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Decentering the Firm: The Limited Liability Company and Low-Wage Immigrant Women Workers

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Decentering the Firm: The Limited Liability Company and Low-Wage Immigrant Women Workers

Miriam A. Cherry^{*}

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INTRODUCTION

Imagine the following scenario: a group of immigrant women clean houses and offices in the suburbs of a large northeastern city. These workers speak languages other than English. Therefore they depend on an intermediary, another immigrant who has been in the United States for a longer period of time, to solicit jobs, negotiate schedules, and communicate with customers.¹ Although this “intermediary” does not actually perform any of the cleaning work, the intermediary’s “cut,” or

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¹ PIERRETTE HONDAGNEU-SOTELO, DOMESTICA: IMMIGRANT WORKERS CLEANING AND CARING IN THE SHADOWS OF AFFLUENCE 64-65 (2001) (discussing how immigrant women arriving in United States typically find work through acquaintances and distant relatives who have been in United States for longer periods, and reporting that “[o]nly 2 percent of the 153 Latina women that . . . [were] surveyed reported finding their current job through a newspaper ad.”).

share of the income generated, is substantial.² The immigrant workers are typically paid a low wage, often averaging below the minimum wage set by the Fair Labor Standards Act.³ The workers have neither health nor unemployment insurance.⁴ All their wages are paid in cash under the table and not reported to the tax system, so no social security benefits accrue to them.⁵ Although their immigration status is unknown, it is likely that some of the workers are in the United States as illegal aliens.⁶

Is it possible for Critical Race Feminist theorists⁷ to assist workers who find themselves in the scenario described above? How might the law be deployed to help those who lack power, those who often find themselves on the bottom of the race, gender, class, and immigration status hierarchies? The traditional answer, unionizing and acting collectively to bargain with an employer, is ineffective in the context described above.⁸ There is no common employer the workers could bargain with

² Throughout the history of immigration in the United States, it has been fairly common for those who have been in the country for a longer period of time tend to define themselves as “in” the mainstream by defining others, those who have more recently immigrated or are of a different national origin, as “out.” See generally ELIZABETH EWEN, *IMMIGRANT WOMEN IN THE LAND OF DOLLARS: LIFE AND CULTURE ON THE LOWER EAST SIDE 1890-1925* (1985) (describing waves of subsequent migration to New York City); RONALD TAKAKI, *STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS* (1989) (describing acculturation of Asian immigrants).

³ 29 U.S.C. § 206 (2000).

⁴ This is part of a general trend in which increasing numbers of low-wage workers lack employer-sponsored health insurance coverage. See, e.g., Sarah Lueck & John D. McKinnon, *Ranks of the Poor, Uninsured Grew Last Year in the U.S.*, WALL ST. J., Aug. 27, 2004, at A2 (“The number of people who lack health insurance – and therefore are more likely to forgo needed medical care or face economic hardship when illness strikes – climbed to 45 million last year from 43.6 million in 2002. The number of people receiving coverage from an employer dropped by 1.3 million. The percentage of working people without health insurance rose to 20.2% from 19.5% – the result of surging health costs that companies say make health benefits for their workers unaffordable.”).

⁵ Eduardo Porter, *Illegal Immigrants Are Bolstering Social Security with Billions*, N.Y. TIMES, Apr. 5, 2005, at A1 (estimating that undocumented workers are contributing seven billion per year to social security, which they do not collect from, thereby providing social security system with subsidy).

⁶ See, e.g., Eduardo Porter, *U.S. Toughens Immigration Stance*, WALL ST. J., May 12, 2003, at A15 (estimating that there are six million illegal immigrants in United States).

⁷ In other words, lawyers who think critically about law take issues of racial and gender inequality seriously, and are also activists. See Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443, 473-78 (2001) (describing lawyers who, beyond providing legal advice, are also active in efforts to organize within certain neighborhoods or low-income groups in order to effect social change).

⁸ Even with more traditional jobs, the power of unions has been steadily declining. See Press Release, Bureau of Labor Statistics, U.S. Dep’t of Labor, *Union Members in 2004*

for higher wages or better working conditions. Moreover, the fear of being deported⁹ makes undocumented workers reluctant to unionize.¹⁰

This Article proposes one possible solution to this problem that might appeal to theorists and practitioners of outsider jurisprudence:¹¹ employing the principles of business associations law, specifically the vehicle of the Limited Liability Company (LLC), to transform these workers into business owners. By using existing legal structures to their benefit, low-wage women workers can curtail a portion of the exploitation that they currently experience. Under an LLC structure, rather than the workers receiving their pay after an intermediary's cut, the LLC receives the income, the intermediary receives a set salary, and the workers share the profits. By becoming members of an LLC, workers can also purchase group benefits, such as health insurance, and better control their working environments.

Professor Scott Cummings has previously explored the idea of worker-owned businesses. He examined them as a potential method of creating job opportunities for workers in disadvantaged communities, and as a way of practicing "rebellious lawyering" within the context of community economic development.¹² This Article continues that analysis by situating the discussion within an explicitly Critical Race Feminist dialogue.¹³

(Jan. 27, 2005), at <http://www.bls.gov/news.release/pdf/union2.pdf> (reporting that unionized workforce has dropped to 12.5 percent for 2004).

⁹ Without proper work authorization, a foreign worker violates the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

¹⁰ Peggie R. Smith, *Organizing the Unorganizable: Private Paid Household Workers and Approaches to Employee Representation*, 79 N.C. L. REV. 45, 46, 51 (2000) (describing difficulties of attempting to organize unions of workers in private households).

¹¹ The term "outsider jurisprudence," first coined by Professor Mari Matsuda, refers to the jurisprudential work of feminists and critical race scholars. See Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2323-24 (1989) ("What is it that characterizes the new jurisprudence of people of color? First is a methodology grounded in the particulars of their social reality and experience. This method is consciously both historical and revisionist, attempting to know history from the bottom. From the fear and namelessness of the slave, from the broken treaties of the indigenous Americans, the desire to know history from the bottom has forced these scholars to sources often ignored: journals, poems, oral histories, and stories from their own experiences of life in a hierarchically arranged world.").

¹² Scott L. Cummings, *Developing Cooperatives as a Job Creation Strategy for Low-Income Workers*, 25 N.Y.U. REV. L. & SOC. CHANGE 181, 184-85 (1999).

¹³ Professor Cummings includes a survey of various choices of business entities, including the LLC, although he ultimately concludes that a worker's cooperative is the best approach. *Id.* at 206-10. However, I suggest that the LLC may be the most appropriate

At first glance, using traditional business law doctrines to benefit those seen as being disadvantaged by those same doctrines appears controversial. However, wedding critical theory with pragmatism¹⁴ should not be a surprising approach. Feminist theory originated from and discusses real women's experiences, including their participation in both paid and unpaid labor.¹⁵ Further, the idea is acceptable because corporate lawyers are constantly structuring agreements and businesses in new ways to respond to their client's needs.¹⁶ This same dynamic approach to corporate law could be utilized by lawyers whose clients just happen to be the immigrant working poor.

This Article began by discussing the unique problems facing low-wage immigrant women workers. Section I focuses on how feminist and critical race approaches can shed light on, and help to deconstruct, these very problems. Section II examines feminist and critical race theorizing in the area of corporate law and concludes that such efforts have perhaps been unduly limited by ideological concerns. Section III sets out the proposed corporate law solution and concludes by offering some larger thoughts on how business law can be used to assist underserved populations.

I. FEMINIST BUSINESS

Before discussing corporate solutions that could assist low-wage immigrant women workers, it is important to situate this topic within the context of a Critical Race Feminist dialogue. This dialogue addresses the

choice of entity for popularizing the idea of a worker-owned business, for the reasons including ease of establishing the entity, as well as familiarity with the entity. *Infra* Part III.

¹⁴ See, e.g., Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1700-01 (1990) ("To generalize a bit, it seems that there are two ways to think about justice. One is to think about justice in an ideal world, the best world that we can now conceive. The other is to think about nonideal justice: given where we now find ourselves, what is the better decision? In making this decision, we think about what actions can bring us closer to ideal justice There is no general solution; there are only piecemeal, temporary solutions."). Justice Ruth Bader Ginsberg, probably the most well-recognized feminist today, is likely "categorized" as a pragmatic feminist.

¹⁵ See CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 83, 86-88, 93-96, 101, 105 (1989); Matsuda, *supra* note 11, at 2324.

¹⁶ See, e.g., Susan Pace Hamill, *The Origins Behind the LLC*, 59 OHIO ST. L.J. 1459, 1463 (1998) ("The explanation behind the LLC's birth boils down to innovative legal professionals creating solutions"); Thomas W. Joo, *Contract, Property, and the Role of Metaphor in Corporations Law*, 35 U.C. DAVIS L. REV. 779, 801, 813 (2002) (describing "fancy lawyering" involved in modifying default rules in either corporate law or property law).

issue through multiple lenses.¹⁷ It applies both feminist and critical race theories to give a complete view of problems these workers face, including class and immigration status complications.¹⁸

The feminist lens focuses on gender-related aspects of the problem. One of the feminist movement's strongest concentrations is women workers earning low wages, both in absolute terms and in comparison to men.¹⁹ Unfortunately, even after the passage of Title VII²⁰ and the Equal Pay Act,²¹ women performing the same or similar work as men are still being paid significantly less.²² In a recent study, the United States General Accounting Office found that:

When [it] account[ed] for difference[s] between male and female work patterns as well as other key factors, women earned, on average, 80 percent of what men earned in 2000 Even after accounting for key factors that affect earnings, [its] model could not explain all of the differences in earnings between men and women.²³

Although Title VII and the Equal Pay Act were intended to equalize the terms and conditions of employment, the sex-segregated nature of work remains mostly intact.²⁴

¹⁷ See generally PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991) (exploring concepts of multiple discrimination and result for Critical Race Feminist theory); Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Policies*, 1989 U. CHI. LEGAL F. 139 (1989) (describing intersectionality of race and sex discrimination); Deborah King, *Multiple Jeopardy, Multiple Consciousness: The Context of a Black Feminist Ideology*, 14 SIGNS 42 (1988) (describing black women's experiences and use of those experiences to formulate inclusive feminist praxis).

¹⁸ See Barbara Ehrenreich & Arlie Russell Hochschild, *GLOBAL WOMAN* 2-3 (2002).

¹⁹ Bob Kemper & Scott Shepard, *Election 2004: Candidates Press for an Advantage*, ATLANTA J. & CONST., Oct. 23, 2004, at B1, available at 2004 WLNR 6348530 (describing appeal of 2004 presidential candidates to women voters on topic of equal pay for equal work).

²⁰ Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253 (codified as amended at 42 U.S.C. §§ 2000e-2000e-17 (2000)).

²¹ Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2005).

²² See GEN. ACCOUNTING OFFICE, *WOMEN'S EARNINGS: WORK PATTERNS PARTIALLY EXPLAIN DIFFERENCE BETWEEN MEN'S AND WOMEN'S EARNINGS 2* (2003), available at <http://www.gao.gov/new.items/d0435.pdf>.

²³ *Id.*

²⁴ Miriam A. Cherry, *How to Succeed in Business Without Really Trying (Cases): Gender Stereotypes and Sexual Harassment Since the Passage of Title VII*, 22 HOFSTRA LAB. & EMP. L.J. 533 (2005) (describing continued sex-segregated nature of work); Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223, 292 tbl.3 (2000) (listing occupational fields, including mechanical and blue collar jobs, that were over 95% male, and listing

The issues women workers generally face are compounded for immigrant women. Immigrant women workers face additional risks of exploitation through sexual harassment and abuse.²⁵ They are especially susceptible to coercion and harassment because they are simply afraid to call the authorities or to report harassment by an employer.²⁶ They fear they will not be believed and that employers will retaliate against reporting with deportation.

The work immigrant women perform is often viewed as being low-value, both in terms of prestige and wages paid.²⁷ This may be partially due to the nature of employment available to them. Frequently, immigrant women work in jobs that are traditionally viewed as private labor — work associated with the uncompensated, and vastly

occupational fields, including receptionists, secretaries, and childcare workers, that were over 95% female). Scott A. Moss, *Women Choosing Diverse Workplaces: A Rationale Preference with Disturbing Implications for Occupational Segregation and Economic Analysis of Law*, 27 HARV. WOMEN'S L.J. 1 (2004). Examining the question from a law and economics perspective, this continued gender segregation is odd. If a position is higher paid and higher status, one would expect women, as rational economic actors, to choose the higher paying positions. The problem with this analysis is that gender stereotyping and discrimination trump the market. Not only do women face barriers to entry, but existing stereotypes perpetually push women toward certain types of jobs (lower paying) and men toward certain types of jobs (higher paying). *Id.* One commentator has suggested that women may be choosing female-dominated, or at the very least, gender integrated, workplaces because women assume that these types of workplaces will engender the least harassment and discrimination. *Id.*

²⁵ This is not to say that men cannot also be victims of sexual harassment at work. *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 78 (1998); *Rene v. MGM Grand Hotel*, 305 F.3d 1061 (9th Cir. 2002). However, sexual harassment disproportionately affects women. In 1992, women filed over 90% of sexual harassment complaints with the Equal Employment Opportunity Commission (EEOC). See EEOC, *Sexual Harassment Charges, EEOC & FEPAs Combined: FY 1992–FY 2004*, <http://www.eeoc.gov/stats/harass.html> (last visited Sept. 19, 2005). In 2003, the numbers were similar, with women filing 85% of EEOC sexual harassment complaints. *Id.*

²⁶ See Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509, 1515 (1995) (stating in context of welfare benefits and immigration, “often ignored in the debate is how, because of the intersection of immigration status, ethnicity, gender, and class, restricting access to benefits disparately impacts particular sub-groups of the immigrant community.” Also describing “quadruple whammy” of immigration status, gender, ethnicity, and class); Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 HARV. C.R.-C.L. L. REV. 345, 347 (2001). Since 1986, when the U.S. Supreme Court issued its opinion in *Meritor Savings Bank v. Vinson*, the law has recognized that sexual harassment falls under the definition of sex-based discrimination and is prohibited by Title VII. 477 U.S. 57, 64 (1986) (establishing quid pro quo and hostile environment causes of action)

²⁷ See Johnson, *supra* note 26, at 1516.

undervalued, work of the housewife.²⁸ As one commentator notes, many tasks that immigrant women perform are “often not recognized as employment because [they take] place in a private home Moreover, the tasks that domestic workers do — cleaning, cooking, and caring for children — are associated with women’s “natural” expressions of love for their families.”²⁹

Further, an examination of housework, who performs it, who does not perform it, and who worries about it not being performed, reveals that women still bear the disproportionate burden of domestic responsibilities.³⁰ Even when engaged in paid work outside the household, the majority of women are still responsible for what has commonly been termed the “second shift” at home.³¹ Thus, in addition to the wage gap, immigrant women suffer low wages because they often perform domestic work perceived as unworthy of compensation.

In addition to feminist theories, critical race theories also illuminate the position of immigrant women workers. The pay gap and the segregated nature of work are compounded for women of color, who face interlocking oppressions — discrimination based on both race and sex. The potential for stereotyping and shunting women into low-wage jobs is even greater when one considers factors such as immigration status or language differences.³² For Latinas, the problem has been described as the “brown collar” ghetto, the clustering of recent immigrants in certain low-wage occupations, including housecleaning, childcare, canning, and migrant labor.³³

²⁸ BETTY FRIEDAN, *THE FEMININE MYSTIQUE* 15-32 (1963) (describing, initially, problem that “had no name,” stifling of women within rigidly-defined gender roles based on housework and childrearing).

²⁹ HONDAGNEU-SOTELO, *supra* note 1, at 9; see also 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, 1046-47 (1998) (describing problems faced by domestic workers, including rationalization that work performed easy, is not real work, and that workers are treated as family, all of which actually contribute to subordination).

³⁰ ARLIE RUSSEL HOCHSCHILD, *THE SECOND SHIFT* 33-39, 43-44 (1989) (describing studies concerning division of household labor and childcare responsibilities between husbands and wives).

³¹ *Id.* Additionally, when examining those hired to care for children, the issue of the “care gap” becomes both racialized and sexualized. MARY ROMERO, *MAID IN THE USA* 1-3 (2002) (describing domestic service as racialized and sexualized work).

³² See Leticia M. Saucedo, *The Browning of the American Workplace: Protecting Workers in Increasingly Latino-ized Occupations*, 80 NOTRE DAME L. REV. 303, 304 (2004) (describing brown collar occupations, resulting negative effect on wages, and proposing legal strategies to protect those in this sector of labor force).

³³ See *id.*; Lisa Catanzarite, *Wage Penalties in Brown-Collar Occupations*, *LATINO POL’Y &*

Feminist writers in the developing Lat-Crit movement have described the legal, economic, and social difficulties that Latinas face.³⁴ Many of the issues raised by Lat-Crit feminists are also relevant to non-Hispanic immigrant women³⁵ who perform lower-status, lower-paid work.³⁶ Ethnic women generally face racial stereotyping, potential language barriers, and even discrimination based on accent.³⁷

Beyond these issues, there is another element of discrimination which surrounds "illegal status." Undocumented workers currently face a hostile climate.³⁸ The "racial othering" of illegal aliens and certain types of work partially explains this hostility.³⁹ Anti-immigrant sentiment seems to coalesce around the idea that undocumented workers are

ISSUES BRIEF, Sept. 2003, available at http://www.chicano.ucla.edu/press/siteart/LPIB_08Sept2003.pdf; Lisa Catanzarite, *Dynamics of Segregation and Earnings in Brown-Collar Occupations*, 29 WORK & OCCUPATIONS 300, 301 (2002).

³⁴ Berta Hernandez-Truyol, *Las Ovidadas: Gendered in Justice/Gendered Injustice: Latinas, Fronteras and the Law*, 1 J. GENDER RACE & JUST. 354, 359-60, 366-67 (1998) (describing obstacles that Latinas must overcome); Elizabeth M. Iglesias, *Identity, Democracy, Communicative Power, Inter/National Labor Rights and the Evolution of LatCrit Theory and Community*, 53 U. MIAMI L. REV. 575, 606 (1999) (describing Lat Crit Theory to that point and describing movement's future); George A. Martinez, *Latinos, Assimilation and the Law: A Philosophical Perspective*, 20 CHICANO-LATINO L. REV. 1, 1-3 (1999) (same).

³⁵ See generally EVELYN NAKANO GLENN, ISSEI, NISEI, WAR BRIDE: THREE GENERATIONS OF JAPANESE AMERICAN WOMEN IN DOMESTIC SERVICE (1986) (pioneering study describing experiences of Japanese domestic workers).

³⁶ As one commentator states:

[R]ace and immigration are interacting in an important new way, which Latina immigrant domestic workers exemplify: their position as 'foreigners' and 'immigrants' allows employers, and the society at large, to perceive them as outsiders and thereby overlook the contemporary racialization of the occupation. Immigration does not trump race but, combined with the dominant ideology of a 'color-blind' society, manages to shroud it.

HONDAGNEU-SOTELO, *supra* note 1, at 13-14.

³⁷ See generally Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991) (discussing discrimination based on accent).

³⁸ See, e.g., *When Anger Against Aliens Clouds Reason: Valley Legislators Need a More Refined Approach*, L.A. TIMES, Aug. 8, 1993, at 12 ("Angry feelings run deep in the San Fernando Valley when it comes to the subject of illegal immigration. Although a Los Angeles Times poll conducted earlier this year, for example, found that a majority of respondents in every part of the city thought that there were too many immigrants here, Valley residents were most inclined to also blame illegal immigrants for everything from crime to the economic downturn.").

³⁹ Leti Volpp, *Talking "Culture": Gender, Race, Nation, and the Politics of Multiculturalism*, 96 COLUM. L. REV. 1573, 1605 (1996) (discussing racialized nature of immigration).

taking American jobs, and therefore do not deserve legal protection.⁴⁰ This “taking” notion persists even though immigrants often perform the “dirty work” lower-class jobs that middle class Americans do not want to perform.⁴¹ Although many have proposed immigration law reforms to help undocumented workers, not much change has occurred.⁴²

Further, this problem is rapidly becoming a gendered issue, given the feminization of migration.⁴³ Traditionally, men left their home countries and came to the United States in search of better economic opportunities. After money was saved, they would send for family members to join them. This demographic model is changing, as more women are the initial migrants.⁴⁴ Increasing numbers of women are leaving their children behind, hoping to be able to send money back to their families eventually.⁴⁵

Thus, immigrant women workers find themselves on the bottom of the labor hierarchy, facing discrimination based on gender, race, class, and immigration status. All of these factors are important to the current situation of low-wage immigrant workers. It is especially important to determine how feminist modes of analysis can be used to improve all women’s situations.

II. CORPORATE LAW: USING THE MASTER’S TOOLS?

One potential solution to the immigrant women workers’ problem relies on principles of business law. For the most part, feminist theory

⁴⁰ Although it is difficult to quantify the prevalence of such an attitude, it is one of longstanding. See Robert Reinhold, *A Welcome for Immigrants Turns to Resentment*, N.Y. TIMES, Aug. 25, 1993, at A1 (quoting California resident as saying “[t]hey violate our laws and demand we feed them, clothe them and educate them in their own language They are taking jobs away from American citizens.”).

⁴¹ In May 2005, there was significant controversy when Vicente Fox, the President of Mexico, made the racially insensitive remark that Mexicans “take jobs that not even blacks want to do.” Ginger Thomson, *World Briefing Americas: Mexico: Meeting Set on Fox’s Comment*, N.Y. TIMES, May 18, 2005, at A8. More appropriately, undocumented workers perform the work that Americans, regardless of race, view as the most unskilled and menial.

⁴² See Johnson, *supra* note 26.

⁴³ The term “feminization of migration” refers to the increasing trend of women to become migrants, drawn from impoverished third world countries where career options and wages are extremely limited, to first world countries in search of better opportunities. See Ehrenreich & Hochschild, *supra* note 18, at 2-3 (describing how third-world women employed in first-world countries are often clustered in care-giving occupations).

⁴⁴ See *id.*

⁴⁵ *Id.*

has tended either to ignore or demonize corporate law.⁴⁶ This negative approach most likely results from the influence of socialist feminist theorists who view capitalism as one of the major forces perpetuating patriarchy.⁴⁷ As one commentator put it: “to the extent that feminist analysis of market economics to date has been profoundly critical and has called for clean-sweeping change, attempts to rehabilitate individual legal constructs may appear premature.”⁴⁸ Lamenting capitalism, however, does not help equalize wages between men and women. Feminism’s tendency to dismiss or ignore the market and corporate law is troubling because full participation in a market wage-based economy is necessary to obtain full economic equality. Although some would argue that this approach is an attempt to use the master’s tools to dismantle the master’s house,⁴⁹ only full economic equality between men and women will lead to full social equality.

There have been scattered attempts at feminist theorizing within corporate law. One line of feminist analysis brings a “difference feminism” or “relational feminism” perspective to corporate law. Carol Gilligan’s work is typically the starting point for difference feminism.⁵⁰ Central to the theory is the belief that women and men generally view the world in different ways — women manifest more of an ethic of care than men.⁵¹ Women value cooperation over competition, and relationships over ambition.⁵² Therefore, women speak in a “different voice” and tend toward caregiving and nurturing more than men.⁵³ In her groundbreaking article *The Lemonade Stand*, Theresa Gabaldon discusses corporate limited liability from a relationship-based

⁴⁶ The same seems to be true of contract law. See Kellye Y. Testy, *An Unlikely Resurrection*, 90 NW. U. L. REV. 219, 219 (1995) (contending that “feminist theory has so vilified contract that feminist writers consider it dead and buried.”).

⁴⁷ Zillah Eisenstein, *Constructing a Theory of Capitalist Patriarchy and Socialist Feminism*, WOMEN, CLASS, AND THE FEMINIST IMAGINATION 114-15, 129, 135-40 (1990) (setting forth socialist feminist vision of state). The socialist-feminist movement has a long and complex history. See, e.g., WRITING RED: AN ANTHOLOGY OF AMERICAN WOMEN WRITERS, 1930-1940 (1987) (compiling depression-era socialist-feminist and communist-feminist writing).

⁴⁸ Theresa A. Gabaldon, *The Lemonade Stand: Feminist and Other Reflections on the Limited Liability of Corporate Shareholders*, 45 VAND. L. REV. 1387, 1414-15 (1992).

⁴⁹ See AUDRE LORDE, *SISTER OUTSIDER: ESSAYS & SPEECHES* 110-13 (1984).

⁵⁰ See, e.g., CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT* (1982).

⁵¹ *Id.* at 62-63.

⁵² *Id.*

⁵³ *Id.* at 2.

standpoint.⁵⁴ Ronnie Cohen has also written about difference feminism and the corporation, suggesting that “[f]eminist structural changes in the corporation would include such reforms as decentralized decision-making, flattening corporate hierarchies, and increased opportunity for all types of corporate employees.”⁵⁵

The theoretical grounds for a feminist study of corporate law are developing. During the spring of 2005, the University of Maryland held a conference on women and corporate law.⁵⁶ Many of the papers from the conference focused on why there are so few women on corporate boards and among the top ranks of executives. Other articles focused on the female pioneers who taught corporate law and what the “duty of loyalty” and “duty of care” might mean in the context of feminism and corporate law.

Similar to feminist theorizing in corporate law, there has been only a cursory exploration of Critical Race Theory and the corporation. That discussion has tended to concentrate on two areas: corporate responsibility for slavery, and criticism of urban development plans. The first area focuses on companies that profit from slave labor, and calls for reparations for slavery.⁵⁷ In the second area, critical race theorists have focused their attention on community economic development programs. Specifically, they examine the federal legislation creating enterprise and empowerment zones.⁵⁸ This legislation assists with business creation, includes tax subsidies, and targets underdeveloped inner-city areas.

Some of the academic writing dealing with empowerment zones has been negative⁵⁹ because empowerment zones, and community economic

⁵⁴ Gabaldon, *supra* note 48, at 1414-15.

⁵⁵ Ronnie Cohen, *Feminist Thought and Corporate Law: It's Time to Find Our Way Up from the Bottom (Line)*, 2 AM. U. J. GENDER & L. 1, 34 (1994).

⁵⁶ University of Maryland School of Law, Women, Leadership & Equality Program 2005-2006, http://www.law.umaryland.edu/specialty/wle/documents/Corporate%20Governance%20Brochure_For-Web.pdf (last visited Sept. 19, 2005).

⁵⁷ See, e.g., Alfred L. Brophy, *The Cultural War over Reparations for Slavery*, 53 DEPAUL L. REV. 1181, 1199-200 (2004) (discussing enrichment of individuals and corporation from slavery and weighing reparations proposals); Alfreda Robinson, *Corporate Social Responsibility and African American Reparations: Jubilee*, 55 RUTGERS L. REV. 309, 329-30 (2003) (same).

⁵⁸ Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, §§ 13301-13322, 107 Stat. 312, 543-63 (1993) (authorizing creation of empowerment zones and enterprise communities to bring economic development to distressed inner city areas).

⁵⁹ See, e.g., Ellen P. Aprill, *Caution: Enterprise Zones*, 66 S. CAL. L. REV. 1341, 1362-63 (1993).

development, involve market-based solutions.⁶⁰ If one begins with the premise, as socialist feminists and many critical race theorists do, that the free market is the problem, then clearly the discussion has ended. The free market will not be eliminated. However, refusing to consider the free market in solution-making necessarily does the inner-city a disservice. If traditional programs have not worked, why not try market-based solutions? The inner city that William Julius Wilson describes in his book, *When Work Disappears*, presents a scenario ripe for an influx of capital.⁶¹ Knowing that poor and working class individuals need quality jobs, I believe it is essential to employ the market forces and whatever legal tools are available. Rather than seeing corporate law as part of the problem, feminist and critical race theorists should look to it as a possible solution.

III. ONE POSSIBLE SOLUTION: THE LIMITED LIABILITY COMPANY

The Limited Liability Company (LLC) started becoming a popular choice of business structure in the 1980s and 1990s.⁶² The LLC combined limited liability, the domain of the traditional corporation, with partnership taxation. Members of an LLC, unlike limited partners, can participate in the day-to-day running and management of the company.⁶³ Reacting to competitive pressure among jurisdictions,⁶⁴ many states

⁶⁰ See, e.g., Audrey G. McFarlane, *Race, Space, and Place: The Geography of Economic Development*, 36 SAN DIEGO L. REV. 295, 297-98 (1999) ("By explicating some of the unwritten rules and processes of economic development in their proper context, this Article demonstrates that economic development is not a neutral policy that government can advance without addressing significant structural issues that externally impact inner-city communities. Probably one of the most significant issues is that the program is applied within many cities that are places laden with racialized meaning and are encumbered by the unstated, yet popular, consensus that the problems of the inner cities should be contained This Article concludes by recommending that we ought to begin to rethink inner city development as an instrument to further economic, social, and geographic justice.").

⁶¹ See generally WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* (1997) (describing bleak outlook and job prospects in inner-cities).

⁶² Howard M. Friedman, *The Silent LLC Revolution – The Social Cost of Academic Neglect*, 38 CREIGHTON L. REV. 35, 35, 45-46 (2004) ("[T]he Limited Liability Company . . . has become the dominant form for newly-created small businesses in a clear majority of the states, and is rivaling corporations for that distinction in several more. Nationwide, over 45% of new businesses are LLCs.").

⁶³ Limited partners who participate in the control of the business risk subjecting themselves to general liability. See Delaware Revised Uniform Limited Partnership Act, DEL. CODE ANN. tit. 6, § 17-303 (1999).

⁶⁴ See William Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE

passed statutes authorizing LLCs.⁶⁵ Commentators typically view LLCs as granting business owners more flexibility in terms of governance, management, and distribution structures.⁶⁶ If one looks at business associations law as a type of contract, albeit a contract regulated by the state and the case law of fiduciary duties, the LLC is a contract designed to allow for an optimal amount of flexibility.⁶⁷

The first, and most tangible, benefit the LLC structure offers low-wage immigrant workers is that it circumvents the intermediary who has been obtaining and scheduling the work. The intermediary, acting as the business owner, takes a significant share of any profits earned. Removing the intermediary's "take" allows for the workers themselves to be paid a higher wage. The problem, however, is that the intermediary performs necessary coordinating functions: marketing, scheduling, and communicating with workers.

The LLC structure positions the intermediary as an employee of the LLC, hired by the workers while the workers function as the business owners. As an employee, the intermediary is paid a set wage to perform the functions of an office manager—scheduling times, communicating between groups, and marketing the business. Once given a set wage, the intermediary no longer takes a disproportionate share of the income being generated. The intermediary performs the same functions, but pay is reallocated through the organization. Thus, those actually performing the services receive a higher wage than those who merely arrange for it to occur.

The second advantage of the LLC structure is that it allows for organized action on behalf of the collective to receive benefits at work. Currently, the major problem for workers in the "underground" economy is lack of health insurance, sick leave, worker's compensation,

L.J. 663, 666 (1974) (detailing competition between jurisdictions for tax revenue and arguing that this creates incentive for lax regulation of corporations); Daniel R. Fischel, *The "Race to the Bottom" Revisited: Reflections on Recent Developments in Delaware's Corporation Law*, 76 NW. U. L. REV. 913, 915-16 (1982) (setting out "race to the bottom," argument and then disagreeing with premise that lax regulation is negative for shareholders).

⁶⁵ Hamill, *supra* note 16, at 1469-78; Friedman, *supra* note 62, at 42, 45-47 (reporting rise of limited liability companies was due to "partnership tax, limited liability, and default rules more suited to the small business than are the corporate default rules. Indeed this last point is often overlooked, but it is an extremely important consideration in the use of LLCs.").

⁶⁶ Friedman, *supra* note 62.

⁶⁷ William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1471 (1989) (explaining rise of contractual model of corporate law).

and other benefits commonly associated with employment.⁶⁸ In the informal economy, the intermediary has little incentive to treat the workers well.⁶⁹ The purchase of health and other insurance is a rarity. If a worker becomes ill, the intermediary can simply turn to another, perhaps more recently-arrived, perhaps cheaper, laborer. The lack of any health care benefits in the underground economy is one of its most troubling aspects, and a problem generally for millions of working-class Americans.⁷⁰ Domestic workers usually do not have benefits such as unemployment insurance.⁷¹ If they are laid off, there is no safety net. To compound the problem, in the informal economy, there is no worker's compensation for on-the-job injuries.⁷² Although not commonly acknowledged, domestic labor entails injury risks — slipping on a wet floor, moving or lifting heavy objects, and exposure to cleaning chemicals.

The LLC structure corrects this problem. The workers are able to decide, with the help of both financial and legal assistance, what benefits would best serve their members. The benefits plan could cover one particular LLC, or could be spread across numerous LLCs. With the second option, the workers would be able to receive a group rate on the insurance plan, allowing for more affordable health insurance.

Another issue that the LLC addresses, although somewhat tangentially, is immigration status. The primary reason that many immigrant workers are willing to work for low wages and without benefits is that they cannot find better employment situations.⁷³ Moreover, some immigrant workers' undocumented status and lack of work permits renders them vulnerable to exploitation. Undocumented workers often have to accept illegal working conditions because of the potential, sometimes unstated, sometimes explicit, threat of "calling the INS." The U.S. Supreme Court decision *Hoffman Plastic Compounds v. NLRB*, which limited the remedies available to alien workers who were

⁶⁸ For more on the informal economy, see Lora J. Foo, *The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation*, 103 YALE L. J. 2179, 2181-83 (1994).

⁶⁹ Bratton, *supra* note 67, at 1295.

⁷⁰ See Lueck & McKinnon, *supra* note 4.

⁷¹ Cf. Gillian Lester, *Insurance and Wealth Redistribution*, 49 UCLA L. REV. 335, 346 n.36 (2001).

⁷² Michael J. Wishnie, *Emerging Issues for Undocumented Workers*, 6 U. PA. J. LAB. & EMP. L. 497, 514-16 (2004) (describing how courts after *Hoffman Plastic Compounds* have denied workers' compensation claims).

⁷³ See *supra* note 32.

attempting to unionize, highlights the precariousness of the legal protections afforded immigrant workers.⁷⁴

The LLC ownership structure eliminates some of the problems associated with immigration status. First, it helps curb hostile attitudes toward immigrant workers. Companies owned by foreign nationals are generally looked upon favorably as making an investment in the United States. Such investments create jobs within our country instead of causing jobs to be moved overseas. In addition, the LLC can arrange for proper tax filings. Many undocumented workers in the informal economy discover problems when they attempt to regularize their immigration status because they are forced to admit that they have not paid taxes. The intermediary, now the office manager, can assist the members with filing their tax returns. Instead of having a potential tax problem along with an immigration problem, undocumented members will face only immigration problems.

There are drawbacks to the LLC structure, but none are insurmountable. The first, and perhaps most significant, drawback to the LLC structure is that it does not address the source of the problem. It does not change either the workers' status within the immigration system or the immigration system itself.⁷⁵ An undocumented worker will remain undocumented after forming and participating in an LLC. An LLC cannot sponsor a worker to remain in this country, and thus working in an LLC will not suddenly regularize a worker's immigration status. The foregoing relates to a larger policy point about the immigration system and how it needs to be reformed so that the United States is not creating a permanent, rotating socio-economic underclass.⁷⁶ While it is true that employing the LLC structure does not reform the immigration system, pragmatically, it may at least benefit a significant

⁷⁴ 535 U.S. 137, 148-49 (2002). For additional discussion of this case, see Christopher Ho & Jennifer C. Chang, *Drawing the Line After Hoffman Plastic Compounds, Inc. v. NLRB: Strategies for Protecting Undocumented Workers in the Title VII Context and Beyond*, 22 HOFSTRA LAB. & EMP. L. J. 473, 476 (2005) (describing effect of *Hoffman Plastic Compounds* and arguing that its reach should be narrowly construed to labor law and not to Title VII).

⁷⁵ Of course the LLC, which is typically being established with technical assistance from a workers' group and with help from lawyers, should also address the immigration issues involved. Such matters, however, are generally beyond the scope of this paper.

⁷⁶ See, e.g., Christopher David Ruiz Cameron, *Borderline Decisions: Hoffman Plastic Compounds, the New Bracero Program, and the Supreme Court's Role in Making Federal Labor Policy*, 51 UCLA L. REV. 1, 5 (2003) (criticizing immigration policy generally and U.S. Supreme Court for "authoriz[ing] the creation of an underclass of low-wage Latino immigrants who are promised workplace rights in theory, but not in practice").

group of workers. Correcting the immigration system not the goal addressed here. The LLC solution explained in this Article is aimed at improving the situation of exploited and powerless immigrant workers.

Another problematic issue is designing a workable structure for such an LLC, one which allows easy entry and exit for its members, and also clearly and succinctly sets up the member's expectations. If one member is not doing his or her fair share of the work, there must be a provision for dismissing that individual member from the LLC without disrupting its structure. Even with a favorable structure, the workers will still face ordinary business risks. A disgruntled worker may want to sue the LLC for wrongful discharge. Further, participating in an LLC is riskier for the individual worker — as in any business, the LLC members run the risk that there will be no profits.

Another objection is that despite creative corporate structuring, the workers are still employees. Courts might look past whatever the parties label their relationship and decide to treat it as an employment relationship.⁷⁷ In fact, workers have used a form of this argument to their advantage before. In *Vizcaino v. Microsoft*, the plaintiffs argued that despite Microsoft labeling workers as "independent contractors," they actually acted as, and were treated as, employees.⁷⁸ As such, the workers argued that they were entitled to all of the benefits that employees enjoyed, including the fringe benefits that accompanied employment.⁷⁹ Looking past the manner in which the parties had labeled their relationship and instead looking to its substance, the Ninth Circuit agreed with the worker's arguments and held that they were employees.⁸⁰

However, under the proposed LLC solution, the workers are actually more than employees. Large, publicly-traded companies that raise capital on exchanges largely disconnect share ownership from the employees who actually perform the work.⁸¹ In a closely held

⁷⁷ For a discussion of some of the issues surrounding the question of labeling workers as employees or independent contractors, see Myra H. Barron, *Who's an Independent Contractor? Who's an Employee*, 14 LAB. LAW. 457, 462 (1999) (describing importance of this analysis as well as tests employed by courts to make determination between these two classifications).

⁷⁸ 120 F.3d 1006, 1008 (9th Cir. 1997).

⁷⁹ *Id.*

⁸⁰ *Id.* at 1010.

⁸¹ Douglas K. Moll, *Shareholder Oppression v. Employment at Will in the Close Corporation: The Investment Model Solution*, 1999 U. ILL. L. REV. 517, 520 (1999) ("The typical close corporation shareholder . . . is also a provider of labor services to the business.").

corporation, however, the shareholders are often also “workers.” Lawyers who are colloquially known as “partners” are more often members of an LLC or shareholders in an S-corporation.⁸² These partners are company owners who also work as lawyers. The same is true of doctors who organize a professional corporation. In these situations, individuals aggregate together in order to limit their liability, but still perform employment services.⁸³ All are employee-owners.

The proposed LLC structure for low-wage workers, therefore, is not much different from those that are already in place for other types of businesses. The difference is that in the professions, the workers either have the legal expertise to set up these business structures, or have the resources to access such expertise. With access to such professional expertise provided by so-called “rebellious lawyers,” there is no reason why housecleaners and other service providers should not also take advantage of the LLC structure.

CONCLUSION

Setting up ownership structures for immigrant workers will result in positive net economic effects for the workers involved. The LLC structure might provide a helpful tool for encouraging and continuing worker organization. The positive economic effects lie in eliminating the intermediary — who unnecessarily profits from the immigrants’ labor — and in training the workers. By participating in an LLC, it is likely that the workers will be learning much more than the skills involved in performing manual tasks. The workers will also learn the skills needed to establish a successful company. Ultimately, perhaps the suggestion that corporate law can be used to improve the status of immigrant women is more pragmatic than critical. At the same time, such theoretical issues should not obscure the concrete benefits that full market participation brings.

⁸² See generally Martin C. McWilliams, *Limited Liability Law Practice*, 49 S.C. L. REV. 359, 361-67 (1996) (discussing forms of entity for legal practice).

⁸³ Moll, *supra* note 81, at 520.