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Critical Race Theory and the Low-Wage Workplace: The Story of Janitorial Services in California

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CRITICAL RACE THEORY AND THE LOW-WAGE WORKPLACE: THE STORY OF JANITORIAL SERVICES IN CALIFORNIA

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ABSTRACT

Critical race and racial capitalism theories posit that systems and structures in the workplace reinforce each other to create oppressive conditions for groups of workers based on race, national origin, and/or sex. Some of these structures are reproduced from other areas of work and have roots in exploitative labor conditions. Civil rights lawyers attempting to use existing laws or develop new laws to root out these structures face obstacles within and outside the judicial system. This Essay focuses on two laws recently passed in California to protect vulnerable workers: the California Property Service Workers Protection Act, which seeks to protect janitorial services workers from highly exploitative practices of their employers, and the Stand Against Non Disclosures Act and its amendment, the Silenced No More Act, which seek to ensure that harassment in the workplace is no longer hidden in settlement or severance agreements. Reading these statutes through a critical race lens demonstrates both their importance to changes in the workplace and their limitations in the face of intractable employer and societal attitudes.

The interaction of these two laws further demonstrates several tenets of Critical Race Theory ("CRT"). This Essay applies these tenets to the janitorial services industry and evaluates the effectiveness of laws meant to protect janitors through a critical race lens. Legislation such as these laws focuses on practices that should be eliminated in the workplace. The legislation does not end systems such as contracting, and it does not end conditions that allow hostile work environments to proliferate. These laws do, however, provide starting points for janitors seeking to improve their workplaces. CRT helps continue interrogation of such legislation and pushes for more systemic change by focusing on the ways in which race informs the treatment of janitors.

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INTRODUCTION

In the workplace, critical race and racial capitalism theories posit that systems and structures reinforce each other to create oppressive conditions for groups of workers based on race, national origin, and/or sex.[1] Some of these structures are reproduced from areas of work—such as agricultural work—and have roots in exploitative labor conditions.[2] One such structure is the subcontracting system, which allows employers to contract with brokers who hire workers and presumably shield employers from liability.[3] This structure, typical in low-wage industries, from agricultural work and garment work to construction and janitorial services, creates distance between workers and the users of their services, and it creates a production system characterized by "extreme exploitation, included the absence of a living wage or benefits, poor working conditions, such as health and safety hazards, and arbitrary discipline."[4] This contracting structure is, as this Essay describes, also characterized by discriminatory and hostile work environment conditions.

Civil rights lawyers attempting to use existing laws or develop new laws to root out these structures face obstacles within and outside the judicial system.[5] This Essay focuses on two laws recently passed in California to protect vulnerable workers. The first, the California Property Service Workers Protection Act, seeks to protect janitorial services workers from highly exploitative practices of their employers.[6] The second, the Stand Against Non Disclosures Act—and its amendment, the Silenced No More Act—seeks to ensure that harassment in the workplace is no longer hidden in settlement or severance agreements.[7] Reading these statutes through a critical race lens demonstrates both their importance to changes in the workplace and their limitations in the face of intractable employer and societal attitudes.

The interaction of these two laws demonstrates several tenets of Critical Race Theory. Most notably, laws that seek to change conditions for the most vulnerable workers must address race to be most effective. Second, "bad actor" laws inevitably fail to dismantle the systems that keep workers vulnerable. Third, the dominant society (of which employers are emblematic) racializes different groups at different times, using similar structures. Finally, stories

1. DESTIN JENKINS & JUSTIN LEROY, HISTORIES OF RACIAL CAPITALISM 3 (2021).

2. ERNESTO GALARZA, FARM WORKERS AND AGRI-BUSINESS IN CALIFORNIA, 1947–1960 55–58 (1977).

3. For a description of the subcontracting system and its effects on unionization, see RUTH MILKMAN, L.A. STORY: IMMIGRANT WORKERS AND THE FUTURE OF THE U.S. LABOR MOVEMENT 78 (2006).

4. SCOTT L. CUMMINGS, AN EQUAL PLACE: LAWYERS IN THE STRUGGLE FOR LOS ANGELES 12–13, 34 (2021).

5. *Id*. at 483–95.

6. *See generally* CAL. LAB. CODE §§ 1420–1434 (2016).

7. *See* CAL. CIV. PROC. CODE § 1001 (2022); CAL. GOV'T CODE § 12964.5 (2022).

provide a counter-narrative to the assumptions about why jobs are racialized; the stories are so powerful that dominant society seeks to silence them. This Essay applies each of these tenets to the janitorial services industry and evaluates the effectiveness of laws meant to protect janitors through a critical race lens.

I. CALIFORNIA LAWS PROTECTING JANITORS AND PROHIBITING EMPLOYEE SILENCING

Workplace conditions for janitors have been documented as unsafe for several reasons. First, janitors tend to work after business hours and often at night. They have little access to upper-level supervisors, and many times their point of contact with a company is the same supervisor who is harassing them.[8] Fear of retaliation, language barriers, and lack of familiarity with laws that protect them make it less likely that janitors complain to higher-level authorities about their treatment. This is especially the case if janitors are Latinx, immigrant, female, or some combination.[9] When harassment occurs, workers find it difficult to achieve redress through internal employer grievance processes.[10] Finally, the contracting system in the janitorial services industry makes it difficult for workers to hold end user companies accountable for discrimination in the workplace.[11] Two laws aimed at protecting vulnerable workers demonstrate the opportunities and challenges for low-wage workers in service industries.

A. The California Property Service Workers Protection Act

In 2016, the California legislature enacted the California Property Service Workers Protection Act to require all janitorial employers to register with the California Labor Commissioner's Office and to provide employees sexual harassment prevention training biennially.[12] The law is aimed at ensuring that employers keep records of wage and hour requirements for employees, workers compensation, and any other conditions of employment.[13] It is also aimed at ensuring that fly-by-night practices of janitorial services companies are curtailed by keeping track of those companies and holding them accountable for violations of employment law.[14] The law broadly covers employers of janitors

8. HELEN CHEN ET AL., THE PERFECT STORM: HOW SUPERVISORS GET AWAY WITH SEXUALLY HARASSING WORKERS WHO WORK ALONE AT NIGHT 5 (Univ. of Cal., Berkeley Lab. Occupational Health Program 2016), https://lohp.berkeley.edu/wp-content/uploads/2016/05/The-Perfect-Storm.pdf [https://perma.cc/5ZJW-WKE3].

9. *Id.* at 4.

10. *Id.* at 7.

11. *Id.* at 6.

12. CAL. LAB. CODE §§ 1420–34 (2016).

13. *Id.* § 1421 (2019).

14. *See id.* § 1428.

who are employees, independent contractors, or franchisees.[15] It prohibits registration to employers who have outstanding wage violation judgments, payroll, social security or income tax obligations, or unpaid disability insurance debts.[16] Further, the Act prohibits registration to employers who have pending or outstanding administrative judgments for violations of the California Fair Employment and Housing Act. A janitorial employer who fails to register is liable for fines up to $10,000, and a janitorial employer who submits a false statement is liable for $10,000 fines for every false statement on an application.[17]

The Act's sexual harassment training provision requires employers to utilize peer training programs run by organizations with extensive experience with janitorial services workers as well as with low-wage immigrant workers.[18] The peer trainers must have at-work experience in the janitorial service sector.[19] The idea behind the training structure is that peer trainers have first-hand knowledge of the conditions in the industry and can speak to the experiences of janitorial service workers.[20]

Importantly, the registration requirements of the Act are modeled on similar legislation regulating agricultural work in the state. Agricultural work has historically been structured through a subcontracting system with agricultural contractors who hire workers directly.[21] In order to deal with the problem of wage theft and inadequate tracking of employment records, California enacted a registration system to ensure agricultural workers were somewhat protected.[22] In the late 20th Century, employers began to jettison their janitorial departments, partly in response to organizing campaigns in the industry.[23] Subcontracting arrangements proliferated as employers followed the lead of the agricultural, garment, construction, and other low-wage industries.

The Property Service Workers Protection Act was, like the registration statutes it was modeled after, meant to address compliance with employment laws like workers compensation, unemployment compensation, social security benefits, and Federal Insurance Contributions Act ("FICA") and Medicare tax obligations. In addition, it was meant to protect employees from sexual harassment in the workplace.

15. *Id.* § 1420(a)(1) (2020).
16. *Id.* § 1429 (2016).
17. CAL. LAB. CODE § 1423(c) (2016).
18. *Id.* § 1429.5(g) (2020).
19. *Id.* § 1429.5(g)(2).
20. *Id.* § 1429.5(g)(3).
21. GALARZA, *supra* note 2, at 56.
22. *See* CAL. LAB. CODE §§ 1683, 1690 (2015).
23. RUTH MILKMAN, ORGANIZING IMMIGRANTS: THE CHALLENGE FOR UNIONS IN CONTEMPORARY CALIFORNIA 201 (2000).

B. The Sexual Harassment Omnibus Bill and the Prohibition Against Secret Settlements

In 2018, the California legislature passed two related laws. First, Senate Bill 820 ("SB 820") prohibits confidentiality provisions in workplace settlement agreements that would seek to prevent disclosure of sexual harassment, sexual offenses, or sex-based discrimination.[24] Second, Senate Bill 1300 ("SB 1300") strengthens protections against harassment and hostile work environment conditions by making an employer responsible for the acts of nonemployees who harass.[25] It also prohibits employers from requiring the release of a claim or right under Fair Employment and Housing Act ("FEHA") or from enforcing non-disparagement agreements that would deny employees the right to disclose information about unlawful acts in the workplace, including but not limited to, sexual harassment.[26] The statute also lowers the burden for plaintiffs seeking to bring hostile work environment claims and expands protection to independent contractors.[27]

The impetus for both laws was the #MeToo movement, which focused attention on the seeming intractability of sexual harassment and assault in the workplace.[28]

The California Legislature found it necessary to expand the protections of the sexual harassment laws to all forms of harassment—not just sex-based discrimination—in 2021.[29] Presumably, a janitorial services worker is now able to make a claim for race or national origin harassment against a company, and that worker would benefit from the laws protecting against workplace sexual harassment and the silencing that surrounds it. The law, effective January 1, 2022,[30] applies to all forms of harassment, discrimination, and retaliation in the workplace based on protected categories, such as race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or veteran or military status of any

24. CAL. CIV. PROC. CODE § 1001 (2022).

25. CAL. GOV'T CODE § 12940 (2021).

26. *Id.* § 12964.5 (2022).

27. The statute allows claimants to bring suit for even a single incident of harassment, makes relevant discriminatory remarks even if not uttered by a decisionmaker, eliminates defenses about the past character or nature of a particular workplace, and establishes that harassment cases should not be disposed of on summary judgment. *Id.* § 12923(b)–(e) (2019).

28. *See* Erik A. Christiansen, *How Are the Laws Sparked by #MeToo Affecting Workplace Harassment?*, AM. BAR ASS'N LITIG. NEWS (May 8, 2020), https://www.americanbar.org/groups/litigation/publications/litigation-news/featured-articles/2020/new-state-laws-expand-workplace-protections-sexual-harassment-victims/ [https://perma.cc/69D4-CTE].

29. S.B. 331, 2021 Leg., Reg. Sess. (Cal. 2021) (enacted) (amending CAL. GOV'T CODE § 12964.5).

30. *Id*.

person. It prohibits nondisclosure or confidentiality provisions in settlement agreements that would prevent employees from disclosing facts related to such discrimination.[31]

The examples of these statutes demonstrate the uphill battles that janitorial service workers face, not just from employers, but from lawyers, insurance companies who control much of the litigation in this arena, and an informal adjudication system that is accustomed to conditioning settlements on confidentiality, non-disparagement, and nondisclosure provisions. And although the Property Service Workers Protection Act reduces some of the obstacles of identifying responsible parties, it does not aim to prevent the types of harassment that exist alongside sexual harassment, such as that based on race. While one of the statutes identifies and focuses on the responsible parties, the other focuses on the types of discrimination that workers face. The next section of this Essay discusses the effects of the different foci in these statutes through the lens of CRT.

II. CRITICAL RACE THEORY AND THE ENFORCEMENT OF LAWS

Several tenets of CRT stand out in the story of the janitorial service workers in California. First, the workers' story must be centered in discussions about the problem and how to solve it. Second, to protect most effectively, laws must address race. Third, "bad actor" laws inevitably fail to dismantle the systems that keep workers vulnerable. Fourth, the dominant society (of which employers are emblematic) racializes different groups at different times, using similar structures. Finally, stories provide the counter-narrative to the assumptions about why jobs are racialized; the stories are so powerful that dominant society seeks to silence them.[32]

Neither the janitor services registration law nor the anti-harassment/anti-silencing laws mention race as a motivating factor for their enactment. They can be used, however, to tell the stories of janitors who labor under discriminatory workplace conditions. This Section explores how CRT helps us introduce race into an analysis of the workplace through the lens of protective legislation.

A. Centering Race in Rights Protection

Importantly, the laws discussed above are centered in two different stories: the story of the devolution of the janitorial services industry as it became more immigrant and Latinx; and the story of sexual assault and harassment at the center of the #MeToo movement. To re-center the story, an example from the viewpoint of the janitorial worker perspective is instructive. In 2017, a group of

31. CAL. GOV'T CODE §§ 12964.5(a)(1)(B)–(b)(2)(B) (2022).

32. For an in-depth discussion of each of these tenets, see RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 7–9 (2001) and KHIARA BRIDGES, CRITICAL RACE THEORY: A PRIMER 10–15 (2019).

workers sued Nugget Market, a chain of upscale grocery stores in northern California, for national origin and race discrimination.[33] Nugget contracts with a janitorial services company to clean its stores nightly, and it also employs janitors in its stores.[34] The workers retained the Mexican American Legal Defense and Educational Fund ("MALDEF") to represent them.[35] Their story is detailed in MALDEF's lawsuit.

Nugget hired one of the plaintiffs directly and hired the second one through a janitorial services company. The janitorial services company was not registered with the California Secretary of State as required by the law.[36] At some point, the janitorial services company operated under two names but had the same owner, same manager, and same employees throughout its contract with Nugget.[37] Both janitors were subjected to racial and national-origin-based epithets, insults, and jokes throughout their employment in Nugget's stores.[38] On a daily basis, the janitors, both from Latin America, endured disparaging racial comments about Latinx persons.[39] They were called "cholos;" they were accused of stealing jobs from Americans; managers mocked their native language; they were demeaned and dehumanized.[40] When one of them complained about the harassment, he was fired.[41] When the other complained, he was given negative performance reviews.[42]

The janitors sued under 42 U.S.C. Section 1981 and Title VII of the Civil Rights Act of 1964 and made analogous hostile work environment claims under the California FEHA.[43] They also claimed wrongful discharge in violation of public policy for the retaliation they suffered at the hands of Nugget and the janitorial services company.[44]

In its summary judgment order, in addition to evaluating the harassment the employees endured at the hands of Nugget and the janitorial services company, the court focused on whether the janitors were employees or independent

33. Complaint at 1, Ramirez-Castellanos v. Nugget Market, Inc., No. 2:17-CV-01025-JAM-AC (E.D. Cal. May 16, 2017).

34. *Id*. at 3.

35. *Id*. at 1.

36. CAL. DEP'T INDUS. RELS., PERMITS, LICENSES, CERTIFICATIONS, AND REGISTRATIONS (2022), https://www.dir.ca.gov/permits-licenses-certifications.html [https://perma.cc/6SHY-6X7C].

37. Ramirez-Castellanos v. Nugget Market, Inc., 2020 WL 2770060 (E.D. Cal. May 28, 2020).

38. Complaint, *supra* note 33, at 5.

39. *Ramirez-Castellanos*, 2020 WL 2770060, at *1.

40. *Id.* at *6.

41. *Id.* at *9.

42. Ramirez-Castellanos v. Nugget Market, Inc., 2020 WL 2770060, at *9 (E.D. Cal. May 28, 2020).

43. *Id*. at *1.

44. *Id*.

contractors and whether the janitors sued the correct parties.[45] This is where the Property Service Workers Protection Act lessens the litigation burdens for janitors. It holds employers like Nugget accountable for violations of employment laws even when they contract with third parties.[46] Because the law focuses on sexual harassment, however, it is less clear whether education around harassment in these workplaces would cover the race-based harassment that the Nugget janitors experienced.

Until 2021, moreover, the anti-silencing laws enacted in the wake of #MeToo failed to protect against the race-based harassment the janitors endured. If they were to settle their lawsuit, they would not be able to avail themselves of the protections-against-confidentiality provisions that would allow public awareness of Nugget's discriminatory conduct. If they moved forward to trial, they would not be able to avail themselves of the lower standards of proof that the anti-harassment legislation allows for sexual harassment and assault victims.[47]

B. Bad Actors vs. Disrupting the System

The bad actors in the Property Service Workers Protection Act are the fly-by-night janitorial services companies that leave janitors without a recourse for employment law violations.

Although the Act expands liability to end-user companies like Nugget, it codifies a registration system that was historically designed to create distance between owners and workers.[48] Importantly, although it extends protection to janitors whether they are employees, independent contractors, or franchisees, it leaves a broader system of employee-based protections in place. These CRT critiques focus on the power dynamics between janitors and end users like Nugget, and they seek to restore direct accountability between owners of capital and workers like the janitors.[49] To achieve such accountability requires breaking down the systems—like the subcontractor system that exists today in janitorial services—that continue to make workers vulnerable.

The bad actors of the anti-silencing legislation are the actors—including, but not limited to the harasser—who seek to keep the company's workplace culture secret. These laws aim to shed light on the practices by ensuring that employment, settlement, and separation agreements no longer hide an employer's bad acts. Although exposing bad actors is a positive aspect of the legislation, it does not erase a system that allows for the bad actors to remain in supervisory positions even after the bad acts have occurred.

45. *Id.* at *4–5.
46. *See* CAL. LAB. CODE § 1420(e) (2020).
47. *See* CAL. GOV'T CODE § 12923(b)–(d).
48. *See supra* Part II.A.
49. *See* DELGADO & STEFANCIC, *supra* note 32, at 125.

C. Racializing Different Groups Through Different Structures

The Property Service Workers Protection Act itself reveals how the system of power relationships in the agricultural industry migrated to and dominated the low-wage service industry. At the same time that the contractor system displaced employment relationships, the mainstream narrative that Americans did not want these jobs hid the fact that at one time, the janitorial services industry was unionized and paid well.[50] At the height of unionization, janitors were a mix of white and Black.[51] As unionization decreased, the percentage of Latinx janitors increased.[52] As employers responded to unionization efforts and created rules that stifled unionization, non-unionized contract work became the norm, and the composition of the workforce shifted from Black and white to Latinx.[53] This structural shift in the industry, from a unionized to a contract work environment, necessitated the protections now found in the Property Service Workers Protection Act. The Act itself recognizes that the employment relationship in the janitorial industry is characterized by contract relationships rather than employment, and its focus is on ensuring that today's janitorial workers receive some level of protection in the structure that has evolved in the industry.

D. Providing the Counter-Narrative

The Nugget lawsuit teaches us that the contracting system in today's janitorial services industry may be a distraction in the sense that it draws attention away from discriminatory practices against Latinx janitors, whether they are employees or subcontractors of the end user company. Recall that one janitor was directly employed by Nugget and another by a janitorial services company. Yet, they both produced evidence that they suffered discrimination and retaliation at the hands of Nugget supervisors.[54] The counter-narrative recenters the discrimination at the heart of the story, and the statute makes questions of employment status secondary.

Second, the Nugget lawsuit demonstrates that hostile work environment claims are not limited to sex-based claims, despite the success of the #MeToo movement in spotlighting sex-based harassment. The most recent California legislation prohibiting confidentiality provisions in any discrimination-based settlement agreement confirms that the lived discriminatory experiences of the Nugget janitors deserve redress alongside the lived experiences of sex-based

50. Catherine L. Fisk et al., *Union Representation of Immigrant Janitors in Southern California: Economic and Legal Challenges*, *in* RUTH MILKMAN, ORGANIZING IMMIGRANTS: THE CHALLENGE FOR UNIONS IN CONTEMPORARY CALIFORNIA 200 (2000).

51. *See id.* at 202.

52. *Id*.

53. *Id.*

54. Ramirez-Castellanos v. Nugget Market, Inc., 2020 WL 2770060, at *7, *10 (E.D. Cal. May 28, 2020).

harassment victims.[55] The expectation is that standard employment agreements, settlement agreements, and separation agreements must be modified to ensure that previously standard non-disclosure and confidentiality provisions do not restrict employees from talking about workplace conditions.[56] New agreements now require a provision stating that "[n]othing in this agreement prevents you from discussing or disclosing information about unlawful acts in the workplace, such as harassment or discrimination or any other conduct that you have reason to believe is unlawful."[57]

CONCLUSION

In the janitorial services industry, legislation such as the laws discussed here focuses on practices that should be eliminated in the workplace. The legislation does not end systems such as contracting, and it does not end conditions that allow hostile work environments to proliferate. These laws do, however, provide starting points for janitors seeking to improve their workplaces. CRT helps us continue to interrogate such legislation and push for more systemic change by focusing on the ways in which race informs the treatment of janitors.

55. CAL. GOV'T CODE. § 12964.5(c) (2022).

56. Mitch Boyarsky et al., *California Continues to Whittle Away Non-Disclosure and Non-Disparagement Clauses in Employee Settlement and Separation Agreements*, XI NAT'L L. REV., no. 299, Oct. 2021, https://www.natlawreview.com/article/california-continues-to-whittle-away-non-disclosure-and-non-disparagement-clauses [https://perma.cc/B4AX-HBQT].

57. *Id.*