EXPLOITED AT THE INTERSECTION: A CRITICAL RACE FEMINIST ANALYSIS OF UNDOCUMENTED LATINA WORKERS AND THE ROLE OF THE PRIVATE ATTORNEY GENERAL

Llezlie Green Coleman *

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* Llezlie Green Coleman is an Assistant Professor of Law and Co-Director of the Civil Advocacy Clinic, American University Washington College of Law, A.B. Dartmouth College, J.D. Columbia Law School. I would like to thank my incredibly supportive colleagues at the Washington College of Law – including Binny Miller, Ann Shalleck, Elliott Milstein, Susan Bennett, Anita Sinha, Natalie Nanasi, and Kate Elengold, for their input on various drafts of this article. I would also like to extend my thanks to the New York Law School Clinical Writers Workshop and the New Voices in Employment Law Workshop at the Southeast Association of Law School's (SEALS) Annual Conference. I am particularly indebted to Nancy Levit, Nicole Porter, and Elizabeth Pendo who provided extensive comments on a draft of this paper at the New Voices in Employment Law Workshop. This article also benefited from presentations at the Northeast Regional People of Color Legal Scholarship Conference and the Junior Clinical Faculty Workshop. Finally, I would like to thank Angela Cabral for her excellent research assistance.

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Undocumented Latina workers experience wage theft and other workplace exploitation at alarmingly high rates. The stock stories associated with immigrant workers often involve male day laborers or female domestic workers and fail to capture the experiences of women toiling in the farms, restaurants, factories, and home and business cleaning services that employ hundreds of thousands of immigrant women. The resulting invisibility of undocumented Latina women in the typical narratives parallels the paucity of undocumented Latina workers who make legal claims against their exploitative employers. Their distinct experiences are characterized by multiple intersecting vulnerabilities based upon their ethnicity, gender, and immigration status. Their vulnerability and their responses to workplace exploitation must also be understood with the context of intra-cultural narratives that complicate or discourage their ability to pursue their rights.

This Article applies a critical race feminist analysis to the workplace exploitation of undocumented Latina workers by exploring cultural narratives that may impact how workers experience workplace exploitation and how they respond to exploitation. It posits that a critical race feminism lens permits us to better identify, analyze, and construct potential solutions to the lack of claims-making by undocumented Latina workers. Given the importance of private enforcement of this country's wage and hour statutes, this Article positions private attorneys general, and their role as storytellers, as critical to the enforcement of Latina workers' rights and argues that the collaboration of organizations and attorneys is necessary to achieve that end.

INTRODUCTION

> "I tell the story more as a meditation than an ment . . . ."[1]

[1] Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1, 4–5 (1990) ("I tell the story more as a meditation than an argument – a meditation on the conditions that undermine the humanist project of procedural justice in our society and the changes that might bring us closer to realizing that vision in the future.").

AT 4:30 a.m., Marisol enters the fields to begin the body-numbing work of picking strawberries, grapes, or apples. She takes pride in her work—both she and her husband have been toiling in those fields since they immigrated to upstate New York from Mexico five years ago. This work, however, takes both a physical and psychological toll. Marisol spends her days hunched over, expertly manipulating the scissors to cut small branches and the cutters for the large branches. The stench of pesticides often causes her to suffer headaches and nausea. In addition, she is vigilant to avoid the often-groping hands of her supervisor. Thus far, he has made lewd comments about her body while "accidentally" brushing his hand along her backside. She has heard the stories from other workers he has cornered and assaulted. She refuses to mention the harassment to her husband for fear that he will blame her for somehow encouraging the unwanted attention. Besides, what can he do? They need these jobs.

In addition to his sexual harassment and assaults, her supervisor often stands over her hurling insults if he believes she's not working quickly enough. He tells her that since she is undocumented, she has no rights in this country and could be easily replaced. He threatens to fire both her and her husband if she does not work faster and to call immigration or the police to detain them.

Marisol earns $40 a day for more than ten hours of work, well below both the federal and New York minimum wage. She does not, however, receive a paycheck. Her husband receives a single check for both of them. She realizes she is not receiving all of the money she is owed, but feels powerless to challenge her employer. To do so, she would need her husband's approval and would risk the possibility of not only losing both of their jobs, but also of their employer following through on threats to call the police and immigration authorities.[2]

The literature on the wage exploitation of undocumented immigrant women has largely focused on workers employed in the home—what is often characterized as a more informal and less-regulated workplace that makes the employees particularly vulnerable and often exists under the radar.[3] This Article takes the discourse on undocumented immigrant women out of private homes and into the public workplace—the farms, poultry-processing plants, restaurants, factories, and home and business cleaning services that employ hundreds of thousands of undocumented immigrant women. Their stories and experiences reveal subjugation based on the intersection of their gender, race, and immigration status

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[2] This narrative draws upon interviews and research completed by the Southern Poverty Law Center and reflected in its 2010 report, Injustice on our Plates. *See* S. POVERTY LAW CTR., INJUSTICE ON OUR PLATES 27 (2010), *available at* http://www.splcenter.org/sites/default/files/downloads/publication/Injustice_on_Our_Plates.pdf.

[3] *See, e.g.*, Janie A. Chuang, *Achieving Accountability for Migrant Domestic Worker Abuse*, 88 N.C. L. REV. 1627 (2010).

that may leave them particularly vulnerable to the various manifestations of workplace exploitation, including wage theft.[4]

The vindication of claims as private attorneys general, either in individual or in collective action cases alleging violations of state and federal statutes, is the primary method by which workers assert their rights and hold employers responsible for wage theft and other workplace exploitation. This claims-making process, however, requires that workers be actively engaged in the litigation, challenging their employer on the public record and in open court. Undocumented immigrant women's experiences in both their homes and workplaces, however, may make their participation in such litigation particularly challenging.

This Article explores the narratives and experiences of exploited Latina undocumented workers in public workspaces and the role of private attorneys general in vindicating their workplace rights. Part I describes the feminization of immigration and the varying roles of Latina immigrant workers. Part II explores wage theft among undocumented Latina workers. Part III provides a critical race feminist analysis of undocumented Latina workers' experiences and explores the ways in which common subordinating narratives may make them more vulnerable to workplace exploitation and less likely to pursue claims against their employers. It then extracts lessons that may be learned from the exploration of cultural narratives and their impact on Latina workers' exploitation. Part IV turns to the private attorney general model of wage and hour enforcement and explores the statutory incentives for private enforcement, the topology for private enforcement, and the challenges to private enforcement in light of recent Supreme Court jurisprudence. Part V argues that the private attorney general may provide undocumented Latina workers access to the legal system, empower exploited workers, and permit workers to engage in storytelling that is both cathartic and legally compelling. Finally, Part VI turns to the collective action mechanism frequently utilized in wage and hour cases and contends that private attorney generals should prioritize undocumented Latinas' narratives in the collective action certification process.

I. THE FEMINIZATION OF IMMIGRATION AND IMMIGRANT WOMEN IN THE WORKPLACE

The typical stock story of the undocumented worker often leads down two paths. The primary path positions the undocumented worker

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[4] Professor Kimberlé Crenshaw theorizes that intersectionality results in the erasure of women of color from prominent discourses and contends that "[b]ecause of their intersectional identity as both women *and* of color within discourses shaped to respond to one *or* the other, women of color are marginalized within both." Kimberlé Williams Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, *in* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 357, 358 (Kimberlé Crenshaw et al. eds., 1995).

as a male day laborer or agricultural worker.[5] The second potential path positions undocumented women as domestic workers engaged in housekeeping or child-rearing within the home.[6] Lost in these narratives, however, are the thousands of immigrant women working outside of homes, including those in food-processing plants, factories, agriculture, and restaurants.

A closer look at immigration patterns and low-wage immigrant workers reveals that their experiences extend beyond the stock stories and stereotypes. In recent years, the number of female immigrants has increased significantly. According to Kevin Johnson, this country has seen a "feminization of immigration," in which the number of women immigrating to the United States has surpassed the number of men.[7] This dynamic includes not only those who immigrate "through the American front door," but also those who enter "through the back doors: swimming rivers, crossing deserts, or overstaying the terms of a valid visa."[8] While a 2009 report found more undocumented men (6.3 million) living in the United States than undocumented women (4.1 million),[9] there remains a steady increase in the number of women, both documented and undocumented, living and working in the United States.[10]

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[5] Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509, 1549 (1995) ("The illegal alien stereotype fails to incorporate women, despite the obvious fact that women immigrate, both lawfully and unlawfully, to the United States.").

[6] Karla Mari McKanders, *The Unspoken Voices of Indigenous Women in Immigration Raids*, 14 J. GENDER RACE & JUST. 1, 37 (2010) ("The Latina female migratory laborer is stereotyped as migrating to work in domestic and service positions.").

[7] Johnson, *supra* note 5, at 1549.

[8] SUSAN C. PEARCE, ELIZABETH J. CLIFFORD & REENA TANDON, IMMIGRATION AND WOMEN: UNDERSTANDING THE AMERICAN EXPERIENCE 78 (2011).

[9] JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CTR., A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES 4 (2009), http://www.pewhispanic.org/files/reports/107.pdf. Determining the exact number of undocumented workers in this country is, of course, a difficult task given that the population prefers a certain degree of invisibility. Assessing the number of undocumented *women* is particularly difficult as more of them are employed in the informal marketplace, causing their presence to be more difficult to ascertain. For a discussion of immigrant experiences in the informal economy, *see* Lora Jo Foo, *The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation*, 103 YALE L.J. 2179 (1994).

[10] PEARCE ET AL., *supra* note 8, at 79 ("[T]he overall gap between male and female immigration rates has narrowed over the years, leading us to conclude that a dynamic of feminization is in process among the unauthorized as well.").

Data on the job categories that typically employ undocumented Latina workers is somewhat imperfect and difficult to obtain.[11] The available studies, however, demonstrate the diversity of their employment. According to a 2013 survey of 400 undocumented Latina women, while nearly half of the women were employed in housekeeping[12] and childcare, the other half worked at restaurants (sixteen percent), factories (fifteen percent), agriculture (eight percent), construction (one percent) or other jobs (fifteen percent).[13] In 2010, the Southern Poverty Law Center reported that women comprise twenty-two percent of agricultural fieldworkers in the United States.[14] Accordingly, immigrant women's workplace experiences extend well beyond domestic work for individual employers to nearly all of the work spaces occupied by low-wage workers.[15] Moreover, workers in these particular job categories are those known to experience high levels of wage theft.[16]

II. WAGE THEFT AMONG IMMIGRANT WOMEN WORKERS

Wage theft, or the failure to pay employees the minimum or agreed upon wage, is a violation of the Fair Labor Standards Act ("FLSA") and various state wage and hour statutes.[17] It takes various forms including the failure to: (1) pay an employee for all of the hours worked; (2) pay the minimum hourly wage; and (3) pay time and a half for overtime hours.[18] Wage theft is rampant in both American cities and rural land-

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[11] Employers do not provide information about undocumented workers to the IRS or other government bodies that could track such data.

[12] Blanca Guillen-Woods, *Gender and Undocumented Experiences*, LATINO DECISIONS (May 10, 2013), http://www.latinodecisions.com/blog/2013/05/10/gender-and-undocumented-immigrant-experiences/. Twenty-six percent of the respondents indicated they worked in housekeeping. *Id.* Such employment would include not only those employed by individuals, but also those employed by housekeeping services that send workers to clean homes and/or businesses.

[13] *Id.*

[14] S. POVERTY LAW CTR., *supra* note 2, at 27.

[15] This is not a new phenomenon. Indeed, a 1984 study of Mexican immigrant women in Los Angeles concluded that most of the documented and undocumented women who participated in the study worked in factories as laborers and that "[t]he popular impression that undocumented Mexican women immigrants in urban areas work mainly in private homes as domestics, cleaning house, babysitting, etc., has not been substantiated." Rita J. Simon & Margo DeLey, *The Work Experience of Undocumented Mexican Women Migrants in Los Angeles*, 18 INT'L MIGRATION REV. 1212, 1227 (1984).

[16] KIM BOBO, WAGE THEFT IN AMERICA: WHY MILLIONS OF AMERICANS ARE NOT GETTING PAID – AND WHAT WE CAN DO ABOUT IT 7–15, 63 (rev. ed. 2011).

[17] *See* 29 U.S.C. §§ 206–07 (2011); *see also* D.C. CODE §§ 32-1001 to 1015 (2002).

[18] Workers whose job responsibilities fall under one of the exemptions to the Fair Labor Standard Act (and its state parallel statutes) are not eligible to

scapes. Various books, reports, and articles have analyzed and discussed its prevalence, particularly among low-wage workers.[19] Indeed, some have described its economic impact as greater than criminal theft,[20] while others have advocated criminalizing wage theft.[21]

The phenomenon is particularly acute among the most vulnerable workers.[22] Women are more likely to experience wage theft than men.[23] Immigrants are more likely to experience wage theft than U.S.-born workers.[24] Among foreign-born workers, women are the most likely to experience wage theft, particularly if they are undocumented.[25] Indeed, undocumented women face severe and consistent deprivations of wages. A 2008 study of low-wage workers in Chicago, Los Angeles, and New York City found that immigrant workers were nearly twice as likely as U.S.-born workers to have experienced minimum wage violations, and

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receive overtime compensation for hours worked beyond 40 in a week. *See* 29 C.F.R. § 541 (2013) (setting out the tests used to determine whether who is entitled to overtime compensation). Employers who misclassify as non-exempt an employee who should receive overtime compensation as an exempt employee are depriving that employee of wages. *See* Nantiya Ruan, *What's Left to Remedy Wage Theft? How Arbitration Mandates That Bar Class Actions Impact Low-Wage Workers,* 2012 MICH. ST. L. REV. 1103, 1106–07 (2012). Similarly, employers who improperly classify workers as independent contractors that do not receive the statutory wage and hour protections often deny those employees their earned wages. *See* Catherine K. Ruckelshaus, *Labor's Wage War*, 35 FORDHAM URB. L.J. 373, 381 (2008). An employer's failure to pay tips that customers have left for the worker is yet another form of wage theft. *See, e.g,* Matthew W. Finkin, *From Weight Checking to Wage Checking: Arming Workers to Combat Wage Theft,* 90 IND. L.J. 851, 851 (2015).

[19] *See, e.g.*, BOBO, *supra* note 16; Llezlie Green Coleman, *Procedural Hurdles and Thwarted Efficiency: Immigration Relief in Wage and Hour Collective Actions*, 16 HARV. LATINO. L. REV. 1, 6–8 (2013).

[20] In a recent article, Ross Eisenbrey compared the value of wages improperly withheld from workers in 2012 ($280 million) to the money lost through robberies that year ($139 million) to reach the conclusion that wage theft "is a far bigger problem than bank robberies, convenience store robberies, street and highway robberies, and gas station robberies combined." Ross Eisenbrey, *Wage Theft Is a Bigger Problem than Other Theft – But Not Enough Is Done to Protect Workers*, ECON. POLICY INST. (Apr. 2, 2014), http://www.epi.org/publication/wage-theft-bigger-problem-theft-protect/.

[21] *See, e.g.*, Stephen Lee, *Policing Wage Theft in the Day Labor Market,* 4 U.C. IRVINE L. REV. 655, 663–64 (2014).

[22] *See* Coleman, *supra* note 19, at 6, 7–8.

[23] ANNETTE BERNHARDT ET AL., BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES 5 (2009), https://www.nelp.org/content/uploads/2015/03/BrokenLawsReport2009.pdf?nocdn=1.

[24] *Id.*

[25] *Id.*; *see also* S. POVERTY LAW CTR., *supra* note 2, at 24–25 (discussing rampant wage theft among immigrant women workers in the food industries).

that minimum wage violations among foreign-born workers were concentrated among women and particularly prevalent for undocumented women.[26] Indeed, nearly half of the female undocumented workers surveyed had experienced minimum wage violations in the prior week, compared to approximately thirty percent of their male counterparts.[27] The report did not find significant variations among demographic groups with regard to overtime violations; rather, employers failed to pay overtime to approximately eighty percent of *both* male and female immigrant workers.[28] Given that undocumented women are paid only seventy-one cents for every dollar earned by undocumented men,[29] the heightened incidents of theft of those wages are particularly devastating.

In addition to wage theft, immigrant women are often subject to sexual harassment and assault that further deter them from asserting any rights in the workplace.[30] According to the Southern Poverty Law Center's report, a majority of the women interviewed reported "endur[ing] some sort of sexual harassment that, at times, rose to the level of sexual assault while working in the fields, packinghouses or processing plants."[31] The shame and fear associated with sexual harassment and assault in the workplace compounds the effects of wage theft, creating yet another barrier to claims-making.[32]

Latina immigrant workers' exploitation is complicated by layers of vulnerability that make it both more likely they will experience wage theft and other forms of exploitation and more likely they will not file claims to enforce their substantive rights. In addition to the more typical understanding of their vulnerability, however, Latina immigrant workers may also experience subjugation based upon cultural narratives that in-

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[26] BERNHARDT ET AL., *supra* note 23, at 43.

[27] *Id.*

[28] *Id.* at 44.

[29] Ann Garcia & Patrick Oakford, *Unequal Pay Day for Immigrant Women*, CTR. FOR AMERICAN PROGRESS (Apr. 9, 2013), http://www.americanprogress.org/issues/labor/news/2013/04/09/59471/unequal-pay-day-for-immigrant-women/.

[30] *See* Maria M. Dominguez, *Sex Discrimination & Sexual Harassment in Agricultural Labor*, 6 AM. U. J. GENDER & L. 231 (1997); Juliana Garcia, *Invisible Behind a Bandana: U-Visa Solution for Sexual Harassment of Female Farmworkers*, 46 U.S.F. L. REV. 855 (2012); Johana P. Lopez, *Perspectives in HRD — Speaking with Them or Speaking for Them: A Conversation About the Effect of Stereotypes in the Latina/Hispanic Women's Experiences in the United States*, NEW HORIZONS ADULT EDUC. & HUM. RESOURCE DEV., SPRING 2013, at 99, 102; Hector E. Sanchez, *Wage Theft, Sexual Harassment and Workplace Violence; The Troubling Reality of Many Latina and Immigrant Workers*, HUFF POST LATINO VOICES BLOG (Jan. 29, 2012, 9:10 AM), http://www.huffingtonpost.com/hector-e-sanchez/wage-theft-sexual-harassm_b_1235182.html.

[31] S. POVERTY LAW CTR., *supra* note 2, at 44.

[32] *See id.* at 42.

form their experiences both at home and at work. A critical race feminist analysis of these narratives provides an additional analytical lens through which their workplace experiences may be assessed.

III. CRITICAL RACE FEMINISM

Undocumented workers are often invisible, toiling in an underground economy that is based largely on the exploitation of workers.[33] Undocumented women are arguably even less visible than men in both the literature and legal analyses.[34] The dearth of their narratives and exploration of the ways in which their gender, ethnicity, and immigration status impact their workplace experiences is cause for concern. Scholars recognize that immigrant women's invisibility and silence in the public sphere "translate into a relative unavailability of social and political power."[35] Arguably, such dynamics also have a detrimental impact on immigrant women's access to the judicial system and their ability to vindicate their substantive and statutory legal rights.

Undocumented Latina workers' stories convey systematic wage theft and exploitation. Undoubtedly, many of their responses to their exploitation are grounded in fears of deportation, and a belief that their decision to immigrate to the United States and work without the proper work authorization leaves them vulnerable.[36] Those stories, however, also echo the complicated dynamics of intra-cultural gender subordination that may create additional barriers to their claims-making.

Critical race feminism provides an analytical lens that illuminates undocumented immigrant women's workplace experiences and advances efforts to determine how to best address the potential legal solutions for their workplace exploitation. Critical race feminism recognizes that women of color experience the world, including exploitation and the legal system, at the intersection of their multiple identities.[37] Therefore, it

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[33] *See* PEARCE ET AL., *supra* note 8, at 2–3 ("[I]mmigrant women in American society are relatively invisible as a recognizable group and have yet to form a collective political or cultural voice."); Karla Mari McKanders, *supra* note 6, at 4; Julie A. Su, *Making the Invisible Visible: The Garment Industry's Dirty Laundry*, 1 J. GENDER RACE & JUST. 405, 405 (1998).

[34] *See, e.g.*, Elizabeth J. Kennedy, *The Invisible Corner: Expanding Workplace Rights for Female Day Laborers*, 31 BERKELEY J. EMP. & LAB. L. 126 (2010).

[35] PEARCE ET AL., *supra* note 8, at 7.

[36] *See, e.g.*, Shannon Gleeson, *Labor Rights for All? The Role of Undocumented Immigrant Status for Worker Claims Making*, 35 LAW & SOC. INQUIRY 561 (2010).

[37] CRITICAL RACE FEMINISM: A READER 1 (Adrien Katherine Wing ed., 2d ed. 2003) ("Critical Race Feminism (CRF) is an embryonic effort in legal academia at the end of the twentieth century to emphasize the legal concerns of a significant group of people – those who are both women and members of today's racial/ethnic minorities, as well as disproportionately poor."); Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist*

does not suffice to discuss immigrant women worker's experiences through a traditional feminist lens, nor does it suffice to apply only a critical race analysis.[38] Rather, immigrant women's narratives reflect their unique vulnerability based upon their gender, racial, and immigrant status.[39]

Undocumented Latina workers experience the workplace at the intersection of their identities. Professor Vicki Ruiz, in her study of domestic workers, observed, "[M]exicana household workers face a quadruple whammy – class, gender, ethnicity, and citizenship. Their dubious status in the United States compounds the barriers confronted by working-class women of color."[40] This observation is not limited to domestic workers, but extends to other work spaces as well.

Critical race feminism also "stresses conscious consideration of race, class, and gender by placing women of color at the center of the analysis and reveals the discriminatory and oppressive nature of their reality."[41] In other words, rather than considering women's experiences as an exception to the broader stories that focus on men, women are the starting and the end point of the analysis.

Critical race feminism also frequently employs storytelling and narrative methodologies.[42] In simplest terms, highlighting immigrant women workers' stories and the interplay of their public and private subordination challenges a central element of their exploitation: invisibility. Stories breathe life into undocumented Latinas' experiences, moving them from the shadows to the forefront of advocacy. They compel us to

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Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Policies, 1989 U. CHI. LEGAL F. 139, 140 (1989) ("[F]ocus on the most privileged group members marginalizes those who are multiply-burdened and obscures claims that cannot be understood as resulting from discrete sources of discrimination. . . . Because the intersectional experience is greater than the sum of racism and sexism, any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which Black women are subordinated.").

[38] *See* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242–45 (1991).

[39] Leticia M. Saucedo, *The Browning of the American Workplace: Protecting Workers in Increasingly Latino-ized Occupations*, 80 NOTRE DAME L. REV. 303, 313 (2004) ("Female brown collar workers tend to be even more isolated than their male counterparts, and they suffer the effects of both gender and national origin in the workplace.").

[40] Vicki L. Ruiz, *By the Day or Week: Mexicana Domestic Workers in El Paso*, *in* "TO TOIL THE LIVELONG DAY": AMERICA'S WOMEN AT WORK, 1780-1980, 269, 282 (Carol Groneman & Mary Beth Norton eds., 1987).

[41] Adrien K. Wing & Christine A. Willis, *From Theory to Praxis: Black Women, Gangs, and Critical Race Feminism*, 4 AFR.-AM. L. & POL'Y REP. 1, 4 (1999).

[42] CRITICAL RACE FEMINISM: A READER, *supra* note 37, at 7.

consider how the law might specifically impact these workers and to grapple with how to provide them access to judicial and other remedies.

Furthermore, the intersections of class, gender, and immigration status heighten immigrant women's risks of exploitation in the workplace. Professor Karla McKanders's analysis of indigenous Guatemalan immigrant women's intersectional experiences in immigration raids at meat-processing plants revealed that the women workers may have been "subjected to double discrimination as a result of their dual status as women and migrants," and that their "invisible status" compounded their fear of seeking redress against their employers.[43] Recognition of the complicated intersections that may typify their experiences also places advocates, including private attorneys general, in a better position to think strategically about ways to best provide workers access to the legal system, and to best represent immigrant women worker's legal interests.

An analysis of their experiences and how the intersection of their multiple identities may create structural and procedural hurdles to vindicating their legal claims is critical to understanding how to make certain our workplace laws are adequately enforced and their rights are adequately protected. There are inherent complexities, risks, and challenges in describing Latinas, or more specifically, Latina undocumented immigrants, as a homogenous group that are impacted by a specific set of traditional cultural norms.[44] The assumption that, for example, Mexican, Honduran, Salvadoran, and Guatemalan women experience culture in exactly the same way risks over-simplifying very complex experiences and essentializing what are, in fact, overlapping yet not identical experiences.[45] Indeed, a more nuanced consideration of other factors, such as

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[43] Karla Mari McKanders, *supra* note 6, at 8. Furthermore, Professor Miriam A. Cherry has posited that immigrant women workers face increased vulnerability, and she proposes that they organize into limited liability corporations in order to protect themselves from wage exploitation. *See* Miriam A. Cherry, *Decentering the Firm: The Limited Liability Company and Low-Wage Immigrant Women Workers*, 39 U.C. DAVIS L. REV. 787 (2006).

[44] I engage in this analysis sensitive to Laura Padilla's warning that "[o]ur strategy must include dispelling myths and stereotypes which are deemed to be normative, even when they legitimately tell part of the story, in order to allow other realidades which are also part of the story, without those being considered exceptional or deviant." Laura M. Padilla, *Re/Forming and Influencing Public Policy, Law and Religion: Missing from the Table*, 78 DENV. U. L. REV. 1211, 1245–46 (2001).

[45] As Professor Elvia Arriola explains, the use of the term "Latina" is "vulnerable to the essentialist critique." Elvia R. Arriola, *Voices from the Barbed Wires of Despair: Women in the Maquiladoras, Latina Critical Legal Theory, and Gender at the U.S.-Mexico Border*, 49 DEPAUL L. REV. 729, 757 (2000). Like Professor Ariolla, I contend that the term is "a starting point of analysis" for a group whose experiences are impacted "not only [by] their sex, gender, sexuality, language, and culture but also [by] their race, ethnicity, education, class, age, and citizenship status." *Id.*

socioeconomic status, level of education, marital status, and migration process would provide a more complete picture of their experiences. Critical race feminism, however, recognizes the need to be strategically essentialist in order to avoid simply discussing individual experiences and to instead draw from the overlapping themes and experiences that permit a broader analysis.[46]

For my purposes here, I engage the various narratives and analyses of Latina scholars, drawing upon the themes that appear to replicate themselves within the more traditional gendered narratives that are often enforced both within and outside of the related cultures.[47] I do not argue that Latinas have necessarily accepted or adopted these narratives as their own truths; rather, I contend that they may create a cultural dynamic that complicates Latinas' reactions to workplace exploitation and create potential additional barriers to efforts to enforce their substantive workplace rights. I also recognize that undocumented Latina workers' stories include those in which they have challenged subordinating narratives or adapted them for their purposes in their efforts to challenge workplace exploitation.

Moreover, my analysis is not a condemnation of the cultural narratives and expectations discussed herein. There exists an inherent tension between respecting cultural expectations and encouraging women to navigate the space between those expectations, their exploitation, and their possible responses to the exploitation. I do not argue that women must somehow make a stark choice between existing within their cultural experiences and vindicating their substantive rights.

Furthermore, my discussion of the interplay of cultural narratives within the exploitative workplace and the potential chilling impact the interplay may have on workers' ability or decision to pursue their substantive employment rights is not intended to excuse the exploiter.[48] Nor is it intended to somehow shift the blame to the exploited workers. Ignoring cultural narratives risks over-simplifying Latina workers' stories

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[46] CRITICAL RACE FEMINISM: A READER, *supra* note 37, at 7.

[47] Professor Berta Hernández-Truyol has observed: "While recognizing the diversities among us *as* Latinas/os, we also have some cultural commonalities, many of which converge around the importance of family and firm notions about appropriate gender and sex roles." BERTA ESPERANZA HERNÁNDEZ-TRUYOL, *Latinas — Everywhere Alien: Culture, Gender, and Sex*, *in* CRITICAL RACE FEMINISM: A READER, *supra* note 37, at 57. In addition, these narratives may have different impacts on undocumented Latina workers that immigrated at very young ages and therefore have had more interaction with counter cultural narratives and experiences, both positive and negative. *See id.* at 57–58.

[48] *See* Leti Volpp, *Migrating Identities: On Labor, Culture, and Law*, 27 N.C. J. INT'L L. & COM. REG. 507, 514 (2002) ("The assumption that immigrants bring with them to the United States a less democratic and more inhumane culture than that of the United States deflects attention from multiple sources of labor abuse. Workplace violations against immigrant workers are not connected to the lack of U.S. labor enforcement.").

and corrupting counsels' ability to engage in client-centered representation and empowerment.[49] Indeed, these narratives may, in fact, increase the vulnerability of undocumented immigrant women to workplace exploitation.[50] These narratives may also help explain why Latina undocumented workers are particularly reluctant to or unable to vindicate their workplace rights.[51]

A. The Deference Narrative

The literature reveals a subordinating narrative that values deference to male authority figures in their families and communities. The ways in which images of Latina womanhood are traditionally created by and imposed upon women by men is evident in the importance of *respeto (respect)*. According to Professor Berta Hernádez-Truyol, this cultural narrative encourages women to "be deferential to [their] elders and to all the men in [their] lives – fathers, brothers, husband – and ask permission for everything."[52] This narrative could be particularly prevalent when women live in households with male members of their families. A 2009 Pew report found that eighty-three percent of undocumented women cohabitated with a spouse or partner.[53] Accordingly, taking into consideration that some subset of women may also live with male family members who are not their spouses or partners, most Latina undocumented women workers likely live with a man to whom this narrative might encourage them to defer.

Adela, a Mexican immigrant activist profiled in a compilation of undocumented immigrants' narratives, expressed frustration about the role played by machismo in her culture. According to Adela: "The woman, too, is taught that to be a woman is to be submissive. To do anything for her husband because he is the master. And this causes problems as well."[54] A study of farmworker women's workplace exploitation, based

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[49] *See, e.g.*, Leticia M. Saucedo & Maria Cristina Morales, *Voices Without Law: The Border Crossing Stories and Workplace Attitudes of Immigrants*, 21 CORNELL J.L. & PUB. POL'Y 641, 642 (2012) ("The fact that narratives intertwine at the intersection of immigration and employment law regimes means that we must consider the effects of law on immigrants in a multidimensional manner, so that the exploitation particular to migrants will be more effectively addressed.").

[50] Lopez, *supra* note 30, at 103.

[51] Professor Padilla's analysis of Mexican women's advocacy, for example, revealed that, "Mexican American women's social, cultural, and familial background often conspires to dissuade them from seeking public policy change, altering legal structures or transforming the religious sphere." Padilla, *supra* note 44, at 1214.

[52] Berta Esperanza Hernández-Truyol, Essay, *Borders (En)Gendered: Normativities, Latinas, and a LatCrit Paradigm*, 72 N.Y.U. L. REV. 882, 916 (1997).

[53] PASSEL & COHN, *supra* note 9, at 6.

[54] UNDERGROUND AMERICA: NARRATIVES OF UNDOCUMENTED LIVES 315 (Peter Orner ed., 2008).

upon door-to-door questionnaires, reflected a similar "belief that the job of women is to obey the men – men at home, the crew leaders in the field, all of the men are to be obeyed, no matter what."[55]

Reliance upon a husband's acquiescence is further reinforced by practices that inextricably link the terms of Latina workers' employment to their husbands. Isabel and Maria Erica, immigrant workers interviewed by the Southern Poverty Law Center, were both paid their wages through their respective husband's paycheck.[56] Maria Erica explained, "So the check was in my husband's name. It was his social security number. If you got hurt, whether your Social Security number is fake or not, there's no proof. It's like you're invisible."[57] Thus, despite her hours of arduous, physical work, any evidence of the employment relationship was hidden within her husband's employment. Her pay could not be differentiated from his compensation. It would, indeed, be nearly impossible for her to determine her hourly rate of pay, whether she received overtime compensation, or whether she received payment for all of her hours worked. Both she and her exploitation are invisible.

The undocumented Latina immigrant worker lacks the ability to exercise control over her circumstances when her employment and compensation are inextricably tied to her husband. Indeed, immigrant women working on farms and in the food industry are sometimes paid through their husbands' paychecks, making Latina workers invisible.[58] The practice is "an accounting shell game that avoids Social Security, unemployment compensation and disability rights," and deprives women of both their minimum wages and any chance of qualifying for Social Security and other benefits.[59] Moreover, her ability to challenge her exploitation is wholly dependent on her husband's acquiescence. These circumstances reinforce the subordination of her interests and needs to those of her husband.

The deference narrative, thus, contributes to an interpenetration of work and familial pressures that may enforce the subordination of Latina immigrant workers' interests to those of their husbands. This dynamic further complicates their ability to enforce their substantive rights. The possibility that a worker might engage in the adversarial process through the courts, while also facing disapproval in her home, may discourage

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[55] Dominguez, *supra* note 30, at 256.

[56] S. POVERTY LAW CTR., *supra* note 2, at 29; *see also* Richard Kamm & Roger Rosenthal, *Women in the Fields: A Brief Analysis of the Plight of Migrant Farmworker Women,* 32 CLEARINGHOUSE REV. 596, 603 (1999) (discussing employer practice of attributing women workers' earnings to their husbands rather than to the women themselves in order to meet the federal or state minimum wage guidelines).

[57] S. POVERTY LAW CTR., *supra* note 2, at 29.

[58] *Id.*

[59] *Id.*

her from vindicating her substantive rights. Waging a battle on two fronts may prove too daunting.

B. Exalting Self-Abnegation

A second subordinating narrative explored by scholars is the narrative of the pure and passive Latina, who subordinates her interests to those of others. Professor Hernández-Truyol has both identified and criticized intra-cultural expectations that attempt to confine Latina identity, explaining that these lessons are taught early and severely and that "we are discouraged from activity and aggressiveness."[60]

Similarly, in her analysis of Mexican American women, Professor Laura M. Padilla criticizes what she describes as a conditioning to believe "they have caused their own problems or that their problems are the result from God's will and they should simply accept their problems."[61] She describes a cultural conditioning that results in a sense of predestination and self-effacement that creates an inclination to "bear their burdens in solitude."[62] Bearing burdens with dignity, therefore, becomes a source of honor.[63] Indeed, "[i]f ingrained deeply enough, this conditioning can silence any Mexican American woman, and it helps to explain tendencies to accept unfavorable public policies, an oppressive legal system, and a patriarchal religious sphere."[64]

The self-abnegation narrative is reflected in Sara's story, as told in *Injustice on Our Plates*. As Sara struggled to close the latch on a rusty, metal safety glove, her supervisor slammed the latch in place, breaking her wrist, and yelled at her to get back to work. Sara did not report the incident because she believed nothing could be done. As she explained, "[y]ou suffer to come. Then once you're here, you suffer some more."[65]

This subordinating narrative also appears in other undocumented Latina workers' descriptions of and reactions to their exploitation in the workplace. In *Injustice on Our Plates*, a Latina worker's response to chronic denial of her proper wages reflects an acceptance of what she considers to be her lack of power and her resolve that she must endure the treatment and persevere as a woman of faith:

> I'm better off keeping quiet, even if they pay me $20 or $30. What can I do? They give me work? That's what I want. I don't want anything more. If someone wants to

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[60] Hernández-Truyol, *supra* note 47, at 60.

[61] Laura M. Padilla, *Single-Parent Latinas on the Margin: Seeking a Room With a View, Meals, and Built-In Community*, 13 WIS. WOMEN'S L.J. 179, 205 (1998).

[62] Padilla, *supra* note 44, at 1215.

[63] *Id.*

[64] *Id.*

[65] S. POVERTY LAW CTR., *supra* note 2, at 33.

> rob me, let them rob me. Only God knows, and God will help me. That's all I can say.[66]

The self-abnegation narrative may discourage workers from complaining about wage theft and exploitation. Indeed, it may encourage them to endure their exploitation in silence and thus reinforce their sense of invisibility.

C. The Family Comes First (Familismo)

A third narrative portrays the Latina as the protector of the family. Specifically:

> The family always comes first – be it their parents and siblings, or their husbands and children . . . . The notion of familismo (family comes first) also keeps Latinas, right here within our fronteras (borders), hiding behind the proverbial privacy closet door of family. Familismo results in the expectation of Latinas to take blows from husbands and fathers alike, and never to complain. Majority culture and Latina culture alike, as well as the church, expect Latinas to be holy, self-effacing and to protect the family.[67]

According to Jenny Rivera:

> Those within the Latino community expect Latinas to be traditional, and to exist solely within the Latino family structure. A Latina must serve as a daughter, a wife, and a parent, and must prioritize the needs of family members above her own. She is the foundation of the family unit. She is treasured self-sacrificing woman who will always look to the needs of others before her own.[68]

The *familismo* narrative, therefore, encourages the placement of the family as the central component of Latina identity.[69] Within this family

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[66] *Id.* at 28.

[67] Berta Esperanza Hernández-Truyol, *Sex, Culture, and Rights: A Re/Conceptualization of Violence for the Twenty-First Century*, 60 ALB. L. REV. 607, 626 (1997).

[68] Jenny Rivera, *Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials*, 14 B.C. THIRD WORLD L.J. 231, 241 (1994).

[69] Scholars recognize the impact of *familismo* on decision-making and dynamics in Latino communities. *See, e.g.*, Jasmine E. Harris, *Cultural Collisions and the Limits of the Affordable Care Act*, 22 AM. U. J. GENDER SOC. POL'Y & L. 387, 430, 437 (2014) (discussing the role of *familismo* in Latinas' underutilization of mental health services); Carlos Villarreal, *Culture in Lawmaking: A Chicano Perspective*, 24 U.C. DAVIS L. REV. 1193, 1224 (1991) ("Familism, ma-

structure, her needs are subjugated to what male family members consider to be the greater good. This gendered construction of women's identities is not entirely unique to Latina culture. Indeed, feminist theorists have long- recognized and criticized the societal norms, narratives, and stereotypes that expect women to situate their identities around their family roles.[70] Latina women, however, "may feel extra pressure coming from her extended family, as a part of the Latino civil society retention of marianismo roles and *familismo* values."[71]

Like the others, this narrative appears in the stories told by immigrant women workers. For example, in the book *Sweatshop Warriors*, Miriam Ching Yoon Louie recounts her interview of an exploited factory worker about her workplace experiences. Maria del Carmen Dominguez explained:

> When I stayed at work in the factory, I was only thinking of myself and how I was going to support my family – nothing more, nothing less. And I served my husband, my son, my girl. But when I started working with La Mujer Obrera [a women workers' advocacy organization], I thought, "I need more respect for myself. We need more respect for ourselves."[72]

Her prioritization of her family's needs over her own need for respect in the workplace is consistent with the *familismo* narrative.

Familismo may, however be a dual-edged sword in the fight against gendered workplace exploitation. Threats to their families and their communities may, in fact, compel Latina women to action.[73] Professor

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chismo, and the Catholic religion are three primary elements defining Chicano culture.").

[70] *See, e.g.*, BELL HOOKS, FEMINIST THEORY: FROM MARGIN TO CENTER (2d ed. 2000); Vicki Schultz, Essay, *Life's Work*, 100 COLUM. L. REV. 1881, 1892 (2000) (criticizing the positioning of women as "inauthentic workers," where the conventional conception of femininity positions women "as first and foremost committed to domesticity – as wives, mothers, daughters, sisters, general nurturers, and providers of care and cleanup.").

[71] Elena Christine Acevedo, *The Latina Paradox: Cultural Barriers to the Equitable Receipt of Welfare Services Under Modern Welfare Reform*, 20 BERKELEY J. GENDER L. & JUST. 199, 204–05 (2005). Another cultural narrative, Marianismo – the expectation that women model their lives after the Virgin Mary – contains aspects of deference, self-abnegation, and *familismo*. *See* Arriola, *supra* note 45, at 777.

[72] MIRIAM CHING YOON LOUIE, SWEATSHOP WARRIORS: IMMIGRANT WOMEN WARRIORS TAKE ON THE GLOBAL FACTORY 88 (2001).

[73] According to Professor Padilla: "Mexican women have been moved by problems that they perceive as harmful to their families. In other words, if a problem only affects them individually, they may silently accept it. However, if it harms their families or the larger community, they are more likely to spring

Padilla, for example, has exalted the participation of Mexican American women in an anti-subordination agenda by entering the legal field, engaging in social change organizing, and working within and without community churches.[74] Nevertheless, Professor Padilla simultaneously recognized that only a small percentage of Mexican American women actually engage in that struggle.[75]

Despite its potential to spur women into action, *familismo* may also discourage undocumented Latinas from taking risks that would involve potential hardship for their families. Thus, this narrative has the potential to both discourage Latina immigrant workers from claims-making and encourage them to challenge their workplace exploitation. Unfortunately, for reasons may be associated with the intersection of the various narratives discussed above as well as complicated issues associated with access and procedural hurdles discussed below, the former appears to occur more often than the latter.

D. Learning from the Narratives

These narratives enrich our understanding of undocumented Latina workers' experiences and their motivations. They provide a lens through which we can view their exploitation and potential legal claims that considers both culture and gender. Undocumented Latina workers must transgress the perceived and real limitations of their vulnerable immigration status and poverty, but also the subordinating narratives that may further discourage claims-making. These narratives may reinforce their perceived lack of power and agency in the workplace.

Furthermore, in what scholars have already identified as an informal and often hidden low-wage worker economy,[76] the cultural narratives that discourage women's advocacy may make undocumented Latina workers even more hidden and their exploitation therefore easier to conceal. In other words, these workers may seem invisible. Moreover, to the extent that these narratives are widely known and operate as stereotypes, they may also make undocumented Latina women more vulnerable in the workplace. Employers may assume that workers are more likely to defer to the needs of others, engage in self-abnegation, and prioritize their families' need in ways that further decrease the likelihood that they will challenge their exploitation.[77]

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into action, exhibiting a 'you can hurt me, but don't you dare hurt my child' attitude." Padilla, *supra* note 44, at 1216.

[74] *Id.*

[75] *Id.* at 1215.

[76] *See generally* Foo, *supra* note 9 (discussing the underground immigrant worker economy and the need for increased private enforcement of workplace laws).

[77] While narratives may further complicate workers' ability to vindicate their wage rights, it is critical to note that the very act of working outside of the household may be considered gender transgressive behavior that could impact

Ultimately, these narratives are layers of cultural norms and expectations that women may internalize. The narratives and resulting expectations run counter to the presumptions imbedded in our legal system that assume workplaces are largely regulated by workers themselves who will enforce our workplace laws through private enforcement or labor-organizing measures.[78] Put simply, there is tension between the narratives described herein and the expectation of private enforcement of workplace laws. The remaining Parts of this Article reflect upon the importance of the private attorney general model of workplace law enforcement, the important role to be played by undocumented Latina workers within the Private Attorney General framework, contend that partnerships between organizations and attorneys may position more Latina workers to engage in the claims-making necessary to vindicate their substantive rights, and finally posit that attorneys should position undocumented Latina workers as named plaintiffs when pursuing collective action litigation.

IV. THE PRIVATE ATTORNEY GENERAL

The interplay of the deference, self-abnegation, and *familismo* narratives, and the heightened vulnerability of undocumented women in the workplace, make it particularly challenging for them to vindicate their substantive rights. Professors Leticia Saucedo and Maria Cristina Morales described masculine immigrant narratives as "carry[ing] the work of silencing immigrants – by discouraging their participation as private attorneys general in the workplace."[79] Likewise, the feminine narratives that may subordinate women workers both increase their vulnerability and discourage them from claims-making as private attorneys general. The result is silence and invisibility.

Immigrant worker exploitation remains rampant, despite years of advocacy and organizing that have cemented the extension of most statutory workplace protections to nearly all workers, regardless of their immigration status.[80] The challenge therefore is not necessarily one of legal reform, but of enforcing the existing statutes. Private attorneys general typically play a critical role in the enforcement of many workplace protections.[81]

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stereotypical gender norms. *See, e.g.*, Phyllis L. Baker, *"It Is the Only Way I Can Survive": Gender Paradox Among Recent Mexicana Immigrants to Iowa*, 47 SOC. PERSP. 393, 403 (2004).

[78] *See* Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319 (2005).

[79] Saucedo & Morales, *supra* note 49, at 657.

[80] JENNIFER GORDON, SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS 23–24 (2005).

[81] While Saucedo and Morales argue for increased involvement of federal enforcement agencies such as the Department of Labor in investigating worker

A. Defining the Private Attorney General

The term "private attorney general" characterizes the private and public role played by individuals (and their counsel) who engage in the private enforcement of certain statutes.[82] The combination of express statutory language that permits private enforcement of these statutes and fee-shifting statutes that permit attorneys to recover fees and costs in these cases creates the rubric for the private attorney general model.

The "American Rule" provides that each party to the litigation will pay his or her own attorney's fees. Nevertheless, Congress has long recognized that exceptions to that rule apply in cases involving the vindication of important public policy goals. As such, nearly every civil rights statute, as well as other rights-based statutes such as the FLSA, relies heavily on the private attorney general for its enforcement.[83] These statutes include fee-shifting statutes through which the prevailing party in the litigation may collect reasonable attorney's fees and costs, thus incentivizing private counsel to represent individuals in these critical cases.[84] As one court observed, "[b]ut for the separate provision of legal fees, many violations of the Fair Labor Standards Act would go unabated and uncorrected."[85] Employers engaged in wage theft, therefore, would often proceed without consequence in the absence of the FLSA's fee-shifting provision.

In *Newman v. Piggie Parker Enterprises, Inc.*, one of the first U.S. Supreme Court cases to address the 1964 Civil Rights Act, the Court recognized the challenges of enforcing the statutes solely through public means and explained: "[I]t was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law."[86] Accord-

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exploitation, there remains an important space for the work of private attorney generals in making sure that undocumented women workers' stories, and therefore their legal claims, are heard. *See* Kati L. Griffith, *U.S. Migrant Worker Law: The Interstices of Immigration Law and Labor and Employment Law*, 31 COMP. LAB. L. & POL'Y J. 125, 160 (2009) ("The promotion of private attorneys general and the protection of collective action are central to workplace law regulation . . .").

[82] The private attorney general is not limited to traditional civil rights or wage and hour advocacy, but can also vindicate statutory rights in, for example, consumer and securities cases.

[83] Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 186 (2003) ("Virtually all modern civil rights statutes rely heavily on private attorneys general.").

[84] *See, e.g.*, Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975). Fee-shifting provisions, however, are not limited solely to traditional civil rights statutes. *See* Marek v. Chesny, 473 U.S 1, 44–48 (1985) (Brennan, J., dissenting) (listing federal statutes that authorize the award of attorney's fees).

[85] Sand v. Greenberg, No. 08 Civ. 7840, 2010 WL 69359, at *3 (S.D.N.Y. Jan. 7, 2010).

[86] Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 401 (1968).

ing to the Court, injunctive relief sought by private plaintiffs in civil rights cases benefitted not only the specific plaintiff, but the greater public.[87] Indeed, the Court subsequently indicated such equitable benefits accrue even when the plaintiff seeks only compensatory damages.[88]

Courts have consistently reiterated the important role played by private litigators in the enforcement of civil rights statutes,[89] including the Fair Labor Standards Act, which regulates much of the employee-employer relationship.[90] The private litigant "not only redresses his own injury, but also vindicates the important congressional policy against discriminatory employment practices."[91] Likewise, private litigants in wage and hour cases vindicate Congress's policy against wage theft and workplace exploitation.

B. Encouraging Private Enforcement through the Private Attorney General

Incentivizing private attorneys general through fee-shifting statutes is necessary for the effective enforcement of wage and hour statutes given workers' difficulty in securing and paying for counsel. Indeed, many exploited low-wage workers are unable to compensate attorneys at market rates.[92] This phenomenon is particularly prevalent in wage and hour cases involving low-wage workers denied the minimum wage and overtime compensation.[93] Persons surviving on the minimum wage, and often less than the minimum wage, simply are not positioned to compensate attorneys. Nor are most low-wage workers able to handle their cases *pro se*. Beyond the need for counsel to navigate the administrative or judicial claims-making process, the reality of low-wage work means that

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[87] *Id.*

[88] *See* City of Riverside v. Rivera, 477 U.S. 561, 574 (1986).

[89] New York Gaslight Club v. Carey, 447 U.S. 54, 63 (1980) ("Congress has cast the Title VII plaintiff in the role of 'a private attorney general,' vindicating a policy 'of the highest priority' . . ."); *see also* Juliet Stumpf & Bruce Friedman, *Advancing Civil Rights Through Immigration Law: One Step Forward, Two Steps Back?*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 131, 135 (2002) ("Civil rights statutes have been described as encouraging the creation of 'private attorneys general' – private individuals who act in the place of the State in order to increase the level of compliance with antidiscrimination laws.").

[90] *See* Kathleen Kim, *The Trafficked Worker as Private Attorney General: A Model for Enforcing the Civil Rights of Undocumented Workers*, 1 U. CHI. LEGAL. F. 247, 253–57 (2009) (discussing the origins of the FLSA and private enforcement of the statute).

[91] Alexander v. Gardner-Denver Co., 415 U.S. 36, 45 (1974).

[92] City of Riverside v. Rivera, 477 U.S. 561, 576 (1986) (citing H.R. REP. NO. 95-1558, at 1, 3 (1976)) ("[T]he private market for legal services failed to provide many victims of civil rights violations with effective access to the judicial process," because they "ordinarily cannot afford to purchase legal services at the rates set by the private market.").

[93] *See* Coleman, *supra* note 19, at 8–9.

hours spent attempting to recoup their wages unassisted are hours that are not spent earning much-needed wages.

In addition to the fee-shifting provisions, the Fair Labor Standards Act (and most of its state law wage and hour counterparts) includes various provisions that incentivize private enforcement.[94] First, unlike Title VII civil rights cases, the FLSA does not require that parties exhaust administrative remedies before proceeding to court.[95] As a result, workers and their attorneys may proceed directly to litigation, rather than languishing for months as they navigate an administrative process. The private enforcement section of the statute contains a punitive measure: liquidated damages where the plaintiff demonstrates a willful violation of the statute.[96] These measures plainly demonstrate Congress's intent to rely on private attorneys general to enforce the statute.[97]

C. Filling the Gap Left by Public Enforcement

In addition to the legislative and judicial recognition of the necessity of private enforcement of these statutes, normative realities also dictate that private enforcement supplement government agencies' efforts to vindicate these statutes. The U.S. Department of Labor's ("DOL") Wage and Hour Division ("WHD")—responsible for enforcing the wage provisions of the FLSA—receives far more FLSA complaints each year than it is capable of investigating.[98] The WHD received 21,558 FLSA complaints in fiscal year 2008, 26,376 in fiscal year 2009, and 32,916 in fiscal year 2011.[99] Furthermore, the number of complaints filed with the

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[94] Kati L. Griffith, *Discovering "Immployment" Law: The Constitutionality of Subfederal Immigration Regulation at Work*, 29 YALE L. & POL'Y REV. 389, 431–32 (2011).

[95] 29 U.S.C.A. § 216(b) (West 2014) ("An action . . . may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.").

[96] *Id.*; § 260.

[97] Kati L. Griffith, *Undocumented Workers: Crossing the Borders of Immigration and Workplace Law*, 21 CORNELL J.L. & PUB. POL'Y 611, 631 (2012) ("[W]orkplace law enforcement is severely compromised when employees do not have the proper incentive to fulfill their intended role as private attorneys general who will pull the workplace law fire alarm when necessary.").

[98] *See* Kim, *supra* note 90, at 256–57 ("Given the historically understaffed and underfunded resources of the DOL, enforcement of FLSA's standards is necessarily reliant on private plaintiffs' actions."). In 2008, the Department of Labor increased the number of wage and hour investigators to nearly 1000. *See* BOBO, *supra* note 16, at 116. Nevertheless, the department remains understaffed. Investigators are responsible for more than 130 million workers in nearly 7 million workplaces. *Id.* Thus, one investigator is responsible for more than 120,000 workers and 7000 workplaces.

[99] *Testimony of Nancy J. Leppink, Deputy Wage and Hour Administrator, Wage and Hour Division, U.S. Dept. of Labor, before the Subcommittee on*

DOL almost certainly understates the problem, as it reflects only the claims of the workers who possessed knowledge about their rights and the complaint process. It also excludes the most vulnerable workers whose claims-making was chilled by threats of deportation. Finally, the number almost certainly excludes unauthorized immigrant workers who would be hesitant to file a claim directly with a federal or state government agency.

The private attorney general, through both individual litigation as well as collective action litigation,[100] is critically necessary to the enforcement of the FLSA, and therefore to the vindication of workers' substantive rights. Both individual and collective action litigation require the active participation of the plaintiffs.[101] The collective action, however, has grown increasingly prevalent in the fight against wage theft. Individual wage cases often involve relatively small amounts of back pay. Individual plaintiffs often find it difficult to obtain counsel who are willing to dedicate the time and resources necessary to litigate a small case that might yield an award of attorneys' fees that does not approximate the amount of attorney time and effort. Accordingly, counsel are more likely to take on cases they can file as collective actions; that is, where the court permits plaintiffs to join their claims in a single case pursuant to §216(b) of the FLSA.

D. The Topology

Moving beyond the consideration of Congress' intent that private attorneys general engage in the enforcement of certain rights-based statutes, Professor William Rubenstein has further developed our understanding of the private attorney general role through his creation of a topology that identifies three specific ways the private attorney general operates at the intersection of private and public interests: (1) the Substitute Attorney General, hired by the attorney general to do the work of her office or to represent her in her individual capacity, or as the qui tam lawyer; (2) the Supplemental Law Enforcer, whose "work for private clients contributes to the public interest by supplementing the government's enforcement of laws and public policies"; and (3) the Simulated Attorney General for Private Interests, whose representation of a single plaintiffs results in the creation of a fund that benefits an entire group of individuals.[102] It is Rubenstein's second character—the Private Attorney

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Workforce Protections, Committee on Education and the Workforce, U.S. House of Representatives, U.S DEP'T OF LABOR (Nov. 3, 2011), http://www.dol.gov/_sec/media/congress/20111103_Leppink.htm.

[100] William B. Rubenstein, *On What a "Private Attorney General" Is – And Why It Matters*, 57 VAND. L. REV. 2129, 2147 (2004) (discussing the individual plaintiff and the class action attorney as manifestations of the supplemental attorney general).

[101] *See* Coleman, *supra* note 19, at 16–22.

[102] Rubenstein, *supra* note 100, at 2146.

General as the Supplemental Law Enforcer —whose role in the enforcement of wage and hour statutes is critical here.

The Supplemental Law Enforcer refers to both the plaintiffs who bring individual suits as well as parties and their counsel who pursue class and collective actions. The individual plaintiff pursues litigation largely for his or her personal interests, but the award of compensatory damages deters future violations of the statute.[103] Class or collective action plaintiffs pursue litigation on behalf of a group of individuals often seek injunctive relief that will fundamentally change the defendants' practices as well as monetary relief that will be sufficient to create a financial deterrent to future bad acts.[104] Both scenarios, individual litigation and collective action litigation, further the statute's goal of protecting workers from wage theft and other workplace exploitation. The FLSA, ultimately, is only as effective as its enforcement mechanisms and their deterrent effects on employers.

E. Current Challenges to the Model

The private attorney general model, however, is not without flaws. In her recent article, Professor Olatunde Johnson identified several deficiencies.[105] Johnson points out that this model "depends heavily on the judicial embrace of rules governing pleading, summary judgment, standing and fee recovery," in a judicial environment that has seemed hostile to the procedural rules necessary for private enforcement.[106] Furthermore, litigation is often time consuming and slow moving and can exact significant emotional costs on litigants.[107]

Moreover, the Supreme Court's recent decisions have complicated the private enforcement of statutory workplace rights. While prior re-

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[103] *Id.* at 2147–48.

[104] I spent six years in private practice pursuing class and collective action cases on behalf of plaintiffs in cases involving wage and hour violations, employment discrimination, housing discrimination, and credit discrimination. Every case sought significant injunctive or programmatic relief, as well as substantial monetary relief. *See also* FED. R .CIV. P. 23(b)(2) (providing for class certification of actions seeking injunctive relief); FED. R .CIV. P. 23(b)(3) (providing for class certification of cases involving monetary damages); Olatunde C.A. Johnson, *Beyond the Private Attorney General: Equality Directives in American Law*, 87 N.Y.U. L. REV. 1339, 1354 (2012) (explaining that class actions "provide an avenue for structural and injunctive relief that is often elusive or unsought in individual claims").

[105] Johnson, *supra* note 104.

[106] *Id.* at 1354. As Johnson explains, the court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011) narrowed employees' ability to seek monetary damages in Rule 23 class action. *Id.* Thus far, collective action wage and hour cases have largely escaped similar limitations on their ability to proceed and seek monetary damages. *See* Jenny R. Yang, *The Impact of* Wal-Mart v. Dukes – *One Year Out*, SU004 ALI-CLE 975 (2012).

[107] Johnson, *supra* note 104, at 1355.

strictions on substantive rights typically involved "redefine[ing] an underlying right in narrower terms," the Court's recent decisions have instead "constrict[ed] the remedial machinery."[108] Professor Pamela Karlan critiqued four of the Court's decisions in the October 2000 Term: two that restricted claimants' ability to a private right of action in civil rights cases; and two that erected procedural barriers to bringing claims.[109] Likewise, more recent cases like *Wal-Mart v. Dukes*[110] and *AT&T v. Concepcion*[111] have made class action enforcement of statutes more complicated by narrowing the availability of monetary damages under Federal Rule of Civil Procedure 23 and permitting employers to avoid class actions through mandatory arbitration clauses and agreement.

Despite these flaws, private attorneys general advocacy through private enforcement of wage and hour statutes, either through individual, class, or collective action litigation, remains the dominant method for countering workplace exploitation in general and wage theft, specifically.[112] What is lost, however, when the focus of a supplemental law enforcer skews too far toward their public role in enforcing an important statute, rather than toward vindicating and giving voices to exploited workers? As discussed below, private attorney generals have the ability to not only collect lost wages, but to engage in a lawyering project that provides important opportunities for Latina workers to obtain other forms of vindication as well.[113] This valuable project is the subject of the remainder of this Article.

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[108] Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 185 (2003).

[109] *See generally id.* (discussing cases "in which the Supreme Court sharply abridged the ability of attorneys general to get their day in court").

[110] Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541 (2011). Thus far, courts largely have not imposed the restrictions created by the Court on collective action wage and hour cases. *See* Yang, supra note 6, at 169 (2012).

[111] AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740 (2011).

[112] *See* Scott A. Moss & Nantiya Ruan, *The Second-Class Class Action: How Courts Thwart Wage Rights By Misapplying Class Action Rules*, 61 AM. U. L. REV. 523, 529–30 (2012) ("[O]ne in five aggregate (class or collective) lawsuits is a wage case, typically a multi-million dollar action by hundreds or thousands of employees claiming years of unpaid minimum wage or overtime wages, that challenges entire industry pay practices.").

[113] Professor Scott Cummings argues, for example, that social change litigation may be useful, even when implementation of the relief is difficult, by permitting workers to "fram[e] [their] grievances in justice terms, [and] conferring legitimacy on a movement's claims, generating favorably publicity, raising consciousness among a movement's constituency, and fostering empowerment." Scott L. Cummings, *Litigation at Work: Defending Day Labor in Los Angeles*, 58 UCLA L. REV. 1617, 1622–23 (2011).

V. THE LATINA IMMIGRANT WORKER AS PRIVATE ATTORNEY GENERAL

Given the gendered cultural dynamics described previously, undocumented women's claims-making, particularly through the private attorney general model, may be challenging. Undocumented immigrant women rarely bring lawsuits to hold their employers accountable for their exploitation and abuse.[114] They are, therefore, nearly invisible in the enforcement of wage and hour statutes, and their distinct experiences receive limited attention from scholars and advocates.

Professors Saucedo and Morales have recognized this challenge and advocated that federal agencies like the DOL should expand their role in protecting immigrant workers by more vigorously seeking out and prosecuting their claims and certifying exploited workers for U visa relief, when possible.[115] Saucedo and Morales assert that if the dominant narratives impede workers from pursuing their claims, third party mechanisms, like government agencies, should step up their enforcement measures by making immigrant industries a priority in their investigations.[116] The DOL's prioritization of immigrant industries would undoubtedly have some impact on ameliorating the rate of wage and hour violations in the immigrant worker community. Undocumented workers' claims-making or cooperation with a federal agency, however, would require the workers to tell their stories and expose their existence to the government—a step that they could consider riskier than speaking with or seeking out a private attorney.[117] Furthermore, a decision to target immigrant industries in order to better protect the rights of undocumented workers would be politically polarizing and unlikely to survive any potential changes to a more conservative administration. Rubenstein's supplemental private attorney general, thus, fills the potential void left by the government's inability to reach and protect certain exploited populations.[118]

Individual and collective action litigation through private attorneys therefore remain critically important to protecting Latina immigrant workers from workplace exploitation.

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[114] S. POVERTY L. CTR., *supra* note 2, at 47.

[115] *See, e.g.*, Leticia M. Saucedo, *A New "U": Organizing Victims and Protecting Immigrant Workers*, 42 U. RICH. L. REV. 891 (2008).

[116] Saucedo & Morales, *supra* note 49, at 657.

[117] *See* Shannon Gleeson, *From Rights to Claims: The Role of Civil Society in Making Rights Real for Vulnerable Workers*, 43 LAW & SOC'Y REV. 669, 677 (2009) (quoting the outreach manager of the San Francisco EEOC, who explained: "The challenge is getting them to trust us. And we work very closely with other organizations to do that. . . I'm a strong believer in collaborating with migrant workers.").

[118] Kathleen Kim, *supra* note 90, at 290 (2009) ("The supplemental private attorney general is better equipped to rectify certain violations because they are free from the constraints of government attorneys whose actions may be limited by scarce resources and political pressures.").

A. Access Through the Private Attorney General

In any discussion of the role of a private attorney general in responding to and ultimately reducing the workplace exploitation of undocumented women workers, the first inquiry is how can this population gain access to counsel in order to vindicate rights they may not even be aware they possess. Therefore, access to the legal system involves both education and legal representation. Where undocumented Latina workers are potentially silenced by inter- and extra-cultural subordination, providing these resources may be particularly challenging.

Historically, labor unions have often served the dual purpose of educating low-wage workers' about their substantive workplace rights and providing the mechanism for protecting those rights.[119] Recent years have seen a significant decline in union membership.[120] In addition, undocumented immigrant workers are concentrated in industries that are largely nonunionized.[121] Furthermore, the Supreme Court has erected barriers to undocumented immigrant workers' access protections under the National Labor Relations Act.[122] In these instances, therefore, the answers may be found in alliances between worker organizations and attorneys positioned to pursue workers' claims.[123]

Worker organizations frequently partner with lawyers—law school clinical programs, private practice attorneys, and public interest attor-

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[119] BOBO, *supra* note 16, at 88–89.

[120] Sameer M. Ashar, *Public Interest Lawyers and Resistance Movements*, 95 CALIF. L. REV. 1879, 1884–85 (2007) (discussing the factors that led to a decline in the power of labor in the second half of the twentieth century); Shirley Lung, *Exploiting the Joint Employer Doctrine: Providing a Break for Sweatshop Garment Workers,* 34 LOY. U. CHI. L.J. 291, 309 (2003) (identifying the decline of union power one factor attributed to the effects of the globalization of production). In addition, Latinos have the lowest levels of union membership of any group in the United States. *See* Shannon Gleeson, *supra* note 117, at 672.

[121] SHANNON GLEESON, CONFLICTING COMMITMENTS: THE POLITICS OF ENFORCING IMMIGRANT WORKER RIGHTS IN SAN JOSE AND HOUSTON 6 (2012). Gleeson explains: "A mere 1.6 percent of all restaurant and food service workers, 2.2. percent of crop production workers, and 1.1 percent of car washers were union members in 2008. . . Union protections are also virtually nonexistent in informal sectors such as day labor and domestic work, where undocumented workers are also common." *Id.* at 7.

[122] See Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002) (limiting the remedies, including back pay, available to undocumented workers under the NRLA); RUBEN GARCIA, MARGINAL WORKERS: HOW LEGAL FAULT LINES DIVIDE WORKERS AND LEAVE THEM WITHOUT PROTECTION 1-3 (2012). Courts, however, have consistently found that back pay remains a valid remedy for undocumented workers seeking enforcement of the Fair Labor Standards Act. *See* Keith Cunningham-Parmeter, *Redefining the Rights of Undocumented Workers*, 58 AM. U. L. REV. 1361, 1370 (2009).

[123] Gleeson, *supra* note 117, at 669.

neys—to provide legal services to undocumented workers.[124] In my own experience, as Co-Director of the Civil Advocacy Clinic at the American University Washington College of Law, we regularly receive referrals of exploited immigrant workers from organizations like CASA de Maryland and the Employment Justice Center. Our ability to reach this population is dependent on the involvement of community-oriented organizations whose relationships with immigrant communities and placement of worker clinics and trainings within those communities permits them to establish the trust necessary to reach vulnerable populations. Other scholars and practitioners have discussed and assessed the success of more extensive partnerships between organizations and attorneys.[125]

Indeed, my experience supervising cases in the Civil Advocacy Clinic has made clear the importance of private enforcement and private attorneys general operating in partnership or concurrently with advocacy organizations.[126] The clinic receives its wage and hour cases through referrals from worker organizations that have often engaged in some form of advocacy for the client. Organizations may sometimes face difficulty in compelling employers to pay workers lost wages. Many organizations lack the resources to effectively litigate cases for clients and are therefore not able to extend their services beyond drafting a demand letter to the employer. A demand letter from an organization may go unanswered, while a similar letter from the law school clinic that poses a sincere threat of litigation prompts a response and, sometimes, an early settlement.[127]

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[124] *See generally* Ashar, *supra* note 120 (discussing the coordination of efforts by immigrant worker centers, the law students of the CUNY Immigrant and Refugee Rights Clinic, and restaurant workers in New York).

[125] *See id.*; Cummings, *supra* note 113.

[126] Where law school clinic students take on wage and hour litigation, enforcing federal and/or state employment statutes, they serve a private attorney general role. Indeed, law clinics are eligible to receive attorneys' fees when they prevail in cases involving violations of civil rights and wage and hour statutes. *See, e.g.*, Siggers-El v. Barlow, 433 F. Supp. 2d 811, 821 (E.D. Mich. 2006) ("Law clinics and legal aid organization [sic], like any law firm or legal association, depend on the recovery of attorney's [sic] fees to sustain a level of representation that is professionally adequate."); Proulx v. Citibank, 709 F. Supp. 396, 400 (S.D.N.Y. 1989) (awarding attorneys' fees to the prevailing plaintiff represented by law clinic students).

[127] Employers may be aware that the constriction of the funding available to organizations has significantly decreased their ability to litigate claims. Some organizations have moved away from direct representation of clients and toward providing limited pro bono assistance by drafting demand letters that are sent directly from the client. Unsurprisingly, such letters do not yield responses from employers who continue to assume that the worker will not retain counsel to represent them in a wage claim. For an analysis of the increase in the provision of unbundled legal services, *see* Jessica K. Steinberg, *In Pursuit of Justice?*

Professor Shannon Gleeson has engaged in an empirical examination of the role of what she has termed the "third sector" of civil society in the legal mobilization of immigrant workers.[128] Gleeson's research confirmed the anecdotal experience of practitioners representing undocumented low-wage workers: the involvement of community and advocacy groups results in higher levels of claims-making.[129] Gleeson explained:

> Community and advocacy groups are often the resource of first resort for immigrants and can connect well-meaning policies, the enforcement agencies that implement them, and the population they seek to protect. These organizations can provide crucial trust and entree to outreach efforts, and equip undocumented workers with the skills and confidence to assert their workplace rights.[130]

As such, an effort to provide undocumented Latina workers access to the court system would greatly benefit from the coordination of efforts between community organizations and attorneys.[131] This coordination requires, however, that organizations take special care to assure that women workers receive outreach. This process may involve determining whether different methods are necessary to make certain that women workers' claims are not lost within a stock story or narrative that skews towards male workers. Targeted outreach to undocumented Latina workers, based upon an understanding of their unique experiences, their unique vulnerabilities, and their unique strengths, would better position organizations to identify exploited Latina workers and bring their stories—and their potential cases—to the attorneys positioned to assist them.

B. Empowerment Through the Private Attorney General

Representation by an attorney in a civil suit is fundamentally different than working with government or state agency attorneys. The former provides opportunities for worker empowerment that are often lacking in government cases.

Scholars have, for example, lauded the importance of the civil remedy for victims of trafficking under the Trafficking Victim Protections

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Case Outcomes and the Delivery of Unbundled Legal Services, 18 GEO. J. ON POVERTY L & POL'Y 453, 453–57, 459–61(2011).

[128] Gleeson, *supra* note 117, at 674.

[129] *Id.* at 688.

[130] *Id.* at 689–90.

[131] The benefits of a relationship between organizations and attorneys, however, do not simply flow in one direction. Rather, these relationships, either through a referral arrangement or a more substantial partnership, permit both models of advocacy to strengthen one another.

Act.[132] In criminal cases, the momentum and decisions are largely driven by prosecutors.[133] Indeed the exploited person's role may be relegated to that of a witness. In civil litigation, the plaintiff exercises more control over the course of the litigation, making decisions about goals and courses of action. As such, the vindication of their rights through civil litigation can be an important source of empowerment for workers who can "exercise discretion over the direction of their case and can utilize the civil case to express their own narratives."[134]

A similar comparison can be made here between reliance upon DOL investigations and individual civil litigation. In a DOL case, the agency drives the decision making about the case, not the exploited workers. The DOL and the worker lack an attorney–client relationship, and thus many of the ethical responsibilities that would attach and require the attorney to keep the client informed and permit the worker to make decisions do not exist.[135] In civil litigation, the client has a more significant voice in the litigation, thus experiencing the opportunity to control the narrative of her case. She is empowered to exercise control over the process of vindicating her exploitation—the underlying circumstances of which likely reinforced a sense of powerlessness. Undocumented immigrant women also often lack the political power to drive the government, or, more specifically, its agencies, to prioritize enforcement actions that are most likely to address their exploitation. The private attorney general is thus an important "means by which to address their social and economic rights."[136]

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[132] Kim, *supra* note 90; Kathleen Kim & Kusia Hreshchyshyn, *Human Trafficking Private Right of Action: Civil Rights for Trafficked Persons in the United States*, 16 HASTINGS WOMEN'S L.J. 1 (2004).

[133] Julie Su, Labor Commissioner of California, has described the "conflicts . . . between the mandates of traditional legal avenues for achieving justice and the goals of nontraditional political and social activism," where prosecutors at the United States Attorney's Office warned workers in a concurrent criminal case not to speak out about the abuses they endured because they were central witnesses to the criminal action. Su, *supra* note 33, at 408–09. "Whereas the restriction may have made sense in the context of the criminal prosecution, it served to silence, indeed make invisible again, the Thai workers at a time when their own voices need to be heard. Thus, a conflict existed between the criminal law's narrow focus on punishing the workers' captors and a larger hope that subordinated individuals and communities could increase control over their lives." *Id.* at 409.

[134] Kim, *supra* note 90, at 292.

[135] For example, Rule 1.4 of the ABA Model Rules of Professional Conduct, requires that attorneys "reasonably consult with the client about the means by which the client's objectives are to be accomplished," and "keep the client reasonably informed about the status of a matter." MODEL RULES OF PROF'L CONDUCT R. 1.4 (2002).

[136] Jennifer J. Lee, *Private Civil Remedies: A Viable Tool for Guest Worker Empowerment*, 46 LOY. L.A. L. REV. 31, 38 (2012).

Private attorneys general also "create worker agency by vindicating individual rights and enforcing workplace norms."[137] The creation of worker agency may be critical to countering gendered subordinating forces operating within Latina workers' experiences. Where state or federal government agencies investigate and negotiate or litigate claims, the voices and narratives of the workers may be lost—the government, not the worker, is the client. In these circumstances, the worker has little control over the litigation and is, instead, merely a witness to the statutory violation. In civil litigation, the worker is the client and, pursuant to the ethical rules,[138] should have the ability to play a significant role in decision-making regarding her case—including the decisions regarding the construction of her narrative and the way in which it is presented to the court. Where Latina workers have experienced a lack of agency or control over their experiences, due to exploitation at work and narratives that may pressure them to subordinate their needs to those of others, the ability to engage in decision making about their claims-making may be particularly significant.

At the same time, however, attorneys must be cautious not to permit litigation to compound their clients' invisibility. During her years advocating and litigating for workers with the Asian Pacific American Legal Center, California Labor Commissioner Julie Su cautioned that after filing a lawsuit, workers may be "made invisible by the way the legal system operates."[139] Su questioned how attorneys can tell worker's authentic stories; that is, "bring them out of invisibility – without distorting their stories at the same time?"[140] Achieving this goal within the constraints of the attorney-client relationship and the substantive and procedural realities of litigation is, therefore, the project of the private attorney general.

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[137] *Id.* at 67.

[138] ABA Model Rule 1.2 provides, "A lawyer shall abide by a client's decisions concerning the objectives of the representation ... and shall consult with the client as to the means by which they are pursued." MODEL RULES OF PROF'L CONDUCT R. 1.2 (2002). According to ABA Model Rule 1.4(b), "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding representation." MODEL RULES OF PROF'L CONDUCT R. 1.4(b). A strict interpretation of the ends-means dichotomy, in which the client drives decisions regarding the ends, while the attorney drives decisions concerning the means to meet those ends, is unsatisfactory within the client-centered advocacy model. *See* Binny Miller, *Give Them Back Their Lives, Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485, 507 (1994). Instead, the ethical rules provide for a baseline for client involvement in decision-making that client-centered lawyering theorists contend should extend to more nuanced areas of the attorney-client relationship, including the development of the case theory. *Id.*

[139] Su, *supra* note 33, at 416.

[140] *Id.*

C. The Power of Storytelling by the Private Attorney General

The private attorney general mode of enforcement provides workers the opportunity to tell their stories.[141] Critical theorists view lawyers as storytellers tasked with constructing a narrative, one that is both compelling to the fact finder, and legally sufficient to merit the requested relief or outcome.[142] In addition, narrative theorists rely heavily upon cognitive research demonstrating that humans better understand and recall experiences presented in a narrative form.[143] Accordingly, storytelling and narrative theory are central components of the successful private enforcement of statutes.

Beyond their practical importance, narratives and storytelling have a cathartic importance as a litigation strategy that simultaneously creates a healing moment for victims of exploitation.[144] Where workers have felt their exploitation was unavoidable, and their experiences were invisible, gaining the opportunity to tell their stories can help heal the wounds to their dignity. The harm inflicted by wage theft is both economic and psychological, and giving voice to workers' experiences advances efforts to remedy these dual harms.[145]

Storytelling may also create solidarity among exploited Latina workers. As Professor Richard Delgado explains, "[s]torytelling emboldens the hearer, who may have had the same thoughts and experiences the storyteller describes, but hesitated to give them voice. Having heard another express them, he or she realizes, I am not alone."[146] This dynamic is particularly evident in complex litigation, where groups pursue their rights together through joinder, Rule 23 class actions, or wage and hour collective actions. Many workers who are hesitant to bring claims alone are emboldened by the group dynamic and sense of purpose that arise when their claim and their stories, are joined with others who have expe-

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[141] *See* Lee, *supra* note 136, at 69.

[142] Miller, *supra* note 138, at 487.

[143] *See, e.g.*, Anne E. Ralph, *Not the Same Old Story: Using Narrative Theory to Understand and Overcome the Plausibility Pleading Standard*, 26 YALE J.L. & HUMAN. 1, 25–26 (2014); Jennifer Sheppard, *What if the Big Bad Wolf in All Those Fairy Tales Was Just Misunderstood?: Techniques for Maintaining Narrative Rationality While Altering Stock Stories that Are Harmful to Your Client's Case*, 34 HASTINGS COMM. & ENT. L.J. 187, 190 (2012).

[144] Lee, *supra* note 136, at 69 (arguing that guest workers' use of private civil remedies, and the resulting storytelling involved in litigation, "can have a cathartic effect as well as promote solidarity among workers"); Binny Miller, *Telling Stories About Cases And Clients: The Ethics of Narrative,* 14 GEO. J. LEGAL ETHICS 1, 20 (2000).

[145] Jennifer Gordon & R.A. Lenhardt, *Rethinking Work and Citizenship*, 55 UCLA L. REV. 1161, 1168 (2008) ("[W]ork is about more than getting a paycheck. It is about pride, dignity and belonging – the societal standing that comes from providing for one's family and contributing to one's community.").

[146] Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2437 (1988).

rienced similar exploitation. Furthermore, where the subordinating cultural narratives of self-abnegation might discourage workers from claims-making, the participation and involvement of other women in the litigation may create an empowering counter-narrative of claims-making in support of their communities and families that drives them to see themselves within a broader movement against Latina worker exploitation.

Immigrant women may also provide counter-narratives that complicate the standard, and often masculine, narratives about immigrant workplace exploitation, and provide the nuances necessary to determine both the judicial and legislative remedies.[147] For example, an immigrant woman's explanation of her workplace exploitation might involve not only wage theft, but sexual harassment or assault. Her descriptions of her response to the exploitation might reflect subordinating cultural narratives that complicated both how she processed the exploitation and how and whether she responded to the exploitation.

The positive effects of storytelling, of course, are only possible where the narrative is an authentic reflection of the worker's voice. Indeed, some "[c]ritical theorists view lawyers as narrators who too often subordinate their clients – their stories and their lives – by telling stories that misrepresent or exclude client experience."[148] Indeed, there exist real challenges to engaging in storytelling where the legal paradigm seems to discourage it.[149] Evidence and procedure rules may create barriers to storytelling, particularly with regard to aspects of a client's story that do not fit neatly within the legal framework. For example, a court may determine that facts concerning a worker's sexual harassment are not relevant, and therefore inadmissible in a case seeking lost wages in violation of the wage and hour laws. The worker, however, might see all of these experiences as interrelated in her workplace exploitation narrative. The private attorneys generals project, therefore, must include the intentional goal of providing a space for workers to tell their stories and should perceive their role as not only enforcing a statute, but creating spaces for workers to share their narratives.

The common assumption that legal storytelling occurs only at the increasingly rare trial stage of litigation, or within the stunted dynamics of depositions, underestimates the various ways in which narrative and storytelling shape a plaintiff's experience with the judicial system more broadly and with her attorney, specifically. A worker's first opportunity to tell her story to a receptive audience may occur when she first meets with a lawyer or advocate to discuss the possibility of pursuing her sub-

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[147] *See* Lee, *supra* note 135, at 74 ("Counternarratives created from the use of the legal system can positively influence policy reform and lend legitimacy to the movement of immigrant workers, thereby contributing to overall worker empowerment.").

[148] Miller, *supra* note 144.

[149] Su, *supra* note 33, at 416.

stantive rights. Clinical legal education has long exalted the importance of permitting and encouraging a client to share her story with her attorney—including facts beyond those that have an immediately ascertainable relationship to the client's expected claim—in order to (1) foster the development of the attorney–client relationship; and (2) permit the development of a compelling case theory.[150]

Further, clinical pedagogy scholars have theorized the development of a case theory as a process that involves weaving the law around the client's story, rather than selecting the specific portions of the story that seem to fit neatly into the legal framework.[151] According to Professor Binny Miller, case theory is "an explanatory statement linking the case to the client's experiences in the world."[152] Miller's portrayal of case theory provides a space within which clients may experience vindication and which may resonate with a fact-finder in a case.[153]

Moreover, an attorney engaged in client-centered lawyering will literally engage the worker in the development of the case theory—a theory that is built upon and centers around the client's story.[154] Thus, the client may have the opportunity to work with the attorney to determine how she wants her story presented during the various stages of litigation, from the complaint, to motion practice, to trial.[155]

The private attorney general, therefore, has the ability to achieve multiple goals through storytelling. The successful vindication of workers' rights is supplemented by the transformative ability of client-

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[150] Professor Binny Miller explains the importance of sharing client stories during lawyer-client interactions because, "the informality of these settings makes it possible to tell the whole range of client stories, unhampered by the constraints legal rules and procedures impose on conveying the life experiences of clients in legal forums." Miller, *supra* note 138, at 517.

[151] *See, e.g.*, *id.*

[152] *Id.* at 553.

[153] *Id.* at 552.

[154] *Id.* at 553.

[155] This approach aligns with what Dean Kevin Johnson has described as the Critical Lawyer role. *See* Kevin R. Johnson, *Lawyering for Social Change: What's a Lawyer to Do?*, 5 MICH. J. RACE & L. 201, 222–23 (1999). Dean Johnson proposes three roles for social justice lawyers: The Zealous Advocate "embodies the traditional conception of the lawyer in our adversary system," "zealously represent[s] their clients within the bounds of the law," and "reflects a client-centered view of professional responsibility." *Id.* at 217. The Impact Lawyer engages in class action or "impact" litigation, selectively pursuing litigation she believes will advance the law in the desired direction. *Id.* at 220. Impact litigation is typically lawyer-driven and thus does little to "empower the disempowered," who typically become "passive observers, pawns of well-meaning attorneys pursuing social change." *Id.* at 221 (quoting Kevin R. Johnson, *Los Olvidados: Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement*, 1993 BYU L. REV. 1139, 1226 (1993). By contrast, the Critical Lawyer prioritizes empowering clients through engaging in collaborative decision-making. *Id.* at 222–23.

engaged storytelling to create multiple avenues to empower exploited Latina workers.

VI. STORYTELLING IN COLLECTIVE ACTION LITIGATION: CENTERING WOMEN IN THE NARRATIVE

Many attorneys who take on the private attorney general role in enforcing wage and hour statutes do so through collective action litigation under §216(b) of the FLSA.[156] Like Federal Rule of Civil Procedure Rule 23 class actions, collective actions proceed with a group of named plaintiffs who represent the larger group of affected workers.[157] In collective actions, however, participation in the case is not based upon establishing class members' commonality, numerosity, typicality, and adequacy;[158] rather it is dependent upon the worker returning a consent form to join the litigation. Those who join the case – called opt-ins – along with the named plaintiffs, are the only persons whose claims are included in the litigation.[159]

Ultimately, the court must determine whether to permit the case to proceed as a collective action. Workers' claims may be joined under §216(b) where their claims are "similarly situated" such that collective adjudication of their claims would be appropriate.[160] Courts typically engage in a two-stage process. During the initial stage, plaintiffs seek conditional certification of the collective action and request authorization to send notice of the suit to potential class members.[161] In order to meet this standard, plaintiffs typically submit to the court briefs to which they attach workers' declarations that detail their work experiences and demonstrate that the named plaintiffs and any opt-ins are similarly situated.[162] These affidavits are the first opportunity for collective action opt-ins to tell their stories of wage theft and workplace exploitation.

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[156] 29 U.S.C.A. § 216(b) (West 2014). For a detailed description of the §216(b) joinder mechanism, *see* Coleman, *supra* note 19, at 16–20.

[157] *See* Coleman, *supra* note 19, at 16.

[158] *See id.* at 15.

[159] § 216(b); Moss & Ruan, *supra* note 112, at 533; *see also* Hoffmann-La Roche, Inc. v. Sperling, 493 U.S. 165, 173 (1989) (explaining that the 1947 Portal-to-Portal Act added a "requirement that an employee file a written consent").

[160] § 216(b).

[161] *See* Coleman, *supra* note 19, at 18. For a discussion of the two-step process for collective action certification of wage and hour collective actions, *see id.* at 18–19.

[162] Moss & Ruan, *supra* note 112, at 558 ("Indeed, on certification motions, plaintiffs regularly offer sworn testimony from opt-ins on their individual claims."); *see also* Plaintiffs' Memorandum in Support of Motion for Certification of a Collective Action and Court-Supervised Notice to Potential Collective Action Members Pursuant to 29 U.S.C. § 216(b), Aaron v. Pilgrim's Pride Corp., No. 06-1082, 2007 WL 4454467 (W.D. Ark. Feb. 21, 2007) (noting that plaintiffs attached to the motion declarations from 20 workers attesting that the challenged practice occurred at their workplaces).

Counsel, however, are incentivized to focus on those details that support the similarity of workers' experiences.[163] Such a narrow focus, might lead to the exclusion of details about the broader work experience that either distract from the main narrative of wage theft or complicate the claim that workers are similarly situated. The goal, after all, is to demonstrate that workers' experiences and exploitation are sufficiently similar to warrant their joint adjudication.[164]

What impact does this need for similarity have on the narratives shared by undocumented Latina workers? The legal process may diminish the gendered or intersectional elements of Latina immigrant workers' stories and experiences. Thus, where the named plaintiffs are men and their workplace experiences provide the stories around which opt-ins' narratives are built, it is likely that the authentic stories of undocumented Latina workers would be excluded. For example, it is possible that the declarations would not include stories reflecting the intersection of sexual harassment and wage theft or wage theft hidden by the payment of Latina women through their husbands' paychecks. Another possibility would be the exclusion of stories of women's payment of wages through their spouse's paychecks. Details that workers consider central to their workplace exploitation experiences might be considered superfluous or irrelevant when the narrative and case theory are based entirely on male workers' stories. When the starting points for strategic decision-making and case development are immigrant Latino workers' stories, the complexities and intersectionalities of immigrant Latina workers' experiences may be lost.

In collective action cases, the inclusion of undocumented Latina workers as named plaintiffs is critical to assuring that the collective action mechanism does not render them invisible. In other words, Latinas' stories should lead the analysis. Doing so will assure that the complexity of their experiences, including the gendered elements of their workplace exploitation, are included in the narratives provided at the various stages of the litigation.

CONCLUSION

What does all of this mean for Marisol, whose story introduced the complicated and intertwined variables discussed in this Article? Her story might continue as follows: first, a workers' organization would make the conscious effort to focus on the specific experiences and exploitation of undocumented Latina workers at the farm employing her. This would

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[163] Moss & Ruan, *supra* note 112, at 558.

[164] Nantiya Ruan, *Facilitating Wage Theft: How Courts Use Procedural Rules to Undermine Substantive Rights of Low-Wage Workers*, 63 VAND. L. REV. 727, 745 (2010) ("[C]ourts rely upon allegations supported by employee declarations or affidavits, in addition to the complaint to determine whether plaintiffs and potential opt-ins are similarly situated.").

include training of outreach workers that provides not only the nuts and bolts of wage and hour law, but also discusses the particular ways in which potentially subordinating cultural narratives might create unique challenges for undocumented Latina workers. The training would not only name and describe the potential cross-cultural considerations, but would prepare the workers to navigate these concerns with the workers. As a result of the targeted efforts to reach Latinas, the organization would provide Marisol a safe space in which to express her concerns and would filter her hesitancy to complain and resignation to her circumstances through a nonjudgmental lens that understands her challenges both in the workplace and in the home. The organization would educate Marisol about her wage and hour rights, help her navigate concerns she has about pursuing her rights—concerns about retaliation at work as well as difficulties at home—and eventually introduce her to attorneys with whom they have partnered and who are able to pursue her claims.

From the beginning of the representation, Marisol's attorneys would alert her to the importance of her story, and their interest in understanding it and relaying it to a fact-finder in a way that provides the potential for catharsis, but is legally compelling. The attorneys would involve Marisol in the development of her case theory—collaborating with her in determining what aspects of her narrative will drive this case theory and, as a result, nearly every other aspect of her case.

Assuming the wage and hour violations extend to many workers at the farm, perhaps Marisol's work with her attorneys will lead to the development of a collective action that joins the claims of a group of employees against the employer. Marisol would again have an opportunity to play a leadership role in the litigation as a named plaintiff. Furthermore, the complaint would include the full narrative of her workplace exploitation, including the sexual harassment and intimidation that further discouraged her claims-making and her receipt of her wages through her husband's paycheck. At the conditional collective action certification stage, the affidavits submitted in favor of certification would include similar narratives from other undocumented Latina workers.

This potential narrative is, of course imperfect. It is unreasonable to assume that every exploited undocumented Latina worker would take the risks inherent in relinquishing their invisibility to challenge their workplace exploitation. The goal, however, is to create spaces and circumstances in which that is more likely to occur. To this end, this Article has proposed a critical race feminist analysis of both undocumented Latina workers' complex experiences and the potential role for private attorney generals in not only vindicating these workers' substantive rights, but also helping to give a voice to our most vulnerable—and often invisible—workers.

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