

THE LIVE-IN WAGE

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The minimum wage was a signature achievement of the New Deal and remains an important safeguard for fair labor today. But for some workers, minimum does not mean minimum. As scholars and advocates have documented, the Fair Labor Standards Act creates legal subminimum wages for workers with disabilities and tipped workers. This Article uncovers another subminimum wage: for live-in domestic workers who live and work in their employer's home, employers can count the value of meals or lodging provided against the cash minimum wage. This leaves take-home wages well below \$7.25 an hour. Although deductions have been lawful since FLSA's origin, this Article is the first to conceptualize deductions as a legal subminimum wage.

I describe the live-in domestic work industry and the history of its inclusion in the federal minimum wage. Next, I explain the law of meal and lodging deductions and how they function as a subminimum wage. Then, proceeding from normative skepticism of subminimum wages for work associated with women of color, I develop four critiques of the deductions rules. I argue that deductions generate poverty wages, mimic a problematic theory of the marriage bargain, widen the existing power gulf between workers and employers, and entrench illegal wage theft. Finally, I note how states have departed from the federal rules and conclude that abandoning deductions is the way forward to make the minimum wage a true wage floor.

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I. INTRODUCTION.....	176
II. THE LIVE-IN DOMESTIC WORK INDUSTRY	183
III. LIVE-IN DOMESTIC WORKERS AND THE FAIR LABOR STANDARDS ACT	187
A. Winning Minimum Wage and Inheriting Deductions	187
1. The Fair Labor Standards Act of 1938	188
2. Amendments of 1966.....	189
3. Amendments of 1974.....	190
4. Regulations of 2013	192
B. Meal and Lodging Deductions: A Subminimum Wage.....	193
1. Regularly provided by this employer or in this industry	195
2. Accepted voluntarily and without coercion	195
3. Compliance with federal, state, and local law	196
4. Provided primarily for the benefit of the worker.....	197
5. Records of actual cost.....	198
6. Amount of deduction	198
IV. RATIONALES FOR REFORMING MEAL AND LODGING DEDUCTIONS	200
A. Generating Poverty Wages	200
B. Mimicking the Marital Contract	205
C. Widening the Power Gulf	210
D. Entrenching Wage Theft.....	214
V. STATE LAW DEPARTURES	220
VI. CONCLUSION	222

I.

INTRODUCTION

Getting paid under minimum wage made me feel like my work and my self were undervalued. . . . Waking up every day and trying to do your best job taking good care of someone else’s kids, teaching them good things and giving them the best of you, and getting paid so low that you can barely live a good life, makes you feel miserable even if you know that it isn’t right and fair.

Anonymous live-in domestic worker, Virginia¹

1. E-mail from Anonymous Former Live-in Domestic Worker to author (Mar. 31, 2021, 12:15 PDT) (on file with author). For this project, I interviewed six live-in domestic workers who have leadership roles in National Domestic Workers Alliance organizing projects. Most of the workers are democratically elected members of the Alliance’s Worker Councils. The goal of these interviews was not to support empirical claims about the subminimum wage but to lend texture to the qualitative experience—what low wages look and feel like—in workers’ own words. Beyond the interviews, I also drew on my experience organizing with, and in some cases providing direct legal services to, live-in and live-out domestic workers between September 2019 and May 2021.

The minimum wage is known as a wage floor.² It is the lowest fair price for labor, a threshold that employers and workers cannot bargain below. Over the past several decades, worker protections have been eroded by the growing wealth gap,³ attacks on worker organizing,⁴ and efforts to legally reclassify employees as independent contractors.⁵ The minimum wage is thus one of our few remaining bulwarks against economic exploitation.⁶ It is also a locus for the kind of organizing that might remake our political economy in the near term. The inadequacy of the federal minimum wage is something to rally around. At \$7.25 an hour,⁷ the floor is too low to live on—anywhere in the country. With the average cost of living, a full-time worker needs \$15.41 an hour to cover the basics just for herself.⁸ That means that a single parent of two children who makes minimum wage would need

2. See *Walling v. A.H. Belo Corp.*, 316 U.S. 624, 636 (1942); President Franklin D. Roosevelt, Message to Congress on Establishing Minimum Wages and Maximum Hours (May 24, 1937) (transcript available at <https://www.presidency.ucsb.edu/documents/message-congress-establishing-minimum-wages-and-maximum-hours> [<https://perma.cc/5CER-HNQF>]); HOLLY SKLAR, LARYSSA MYKYTA, & SUSAN WEFALD, *RAISE THE FLOOR: WAGES AND POLICIES THAT WORK FOR ALL OF US* 35 (2001) (“We emphasize the word floor. Today, many states and localities have higher minimum wages, living wage ordinances and higher eligibility thresholds for social services. States should be encouraged to reach higher than the federal standard . . .”).

3. JULIANA MENASCE HOROWITZ, RUTH IGIELNIK, & RAKESH KOCHHAR, PEW RSCH. CTR., *MOST AMERICANS SAY THERE IS TOO MUCH ECONOMIC INEQUALITY IN THE U.S., BUT FEWER THAN HALF CALL IT A TOP PRIORITY* 19–21 (2020), https://www.pewresearch.org/social-trends/wp-content/uploads/sites/3/2020/01/PSDT_01.09.20_economic-inequailty_FULL.pdf [<https://perma.cc/MG6B-GBRX>] (observing the widening wealth gap between upper-income families and middle- and lower-income families).

4. See generally SOPHIA Z. LEE, *THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT* 56–78, 115–32, 223–55 (2014) (detailing the right-to-work movement led by anti-New Deal conservatives and legal battles against unions).

5. See *After Prop 22 Win for Uber & Lyft, Advocates Fear New Wave of Anti-Worker Laws Pushed by Big Tech*, DEMOCRACY NOW (Dec. 8, 2020), https://www.democracynow.org/2020/12/8/prop_22_uber_lyft_gig_workers [<https://perma.cc/AEV9-TH78>]; Wilfred Chan, *Can American Labor Survive Prop 22?*, NATION (Nov. 10, 2020), <https://www.thenation.com/article/politics/prop-22-labor/> [<https://perma.cc/EYP6-X394>]; Veena Dubal & Meredith Whittaker, *‘Those in Power Won’t Give up Willingly’: Veena Dubal and Meredith Whittaker on the Future of Organizing Under Prop 22*, MEDIUM (Nov. 5, 2020), <https://onezero.medium.com/prop-22-where-do-gig-workers-go-from-here-e6eaa3ee2324> [<https://perma.cc/NML6-53Z3>].

6. See Catherine Ruckelshaus, *Fair Labor Standards Act at 80: It’s More Important than Ever*, NAT’L EMP’T L. PROJECT (June 26, 2018), <https://www.nelp.org/commentary/fair-labor-standards-act-at-80-its-more-important-than-ever/> [<https://perma.cc/KJ4E-TRHZ>].

7. 29 U.S.C. § 206(a)(1)(C) (2018).

8. Greg Iacurci, *Many Americans, Especially Families, Can’t Live on a \$15 Minimum Wage*, CNBC (Feb. 21, 2021), <https://www.cnbc.com/2021/02/21/15-minimum-wage-wont-cover-living-costs-for-many-americans.html> [<https://perma.cc/9V3W-CBGC>].

Throughout the Article, I use “she” and “her” as a default singular pronoun to reflect that the vast majority of domestic workers are women and that domestic work is closely associated with “women’s work,” including in the congressional record on minimum wage for domestic work. See *infra* notes 32, 41, 42, 215–18. Of course, the domestic worker workforce includes people with varying genders and pronouns.

to work almost 24 hours a day, six days a week, to bring home a living wage.⁹ Against this backdrop, raising the federal minimum wage has become a mass movement, ranking as a central political issue¹⁰ that most voters support.¹¹ In the process, the campaign has helped reinvigorate the broader labor movement, which is attracting new workers, experimenting with new forms of power, and building political will to reform labor law.¹²

But, as in a house with a hidden cellar, the minimum wage is a false floor.¹³ The federal Fair Labor Standards Act (FLSA) excludes outright a sizable share of

9. Carey Ann Nadeau, *New Living Wage Data for Now Available on the Tool*, LIVING WAGE CALCULATOR (May 17, 2020), <https://livingwage.mit.edu/articles/61-new-living-wage-data-for-now-available-on-the-tool> [<https://perma.cc/52HS-WAZK>]; see also Emily Stewart, *Life on the Minimum Wage*, VOX (Apr. 7, 2021, 10:00 AM), <https://www.vox.com/policy-and-politics/22364633/federal-minimum-wage-workers> [<https://perma.cc/A555-ZU8W>] (describing financial, social, and emotional stress of earning minimum wage).

10. See, e.g., Alex Seitz-Wald, *'The World Has Changed': The Scrambled New Politics of the Minimum Wage*, NBC NEWS (Mar. 8, 2021), <https://www.nbcnews.com/politics/white-house/world-has-changed-scrambled-new-politics-minimum-wage-n1259647> [<https://perma.cc/YYP8-29BR>]; Alan Rappoport & Jeanna Smialek, *Republicans Grapple With Raising the Minimum Wage*, N.Y. TIMES (Feb. 28, 2021), <https://www.nytimes.com/2021/02/26/us/politics/republicans-minimum-wage.html> [<https://perma.cc/RU3S-WF8V>]; DEMOCRATIC NAT'L COMM., 2020 DEMOCRATIC PARTY PLATFORM 14–16 (2020), <https://democrats.org/wp-content/uploads/2020/08/2020-Democratic-Party-Platform.pdf> [<https://perma.cc/6RZT-7LVX>].

11. Reuters Staff, *Majority of Americans Support \$15 Minimum Wage, Reuters/Ipsos Poll Shows*, REUTERS (Feb. 25, 2021, 11:38 AM), <https://www.reuters.com/article/us-usa-minimum-wage/majority-of-americans-support-15-minimum-wage-reuters-ipsos-poll-shows-idUSKBN2AP2B9> [<https://perma.cc/2MTF-UR6C>]; Gabby Birenbaum, *Poll: 61% of Likely Voters Support Democrats' Gradual Minimum Wage Hike*, VOX (Feb. 24, 2021, 12:20 PM), <https://www.vox.com/2021/2/24/22299029/poll-majority-support-15-minimum-wage-democrats> [<https://perma.cc/HJ5Z-CE3P>]; *New Polling Commissioned by NELP: Voters Agree—Raising the Federal Minimum Wage to \$15 is Good for Everyone*, NAT'L EMP'T L. PROJECT (Feb. 10, 2021), <https://www.nelp.org/news-releases/new-polling-commissioned-nelp-voters-agree-raising-federal-minimum-wage-15-good-everyone/> [<https://perma.cc/QXF9-QGFH>]; Molly Kinder, *Even a Divided America Agrees on Raising the Minimum Wage*, BROOKINGS (Nov. 13, 2020), <https://www.brookings.edu/blog/the-avenue/2020/11/13/even-a-divided-america-agrees-on-raising-the-minimum-wage/> [<https://perma.cc/QLK5-SNN2>]; Leslie Davis & Hannah Hartig, *Two-Thirds of Americans Favor Raising Federal Minimum Wage to \$15 an Hour*, PEW RSCH. CTR. (July 30, 2019), <https://www.pewresearch.org/fact-tank/2019/07/30/two-thirds-of-americans-favor-raising-federal-minimum-wage-to-15-an-hour/> [<https://perma.cc/T7LR-9EQR>].

12. See Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 46–69 (2016); Don Gonyea, *House Democrats Pass Bill That Would Protect Worker Organizing Efforts*, NPR (Mar. 9, 2021, 9:18 PM), <https://www.npr.org/2021/03/09/975259434/house-democrats-pass-bill-that-would-protect-worker-organizing-efforts> [<https://perma.cc/667L-LNMB>]; Alina Selyukh, *'Gives Me Hope': How Low-Paid Workers Rose up Against Stagnant Wages*, NPR (Feb. 26, 2020, 4:07 PM), <https://www.npr.org/2020/02/26/808113169/gives-me-hope-how-low-paid-workers-rose-up-against-stagnant-wages> [<https://perma.cc/6KXW-MQRB>].

13. See Ade Samuel & Amy K. Glasmeier, *The Other Minimum Wage: Restaurant Workers and the Tipped Minimum Wage*, LIVING WAGE CALCULATOR (May 29, 2019), <https://livingwage.mit.edu/articles/41-the-other-minimum-wage-restaurant-workers-and-the-tipped-minimum-wage> [<https://perma.cc/54J6-PTW2>] (“The minimum wage is somewhat of a false floor in the United States because of the provision that allows employers to pay tipped workers less than this minimum.”).

the workforce.¹⁴ Factoring in all of FLSA's exemptions, it covers roughly 70% of workers among the ten most populous states.¹⁵ FLSA also creates categories of partial inclusion for workers who are regulated by FLSA, but who are not entitled to the full minimum wage. For example, workers with disabilities can earn subminimum wages, averaging \$3.34 an hour, in segregated workplaces approved by the U.S. Department of Labor (DOL).¹⁶ Tipped workers in restaurants, bars, salons, and other service establishments can earn the tipped wage, \$2.13 an hour, if their tips top up to the minimum wage.¹⁷ Workers have persuasively argued that

14. The threshold issue is whether the worker is a covered "employee." 29 U.S.C. § 203(e)(1) (2018). See generally Kati L. Griffith, *The Fair Labor Standards Act at 80: Everything Old Is New Again*, 104 CORNELL L. REV. 557 (2019) (analyzing legal debates as to whether "contract" or "gig" workers are covered "employees"); Noah D. Zatz, *Working Beyond the Reach or Grasp of Employment Law*, in THE GLOVES-OFF ECONOMY: WORKPLACE STANDARDS AT THE BOTTOM OF AMERICA'S LABOR MARKET 31, 33–37 (Annette Bernhardt, Heather Boushey, Laura Dresser, & Chris Tilly eds., 2008) [hereinafter Zatz, *Working Beyond*] (discussing the limited scope of employment law). For analysis of subminimum wages for workers ostensibly excluded from FLSA, see generally, for example, Lan Cao, *Made in the USA: Race, Trade, and Prison Labor*, 43 N.Y.U. REV. L. & SOC. CHANGE 1 (2019) (incarcerated workers); Ruben J. Garcia, *The Thirteenth Amendment and Minimum Wage Laws*, 19 NEV. L.J. 479, 496–98 (2018) (same); Jacqueline Stevens, *One Dollar Per Day: The Slaving Wages of Immigration Jail, from 1943 to Present*, 29 GEO. IMMIGR. L.J. 391 (2015) (immigrant workers in civil detention); Charlotte S. Alexander & Nathaniel Grow, *Gaming the System: The Exemption of Professional Sports Teams from the Fair Labor Standards Act*, 49 U.C. DAVIS L. REV. 123 (2015) (seasonal recreational or amusement workers).

15. DAVID COOPER & TERESA KROEGER, ECON. POL'Y INST., EMPLOYERS STEAL BILLIONS FROM WORKERS' PAYCHECKS EACH YEAR 32–33 (2017), <https://files.epi.org/pdf/125116.pdf> [<https://perma.cc/7GK9-DUD5>]; see also U.S. DEP'T OF LAB., FACT SHEET #14: COVERAGE UNDER THE FAIR LABOR STANDARDS ACT (FLSA) (2009), <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs14.pdf> [<https://perma.cc/CM3L-P9LW>] (estimating that FLSA covers about 143 million workers).

16. 29 U.S.C. § 214(c) (2018); 29 C.F.R. § 525 (2020). See generally U.S. COMM'N ON C.R., SUBMINIMUM WAGES: IMPACTS ON THE CIVIL RIGHTS OF PEOPLE WITH DISABILITIES xii (2020), <https://www.usccr.gov/files/2020-09-17-Subminimum-Wages-Report.pdf> [<https://perma.cc/FNK5-3ABY>] (finding average wage of \$3.34 an hour among workers with disabilities in the section 14(c) subminimum wage program between 2017 and 2018); Matthew Crawford & Joshua Goodman, *Below the Minimum: A Critical Review of the 14(C) Wage Program for Employees with Disabilities*, 30 HOFSTRA LAB. & EMP. L.J. 591 (2013) (examining history of section 14(c) subminimum wage program and systemic failures in oversight).

17. 29 U.S.C. § 203(m)(2) (2018); 29 C.F.R. §§ 531.50–.60 (2020); see Samuel & Glasmeier, *supra* note 13.

these legal subminimum wages are rooted in racism, sexism, and ableism.¹⁸ Recognizing that raising the minimum wage alone will not reach subminimum wage workers¹⁹—who are disproportionately people of color and women²⁰—the Raise the Wage movement has embraced the goal of ending these subminimum wages.²¹ Equally important, then, to raising the wage is exposing the subminimum wages allowed by law.

This Article uncovers another subminimum wage: the wage for live-in domestic work. FLSA allows employers to count the value of meals, lodging, and other facilities that they provide towards the minimum wage.²² These deductions can dip into the minimum wage or even deplete it, making a \$0 cash wage perfectly legal. Employers in many industries can use these deductions, but the practice is noteworthy in live-in domestic work because living in the employer's home is the essence of the job. Although there are no data available to verify the prevalence of legal deductions, a national survey in 2012 found a median wage of \$6.15

18. See Andre Manuel, *The Tipped Subminimum Wage Has Sexist and Racist Origins: It's Time to End It*, ONLABOR (Feb. 17, 2021), <https://onlabor.org/the-tipped-subminimum-wage-has-sexist-and-racist-origins-its-time-to-end-it/> [<https://perma.cc/PZ8U-F63N>] (“[T]he practice [of a subminimum wage for tipped workers] is rooted in the exclusion of women and people of color from modern social protections. Tipping also continues to disproportionately harm those groups, introducing discretion and bias into workers’ wages.”); ONE FAIR WAGE & U.C. BERKELEY FOOD LAB. RSCH. CTR., A PERSISTENT LEGACY OF SLAVERY: ENDING THE SUBMINIMUM WAGE FOR TIPPED WORKERS AS A RACIAL EQUITY MEASURE 1 (2020), https://onefairwage.site/wp-content/uploads/2020/11/OFW_LegacyOfSlavery_USA-1.pdf [<https://perma.cc/FRV5-5SG7>] (“[T]he subminimum wage for tipped workers [is] a legacy of slavery that emerged during the era following Emancipation to exploit recently freed people, particularly Black women. This legacy continues today.”); U.S. COMM’N ON C.R., *supra* note 16, at vi (“[The] Section 14(c) [subminimum wage provision for workers with disabilities] is antiquated as it was enacted prior to our nation’s civil rights laws, and its operation in practice remains discriminatory by permitting payment of subminimum wages based on disability without sufficient controls . . .”); *id.* at 98 (“The subminimum wage is abusive and exploitative, as it encourages businesses to deem employees not productive so they can pay them less. . . . Allowing any people with disabilities to be paid under minimum wage is a message to society that we are less valuable because of our disabilities.” (quoting Public Comment No. 786 on the repeal of Section 14(c) of the Fair Labor Standards Act)).

19. *Cf. Zatz, Working Beyond*, *supra* note 14, at 31 (“Employment law reaches out to regulate only specific work arrangements; it does not apply to all firms and all workers. . . . Public debate about employment law rarely considers these issues of the scope of employment coverage and the effectiveness of employment law enforcement. Instead, it typically focuses on substantive rights: what employers must do for their workers, or not do to them.”).

20. See JUSTIN SCHWEITZER, CTR. FOR AM. PROGRESS, ENDING THE TIPPED MINIMUM WAGE WILL REDUCE POVERTY AND INEQUALITY 8–9 (2021), <https://cdn.americanprogress.org/content/uploads/2021/03/29133657/Ending-Tipped-Minimum-Wage1.pdf> [<https://perma.cc/2AKM-YNLX>] (noting that women comprise 68% of tipped workers but 47% of the total workforce, and that people of color comprise 48% of tipped workers but 37% of the total workforce).

21. See Raise the Wage Act of 2021, S. 53, 117th Cong. §§ 3, 6 (2021); Raise the Wage Act of 2021, H.R. 603, 117th Cong. §§ 3, 6 (2021); H. COMM. ON EDUC. & LAB., RAISE THE WAGE FACT SHEET (2021), <https://edlabor.house.gov/imo/media/doc/2021-01-26%20Raise%20the%20Wage%20Act%20Fact%20Sheet.pdf> [<https://perma.cc/KN54-MZYR>] (explaining that Raise the Wage Act of 2021 would phase out subminimum wages for workers with disabilities and tipped workers).

22. 29 U.S.C. § 203(m)(1) (2018).

for live-in domestic workers—\$1.10 below the minimum wage of \$7.25.²³ This Article takes the position that the gap between minimum wage and what live-in workers actually earn is at least partially explained by legal deductions.²⁴ Because deductions have not been articulated as a legal subminimum wage in academic or policy circles,²⁵ leading proposals to reform the minimum wage do not address this issue.²⁶

Conceptualizing meal and lodging deductions as a subminimum wage opens them up to critique. As with workers with disabilities and tipped workers, the problem with a subminimum wage for live-in domestic workers is both absolute and relative. In an absolute sense, the subminimum wage is too low to live on and does not fairly compensate the value of live-in domestic work.²⁷ In a relative sense, the subminimum wage expresses—indeed, quantifies—that live-in domestic work is inferior to other work.²⁸ Thus, it is worth investigating the ideas of fairness that animate deductions, and whether they are compatible with FLSA’s purpose: “[T]o aid the unprotected, unorganized and lowest paid of the nation’s working population . . . who lack[] sufficient bargaining power to secure for themselves a minimum subsistence wage.”²⁹ As with other subminimum wages, the

23. See LINDA BURNHAM & NIK THEODORE, NAT’L DOMESTIC WORKERS ALL., HOME ECONOMICS: THE INVISIBLE AND UNREGULATED WORLD OF DOMESTIC WORK 18 (2012), <https://www.domesticworkers.org/wp-content/uploads/2021/06/HomeEconomicsReport.pdf> [<https://perma.cc/5T5J-459B>] (finding median hourly wage of \$6.15 for live-in and \$10.82 for live-out domestic workers). This Article assumes that the below-\$7.25 average wage for live-in domestic work is at least partially explained by deductions. However, other practices likely contribute as well. See *infra* note 24.

24. Note that other factors are also at play. Illegal wage theft contributes to the gap between minimum wage and actual wages. See *infra* Section IV.D. Similarly, illegal misclassification of live-in domestic workers as independent contractors, rather than employees, may contribute to the gap. See generally NAT’L EMP’T L. PROJECT, INDEPENDENT CONTRACTOR CLASSIFICATION IN HOME CARE (2015), <https://www.nelp.org/wp-content/uploads/Home-Care-Misclassification-Fact-Sheet.pdf> [<https://perma.cc/A5MM-X2AC>] (explaining that home care workers, including live-in home care workers, are often misclassified as independent contractors).

25. By contrast, the legal subminimum wages for workers excluded from FLSA, workers with disabilities, and tipped workers are thoroughly documented in legal scholarship. See *supra* notes 14, 16–21.

26. See S. 53; H.R. 603.

27. See *infra* Section IV.A.

28. See Garcia, *supra* note 14, at 495–507 (explaining subminimum wages for incarcerated workers, workers with disabilities, and tipped workers and “the need for an underlying normative theory of an equal floor for labor”); NAT’L WOMEN’S L. CTR., THE RAISE THE WAGE ACT: BOOSTING WOMEN’S PAYCHECKS AND ADVANCING EQUAL PAY 1 (2019), <https://nwlc.org/wp-content/uploads/2019/10/Raise-the-Wage-Act-Boosting-Womens-Pay-Checks-10.22.19.pdf> [<https://perma.cc/E94T-8D8R>] (“Establishing one fair minimum wage is a key step toward equity, dignity, and safety for women at work.”). See generally Brishen Rogers, *Justice at Work: Minimum Wage Laws and Social Equality*, 92 TEX. L. REV. 1543, 1570–78 (2014) (explaining how minimum wage facilitates social equality); Noah D. Zatz, *The Minimum Wage as a Civil Rights Protection: An Alternative to Antipoverty Arguments?*, 2009 U. CHI. LEGAL F. 1, 6 (2009) [hereinafter Zatz, *The Minimum Wage*] (developing anti-discrimination argument that “the offense of low wages cannot be reduced to the offense of low income”).

29. *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 707 n.18 (1945).

discussion can consider the particular context of live-in domestic work, with its history of legal exclusion and social marginalization.

Part II describes the landscape of the live-in domestic work industry and traces the historical and legal splits between live-out and live-in work. Part III explains how domestic workers were excluded from the federal minimum wage in the New Deal and were first included in 1974. Part III also gives an overview of the deductions doctrine.

In Part IV, I develop four rationales for reforming the current deductions rules, grounded in the context of live-in domestic work. First, deductions make for very low cash wages. They also build a structure in which cash wages are bound to decrease over time: as the costs of meals and lodging go up, they will cut deeper into the stagnant minimum wage. While proponents argue that low wages are fair because workers have the meals and lodging they need to survive, this justification overlooks the social context and power dynamics in this sector. Second, meal and lodging deductions draw on our tradition of providing subsistence in exchange for women's work in the home. I argue that deductions preserve gendered and racialized household politics when the archetypal wife outsources her unpaid labor to a domestic worker. Third, meal and lodging deductions widen the existing power gulf between live-in domestic workers and employers. When a live-in domestic worker relies on her employer for food and shelter, deductions prevent her from saving cash for times of crisis. By making it harder to leave a live-in job, deductions increase the potential for exploitation. Finally, legal deductions entrench illegal wage theft by creating uncertainty about a worker's legal wage. The law allows deductions up to actual cost or fair value, a legally uncertain amount that a domestic worker can only test by filing a wage claim. The risk that deductions will mask wage theft is especially concerning in this sector, which has perhaps the highest rate of wage theft but the lowest rate of complaints.³⁰

Part V briefly surveys how state minimum wage laws have departed from the federal deductions rules. It considers how some of the alternatives might mitigate the critiques developed in Part IV. Ultimately, I conclude that abandoning the sub-minimum "live-in" wage is necessary not only to ensure workers' economic survival, but also to express that domestic work is equal in dignity to all other work.

30. See *infra* Section IV.D; *infra* notes 262–66 and accompanying text.

II.

THE LIVE-IN DOMESTIC WORK INDUSTRY

Domestic workers are nannies, house cleaners, and home care workers who work in private homes.³¹ They take care of children, the elderly, and people with disabilities, as well as homes. The vast majority of domestic workers are women.³² Most are women of color, and many are immigrants.³³ Median pay for domestic workers is nearly 40% less than the median for all other workers, and these workers are three times more likely to live in poverty than other workers.³⁴ The “quintessential low-wage work,”³⁵ domestic work lacks social and political recognition despite its importance as “the work that makes all other work possible.”³⁶

In the U.S., domestic work carries the legacies of slavery and colonialism.³⁷ In the colonies and early republic, the forced labor of Black and indigenous people supplied much of the domestic work.³⁸ These regimes of slavery were created and

31. See NIK THEODORE, BETH GUTELIUS, & LINDA BURNHAM, NAT’L DOMESTIC WORKERS ALL., HOME TRUTHS: DOMESTIC WORKERS IN CALIFORNIA 1 (2013), <https://www.issueab.org/resources/15456/15456.pdf> [<https://perma.cc/XPC5-C8WV>]; BURNHAM & THEODORE, *supra* note 23; DOMESTIC WORKERS UNITED & DATACENTER, HOME IS WHERE THE WORK IS: INSIDE NEW YORK’S DOMESTIC WORK INDUSTRY 1 n.1 (2006), <https://www.datacenter.org/reports/homeiswheretheworkis.pdf> [<https://perma.cc/ZH76-ARF2>] (defining domestic worker to include “anyone employed to work in a private home by the head(s) of household, including nannies, housekeepers, elderly companions, cleaners, babysitters, baby nurses and cooks”).

32. JULIA WOLFE, JORI KANDRA, LORA ENGDAHL, & HEIDI SHIERHOLZ, ECON. POL’Y INST., DOMESTIC WORKERS CHARTBOOK 5 (2020), <https://files.epi.org/pdf/194214.pdf> [<https://perma.cc/K2UZ-Y5DR>].

33. *Id.* at 5–12. See generally Hila Shamir, *What’s the Border Got to Do with It? How Immigration Regimes Affect Familial Care Provision—A Comparative Analysis*, 19 AM. U. J. GENDER SOC. POL’Y & L. 601, 624–30, 642–54 (2011) (explaining the role of immigration law in structuring the political economy of domestic work).

34. WOLFE, KANDRA, ENGDAHL, & SHIERHOLZ, *supra* note 32, at 1, 18.

35. Laura Dresser, *Cleaning and Caring in the Home: Shared Problems? Shared Possibilities?*, in THE GLOVES-OFF ECONOMY: WORKPLACE STANDARDS AT THE BOTTOM OF AMERICA’S LABOR MARKET 111 (Annette Bernhardt, Heather Boushey, Laura Dresser, & Chris Tilly eds., 2008).

36. Ai-jen Poo, *The Work that Makes All Other Work Possible*, TED (Nov. 2018), https://www.ted.com/talks/ai_jen_poo_the_work_that_makes_all_other_work_possible?language=en [<https://perma.cc/MCA5-RRS8>].

37. See EVELYN NAKANO GLENN, FORCED TO CARE: COERCION AND CAREGIVING IN AMERICA 25–31 (2010) [hereinafter GLENN, FORCED TO CARE]; BRENDA J. CHILD, BOARDING SCHOOL SEASONS: AMERICAN INDIAN FAMILIES, 1900–1940 at 81–83 (1998); DAVID ROEDIGER, THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS 145–46 (1991); JUDITH ROLLINS, BETWEEN WOMEN: DOMESTICS AND THEIR EMPLOYERS 49–51 (1985).

38. See generally THAVOLIA GLYMPH, OUT OF THE HOUSE OF BONDAGE: THE TRANSFORMATION OF THE PLANTATION HOUSEHOLD (2008) (examining the plantation household as a site of production, including the production of domestic work by enslaved Black women); INDIAN SLAVERY IN COLONIAL AMERICA (Allan Galloway ed., 2010) (examining enslavement of indigenous people in the American colonies).

legitimized by law.³⁹ After the Civil War, domestic work kept “an indelible badge of racial inferiority.”⁴⁰ With this legacy, domestic work has been continually devalued as the work of Black women, women of color, and immigrant women.⁴¹ Domestic work remains available to workers who are devalued and segregated out of other industries; in turn, the work is devalued because these workers perform it.⁴²

Before the First World War, most domestic work in the U.S. was “live-in.”⁴³ Workers lived in their employers’ homes for all or most of the week, keeping up with the never-ending labor of the home.⁴⁴ The harsh conditions of live-in work spurred some of the earliest reform efforts in the sector, with reformers creating model contracts and proposing legislation that would limit live-in work hours and compensate on-call time.⁴⁵ Beginning in the 1920s, the industry shifted from live-in to primarily live-out work.⁴⁶ Today, live-in work is rare, accounting for roughly

39. See generally MARK TUSHNET, *THE AMERICAN LAW OF SLAVERY, 1810–1860: CONSIDERATIONS OF HUMANITY AND INTEREST* (1981) (discussing cases related to slavery by state supreme courts); DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* (1978) (examining the infamous *Dred Scott* case and the broader legal context of American slavery).

40. Peggie R. Smith, *Regulating Paid Household Work: Class, Gender, Race, and Agendas of Reform*, 48 AM. U. L. REV. 851, 877 (1999); see also Verna L. Williams, *Reform or Retrenchment? Single-Sex Education and the Construction of Race and Gender*, 2004 WIS. L. REV. 15, 39–53 (2004) (documenting how postbellum education programs directed Black women into domestic work); ELIZABETH CLARK-LEWIS, *LIVING IN, LIVING OUT: AFRICAN AMERICAN DOMESTICS IN WASHINGTON, D.C., 1910–1940* at 98–99 (1994) (describing “two indelible facets of live-in service in Washington, D.C., namely, the stigma placed on African American live-in servants and the master-servant nexus the employer required”).

41. Hina Shah & Marci Seville, *Domestic Worker Organizing: Building a Contemporary Movement for Dignity and Power*, 75 ALB. L. REV. 413, 415–18 (2012).

42. See *id.* at 416 (“The racial disdain for the black servant—‘a despised race to a despised calling’—justified labeling the work as ‘[n-word]’s work.”) (quoting DANIEL E. SUTHERLAND, *AMERICANS AND THEIR SERVANTS: DOMESTIC SERVICE IN THE UNITED STATES FROM 1800 TO 1920* at 4 (1981)); Evelyn Nakano Glenn, *From Servitude to Service Work: Historical Continuities in the Racial Division of Paid Reproductive Labor*, 18 SIGNS 1, 14–16 (1992) (“Even though racial stereotypes undoubtedly preceded their entry into domestic work, it is also the case that domestics were forced to enact the role of the inferior.”). See generally Dorothy E. Roberts, *Spiritual and Menial Housework*, 9 YALE J.L. & FEMINISM 51 (1997) (theorizing a split between the spiritual parts of domestic work, which are highly valued and associated with privileged white women, and the menial parts, which are devalued and associated with minority, immigrant, and working-class women).

43. EVELYN NAKANO GLENN, *ISSEI, NISEI, WAR BRIDE: THREE GENERATIONS OF JAPANESE-AMERICAN WOMEN IN DOMESTIC SERVICE* 141 (1986).

44. PHYLLIS M. PALMER, *DOMESTICITY AND DIRT: HOUSEWIVES AND DOMESTIC SERVANTS IN THE UNITED STATES, 1920–1945* at 65–87 (2d ed. 2018); Smith, *supra* note 40, at 868–75.

45. Smith, *supra* note 40, at 869–75, 882–89.

46. PALMER, *supra* note 44, at 1–13; CLARK-LEWIS, *supra* note 40, at 147; Suzanne Goldberg, *In Pursuit of Workplace Rights: Household Workers and a Conflict of Laws*, 3 YALE J.L. & FEMINISM 63, 67–69 (1990).

10% of the domestic worker workforce.⁴⁷ Like other domestic workers, live-in workers may be authorized to work by U.S. citizenship, a temporary work visa,⁴⁸ or other status, or may be undocumented.⁴⁹ They might be employed through an agency or directly by the household. They might nanny, clean, provide care exclusively, or have a mix of duties. Overall, domestic work will be one of the fastest growing occupations of the next decade.⁵⁰ This labor force numbers about 2.2 million⁵¹ and will continue to grow as the U.S. population ages and needs the care that domestic workers provide.⁵²

Although live-in work is uncommon today, it is a subcategory worthy of attention. Live-in work is an extreme case of domestic work: domestic workers have poorer working conditions than other workers, and live-in workers have poorer

47. SABA WAHEED, LUCERO HERRERA, REYNA ORELLANA, BLAKE VALENTA, & TIA KOONSE, UCLA LAB. CTR., PROFILE, PRACTICES AND NEEDS OF CALIFORNIA'S DOMESTIC WORK EMPLOYERS 3 (2016), https://www.labor.ucla.edu/wp-content/uploads/2018/06/UCLA_domesticworkers_report_final.pdf [https://perma.cc/D3D2-93MS] (finding, in survey of California employers of domestic workers, that 10% hired live-in domestic workers and 6% required 24-hour care); BURNHAM & THEODORE, *supra* note 23, at 41 (finding, in first national survey of domestic workers, that 11% of respondents were live-in workers).

48. The relevant temporary work visas are the J-1, A-3, G-5, and B-1. The J-1 Au Pair Program is for foreign workers, mostly young women ages 18–26, who provide full-time live-in childcare to families in the U.S. *See* 22 C.F.R. § 62.31 (2021); EUREKAFACTS, AU PAIR PROGRAM 2020 REVIEW REPORT 23 (2020), https://www.alliance-exchange.org/wp-content/uploads/2020/10/EF_AuPairReport_2020.pdf [https://perma.cc/5FPA-T4KG] (noting, in survey of former au pairs commissioned by industry group for au pair sponsor agencies, that 96% were women). Although the J-1 is nominally a cultural exchange visa, it functions as a temporary work visa. *See* Shayak Sarkar, *The New Legal World of Domestic Work*, 32 YALE J.L. & FEMINISM 1, 34–38 (2020); Janie A. Chuang, *The U.S. Au Pair Program: Labor Exploitation and the Myth of Cultural Exchange*, 36 HARV. J.L. & GENDER 269 (2013) [hereinafter Chuang, *The U.S. Au Pair Program*]; *see also* INT'L HUM. RTS. L. CLINIC, CENTRO DE LOS DERECHOS DEL MIGRANTE, INC., INT'L LAB. RECRUITMENT WORKING GRP., & NAT'L DOMESTIC WORKERS ALL., SHORTCHANGED: THE BIG BUSINESS BEHIND THE LOW WAGE J-1 AU PAIR PROGRAM (2018), <https://fairlaborrecruitment.files.wordpress.com/2018/08/shortchanged.pdf> [https://perma.cc/J45W-QU5P] (describing exploitation in the J-1 visa program based on interviews with au pairs); JUST. IN MOTION, VISA PAGES: U.S. TEMPORARY FOREIGN WORKER VISAS: J-1 VISA (2020), https://www.justiceinmotion.org/_files/ugd/64f95e_cd79fd93290b461c96a53817f6a02c4b.pdf [https://perma.cc/6R2B-8EUG] (explaining legal and regulatory structure of the J-1 visa). The A-3 and G-5 visas are for foreign workers who accompany diplomats and employees of international organizations and work in their homes while in the U.S. *See* Amy Tai, *Unlocking the Doors to Justice: Protecting the Rights and Remedies of Domestic Workers in the Face of Diplomatic Immunity*, 16 AM. U.J. GENDER SOC. POL'Y & L. 175 (2007). The B-1 visa is for, among others, foreign workers who accompany U.S. citizens or foreign nationals traveling to the U.S. for short-term business. *See* JUST. IN MOTION, VISA PAGES: U.S. TEMPORARY FOREIGN WORKER VISAS: B-1 VISA (2015), https://www.justiceinmotion.org/_files/ugd/d83957_026ac6bbc022420494c91d549ec89800.pdf [https://perma.cc/97JB-W7VM].

49. *See* Shamir, *supra* note 33, at 624–30, 642–54.

50. *See* WOLFE, KANDRA, ENGD AHL, & SHIERHOLZ, *supra* note 32, at 37 (projecting that, in the next decade, domestic work employment will increase by 22.9%, compared with 6.9% for all other employment).

51. *Id.* at 4.

52. Dresser, *supra* note 35, at 114–17.

conditions than other domestic workers.⁵³ This difference is related to structural features of the job. Live-in work easily blurs the boundaries between work time and personal or rest time.⁵⁴ Domestic tasks have a way of unfurling in an endless roster: between setting the table, making breakfast, packing lunchboxes, dressing the children, helping the children brush their teeth, dropping off the children, walking the dog, wiping the table, doing dishes, making beds, doing laundry, changing bedsheets, ironing clothes, scrubbing toilets, cleaning sinks, vacuuming floors, wiping counters, picking up the children, cooking dinner, bathing the children, and taking out the trash, there is always more work that could be done.⁵⁵ Workers are expected to be constantly available and on-call at a moment's notice,⁵⁶ including in the middle of the night.⁵⁷ And even during the rest time they can enjoy, many workers don't feel truly at ease in someone else's home.⁵⁸ Workers can become isolated from family, friends, and support networks.⁵⁹ Live-in domestic workers are more likely to be threatened, verbally abused, sexually harassed, and trafficked.⁶⁰ They commonly switch to live-out work as soon as they can.⁶¹

Live-in work also deserves special attention because it is treated differently under the law. Sacrificed to the racial politics of the New Deal, domestic workers were written out of every major federal employment law: the minimum wage,

53. PIERRETTE HONDAGNEU-SOTELO, *DOMÉSTICA: IMMIGRANT WORKERS CLEANING & CARING IN THE SHADOWS OF AFFLUENCE* 214 (2d ed. 2007) (“[L]ive-in work . . . remains, as we have seen, the domestic employment arrangement in which we find the greatest abuse.”).

54. BURNHAM & THEODORE, *supra* note 23, at 19–20 (“Because every home has a never-ending list of tasks to be completed, and because live-in workers are essentially on-call, the limits to work that would normally apply in a job simply do not exist.”).

55. *See* Class and Collective Action Complaint at 10–11, *Besera v. Great Au Pair, LLC*, No. 20-cv-03862-ARR-SMG (E.D.N.Y. Aug. 21, 2020) (alleging live-in domestic worker's daily work duties).

56. BURNHAM & THEODORE, *supra* note 23, at 26 (“Fifty-eight percent of live-in workers report that their employers expect them to be available for work outside of their scheduled work hours.”).

57. WAHEED, HERRERA, ORELLANA, VALENTA, & KOONSE, *supra* note 47, at 16 (“22% of employers with overnight workers reported that they have woken the worker from sleep.”); BURNHAM & THEODORE, *supra* note 23, at xii, 26–28 (“25 percent of live-in workers had responsibilities that prevented them from getting at least five hours of uninterrupted sleep at night during the week prior to being interviewed. . . . 49 percent [of the 58 percent expected by employers to be available outside scheduled work hours] report that their employer expects them to be available at any time—whether or not they are enjoying a day off or simply a night of sleep.”).

58. *See* HONDAGNEU-SOTELO, *supra* note 53, at 31 (quoting live-in domestic worker who explains, “I could never feel at home, never. . . . There's always something invisible that tells you this is not your house, you just work here.”); MARY ROMERO, *MAID IN THE U.S.A.* 153 (1992) (“The family eats in the dining room and I eat in the kitchen.”).

59. HONDAGNEU-SOTELO, *supra* note 53, at 30–37 (describing live-in nanny and housekeeper jobs in Los Angeles); *see also* RHACEL PARREÑAS, *SERVANTS OF GLOBALIZATION: WOMEN, MIGRATION, AND DOMESTIC WORK* 233–35 (2001).

60. BURNHAM & THEODORE, *supra* note 2331, at 33; TIFFANY WILLIAMS, *NAT'L DOMESTIC WORKERS ALL., BEYOND SURVIVAL: ORGANIZING TO END HUMAN TRAFFICKING OF DOMESTIC WORKERS* (Elly Kugler, Mariana Viturro, Erica Simpson, & Sarah Anderson eds., 2015), https://www.domesticworkers.org/wp-content/uploads/2021/06/bs_report2015.pdf [<https://perma.cc/Q33C-NB46>].

61. HONDAGNEU-SOTELO, *supra* note 53, at 252 n.6; ROMERO, *supra* note 58, at 92.

health and safety protections, collective bargaining rights, and Social Security.⁶² State laws resemble federal precedent in excluding these workers.⁶³ Slowly and piecemeal, the legal exclusions are changing.⁶⁴ But live-in domestic workers remain excluded from some of the rights that live-out domestic workers now enjoy. Second-class employment rights for live-in domestic workers are especially entrenched, and meal and lodging deductions are a key example.⁶⁵

III.

LIVE-IN DOMESTIC WORKERS AND THE FAIR LABOR STANDARDS ACT

A. Winning Minimum Wage and Inheriting Deductions

The federal minimum wage was a signature achievement of the New Deal. By enacting FLSA in 1938, Congress aimed to

raise substandard wages and to give additional compensation for overtime work as to those employees within its ambit, thereby helping to protect this nation “from the evils and dangers resulting from wages too low to buy the bare necessities of life and from long hours of work injurious to health.”⁶⁶

Domestic workers were originally excluded from FLSA. Through a series of legal developments since 1938, domestic workers won initial inclusion and fuller coverage.

Though the original FLSA excluded domestic workers, it contained the meal and lodging deductions rules that would later limit domestic worker wages. As Congress prepared to enact key amendments in 1966 and 1974, deductions occasionally appeared in the legislative debates and helped to shape the policy considerations surrounding minimum wage.

62. Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95 (2011); Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 72–79 (1996).

63. See BURNHAM & THEODORE, *supra* note 23, at 8–9.

64. JULIE KASHEN, CENTURY FOUND., DOMESTIC WORKERS BILL: A MODEL FOR TOMORROW’S WORKFORCE 3–4 (2019), https://production-tcf.imgix.net/app/uploads/2019/12/19172444/Julie_DomesticWorkersPDF.pdf [<https://perma.cc/YZ9A-9QMQ>] (listing Domestic Worker Bills of Rights enacted by states and cities since 2010); see also Shah & Seville, *supra* note 41 (reviewing history of domestic worker organizing and legal victories).

65. See *infra* Section III.B. FLSA, for example, gives domestic workers and other workers the right to overtime pay. 29 U.S.C. § 207(a)(1) (2018); 29 C.F.R. § 552.100(a)(2) (2020). However, the law excludes live-in domestic workers if they are hired directly by an individual household. 29 U.S.C. § 213(b)(21) (2018); 29 C.F.R. § 552.109(c) (2020). An individual employer only has to pay the minimum wage for the live-in’s hours worked, no matter how many hours tally up.

66. *United States v. Rosenwasser*, 323 U.S. 360, 361 (1945) (quoting S. REP. NO. 75-884, at 4 (1937)).

1. *The Fair Labor Standards Act of 1938*

President Roosevelt summarized FLSA's policy as "a fair day's pay for a fair day's work."⁶⁷ The minimum wage provisions required covered employers to pay employees a minimum hourly wage for their hours worked.⁶⁸ The maximum hours provisions rewarded long hours and incentivized employers to spread work hours among employees⁶⁹ by requiring 1.5 times the employee's regular hourly rate for hours worked above 40 in a week.⁷⁰

The law, however, excluded domestic workers. Like other New Deal legislation, FLSA was the product of a raw political compromise.⁷¹ Southern Democrats in Congress wanted to preserve the racial political economy of their region, which was built on exploitation of Black agricultural and domestic workers.⁷² The Roosevelt Administration conceded and carved out the majority of Black workers from the legislation using their common jobs—agricultural work and domestic work—as proxy.⁷³ In the case of domestic workers, Congress accomplished the exclusion by covering workers "engaged in commerce or in the production of goods for commerce,"⁷⁴ and stating that domestic work did not implicate commerce.⁷⁵ The 1938 exclusion of domestic workers from FLSA resulted from a conscious move to preserve racial domination in labor,⁷⁶ a testament to the legacies of slavery and colonialism in defining what kinds of work have value. As the NAACP said of one piece of legislation, "The more [the NAACP] studied the bill, the more holes appeared, until from a Negro's point of view it looks like a sieve with the holes just big enough for the majority of Negroes to fall through."⁷⁷

67. IRA KATZNELSON, *FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME* 267 (2013) [hereinafter KATZNELSON, *FEAR ITSELF*] (quoting S. REP. NO. 75-884, at 2 (1937)).

68. Fair Labor Standards Act, Pub. L. No. 75-718, § 6, 52 Stat. 1060, 1062–63 (1938) (codified as amended at 29 U.S.C. § 206 (2018)).

69. *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 577–78 (1942).

70. § 7, 52 Stat. at 1063–64.

71. Perea, *supra* note 62, at 104–24 (describing exclusions from National Industrial Recovery Act, Agricultural Adjustment Act, Social Security Act, Fair Labor Standards Act, and National Labor Relations Act).

72. IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA* 25–61 (2005); Perea, *supra* note 62, at 100–04.

73. Perea, *supra* note 62, at 114–17.

74. § 2(a), 52 Stat. at 1060.

75. See *Fair Labor Standards Act of 1937: Joint Hearings on S. 2475 and H.R. 7200 Before the S. Comm. on Educ. & Lab. and H. Comm. on Lab.*, 75th Cong. 1067 (1937) [hereinafter *FLSA Hearings*] (statement of Sen. Hugo L. Black, Chairman, S. Comm. on Educ. & Lab.) (noting that exclusion of domestic service is "very intentional," as "this bill does not attempt to regulate anything except interstate commerce").

76. KATZNELSON, *FEAR ITSELF*, *supra* note 67, at 266–72.

77. Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335, 1365 (1987) (quoting *Economic Security Act: Hearings on S. 1130 Before the S. Comm. on Fin.*, 74th Cong., 1st Sess. 640–41 (1935) (statement of Charles H. Houston, National Association for the Advancement of Colored People)).

From the beginning, FLSA permitted meal and lodging deductions from wages, including from minimum wage. The law defined “wage” to include “the reasonable cost . . . to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees.”⁷⁸ Although some industry groups opposed provisions in the draft bill that would have created a Labor Standards Board with the power to set deductions,⁷⁹ there was generally scant debate about the deductions provision. The National Maritime Union, representing sailors, opposed it and wanted an exemption.⁸⁰ Pointing out that “at sea [sailors] have no choice but to accept from the company meals and sleeping quarters along with [their] wages,” the union representative argued that deductions would lead to unacceptably low wages.⁸¹ Sailors would need either higher baseline wages or a deductions exemption: “If we had to pay for board and lodging we would have practically nothing left.”⁸² An exemption from the deductions provision was a backup plan to the workers’ primary goal to be exempt from FLSA altogether.⁸³ The version of the bill enacted in 1938 excluded sailors from the wage and hour provisions, avoiding the deductions problem for that industry.⁸⁴

2. Amendments of 1966

Congress took up amendments to FLSA in 1966.⁸⁵ The NAACP urged lawmakers to remedy the 1938 exclusions of agricultural workers and domestic workers, emphasizing that Black workers generally lacked minimum wage protections because they were concentrated in those industries.⁸⁶ Congress seemed more

78. § 3(m), 52 Stat. at 1061.

79. The coal industry sought a broad exemption from FLSA and emphasized the proposed bill’s delegations of power to the new Labor Standards Board. *FLSA Hearings*, *supra* note 75, at 848–49 (statement of John D. Battle, Executive Secretary, National Coal Association). In a long list of excessive delegations, the industry group pointed to the Board’s power to authorize deductions. *Id.* at 851–52; see John S. Forsythe, *Legislative History of the Fair Labor Standards Act*, 6 L. & CONTEMP. PROBS. 464, 475–78 (1939) (explaining how proposed Labor Standards Board gave way to DOL administrator and industry committees). See generally Kate Andrias, *An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act*, 128 YALE L.J. 616 (2019) (explaining origins and implications of FLSA’s industry committees).

80. *FLSA Hearings*, *supra* note 75, at 548–49 (statement of Ralph Emerson, Legislative Representative, National Maritime Union of America).

81. *Id.* at 545.

82. *Id.* at 549.

83. See 29 C.F.R. § 783.29 (2020).

84. Fair Labor Standards Act, Pub. L. No. 75-718, § 13(a)(3), 52 Stat. 1060, 1067 (1938) (codified as amended at 29 U.S.C. § 213(a)(5) (2018)).

85. Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, §§ 103, 203, 80 Stat. 830, 830–45 (codified as amended at 29 U.S.C. §§ 201–219 (2018)).

86. *Amendments to the Fair Labor Standards Act: Hearings on S. 763, S. 1741, S. 1770, S. 1986, and S. 2210 Before the Subcomm. on Lab. of the S. Comm. on Lab. & Pub. Welfare*, 89th Cong. 1070 (1965) (statement of Clarence Mitchell, Director, Washington Bureau of National Association for the Advancement of Colored People) (“Many, many Negroes are in occupations that are not even protected by the [FLSA].”).

willing to extend the minimum wage to agricultural workers than domestic workers, but the NAACP pressed lawmakers to “end the scandal under which women, many of them mothers and often the sole earner in a family[,] are paid a poverty wage to serve the tables of the affluent.”⁸⁷ Their bid failed, however, and the 1966 amendments extended minimum wage protections only to agricultural workers, not domestic workers.⁸⁸

Because many agricultural workers lived in employer-provided housing, the issue of meal and lodging deductions came up in the legislative debates. The original FLSA of 1938 provided for meal and lodging deductions, meaning that if agricultural workers won minimum wage rights, they would be subject to deductions by default. Lawmakers debated outlawing deductions specifically for agricultural workers, motivated by reports of poor housing conditions on the nation’s farms, but eventually rejected that idea.⁸⁹ Therefore, agricultural workers won the minimum wage but inherited the meal and lodging deductions rules already on the books.⁹⁰

3. Amendments of 1974

In 1974, domestic workers won initial inclusion in FLSA. In the amendments of that year, Congress found that “the employment of persons in domestic service in households affects commerce,” opening the door to FLSA coverage.⁹¹ Lawmakers estimated that 1.28 million domestic workers would gain FLSA coverage, about 73% of whom earned less than minimum wage at that time.⁹² FLSA coverage, according to the House Subcommittee on Labor, “should help to raise the status and dignity of this work.”⁹³ This victory was the result of decades of worker organizing⁹⁴ and extensive legislative debate.⁹⁵ FLSA coverage of domestic

87. *Id.* at 1070–71.

88. §§ 103, 203, 80 Stat. at 832–34.

89. *See Soler v. G. & U., Inc.*, 833 F.2d 1104, 1108–09 (2d Cir. 1987) (recounting legislative history of 1966 FLSA amendments).

90. *Id.*

91. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 7, 88 Stat. 55, 62 (1974) (codified as amended at 29 U.S.C. §§ 202(a), 206(f), 207, 213 (2018)).

92. H.R. REP. NO. 93-913, at 33 (1974).

93. *Id.* at 34.

94. *See generally* Premilla Nadasen, *Citizenship Rights, Domestic Work, and the Fair Labor Standards Act*, 24 J. POL’Y HIST. 74, 75 (2012) (examining the “national campaign by domestic workers in the 1970s for coverage under the 1938 Fair Labor Standards Act”); Eileen Boris & Premilla Nadasen, *Domestic Workers Organize!*, 11 WORKINGUSA: J. LAB. & SOC’Y 413, 413, 416–24 (2008) (detailing “the history of domestic worker organizing in the U.S.”); *see also Fair Labor Standards Amendments of 1973: Hearings on H.R. 4757 and H.R. 2831 Before the Gen. Subcomm. on Lab. of the H. Comm. on Educ. & Lab.*, 93d Cong. 204–09 (1973) [hereinafter *1973 H. Comm. Hearings*] (statements of Edith B. Sloan, Executive Director, National Committee on Household Employment, and Geneva Reid, Chairwoman, Household Technicians of America).

95. Molly Biklen, *Healthcare in the Home: Reexamining the Companionship Services Exemption to the Fair Labor Standards Act*, 35 COLUM. HUM. RTS. L. REV. 113, 116–25 (2003).

workers, however, was not complete.⁹⁶ The 1974 amendments excluded, from both minimum wage and overtime, casual babysitters and workers employed to provide “companionship services” to people unable to care for themselves.⁹⁷ Live-in domestic workers, who resided in the employer’s household, were excluded from overtime, although not minimum wage.⁹⁸ These exemptions represented a refusal to “completely abandon[] the traditional view that certain types of wage work in the home were too private and familial for federal wage and hour law to regulate.”⁹⁹

Leading up to the 1974 amendments, lawmakers considering minimum wage for domestic work understood that deductions were part of the policy landscape. Employers in other industries, concerned about proposed increases to the minimum wage, emphasized that deductions made the minimum wage workable.¹⁰⁰ As one hotel and motel industry group testified,

The only way we have been able to meet our obligation under the law and still survive has been due to our tip credit, our exemption from overtime, and the reasonable credit provided in the law for meals and lodging. The continuation of these provisions in the law are [sic] extremely important if we are to successfully absorb any further minimum wage increases.¹⁰¹

Those on the other side of the debate also used this justification. Aiming to neutralize broad opposition to minimum wage for domestic work,¹⁰² union

96. See Lisa Diaz-Ordaz, *Real Work: Domestic Workers’ Exclusion from the Protections of Labor Laws*, 19 BUFF. J. GENDER L. & SOC. POL’Y 107, 118–39 (2010) (discussing the exemption of various types of domestic workers from FLSA).

97. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 7(b)(3), 88 Stat. 55, 62 (1974) (codified as amended at 29 U.S.C. § 213 (2018)). See generally Biklen, *supra* note 95 (discussing origins and significance of companionship exemption in 1974 FLSA amendments).

98. § 7(b)(4), 88 Stat. at 62.

99. Biklen, *supra* note 95, at 114.

100. See *Fair Labor Standards Amendments of 1973: Hearings on S. 1861, S. 1725, and H.R. 7935 Before the Subcomm. on Lab. of the S. Comm. on Lab. & Pub. Welfare*, 93d Cong. 164a (1973) [hereinafter *1973 S. Comm. Hearings*] (statement of Albert L. McDermott, Government Affairs Committee, American Hotel & Motel Association) (“In order to successfully absorb any increase in the minimum wage, we must point out that it must be reasonable and gradual and must contain . . . [t]he present provision in the law permitting an employer a credit where he provides his employees with meals and lodging.”); *To Amend the Fair Labor Standards Act of 1938: Hearings on H.R. 7130 Before the Gen. Subcomm. on Lab. of the H. Comm. on Educ. & Lab.*, 92d Cong. 814 (1971) (statement of Robert L. Brock, President, Topeka Inn Management, Inc.) (“There is no rational reason which we know of for eliminating the credit for meals and lodging.”).

101. *1973 H. Comm. Hearings*, *supra* note 94, at 112, 115 (statement of Arthur J. Packard, Chairman, Government Affairs Committee, American Hotel & Motel Association).

102. See H.R. REP. NO. 93-913, at 34 (1974) (letter from members of Congress to Chair of House Subcommittee on Labor noting “rumors that [the] Subcommittee is under pressure to drop the extension of minimum wage coverage to domestic workers”).

representatives pointed out that deductions would soften the blow to employers.¹⁰³ This argument made its way into the House Subcommittee on Labor's report on the proposed legislation:

The committee is confident that appropriate methods to ensure compliance can be fashioned within the authority of the Secretary of Labor under the Act. The committee calls attention, for example, to the provisions of the law and the Secretary of Labor's regulations which credit the employer with the reasonable value of board and lodging furnished to an employee. These provisions, coupled with the provision for an overtime exemption for live-in domestics, as provided in the bill, will serve to minimize any problems which might arise in the application of the law.¹⁰⁴

Moreover, deductions had been a standard practice, though unregulated, in domestic work for decades.¹⁰⁵ Thus, politically and practically, deductions were a counterbalance to burdening private households with minimum wage. The existing deductions rules made it more feasible for Congress to extend minimum wage to domestic work. Therefore, when domestic workers came into FLSA's coverage in 1974, they inherited the deductions rules on the books.

4. Regulations of 2013

The most recent realignment of FLSA's protections for domestic workers was the 2013 home care rule.¹⁰⁶ DOL significantly revised its rules implementing the 1974 amendments,¹⁰⁷ resulting in fuller FLSA coverage for a broader group of domestic workers. The rule narrowed the definition of companionship services¹⁰⁸ and announced that third-party employers, such as home care agencies, cannot use the minimum wage and overtime exemptions for companions¹⁰⁹ or the overtime exemption for live-in domestic workers.¹¹⁰

Today, domestic workers are generally covered by FLSA's minimum wage and overtime provisions. The current exemptions are limited, but entrenched: employers of casual babysitters are not required to pay minimum wage or overtime;

103. 1973 S. Comm. Hearings, *supra* note 100, at 353 (statement of George Meany, President, AFL-CIO) ("In determining the cost impact of applying FLSA coverage to domestics, it is important to make allowances for the value of perquisites which such workers receive. The law makes provision for crediting of noncash wages toward complying with the minimum wage standard set by the statute.").

104. H.R. REP. NO. 93-913, at 36.

105. PALMER, *supra* note 44, at 65-87.

106. Application of the Fair Labor Standards Act to Domestic Service, 78 Fed. Reg. 60,454 (Oct. 1, 2013) (codified at 29 C.F.R. § 552 (2020)); *see also* Home Care Ass'n of Am. v. Weil, 799 F.3d 1084 (D.C. Cir. 2015) (upholding rule).

107. *See* Extension to Domestic Service Employees, 40 Fed. Reg. 7404 (Feb. 20, 1975) (codified at 29 C.F.R. §§ 516, 552 (2020)).

108. 29 C.F.R. § 552.6 (2020); 29 U.S.C. § 213(a)(15) (2018).

109. 29 C.F.R. § 552.109(a) (2020); 29 U.S.C. § 213(a)(15).

110. 29 C.F.R. § 552.109(c) (2020); 29 U.S.C. § 213(b)(21) (2018).

individual employers of companions are not required to pay minimum wage or overtime; and individual employers of live-in domestic workers are not required to pay overtime.¹¹¹ For live-in domestic workers, inclusion in the federal minimum wage is hard-won, yet incomplete. The law still regards live-in domestic work as too private and too indispensable to regulate on par with other work.¹¹² This history of legal exclusion forms the context for evaluating meal and lodging deductions. Deductions are part of a long lineage of second-class rights for live-in domestic workers.

B. Meal and Lodging Deductions: A Subminimum Wage

Since it was first enacted, FLSA has defined “wage” to include “the reasonable cost . . . to the employer of furnishing such employee with board, lodging, or other facilities.”¹¹³ This means that employers who provide meals, lodging, or other facilities to their workers can count those towards the minimum wage or the agreed-upon wage. Employers can pay a subminimum cash wage if the value of facilities brings the wage up to minimum. A worker can even be paid exclusively in facilities, with zero take-home cash.¹¹⁴ An employer in any industry can use deductions: a restaurant that serves meals to staff before a shift,¹¹⁵ an agribusiness that provides onsite dormitories to seasonal workers,¹¹⁶ a landlord that provides apartments to property managers.¹¹⁷

However, deductions have special significance in live-in domestic work.¹¹⁸ First, there is a fundamental relationship between the employer-provided meals and lodging and the work itself. “Living-in”—sleeping at the workplace, and usually eating there too—is the essence of the job. Second, the setting is the employer’s home. An employer of a live-in domestic worker provides meals and lodging in the same place where the employer also eats and lives. The space is arranged for the employer’s comforts and tastes. When the employment ends, the space will no longer include the worker, but it will still be the employer’s home.

111. See 29 U.S.C. § 213(a)(15) (casual babysitters and companions); 29 C.F.R. § 552.109(a) (companions); § 552.109(c) (live-in domestic workers); 29 U.S.C. § 213(b)(21) (same).

112. See Diaz-Ordaz, *supra* note 96, at 108–09 (noting that the same work performed outside the home—housekeeping in hotels, childcare in day care facilities, home health care in hospitals—is afforded protection under labor laws); Silbaugh, *supra* note 62, at 72–74 (discussing how exemptions of domestic workers from labor laws “paint a picture of a *kind* of work that does not look like work”). The landmark case establishing that states can set minimum wages started with a hotel housekeeper’s claim. *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

113. 29 U.S.C. § 203(m)(1) (2018).

114. 29 C.F.R. §§ 531.36(a), 531.37(a) (2020); *e.g.*, *Myers v. Baltimore County*, 50 F. App’x 583 (4th Cir. 2002) (upholding arrangement where park caretakers were compensated exclusively with lodging and water).

115. *E.g.*, *Davis Bros., Inc. v. Donovan*, 700 F.2d 1368 (11th Cir. 1983).

116. *E.g.*, *Castillo v. Case Farms of Ohio, Inc.*, 96 F. Supp. 2d 578 (W.D. Tex. 1999) (denying deduction for substandard lodging).

117. *E.g.*, *Roces v. Reno Hous. Auth.*, 300 F. Supp. 3d 1172, 1183–93 (D. Nev. 2018).

118. DOL has promulgated a general set of regulations about facilities deductions, 29 C.F.R. §§ 531.1–40, and one specific to domestic workers, 29 C.F.R. § 552.100.

Other employers provide meals or lodging in a designated part of the workplace or in a separate place where workers live during the employment. Those settings may not be neutral—the employer still has control, and the worker may not have complete privacy—but they are not as intimate as the employer’s home.

Finally, deductions have special significance in this industry because they appear to be widespread. Although there is no comprehensive data on the practice of taking meal and lodging deductions, the average live-in domestic worker earns less than the federal minimum wage: one national survey found a median hourly wage of \$6.15.¹¹⁹ If we assume that the gap between minimum wage and what live-in workers actually earn is at least partially explained by legal deductions,¹²⁰ then we can conceptualize deductions as creating a legal subminimum wage for live-in domestic work—the “live-in wage.”

The FLSA deductions framework has five requirements: (i) the meals, lodging, or facilities are regularly provided by this employer or in this industry;¹²¹ (ii) the worker accepts the facilities voluntarily and without coercion;¹²² (iii) the facilities comply with federal, state, and local law;¹²³ (iv) the facilities are provided primarily for the benefit of the worker;¹²⁴ and (v) the employer keeps records of the actual cost of providing the facilities.¹²⁵ An employer who meets all five requirements can deduct the actual cost or fair value of the facilities, whichever is less.¹²⁶ Alternatively, an employer can skip requirement (v) and deduct an amount set by regulation, without keeping records of actual cost.¹²⁷

The requirements are typically litigated in the context of an employee’s claim for unpaid wages under FLSA.¹²⁸ When an employee claims that she has been

119. BURNHAM & THEODORE, *supra* note 23, at 18 (finding median hourly wage of \$6.15 for live-in and \$10.82 for live-out domestic workers); *see also id.* at xi (finding, in survey of 14 metropolitan areas, that 67% of live-in domestic workers were paid below the state minimum wage); DOMESTIC WORKERS UNITED & DATACENTER, *supra* note 31, at 15 (finding, in survey of New York City, that 20% of live-in domestic workers were paid below minimum wage); HONDAGNEU-SOTELO, *supra* note 53, at 35 (finding, in survey of Los Angeles in the 1990s, that 79% of live-in domestic workers were paid below minimum wage); Adam J. Hiller & Leah E. Saxtein, *Falling Through the Cracks: The Plight of Domestic Workers and Their Continued Search for Legislative Protection*, 27 HOFSTRA LAB. & EMP. L.J. 233, 250 n.128 (2009) (reporting, from survey of Montgomery County, Maryland, a median hourly wage of \$6.29 among live-in domestic workers). An analysis of a set of live-in employment arrangements, although likely not representative, found a median hourly wage of \$2.14. HUM. RTS. WATCH, HIDDEN IN THE HOME: ABUSE OF DOMESTIC WORKERS WITH SPECIAL VISAS IN THE UNITED STATES 1 (2001), <https://www.hrw.org/reports/2001/usadom/usadom0501.pdf> [<https://perma.cc/GFG9-5CHV>] (reviewing 43 live-in employment arrangements, explaining patterns in exploitation, and finding median hourly wage of “\$2.14, including deductions for room and board—only forty-two percent of the median federal hourly minimum wage of \$5.15”).

120. *See supra* text accompanying note 24.

121. 29 C.F.R. § 531.31 (2020).

122. 29 C.F.R. §§ 531.30, 552.100(b) (2020).

123. 29 C.F.R. § 531.31 (2020).

124. 29 C.F.R. § 531.3(d)(1) (2020).

125. 29 C.F.R. §§ 516.27, 552.110(a) (2020).

126. 29 C.F.R. § 531.3(c) (2020).

127. 29 C.F.R. § 552.100(c)–(d) (2020).

128. *See, e.g., Lopez v. Rodriguez*, 668 F.2d 1376 (D.C. Cir. 1981).

underpaid, her employer can invoke the deductions framework to argue that they owe no wages or that they owe less than the employee claims. A court or administrative agency then analyzes the deductions requirements to determine what the employee is owed, depending on whether any apparent deductions were lawful.

1. Regularly provided by this employer or in this industry

The employer, or similar employers in the trade, must regularly provide the facilities to workers to qualify for a deduction.¹²⁹ The practice does not need to be industry-wide.¹³⁰ For a meal deduction, this requirement is analyzed based on the circumstances. DOL has determined that lodging, however, is regularly provided to live-in domestic workers.¹³¹ Therefore, employers of live-in domestic workers automatically meet this requirement to take a lodging deduction.

2. Accepted voluntarily and without coercion

As a general matter, the worker must accept the facilities voluntarily and without coercion.¹³² However, courts have rejected this requirement with regard to meals, so this requirement no longer applies; an employer can deduct the cost of provided meals even if the worker has no choice whether to accept.¹³³ As for lodging, like the first requirement, live-in domestic workers are presumed to have

129. 29 C.F.R. § 531.31 (2020).

130. U.S. DEP'T OF LAB., WAGE & HOUR DIV., FIELD OPERATIONS HANDBOOK § 30c02(a) (Nov. 17, 2016) [hereinafter FIELD OPERATIONS HANDBOOK], https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FOH_Ch30.pdf [<https://perma.cc/Y4WC-AVWU>].

131. “Because live-in domestic service employees, for example, often reside at their employers’ private homes without paying rent, this requirement is met for those workers.” U.S. DEP'T OF LAB., WAGE & HOUR DIV., FIELD ASSISTANCE BULLETIN No. 2015-1, at 2 (Dec. 17, 2015) [hereinafter FIELD ASSISTANCE BULLETIN], https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab2015_1.pdf [<https://perma.cc/TLX2-GMRA>].

132. 29 C.F.R. §§ 531.30, 552.100(b) (2020); *cf.* Seth H. Garfinkel, *The Voluntary Work Program: Expanding Labor Laws to Protect Detained Immigrant Workers*, 67 CASE W. RES. L. REV. 1287, 1319–21 (2017) (analyzing this requirement with respect to immigrant workers in civil detention).

133. *See* Herman v. Collis Foods, Inc., 176 F.3d 912, 916–18 (6th Cir. 1999); Donovan v. Miller Props., Inc., 711 F.2d 49 (5th Cir. 1983) (per curiam); Davis Bros., Inc. v. Donovan, 700 F.2d 1368 (11th Cir. 1983); *see also* FIELD OPERATIONS HANDBOOK, *supra* note 130, § 30c09(b) (“The ‘voluntary and un-coerced’ provision has been rejected in several court of appeals and district court decisions regarding *meals* provided to employees. The [DOL] no longer enforces the ‘voluntary’ provision with respect to *meals*.”).

accepted lodging voluntarily.¹³⁴ When “living-in” is integral or required for the job, a domestic worker accepts lodging when she accepts the job.¹³⁵

A worker can rebut the presumption by showing that her initial voluntary acceptance later became coerced. As the D.C. Circuit explained, “[A]n employer may impose ‘coercive’ conditions—that is, conditions so onerous and restrictive that the employee’s continued employment and acceptance of board and lodging ceases to be voluntary.”¹³⁶ Therefore, this requirement is not met if the worker shows she would have left the job but for the employer’s restrictive conditions.¹³⁷

This requirement is also not met if the employer is required by law to provide the lodging. At least one court has implied that a worker does not accept lodging voluntarily if the employer is required to provide it.¹³⁸ For example, workers in the J-1 Au Pair Program live with a family in the U.S. and provide full-time child-care.¹³⁹ Under the program regulations, host family employers must provide au pairs a private bedroom.¹⁴⁰ Because providing lodging is a condition of the program, the lodging is not accepted voluntarily, so a deduction is not allowed.¹⁴¹

3. Compliance with federal, state, and local law

The provided facilities must comply with applicable federal, state, and local law.¹⁴² Courts have held that employers cannot deduct for providing cigarettes or alcohol if they are not licensed to sell those products under state law.¹⁴³ For meals,

134. FIELD ASSISTANCE BULLETIN, *supra* note 131, at 3 (“[DOL] will normally consider the lodging as voluntarily accepted by the employee when living at or near the site of the work is necessary to performing the job. For example, this requirement is typically met when a live-in domestic service employee and the employer have an understanding that the employee will live on the premises as a condition of employment, or when an apartment complex provides a free apartment to the complex manager.”).

135. *Lopez v. Rodriguez*, 668 F.2d 1376, 1380 (D.C. Cir. 1981) (“[I]n the present case, [employers] were concededly seeking to employ a ‘live-in’ housekeeper and babysitter If [the worker] understood this when she accepted the job, and if her acceptance of the job was voluntary and uncoerced, then it is idle to inquire whether her initial acceptance of board and lodging was voluntary and uncoerced. [She] had no choice but to accept the lawful ‘live-in’ condition if she desired the job.”); *see also* *Roces v. Reno Hous. Auth.*, 300 F. Supp. 3d 1172, 1185–88 (D. Nev. 2018) (concluding that “living-in” was necessary part of the job as onsite property manager).

136. *Lopez*, 668 F.2d at 1380.

137. *See id.*; *Marshall v. Intraworld Commodities Corp.*, No. 79 C 918, 1980 U.S. Dist. LEXIS 13325, at *11 (E.D.N.Y. June 9, 1980).

138. *See Beltran v. InterExchange, Inc.*, 176 F. Supp. 3d 1066, 1082–83 (D. Colo. 2016) (concluding that sponsors of au pairs could not deduct the cost of room and board from wages because they were required by law to provide room and board); *see also* U.S. Dep’t of Lab., Wage & Hour Div., Opinion Letter (July 19, 1997), https://www.dol.gov/sites/dolgov/files/WHD/opinion-letters/legacy/ol_1997-07-19_a.pdf [<https://perma.cc/SK2J-AR2P>].

139. 22 C.F.R. § 62.31(a) (2021).

140. 22 C.F.R. § 62.31(e)(6) (2021).

141. *Beltran*, 176 F. Supp. 3d at 1082–83.

142. 29 C.F.R. § 531.31 (2020).

143. *See, e.g., Ortiz v. Paramo*, No. 06-3062 (RBK/AMD), 2009 WL 4575618, at *3 (D.N.J. Dec. 1, 2009); *Leach v. Johnston*, 812 F. Supp. 1198, 1213 (M.D. Fla. 1992).

it is not clear which laws an employer must follow because there is no authority on whether employers must comply with food service codes or related laws.

For lodging, courts and DOL have interpreted this requirement to mean that the lodging must be up to code.¹⁴⁴ If state or local law requires lodging to be inspected,¹⁴⁵ to be permitted,¹⁴⁶ to have a bed,¹⁴⁷ or to be zoned for residential use,¹⁴⁸ an employer who does not comply cannot take a deduction. This requirement does not mean, though, that state or local law must affirmatively authorize a lodging credit.¹⁴⁹

4. *Provided primarily for the benefit of the worker*

The facilities must be provided primarily for the benefit of the worker, not the employer.¹⁵⁰ For meals, this requirement is met per se.¹⁵¹ Lodging, meanwhile, is “ordinarily presumed” to be for the worker’s benefit,¹⁵² but the presumption can be rebutted with substantial evidence that the lodging is instead “a burden imposed upon the employee in furtherance of the employer’s business.”¹⁵³ Courts balance the relative benefits of the lodging to the employer and the worker. Adequate private lodging is one factor that indicates the lodging is for the worker’s benefit.¹⁵⁴ If the employer requires the worker to live onsite to meet a particular need, keeps the worker on-call, and frequently calls her to work, then the lodging is likely for the employer’s benefit.¹⁵⁵ With respect to live-in domestic workers, DOL has concluded that the lodging is likely for the employer’s benefit “in the

144. *See Rocés v. Reno Hous. Auth.*, 300 F. Supp. 3d 1172, 1188–89 (D. Nev. 2018) (collecting cases “strongly suggest[ing] that the purpose of 29 C.F.R. § 531.31 is merely to ensure that the lodging provided in lieu of wages meets minimum standards for safe, healthful, and lawful housing conditions pursuant to all applicable laws and ordinances”); FIELD OPERATIONS HANDBOOK, *supra* note 130, § 30c02(b).

145. *Garcia v. Frog Island Seafood, Inc.*, 644 F. Supp. 2d 696, 710–12 (E.D.N.C. 2009).

146. *See Balbed v. Eden Park Guest House, LLC*, 881 F.3d 285, 291 n.4 (4th Cir. 2018) (directing lower court to decide on remand whether the lodging provided was the type for which a permit is required under municipal law).

147. *See Archie v. Grand Cent. P’ship*, 86 F. Supp. 2d 262, 269–70 (S.D.N.Y. 2000) (finding that a shelter without beds did not constitute lodging).

148. FIELD ASSISTANCE BULLETIN, *supra* note 131, at 4.

149. *Rocés*, 300 F. Supp. 3d at 1188–89.

150. 29 C.F.R. § 531.3(d)(1) (2020); *cf.* Andrea L. Schmitt, *Ending the Silence: Thai H-2A Workers, Recruitment Fees, and the Fair Labor Standards Act*, 16 PAC. RIM L. & POL’Y J. 167, 189–94 (2007) (analyzing this requirement with respect to recruitment fees paid by agricultural workers on temporary work visas).

151. 29 C.F.R. § 531.32(c) (2020).

152. FIELD OPERATIONS HANDBOOK, *supra* note 130, § 30c03(a)(2).

153. *Soler v. G. & U., Inc.*, 833 F.2d 1104, 1110 (2d Cir. 1987).

154. *Id.*; *see also Rocés*, 300 F. Supp. 3d at 1189–91; *Marshall v. Truman Arnold Distrib. Co.*, 640 F.2d 906, 909 (8th Cir. 1981) (“There is no doubt that the company gained some incidental benefit from the [gas station operator] living on the premises of the station. We cannot say, however, that the primary benefit was not to the [employee].”).

155. *E.g., Bailey v. Pilots’ Ass’n for Bay & River Del.*, 406 F. Supp. 1302, 1309 (E.D. Pa. 1976).

case of a live-in nanny who tends to a baby throughout the night, [or] a home health aide who serves an individual with a health condition that requires her to have constant assistance, including overnight.”¹⁵⁶ Otherwise, the lodging is primarily for the benefit of the live-in domestic worker.

5. Records of actual cost

Employers must keep records of the actual cost of providing meals, lodging, or other facilities to take a deduction.¹⁵⁷ For both meals and lodging, courts have loosened this requirement to mean that employers have the evidentiary burden to substantiate cost, even if they do not keep or produce the required records.¹⁵⁸

Employers of live-in domestic workers have a special exemption from this requirement. An employer of a live-in domestic worker can take a deduction up to an amount set by regulation, without substantiating the actual cost of providing meals or lodging.¹⁵⁹ The employer can deduct 1.5 times the hourly minimum wage for each day of meals provided,¹⁶⁰ and 7.5 times the hourly minimum wage for each week of lodging provided,¹⁶¹ without triggering requirement (v). The employer has the option to take a larger deduction if they meet requirement (v) by substantiating costs, in addition to meeting requirements (i) through (iv).¹⁶²

6. Amount of deduction

An employer who meets the above requirements can deduct up to the “reasonable cost” or “fair value” of the facilities, whichever is less.¹⁶³ Reasonable cost means “not more than the actual cost to the employer of the board, lodging, or

156. FIELD ASSISTANCE BULLETIN, *supra* note 131, at 4–6.

157. 29 C.F.R. §§ 516.27, 552.110(a) (2020).

158. *Compare* Balbed v. Eden Park Guest House, LLC, 881 F.3d 285, 290–91 (4th Cir. 2018), *Roces*, 300 F. Supp. 3d at 1191–93, *and* Archie v. Grand Cent. P’ship, Inc., 86 F. Supp. 2d 262, 266–70 (S.D.N.Y. 2000) (allowing employer, which did not produce required records, to provide a reconstruction of records to calculate cost of lodging), *with* Donovan v. New Floridian Hotel, Inc., 676 F.2d 468, 473–76 (11th Cir. 1982), *Marroquin v. Canales*, 505 F. Supp. 2d 283, 291–92 (D. Md. 2007), *Brock v. Carrion, Ltd.*, 332 F. Supp. 2d 1320, 1324–27 (E.D. Cal. 2004), *and* Cuevas v. Bill Tsagalis, Inc., 500 N.E.2d 1047, 1052–53 (Ill. App. Ct. 1986) (finding, where employer failed to maintain required records, that employer’s unsubstantiated estimate did not meet burden of proving cost).

159. 29 C.F.R. § 552.100(c)–(d) (2020).

160. § 552.100(c) (allowing deduction of 37.5% of the hourly minimum wage for breakfast, 50% for lunch, and 62.5% for dinner). 150% of the current hourly minimum wage (\$7.25) is \$10.88 for a day of meals. *See* 29 U.S.C. § 206 (2018) (requiring a minimum wage of \$7.25).

161. 29 C.F.R. § 552.100(d). 7.5 times the current hourly minimum wage (\$7.25) is \$54.38 for a week of lodging. *See* 29 U.S.C. § 206 (requiring a minimum wage of \$7.25).

162. 29 C.F.R. § 552.100(c)–(d).

163. 29 C.F.R. § 531.3(c) (2020) (“[I]f the [reasonable cost] so computed is more than the fair rental value (or the fair price of the commodities or facilities offered for sale), the fair rental value (or the fair price of the commodities or facilities offered for sale) shall be the reasonable cost.”); *see* 29 U.S.C. § 203(m)(1) (2018).

other facilities.”¹⁶⁴ Reasonable cost “is the cost of operation and maintenance including adequate depreciation plus a reasonable allowance . . . for interest on the depreciated amount of capital invested by the employer.”¹⁶⁵ It does not mean market or retail value, because the employer cannot profit from the deduction.¹⁶⁶ The employer has the burden to establish reasonable cost by producing the required records, by providing other evidence, or by seeking DOL’s determination.¹⁶⁷ Fair value means “the fair price of the commodities or facilities offered for sale.”¹⁶⁸ Whereas reasonable cost can be shown by the employer or determined by DOL, fair value can only be determined by DOL.¹⁶⁹

Though similar, reasonable cost and fair value are not exactly the same.¹⁷⁰ Reasonable cost is based on the employer’s actual cost, while fair value refers to what the worker gets out of the arrangement.¹⁷¹ Of these two options, the deduction is capped at whichever is less.¹⁷² If the fair value of provided lodging is less than what it actually costs the employer, then the employer can only deduct the fair value. The employer bears the brunt of the decision to spend more on the lodging than it is worth. By contrast, if the fair value of the lodging is higher than

164. 29 C.F.R. § 531.3(a) (2020); *see* 29 C.F.R. § 552.100(b) (2020).

165. § 531.3(c).

166. *See* 29 C.F.R. § 531.3(b) (2020) (“Reasonable cost does not include a profit to the employer . . .”); *Balbed v. Eden Park Guest House, LLC*, 881 F.3d 285, 290–91 (4th Cir. 2018); *Chavez v. Arancedo*, No. 17-20003-Civ-TORRES, 2018 WL 4610564, at *8 (S.D. Fla. Sept. 24, 2018); FIELD ASSISTANCE BULLETIN, *supra* note 131, at 10 (“Because an employer may not profit from the section 3(m) credit, an employer may only use the fair value of housing as the amount credited toward wages if that amount is equal to or lower than the amount the employer actually pays for the housing.”).

167. 29 U.S.C. § 203(m)(1) (2018); 29 C.F.R. §§ 531.4, 552.100(b) (2020); *see Chavez*, 2018 WL 4610564, at *7 (“While the burden is on the employer to establish the reasonableness of the credits, the burden is met by either complying with the FLSA’s recordkeeping provisions or seeking [DOL]’s determination.” (citing *Donovan v. New Floridian Hotel*, 676 F.2d 468, 475 (11th Cir. 1982))); *Archie v. Grand Cent. P’ship*, 86 F. Supp. 2d 262, 267 n.3 (S.D.N.Y. 2000) (“While there seems to be nothing in the [sic] either the statute or the regulations that explicitly requires a court to allow for ‘reasonable costs’ in cases when such costs have not been determined by [DOL], it is taken for granted in the case law that such allowance should be made.”).

168. § 531.3(c).

169. *See* 29 C.F.R. §§ 531.3–.5 (2020); FIELD OPERATIONS HANDBOOK, *supra* note 130, § 30c05(b) (“The method used by an employer for determining reasonable cost must be based on good accounting practices.”); *id.* § 30c06 (providing examples of employer determinations of reasonable cost); *id.* §§ 30c07–30c08 (providing procedure to request determination of reasonable cost or fair value by DOL).

170. *See* FIELD OPERATIONS HANDBOOK, *supra* note 130, § 30c07.

171. *See id.* § 30c05(a) (“Reasonable cost cannot exceed the actual cost to the employer. In deciding whether wage credits for facilities are in amounts permissible . . . , experience and judgment must be used by [DOL personnel]. It should be kept in mind that the test in [29 C.F.R. § 531.3] is reasonable cost rather than market value or comparable prices.”); *id.* § 30c07 (“In those cases where cost to the employer is not a true measure of the value of the facilities to the employees, it may be appropriate to apply the fair value provisions of [29 U.S.C. § 203(m) (2018)]. ‘Fair value’ is not synonymous with ‘reasonable cost.’”).

172. § 531.3(c).

the employer's actual cost, then the employer can only deduct the actual cost. The employer cannot make a profit by deducting more than it costs to provide lodging.

In accordance with the domestic worker exemption from requirement (v), employers of live-in domestic workers can deduct up to a specific amount for meals and lodging, regardless of the actual cost or fair value.¹⁷³ Without regard to cost or value, the employer can deduct 1.5 times the hourly minimum wage for a day of meals provided, and 7.5 times the hourly minimum wage for a week of lodging provided.¹⁷⁴ Again, the employer has the option to take a larger deduction where the deduction meets all requirements (i) through (v) and represents the lesser of actual cost or fair value.¹⁷⁵

IV.

RATIONALES FOR REFORMING MEAL AND LODGING DEDUCTIONS

FLSA allowed meal and lodging deductions long before it covered domestic workers.¹⁷⁶ But the particular context of live-in domestic work raises questions as to whether deductions are sound policy. I develop four rationales for reforming the deductions rules, grounded in the realities of this sector. First, deductions generate poverty wages. Given that the federal minimum wage is already too low to live on, the law should not sanction a subminimum wage. Second, deductions uphold a problematic theory of fairness—mere subsistence in exchange for household work—that has roots in coverture.¹⁷⁷ Third, deductions make live-in domestic workers more vulnerable to exploitation because they must depend on their employer for what they need to survive. Finally, although deductions are legal, they serve to mask illegal employer conduct: withholding of wages that domestic workers are legally due, also known as “wage theft.”

A. Generating Poverty Wages

Even with the minimum wage . . . it's not enough for you to live, the cost of living can be higher. Minus the food and lodging, it won't be enough. . . . [It's] only thinking of one person. How about if you have family to feed? So that's a question there. Your family's back home in your house. Will it be enough?

R. Magusara, live-in domestic worker, California¹⁷⁸

173. 29 C.F.R. § 552.100(c)–(d) (2020).

174. *Id.*

175. *Id.*

176. *See supra* Sections III.A.1, 3.

177. Coverture is a legal doctrine, generally considered “a relic of the past,” that “delineat[ed] . . . appropriate roles for husband and wife,” prescribed “the wife’s specific duty to perform services” for her husband, and “prohibit[ed] . . . married women from owning or controlling property.” Alberta Antognini, *Nonmarital Coverture*, 99 B.U. L. REV. 2139, 2150 (2019); *see infra* Section IV.B.

178. Telephone Interview with R. Magusara, live-in domestic worker (Apr. 14, 2021).

Deductions create unacceptably low cash wages. The typical live-in domestic worker earns less than minimum wage—a benchmark already too low to live on.¹⁷⁹ Workers in this sector are three times more likely to live in poverty as other workers.¹⁸⁰ Moreover, the deductions rules mean that cash wages are bound to decrease over time: Congress raises the minimum wage infrequently,¹⁸¹ and in the intervals between, the costs of meals and lodging will increase with inflation, cutting deeper into cash wages. While proponents justify low cash wages on the grounds that the worker’s necessities are provided, their argument does not account for the comfort and independence that a worker forgoes when her employer provides meals and lodging.

FLSA sets the minimum wage in dollars and cents, without a mechanism to increase over time.¹⁸² Every wage increase requires fresh congressional action. While Congress works on other priorities, the price of consumer goods generally increases with inflation and the real value of the minimum wage declines.¹⁸³ Because raises are both infrequent and small, the real value of the federal minimum wage peaked in 1968, at \$10.59 in today’s dollars.¹⁸⁴ As William Quigley describes the dilemma, “The minimum wage has long fought a losing battle with inflation: Congress sets the wage and it continually erodes until Congress resets

179. See *supra* notes 8, 119 and accompanying text.

180. WOLFE, KANDRA, ENGDahl, & SHIERHOLZ, *supra* note 32, at 1.

181. See U.S. DEP’T OF LAB., HISTORY OF FEDERAL MINIMUM WAGE RATES UNDER THE FAIR LABOR STANDARDS ACT, 1938–2009, <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/chart.pdf> [<https://perma.cc/64TG-VZJ3>] (last visited Jan. 20, 2022) (indicating that, over the past 30 years, Congress has increased the minimum wage five times, with no increase in the past 12 years).

182. 29 U.S.C. § 206(a)(1) (2018).

183. DAVID COOPER, ELISE GOULD, & BEN ZIPPERER, ECON. POL’Y INST., LOW-WAGE WORKERS ARE SUFFERING FROM A DECLINE IN THE REAL VALUE OF THE FEDERAL MINIMUM WAGE (2019), <https://files.epi.org/pdf/172974.pdf> [<https://perma.cc/65D9-H2DN>]; David Cooper, *Congress Has Never Let the Federal Minimum Wage Erode for This Long*, ECON. POL’Y INST., (June 17, 2019), <https://www.epi.org/publication/congress-has-never-let-the-federal-minimum-wage-erode-for-this-long/> [<https://perma.cc/G5RT-GMZN>].

Representative Bella Abzug invoked inflation in the 1970s debates on FLSA coverage for domestic workers:

I am especially happy that domestic workers are included in this bill. It is dismaying to realize, amidst all the pressure for raising wages to keep up with inflation, that a group of 16 million Americans, including 12 million domestic workers, is still struggling to live on a minimum wage that in most States is still at the Federal level of \$1.60 an hour. For a 40-hour week this comes to \$3,328 a year—well under the official definition of poverty level, \$4,000 for a family of four. Yet inflation hits this worker just as it hits all of us—in the rent bill, at the grocery store, in the department store.

1973 H. Comm. Hearings, *supra* note 94, at 86 (statement of Rep. Bella Abzug).

184. DAVID COOPER, ZANE MOKHIBER, & BEN ZIPPERER, ECON. POL’Y INST., RAISING THE FEDERAL MINIMUM WAGE TO \$15 BY 2025 WOULD LIFT THE PAY OF 32 MILLION WORKERS 3 (2021), <https://files.epi.org/pdf/221010.pdf> [<https://perma.cc/JVZ8-KDLC>].

the wage.”¹⁸⁵ To win the battle, many propose indexing the minimum wage to inflation.¹⁸⁶

Deductions supersize the inflation problem. Employers can deduct the actual cost of meals and lodging provided, which will inflate over time while the minimum wage holds steady. In the years between congressional action, we can expect meal and lodging deductions to claim more and more of the minimum wage and leave leaner cash wages. Like minimum wage workers, the real value or purchasing power of live-in domestic workers’ wages will decline. But for workers subject to deductions, the *actual* value of their cash wages will also decline. In this way, FLSA’s deductions rules bake in a gradual wage decrease for workers with employer-provided meals and lodging.

Proponents of deductions argue that, even if cash wages are very low, the employer has contributed to FLSA’s stated goal of “protect[ing] this nation ‘from the evils and dangers resulting from wages too low to buy the bare necessities of life.’”¹⁸⁷ A worker must pay for meals and lodging one way or another. If she happens to receive those from her employer, as opposed to a grocery store and a landlord, the employer deserves reimbursement. As the Second Circuit explained:

Congress explicitly authorized a wage paid by an employer to an employee to include the reasonable cost of lodging, board, and other facilities which confer similar benefits on employees, and which are customarily furnished by the employer to his employees. Thus, Congress recognized that housing facilities, like meals, are essential for human existence and are ordinarily paid for from an employee’s earnings. An employee has to reside somewhere, and therefore rental payments for the employee are usual and customary items of his or her living expenses. If an employer absorbs this expense for an employee, it is only equitable and reasonable that the employee ‘reimburse’ the employer from wages earned.¹⁸⁸

This justification has a foothold in part (iv) of the deductions analysis, whether the facility is provided primarily for the benefit of the worker.¹⁸⁹ Because a worker

185. William Quigley, “*A Fair Day’s Pay for a Fair Day’s Work*”: *Time to Raise and Index the Minimum Wage*, 27 ST. MARY’S L.J. 513, 549 (1996).

186. *E.g., id.*; see also H. COMM. ON EDUC. & LAB., *supra* note 21 (explaining that Raise the Wage Act of 2021 would index future increases in the federal minimum wage to median wage growth).

187. *United States v. Rosenwasser*, 323 U.S. 360, 361 (1945) (quoting S. REP. NO. 75-884, at 4 (1937)).

188. *Soler v. G. & U., Inc.*, 833 F.2d 1104, 1108 (2d Cir. 1987); see also *Arriaga v. Fla. Pac. Farms*, 305 F.3d 1228, 1242–44 (11th Cir. 2002) (explaining that DOL regulations on deductions draw “a consistent line . . . between those costs arising from the employment itself and those that would arise in the course of ordinary life”).

189. See *supra* Section III.B.4.

would have to pay for meals and lodging elsewhere, it is perhaps for the worker's benefit that her employer provides them instead.¹⁹⁰

Employers marshal this justification in the policy arena as well, arguing that “free room and board” counterbalance the very low wages of live-in domestic work.¹⁹¹ In recent years, some employers of au pairs—live-in domestic workers who provide childcare on the J-1 visa—have opposed efforts to include au pairs in state minimum wage laws.¹⁹² In the press and in online community forums, employers have argued that room and board, among other benefits, make minimum wage unnecessary for au pairs.¹⁹³ One employer in Washington, D.C., wrote,

Requiring a living wage makes sense for domestic workers. But the whole point of a living wage is that it is enough to live on: to pay your rent/mortgage, buy food, pay for transportation. Au pairs do not have to pay for those things, and so it does not make sense

190. *Arriaga*, 305 F.3d at 1243 (explaining that “universally ordinary living expenses that one would incur in the course of life outside of the workplace” are for the worker's benefit and can be deducted).

191. HONDAGNEU-SOTELO, *supra* note 53, at 214 (“Employers, employees, and observers alike often justify and defend the subminimum wages paid to live-in domestic workers by pointing out that live-in jobs include ‘free room and board.’”); ROMERO, *supra* note 58, at 149 (“Frequently, employers considered the meal as part of the domestic's pay.”); cf. Sam C. Ehrlich, “*But They're Already Paid*”: *Payments In-Kind, College Athletes, and the FLSA*, 123 W. VA. L. REV. 1 (2020) (examining argument that, if college athletes are employees, they are “already paid” according to FLSA's deductions rules).

192. Note, however, that under the federal FLSA, meal and lodging deductions from au pair wages are prohibited because employers are required to provide them. *Beltran v. InterExchange, Inc.*, 176 F. Supp. 3d 1066, 1082–83 (D. Colo. 2016); see *supra* Section III.B.2.

193. See Anonymous, Comment to *Proposed DC Legislation Re: Domestic Workers*, DC URBAN MOMS & DADS (Jan. 28, 2020, 2:36 PM), <https://www.dcurbanmom.com/nanny-forum/posts/list/15/359474.page#3329136> [<https://perma.cc/WEF2-SXFR>] (“[O]n paper, I realize we sound terrible for not wanting to pay them minimum wage. But SO MUCH MORE GOES INTO IT THAN THE \$200 A WEEK STIPEND.”); Anonymous, Comment to *Proposed DC Legislation Re: Domestic Workers*, DC URBAN MOMS & DADS (Jan. 28, 2020, 9:43 AM), <https://www.dcurbanmom.com/nanny-forum/posts/list/15/359474.page#3329082> [<https://perma.cc/2Y73-F3B5>] (“I would tell [legislators] that au pairs DO NOT PAY FOR ANYTHING. The host families provide full room and board, transportation, education, cell service, health insurance, etc. . . . The weekly stipend is supposed to be spending money because their expenses are all covered.”). Anna Bahney, *Why Child Care Costs Have Skyrocketed by 150% for Some Massachusetts Families*, CNN BUS. (Feb. 4, 2020, 10:51 AM), <https://www.cnn.com/2020/02/04/success/au-pair-pay/index.html> [<https://perma.cc/Q58N-CSB3>] (“Though the ruling [that au pairs are covered by the Massachusetts Domestic Worker Bill of Rights] was designed to protect [au pairs], many say that it doesn't fairly account for the value of free food, housing and additional financial support provided by the host family”); Gaby Del Valle, *Is Being an Au Pair a Dream Job—or a Nightmare?*, NYLON (Mar. 13, 2019, 9:00 AM), <https://www.nylon.com/articles/au-pairs> [<https://perma.cc/MD5Q-2THP>] (“One commenter on the website Au Pair Mom said the [subminimum wage] stipend is fair because ‘it does not take into account all the other things [host families] provide the [au pair]. Considering the [au pair] is living independently as a renter of a single room in a shared apartment. . . . Room cost is just one variable that chips away at the gross minimum wage earnings.’”).

to lump them in with other domestic workers who truly have to bear those types of expenses.¹⁹⁴

On this account, when an employer provides the necessities of life—meals and lodging—the subminimum cash wage is still a living wage.

This justification has logical heft, not to mention vocal supporters. What it misses, though, is the intrinsic difference between an employer providing meals and lodging and a worker choosing those for herself. What to eat, how to relax, and when to sleep are extremely personal choices, usually shared only with intimate friends and family.¹⁹⁵ Food, in particular, is a core expression of identity and belonging, with special significance in this context where many workers are immigrants.¹⁹⁶ When an employer provides room and board—however high-quality—the worker loses a sense of ownership, privacy, and comfort. Live-in domestic workers describe not feeling truly at home or at ease in their employer’s home.¹⁹⁷ They become isolated from family and friends, unable to invite them over in the same way they would to their own homes.

[My employer] would have frequent dates throughout the week and the house wasn’t well-insulated, so I could hear every step and every conversation. As I go to bed very early, to have people over in the place where you’re supposed to be able to rest and feel safe was very intrusive. And there was really nothing I could do about that because it wasn’t my home. That’s something a lot of employers who demand live-in service don’t take into account, that no matter what they tell themselves about how welcoming they’re going to be, it’s not the employee’s home.

Anonymous live-in domestic worker, California¹⁹⁸

I have my own home to go back to when I take my days off. It’s very comfortable for me, I don’t have to worry about anything. . . . [Otherwise], if it’s my day off, I still don’t have freedom to do anything I want to do in my own room. It feels like I didn’t get a day off because I’m still in that place. . . . [I]f I have

194. Anonymous, Comment to *Proposed DC Legislation Re: Domestic Workers*, DC URBAN MOMS & DADS (Jan. 22, 2020, 2:58 PM), <https://www.dcurbanmom.com/nanny-forum/posts/list/359474.page#3328546> [<https://perma.cc/7H8A-A85X>].

195. See *Fair Hous. Council v. Roommate.com*, 666 F.3d 1216, 1218 (9th Cir. 2012) (“There’s no place like home. In the privacy of your own home, you can take off your coat, kick off your shoes, let your guard down and be completely yourself. While we usually share our homes only with friends and family, sometimes we need to take in a stranger to help pay the rent.”).

196. See HONDAGNEU-SOTELO, *supra* note 53, at 33–35 (describing the social meaning of food for live-in domestic workers).

197. See *id.* at 31; ROMERO, *supra* note 58, at 148–49 (discussing how employers maintain “superior-inferior relationships” between themselves and domestic workers through eating arrangements and the allocation of food).

198. Telephone Interview with Anonymous Former Live-in Domestic Worker (Apr. 9, 2021).

my own place, I can accept visitors and mingle with everyone else. It's freedom.

R. Magusara, live-in domestic worker, California¹⁹⁹

Although a worker would have to pay for meals and lodging one way or another, receiving those from an employer rather than another source is not a perfect substitution. These necessities do not neutralize the very low wages that come with them.

B. *Mimicking the Marital Contract*

As soon as the mom or someone else has to take care of the children, they're going to value the work and they will see why people want someone to do the job. . . . They start seeing the value of having someone there specifically to care for the children and be attentive to the child's needs.

Thaty Oliveira, live-in domestic worker, Massachusetts²⁰⁰

He really had no idea of what it took to maintain his own home. Over the last ten years I think there's always been someone there, keeping those things running.

Anonymous live-in domestic worker, California²⁰¹

Meal and lodging deductions express a theory of fairness that warrants critique and reconsideration. Tracing back through the common law, the system of marriage as coverture expressed the idea that subsistence is a fair exchange for household work. Meal and lodging deductions are a logical extension of this theory. They transfer a domestic worker into the marriage bargain of the imagined

199. Telephone Interview with R. Magusara, *supra* note 178.

This quote raises the legal issue of who qualifies as a live-in domestic worker. FLSA distinguishes between live-in domestic workers, domestic workers on duty for 24 hours or more, and domestic workers on duty for less than 24 hours. A live-in domestic worker "reside[s] in the household" where she is employed. 29 U.S.C. § 213(b)(21) (2018); 29 C.F.R. § 552.102(a) (2020). This means that the worker either (i) resides in the employer's household on a permanent basis, meaning that she stays there every night and has no other home, or (ii) stays at the household for extended periods of time, meaning that she works and sleeps there for five days a week (120 hours or more) or five consecutive days or nights. FIELD OPERATIONS HANDBOOK, *supra* note 130, § 31b12(d). A live-out worker may be on duty for 24 hours or more, 29 C.F.R. § 785.22 (2020), or less than 24 hours, 29 C.F.R. § 785.21 (2020). As a matter of law, whether a worker is a live-in domestic worker or is on duty for 24 hours or more depends on the relevant facts, including whether the worker has another permanent home and how long she typically stays at the employer's home. See FIELD OPERATIONS HANDBOOK, *supra* note 130, § 31b12(d) (noting that whether a worker "has no other home" is a factor in determining whether the worker resides in the employer's household); *id.* § 31b20(b) (noting that number of consecutive days or nights that a worker spends at the employer's premises is a factor in determining whether the worker resides in the employer's household).

For these reasons, the worker quoted here might be categorized as a live-in domestic worker or a worker on duty for 24 hours or more. State law definitions would further complicate the issue. Given this nuance, I include the quote as relevant to the experience of live-in domestic work.

200. Telephone Interview with Thaty Oliveira, former live-in domestic worker (Apr. 9, 2021).

201. Telephone Interview with Anonymous, *supra* note 198.

household unit that employs her.²⁰² As a husband provides for his wife, so a household can pay a domestic worker in meals and lodging.

Inherited from English common law, coverture is part of the American legal tradition.²⁰³ As Blackstone described the doctrine, “the husband and wife are one person in the law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs every thing.”²⁰⁴ Throughout the nineteenth century, marriage was a bargain of “obedience for protection.”²⁰⁵ A husband was expected to provide his wife with subsistence, and a wife to provide her husband with household labor.²⁰⁶ In this way, the law facilitated a wife’s economic dependence on her husband.²⁰⁷ Coverture, then, expressed the idea that subsistence is a fair exchange for household labor. A husband compensated his wife for her work by putting a roof over her head.

Coverture casts a long shadow.²⁰⁸ Even as economic and social conditions change, “obedience for protection” has remained a leading ideology of

202. Cf. Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL’Y & L. 13, 14 (2000) (“This reliance on what I have termed the ‘assumed family’ distorts analysis and policy. The assumed family is a specific ideological construct with a particular population and a gendered form that allows us to privatize individual dependency and pretend that it is not a public problem.”).

203. GLENN, FORCED TO CARE, *supra* note 37, at 12.

204. 1 WILLIAM BLACKSTONE, COMMENTARIES *442.

205. BRIDGET ANDERSON, DOING THE DIRTY WORK? THE GLOBAL POLITICS OF DOMESTIC LABOUR 164 (2000); see also Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 YALE L.J. 1641, 1655 (2003) [hereinafter Dubler, *In the Shadow of Marriage*] (“Marriage, in the eyes of the law, entailed a particular bargain (albeit one the terms of which a woman was powerless to alter): In exchange for giving up certain rights, the law protected a married woman by requiring her husband to represent her legally and politically and to support her economically. From the point of view of nineteenth-century lawmakers, married women—that is, the white, middle-class married women whom lawmakers considered—got the better of this bargain, gaining both the social status of marriage and the legal protections of coverture.”).

206. See Antognini, *supra* note 177, at 2152 (“The respective duties placed on husbands and wives created property rights in the labor of the wife that only the husband could claim. Marriage required the wife to give her husband . . . rights to the work she performed . . . [, primarily] in the realm of housework.”); Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1, 30–34 (2012). See generally Reva B. Siegel, *Home As Work: The First Woman’s Rights Claims Concerning Wives’ Household Labor, 1850–1880*, 103 YALE L.J. 1073 (1994) (tracing the nineteenth-century feminist movement to give wives joint marital property rights by virtue of their household labor).

207. See Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189, 193 (2007) (discussing marriage “as a means to privatize the dependency of both women and children”); Ariela R. Dubler, *Governing Through Contract: Common Law Marriage in the Nineteenth Century*, 107 YALE L.J. 1885, 1908 (1998) (“[T]he marriage-as-contract formulation . . . effectively privatized the dependencies of women and children within the private sphere of the family.”).

208. See Antognini, *supra* note 177, at 2142–43 (“The doctrine of coverture, where a man and a woman become one upon marriage, is understood as a matter of positive law to be a relic of the past. . . . Numerous scholars have, however, complicated the narrative of coverture’s collapse.”).

marriage.²⁰⁹ And, as scholars of domestic work have argued, that ideology carries over to paid domestic work.²¹⁰ On this account, when a wife outsources her unpaid tasks to a paid worker, they remain her responsibility in a cultural and social sense.²¹¹ The wife manages the administration of an orderly home and nurtured family, while delegating the dirty work.²¹² This distribution of labor appears in the familiar reference to domestic workers as “the help”—the work is meant to assist the wife, but never usurp her role in the home.²¹³ This ideology, then, assigns domestic workers a partial role in the gendered household exchange.

209. GLENN, FORCED TO CARE, *supra* note 37, at 92–106; *see also* Dubler, *In the Shadow of Marriage*, *supra* note 205, at 1655 (“Long after the passage of married women’s property acts . . . and the passage of married women’s earnings statutes later in the nineteenth century, married women’s legal and political identities continued to be defined and limited by their marital status.”); Vicki Schultz, *Life’s Work*, 100 COLUM. L. REV. 1881, 1917–18 (2000) (“[F]amily-wage ideology is such a deeply-ingrained part of our heritage that it remains difficult to recast women’s (and men’s) roles as workers and citizens in such transformative terms. . . . [E]ven most late nineteenth and early twentieth-century women’s rights activists . . . accept[ed] a gendered system of labor . . . , rather than a system that enabled both women—and men—to take care of their families while at the same time engaging in paid work.”).

210. *See* Sarkar, *supra* note 48, at 21–23 (explaining link between coverture and present-day household sovereignty, which is invoked to prevent regulation of domestic work in private homes). *See generally* GLENN, FORCED TO CARE, *supra* note 37, at 5 (“[T]he social organization of care has been rooted in diverse forms of coercion that have induced women to assume responsibility for caring for family members and that have tracked poor, racial minority, and immigrant women into positions entailing caring for others. The forms of coercion have varied in degree, directness, and explicitness but nonetheless have served to constrain and direct women’s choices; the net consequence of restricted choice has been to keep caring labor ‘cheap,’ that is, free (in the case of family care labor) or low waged (in the case of paid care labor).”).

211. *See* Smith, *supra* note 40, at 919 (“Even as women participate in the paid labor force, they remain culturally and socially responsible for childcare and household maintenance. In the absence of both supportive legislative initiatives and greater male involvement in childcare some women find domestic service a viable solution to help balance the demands of their work lives with ‘their’ domestic responsibilities.”); CLARK-LEWIS, *supra* note 40, at 107 (“[E]mployers were . . . encouraged . . . to use the management principles of commerce, industry, and shops in the home. The mistress took seriously her responsibility to manage money wisely; stories abounded of women who triumphantly explained how they fired a fifteen-dollars-a-week maid and got another ‘who gave perfect service for \$6.25 a week.’ The mistress maximized profits for the household by minimizing labor costs and exploiting their household servants.”) (footnotes omitted); *see also* ANDERSON, *supra* note 205, at 162 (“In social/sexual contract theory terms, given that the private sphere is ultimately governed by the sexual contract, it is women/wives who have responsibility for domestic labour. This explains why, when a household employs the domestic worker, she is managed by the woman of the household.”).

212. *See* Roberts, *supra* note 42, at 55 (“[W]omen may delegate housework’s menial tasks to others while retaining their more valuable spiritual duties. . . . [T]his fragmentation fosters a hierarchy among women because the menial aspects of housework are typically delegated by more privileged women to less privileged ones.”). *See generally* CAMERON LYNNE MACDONALD, SHADOW MOTHERS: NANNIES, AU PAIRS, AND THE MICROPOLITICS OF MOTHERING (2011) (exploring distribution of labor and quality of relationships between female employers and nannies).

213. *See* Biklen, *supra* note 95, at 120–22; Smith, *supra* note 40, at 876–82. *See generally* Enobong H. Branch & Melissa E. Wooten, *Suited for Service: Racialized Rationalizations for the Ideal Domestic Servant from the Nineteenth to the Early Twentieth Century*, 36 SOC. SCI. HIST. 2 (2012) (explaining historical transition from “the help” to “domestic servants” and related shifts in modes of racial hierarchy).

Deductions complete the bargain. Paying a domestic worker with meals and lodging swaps her into the “obedience for protection” contract of marriage. Deductions implement the policy that mere subsistence is a fair exchange for household work, whether it is performed by a family member or a live-in domestic worker.²¹⁴

This theory of fairness infuses the legislative history of minimum wage for domestic work. In the early 1970s, when Congress considered whether to extend minimum wage to domestic workers, a leading concern was the consequences for America’s “housewives.”²¹⁵ Legislators assumed that domestic workers were employed and managed by the wife of the household.²¹⁶ Testifying in opposition to extending minimum wage, the Secretary of Labor implied that wives alone would bear the burden of paying domestic workers:

[D]omestic service is rather unique in terms of the characteristics of the demand and the housewife who hires a maid typically has just so much budgeted for that purpose with no more available. She also has no opportunity to pass on any higher wage cost. If it comes down to it, the housewife can substitute her labor and that of other family members for the domestic. Few employers in other fields can do so. . . . For these reasons, Mr. Chairman, I must oppose extension of FLSA coverage to domestics.²¹⁷

214. Indeed, considering domestic workers to be “part of the family” is a key rhetorical strategy to manage the tension between unpaid and paid household labor. ANDERSON, *supra* note 205, at 164 (“Obedience for protection is a ‘family’ relation and underlies the worker becoming ‘part of the family’”); BURNHAM & THEODORE, *supra* note 23, at viii; Chuang, *The U.S. Au Pair Program*, *supra* note 48, at 311 (“[T]he recurring tropes that au pairs are ‘part of the family’ and that host families are giving au pairs the privilege of experiencing American life help manage the discomfort of bringing the employment relationship into the home. But they do so in a way that resists the role and relevance of labor law.”); ROMERO, *supra* note 58, at 153 (“Redefining work obligations as family or friendship obligations assures employers access to both the emotional and the physical labor of their employees. . . . Employers’ refusal to relate to domestics’ concerns as workers’ rights distorts the real conditions of their interaction.”). See generally SARAH JAFFE, *WORK WON’T LOVE YOU BACK: HOW DEVOTION TO OUR JOBS KEEPS US EXPLOITED, EXHAUSTED, AND ALONE* 55–82 (2021) (discussing relationships between domestic workers and families who employ them).

215. Nadasen, *supra* note 94, at 81–83; Biklen, *supra* note 95, at 120–21.

216. See, e.g., 1973 H. Comm. Hearings, *supra* note 94, at 86–87 (statement of Rep. Bella Abzug) (“There is an unfortunate exception in the present bill: domestic workers who ‘live in’ will not be entitled to overtime compensation. Presumably the rationale is that they’re ‘part of the family’—but even if ‘the lady of the house’ works a 20-hour day for free, she should not expect her helper to do so.”).

217. *Id.* at 263–64 (statement of Hon. Peter J. Brennan, Secretary, U.S. Department of Labor); see also *id.* at 264 (“It may be unrealistic to expect accurate recordkeeping. Homemakers are not engaged in business in the traditional sense with experience in maintaining business records.”); 1973 S. Comm. Hearings, *supra* note 100, at 330–31 (1973) (statement of Hon. Peter J. Brennan, Secretary, U.S. Department of Labor) (“[Y]ou open the door to a lot of trouble. Your wife will want to get paid. I think we are going to be in trouble here because . . . [in] many cases the wife cannot afford it; she will have to do it herself or someone in the family will have to. That means you and I or we have to pay her. So we have to be very careful unless we are ready to do dishes. . . . [T]he woman in the house couldn’t afford it”).

This assumption, echoed throughout the debates, makes plain the limited imagination in Congress. Lawmakers failed to consider other possible arrangements of household labor—mainly, that men might do some of it. For husbands, the potential consequences of being required to pay domestic workers a minimum wage were indirect: wives would inevitably take up the work and become frustrated.²¹⁸ The legislative debate not only reproduced the gendered status quo of household politics, but also the racial hierarchy of labor outside the household.²¹⁹ As Premilla Nadasen explains,

By relegating the rights of domestic workers to “women’s sphere,” male politicians employed a rhetorical strategy that absolved them of any responsibility for the legal rights of domestic workers. They used the cloak of gender to dismiss the class and race politics that were central to the exclusion of domestic workers from labor legislation. They placed responsibility for low wages and poor treatment squarely on the shoulders of middle-class female employers—their “wives”²²⁰

Although legislators eventually reached consensus on minimum wage for domestic work, they made clear that the new law ought not shift the background conditions of marriage and household politics.

Meal and lodging deductions borrow the logic of these background conditions. Deductions structure the employment relationship as an exchange of subsistence for household work. FLSA allows deductions to dip below minimum wage, so meals and lodging can be the sole payment for domestic work. The effect of deductions is that a live-in domestic worker earns her keep by her labor, just as a wife does under coverture.²²¹ The policy formalizes both women’s dependence on men and men’s entitlement to women’s work.²²² As deductions mimic the economics of marriage, they reinforce a patriarchal arrangement in upper- and middle-class homes, and, at the same time, rely on low-wage work by women of

218. See 1973 S. Comm. Hearings, *supra* note 100, at 369 (Sen. Jacob K. Javits, Member, S. Comm. on Lab. & Pub. Welfare) (“[I]t is impractical, undesirable, to badger the housewife with a minimum wage.”); 1973 H. Comm. Hearings, *supra* note 94, at 228 (Robert T. Thompson, Representative, U.S. Chamber of Commerce) (“If you leave that domestic coverage in it I think you are going to have a lot of irate housewives come looking for you.”).

219. See Roberts, *supra* note 42, at 52–55 (explaining that the expectation of unpaid women’s work in the home assumes a white family). See generally JACQUELINE JONES, LABOR OF LOVE, LABOR OF SORROW: BLACK WOMEN, WORK, AND THE FAMILY FROM SLAVERY TO THE PRESENT (1985) (tracing history of Black women’s labor and how racial and gender discrimination have endured, in evolving forms, since slavery).

220. Nadasen, *supra* note 94, at 81.

221. See Silbaugh, *supra* note 62, at 73 (“The labor of paid domestic workers replaces the unpaid housework performed in other homes by a member of the household, and the transition to paid labor in those few homes that employ domestic workers does not transform our understanding of the work itself.”).

222. See *id.*; Schultz, *supra* note 209, at 1918–19.

color.²²³ Care is relegated to a private need—to be negotiated among husband, wife, and domestic worker—rather than a public concern.²²⁴

C. Widening the Power Gulf

You can feel stress every day and be afraid of getting fired, without a place to go and live while you find another family to work with.

Anonymous live-in domestic worker, Virginia²²⁵

I was treated very badly as a live-in worker. I worked as a house maid, cook, cleaner, massager, did childcare, gardening, and anything they told me to do. I was paid \$120 total for my entire work of 3–4 years. That was hell for me living as a slave. . . . Whenever they had a party or gathering at their home, the guests used to give me some money as tips. I collected and saved that money, about \$300 total. Then I had the opportunity to run away with the help of a Nepali sister, who I had met at the grocery store three months before. Then I started a whole new journey with help from my friends and [a domestic worker organization].

Anonymous live-in domestic worker, New York²²⁶

It makes them afraid and super vulnerable. They feel like, how would I be able to afford another place to run away to, I barely make money. . . . It's almost like we're setting up the environment for abuse to happen. We're creating these conditions that are going to keep them vulnerable, not having the resources to live and meet their basic needs, their independence.

Thaty Oliveira, live-in domestic worker, Massachusetts²²⁷

223. See ROLLINS, *supra* note 37, at 104 (“The middle-class women I interviewed were not demanding that their husbands play a greater role in housekeeping; they accepted the fact that responsibility for domestic maintenance was theirs, and they solved the problem of their dual responsibilities by hiring other women to assist.”); see also Taunya Lovell Banks, *Toward a Global Critical Feminist Vision: Domestic Work and the Nanny Tax Debate*, 3 J. GENDER RACE & JUST. 1, 10 (1999) (“[Middle class women who work outside the home] hire other women, and thus, childcare remains solidly within the realm of women’s work.”).

224. Cf. Fineman, *supra* note 202, at 18–19 (“[C]aretaking work creates a collective or societal debt. Each and every member of society is obligated by this debt. . . . The mandate that the state (collective society) respond to dependency, therefore, is not a matter of altruism or empathy (which are individual responses often resulting in charity), but one that is primary and essential because such a response is fundamentally society-preserving.”); MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 174–77 (1983) (arguing that higher pay for domestic work expresses that it is a collective burden and public good).

225. E-mail from Anonymous Former Live-in Domestic Worker, *supra* note 1.

226. E-mail from Anonymous Former Live-in Domestic Worker to author (Apr. 8, 2021, 10:39 PDT) (on file with author).

227. Telephone Interview with Thaty Oliveira, *supra* note 200.

Like other New Deal laws, FLSA embeds an understanding of the power imbalance between workers and employers.²²⁸ Recognizing that workers have limited leverage to secure a fair wage, the minimum wage is meant to set a floor for bargaining.²²⁹ The power imbalance that animated FLSA is sharpened in the context of live-in domestic work. It is intimate work, excluded from major legal protections and imbued with the politics of race, gender, immigration, and class.²³⁰ In this context, meal and lodging deductions widen the existing power gulf. They make workers rely on their employers for meals and lodging, while making it almost impossible to save cash for an emergency.

Live-in domestic workers are already more vulnerable than other workers to exploitation and trafficking.²³¹ They are isolated in private homes and placed in a

228. See *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 706–07 (1945) (“[FLSA] was a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency and as a result the free movement of goods in interstate commerce.”).

229. See INT’L LAB. OFF., *DOMESTIC WORKERS ACROSS THE WORLD: GLOBAL AND REGIONAL STATISTICS AND THE EXTENT OF LEGAL PROTECTION* 73 (2013), https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_173363.pdf [<https://perma.cc/ZK7K-TSVP>] (“Minimum wages are a classic tool for overcoming asymmetries in bargaining power or the lack of effective collective bargaining. . . . [O]ne of their main objectives is to protect ‘disadvantaged groups of wage earners’ against ‘unduly low wages.’” (quoting International Labour Organization, Convention (No. 131) Concerning Minimum Wage Fixing, with Special Reference to Developing Countries, June 22, 1970, 825 U.N.T.S. 77)).

230. See *supra* Sections II, III.A.

231. See generally WILLIAMS, *supra* note 60 (reporting on structural factors that contribute to trafficking of domestic workers and describing survivor-led movement-building approach to ending trafficking); Janie A. Chuang, *Achieving Accountability for Migrant Domestic Worker Abuse*, 88 N.C. L. REV. 1627, 1641–46 (2010) (examining trafficking of domestic workers by foreign diplomats and power imbalances that render workers vulnerable to exploitation); Hiller & Saxtein, *supra* note 119, at 247–49 (providing examples of abuse and trafficking of live-in domestic workers); Elizabeth Keyes, *CASA of Maryland and the Battle Regarding Human Trafficking and Domestic Workers’ Rights*, 7 U. MD. L.J. RACE RELIG. GENDER & CLASS 14, 14–16 (2007) (providing case study of live-in domestic worker trafficked by diplomat employer); HUM. RTS. WATCH, *supra* note 119 (examining exploitation and trafficking among live-in domestic workers on special visas).

position of dependence on employers for what they need to survive.²³² For the subset of live-in domestic workers who are on temporary visas, the stakes are even higher. A worker on the J-1, A-3, G-5, or B-1 visa also depends on her employer for her immigration status.²³³ Her visa is tied to the particular employer who sponsored it.²³⁴ These factors make it more difficult for a worker to improve her working conditions by either voice (negotiating with her employer) or exit (leaving for a better job).²³⁵ A worker who speaks up risks retaliation. Employers of live-ins have a range of sharp tools to retaliate, if so inclined. For workers on visas, this includes the ability to push a worker into undocumented status overnight.²³⁶ A

232. See Chuang, *The U.S. Au Pair Program*, *supra* note 48, at 336 (“For those who are exploited in private households, access to justice can be extremely difficult to achieve given the substantial control employers can exert over domestic workers. This is particularly so for live-in workers, who must rely on their employers for basic subsistence needs (e.g., food and housing), and whose mobility and exposure to the outside world is contingent on employer work demands.”); BURNHAM & THEODORE, *supra* note 23, at 34 (“Workers who have just one employer, especially live-ins, are highly susceptible to employer abuse and least able to quit their jobs. The low pay associated with domestic work, and the corresponding inability of workers to accumulate savings from their meager earnings, imposes severe constraints on labor-market mobility. These domestic workers fear extended spells of unemployment if they quit or lose their job, which is exceptionally threatening when the worker has no place else to live.”); Kristi L. Graunke, “*Just Like One of the Family*”: *Domestic Violence Paradigms and Combating On-the-Job Violence Against Household Workers in the United States*, 9 MICH. J. GENDER & L. 131, 159–60 (2002) (“[I]n many accounts of abuse suffered by domestic workers, a state of economic dependency is a factor exacerbating workers’ entrapment in an abusive situation. Many abused domestic workers are live-in workers who depend on their employer for room and board.”); ANDERSON, *supra* note 205, at 177 (discussing migrant domestic workers’ dependence on their employers and risk of exploitation).

233. See *supra* note 48.

234. See Hila Shamir, *A Labor Paradigm for Human Trafficking*, 60 UCLA L. REV. 76, 110–12 (2012) [hereinafter Shamir, *A Labor Paradigm*] (“The incentive to stay with the employer is further bolstered under guest worker regimes that bind the worker to one designated employer (a ‘binding arrangement’) and effectively ensure that leaving that employer entails losing the documented status.”); Cathleen Caron, *Temporary Visa Systems Foster Human Trafficking*, in BEYOND SURVIVAL: ORGANIZING TO END HUMAN TRAFFICKING OF DOMESTIC WORKERS, *supra* note 60, at 97 (“With most classes of [temporary visas], work is only authorized for one specific employer, which means that if an employee suffers abuse on the job the visa does not allow him or her to look for another job.”).

235. See generally RICHARD B. FREEMAN & JAMES L. MEDOFF, *WHAT DO UNIONS DO?* 7–8 (1984) (describing the voice-exit paradigm in the workplace).

236. See Chuang, *The U.S. Au Pair Program*, *supra* note 48, at 330–32. See generally Patricia Medige & Catherine Griebel Bowman, *U.S. Anti-Trafficking Policy and the J-1 Visa Program: The State Department’s Challenge from Within*, 7 INTERCULTURAL HUM. RTS. L. REV. 103, 135 (2012) (“With fewer regulatory protections and less oversight, however, [J-1 au pairs] are even more vulnerable to exploitation than similarly situated international workers on temporary employment visas such as the H-2A and H-2B. With so little capacity to provide oversight, the State Department is not likely to uncover exploitation when it does happen.”).

visa-dependent worker who leaves her job risks her ability to survive without room, board, and legal status in the U.S.²³⁷

Rehana Bibi's experience is one example. In 2013, Bibi came to the U.S. from Pakistan to work as a live-in domestic worker for a family in Virginia.²³⁸ She spent five years "working constantly," "effectively trapped" in the home.²³⁹

Bibi says during her time with the Yahya [family], she cooked, cleaned and cared for three children. She said she was on call to assist an elderly relative who rang a bell for help day and night. She said they told her she could shower only once a week because any more was a waste of hot water. And they forbade her from eating meat, saying she was too fat . . . Bibi maintains that she was confined because she spoke almost no English and was told she was in the country illegally. The visa she came to the country on was good for only one year. She says the family almost never let her out alone and warned her that if she went to the police, she would be arrested.²⁴⁰

Bibi contemplated suicide, but, after meeting an Urdu-speaking woman who encouraged her to escape, she "sneaked out in the early morning" in December 2018.²⁴¹ She later filed a civil trafficking suit in federal court.²⁴² Bibi says she was paid about \$25,000 for five years of work, and her complaint seeks back pay from her employers.²⁴³ The employers have argued that any amount they owe should be reduced to account for meal and lodging deductions.²⁴⁴ Bibi's story illustrates the isolation and dependence that can arise in live-in domestic work arrangements. When she decided to escape, Bibi risked not only her source of income but also her place to sleep and her immigration status.

Deductions inhibit live-in domestic workers from one of the main ways they might manage these risks: saving money. A legal subminimum wage makes it almost impossible to conserve any wages for the future. With deductions, live-in

237. See ROMERO, *supra* note 58, at 93 ("Domestics employed on a live-in basis were particularly vulnerable because they depended upon their employment for room and board. Consequently, finding a new employer and moving were more problematic and difficult."); cf. Graunke, *supra* note 231, at 181 ("Feminist efforts to create low-cost, off-site housing independent of employer control might prove enormously valuable to domestic workers as a preventative measure against workplace exploitation. . . . If an employment situation is becoming abusive, the domestic worker with non-employer-controlled housing can walk off the job without fearing immediate homelessness.").

238. See Rachel Weiner, *Pakistani Woman Says Northern Virginia Housekeeping Job Was Labor Trafficking*, WASH. POST (Feb. 21, 2021, 9:00 AM), https://www.washingtonpost.com/local/legal-issues/rehana-bibi-labor-trafficking/2021/02/20/834fa6ca-35a8-11eb-b59c-adb7153d10c2_story.html [https://perma.cc/5PK9-ZQTK].

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.* (noting that the employers' counsel says Bibi's "room and board should be considered part of the payment").

domestic workers in exploitative or abusive employment arrangements must make extremely difficult choices without any financial cushion. They risk their job, their place to live, and their status, with precious little money on hand to survive the transition.²⁴⁵ For this reason, the International Labour Office identifies “in-kind payments,” like meal and lodging deductions, as a cause for concern in this sector.²⁴⁶

Payment in kind continues to be customary in the domestic work sector in many parts of the world, particularly in the form of accommodation and food. While this can be in the interests of the worker and the worker’s family, these in-kind payments bear the potential for abusive practices Excessive deductions can also greatly reduce the already low amount of wages that is paid in money, and hence undermine domestic workers’ economic independence and their freedom to decide how to spend their earnings.²⁴⁷

In this way, deductions widen the power gulf between live-in domestic workers and their employers.²⁴⁸ The legal subminimum wage limits one of the few resources a worker might use to protect herself in an emergency.

D. Entrenching Wage Theft

We need really clear guidelines without leaving any room for loopholes, because people are going to try to go around. Everything needs to be spelled out.

Thaty Oliveira, live-in domestic worker, Massachusetts²⁴⁹

When I got into the industry, I was a bit clueless. You get information from people who don’t really know the law either, or you just go based on experience. I thought the weekly pay was good, but I wasn’t aware that we are hourly workers and entitled to overtime. I was so naive . . . until I learned better and I was like, oh, so I am literally working below the minimum wage. You’re not sure whether your employer is paying you that amount of money

245. See HUM. RTS. WATCH, *supra* note 119 (reviewing 43 live-in employment arrangements, explaining patterns in exploitation, and finding median hourly wage of “\$2.14, including deductions for room and board—only forty-two percent of the . . . federal hourly minimum wage of \$5.15”).

246. INT’L LAB. OFF., *supra* note 229, at 81–83.

247. *Id.* at 81.

248. See generally Shamir, *A Labor Paradigm*, *supra* note 234, at 82 (explaining how a labor response to trafficking “would focus on labor market inequalities and background rules that shape workers’ bargaining positions and facilitate their exploitation”).

249. Telephone Interview with Thyaty Oliveira, *supra* note 200.

because you're living in their house, and you figure, the fact that you live in their house, they should not pay you more money.

Cecilia, live-in domestic worker, New York²⁵⁰

“Wage theft” is an employer’s failure to pay a worker the full wages she is legally due.²⁵¹ Legal deductions are not a form of wage theft—those wages are legally withheld, not stolen. But legal deductions entrench wage theft in its true forms. By creating uncertainty about how much a worker is due, legal deductions mask illegal wage theft and deter workers from trying to recover stolen wages.

Wage theft is estimated at \$50 billion each year.²⁵² It is one of the biggest forms of theft in the U.S., exceeding the value of robbery, burglary, larceny, and vehicle theft combined.²⁵³ Minimum wage violations—just one form of wage theft—amount to an estimated \$15 billion each year.²⁵⁴ Because the minimum wage is so low to begin with, an employer who takes a little takes a lot: the average victim of a minimum wage violation loses a quarter of her rightful weekly pay.²⁵⁵ A minimum wage violation can take different forms. A violation can be overt, such as paying less than the applicable minimum wage for an hour of work, or it may require a bit more digging to uncover. Suppose a worker usually works an

250. Telephone Interview with Cecilia, former live-in domestic worker (Apr. 7, 2021).

251. See generally Nicole Hallett, *The Problem of Wage Theft*, 37 YALE L. & POL’Y REV. 93 (2018) (analyzing the present-day wage theft crisis and why current enforcement efforts cannot meaningfully address it); KIM BOBO, WAGE THEFT IN AMERICA: WHY MILLIONS OF WORKING AMERICANS ARE NOT GETTING PAID—AND WHAT WE CAN DO ABOUT IT (2009) (coining term “wage theft” and examining its prevalence in the U.S. labor market); see also Steven Greenhouse, *More Workers are Claiming ‘Wage Theft’*, N.Y. TIMES (Aug. 31, 2014), <https://www.nytimes.com/2014/09/01/business/more-workers-are-claiming-wage-theft.html> [<https://perma.cc/4D7F-FNNL>] (reporting surge in wage theft enforcement actions by government agencies and workers). Wage theft includes paying less than the applicable minimum wage, paying less than the overtime rate for hours above the overtime threshold, asking workers to work outside of their paid shifts, denying required meal or rest breaks, taking illegal deductions, keeping workers’ tips, failing to make up the difference between workers’ tips and minimum wage, misclassifying employees as independent contractors to avoid paying minimum wage, and simply not paying workers for their work. See Hallett, *supra*, at 101 (discussing the scope and impact of wage theft in the U.S.); COOPER & KROEGER, *supra* note 15, at 4, 7–8 (discussing different forms of wage theft); ANNETTE BERNHARDT, RUTH MILKMAN, NIK THEODORE, DOUGLAS HECKATHORN, MIRABAI AUER, JAMES DEFILIPPIS, ANA LUZ GONZÁLEZ, VICTOR NARRO, JASON PERELSHTEYN, DIANA POLSON, & MICHAEL SPILLER, UCLA INST. FOR RSCH. ON LAB. & EMP’T, BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA’S CITIES 19–28 (2009), <https://www.nelp.org/wp-content/uploads/2015/03/BrokenLawsReport2009.pdf> [<https://perma.cc/63J3-Y5ZW>] (same).

252. BRADY MEIXELL & ROSS EISENBREY, ECON. POL’Y INST., AN EPIDEMIC OF WAGE THEFT IS COSTING WORKERS HUNDREDS OF MILLIONS OF DOLLARS A YEAR 1–2 (2014), <https://files.epi.org/2014/wage-theft.pdf> [<https://perma.cc/KEV2-JN4B>].

253. *Id.* at 2.

254. COOPER & KROEGER, *supra* note 15, at 9.

255. *Id.* Other estimates are even higher: the average victim in California and New York loses about 49–71% and 37–48% of her weekly earnings, respectively. E. RSCH. GRP., THE SOCIAL AND ECONOMIC EFFECTS OF WAGE VIOLATIONS: ESTIMATES FOR CALIFORNIA AND NEW YORK FINAL REPORT at ES-2–3 (2014), <https://www.dol.gov/sites/dolgov/files/OASP/legacy/files/WageViolationsReportDecember2014.pdf> [<https://perma.cc/6E43-8TJS>].

eight-hour shift at federal minimum wage, \$7.25, totaling \$58. If her employer tells her to stay late and work for another hour without more pay, she is now earning \$58 for nine hours of work instead of eight. The unpaid work lowers her hourly wage to \$6.44. The employer is practicing wage theft by requiring work outside of a paid shift, creating a minimum wage violation.²⁵⁶

Civil enforcement for wage laws generally relies on individual workers filing complaints with government agencies.²⁵⁷ Other hurdles await after filing, but a complaint is what sets the process in motion.²⁵⁸ Yet the vast majority of workers who experience wage theft never file a complaint.²⁵⁹ As a result, most wage theft will never be punished, and an employer's intentional theft of wages might be an economically rational choice.²⁶⁰ Across the economy, wage theft is a free-flowing upstream redistribution of wealth from workers to employers.²⁶¹

256. See BERNHARDT, MILKMAN, THEODORE, HECKATHORN, AUER, DEFILIPPIS, GONZÁLEZ, NARRO, PERELSHTEYN, POLSON, & SPILLER, *supra* note 251, at 22.

257. 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, 59 (2006).

Wage theft may also be criminally prosecuted, raising a different set of questions about the moral purpose and harms of incarceration. See Benjamin Levin, *Wage Theft Criminalization*, 54 U.C. DAVIS L. REV. 1429 (2021). Here, I focus on civil enforcement that seeks to make workers whole by paying their wages due and to punish or deter employers with monetary penalties. See *Tenn. Coal, Iron & R.R. Co. v. Muscoda*, 321 U.S. 590, 597 (“[T]he Fair Labor Standards Act [is] remedial and humanitarian in purpose.”); see also, e.g., *Snapp v. Unlimited Concepts, Inc.*, 208 F.3d 928, 935 (11th Cir. 2000) (“Congress has enacted a comprehensive remedial scheme for violations of the FLSA’s substantive provisions that covers the whole terrain of punitive sanctions, compensatory relief, private rights of action, and actions brought by [DOL].”).

258. See Hallett, *supra* note 251, at 103–13; Charlotte S. Alexander & Arthi Prasad, *Bottom-Up Workplace Law Enforcement: An Empirical Analysis*, 89 IND. L.J. 1069, 1102–08 (2014).

259. Weil & Pyles, *supra* note 257, at 69.

260. Hallett, *supra* note 251, at 97.

261. Its effects also trickle up to economic growth and the allocation of public funds. BERNHARDT, MILKMAN, THEODORE, HECKATHORN, AUER, DEFILIPPIS, GONZÁLEZ, NARRO, PERELSHTEYN, POLSON, & SPILLER, *supra* note 251, at 50 (“Low-income families spend the large majority of their earnings on basic necessities, such as food, clothing and housing. . . . Wage theft robs local communities of this spending, and ultimately limits economic growth.”); Hallett, *supra* note 251, at 101; see also JANICE FINE, DANIEL GALVIN, JENN ROUND, & HANA SHEPHERD, WASH. CTR. FOR EQUITABLE GROWTH, MAINTAINING EFFECTIVE U.S. LABOR STANDARDS ENFORCEMENT THROUGH THE CORONAVIRUS RECESSION 17–18 (2020), <https://equitablegrowth.org/wp-content/uploads/2020/09/090320-labor-enforcement-report.pdf> [<https://perma.cc/U2W8-AJPG>] (explaining that wage theft is likely to worsen during the COVID-19 pandemic-induced recession); Noam Scheiber, *Stiffing Workers on Wages Grows Worse with Recession*, N.Y. TIMES (Sept. 3, 2020), <https://www.nytimes.com/2020/09/03/business/economy/wage-theft-recession.html> [<https://perma.cc/S35C-YY7P>] (reporting that “during a recession,” wage theft “tends to increase significantly”).

All of these dynamics are amplified in the domestic work industry. Wage theft is particularly rampant.²⁶² One survey found that, in the preceding week, as many as 66% of domestic workers had experienced wage theft in the form of a minimum wage violation, and 89% in the form of an overtime violation.²⁶³ At the same time, complaints are remarkably rare.²⁶⁴ For example, an analysis of San Francisco estimated that, between 2005 and 2018, 51% of domestic workers experienced a minimum wage violation, but less than 1% filed a complaint.²⁶⁵ Put differently, there were 1,300 violations for every complaint filed.²⁶⁶

As such, researchers have described domestic work as one of the top “high noncompliance, low complaint rate” industries.²⁶⁷ This pair of features is concerning, given that enforcement depends on complaints:

Ideally, regulators would like to assume two things: (1) that the workers who are complaining are voicing legitimate grievances and representing them accurately (in other words, that employees working under lawful conditions are not complaining); and (2) that workers who are experiencing violations will complain. . . .

262. DANIEL J. GALVIN, JENN ROUND, & JANICE FINE, RUTGERS CTR. FOR INNOVATION IN WORKER ORG., A ROADMAP FOR STRATEGIC ENFORCEMENT: COMPLAINTS AND COMPLIANCE WITH SAN FRANCISCO’S MINIMUM WAGE 5 (2020), https://smlr.rutgers.edu/sites/default/files/Documents/Centers/CIWO/20_0828_sanfrancisco_study.pdf [<https://perma.cc/6HVK-SNGQ>] (finding, in a 2005–2018 analysis of San Francisco, that 49% of childcare workers, 29% of maids and housekeeping cleaners, and 22% of personal and home care aides experienced a minimum wage violation); Yana van der Meulen Rodgers & Elaine Zundl, *Domestic Worker Inequities and Rights: A Mixed-Methods Analysis* 13 (Rutgers Ctr. for Women & Work, Working Paper No. 2018-1, 2018), https://smlr.rutgers.edu/sites/default/files/Documents/CWW/Publications/domestic_worker_inequities_and_rights_working_paper_series_nov_2018.pdf [<https://perma.cc/3U73-EEDX>] (finding, in survey of New Jersey, that about 25% of domestic workers experienced a minimum wage violation); BURNHAM & THEODORE, *supra* note 23, at 22 (finding, in survey of 14 metropolitan areas, that 10% of domestic workers experienced wage theft in the previous year; 23% reported being paid late); *see also* Annette Bernhardt, Michael W. Spiller, & Nik Theodore, *Employers Gone Rogue: Explaining Industry Variation in Violations of Workplace Laws*, 665 ILR REV. 808 (2013) (finding that small employer size, nonstandard pay systems, and lack of benefits correlate with high noncompliance).

263. BERNHARDT, MILKMAN, THEODORE, HECKATHORN, AUER, DEFILIPPIS, GONZÁLEZ, NARRO, PERELSHTEYN, POLSON, & SPILLER, *supra* note 251, at 31, 34 (reporting that 66% of childcare workers, 30% of maids and housekeepers, and 18% of home health care workers experienced a minimum wage violation in the previous week; 89% of workers in private households experienced wage theft in the form of an overtime violation).

264. *See* BURNHAM & THEODORE, *supra* note 23, at 34 (“Of the domestic workers surveyed who indicated that there were problems with their working conditions in the past 12 months, 91% reported that they did not complain because they were afraid they would lose their job.”).

265. GALVIN, ROUND, & FINE, *supra* note 262, at 3–4. An earlier nation-wide analysis estimated that 12% of workers in private households experienced an overtime violation, but less than 1% filed a complaint. *See* Weil & Pyles, *supra* note 257, at 73–74 (estimating that 12,113 domestic workers out of 100,000—about 12%—were paid in violation of overtime requirements and estimating that 3.8 domestic workers out of 100,000—about 0.0038%—filed a complaint for overtime violations).

266. FINE, GALVIN, ROUND, & SHEPHERD, *supra* note 261, at 15.

267. *See* GALVIN, ROUND, & FINE, *supra* note 262, at 3–4 (listing “private households” as one of three industries with the highest estimated violation rates, but the lowest complaint rates).

[R]egulators need to know that they are receiving as few false positives (workers complaining in the absence of violations) and false negatives (workers experiencing violations who do not complain) as possible. The latter type of error is clearly the more critical—investigators want to be sure that “quiet” industries tend to have working conditions that are satisfactory, rather than a greater number of workers who face obstacles to using their right to complain.²⁶⁸

The mismatch between noncompliance and complaints underscores the need to move beyond complaint-based enforcement.²⁶⁹ But, as things stand, the mismatch should direct scrutiny to policies that make it harder to complain. Meal and lodging deductions are one such policy. If illegally applied, meal and lodging deductions may be wage theft.²⁷⁰ But even proper deductions *contribute* to wage theft: they make it harder for workers to know if they have been paid their due. If step one of enforcement is filing a complaint, step zero is detecting a violation.²⁷¹

Because FLSA allows deductions of “reasonable cost” or “fair value,” the legality of a particular deduction is essentially indeterminate from the worker’s view. When an employer pays cash at the end of the week and mentions that

268. Weil & Pyles, *supra* note 257, at 70–71.

269. Other models, which conceptually overlap, include strategic enforcement, collaborative enforcement, diffuse enforcement, and co-enforcement. *See generally* David Weil, *Creating a Strategic Enforcement Approach to Address Wage Theft: One Academic’s Journey in Organizational Change*, 60 J. INDUS. REL. 437 (2018) (strategic enforcement); Andrew Elmore, *Collaborative Enforcement*, 10 NE. U. L. REV. 72 (2018) (collaborative enforcement); Hallett, *supra* note 251, at 138–41 (diffuse enforcement); Janice Fine, *New Approaches to Enforcing Labor Standards: How Co-Enforcement Partnerships Between Government and Civil Society are Showing the Way Forward*, 2017 U. CHI. LEGAL F. 143 (2017) (co-enforcement).

270. *E.g.*, *Beltran v. InterExchange, Inc.*, 176 F. Supp. 3d 1066, 1082–83 (D. Colo. 2016) (holding that employers of au pairs, as live-in domestic workers, cannot take deductions because they are legally obligated to provide meals and lodging, and thus the meals and lodging are not voluntarily accepted under federal law); *see also* Melanie Ryan, *Swept Under the Carpet: Lack of Legal Protections for Household Workers—A Call for Justice*, 20 WOMEN’S RTS. L. REP. 159, 166–68 (1999) (“[W]ithout specific limits on deductions, many employers inflate the cost of food and board and pay workers less than minimum wage.”).

Other types of deductions may also be illegal or illegally applied. Deductions for uniforms, equipment damage, or work-related tools, materials, or travel may be a form of wage theft, if those costs are the employer’s legal responsibility. *See* BERNHARDT, MILKMAN, THEODORE, HECKATHORN, AUER, DEFILIPPIS, GONZÁLEZ, NARRO, PERELSHTEYN, POLSON, & SPILLER, *supra* note 251, at 23 (finding, in survey of low-wage workers in three cities, that “[a]mong respondents who reported deductions from their pay, 41 percent were subjected to illegal deductions”).

271. Alexander & Prasad, *supra* note 258, at 1072 (noting that complaint-based enforcement assumes “workers have the substantive and procedural legal knowledge to identify violations of their rights and access the proper enforcement procedures”); Weil & Pyles, *supra* note 257, at 63 (“In order to ascertain the magnitude of [the] benefits [of complaining], workers must acquire information on the current and legally permissible level of a regulated outcome. The costs of exercising rights include the costs of gathering this information.” (emphasis omitted)); *cf.* *Magadia v. Wal-Mart Assocs.*, 999 F.3d 668, 679–80 (9th Cir. 2021) (concluding, for purposes of Article III standing, that employees have a “concrete interest in receiving accurate information about their wages in their pay statements”).

lodging has been deducted, a live-in domestic worker has no way to know whether the amount is legal. Her employer may need to keep records that confirm the amount, but they have no obligation to share those with the worker.²⁷² Even if the worker were to do her own research on the local housing market, she could not know for sure where a court or administrative agency would land in an analysis of reasonable cost or fair value. From the worker's view, the only way to test whether the amount is right or inflated is by complaining. It is as if the fixed minimum wage—a crystal clear dollar amount—were replaced by a “reasonable” wage. Who would take the risk of complaining that she was underpaid?

Thus, the legal uncertainty of a “reasonable cost” or “fair value” deduction is likely to dissuade workers from complaining about wage theft.²⁷³ If a worker suspects her employer is deducting too much or not paying for all her hours worked, she must weigh the uncertain benefits of filing a complaint against a laundry list of risks.²⁷⁴ In this way, uncertainty has the regressive effect of reinforcing illegal wage theft.²⁷⁵ Legal deductions contribute to the problem of “false negatives”—

272. See *supra* notes 157–62 and accompanying text.

273. See PALMER, *supra* note 44, at 84 (“The unregulated nature of the employment, coupled with no reasonable assessment of the value of room and board, meant that housewives could demand full-time work in return for housing.”).

274. Alexander & Prasad, *supra* note 258, at 1102–06 (“[O]ur analysis reveals that workers doubt the certainty of the benefit they might receive from claims making: the second-most frequent reason for workers’ choices not to make claims was that workers doubted their claims would make any difference.”); Weil & Pyles, *supra* note 257, at 82–84 (noting the significant cost of “obtaining information regarding the existence of basic worker rights as well as the standards to which employers are held accountable”).

Tipped workers face similar uncertainty with respect to the service industry’s subminimum wage. COOPER & KROEGER, *supra* note 15, at 7–8 (“[P]olicing this requirement is largely left to the tipped workers themselves, who would need to carefully track their weekly hours and tips to know if employers were paying an adequate base wage. . . . The opaqueness of tipped wage laws leaves most tipped workers with little knowledge of their rights and particularly open to abuse.”); see also REST. OPPORTUNITIES CTR. UNITED, BETTER WAGES, BETTER TIPS: RESTAURANTS FLOURISH WITH ONE FAIR WAGE 2–3 (2018), https://workercenterlibrary.org/wp-content/uploads/2021/08/2018_Better-Wages-Better-Tips-Restaurants-Flourish-With-One-Fair-Wage.pdf [<https://perma.cc/6SX6-T67D>] (“The FLSA allows employers to take a ‘tip credit’ from tip earnings to cover their liability to provide the minimum wage above the subminimum wage. . . . This practice leads to some of the highest rates of wage theft of any industry. . . . [T]ip credit violations . . . resulted in nearly \$5.5 million in back wages.”).

275. See Deepak Gupta & Lina Khan, *Arbitration as Wealth Transfer*, 35 YALE L. & POL’Y REV. 499, 510–13 (2017); see also *Dynamex Operations W. v. Superior Ct.*, 416 P.3d 1, 33–34 (Cal. 2018) (observing, in context of classifying workers as employees or independent contractors, that “a multifactor, ‘all the circumstances’ standard” defers the “determination to a subsequent and often considerably delayed judicial decision,” “leaves both businesses and workers in the dark,” and “affords a hiring business greater opportunity to evade its fundamental responsibilities under a wage and hour law”). See generally Uri Weiss, *The Regressive Effect of Legal Uncertainty*, 2019 J. DISP. RESOL. 149, 151–52 (2019) (“There are sides that gain from increasing legal uncertainty and others that lose from it. Legal uncertainty leads to regressive settlements; a shift from a more certain legal regime to a less certain one transfers wealth from risk-averse parties to risk-neutral parties. . . . Furthermore, legal uncertainty transfers wealth from parties with weak bargaining power to those with strong bargaining power. It is important to understand the regressive effects of legal uncertainty because the degree of legal uncertainty is not determined by nature; it is a societal choice.”).

wage violations that do not yield a complaint—in an industry where wage theft is ubiquitous.

* * *

For a variety of reasons, deductions need reform. Since the early 20th century, domestic workers have often left live-in jobs seeking the autonomy and independence of live-out work.²⁷⁶ For those living-in today, the legal subminimum wage perpetuates the second-class status of the work in a way that undermines the purpose of the federal minimum wage.

V.

STATE LAW DEPARTURES

In addition to directly regulating live-in domestic work, FLSA's deductions rules influence how states regulate in this area. Many states have adopted deductions rules that track FLSA.²⁷⁷ State courts interpreting such rules might look to federal court interpretations of FLSA as persuasive, but not binding, authority. Other states, recognizing some of the problems created by deductions, have diverged from the FLSA deductions framework in a few ways.

First, some states add an additional requirement to the FLSA framework: written authorization by the worker.²⁷⁸ An employer defending against a claim for unpaid wages would need to produce the worker's written authorization for meal and lodging deductions, or face liability for the full minimum wage. This requirement might facilitate informed consent on the worker's part. However, consent can only be as meaningful as the relative bargaining power between the worker and her employer. In this sector, with its enormous asymmetries of power, the most likely scenario is that an employer presents a document and the worker signs without reading it or without perceiving that she has a choice in the matter. On balance, written authorization is a positive policy development for workers, but it is unlikely to increase wages, reduce wage theft, or lessen the risks of trafficking and exploitation due to the unequal bargaining power in live-in domestic work relationships.

276. HONDAGNEU-SOTELO, *supra* note 53, at 252.

277. *E.g.*, HAW. CODE. R. § 12-20-9, HAR (LexisNexis 2022); ILL. ADMIN. CODE tit. 56, § 210.200 (2021).

278. *E.g.*, MD. CODE ANN., LAB. & EMPL. §§ 3-418(b), 3-503(2) (LexisNexis 2021).

Second, some states cap the amount that can be deducted.²⁷⁹ Capping deductions allows workers to keep more cash wages, closing some of the gap between the subminimum live-in wage and the minimum wage. Moreover, clear caps—set in dollars and cents—are a promising policy intervention because they empower workers, advocates, and enforcement agencies to articulate the legal wage with certainty. A worker in Vermont, for example, can arm herself with the knowledge that she is entitled to at least \$372.11 for her 40-hour workweek: \$11.75 per hour²⁸⁰ multiplied by 40 hours, less \$97.89 for a full week of meals and lodging.²⁸¹ Such caps strip employers of the ability, in practice, to unilaterally announce a deduction amount. In this way, clear caps might limit the degree to which uncertain deductions entrench wage theft. Caps that do not set an amount in dollars and cents, such as Washington, D.C.’s lodging deduction cap at 80% of the rental value, do much less to mitigate the harms of deductions.

A third group of states prohibit deductions altogether if living-in is a requirement of the job.²⁸² This policy helpfully distinguishes the live-in domestic work context from the more unusual context in which an employer happens to provide lodging or food to a worker who is not “live-in.” For example, imagine an arrangement where a domestic worker cares for children from 8:00 AM to 6:00 PM in the employer’s home while they are at work. When the employer comes home, the worker heads down to the home’s in-law unit, where she has a separate entrance, bathroom, and kitchen—and where the employer does not go because it is the worker’s space. Living-in is not a requirement of the job, because the worker is free to move while continuing to work for the employer. The employer’s role is bifurcated: they function as an employer for purposes of the work, but as a landlord for purposes of the lodging. Or imagine a domestic worker’s employer is a professional caterer. The employer often has prepared food on hand after weekend events, so they offer to provide the worker lunch and dinner every Monday, and the worker agrees. Here too, the employer’s role in providing food is incidental to

279. *E.g.*, Cal. Indus. Welfare Comm’n, Order No. 15-2001, Official Notice: Regulating Wages, Hours, and Working Conditions in the Household Occupations § 10(C) (2020) (capping deductions at \$18.32 per day for meals and \$56.43 per week for a single-occupancy room); D.C. CODE MUN. REGS. tit. 7 § 904 (LexisNexis 2022) (capping deductions at \$6.36 per day for meals and 80% of rental value for lodging); N.Y. COMP. CODES R. & REGS. tit. 12, § 142-2.5 (2022) (capping deductions based on employer size and location, with maximum of \$5.15 per day for meals and \$44.45 per week for lodging); VT. DEP’T OF LAB., NOTICE: MEAL AND LODGING ALLOWANCE INCREASE (2022) [hereinafter VT. DOL NOTICE], https://labor.vermont.gov/sites/labor/files/doc_library/Meals%20and%20Lodging%20Allowance%20-%202022.pdf [<https://perma.cc/B7T8-TCMB>] (indicating caps of \$11.54 per day for meals and \$28.35 per week for lodging, but \$97.89 per week for full room and board).

280. *See* Press Release, Vt. Dep’t of Lab., Vermont Minimum Wage to Increase in 2021 (Oct. 8, 2020), <https://labor.vermont.gov/press-release/vermont-minimum-wage-increase-2021> [<https://perma.cc/26Z9-UU9T>].

281. *See* VT. DOL NOTICE, *supra* note 279 (indicating a cap of \$97.89 per week for full room and board).

282. *E.g.*, 940 MASS. CODE REGS. 32.03(5)(c)2 (2021); NEV. REV. STAT. ANN. § 613.620(1)(f)–(g) (LexisNexis 2021).

the worker's job. These scenarios are meaningfully different from the more common one in which living-in is a requirement. There, the worker lives within the employer's home proper, which typically reduces her personal space and muddies the boundaries between work and non-work time. And, because the job is for a live-in worker, if the worker leaves or loses her job, she loses her housing as well—an additional constraint that most workers do not assume. Prohibiting deductions in the latter context is good policy for all the rationales developed in this Article. Federal law should follow these states and prohibit deductions for live-in domestic workers, bringing their legal wages up to the minimum.

VI.

CONCLUSION

Domestic workers won initial inclusion in the federal minimum wage nearly fifty years ago. Today, live-in domestic workers remain subject to a little-known subminimum wage. Meal and lodging deductions can legally dip into, or even deplete, the \$7.25 an hour to which other workers are entitled by law.

The poverty wages engineered by deductions must be understood in social context. Live-in domestic workers paid a legal subminimum wage are Black women, women of color, immigrants, and often undocumented and marginalized politically as well as economically. Their low wages contribute to broader pay gaps based on gender and race.²⁸³ But low wages are about more than the absolute ability to survive; relative to the minimum wage, the subminimum wage implicates basic norms of equality.²⁸⁴ The legal subminimum wage has an expressive function. It signals that the work is lowly—so lowly that the usual floor does not apply. It also signals that workers themselves are inferior, because the history of domestic work reveals a close link between the work and the worker who is called

283. Compared to white men, median annual pay is 87% for Asian women, 79% for white women, 63% for Black women, and 55% for Latina women. AM. ASS'N OF UNIV. WOMEN, THE SIMPLE TRUTH ABOUT THE GENDER PAY GAP: 2020 UPDATE 4 (2020), https://www.aauw.org/app/uploads/2020/12/SimpleTruth_2.1.pdf [<https://perma.cc/2SZA-Z2AD>]. Moreover, the numbers barely budge. At the current pace of change, Latina women's pay will not equal white men's pay until the year 2451. *Id.* Because of occupational segregation, raising the minimum wage and ending subminimum wages would significantly narrow wage gaps. Aimee Allison, *Raising Minimum Wage is the Minimum Promise for Women of Color*, THE HILL (Mar. 6, 2021, 9:30 AM), <https://thehill.com/blogs/congress-blog/politics/541901-raising-minimum-wage-is-the-minimum-promise-for-women-of-color?rl=1> [<https://perma.cc/8RR4-48BD>]; Ellora Derenoncourt & Claire Montialoux, *To Reduce Racial Inequality, Raise the Minimum Wage*, N.Y. TIMES (Oct. 25, 2020), <https://www.nytimes.com/2020/10/25/opinion/minimum-wage-race-protests.html> [<https://perma.cc/FG2N-8WLX>] (“[R]aising and expanding the minimum wage could once again reduce the persistent earnings divide between white workers and Black, Hispanic and Native American workers. Though legislation to raise the wage floor would be a universal program in name and application, in practice it would be a remarkably effective tool for racial justice.”).

284. See generally Rogers, *supra* note 28, at 1570–87; Zatz, *The Minimum Wage*, *supra* note 28 (discussing how low wages implicate normative concerns of equality).

on to perform it.²⁸⁵ For this reason, when domestic workers organize and call for higher wages, they make a claim not only for the value of their work, but also for their dignity and social citizenship.²⁸⁶ The subminimum wage, and its source in deductions, unacceptably targets an already marginalized group of workers and undermines their dignity.

Eliminating the live-in wage could be a powerful standalone legislative action. But the best way forward is to make eliminating the live-in wage part of a broader proposal to raise the wage. Raising the minimum wage lays bare the problem of the legal subminimum wage paid to live-in domestic workers—those who will not reap the full benefits of a higher minimum wage—and campaigns can marshal the connections between the two problems. As the domestic work sector expands rapidly in the twenty-first century, it must be compensated equally to other work and generously in proportion to its importance as “the work that makes all other work possible.”²⁸⁷

285. See PALMER, *supra* note 44, at 73 (noting Depression-era practice of paying live-in domestic workers only with room and board as a factor “metaphorically and structurally link[ing] housework and slavery”).

286. Nadasen, *supra* note 94, at 76–81 (“For many domestic workers, their marginalization as workers signaled second-class status and their citizenship rights hinged fundamentally on a decent salary. . . . Domestic workers’ claim for social citizenship largely came from the idea that household work was like any other work performed and that it ought to be treated as such.”); see also KATHLEEN COLL, *REMAKING CITIZENSHIP: LATINA IMMIGRANTS AND NEW AMERICAN POLITICS* 154–81 (2010) (analyzing grassroots organizing by Latina immigrants in San Francisco as a form of social and political citizenship).

287. Poo, *supra* note 36.