

Opening the Pandemic Portal to Re-Imagine Paid Sick Leave for Immigrant Workers

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Historically, pandemics have forced humans to break with the past and imagine their world anew. This one is no different. It is a portal, a gateway between one world and the next.

—Arundhati Roy¹

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1. Arundhati Roy, *The Pandemic is a Portal*, FIN. TIMES (Apr. 3, 2020), <https://www.ft.com/content/10d8f5e8-74eb-11ea-95fe-fcd274e920ca> [https://perma.cc/XQ2U-QW9A].

The COVID-19 pandemic has spotlighted the crisis low-wage immigrant and migrant (im/migrant) workers face when caught in the century-long collision between immigration enforcement and workers' rights. Im/migrant workers toil in key industries, from health care to food production, that many now associate with laudable buzzwords such as "frontline" and "essential." But these industries conceal jobs that pay little, endanger workers' health and safety, and have high rates of legal violations by employers. Im/migrant workers usually do not benefit from employment and labor law protections, including paid sick leave. This has proven deadly during the pandemic. When im/migrants show up to work ill, they endanger not only themselves but risk transmission to co-workers, customers, patients, and the public at large. This has been starkly illustrated in nursing homes, which rely heavily on im/migrant labor and have been the locus of nearly one third of all coronavirus deaths. The pandemic presents an opportunity to analyze why and how existing paid sick leave laws fail im/migrant workers. It is also a portal to re-imagine paid sick time in a way that will benefit im/migrant workers, and by extension, a nation facing labor shortages and high worker turnover as demand for goods and services rises.

This Article is the first to scrutinize paid sick leave laws through the lenses of critical race, movement, and health law theories. It argues that existing paid sick leave laws fail im/migrant workers because they ignore these workers' social and economic situations and singularly focus on workers' rights rather than collective well-being. Drawing from critical race, movement, and health law frameworks, this Article situates paid sick leave within a public health matrix based on mutual aid. It argues that when paid sick leave laws are drafted and enforced in a manner informed by workers' lived experiences and contextualized within a broader public health conversation, employment and labor protections can better safeguard im/migrant workers and the health of the nation. Additionally, the proposed solution will reduce tensions between immigration enforcement and workers' rights.

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INTRODUCTION

In 2016, there were two major events that would determine the future of Arizona’s paid sick leave policies. First, a coalition of community organizations and public interest groups placed a paid sick time law on the Arizona ballot through the state’s constitutionally guaranteed right to voter initiative. This initiative asked Arizona voters to decide whether paid sick leave should be mandated.² Around the same time, the University of Arizona’s Workers’ Rights Clinic (the Clinic)³ surveyed ninety, low-wage, immigrant and migrant (im/migrant)⁴ workers in Southern Arizona to assess the need for stronger workplace protections, including a paid sick leave law which did not exist in Arizona at the time.⁵ The Clinic’s research revealed that im/migrant workers were underpaid and overworked, labored in unsafe workplaces, and lacked the

2. *In Arizona, A Victory in the Courts for Paid Sick Time and Local Democracy*, BETTER BALANCE (Sept. 18, 2019), <https://www.abetterbalance.org/in-arizona-a-victory-in-the-courts-for-paid-sick-time-and-local-democracy> [https://perma.cc/PMC4-WU2R]; Russ Wiles, *Arizona Bucks Conservative Image with Progressive Law on Paid Sick Leave*, ARIZ. REPUBLIC (June 15, 2017), <https://www.azcentral.com/story/money/business/jobs/2017/06/15/arizona-bucks-conservative-image-progressive-law-paid-sick-leave/394556001/> [https://perma.cc/N4Q2-RDGR].

3. Professor Nina Rabin founded the Clinic. Professor Rabin is currently the Director of the Family Immigrant Legal Clinic at the UCLA School of Law. The Workers’ Rights Clinic is the only law clinic in Arizona that provides free legal assistance to low-wage im/migrant workers.

4. Because neither “immigrant” nor “migrant” adequately describes the foreign-born, noncitizen, low-wage, workers discussed in this Article, the author created the term “im/migrant” to serve as a comprehensive way to address the population at issue here. *See infra* Appendix A for a detailed explanation of the creation and use of this term in the Article.

5. *See* NINA RABIN & TIANA O’KONEK, *OUT OF THE SHADOWS: SHEDDING LIGHT ON THE WORKING CONDITIONS OF IMMIGRANT WOMEN IN TUCSON 2* (2014).

ability to take days off when they or a family member needed medical care.⁶ Based on these findings, the resulting report recommended, among other protections, that Arizona institute a paid sick leave law.⁷ The report was circulated among lawmakers and policymakers while signatures on the paid sick leave initiative were being gathered. What resulted seemed to be a quintessential success story. The paid sick leave initiative made it onto the ballot,⁸ voters overwhelmingly supported it,⁹ and in January 2017, it became the law in the border state of Arizona.¹⁰

Five years and a deadly pandemic later, the success of Arizona's paid sick leave law appears less certain given its failure to reach and benefit im/migrant workers.¹¹ While this was true before the novel coronavirus hit American shores, Arizona residents paid little attention to this phenomenon. The pandemic has exacerbated the century-long collision between immigration enforcement and workers' rights. COVID-19 has rebranded low-wage im/migrant workers as essential, frontline workers upon whom the nation depends in key economic sectors from health care to food production. Yet, these much-lauded workers catch COVID-19, suffer from it, and die from it at rates far higher than the U.S. average.¹² The ever-present threat of immigration enforcement and the lack of

6. *Id.* at 2–4.

7. *Id.* at 34.

8. Lisa Nagele-Piazza, *Will More States Provide Paid Sick Leave After Election Day?*, SOC'Y FOR HUM. RES. MGMT. (Nov. 7, 2016), <https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/local-paid-sick-leave-laws.aspx> [https://perma.cc/6JFJ-G45X].

9. See BETTER BALANCE, *supra* note 2 (“In November 2016, voters in Arizona passed—by a three-to-two margin—a statewide paid sick & safe days ballot initiative that guarantees workers the right to earn paid sick days.”).

10. *Id.*; Clarisse Markarian, *Mandatory Paid Sick Leave Kicking in for Arizona Employees*, ARIZ. DAILY STAR (Dec. 28, 2017), https://tucson.com/business/mandatory-paid-sick-leave-kicking-in-for-arizona-employees/article_a94744c7-9119-58a1-9061-8b415bba3dd.html [https://perma.cc/4XLU-TCGR].

11. See *infra* Appendix B, Workers' Rights Clinic Stories 2020–2021. This is true in other states as well. See Clare Hammonds & Jasmine Kerrissey, “We Are Not Heroes Because It Is Not a Choice”: A Survey of Essential Workers' Safety and Security During COVID-19 6 (Univ. Mass. Amherst Lab. Ctr. Working Paper, May 1, 2020) (finding that essential workers in Massachusetts, which has a paid sick leave law, did not benefit from that law during the pandemic), <https://www.umass.edu/lrrc/sites/default/files/Western%20Mass%20Essential%20Worker%20Survey%20-%20May%202020.pdf> [https://perma.cc/MF4W-H48L]; Marielena Hincapié, *Immigrant Workers are Essential to America's Future—and We Need a New Paradigm for Justice*, SALON (May 1, 2021), <https://www.salon.com/2021/05/01/immigrant-workers-are-essential-to-americas-future--and-we-need-a-new-paradigm-for-justice/> [https://perma.cc/73BC-D7KF].

12. Eva Clark, Karla Fredricks, Laila Woc-Colburn, Maria Elena Bottazzi & Jill Weatherhead, *Disproportionate Impact of the COVID-19 Pandemic on Immigrant Communities in the United States*, 14 PLOS NEGLECTED TROPICAL DISEASES 1 (2020) (“Certain ‘hot spots’ have already demonstrated high rates of Covid-19–related mortality in minority populations, particularly those of impoverished communities, likely due to increased prevalence of comorbid conditions as a result of unequal socioeconomic factors and inadequate access to timely healthcare. We can anticipate similar outcomes in other vulnerable populations, particularly in immigrant communities, which have similar socioeconomic status and rates of comorbidities.”); Kevin Sieff, *Mexican Migrant Deaths in the U.S.*

access to employment and labor law protections, such as paid sick leave laws, force im/migrants to report to work while sick, thereby endangering their own health and risking transmission to co-workers, customers, and the public at large.

The pandemic demonstrates that when paid sick leave laws fail to benefit im/migrant workers, this affects the health and safety of all Americans who rely on their essential, frontline labor.¹³ Yet, during the pandemic, im/migrant workers largely have not benefitted from paid sick leave, even in jurisdictions with robust paid sick time laws and during the nine months of federally mandated paid sick leave nationwide.¹⁴ This is because U.S. law and policy have long privileged immigration enforcement over employment and labor laws, which largely have failed to protect im/migrant workers.¹⁵ Even though legislators intended for these laws to cover all workers irrespective of immigration status, im/migrant workers often do not benefit from workers' rights to minimum wage, overtime pay, collective action, workplace health and safety, and anti-discrimination legislation on federal, state and local levels.¹⁶ A confluence of factors is to blame, not least of all the nation's restrictive immigration mandates¹⁷

Have Surged During the Pandemic. Getting Bodies Home is a Challenge, WASH. POST (Apr. 11, 2021), <https://www.washingtonpost.com/world/2021/04/11/coronavirus-mexico-migrant-death-repatriate-remains/> [https://perma.cc/8TTT-88EU]; Richard A. Oppel Jr., Robert Gebeloff, K.K. Rebecca Lai, Will Wright & Mitch Smith, *The Fullest Look Yet at the Racial Inequality of the Coronavirus*, N.Y. TIMES (July 5, 2020), <https://www.nytimes.com/interactive/2020/07/05/us/coronavirus-latinos-african-americans-cdc-data.html> [https://perma.cc/PU69-TWLG] (analyzing the first set of comprehensive data that represents the majority of the country, based on a Freedom of Information Act request directed to the Centers for Disease Control, concerning COVID-19 infections and deaths by race and ethnicity and showing that people of color, including low-wage im/migrant workers, have been twice as likely to contract COVID-19 and three times as likely to die from it than the rest of the population).

13. See generally Hammonds & Kerrissey, *supra* note 11 (describing the pressures workers face in accessing and using paid sick leave); see also Hincapié, *supra* note 11; *Immigrant Essential Workers are Crucial to America's COVID-19 Recovery*, FWD.US (Dec. 16, 2020), <https://www.fwd.us/news/immigrant-essential-workers/> [https://perma.cc/D6PX-YECK] (describing how failures in immigration and labor laws and policies have left many im/migrant workforces marginalized and exploited); *Why Do So Many Immigrant Workers Struggle for Legal Status?*, PBS NEWSHOUR (May 20, 2021), <https://www.pbs.org/video/the-cost-of-uncertainty-1621546179/> [https://perma.cc/669J-PAPS]; Denise Lu, *Which Groups Are Still Dying of COVID in the US?*, N.Y. TIMES (June 10, 2021), <https://www.nytimes.com/interactive/2021/06/10/us/covid-death-patterns.html> [https://perma.cc/7RZN-37W2].

14. See *infra* Part III.C.

15. Hincapié, *supra* note 11.

16. *Id.*; see MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 153–63 (2014); see also RUTH MILKMAN, IMMIGRANT LABOR AND THE NEW PRECARIAT 22–26, 144–47 (2020) (describing various forms of workers' rights violations that im/migrant workers face).

17. Many legal scholars have written about how fear of immigration laws relegates im/migrant workers to a lower-caste worker status. See, e.g., Leticia M. Saucedo, *The Making of the "Wrongfully" Documented Worker*, 93 N.C. L. REV. 1505, 1546 (2015); D. Carolina Nuñez, *Fractured Membership: Deconstructing Territoriality to Secure Rights and Remedies for the Undocumented Worker*, 2010 WIS. L. REV. 817, 820–21 (2010); Keith Cunningham-Parmeter, *Redefining the Rights of Undocumented Workers*, 58 AM. U. L. REV. 1361, 1363–64 (2009); Jennifer J. Lee, *Redefining the Legality of Undocumented Work*, 106 CALIF. L. REV. 1617, 1618–19 (2018) [hereinafter *Redefining*]; Jennifer J. Lee, *Legalizing Undocumented Work*, 42 CARDOZO L. REV. 1893, 1894 (2021) [hereinafter *Legalizing*];

and a multi-generational impasse at overhauling the country's badly broken immigration system.¹⁸

Given this predicament, scholars and advocates have called for everything from enhanced state, local, and federal government enforcement of employment and labor laws against employers,¹⁹ to non-enforcement of immigration laws against im/migrant workers who file work-related claims,²⁰ to legalization of work performed by im/migrants without work authorization.²¹ While these recommendations provide creative, stopgap solutions to the im/migrant workers' rights problem, they do not address the heart of the matter: the inability of U.S. law and policy and broad public opinion to separate im/migrant workers' rights from their immigration status. This Article argues that one subset of worker protections—paid sick leave laws—offers an avenue for reframing im/migrant workers' rights in a manner that detours from the typical collision between immigration enforcement and employment and labor laws. Paid sick leave has the potential to protect not only low-wage im/migrant workers, but also everyone they encounter. In this way, paid sick leave is a law based in mutual aid; when im/migrant workers benefit from paid sick time, so does the public at large. For this reason, lawmakers and policymakers should be eager to ensure that im/migrant workers can meaningfully benefit from paid sick leave laws both in the context of existing state and local paid sick time laws as well as in any future proposals for national paid sick leave legislation.

The inability of im/migrants to benefit from paid sick leave laws, which have been historically overlooked in discussions about workers' rights, takes on a new meaning when discussed within the context of a deadly global pandemic.²²

David Bacon & Bill Ong Hing, *The Rise and Fall of Employer Sanctions*, 38 FORDHAM URB. L.J. 77, 88 (2010); Leticia M. Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 OHIO ST. L.J. 961, 968–70 (2006) [hereinafter *Employer Preference*].

18. See NGAI, *supra* note 16, at 227–64; MILKMAN, *supra* note 16, at 152–60.

19. Charlotte S. Alexander & Arthi Prasad, *Bottom-Up Workplace Law Enforcement: An Empirical Analysis*, 89 IND. L.J. 1069, 1103 (2014); RABIN & O'KONEK, *supra* note 5, at 26–33; Lee, *Redefining*, *supra* note 17, at 1620–22; Cunningham-Parmeter, *supra* note 17, at 1415; NGAI, *supra* note 16, at 269; Hincapié, *supra* note 11.

20. *Letter to Public Officials on DHS Statement on Worksite Enforcement*, HUM. RTS. WATCH (Nov. 19, 2021), <https://www.hrw.org/news/2021/11/19/letter-public-officials-dhs-statement-worksite-enforcement> [<https://perma.cc/DMY2-6Q5Y>] (urging the Department of Homeland Security (DHS) to “provide for the consideration of deferred action, continued presence, parole, and other available relief for noncitizens who are witnesses to, or victims of, abusive and exploitative labor practices” and to “consider ways to ensure that noncitizen victims and witnesses generally are not placed in immigration proceedings during the pendency of an investigation or prosecution”); Lee, *Legalizing*, *supra* note 17, at 1903, 1940–44; Hincapié, *supra* note 11.

21. Lee, *Legalizing*, *supra* note 17, at 1940–46 (asserting that legalizing undocumented work, as opposed to legalizing im/migrant status, has the potential for reaching far more workers than pathways to citizenship, which inevitably exclude large categories of undocumented people).

22. See *How the Lack of Paid Sick Leave Will Make Coronavirus Worse*, ECON. POL'Y. INST. (Mar. 16, 2020), <https://www.epi.org/multimedia/coronavirus-paid-sick-leave-explainer/> [<https://perma.cc/BW4B-K5MK>]; SUE CRAWFORD, PAID SICK LEAVE POLICY IN PRACTICE DURING A PANDEMIC 2–3 (2021) (on file with author; also presented to Nebraska State Legislature as REVIEW OF

Im/migrants make up large swaths of America's frontline, essential workforce.²³ As a result they, like other vulnerable populations, have been more likely to contract and die from COVID-19 than their counterparts.²⁴ Unsurprisingly, industries that rely heavily on im/migrant workers, such as agriculture, meatpacking, and long-term care, have been hit especially hard by the pandemic, both in terms of worker deaths and fiscal impact.²⁵ This has been starkly illustrated in nursing homes, which have been the locus of nearly a third of all U.S. COVID-19 deaths. This is because aides, many of whom are im/migrants, contributed to over 40 percent of viral spread when working at multiple facilities while infected.²⁶

The pandemic presents an opportunity to analyze why and how existing paid sick leave laws fail im/migrant workers. Prior to the pandemic, paid sick leave laws existed only at state and local levels.²⁷ The novel coronavirus propelled Congress to pass a temporary paid sick time law, which was the first

RESEARCH ON PAID SICK LEAVE AND PANDEMIC SPREAD (2020), https://nebraskalegislature.gov/pdf/reports/committee/business/lr391_2020.pdf [<https://perma.cc/7XBG-7WXK>]; Alex Zhang, *Pandemics, Paid Sick Leaves, and Tax Institutions*, 52 LOY. U. CHI. L.J. 383, 385–88, 393–96 (2021); Emily Brill, *States Mull Paid Sick Laws After Stimulus Leaves Out Mandate*, LAW360 (Mar. 24, 2021), <https://www.law360.com/benefits/articles/1368386> [<https://perma.cc/M2CG-68FW>]; Lu, *supra* note 13.

23. Nearly 20 million essential workers in the United States are im/migrants, and more than 5 million of these workers lack documentation. Xavier Roberts & Christian Burks, *Immigrant Essential Workers and COVID-19*, NAT'L CONF. STATE LEGISLATURES (July 27, 2021), <https://www.ncsl.org/research/immigration/immigrant-essential-workers-and-covid-19.aspx> [<https://perma.cc/YB9X-C9PW>]; *see also* Lee, *Legalizing*, *supra* note 17, at 136 (“Many undocumented workers are ‘essential workers’ to the economy.”); U.S. CONG. JOINT ECON. COMM., IMMIGRANTS, THE ECONOMY AND THE COVID-19 OUTBREAK 1 (2020) (“Immigrants are concentrated in occupations critical to the food supply chain, public health and key sectors of the economy. Approximately 69 percent work in occupations designated by the federal government as ‘essential.’ This compels them to be at work during widespread stay-at-home orders that shielded many others from the peak risk of infection [from the coronavirus pandemic].”).

24. *See supra* note 12.

25. *See* UNIV. CAL. MERCED CMTY. & LAB. CTR., FACT SHEET: LATINO AND IMMIGRANT WORKERS AT HIGHEST RISK OF DEATH 1–2 (2021), https://clc.ucmerced.edu/sites/clc.ucmerced.edu/files/documents/fact_sheet_-_latinos_and_immigrants_at_highest_risk_of_death.pdf [<https://perma.cc/3ATG-C9NQ>]; Bernice Yeung & Michael Grabell, *After Hundreds of Meatpacking Workers Died From COVID-19, Congress Wants Answers*, PROPUBLICA (Feb. 4, 2021), <https://www.propublica.org/article/after-hundreds-of-meatpacking-workers-died-from-covid-19-congress-wants-answers> [<https://perma.cc/626N-GPTM>].

26. Priya Chidambaram & Rachel Garfield, *Nursing Homes Experienced Steeper Increase In COVID-19 Cases and Deaths in August 2021 Than the Rest of the Country*, KAISER FAM. FOUND. (Oct. 1, 2021), <https://www.kff.org/coronavirus-covid-19/issue-brief/nursing-homes-experienced-steeper-increase-in-covid-19-cases-and-deaths-in-august-2021-than-the-rest-of-the-country/> [<https://perma.cc/QR9M-6NFZ>]; *see* Shefali Milczarek-Desai & Tara Sklar, *The Return of Typhoid Mary? Immigrant Workers in Nursing Homes*, 1 J. ELDER POL'Y 175, 177 (2021).

27. Currently, approximately nineteen states, the District of Columbia, and twenty-four localities have laws that address paid sick leave. *State and Local Paid Sick Leave Laws*, WORKPLACE FAIRNESS, <https://www.workplacefairness.org/paid-sick-leave> [<https://perma.cc/4NR8-XS6A>] [hereinafter *Sick Leave Laws*].

national paid sick leave law the United States had ever seen.²⁸ Im/migrant workers have not benefitted from these laws; instead, during the COVID-19 era, their lack of access to paid sick leave protections has endangered the general public as well as essential industries and supply chains.²⁹ The pandemic presents a portal to re-imagine paid sick time rights in a way that will benefit not only im/migrant workers but the entire nation.

This Article is the first to scrutinize existing paid sick leave laws through the lenses of critical race, movement, and public health law theories. It argues that existing paid sick leave laws fail im/migrant workers by treating them the same as other workers even though they are treated differently by employers,³⁰ the courts,³¹ and the labor hierarchy.³² Paid sick leave laws ignore im/migrant workers' social and economic realities at great peril because these workers' ability to access paid sick time impacts a broad range of stakeholders, in addition to the workers themselves.

Drawing from critical race, movement, and public health law frameworks, this Article is also the first to situate paid sick leave within a paradigm of mutual aid that emerges from a solidarity-based theory of public health. It argues that when paid sick leave laws are written and enforced in a manner that is informed by workers' lived experiences and contextualized within a public health conversation, employment laws can better safeguard the health and safety of im/migrant workers and the nation. Also, this proposed solution reduces tensions between immigration enforcement and workers' rights. The Article proceeds in four additional parts.

Part I provides essential background information for understanding how im/migrant workers have come to occupy an increasingly precarious position when accessing employment and labor protections. It gives a brief history of the collision between workers' rights and immigration laws and policies to describe the formation of what has been dubbed the "brown-collar workplace."³³ This Section also details empirically documented barriers im/migrant workers face to benefiting from employment and labor laws.

28. Families First Coronavirus Response Act, Pub. L. No. 116-127, 134 Stat. 178 (2020).

29. NAT'L P'SHIP FOR WOMEN & FAMILIES & UNIDOSUS, LATINOS AND THEIR FAMILIES NEED PAID SICK DAYS 1–2 (2020), <https://www.nationalpartnership.org/our-work/resources/economic-justice/paid-sick-days/latino-workers-need-paid-sick-days.pdf> [<https://perma.cc/DYU8-A8H7>]; Diana Boesch, Sarah Jane Glynn & Shilpa Phadke, *Lack of Paid Leave Risks Public Health During the Coronavirus Outbreak*, *CTR. FOR AM. PROGRESS* (Mar. 12, 2020), <https://www.americanprogress.org/article/lack-paid-leave-risks-public-health-coronavirus-outbreak/> [<https://perma.cc/72RM-TLA3>]; Milczarek-Desai & Sklar, *supra* note 26, at 177.

30. *See infra* Part I.A.

31. *See infra* Part I.B.

32. *See infra* Part I.C.

33. Saucedo, *Employer Preference*, *supra* note 17, at 964–68 (defining the contours of the "brown collar workplace"); Lisa Catanzarite, *Dynamics of Segregation and Earnings in Brown-Collar Occupations*, 29 *WORK & OCCUPATIONS* 300, 301 (2002).

Part II introduces the current U.S. paid sick leave landscape by describing the dozens of state and local paid sick leave laws currently in existence across the country. It also discusses numerous empirical studies conducted on the efficacy of paid sick time that demonstrate paid sick time laws' benefits for workers, employers, and the public at large. Although there is limited data available to date, these studies overwhelmingly suggest that, even in jurisdictions with robust paid sick time mandates, paid sick leave laws do not benefit im/migrant workers.

Part III explains how labor protections fail im/migrant workers, proposes potential policy solutions, and identifies challenges that policymakers will face in devising solutions. This Part utilizes critical race theory's insights on the limits of formal equality to analyze how and why existing paid sick leave laws fail im/migrant workers. Part III then draws from movement law theory, which instructs lawyers and legal scholars to learn alongside marginalized and vulnerable groups.³⁴ Working alongside these groups empowers lawyers to gain insights from a workers' movement that employs critical race theory's interest convergence principle³⁵ and public health law's solidarity theory³⁶ to prevail in securing workers' rights. One insight is that im/migrant workers are more likely to benefit from laws and policies when dominant groups benefit too.³⁷ Another is that public health concerns can be resolved by acknowledging the interconnections among people and working towards mutual aid.³⁸ Part III then proposes reframing paid sick leave as a legal hybrid that exists at the intersection of workplace rights and public health to benefit im/migrant workers in three ways. First, it removes im/migrant workers' access to paid sick leave from the collision between immigration enforcement and workers' rights. Second, it situates paid sick leave within a public health matrix of mutual aid that benefits multiple groups simultaneously. Third, it invites innovations that could strengthen the application and enforcement of paid sick time laws to benefit im/migrant workers. This Section also raises challenges to drafting paid sick leave laws that will embrace im/migrant workers and proposes recommendations for researchers and policymakers. A conclusion follows.

34. See *infra* Part III.A.

35. See *infra* Part III.B (proposing that marginalized groups benefit when their interests converge with those of dominant groups).

36. See *infra* Part III.B (proposing that responses to pandemics require acknowledgement of human interconnectedness).

37. See KHIARA M. BRIDGES, *CRITICAL RACE THEORY: A PRIMER* 447–48 (2019); Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980); see Vinay Harpalani, *Racial Triangulation, Interest-Convergence, and the Double-Consciousness of Asian Americans*, 37 GA. ST. U. L. REV. 1361, 1369-70 (2021)

38. See Lindsay F. Wiley & Samuel R. Bagenstos, *The Personal Responsibility Pandemic: Centering Solidarity in Public Health and Employment Law*, 52 ARIZ. ST. L.J. 1235, 1236 (2020).

I.

THE COLLISION BETWEEN IMMIGRATION ENFORCEMENT AND EMPLOYMENT
AND LABOR RIGHTS

In the United States, immigration and labor have always gone hand in hand.³⁹ This Section provides a historical snapshot of the interaction between immigration and labor laws, which has resulted in the current tension between immigration enforcement and workers' rights. This tension is important to understand because it bears significant responsibility for im/migrant workers' inability to benefit from workers' rights laws. These laws include paid sick leave, which, when not accessed by im/migrant workers, creates health risks for the public at large, as the pandemic illustrates.

A. *The Intersections of Immigration, Employment, and Labor Laws*

From the nation's inception to the civil rights era, there were no limits on how many people could legally enter the United States from Mexico. This changed with the 1965 amendments to the Immigration and Nationality Act (INA).⁴⁰ The INA overhauled the country's immigration system by eliminating national origins quotas,⁴¹ and instead, it imposed quotas on all countries.⁴² Although the law was propelled by the civil rights movement and was hailed as a paragon of racial equality since it applied equally to all countries,⁴³ it had the consequence of limiting, for the first time, the number of migrants who could legally seek entry into the United States from Mexico.⁴⁴ As a result, the INA

39. E.P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY, 1798–1965 492 (1981) (“It would in fact be difficult to determine where immigration policy ends and labor policy begins, the two are so closely interrelated.”); see NGAI, *supra* note 16, at 91–166 (describing the intricate relationship between immigration and labor in American history); MILKMAN, *supra* note 16, at 32–61 (detailing the historical need for immigrant labor since the founding of the United States).

40. NGAI, *supra* note 16, at 17–20, 23 (explaining that, despite being the nation's first comprehensive immigration law, the Johnson-Reed Act of 1924 placed no “numerical restrictions on immigration from countries of the Western Hemisphere, in deference to the need for labor in southwestern agriculture and American diplomatic and trade interests with Canada and Mexico”).

41. First introduced in the INA, reified in the 1924 Act, and in effect until 1965, the national origins quotas allocated immigration visas to countries based on “the same proportion that the American people traced their origins to those geographical areas, through immigration or the immigration of their forebears . . . [but] excluded nonwhite people residing in the United States in 1920 from the population universe governing the quotas.” NGAI, *supra* note 16, at 25–26. The national origins quota system ensured larger immigration quotas for Northern and Western European countries and was intended to preserve a racially white majority in the United States. *Id.* at 26–27. Western hemisphere immigrants were not subject to the national origins quota system. *Id.* at 50.

42. *Id.* at 227 (explaining that the 1965 law “repealed the system of national origins quotas, replacing it with a new system of quotas” that were applied equally to all countries, which continues to be the system in place today).

43. *Id.* (describing the 1965 law's “signal achievement” as “end[ing] the policy of admitting immigrants according to a hierarchy of racial desirability and establish[ing] the principle of formal equality in immigration”).

44. The 1965 Act, for the first time in U.S. history, restricted immigration from Mexico (and Canada) to a certain numerical limit with the quota system. MILKMAN, *supra* note 16, at 49; HIROSHI

amendments disrupted centuries-old, circular migration patterns whereby mostly male, Mexican laborers traveled north for work and returned south to their families and villages over and over again.⁴⁵ Workers who for generations had supported their families and villages back home through U.S. jobs,⁴⁶ but who would not have permanently settled in America before the new law was enacted, were now forced to make a terrible choice. They could either live unlawfully in the shadows in America, abandoning their livelihoods and searching for nonexistent work at home, or they could continue as they had and risk border apprehension and long stretches of imprisonment.⁴⁷ Paradoxically, the civil rights era amendments to immigration law ultimately transformed legal workers into undocumented immigrants,⁴⁸ consequently creating the current undocumented workforce that struggles to meaningfully access employment and labor rights.⁴⁹

The parallel story of workers' rights began almost three decades earlier when, in 1938, Congress passed the Fair Labor Standards Act (FLSA). The FLSA required employers to pay a minimum wage⁵⁰ and provide overtime compensation to workers,⁵¹ making it the first national legislation to articulate individual employee rights in the workplace.⁵² The FLSA has always applied to

MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 128–35 (2006); NGAI, *supra* note 16, at 227–28, 254–55.

45. Douglas S. Massey, *The Counterproductive Consequences of Border Enforcement*, 37 CATO J. 539, 539 (2017); Douglas S. Massey, Jorge Durand & Karen A. Pren, *Explaining Undocumented Migration to the U.S.*, 48 INT'L MIGRATION REV. 1028, 1029–33 (2014).

46. Ezra Rosser, *Immigrant Remittances*, 41 CONN. L. REV. 1, 3–4 (2008) (explaining that “the money that migrants send home to their families” and villages “can account for as much as a third of GDP” in certain countries).

47. Massey, Durand & Pren, *supra* note 45, at 1032; NGAI, *supra* note 16, at 255, 261, 265–66; *see also Radiolab Presents: Border Trilogy*, RADIOLAB (Mar. 23, 2018), <https://radiolab.org/series/border-trilogy> [<https://perma.cc/93YT-BTZR>]; Ira Glass & Miki Meek, *Our Town—Part One*, THIS AM. LIFE (Dec. 8, 2017), <https://www.thisamericanlife.org/632/our-town-part-one> [<https://perma.cc/S4EU-J8PZ>].

48. This is not to say that im/migrant workers did not face discrimination and mass deportation prior to 1965, as exemplified by the Bracero Program, Operation Wetback, and other laws and policies. *See* NGAI, *supra* note 16, at 138–58.

49. NGAI, *supra* note 16, at 227; Massey, Durand & Pren, *supra* note 45, at 1030–31; MILKMAN, *supra* note 16, at 49.

50. Fair Labor Standards Act, 29 U.S.C. § 206 (2016). The minimum wage set by the FLSA has increased since the time it was enacted and has remained at \$7.25 since 2009. *See also* Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, U.S. DEP'T LAB., <https://www.dol.gov/general/aboutdol/history/flsa1938> [<https://perma.cc/6DEQ-AH28>] (explaining the historical background of the passage of the FLSA and detailing that at the time the FLSA was enacted, the FLSA set the minimum wage at twenty-five cents per hour).

51. 29 U.S.C. § 207 (providing that overtime equals one and one-half times a worker's regular rate of pay and that workers covered by this section of the statute must be paid overtime if they work more than forty hours in a consecutive seven-day workweek).

52. *See generally* Grossman, *supra* note 50 (describing the history and significance of the passage of the FLSA, including that it was the first federal law to codify employee rights to a minimum wage).

employees irrespective of a worker's immigration status.⁵³ As legal scholars have observed, this was necessary because not protecting im/migrant workers would give employers explicit permission to treat undocumented workers as a lower-caste workforce. And it would discourage employers from hiring documented workers, including American citizens, to whom they would have to provide higher wages and other workplace protections.⁵⁴

After the 1965 INA amendments, im/migrants could still insist on their workers' rights under the FLSA with relatively little fear of deportation.⁵⁵ This was due to a tacit understanding between immigration authorities and American business interests, which kept immigration enforcement out of the workplace.⁵⁶ That drastically changed, however, when Congress passed the Immigration Reform and Control Act (IRCA) in 1986,⁵⁷ which, for the first time in U.S. history, made the employment of unauthorized workers unlawful.⁵⁸

The impetus behind IRCA's passage is complicated. On the one hand, it followed similar, historical patterns whereby economic downturns were blamed on migrant workers who were accused of taking jobs away from Americans.⁵⁹

53. See 29 U.S.C. § 203(e). Even though the FLSA never excluded im/migrant workers without work authorization from its protections, the law's historical, race-based exceptions have contributed to negative impacts on the rights of im/migrant workers. The original formulation of the FLSA excluded domestic workers and agricultural laborers in exchange for support from southern senators who refused to endorse the law otherwise because, in the Jim Crow south, those jobs were filled mostly by Black Americans. See Phyllis Palmer, *Outside the Law: Agricultural and Domestic Workers Under the Fair Labor Standards Act*, 7 J. POL'Y HIST. 416, 416, 419–32 (1995); MILKMAN, *supra* note 16, at 20 (observing that certain jobs, "such as paid domestic labor, [have] always . . . been undesirable but were abandoned by U.S.-born workers—especially workers of color—when the civil rights movement opened up better opportunities" for Black Americans). These provisions subsequently affected im/migrant workers who began replacing Black Americans in these jobs after passage of civil rights laws, especially Title VII, which mandates equal employment opportunities. *Id.* at 27–28, 114. In 1966, farmworkers were included in the FLSA's minimum wage mandate and in 1974, domestic workers, except those who provide live-in services, began enjoying rights to minimum wage and overtime. See 29 U.S.C. §§ 206(a), 206(f), 207(l); see also MILKMAN, *supra* note 16, at 115 (explaining that the FLSA's overtime requirements were extended to most live-in domestic workers in 2015). The FLSA's overtime requirements continue to exclude certain agricultural workers. 29 U.S.C. § 213(a)(6); 29 U.S.C. § 213(b)(12)–(13); see also *Fact Sheet 12: Agricultural Employers Under the Fair Labor Standards Act (FLSA)*, U.S. DEP'T LAB. (Jan. 2020), <https://www.dol.gov/agencies/whd/fact-sheets/12-flsa-agriculture> [<https://perma.cc/8PJV-2WLG>] (describing the categories of agricultural workers that are exempt from FLSA's overtime provisions). Protection under certain provisions of the National Labor Relations Act continue to exclude agricultural workers. 29 U.S.C. § 152(3).

54. Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193, 204–25 (2007); Nuñez, *supra* note 17, at 861–63, 871.

55. The legal term for "deportation" is "removal" under the Immigration and Nationality Act (INA), 8 U.S.C. § 1229.

56. See NGAI, *supra* note 16, at 64; Wishnie, *supra* note 54, at 198–200.

57. Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, § 101, 100 Stat. 3359 (codified at 8 U.S.C. § 1324a).

58. See *id.*

59. Wishnie, *supra* note 54, at 198 ("[L]abor market considerations frequently influenced immigration rules, at times favoring liberalization (as in the massive *braceros* programs of the 1940s–60s) and in other periods constriction (as in the anti-Asian laws of the late 19th and early 20th centuries.); *id.* at 198 n.23. In IRCA's case, supporters argued that the "'jobs magnet' in the United

On the other hand, as legal scholar Michael Wishnie pointed out, IRCA struck a “grand bargain” by granting a “one-time amnesty . . . which led to the eventual legalization of three million people.”⁶⁰ What was clear, however, was IRCA’s legislative mandate sanctioning employers, *not workers*, which means that IRCA does not criminalize workers for laboring without work authorization.⁶¹ IRCA’s unauthorized work rule instead prohibits employers from knowingly hiring or employing undocumented workers.⁶² It also requires employers to verify a worker’s work authorization documents prior to or soon after hiring, and allows immigration authorities to engage in enforcement through inspections.⁶³ Lawmakers deliberately fashioned IRCA in this manner because they recognized that the longstanding recruitment of migrant labor by American businesses, and the lure of American jobs for people from countries that had “[e]normous wage disparities,” created a situation where the IRCA could not adequately sanction workers to curtail undocumented migration.⁶⁴ Even the U.S. Supreme Court chimed in to underscore that IRCA demonstrates congressional intent not to penalize migrant workers for attempting to make a living.⁶⁵

Although IRCA’s employment authorization rule targets employers rather than people who lack work authorization, the law’s passage has resulted in multiple pernicious harms to im/migrant workers. As detailed by David Bacon and Bill Ong Hing, IRCA’s employer “[s]anctions pretend to punish employers,

States inexorably attracted undocumented immigrants, who entered the country illegally” and “that their presence had significant negative effects for domestic workers, especially ‘low-income, low-skilled Americans.’” *Id.* at 195. Although this reasoning and the research upon which it was based has since been challenged, and much of it has been debunked, it prevailed in the late twentieth century despite strong opposition from the American business lobby, the U.S. Chamber of Commerce, and civil rights groups such as the ACLU and the National Council of La Raza. MILKMAN, *supra* note 16, at 195; Wishnie, *supra* note 54, at 196. *But see* MILKMAN, *supra* note 16, at 52, 55–57 (describing big labor’s fraught and nuanced relationship with im/migrant workers); Wishnie, *supra* note 54, at 202 (explaining that the AFL-CIO and the NAACP supported IRCA’s employers sanctions for hiring undocumented workers because they “insisted that protection of U.S. workers, especially low-wage and African-American workers, demanded that employers be prohibited from hiring undocumented immigrants”).

60. Wishnie, *supra* note 54, at 196.

61. IRCA § 101 (codified at 8 U.S.C. § 1324a) (making it unlawful for an employer to knowingly employ persons without work authorization). *But see* § 1324c(a) (criminalizing the tendering of fraudulent documentation by workers such as providing false or others’ social security numbers to employers who attempt to verify work authorization as required under IRCA); *Arizona v. United States*, 567 U.S. 387, 404 (2012); *see also* Saucedo, *The Making of the “Wrongfully” Documented Worker*, *supra* note 17, at 1513; Wishnie, *supra* note 54, at 204 (“Congress chose not to penalize workers for accepting employment without authorization.”).

62. IRCA § 101 (codified at 8 U.S.C. § 1324a(a)(1)(A)) (“It is unlawful for a person or other entity . . . to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien . . . with respect to such employment.”).

63. *See* IRCA § 101 (codified at 8 U.S.C. § 1324a(b)).

64. Wishnie, *supra* note 54, at 201; *see also* Saucedo, *The Making of the “Wrongfully” Documented Worker*, *supra* note 17, at 1513.

65. *Arizona v. United States*, 567 U.S. at 405 (observing that “IRCA’s framework reflects a considered judgment that making criminals out of aliens engaged in unauthorized work—aliens who already face the possibility of employer exploitation because of their removable status—would be inconsistent with federal policy and objectives”).

but in reality, they punish workers.”⁶⁶ For example, immigration law scholar Leticia Saucedo detailed that, after 9/11, enforcement of IRCA’s work authorization requirement “shifted to removal of undocumented workers.”⁶⁷ Even though President Barack Obama’s administration shifted its focus from workplace raids to employer audits, the audits still had a detrimental effect. By forcing employers to terminate any worker who lacked authorization, the audits cost thousands of workers their jobs.⁶⁸ After Donald Trump was elected in 2017, workplace raids once again took precedence over employer audits, and were intensified by the intentional cruelty with which they were carried out. Immigration law scholar Jennifer Chacón painfully detailed the public spectacles of armed agents brutally detaining any worker who fit the category of a racialized, brown, “illegal” immigrant during numerous raids carried out during the Trump era.⁶⁹

Critics of IRCA have argued that, instead of reducing the number of unauthorized migrants in the United States, IRCA has forced unauthorized workers into jobs where employers are more likely to violate employees’ employment and labor rights. IRCA’s logic was based on the notion that “if the workers cannot work, they will self-deport.”⁷⁰ Data amassed since IRCA’s passage, however, shows that unauthorized workers “actually do not leave because they need to work.”⁷¹ They remain in the United States but with limited prospects for work. As a result, “[t]hey become more desperate and take jobs

66. Bacon & Hing, *supra* note 17, at 79. Bacon and Hing further point out the ironies embedded in IRCA with a quote from a grassroots organizer: “These workers have not only done nothing wrong, they’ve spent years making the company rich. No one ever called company profits illegal, or says they should give them back to the workers. So why are the workers called illegal?” *Id.* at 102. *See also* Saucedo, *The Making of the “Wrongfully” Documented Worker*, *supra* note 17, at 1507 (“Employers have succeeded in weakening the provisions created to dissuade them from hiring undocumented workers, thus shifting the scrutiny . . . to the workers themselves . . . The result is an expanding deportation (and now detention) apparatus increasingly focusing on undocumented workers.”).

67. Saucedo, *The Making of the “Wrongfully” Documented Worker*, *supra* note 17, at 1515.

68. Bacon & Hing, *supra* note 17, at 77, 81.

69. *See generally* Jennifer M. Chacón, *Spectacular Immigration Enforcement in Hidden Spaces*, in *CARCERAL LOGICS: HUMAN INCARCERATION AND ANIMAL CAPTIVITY* (Lori Gruen & Justin Marceau eds., 2022) (discussing the horrific spectacle of the mass workplace raid conducted by ICE at a Tennessee meatpacking plant in 2018); *see also* Travis Dorman, *Bean Station Slaughterhouse Raided by ICE Ordered to Pay Workers \$610,000*, KNOXVILLE NEWS SENTINEL (July 9, 2020), <https://www.knoxnews.com/story/news/local/2020/07/09/bean-station-slaughterhouse-raided-ice-must-pay-workers-610000/5399508002/> [<https://perma.cc/SA32-B56E>] (detailing how although the meatpacking plant had engaged in repeated violations of im/migrant workers’ rights, and in a subsequent lawsuit was ordered to pay workers \$610,000 in backpay, minimum wage, and overtime damages, some of the plaintiffs had already been deported or were in immigration detention awaiting deportation proceedings).

70. Bacon & Hing, *supra* note 17, at 81.

71. *Id.*

[with] lower wages⁷² and higher violations of workers' rights.⁷³ At the same time, unauthorized workers are less likely to complain because doing so could result in loss of employment or deportation.⁷⁴ Thus, IRCA has increased the likelihood that im/migrant workers will experience violations of their employment and labor rights, including rights to paid sick leave.⁷⁵

When passing IRCA, Congress emphasized that workers' rights protections apply to all employees irrespective of documentation status. Congress carefully crafted the legislation "to ensure that courts and executive branch agencies would not construe IRCA as excluding immigrants from mainstream labor protections, for the obvious reason that any such exclusion would increase employer incentives to prefer undocumented workers and therefore undermine IRCA's purposes."⁷⁶ Nevertheless, many people, including im/migrant workers themselves, are surprised to learn that most federal, state, and local employment and labor protections apply to everyone regardless of immigration status.⁷⁷ Indeed, IRCA has fueled employers' ability to treat im/migrant workers as a lower-caste workforce in two interconnected ways. First, unscrupulous employers take advantage of people without work authorization, knowing that

72. *Id.*

73. David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 *COMPAR. LAB. L. & POL'Y J.* 59, 91–92 (2005); see Bacon & Hing, *supra* note 17, at 81.

74. See Bacon & Hing, *supra* note 17, at 88; Weil & Pyles, *supra* note 73, at 91–92.

75. Moreover, the employment discrimination concerns first vocalized in the debates leading up to IRCA's passage have transpired because some employers, worried about being sanctioned, have opted not to hire workers whose appearance or accent lead them to suspect they might be unauthorized. Wishnie, *supra* note 54, at 200, 207 (Prior to the passage of IRCA, "Latino organizations, civil rights groups, and the U.S. Catholic Conference of Bishops . . . testified in opposition [to employer sanctions], emphasizing that sanctions would encourage employment discrimination by employers"); Chamber Com. *United States v. Whiting*, 563 U.S. 582, 617 (2011) (Breyer, J., dissenting) (stating that "four years after [IRCA] had become law, discrimination was a serious problem. In 1990, the General Accounting Office identified 'widespread discrimination . . . as a result of' the Act"). This has occurred even though IRCA's drafters specifically considered this problem and created additional sanctions for employers who violated anti-discrimination mandates embodied in Title VII, the employment law that prohibits workplace discrimination on the basis of race, color, and national origin among other categories. See 8 U.S.C. § 1324(b).

76. Wishnie, *supra* note 54, at 204 (referencing the House Judiciary Committee's report that accompanied IRCA). The House Judiciary Committee's report states that "[i]t is not the intention of the Committee that the employer sanctions provisions of the bill be used to undermine or diminish in any way labor protections in existing law, or to limit the powers of federal or state labor relations boards, labor standards agencies, or labor arbitrators to remedy unfair practices committed against undocumented employees." H.R. REP. NO. 99-682(I), at 58 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5650.

77. Cunningham-Parmeter, *supra* note 17, at 1362. This is true for almost all federal, state, and local employment and labor protections. These laws protect against discrimination on the basis of race, national origin, color, religion, sex, disability, age, sexual orientation, see Title VII, 42 U.S.C. § 2000(e); the Americans with Disabilities Act, 42 U.S.C. § 12101; the Age Discrimination in Employment Act, 29 U.S.C. § 623; and similar state and local laws; provide rights to unpaid leave, see Family Medical Leave Act, 29 U.S.C. §§ 2611(2), 2612; provide rights to collective bargaining and protected concerted activity, see National Labor Standards Act, 29 U.S.C. § 151; and provide various additional state and local rights, including workers' compensation, minimum wage, and paid sick time.

they are less likely to “rock the boat” by trying to vindicate their rights to minimum wage, overtime, and other similar workplace rights.⁷⁸ Workers often fear employer retaliation in the form of adverse employment actions,⁷⁹ such as termination, if they dare to speak up or complain to authorities. Second, this fear is exacerbated by the fear of deportation because most im/migrants, including many who have documentation, live under the specter of immigration enforcement.⁸⁰ The displays of overt racism embodied in recent workplace raids,⁸¹ exemplified by the incident at the Tennessee meat-processing plant in 2018,⁸² are spectacles that convince even documented workers that it is too risky to argue or complain about their worker’s rights.⁸³

In sum, after over three decades of IRCA, legal scholars and historians agree that IRCA has not fulfilled its goals. Moreover, despite IRCA’s plain language⁸⁴ and Congress’ intentions, IRCA created a seismic shift in the status of work performed by people without documentation. This resulted in immigration enforcement winning the battle between immigration law and employment and labor protections.⁸⁵ Viewed through the lens of critical race

78. John Lahad, *Dreaming A Common Dream, Living A Common Nightmare: Abuses and Rights of Immigrant Workers in the United States, the European Union, and the United Arab Emirates*, 31 HOUS. J. INT’L. L. 653, 678–79 (2009).

79. Adverse employment actions are any actions by an employer that negatively alters an employee’s working conditions including demotions, hostile work environment, being assigned to less desirable tasks, and termination. 1 LEX K. LARSON & KIM H. HAGEN, *LARSON ON EMPLOYMENT DISCRIMINATION* § 12.01 (2021).

80. Even im/migrant workers who have work authorization or who are citizens may fear immigration enforcement against family members who lack documentation, since an estimated 16 million U.S. citizens live with at least one undocumented family member. *Immigrants in the United States*, AM. IMMIGR. COUNCIL (Sept. 21, 2021), <https://www.americanimmigrationcouncil.org/research/immigrants-in-the-united-states> [<https://perma.cc/TN8J-ZNAJ>].

81. See *Zelaya v. Hammer*, 516 F. Supp. 3d 778, 789–90, 807–10 (E.D. Tenn. 2021) (recognizing two im/migrant workers’ *Bivens* claims against ICE officials during a mass workplace raid in Bean Station, Tennessee, and acknowledging racism directed at workers by ICE agents who arrested them based solely on the color of their skin).

82. See Chacón, *supra* note 69, at 115–22 (discussing the horrific spectacle of the mass workplace raid conducted by ICE at a Tennessee meatpacking plant in 2018); see also Ryan Devereaux & Alice Speri, *The Day After Trump’s ICE Raid in a Small Tennessee Town, 550 Kids Stayed Home From School*, INTERCEPT (Apr. 10, 2018), <https://theintercept.com/2018/04/10/ice-raids-tennessee-meatpacking-plant/> [<https://perma.cc/65QT-ZWWE>] (describing how the workplace raid impacted the local im/migrant community).

83. See Bacon & Hing, *supra* note 17, at 88.

84. 8 U.S.C. § 1324a(a)(1), 1324a(h)(3) (making it unlawful to hire a person who is not a permanent legal resident or who does not have documents that confer work authorization).

85. Although IRCA created the impetus for mass worksite raids that induce fear in im/migrant workers, thereby making it less likely they will complain about workers’ rights violations, the executive branch policy determines whether to use these types of raids to address employer violations of IRCA. In October of 2021, the DHS Secretary under the Biden Administration announced that DHS would no longer conduct mass worksite raids to arrest workers who lack documentation. U.S. Dep’t Homeland Sec., Policy Statement 065-06 on Worksite Enforcement: The Strategy to Protect the American Labor Market, the Conditions of the American Worksite, and the Dignity of the Individual (Oct. 12, 2021), https://www.dhs.gov/sites/default/files/publications/memo_from_secretary_mayorkas_on_worksite_e

theory, IRCA's emphasis on immigration enforcement has meant that even though im/migrant workers are formally protected by workers' rights laws, including paid sick leave laws in jurisdictions where these laws exist, their fear of immigration enforcement prevents them from substantively benefitting from these rights.⁸⁶

B. The Collision Between Immigration Enforcement and Workers' Rights in the Courts

Court cases furthered exacerbated IRCA's negative impact on the employment and labor rights of im/migrant workers because they opened the door to limiting certain remedies for im/migrant workers, whose workplace rights had been violated. This case law is important to understand before examining why im/migrant workers fail to benefit from paid sick leave laws because it contextualizes im/migrant workers' predicament when it comes to asserting rights in the workplace, such as the right to paid sick leave.

After IRCA "injected the nation's immigration laws directly into the workplace,"⁸⁷ the Supreme Court, in *Hoffman Plastic Compounds, Inc. v. NLRB*, severely limited im/migrant workers' rights under a leading federal labor rights law.⁸⁸ The National Labor Relations Act (NLRA) provides workers with the right to engage in union-related activities and concerted action in the workplace.⁸⁹ If a worker faces adverse employment action including, but not limited to, termination for participating in activity protected under the statute, the NLRA provides the worker with the sole monetary remedy of backpay.⁹⁰ Backpay means the earnings a worker would have made but for an employer's retaliatory actions.⁹¹ The National Labor Relations Board (NLRB) is the federal administrative agency tasked with bringing NLRA claims against employers and determining backpay awards.⁹² In determining whether to award backpay under the NLRA, the NLRB can take into account whether a worker sought replacement employment in good faith after termination.⁹³

nforcement.pdf [https://perma.cc/EF3T-K93E]; see also Nick Miroff, *Biden Administration Orders Halt to ICE Raids at Worksites*, WASH. POST (Oct. 12, 2021), https://www.washingtonpost.com/national/biden-administration-halts-ice-raids/2021/10/12/631dc86e-2b70-11ec-92bd-d2ffe8570c7d_story.html [https://perma.cc/L3AD-C42P] (describing the Biden administration's rationales for halting ICE worksite raids).

86. See *infra* Part III.A.

87. Cunningham-Parmeter, *supra* note 17, at 1369.

88. 535 U.S. 137, 151–52 (2002).

89. National Labor Relations Act (NLRA), 29 U.S.C. § 151 (1935).

90. 29 U.S.C. § 160(c) (in addition to monetary backpay awards, the National Labor Relations Board also may order reinstatement of workers whose rights were violated).

91. See *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197–98 (1941) (discussing calculation of backpay awards under the NLRA).

92. See *Hoffman Plastic Compounds, Inc.*, 535 U.S. at 140–43.

93. *Phelps Dodge Corp.*, 313 U.S. at 194–95, 199–200.

Hoffman Plastic arose when Jose Castro, a worker in the polyvinyl resins and plastic pipework company, was fired by his employer for attempting to unionize his workplace.⁹⁴ The NLRB determined that Mr. Castro's rights had been violated by Hoffman Plastic Compounds, Inc., and that he should be awarded \$66,951 in backpay.⁹⁵ The employer appealed and argued that Mr. Castro, who lacked work authorization,⁹⁶ should not be entitled to backpay because IRCA made it unlawful to employ unauthorized workers.⁹⁷

In an earlier case that arose before the passage of IRCA, the Court had held that unauthorized workers were covered by the NLRA because the Act states that the "'term employee' shall include any employee."⁹⁸ In *Hoffman Plastic*, the Court followed its precedent that unauthorized workers like Mr. Castro were covered under the NLRB.⁹⁹ However, the opinion, written by then-Chief Justice William Rehnquist, went on to state that, due to IRCA having "significantly changed" the legal landscape, Mr. Castro could not be awarded backpay.¹⁰⁰ The Court asserted that IRCA made "combating the employment of [undocumented workers]" central to immigration law and policy and that awarding Mr. Castro backpay "runs counter to policies underlying IRCA."¹⁰¹ The Court's opinion, however, ignored the legislative history clearly stating that IRCA should not be read to alter unauthorized workers' rights under employment and labor laws since the very purpose of the NLRA's backpay provision is to deter violations of workers' rights to unionize.¹⁰² Instead, the Court reasoned that, because IRCA prohibited Mr. Castro from legally working in the United States in the first place, it would contravene everything IRCA stood for to award him backpay. This reasoning is based on the notion that a worker would have been employed but for an employer's unlawful action.¹⁰³ The Court went on to state that awarding backpay to unauthorized workers under the NLRA "condones and encourages future violations."¹⁰⁴ This, it said, was because unauthorized workers would not

94. 535 U.S. 137, 140 (2002).

95. *Id.* at 142.

96. *Id.* at 141.

97. *See id.* at 147.

98. *Sure-Tan Inc. v. NLRB*, 467 U.S. 883, 891 (1984); *see also* NLRA, 29 U.S.C. § 152(3).

99. 535 U.S. at 144–46.

100. *Id.* at 147–50.

101. *Id.* at 147–49.

102. *See* Wishnie, *supra* note 54, at 212.

103. *Hoffman Plastic*, 535 U.S. at 150–52. Although IRCA does not penalize workers for obtaining employment without work authorization, it does criminalize as fraud when workers obtain employment using false work authorization documents. *See* 18 U.S.C. § 1546(b). Even though the Court did not say this entered its analysis, its recitation of the facts of the case stated that Mr. Castro had provided his employer with false documents to obtain employment. *Hoffman Plastic*, 535 U.S. at 141–42. Although IRCA does not state that falsifying work authorization documents should be a reason for limiting a workers' rights under labor law, that is, in effect, the rule the Court enunciated in the case. *See* 18 U.S.C. § 1546; *Hoffman Plastic*, 535 U.S. at 150.

104. *Hoffman Plastic*, 535 U.S. at 150–51; *see also* *Torres v. Precision Indus.*, 995 F.3d 485, 492 (2021) (Mitigation of damages requirements under the NLRA require an unlawfully terminated worker to, at the very least, seek employment after they are discharged. This means unauthorized workers

be able to fulfill their duty to mitigate damages “without triggering new IRCA violations, either by tendering false documents to employers or by finding employers willing to ignore IRCA and hire illegal workers.”¹⁰⁵ Thus, the Court concluded that “allowing the Board to award backpay to [persons without work authorization] would unduly trench upon explicit statutory prohibitions critical to federal immigration policy.”¹⁰⁶

The central dilemma in *Hoffman Plastic* perfectly illustrates the collision between immigration laws, like IRCA, and workers’ rights laws, like the NLRA. On the one hand, Hoffman Plastic Compounds, Inc. clearly violated Mr. Castro’s labor rights, and IRCA’s legislative history states that the rights of workers are not to be diminished by IRCA. On the other hand, the logic of backpay is that a worker would have been employed but for an employer’s bad actions. The Court could have chosen to adhere to the plain language of the NLRA, which does not require work authorization as a prerequisite for mitigation of damages under its backpay provision, but it did not.¹⁰⁷ Rather, the *Hoffman Plastic* Court chose to privilege immigration enforcement above workers’ rights.¹⁰⁸

Refusing to award workers backpay when employers are liable for workers’ rights violations—what Professor Wishnie referred to as “functional immunity” from employment and labor laws—has done little to nothing to further IRCA’s prohibition on unauthorized employment but has significantly hurt labor rights.¹⁰⁹ Worse still, *Hoffman Plastic* brought the exact opposite result from what IRCA sought because the Court’s holding incentivizes employers to hire people without work authorization who are barred from seeking certain types of damages.¹¹⁰

“would have an incentive to remain in the United States, avoid apprehension by immigration officials, and violate IRCA again by seeking future employment with a different employer in order to comply with mitigation-of-damages requirements.”)

105. See *Hoffman Plastic*, 535 U.S. at 151.

106. *Id.* at 138.

107. Nothing in the NLRA’s backpay provisions make mitigation of damages contingent upon work authorization. See 29 U.S.C. § 160(c).

108. In doing so, the Court engaged in a bit of magical reasoning. The NLRB ordered that Mr. Castro be awarded \$66,951 in backpay and found that Mr. Castro had satisfied his obligation to make reasonable efforts to find other employment. *Hoffman Plastic Compounds, Inc. & Casimiro Arauz*, 326 N.L.R.B. 1062, 1062 n.11 (1998). Therefore, the Court’s concern that upholding Mr. Castro’s backpay award would encourage Mr. Castro to engage in additional employment without work authorization does not make sense because Mr. Castro did not, in fact, work without authorization after he was terminated by Hoffman Plastic Compounds, Inc. See *Cunningham-Parmeter supra* note 17, at 147–49 (backpay would not have been awarded had Mr. Castro found other employment). Moreover, despite the Court’s grandiose language about the purpose of IRCA, nothing in IRCA or its legislative history suggested prohibition of backpay awards in workers’ rights cases to reduce unlawful employment. See Wishnie, *supra* note 54, at 212–13.

109. See Wishnie, *supra* note 54, at 205.

110. See *id.* at 204–05.

By gutting NLRA backpay protections for unauthorized workers,¹¹¹ *Hoffman Plastic* signaled to employers that they could retaliate against im/migrant workers who dared engage in collective bargaining or other NLRA protected activities with impunity—even if they were found liable they would not have to make backpay awards.¹¹² Employers soon began pressing courts to apply *Hoffman Plastic* logic to damages under other federal employment and labor laws such as Title VII and the FLSA.¹¹³

The most recent battle over the reach of *Hoffman Plastic* arose in the context of a state workers' compensation law. In *Torres v. Precision Industries, Inc.*, Ricardo Torres hurt his back while working at Precision Industries.¹¹⁴ He filed for worker's compensation under Tennessee state law, and was terminated for doing so by his employer in contravention of that law's anti-retaliation provision.¹¹⁵ When Mr. Torres sued for retaliatory discharge, Precision Industries borrowed *Hoffman Plastic* logic to argue that the former employee should not be awarded *any* damages, not merely non-payment of backpay, because he lacked work authorization.¹¹⁶ A federal district court in Tennessee initially agreed with the employer and prohibited Mr. Torres from recovering economic and non-economic damages based on IRCA.¹¹⁷ Relying heavily on *Hoffman Plastic*, the Sixth Circuit Court of Appeals ultimately upheld the portion of the district court's decision on remand that denied Mr. Torres backpay for the period in which he was unauthorized to work.¹¹⁸ The appeals court concluded, however, that Mr. Torres could recover other types of damages because IRCA does not "preempt compensatory and punitive damage awards unrelated to an employee's immigration status."¹¹⁹ The court made this distinction by focusing on that portion of the *Hoffman Plastic* decision pointing out that backpay mitigation requires an unauthorized person to seek

111. The NLRB has attempted to mitigate the devastating effects of *Hoffman Plastic* by continuing the practice of not asking workers about their immigration status and work authorization, which long precedes the *Hoffman Plastic* decision. Employers, however, continue to attempt to elicit immigration status information during NLRB hearings to avoid liability under the NLRA, even when they have violated the law. Leah Jaffe, Former Supervising Attorney, Nat'l Lab. Rels. Bd., Lecture on NLRB Practices (Sept. 2, 2001) (on file with author).

112. The NLRB argued this in *Hoffman Plastics*. See 535 U.S. 137, 149–51 (2002).

113. Cunningham-Parmeter, *supra* note 17, at 1370. While a few lower courts have held that Title VII's backpay remedy is not available to plaintiffs without work authorization, nearly all courts have declined to extend *Hoffman Plastic* reasoning to the FLSA's minimum wage and overtime provisions. *Id.* at 1370 nn.55–56.

114. 995 F.3d 485, 488–89 (6th Cir. 2021).

115. *Id.*

116. See *id.* at 494–95 (addressing compensatory and punitive damages because Precision also appealed that portion of the district court's decision).

117. *Id.* at 488–89 (explaining that the district court initially held that IRCA preempted that portion of the Tennessee state workers' compensation law that would have awarded damages to a worker who lacked work authorization).

118. *Id.* at 495.

119. *Id.* at 490 (permitting award of backpay damages for the period of time after which Mr. Torres obtained work authorization).

employment.¹²⁰ Thus, the Sixth Circuit holding reasons that even though IRCA was created to “halt the hiring and *continued* employment of unauthorized [workers] . . . this does not mean Congress has occupied the *entire* field of employment regulation, including causes of action arising out of an individual’s employment, authorized or not.”¹²¹

The *Precision Industries* opinion, like the *Hoffman Plastic* opinion, straddles the intersection between immigration enforcement and workers’ rights. Both *Precision Industries* and *Hoffman Plastic* continue to indulge the legal fiction that situates im/migrant workers as impossible subjects forced to occupy a space that refuses to recognize their rights but that profits from their labor.¹²² Even though these cases do not limit im/migrant workers’ rights to remedies under most employment and labor laws, the next Section explains how the collision between immigration enforcement and workers’ rights—created in part by IRCA and its resulting case law—largely strips im/migrant workers of meaningful access to employment and labor protections such as paid sick leave.

C. The Emergence of the “Brown Collar Workforce”

The COVID-19 pandemic has laid bare a twenty-first-century workforce that is highly stratified and segregated based on race and immigration status.¹²³ In this picture, im/migrant workers toil in occupations and industries that have come to be associated with laudable buzzwords such as “frontline” and “essential,” which really are code words for jobs that pay little, often are dangerous to health and safety, and have high rates of employment and labor law violations.¹²⁴ What led to the overrepresentation of im/migrant workers in these

120. *See id.* at 493.

121. *Id.* at 492 (first emphasis added, second emphasis in original).

122. Mae M. Ngai coined the term “impossible subjects” in the title of her landmark book, which describes in detail how, from the very beginnings of U.S. history to the present era, im/migrant workers have been relegated to outsider status even though they are vital to America’s success story. *See* NGAI, *supra* note 16, at xxiii-xxiv (“In a liberal society that values the moral and legal equality of all persons, the undocumented are impossible subjects, persons whose presence is a social reality yet a legal impossibility.”). *See also* Shannon Gleeson, *Labor Rights for All? The Role of Undocumented Immigrant Status for Worker Claims Making*, 35 L. & SOC. INQUIRY 561, 567 (2010) (“Sociolegal scholarship has commented extensively on the contradictory legal position of undocumented workers in the United States . . . [b]arred from residing or working here, these workers are nonetheless afforded ‘on paper’ many of the same legal workplace protections as native-born workers.”).

123. *See* MILKMAN, *supra* note 16, at 20 (“[T]he immigrant labor force in the twenty-first-century United States—both the unauthorized ‘illegal aliens’ who are the focus of contemporary political controversy and the larger population of immigrant workers with legal status . . . [is concentrated] in particular occupations and industries.”).

124. *See id.* at 20–31; Hammonds & Kerrissey, *supra* note 11, at 11 (quoting one essential frontline workers as saying, “[w]e are not heroes because it is not a choice”); *see also* Raymond G. Lahoud, *Study Says 69% of Undocumented Immigrant Workers Hold Essential Jobs to Fight COVID*, NAT’L L. REV. (Jan. 14, 2021), <https://www.natlawreview.com/article/study-says-69-undocumented-immigrant-workers-hold-essential-jobs-to-fight-covid> [<https://perma.cc/2KCJ-JNJH>]; PBS NEWSHOUR, *supra* note 13.

jobs¹²⁵ is a long and complicated puzzle, painstakingly put together by renowned scholars, such as historian Mae Ngai and sociologist Ruth Milkman.¹²⁶ Their work carefully traces the decades-long lineage of im/migrant workers' concentration in certain types of jobs. It also shows that changes to the legal landscape between the mid-1960s and the mid-1980s ultimately resulted in the making of what often is referred to today as the "brown collar workplace."¹²⁷

With the passage of Title VII, which forbid workplace discrimination on the basis of race, national origin, ethnicity, sex and religion,¹²⁸ Black Americans, along with other less-educated Americans, began fleeing undesirable jobs made worse by the weakening of labor unions.¹²⁹ At the same time, as described above, the 1965 amendments to the INA and the first-time imposition of quotas on legal migration from Mexico resulted in a newly undocumented workforce desperate for work.¹³⁰ Twenty years later, IRCA's passage in 1986 led to the *Hoffman Plastic* decision, workplace raids, and im/migrant workers' increased sense of vulnerability.¹³¹ This vulnerability is a key element in the making of the brown collar workforce because it creates subservience,¹³² which is appealing to employers who engage in violations of workplace rights.¹³³ Indeed, researchers have shown that brown collar workers' vulnerable status makes them less likely to engage in complaint-making when their employment and labor rights are violated.¹³⁴

125. See Saucedo, *Employer Preference*, *supra* note 17, at 965–66.

126. See generally NGAI, *supra* note 16; MILKMAN, *supra* note 16.

127. See Saucedo, *Employer Preference*, *supra* note 17, at 962 n.1 (defining the "brown collar workplace" as one in which newly arrived Latino immigrants are overrepresented in jobs or occupations. Because the newly arrived Latino can be documented or undocumented, it is less immigration status than the employer's perception of the worker as a newly arrived immigrant that marks the identity of the brown collar worker."); see also Catanzarite, *supra* note 33, at 301 (coining the term "brown collar" to refer to workplace conditions of low-wage im/migrant workers).

128. See 42 U.S.C. § 2000(e).

129. See MILKMAN, *supra* note 16, at 12–13 ("[I]mmigration was not the *cause* . . . of the massive economic restructuring that began in the 1970s or of the accompanying growth of economic inequality and labor degradation; rather, the influx of low-wage immigrants was a *consequence* of those developments. As American employers . . . took steps to undermine organized labor, their demand for low-wage labor exploded. That, in turn, led millions of immigrants, both authorized and unauthorized, to enter the bottom tier of the U.S. labor market . . . immigrants entered low-wage jobs in substantial numbers largely *after* pay and conditions had been degraded to such a degree that U.S.-born workers exited the impacted occupations *en masse*." (emphasis in original).

130. See *supra* Part II.A.

131. See *supra* Parts II.B, II.C.

132. See Saucedo, *Employer Preference*, *supra* note 17, at 961–62, 970 (quoting an employer as stating, "The Latinos in our locations, most are recent arrivals. Most are tenuously here, and here on fragile documents. I see them as very subservient."); see also Gleeson, *supra* note 122, at 566–67 (citing studies showing that "employers *prefer* immigrant workers because they view them as a pliant workforce willing to withstand substandard working conditions") (emphasis in original).

133. See Gleeson, *supra* note 122, at 562 ("The vulnerability of undocumented workers stems in large part from their contradictory legal position.").

134. Saucedo, *Employer Preference*, *supra* note 17, at 966–68 ("Several elements of newly arrived status, including perceived immigration status, lack of knowledge about workplace rights, political disenfranchisement, 'push factors,' language deficiencies, and fear of job loss or deportation,

In addition to a lack of im/migrant worker complaint-making, there is also an enforcement problem. Employment and labor laws disincentivize violations of workplace rights by making employers pay when violations occur.¹³⁵ For example, the FLSA permits workers whose minimum wage and overtime rights have been violated to seek up to double the amount they are owed in unpaid wages;¹³⁶ the NLRA allows workers to be paid for time they could not work due to retaliatory discharge;¹³⁷ Title VII provides for backpay, frontpay, and compensatory and punitive damages;¹³⁸ and most local minimum wage and paid sick time laws allow workers to recover liquidated damages in addition to compensatory damages for employer violations.¹³⁹ These laws also come with strong prohibitions against retaliation when workers assert their rights, which can result in additional monetary damages.¹⁴⁰ Importantly, in order to get from violation to economic recovery for workers and punishment for employers, the system relies nearly exclusively on worker complaints.¹⁴¹ This bottom-up method of workers' rights enforcement does not function as intended when it comes to im/migrant workers.¹⁴²

Employment and labor laws on federal, state, and local levels set up a dual system whereby enforcement action can be taken by the agency tasked with upholding the law at issue or by an individual worker or groups of workers under private rights of action.¹⁴³ Sometimes the two enforcement mechanisms work in

or both, combine to create an especially vulnerable workforce . . . [that] fear[s] 'rocking the boat' at work because recent court rulings [such as *Hoffman Plastic*] have fueled the perception that immigrant workers have limited rights."); see also Amanda M. Grittner & Matthew S. Johnson, *Detering Worker Complaints Worsens Workplace Safety: Evidence from Immigration Enforcement* 1, 15–19 (Jun. 10, 2022), <http://dx.doi.org/10.2139/ssrn.3943441> (empirically correlating a reduction in worker complaints and increase in worker injuries in jurisdictions that cooperate with federal immigration enforcement).

135. Weil & Pyles, *supra* note 73, at 61 ("Federal labor policies attempt to change employer behavior primarily via the threat of inspection, detection of violations, and levying of penalties. The direct pressure from inspection activities, therefore, or the deterrence effects of enforcement leads to compliance with labor policies.").

136. 29 U.S.C. § 216(b).

137. *Id.* § 158.

138. See 42 U.S.C. § 2000e-5(g) (stating that the court may "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate").

139. See, e.g., ARIZ. REV. STAT. ANN. §23-364(G) (2016) (permitting workers to recover up to three times the amount they were supposed to be paid in minimum wage or earned paid sick time); CAL. LAB. CODE § 248.5(b)(2) (West 2020); COLO. CODE REGS. § 1103-11:3.5.3(B) (2023); CONN. GEN. STAT. ANN. § 31-57v (West 2012).

140. See, e.g., ARIZ. REV. STAT. ANN. § 23-364(B) (2016) (stating that retaliation is presumed if an employee experiences an adverse employment action within ninety days of asserting rights to minimum wage or paid sick time); CONN. GEN. STAT. ANN. § 31-57v (West 2012); OR. REV. STAT. ANN. § 653.641 (West 2016); CAL. LAB. CODE § 247(b)(4) (West 2015).

141. See Weil & Pyles, *supra* note 73, at 59–63, 70; see Alexander & Prasad, *supra* note 19, at 1070–72.

142. See Alexander & Prasad, *supra* note 19, at 1095–96.

143. See Weil & Pyles, *supra* note 73, at 61–63; 29 U.S.C. § 216 (stating that the FLSA and its provisions may be enforced by the U.S. Department of Labor or by private right of action); ARIZ. REV.

tandem, such as when workers file complaints with the appropriate agency and then the agency investigates and, if necessary, takes legal action.¹⁴⁴ Over time, consistent starvation of agency budgets on the federal level as well as in many states has led to worker complaints being “the primary driver of enforcement activity.”¹⁴⁵ The legal system assumes that all workers have equal access to complaint-making. Several empirical studies conducted by economists over the past twenty years have disproved this assumption when it comes to the most vulnerable workers.¹⁴⁶

In a 2004 study, David Weil and Amanda Pyles examined three years’ worth of complaint data at the U.S. Department of Labor (DOL) for violations under the FLSA and the Occupational Safety and Health Act (OSHA).¹⁴⁷ After deducing that “the annual probability of receiving an inspection for one of the 7.0 million establishments covered [by the FLSA or OSHA] is well below .001,”¹⁴⁸ the researchers concluded that holding employers who commit FLSA and OSHA violations responsible is mostly contingent upon worker complaint-making.¹⁴⁹ They then hypothesized that a worker is more likely to engage in the complaint-making process if the perceived benefits to the worker outweigh the costs.¹⁵⁰

The researchers defined the cost of making a complaint not only as retaliatory behavior by the employer, but also the cost in time and energy required to research and understand the laws under which an employee’s rights may have been violated.¹⁵¹ After sifting through the data, the researchers

STAT. ANN. § 23-364 (2016) (stating that Arizona’s minimum wage and paid sick time laws may be enforced by the Industrial Commission of Arizona or by private right of action).

144. See Weil & Pyles, *supra* note 73, at 62, 70 (finding that the U.S. Department of Labor’s Wage and Hour and Occupational Safety and Health divisions “rely heavily on incoming complaints to guide enforcement activities”).

145. *Id.* at 59 (adding that “in 2004, complaint inspections constituted about 78% of all inspections undertaken by” the Wage and Hour Division of the Department of Labor); see also *id.* at 62 (“Resource limitations substantially lower the probability that a workplace will be inspected by the government in a given year.”); Gleeson, *supra* note 122, at 568 (“[T]he current apparatus of wage and hour enforcement relies on 50 percent fewer [Department of Labor] investigators than it did when the [agency] was created in 1941, despite a 900 percent increase in the size of the US workforce.”). See generally KIM BOBO, WAGE THEFT IN AMERICA: WHY MILLIONS OF WORKING AMERICANS ARE NOT GETTING PAID—AND WHAT WE CAN DO ABOUT IT (2009) (showing the decline in the Department of Labor’s enforcement of wage and hour laws in workplaces with the highest level of violations).

146. See Weil & Pyles, *supra* note 73, at 63; Alexander & Prasad, *supra* note 19, at 1070–72.

147. Weil & Pyles, *supra* note 73, at 66–68 (explaining that they chose to look at complaints under the FLSA and OSHA because “both Acts cover a major percentage of the private sector workforce as well as substantial portions of the public workforce”).

148. *Id.* at 62.

149. *Id.* at 63; see also Charlotte S. Alexander, *Anticipatory Retaliation, Threats, and the Silencing of the Brown Collar Workforce*, 50 AM. BUS. L.J. 779, 782–83 (2013).

150. Weil & Pyles, *supra* note 73, at 63 (remarking that “the propensity to exercise rights varies along systemic lines across different groups”).

151. *Id.* at 63–64, 82–83 (cataloging information-gathering costs as including learning what workplace rights exist under what laws and the standards employers are held accountable under these

concluded that “the nature of the benefits and costs [of complaint-making] preclude many workers from exercising their rights in the first place, resulting in a modest-level of complaint activity.”¹⁵² They theorized that workers who “feel vulnerable to exploitation,” including “immigrant workers,” are even less likely to assert their workplace rights.¹⁵³

This research makes two important contributions to understanding the plight of im/migrant workers. First, it demonstrates that the existing system of bottom-up workplace rights enforcement wrongly assumes that all workers experiencing workplace violations have equal access to vindicating their rights by complaining either to agencies or through private rights of action.¹⁵⁴ Second, it shows that differently situated workers have differing benefit/cost ratios for engaging in complaint-making, and that the most vulnerable workers are unlikely to assert their workplace rights because the costs greatly exceed the benefits of complaining about workers’ rights violations.¹⁵⁵ Additional studies confirm that im/migrant workers often fall into this “most vulnerable” category and are less likely than other workers to engage in complaint-making when their workers’ rights are violated.¹⁵⁶

Building on earlier studies, in 2014, economists Charlotte Alexander and Arthi Prasad examined the “powerful incentives [vulnerable workers have] to stay silent in the face of workplace problems” by specifically surveying im/migrant workers.¹⁵⁷ Reviewing data collected from over four-thousand workers in three of the largest U.S. cities, they found that im/migrant workers do not benefit from employment and labor laws for two main reasons: 1) they lack the legal knowledge “to identify violations of their rights and access the proper enforcement procedures,” and 2) the risks in complaint-making far outweigh the benefits for these workers.¹⁵⁸ The researchers further found that even when workers had knowledge of workplace rights and how to engage in complaint-making, “43 [percent] of workers who had experienced a workplace problem . . . decided not to make a claim”¹⁵⁹ and that “the most common reason” for im/migrant workers’ “silence was their fear of employer retaliation.”¹⁶⁰

laws, how laws are administered and enforced, and the sometimes-byzantine process of how to go about making a complaint).

152. *Id.* at 90–91.

153. *Id.* at 91; *see also* Grittner & Johnson, *supra* note 134, at 5, 8–9.

154. Weil & Pyles, *supra* note 79, at 91 (commenting that workers’ “silence should not be confused with [employer] compliance” of workers’ rights laws).

155. *Id.* at 91–92; *see also* Grittner & Johnson, *supra* note 134, at 6.

156. Gleeson, *supra* note 122, at 570 (citing several researchers for the “well-established finding that undocumented workers are less likely to come forward than are other workers”); *see also* Grittner & Johnson, *supra* note 134, at 2–3.

157. Alexander & Prasad, *supra* note 19, at 1072.

158. *Id.*

159. *Id.* at 1073. Further, “[a]bout one-third of low-wage, front-line workers identified a problem on the job in the twelve months before the survey.” *Id.* at 1085.

160. *Id.* at 1073.

Other research shows that im/migrant workers often do not complain about workplace abuses because they anticipate retaliation before it occurs.¹⁶¹ This has been well documented in im/migrant-heavy workplaces where employer threats—both spoken and unspoken—prevent workers from raising their workplace rights for fear of adverse employment action.¹⁶² These silencing tactics are especially effective because, under the law, employees cannot state a claim for employer retaliation until after the retaliation occurs.¹⁶³ Thus, the mere threat of retaliation is often enough to foreclose im/migrant workers from making complaints.¹⁶⁴ Alexander and Prasad’s 2014 study also found that when im/migrant workers overcome the fear of retaliation and complain, roughly 43 percent “experienced some form of employer reprisal in response” and of these reprisals, 35 percent “constituted unlawful retaliation in violation of labor and employment laws.”¹⁶⁵ While the remainder of reprisals “likely did not rise to the level of an ‘adverse employment action’” as defined under employment and labor laws, they “nevertheless likely had a silencing effect on workers.”¹⁶⁶ Importantly, even when actionable retaliation occurs, anti-retaliation remedies in employment and labor laws “can be invoked only after the employee has suffered [harm], and offer, at best, the possibility of an uncertain remedy after a long delay.”¹⁶⁷

For example, in *Tolano v. El Rio Bakery*, four im/migrant workers filed claims against their employer under the FLSA, NLRA, and state minimum wage law for failing to pay overtime or minimum wage and for engaging in retaliation against the workers when they collectively complained about these violations of their workplace rights.¹⁶⁸ After the case was filed in federal district court, the

161. Alexander, *supra* note 149, at 780, 786 (stating that “Anticipatory retaliation can take many forms: an employer might preemptively fire a worker whom it believes will file a lawsuit or complain to a government agency, or might . . . threaten workers with the consequences of contacting a lawyer, reporting a workplace injury, or ‘making trouble’ on the job” and defining “anticipatory retaliation” as “adverse employment actions that take place before protected activity, foreclosing the opportunity for that protected activity ever to occur.”).

162. *Id.* at 781 n.10 (providing examples of im/migrant agricultural and poultry plant workers who feared adverse employment actions if they raised workplace-related issues based on statements made by supervisors or observations of how others were treated for complaining); *see also* Alexander & Prasad, *supra* note 19, at 1098 (documenting that 14 percent of workers who chose not to engage in complaint-making had “witnessed a co-worker being retaliated against”).

163. Like underlying employment and labor protections such as the rights to minimum wage, overtime, and collective bargaining, anti-retaliation provisions are “reactive” rights in that “they are designed to shield workers . . . and respond to the resulting ‘adverse employment action’ after it has occurred.” Alexander, *supra* note 149, at 786, 790 (stating that most courts have not recognized threats as retaliation under employment and labor laws).

164. *Id.* at 781 (“A 2008 survey of more than 4,300 low-wage workers in the three largest U.S. cities demonstrated that fear of retaliation was the most common reason that workers did not complain, even after they had identified a workplace problem.”).

165. Alexander & Prasad, *supra* note 19, at 1091 (reprisals included “termination or suspension, calls to the police or immigration, decreases in hours, and abuse and harassment”).

166. *Id.*

167. *Id.* at 1104.

168. No. CV-18-00125-TUC-RM, 2019 WL 6464748, at *2–6 (D. Ariz. Dec. 2, 2019).

employer filed for bankruptcy, which led the district court to stay its case pending the bankruptcy court's determination.¹⁶⁹ Almost a year later, the bankruptcy court rejected the employer's bid for bankruptcy protection. In the intervening months, the employer shut down its business, sold all assets, and disappeared.¹⁷⁰ Thus, when the district court resumed the initial case and ultimately awarded the workers a combined \$197,078 in monetary damages, there was little to no hope of actual recovery for the im/migrant workers who braved making a legal complaint.¹⁷¹

A similar situation developed with *Turman v. Koji's Japan, Inc.*, a class action that began in 2010 as a result of an employer systematically violating workers' rights under the FLSA and state labor laws.¹⁷² Like the employer in *Tolano*, the restaurant responded by shuttering its business and filing for bankruptcy, while the sole shareholder and director absconded with the assets.¹⁷³ Over eleven years of litigation and several court decisions later, an appellate court finally ruled that the restaurant's sole shareholder and director was personally liable for violations of workers' rights under both the FLSA and state law.¹⁷⁴

Thus, even when vulnerable workers muster the courage to complain, despite the costs they are likely to encounter, they may never recover damages to make up for lost wages or time. Even when courts award damages, workers may have to wait many years for payment. Moreover, employers often avoid paying the steep prices needed to deter them from committing future workplace violations.¹⁷⁵ Thus, the logic behind enforcement of employment and labor laws, which depends on workers making complaints, has failed im/migrant workers.¹⁷⁶

169. *Id.* at *1.

170. Univ. Ariz. James E. Rogers Coll. L., Presentation to Workers' Rights Clinic (Feb. 11, 2021) (on file with author). Moreover, one of the named plaintiffs likely will never recover his portion of the damages because even though he had lived in the United States since he was a boy, he was placed in removal proceedings for issues unrelated to this case, placed in an immigration detention facility, and eventually deported. *Id.*

171. *See Tolano*, 2019 WL 6464748, at *8.

172. *See Turman v. Super. Ct. Orange Cnty.*, 246 Cal. Rptr. 3d 607, 609–610 (Cal. Ct. App. 2017).

173. *Id.* at 613–14.

174. *Id.* at 618–21; *see also* Press Release, Bryan Schwartz L., Court Approves Multi-Million Dollar Settlement for Low-Wage Workers Against Former Restaurant Owner (May 26, 2021), <https://www.bryanschwarzlaw.com/052621-2/> [<https://perma.cc/NH7Z-UQDR>] (describing that after the court's decision in this matter, the class action, which involved hundreds of former employees, settled for \$2.2 million).

175. *See Alexander & Prasad*, *supra* note 19, at 1089 (stating that another reason workers do not complain is due to “a belief that [their] claim would make no difference,” which is among the top two reasons workers provide for not engaging in claims-making).

176. *Alexander & Prasad*, *supra* note 19, at 1073 (observing that “workplace laws offer a set of protections and inducements to entice workers to become law enforcers . . . these incentives are miscalibrated in the case of many low-wage, front-line workers, whose fear of retaliation or doubt in the efficacy of complaining outweigh the benefits that would accrue from workplace law enforcement”).

Viewed another way, the effectiveness of workers' rights laws depend "significantly on worker 'voice,'" and cannot help im/migrant workers when their voices are effectively silenced.¹⁷⁷ To be sure, this silencing is based, in large part, on fear of employer retaliation and the threat of immigration enforcement. But there is also another more insidious reason for this silencing. In 2010, Latin American Studies scholar Shannon Gleeson interviewed forty-one Latinx workers, both with and without work authorization, in the restaurant industry in two large U.S. cities to determine why im/migrant workers are less likely to engage in complaint-making.¹⁷⁸ Gleeson found that not only did rights enforcement face substantial barriers created by "limitations of an underresourced labor standards enforcement bureaucracy, lack of knowledge about rights, and employer intimidation," but workers themselves had internalized a "legal consciousness" that prevented them from making claims when their workplace rights were violated.¹⁷⁹ Gleeson concluded that because the im/migrant workers she interviewed assumed a stance in which they did not believe they were worthy of accessing their workplace rights, "efforts toward reducing [barriers to workplace rights enforcement], while certainly necessary, may be insufficient to ameliorate the fundamental challenge that undocumented status poses."¹⁸⁰

In summary, the century-long collision between immigration laws and employment and labor laws has produced a brown collar workforce critical to the American economy but unable to benefit from basic workplace rights. The COVID-19 pandemic has revealed that this disenfranchisement reverberates beyond the well-being of individual workers by threatening entire industries, those they serve, and the public at large. One way to address this crisis is to locate im/migrant workers outside the binary of immigration enforcement versus workers' rights and inside a public health matrix dependent upon the health and safety of frontline, essential workers. Paid sick leave laws are a portal through which this re-imagining can occur.

II.

PAID SICK LEAVE IN AMERICA

The pandemic has demonstrated that public health suffers when low-wage im/migrant workers do not have access to paid sick leave. This Section situates paid sick leave rights within a broader public-health policy conversation and highlights the importance of ensuring that im/migrant workers benefit from paid

177. *Id.* at 1071.

178. *See generally* Gleeson, *supra* note 122.

179. *Id.* at 562–63, 569.

180. *Id.* at 569; *see also* Alexander, *supra* note 149, at 780–81 (agreeing that im/migrant workers are subject to many "methods of preemptive labor control—ways to keep workers quiet and deter them from ever making claims, filing suit, or otherwise exercising 'voice' in the workplace").

sick leave laws. It does so by describing the United States' paid sick leave laws and the significant public health benefits they confer to multiple stakeholders.

A. *The Legal Landscape*

The federal government has never enacted a permanent, national, paid sick time law.¹⁸¹ Indeed, America lags far behind nearly all of its counterparts among wealthy nations and even among many developing countries in this regard.¹⁸² Congress tried but failed to enact the Pandemic Protection for Workers, Families, and Businesses Act after the 2010 H1N1 epidemic.¹⁸³ The Healthy Families Act, first introduced in Congress in 2004 and most recently re-introduced in 2019, has also failed to garner the Congressional votes required to become law.¹⁸⁴ Congress finally implemented a national paid sick leave mandate in the form of the Families First Coronavirus Response Act (FFCRA) after the COVID-19

181. Erin Garrity, *Guacamole Is Extra but the Norovirus Comes Free: Implementing Paid Sick Days for American Workers*, 58 B.C. L. REV. 703, 704–05 (2017). Nonetheless, “approximately 88% of Democrat and 71% of Republican voters favor requiring employers to offer paid leave to parents of new children and employees caring for sick family members.” Dylan Karstadt, *Too Sick to Work? Defending the Paid Sick Leave Movement and the New Jersey Paid Sick Leave Act*, 44 SETON HALL LEGIS. J. 145, 152 (2020) (internal citations omitted). The Family and Medical Leave Act (“FMLA”) provides up to twelve weeks of unpaid leave for illness or the birth or adoption of a child for workers whose employers have fifty or more employees within a seventy-five-mile radius; therefore, this law does not provide universal paid sick leave. See Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (1993); Karstadt, *supra*, at 155. After campaigning on introducing a national paid family and sick leave policy, the Biden Administration did not include any such law in any of its budget proposals. Erin B. Logan, *What to Know About the Paid Family and Sick Leave Axed from Democrats’ Spending Bill*, L.A. TIMES (Nov. 1, 2021), <https://www.latimes.com/politics/story/2021-11-01/paid-family-leave-was-left-out-of-democrats-social-spending-bill-heres-what-you-need-to-know> [<https://perma.cc/N2PW-JJ5B>].

182. Garrity, *supra* note 181, at 710 (noting that “the United States, Canada, and Japan are the only top-grossing nations that lack national laws for paid sick days that would be used for short-term illnesses such as the flu”); Madeleine Goss, *The Therapist Can’t See You Now: How Paid Sick Leave Policy Can Accommodate Mental Illness in the Workplace*, 71 ARK. L. REV. 969, 972 (2019) (“[N]early all the highly competitive countries guarantee some form of paid sick leave.”); see also Karstadt, *supra* note 181, at 150 (“Worldwide, workers in 145 countries have access to paid sick time.”); see generally Hye Jin Rho, Shawn Fremstad & Jared Gaby-Biegel, *Contagion Nation 2020: United States Still the Only Wealthy Nation Without Paid Sick Leave*, CTR. FOR ECON. & POL’Y RSCH. 3–4 (Mar. 19, 2020), <https://cepr.net/report/contagion-nation-2020-united-states-still-the-only-wealthy-nation-without-paid-sick-leave/> [<https://perma.cc/6G9F-MK69>] (finding that of twenty-two countries with high living standards, including Australia, Canada, and the United Kingdom, the United States was the only country without guaranteed national paid sick days or paid sick leave).

183. Milczarek-Desai & Sklar, *supra* note 26, at 187; Ryan H. Nelson, *Federalizing Direct Paid Leave*, 20 U. PA. J. BUS. L. 623, 642 n.90 (2018) (despite numerous attempts since 2004, including the Pandemic Protection for Workers, Families, and Businesses Act of 2009, Congress has failed to pass a national paid sick leave law); see also *Support for Paid Sick Leave and Family Leave Policies*, AM. PUB. HEALTH ASS’N (Nov. 5, 2013), <https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2014/07/16/11/05/support-for-paid-sick-leave-and-family-leave-policies> [<https://perma.cc/A8AV-S37H>] (recommending that the United States pass national paid sick leave legislation) [hereinafter *Support*].

184. Karstadt, *supra* note 181, at 153–54 (noting that due to this impasse, President Obama signed an executive order requiring federal contractors and subcontractors to provide paid sick leave days).

pandemic hit U.S. shores. However, that mandate was temporary and expired six months before the deadly Delta variant gripped the nation in the summer of 2021.¹⁸⁵ Even when it was in effect, FFCRA was limited in scope because it excluded millions of U.S. workers, including those working at companies with more than 500 employees, those at workplaces with fewer than 50 employees,¹⁸⁶ and those designated by their employers as healthcare workers and first responders.¹⁸⁷

The only paid sick leave laws in the United States today have been enacted by states and municipalities. Since 2006, when San Francisco became the first place in America to enact a paid sick leave ordinance, local paid sick time laws have burgeoned.¹⁸⁸ Although these laws vary, most are based on a system whereby workers earn one hour of paid sick time for every thirty to forty hours worked.¹⁸⁹ Workers may use a capped number of earned paid sick time hours per year¹⁹⁰ for a variety of reasons including preventative medical care for themselves or a family member, their own illness, caring for a sick family member, and in some cases, for domestic violence related reasons and during a public health emergency.¹⁹¹ These laws also have a notice requirement; employers must notify their employees of their right to take sick leave and the terms under which they can use it.¹⁹²

Contrary to some employer concerns that workers would abuse paid sick leave, studies of paid sick time laws in several jurisdictions have shown that workers are unlikely to use their earned paid sick days for reasons that don't qualify for paid sick time.¹⁹³ Rather, "employees treat paid sick days not as an entitlement, but as insurance, to use when illness strikes the worker or a family member."¹⁹⁴

185. Milczarek-Desai & Sklar, *supra* note 26, at 188.

186. *Id.* at 188–89; Sarah Jane Glynn, *Coronavirus Paid Leave Exemptions Exclude Millions of Workers From Coverage*, CTR. FOR AM. PROGRESS (Apr. 17, 2020), <https://www.americanprogress.org/article/coronavirus-paid-leave-exemptions-exclude-millions-workers-coverage/> [<https://perma.cc/SG4A-QWV4>].

187. Milczarek-Desai & Sklar, *supra* note 26, at 188–89; Glynn, *supra* note 186.

188. Karstadt, *supra* note 181, at 148 (discussing over thirty-five cities and twelve states that had implemented paid sick leave laws as of 2020). As of 2022, approximately seventeen states and twenty-four localities have laws that address paid sick leave. WORKPLACE FAIRNESS, *Sick Leave Laws*, *supra* note 27; Goss, *supra* note 198, at 976 (stating that in 2019, there were "approximately forty-three local laws and ordinances mandate[ing]" paid sick leave).

189. Milczarek-Desai & Sklar, *supra* note 26, at 187; Karstadt, *supra* note 181, at 156.

190. In Arizona, for example, workers may only use up to 24 hours of earned paid sick days per year if their place of business has fewer than fifteen employees and up to forty hours of earned paid sick days per year if their workplace contains fifteen or more employees. ARIZ. REV. STAT. ANN. § 23-372 (2016).

191. Milczarek-Desai & Sklar, *supra* note 26, at 186–87; Karstadt, *supra* note 181, at 156; Goss, *supra* note 182, at 975–77.

192. Karstadt, *supra* note 181, at 156.

193. *Id.* at 165–70.

194. *Id.* at 165 (internal citations omitted).

The modern patchwork of local paid sick leave laws has significantly increased the number of American workers with access to paid sick days. New York City’s law, for example, expanded paid sick leave coverage by 1.2 million workers.¹⁹⁵ Two years after San Francisco’s law went into effect, 99 percent of the city’s workplaces with twenty or more employees provided paid sick days and “[l]ow-wage workers . . . significantly benefitted from the ordinance, especially those working in food service and accommodation sectors.”¹⁹⁶ A survey of employers one year after Seattle’s paid sick time law passed found that “marginalized workers—those in low-paying and part-time positions—are likely to gain significant coverage through mandated paid sick leave policies.”¹⁹⁷ Connecticut’s paid sick leave law similarly resulted in “the largest increases in paid sick leave coverage . . . where workers needed the assistance most, e.g., healthcare, education and social services, hospitality, and retail.”¹⁹⁸

B. Paid Sick Days Create Net Benefits

Numerous empirical and simulated studies show that paid sick days create net benefits because they achieve the twin goals of ensuring worker health and community safety. This research has revealed that workers without access to paid sick leave are more likely to engage in “presenteeism”¹⁹⁹ than their counterparts with leave, and that these sick workers subsequently infect others at high rates.²⁰⁰ The converse also is true: when workers have access to paid sick leave, there is a correlative reduction in the spread of viral infections.²⁰¹

Empirical data collected during the H1N1 epidemic of 2009–10²⁰² revealed that about eight million workers showed up to work with that dangerous influenza virus and went on to infect about seven million additional people.²⁰³ A

195. *Id.* at 164.

196. *Id.* at 167.

197. *Id.* at 169.

198. *Id.* at 169–70.

199. Presenteeism occurs when employees show up to work despite being sick. Garrity, *supra* note 181, at 704.

200. See, e.g., Crawford, *supra* note 22, at 2–6; ROBERT DRAGO & KEVIN MILLER, INST. FOR WOMEN’S POL’Y RSCH., SICK AT WORK: INFECTED EMPLOYEES IN THE WORKPLACE DURING THE H1N1 PANDEMIC I (2010), <https://iwpr.org/wp-content/uploads/2020/11/B284.pdf> [<https://perma.cc/VDN5-RZKD>]; AM. PUB. HEALTH ASS’N, *Support*, *supra* note 183.

201. Crawford, *supra* note 22, at 5–6; see also Stefan Pichler & Nicolas R. Ziebarth, *The Pros and Cons of Sick Pay Schemes: Testing for Contagious Presenteeism and Noncontagious Absenteeism Behavior* 3–4 (Nat’l Bureau Econ. Rsch., Working Paper No. 22530, 2016), https://www.nber.org/system/files/working_papers/w22530/w22530.pdf [<https://perma.cc/Q2X8-GRSB>] (finding a correlation between paid sick leave policies and lower rates of influenza).

202. Much of the research regarding paid sick leave and H1N1 derives from the substantial data collected during the from the 2009-2010 National H1N1 Flu Survey. See also AM. PUB. HEALTH ASS’N, *Support*, *supra* note 183.

203. DRAGO & MILLER, *supra* note 200, at 1; see also Karstadt, *supra* note 181, at 170–71; AM. PUB. HEALTH ASS’N, *Support*, *supra* note 183; *New Study: Lack of Paid Sick Days Contributed to Millions of H1N1 Cases*, NAT’L P’SHIP FOR WOMEN & FAMS. (Nov. 22, 2011),

2013 National Health Interview Survey concluded that “both full-time and part-time workers without paid sick leave are more likely to attend work while sick.”²⁰⁴ Although no large-scale studies have yet discerned how many workers went to work infected with the novel coronavirus or how many additional COVID-19 cases resulted, an empirical study during the first summer of the pandemic showed that nursing home aides who engaged in presenteeism were responsible for 44 percent of COVID-19 spread among multiple nursing homes, co-workers, and older residents.²⁰⁵

A significant body of research has established that presenteeism is responsible for several large outbreaks of foodborne illnesses too. In 2008, a worker without paid sick leave at a Chipotle restaurant in Ohio came to work ill, prepared food, and subsequently infected 500 people, resulting in hundreds of dollars in cost to the local community.²⁰⁶ A Wyoming norovirus outbreak in 2012 affected over three hundred people and was traced to restaurant workers who showed up to work sick.²⁰⁷ Moreover, each year, “there are approximately seventy-six *million* instances of food-borne illness nationwide . . . and food-service workers who go to work despite being sick were the leading causes of such outbreaks.”²⁰⁸ Looking beyond the costs incurred by workers, consumers, and communities when disease outbreaks occur, the Harvard Business Review has estimated that presenteeism costs “American companies . . . more than \$150 billion” annually.²⁰⁹

On the flip side of presenteeism are paid sick leave policies, which have been shown to reduce disease outbreaks. For example, one study comparing the rate of foodborne illnesses in jurisdictions before and after they adopted paid sick leave laws found that the rate diminished by 22 percent after paid sick leave was mandated.²¹⁰ A Harvard School of Public Health survey showed that while paid sick leave did not eliminate presenteeism, it “greatly reduce[d] it.”²¹¹ A

<https://www.nationalpartnership.org/our-impact/blog/paid-sick-days/new-study-lack-of-paid-sick-days-contributed-to-millions-of-h1n1-cases.html> [https://perma.cc/42R6-MHXY].

204. Crawford, *supra* note 22, at 6.

205. See M. Keith Chen, Judith A. Chevalier & Elisa F. Long, *Nursing Home Staff Networks and COVID-19* 1 (Nat’l Bureau of Econ. Rsch., Working Paper No. 27608, 2020), https://www.nber.org/system/files/working_papers/w27608/w27608.pdf [https://perma.cc/9M49-K25G].

206. Karstadt, *supra* note 181, at 171.

207. Garrity, *supra* note 181, at 703–04.

208. Karstadt, *supra* note 181, at 171 (emphasis added).

209. *Id.* at 172 (stating that “researchers at Harvard estimated that the cost of presenteeism is more than seven times greater than absenteeism”); see also Claudia Caledron Machicado, *The Business Case for Paid Leave and Paid Sick Days*, CTR. FOR AM. PROGRESS (Apr. 17, 2014), <https://www.americanprogress.org/article/the-business-case-for-paid-leave-and-paid-sick-days/> [https://perma.cc/9Z8R-PM9F].

210. Crawford, *supra* note 22, at 8; see also Charleen Hsuan, Suzanne Ryan-Ibarra, Kat DeBurgh & Dawn M. Jacobson, *Association of Paid Sick Leave Laws With Foodborne Illness Rates*, 53 AM. J. PREVENTATIVE MED. 609, 613 (2017).

211. Crawford, *supra* note 22, at 6.

simulated study using Google Flu Trends data demonstrated that when workers have access to paid sick leave policies that allow them to stay home when they are sick, infection rates decrease by about 10 percent.²¹² At least three other simulated studies showed a similar and significant reduction in pandemic spread as a result of paid sick leave laws.²¹³ Yet another simulated study suggested that paid sick leave would encourage workers to abide by governmental quarantine recommendations.²¹⁴ Two other studies have shown that paid sick leave policies result in increased vaccination rates for a broad spectrum of workers.²¹⁵ One of these studies, based on Medical Panel Expenditure data from 2006–10, projects that higher vaccination rates due to paid sick days “would result in 18.2 thousand fewer health care visits” and “64 thousand fewer work absences from influenza” alone.²¹⁶

Employees are not the only beneficiaries of paid sick time laws, which have also been linked to favorable conditions for employers. Studies have consistently “found a relationship between paid sick leave policies and economic benefits for employers such as improved employee productivity, reduced turnover and lower associated hiring and training costs as well as improved employee morale and loyalty.”²¹⁷ Moreover, several studies conducted in jurisdictions with paid sick leave mandates show that the “overall [negative] impact on businesses was minimal” in that employers reported experiencing “little or no additional costs” and that implementing paid sick days “had minimal effect on business operations.”²¹⁸ In New York City, where the paid sick time law covers 3.4

212. Karstadt, *supra* note 181, at 171 (explaining that the study compared “rates of influenza-like illnesses in regions with paid sick day policies” with the rates in regions without such policies).

213. Crawford, *supra* note 22, at 5 (stating that “[s]everal simulation studies point to the importance of paid sick leave as a key component of an effective pandemic containment strategy”) (citing M. Elizabeth Halloran, Neil M. Ferguson, Stephen Eubank, Ira M. Longini, Jr., Derek A. T. Cummings, Bryan Lewis, Shufu Xu, Christophe Fraser, Anil Vullikanti, Timothy C. Germann, Diane Wagener, Richard Beckman, Kai Kadau, Chris Barrett, Catherine A. Macken, Donald S. Burke & Philip Cooley, *Modeling Targeted Layered Containment of an Influenza Pandemic in the United States*, 105 PROC. NAT’L ACAD. SCI. 4639, 4639–44 (2008)); *see also* Shaojuan Liao, Yifei Ma, Jiangzhuo Chen & Achla Marathe, *Paid Sick-Leave: Is It a Good Way to Control Epidemics?*, in COMPLEX SCIENCES 214–15 (Kristin Glass, Richard Colbaugh, Paul Ormerod & Jeffrey Tsao eds., 2013); Supriya Kumar, Sandra Crouse Quinn, Kevin H. Kim, Laura H. Daniel & Vicki S. Freimuth, *The Impact of Workplace Policies and Other Social Factors on Self-Reported Influenza-Like Illness Incidence During the 2009 H1N1 Pandemic*, 102 AM. J. PUB. HEALTH 134, 134 (2011); Supriya Kumar, John J. Grefenstette, David Galloway, Steven M. Albert & Donald S. Burke, *Policies to Reduce Influenza in the Workplace: Impact Assessments Using an Agent-Based Model*, 103 AM. J. PUB. HEALTH 1406, 1406 (2013).

214. *See* Crawford, *supra* note 22, at 5–6; Karstadt, *supra* note 181, at 170–71.

215. Crawford, *supra* note 22, at 6.

216. *Id.* (citing Fernando A. Wilson, Yang Wang, & Jim P. Stimpson, *Universal Paid Leave Increases Influenza Vaccinations among Employees in the U.S.*, 32 VACCINE 2441, 2444 (2014)).

217. Goss, *supra* note 182, at 985.

218. *Id.* at 985–86; Karstadt, *supra* note 181, at 172 (“[R]esearch consistently demonstrates that working while sick decreases employee productivity and performance”); Eileen Appelbaum, Ruth Milkman, Luke Elliott & Teresa Kroeger, *Good for Business? Connecticut’s Paid Sick Leave Law*, CTR. FOR ECON. & POL’Y. RES. 4 (2014), <https://cepr.net/documents/good-for-buisness-2014-02-21.pdf> [<https://perma.cc/2AZM-DQVQ>].

million workers, 94 percent of employers reported “the law ‘had no effect on business’ productivity, while 2 [percent] . . . reported that productivity actually increased.”²¹⁹ Employers also reported little to no extra cost for implementation of the paid sick leave law.²²⁰ Surveys collected from employers in San Francisco and Connecticut, two other jurisdictions with paid sick leave laws, show that most employers did not experience an increase in costs as a result of these laws.²²¹ Similarly, the California Chamber of Commerce, which originally opposed that state’s paid sick leave law, “reported that employers have not experienced the expected burden” of the law and reported little to no difficulty in complying with the law.²²² In short, a substantial and growing body of empirical data and research confirms “that paid sick leave can be used as an effective policy instrument for controlling epidemics”²²³ without harming business interests.

C. Paid Sick Leave and Im/migrant Workers

Despite the demonstrable win-win-win that paid sick leave brings to workers, employers, and the public at large, low-wage workers—a workforce that includes large numbers of im/migrant workers, and everyone they come into contact with—are being excluded from these benefits. DOL figures reveal that “low-income workers still lag far behind in access to paid sick leave.”²²⁴ Nationwide, “only about 65 [percent] of American full-time workers have access to sick leave” and in low-wage, part-time, and service sectors of the economy, this numbers drops precipitously to 20 [percent] of the workforce.²²⁵ All in all, about “forty-four million workers—primarily within low-income brackets—lack access to even a single paid sick day in the United States.”²²⁶ Moreover, using data from the Centers for Disease Control and the U.S. Bureau of Labor Statistics, researchers have estimated that “at least 20 million Americans go to work sick, which [researchers] attribute to lack of access to paid sick leave.”²²⁷ Indeed, one worker survey found that “[o]nly 13 [percent] of low-income

219. Karstadt, *supra* note 181, at 164–65 (citing EILEEN APPELBAUM & RUTH MILKMAN, CTR. FOR ECON. & POL’Y RSCH., NO BIG DEAL: THE IMPACT OF NEW YORK CITY’S PAID DAYS LAW ON EMPLOYERS 1, 3 (2016) (internal citations omitted), <https://cepr.net/images/stories/reports/nyc-paid-sick-days-2016-09.pdf> [<https://perma.cc/9MRD-7XWU>]).

220. Karstadt, *supra* note 181, at 165; Goss, *supra* note 182, at 985–87.

221. Karstadt, *supra* note 181, at 167, 169.

222. Goss, *supra* note 182, at 986; *see also* Machicado, *supra* note 209.

223. Crawford, *supra* note 22, at 5 (internal citations omitted).

224. *Id.* at 7 (observing that “[o]nly 33% of those in the lowest 10% of incomes and 52% of those in the lowest 25% of incomes have access to paid sick leave”).

225. Karstadt, *supra* note 181, at 150; *see also* Drew DeSilver, *As Coronavirus Spreads, Which U.S. Workers Have Paid Sick Leave—and Which Don’t?*, PEW RSCH. CTR. (Mar. 12, 2020), <https://www.pewresearch.org/fact-tank/2020/03/12/as-coronavirus-spreads-which-u-s-workers-have-paid-sick-leave-and-which-dont/> [<https://perma.cc/659D-6LUQ>] (comparing paid sick leave based on income and industry).

226. Karstadt, *supra* note 181, at 147.

227. Crawford, *supra* note 22, at 5.

workers . . . reported beliefs that they could stay home during a pandemic outbreak.”²²⁸ Many of these workers are im/migrants who work in essential industries performing frontline jobs.²²⁹

National surveys collected in the aftermath of the H1N1 Pandemic revealed that Latinx workers “had a higher risk of infection due to disproportionate lack of access to paid sick leave” and that these workers had “lower rates of paid-leave access” than their counterparts during that epidemic.²³⁰ Not only were workers in these groups unable to stay home when ill or appropriately socially distance while at work, but they also faced increased hospitalizations and deaths.²³¹ These higher hospitalization and death rates among racial and ethnic minorities have been replicated during the current COVID-19 pandemic, with Black and Latinx individuals being three times as likely to contract coronavirus and twice as likely to die from it than individuals in other ethnic groups.²³²

While some portion of im/migrant workers’ lack of access to paid sick leave can no doubt be attributed to jurisdictions without paid sick leave laws, emerging research shows that even im/migrant workers who live in jurisdictions with paid sick leave mandates fail to benefit from these laws.²³³ To date, no comprehensive study has gathered data regarding the extent to which im/migrant workers have been able to access paid sick leave when they live and work in jurisdictions with paid sick leave laws. The COVID-19 pandemic, however, has prompted researchers to begin looking at this important question since earlier disease outbreak data shows that paid sick leave laws among this group of workers significantly reduces the spread of contagious diseases and resulting fatalities. The largest such study so far to look at this issue was conducted in the middle of the COVID-19 pandemic by the University of Massachusetts Labor Center, which collected surveys from 1600 frontline, essential, low-wage workers.²³⁴ The data revealed that workers felt unprotected from COVID-19 at work and that they could not quit due to economic concerns.²³⁵ Thus, this study revealed information previous research had not unearthed—that despite a robust state paid sick leave law and temporary federal paid sick leave legislation then in effect, a large percentage of low-wage workers, many of whom identified as Latinx, did not receive paid sick days.²³⁶

228. *Id.* at 6–7.

229. *Id.*; Ruqaiyah Yearby & Seema Mohapatra, *Law, Structural Racism, and the Covid-19 Pandemic*, 7 *J.L. & BIOSCIENCES* 1, 4–6 (2020).

230. Crawford, *supra* note 22, at 4–5 (citing to Kumar et al., *supra* note 213).

231. Yearby & Mohapatra, *supra* note 229, at 2.

232. Opiel et al., *supra* note 12; Yearby & Mohapatra, *supra* note 229, at 2–3.

233. The University of Arizona, James E. Rogers College of Law, Workers’ Rights Clinic is in the process of conducting two small studies aimed at empirically documenting low wage im/migrant workers’ access to paid sick days under Arizona’s paid sick leave law, but additional research in this area is needed.

234. *See* Hammonds & Kerrissey, *supra* note 11, at 5.

235. *See id.* at 6, 10.

236. *See id.* at 15–16.

Empirical researchers have yet to explore why im/migrant workers do not benefit from paid sick leave laws when such laws exist, although at least two small-scale studies have been launched by the Clinic.²³⁷ The next Section utilizes critical legal theories to construct a framework within which to analyze im/migrant workers' inability to access paid sick time in jurisdictions with paid sick leave laws.

III.

IM/MIGRANT WORKERS, PAID SICK LEAVE, AND COVID-19

As described in Section II, paid sick leave laws benefit multiple stakeholders because when workers can take paid sick time, they reduce the risk of disease transmission to all members of the public they encounter. The collision of immigration enforcement and workers' rights, described in Part I, however, has historically prevented low wage, im/migrant workers from accessing workers' rights, including paid sick leave. This Section uses critical race and movement law theories to explain why im/migrant workers have not, to date, benefitted from existing paid sick leave laws. It then employs critical race, movement, and public health law frameworks to argue that paid sick leave should be situated within a paradigm of mutual aid, as opposed to a traditional workers' rights paradigm, to better benefit im/migrant workers.

A. *Paid Sick Leave's Failure to Protect Im/migrant Workers*

Dating at least as far back as the 1918 flu pandemic, racial and ethnic minorities in the United States have fared worse than the rest of the population during disease outbreaks.²³⁸ In the wake of COVID-19's devastation in marginalized communities, critical legal scholars have asserted that this type of disproportional impact is "not due to any biological differences between races, but rather . . . a result of social factors."²³⁹ One such factor is workers' ability, or lack thereof, to stay home from work to rest, recover, and seek medical attention when sick. As discussed above, emerging studies show that im/migrant workers largely lack access to this social benefit even when they live in jurisdictions with robust paid sick leave laws.

Critical race theory's critique of the formal equality doctrine provides a framework to analyze and explain this situation. Critical race theorists have long pointed out that formal equality,²⁴⁰ which is embedded in all workers' rights

237. The University of Arizona, James E. Rogers College of Law, in conjunction with researchers at Northern Arizona University's Center for Health Equity Research, is conducting a state-wide im/migrant worker survey concerning workers' paid sick leave rights. The Clinic, in conjunction with the College of Law's health law program, is also engaged in qualitative research regarding im/migrant nursing home aides' access to aid sick time.

238. Yearby & Mohapatra, *supra* note 229, at 2–4.

239. *Id.* at 1–2.

240. Formal equality is the notion that the law provides "all competent adults" the same "equal legal status and . . . the same bundle of rights." BRIDGES, *supra* note 37, at 44.

legislation and is what requires the law to protect workers equally,²⁴¹ must be distinguished from substantive equality,²⁴² which “asks whether an individual can *actually* do what the right allows [them] to do in theory.”²⁴³ Viewing paid sick leave laws with this distinction in mind demonstrates that im/migrant workers experience a wide chasm between the formal equality written into paid sick leave laws and the substantive equality in the outcomes that result from these same laws.

The nation’s collection of paid sick leave laws are intended to benefit all workers, including im/migrant workers, because they apply to all workers regardless of documentation status, job, or industry.²⁴⁴ These laws mandate that workers earn, and have the opportunity to use, a set number of paid sick days per year.²⁴⁵ They also provide robust remedies when workers’ paid sick leave rights are violated. For instance, most laws allow for double or treble damages when workers are not paid for sick leave days that they have earned.²⁴⁶ This means that workers who earned but were denied paid sick days can be compensated two to three times their hourly wage rate if they had to take time off from work for a paid sick leave purpose. Moreover, all paid sick leave laws contain anti-retaliation provisions intended to prevent employers from punishing workers who either use paid sick leave or assert their right to it.²⁴⁷ At least one state law imposes a severe penalty for retaliation, requiring employers to pay a minimum of \$150 per day as long as the retaliatory action continues or until final judgment is rendered.²⁴⁸ Finally, all paid sick leave laws can be enforced by filing complaints with the appropriate state or local agency or through private right of action in court.

In this respect, paid sick leave laws mirror earlier workplace rights such as minimum wage, overtime, and anti-discrimination mandates—all of which provide damages to workers for rights violations, anti-retaliation protection, and complaint procedures through labor agencies and courts.²⁴⁹ The empirical data regarding im/migrant workers and other employment and labor protections, however, demonstrates that im/migrant workers are less likely to benefit from

241. Workers’ rights laws protect all similarly situated workers equally regardless of immigration status. *See supra* note 77 and accompanying text.

242. Substantive equality, unlike formal equality, is not satisfied merely because the law treats everyone in the same way. Rather, it looks to see whether differently situated individuals are, in fact, receiving similar treatment under the law. BRIDGES, *supra* note 37, at 44–45.

243. BRIDGES, *supra* note 37, at 45 (emphasis in original).

244. *See Sick Leave Laws, supra* note 27.

245. *See id.*

246. *See id.*

247. *Id.*

248. RIZ. REV. STAT. ANN. § 23-364(G) (2016).

249. Like paid sick leave laws, not all employment and labor laws cover all employers, and some exclude workers based on an employer’s size, gross income, and/or the number of hours an employee works. *See, e.g.*, 42 U.S.C. § 2000e(b) (requiring a minimum of 15 employees); 29 U.S.C. § 2611(2)(B)(ii) (requiring a minimum of 50 employees within a 75-mile radius); 29 U.S.C. § 203(s)(1)(ii) (requiring that an employer have two or more employees and gross \$500,000 or more per year).

rights such as minimum wage and overtime for a plethora of reasons, including fear of immigration enforcement, threats of retaliation, lack of education and knowledge about workers' rights, and financial inability to retain counsel or other legal support.²⁵⁰ These obstacles make im/migrant workers less likely to engage in complaint-making.²⁵¹ Complaint-making, however, is critical because the research also shows that under-resourced labor agencies rely on worker complaints in order to enforce workers' rights laws.²⁵²

In spite of this evidence, paid sick leave laws, many of which were enacted after this research was conducted and made available,²⁵³ continue to provide the same mechanisms for enforcement as earlier workers' rights laws that were not already benefitting im/migrant workers. It stands to reason that paid sick leave laws, which are modeled after traditional workers' rights laws, also fail im/migrant workers. This is because these workers are less likely to engage in the requisite complaint-making when faced with employers who do not provide paid sick days even when the law requires it.²⁵⁴ The underlying reasons for not engaging in complaint-making likely mirror the reasons found under traditional workers' rights laws—fear due to the worker's or a family member's immigration status, threats of adverse employment action, and lack of understanding of paid sick leave rights.²⁵⁵ Thus, when viewed through the lens of critical race theory's critique of the formal equality doctrine, paid sick leave laws fall short of conferring substantive equality upon im/migrant workers just like their traditional workers' rights counterparts.

It seems clear that paid sick leave laws were crafted with traditional workers' rights laws in mind but without a corresponding thought as to these laws' shortcomings when it comes to assisting im/migrant workers. This is somewhat surprising given that the contemporary paid sick leave movement, which began in the early 2000s, had its origins in grassroots advocacy that

250. See *supra* Part II.C.

251. See *id.*

252. See *id.*

253. WORKPLACE FAIRNESS, *Sick Leave Laws*, *supra* note 27.

254. Although no empirical research has yet to pose this question to im/migrant workers, it is consistent with what clients tell the Workers' Rights Clinic. Indeed, most clients come to the clinic seeking legal assistance for unpaid wages only to learn that they also have experienced paid sick leave violations. It also is consistent with past research showing that im/migrant workers often do not know what their workplace rights are in general. Jennifer Gordon & R.A. Lenhardt, *Rethinking Work and Citizenship*, 55 UCLA L. REV. 1161, 1214 (2008).

255. See RUTH MILKMAN & EILEEN APPELBAUM, UNFINISHED BUSINESS: PAID FAMILY LEAVE IN CALIFORNIA AND THE FUTURE OF U.S. WORK-FAMILY POLICY 14–15 (2013). See generally Ruth Milkman and Eileen Appelbaum, *Low-Wage Workers and Paid Family Leave: The California Experience*, in WHAT WORKS FOR WORKERS?: PUBLIC POLICIES AND INNOVATIVE STRATEGIES FOR LOW-WAGE WORKERS (Stephanie Luce, Jennifer Luff, Joseph A. McCartin & Ruth Milkman, eds., 2014) (finding that low-wage workers, especially workers who are minorities or disadvantaged for other reasons, who are most in need of paid sick leave are the least likely to know if they have rights to paid sick leave).

included im/migrant rights groups.²⁵⁶ The emergent field of movement law theory provides guidance in understanding how paid sick leave advocates may have unintentionally replicated earlier workplace rights' blind spots, and how this might be avoided in the creation of future paid sick leave policy.

Movement law, like critical legal studies, is interested in ideals such as justice and equality that come under the purview of the law but that the law has failed to achieve.²⁵⁷ Its focus is on working in solidarity with social and grassroots movements in order to create legal meaning and frameworks, and to do so without imposing a hierarchical structure that places the law, lawyers, and legal scholars at the top and groups of people organizing for a more just, equitable, and sustainable future at the bottom.²⁵⁸ In other words, movement law urges those with legal knowledge to co-generate “ideas alongside social movements” rather than for them.²⁵⁹

Viewed through a movement law lens, paid sick leave laws are crafted in a manner that do not consider the lived reality of im/migrant workers. For example, it is common for im/migrant workers and communities to be unaware of their workplace rights or, even if they have knowledge regarding workers' rights, to lack an understanding of the specific mechanisms for provision and enforcement of these rights.²⁶⁰ Paid sick leave laws reflect this on a basic level because some provide state and local labor agencies with the option to engage in community education and outreach.²⁶¹ But these laws are silent when it comes to determining how to go about identifying vulnerable worker groups for outreach purposes, the importance of gaining community trust, and/or best practices for educating marginalized groups. Perhaps due to these oversights, labor agency educational programming often does not reach im/migrant workers.²⁶²

256. See *National Paid Sick Days Coalition*, NAT'L P'SHIP FOR WOMEN & FAMS., <http://www.paid sick days.org/about-us/about-coalition.html> [<https://perma.cc/E94N-52AK>] (listing national, state, and local advocacy groups in support of paid sick leave legislation, including El Centro de la Raza, the League of United Latin American Citizens, and the National Council of La Raza).

257. See Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 826 (2021).

258. *Id.* at 841 (calling for lawyers to work collaboratively with community members, to accompany rather than to lead, to learn rather than to wield professional privilege).

259. *Id.* at 876.

260. See *supra* Part II.C.

261. See, e.g., ARIZ. REV. STAT. ANN. § 23-380 (2016) (providing that the “commission may develop and implement a multilingual outreach program”).

262. See generally CHRIS BENNER, TONY LOPRESTI, MARTHA MATSUOKA, MANUEL PASTOR & RACHEL ROSNER, CTR. FOR JUST., TOLERANCE & CMTY., IMMIGRANT WORKERS EMPOWERMENT AND COMMUNITY BUILDING: A REVIEW OF ISSUES AND STRATEGIES FOR INCREASING WORKFORCE AND ECONOMIC OPPORTUNITY FOR IMMIGRANT WORKERS 5 (2005), https://cjtc.ucsc.edu/docs/cbr_immigrant_workforcereport.pdf [<https://perma.cc/SR6X-PMBR>] (discussing the challenges in providing immigrant workers with educational and outreach programming).

Paid sick time laws also ignore the reality that most im/migrant workers cannot afford legal assistance to file workplace complaints with labor agencies or courts. Labor agency complaint procedures can be byzantine,²⁶³ and successfully filing a court action requires some degree of legal knowledge, advice, or representation. Without creating alternative mechanisms for enforcement—that is, modes of enforcement that do not rely largely on worker complaint-making—paid sick leave laws all but ensure im/migrant workers’ inability to benefit from paid sick days when faced with non-compliant employers. For example, sick time laws could require state and local labor agencies to conduct periodic sick leave audits of employers in industries that are known violators of workers’ rights. As written, however, paid sick leave laws do not embrace movement law strategies informed by im/migrant workers’ stories, concerns, and suggestions, which in turn might have led to better protections for this subset of workers.²⁶⁴

Drafters of paid sick leave laws are not the only ones who have failed to appreciate the “limits of rights discourse to transform the prevailing order”²⁶⁵ when it comes to im/migrant workers and paid sick time. Scholars and policy analysts analyzing paid sick leave laws, including those discussing vulnerable groups’ lack of access to paid sick days, are silent when it comes to im/migrant workers’ predicaments and perspectives.²⁶⁶ In this way, the literature surrounding paid sick leave continues to ignore voices and experiences that are traditionally overlooked by the legal academy and its primary reliance on “traditional legal sources.”²⁶⁷ When workers’ perspectives are ignored, recommendations for enhancing paid sick leave’s reach to marginalized workers

263. In Arizona, for example, the state labor agency—the Industrial Commission of Arizona—has created a one-year statutory deadline and a maximum award amount even though neither of these conditions are set forth in the statute itself. See INDUS. COMM’N OF ARIZ., FREQUENTLY ASKED QUESTIONS (FAQS) ABOUT MINIMUM WAGE AND EARNED PAID SICK TIME 35 (2022), https://www.azica.gov/sites/default/files/media/22222%20FREQUENTLY%20ASKED%20QUESTIONS_MasterwTOC%20FINAL%20-%20CLEAN%20%281%29.pdf [<https://perma.cc/GR7S-EFJ4>]. Moreover, the ICA nowhere specifies how workers without access to the internet or online expertise might fill out complaint forms or how workers can contact the agency with respect to claims they already have made when new facts or information arises. See *Forms*, INDUS. COMM’N ARIZ., <https://www.azica.gov/forms> [<https://perma.cc/GK3F-H9MX>].

264. Akbar, Ashar & Simonson, *supra* note 257, at 852 (“When we ignore social movement visions and organizing, we tacitly give weight to conventional policy approaches and actors, and we ignore transformative possibilities.”).

265. *Id.* at 854.

266. See, e.g., Jennifer L. Pomeranz, Diana Silver, Sarah A. Lief & Jose A. Pagan, *State Paid Sick Leave and Paid Sick-Leave Preemption Laws Across 50 U.S. States, 2009–2020*, 62 AM. J. PREVENTIVE MED. 688, 688–95 (2022) (making the common misstep of calling for national paid sick leave policy based on current state and local laws without critically analyzing whether these existing laws are meaningful for vulnerable workers such as low wage im/migrants); DILINI LANKACHANDRA, A BETTER BALANCE, SICK WITHOUT A SAFETY NET: NOW IS THE TIME TO BUILD ON STATE SUCCESSES WITH A FEDERAL PAID SICK TIME LAW 2 (2022) (arguing for a national paid sick time law using existing state laws as a model).

267. Akbar, Ashar & Simonson, *supra* note 257, at 863.

risk being stale upon arrival.²⁶⁸ Indeed, otherwise comprehensive legal articles discussing paid sick leave exemplify this when they call for expanding paid sick leave by using existing laws as templates to increase the number of jurisdictions with paid sick time and, ultimately, to enact a national paid sick leave law.²⁶⁹ Although this scholarship is well meaning, its failure to acknowledge the limits of current paid sick leave laws and to explore why im/migrant workers' are not able to access them leaves the most vulnerable workers out of the paid sick time paradigm.

B. Shifting the Paid Sick Time Paradigm to Center Im/migrant Workers

Shifting the paid sick time paradigm in a manner that is more inclusive of vulnerable workers will require scholars and policymakers to center im/migrant workers when advocating for and drafting sick time laws.²⁷⁰ This centering does not mean that marginalized workers necessarily have all the answers. Rather, this type of engagement with im/migrant workers and their communities often makes legal theory and law work "better, [and be] more hopeful, more grounded, and more accountable."²⁷¹ This is critical given the hegemonic forces, lack of political will, and limited economic resources that buttress status quo notions, such as the sufficiency of formal equality within paid sick leave laws.²⁷² It is precisely because of these types of challenges and obstacles that movement law urges those trained in law to "take cues from social movement epistemes," in order to be able to "gesture at new possibilities."²⁷³ This Section aims to do just that by first learning alongside a group of essential, frontline workers who successfully advocated for their workplace rights, and then applying these lessons to show how paid sick leave laws could be more effective for im/migrant workers.

In 2018, a group of nurses at two hospitals in Tucson, Arizona, many of whom are im/migrants, decided to organize themselves under National Nurse's United (NNU), an AFL-CIO affiliated union, because hospital management had consistently failed to ensure safe working conditions for them and their patients.²⁷⁴ At first, the nurses' chances of unionizing seemed miniscule because

268. These types of recommendations also fail to "refuse the abstraction of the violence of everyday law." *Id.* at 861.

269. *See, e.g.,* Zhang, *supra* note 22, at 410; Karstadt, *supra* note 181, at 173–75; Garrity, *supra* note 181, at 740–42.

270. *But see* Akbar, Ashar & Simonson, *supra* note 257, at 877 ("Movement law often centers narrative in part because storytelling is central to what social movements do.")

271. *Id.* at 852; *see also id.* at 843 ("Movement law gives scholars permission to ground their work in movement organizing and ideation as an initial matter, rather than beginning with our siloed legal understandings.")

272. *See id.* at 852–54 (discussing the challenges facing social justice movements).

273. *Id.* at 861. *But see id.* at 848 (recognizing that "social movements are not a perfect proxy" for alternative modes of legal thinking).

274. Univ. Ariz. James E. Rogers Coll. L., National Nurses United Presentation to Workers' Rights Clinic on Unionization (Sept. 2, 2021) (on file with author) [hereinafter Clinic on Unionization].

Arizona has very few unionized workplaces and unionizing in the state is difficult.²⁷⁵ The nurses, however, crafted a unique strategy: they centered their campaign around narrating personal stories about what it felt like to be essential, frontline, healthcare workers who are overworked and dangerously understaffed while tending to patients in need of critical care and attention.²⁷⁶ Importantly, the nurses' narrative shifted focus away from their workplace right to organize to change hospital staffing policies and onto their lack of ability to provide the best care possible for their patients given current staff-to-patient ratios. Additionally, early in the campaign, the nurses prioritized providing legal knowledge to and cultivating solidarity among their ranks.²⁷⁷ This was important given that the nurses knew management would engage in aggressive and unlawful tactics against nurses advocating for the union, such as threats and retaliatory behavior.²⁷⁸ By fall of 2019, just months before COVID-19 inundated hospitals and healthcare workers nationwide, the Tucson nurses achieved what no other group of hospital workers in the state had ever done before: they unionized their hospitals. As a result, they ensured that their voices would be heard and their concerns addressed—and they did this in furtherance of their goal to provide the best quality healthcare to the people they had dedicated their careers to serving.

The nurses who brought NNU to Arizona engaged in a seemingly simple yet extraordinary move—they situated their workers' rights within a broader public health conversation. The NNU provides useful lessons for shifting the paid sick leave paradigm, notwithstanding the differences between unionization campaigns and drafting paid sick time legislation that embraces im/migrant workers.

When the NNU nurses foregrounded their patients' well-being and tied this to their need for lower staff-to-patient ratios, they activated critical race theory's "interest convergence principle." A term coined by Derrick Bell, interest convergence posits that minority groups, such as im/migrant workers, significantly benefit from laws and social policies that also benefit dominant groups.²⁷⁹ The nurses highlighted the convergence of their interests and their patients' interests by focusing their unionizing campaign on patients' negative healthcare outcomes when nurses are overworked and understaffed. The same strategy can be used to enhance paid sick leave protections for im/migrant

275. This is due to several factors, including that Arizona is a "right to work" state, which means that the state does not require employees who work in a unionized workplace to join the union or pay regular union dues. See *Right-to-Work Resources*, NAT'L CONF. STATE LEGISLATURES, <https://www.ncsl.org/research/labor-and-employment/right-to-work-laws-and-bills.aspx> [<https://perma.cc/4GRC-2NZ7>].

276. Clinic on Unionization, *supra* note 274.

277. See *id.*

278. *Id.* This turned out to be critical. For example, one young nurse was written up on trumped-up charges after she came to work sporting a union button on her uniform. When she was called into the manager's office, a group of other nurses encircled her in an act of solidarity and support so that management could not successfully isolate and target her.

279. Bell, *supra* note 37, at 523.

workers by pointing out that dominant groups—be they nursing home residents, meat purchasers, or restaurant goers—will benefit if workers in these industries, many of whom are im/migrants, are more likely to use paid sick leave.

Critical race theorists do not always view interest convergence as a successful strategy because, as Bell argued, “even when the interest convergence principle results in an effective . . . remedy [for marginalized groups], that remedy will be abrogated at the point that policymakers fear [it] . . . is threatening the superior societal status of [dominant groups].”²⁸⁰ Although this failure of interest convergence to sustainably help vulnerable groups often has played out as Bell feared,²⁸¹ this critique does not necessarily extend to laws and policies connecting workers’ rights to public health. For instance, low staff-to-patient ratios at a hospital arguably enhances the quality of life for all patients regardless of their status in dominant or vulnerable groups. The same can be said for paid sick leave laws that embrace im/migrant workers. For example, disincentivizing presenteeism by providing an im/migrant worker who is sick with COVID-19, H1N1, or even the common flu with paid sick leave benefits both that worker and an exponentially larger number of individuals, some of whom are from dominant groups that rely on that worker’s labor. When paid sick leave is viewed as a broader public health measure, rather than as an individual workers’ rights issue, it perfectly converges the interests of workers and those who rely on and benefit from the workers’ labor.²⁸²

Recently, health law scholars have hit upon a similar idea in calling for a “solidarity-based theory of public health” that highlights the interconnectedness of workers’ rights and public health outcomes.²⁸³ Specifically, they argue that because “[i]nfectious disease pandemics are fueled by the connection of people to one another in society,” the public’s health and safety can be safeguarded only by acknowledging these connections and working toward mutual aid.²⁸⁴ When viewed within this paradigm of connection and mutual aid, paid sick leave is more than a workplace right—it is a highly efficacious tool for achieving and maintaining the health and safety of entire populations, especially during times of disease outbreaks, epidemics, and pandemics. Indeed, a central policy purpose behind paid sick leave is to ensure that workers take time off from work when they are ill rather than engaging in presenteeism, which spreads infection and

280. BRIDGES, *supra* note 37, at 447 (explaining the example of interest convergence gone awry after the *Brown v. Board of Education* decision and the failure to integrate public education).

281. *Id.*

282. The Daily, *We Need to Talk About Covid, Part 2: A Conversation with Dr. Anthony Fauci*, N.Y. TIMES (Jan. 31, 2022), <https://www.nytimes.com/2022/01/31/podcasts/the-daily/we-need-to-talk-about-covid-part-2-a-conversation-with-dr-fauci.html> [<https://perma.cc/UPH8-AP8G>] (statement of Dr. Anthony Fauci) (emphasized that the pandemic has demonstrated that “we all are connected with each other” in discussing how the nation should emerge from the pandemic).

283. Wiley & Bagenstos, *supra* note 38, at 1236.

284. *Id.* at 1236.

disease.²⁸⁵ Thus, attempts to expand paid sick leave laws that are inclusive of im/migrant workers must prominently feature the fact that paid sick leave laws protect *everyone*—im/migrant workers by providing time off for medical care, rest, and recovery,²⁸⁶ and everyone else by protecting the public from sick workers who can spread contagion.²⁸⁷

Framing paid sick leave as a hybrid law at the intersection of workplace rights and public health shifts the paid sick time paradigm to embrace im/migrant workers in three ways. First, it removes im/migrant workers' access to paid sick leave from the confines of immigration enforcement and im/migrant workers' rights, which have stifled the ability of paid sick leave laws to adequately reach and protect im/migrant workers.

Second, situating im/migrant workers and paid sick leave within a public health matrix allows us to see how “fundamentally individualistic employment and anti-discrimination laws have undermined—rather than supported—workers' ability to protect themselves and others.”²⁸⁸ Employment and labor laws are focused on the “attribution of fault and responsibility” among workers and employers, which not only obfuscates communal or governmental responsibilities but also does not result in effective public health outcomes.²⁸⁹ Paid sick leave laws exemplify this problem. Even though these laws exist to safeguard workers and the public, their enforcement mechanisms for apportioning blame and damages focus on individual employers and, because im/migrant workers are unlikely to complain about their employers, these laws do not ultimately function as intended.²⁹⁰

Third, tying im/migrant workers' rights to public health opens the door to innovations that do not currently exist in paid sick leave laws. For example, perhaps the very process whereby paid sick days are requested and provided needs to be re-examined. If the underlying goal of paid sick leave is to ensure public health and safety beyond a singular workplace, then it does not make sense to expect individual employers to bear the brunt of paying for all sick days,

285. See Crawford, *supra* note 22, at 5; Garrity, *supra* note 179, at 704; Milczarek-Desai & Sklar, *supra* note 26, at 189–90; Karstadt, *supra* note 179, at 147.

286. See Crawford, *supra* note 22, at 2, 4–5; Garrity, *supra* note 181, at 704–05; Karstadt, *supra* note 181, at 158, 170–71.

287. In a recent *New York Times* opinion piece, a medical doctor lamented that vaccine hesitancy, at its core, reflects “a transformation of our core beliefs about what we owe one another” and fears that today, “public health is no longer viewed as a collective endeavor, based on the principle of social solidarity and mutual obligation. People are conditioned to believe they’re on their own and responsible only for themselves.” She went on to argue that changing this mindset and “to beat the pandemic, countries need policies that promote a basic, but increasingly forgotten, idea: that our individual flourishing is bound up in collective well-being.” Anita Sreedhar & Anand Gopal, Opinion, *Behind Low Vaccination Rates Lurks a More Profound Social Weakness*, N.Y. TIMES (Dec. 3, 2021), <https://www.nytimes.com/2021/12/03/opinion/vaccine-hesitancy-covid.html> [https://perma.cc/JA2G-8WGM].

288. Wiley & Bagenstos, *supra* note 38, at 1244.

289. *Id.* at 1247–48.

290. *Id.* at 1266–67.

as is required under most state paid sick leave laws.²⁹¹ Rather, a system more akin to workers' compensation, where employers are required to purchase insurance to pay for injured workers' medical bills, might be more appropriate. A workers' compensation model is especially attractive to im/migrant workers since workers' compensation does not exclude im/migrant workers as is the case under public benefits models such as unemployment insurance.²⁹² Therefore, im/migrant workers might be less fearful of making paid sick leave claims under a workers' compensation-type rubric.²⁹³ Moreover, workers' compensation claims contain built-in mechanisms for attorney's fee payments, which may make it more feasible for im/migrant workers to file these claims as opposed to claims for other types of workers' rights.²⁹⁴

Shifting paid sick time from an exclusively workers' rights-based paradigm to a mutual aid paradigm centers the importance of low wage, im/migrant workers' access to paid sick leave. When these workers, who often are also essential and frontline workers, can afford to stay home while ill, they simultaneously benefit the public at large by preventing disease outbreaks. Thus, situating paid sick leave within a public health matrix underscores why lawmakers and policymakers should put care and attention into ensuring that im/migrant workers meaningfully benefit from paid sick leave laws.

291. Instead of making employers pay for workers' paid sick leave time, federal, state, or local governments could provide direct payments to workers who take paid sick leave. See CHANTEL BOYENS, URB. INST., STATE PAID FAMILY AND MEDICAL LEAVE PROGRAMS HELPED A SURGE OF WORKERS AFFECTED BY THE COVID-19 PANDEMIC 3 (2020), https://www.urban.org/sites/default/files/publication/102325/state-paid-family-and-medical-leave-programs-helped-a-surge-of-workers-affected-by-the-covid-19-pandemic_0.pdf [<https://perma.cc/HM83-XXHX>]. This is the case in several other countries. See, e.g., AMY RAUB, PAUL CHUNG, PRIYA BATRA, ALISON EARLE, BIJETRI BOSE, JUDY JOU, NICOLAS DE GUZMAN CHORNY, ELIZABETH WONG, DANIEL FRANKEN & JODY HEYMANN, WORLD POL'Y ANALYSIS CTR., PAID LEAVE FOR PERSONAL ILLNESS: A DETAILED LOOK AT APPROACHES ACROSS OECD COUNTRIES 2-3 (2018), https://www.worldpolicycenter.org/sites/default/files/WORLD%20Report%20-%20Personal%20Medical%20Leave%20OECD%20Country%20Approaches_0.pdf [<https://perma.cc/Q8GU-DFYQ>] (detailing the paid sick leave policies across OECD countries).

292. See generally DEBORAH BERKOWITZ, NAT'L EMP. L. PROJECT, UNINTENDED CONSEQUENCES OF LIMITING WORKERS' COMP BENEFITS FOR UNDOCUMENTED WORKERS (2017), <https://s27147.pcdn.co/wp-content/uploads/Unintended-Consequences-Limiting-Workers-Comp-Undocumented-Workers.pdf> [<https://perma.cc/D24W-DJWA>] (discussing the public policy reasons behind providing workers' compensation benefits to all workers, including those without documentation). FFCRA, unlike workers' compensation benefits, used a tax credit model whereby employers would receive tax credits for sick days they paid out to workers under the law. Zhang, *supra* note 22, at 387. This model, however, does not consider the likelihood that employers, who have workers without authorization, will not provide paid sick leave to those workers, because employers will not want to request tax credits from the IRS for workers whom they do not pay taxes on.

293. See, e.g., Molly Weston Williamson, *The Meaning of Leave: Understanding Workplace Leave Rights*, 22 N.Y.U. J. LEGIS. & PUB. POL'Y 197, 254 (2019) (analyzing workers' compensation laws and the efficacy of anti-retaliation protections).

294. See, e.g., ARIZ. REV. STAT. ANN. § 23-1069 (2022) (providing attorney fees for workers' compensation claims).

C. *Challenges and Recommendations to Ensuring that Im/migrant Workers Benefit from Paid Sick Leave Laws*

While locating paid sick leave policies within a public health matrix highlights the public health benefits of providing im/migrant workers with access to paid sick leave, it is not enough to ensure that im/migrant workers will be able to benefit from paid sick leave laws. To do this, scholars and policymakers must spend time engaging with, listening to, and learning from im/migrant workers. Lawmakers can then look to this research and craft more inclusive paid sick leave laws that implement effective strategies to educate im/migrant workers about their paid sick leave rights, encourage workers to request paid sick time, and enforce paid sick leave laws when they are not followed. For example, im/migrant workers might express that education and outreach components of paid sick leave laws would be more beneficial if they instructed labor agencies to use certain types of presentation techniques such as the use of interpreters and bilingual materials. Im/migrant workers may also favor outreach methods that utilize individuals whom their community trusts, such as embedded community health workers.²⁹⁵

Including im/migrant workers in these conversations also helps policymakers understand what exactly is needed to help workers feel safe, or at the very least emboldened to engage in complaint-making. This is another important lesson that can be gleaned from the NNU nurses' campaign. Because the nurses took time to engage in community building within their ranks before launching a full-scale unionizing effort, those nurses singled out for employment retaliation were more able to withstand management's intimidation tactics. Some workers, however, will never feel comfortable making complaints against employers who violate their paid sick leave rights. To address these situations, policymakers must take fears of immigration enforcement and job loss into account when crafting paid sick leave laws.²⁹⁶ They can do so by using scarce

295. Community health workers embedded in im/migrant communities serve as bridges between community members and public health policies. Nadia Islam, Ephraim Shapiro, Laura Wyatt, Lindsey Riley, Jennifer Zanowiak, Rhodora Ursua & Chau Trinh-Shevrin, *Evaluating Community Health Workers' Attributes, Roles, and Pathways of Action in Immigrant Communities*, 103 PREVENTATIVE MED. 1, 2 (2017). A collaborative of public health researchers at Northern Arizona University's Center for Health Equity Research who work in conjunction with the Workers' Rights Clinic at the James E. Rogers College of Law are currently studying the impact community health workers have when they provide education and outreach to low-wage im/migrant workers on paid sick leave issues.

296. For example, on January 13, 2023, DHS announced new official policy that would permit im/migrant workers to seek prosecutorial discretion, such as deferred action, which is a temporary form of immigration relief, from the United States Citizenship and Immigration Service, when workers are involved in labor and employment disputes that are being investigated by federal, state, or local agencies. See *DHS Support of the Enforcement of Labor and Employment Laws*, DEP'T HOMELAND SEC. (Jan. 13, 2023), <https://www.dhs.gov/enforcement-labor-and-employment-laws> [<https://perma.cc/Z532-95NP>]. The purpose behind these guidelines is to remove fear of immigration retaliation by employers so that workers will freely cooperate with agency investigations when workers' rights are violated. *Id.* The new guidelines require workers who are involved in a labor dispute to obtain a "statement of interest" letter from the agency that is investigating the dispute. *Id.* Federal agencies such as DOL,

resources to target enforcement of paid sick leave laws in frontline, essential industries like agriculture, meat-processing, and long-term care that rely heavily on im/migrant labor. They also can work closely with advocates within im/migrant worker communities to begin conversations about the benefits of paid sick leave not just for individual workers, but also for their families and communities.

Although there is no substitute for spending time alongside the very workers that paid sick leave laws intend to, but fail to, protect, this is not a panacea because workers do not speak in a unified voice.²⁹⁷ It is highly likely that im/migrant worker communities will contain different, sometimes opposing views regarding how best to craft paid sick leave laws that provide maximum benefits. This means that movement lawyers and policymakers must do the difficult work of tolerating dissonance, participating in active listening, and practicing patience, while workers identify possible solutions. There may be other hurdles as well. For instance, extrapolating from prior research about im/migrant workers and other workplace rights, it is plausible that at least some workers have culturally-based or self-limiting beliefs that will prompt them to shy away from asserting their paid sick time rights and encourage them to engage in presenteeism.²⁹⁸ Even robust laws and policies may not be able to address deeply embedded psychological factors.

Overcoming these types of obstacles will take time, research, and experimentation in the field. To date, no large-scale quantitative or qualitative data has been collected on im/migrant workers' experiences with paid sick leave laws. This type of research would allow policymakers to evaluate the efficacy of different paid sick leave models and conduct additional research on how im/migrant workers have benefited. In collecting this data, researchers and policymakers should consider collaborating with trusted partners of im/migrant communities, such as embedded community health workers, to understand and

NLRB, and the Equal Employment Opportunity Commission have already created procedures or have promised to soon create procedures by which workers may seek statements of interest for deferred action applications to the Department of Homeland Security. See *NELP Welcomes New U.S. Department of Labor (DOL) FAQs on Supporting Immigration Relief and Retaliation Protection for Immigrant Workers*, NAT'L EMP. L. PROJECT (July 7, 2022), <https://www.nelp.org/news-releases/nelp-welcomes-new-u-s-department-of-labor-dol-faqs-on-supporting-immigration-relief-and-retaliation-protections-for-immigrant-workers/> [https://perma.cc/2UWN-HR6F]; Low-Wage Worker Legal Network Webinar on New DHS Deferred Action Guidance (Jan. 18, 2023) (on file with author). The Department of Homeland Security guidance, however, will not benefit workers who experience paid sick leave violations unless state and local agencies, which are the only agencies with jurisdiction over paid sick leave laws, claims, and investigations, are willing to provide workers with statements of interest. As of the time of writing of this paper, it is too soon to know whether agencies that oversee investigations of paid sick leave violations will assist workers fearful of immigration retaliation by providing them with statements of interest they can use for deferred action.

297. See Akbar, Ashar & Simonson, *supra* note 257, at 847–48; JENNIFER GORDON, *SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS* 160–62 (2005).

298. See Gleeson, *supra* note 122, at 569, 582–83, 589–90.

address the psychological barriers im/migrant workers face when accessing their paid sick leave rights.

CONCLUSION

The pandemic has shown that multiple stakeholders, including workers, employers, and the public, suffer when im/migrant workers engage in presenteeism. Existing paid sick leave laws fail to remedy this problem because they, like other workers' rights laws, ignore the lived realities of im/migrant workers as well as the interconnections among workers and everyone else. Situating paid sick time within a public health matrix removes it from the collision between immigration enforcement and workers' rights and places it within the context of mutual aid. It also opens the portal to drafting paid sick leave laws, whether on the federal, state, or local level, in a way that will encourage im/migrant workers to assert paid sick leave rights and focuses scarce agency resources on effectively remedying paid sick time violations when they occur. Without re-imagining paid sick time as more than a workers' rights issue, a nation that relies heavily on im/migrant labor will continue to suffer significant social, economic, and human losses from current and future pandemics.

APPENDIX A: CREATION AND USE OF TERM "IM/MIGRANT" IN THIS ARTICLE

Neither of the terms "immigrant" nor "migrant" adequately capture the foreign-born, noncitizen, low-wage, mostly Latinx, worker population that is adversely affected by the collision of immigration enforcement and workplace rights. Under U.S. immigration law, the term "immigrant" refers to noncitizen persons who have obtained a formal legal status that provides a pathway to U.S. citizenship.²⁹⁹ U.S. immigration laws also allow noncitizens to obtain what is called "non-immigrant" status through various non-immigrant visas, but these individuals are not technically considered "immigrants."³⁰⁰ The term "migrant," on the other hand, is not found in U.S. immigration statutes but is referred to in employment and labor laws to describe temporary or seasonal workers.³⁰¹ The INA does have a term to refer to all noncitizens, whether they have status or not, and that term is "alien."³⁰² Legal scholars, advocates, and others have argued that this is an archaic and dehumanizing term.³⁰³ Under the Biden Administration, "alien" has been replaced with "noncitizen" on all official DHS communications including websites.³⁰⁴

299. INA § 101(a)(15), 8 U.S.C. § 1101(a)(15).

300. *Id.*

301. Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 3222.

302. *See generally* 8 U.S.C. § 1101(a).

303. Editorial Bd., Editorial, *Time to Retire the Word "Alien,"* N.Y. TIMES (Oct. 20, 2015), <https://www.nytimes.com/2015/10/20/opinion/time-to-retire-the-term-alien.html> [<https://perma.cc/5AD6-8VS5>].

304. Daniel Hernandez, *From "Alien" to "Noncitizen": Why the Biden Word Change Matters in the Immigration Debate,* L.A. TIMES (Feb. 18, 2021), <https://www.latimes.com/entertainment->

Unlike the terminology of U.S. immigration statutes, the term “migrant” is commonly used to refer broadly to any person who has moved to the United States from another country. The term migrant refers to a person who migrates, which is defined as “to move from one country, place, or locality to another.”³⁰⁵ This term includes those with and without legal status and those with and without work authorization because legal status and work authorization are not coextensive. For example, a worker may have legal status through a temporary work-based visa, which also provides work authorization;³⁰⁶ a worker may have legal status through a student-based visa, which does not include work authorization;³⁰⁷ or a worker may lack both legal status and work authorization. Employers, like the general public, often treat foreign-born, noncitizen, low-wage workers as if they lack immigration status or work authorization irrespective of their technical immigration or work authorization status.³⁰⁸ This is especially true if the workers at issue are racialized as Latinx.³⁰⁹ Because this workforce is comprised of individuals from immigrant, non-immigrant visa, and migrant categories, the term “im/migrant,” is used in this paper to inclusively refer to a wide swath of mostly Latinx, low-wage workers who occupy “the bottom of the labor market . . . [in] poorly paid, physically demanding, menial, and often dangerous jobs with limited requirements for English-language proficiency—jobs that most U.S.-born workers seek to avoid.”³¹⁰

APPENDIX B: WORKERS’ RIGHTS CLINIC STORIES 2020-2021*

BG often worked twelve-hour shifts cleaning a large warehouse for a janitorial company. One day, in the middle of the pandemic, she started coughing and her supervisor told her to leave, did not provide her with paid sick leave, and never scheduled her to work again, even though BG later provided a negative COVID test. When the Clinic sent a demand letter to BG’s employer requesting her paid sick time payments, the employer responded with threats, suggesting they would report BG’s lack of documentation to immigration authorities.

NS worked twelve-hour or longer days painting houses for a contractor in the blistering Arizona heat. Her employer expected her to continue working after she contracted COVID-19, and she worked for as long as she could. When she

arts/story/2021-02-18/immigration-alien-noncitizen-language-politics-undocumented
[<https://perma.cc/8MDL-7VWG>].

305. *Migrate*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 787 (11th ed. 2003).

306. *See* 8 U.S.C. § 1101(15)(H)(ii)(a).

307. *See id.* § 1101(a)(15)(F)(i).

308. *See* MILKMAN, *supra* note 16, at 23 (“[F]oreign-born workers [in low-wage, ethnically segregated jobs] are often presumed to be unauthorized although in fact many have legal status.”); *see also* RABIN & O’KONEK, *supra* note 5, at 23 (explaining that “workplace abuse does not end with work authorization,” and quoting a low wage, im/migrant, woman worker expressing that “I now have papers, and I continue to feel discriminated”).

309. MILKMAN, *supra* note 16, at 1 (observing that “less-educated immigrants concentrated at the bottom of the labor market [are mostly] Latinx”).

310. *Id.* at 20; *see also* NGAI, *supra* note 16, at 158–66.

could not stand up any longer due to the fever, chills, and aches, she stayed home for one week. She was not paid for any of this time.

JF worked in a restaurant cooking in a hot kitchen, sometimes for over seventy hours a week. One day, her son was hit hard on the nose with a pipe at school. For days afterwards, blood pooled in the back of his throat. JF did not have money to take him to a specialist but the teachers at her son's school helped her to afford a doctor. When she asked for time off to take her son to that doctor, her employer fired her. That was just before the pandemic hit. Her employer re-hired her a couple months later, but the work was more intense than ever. Between tears, she told us she has two young children to take care of, so she endured the heat and long hours, but it took a toll on her. She began fainting at work and the last time she fainted, she hit her head and had to go to the hospital. Her employer fired her shortly thereafter, without paid sick leave.

FM initially contacted the clinic because she was horrified how her employer, a popular and successful restaurant, treated a co-worker after he lost a piece of his finger while operating a in a food juicing machine. Because her co-worker was undocumented, the employer refused to call an ambulance, instructed the co-worker not to report his injury, and failed to provide him with paid sick leave. FM also experienced workplace violations. Her employer did not pay FM sick leave when she was required to stay home after exhibiting COVID-19 symptoms or when her doctor instructed her to take time off for a hand injury.

ND worked for fifteen years at a nursing home where she fed, cleaned, bathed, clothed, and provided companionship to elder residents. She never received paid sick leave, even when ill, though she worked closely with a vulnerable population. When she finally asserted her right to paid sick time in the spring of 2020 due to pandemic-related concerns, she was terminated and came to the clinic for help. After she prevailed in her lawsuit, ND returned to the clinic to be interviewed on her thoughts about how paid sick leave laws could be changed to more effectively help workers like her. She eagerly discussed what would have made her feel more comfortable asserting paid sick leave rights and what could be done to hold employers like her former boss accountable. Her suggestions, such as increased workers' rights education for employees at her workplace and holding collaborative meetings with co-workers, the employer, residents or their families, and agencies tasked with upholding the law, were ideas that lawyers and policymakers do not typically consider, but that, like the NNU nurses' campaign, could open the portal to re-framing paid sick leave in a manner that benefits im/migrant workers.

*These stories are emblematic of the workers who come to the Clinic seeking help and hope. Much of what my students and I do is listen to and acknowledge the experiences im/migrant workers face in a country that relies on their labor but fails to ensure their basic workplace rights. When the Clinic is

successful in pursuing workers' claims and a best-case scenario results, a worker is compensated for monetary losses. This is rare. When it does occur, workers already have lost something irretrievable—their dignity and a piece of their humanity. Incorporating im/migrant workers' lived realities into workers' rights legislation, such as paid sick leave laws, might alleviate these types of experiences.