013/03/FINAL_modern_parenthood_03-2013.pdf [<http://perma.cc/XSTQ-L9VE>] (analyzing data from U.S. Bureau of Labor Statistics’ American Time Use Survey).

shift” of unpaid domestic work on top of paid work,⁵⁰ and are expected to perform that work by default if they do not hire someone to perform that work.

U.K.-based feminist political scholars Genevieve LeBaron and Adrienne Roberts predicted this state of economic insecurity and have described it as a “carceral matrix.”⁵¹ In a carceral matrix, economic and social policies, state actors, and market forces “contain[] and manage[] tensions and contradictions,” locking individuals into unequal social relations and limiting their social mobility and life choices.⁵² Because these layers of inequality are interlocking, they may render ineffective any effort to focus on one aspect of identity alone as a means to understand structural subordination, whether it be gender, race, class, sexuality, or immigration status. Carceral dynamics create an impasse for some women, and metaphorical confinement for those women with the least mobility. In the U.S. context, not only did the federal government decline to provide state support for social-reproductive work, in the 1980s and 1990s it drastically curtailed social welfare programs and relied upon upper-class women and household workers to absorb the work of social reproduction.⁵³

Today, social-reproductive work is increasingly performed by immigrant domestic workers and home care workers, and these positions remain the most marginalized in economic and political thought. Work in the home has historically been devalued because the work had been unpaid,⁵⁴ and its exclusion from labor laws originated to exclude domestic workers and agricultural workers who previously provided unpaid slave labor in those roles.⁵⁵ To this day, the Gross Domestic Product excludes the value of unpaid care services when measuring the nation’s wealth and economic well-being. If economists accounted for nonmarket household production in the U.S. Gross Domestic Product for 2010, the GDP would have increased by 26%, or \$3.8 trillion.⁵⁶ Attempts by industry and the state to commodify that work by

⁵⁰ JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* 48 (2000) (attributing the coining of the phrase “second shift” to sociologist Arlie Hochschild, who advocated for the redistribution of household work between men and women, and reevaluating normative assumptions of privilege for mothers who cannot afford child care).

⁵¹ Genevieve LeBaron & Adrienne Roberts, *Toward a Feminist Political Economy of Capitalism and Carcerality*, 36 *SIGNS: J. OF WOMEN IN CULTURE AND SOC’Y* 19, 24 (2010).

⁵² *Id.*

⁵³ See Joya Misra, Jonathan Woodring & Sabine N. Merz, *The Globalization of Care Work: Neoliberal Economic Restructuring and Migration Policy*, 3 *GLOBALIZATIONS* 317, 318 (2006) (“As states have withdrawn from social care provision, women’s care work requirements have intensified. Poorer women migrate to provide support for their families, while wealthier families solve their care needs through hiring immigrant care workers.”).

⁵⁴ Smith, *supra* note 16, at 898–99.

⁵⁵ See Perea, *supra* note 40, at 98.

⁵⁶ BENJAMIN BRIDGMAN ET AL., U.S. BUREAU OF ECON. ANALYSIS, ACCOUNTING FOR HOUSEHOLD PRODUCTION IN THE NATIONAL ACCOUNTS, 1965–2010, at 23 (2012), <http://>

hiring workers from abroad—in the absence of workers’ ability to earn minimum wage or organize—is a continuation of these devastating precedents, as further discussed in Part II.B, *infra*.

Feminist social science research, rather than feminist legal theory, has provided a key counterweight to mainstream preoccupations with the “formal” economy by focusing on household economics.⁵⁷ Over the past few decades, social reproduction analysis has been used to explain gender inequality in international development policy,⁵⁸ as governments implemented neoliberal policies that justified lowering state costs for care and other social-reproductive resources in order to fundamentally restructure the economy and the role of government.⁵⁹ In recent decades, after neoliberal arguments that labor market deregulation and cuts to social welfare programs would bolster economic growth took root during the Reagan and Clinton Administrations, an application of social reproduction analysis to the United States would be illuminating. Republicans and Democrats alike retreated from the ideals of the New Deal and Great Society⁶⁰ by dismantling welfare programs and cutting off eligibility to economically vulnerable populations—including the formerly incarcerated and immigrants—by arguing that continuing to provide temporary benefits would “corrode [] personal responsibility, divorce [] work from reward, and let [] crime go without punishment.”⁶¹

For centuries, lawmakers have shown that they are willing to create workplaces leached of rights for certain classes of workers, particularly those in social-reproductive work. This regulatory exclusion, in turn, condones serious, widespread, and documented mistreatment. Because Congress has been willing to mitigate free-market principles by instituting minimum-wage and overtime protections for all other workers since the 1938 Fair Labor Standards Act,⁶² lawmakers’ exclusion of caregiving professions from labor laws is a glaring policy choice. For these workers, U.S. lawmakers consciously extended a legacy born of racism to deny certain women basic

www.bea.gov/scb/pdf/2012/05%20May/0512_household.pdf [<http://perma.cc/NU9J-QSBV>].

⁵⁷ Suzanne Bergeron, *Economics, Performativity, and Social Reproduction in Global Development*, 8 *GLOBALIZATIONS* 151, 151 (2011).

⁵⁸ *Id.* at 152.

⁵⁹ Misra et al, *supra* note 53, at 318.

⁶⁰ Core social democratic programs that actively expanded the government’s role in the economy were introduced later in the United States than other industrialized nations, see Ira Katznelson, *Rethinking the Silences of Social and Economic Policy*, 101 *POL. SCI. Q.* 307, 308 (1986), but began with the New Deal (introducing Social Security, financial regulation, public works projects, and labor standards such as the minimum wage and the forty-hour workweek) and the Great Society (establishing Medicare, Medicaid, food stamps, and Head Start).

⁶¹ Rebecca Bohrman & Naomi Murakawa, *Remaking Big Government: Immigration and Crime Control in the United States*, in *GLOBAL LOCKDOWN: RACE, GENDER, AND THE PRISON-INDUSTRIAL COMPLEX* 109, 110 (Julia Sudbury ed., 2005); see also *id.* at 109–110, 118–20.

⁶² 29 U.S.C. §§ 201–219 (2012).

wage protections,⁶³ with the undeniable implication that those in the domestic work and in-home caregiving industries, which are comprised almost entirely of women, are undeserving of economic rights. This mode of policymaking presents problems for a country that prides itself on egalitarian principles.⁶⁴

While the legacies of gender, class, and race divisions intersect and overlap with immigration status, they are incomplete proxies for understanding the dimension of immigration and citizenship status. As Shirley Lung has urged, work/family discussions will only include poor and low-income women, including immigrant women, once they

strive for an understanding of: (1) how the nature of low-wage jobs with poor working conditions, often under autocratic rule, creates inflexible workplaces and powerlessness to make choices about time; (2) how the structure of low-wage work concurrently produces patterns of mandatory long hours, involuntary part-time jobs, and unemployment among women; (3) how immigration status complicates work/family conflicts by intensifying job exploitation; and (4) how shifting family structures beyond the two-parent nuclear family accentuates the need for greater support [through] childcare and other kinds of caregiving for *all* families.⁶⁵

As discussed below, Congress's recent willingness to outsource caregiving work to "other women" from abroad as a component of comprehensive immigration reform is a deliberate extension of the carceral matrix by the state: one that is predictable, but ill-advised.⁶⁶ Government policies that continue to restrain the physical and social mobility of certain classes to insure social reproduction for others institutionalizes social inequality and the subordination of entire communities in a society that professes to abide by egalitarian principles. Public concern for preserving family unity for families of mixed immigration status, for example, has not reached the critical mass necessary to prevent the more than 200,000 deportations of immigrant adults with U.S. citizen children between 2010 and 2012.⁶⁷ Mainstream feminists align themselves with the state when they advance the "othering" of

⁶³ Perea, *supra* note 40, at 96 n.1.

⁶⁴ Linda Greenhouse, *What Would Justice Powell Do?: The 'Alien Children' Case and the Meaning of Equal Protection*, 25 CONST. COMMENT. 29, 44 (2008) ("[Justice] Brennan had written [in his draft opinion for the majority in *Plyler v. Doe*] that the creation of a permanent underclass of undocumented residents 'presents most difficult problems for a Nation that prides itself on egalitarian principles.'").

⁶⁵ Lung, *supra* note 2, at 1125.

⁶⁶ See discussion *infra* Part II.B.

⁶⁷ Seth Freed Wessler, *Nearly 205K Deportations of Parents of U.S. Citizens in Just over Two Years*, COLORLINES (Dec. 17, 2012, 9:45 AM EST), www.colorlines.com/archives/2012/12/us_deports_more_than_200k_parents.html [<http://perma.cc/M34E-PPYQ>] (reporting that between July 1, 2010, and Sept. 31, 2012, nearly 23% of all deportations—or, 204,810 deportations—were carried out against parents with citizen children).

immigrant women, remain silent about deportation-first policies, or directly benefit from the continued devaluation and de-legitimization of their work, particularly in the social-reproductive arena.

Because the gains of feminism need not be limited to women of certain race, class strata, or nationality (nor can it be), domestic workers and caregivers have organized in spite of their immigration status to demand “rights, respect, and recognition.”⁶⁸ Like Sojourner Truth before them, immigrant women workers ask, “And ain’t I a woman?”⁶⁹

B. Immigrants and the Deepening Paradox of Wrongs Without Remedies

The inequalities that non-citizens face are so deeply ingrained in our jurisprudence that when courts remark upon them, it is uncontroversial.⁷⁰ Chief Justice Warren called citizenship “the right to have rights,” the loss of which would mean “the total destruction of [an] individual’s status in organized society.”⁷¹ Writing for the majority in *Trop v. Dulles*,⁷² the Chief Justice said that for a person to lack citizenship in the country in which she is presently located,

[her] very existence is at the sufferance of the country in which [she] happens to find [herself]. While any one country may accord [her] some rights, and presumably as long as [she] remained in this country [she] would enjoy the limited rights of an alien Furthermore, [her] enjoyment of even the limited rights of an

⁶⁸ See *infra* note 231.

⁶⁹ See, e.g., Pramila Jayapal, *Immigration Reform: Good for Immigrant Women, Good for American Feminism*, THE NATION (Apr. 9, 2013), <http://www.thenation.com/article/immigration-reform-good-immigrant-women-good-american-feminism/> [<http://perma.cc/NST5-NRFT>] (quoting Sojourner Truth in connection with undocumented women’s stories “of being detained and not seeing a child for three months, of surviving domestic violence and not being able to call for help, of caring for someone else’s children but not being paid”); *About, AIN’T I A WOMAN!?*, <http://aintiawoman.org/about> [<http://perma.cc/FKY8-3BY3>] (describing a campaign for employer accountability led by immigrant women workers at Chinese Staff & Workers’ Association and National Mobilization Against SweatShops).

⁷⁰ See, e.g., *Plyler v. Doe*, 457 U.S. 202, 219 n. 19, 230 (1982) (declining to apply strict scrutiny to a state statute that would prohibit undocumented immigrant children from attending public schools, and applying a heightened rational basis standard instead); *Dandamudi v. Tisch*, 686 F.3d 66, 74 (2d Cir. 2012) (holding that “statutes that deny opportunities or benefits to aliens are subject to strict scrutiny” unless they involve excluding aliens from certain civil roles in the political process or excluding “people who reside in the United States without authorization [versus] those who are here legally”); *League of United Latin Am. Citizens v. Bradesen*, 500 F.3d 523, 537 (6th Cir. 2007) (upholding a state law that conditioned issue of driver’s license upon U.S. citizenship or legal permanent resident status, thereby excluding the undocumented and all other immigrants with lawful status); *LeClerc v. Webb*, 419 F.3d 405, 415 (5th Cir. 2005) (same decision with respect to a court rule governing admission to the state bar).

⁷¹ *Trop v. Dulles*, 356 U.S. 86 (1958).

⁷² *Id.* at 101–02.

alien might be subject to termination at any time by reason of deportation.⁷³

Although Chief Justice Warren was referring to denationalization (i.e., the loss of U.S. citizenship, which the majority rejected as cruel and unusual punishment in *Trop*), his description captures the fearful and tenuous situation of our nation's 11.3 million undocumented immigrants.⁷⁴ His description is also particularly apt today, when the state and private employers have unparalleled infrastructure worth tens of billions of dollars to bind immigrant workers and channel them out at their discretion.⁷⁵

In this Part, I apply feminist carceral analysis to examine how the Immigration Reform and Control Act ("IRCA")⁷⁶ and the Supreme Court's *Hoffman Plastics*⁷⁷ decision laid the groundwork for public and private policing of immigrant labor and immigrant lives. Post-*Hoffman*, any employer in the United States can become an extension of the carceral state and "lawfully" retaliate against whistleblowers by facilitating their incarceration or expulsion. Furthermore, because undocumented workers can be denied remedies that citizens would be entitled to, they are not full-fledged persons in the eyes of the law. Under this legalized inequality, their urgent needs—particularly those of immigrant women workers—are all but ignored.

⁷³ *Id.* at 101–02. One court, upon review of a denial of U.S. citizenship, invoked the "right to have rights" as a "basic right" and granted the plaintiff's application for naturalization. *Plewa v. I.N.S.*, 77 F. Supp. 2d 905, 909 (N.D. Ill. 1999).

⁷⁴ JEFFREY S. PASSEL ET AL., PEW RESEARCH CTR., AS GROWTH STALLS, UNAUTHORIZED IMMIGRANT POPULATION BECOMES MORE SETTLED 4 (2014), http://www.pewhispanic.org/files/2014/09/2014-09-03_Unauthorized-Final.pdf [<http://perma.cc/US7D-XY24>]. The situation of immigrants with legal status in the United States is somewhat less precarious, with deportation generally triggered only if the individual has been convicted of serious crimes, engaged in terrorism, or had misrepresented information in his immigration paperwork.

⁷⁵ DORIS MEISSNER ET AL., MIGRATION POLICY INST., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY 2 (2013), <http://www.migrationpolicy.org/sites/default/files/publications/enforcementpillars.pdf> [<http://perma.cc/M5WS-QRV8>] (noting that in 2012, U.S. federal spending on its two main immigration enforcement agencies, U.S. Customs and Border Protection and U.S. Immigration and Customs Enforcement, and its enforcement technology, U.S. Visitor and Immigrant Status Indicator Technology, was \$17.9 billion, a figure nearly fifteen times what was spent in 1986 before the passage of the Immigration Reform and Control Act). Furthermore, the U.S. government's spending on immigration enforcement in 2012 was 24% more than spending for the FBI, Drug Enforcement Administration, Secret Service, U.S. Marshals Service, and Bureau of Alcohol, Tobacco, Firearms, and Explosives combined. *Id.* at 9.

⁷⁶ Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a(1) (2012).

⁷⁷ *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 143 (2002) [here and subsequently referred to textually as "*Hoffman Plastics*" or "*Hoffman*," its colloquial names].

1. *From Contradiction to “Lawful” Retaliation: IRCA and Hoffman Plastics Force Undocumented Workers into a Bind*

Although major laws regulating work in the United States were drafted without reference to workers’ citizenship status, some courts have written undocumented workers out of major protections. Court rulings and increasingly harsh immigration policies have in turn bred carceral conditions so that workers continually fear retaliation in the form of losing their job or being reported to immigration authorities to deport them. The enforcement-first approach of IRCA and *Hoffman Plastics* has stripped immigrant workers of the major safeguards that would permit them to complain about workplace violations or even leave abusive jobs.

Under normal circumstances, freedom of contract and the employment-at-will doctrine are the two dominant legal philosophies defining employment, leaving an employee’s market value and bargaining position as her main protections.⁷⁸ Three categories of laws have been enacted to mitigate these two doctrines: labor standards regarding wages, hours, and safety; anti-discrimination laws based upon protected characteristics; and collective bargaining.⁷⁹ Under all of these laws, it is illegal for an employer to retaliate against a worker who complains about a violation of these laws. After the 1986 Immigration Reform and Control Act (“IRCA”), however, employers were prohibited from hiring immigrants who were not lawfully admitted or did not have work authorization,⁸⁰ placing employers who did do so in a position to blackmail undocumented employees by making immigration-based threats.

In 2002, the Supreme Court took IRCA a step further by permitting immigration enforcement to trump enforcement of labor laws. In *Hoffman*, the Court eliminated two of the most important remedies available to undocumented workers under the National Labor Relations Act: reinstatement to one’s job, and back pay.⁸¹ The Court held that an undocumented immigrant who sought to organize a union and was fired in retaliation could not be awarded the remedies for the illegal termination because doing so would contradict immigration law and Congressional intent.⁸² The *Hoffman Plastics* decision has emboldened employers to argue that undocumented workers

⁷⁸ Ontiveros, *supra* note 2, at 236.

⁷⁹ *Id.* at 236–37.

⁸⁰ 8 U.S.C. § 1324a(a)(1)–(h)(3). Congress reasoned that “the most humane, credible and effective way to respond” to unauthorized immigration was to penalize those employers who hired undocumented immigrants. H.R. REP. NO. 99-682, at 46 (1986), *as reprinted in* 1986 U.S.C.A.N. 5649, 5650. Immigration law does not prohibit undocumented workers from accepting work. See 8 U.S.C. § 1324c(a)–(f). In 1990, Congress only created new sanctions that prohibited immigrants from knowingly or recklessly using false documents to obtain employment. Immigration Act of 1990, Pub. L. 101-649, § 205(a), 104 Stat. 4978, 5019 (codified at 8 U.S.C. § 1184(g)(1)(B) (2012)).

⁸¹ 535 U.S. at 148–49, 152.

⁸² *Id.* at 148–49.

have little to no remedies under laws beyond the NLRA, such as wage-and-hour laws and federal anti-discrimination laws. Although courts post-*Hoffman* have refused to extend the Supreme Court's holding to the Fair Labor Standards Act,⁸³ they may be reluctant to distinguish Title VII⁸⁴ or anti-discrimination statutes⁸⁵ from *Hoffman*'s ruling because those laws provide an analogous right to reinstatement or back pay.⁸⁶ *Hoffman Plastics* also provided employers with a basis to argue that they are entitled to know a worker's immigration status as relevant discovery in litigation, although advocates have been able to win protective orders, obtain bifurcation of liabilities and damages phases, or argue that *Hoffman Plastics* does not bar their recovery under statutes with an enforcement framework distinct from that of the NLRA, including federal and state civil rights laws.⁸⁷ Employers nevertheless use these discovery requests under the cover of law to intimidate workers and chill the exercise of their rights.

Rather than deterring unauthorized immigration over the past three decades, IRCA had the effect of deputizing all employers to police the immigration status of its employees across tens of millions of private sites across the country: the workplace. By effectively "legalizing" employer retaliation when it invokes the state's immigration powers, IRCA and *Hoffman* intensified the disparity in power between employers and immigrant workers, and lay the foundation for the carceral dynamics that the undocumented face today.⁸⁸ Denying a worker the protections and remedies that would prevent

⁸³ *Zavala v. Wal-Mart Stores, Inc.*, 393 F. Supp. 2d 295, 321–25 (D.N.J. 2005) (concluding that the FLSA did not preclude undocumented workers from obtaining relief for work already performed); *Galaviz-Zamora v. Brady Farms, Inc.*, 230 F.R.D. 499, 501–03 (W.D. Mich. 2005) (holding that immigration status is not relevant to a claim under FLSA).

⁸⁴ Pre-*Hoffman*, the Second Circuit considered Title VII alongside IRCA's immigration provisions, and held that undocumented immigrants were entitled to receive back pay under Title VII. See *Rios v. Enter. Ass'n Steamfitters Local Union 638*, 860 F.2d 1168, 1173 (2d Cir. 1988) (holding that undocumented aliens were eligible to receive back pay under Title VII). Because the Supreme Court has not addressed this question in a Title VII context, *Rios* has not been overruled. See *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1067 (9th Cir. 2004) (finding *Hoffman* not broadly applicable and specifically noting the differences between the NLRA and Title VII), *cert. denied*, 544 U.S. 905 (2005).

⁸⁵ *Lopez v. Superflex, Ltd.*, No. 01 Civ. 10010, 2002 WL 1941484, at *1 (S.D.N.Y. Aug. 21, 2002) (noting that plaintiff in disability discrimination action withdrew claim for back pay "in light of the Supreme Court's decision in *Hoffman*").

⁸⁶ Just after the *Hoffman* ruling, the Equal Employment Opportunity Commission (EEOC) clarified that undocumented workers are entitled to the anti-discrimination protections, but also rescinded its former Guidance that recognized their entitlement to a back pay remedy. EEOC, No.915.002, RESCISSION OF ENFORCEMENT GUIDANCE ON REMEDIES AVAILABLE TO UNDOCUMENTED WORKERS UNDER FEDERAL EMPLOYMENT DISCRIMINATION LAWS (2002), <http://www.eeoc.gov/policy/docs/undoc-rescind.html> [http://perma.cc/U9J2-ELUS].

⁸⁷ See, e.g., *NIBCO, Inc.*, 364 F.3d at 1067; *Avila-Blum v. Casa de Cambio Delgado, Inc.* 236 F.R.D. 190, 192 (S.D.N.Y. 2006) (citing *Rivera*, 364 F.3d at 1067–69).

⁸⁸ This potential for abuse extends to immigrant guest workers (formally called "temporary workers"), whose employment-based visas are valid only so long as they remain employed by their sponsor, and therefore places these immigrant guest workers in continual fear of becoming undocumented or being deported if their employer chooses to retali-

her from being worse off for lodging a complaint (and make it futile for employers to retaliate) makes it possible for an employer to punish her for engaging in the same activities a citizen would be protected in while seeking enforcement of her rights.

At the worst extremes of abusive employer conduct, undocumented workers and so-called “guest workers” alike have been trapped in exploitative employment relationships that undermine the workers’ ability to freely leave their employ. In a survey of twenty-four non-governmental organizations, between 2010 and 2012 advocates documented thousands of instances in which employers engaged in labor trafficking of such workers through force, fraud, or coercion.⁸⁹ These cases illustrate that in the post-IRCA/*Hoffman* era, the supposedly bilateral nature of at-will employment is a fiction for immigrant workers, and only serves the interests of employers who wish to bind the immigrants they employ. It is common for employers to extract labor from immigrants with threats to turn them over to immigration authorities or police, or cancel temporary labor authorization for guest workers at whim.⁹⁰ Thus, undocumented immigrants and workers on temporary visas are extremely vulnerable to trafficking while deportation-first U.S. immigration laws ripen the conditions for labor trafficking to flourish. Even among employers that do not actively employ coercive or carceral tactics against their immigrant employees, the potential for abuse deters many from asserting their rights.

2. *Undocumented Workers and the Post-IRCA Carceral Matrix*

Our legal system’s unwillingness to recognize the undocumented as legitimate persons vests employers with the power to exploit and control undocumented immigrants. The paradox of a “wrong without a remedy”

ate. FREEDOM NETWORK (USA), HUMAN TRAFFICKING AND H-2 TEMPORARY WORKERS 2 (2012), <http://freedomnetworkusa.org/wp-content/uploads/2012/09/FN-Factsheet-Temporary-Workers-H2-FINAL-9-19-12.pdf> [<http://perma.cc/87PH-XLQB>] (discussing how temporary worker visas such as H-2 visas tied workers’ livelihood and status to their employers, easily creating situations of subordination and exploitation akin to cases of labor trafficking involving undocumented immigrants).

⁸⁹ FREEDOM NETWORK (USA), FREEDOM NETWORK MEMBER REPORT: A CLOSER LOOK AT HUMAN TRAFFICKING ACROSS THE UNITED STATES (2010–2012), at 5 (2014), <http://freedomnetworkusa.org/wp-content/uploads/2014/07/Member-Report-20141.pdf> [<http://perma.cc/A22A-6DV5>]. Under U.S. law, labor trafficking occurs when a person is induced to provide labor or services through force, fraud, or coercion. In this survey, 76% of the 2,236 trafficking survivors served in a three-year period had been trapped in a labor trafficking situation (73%) or a combined labor and sex trafficking situation (3%). *Id.* at 10.

⁹⁰ See S. POVERTY LAW CTR., VOICES FOR JUSTICE 26 (2008), www.splcenter.org/voices-for-justice/human-trafficking [<http://perma.cc/59T5-ATY8>]; see also *Written Testimony of Daniel Werner, Senior Supervising Attorney, Southern Poverty Law Center, EEOC* (June 17, 2015), www.eeoc.gov/eeoc/meetings/6-17-15/werner.cfm [<http://perma.cc/6VGM-6AAP>].

contradicts a long-held tenet of our legal system,⁹¹ yet typifies the carceral matrix of legal tensions and coercive conditions. It condones the entrapment of immigrant workers, particularly women, in a damned-if-you-do, damned-if-you-don't impasse of poor or dangerous working conditions without a clear alternative. Three decades of increasingly punitive immigration laws since IRCA have also armed employers with additional carceral instrumentalities of the state—nearly \$18 billion in detention and deportation infrastructure annually⁹²—at no additional cost to the retaliating employer.

Undocumented workers experience risks and vulnerabilities that are solely the result of their immigration status. Employers intentionally abuse their positions as citizens or individuals with legal status by contacting immigration or law enforcement officials to remove the complaining immigrant worker, a tactic that has been increasingly documented in recent years.⁹³ In California alone, advocates highlighted at least twelve instances in the past five years in which employers threatened to, or actually did, contact immigration authorities or local police to retaliate against immigrants complaining about workplace violations or engaging in a union organizing campaign.⁹⁴ Many resulted in incarceration, either in immigration detention or in police custody, and several resulted in the worker's deportation.⁹⁵ The true prevalence of these abuses is certain to be much higher, because we are only aware of the stories that have been reported to advocacy groups. Despite free-market assumptions about employee freedom of movement, immigrants risk deportation and separation from their families simply by speaking up.

A highly sophisticated detection, detention, and deportation apparatus, largely developed under the presidencies of George W. Bush and Barack Obama,⁹⁶ gives credence to employer's threats of deportation or misuse of

⁹¹ Drawing from Blackstone's *Commentaries*, Justice Marshall laid out the constitutional rationale for federal courts to fashion judicial remedies in *Marbury v. Madison*, 5 U.S. 137 (1803):

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. . . . The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

Id. at 163.

⁹² MEISSNER ET AL., *supra* note 75, at 2.

⁹³ CHO & SMITH, *supra* note 26, at 6.

⁹⁴ EUNICE H. CHO & REBECCA SMITH, NAT'L EMP'T LAW PROJECT, HOW IMMIGRATION REFORM CAN STOP RETALIATION AND ADVANCE LABOR RIGHTS: CALIFORNIA REPORT 5–10 (2013), <http://www.nelp.org/page/-/justice/2013/workers-rights-on-ice-retaliation-report-california.pdf> [<http://perma.cc/PX5R-JYNC>].

⁹⁵ *Id.*

⁹⁶ Anil Kalhan, *Immigration Policing and Federalism Through the Lens of Technology, Surveillance, and Privacy*, 74 OHIO ST. L.J. 1105, 1108, 1124–25 (2013) (describing shift toward 'automated immigration policing,' including use of interoperable database systems and other technologies beginning with the Bush Administration following the September 11, 2001 terrorist attacks, including records of immigrants deemed to be "ab-

law enforcement authorities against a complaining worker. The United States now expels immigrants at nine times the rate it did twenty years ago, and the total number of deportations under President Obama has surpassed two million, far more than any other president.⁹⁷ Similarly, the numbers of immigrants the U.S. government detains nationwide has reached all-time highs, driven by a little-known but extremely expensive Congressional “quota” requiring U.S. Immigration and Customs Enforcement to hold an average of 34,000 immigrants in detention per day.⁹⁸ Finally, the immigration and criminal justice systems have become even more punitive and enmeshed, with interlocking mandates, information-sharing, and tactics through programs such as Secure Communities,⁹⁹ recently superseded by the Priority Enforcement Program.¹⁰⁰

The laws and institutions that underpin the carceral matrix do not distinguish by gender, so the experiences of specifically immigrant women are rarely considered. Forty seven percent of female undocumented immigrant workers reported a minimum wage violation in the past week (compared with 30% for men),¹⁰¹ and 85% of all undocumented workers reported overtime pay violations.¹⁰² In social-reproductive industries, undocumented domestic workers performing all categories of work (nannies, caregivers, and housecleaners) were paid less than documented immigrants and native-born workers.¹⁰³ Because employers who flout overtime laws do not pay any overtime premiums for long workweeks, they have no incentive to hire more

sconders” or “fugitives,” and individuals with prior removal orders); *see also* Shirley Lin, Note, *States of Resistance: The REAL ID Act and Constitutional Limits Upon Federal Deputization of State Agencies in the Regulation of Non-Citizens*, 12 N.Y.C. L. REV. 329, 340–47 (2009) (describing concerted investment post-9/11 in deputizing state agencies and law enforcement through the INA Section 287(g) and Secure Communities immigration-police collaborations, and in screening out undocumented applicants for drivers’ licenses).

⁹⁷ *Barack Obama, Deportee-in-Chief*, THE ECONOMIST (Feb. 8, 2014), www.economist.com/news/leaders/21595902-expelling-record-numbers-immigrants-costly-way-make-america-less-dynamic-barack-obama [<http://perma.cc/62BX-NW33>].

⁹⁸ Nick Miroff, *Controversial Quota Drives Immigration Detention Boom*, WASH. POST (Oct. 23, 2013), www.washingtonpost.com/world/controversial-quota-drives-immigration-detention-boom/2013/10/13/09bb689e-214c-11e3-ad1a-1a919f2ed890_story.html [<http://perma.cc/96W7-JPPX>].

⁹⁹ *See* Bohman & Murakawa, *supra* note 61, at 113–18; Kalhan, *supra* note 96, at 1108 (describing Secure Communities’ linking of criminal records databases maintained by states and the FBI with the immigration databases maintained by the Department of Homeland Security, “automating DHS’s ability to identify potentially deportable noncitizens in state or local custody.”).

¹⁰⁰ Memorandum from Jeh C. Johnson, Sec’y of the Dep’t of Homeland Sec. on Secure Cmty. to Thomas S. Winkowski, Acting Dir. of U.S. Immigration & Customs Enf’t. (Nov. 20, 2014), www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf [<http://perma.cc/83HJ-5TUM>].

¹⁰¹ ANNETTE BERNHARDT ET. AL., NAT’L EMP. LAW PROJECT, BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA’S CITIES 43 fig.5.1 (2009), <http://www.nelp.org/page/-/brokenlaws/BrokenLawsReport2009.pdf> [<http://perma.cc/ZK2J-XSMX>].

¹⁰² *Id.* at 44 tbl.5.2.

¹⁰³ HOME ECONOMICS, *supra* note 42, at 20.

workers to perform the additional hours rather than pay the existing, over-worked staff higher wages.¹⁰⁴ Due to the grueling, long days employers require them to work, 67% of live-in domestic workers are ultimately paid less than the minimum wage.¹⁰⁵

Undocumented women are also more vulnerable to experience sexual assault and harassment at work because of the coercive leverage that their immigration status potentially provides employers. Eighty percent of Mexican immigrant women employed as farmworkers interviewed in 2010 said that they had faced some form of sexual harassment.¹⁰⁶ Thirty six percent of live-in domestic workers have been threatened, insulted, or verbally abused on the job, which reflects the means employers will use to exert control over them.¹⁰⁷ Incidents of harassment and abuse persist, notwithstanding the government's provision of humanitarian U visas since 2007 that provide a path to legal status for immigrant victims of serious crimes, including rape.¹⁰⁸ They serve as after-the-fact remedies, however, while keeping the carceral framework intact.

Feminist concerns about how women will balance both work outside the home and social-reproductive work (that falls upon women's shoulders disproportionately)¹⁰⁹ apply with equal urgency for the immigrant women employed in time-intensive service professions. In the case of Evelyn Coke, the home health worker and Jamaican immigrant whose action for minimum wage and overtime was heard by the Supreme Court in 2007, it would be fair to ask, as Lung proposed, "who cleaned Ms. Coke's home and took care of her family while she was working sixty to seventy hours per week taking care of others?"¹¹⁰ Our failure to make these inquiries only legitimizes the erasures of individuals whose labor is readily consumed, but ironically de-

¹⁰⁴ Cf. Shirley Lung, *Overwork and Overtime*, 39 IND. L. REV. 51, 58 (2005) ("The [Fair Labor Standards Act's overtime requirement] represented a paradigm shift by halting federal progress toward reducing the ceiling on maximum work hours in favor of permitting employers to require unlimited overtime hours if they were willing to pay for it.").

¹⁰⁵ HOME ECONOMICS, *supra* note 42, at 19.

¹⁰⁶ Irma Morales Waugh, *Examining the Sexual Harassment Experiences of Mexican Immigrant Farmworking Women*, 16 VIOLENCE AGAINST WOMEN 237, 241 (2010).

¹⁰⁷ HOME ECONOMICS, *supra* note 42, at 33 tbl.4.

¹⁰⁸ See New Classification for Victims of Criminal Activity; Eligibility for "U" Non-immigrant Status, 72 Fed. Reg. 53,014, 53,015 (Sept. 17, 2007) (codified at 8 C.F.R. pts. 103, 212, 214, 248, 274a, 299). Although a vital form of relief, this humanitarian visa provides immigration relief only to victims who are willing to cooperate with law enforcement to prosecute the perpetrators.

¹⁰⁹ A study that attempted to measure the economic value of household production, or work done in the home, including childcare, cooking, shopping, and housework revealed that in 2010, women spent ten hours a week on household production more than men: 25.9 hours a week in 2010, compared with 16.8 hours by men. BENJAMIN BRIDGMAN ET AL., *supra* note 56, at 26 tbl.1; see also *What is the Value of Household Work?*, U.S. BUREAU OF ECON. ANALYSIS: BLOG (June 11, 2012), blog.bea.gov/tag/household-production [<http://perma.cc/AU5H-H2G8>].

¹¹⁰ Lung, *supra* note 2, at 1126 (referencing Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158 (2007)).

valued because our courts and our conversations divorce that labor from their personhood and dignified needs. Even while adult immigrant women’s labor is in high demand to make it possible for the government to maintain and reproduce the American workforce “at virtually no cost” to the state, “their own reproduction, be it biological or social, is not [equally desired].”¹¹¹

Non-citizen workers, particularly undocumented women workers, bear the brunt of the many contradictions and exceptions to our national rhetoric of equality and fair dealing. They work in a legal system that condones detention or removal as a consequence of demanding equitable treatment, and is otherwise indifferent to their own needs to care for themselves or for their families. The economic and social instability immigrant workers experience through their employment relationship, which in turn replicates and reinforces further social constraints, is a dominant, ubiquitous, but by no means exclusive source of carceral tension. Discrimination based upon immigration status also occurs openly in education, social services, health care, and in the state’s response to violence against these communities, and while beyond the scope of this Article, should be further explored in the additional context of sexual orientation and gender identity.¹¹² Without remedial laws that will legalize undocumented workers or place immigrant workers on equal footing with all other workers, the carceral matrix remains the dominant order of business.

II. STATE INTERVENTIONS AND RETREATS IN SOCIAL REPRODUCTION: OPPORTUNITIES TO GET LABOR AND IMMIGRATION RIGHT

*Cuts in government support for social reproduction advocated by the IMF, the World Bank, and other global governance institutions were based on the flawed belief that women would take on the newly privatized care tasks formerly supported by the state and that women’s supply of non-market labor was “infinitely elastic.”*¹¹³

Critiques regarding the role of women in social reproduction—such as the one typified in the above commentary regarding economic restructur-

¹¹¹ LeBaron & Roberts, *supra* note 51, at 37.

¹¹² See, e.g., CATHERINE HANSSSENS, CTR. FOR HIV LAW & POLICY, AISHA C. MOODIE-MILLS, CTR. FOR AM. PROGRESS, ANDREA J. RITCHIE, STREETWISE AND SAFE, DEAN SPADE, COLUMBIA LAW SCH. & URVASHI VAID, COLUMBIA LAW SCH., A ROADMAP FOR CHANGE: FEDERAL POLICY RECOMMENDATIONS FOR ADDRESSING THE CRIMINALIZATION OF LGBT PEOPLE AND PEOPLE LIVING WITH HIV 26 (2014), https://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/roadmap_for_change_full_report.pdf [<https://perma.cc/4373-6LBB>] (applying a carceral analysis to the criminalization of LGBTQ individuals and individuals living with HIV in the United States, including immigrants).

¹¹³ Bergeron, *supra* note 57, at 151 (citation omitted).

ing—have long been a subject of international development theory.¹¹⁴ These critiques are increasingly relevant to examining social trends regarding caregiving work in U.S. households. In this Part, I argue that two major legal trends are intertwined and will undergo substantial negotiation in the years to come: labor standards for caregiving work and comprehensive immigration reform.

In the first development, the U.S. Department of Labor (“DOL”) rulemaking to extend minimum wage and overtime protections to home health workers employed by third parties in October 2013 is the subject of a legal challenge that will likely be heard by the Supreme Court next term. In the second development, members of Congress included “W visas” with a path to citizenship for immigrant home health workers in S. 744, the last major immigration reform bill that passed the Senate in mid-2013. Both legal trends reflected positive steps forward and damaging setbacks to the agenda of ending economic and political subordination of women. The significance of these developments in the last few years will be examined under the analytical framework of the carceral matrix.

A. *Caregiving Exceptionalism in the Twenty-First Century*

In 1890, live-in domestic workers typically worked exceedingly long, seventeen-hour days—seven days a week—and earned less per hour than women in textiles, restaurants, shops, and factories.¹¹⁵ Over the following century, with the increased participation of women in the workforce and medical advances extending our longevity, the home care industry emerged as a subset of domestic work.¹¹⁶ Now, in the twenty-first century, the home care industry has marshaled its resources to maintain nineteenth-century working conditions for in-home caregivers.

In 1974, Congress extended FLSA minimum wage and overtime protections to most domestic workers, recognizing that domestic work affected interstate commerce and extending vital wage protections to domestic employees.¹¹⁷ But the legislation amending the FLSA also excluded from FLSA

¹¹⁴ E.g., Misra et al., *supra* note 53, at 318–21.

¹¹⁵ *Aging and Caring in the Home*, *supra* note 34, at 1851–52.

¹¹⁶ AI-JEN POO WITH ADRIENNE CONRAD, *THE AGE OF DIGNITY: PREPARING FOR THE ELDER BOOM IN A CHANGING AMERICA* 2–4 (2015) (comparing the age sixty-five-and-older population in the United States a century ago (3%) with the sixty-five-and-older population in 2015 (13%) and in 2030 (20%)) [hereinafter *THE AGE OF DIGNITY*]; *see id.* at 90–92 (discussing overlaps between professional caregivers and domestic workers).

¹¹⁷ Fair Labor Standards Amendments of 1974, Pub. L. No. 93–259, § 7(b)(1)–(2), 88 Stat. 55, 62 (as codified at 29 U.S.C. § 206(f)); 29 C.F.R. § 552.99 (2014) (“In the legislative history it was pointed out that employees in domestic service employment handle goods such as soaps, mops, detergents, and vacuum cleaners that have moved in or were produced for interstate commerce and also that they free members of the household to themselves to engage in activities in interstate commerce.”); *Id.* (noting “the expanded use of the interstate commerce clause by the Supreme Court,” and concluding that “coverage of domestic employees is a vital step in the direction of ensuring that all workers

coverage in-home caregivers: “any employee employed in domestic service employment to provide companionship services,” as well as those “employed on a casual basis in domestic service employment to provide babysitting services.”¹¹⁸ A year later, the DOL interpreted the new amendment to exempt home care workers—including employees of for-profit third party agencies, by claiming that they were “companions” for the elderly and disabled.¹¹⁹ The regulation exempting these caregivers from basic wage protections is known as the “companionship services exemption.”

Pivotal to the DOL’s inclusion/exclusion determination was the agency’s definition of the *type* of services provided by the workers to be excluded—“companionship services”—which the DOL defined extremely broadly to mean “those services which provide fellowship, care, and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs.”¹²⁰ But the agency expressly excluded from the definition services that “require and are performed by trained personnel,” such as nurses, so that those professions would remain protected by wage-and-hour standards.¹²¹ On two prior occasions, the DOL considered narrowing the companionship services exemption to bring more workers under FLSA’s coverage in 1993 and 2001, but the agency ultimately decided not to make any change.¹²²

Recently, the executive branch reevaluated its stance once more, and definitively. In 2007, the Supreme held that the agency’s rules clearly exempted home health workers employed by third parties from receiving minimum or overtime wages, in *Long Island Care at Home, Ltd. v. Coke*.¹²³ In response to *Coke*, the DOL under President Obama heavily revised those rules by issuing a new interpretation of the “companionship services exemption” and a narrower definition of “companionship services” under the FLSA, in October 2013, with the effect of extending minimum wage and overtime protections to this predominately female workforce.¹²⁴ The new regulations were intended to elevate millions of current and future home health workers from poverty wages, and the agency considered more than 26,000 comments.¹²⁵ By the DOL’s estimate, the effect of its rulemaking would be the “transfer” of approximately \$321.8 million in income from

affecting interstate commerce are protected by the Fair Labor Standards Act”) (citation omitted). The FLSA Amendments excluded domestic workers who reside in their employers’ homes from receiving overtime protections, however. FLSA Amendments of 1974 § 7(b)(4).

¹¹⁸ FLSA Amendments of 1974 § 7(b)(3).

¹¹⁹ 29 C.F.R. § 552.109(a) (2014).

¹²⁰ *Id.* § 552.6.

¹²¹ *Id.*

¹²² 58 Fed. Reg. 69,310, 69,312 (Dec. 30, 1993); 66 Fed. Reg. 5481, 5485 (Jan. 19, 2001).

¹²³ 551 U.S. 158, 171 (2007).

¹²⁴ Application of the Fair Labor Standards Act to Domestic Service, 78 Fed. Reg. 60,454, 60,454 (Oct. 1, 2013).

¹²⁵ *Id.* at 60,460.

home care agencies to direct care workers annually.¹²⁶ The agency also predicted that providing wage protections to home health workers could reduce their “reliance on public assistance programs to meet the needs of their own households,” noting that approximately half the home health workforce currently qualifies for and relies upon public assistance.¹²⁷ By all measures, the new home care regulations would directly transform the class dynamics of millions of minority and immigrant women in the U.S. workforce, potentially lifting them out of poverty.

The home-care industry immediately sued to stop the regulations, and in December 2014 and January 2015, the DOL received a sharp rebuke from the district court, which issued two opinions in *Home Care Association of America v. Weil* invalidating the remedial regulations as (in its view) contradictory to Congressional intent.¹²⁸ On appeal, however, the D.C. Circuit swiftly reversed both judgments after carefully reviewing the statutory text, the Congressional record, and the new regulations under both steps of *Chevron* analysis.¹²⁹ The panel noted binding Supreme Court precedent on the very question of agency authority from *Coke*, and reaffirmed the federal agency’s expertise in matters of policy.¹³⁰ In September 2015, the home care employer trade groups confirmed that they would petition for certiorari from the Supreme Court in one last effort to preserve substandard working conditions for home care workers.¹³¹

The district court’s selective reasoning and stinging reprimand of the DOL in *Weil* are clear examples of institutional hostility toward efforts to remediate historic subordination on both racial and gendered grounds in a federal statute. In his first *Weil* ruling, Judge Richard Leon opined that the exemption’s language covering “any employee” who provides “companionship services” clearly included all such employees, and accordingly, the new DOL regulations regarding workers employed by third-party providers contradicted the broad language of who is to be excluded.¹³² Thus, rather than

¹²⁶ *Id.* at 60,456.

¹²⁷ *Id.* at 60,545 & n.203 (citing DORIE SEAVY & ABBY MARQUAND, PARAPROFESSIONAL HEALTHCARE INST., CARING IN AMERICA: A COMPREHENSIVE ANALYSIS OF THE NATION’S FASTEST-GROWING JOBS: HOME HEALTH AND PERSONAL CARE AIDES 58 (Dec. 2011), <http://phinational.org/sites/phinational.org/files/clearinghouse/caringinamerica-20111212.pdf> [<http://perma.cc/GZ4Q-2E8V>]).

¹²⁸ *Home Care Ass’n of Am. v. Weil*, 76 F.Supp.3d 138, 145–147 (D.D.C. 2014) (vacating DOL’s October 1, 2013 third-party employer regulation); *Home Care Ass’n of Am. v. Weil*, 78 F.Supp.3d 123, 130 (D.D.C. 2015) (vacating DOL’s October 1, 2013 regulation defining “companionship services”).

¹²⁹ *Home Care Ass’n of Am. v. Weil*, 799 F.3d 1084, 1087 (D.C. Cir. 2015) (relying on two-step analysis established in *Chevron, U.S.A., Inc., v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984)). The panel issued its opinion fewer than four months after hearing oral argument from the parties.

¹³⁰ *Id.* at 1089–96.

¹³¹ Motion for Stay of Mandate Pending Filing of Petition for Writ of Certiorari at 2, *Home Care Ass’n of Am. v. Weil*, 799 F.3d 1084 (D.C. Cir. 2015) (No. 15-5018).

¹³² *Weil*, 76 F. Supp. 3d at 145–46.

apply both steps of the two-step analysis laid out in *Chevron*,¹³³ Judge Leon held that the rule was invalidated at step one, which inquires “whether Congress has directly spoken to the precise question at issue.”¹³⁴ In his view, the DOL was “amazingly . . . try[ing] to do administratively what others had failed to achieve in either the Judiciary or the Congress,”¹³⁵ and appeared to give considerable weight to the fact that after *Coke*, Congress failed to pass any of the bills introduced that would have abolished the exemption.¹³⁶ The Leon opinion, however, failed to address the fact that the Supreme Court in *Coke*, in reviewing the same statutory provision, determined that FLSA’s language “explicitly le[ft] gaps . . . as to the scope and definition of statutory terms such as ‘domestic service employment’ and ‘companionship services,’” and therefore it was up to DOL as the “expert” agency to address the “interstitial matter, i.e., a portion of a broader definition, the details of which . . . Congress entrusted the agency to work out.”¹³⁷

Judge Leon also appears to have been swayed by the fact that two senators debating the exemption in 1974 were concerned about “the costs incurred by those in need of the types of services at issue,” and quoted an observation by the Tenth Circuit that “Congress created the ‘companionship services’ exemption to enable guardians of the elderly and disabled to financially afford to have their wards cared for in their own private homes as opposed to institutionalizing them.”¹³⁸ He reiterated those concerns in his subsequent ruling vacating the DOL’s narrower definition of “companionship services,” closing with his view that Congress’s creation of the companionship services definition “has been, and is, a central component of [its] effort to insure that as many of those families as possible will be able to survive th[e financial] struggle” to “care for their loved ones.”¹³⁹ Judge Leon also noted that 90% of home health aides and personal care aides are employed by third parties rather than by individuals or families and surmised that “Congress included the exemptions for a reason”¹⁴⁰—even though the modern-day home health industry and public funding system are vastly different from what existed in 1974.

On appeal, the D.C. Circuit reversed both rulings entirely. The panel observed at the outset that the DOL adopted its prior interpretation of the exemption at a time when “the provision of professional care took place outside the home” in outside settings such as nursing homes, and recognized that the agency’s newest interpretation would provide home care workers

¹³³ 467 U.S. 837 (1984).

¹³⁴ *Weil*, 76 F. Supp. 3d at 143 (quoting *Chevron*, 467 U.S. at 842).

¹³⁵ *Id.* at 142.

¹³⁶ *Id.* at 147 (citing *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007)).

¹³⁷ *Coke*, 551 U.S. at 165.

¹³⁸ *Weil*, 76 F. Supp. 3d at 146 (quoting *Welding v. Bios Corp.*, 353 F.3d 1214, 1217 (10th Cir. 2004)). Interestingly, the Tenth Circuit opinion does not cite any remarks by members of Congress. See *Welding*, 353 F.3d at 1217.

¹³⁹ *Weil*, 78 F. Supp. 3d at 130.

¹⁴⁰ *Weil*, 76 F. Supp. 3d at 147.

“the same FLSA protections afforded to their counterparts who provide largely the same services in an institutional setting.”¹⁴¹ Addressing *Chevron* step one, the panel concluded that the Supreme Court had already held that “the text of the FLSA does not expressly answer the third-party-employment question” in *Coke* and that there was no “clear answer in the statute’s legislative history.”¹⁴² Rather, the question of “whether to include workers paid by third-parties within the scope of the [exemption’s] definitions is among the ‘details’ that the statute leaves the ‘agency to work out.’”¹⁴³ At *Chevron* step two, assessing the reasonableness of the agency’s interpretation of the statute, the panel held that the DOL’s interpretation was “entirely reasonable” because the 1974 FLSA Amendments were “intended to expand [] coverage . . . to include all employees whose vocation was domestic service.”¹⁴⁴

If the Supreme Court were to hear the trade groups’ appeal, judicial nullification of the DOL regulations would require the Court to backtrack its previous unanimous support for broad, discretionary executive power in *Coke*, when the executive had then taken the position of denying labor standards to in-home workers employed by third parties. It would also mean that minority and largely undocumented immigrant women must continue to bear the brunt of governmental cuts to funding for home health care. By withholding minimum wage and overtime guarantees, in-home health workers employed by corporations will continue to subsidize the state and the companies that employ them through undercompensated and undervalued labor.

The trial court rulings in *Weil* typify the neoliberal view of infinite (female) worker elasticity that will guarantee social-reproductive work despite governmental cuts to social welfare programs.¹⁴⁵ After the elderly and disabled increasingly preferred care at home over institutionalized care, Medicare and Medicaid program for the elderly and disabled began to largely subsidize home care services. In the 1990s, Medicaid accounted for 43% of all long-term care funds, and more than one-half of funds allocated from federal, state, and county sources funded home health care.¹⁴⁶ During this period, the labor union Service Employees International Union (“SEIU”)

¹⁴¹ *Home Care Ass’n of Am. v. Weil*, 799 F.3d 1084, 1087 (D.C. Cir. 2015).

¹⁴² *Id.* at 1091 (quoting *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 168 (2007)).

¹⁴³ *Id.* (quoting Fair Labor Standards Amendments of 1974, Pub. L. No. 93–259, § 29(b), 88 Stat. 55, 76 (1974) (as codified at 29 U.S.C. § 202)). In fact, because FLSA “does not expressly answer the third-party-employment question,” the Supreme Court left it to the DOL to determine whether the exemption should apply to “all,” “some,” or “none” of the home care workers paid by third parties. *Id.* at 1093 (quoting *Coke*, 551 U.S. at 167–68)).

¹⁴⁴ *Id.* at 1093 (quoting Application of the Fair Labor Standards Act to Domestic Service, 78 Fed. Reg. 60,454, 60,454 (Oct. 1, 2013)).

¹⁴⁵ *Cf. supra* note 53 and accompanying text.

¹⁴⁶ Eileen Boris & Jennifer Klein, “*We Were the Invisible Workforce*”: *Unionizing Home Care*, in *THE SEX OF CLASS: WOMEN TRANSFORMING AMERICAN LABOR* 177, 180 (Dorothy S. Cobble ed., 2007) [hereinafter “*We Were the Invisible Workforce*”].

formed coalitions with groups for senior citizens and people with disabilities to lobby states to stop capping funding that would allow the consumers to live independently and home health workers to receive improved wages and benefits.¹⁴⁷ Because government funds continue to pay the overwhelming majority of the cost for providing home care services, as the DOL noted when it issued the new regulations,¹⁴⁸ the industry’s argument that consumers can ill afford to pay workers standardized wages is a red herring. According to data from the Centers for Medicare and Medicaid Services, as the DOL noted,

Medicare and Medicaid together paid roughly two-thirds of the funds paid to freestanding [home-health care] agencies (41 and 24 percent, respectively) State and local governments account for 15 percent of revenues, while private health insurance accounts for eight percent. *Out-of-pocket funds account for 10 percent of agency revenues.*¹⁴⁹

The *Weil* rulings also reflect a political reality: the burgeoning home care industry has been successful in claiming (at this juncture) to know “what’s best for the consumer” by marginalizing home care workers’ serious concerns about economic self-sufficiency while employed by those consumers. After the district court invalidated the DOL’s revised third-party rule, the home care industry hailed it as “a huge victory for patients and their families who will be able to continue receiving home care services without interruption” and “a huge victory for caregivers who will continue to be protected instead of being forced to work only part time.”¹⁵⁰

These statements fail to recognize that the median hourly wage for home health workers is already a few dollars above the minimum wage;¹⁵¹ holding employers to an *overtime* obligation to pay a home health worker 1½-times her hourly rate after she has worked forty hours in a week, on the other hand, incentivizes employers to hire and staff additional workers instead of forcing its workers to provide elastic, up-to-twenty-four-hour care. In the case of Ms. Coke, who challenged the third-party exemption to the Supreme Court, she sometimes worked three consecutive twenty-four-hour shifts without an agency colleague to relieve her.¹⁵² One major home care

¹⁴⁷ *Id.* at 190–92.

¹⁴⁸ Application of the Fair Labor Standards Act to Domestic Service, 78 Fed. Reg. at 60,458 n.2 (citation omitted, including attribution of figures to one *Weil* plaintiff, National Association for Home Care and Hospice).

¹⁴⁹ *Id.* (emphasis added).

¹⁵⁰ *Court Vacates Definition of Companionship Services in Home Care Workers’ Wage Rights*, 13 WORKPLACE L. REP. 113 (2015).

¹⁵¹ See HOME ECONOMICS, *supra* note 42, at 18.

¹⁵² Douglas Martin, *Evelyn Coke, Home Care Aide Who Fought Pay Rule, Is Dead at 74*, N.Y. TIMES (Aug. 9, 2009), www.nytimes.com/2009/08/10/nyregion/10coke.html [http://perma.cc/KU75-VQYH]; see also Ruthann Robson, *A Servant of One’s Own: The Continuing Class Struggle in Feminist Legal Theories and Practices*, 23 BERKELEY J. GENDER L. & JUST. 392, 408–09, 409 n.135 (2008) (book review) (discussing the Su-

company reported that in preparation for the new DOL regulations, it planned to pass along the pay increases to its clients, as “the majority of [its] clients are willing to pay for overtime.”¹⁵³ Having capitalized on a workforce without wage regulation, home care franchises have been extremely profitable. Top agencies receive \$1 million or more in gross revenue, with profit margins at 30% to 40%.¹⁵⁴

The fate of these remedial regulations has far-reaching implications. The demand for home care workers is expected to nearly double over the next seven years, when more the Baby Boomer generation will age into their seventies and eighties in addition to the forty million elderly Americans today.¹⁵⁵ While there are currently more than two million home health workers today,¹⁵⁶ by 2018 that number will expand to approximately 4,322,000—a figure exceeding the number of teachers from kindergarten through high school (3.9 million), all law enforcement and public safety workers (3.7 million), fast food and counter workers (3.7 million), registered nurses (3.2 million), and all child care workers and preschool teachers (2.0 million).¹⁵⁷

As discussed earlier, the relegation of caregiving work to a separate economic caste has an extensive legal history. In addition to the devaluation of the work and the predominantly minority women who perform it, lawmakers continued to treat such work as something other than legitimate work requiring regulation. After the DOL interpreted the FLSA to exempt home health workers staffed by agencies from wage protections in 1975, the for-profit third-party home health industry grew with government income from Medicaid and other programs into a \$90-billion industry.¹⁵⁸ Revenues in the home care industry have doubled in the past decade.¹⁵⁹ Today, 90% of

preme Court justices’ failure to discuss Ms. Coke’s working conditions during oral arguments or in the Court’s opinion and instead addressing affordability for families of the elderly requiring care). Ms. Coke suffered from kidney failure, but could not afford to hire a home care worker in her last days. Martin, *supra*.

¹⁵³ Esha Chhabra, *How Select Home Care Is Coping with New Wage and Labor Regulations*, N.Y. TIMES (June 25, 2014, 2:00 PM), boss.blogs.nytimes.com/2014/06/25/how-select-home-care-is-coping-with-new-wage-and-labor-regulations [<http://perma.cc/R35G-KJXR>].

¹⁵⁴ Kelly Kennedy, *Home Health Care Is One of the Most Profitable Franchises*, USA TODAY (May 7, 2012, 9:41 PM), usatoday30.usatoday.com/money/industries/health/story/2012-05-03/home-health-care-a-profitable-franchise/54813562/1 [<http://perma.cc/S82W-9ARJ>].

¹⁵⁵ *How 2 Million Workers Lost Rights*, *supra* note 14.

¹⁵⁶ PARAPROFESSIONAL HEALTHCARE INST., FACTS 5: HOME CARE AIDES AT A GLANCE 1 (2014), <http://phinational.org/sites/phinational.org/files/phi-facts-5.pdf>. [<http://perma.cc/S8Y7-D3AK>] [hereinafter HOME CARE AIDES AT A GLANCE].

¹⁵⁷ PARAPROFESSIONAL HEALTHCARE INST., FACTS 3: WHO ARE DIRECT-CARE WORKERS? 4 (2011), <http://www.phinational.org/sites/phinational.org/files/clearinghouse/NCD%20Fact%20Sheet-1.pdf> [<http://perma.cc/U4G8-E6Y7>].

¹⁵⁸ *How 2 Million Workers Lost Rights*, *supra* note 14.

¹⁵⁹ *Court Vacates Definition of Companionship Services in Home Care Workers’ Wage Rule*, *supra* note 150.

in-home health care workers are women, and 56% are women of color.¹⁶⁰ Only around a quarter of home care workers are unionized.¹⁶¹

Without fundamental wage guarantees, however, the profession will continue to be associated with unstable income, an unsustainable career, and turnover in care for the recipients of those services.¹⁶² The median annual earnings of all female in-home health care workers is \$16,016, approximately half that of the median earnings for all women in the U.S. workforce.¹⁶³ With median weekly wages of \$308,¹⁶⁴ home care workers are among the lowest earners of all service professions.¹⁶⁵ One in four home care workers lives below the poverty line.¹⁶⁶ As in the domestic work industry, this workforce also continues to face labor law exclusions including Title VII anti-discrimination/anti-harassment law and workplace safety laws. In one study, home care workers reported incidents of workplace physical violence (44%), psychological abuse (65%), sexual harassment (41%), and sexual violence (14%).¹⁶⁷

Immigrant women are increasingly among those providing in-home health care for the elderly and disabled. Census data suggests that immigrants have a disproportionately higher representation among home care workers employed in private homes, approximately 28% of the workforce.¹⁶⁸ The proportion of immigrant workers is substantially higher in the Miami-Hialeah, Florida area, the New York and Northeastern New Jersey metropolitan area, and the McAllen-Edinburg-Pharr-Mission, Texas area, at 83%, 74%, and 69%, respectively.¹⁶⁹ Experts estimate that approximately 21% of foreign-born direct care workers providing long-term care for the elderly are undocumented immigrant workers,¹⁷⁰ although those figures for the subsidi-

¹⁶⁰ HESS & HENRICI, *supra* note 45, at 5.

¹⁶¹ *Labor’s Wage Smackdown: A Federal Judge Rebukes Another Regulatory Overreach*, WALL ST. J. (Jan. 8, 2015, 7:23 PM), <http://www.wsj.com/articles/labors-wage-smackdown-1420762984> [<http://perma.cc/M26S-ZD9Y>].

¹⁶² “*We Were the Invisible Workforce*,” *supra* note 146, at 181.

¹⁶³ HESS & HENRICI, *supra* note 45, at 5.

¹⁶⁴ *Id.*

¹⁶⁵ Application of the Fair Labor Standards Act to Domestic Service, 78 Fed. Reg. 60,454, 60,458 (Oct. 1, 2013) (codified at 29 C.F.R. pt. 552).

¹⁶⁶ HOME CARE AIDES AT A GLANCE, *supra* note 156, at 2.

¹⁶⁷ Lindsay Nakaishi et al., *Exploring Workplace Violence Among Home Care Workers in a Consumer-Driven Home Health Care Program*, 61 WORKPLACE HEALTH & SAFETY 441, 446 (2013). The study identified three factors that may increase the risk of workplace violence: (1) real and perceived barriers to reporting violence; (2) tolerance of violence; and (3) limited training to prevent violence. *Id.* at 446–49. By contrast, a 2011 poll of more than 1000 adult women reported 24% of U.S. women experienced sexual harassment in the workplace. Gary Langer, *One in Four U.S. Women Report Workplace Harassment*, ABC NEWS (Nov. 16, 2011, 12:01AM), <http://www.langerresearch.com/wp-content/uploads/1130a2WorkplaceHarassment.pdf> [<http://perma.cc/4H92-G9S6>].

¹⁶⁸ HESS & HENRICI, *supra* note 45, at 5.

¹⁶⁹ *Id.*

¹⁷⁰ SUSAN MARTIN ET AL., THE ROLE OF MIGRANT CARE WORKERS IN AGING SOCIETIES: REPORT ON RESEARCH FINDINGS IN THE UNITED STATES 23 (2009), http://www.compas.ox.ac.uk/fileadmin/files/Publications/Research_projects/Labour_markets/Migrant_care_workers/ElderCareReport.pdf [<http://perma.cc/Z7L2-F3UG>].

ary in-home care industry are not available. The difficulty in estimating the true numbers due to the off-the-books nature of the work suggests that immigrant women's actual representation in the workforce is likely to be even higher.

Hostility from the industry and the district court in *Weil* toward providing a baseline of income above the poverty level to home health workers reflect prevailing political thought: endorsement of a free-market status quo and the devaluation of social-reproductive work. Judge Leon invoked this status quo in an impassioned conclusion to his second opinion:

Millions of American families each day struggle financially to care for their loved ones who are either too elderly or infirm to care for themselves. Congress is now, and has been, keenly aware of that struggle for many decades. . . . The exemption Congress has provided third-party employers and individual families with respect to minimum and overtime wages has been, and is, a central component of Congress's effort to insure that as many of those families as possible will be able to survive that struggle.¹⁷¹

But the DOL's regulatory fixes to home health worker compensation, which were to take effect on January 1, 2015, will likely remain in limbo until the Supreme Court revisits the issue. Unlike in *Coke*,¹⁷² however, the executive branch is now on the side of the caregiver in *Weil* and defending its own regulations.

A broader national caregiver movement has also emerged since *Coke* to raise the public profile of home health workers and overhaul working conditions in the industry. Known as Caring Across Generations, the coalition was formed by domestic worker and low-wage advocacy groups in 2011—the National Domestic Workers Alliance and Jobs With Justice—and joined by home health worker groups, labor unions (including SEIU and AFSCME), and “care consumers.”¹⁷³ With labor advocates, Caring Across Generations lobbied the DOL for the reforms that led to the 2013 revised rules, and will continue to organize for public support and recognition for caregivers.¹⁷⁴ As discussed below, however, the leaders of the contemporary domestic worker and home health worker movements knowingly brokered a compromise rife with contradiction once it had an opportunity to address female workers and immigration law. While they marshaled counter-neoliberal arguments to support higher wages for workers, they simultaneously endorsed market- and consumer-driven neoliberal immigration reform for immigrant home health workers. The audience for their immigration reform ideas were, osten-

¹⁷¹ Home Care Ass'n of Am. v. *Weil*, 78 F. Supp. 3d 123, 130 (D.D.C. 2015)

¹⁷² See *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 165 (2007).

¹⁷³ THE AGE OF DIGNITY, *supra* note 116, at 5–6; *What Is Caring Across Generations?*, CARING ACROSS GENERATIONS, <http://www.caringacross.org/about-us/> [<http://perma.cc/TZM5-HZ56>].

¹⁷⁴ *What Is Caring Across Generations?*, *supra* note 173.

sibly, U.S. citizen women, rather than the migrant caregivers themselves who are, and would be, women too.

B. Migrant Caregivers, Comprehensive Immigration Reform, and Drones: The Lines in the Sand

Feminist scholarship has not systematically addressed citizenship or immigration status in depth, perhaps because to do so will require feminism to address nationalism, its cognate, xenophobia, and carceral assumptions. U.S. immigration laws are rife with provisions and policies that have given effect to racist and gendered exclusions, and the fierce controversy currently raging over legalization of the undocumented makes clear that articulation of feminist approaches to immigration are necessary. As discussed below, existing carceral dynamics wholly framed Congress’s last major immigrant legalization proposal, S. 744, which proposed to import and integrate migrant home health workers within the legal system while offering only a precarious, highly contingent and unforgiving fifteen-year path to citizenship for the undocumented. The legislation would have fundamentally altered future U.S. immigration from a system primarily focused upon family reunification to one based upon ties to private employers.

Our nation’s enforcement-first approach to immigration did not emerge from an ideological vacuum. Political scholars Rebecca Bohrman and Naomi Murakawa have drawn connections between the growth of the security state and the shrinking welfare state: due to retrenchment in social welfare programs under Presidents Clinton and Bush, bipartisan ideological attacks on “big government”¹⁷⁵ has shifted domestic social policy from “social provision” to “social lockdown”¹⁷⁶—with little public outcry over government up-sizing of security and enforcement infrastructure and its explicit targeting of immigrants. The federal government has assembled and maintained a carceral matrix of detection, detention, and deportation directed toward immigrants, while no shift in funding or legal reform for social-reproductive work for families has materialized to address caregiving needs. For industrialized countries experiencing care deficits, including the United States, global migration yields “hidden savings for the governments of the receiving countries” because the wages of middle-class women and the labor of relatively underpaid female immigrant workers in social-reproductive work subsidize aid to those homes.¹⁷⁷ With this overarching framework, it is worthwhile to identify a new role for feminist legal theory and critical legal

¹⁷⁵ Bohrman & Murakawa, *supra* note 61, at 109.

¹⁷⁶ *Id.* at 121 (noting the general shift in policy but also that the state has always been locked down to some extent for women of color).

¹⁷⁷ Misra, *supra* note 53, at 318–19 (quoting Noeleen Heyzer & Vivienne Wee, *Domestic Workers in Transient Overseas Employment: Who Benefits, Who Profits, in THE TRADE IN DOMESTIC WORKERS: CAUSES, MECHANISMS AND CONSEQUENCES OF INTERNATIONAL MIGRATION* 31, 44–45 (Noleen Hyzer et al., eds., 1994)).

studies to elevate the discourse surrounding immigrants' rights and future rounds of immigration reform.

Market interests have shaped U.S. immigration policy since its inception, when the executive branch delegated immigration agency functions first to the Department of Treasury, then to the Department of Labor.¹⁷⁸ Since 2001, large-scale guest worker programs have been a feature of every major immigration reform proposal.¹⁷⁹ In mid-2013, the Senate passed the "Border Security, Economic Opportunity, and Immigration Modernization Act" (S. 744),¹⁸⁰ the last major bipartisan effort to address comprehensive immigration reform ("CIR"). For the first time in history, a CIR bill included strong measures to counter exploitation: a guest worker visa program with a path to citizenship, a work permit decoupled from the original sponsoring employer, and stringent anti-retaliation protections. Immigrants from abroad who would be eligible for these visas would include home health workers.¹⁸¹ S. 744's primary features, however, were a "legalization" process for the 11.3 million undocumented immigrants, in the form an arduous ten-year probationary period known as Registered Provisional Immigrant status,¹⁸² and \$46.3 billion in additional funds for border security and immigration detention.¹⁸³

The chief architects of any guest worker program in an immigration reform bill are the U.S. Chamber of Commerce and the AFL-CIO.¹⁸⁴ In a compromise for S. 744, the Chamber of Commerce proposed a "W visa" program that would sponsor immigrant workers in so-called "low-skilled" industries with a shortage of workers, including in-home care for the elderly and individuals with disabilities and other industries including construction and hospitality, although the AFL-CIO opposed the inclusion of home health

¹⁷⁸ See U.S. CITIZENSHIP & IMMIGRATION SERVS. HISTORY OFFICE & LIBRARY, OVERVIEW OF INS HISTORY 4 (2012), <http://www.uscis.gov/sites/default/files/USCIS/History%20and%20Genealogy/Our%20History/INS%20History/INSHistory.pdf> [<http://perma.cc/CBG5-TEWS>].

¹⁷⁹ See NAT'L EMP'T LAW PROJECT, SUMMARY OF KEY IMMIGRATION REFORM PROPOSALS: IMMIGRANT WORKER ISSUES 2 (2015), www.nelp.org/content/uploads/2015/03/SUMMARY-OF-KEY-IMMIGRATION-REFORM-PROPOSALS.pdf [<http://perma.cc/P2PT-EXTX>]; Cristina M. Rodríguez, *Guest Workers and Integration: Toward a Theory of What Immigrants and Americans Owe One Another*, 2007 U. CHI. LEGAL F. 219, 219–20 (2007); see also MADELEINE SUMPTION & DEMETRIOS G. PAPADEMETRIOU, MIGRATION POLICY INST., LEGAL IMMIGRATION POLICIES FOR LOW-SKILLED FOREIGN WORKERS 1, <http://www.migrationpolicy.org/sites/default/files/publications/CIRbrief-Low-SkilledVisas.pdf> [<http://perma.cc/3RTD-THSV>].

¹⁸⁰ Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (as passed by Senate, June 27, 2013); see also S. REP. NO. 113-40 (2013).

¹⁸¹ See Sam Hananel, *New W-Visas Could Help Employers Fill Jobs*, ASSOCIATED PRESS (Apr. 10, 2013, 9:52 a.m.), <http://www.usatoday.com/story/money/business/2013/04/10/foreign-worker-visas/2070005> [<http://perma.cc/S6FC-WXS7>] (reporting that W visas could assist "employers that struggle to fill those jobs [] washing dishes, cleaning hotels, caring for the elderly. . . [after] business groups and labor unions have agreed on a plan to allow thousands of new low-skilled foreign workers into the workforce").

¹⁸² S. 744 § 6(a)(2)(A).

¹⁸³ *Id.* § 2101(a).

¹⁸⁴ See SUMPTION & PAPADEMETRIOU, *supra* note 179, at 1.

workers in this program.¹⁸⁵ Senate leaders included the new W visas in the final legislation.¹⁸⁶ Under this program, employers could apply to register for a certain number of W visa workers from abroad each year if they certified that they could not find a worker in the United States willing to take the job.¹⁸⁷ The visa would last three years, and the W visa holder could choose to renew it for additional three-year periods.¹⁸⁸ However, an immigrant with a W visa could not be unemployed for more than sixty consecutive days.¹⁸⁹

The twenty thousand W visas for so-called “low-skilled workers”¹⁹⁰ in the first year could gradually increase over five years to up to two hundred thousand per year.¹⁹¹ The number of visas permitted would fluctuate based upon changes in the unemployment rates, job availabilities, and other data maintained by a new Bureau of Immigration and Labor Market Research, a statistical agency within U.S. Citizenship and Immigration Services.¹⁹² Ostensibly, the caps would regulate guest worker migration based upon a verifiable scarcity of workers already in the United States who are willing and able to perform the positions offered.¹⁹³

The W visa offered three remedial—and in our post-IRCA world, unprecedented—changes over existing work-based immigration visas. First, it would permit these immigrant workers to be employed year-round, rather than for months at a time. Currently, the H-2B visa program only permits low-wage workers to work in seasonal jobs, and while renewable, has been capped at sixty-six thousand per year since 1990.¹⁹⁴ The temporary, one-

¹⁸⁵ Interview with Ana Avendano, Former Assistant to the President and Director of Immigration and Community Action (Mar. 4, 2015) (notes on file with author).

¹⁸⁶ S. 744 §§ 4702–03.

¹⁸⁷ *Id.* § 4703(e)(1)(B) (providing the requirements for registered employers to designate a position for a W visa worker, including attestations regarding wages to be paid, prior attempts to recruit workers in the United States, that there is no strike, lockout, or work stoppage at the visa-holder’s potential place of employment, and that there have not been recent layoffs of U.S. workers).

¹⁸⁸ *Id.* § 4703(c)(4)(A) (“A certified alien may be granted W nonimmigrant status for an initial period of 3 years.”); *id.* § 4703(c)(4)(B) (“A W nonimmigrant may renew his or her status as a W nonimmigrant for additional three-year periods.”).

¹⁸⁹ *Id.* § 4703(c)(5) (“A W nonimmigrant (A) may be unemployed for a period of not more than 60 consecutive days; and (B) shall depart the United States if such W nonimmigrant is unable to obtain employment during such period.”).

¹⁹⁰ Hananel, *supra* note 181; *see* S. 744 § 4703(a) (including under “Excluded Occupations” those occupations that are classified by the Bureau of Labor Statistics as “requiring an individual with a bachelor’s degree or higher level of education”).

¹⁹¹ S. 744 § 4703 (setting numerical limitations at a maximum of 20,000 W nonimmigrants during the first year and no more than 200,000 during any year after the fourth year).

¹⁹² *Id.* § 4701(d), (f)–(h).

¹⁹³ *See, e.g.,* Hananel, *supra* note 181 (“It’s tough work taking care of people with Alzheimer’s and dementia that may strike somebody or scream at people, may be incontinent, have difficulty getting in and out of bed, or need help feeding.” (quoting Fred Benjamin, chief operating officer of Medicalodges, which provides in-home care and offers nursing homes and assisted living facilities)).

¹⁹⁴ Immigration Act of 1990, Pub. L. 101-649, § 205(a), 104 Stat. 4978, 5019 (codified at 8 U.S.C. § 1184(g)(1)(B) (2012)).

sided nature of the H visa reduces the worker's presence in the United States to a contingency and leaves workers in perpetual uncertainty.

Second, W visa immigrants would have whistle-blower protections and the ability to change employers without losing legal status or legal work authorization (which guest workers currently do not have the option to do).¹⁹⁵ In a section applicable to all immigrants employed without authorization, S. 744 included a clear, remedial "*Hoffman* fix" to restore "all rights and remedies provided under any Federal, State, or local law relating to workplace rights," including but not limited to back pay and reinstatement to immigrant workers facing discrimination or retaliation.¹⁹⁶

Third, and more importantly, although the W visas would be issued with termination dates, those workers would be eligible to apply for lawful permanent residence, a precursor to U.S. citizenship.¹⁹⁷ The W visa holder would also be able to bring a spouse and minor children.¹⁹⁸ This provision of S. 744 is an important sign of progress, because it would be the first time that workers without a bachelor's or advanced degree (whom lawmakers and the media have called "low-skilled workers") would be allowed to obtain a green card without an employer's sponsorship.

This historic agreement to provide job offers to migrant caregivers with the strongest labor and immigration-status protections we have seen since IRCA reveals the strong interest convergence between native-born American families with caregiving needs and non-citizen workers.¹⁹⁹ At a Senate Judiciary Committee hearing entitled "How Comprehensive Immigration Reform Should Address the Needs of Women and Families," Ai-jen Poo,

¹⁹⁵ S. 744 § 4703(a) (providing under "Portability" that a W visa holder "admitted to the United States for employment by a registered employer may (1) terminate such employment for any reason; and (2) seek and accept employment with another registered employer in any other registered position within the terms and conditions of the W non-immigrant's visa," and under (l)(6) "Prohibited Activities" that acts to "intimidate, threaten, restrain, coerce, retaliate, discharge, or in any other manner, discriminate against" an employee who has complained are unlawful).

¹⁹⁶ *Id.* § 3101.

¹⁹⁷ *See id.* § 2301 (allocating a merits-based points system, in which an immigrant "employed full-time in the United States, or has an offer of full-time employment . . . in a zone 1, zone 2, or zone 3 occupation shall be allocated 10 points"); *Summary Report for: 31-1011.00—Home Health Aides*, O*NET ONLINE (2015), www.onetonline.org/link/summary/31-1011.00 [<http://perma.cc/8ZUL-J2BL>] (classifying home health aides as a Zone 2 profession).

¹⁹⁸ *See* S. 744 § 4703 (providing that the spouse and minor children of a W nonimmigrant may be admitted to the United States).

¹⁹⁹ *Cf.* Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980). Bell discusses the political history that led to the holding in the Supreme Court's landmark decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), which reflected "the principle of interest convergence" that the interest in providing blacks with racial equality in public schooling will only be accepted as long as it "converges with the interests of whites." Bell, *supra*, at 483. This inspired his famous observation "justice—or its appearance—may, from time to time, be counted among the interests deemed important by the courts and by society's lawmakers." Bell, *supra*, at 523.

director of the National Domestic Workers’ Alliance and co-founder of Caring Across Generations,²⁰⁰ testified:

Immigrant women workers will only play a *greater* role in America’s economy going forward The aging of America means the overall demand for direct-care workers, who are predominantly women, is projected to increase by 48[%] over the next decade. But the population of U.S.-born workers is only growing by about 1%.

Demand for these services is growing much faster than the labor pool. Immigrant women will be needed to fill the labor shortage; we must increase the legal pathways for workers who will come in the future to come safely, with full worker protections, and the opportunity to bring their families with them from the outset.²⁰¹

The AFL-CIO and Caring Across Generations’ domestic worker advocates were successful in gaining political recognition for the vital role of immigrant women and home health workers, and translating that recognition into a discrete claim in “future flows” of immigration through an expanded guest worker function in immigration. Their advocacy reflects the view that currently unauthorized forms of immigration by undocumented women is less preferable than immigration occurring through legal channels.²⁰² By voting for S. 744, a majority of Senators signaled that they believed that providing home health workers with visas along with significantly expanded labor and immigration-status protections would be economically beneficial for the country. Most likely, the Senators and the Chamber of Commerce were aware that the migrant home health workers might arrive into a newly reformed industry with minimum wage and over time protections: by June 2013, when S. 744 passed the Senate, the DOL had firmly and publicly declared its intent to bring home health workers within the ambit of wage and overtime protections under its revised regulations—and did issue the new regulations within months. Although S. 744 was considered dead upon arrival—House leaders stubbornly refused to take up S. 744 for debate²⁰³—

²⁰⁰ THE AGE OF DIGNITY, *supra* note 116, at 5.

²⁰¹ *How Comprehensive Immigration Reform Should Address the Needs of Women and Families: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. (2013) (statement of Ai-jen Poo, Executive Director of the National Domestic Workers Alliance), <http://www.judiciary.senate.gov/imo/media/doc/CHRG-113shrg81734.pdf> [<http://perma.cc/YLL7-FWA3>] (citations omitted); *see also* AGE OF DIGNITY, *supra* note 116, at 93 (citing study that after accounting for workforce growth and retiring workers in the coming decades, more than eighty-two million workers must enter the U.S. workforce, and 35% to 40% of those workers must come from first- and second-generation immigrants).

²⁰² *See* Rodríguez, *supra* note 179, at 249 (noting that those who champion temporary worker programs believe “inevitable immigration through expanded legal mechanisms is certainly preferable to the status quo”).

²⁰³ Ginger Gibson, *Boehner: No House Vote on Senate Immigration Bill*, POLITICO (July 8, 2013, 04:52 PM), www.politico.com/story/2013/07/john-boehner-house-immigration-vote-93845.html [<http://perma.cc/5UET-85SB>].

its historic provision for recruiting migrant caregivers and other guest workers is certain to be a recurring feature of CIR proposals in the coming years.²⁰⁴

The Senate's willingness to include caregiver visas for immigrant women workers with beneficial and explicitly remedial labor protections was also the product of an exorbitant compromise: large-scale carceral expansions to border patrol and interior enforcement in the overall CIR provisions of S. 744. The bill would have funneled \$46.3 billion into southwest border enforcement, regardless of whether it was needed or not, and included specific appropriations for: 19,200 new Border Patrol agents to double the force within ten years (costing \$30 billion);²⁰⁵ 3,500 additional Customs and Border Protection officers; seven hundred miles of fencing (costing \$8 billion);²⁰⁶ specific types of military-grade technology (including watch towers, Blackhawk helicopters, "mobile automated targeting systems," drones, and cameras, costing \$3.2 billion); and other infrastructure.²⁰⁷ Every major CIR effort in the past decade has included these carceral measures for immigration hardliners in exchange for any CIR proposal that would provide a means for the 11.3 million undocumented to legalize.²⁰⁸ Without adequate political demands for an alternative approach to immigration policy, the now-overt intent to militarize our nation's carceral infrastructure gives credence to advocates' warnings regarding a 'war on immigrants' mentality, with disastrous results for human rights and women's rights along the border, in detention centers, and elsewhere in the interior.²⁰⁹

The Senators' inclination to deal with future immigrant caregivers fairly must be considered in the context of S. 744's treatment of the undocumented women who have already been providing caregiving work. If S. 744 had

²⁰⁴ See Rodríguez, *supra* note 179, at 219–20 (noting that guestworker programs have been a core feature of frontrunner immigration reform proposals since President George W. Bush's first term and all subsequent CIR bills, partly because of special interest lobbying by potential employers and the political palatability of such "market"-based programs among lawmakers).

²⁰⁵ Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 6(a)(3)(A)(i) (as passed by Senate, June 27, 2013).

²⁰⁶ *Id.* § 6(3)(A)(iv).

²⁰⁷ *Id.* § 5(a)(3).

²⁰⁸ See Marc Cooper, *High Noon on the Border*, THE NATION (May 19, 2005), <http://www.thenation.com/article/high-noon-border> [<http://perma.cc/6USN-8D3B>] (describing the McCain-Kennedy CIR bill as trading off tougher border and workplace enforcement for legalization of the undocumented); Seth Freed Wessler, *Senate Passes Border Militarization Amendment with Bipartisan Support*, COLORLINES (June 25, 2013, 7:00 AM), www.colorlines.com/articles/senate-passes-border-militarization-amendment-bipartisan-support [<http://perma.cc/CS3K-6N4D>] (reporting Senate agreement for billions in new border militarization by amendment to S. 744 as a "compromise to galvanize Republican support to guarantee a supermajority in favor of the larger immigration overhaul").

²⁰⁹ See Todd Miller, *War on the Border*, N.Y. TIMES (Aug. 17, 2013), www.nytimes.com/2013/08/18/opinion/sunday/war-on-the-border.html [<http://perma.cc/EFE8-WK53>]; see also INCITE!, IMMIGRATION ENFORCEMENT, incite-national.org/sites/default/files/incite_files/resource_docs/0767_toolkitrev-immigration.pdf [<http://perma.cc/27PK-S5SV>].

been enacted into law, these women, along with their family members and community members, would have faced a harsher ten-year contingent status (called Registered Provisional Immigrant, or “RPI”) with a slew of arduous requirements that would have excluded between 3.5 to 5 million out of the 11.3 million who require legalization.²¹⁰ Among the hurdles that applicants for this contingent status would have been required to overcome: be free of certain criminal convictions; satisfy all tax liabilities; acquire English proficiency; pay a penalty and filing fees; and have been physical present in the country before December 31, 2011.²¹¹ The millions of immigrants who would not have been able to legalize under S. 744 would “most likely be left facing an extremely harsh and unforgiving set of laws almost certain to eventually force their detention and deportation (if detected) or more likely leave them in undocumented status for the rest of their lives (if undetected).”²¹² Finally, in a shift that was not lost upon immigrant communities of color, S. 744’s second major bipartisan compromise was an agreement to institute a “points” system and fundamentally shift our immigration system from one favoring family ties to one favoring employment ties,²¹³ disadvantaging women, people who work in the informal economy or perform unpaid work, relatives of U.S. citizens with insufficient formal education and employment history, older adults, and applicants from less-developed countries.

When critical feminism urges an analysis of laws beyond their literal words to acknowledge how they could have otherwise been written; how they are coded for gender, race, class, and citizenship by terms or by application; and how values such as family unity, equality, and dignity should extend from the cultural to the political, it is possible to articulate a feminist analysis of immigration sophisticated enough to comment on all aspects of immigration reform, including the carceral ones. A grassroots feminist cri-

²¹⁰ See CONG. BUDGET OFFICE, COST ESTIMATE: S. 744, BORDER SECURITY, ECONOMIC OPPORTUNITY AND IMMIGRATION MODERNIZATION ACT 21 (2013), <https://www.cbo.gov/sites/default/files/cbofiles/attachments/s744.pdf> [<https://perma.cc/DZW9-WUWQ>] (estimating 3.5 million will be excluded); PETER SCHEY, CTR. FOR HUMAN RIGHTS AND CONSTITUTIONAL LAW, ANALYSIS OF SENATE BILL 744’S PATHWAY TO LEGALIZATION AND CITIZENSHIP 2 (2013) (estimating four to five million will be excluded). Not one of the previous leading CIR proposals in Congress required a ten-year contingent period for legalization until S. 744. See NAT’L EMP’T LAW PROJECT, *Summary of Key Immigration Reform Proposals: Immigrant Worker Issues* 1–2 (2015), www.nelp.org/content/uploads/2015/03/SUMMARY-OF-KEY-IMMIGRATION-REFORM-PROPOSALS.pdf [<http://perma.cc/P2PT-EXTX>].

²¹¹ See Elizabeth Keyes, *Race and Immigration, Then and Now: How the Shift to “Worthiness” Undermines the 1965 Immigration Law’s Civil Rights Goals*, 57 *How. L. J.* 899, 915–19 (2014) (applying a CRT and class analysis to the major provisions of S. 744).

²¹² Schey, *supra* note 210, at 2.

²¹³ See IMMIGRATION POLICY CTR., A GUIDE TO S.744: UNDERSTANDING THE 2013 SENATE IMMIGRATION BILL 9 (2013), http://www.immigrationpolicy.org/sites/default/files/docs/guide_to_s744_corker_hoeven_final_12-02-13.pdf [<http://perma.cc/6UVU-B3NL>].

tique of “carceral feminism” has emerged in recent years to denounce mainstream feminism’s absolute reliance upon police and other law enforcement personnel as the solution to remedying inequalities, from domestic violence to anti-trafficking.²¹⁴ Some commentators have observed that carceral feminism and militant humanitarianism as traditional feminist frames have the effect of reinforcing nationalism and, in the anti-trafficking context, xenophobia.²¹⁵ A unitary — some say predominant²¹⁶ — feminist view of the state and the role of law enforcement as a primary solution to social ills, rather than a source of state-based abuse and subjugation, is an incomplete analysis that requires a reexamination of existing laws, practices, and manifestations of racism, xenophobia, or the excessive reliance upon policing and incarceration by governmental actors under current laws.

For many immigrants’ rights activists, S. 744 should have been rejected by the public outright because its framework “systematically binds [a] criminal legal system rooted in mass imprisonment with an immigration system driven by enforcement.”²¹⁷ The human rights group Families for Freedom reasoned that from a critical race viewpoint, Americans should “not on one hand criticize the criminal legal system for being flawed and racist and yet hypocritically justify and condone it when it interacts with noncitizens.”²¹⁸ Yet the carceral, enforcement-only logic that monopolizes our immigration discourse was central to President Obama’s November 21, 2014 executive actions to grant work authorization to undocumented parents of U.S. citizens and legal permanent residents and protect them from deportation, while prioritizing deportations of undocumented immigrants with crim-

²¹⁴ See, e.g., Elizabeth Bernstein, *Militarized Humanitarianism Meets Carceral Feminism: The Politics of Sex, Rights, and Freedom in Contemporary Antitrafficking Campaigns*, 36 SIGNS 45, 54 (2010) (discussing commentary regarding a “collusion between mainstream feminism and state agendas of border control in contemporary antitrafficking campaigns”); Victoria Law, *Against Carceral Feminism*, JACOBIN (Oct. 17, 2014), <https://www.jacobinmag.com/2014/10/against-carceral-feminism> [<https://perma.cc/4WQ6-E8CF>]; *One Billion Rising, Eve Ensler and the Contradictions of Carceral Feminism(s)*, PRISON CULTURE (Dec. 11, 2013), www.usprisonculture.com/blog/2013/12/11/one-billion-rising-eve-ensler-and-the-contradictions-of-carceral-feminisms [<http://perma.cc/6UCC-QUW6>].

²¹⁵ See Bernstein, *supra* note 214, at 66; Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655, 1702–05 (2010) (discussing militaristic humanism and carceral feminism with respect to anti-trafficking advocacy in the United States and abroad).

²¹⁶ See Law, *supra* note 214.

²¹⁷ *Families for Freedom Rejects S. 744: Noncitizens Communities Endangered by More Exclusion and Criminalization*, FAMILIES FOR FREEDOM (July 30, 2013), <http://familiesforfreedom.org/news/families-forfreedom-rejects-s-744> [<http://perma.cc/L2M5-LQV6>]; see also David Bacon, *The Dignity Campaign’s Alternative Vision for Immigration Reform*, THE NATION (Feb. 6, 2013), <http://www.thenation.com/article/dignity-campaigns-alternative-vision-immigration-reform> [<http://perma.cc/64M4-LK92>] (discussing coalitional position of more than forty immigrant rights and community organizations, unions, and churches against S. 744 and any comprehensive immigration reform proposal that “trades off” legalization for border militarization and expanded guest worker programs).

²¹⁸ FAMILIES FOR FREEDOM, *supra* note 217.

inal convictions.²¹⁹ His new Priority Enforcement Program would target “felons, not families,”²²⁰ conveniently omitting the facts that among those he called felons include those recently convicted of crossing the border, and that individuals who come into contact with the criminal justice system also have families. While President Obama’s executive action would provide a temporary reprieve for undocumented individuals from workplace exploitation or immigration status-based coercion—so long as his successor does not rescind this program—neither the President nor Congress has been willing to divest from carceral laws holding immigrants to a different (higher) standard than citizens if they have contact with the criminal justice system, or from the institutions of detention and deportation. Nor have they attempted to explore alternatives to these systems.

The absence of any determinative public opposition to these changes in immigration policy and to our carceral systems points to the silence of major political constituencies. Leading feminist organizations in Washington chose not to criticize the most draconian components of CIR in the run-up to the vote on S. 744. Instead, if they commented on CIR at all, they focused upon immigrants’ eligibility for programs that aid in social-reproductive work. In a letter to Senators regarding amendments to the legislation, the National Women’s Law Center (“NWLC”) wrote compellingly regarding a fair path to citizenship, workplace protections, and eligibility for health care and safety-net programs in connection with CIR,²²¹ but was silent regarding border militarization, the increasingly punitive nature of civil immigration detention,²²² or the double standard for immigrants convicted of crimes.²²³ The same held true for the We Belong Together Coalition’s letter to women Senators, which the National Organization for Women (“NOW”), the Feminist Majority, and NWLC endorsed.²²⁴

Feminist groups’ curious selectivity as to exactly which issues affecting all immigrant women are “women’s issues” signals a need for additional

²¹⁹ THE WHITE HOUSE OFFICE OF THE PRESS SEC’Y, FACT SHEET: IMMIGRATION ACCOUNTABILITY EXECUTIVE ACTION (NOV. 20, 2014), www.whitehouse.gov/the-press-office/2014/11/20/fact-sheet-immigration-accountability-executive-action [http://perma.cc/VE6G-PH96].

²²⁰ *Id.*

²²¹ See Letter from Marcia Greenberger & Nancy Duff Campbell, Nat’l Women’s Law Ctr. (June 18, 2013), www.nwlc.org/sites/default/files/pdfs/nwlc_letter_to_senators_re_immigration_06.18.13.pdf [http://perma.cc/BY5N-MXY6].

²²² See generally César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346 (2014) (arguing that the modern civil immigration detention system, based on congressional intent, is more punitive than regulatory in practice, and advocating for a shift to a more civil detention system).

²²³ See Letter from Greenberger & Campbell, *supra* note 221.

²²⁴ *Women’s Statement for Immigration Reform*, WE BELONG TOGETHER, www.webelongtogether.org/news/women’s-statement-immigration-reform [http://perma.cc/2SJM-3HA2]. The We Belong Together Coalition, not coincidentally, was co-founded by the National Domestic Workers Alliance and the National Asian Pacific American Women’s Forum. *About We Belong Together*, WE BELONG TOGETHER, www.webelongtogether.org/about [http://perma.cc/R7TV-VVYF].

analysis within feminist movements. Months after S. 744 passed the Senate and the House refused to take any action toward legalization, NOW President Terry O'Neill was arrested with approximately three hundred other activists outside the White House in an act of civil disobedience to demand that President Obama halt deportations.²²⁵ While O'Neill gave a statement that "[i]mmigration reform that *respects women and families* is a feminist issue," she provided only two narrow examples: the inability of the wives of immigrants sponsored by an employer to obtain work authorization for themselves; and the need to expand the number of U visas available to victims of trafficking and domestic violence.²²⁶ The two issues NOW chose to highlight — entry of women into the "formal" workforce and law enforcement-oriented solutions to violence and coercion — reflect mainstream feminist goals that perhaps the organization believes will resonate with white, middle- to upper-class citizen women. Once more, O'Neill's messaging avoids any mention of the militarization and criminalization trends in CIR, much less deportation, although both themes have predominated CIR and preclude an immigration reform that "respects women and families."

On the issue of immigration, feminism is at a crossroads. A feminism that aims to be inclusive cannot draw the line at citizenship or national borders, or ignore the totalizing, disruptive effect of the policing of those boundaries. The challenge for feminist legal theory is to articulate an analysis of citizenship and nationalism that extends beyond the self-interests of sharing social-reproductive work through a commodified migrant workforce (an idea for which there is ample political capital).²²⁷ For example, no women's groups urged caution regarding the use of guest worker visas to bring in caregivers, and it remains to be seen whether any will make that connection now that caregivers for now are still excluded from basic labor and employment laws. In a striking parallel, agricultural workers are also excluded from the right to overtime and is today an industry largely subsidized by guest workers and immigrants and characterized by abusive and dangerous working conditions. As the contentious debate over CIR and the fate of undocumented immigrants has revealed, feminists must also develop a critique of the currently dominant demands for profiling, surveillance, and enforcement. Rather than a system that disregards family unity and permits the state to dispose of immigrants when they and their skills are no longer

²²⁵ *Terry O'Neill Was One of Hundreds Arrested Calling for Immigration Reform at White House Rally*, FEMINIST MAJORITY FOUND. (Aug. 29, 2014, 11:00 AM), <http://feminist.org/blog/index.php/2014/08/29/terry-oneill-was-one-of-hundreds-arrested-calling-for-immigration-reform-at-white-house-rally> [<http://perma.cc/4CL8-9978>].

²²⁶ *Id.* (emphasis added).

²²⁷ *But see* David Bacon, Rosalinda Guillen & Mark Day, *The Price of Immigration Reform is Steep*, NEW AM. MEDIA (June 6, 2013), newamericamedia.org/2013/06/the-price-of-immigration-reform-is-steep.php [<http://perma.cc/BK64-4Q28>] (arguing that the guest worker programs in S. 744 would "further transform our immigration policy into a corporate labor supply system").

needed, new voices are needed to achieve laws that reflect fairness and human rights.

III. “RIGHTS, RESPECT, AND RECOGNITION,” VERSUS “THE RIGHT TO HAVE RIGHTS”

*Depending on whether we are addressing citizenship as a legal status, as a system of rights, as a form of political activity, or as a form of identity and solidarity, the answer [to whether citizenship may be de-nationalized] varies substantially.*²²⁸

As the discussions about migrant workers, legalization, and the status of the undocumented make clear, feminist legal theory must address whether its analysis is limited by national boundaries and existing law. This Part argues that feminism, having historically transcended national borders and local systems of jurisprudence in its identification and reach, can be pressed to examine the issues of citizenship, immigration, and nationalism with a critical lens.²²⁹ To center the experiences of immigrant women caregivers, it may be useful to explore their activism and social membership in the U.S. along the four oft-cited conceptualizations of citizenship Linda Bosniak proposed: legal status; a system of rights; political activity; or a mode of identity and solidarity.²³⁰ Our close study of immigrant domestic worker and caregiver organizing reflects aspects of all four modes of citizenship discourse, which are in tension with each other. In the current political context, citizenship is simultaneously a tool of classification and subordination, as we have seen with immigration status. Race and class have also resulted in starkly different experiences even among U.S. citizens, as we have seen with minority home health workers who were denied the right to minimum wage and overtime for nearly eight decades. Nevertheless, citizenship as concept defined by social engagement and individual agency, rather than a legal externality, is another avenue for discourse for feminists.

²²⁸ Linda Bosniak, *Citizenship Denationalized*, 7 *IND. J. GLOBAL LEGAL STUD.* 447, 452 (2000).

²²⁹ See Myra Marx Ferree, *Globalization and Feminism: Opportunities and Obstacles for Activism in the Global Arena*, in *GLOBAL FEMINISM: TRANSNATIONAL WOMEN'S ACTIVISM, ORGANIZING, AND HUMAN RIGHTS* 3, 11–14 (Myra Marx Ferree & Aili Mari Tripp eds., 2006) (discussing the rich history of women working through transnational advocacy networks, such as the World Social Forum, to address issues spanning economic restructuring, health, and armed conflict; cross-border collaborations among migrant and labor groups; and global advocacy through international policymaking bodies such as the United Nations); Nira Yuval-Davis, *Human/Women's Rights and Feminist Transversal Politics*, in *GLOBAL FEMINISM: TRANSNATIONAL WOMEN'S ACTIVISM, ORGANIZING, AND HUMAN RIGHTS*, *supra*, at 275, 291 (describing normative legal discourse regarding women's rights as “dominant in recent global feminist activism”); see also CHANDRA TALPADE MOHANTY, *FEMINISM WITHOUT BORDERS: DECOLONIZING THEORY, PRACTICING SOLIDARITY* 3 (2003) (in a seminal feminist text, describing transnational solidarity as “a political as well as ethical goal” of feminism).

²³⁰ Bosniak, *supra* note 228, at 452.

Around the country, women members of immigrant workers' centers and other affiliates of the National Domestic Workers Alliance have formed a movement by demanding "rights, respect, and recognition": a conceptualization of a claim for social integration that is not bounded by legal immigration status.²³¹ Their demand is a brilliant one, because even when denied certain rights under the law, a woman may still demand that she be treated with respect and dignity. By avoiding a complete reliance upon legal definitions of "rights," which arise from legally defined relationships with state institutions that constrain them, immigrant caregivers have sparked interpersonal conversations outside of the legal realm and made cultural consciousness a goal.²³² Jayesh Rathod has cautioned against an exclusive focus on immigration status and the "chilling effect" of immigration enforcement post-IRCA as the determining factor that guides the lives of the undocumented; instead, we must acknowledge the individual experiences and attributes of immigrant workers and "the multiple forms of resistance practiced by these workers, notwithstanding concerns related to status."²³³

The immigrant women activists who secured specific rights for domestic workers and caregivers in New York, California, Hawaii, Massachusetts, and Oregon through the passage of state domestic worker bills of rights succeeded in doing so at the grassroots level, cultivating a sense of social responsibility toward household workers whose work "makes all other work possible."²³⁴ The movement's focus on immigrant women's labor, rather than victimhood, accordingly emphasizes the inherent social worth of every individual who is integrated through working relationships. Rather than "unskilled" or "low-skill" labor that has borne centuries of disrespect and

²³¹ See, e.g., Ai-jen Poo, *Dying to Work*, THE VILLAGE VOICE (Mar. 19, 2002), <http://www.villagevoice.com/2002-03-19/specials/letters> [<http://perma.cc/9QW2-8TGL>] (regarding domestic workers in New York City, "It's about time that we give this workforce the rights, respect, and recognition it deserves."); Press Release, AFL-CIO, National Domestic Workers' Alliance, National Guestworkers' Alliance Announce Partnership Agreements (May 10, 2011), <http://www.aflcio.org/Press-Room/Press-Releases/AFL-CIO-National-Domestic-Workers-Alliance-Nati> [<http://perma.cc/J2JC-7D77>] ("We are proud to fight together with our union brothers and sisters to defend and expand the right to organize, win justice for immigrants, and ensure that one day the workers that makes [sic] all other work possible—cleaning and caring for children and seniors—will have rights, respect, and recognition.") (quoting Barbara Young, nanny and National Organizer with the National Domestic Workers Alliance); #BetheHelp We Need to Win Respect and Recognition for Domestic Workers, NAT'L DOMESTIC WORKERS ALLIANCE (Dec. 7, 2011), <http://www.domesticworkers.org/news/2011/bethehelp-we-need-win-respect-and-recognition-domestic-workers> [<http://perma.cc/NJ3U-VL6D>] ("Please join us in this exciting new campaign, and #BeTheHelp we need to win respect and recognition for domestic workers across the nation and around the world.").

²³² But see Nilliasca, *supra* note 2, at 399 (arguing that the campaign to pass the New York Domestic Worker Bill of Rights prioritized law reform over other forms of social change, where rights were duplicative of those already codified into law that domestic workers are unable to enforce).

²³³ See Jayesh M. Rathod, *Beyond the "Chilling Effect": Immigrant Worker Behavior and the Regulation of Occupational Safety and Health*, 14 EMP. RTS. & EMP. POL'Y J. 267, 270 (2010).

²³⁴ HOME ECONOMICS, *supra* note 42, at ix.

deliberate(d) classism—as we saw in S. 744’s definition of the W visa for home health workers—they describe their work as a skillful, complicated service that is ultimately valued for its inherent social worth.²³⁵ The recent campaign achievements of immigrant women workers have challenged the view that the citizenship alone is the source of an individual’s or group’s “right to have rights.”²³⁶ As Bosniak has observed, “the tension between [Constitutional] personhood and citizenship as the basis for rights is, in fact, a chronic national preoccupation” in the United States.²³⁷

In the 20th century, citizenship has been most commonly associated “with the enjoyment of important rights and entitlements.”²³⁸ But even after women gained the franchise through suffragist movements during the last century, many women in the United States continue to struggle to achieve social and economic self-determination in all respects. Ayten Gündoğdu has argued that the “right to have rights” belongs all humans, rather than simply citizens of a certain nation, so that all individuals have “a right *to* citizenship and humanity.”²³⁹ It is imperative that the more universal orientation have resonance today, she explains, because many nations engage in arbitrariness that is deceptively masked as a system “highly regulated by laws.”²⁴⁰ To the extent that human rights discourse in the United States and Europe is driven by humanitarian impulses, Gündoğdu cautions, “states, courts, and rights advocates [that] turn to compassion to make decisions . . . risk unmaking the equal personhood of migrants, rendering their rights dependent upon a capricious moral sentiment,”²⁴¹ because doing so “does not imply any positive duties.”²⁴²

This distancing from the rhetoric of “legal” rights is necessary to re-frame injustice. The rhetoric of equality and workplace fairness rings hollow

²³⁵ POO & CONRAD, *supra* note 116, at 82–83 (“While [in-home caregivers] often serve as nutritionists, teachers, physical therapists, psychotherapists, emergency responders, drivers, personal organizers, and nurses, the most precious services they provide are often physical and emotional: compassion, tenderness, and listening.”). Crain has also highlighted the emergence of “comparable worth strategies,” which “seek to substitute a system of collective definition of the value of labor for the existing market definition, shifting the emphasis from its value to the person who buys it (buyers tend disproportionately to be white males or white-male controlled entities) to its inherent value to society (a gender- and racially-diverse collective).” Crain, *supra* note 31, at 1923 n.99 (citing ELIZABETH FOX-GENOVESE, *FEMINISM WITHOUT ILLUSIONS: A CRITIQUE OF INDIVIDUALISM* 77–78 (1991)).

²³⁶ We do not know whether Justice Warren’s decision to call citizenship the “right to have rights” in *Trop v. Dulles*, 356 U.S. 86, 102 (1958), was influenced by Hannah Arendt. Arendt famously introduced the phrase seven years earlier in *The Origins of Totalitarianism*. HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 294 (1951) (linking a loss of citizenship with a loss of rights).

²³⁷ Bosniak, *supra* note 228, at 461.

²³⁸ *Id.* at 463.

²³⁹ AYTEN GÜNDOĞDU, *RIGHTLESSNESS IN AN AGE OF RIGHTS: HANNAH ARENDT AND THE CONTEMPORARY STRUGGLES OF MIGRANTS* 5 (2015).

²⁴⁰ *Id.* at 113.

²⁴¹ *Id.*

²⁴² *Id.* at 115.

when immigrant women publicly highlight private abuses—social hypocrisies—that arise in the absence of rights of those involved in the social reproduction of that same body of citizens. For example, the concerns regarding home health worker wages that concerned the district court in *Weil* as it struck down the more expansive DOL regulations were identical to those California Governor Jerry Brown in 2012 gave when he originally vetoed the state Domestic Worker Bill of Rights:

What will be the economic and human impact on the disabled or elderly person and their family of requiring overtime, rest and meal periods for attendants who provide 24 hour care? What would be the additional costs and what is the financial capacity of those taking care of loved ones in the last years of life?²⁴³

Faced with mounting political support for California's domestic workers, Governor Brown ultimately signed a bill into law in 2013 that extended, *inter alia*, overtime protections to domestic workers providing care for the elderly and disabled who work directly for the private individual or family.²⁴⁴ Under the first-in-nation New York Domestic Worker Bill of Rights, enacted in 2010, caregivers (along with other domestic workers) employed directly by a household became entitled to receive overtime and workers' compensation insurance if they worked more than forty hours a week.²⁴⁵

The groundbreaking state-by-state organizing of domestic workers and caregivers nationwide may pave the way for grassroots feminist engagement in issues that necessarily touch upon immigration, legalization, and citizenship.²⁴⁶ Organizing by undocumented immigrants belies the conclusion that without U.S. citizenship, they do not have the right to have rights. Of course, without the legal status of citizenship, one does not have protection from deportation, a state that embodies the all-encompassing precariousness of the immigrant experience. But for those who assume a more fluid concept of citizenship as a form of political activity, social movements that challenge nationalized citizenship emphasize political activism and integration "lay claim to a political space that may or may not conform to the spaces allowed

²⁴³ CAL. ASSEMB. COMM. ON APPROPRIATIONS, BILL ANALYSIS FOR A.B. 241, 2013–2014 Reg. Sess., at 4 (2013), http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_0201-0250/ab_241_cfa_20130506_164646_asm_comm.html [http://perma.cc/T9RY-NRT6].

²⁴⁴ CAL. LAB. CODE § 1450 (West 2014).

²⁴⁵ N.Y. LAB. LAW § 170 (McKinney 2010) (Overtime entitlement would begin after working more than forty-four hours in a week for domestic workers who reside in the home of their employer.). Domestic workers also receive protections from sexual harassment. N.Y. EXEC. LAW § 296(b)(2) (McKinney 2010).

²⁴⁶ *But see generally* Nilliasca, *supra* note 2 (examining the early goals of domestic worker organizing around passage of the New York Domestic Worker Bill of Rights and cautioning against the limits of majoritarian legal reforms that centralize political power in a professionalized coalition rather than in grassroots organizations).

by the existing system of government” and tend first to manifest as localized movements.²⁴⁷

Although the term “xenophobia” has its origins in the fear of strangers, the prominence of home health care activism has remarkably met with little resistance in the CIR debate. In the face of stark need with limited state support or high-quality public infrastructure, millions of families have opened their homes to caregivers previously unknown to them, making them privy to families’ deepest limitations, conflicts, and fears. Given NDWA’s initial wave of success for its state-level campaigns for the rights of household workers, it is not, as some would have it, a foregone conclusion that human beings must expect only a spectrum of rights based upon their proximity to citizenship status.

As NDWA activists tackled federal-level initiatives, however, it has become more difficult to contend with the carceral constraints that devalue social reproduction and strictly regulate and channel non-citizen labor. In recent years, Caring Across Generations’ lobbying for remedial fixes to the DOL rules set them on a collision course against state and private interests in unfettered access to and strict policing of low-cost labor from largely minority and non-citizen women. The difficulties these advocacy efforts have encountered at the federal level have been tightly circumscribed by the carceral framework because it is at the federal level where the most rigid and conservative conceptions of citizenship Bosniak described—citizenship as legal status, and citizenship as a (fixed) system of rights—still thoroughly permeate legal and political discourse.

Conversations about recognition outside of the rubric of rights have been successful in mobilizing others to demand social changes outside of a carceral framework. In light of these developments, including grassroots feminist successes, for the benefit of a more equal society, it is within the ambit of feminism to propose a broader view of citizenship, in which personal investment and a desire to belong are the cornerstones of mutual respect and recognition.

CONCLUSION

By analyzing recent and previously unexplored connections between social reproduction, carceral constraints imposed by legal and social contradictions, and CIR, this Article has sought to articulate a feminist approach to analyzing immigration and citizenship, and has hopefully provided a useful starting point. A multidimensional approach recognizes that the dimensions of gender, class, and immigration status are materially relevant and rather than “additive” categories, they are linked to systems that “intersect, inter-

²⁴⁷ WARREN MAGNUSSON, *THE SEARCH FOR POLITICAL SPACE* 9–10 (1996).

relate, and are mutually reinforcing.”²⁴⁸ In the same way that Sojourner Truth’s famous rhetorical question naturally linked the causes of abolition and women’s suffrage, so perhaps might contemporary domestic worker organizing link the causes of feminism and immigration, and energize both concepts.

The feminist movement’s historical emphases on equality and on economic and social agency for all individuals can provide a platform for addressing the experiences of our growing undocumented workforce. The rigidity of statutory and legislative approaches to immigration may initially pose barriers to immediate solutions, but feminist and critical legal theory provide the analytical tools for several important projects: to connect the ideological assumptions behind social-reproductive work affecting all women to immigration trends; to develop a broader critique of the carceral matrix involving immigration status, deportation, and criminalization; to develop theories of citizenship that recognize the fluidity of that determination as a legal concept; and to recognize current organizing by immigrants and other disenfranchised groups as the basis for conceptualizing expansion of citizenship as a composite of rights, activism, and identity. Until others are willing to undertake these projects to support social movements and elevate the discourse around immigration, our carceral reality will remain the “third rail” of immigrants’ experiences.

Immigrant domestic workers’ and caregivers’ organizing has deliberately connected social-reproductive work with labor rights and immigration, demanded political attention, and in recent years allowed us to gauge the conditions for change while identifying the challenges ahead. Recent legal tests of the rights of immigrant women caregivers in judicial and legislative arenas revealed potential common ground between the larger feminist movement and the rights of immigrant women. Their campaigns for “rights, respect and recognition” invite feminists to join in a 21st-century discussion about the rights of all women.

²⁴⁸ Mutua, *supra* note 3, at 373 (describing the emerging theory of multidimensionality based upon earlier discussions of intersectionality in Critical Race Theory).