

GIVING “THE HELP” THE SILENT TREATMENT: HOW
ALABAMA’S NEW IMMIGRATION LAW PUNISHES DOMESTIC
WORKERS, IGNORES CERTAIN EMPLOYERS, AND
SHORTCHANGES US ALL

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INTRODUCTION

On June 9, 2011, Governor Robert Bentley signed what has been described as the “nation’s toughest immigration law.”¹ The primary goal of House Bill 56 (H.B. 56), also known as the Beason–Hammon Alabama Taxpayer and Citizen Protection Act,² is to drive all undocumented immigrants out of Alabama and dissuade others from coming.³ On September 28, 2011, Federal District Court Judge Sharon Lovelace Blackburn upheld major portions of the bill, and many provisions are now in effect.⁴ Even prior to its enactment the law seemed to be achieving its aim: Hispanics are fleeing the state in droves.⁵

The new legislation makes it illegal to “knowingly employ, hire for employment, or continue to employ an unauthorized alien.”⁶ Curiously, though, the law exempts employers of “casual domestic labor within the household” from this provision.⁷ This exemption reinforces the notion that domestic work is not “real work,” and it maintains the underground status of domestic labor as an employment field. While excluding domestic workers from coverage by labor and employment laws marginalizes them and the industry they work in, applying punitive policies to domestic workers in an effort to purge the market of these workers would neither elevate their profession nor discourage illegal immigration. A better

1. Peggy Gargis, *Alabama Sets Nation’s Toughest Immigration Law*, REUTERS (June 9, 2011, 6:57 PM), <http://www.reuters.com/article/2011/06/09/us-immigration-alabama-idUSTRE7584C920110609>.

2. Beason–Hammon Alabama Taxpayer and Citizen Protection Act (ATCPA), No. 2011-535, 2011 ALA. ACTS ____ (codified as amended at ALA. CODE §§ 31-13-1 to 31-13-30, 32-6-9).

3. See CNN Wire Staff, *Alabama Governor Signs Tough New Immigration Law*, CNN (June 9, 2011), http://articles.cnn.com/2011-06-09/us/alabama-immigration_1_illegal-immigration-immigration-law-immigration-status?_s=PM:US (quoting Republican state Rep. John Merrill in stating that the new law is “‘good for Alabama’ because it will reduce illegal immigration to the state”); see also Conor Friedersdorf, *Why Alabama’s Immigration Bill Is Bad for Citizens*, THE ATLANTIC (June 13, 2011, 7:00 AM), <http://www.theatlantic.com/politics/archive/2011/06/why-alabamas-immigration-bill-is-bad-for-citizens/240297/> (quoting state representative and bill sponsor Mickey Hammon who said the bill “‘attacks every aspect of an illegal alien’s life’ and ‘is designed to make it difficult for them to live here so they will deport themselves.’”).

4. *United States v. Alabama*, 813 F. Supp. 2d 1282 (N.D. Ala. 2011), *aff’d in part, rev’d in part, dismissed in part, remanded in part*, 691 F.3d 1269 (11th Cir. 2012); see also Campbell Robertson, *Alabama Wins in Ruling on Its Immigration Law*, N.Y. TIMES (Sept. 28, 2011), http://www.nytimes.com/2011/09/29/us/alabama-immigration-law-upheld.html?_r=1&ref=us.

5. Margaret Newkirk, *Hispanics Flee Alabama’s Immigration Law*, BLOOMBERG (June 28, 2011, 4:42 PM), <http://www.bloomberg.com/news/2011-06-28/alabama-law-threatens-tornado-recovery-as-hispanics-flee.html>.

6. ALA. CODE § 31-13-15(a) (2011).

7. *Id.* § 31-13-3(5). This exemption directly impacts women as a class because women are significantly over-represented in the private household labor market. *20 Leading Occupations of Employed Women: 2010 Annual Averages*, U.S. DEP’T OF LABOR, <http://www.dol.gov/wb/factsheets/20lead2010.htm> (last visited Oct. 19, 2012).

solution would be to institute policies that ensure fair wages and working conditions for domestic workers, thereby serving three public policy goals: (1) protecting workers’ basic human rights; (2) making private household labor a more desirable work choice (thus encouraging documented workers to self-select into the field to satisfy demand); and (3) discouraging illegal immigration.

By omitting employers of domestic workers, our legislature reinforces the notion that domestic work is not “real work.”⁸ Because housework is traditionally uncompensated, performed as a “labor of love” by wives and mothers in the private sphere of the home, many see household tasks as within the innate purview of women.⁹ The idea is that cooking, child rearing, and cleaning come “naturally” to women. It is not “real work” because it’s easy for women—something they want to do and get to do at home *instead of* “working.”

The exemption also maintains the underground nature of many domestic employment arrangements. Household labor’s existence outside of the reach of most labor laws has resulted in low wages, long and irregular hours, exploitation, and abuse for many women in these occupations.¹⁰ Many native-born women, who have alternative employment options, have self-selected out of the household labor market, in large part due to these negative aspects of domestic work.¹¹ Thus, the U.S. has faced a shortage of qualified, affordable workers in this market.¹²

While certain exemptions from labor and employment laws have negatively affected the plight of domestic service workers, punitive policies that seek to eliminate certain workers from the market entirely do not improve employment conditions for the workers or increase the labor supply. Instead, punitive policies that seek to eliminate an undesirable labor force (e.g., undocumented immigrants) fuel hostilities toward workers and insulate abusive employers by publicly declaring that workers, rather than employers, are “the problem.”¹³ Only protective policies, like minimum wage and hour laws that seek to improve working conditions for domestic

8. Taunya Lovell Banks, *Toward a Global Critical Feminist Vision: Domestic Work and the Nanny Tax Debate*, 3 J. GENDER RACE & JUST. 1, 6 (1999).

9. See Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 4 (1996).

10. Mary Louise Fellows, *Rocking the Tax Code: A Case Study of Employment-Related Child-Care Expenditures*, 10 YALE J.L. & FEMINISM 307, 384 (1998).

11. Cf. U.S. COMM. ON CIVIL RIGHTS, *THE IMPACT OF ILLEGAL IMMIGRATION ON THE WAGES AND EMPLOYMENT OPPORTUNITIES OF BLACK WORKERS* 8 (2010).

12. See Ruth Milkman, Ellen Reese & Benita Roth, *The Macrosociology of Paid Domestic Labor*, 25 WORK & OCCUPATIONS 483, 491 (1998) (showing a 16.76% decrease in the household labor market over a fifty year period).

13. Elizabeth J. Kennedy, *The Invisible Corner: Expanding Workplace Rights for Female Day Laborers*, 31 BERKELEY J. EMP. & LAB. L. 126, 145 (2010).

workers, both encourage the market to meet labor demands and discourage illegal immigration.¹⁴

This Note examines H.B. 56's employment provisions, focusing on the exemption for private household workers. Part I considers the goals of the bill in light of Alabama's shifting immigration demographics. It then looks at the bill's exemption for domestic employers, paying special attention to those persons who tend to hold private household jobs. Part II juxtaposes H.B. 56's domestic-employer exemption with other major employment laws and explains how exempting domestic servants from legislation discourages documented workers from entering or remaining in the field. Part III offers an explanation of why labor and employment legislation often exempts or otherwise fails to protect domestic workers. Finally, Part IV draws out some implications of H.B. 56's exemption for domestic employers and argues that policies that seek to protect rather than punish workers are better tailored to guarantee basic human rights, ensure that the labor demands of Alabama's working women are met, and discourage illegal immigration.

I. BACKGROUND

A. H.B. 56's Findings and Purposes

In the Beason–Hammon Alabama Taxpayer and Citizen Protection Act, Alabama's legislature declares that “illegal immigration is causing economic hardship and lawlessness” in Alabama.¹⁵ This broad language hints at several common accusations leveled against the undocumented immigrant community—that “they” raise crime rates, take “American” jobs, don't pay taxes, and drain public resources.¹⁶ Comments by the law's sponsors reveal this perspective. GOP Rep. Micky Hammon, a co-author of the bill, describes it as “a jobs-creation bill for Americans.”¹⁷ GOP Senator Scott Beason said the bill “will put thousands of Alabamians back in the work force.”¹⁸ The underlying rationale is a pervasive one: undocumented

14. See *infra* Part IV.D.

15. ALA. CODE § 31-13-2 (2011).

16. Marlin W. Burke, *Reexamining Immigration: Is It a Local or National Issue?*, 84 DENV. U. L. REV. 1075, 1085 (2007).

17. Elizabeth Summers, *New Alabama Immigration Law Tougher Than Arizona's SB-1070 Measure*, PBS NEWSHOUR (June 10, 2011, 12:33 PM), http://www.pbs.org/newshour/updates/law/jan-june11/alabama_06-10.html?print.

18. Bob Johnson, *Alabama Immigration Law Signed by Governor Robert Bentley*, HUFFINGTON POST (June 10, 2011, 12:48 AM), http://www.huffingtonpost.com/2011/06/09/alabama-immigration-law-s_n_873868.html.

immigrants are taking “our” jobs; get rid of them, and “we” will have those jobs back.

B. Immigration in Alabama

Historically, Alabama has had very low levels of immigration.¹⁹ From 1900 to 1990, Alabama’s immigrant population increased at the same rate that the state’s native-born population increased, hovering around 1% of the state’s population for ninety years.²⁰ However, over the past twenty years, Alabama has become a popular destination for immigrants. From 1990 to 2000, the foreign-born population in Alabama increased 101.6% from 43,533 to 87,772.²¹ During the same period, the undocumented immigrant population increased 400%—from 5,000 in 1990 to 25,000 in 2000.²² Over a ten-year period, the state’s immigration population increased from 1% to 2% of the state’s total population.²³ From 2000 to 2009, Alabama’s foreign-born population increased 67.5% from 87,772 to 146,999,²⁴ and the undocumented immigrant population accounted for much of this growth, increasing 420% from 25,000 to 130,000.²⁵ Thus, in a nine-year period, the foreign-born population increased to more than 3% of the state’s total population.²⁶ Alabama’s recent increase in undocumented immigrants defies the national trend: an 8% decrease nationwide between 2007 and 2009.²⁷

This dramatic change in the state’s population has presented substantial challenges. Local governments must contend with day-work sites, overcrowded schools, unlicensed drivers, and language barriers.²⁸ On the other hand, undocumented immigrants increase Alabama’s overall productivity by providing low-skilled labor at wages below what most native-born

19. Audrey Singer, *21st Century U.S. Immigration Includes Alabama*, BROOKINGS (May 17, 2009), http://www.brookings.edu/opinions/2009/0517_alabama_singer.aspx.

20. *Id.*

21. Migration Policy Inst., *Alabama: Social & Demographic Characteristics*, MPI DATA HUB, <http://www.migrationinformation.org/datahub/state.cfm?ID=AL> (last visited Oct. 18, 2012). The *foreign born* population includes both documented and undocumented immigrants.

22. JEFFREY S. PASSEL & D’VERA COHN, PEW HISPANIC CTR., U.S. UNAUTHORIZED IMMIGRATION FLOWS ARE DOWN SHARPLY SINCE MID-DECADE 14 (2010).

23. Singer, *supra* note 19.

24. Migration Policy Institute, *supra* note 21.

25. PASSEL & COHN, *supra* note 22. The Pew Report leaves a wide margin of error, putting the total undocumented immigrant population at somewhere between 95,000 and 170,000 people.

26. Singer, *supra* note 19.

27. PASSEL & COHN, *supra* note 22, at i.

28. Singer, *supra* note 19.

workers can or will accept.²⁹ Additionally, undocumented immigrants pay sales, property, and other taxes; inject money into the economy as consumers; create “new, ethnically derived markets”;³⁰ and contribute to Social Security and Medicare despite being ineligible to draw funds from these programs.³¹ While the federal and some state governments collect more revenue from undocumented immigrants than they expend providing services to this group,³² other state and many local governments suffer a net loss.³³

Nationwide, there were 4.1 million undocumented women living in the U.S. in 2008.³⁴ Approximately 83% of these women live with their spouse or partner, and 64% live with their children.³⁵ Roughly 58% of undocumented women of working age participate in the labor force.³⁶ Jeffrey Passel of the Pew Hispanic Center explains that because undocumented workers are “[d]isproportionately likely to be less educated than other groups, [they] also are more likely to hold low-skilled jobs and less likely to be in white-collar occupations. Consequently, undocumented immigrants are overrepresented in several sectors of the economy, including agriculture, construction, leisure/hospitality and services.”³⁷ Specifically, undocumented workers constitute “27% of maids and housekeepers”³⁸ and 23% of private household employees.³⁹

29. THE PERRYMAN GROUP, AN ESSENTIAL RESOURCE: AN ANALYSIS OF THE ECONOMIC IMPACT OF UNDOCUMENTED WORKERS ON BUSINESS ACTIVITY IN THE US WITH ESTIMATED EFFECTS BY STATE AND BY INDUSTRY (2008).

30. Shannon Leigh Vivian, *Be Our Guest: A Review of the Legal and Regulatory History of U.S. Immigration Policy Toward Mexico and Recommendations for Combating Employer Exploitation of Nonimmigrant and Undocumented Workers*, 30 SETON HALL LEGIS. J. 189, 194 (2005).

31. THE PERRYMAN GROUP, *supra* note 29, at 27.

32. MICHAEL FIX & JEFFREY S. PASSEL, URBAN INST., IMMIGRATION AND IMMIGRANTS: SETTING THE RECORD STRAIGHT 57–58 (1994).

33. THE PERRYMAN GROUP, *supra* note 29, at 39 (“Available evidence suggests that undocumented workers pay far more in overall taxes than they receive in benefits from various governments . . . ; on the other hand, many state and local public entities experience a net deficit resulting from the specific services they offer (education, health care, law enforcement, etc.) relative to their principle sources of revenues.”). *See also* FIX & PASSEL, *supra* note 32.

34. 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>.

35. *Id.* at 6.

36. *Id.* at 13.

37. *Id.* at 14.

38. *Id.* at 15.

39. *Id.* at 16 (Documented immigrants account for another 24% of “maids and housekeeping cleaners” and 24% of private household workers. So, over half of housekeepers and almost half of private household workers are foreign-born.).

C. The Domestic-Employer Exemption

Section 15(a) of the Beason–Hammon Alabama Taxpayer and Citizen Protection Act states that “[n]o business entity, employer, or public employer shall knowingly employ, hire for employment, or continue to employ an unauthorized alien to perform work within the State of Alabama.”⁴⁰ Section 9(a) specifies that this prohibition applies to businesses that contract with or receive money from the state.⁴¹ Section 17(a) makes it a discriminatory practice for “a business entity or employer” to fail to hire a documented worker while employing an undocumented “employee.”⁴² However, “occupants of households” who hire employees to perform “casual domestic labor” within the household are excluded from these provisions by definition.⁴³

While homeowner-employers are exempt, undocumented “casual domestic laborers” themselves are not excluded from the law’s punitive measures. Rather, section 11 (a) declares that “[i]t is unlawful for a person who is an unauthorized alien to knowingly apply for work, solicit work in a public or private place, or perform work as an employee or independent contractor in this state.”⁴⁴ The law makes all undocumented domestic workers criminals by virtue of their labor yet simultaneously condones their employers’ facilitation. When negotiating or unilaterally renegotiating an informal employment contract, the employer carries a major trump card—the ability to surrender the employee to the authorities with no negative legal repercussions. Conversely, an undocumented employee whose wages are unjustly withheld or who is assaulted by her employer

40. ALA. CODE § 31-13-15(a) (2011).

41. *Id.* § 31-13-9(a) (“As a condition for the award of any contract, grant, or incentive by the state, any political subdivision thereof, or any state-funded entity to a business entity or employer that employs one or more employees, the business entity or employer *shall not knowingly employ, hire for employment, or continue to employ an unauthorized alien* within the State of Alabama.” (emphasis added)).

42. *Id.* § 31-13-17(a), *invalidated by* United States v. Alabama, 691 F.3d 1269, 1291–92 (11th Cir. 2012).

43. *Id.* § 31-13-3(5) (An employer is “[a]ny person, firm, corporation, partnership, joint stock association, agent, manager, representative, foreman, or other person having control or custody of any employment, place of employment, or of any employee, including any person or entity employing any person for hire within the State of Alabama, including a public employer. *This term shall not include the occupant of a household contracting with another person to perform casual domestic labor within the household.*” (emphasis added)).

44. *Id.* § 31-13-11(a), *invalidated by Alabama*, 691 F.3d at 1283. While section 11(a) could be read to exclude private household workers, state Rep. Hammon has stated that that was not his intention: “If it can be interpreted that way, that’s something we need to correct. We were trying to prevent homeowners from having to be responsible for identifying whether someone was here illegally We didn’t intend to exempt the illegal alien when he worked at someone’s home.” David White, *New Alabama Immigration Law Allows Hiring ‘Casual Domestic Labor’ Without Check*, AL.COM (Aug. 5, 2011, 7:30 AM), http://blog.al.com/spotnews/2011/08/new_alabama_immigration_law_al.html.

cannot appeal to the authorities for help without exposing herself to incarceration and deportation. Thus, the bill reinforces an imbalance of power in these employer–employee relationships.

*1. What Is “Casual Domestic Labor Within the Household”?*⁴⁵

House Bill 56 fails to specify which jobs qualify as “casual domestic labor within the household.” A broad reading could encompass all types of household employment, while a narrow interpretation might limit the scope to specific jobs or limited hours and wages. Homeowners hire workers to perform a wide range of tasks “within the household”—from childcare to lawn care, dog walking to power washing, cooking to gardening. Though lawn care, power washing, and gardening arguably do not occur “within the household,” the Alabama legislature likely intended to include these outdoor tasks.⁴⁶

Representative Hammon has suggested that the legislature did not intend to exclude more permanent private household labor such as childcare workers, gardeners, etc.⁴⁷ However, the law’s enforcement mechanism tells a different story. The employment provisions of the law have teeth because they demand the revocation of a derelict employer’s business license.⁴⁸ Section 15(c)(4) directs the government to suspend the business license of any employer caught employing an undocumented worker.⁴⁹ A second violation of the law warrants permanent revocation of the employer’s business license.⁵⁰ There is no comparable punishment for homeowners who employ an undocumented worker. So even if Alabama courts interpret the exemption narrowly,⁵¹ it is not clear what the consequences of noncompliance would be for homeowners.

45. The Alabama legislature does not publish any legislative history. Rather, statements made by legislators to the press are one of the few resources available for elucidating the legislature’s intent. Further, Alabama’s Workmen’s Compensation statute refers to *casual* employment. ALA. CODE § 25-5-50 (a) (2007). However, the statute specifically exempts “domestic employees.” *Id.* So, Alabama courts have not interpreted the term “casual” in the context of domestic employment.

46. See White, *supra* note 44 (quoting state Rep. Micky Hammon, the law’s sponsor, “[W]e don’t want homeowners all over the state to have to [verify an employee’s immigration status] when someone cuts their grass or cleans their home.”).

47. See *id.*

48. ALA. CODE § 31-13-15(c)(4) (2011).

49. *Id.*

50. *Id.* § 31-13-15(e).

51. The Canons of Statutory Construction in Alabama do not clearly resolve how courts would interpret the phrase “casual domestic labor within the household.” While Alabama courts subscribe to the plain meaning doctrine, which declares that absent ambiguity the legislature’s intent should be deduced from the plain language of the statute (Water Works Bd. of Bear Creek v. Town of Bear Creek, 70 So. 3d 1186, 1190 (Ala. 2011)), they are also instructed to “glean legislative intent from the language used, the reason and necessity for the legislative act, and the purpose sought to be obtained” (Long v. Bryant, 992 So. 2d 673, 684 (Ala. 2008)). Here, the term “casual” seems ambiguous, but it is

2. *Women, Increasingly Foreign-Born, Tend to Hold These Jobs*

Traditionally, women have been disproportionately over-represented in the domestic service field and they continue to be today.⁵² Of the roughly 1.4 million “maids and housekeeping cleaners” nationwide, 89% or about 1.25 million are women.⁵³ Of approximately 1.25 million childcare workers, women account for around 94.7% or 1.18 million.⁵⁴ Of the 973,000 personal and homecare aides in the states, women hold roughly 86.1% or 838,000 of these jobs.⁵⁵ While many of these positions are not “domestic work” because they occur outside of the home (in daycare centers, hotels, and office buildings), these categories constitute the bulk of domestic service, and the gender breakdown for these jobs when performed in the home is comparable.⁵⁶

Because domestic service work often occurs under the table, data on these jobs and workers is, at best, a rough estimate.⁵⁷ The Excluded Workers Congress estimates that 1.8 million domestic workers are employed in American homes today.⁵⁸ These workers clean, iron, cook, care for children, and care for elderly and disabled people.⁵⁹ Around 95% of domestic workers are foreign born, persons of color, or both.⁶⁰ As the baby boomers age and the country’s elderly population grows, the Bureau of Labor Statistics projects a significant increase in demand for home-care workers.⁶¹ As a result, the population of domestic workers is expected to increase.⁶²

not clear which of the legislature’s purposes would hold more weight with the court—the goal of prohibiting the employment of undocumented workers or the goal of protecting homeowners from the employment provisions of the law.

52. *20 Leading Occupations of Employed Women*, *supra* note 7.

53. *Id.*

54. *Id.*

55. *Id.*

56. For example, in New York, “[m]ost of these workers (95 percent) are female, foreign born and/or persons of color.” EXCLUDED WORKERS CONGRESS, UNITY FOR DIGNITY: EXPANDING THE RIGHT TO ORGANIZE TO WIN HUMAN RIGHTS AT WORK 18 (2010) (citing DOMESTIC WORKERS UNITED & DATACENTER, HOME IS WHERE THE WORK IS: INSIDE NEW YORK’S DOMESTIC WORK INDUSTRY 2 (2006), <http://www.datacenter.org/reports/homeiswheretheworkis.pdf>); Banks, *supra* note 8, at 10 (“Despite advances in the condition and status of women in the United States during the latter part of the twentieth century, household work . . . remains women’s work.”).

57. See Glenda Labadie-Jackson, *Reflections on Domestic Work and the Feminization of Migration*, 31 CAMPBELL L. REV. 67, 76 (2008). There is no Alabama-specific data on the domestic service industry.

58. EXCLUDED WORKERS CONGRESS, *supra* note 56.

59. *Id.*; DOMESTIC WORKERS UNITED & DATACENTER, *supra* note 56, at 20.

60. EXCLUDED WORKERS CONGRESS, *supra* note 56.

61. News Release, Bureau of Labor Statistics, Employment Projections—2010–20 (Feb. 1, 2012), <http://www.bls.gov/news.release/pdf/ecopro.pdf>.

62. Because Alabama has become a popular destination for immigrants only recently compared to other states (Singer, *supra* note 19), the percentage of foreign-born women employed in Alabama’s

Since the overwhelming majority of private household workers are women, and the number of domestic employees in the country is around 1.8 million and growing, it is clear that a significant number of women feel the impact of laws like H.B. 56. Because women are overrepresented in the field, women are disproportionately affected by policies that fail to protect domestic workers.

II. ALABAMA'S EXEMPTION FOR DOMESTIC LABOR IS NOT UNIQUE⁶³

A. Labor Laws Consistently Exempt or Fail to Protect Paid, Domestic Employees

The National Labor Relations Act (NLRA)—which grants employees the right to engage in concerted activities for their “mutual aid or protection”—defines “employee” to exclude “any individual employed . . . in the domestic service of any family or person at his home.”⁶⁴ The Occupational Safety and Health Act (OSHA)—which guarantees workers a safe and healthy work environment—defines “employer” to exclude “individuals who, in their own residences, privately employ persons for the purpose of performing . . . what are commonly regarded as ordinary domestic household tasks, such as house cleaning, cooking, and caring for children.”⁶⁵ At the state level, Alabama law exempts employers of “domestic employee[s]” from workers’ compensation regulations.⁶⁶ While the NLRA and OSHA explicitly exempt domestic household workers, other labor legislation fails to protect these workers due to ineffective enforcement schemes or insufficient agency funding.⁶⁷

The Fair Labor Standards Act of 1938 (FLSA), which sets minimum wage and overtime pay standards, excludes live-in domestic service workers from maximum hours and overtime pay regulations.⁶⁸

domestic service industry may be lower than the national average. However, while the immigrant populations in states that have traditionally been popular with immigrants—Texas, California, and New York—have leveled off since the recession hit, Alabama’s immigrant population has continued to grow. Jeremy Gray, *Report Estimates Illegal Immigration Up in Alabama, Down Nationally*, AL.COM (Sept. 1, 2010, 8:45 PM), http://blog.al.com/spotnews/2010/09/report_estimates_illegal_immig.html. Thus, one can expect the workforce in Alabama to increasingly reflect nationwide statistics.

63. Kennedy, *supra* note 13, at 126.

64. 29 U.S.C. § 152(3) (2006).

65. 29 C.F.R. § 1975.6 (2009).

66. ALA. CODE § 25-5-50 (a) (2007).

67. PIERRETTE HONDAGNEU-SOTELO, *DOMÉSTICA: IMMIGRANT WORKERS CLEANING AND CARING IN THE SHADOWS OF AFFLUENCE* 213 (2001); *see also* Kennedy, *supra* note 13, at 134.

68. 29 U.S.C. § 213(a)(15) (2006) (“The provisions of section 206 . . . and section 207 of this title shall not apply with respect to . . . any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service

Additionally, it excludes elder care employees who work in the home from both minimum wage and maximum hours requirements.⁶⁹ Despite these exceptions, many household workers are technically covered by the FLSA, yet they do not benefit from its protections because neither they nor their employers understand what the law requires or that it applies to domestic workers.⁷⁰ The underfunding of regulatory agencies charged with enforcing the FLSA guarantees that employers who violate their workers’ rights face virtually no legal repercussions.⁷¹ An unenforceable right is no right at all.

B. Inadequate Legal Protections Contribute to “The Servant Problem”

Inadequate legal protections for domestic workers have made this work undesirable. Because wage and hour, workplace safety, and right to organize laws do not effectively protect household employees, domestic workers face low pay, hazardous working conditions, long and irregular hours, and lack of benefits.⁷² For these reasons, women who have other employment options are often unwilling to perform these jobs.⁷³ Legally present workers in particular have been drawn away from the field. In public discourse, the lack of qualified domestic workers has been termed “the servant problem.”⁷⁴

This vacuum in the domestic labor market has created demand for foreign-born workers.⁷⁵ Many foreign-born women come to the U.S. because they (or their families) are unable to earn a living wage in their home country.⁷⁶ Many immigrants remain in the domestic service industry because they lack education, do not speak English, or are constrained by immigration status to remain with an employer-sponsor.⁷⁷

employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves . . .”).

69. *Id.* § 213(b)(21) (2006) (“The provisions of section 207 of this title shall not apply with respect to . . . any employee who is employed in domestic service in a household and who resides in such household . . .”).

70. HONDAGNEU-SOTELO, *supra* note 67, at 211.

71. Kennedy, *supra* note 13, at 154.

72. *See generally* EXCLUDED WORKERS CONGRESS, *supra* note 56.

73. Mary Romero, *Immigration, the Servant Problem, and the Legacy of the Domestic Labor Debate: “Where Can You Find Good Help These Days!”*, 53 U. MIAMI L. REV. 1045, 1056 (1998).

74. *Id.*

75. *See* Labadie-Jackson, *supra* note 57, at 75 (“[D]omestic work constitutes one of the major forces driving international female labor migration. The emergence of a growing international trade of domestic workers can be attributed, in part, to the fact that developing countries have become more dependent on the immigrants to perform household responsibilities and caregiving. Female immigrants are increasingly becoming indispensable in the supply of cheap labor in the capitalist global economy.”). *See generally* Vivian, *supra* note 30.

76. *See generally* Vivian, *supra* note 30.

77. HONDAGNEU-SOTELO, *supra* note 67, at 240.

III. THE ROOTS OF DOMESTIC SERVICE EXCLUSIONS FROM LABOR AND EMPLOYMENT LAWS

While employees in virtually every other sector have benefitted from the promulgation and enforcement of wage and hour, workplace safety, and right to organize legislation, legislatures have acted deliberately and systematically to maintain the status quo in the household labor market. That H.B. 56 and other employment legislation exclude domestic employers, however, is not coincidence. Scholars who explore the exemption of domestic work from labor laws have identified three intersecting reasons for the phenomenon. First, because domestic work was traditionally uncompensated, it is often not considered “real work.”⁷⁸ Second, domestic work occurs within the private sphere of the home and is therefore a “private matter.”⁷⁹ Third, domestic work is “women’s work”—a peripheral issue affecting an underrepresented minority.⁸⁰ These are not alternative explanations for household labor’s existence outside of the law. Rather, these realities work in tandem to relegate the field of domestic work to the shadows.

In capitalist societies, labor is valued according to its cost. Traditionally, housewives performed domestic work—child rearing, cooking, cleaning, washing, ironing, caring for sick and elderly relatives—and did not collect wages for their labor.⁸¹ Because housework did not garner real wages, it was seen as having no economic value.⁸² Therefore, it was not considered “real work.” Even when housework is done for pay, the connotation remains:

The labor of paid domestic workers replaces the unpaid housework performed in other homes by a member of the household, [but] the transition to paid labor in those few homes that employ domestic workers does not transform our understanding of the work itself. Devalued or not valued when it is performed for free, housework is not fully dignified as labor even when it is performed for pay.⁸³

However, when performed in restaurants, daycare centers, laundries, retirement homes, etc., the tasks done by domestic workers are considered

78. Banks, *supra* note 8, at 6.

79. *Id.* at 7.

80. *Id.* at 8.

81. *Id.* at 6.

82. *Id.*

83. Silbaugh, *supra* note 9, at 73.

real work.⁸⁴ So, additional factors must converge with the traditional lack of pay structure to devalue housework.

The American conception of the “home”—the site of domestic work—functions to relegate the field of domestic work to something other than employment. Americans draw a distinct boundary between the private and public spheres:⁸⁵ the home is private, beyond the reach of governmental regulation. As Mary Romero puts it, “home is assumed to be an escape from the world of work and a haven for leisure activities and emotional warmth.”⁸⁶ A common sentiment is that “state intervention in household matters (including domestic working relationships) should be minimized in order to retain a place to raise families free from governmental interference.”⁸⁷ This attitude has shielded household employers from the demands and expectations other employers face.

However, when a homeowner contracts with a maid service or an apartment building employs housekeepers, the work is considered labor and it warrants the protection of labor laws.⁸⁸ In other words, work traditionally done by housewives for free is done within the private sphere of the home, but a traditional employer–employee relationship exists and labor laws apply. This scenario suggests yet another factor must be at work in keeping domestic work under the labor-law radar.

Though women have entered the workforce in significant numbers, household work—including cooking, cleaning, and childcare—remains “women’s work.”⁸⁹ The notion that domestic work is part of a woman’s “‘inherent’ abilities” persists;⁹⁰ “[i]f women are ‘naturally predisposed’ to excel at household tasks, these tasks appear not to be work at all.”⁹¹ Because wives and mothers have traditionally performed housework, housework has fused with our collective concept of wife and mother.⁹² Mary Romero theorizes that since the roles of wife and mother are fulfilling, the household labor that “naturally” comes with them is dismissed as less than work.⁹³ Rather, it is a “labor of love.”⁹⁴

84. MARY ROMERO, MAID IN THE U.S.A. 53 (10th anniversary ed. 2002).

85. Labadie-Jackson, *supra* note 57, at 84.

86. ROMERO, *supra* note 84, at 51.

87. Donna E. Young, *Working Across Borders: Global Restructuring and Women’s Work*, 2001 UTAH L. REV. 1, 19–20 (2001).

88. Silbaugh, *supra* note 9, at 73.

89. Banks, *supra* note 8, at 10.

90. Labadie-Jackson, *supra* note 57, at 82.

91. Young, *supra* note 87, at 20.

92. ROMERO, *supra* note 84, at 51.

93. *Id.*

94. *Id.* at 73.

Katharine Silbaugh connects this notion of housework as the work of wives and mothers, or “women’s work,” to the domestic worker’s lack of legal protections. She posits that when “the relationship of the individual employer to a paid domestic worker resembles the family relationships [as opposed to a more traditional employment relationship] . . . labor laws do not apply to [that] relationship.”⁹⁵ In other words, when a woman unassociated with a business, steps into a role usually performed by another woman, she is often viewed as a “one of the family.”⁹⁶ While family members may earn an allowance for their efforts, they are not employees warranting “the restrictions and state regulatory intrusions accompanying the employer-employee relationship.”⁹⁷

One of H.B. 56’s co-sponsors, Representative Hammon, has offered his own explanation for why employers of domestic workers were exempted from the new law. He suggests that employers of private household labor were excluded from the legislation because the legislature did not want to burden homeowners: “When you start having E-Verify, we don’t want homeowners all over the state to have to do that when someone cuts their grass or cleans their home. This is just incidental labor that happens time to time.”⁹⁸ Hammon’s characterization of domestic labor perpetuates the stereotype that it is not “real work” and devalues the workers who perform it. More importantly, the legislature was comfortable with burdening small business owners in industries that employ few, if any, undocumented workers. In light of this, their reluctance to apply the law to a sector of the economy increasingly dominated by immigrants, both documented and undocumented, is peculiar.

All government regulation imposes some “burden” on those affected. But governments impose regulations because the benefit received outweighs the burden. Here, the Alabama legislature determined that the “benefit” of purging the state of undocumented immigrants outweighs the burden of requiring small business owners to use E-Verify. The law requires employers who only employ one part-time employee to use E-Verify. Consequently, if the owner of a mom-and-pop shop hires an individual to come in and do spring-cleaning one afternoon, she must verify the employee’s immigration status. But, if the same shop owner hires the same individual to come to the shop owner’s home and perform the same tasks, she is exempt from the law.

If you accept the premise that requiring employers to verify the immigration status of employees decreases undocumented immigration (as

95. Silbaugh, *supra* note 9, at 73.

96. Labadie-Jackson, *supra* note 57, at 83.

97. *Id.*

98. White, *supra* note 44.

our legislature does), there is no reason to believe that requiring a homeowner to verify her workers’ status would not be just as beneficial as requiring a business owner to verify her employee’s status. Further, H.B. 56 provides that “[t]he Alabama Department of Homeland Security will establish and maintain an E-Verify employer agent service for any business entity or employer in this state with 25 or fewer employees.”⁹⁹ The homeowner would ostensibly have access to this resource. Requiring homeowners to verify an employee’s immigration status, then, would not pose more of a burden than requiring a local shop owner to do the same.¹⁰⁰ Thus, the argument that requiring homeowners to verify their employee’s immigration status is unduly burdensome is both inconsistent with the law’s general provisions and wholly unpersuasive.

IV. IMPLICATIONS OF THE EXEMPTION

A. The Legislature’s Lack of Concern for Domestic Work, Domestic Workers, and the Demand that Sustains the Market

Over the past sixty years, workers have become increasingly mobile, women have entered the workforce in record numbers, and the average workday has lengthened.¹⁰¹ These and other factors, combined with growing income disparity, have led to an increase in demand for domestic labor.¹⁰² Today, about 59% of women in the U.S. participate in the labor force.¹⁰³ This figure has steadily risen from about 25% in 1950, “to 37.7% in 1960, 43.0% in 1970, 51.5% in 1980, [and] 57.5% in 1990.”¹⁰⁴ Of those

99. ALA. CODE § 31-13-25(a)(1) (2011).

100. Some argue that holding homeowners to the same standards as other employers is impractical from an administrative standpoint because homeowners employ so few workers. To answer this concern, Katherine Silbaugh suggests, “Individuals might be expected to do what very small businesses often do: contract payroll concerns, including compliance with labor laws, out to an agency. Housecleaning companies currently perform this function for those consumers who choose to use them rather than hire domestic workers directly.” Silbaugh, *supra* note 9, at 78–79.

101. HONDAGNEU-SOTELO, *supra* note 67, at 4–5.

102. *Id.* at 27 (“[N]o single cause explains the recent expansion of paid domestic work. Several factors are at work, including growing income inequality; women’s participation in the labor force, especially in professional and managerial jobs; the relatively underdeveloped nature of day care in the United States—as well as middle-class prejudices against using day care; and the mass immigration of women from Central America, the Caribbean, and Mexico.”).

103. *Women in the Labor Force in 2010*, U.S. DEP’T OF LABOR, <http://www.dol.gov/wb/factsheets/Qf-laborforce-10.htm> (last visited Oct. 19, 2012). Labor force participants include both employed people and people looking for work. This figure reflects a 44.2% increase since 1984 in the total number of women employed in the U.S. U.S. CONGRESS JOINT ECON. COMM., *WOMEN AND THE ECONOMY 2010: 25 YEARS OF PROGRESS BUT CHALLENGES REMAIN* 4 (2010), available at [http://op.bna.com/dlrcases.nsf/id/lswr-88nlnb/\\$File/Women%20Workers%20JEC.pdf](http://op.bna.com/dlrcases.nsf/id/lswr-88nlnb/$File/Women%20Workers%20JEC.pdf).

104. Labadie-Jackson, *supra* note 57, at 69.

employed, roughly three quarters work full-time.¹⁰⁵ Despite this steady influx of women into the labor force, however, there has not been a corresponding shift in domestic responsibilities.

Women still bear the brunt of responsibility for household chores and childcare.¹⁰⁶ Because housework remains “women’s work,” the careers of women tend to suffer from lack of access to affordable childcare, elder care, and home care services. Working full-time and then coming home to cook, do laundry, wash dishes, chauffeur kids, sweep, mop, dust, check homework, etc., has been dubbed the “double day.”¹⁰⁷ Women need access to affordable childcare, elder care, and home cleaning services in order to thrive in the workforce.¹⁰⁸ Both the government and the private sector, though, have been unresponsive to the needs of working women, hence the proliferation of private household workers, both documented and undocumented.¹⁰⁹

Rather than acknowledge and respond to the needs of working women, our legislature enacted a harsh bill designed to drive all undocumented immigrants out of the state and did nothing to fill the gap these workers would leave. The law’s exemption for “casual domestic labor within the household,”¹¹⁰ like the exemption for domestic labor elsewhere in U.S. labor law, betrays a lack of concern for these jobs, the women who work them, and the labor shortage in this field generally. If one believes, as our legislature does, that undocumented workers are “taking our jobs” and that legislation of this sort will result in documented workers “reclaiming” the jobs undocumented workers relinquish as they flee the state, then one must ask why a field heavily dominated by female workers would fall outside of such “protection.” The exemption is even more curious in light of the fact that the field of private household labor is increasingly composed of

105. *Women in the Labor Force in 2010*, *supra* note 103 (“73 percent of employed women work[] on full-time jobs, while 27 percent work[] on a part-time basis.”).

106. Labadie-Jackson, *supra* note 57, at 69.

107. Evelyn Nakano Glenn, *Cleaning Up/Kept Down: A Historical Perspective on Racial Inequality in “Women’s Work,”* 43 STAN. L. REV. 1333, 1334 (1991) (“[E]ven those women with only one job face a ‘double day,’ finishing a full day at work only to start a second shift of domestic labor at home. Surveys indicate that married women, irrespective of employment status, put in 70 to 80 percent of total housework hours.”).

108. Labadie-Jackson, *supra* note 57, at 69 (“[I]n order to facilitate their incorporation and continued permanence in the remunerated labor market, many women with enough resources to do so delegate a great deal of the household tasks and childcare responsibilities to other women . . .”).

109. *Id.* (“The apathy of the State and other sectors within the labor market forced many women to provide their own solution to the problem. In fact, the development of a domestic labor sector usually takes place in countries that lack effective social policies and initiatives designed to help families to achieve such a balance between labor activity, household responsibilities, and caretaking.”).

110. ALA. CODE § 31-13-3(5) (2011).

immigrant workers, documented and undocumented alike.¹¹¹ With these facts in mind, it would appear that the household labor exemption was specifically designed to shield employers who benefit from the labor of undocumented workers at home.

B. Perpetuating Inequality and Oppression

Failing to protect domestic workers through labor legislation—whether through explicit exemptions or inadequate enforcement schemes or funding—reinforces the underground nature of the field. Exclusions both reflect and reinforce the idea that the home is a private sphere outside of the government’s regulatory reach. Congressman Hammon’s explanation for H.B. 56’s domestic-employer exemption—that the legislature simply did not want to burden homeowners—underscores this fact. As previously noted, requiring homeowners to verify their employees’ immigration status would not pose a greater burden than requiring small business owners to do so. However, requiring *anything* of a “homeowner” seems more onerous due to the homeowner’s status: king in his castle.

Accommodating homeowner-employers by excluding them from labor and employment laws creates a gross imbalance of power in the domestic employer–employee relationship. In an economy characterized by high unemployment, workers are already at a disadvantage in negotiating employment terms and conditions. This imbalance is aggravated by legislative schemes that explicitly or implicitly tell homeowner-employers that workers have no right to expect fair employment terms and conditions.

The underground nature of the field makes it attractive to employers by keeping costs low and disempowering workers. Furthermore, the lack of regulation in the domestic service industry makes this work less appealing than other jobs available to documented workers. Thus, exemptions discourage documented workers from taking the jobs.

*C. Creating More Problems than Solutions*¹¹²

Governments typically respond to the public’s “anti-immigration animus” with either protective or punitive policies.¹¹³ Punitive policies seek

111. Undocumented immigrants account for 27% of “maids and housekeeping cleaners,” while legal immigrants comprise another 24%. Additionally, 23% of “private household workers” are undocumented immigrants, and another 24% are legal immigrants. Thus, over half of housekeepers and almost half of private household workers are foreign-born. PASSEL & COHN, *supra* note 34, at 31–32.

112. Here, it is important to remember that our legislature exempted the employers of domestic workers, but not the workers themselves from the punitive aspects of the new law.

113. Kennedy, *supra* note 13, at 145. Kennedy’s article focuses on day laborers and the underground day labor market. Because there is significant overlap between day laborers,

to eliminate the underground market entirely by “prosecuting and penalizing” undocumented workers and their employers.¹¹⁴ Alabama’s anti-immigration law falls into this category.

Punitive policies have been criticized for aggravating anti-immigrant vitriol. Studies show a correlation between punitive policies and assaults, both verbal and physical, against the targets of such policies.¹¹⁵ Since H.B. 56 was passed, the Southern Poverty Law Center’s hotline—for reporting the effects of H.B. 56—has received over 5,000 calls.¹¹⁶ Workers have reported wage theft and threats of physical violence.¹¹⁷ Latinos, both documented and undocumented, have reported xenophobic taunts like “Go Back to Mexico.”¹¹⁸

When community leaders, in this case our legislators, declare their intent to purge the state of a group of people, they foment an “us” versus “them” mentality. As one resident put it, “[h]ateful people are hateful no matter what, but with this law they feel more empowered.”¹¹⁹ While H.B. 56 does not force an employer to abuse or disrespect her immigrant–domestic worker, it sends a message to the employer who already harbors hostility toward immigrant workers that society condones anti-immigrant attitudes and behaviors.

D. The Benefits of Protective Policies

Rather than responding to the public’s anti-immigration anger with punitive anti-immigrant legislation, Alabama could enact protective policies that would simultaneously protect the basic human rights of undocumented immigrants who are present and discourage future illegal immigration.¹²⁰ Such policies would seek to both enforce existing labor and employment laws in the domestic employment arena, as well as extend

undocumented workers, and domestics, I have taken Kennedy’s ideas about policies affecting day laborers and extrapolated out to apply these ideas to undocumented workers generally.

114. *Id.* at 146.

115. *Id.* (“[G]overnment repression in the form of threatening, fining, and arresting day laborers correlated with significant increases in physical assaults by contractors and the police. Day laborers . . . also endured a significant increase in threats from strangers and merchants, ethnic slurs from police officers, injuries on the job, wage theft by contractors, and other violations of workplace standards and basic human rights.”).

116. S. POVERTY LAW CTR., ALABAMA’S SHAME: HB 56 AND THE WAR ON IMMIGRANTS 4 (2012), available at http://www.splcenter.org/sites/default/files/downloads/publication/SPLC_HB56_AlabamasShame.pdf.

117. *Id.* at 10–12.

118. *Id.* at 7.

119. *Id.* at 5.

120. See Kennedy, *supra* note 13, at 151–58 for a discussion of protective policies enacted by other states.

labor and employment laws that do not currently regulate this sphere.¹²¹ For example, household laborers, like other workers, benefit from organizing.¹²² Domestic worker unions exist but currently have no legal protections.¹²³ Including domestic workers in NLRA-type legislation would encourage worker-initiated reforms. Likewise, some municipalities have created “formal, regulated day labor worker centers”—hiring sites where workers receive education and training, are informed of their legal rights and remedies, receive support in negotiating wages and working conditions, and are better positioned for recourse in the event of employer abuse.¹²⁴

Unlike punitive policies, which send a message of division and discord, some protective policies send “a very public message of community acceptance that can serve to discourage hostility and violence against” workers.¹²⁵ Additionally, protective policies improve working conditions for all domestic workers, both documented and undocumented, making this work more appealing to legally present workers. By making private household labor a more appealing work choice, protective policies funnel legal workers into these jobs.¹²⁶ With demand for household labor met by the documented workforce, there are fewer jobs available to undocumented workers and thus less incentive for undocumented workers to immigrate to Alabama.

V. CONCLUSION

As a state with a relatively recent immigration influx, Alabama is contending with serious new challenges.¹²⁷ As we debate how to negotiate these challenges, we would be remiss to forget the underlying motive behind immigration—labor demand exceeds supply. While criminalizing employment arrangements between undocumented workers and their employers may seem the obvious solution, it often does not work. In the

121. *Id.* at 147.

122. HONDAGNEU-SOTELO, *supra* note 67, at 219–21.

123. *Id.*

124. Kennedy, *supra* note 13, at 147–48.

125. *Id.* at 151.

126. When Congress extended FLSA coverage to some domestic workers in 1974, it did so with an eye to encouraging workers to self-select into the field: “[E]xtending minimum wage and overtime protection to domestic workers will not only raise the wages of these workers but will improve the sorry image of household employment [T]he sharp decline in household employment over the last decade reflects not only the prevalence of low wages and long hours, but the widespread conviction that these are dead-end jobs. Including domestic workers under the protection of the Act should help to raise the status and dignity of this work.” H.R. REP. NO. 93-913 at 33–34 (1974). However, under-enforcement and lack of education have largely prevented the FLSA’s coverage of domestic workers from producing the intended results. *See supra* notes 68–71.

127. *See supra* Part I.B.

domestic labor field, in particular, punitive legislation like H.B. 56 is a double edged sword: exempting domestic employers from such laws reinforces the idea that domestic workers (the majority of whom are women) are fundamentally different from other laborers and, consequently, not worthy of equal treatment under the law.¹²⁸ Including domestic workers in punitive, anti-immigrant legislation, however, further disempowers the women who do this work.¹²⁹ In addition, relegating domestic work to the shadow economy, either by ignoring it or criminalizing it, works to keep wages low and working conditions poor.¹³⁰ This, in turn, drives documented workers out of the field and lures undocumented workers here to meet demand.¹³¹

Protective policies, on the other hand, lift domestic work out of the shadow economy.¹³² By improving working conditions and pay for domestics, protective policies encourage legally present workers to fill these positions, thus eliminating “the ‘magnet’ [that] pulls illegal immigrants towards the United States”:¹³³ available jobs.¹³⁴ This humane, responsible approach has the dual effects of discouraging illegal immigration and incentivizing a qualified, willing, documented labor force to meet the demands of Alabama’s working women.

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128. *See supra* Part IV.B.

129. *See supra* Part IV.C.

130. *See supra* Part IV.B–C.

131. *See supra* Part IV.B.

132. *See supra* Part IV.D.

133. Vivian, *supra* note 75, at 205 (quoting *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137, 155 (2002) (Breyer, J., dissenting)).

134. *See supra* Part IV.D.

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