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Toward a Global Critical Feminist Vision: Domestic Work and the Nanny Tax Debate

*Taunya Lovell Banks**

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Feminism's adoption of the liberalist assumption that "propertied individualism affords the necessary foundation for . . . freedom and equality" led feminists to focus on gender to the exclusion of class and race.¹

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1. Marion Crain, *Between Feminism and Unionism: Working Class Women, Sex Equality, and Labor Speech*, 82 GEO. L.J. 1903, 1924-25 (1994).

I. INTRODUCTION

In the spring of 1990, Lillian Cordero, an undocumented Peruvian woman, applied for a job with a Connecticut couple. The couple, a corporate lawyer and a law professor, advertised for a live-in nanny for their seven-month-old son. The nanny also would do light housekeeping and cook dinners.² The couple hired Lillian along with her husband, also an undocumented worker. Lillian worked many weeks for up to seventy hours in exchange for a weekly wage of \$250 plus room and board.³ During those weeks her hourly wage amounted to no more than \$3.50, less than the minimum wage.⁴ Lillian's employer did not pay Social Security taxes on those wages.

In December 1992, Zoe Baird, Lillian's employer, became the first woman nominated as Attorney General of the United States.⁵ Baird subsequently withdrew her nomination following the disclosure that she failed to pay Social

2. The ad read: "Child Care Nanny. Live-in Nanny for 7-Mo. old Boy in warm family setting. Light housekeeping, cook dinners. Long term position with appreciative family in beautiful home. Non-smoker. Driver. Citizen or Green Card only. Require child care references." Sidney Blumenthal, *Adventures in Babysitting*, NEW YORKER, Feb. 15, 1993, at 55.

3. The Corderos received a total of \$2000 a month or \$250 per week each, plus room and board. Stuart Taylor, Jr., *Inside the Whirlwind*, AM. LAW., Mar. 1993, at 65. Since her employer often worked 12 hour days at her job as vice-president and general counsel of Aetna Life and Casualty Company and had a thirty minute commute each way, some weeks Lillian Cordero also must have worked up to 70 hours. *Id.*; Blumenthal, *supra* note 2, at 55. Cameron Lynne Macdonald's recent study of nannies and au pairs found that the average weekly wage for nannies ranged from \$150-\$400 in addition to room and board. Cameron Lynne Macdonald, *Shadow Mothers: Nannies, Au Pairs, and Invisible Work*, in WORKING IN THE SERVICE SOCIETY 244, 245 (Cameron Lynne Macdonald & Carmen Sirianni eds., 1996). So the employer, who earned over \$500,000 annually, exclusive of her husband's salary, paid Lillian Cordero the average nanny wage. Taylor, Jr., *supra*, at 65; Blumenthal, *supra* note 2, at 55. A letter writer to the editor of *The American Lawyer*, responding to Stuart Taylor, Jr.'s article on the Baird controversy, thought that \$2000 per month was "[p]retty damn good for after-tax, after-housing, after-food income . . . [commenting that she is] not sure [her] disposable income amounts to that much." Lynnette C. Fallon, Letter to the Editor, *Redefining Illegal Aliens: The Zoë and Paul Story*, AM. LAW., June 1993, at 21. What Ms. Fallon's letter discounts in Taylor's article is that Baird and Gewirtz only intended to pay their nanny \$1000 per month. Taylor, Jr., *supra*, at 65. The amount doubled when they hired Victor Cordero, Lillian's husband, as a driver, enabling Baird to "get another two hours' work done while Victor drove her to and from Aetna, freeing up time for her baby when she got home." *Id.*

4. In 1990 the minimum wage was \$3.80 per hour. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 433 tbl.674 (1997). It was raised to \$4.25 in 1991. *Id.*

5. Gwen Ifill, *The Transition; Clinton Planning to Name a Woman for Justice Dept.*, N.Y. TIMES, Dec. 24, 1992, at A1. One commentator lauded Baird's nomination as "inspired." Anthony Lewis, *Abroad at Home; Challenge of Justice*, N.Y. TIMES, Dec. 25, 1992, at A31.

Security taxes for her undocumented live-in childcare worker.⁶ At the time of Baird's nomination, only twenty-five percent of households with domestic workers complied with the Social Security requirements.⁷ Baird, like a majority of working affluent women, knowingly and unlawfully failed to pay Social Security taxes for her domestic employee.⁸

Initially, most senators and political analysts discounted the effect of this disclosure on Baird's nomination, but by January talk radio was calling the controversy Nannygate.⁹ Some news commentators framed the issue solely in class terms.¹⁰ The issues raised by Nannygate, however, are much larger, reflecting how work and workers are constructed and valued in American society. Nannygate also raises hard questions long avoided by American feminists about mothering as women's work.

Influenced by Zoe Baird's plight, Congress enacted the Social Security Domestic Employment Reform Act of 1994, popularly known as the Nanny Tax law.¹¹ The new law increases the threshold amount of employee wages required to trigger the tax from \$50 quarterly to \$1000 annually and requires annual instead of quarterly payments of the tax to ease the reporting burden on employers like Baird.¹² During the congressional hearings on this legislation, Florida Representative Carrie Meek, a Black woman, said she spoke for the "nameless, faceless [household] workers" who were not considered during the Zoe Baird controversy.¹³ She put a face on these women—her sisters', her

6. Michael Kelly, *Settling In: The President's Day; Clinton Cancels Baird Nomination for Justice Department*, N.Y. TIMES, Jan. 22, 1993, at A1. In addition to Social Security taxes, employers must pay unemployment and workers' compensation taxes which add up to 20% of the cost of domestic help. Mike McNamee, *Now, the Nanny Tax Is a Bit Less Taxing*, BUS. WK., Nov. 14, 1994, at 142.

7. 140 CONG. REC. 11,802-03 (1994) (statement of Sen. Moynihan).

8. See *infra* notes 87-96 and accompanying text.

9. Howard Kurtz, *Talk Radio's Early Word on Zoe Baird; Listeners' "Nannygate" Reactions Signaled Trouble for Nominee*, WASH. POST, Jan. 23, 1993, at B1. The print media quickly picked up the term. See, e.g., Anna Quindlen, *Public & Private: I'm O.K., You're Bill*, N.Y. TIMES, Jan. 24, 1993, § 4, at 17; Maureen Downey, *Baird Case Forces Parents to Face the Nanny Issue: Green Cards, Taxes and Insurance*, ATLANTA J. & CONST., Jan. 23, 1993, at A8.

10. "Here's a woman and her husband making \$600,000 and they're out there hiring illegals because they 'can't find anybody' She broke the law. . . . [N]obody's above the law." Kurtz, *supra* note 9, at B1. Albert Hunt, *Wall Street Journal* Washington bureau chief, said: "[I]t took talk radio to remind Washington reporters that not all couples can afford full-time nannies." *Id.*

11. Social Security Domestic Employment Reform Act of 1994, Pub. L. No. 103-387, 108 Stat. 4071 (codified as amended in scattered sections of 26 U.S.C.).

12. *Id.* § 3121(x).

13. Representative Meek stated:

the chief value of H.R. 4278 is that it will help the employees—the people who work in other peoples' homes. . . .

mother's and her own.¹⁴ While Representative Meek spoke of Black women as household workers who needed financial security, other legislators spoke of childcare workers as babysitters and nannies who created problems for their employers.¹⁵ Throughout the legislative debate little attention was paid to the real nanny at the heart of the Nannygate controversy, Lillian Cordero, the undocumented Peruvian woman.

This essay explores how gender, race, class, and immigrant status influence legal policies affecting paid household workers. The legislative response to Nannygate reflects legal feminists' ambivalence toward mothering. Legal feminists' failure to reconcile the tension between a career outside the home and mothering left them unable to use Nannygate as an opportunity to push for adequate legal protection and regulation of paid household workers.

The first section briefly summarizes how the public-private distinction in law effectively removes paid domestic work from government scrutiny and regulation, facilitating the exploitation of domestic workers. By failing to challenge the artificially created legal distinction between labor performed in the public versus private sphere, legal feminists and supporters of the Nanny Tax law deflect attention away from the real problem—laws that perpetuate the notion that childcare, and other forms of domestic labor traditionally performed in the home, is women's work with little economic value. I also argue that *nanny*, the term used by affluent professional women, romanticizes and conceals the exploitative nature of the employer-employee relationship. The term *nanny* genders as female, and normalizes surrogate childcare and domestic labor in the private sphere, reinforcing the notion that men are entitled to women's domestic labor.

The next section discusses the public and legislative debates surrounding the enactment of the Nanny Tax law. The congressional debate on the Nanny Tax law, although couched in terms of protecting working women's interests, reflects the interests of powerful white men in maintaining paid domestic work as women's work. As a result, the legislative response to Nannygate fails to address the problems of poor working immigrant women like Lillian Cordero. By Americanizing the domestic workers discussed in these debates, Lillian

....

... They are very often minority women, already among the most vulnerable in our society.

These are the people who do not get their names in the paper, and until recently, they have been unrepresented in Congress.

140 CONG. REC. 9703 (1994) (statement of Rep. Meek).

14. *Id.*

15. See 139 CONG. REC. 9879-80 (1993) (statement of Rep. Meek); see also 140 CONG. REC. 28,500, 28,503 (1994) (statements of Rep. Bunning and Rep. Klug).

Cordero, the original nanny of Nannygate, was erased. Her erasure perpetuates an exploitive public policy that uses underpaid foreign workers to perform labor in the home, including childcare work.

In the third section I explore why both affluent working women and Black feminists distanced themselves from Zoe Baird. The affluent women argued class differences, while Black feminists argued racial differences separated them from Baird. I argue that both groups adopt themes and perspectives similar to the legislative narratives adopted by Representative Carrie Meek and her powerful white male legislative opponents. Furthermore, this section examines how Black feminists adopt a nationalistic view of the problem, ignoring the global trade in domestic workers.

The fourth section looks more closely at how federal law facilitates the migration of foreign-born women immigrants, concluding that there is little difference between the exploitation of undocumented workers like Lillian Cordero and documented foreign-born domestic workers. The fifth section briefly explores affluent working women's ambivalence and discomfort about Nannygate and contrasts these reactions to those of Black feminist legal scholars. I conclude that Black feminists see the racial dynamics surrounding domestic labor, but conflate race with class, ignoring the importance of citizenship in claiming rights. I argue that Black feminists do not fully acknowledge the complex hierarchy of paid domestic work in the United States.

In the final section I conclude that Nannygate represents a missed opportunity for all feminists. Domestic work remains under valued and under regulated because cheap female household workers are so readily available. Nannygate was an opportunity for a dialogue about the gendering of domestic work and the application of the public-private distinction to paid domestic workers. In addition, Nannygate was a missed opportunity for a public debate about whether "mothering" is only women's work. These are core feminist issues.

An analytical starting point for a more global approach to the problems represented in the Nannygate incident is what Mari Matsuda characterizes as a bottom-up analysis.¹⁶ Focusing on working women at the bottom of the labor hierarchy displaces over-reliance on a race-based analysis adopted by some Black feminists. A more global feminist analysis does not always assume that Blacks occupy the bottom rung of any hierarchical labor structure in the United States. Affluent, native-born Black working women may have different

16. See generally Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987). She argues that by "[l]ooking to the bottom—adopting the perspective of those who have seen and felt the falsity of the liberal promise—can assist critical scholars in the task of fathoming the phenomenology of law and defining the elements of justice." *Id.* at 324; *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7, 9 (1989) (arguing that all lawyers should develop multiple consciousness by choosing to see the world from the standpoint of the oppressed).

interests from working class women, even Black working class women. Race and gender, alone or intersected, are inadequate analytical frameworks in which to discuss domestic work.

II. THE UNDER REGULATION OF DOMESTIC LABOR

A. Domestic Work Is Not Real Work

Since housewives traditionally did domestic work for no pay,¹⁷ domestic work has little or no economic value. It “takes place outside the boundary of the world’s economy as men see it”¹⁸ Joan Fitzpatrick and Katrina R. Kelly, writing about the Asian “maid trade,”¹⁹ posit that the increased demand for household help by affluent women in Asian countries may reflect their internalization of the low social value ascribed to home care.²⁰ Their point applies equally to affluent working women in the United States.

The names we call women who labor as resident childcare workers reinforce the noncommercial nature of domestic work. Names like babysitter and nanny, a child’s pet name for a caregiver,²¹ mask the value of childcare work. Society commonly believes that young children are not capable of any serious learning; thus, childcare workers are not considered education providers and generally are not paid as much as teachers.²² Calling childcare workers babysitters and nannies makes it easier for employers to justify paying poor women meager wages for their work. Thus, the name Nanny Tax struck a chord with some affluent parents like Meg Reggie, an Atlanta public relations consultant, who thought that paying Social Security taxes and providing health

17. In the nineteenth century, during what some feminists call the first feminist movement, housewives argued unsuccessfully that the labor they did at home had economic value, and thus they were entitled to joint rights in family assets. Reva B. Siegel, *Home as Work: The First Woman’s Rights Claims Concerning Wives’ Household Labor, 1850-1880*, 103 YALE L.J. 1073, 1081-112 (1994).

18. Peter Pitegoff, *Child Care Enterprise, Community Development, and Work*, 81 GEO. L.J. 1897, 1921 n.131 (1993) (quoting HILDA SCOTT, *WORKING YOUR WAY TO THE BOTTOM: THE FEMINIZATION OF POVERTY* 129 (1984)). Mary Frances Berry writes that some economists “disregard[] the fact that employment is valued in our society by how much employees are paid, and that household workers are paid less than either physicists or economists.” MARY FRANCES BERRY, *THE POLITICS OF PARENTHOOD: CHILD CARE, WOMEN’S RIGHTS, AND THE MYTH OF THE GOOD MOTHER* 21 (1993).

19. “The term ‘maid trade’ describes the temporary legal migration of unaccompanied women from less developed Asian states to Western Asia (the Middle East) or to prosperous East Asian states . . . to take positions as live-in domestic servants.” Joan Fitzpatrick & Katrina R. Kelly, *Gendered Aspects of Migration: Law and the Female Migrant*, 22 HASTINGS INT’L & COMP. L. REV. 47, 58 (1998).

20. *Id.* at 64.

21. 10 OXFORD ENGLISH DICTIONARY 208 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989).

22. JIM MORIN, *TAKING MATTERS INTO OUR OWN HANDS: A GUIDE TO UNIONIZING IN THE CHILD CARE FIELD* 8 (1991).

care benefits makes it “feel[] more like a real job to the nanny.”²³ Workers most in need of Social Security benefits, and least likely to have the resources to save for old age, remain uncovered by the Social Security law because the arrangement between employers and household workers is a private matter.

B. Domestic Work Is a Private Matter

In the United States the law draws distinctions between work performed in the public sphere and work performed in the private sphere. Feminists often condemn courts and legislative bodies for their expressed reluctance to intervene in this private sphere.²⁴ Domestic work, especially residential childcare, not only has low economic value, but also occurs in the private sphere. Feminist legal theory, while “[c]oncern[ed] with the ideological separation between home and work . . . has all but ignored the women who stand at the very nexus of the ideological split between home and work—paid household workers.”²⁵ Thus, paid domestic labor performed in the home goes largely unregulated, or when regulated, laws passed for the benefit of household workers go unenforced.²⁶

Laws reflect shared social values and play an important role in shaping societal perceptions of these values.²⁷ Recently, Yale Law professor Stephen Carter asked whether hiring a nanny should be defined as a privacy issue.²⁸

23. Downey, *supra* note 9, at A8.

24. See, e.g., Tracey E. Higgins, *Democracy and Feminism*, 110 HARV. L. REV. 1657, 1671-77 (1997) (arguing that constitutional limits on public, but not private power fail to protect women); Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1, 22 (1992) (critiquing the feminist perspective on the public/private distinction).

25. Peggie R. Smith, *Regulating Paid Household Work: Class, Gender, Race, and Agendas of Reform*, 48 AM. U. L. REV. 851, 852-54 (1999) (arguing that competing images shaped among maids, mistresses, and progressive reformers determined the terms and conditions of the paid household relationship during the Progressive Era and the New Deal). For other examples of feminist theorists who make the public-private distinction, but fail to recognize the place of domestic workers, see Suzannah Bex Wilson, *Eliminating Sex Discrimination in the Legal Profession: The Key to Widespread Social Reform*, 67 IND. L.J. 817, 817 (1992) (arguing that sex discrimination is rooted in the sexual division of labor and its accompanying gender roles); Elizabeth Messud, *Russian Women and Women's Rights: A Case Study in Universalist/Cultural Relativist Debate*, 12 CONN. J. INT'L L. 77 (1996) (exploring the concept of “universality” in women's rights, focusing on Russian women); see also generally Higgins, *supra* note 24.

26. “[O]f the millions who have flouted the new law, only two have been charged with wrongdoing.” *IRS Finds More People Are Skipping Nanny Tax: Simplified Rules Bring Increase in Cheating*, CHI. TRIB., Apr. 5, 1998, at 15.

27. See KATHERINE O'DONOVAN, *SEXUAL DIVISIONS IN LAW* 19 (1985).

28. STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* 179 (1994). Professor Carter argues that the nanny problem raised by Zoe Baird's case must be discussed by naming the three most common “nanny offenses”: (1) failure to pay Social Security taxes; (2) failure to report the nanny's wages to the IRS; and (3) knowingly hiring a nanny without

Since child-rearing may be considered a fundamental right under *Meyer v. Nebraska*,²⁹ Carter argues that laws regulating child-rearing, like the Nanny Tax, must be strictly scrutinized because they interfere with a fundamental right.³⁰ But even Carter believes that a family's privacy interest should be overridden when employers fail to pay Social Security taxes because noncompliance with this law allows employers to exploit or harm their employees, and that concern constitutes a sufficiently compelling governmental interest.³¹ Using Carter's rationale, the continued invocation of the public-private distinction to justify the failure to remedy the exploitative labor arrangement between employers and household workers seems unsupportable and disingenuous.

C. Domestic Work as Women's Work

A less pejorative view is that the failure of labor laws to effectively protect domestic workers simply reflects the social organization of housework, including childcare. Arguably, the persistent over-representation of women as childcare providers could be the result of each individual working woman's failure to renegotiate childcare responsibilities with her husband or partner.³² Mothering does not have to be women's work.

Mary Frances Berry points out that "[d]uring the seventeenth and eighteenth centuries . . . fathers [in what became the United States] had primary responsibility for child care beyond the early nursing period."³³ As the nature of men's labor changed, the responsibility for childcare shifted to women.³⁴ Then middle- and upper-class women of all races and ethnicities enlisted the

inquiring into her legal status. *Id.*

29. 262 U.S. 390 (1923) (holding that the upbringing of one's children constitutes a fundamental constitutional right).

30. CARTER, *supra* note 28, at 180-82.

31. *Id.* at 181-82.

32. See JUDITH ROLLINS, *BETWEEN WOMEN: DOMESTICS AND THEIR EMPLOYERS* 104 (1985). Rollins states: "The middle-class women I interviewed were not demanding that their husbands play a greater role in housekeeping; they accepted the fact that responsibility for domestic maintenance was theirs, and they solved the problem of their dual responsibilities by hiring other women to assist." *Id.*

33. BERRY, *supra* note 18, at 42. "Fathers were deeply involved emotionally and personally in the lives of their children. . . . The fathers gave actual physical care such as rocking children, walking them at night when they were babies, or cuddling them when they travelled." *Id.* at 45. See *id.* at 45-49 (citing specific examples of childcare responsibilities performed by fathers). "What we call the traditional family first emerged in the middle of the nineteenth century, but became fully developed only in this century." *Id.* at 42.

34. *Id.* at 49-52.

help of “hired girls,” domestic servants and boarders as childcare providers.³⁵ Things changed with the rise of “mother-intensive” child-rearing ideologies during the twentieth century.³⁶ Middle-class, as opposed to upper-class white mothers became the primary caregiver.³⁷ By the late twentieth century, increasing numbers of middle-class women with children moved out of the home and into the job market, often at the expense of other women.³⁸

Today two-thirds of women with school-age children and one-half of women with preschool children work outside the home.³⁹ There has been, however, no parallel movement of men into the domestic sphere.⁴⁰ Zoe Baird, like most working women, did not renegotiate the responsibility for performing needed domestic tasks with her husband. Mothering remains women’s work.

An interesting question is why Paul Gewirtz, who probably was not the primary bread winner given Zoe Baird’s published annual salary of \$507,000,⁴¹ could not stay home with their child. Perhaps Zoe Baird’s decision to shift childcare responsibility to Lillian Cordero, the poor undocumented non-white woman, reflects Baird’s own ambivalence about relinquishing primary responsibility for parenting to her husband Paul. On the other hand, Baird’s decision, supported by her husband, to hire a surrogate mother may simply

35. Macdonald, *supra* note 3, at 246 (citing FAYE E. DUDDEN, *SERVING WOMEN: HOUSEHOLD SERVICE IN NINETEENTH-CENTURY AMERICA* (1983); DAVID KATZMAN, *SEVEN DAYS A WEEK: WOMEN AND DOMESTIC WORK IN INDUSTRIALIZING AMERICA* (1978); Cameron Lynne MacDonald, “One to Hold Me, the Other to Look At”: Mothers, Servants, and Others Performing Child Care in Nineteenth-Century New England (1992) (unpublished manuscript); PHYLLIS PALMER, *DOMESTICITY AND DIRT: HOUSEWIVES AND SERVANTS IN THE UNITED STATES, 1920-1989* (1989); DANIEL E. SUTHERLAND, *AMERICANS AND THEIR SERVANTS: DOMESTIC SERVICE IN THE UNITED STATES FROM 1800 TO 1920* (1981)). Although these sources point out that the race or ethnicity of domestic workers varied by region, they focus on white women as employers. As women of color become more affluent and work outside the home, they too, because of their class status, can become exploiters of poor working women. In 1980, a Guyanese-born, but legal immigrant, who worked as a housekeeper for Eleanor Holmes Norton, then head of the U.S. Equal Employment Opportunity Commission, claimed that Norton owed her \$18,663 in overtime for a three-year period, and failed to make the required contributions to her housekeeper’s unemployment compensation fund. Holmes Norton did, however, pay the required Social Security taxes on her housekeeper’s wages. Laura A. Kiernan, *Ex-Housekeeper Says EEOC Chief Owes Her \$18,663 in Overtime*, WASH. POST, Dec. 4, 1980, at A16.

36. Macdonald, *supra* note 3, at 246.

37. *Id.*

38. *Id.* at 246-48 (citations omitted).

39. Beth Belton & Tammi Wark, *Economics of Child Care: Problem of Supply, Demand Defy Logic*, USA TODAY, Oct. 13, 1995, at B1. “More than 40% of the nation’s 130 million workers are parents with children school-age or younger. Two-thirds of mothers of school-age children have jobs. Half of mothers of preschool children work outside the home.” *Id.* Most children are cared for outside the home, with only 5% of all childcare for preschool-age children occurring in the home. *Id.*

40. Kathryn Branch, Note, *Are Women Worth as Much as Men?: Employment Inequities, Gender Roles, and Public Policy*, 1 DUKE J. GENDER L. & POL’Y 119, 125 (1994).

41. Blumenthal, *supra* note 2, at 55; Taylor, Jr., *supra* note 3, at 65.

reflect how we are socialized to think of women, but not men, as “mothering.” Baird accepted, consciously or unconsciously, the notion of mothering as women’s work and may have been unwilling to totally surrender her mothering role for a career outside the home.

The increased numbers of middle-class women working outside the home face “a dilemma: how to excel at their jobs outside of the home while ensuring that their children are attended to The solution has often been to hire domestic help.”⁴² They hire other women, and thus, childcare remains solidly within the realm of women’s work. Despite advances in the condition and status of women in the United States during the latter part of the twentieth century, household work, including childcare, remains women’s work.

Feminists need to resolve the tension many women face between career and motherhood. It may be in the best interest of children and society for a parent to stay home to “mother” young children. If young children benefit from parental “mothering” then feminists need to decide whether women lose something of value by giving up or sharing primary responsibility for child-rearing. Feminists may have to admit that it is impossible to be simultaneously both a good mother and a full-time worker outside the home.

Zoe Baird’s dilemma, however, is quite different from the circumstances faced by most working mothers in this country. Finding childcare is always problematic for poor and working-class women because they lack Baird’s financial resources. Ironically, the Nanny Tax debate was triggered because Baird and her husband did not comply with laws designed to protect poor working women. Yet the reform measure addressed the preferences of affluent employers of home care workers, protecting the interests of the propertied class employers who benefit from the public-private distinction. Affluent working women, like Zoe Baird, adopted an unsisterly position by supporting a simplified tax measure that actually decreased rather than increased the financial security of their female household employees.⁴³ Gender, class, and

42. Twila L. Perry, *Alimony: Race, Privilege, and Dependency in the Search for Theory*, 82 GEO. L.J. 2481, 2508-09 (1994).

43. Evelyn Nakano Glenn writes: “Rather than challenge the inequity in the relationship with their husbands, white women pushed the burden onto women with even less power. They could justify this only by denying the domestic worker’s womanhood, by ignoring the employee’s family ties and responsibilities.” Evelyn Nakano Glenn, *From Servitude to Service Work: Historical Continuities in the Racial Division of Paid Reproductive Labor*, in *WORKING IN THE SERVICE SOCIETY*, *supra* note 3, at 115, 130. She concludes:

When feminists perceive reproductive labor only as gendered, they imply that domestic labor is identical for all women and that it therefore can be the basis of a common identity of womanhood. By not recognizing the different relationships women have had to such supposedly universal female experiences as motherhood and domesticity, they risk essentializing gender—treating it as static, fixed, eternal, and natural.

Id. at 142.

even race are inextricably intertwined in any discussion of mothering, childcare and household work.⁴⁴

III. LEGISLATIVE NARRATIVE: FRAMING THE PUBLIC POLICY DEBATE

The narratives of members of Congress and witnesses who participated in the hearings juvenilized, gendered as female and raced as Black in-home or resident childcare workers. Professional women like Baird called childcare workers nannies, powerful male members of Congress called them babysitters, and Black members of Congress called them "Black female domestic workers."⁴⁵ Whether nanny, babysitter or Black female domestic worker, resident childcare workers discussed in the hearings also are presumptively native-born, virtually erasing foreign-born workers like Lillian Cordero from the debates.

A. The Legislative Debates About Employees

"We have decriminalized baby-sitting," Senator Daniel Patrick Moynihan proclaimed in early October 1994, announcing the accord reached by congressional negotiators on the Social Security Domestic Employment Reform Act of 1994 (the Nanny Tax).⁴⁶ According to Senator Moynihan, the new tax measure would improve Social Security coverage for thousands of domestic workers.⁴⁷ Previously, he noted, most households with domestic workers did not comply with the old Social Security requirements.⁴⁸ Ironically, however, the new tax law provided tax refunds for those few employers who paid Social Security taxes during 1994 if they paid their household workers less than \$1000 per year.⁴⁹

Although Congress, as a whole, agreed that simplification of the taxing scheme was needed for the employer's sake, members disagreed over the

44. "[D]omestic work has . . . been the occupation that most clearly defines women's class, race, and ethnic differences, for it is an occupation in which some women (poor, black, ethnically subordinate) have worked for wages paid by other women (usually middle class, white, or ethnically dominant)." Phyllis Palmer, *Housework and Domestic Labor: Racial and Technological Change, in MY TROUBLES ARE GOING TO HAVE TROUBLE WITH ME: EVERYDAY TRIALS AND TRIUMPHS OF WOMEN WORKERS* 80, 80 (Karen Brodtkin Sacks & Dorothy Remy eds., 1984).

45. Even Sidney Blumenthal in writing about the Zoe Baird controversy states, "[w]hat began as a misadventure in *babysitting* became the opening scene of Clinton's Presidency." Blumenthal, *supra* note 2, at 54 (emphasis added).

46. Jennifer Dixon, *Congressional Negotiators Reach Agreement to Fix "Nanny Tax,"* ASSOCIATED PRESS POL. SERVICE, Oct. 5, 1994, available in 1994 WL 3375341.

47. *Id.*

48. 140 CONG. REC. 11,803 (1994) (statement of Sen. Moynihan).

49. Dixon, *supra* note 46.

amount of annual wages needed to trigger payment of the tax. Those arguing for a higher threshold focused on the needs of employers for a simplified means of reporting that excluded occasional or part-time employees.⁵⁰

Under the new law, workers whose earnings from a single employer fell short of the \$1,000 annual threshold had no Social Security coverage.⁵¹ Thus, the law does not cover workers earning less than \$4.25 per hour, then the minimum wage, or workers earning as much as \$5.00 per hour who only work one day every two weeks, or half-days every week for the same employer. A home care worker employed four hours each, for five or six different households every week at \$5.00 per hour, could earn a yearly income between \$4,000 and \$5,000, but still not be covered under the new legislation. Under the old law, this worker's employers would be legally obligated to pay Social Security and Medicare taxes on the worker's wages.

The loss of Social Security coverage for some domestic workers was foreseen by Congress. Black members of Congress, while supportive of any measure to increase employer compliance with the Social Security law, feared that a higher triggering threshold would remove some currently covered workers from the Social Security system.⁵² During the legislative debates, Black members of Congress argued that under the new law, a worker earning \$9,000 annually in aggregated wages might receive no Social Security credit if no single employer paid the worker \$1,000 per year.⁵³

Representative Carrie Meek was particularly vocal in making this point. At a House Ways and Means Committee hearing, Meek spoke about her mother, who had no retirement benefits because her employer never paid the required taxes, saying that the Act:

will help the employees—the people who work in other peoples' homes

50. See Representative Jacobs's remarks describing the bill as "a pleasant effort to correct the egregious wrong that has occurred by the inadvertence of the U.S. Government to the *taxpayers* of this country." 140 CONG. REC. 28,499 (1994) (statement of Rep. Jacobs) (emphasis added). Representative Bunning said that the new bill was the "least Congress could do for average Americans who occasionally hire people to look after their children or mow their grass." *Id.* at 28,500. Representative McCrery said that "this bill finally is one that can make things better for folks who try to abide by the law, who work hard, and also provide a job for somebody in their community." *Id.* at 28,504 (emphasis added).

51. *New Nanny-Tax Law Eases the Rules on Paying Taxes for Domestic Workers*, TAX UPDATE, Feb. 1995, at 9.

52. *Proposals to Simplify and Streamline the Payment of Employment Taxes for Domestic Workers: Hearing Before the Subcomm. on Soc. Sec. and Subcomm. on Human Resources of the House Comm. on Ways and Means*, 103d Cong. 16, 23-24 (1993) [hereinafter *Proposals to Simplify*] (statements of Rep. Meek & Rep. Reynolds).

53. *Id.*

....

... They are very often minority women, already among the most vulnerable in our society.

These are the people who do not get their names in the paper, and until recently, they have been unrepresented in Congress.⁵⁴

Representative Meek alluded to her prior support for a simplified reporting system to offset the “detrimental effects on the hiring of domestic workers who work independently of companies that contract for services in the home.”⁵⁵ The current system, she argued, encourages employers to pay their household workers under the table.⁵⁶ It is ironic, Meek said, that the problems of “Zoe Baird and other prominent people,” and not the interests of domestic workers, were the impetus for the current bill.⁵⁷ Meek understood whose interests were driving the legislation.

According to her legislative aide, John Shelby, Representative Meek, a freshman legislator with little influence, supported the \$1,000 annual threshold even though she wanted a lower triggering amount because she believed that the law could be perfected later.⁵⁸ She and a few others remained focused on

54. 140 CONG. REC. 9703 (1994) (statement of Rep. Meek).

55. 139 CONG. REC. 2580 (1993) (statement of Rep. Meek).

56. *Id.* at 2581.

57. *Id.* at 2580.

58. Telephone interview with John Shelby, legislative aide to Representative Meek (Feb. 12, 1996). Professor Lani Guinier writes about the ineffectiveness of Black elected officials and argues for proportional representation after illustrating that absent a critical mass, one or two Black elected officials may not be able to significantly alter public policy. Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1102, 1111 (1991). Representative Meek continued to push for a lower triggering wage threshold when the tax proposal reached the floor of the House of Representatives:

Madam Speaker, too much lip service is paid to the needs of the working poor and there is not enough action on their behalf. . . .

The Ways and Means Committee is proposing to raise the wage threshold for the payment of Social Security taxes to \$1,750 per year. Earlier this year I testified before the members of the committee to recommend a modest increase and to improve compliance, but my recommendation was for an increase only to \$300 annually. I was concerned that raising the threshold too high would eliminate from the Social Security system too many people who do domestic work for a number of employers. A worker who gets paid to clean house once every 2 weeks for several employers would have a hard time reaching the threshold. Such a person could work for 10 families and earn \$13,000 annually and still not qualify to have Social Security taxes withheld. \$300 per year may be too low a threshold, but \$1,750 is too high. . . .

... Domestic workers affected by this proposal are mostly female and mostly

the need to ensure retirement benefits for many household workers.⁵⁹ Thus, Representative Meek focused on how to protect the retirement needs of some household workers, constructed by her as native-born minority women. Her pragmatic compromise meant that the poorest paid women either remained uncovered, or lost coverage all together.

A Black woman who testified during the legislative hearings also focused on native-born women workers. Diane Williams, the daughter of a household worker, clearly positioned native-born women in opposition to immigrant domestic workers like Lillian Cordero. Ms. Williams testified that too much media attention was focused on undocumented domestic workers and not on “the thousands of black and white Americans who have lived here legally, [and] worked for years as domestics and day workers”⁶⁰ Rather than advocate on behalf of all working women who occupy this female-dominated labor category, Williams asserts the citizenship status of native-born Black and white Americans as the basis for greater government protection. According to Williams, “[t]his kind of abuse . . . has been happening for years to employees who do not know the law” because employers either cannot afford to comply with the law or consciously choose to ignore it.⁶¹ Williams understood the exploitative nature of the relationship between household worker and employer, especially when the worker also lives in an employer’s home.⁶²

minority. . . .

. . . The \$1,750 threshold will provide tax relief for those who can afford to hire domestic help. It will not help, and will actually hurt, many of the low-income workers who now have taxes withheld on their behalf. . . .

. . . 80,000 to 115,000 household workers a year could lose some coverage. What happens to all these people when they are too old and frail to work? . . . Our society claims to place a high value on work, but reducing the participation of so many workers in the Social Security system sends a different message.

139 CONG. REC. 9879-80 (1993) (statement of Rep. Meek).

59. Representative Kennelly stated, “It is necessary that we safeguard people who perform domestic work. . . . This bill is not for the elite of America, this is not for the well-known names, it is for the working men and women who have to count on their Social Security.” 140 CONG. REC. 28,501 (1994) (statement of Rep. Kennelly).

60. *Proposals to Simplify*, *supra* note 52, at 73 (statement of Diane Williams, daughter of a household worker).

61. *Id.* at 74.

62. By the late nineteenth century Black women resisted the pressure to “live-in,” refusing to be “on call” for white women twenty-four hours a day. JACQUELINE JONES, *LABOR OF LOVE, LABOR OF SORROW: BLACK WOMEN, WORK, AND THE FAMILY FROM SLAVERY TO THE PRESENT* 3-4 (1985) (studying the changes in the patterns of Black women’s work as slaves and wage earners from 1830 to 1984). Weida Edwards described her day as a live-in domestic worker in Washington, D.C.:

You had to do everything, twenty-four hours to the day. You was up with the mister—if you was upstairs you got all the fresh linen for him. Everyone downstairs prepared the food,

B. The Legislative Debates About Employers

While Representative Meek spoke of native-born minority domestic workers who needed financial security, other legislators spoke of babysitters and nannies who created legal problems for employers.⁶³ Most members of Congress identified with Zoe Baird and her husband, Paul Gewirtz. Thus, the mainstream legislative and public debate focused on the problems faced by employers—well-to-do women and their husbands—not household workers, and especially not foreign-born resident childcare providers.⁶⁴ Either the law or the workers were the cause of the problem, never the employer.

During the legislative debate, one commonly cited excuse for nonpayment of the tax by employers was the “complex” quarterly paperwork required to comply with the law.⁶⁵ Therefore, many members of Congress argued that employers should not have to pay Social Security taxes on quarterly employee wages of \$50 or more.⁶⁶ They reasoned that employer compliance with the Social Security law would increase by requiring annual instead of quarterly payments and a higher triggering wage threshold.⁶⁷ Proponents of a higher triggering wage, however, never adequately explained how raising the triggering wage threshold would increase compliance with the Social Security

waited his table, or got his car ready. ‘Cause the outside had to be just so when he came out.

Then the children had to be cared for and, of course, she’d finally start calling for this and that by about ten or eleven. The whole place is cleaned daily and all meals are from scratch. They’d have had lunch served and dinner readied. Everybody put on dark uniforms, and us upstairs served the childrens in they room and they parents ate downstairs. After nine or so—after dinner they’d go to the parlor with they friends in or go out. You get them kids to bed, and by ten help get all the dishes done. Now she’d be up to all hours worrying everybody to do this or that. Why not? She’d sleep ‘til noon if she wanted to—it was you that had to be up, dressed in your gray by six-thirty.

ELIZABETH CLARK-LEWIS, *LIVING IN, LIVING OUT: AFRICAN AMERICAN DOMESTICS IN WASHINGTON, D.C., 1910-1940*, at 106 (1994) (providing narratives of domestic workers in the District of Columbia).

63. See sources cited *supra* note 15.

64. The isolating of gender issues along class lines is a recurring problem in the struggle for gender equality. See, e.g., FAYE E. DUDDEN, *SERVING WOMEN: HOUSEHOLD SERVICE IN NINETEENTH-CENTURY AMERICA* 241-42 (1983) (discussing how many nineteenth century feminists used domestic workers to help in their homes while they pursued political careers and how these early feminists failed to recognize the significance of the household labor their servants performed).

65. For example, Representative Dan Rostenkowski stated that the Nanny Tax bill would ease the paperwork burden of employers and thereby increase compliance with the law. 140 CONG. REC. 9700 (1994) (statement of Rep. Rostenkowski).

66. *Id.*

67. *Id.*

law.⁶⁸ In fact, there was evidence to the contrary. A former IRS Commissioner accurately predicted that if the proposed legislation became law, compliance rates "would fall 'straight to zero.'"⁶⁹ News articles published since passage of the Act confirmed his prediction that "the I.R.S. had its greatest compliance [in 1992,] two years after Zoe Baird."⁷⁰

Another argument advanced during the hearings was that the current law covered women who were not real workers. For many legislators, childcare labor was not real work, it was child's work. Thus, the Social Security law made otherwise law-abiding households tax cheats because they occasionally hired teenagers to babysit their children, yet were liable, under the law, for the Social Security taxes on their wages.⁷¹ *Remember now, Lillian Cordero was neither a part-time nor an occasional worker.*

Some members of Congress blamed household workers for encouraging their employers to evade minimum wage and Social Security laws by paying wages under the table, a point countered by Diane Williams and Queen E. Sledge, a former household worker.⁷² Both women testified that most

68. Representative Meek also seemed to buy into the argument that increasing the threshold amount would increase employer compliance with the law. 139 CONG. REC. 2581 (1993) (statement of Rep. Meek).

69. *Raising Wage Threshold Will Not Boost Compliance*, LAB. REL. REP., July 26, 1993, at 410-11 (quoting Shirley Peterson, former IRS commissioner).

70. David J. Morrow, *Spending It; Nanny-Tax Tally of '95: Who Paid, Who Lied?*, N.Y. TIMES, Apr. 21, 1996, § 3, at 1.

"A lot of people just refuse to pay these taxes," said Merlin Larsen, president of Pacific Benefits, a payroll deduction service based in Salt Lake City. "I've heard that of the 75,000 live-in nannies in the U.S., only 20 percent of their employers pay their household taxes. Most people still pay their nanny in cash on Friday night and let it go at that."

Id. "When Congress wrote the Nanny [Tax] Act, it estimated that 1.5 million employers were out of compliance. Yet even after the change, the IRS reports, only 280,000 families file Schedule H." Amity Shlaes, *Caught in the Nanny Tax Trap*, WALL ST. J., Jan. 10, 1997, at A10. When Congress enacted the Nanny Tax,

[t]he response was immediate . . . [t]he number of people paying the tax on household help fell 40 percent, from nearly 500,000 in 1994 to just below 300,000 in 1995, the year the new law took effect, and 314,000 in 1996. The Internal Revenue Service expects little change for 1997.

. . . [The] IRS estimates that as many as 4 million people owe nanny taxes each year, that means that fewer than 1 in 13 is obeying the law, compared with 1 in 8 under the old, more cumbersome reporting system.

IRS Finds More People Are Skipping Nanny Tax: Simplified Rules Bring Increase in Cheating, *supra* note 26, at 15.

71. See 140 CONG. REC. 28,500-01 (statements of Rep. Bunning & Rep. Kennelly).

72. During the hearings Congressman Bunning asked Diane Williams and Queen Sledge:

[S]ome of the prior people asked the question that there could be a possibility that there would be an advantage of being paid in cash, particularly if you had some other social

household workers did not know the law and just assumed that their employers would pay in cash.⁷³ Ignoring the tremendous power and informational imbalance between employer and worker, legislators persisted in justifying employers' failure to comply with the law by asserting that household workers resent having to pay Social Security taxes and income taxes.⁷⁴ According to these legislators the employees, not the employers, were the real tax cheats. Their arguments blindly ignore what drives workers' concerns—low wages for hard labor.

During the debates legislators repeatedly stressed that the Nanny Tax bill was not intended to cover babysitters. The word babysitter invokes the image of a teenage girl who works occasionally for short periods of time and receives token compensation. She is a youthful or unskilled casual worker not engaged in a serious occupation. In reality, babysitters often provide full-time childcare for women working outside their homes. In contrast, the word "nanny" invokes the image of a skilled woman who cares for the children of wealthy women,⁷⁵ and who often lives in her employer's home. Both words, nanny and babysitter, describe essentially the same work, the care of children in their parents'

benefits coming like food stamps, like social welfare benefits under other systems other than Social Security and/or withholding taxes.

Proposals to Simplify, *supra* note 52, at 75 (statement of Rep. Bunning). Ms. Sledge replied: "I have never been on welfare, food stamps or any of them. I have always worked." *Id.* (statement of Queen E. Sledge, former household worker). Ms. Williams added: "My mother has never been on public assistance, so that did not affect her. . . . [I]t was just assumed that they paid her cash." *Id.* (statement of Diane Williams, daughter of a household worker).

73. *Id.* at 74-75 (statements of Diane Williams, daughter of a household worker & Queen E. Sledge, former household worker).

74. In an interview with the *Washington Post* shortly after the Nannygate controversy, Maria de la Cruz Gonzalez, an immigrant from El Salvador who lives with her husband and children in Takoma Park, Maryland and who works as a household employee said,

"I have my Social Security card and I know it's a good thing If [employers] aren't willing to pay Social Security and taxes, I won't work for them. I want everything to be good and legal."

Her resolve comes from experience. She spent four years as a live-in housekeeper for a D.C. family that insisted on paying cash and, she said, declined to pay taxes for her. When they ran into "money trouble" and fired her in June 1991, she said, she lost years of potential retirement benefits.

Howard Schneider & Graciela Sevilla, *America's Homes Hide an Underground Economy; Many Workers Want to Pay Taxes, but Employers Don't*, WASH. POST, Feb. 14, 1993, at A1. *See also New Nanny-Tax Law Eases the Rules on Paying Taxes for Domestic Workers*, *supra* note 51, at 9. Residential childcare givers often are undocumented and do not benefit from Fair Labor Standards law. The personal nature of the relationship allows for a higher level of psychological exploitation and further impedes the childcare employee's ability to assert a right to better working conditions. ROLLINS, *supra* note 32, at 156-57.

75. By definition a nanny is a child's nurse and the title "nurse" implies skilled labor and special expertise. *See OXFORD ENGLISH DICTIONARY*, *supra* note 21, at 208.

absence, but these two terms invoke different images—the inexperienced occasional worker and the experienced, full-time professional childcare provider. The mainstream members of Congress characterized childcare providers as babysitters, not nannies, and the difference between these two images had economic consequences for domestic workers.

C. Public Debates: What's in a Name—Racial Markers

The news media labeled the controversy surrounding Baird's nomination Nannygate because Baird called Lillian Cordero a nanny. Job titles are important because they do invoke certain images in the minds of the public, and these images influence public policy. The term "domestic worker" invokes the historic image of a native-born Black woman, the mammy, an "ideological construct of the plantation's faithful household servant and the South's most perfect slave."⁷⁶ Even today in the minds of many, the contemporary maid or household worker is an unskilled Black woman.

Poet Audre Lorde, a Black woman, wrote about a little white girl riding in a supermarket grocery cart who looked at Lorde's two-year-old daughter and remarked, "Oh look, Mommy, a baby maid!"⁷⁷ Patricia Hill Collins, a Black feminist scholar commenting on the 1967 incident, writes that "[t]he status of Black woman as servant is so 'common sense' that even a child knows it. That the child saw a Black female child as a baby maid speaks to the naturalization

76. Smith, *supra* note 25, at 864 n.75. Several Black feminists have written about this characterization of some Black women as mammy. See, e.g., DEBORAH GRAY WHITE, *AR'N'T I A WOMAN?: FEMALE SLAVES IN THE PLANTATION SOUTH* 27-61 (1985); BELL HOOKS, *AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM* 84-85 (1981). Black women depicted as mammies, devoted and nurturing "servants" for white families, are an enduring image in both film and commercial advertising. ED GUERRERO, *FRAMING BLACKNESS: THE AFRICAN AMERICAN IMAGE IN FILM* 15-16 (1993). "The mammy figures convey the notion that genuine fulfillment for black women comes not from raising their own children or feeding their own man . . . but from serving in a white family's kitchen." PATRICIA A. TURNER, *CERAMIC UNCLES & CELLULOID MAMMIES: BLACK IMAGES AND THEIR INFLUENCE ON CULTURE* 24-25 (1994) (writing about Mammy figures as popular collectable items).

In 1950, ABC aired *Beulah*, the first television sitcom featuring a Black lead. Elizabeth Kolbert, *From "Beulah" to "Oprah,"* N.Y. TIMES, Jan. 15, 1993, at C1. Beulah, played by Hattie McDaniel, best known for her Academy Award winning portrayal of a mammy in the film *GONE WITH THE WIND* (Metro-Goldwyn-Mayer 1939), played the lead character, "a huge black maid with a mooching, irresponsible boyfriend; a dimwitted, high-strung girlfriend; a keen sense of rhythm, and an apparently inexhaustible supply of patience." Kolbert, *supra*, at C1. "Episodes focused on a suburban household in which a dedicated, loving black housekeeper nurtured a white middle-class family. . . . [S]he cheerfully dispensed homespun wisdom along with nutritious meals to the white children and their parents." TURNER, *supra*, at 53. Donald Bogle, however, claims that McDaniel played Beulah on the radio, but Ethel Waters, followed by Louise Beavers, played Beulah on television. DONALD BOGLE, *TOMS, COONS, MULATTOES, MAMMIES, & BUCKS: AN INTERPRETATIVE HISTORY OF BLACKS IN AMERICAN FILMS* 66 (1994).

77. AUDRE LORDE, *The Uses of Anger: Women Responding to Racism*, in *SISTER OUTSIDER: ESSAYS AND SPEECHES* 124, 126 (1984).

dimension and to the persistence of controlling images in individual consciousness and the social system overall.”⁷⁸

Even the names domestic workers call themselves are significant. Labor historian David Roediger writes about the language of labor in the formation of the American white working class. To European immigrants in the nineteenth century “hard, drudging labor” was synonymous with the kind of labor reserved for Black workers—“arduous unskilled jobs or . . . subservient positions.”⁷⁹ In the northern United States the term “servant” became closely associated with Black labor, whether slave or free. “[D]omestic service bore an indelible badge of racial inferiority. It was stigmatized as ‘n[*****]’s work,’ a form of voluntary slavery or wage slavery that was incompatible with the values of democracy.”⁸⁰ For this reason, Irish immigrant women, over-represented as household workers during this period, resisted the “servant” and “domestic” labels in order to distinguish themselves from Black women.⁸¹ Thus, white workers who performed domestic work advertised for work describing themselves as “help,” “helper” and “hand” rather than “servant” and

78. 2 PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT: PERSPECTIVES ON GENDER* 90 n.2 (1990). The novelist and essayist James Baldwin, writing in 1976 about American films, states that the Black maid is

part of the [white] family: she would appear to have no family of her own: and is clearly prepared to protect her golden-haired mistress [in *THE BIRTH OF A NATION* (Epoch Producing Corp. 1915) and *GUESS WHO’S COMING TO DINNER* (Columbia 1967)] from the clutches of this black ape [the Black doctor fiancé in *GUESS WHO’S COMING TO DINNER*] by any means necessary.

The [Black maid’s] inclusion . . . is absolutely obligatory—compulsive—no matter what the film imagines itself to be saying by means of inclusion. . . . [I]n life, [however,] she has a family, she may even have a doctor for a son, and she assuredly does not love the white family so deeply as they are compelled to suppose: she cannot, since she knows how bitterly her [B]lack family is endangered by her white one.

JAMES BALDWIN, *The Devil Finds Work*, in *THE PRICE OF THE TICKET: COLLECTED NONFICTION 1948-1985*, at 603 (1985). For a more complete discussion of Black women as servants in American films, see BOGLE, *supra* note 76, at 9, 45-47, 57-60, 82-94, 160-166.

79. DAVID R. ROEDIGER, *THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS* 144-45 (1991).

80. Smith, *supra* note 25, at 877.

81. Roediger states:

An 1859 traveller found that native-born Americans still avoided calling domestic workers of the same background servile names but reasoned, “Let negroes be servants and, if not negroes, let Irishmen. . . .” “Help,” [Faye] Dudden [in *SERVING WOMEN: HOUSEHOLD SERVICE IN NINETEENTH-CENTURY AMERICA* (1983)] comments, “were likely to deny the name of servant, while domestics usually had to accept that title.”

ROEDIGER, *supra* note 79, at 146.

"domestic" to convey a more equalitarian notion of their labor.⁸² These labels also served as a means of separating the labor performed by white workers from that performed by Black workers, whether free or slave.⁸³

Today the terms "nanny" and "domestic worker" serve similar purposes. The term "nanny" invokes the image of a "foreign" woman, unless you are a Brooklyn-accented television nanny.⁸⁴ Many Americans have "vastly sentimentalized notions from old English history books or PBS television series that a typical nanny came to change the diapers and stayed on for the weddings."⁸⁵ Literature and mass media construct nannies as cultured,

82. *Id.* at 47-50. Sociologist Cameron Lynne Macdonald, in discussing the difference between nannies and au pairs, states that how the job is defined by the worker and employer "is crucial in determining demands associated with it and how workers respond to them." Macdonald, *supra* note 3, at 245.

83. The distinction between servant and helper ultimately disappeared as "increasing numbers of immigrants and emancipated African-Americans entered paid service." Smith, *supra* note 25, at 879. By the end of the nineteenth century, the term "servant" applied to all who did paid domestic work. *Id.*

84. In the television show, *The Nanny*, a stereotypical working-class Jewish woman from Brooklyn, played by Fran Drescher, works as an obviously miscast nanny who falls in love with, and ultimately marries, her wealthy widowed boss. *The Nanny* (CBS television broadcast). The implication throughout several seasons of the show was that the Drescher character was too "lower-class ethnic" to be a nanny to a wealthy WASP family. The contemporary image of the nanny is best represented by the film classic *MARY POPPINS* (Walt Disney 1964). In the film, Julie Andrews plays a "magical" London nanny. The very next year Andrews appeared in *THE SOUND OF MUSIC* (Twentieth Century Fox 1965) playing an Austrian governess.

The Mary Poppins image of a nanny continues to define who is a nanny in the public mind. *See, e.g.,* the title of a recent article in *The New York Times* describing the joys of being a nanny. Bonnie Rothman Morris, *Cyberagencies Match Families with Modern Mary Poppinses*, N.Y. TIMES, Oct. 8, 1998, at G5. The article described these modern nannies as "a new breed of live-in nann[ies], the kind coveted by many families and . . . increasingly available: college educated, at least 25 years old and accustomed to being away from home." *Id.* The prototypical nanny described in the article graduated from Oral Roberts University and taught for four years at a Christian school in Wisconsin. *Id.* The "older" version (1996 and earlier) found by nanny agencies often was younger, "inexperienced" and came from the Midwest. *Id.* Although native-born as opposed to foreign-born, implicitly, both the modern and older nanny are women, white and Christian. Robin Rice describes the "American" nanny as between twenty and twenty-five years of age, with some college education, often with a major in some child-related field, and from the Midwest. ROBIN D. RICE, *THE AMERICAN NANNY* 2-3 (1987). Rice explains that women from the Midwest seem more likely to major in child-related fields, are more "family oriented," and eager to relocate to large cities. *Id.* at 3.

85. 135 CONG. REC. 12,692 (1989) (statement of Linda Burton). Linda Burton submitted written testimony from her book, titled *WHAT'S A SMART WOMAN LIKE YOU DOING AT HOME?* (1986) in support of the proposed Act for Better Child Care documenting her difficulty obtaining childcare.

When I was looking hard for child care, I spent literally hours on the telephone, every day, trying to scout out the best available care. Other more broken-in mothers shared their allegedly fool-proof "Lists of What to Ask Potential Housekeepers" who telephoned me in response to the many advertisements I placed. They suggested nefarious ways to tap into the market of illegal aliens (remarking that it would be nice to have someone who spoke English, but concluding that we couldn't have everything) and passed on whispered directions toward certain population groups who were rumored to "be wonderful with children."

educated, unmarried women—surrogate mothers for upper class children.⁸⁶ Therefore, it is no accident that both the press and Zoe Baird called Lillian Cordero a nanny. The term erases the most negative connotations of in-home childcare—low wage work often performed by non-white women in a potentially exploitative environment. The significance of job titles is apparent in the public and congressional debates surrounding the enactment of the Nanny Tax law. Strangely, strong feminist voices were missing from the public debates.

IV. COMPETING GENDERED NARRATIVES ABOUT DOMESTIC WORK: AFFLUENT WORKING WOMEN AND BLACK FEMINISTS

During and following the Nannygate controversy neither affluent working women nor Black feminists questioned the gendered nature of paid domestic labor. In distancing themselves from Zoe Baird, both groups tacitly accepted that domestic work, including in-home or resident childcare, is women's work, but each group operated from different perspectives, influenced by race, and often class. This section compares and contrasts the narratives of affluent working women with Black feminists' writings about and reactions to paid domestic work.

A. Affluent Women: Zoe Baird, Not One of Us?

During a meeting with Joseph Biden, the Chairman of the Judiciary Committee at the time, Zoe Baird admitted not paying Social Security taxes for Lillian Cordero and Cordero's husband, but analogized her violation of the law to a *parking ticket*.⁸⁷ Excusing her conduct at her confirmation hearing, Baird

At the beginning, I confined my search for child care to housekeepers and nannies. However, no matter how much I wanted my child to have personal, one-on-one care and attention, provided in his own home, I always seemed to come up against one of the same three obstacles. First of all, nannies and housekeepers were very expensive, and their wages would have eaten up a major chunk of my salary. I soon learned that in conjunction with the other expenses of working outside the home—clothing, transportation, lunches, and the convenience foods which became almost essential for cooking—the expense of one-on-one care was something my husband and I could not reasonably handle.

Second, if the tedious progression of interviews which I conducted with the aspiring housekeepers who answered my ads was any indication of the sort of care givers available for hire in the nanny market, even the people able to afford full-time, one-on-one care were rarely getting what they bargained for. The truth of the matter was that an overwhelming percentage of the people who came to my door, ready and willing to care for my children, were clearly unqualified for the job.

135 CONG. REC., *supra*, at 12,692.

86. See *supra* note 84 and accompanying text.

87. Blumenthal, *supra* note 2, at 56 (emphasis added).

invoked motherhood saying, “I was acting at that time really more as a mother than as someone who would be sitting here designated to be Attorney General.”⁸⁸ She was desperate and scrambling to find childcare. Despite placing ads in three local newspapers⁸⁹ and employing the services of five employment agencies, Baird *had* to hire Lillian Cordero, the undocumented immigrant woman sent by a sixth agency.⁹⁰ Baird’s excuse for breaking the law highlighted her class privilege and invited comparisons with working mothers who did not have her financial resources.⁹¹

A few years earlier, legal feminist Joan Williams wrote that women lawyers with children have two alternatives: spend little time with their children, like “the typical workaholic father” or juggle home and career “in ways that interfere with one’s ability to perform as an ideal worker—in other words, to join the mommy track.”⁹² Zoe Baird chose the first alternative, working the hours of a traditional workaholic man. Thus, she needed adequate childcare to pursue her career as a corporate lawyer. Baird’s solution was to hire a less privileged woman, Lillian Cordero, to care for her child. Feminists like Williams would argue that Baird’s solution preserves and reinforces the gendering of domestic labor as women’s work.⁹³ Williams’ concern, however, is the plight of upper middle-class or affluent women, not the women hired to do domestic labor. With few exceptions, feminist legal theory does not address the plight of paid household workers.⁹⁴

88. *Id.* at 59.

89. *Id.* at 55.

90. Taylor, Jr., *supra* note 3, at 65. Ironically, it was Baird’s husband, Paul Gewirtz, who placed the ads and had primary responsibility for securing a nanny. *Id.* Baird and Gewirtz received no response to their ads. See Blumenthal, *supra* note 2, at 55. See also Kathleen A. DeLaney, *A Response to “Nannygate”: Untangling U.S. Immigration Law to Enable American Parents to Hire Foreign Child Care Providers*, 70 IND. L.J. 305, 306 (1994) (arguing that a shortage of Americans willing to provide live-in childcare forces families to hire nannies and au pairs from other countries).

91. Blumenthal, *supra* note 2, at 59. Sidney Blumenthal, writing in *The New Yorker*, tries to undercut Zoe Baird’s image as an affluent white woman by describing her as “a classic working-class striver, a meritocrat who rose by virtue of her own efforts and the impressive credentials that accrued as a result.” *Id.* at 54.

92. Joan C. Williams, *Sameness Feminism and the Work/Family Conflict*, 35 N.Y.L. SCH. L. REV. 347, 352-53 (1990).

93. *Id.* at 355. The solution, she writes, “is a direct challenge to the gendered structure of wage labor” where child rearing is balanced with work demands. *Id.* at 356. Williams’ solution, however, does not squarely address the needs of working-class women like Lillian Cordero.

94. For exceptions, see Suzanne Goldberg, *In Pursuit of Workplace Rights: Household Workers and a Conflict of Laws*, 3 YALE J.L. & FEMINISM 63, 76, 102 (1990) (arguing that laws regulating household workers based on group membership tend to harm individual members of the group; and that law generally is an ineffective means of addressing the abuses of household workers); Smith, *supra* note 25, at 852-53.

The failure of mainstream feminists to press harder for better childcare arrangements for working women and better wages for the women who work as nannies and house cleaners reflects feminists' "reluctance and ambivalence" about the topic of family and motherhood.⁹⁵ The reaction of other affluent women to Nannygate reflects a similar reluctance and ambivalence about work outside the home and parenting, and may explain why some affluent women employers of household workers distanced themselves from Baird, even when they, too, paid no Social Security taxes on their workers' wages.⁹⁶

Sociologist Pierrette Hondagneu-Sotelo surveyed and interviewed affluent women employers of paid household workers in Los Angeles.⁹⁷ Hondagneu-Sotelo found that an overwhelming majority of the women employers surveyed did not pay Social Security, Medicare and federal withholding taxes as required by law.⁹⁸ Yet these affluent working women believed Zoe Baird acted inappropriately in not paying Social Security taxes on Lillian Cordero's wages.⁹⁹

Echoing the legislative hearings, the women employers interviewed justified their own failure to comply with the law, stating that non-compliance is normative practice.¹⁰⁰ A few of the women employers surveyed even blamed the federal government or domestic workers for imposing these problems on hard-working families.¹⁰¹ These women employers distinguished their non-compliance with the law from Baird's, holding Baird to a higher standard than non-lawyers.¹⁰² Some women also applied this higher standard of accountability to "celebrities and people of Baird's socio-economic group."¹⁰³ Their responses, however, provide no clear guide to determine when one falls into Baird's socio-economic group.

95. Martha Albertson Fineman, *Preface* to *MOTHERS IN LAW: FEMINIST THEORY AND THE LEGAL REGULATION OF MOTHERHOOD* ix (Martha Albertson Fineman & Isabel Karpin eds., 1995). Race may also play a part in mainstream feminists' lack of activism during the Nannygate controversy, a point discussed later in the next section of this article.

96. Pierrette Hondagneu-Sotelo, *Affluent Players in the Informal Economy: Employers of Paid Domestic Workers*, 17 INT'L J. SOC. & SOC. POL'Y 130, 130 (1997).

97. *Id.*

98. *Id.* at 144. Of the 35 employers interviewed by Hondagneu-Sotelo, only four were complying with state regulations, and "[a]ll four individuals were potentially likely to come under public scrutiny." *Id.* at 145.

99. *Id.* at 147-48.

100. *Id.* at 148.

101. Hondagneu-Sotelo, *supra* note 96, at 150-51.

102. *Id.* at 147.

103. *Id.* at 148.

Hondagneu-Sotelo's study suggests that women employers, usually working women, of paid household workers seldom admit that they are part of the problem. Yet these employers are participants in an informal economy that exploits less privileged working women. "[T]he informal economic sector ... [consists of] those income-generating activities that occur outside of state regulation, where formal labor contracts, payment of taxes and benefits, and standard hiring are generally absent."¹⁰⁴ Upper middle-class and affluent working women hire household workers without formal contracts and pay these workers under the table to avoid liability for taxes and benefits—working conditions most working women employers would not tolerate.

B. Black Feminists: Zoe Baird, Not One of Us—Black Women as Domestic Workers, Myth or Reality

A few Black feminists focus on race rather than class aspects of Nannygate. These feminists interpreted Baird's explanation for hiring an undocumented, non-Black woman immigrant as a cover for the intentional displacement of Black women as in-home child caregivers and domestic workers.¹⁰⁵ Their impressions seemed confirmed when a second nominee, Federal District Court Judge Kimba Wood, also withdrew because she employed an undocumented childcare provider for seven years.¹⁰⁶ A letter in the June 1993 issue of the *American Lawyer* best expresses the sentiments within my circle of Black legal feminists. The letter read:

My point is that Americans like Zoë and Paul [Gewirtz, Baird's husband,] are hiring *illegal aliens* not because they're willing to work

104. *Id.* at 133.

105. This explanation was offered by some Black professional women at a meeting I attended shortly after the Baird nomination was withdrawn. There is some truth to their belief. "[W]hites, it must be said, frequently no longer want to employ blacks, in some cases out of malign prejudice, in others out of a lingering sense of guilt." David Frum, *Domestic Workers*, CURRENT, May 1997, at 39, 40. The author, however, goes on to remark, "Can anyone imagine Kimba Wood or Zoe Baird telling a black woman to clean their ovens?" *Id.* Unfortunately, Audre Lorde's anecdote about the white child in the grocery store who associates Black women, even children, with domestic work, suggests that in 1967 many Americans had no difficulty imagining this scenario. See *supra* notes 77-78 and accompanying text.

106. Blumenthal, *supra* note 2, at 61. Unlike Baird, Judge Wood paid Social Security taxes on her employee's wages, but violated federal law by employing an undocumented worker. Maureen Dowd, *Message and Morality; Concerns Over Public Relations and Ethics Clash in the Crisis of Clinton's First Weeks*, N.Y. TIMES, Feb. 3, 1993, at A1. The Immigration Reform and Control Act of 1986 (IRCA) imposes civil penalties on employers ranging from \$250 to \$2,000 per undocumented worker for the first violation and from \$2,000 to \$5,000 per worker for a second violation. 8 U.S.C. § 1324a(e)(4)(A) (1994). An employer found to have a pattern of hiring undocumented workers can be criminally prosecuted, and if convicted, fined up to \$3,000 per worker and imprisoned for up to six months. *Id.* § 1324a(f)(1).

for less than Americans, but because these people fit the domestic employer's idea of a good domestic employee.

....

... [W]e need to focus on why the unemployed Americans who would like the money Zoë and Paul were offering didn't seem attractive to Zoë and Paul.¹⁰⁷

The letter raises the question, what constitutes an "employer's idea of a good domestic employee?" Studies suggest that women hire domestic workers based on personal characteristics rather than skill.¹⁰⁸ They hire workers "with whom they feel comfortable in their household, rather than a worker who is able to complete certain tasks."¹⁰⁹ Race, class, gender, and increasingly, immigration status all influence worker selection.¹¹⁰ In addition, immigrant workers may be preferable because few native-born American women, including native-born Black women, are willing to take residential (live-in) home care jobs.¹¹¹

107. Fallon, *supra* note 3, at 21 (emphasis added).

108. Carole Turbin, *Domestic Service Revisited: Private Household Workers and Employers in a Shifting Economic Environment*, 47 INT'L LAB. & WORKING-CLASS HIST. 91, 92 (1995). "Most women who employ servants look for personal characteristics in their employees rather than expertise." *Id.*

109. *Id.*

110. "Although ideologies of 'race' and 'racial difference' justifying the dual labor system already were in place, specific ideas about racial-ethnic womanhood were invented and enacted in everyday interactions between mistresses and workers. Thus, ideologies of race and gender were created and verified in daily life." Glenn, *supra* note 43, at 142 (citing Barbara Fields, *Ideology and Race in American History*, in REGION, RACE, AND RECONSTRUCTION: ESSAYS IN HONOR OF C. VANN WOODWARD 143 (J. Morgan Kousser & James M. McPherson eds., 1982)). Carole Turbin writes:

[Judith] Rollins and others argue that women employers benefit from the "degradation" of servants "because it underscores the power and advantage . . . of being white and middle class." It is likely that it is all the more important for white middle-class women to affirm their racial and class status precisely because on some level they are conscious of being inferior and subordinate to men. Paradoxically, white middle-class women find that employing servants of an inferior class and race in the private domestic setting enables them to experience some of the benefits of their class and racial privileges they are denied in many formal institutions.

Turbin, *supra* note 108, at 93. Turbin counters that employer-employee relationships are not one-way arrangements, and domestic employees often find ways to resist employer subordination. *Id.* at 93-94.

111. Perhaps some employers want migrant home care workers to reside within their households "to insure full-time availability at their convenience." Fitzpatrick & Kelly, *supra* note 19, at 67-68. In turn, some household workers may be unwilling to reside in their employers' homes for reasons other than low pay. These workers express concerns about a lack of privacy and a desire for independence. DAPHNE SPAIN, GENDERED SPACES 175-79 (1992) (explaining why white women left domestic service early in the twentieth century). Further discussion of this point is beyond the scope of this article.

Too often white feminists focus on issues of concern to women of their race and class.¹¹² These feminists could identify with Zoe Baird's frustration in trying to secure competent in-home childcare because these feminists assume that women traditionally stayed at home to care for their families. In contrast, Black feminist theory is grounded in the experiences of native-born Black women.

Many Black feminists operate from the presumption that most Black mothers work outside the home, sometimes in the homes of white women.¹¹³ Twila Perry, for example, places primary emphasis on the role of race in driving exploitative domestic employment arrangements. Speaking directly to the Nannygate controversy she writes:

One of the largely unaddressed issues in the media controversies over the failed nominations of Zoe Baird and Kimba Wood to be Attorney General was the potential exploitation of women who take care of the children of white middle and upper-middle class professional women while they pursue careers outside of the home. These women usually end up employing poor minority women, often at low wages. Frequently, these arrangements are "off the books," which means that the workers do not receive job-related benefits such as social security, health insurance, unemployment compensation, or other protections.¹¹⁴

112. See generally Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990) (arguing that feminist legal theorists "[are] in danger of silencing those who have traditionally been kept from speaking, or who have been ignored when they spoke, including black women"). For non-legal scholarship discussing the failure of white feminists to adequately address issues affecting women of color, see Deborah K. King, *Multiple Jeopardy, Multiple Consciousness: The Context of a Black Feminist Ideology*, 14 SIGNS: J. WOMEN CULTURE & SOC'Y 42 (1981) (asserting that Black women's experiences are defined by multiple oppression or jeopardy); ALICE WALKER, IN SEARCH OF OUR MOTHER'S GARDENS (1983) (preferring the term "womanist" rather than "feminist" to describe a feminist of color); AUDRE LORDE, *Age, Race, Class and Sex: Women Redefining Difference*, in SISTER OUTSIDER: ESSAYS AND SPEECHES, *supra* note 77, at 114, 117 (stating that white women, in defining womanhood from their own experiences, marginalize women of color as the "other").

113. See Marlee Kline, *Race, Racism and Feminist Legal Theory*, 12 HARV. WOMEN'S L.J. 115, 130 (1989).

114. Perry, *supra* note 42, at 2509. She continues:

The current arrangement, whereby middle and upper-middle class white women pursuing careers avail themselves of the work of low-paid women of color and other poor women, is problematic for the feminist movement. It is true that the ability of these women to pursue their careers and maintain acceptable home lives is dependent upon their ability to obtain domestic help. It is equally true that they have an interest in paying as little as they can for that help. . . . Consequently, although obtaining jobs outside of the home may assist in the liberation of white women, it fails to challenge an important context for racial subordination—the domestic service relationship between Black and white women that has existed in this country since slavery. Indeed, such liberation can easily serve to reinforce this unequal relationship.

Id. at 2509-10.

Her assessment of the problem is only partially correct. Professor Perry overlooks the experiences of white European ethnics and non-white immigrants.¹¹⁵ The racial composition of childcare and other household workers is not constant, but varies based on economic, political and social circumstances. The racial or ethnic composition of paid domestic workers also depends on the type of domestic work.

Class can mediate race, even for Black women. Although more white than Black women can afford to employ household workers, affluent Black women also participate in exploitative employer-employee domestic worker relationships.¹¹⁶ Thus, affluent Black women, like their white counterparts, may escape being exploited as domestic workers only to participate in the exploitation of less privileged women, who may or *may not be Black*.¹¹⁷ The Black feminist critique often fails to acknowledge how class differences influence the concerns of Black women.¹¹⁸

C. Paid Domestic Workers: Class and Race Hierarchies

Despite the persistent stereotype, domestic work in the United States never was the exclusive domain of Black women. From 1870 until the 1940s, the vast

115. *But cf.* Dorothy E. Roberts, *Spiritual and Menial Housework*, 9 YALE J.L. & FEMINISM 51, 51 (1997) (arguing that spiritual housework, associated with white women, is highly valued because it is thought to be essential to the proper function of the household and moral child rearing, while menial housework associated with minority, immigrant, and working class women, is strenuous and unpleasant, and thought to require little moral or intellectual skill).

116. *See* Hondagneu-Sotelo, *supra* note 96, at 139 (describing a source of the author's research which consisted of interviews with 35 "affluent" employers of paid domestic workers in Los Angeles, one of whom was Black).

117. I confess to assigning my childcare and cleaning work to poor women over the course of my professional life. In the 1970s when I lived in Mississippi, following the example of my mother before me, I employed poor Black women to care for my children and clean my home. Although I paid them more than the minimum wage and paid Social Security taxes on their wages, financially, I could have afforded to pay them even more for the invaluable services they provided me and my family. During the 1980s and 1990s, I resorted to cleaning services that employed poor American Indian and white women in Oklahoma, and poor Black and white women in Baltimore to clean my home. I feel confident that the cleaning services pay their employees' Social Security taxes and unemployment insurance, but never determined whether these services also pay their employees a decent wage or provide health insurance.

118. One notable exception is Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539. Commenting on the outcome in *Chambers v. Omaha Girls Club*, 834 F.2d 698 (8th Cir. 1987), which upheld the dismissal of single-parent Crystal Chambers, Austin writes that young single parents may actually be consciously trying "to break out of the rigid economic, social, and political category that a racist, sexist, and class-stratified society would impose upon them." *Id.* at 555. Professor Austin argues that Chambers is being punished for resisting the Girls Club's efforts "to model her in conformity with white and middle-class morality." *Id.* at 557. She notes that Blacks, as well as whites, adopt middle-class standards of morality. *Id.*

majority of all women who worked outside the home did domestic work.¹¹⁹ The supply of domestic workers increased significantly between 1870 and 1910, but the demand exceeded the supply.¹²⁰ As white working-class women entered factories, white employers outside the South complained about the lack of native-born white servants.¹²¹ By the end of the nineteenth century, European immigrants—primarily Irish and German women—performed the majority of domestic work in the Northeast until World War I.¹²² In the Southwest, it was Mexican women, Black women in the South, and Japanese men and women in northern California and Hawaii.¹²³ Sociologist Evelyn Nakano Glenn writes: “Where more than one group was available for service, a differentiated hierarchy of race, color, and culture emerged. White and racial-ethnic domestics were hired for different tasks.”¹²⁴ So, even among domestic workers there is a racialized hierarchy of labor.

In addition, some domestic work is more highly valued than other domestic work. Social scientist Cameron Lynne Macdonald divides domestic work into three categories of household workers: (1) general workers who are responsible for all tasks related to the family; (2) more specialized workers who only perform housework; and (3) others, like nannies and au pairs, whose primary responsibility is childcare.¹²⁵ She classifies the first two categories of household workers as maids because they perform some housework. Domestic workers

119. JANET HOOKS, U.S. DEP’T OF LABOR, *WOMEN’S OCCUPATIONS THROUGH SEVEN DECADES* 52 (1947).

120. Smith, *supra* note 25, at 864-65.

121. *Id.* at 866. When the “employing classes . . . complained about an inability to locate domestics . . . [they] were usually bemoaning the lack of white women, native-born white women in particular.” *Id.*

122. DAVID M. KATZMAN, *SEVEN DAYS A WEEK: WOMEN AND DOMESTIC SERVICE IN INDUSTRIALIZING AMERICA 65-70* (1978); Glenn, *supra* note 43, at 121.

123. Glenn, *supra* note 43, at 121. “Until the First World War 90 percent of all nonagriculturally employed Black women in the South were employed as domestics.” *Id.*

124. *Id.* at 123 (referring to a study by Julia Kirk Blackwelder, *Women in the Work Force: Atlanta, New Orleans, and San Antonio, 1930 to 1940*, 4 J. URB. HIST. 331, 349 (1978)). During the first half of the twentieth century, “most white middle-class women could hire another woman—usually a recent immigrant, a working-class woman, a woman of color, or all three—to perform much of the hard labor of household tasks.” Phyllis Palmer, *Housewife and Household Worker: Employer-Employee Relationships in the Home, 1928-1941*, in “TO TOIL THE LIVELONG DAY”: AMERICA’S WOMEN AT WORK, 1780-1980, at 179, 182-83 (Carole Groneman & Mary Beth Norton eds., 1987).

125. Macdonald, *supra* note 3, at 244. According to MacDonald, social scientists who traditionally defined domestic work “as housework and as service to the master and mistress” recently have expanded the definition of domestic work to include childcare. *Id.*

who perform childcare, but no housework, are classified as nannies or au pairs.¹²⁶

Using Macdonald's classification system, the job described in the advertisement posted by Baird and her husband looks like a general worker, the first category of domestic worker, rather than the third category, childcare nanny.¹²⁷ Baird and her husband expected their nanny to do more than care for their infant son. Lillian Cordero was expected to do "light housekeeping" and cook dinner for Baird's family. In reality, she was a nanny in name only. Cordero performed labor traditionally associated with southern Black women domestic workers, but she was given a more prestigious job title—nanny.

Unsurprisingly, the type of paid domestic work performed also has economic significance. Comparing weekly wages, Macdonald found that domestic workers whose primary responsibility is childcare are paid better than workers whose primary responsibility is housework.¹²⁸ Assuming that childcare providers' higher pay accurately reflects the value ascribed by employers to childcare versus housework, in the hierarchy of domestic work, childcare ranks above housework. There is reason to believe that this stratification between housework and childcare continues today. "In one section of Brooklyn, West Indian workers shun the title 'domestic,' and are choosing only the higher status child-care positions."¹²⁹

126. *Id.* at 244-45. There is a difference between a nanny and an au pair. One national nanny organization defines a nanny as someone

[e]mployed by the family on either a live-in or live-out basis to undertake the tasks related to the care of children. Duties are generally restricted to child care and the domestic tasks related to child care. May or may not have had any formal training, though often has a good deal of actual experience. Nanny's work week ranges from 40 to 60 hours. Usually works unsupervised.

International Nanny Association, *INA In-Home Child Care Definitions* (visited Oct. 9, 1998) <<http://www.nanny.org/inhome.html>>. The INA divides au pairs into two categories, "American" and "Foreign." The association defines an American au pair as someone who "[l]ives with the family and provides help with light housework and child care 40 to 60 hours per week. Usually works under the direct supervision of the parent. May or may not have any previous child care experience." *Id.* A foreign au pair is defined as a "[f]oreign national in the United States for up to a year to experience American life. Lives as part of the host family and receives a small stipend in exchange for babysitting and help with housework. May or may not have previous childcare experience." *Id.*

127. Macdonald, *supra* note 3, at 244.

128. *Id.* at 245.

129. Maria Laurino, "I'm Nobody's Girl": New York's New Indentured Servants, *VILLAGE VOICE*, Oct. 14, 1986, at 17, 24 (describing the plight of undocumented women who work as domestics in New York City).

V. PAID DOMESTIC WORKERS: WORKING CLASS WOMEN IMMIGRANTS

Largely ignored during the Nannygate controversy was Cordero's status as an undocumented worker. Baird raised the issue of Cordero's immigration status only to justify nonpayment of Social Security taxes.¹³⁰ In the end, Baird employed an undocumented foreign-born woman as a childcare provider, driven, she claimed, by the fact that she could not obtain satisfactory services from native-born workers.¹³¹

Starting in the 1980s, the number of women household workers grew steadily, reaching levels comparable to the early twentieth century, when domestic work was the most common women's occupation.¹³² Increasingly, immigrant women in the United States perform this work;¹³³ thus, domestic labor has a global dimension.¹³⁴ Joan Fitzpatrick and Katrina R. Kelly argue that feminists, when critiquing international law, tend to ignore how migration and globalization influence policy and reallocate wealth among women and men.¹³⁵ They conclude that both feminist and academic migration scholars pay

130. IRCA imposes penalties on any employer who hires or employs undocumented alien workers. 8 U.S.C. § 1324(a)(1)(A). The IRCA "mandates" civil and criminal penalties for any employer who knowingly hires an undocumented worker. *Id.* § 1324a(f)(1). Gewirtz, Baird's husband, was advised by immigration lawyers not to pay Social Security taxes for Cordero because the Department of Labor would not accept them because Cordero was undocumented and had no Social Security card. Blumenthal, *supra* note 2, at 55.

131. *See supra* notes 89-90 and accompanying text..

132. Turbin, *supra* note 108, at 91. "From 1870 to 1940, domestic service was the predominate occupation of all gainfully employed women." Smith, *supra* note 25, at 865 (citing HOOKS, *supra* note 119, at 52).

133. Hondagneu-Sotelo, *supra* note 96, at 131. "In many areas of the United States, paid domestic work is today performed almost exclusively by Latina and Caribbean immigrant women . . ." *Id.* "[H]omeworkers who are not independent contractors . . . [are a] predominately female and immigrant population." Crain, *supra* note 1, at 1907 n.18.

134. Turbin, *supra* note 108, at 91.

As in former periods of massive immigration . . . many [women immigrants] . . . seek employment as domestic servants. . . . As immigrants, they have much in common with Irish, German, and Scandinavian women who worked as domestic servants from the mid-nineteenth century to World War I. As women of color, they are similar to African-American women who worked as domestic servants in the Northeast after World War I (when white immigrants and their daughters took manufacturing and white-collar jobs), to Asians in the far West, and to Mexicans and Native Americans in the Southwest.

Id.

135. Fitzpatrick & Kelly, *supra* note 19, at 51. "Feminist critiques of international law tend to unmask masculine values embedded in prevailing notions of force, diplomacy and the state system, rather than to examine migration and the effects of globalization on the reallocation of wealth and policy influence among men and women." *Id.*

little attention to the conditions of female migrants.¹³⁶ With few exceptions, migrants are constructed as male.¹³⁷

Today, approximately twenty-five percent of foreign-born women in the United States are household workers.¹³⁸ Like the past, there is a racialized hierarchy among immigrant domestic workers. In New York City, for example, non-English speaking Haitian women are paid less than women from English-speaking Caribbean countries.¹³⁹ Latinas who do not speak English earn more than Black women from Haiti or English-speaking Caribbean countries because some employers consider (presumably light-skinned) Latinas white.¹⁴⁰

Some migrant women work as in-home childcare providers.¹⁴¹ These foreign-born household workers with limited job options are especially vulnerable to employer abuse. Although protected by labor laws, undocumented (and documented) foreign-born workers rarely report employers because they fear loss of income and possible deportation.¹⁴² Their stories of abuse are common and horrifying.

[Yuni Mulyono] was recruited in Indonesia by a wealthy fellow countrywoman and her American husband and brought to Los Angeles to do housework. "I began working when I got up in the morning ... and I worked until it was time to go to bed at night. I prepared the family's breakfast and lunch, cleaned the kitchen and living room ... I had to wake up their daughter, get her dressed and ready for school. After they left the house I had to clean up the back yard. I had to feed and clean up after their two dogs. Every day I did laundry and washed the bathroom. I fixed the dinner and served it and washed the dishes.

136. *Id.* at 52.

137. Joan Fitzpatrick, *The Gender Dimension of U.S. Immigration Policy*, 9 YALE J.L. & FEMINISM 23, 24-26 & n.17 (1997) (discussing the gendered nature of migration and complacency of U.S. immigration policies toward the "differential harm" experienced by women).

138. DONNA GABACCIA, *FROM THE OTHER SIDE: WOMEN, GENDER, AND IMMIGRANT LIFE IN THE U.S., 1820-1990*, at 54 (1994).

139. Laurino, *supra* note 129, at 18. "The going rates are \$150 a week plus room and board for an inexperienced woman from the English-speaking Caribbean. Haitians come cheaper. Their starting salary ranges from \$100 to \$125 a week, but most agencies won't work with them because of the language barrier—the women speak Creole—and Americans' fear of AIDS. *Id.*

140. *Id.* "A Hispanic woman who doesn't know English is likely to start at \$200 a week, since she's white." *Id.*

141. *Id.* at 31.

142. For examples of employer abuse, see Martha F. Davis, *Domestic Workers: Out of the Shadows*, 20 HUM. RTS. 14, 14-15, 28 (1993). A recent memorandum of understanding between the Department of Labor and the INS allows undocumented workers to file complaints about employer violations of minimum wage and overtime pay without questioning the legal status of the complaining employees. *Deal Permits Immigrants' Wage Complaints*, N.Y. TIMES, Nov. 29, 1998, § 1, at 32.

Sometimes the wife would ask me to give her a massage in the evening, and I would do that too."¹⁴³

For almost three years Ms. Mulyono worked sixty-five hours a week for \$100 a month.¹⁴⁴ When she sued for back wages, her employers claimed that Ms. Mulyono was "an ungrateful 'guest' in their home who spent her time engaging in 'vacation and leisure time activities.'"¹⁴⁵

A family relative of an Indian businessman and his Indonesian wife recruited Francesca Ekka, a twenty-three-year-old Indian woman described by a newspaper as "an au pair and housekeeper for an affluent couple with two children."¹⁴⁶ Ms. Ekka entered the United States on a tourist visa and was held in virtual servitude and physically abused by the couple in Miami.¹⁴⁷ The couple was convicted of "conspiring to hold Ms. Ekka in involuntary servitude, inducing her to reside in the United States illegally and harboring her in violation of immigration laws."¹⁴⁸

The conviction of this couple is unusual. Criminal action against employers is rare, according to news reports, because abuse of domestic workers occurs in the privacy of the home making the abuse difficult to document and expose.¹⁴⁹ Stories like Ms. Ekka's involving abuses by foreign-born employers from Asian or Middle Eastern countries often are widely publicized, which gives the mistaken impression that cultural differences, rather than the exploitative nature of the employee-employer relationship, explain employer

143. David Bacon, *Last Lawsuit—Back Pay Award a Bittersweet Victory for Domestic Worker*, PAC. NEWS SERVICE, June 12, 1997, at 1-2, available in LEXIS, News Library, Wire Service Story File.

144. Patrick J. McDonnell, *Domestic Worker Given Back Pay in Rare Win*, L.A. TIMES, June 1, 1997, at A1.

145. *Id.*

[T]he judge rejected as a "nonissue" Mulyono's immigration status. . . .

. . . .

Live-in positions, experts say, represent the most exploitation-prone segment of domestic employment. These workers, typically non-English speakers, are often isolated in suburban homes, dependent on bosses for transportation, and cut off from networks of other immigrants, thus deprived of knowledge about prevailing wages and conditions. Distinctions between work hours and free time are especially ill-defined for live-in workers.

Id. The court awarded Mulyono \$47,827, but her future was uncertain because her former employers still have her passport and "if the judgment holds up on appeal, it could be some time before she sees the back wages." *Id.*

146. Mireya Navarro, *In Land of the Free, a Modern Slave*, N.Y. TIMES, Dec. 12, 1996, at A22.

147. *Id.*

148. *Id.* Ekka's employers faced up to five years in jail and \$250,000 in fines. *Id.*

149. *Id.*

abuse of domestic workers, but there is documentation that employer abuse has no cultural limits.¹⁵⁰

United States immigration laws also facilitate the exploitation of foreign-born household workers by middle-class and affluent employers. Employers hire foreign childcare providers who are either: (1) J-1 visa (exchange visitor visa) candidates; (2) H-2B non-immigrant visa candidates (unskilled workers); or (3) undocumented workers.¹⁵¹ A brief review of the procedures for the J-1 and H-2B visas illustrates why recruiting undocumented workers, although illegal, is the easiest and most inexpensive route for employers.

A. *Au Pairs*

Although the exchange visitor visa (au pair program) is the easiest legal way to obtain a foreign-born childcare worker, there are few exchange programs. Since 1986, approximately 60,000 women between the ages of eighteen and twenty-five entered the United States on J-1 visas to work as au pairs.¹⁵² Under the Mutual Educational and Cultural Exchange Act of 1961,¹⁵³ non-immigrants, like teachers, medical students, or research scholars, who come to the United States to study usually get J-1 visas.¹⁵⁴ The Act's goal is "to provide a cross-cultural exchange, improve the au pair's English . . . and to assist host families with child care."¹⁵⁵ To comply with the letter of the law, au pair candidates must agree to come to the United States for only one year and take educational courses,¹⁵⁶ but many au pairs never take any courses while in the United States.¹⁵⁷

Although difficult to get, au pairs are a cheap and unregulated source of childcare,¹⁵⁸ making them desirable childcare options for many affluent

150. See, e.g., Davis, *supra* note 142, at 14-15, 28.

151. DeLaney, *supra* note 90, at 307.

152. Alvin A. Snyder, *A Look at . . . Au Pairs; Uncle Sam's Babysitting Service*, WASH. POST, Nov. 9, 1997, at C3.

153. 22 U.S.C. § 2451 (1994).

154. Snyder, *supra* note 152, at C3.

155. DeLaney, *supra* note 90, at 311.

156. 22 U.S.C. § 2452(a)(1)(i)(B) (1994).

157. Snyder, *supra* note 152, at C3.

158. The average annual cost of an au pair is about \$11,000 to \$12,000. "The host family pays the sponsor agency about \$4,000, and gives the au pair a stipend of about \$140 per week, in addition to providing room and board, for no more than 10 hours work a day or 45 hours per week." *Id.* The current minimum wage is \$5.15 per hour which translates into a weekly working wage of \$231.75 or \$12,051 for 52 weeks of work, not counting Social Security and Medicare taxes, or state and federal unemployment insurance premiums. BUREAU OF THE CENSUS, *supra* note 4, at 433 tbl.674 n.1. More

families. According to one agency, "an au pair 'costs . . . less than day care and gives your family a culturally enriching experience of hosting a well-educated, English-speaking European.'" ¹⁵⁹ More importantly, employers are not required to pay Social Security taxes on au pairs' wages, nor file IRS W-2 employment forms. ¹⁶⁰ In addition, as mentioned previously, most au pairs are white and come from Western Europe, ¹⁶¹ satisfying those employers who want a live-in employee who looks most like them.

In addition, the work arrangement, as well as the job title, *au pair*, sound genteel and less exploitative than babysitter. In reality, au pairs do much more than babysit their employer's children. They may be required to drive children to school, appointments, outings or errands, prepare meals, do laundry and clean the children's rooms. ¹⁶²

The United States Information Agency (USIA), the agency responsible for administering the program, complains that au pairs are simply "live-in domestics." ¹⁶³ Yet in 1990, Congress rejected suggested program changes, mandating instead that "USIA continue administering the au pair program 'without change' until such time as the program is transferred to another federal agency." ¹⁶⁴ Much of the pressure to continue the program unchanged came from au pair host families. ¹⁶⁵

importantly, it may be difficult, if not impossible to find a "nanny" who would work for \$231.75 a week. "So why do we expect an untrained teenage girl to be able to manage an infant—just because we call her an au pair?" Penelope Leach, *Children Minding Children*, N.Y. TIMES, Nov. 5, 1997, at A27. Leach's answer is that au pairs are a cheap source of labor. *Id.*

159. Snyder, *supra* note 152, at C3. This agency sent Louise Woodward, the then 18-year-old English au pair convicted in 1997 in the death of her eight-month-old charge, Matthew Eappen. *Id.*; Leach, *supra* note 158, at A27. Matthew's death while in the custody of Louise Woodward is just one of several recent tragedies involving small children and their au pairs. Snyder, *supra* note 152, at C3. "In 1993, a German au pair was convicted in Massachusetts of child abuse and deported. And in 1994 in Loudoun County, a 19-year-old Dutch au pair was charged with shaking to death an infant in her care and was returned to the Netherlands on a plea bargain." *Id.*

160. Snyder, *supra* note 152, at C3.

161. *Id.*

162. *Id.* (describing the information provided to potential host families by Au Pair in America, the largest "sponsor" agency in the United States).

163. *Id.*

164. *Id.* USIA suggested that the maximum number of hours an au pair could work per week be reduced from 45 to 30. *Id.* It was suggested that the Labor Department become involved in the regulation of the program since 45 hours of work weekly constitutes full-time employment. Snyder, *supra* note 152, at C3.

165. *Id.*

Au pair families flooded the USIA and Congress with letters, faxes and phone calls supporting the au pair program as it stood. "All hell broke loose," recalled USIA's general counsel Normand Poirier. A former general counsel of the USIA told [the reporter] that executives of the au pair agencies claimed that anything less than 45 hours a week would

B. Unskilled Workers

The unskilled worker visa process is a less attractive option for obtaining a foreign-born resident home care worker. The lengthy visa process requires potential employers to prove that they are unable to fill the position with an American worker, and “sponsored” workers only receive temporary visas.¹⁶⁶ In addition, there are few visas available for unskilled workers.¹⁶⁷ Foreign-born workers are permitted to work temporarily in the United States only if their presence will not have a harmful impact on American workers.¹⁶⁸ Although the unskilled worker visa is a less attractive option from an employer’s perspective for the reasons previously stated, it is a legal means of obtaining foreign-born domestic help.

Following the Nannygate controversy, pressure to simplify this visa process grew. In February 1993, the Federal Commission on Immigration Reform heard testimony supporting some type of immigration program for household workers.¹⁶⁹ One proposal, modeled after Canada’s “Live-in Caregiver Program” would have created a subcategory of H-2B non-immigrant visas for employers who swear that they cannot find a “qualified” U.S. citizen or resident home care worker.¹⁷⁰ Under another proposal, foreign-born workers outside and inside the country could apply directly for H-2B visas once the Department of Labor determines that there is a shortage of household workers and if applicants demonstrate previous work in the “home care” industry, as well as an intention to remain in the industry.¹⁷¹

Neither proposal was accepted.¹⁷² In April 1994, the Department of Labor created a job classification for “nannies” with two years of formal training and childcare experience.¹⁷³ Quickly reversing itself, a Labor Department official

be “commercially unmarketable.”

Id.

166. DeLaney, *supra* note 90, at 307-10.

167. *Id.* at 308 (explaining that Congress only issues 66,000 H-2B visas yearly with childcare workers only constituting a portion of the total).

168. *Id.* at 310.

169. Grace Chang, *Disposable Nannies: Women’s Work and the Politics of Latina Immigration*, 67 RADICAL AM. 5, 13 (1996).

170. *Id.*

171. *Id.* at 13-14.

172. Sue Shellenbarger, *Nannygate Reversal Enrages Advocates*, WALL ST. J., Apr. 27, 1994, at B1.

173. *Id.*

wrote that “the move was ‘based on insufficient fact-finding and research.’”¹⁷⁴ Despite these problems, foreign-born women may be lured into live-in domestic situations on unskilled worker visas by the promise of a green card.

To the immigrant, [an employer’s promise to sponsor a green card application] seems a worthy gamble—a few years work as a domestic may lead to citizenship. The sponsoring employer needs to prove it’s a necessity to have a live-in domestic or that there aren’t enough Americans to fill the job. . . . [but t]here’s no guarantee that sponsorship will lead to a green card and many cases have been denied at the initial stage.¹⁷⁵

The au pair and H-2B non-resident visa programs work against unskilled native-born women and foreign-born women with families.¹⁷⁶ Pressure to retain both programs and facilitate visas for foreign-born resident home care workers illustrates how affluent working women and powerful men perpetuate a division of labor in the home that is gendered female, undervalued, and consequently underpaid. Mainstream feminism’s failure to effectively articulate and actualize policies that value and adequately compensate people who perform traditional household tasks contributes to the continued impoverished circumstances of home care workers.

VI. SEARCHING FOR SOLUTIONS

A. Complex Problems Suggest Complex Solutions

The absence of any comprehensive regulatory scheme for paid domestic labor helps perpetuate potentially exploitative employment situations, and poor women workers are most likely to be exploited under the current regime.¹⁷⁷ Legal feminists have not focused on the plight of domestic workers for several reasons. Charlotte Rutherford, a Black feminist, writes:

174. *Id.*

175. Laurino, *supra* note 129, at 17-18.

176. It is difficult for women migrants with children to bring their children into the United States unless the mother has permanent resident status. Shellee Colen, “*Like a Mother to Them*”: *Stratified Reproduction and West Indian Childcare Workers and Employers in New York*, in *CONCEIVING THE NEW WORLD ORDER: THE GLOBAL POLITICS OF REPRODUCTION* 78, 80 (Faye D. Ginsburg & Rayna Rapp eds., 1995).

177. Lisa Lowe writes: “legal institutions *reproduce* the relations of production as *racialized gendered relations*, and are therefore symptomatic *and* determining of the relations of production themselves. . . . [I]mmigration law reproduces a racially segmented and stratified labor force for capital’s needs” Lisa Lowe, *The International Within the National: American Studies and Asian American Critique*, 40 *CULTURAL CRITIQUE* 29, 29, 32 (1998) (arguing that “racialized” immigration is a continuous component in the historical development of modern capitalism and “racialized democracy” in the United States).

A primary problem has been the focus of the [mainstream feminist] movement's legal efforts on removing those barriers which prevent women from occupying traditionally male jobs, and its failure to address the issues that are most important to working, and especially low-income, women. . . .

. . . With the modest exception of pay equity theories, early legal efforts to achieve this goal within the employment context targeted the removal of barriers and the movement of women into occupations from which we historically had been excluded The goal was to allow women access to the same jobs as white men

At the same time, little attention was being paid to improving conditions in traditionally female occupations. . . .

Both women's advocacy groups and civil rights organizations focused on moving women "upward" . . . to improve the economic position of women in the workforce.¹⁷⁸

Second, the relationship between domestic worker and employer raises class and racial overtones usually ignored by white feminists and immigration issues usually ignored by both white and Black feminists.¹⁷⁹ Third, paid in-home domestic work falls within the private sphere, where regulation is discouraged.¹⁸⁰ Finally, the feminist movement has never resolved the ambivalence and guilt of women who work outside the home, leaving their children behind.¹⁸¹

Working women with children constantly complain about the problems of juggling work and family. The two options most often advanced—adopt the traditional male workaholic model and then hire a surrogate mother to care for home and family, or work part-time outside the home, sacrificing professional advancement—are unsatisfactory to most women.¹⁸² Mainstream feminists who emphasize careers outside the home by implication devalue mothering as equally important work. We need new models that support and encourage

178. Charlotte Rutherford, *African American Women and "Typically Female," Low-Wage Jobs: Is Litigation the Answer?*, 17 YALE J. INT'L L. 211, 211, 216-17 (1992) (arguing that while legal victories opened new and better paying jobs for Black workers, the poverty level among Black families headed by working women remained unaffected).

179. See *supra* Part IV.A-B.

180. See *supra* Part II.A-B.

181. See discussion *supra* Part II.C.

182. See *supra* notes 92-93 and accompanying text.

women and men who wish to stay home and “mother” their young children, and when needed, receive financial support from the state for doing an important job—raising this country’s next generation of citizens. Since women, whether mothers or not, still have primary responsibility for housework, elevating or revaluing domestic work (including childcare) is an issue around which a global feminist model could be developed.

Given the multiple issues connected to paid domestic work, developing an analytical lens through which to process and address all the issues is difficult. A decade ago critical race feminist Kimberlé Crenshaw advanced her intersectionality theory, the notion that some types of subordinating conduct cannot be analyzed using “a single categorical axis.”¹⁸³ Professor Crenshaw’s theory of intersectionality captures an approach to feminism similar to the unified-systems theory adopted by some socialist feminists. Unlike liberal,¹⁸⁴ radical,¹⁸⁵ or cultural feminism,¹⁸⁶ socialist feminism argues “that because male

183. Crenshaw states:

[D]ominant conceptions of discrimination condition us to think about subordination as disadvantage occurring along a single categorical axis. . . . limiting [our] inquiry to the experiences of otherwise-privileged members of the group. In other words, in race discrimination cases, discrimination tends to be viewed in terms of sex- or class-privileged Blacks; in sex discrimination cases, the focus is on race- and class-privileged women.

....

... These problems of exclusion cannot be solved simply by including Black women within an already established analytical structure. Because the intersectional experience is greater than the sum of racism and sexism, any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which Black women are subordinated. Thus, for feminist theory and antiracist policy discourse to embrace the experiences and concerns of Black women, the entire framework that has been used as a basis for translating “women’s experience” or “the Black experience” into concrete policy demands must be rethought and recast.

Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140.

184. “Liberal feminism directs itself toward winning equality for women within existing structures; the legitimacy of the economic and political systems is assumed.” Crain, *supra* note 1, at 1927. Crain states that liberal feminism was inspired by the politics of the National Organization for Women (NOW) and Betty Friedan’s *THE FEMININE MYSTIQUE* (1963). *Id.* at 1926-27. Cass Sunstein calls this approach “difference” feminism. Cass R. Sunstein, *Feminism and Legal Theory*, 101 HARV. L. REV. 826, 827 (1988) (reviewing CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987)). Joan Williams calls this approach “sameness feminism.” Joan C. Williams, *Sameness Feminism and the Work/Family Conflict*, 35 N.Y.L. SCH. L. REV. 347, 347-48 (1990) (citing Cynthia Fuchs Epstein, *Faulty Framework: Consequences of the Difference Model for Women in the Law*, 35 N.Y.L. SCH. L. REV. 309, 310-11 (1990), as an example of legal sameness feminist writing, in which Epstein argues that focusing on gender differences perpetuates inequality).

185. “Radical feminism posits sex-based subordination as the primary locus of oppression; gender oppression is viewed as the root of all other sources of oppression.” Crain, *supra* note 1, at 1927. Radical feminists focus on “issues of sexuality, sexual violence, and reproductive capacity, and away from issues of livelihood.” *Id.* at 1929. Crain states that contemporary radical feminists drop the “radical” label, calling themselves “simply ‘feminists’” (citing CATHARINE A. MACKINNON, *TOWARD*

dominance, capitalism, and racism are inextricably intertwined, it is necessary to construct a [feminist] theory that takes account of the multiple bases of oppression[, because] a challenge to any one alone is inadequate.”¹⁸⁷ As a result, socialist feminists might view the status of women household workers in the context of how the under regulation and gendering of childcare and other domestic work as women’s work reenforces both the public-private and worker/mother dichotomies,¹⁸⁸ and creates a market for migrant women workers, an approach used in this article. Socialist legal feminists, for example, might argue that women who stay home to care for young children should be paid a salary commensurate with school teachers since mothering involves many of the same skills. Mothering must be seen as work that is highly valued in both moral and monetary terms.

Socialist feminism also is a helpful analytical lens because it allows us to consider how globalization contributes to the resurgence of a female, largely non-white servant class in the United States.¹⁸⁹ By looking at domestic workers

A FEMINIST THEORY OF THE STATE 117 (1989)). *Id.* at 1928. Professor Sunstein calls this approach “dominance” feminism. Sunstein, *supra* note 184, at 828-29.

186. In contrast to radical feminism, cultural feminism focuses on women’s positive “gendered attributes, particularly their nurturing and caretaking skills . . . to reverse the cultural devaluation of the female.” Crain, *supra* note 1, at 1929-30.

Cultural feminists . . . [like radical feminists] focus on reproduction, childbirth, and childrearing, but they identify these areas as the source of women’s power, rather than the locus of their oppression. . . . Because economic class struggle is not a significant part of white upper and middle class women’s cultural experience, cultural feminists tend to dismiss it as irrelevant to women.

Id. For examples of cultural feminism, see CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT (1982) (stating that men and women have “different” voices, operating upon differences in experiences and modes of thought); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 3 (1988) (arguing that the term “human being” that is often assumed by modern legal theory contrasts with the term “woman” constructed by modern feminist theory).

187. Crain, *supra* note 1, at 1931-32 (citing ALISON M. JAGGAR, FEMINIST POLITICS AND HUMAN NATURE 124 (1983)). According to Crain, there are two strands of socialist feminists: dual-systems theory advocates who “analyze[] patriarchy and capitalism separately, and then assess[] their dialectic relation to one another” and unified-systems advocates who “analyze[] capitalism and patriarchy simultaneously, filtering all aspects of women’s oppression through a single conceptual lens.” *Id.* at 1932, 1934.

188. According to Crain, a unified-systems socialist feminist theory would consider “women’s oppression not just as women, or as workers, but as women workers.” *Id.* at 1934.

189. In the 1970s, sociologist Lewis A. Coser and others predicted that servants would disappear from the workforce in the United States, but increasing numbers of two-income middle- and upper-middle class families, and non-white immigrant population in a system where “capitalists and politicians have fought expanded social services and people privately buy what is available by right in welfare states such as Sweden” fosters a thriving servant class. Julia Wrigley, *Feminists and Domestic Workers*, 17 FEMINIST STUD. 317, 317-18 (1991) (reviewing MUCHACHAS NO MORE: DOMESTIC WORKERS IN LATIN AMERICA AND THE CARIBBEAN (Elsa M. Chaney & Mary Garcia Castro eds., 1989) & PHYLLIS PALMER, DOMESTICITY AND DIRT: HOUSEWIVES AND DOMESTIC SERVANTS IN THE UNITED STATES, 1920-1989 (1989)).

from a global perspective it is easy to understand how the lack of work in poor countries creates a flow of low paid workers into more developed countries. Adopting a socialist feminist approach to the plight of home care workers, however, might result in a theory without practical application. Socialist feminism requires significant structural changes that are unlikely to occur in a capitalistic country like the United States. Socialist feminism also requires a level of activism and involvement to reach and mobilize working class women.

When unions were a strong presence on the U.S. political scene, they provided an entry point for this kind of activism, but now “socialist feminism has become a creature of theory rather than practice, finding its home . . . primarily within the academy.”¹⁹⁰ Crain suggests putting working class women at the center of the feminist agenda and using collective action and non-litigation strategies to mobilize working women around concrete issues.¹⁹¹ Collective action, while useful, will not address the concerns of all household workers. Domestic work in this country has both racial and citizenship components which tend to separate rather than unite working class women. In addition, household workers often labor in isolation from each other, further hindering mobilization efforts.

B. Mobilizing Household Workers

Almost a decade ago Suzanne Goldberg wrote about the limitations inherent in relying only on legal regulation to improve the working conditions and wages of household workers.¹⁹² Goldberg advocates developing laws that “enhance ‘community’ organizing” so that workers might support laws that facilitate a balancing of the often conflicted interests of people who do the same type of work.¹⁹³ History suggests, however, that community organizing alone seldom produces significant structural changes. At various points in the twentieth century, household workers organized to improve working conditions.¹⁹⁴ Most of these efforts were either unsuccessful or resulted in small changes.

More recently, social scientist Mary Romero studied Chicana household workers in Denver, documenting the humiliation and degradation of the

190. Crain, *supra* note 1, at 1935.

191. *Id.* at 1937-38.

192. Goldberg, *supra* note 94, at 102-04. “Absent broader changes in the background of the employment relationship and in the worker’s own sense of empowerment, any legally-imposed change or improvement in one facet of the job will cost the worker bargaining power in another area.” *Id.* at 103.

193. *Id.* at 104.

194. *Id.* at 89-91.

workers at the hands of their employers.¹⁹⁵ Romero found, however, that the Chicana household workers she studied resisted their subordination, establishing informal strategies to improve their position, negotiating schedule changes, length of work day, and payment by the job rather than the hour.¹⁹⁶ They negotiated with individual employers for their labor. Romero argues that the transformation by the Chicana workers in Denver of their work from hourly into fee-for-service work holds the promise of “eliminat[ing] aspects of hierarchy along the lines of gender, race, and class.”¹⁹⁷

The women in Romero’s study may be exceptional, and if not, then the reasons for their success bears closer scrutiny by feminists as we search for solutions. Nevertheless, the household work most likely to be transformed into a fee-for-service occupation is house cleaning and group childcare outside the home, not residential childcare. Residential or in-home childcare, the preferred model for affluent parents, will remain a potentially exploitative and under regulated employment situation. Feminists, some of whom are employers of domestic workers themselves, may find it difficult to encourage their workers to press for better employment conditions because of conflicting interests.

C. Ambivalent and Affluent Mothers

The Zoe Baird problem touches very few working women, only those at the very top and bottom of the labor hierarchy, since the vast majority of working families cannot afford in-home or residential childcare.¹⁹⁸ Richard T. Gill, discussing the findings of two reports about the benefits of parental care versus out-of-home care on the well being of children, posits that federal childcare-related legislation enacted in the early 1990s was concerned less with policies that were most beneficial to children than policies that facilitated parents who worked outside the home.¹⁹⁹ This focus on facilitating out-of-home

195. MARY ROMERO, *MAID IN THE U.S.A.* (1992).

196. *Id.* at 141-60. Informal networks for immigrant women home care workers exist for sharing strategies. *See, e.g.,* Doreen Carvajal, *For Immigrant Maids, Not a Job but Servitude*, N.Y. TIMES, Feb. 25, 1996, at A1.

197. ROMERO, *supra* note 195, at 15.

198. As increasing numbers of women with children work outside the home, most childcare also occurs outside the home. *See supra* note 39 and accompanying text. “There is virtually no regulation of the industry. Only 16 states require training to obtain home care licenses. Inspection is spotty or non-existent.” Belton & Wark, *supra* note 39, at B1. As a result, there are many unlicensed providers who keep overall wages for child-care workers low. The average wage, despite the fact that many workers are college-educated, is \$6.70 per hour compared with the national average of \$11.25 per hour for all workers. *Id.* “Meanwhile, the current economics means zoo keepers earn more per hour than day-care providers, and it takes more certification to become a dog groomer than it does to become a day-care worker.” *Id.*

199. Richard T. Gill, *Day Care or Parental Care?*, 105 PUB. INTEREST 3, 3-13 (1991).

employment, he argues, rests on the assumption present in both reports: "[T]hat the nation really has no alternative. . . . [T]hat socioeconomic forces are moving us in the direction of non-parental child care" ²⁰⁰ According to one of the reports, the increased number of single-parent families and mothers of young children who enter the labor force leave us no viable alternative except non-parental childcare. ²⁰¹

Legal feminists, rather than accept these trends, should initiate public debates about parenting and the construction of motherhood. In the absence of such debate, the ambivalence and guilt of affluent feminists about mothering remains a barrier to meaningful change. Mary Romero writes that she

was not prepared for scholars and feminists to respond to [her] scholarly works as housewives or employers. [She] was also surprised to discover that many of the maternalistic practices traditionally found in domestic service were common practices in their homes. . . . When, through [her] research, [she] pointed out the contradiction, many still had difficulty thinking of their homes . . . as someone's workplace. Their overwhelming feelings of discomfort, guilt and resentment, which sometimes came out as hostility, alerted [Romero] to the fact that something more was going on. ²⁰²

Romero concludes that "[d]omestic service must be studied because it raises a challenge to any feminist notion of 'sisterhood.'" ²⁰³

Affluent feminists who supported the Nanny Tax law constitute a group against patriarchy, yet not for women. ²⁰⁴ The failure of women's groups to strongly support comprehensive government regulation of wage and hour provisions for household workers, which is a rather modest proposal, leaves labor performed in the home undervalued, underpaid, and under regulated.

200. *Id.* at 8.

201. *Id.*

202. ROMERO, *supra* note 195, at 14. For a personal narrative by an affluent woman expressing some of these feelings, see Jennifer Nedelsky, *Dilemmas of Passion, Privilege, and Isolation: Reflections on Mothering in a White, Middle-Class Nuclear Family*, in MOTHER TROUBLES: RETHINKING CONTEMPORARY MATERNAL DILEMMAS, 304, 314-322 (Julia E. Hanigsberg & Sara Ruddick eds., 1999).

203. ROMERO, *supra* note 195, at 15.

204. This is a traditional complaint against white feminists in particular. Kathryn Branch writes:

Ironically, feminists have historically been seen by many not as a group for women, but as a group against men. This characterization is consistent with the cultural pressures that confine appropriate women to subordinate, supportive roles. The negative connotations applied to the feminist movement gave credence to hostility directed at its proponents—bias which still exists today.

Branch, *supra* note 40, at 122 n.8.

Although Black feminists, using race as a starting point, acknowledge that the gender and class of the employer and the worker influence government labor policies, their critique does not go far enough. There is an international market for household workers and few regulations to protect women like Lillian Cordero from exploitation. Thus, a more global analysis is needed.

VII. CONCLUSION

One of the ironies of the Zoe Baird controversy is that her spouse, Paul Gewirtz, not Baird, bore the primary responsibility for securing and paying taxes and other benefits for Lillian Cordero,²⁰⁵ yet Baird bore the full political flack for failing to comply with the law regulating household workers. So Baird's nomination, which went against tradition because of her gender, failed because of traditional and outdated notions that place responsibility for childcare on working mothers, without the benefit of institutional support.

The feminist movement has never adequately addressed this displacement of a woman's "second shift" down the class ladder. To some extent, the feminist carries a double burden. Our society holds her to a higher moral standard—than her husband . . . if she decides to pursue her own professional interests. Advocates for domestic workers hold the feminist accountable for oppressing the woman who takes on "her" domestic role, just as the workers themselves blame the woman, not the male breadwinner, for their poor salaries.²⁰⁶

Rather than demonstrate, legislatively, that the work of caring for children is valuable, the Nanny Tax law simply confirms the lack of value society places

205. See Blumenthal, *supra* note 2, at 55-56. Baird's arrangement with her husband was unusual. "Even in homes where both parents work and arrangements have been made for paid help to assist with childcare and housework, it is still the woman who directs and supervises domestic maintenance." Branch, *supra* note 40, at 123. Branch continues:

When men and women speak of performing household duties, the usual description of men's participation is that he "helps" with "her" housework; she hires and instructs the cleaning woman and the baby-sitter. In other words, we have progressed to the point where a woman is allowed to delegate her responsibilities in the home, but it is still clearly her responsibility to make sure the children are cared for and the house is clean.

Id.

206. Laurino, *supra* note 129, at 21.

The feminist movement is concerned with correcting inequities in traditionally low-paying female jobs; the comparable worth battle, is the best example of this commitment. Yet, so far, better pay for housework hasn't been included in the pay equity struggle. On the surface, there are obvious political reasons: this battle is easier to wage in the workplace than in the home, and many pay equity cases are decided at the bargaining table.

Id. at 21-22.

on the women who perform domestic work, whether paid or unpaid.²⁰⁷ The failure of all feminists to coalesce around domestic work and press for structural changes, or even effective reforms, leaves labor performed in the home undervalued, underpaid, and under regulated. The narratives surrounding the enactment of the Nanny Tax law illustrate how the venue of work, gender, race, class, and citizenship of employer and worker influenced government labor policies.²⁰⁸

POSTSCRIPT

Unanswered questions remain. Did Lillian Cordero have children, and if so, who cared for them while she lived and worked for Zoe Baird and Paul Gewirtz? "The irony for women engaged in migrant domestic work is that, at the same time their employment equates them with the home and domestic duties, the fact of their migration often fractures their own family ties and home life."²⁰⁹ *Finally, what happened to Lillian Cordero? Her husband deserted her. She no longer works for Zoe Baird. Her whereabouts are unknown.*²¹⁰

207. "[M]any women still share the cultural assumption that work they've performed through the centuries for nothing isn't worth a decent wage." *Id.* at 22. "Wages for Housework, a 1970s left-feminist movement, did address the devaluation of housework, arguing that the state should pay housewives a salary. But the campaign's strategy was murky, with no real discussion of how this government intervention would be achieved." *Id.*

208. Evelyn Nakano Glenn states:

As long as the gender division of labor remains intact, it will be in the short-term interest of white women to support or at least overlook the racial division of labor because it ensures that the very worst labor is performed by someone else. . . . [White women] will have less impetus to struggle to change the gender division of labor.

Glenn, *supra* note 43, at 146.

209. Fitzpatrick & Kelly, *supra* note 19, at 68.

210. Blumenthal, *supra* note 2, at 55.