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Beyond Coercion

Kathleen Kim

ABSTRACT

Many immigrants' rights advocates and scholars have recognized the undocumented worker exploitation that takes place when immigration restrictions enter the workplace, which create incentives for employer misconduct and increase the vulnerability of workers without status. However, little has been discussed about the broader implications of the currently expansive immigration enforcement regime for a general theory of free labor rights, which is derived from the 13th Amendment and other labor and employment laws. Historically, the advancement of free labor (and the prevention of illegitimate coerced labor) relied on legal interventions that prohibited servitude and promoted workplace protections to ameliorate power inequities between the employer and worker. Although these protections theoretically apply regardless of citizenship status, due to their illegality under immigration laws, undocumented workers often accept substandard conditions out of fear of the alternative—deportation. This Article suggests that when workplace alternatives are constrained to this degree, a free labor problem arises. Drawing from scholarship addressing free labor theory and research at the intersection of immigration law and workplace rights, this Article highlights the structurally coercive effects of immigration restrictions in the workplace. Coercion persists in the undocumented workplace, not because of inadequate employment and labor protections, but because immigration policies have created a criminal class of workers, who are denied remedies for workplace exploitation because their illegality renders them consensual in the workplace exploitation. This contract-based conception of undocumented labor perceives undocumented workers as engaging in a collusive relationship with their employers, in which they freely comply with substandard working conditions and voluntarily remain in the U.S. without legal status. The notion that these workers willingly accept their exploitation nullifies their coercion claims, fueling the law's continued preference of immigration enforcement over labor rights and rendering the assertion of labor rights ineffective. Free labor rights seek to correct coercion in the workplace. Yet, the illegality of undocumented workers places them *beyond coercion* or outside the protection of free labor remedies.

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INTRODUCTION

In recent years, courts adjudicating forced labor cases have demonstrated a heightened awareness of the vulnerabilities that increase a worker's susceptibility to coerced or unfree labor, in particular, undocumented status. In *United States v. Calimlim*,[1] the Seventh Circuit upheld a forced labor conviction against the employers of Irma Martinez, an undocumented domestic worker from the Philippines subjected to unconscionable working conditions under implicit threats of deportation and indirect threats of nonphysical harm.[2] In reasoning its decision, the court explained that the defendants compelled Martinez's work by manipulating her undocumented status which gave her no "exit option" and prohibited her from "freely work[ing] for another employer."[3] The court noted that Martinez, an "illegal alien," was among "the most vulnerable of the broader group who are forced into labor."[4] In *Garcia v. Audubon*, the Eastern District of Louisiana found that the defendant-employers coerced migrant workers from Mexico into exploitative labor conditions "by taking advantage of [their] undocumented immigration status."[5] As these decisions highlight, the role of undocumented status in coercing labor is critical. But how systemic is the coercion of undocumented workers? Does the absence of status render undocumented workers unfree in the workplace? The answer to these questions requires careful consideration of the workplace as a primary locus for immigration enforcement, which increases the precarity of work for those who are unauthorized.

Many immigrants' rights advocates and scholars have recognized that transferring immigration enforcement to the workplace creates incentives for employer misconduct and increases the vulnerability of undocumented workers.[6] Little

1. 538 F.3d 706 (7th Cir. 2008).
2. *Id.*
3. *Id.* at 708.
4. *Id.* at 717.
5. Garcia v. Audubon Cmty's Mgmt., LLC, No. 08-1291, 2008 WL 1774584 at *5, (E.D. La. Apr. 14, 2008).
6. Linda Bosniak, *Varieties of Citizenship*, 75 FORDHAM L. REV. 2449 (2007); Keith Cunningham-Parmeter, *Redefining the Rights of Undocumented Workers*, 58 AM. U. L. REV. 1361 (2009); Neil A. Friedman, *A Human Rights Approach to the Labor Rights of Undocumented Workers*, 74 CALIF. L. REV. 1715 (1986); Ruben J. Garcia, *Ghost Workers in an Interconnected World: Going Beyond the Dichotomies of Domestic Immigration and Labor Laws*, 36 U. MICH. J.L. REFORM 737 (2003); Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503 (2007); Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 HARV. C.R.-C.L. L REV. 345 (2001); Maria L. Ontiveros, *Immigrant Workers' Rights in a Post-*Hoffman *World—Organizing Around the Thirteenth Amendment*, 18 GEO. IMMIGR. L.J. 651, 654 (2005); Cristina M. Rodriguez, *Guest Workers and Integration: Toward a Theory of What Immigrants*

has been discussed, however, about the broader implications of the currently expansive immigration enforcement regime for a general theory of free labor.[7] Historically, the advancement of free labor, and the prevention of illegitimate coerced labor, relied on legal interventions, such as anti-peonage laws, minimum wage and maximum hour laws, as well as collective bargaining, to ameliorate power inequities between the employer and worker. Although these protections theoretically apply regardless of citizenship status, undocumented workers' illegality under immigration laws often leads them to accept substandard conditions. These conditions persist in part because they resist filing claims against their employers for fear of the alternative—deportation.[8] Despite the coercive effects that worksite immigration restrictions produce, when the goals of immigration enforcement and workplace rights collide, federal agencies, courts, and increasingly state governments have prioritized immigration enforcement.

This Article suggests that when workplace alternatives are constrained to this degree, a free labor problem arises. Drawing from scholarship that addresses free labor theory and research at the intersection of immigration law and workplace rights, this Article examines the coercion experienced by undocumented workers. Importantly, this Article highlights a structural coercion analysis, which departs from descriptive accounts of bad actor employers, to posit a broader critique of the immigration policies and practices that systemically render undocumented workers unfree. Workplace coercion persists among undocumented workers, not because of inadequate employment and labor laws, but as a result of immigration policies that have created a criminal class of workers who are denied legal remedies for workplace exploitation; their illegality renders them consensual to that exploitation. This contract-based conception of undocumented labor perceives undocumented workers as engaging in a collusive relationship with their employers, in which they freely accept substandard working conditions in exchange for the opportunity to continue working and living in the U.S. without legal status. The notion that these workers willingly accept their exploitation nullifies their coercion claims. Free labor rights seek to correct coercion in the

and Americans Owe One Another, 2007 U. CHI. LEGAL F. 219 (2007); Leticia Saucedo, *A New "U": Organizing Victims and Protecting Immigrant Workers*, 42 U. RICH. L. REV. 891 (2008); Michael Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193 (2007).

7. Professor Maria Ontiveros is one of the only scholars to address the Thirteenth Amendment's applicability to a broad range of immigrant workers. *See* Maria L. Ontiveros, *A Strategic Plan for Using the Thirteenth Amendment to Protect Immigrant Workers*, 27 WIS. J.L. GENDER & SOC'Y 133 (2012).

8. Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities*, NAT'L EMP'T LAW PROJECT 54 (2010), http://nelp.3cdn.net/1797b93dd1ccdf9e7d_sdm6bc50n.pdf.

workplace, yet the illegality of undocumented workers places them *beyond coercion*, outside the protection of free labor remedies.

This Article has three parts. Part I explores the historical backdrop of free labor. Labor historians have deepened our understanding of the free labor principle at the time of the Thirteenth Amendment's enactment.[9] There was no single vision of free labor, but rather several conflicting approaches. Driving the passage of the Thirteenth Amendment was a freedom of contract approach to free labor, consistent with the emerging laissez-faire politics of the time. Labor advocates considered freedom of contract illusory, recognizing the vulnerability of wage earners without adequate bargaining power. Increased workplace regulation reflected a changing conception of free labor from one that was contract-based to another based on freedom from coercion. This transformation resulted from a redrawing of lines on a continuum of consent and coercion. Rejecting freedom of contract, workplace laws expanded to protect workers against a range of coercive abuses that included not only specific acts of coercion, but also structural coercion, with the ultimate goal of correcting power inequities in the workplace.

Part II examines the ways in which coercion operates in the undocumented workplace. Undocumented workers frequently experience substandard workplace conditions. Some employers may utilize specific threats of a penalty to coerce undocumented workers to submit to substandard conditions. In these cases, workers may qualify as a victim of workplace crime and seek an immigration remedy such as a T visa or a U visa.[10] With regularized status, these workers may then pursue employment and labor remedies without fear of deportation. But undocumented workers may more commonly experience structural coercion, which causes them to acquiesce or decline to improve poor working conditions because of the constraining effects of their unauthorized status. In these cases, immigration restrictions are the culprit and there is no lasting immigration relief, thereby circumventing employment and labor law protections.[11] When undocumented

9. GUNTHER PECK, REINVENTING FREE LABOR: PADRONES AND IMMIGRANT WORKERS IN THE NORTH AMERICAN WEST 1880–1930, at 7 (explaining the absence of a unitary definition of free labor); William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, WIS. L. REV. 767 (1985).

10. Immigration and Nationality Act §§ 101(a)(15)(T)–(U) (2014).

11. While prosecutors may exercise discretion to defer removal proceedings for undocumented workers participating in civil suits or workplace investigations against their employers, such relief is not available until a claim is asserted, and it does not provide long-term relief. For example, deferred action has no statutory basis and is instead merely "an act of administrative convenience to the government which gives some cases lower priority." *See* U.S. Dep't of Homeland Sec., *Recommendation From the CIS Ombudsman to the Director, USCIS* (Apr. 6, 2007), http://www.dhs.gov/xlibrary/assets/CISOmbudsman_RR_32_O_Deferred_Action_04-06-07.pdf (citing 8 C.F.R. § 274a.12(c)(14) (2014)).

workers do assert labor and employment claims, even in the absence of a T or U visa, depending on the extent of their perceived complicity in the unauthorized employment arrangement, immigration enforcement norms may serve to deny them of full legal remedies.

Part III concludes by encouraging a reexamination of our current workplace-related immigration enforcement regime in light of free labor norms. Legal protections entered the workplace to reject freedom of contract and to correct the structural imbalance between wage earners and their employers. Yet, in the undocumented workplace, worker-employer inequities are amplified through an immigration enforcement system that is insufficiently counterbalanced with stable immigration relief for aggrieved workers. While undocumented workers can receive remedies for coercion claims when they are victims of an employer's specific coercive conduct, they are presumed to be consensual participants in the structurally coercive employment arrangements that immigration policy produces.[12] This presumption of consent in the undocumented workplace permits worker-employer power inequities to persist.

I. FROM FREEDOM OF CONTRACT TO FREEDOM FROM COERCION

Today, most labor scholars agree that free labor rights—grounded in the Thirteenth Amendment's constitutional prohibition of slavery and involuntary servitude—include the "inalienable right to quit work" without nonpecuniary repercussion, as well as the rights to change employers, receive fair wages, and organize for improved working conditions.[13] Coerced labor—a concept still inconclusively defined[14]—limits these free labor rights by means of an employer's

12. This Article refers to "specific coercion" as conduct arising within an employer/employee dyadic relationship whereby an employer intends to coerce an employee into compliance. This Article refers to "structural coercion" as the phenomenon whereby laws, policies and institutional structures coerce workers into compliance. Though an employer may take advantage of structurally coercive constructs to exploit a worker, structural coercion does not require the intentional conduct of an employer to cause workers to acquiesce to substandard workplace conditions.

13. WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT, 135–41 (1991); ROBERT J. STEINFELD, COERCION, CONTRACT, AND FREE LABOR IN THE NINETEENTH CENTURY (2001); James Gray Pope, *Contract, Race and Freedom of Labor in the Constitutional Law of "Involuntary Servitude"*, 119 YALE L.J. 1474, 1478 (2010) (providing an insightful and compelling account of the Thirteenth Amendment's guarantee of free labor rights); James Gray Pope, *Labor's Constitution of Freedom*, 106 YALE L.J. 941 *passim* (1997); Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 437–38 (1989) (finding evidence in the congressional record and the history of the Thirteenth Amendment that the amendment encompasses "a much broader idea of employee autonomy and independence" than the mere right to quit).

14. GERTRUDE EZORSKY, FREEDOM IN THE WORKPLACE? 5–14 (2007); STEINFELD, *supra* note 13, at 1–26; Kathleen Kim, *The Coercion of Trafficked Workers*, 96 IOWA L. REV. 409 (2011).

conduct intended to constrain the worker's choice between providing labor according to the employer's demands or suffering a negative consequence. Beyond an employer's specific conduct, structural imbalances in bargaining power between employers and their workers may also coerce workers into accepting exploitive employment terms. Depending on degree, evidence of coercion may negate free labor and potentially violates the Thirteenth Amendment as well as other labor and employment laws. For example, chattel slavery, which was characterized by the threat of physical punishment as a means to compel labor, was abolished in 1865.[15] The U.S. Supreme Court subsequently upheld the constitutionality of anti-peonage laws, recognizing the illegitimacy of coercive pressures that involved criminal penalties for failure to work.[16] Modern day anti-human trafficking laws prohibit the use of nonphysical coercion including threats of financial, reputational, or psychological harm, acknowledging that these are subtle yet equally effective means of forcing labor.[17] Other foundational labor and employment laws protect workers against coercive labor practices. The National Labor Relations Act (NLRA) makes it unlawful for employers "to interfere with, restrain, or coerce employees in the exercise of" organizing activities.[18] Both Title VII of the Civil Rights Act (Title VII)[19] and the Fair Labor Standards Act (FLSA)[20] prohibit employers from retaliating against employees who object to discriminatory or substandard working conditions. Additionally, by setting a minimum floor of acceptable workplace conditions, these laws also address structural coercion by seeking to rectify the power differentials between workers and their employers that often result in unfair employment terms.[21]

Yet, despite this current understanding of free labor as an anticoercion principle, this was not clear at the time the Thirteenth Amendment was enacted. This Part describes the Thirteenth Amendment's early interpretive struggle between three competing conceptions of free labor, each somewhat irreconcilable with the other: one grounded in freedom of contract, another based on the freedom to quit, and the last, which that this Article terms freedom from coercion. The Supreme Court eventually decided in favor of a freedom from coercion concept by invalidating even voluntarily entered employment arrangements if an

15. *See* U.S. CONST. amend. XIII, § 1.
16. Bailey v. Alabama, 219 U.S. 219 (1911). *See generally* Peonage Abolition Act, ch. 187, § 1, 14 Stat. 546 (1867) (codified as amended at 41 U.S.C. § 1994 (2012)).
17. Victims of Trafficking and Violence Protection Act of 2000, 18 U.S.C. § 1589 (2012).
18. 29 U.S.C. § 158 (2012).
19. 42 U.S.C. § 2000e-3(a) (2012).
20. 29 U.S.C. § 215(a)(3) (2012).
21. *See infra* Part I.

employer subjected a worker to coercive conditions, and by upholding the constitutionality of broader workplace protections to prevent coercive labor abuses.[22]

A. Freedom of Contract

At the time of its enactment, the Thirteenth Amendment was used by laissez-faire Republicans, who allied with abolitionists, to advance what they called "free labor ideology."[23] Under this rubric, free labor was synonymous with freedom of contract, which promoted the individual's unencumbered right to contract with another to sell one's own labor.[24] Republicans opposed slavery, not because it legally and physically bound workers to exploitive work situations, but because it permitted involuntary, nonconsensual labor arrangements that would ultimately impede market competition and economic growth.[25] President Lincoln and Republican legislators believed that a system of free labor required "economic independence" and the ownership of "productive property."[26] They idealized free labor as the "unrestricted right" of everyman to enjoy the "fruits of his own labor."[27] Thus, Republicans predicted that the free laborer might begin as a wage earner but could then enjoy upward mobility by investing his accumulated earned wages to achieving true economic autonomy as an entrepreneur or artisan.[28] The abolitionists' concern was less about economic independence in a free market system and more about emancipation, equal rights, and racial justice for blacks.[29] But in joining the efforts of the Republican Party, the antislavery movement advanced a political agenda beyond the civil rights of blacks to promote the flourishing of a capitalist free labor system.

B. Freedom to Quit

Ironically, the freedom of contract notion of free labor that animated the passage of the Thirteenth Amendment had the distorted effect of permitting voluntary labor contracts based on unequal bargaining arrangements and unconscionable terms. Thus, despite the elimination of chattel slavery, indentured

22. *Id.*
23. ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR (1970).
24. *See id.* at 15–18.
25. *See id.*
26. *See* Forbath, *supra* note 9, at 775.
27. *Id.* at 778.
28. FONER, *supra* note 23, at 17.
29. *See* ERIC FONER, THE STORY OF AMERICAN FREEDOM 85 (1998).

servitude and peonage contracts persisted.[30] Both were forms of debt bondage, which subjected a worker to criminal penalties if he or she failed to complete the contracted term of labor to repay the debt.[31] Despite the significant legal restraint on the freedom to quit that both peonage and indentured servitude imposed, advocates of the free labor ideology viewed the invalidation of any voluntary labor arrangements as inconsistent with their freedom of contract-based vision of economic autonomy.[32] In contrast, supporters of anti-peonage laws believed that free labor necessitated the freedom to quit.[33] Congress and the Supreme Court agreed.[34]

In 1867, empowered by Section 2 of the Thirteenth Amendment, Congress passed the Peonage Abolition Act.[35] The Act prohibited peonage, defined as the "status or condition of compulsory service, based upon the indebtedness of the peon to the master."[36] The Act also voided all state laws that enforced "the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise."[37] Thus, peonage was prohibited even when the worker, at the outset, voluntarily agreed to the work situation.

In *Clyatt v. United States*, the Supreme Court upheld the constitutionality of the Peonage Abolition Act by emphasizing that the Thirteenth Amendment established "universal freedom" and noting that peonage also constituted slavery.[38] Later, in *Bailey v. Alabama*, the Court invalidated Alabama's false pretenses statute, which imposed criminal punishment on workers if they abandoned a labor contract while fulfilling a debt to an employer.[39] The Court declared the statute unconstitutional because it criminally compelled the performance of labor, even if the labor had been voluntarily assumed at the outset.[40] This amounted to involuntary servitude and violated the Thirteenth Amendment:

30. Scholars have referred to peonage as the second progeny of slavery. *See generally* Baher Azmy, *Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda*, 71 FORDHAM L. REV. 981, 1026–27 (2002); Tobias Barrington Wolff, *The Thirteenth Amendment and Slavery in the Global Economy*, 102 COLUM. L. REV. 973, 982–83 (2002).
31. Clyatt v. United States, 197 U.S. 207, 215 (1905) (defining peonage as the "status or condition of compulsory service, based upon the indebtedness of the peon to the master").
32. *See* James Gray Pope, *Contract, Race and Freedom of Labor in the Constitutional Law of "Involuntary Servitude"*, 119 YALE L.J. 1474, 1487–93 (2010).
33. *Id.*
34. *Id.*
35. Peonage Abolition Act, ch. 187, § 1, 14 Stat. 546 (1867) (codified as amended at 42 U.S.C. § 1994 (2012)).
36. *Clyatt*, 197 U.S. at 215.
37. Peonage Abolition Act § 1.
38. *Clyatt*, 197 U.S. at 217–18.
39. 219 U.S. 219, 245 (1911).
40. *Id.* at 244–45.

> [T]he State could not authorize its constabulary to prevent the servant from escaping and to force him to work out his debt. But the State could not avail itself of the sanction of the criminal law to supply the compulsion any more than it could use or authorize the use of physical force.[41]

Laws rejecting peonage expressed an interpretive strain of the Thirteenth Amendment that looked beyond the consent of the parties to the agreement and instead focused on the conditions of the work. Employment became at will rather than bound by contract. Despite the voluntariness of the labor contract, if the worker did not have a subsequent right to quit the labor, the law recognized that the worker was not free.

C. Freedom From Coercion

Anti-peonage laws also informed a much broader notion of free labor: freedom from coercion. As the *Bailey* Court stated, the Thirteenth Amendment was intended "to render impossible any state of bondage; to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit. . ."[42] Thus, free labor had less to do with consent and more to do with the coercive power and control that an employer might exercise over a worker. This freedom from coercion concept of free labor stood in direct contrast to the free labor ideology.

While the free labor ideology rested on notions of economic independence and the accumulation of productive property, the reality for most working people in the United States around the time the Thirteenth Amendment was enacted was that the only property to which they had an ownership right was their own labor.[43] Labor was the commodity on which they depended and the only one that they had a right to sell.

Labor advocates rejected the free labor ideology as an illusory freedom that facilitated wage slavery, a new form of unfree labor.[44] Because a wage employee was economically dependent on his or her job, labor advocates viewed wage labor as inherently coercive by obligating workers to accept unfavorable working

41. *Id.* at 244.
42. *Id.* at 241.
43. Forbath, *supra* note 9, at 801–06 (documenting the historical origins of the notion that "[t]he roots of labor's counter-ideology lay in a certain historical consciousness common among skilled workers that in the Gilded Age—a knowledge that the commodification of labor was not a natural state of affairs but a contingent historical occurrence").
44. *Id.*

conditions in order to survive.[45] Labor advocates thought of such dependence as an insidious outgrowth of chattel slavery because it had the appearance of free contract and tacit consent.[46] To labor advocates, free labor meant freedom from coercion with the attendant rights to quit, to receive a minimum floor of fair labor standards, and to bargain on equal footing with employers to determine the terms of employment.[47] Proponents of free labor ideology, on the other hand, continued to view workplace regulation as a form of government interference into freedom of contract.[48] This debate raised the public's awareness of industrial working conditions and as a result, "by the [early twentieth] century many leading social scientists and jurists had come not only to promote state intervention into the marketplace, but to agree that free contract was a fiction between individual laborers and corporate capital."[49]

Our nation's first minimum wage and maximum hour laws were precipitated by the recognition that capitalism bred an inherently unequal bargaining relationship.[50] In *Holden v. Hardy*, the Supreme Court acknowledged that "[employers] naturally desire to obtain as much labor as possible from their employees, while [employees] are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength."[51] In upholding the FLSA, the *Holden* Court cautioned against the danger that employers might be motivated by "self-interest" and that workers would be constrained "to obey them."[52] In these cases "the legislature may properly interpose its authority."[53]

By upholding workplace regulations, the Court acknowledged the role of the law to intervene and remedy even structural inequities in the workplace.[54] Workers now had a right to be free from coercion, which conferred a range of positive free labor rights advanced by subsequent workplace laws. In addition to

45. *Id.* (describing the decline in equality in the relationship between the "master artisan" and the merchant, resulting in a decline in the master artisan's autonomy).
46. AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION 67 (1998) (describing examples of this phenomenon).
47. Forbath, *supra* note 9, at 812.
48. *Id.* at 776.
49. STANLEY, *supra* note 46, at 97.
50. FORBATH, *supra* note 13, at 12.
51. 169 U.S. 366, 397 (1898).
52. *Id.*
53. *Id. See also* West Coast Hotel Co. v. Parrish, 300 U.S. 379, 393–94 (1937) (citing *Holden*, 169 U.S. at 397*)*.
54. Though it should be noted that the FLSA continued to exclude certain categories of workers such as domestic and agricultural workers suggesting its limitations in ameliorating certain structural inequalities in the workplace.

the right to fair working conditions under the FLSA, the NLRA protects worker organizing and collective bargaining, and Title VII makes workplace discrimination based on suspect classifications unlawful.[55]

II. COERCION IN THE UNDOCUMENTED WORKPLACE

All workers theoretically receive protection under these laws.[56] In reality however, undocumented workers remain severely constrained in the exercise of their free labor rights. For example, undocumented workers at a New York meat-processing plant organized to object to substandard working conditions that included unpaid overtime, a dangerous worksite, and a lack of adequate health and safety measures.[57] But their attempt to unionize failed when their employer threatened to have them deported.[58] In another case, a contractor hired an undocumented day laborer to pave a parking lot near Los Angeles.[59] After providing ten hours of labor, the worker requested his wages yet the contractor refused to pay and instead accused him of stealing.[60] The police responded and although they did not arrest the worker, they transferred him to federal immigration authorities.[61] These are familiar stories among undocumented workers and illustrate how the threat of deportation, whether explicit or implicit, often coerces them into complying with unconscionable working conditions.

55. *See infra* notes 53–56.

56. Espinoza v. Farah Mfg. Co., 414 U.S. 86, 95 (1973) (discussing the statutory framework establishing that undocumented workers are included within the meaning of "employee" under Title VII). *See also* Plyler v. Doe, 457 U.S. 202, 213–15 (1982) (Finding that the undocumented immigrant "is subject to the full range of obligations imposed by the State's civil and criminal laws. And until he leaves the jurisdiction—either voluntarily, or involuntarily in accordance with the Constitution and laws of the United States—he is entitled to the equal protection of the laws that a State may choose to establish."); In re Reyes, 814 F.2d 168, 170 (5th Cir. 1987) ("[T]he protections of the [FLSA] are applicable to citizens and aliens alike and whether the alien is documented or undocumented is irrelevant."). Some government agencies have taken these holdings to mean that undocumented workers are entitled to almost all of the discrimination remedies available to documented workers. *See* Nat'l Immigr. Law Ctr., *EEOC: Undocumented Workers Entitled to Same Remedies as Authorized Workers*, IMMIGRANTS' RIGHTS UPDATE, Vol. 13, No. 7, (Nov. 17, 1999), http://www.nilc.org/document.html?id=734.

57. Nathaniel Popper, *Judge: Kosher Company Illegally Coerced Workers Before Union Election*, JEWISH DAILY FORWARD (July 1, 2009), http://www.forward.com/articles/108788; Nathaniel Popper, *Workers at Alle Kosher Meat Plant Reject Union in Contested Vote,* JEWISH DAILY FORWARD (November 26, 2008), http://forward.com/news/14635/workers-at-alle-kosher-meat-plant-reject-union-in-02896.

58. *Id.*

59. Marc Lifsher, *Employer Retaliation Against Immigrants Decried*, L.A. TIMES (Mar. 6, 2013), http://articles.latimes.com/2013/mar/06/business/la-fi-immigrant-retaliation-20130307.

60. *Id.*

61. *Id.*

This Part analyzes how immigration restrictions are deployed in the workplace to subject undocumented workers to both specific and structural coercion.[62] While the law has intervened to protect some undocumented workers against bad actor employers who use specific coercive threats to exploit workers, the structural constraints imposed by immigration enforcement have not been rectified. This Part begins with a brief description of the prevalence of undocumented worker exploitation.

A. Undocumented Worker Exploitation

Undocumented workers typically experience a large number of unlawful working conditions such as substandard wages, overtime violations, and health and safety violations.[63] Most undocumented workers labor in traditionally low-wage occupations such as agriculture, construction, manufacturing, and service industries, where workers face the greatest risk for exploitation.[64] While there is little comprehensive national data due to the clandestine nature of undocumented workers' employment, one report found a 22 percent general wage penalty for being undocumented when compared to documented workers, controlling for length of U.S. work experience, education, English proficiency, and occupation.[65] Other regional research provides a more detailed picture of the working conditions of undocumented immigrants. For example, recent research on San Diego

62. This Article refers to "specific coercion" as conduct arising within an employer-employee dyadic relationship whereby an employer intends to coerce an employee into compliance. This Article refers to "structural coercion" as the phenomenon whereby laws, policies and institutional structures coerce workers into compliance. Though an employer may take advantage of structurally coercive constructs to exploit a worker, structural coercion does not require the intentional conduct of an employer to cause workers to acquiesce to substandard workplace conditions.

63. *See generally* Bernhardt, *supra* note 8; Annette Bernhardt, Siobhán McGrath, & James DeFilippis, *Brennan Center for Justice Report:Unregulated Work in the Global City: Employment and Labor Law Violations in New York City*, BRENNAN CTR. FOR JUST. (2007), http://www.brennancenter.org/sites/default/files/legacy/d/download_file_49436.pdf (researching unregulated industries and labor violations in New York City with a focus on the immigrant workforce); Eunice Hyunhye Cho & Rebecca Smith, *Workers' Rights on ICE: How Immigration Reform Can Stop Retaliation and Advance Labor Rights*, NAT'L EMP'T L. PROJECT (Feb. 2013), http://nelp.org/content/uploads/2015/03/Workers-Rights-on-ICE-Retaliation-Report-California.pdf; Paul Harris, *Undocumented Workers' Grim Reality: Speak Out on Abuse and Risk Deportation*, GUARDIAN UK (Mar. 28, 2013, 11:03 AM),www.theguardian.com/world/2013/mar/28/undocumented-migrants-worker-abuse-deportation.

64. Hans Johnson & Laura Hill, *Illegal Immigration,* AT ISSUE 9 (2011), http://www.ppic.org/content/pubs/atissue/AI_711HJAI.pdf.

65. DEMETRIOS G. PAPADEMETRIOU ET AL., MIGRATION POL'Y INST., OBSERVATIONS ON REGULARIZATION AND THE LABOR MARKET PERFORMANCE OF UNAUTHORIZED AND REGULARIZED IMMIGRANTS 14 (2004), http://www.migrationpolicy.org/sites/default/files/publications/papademetriou-oneil-jachimowicz-2004.pdf.

County's undocumented worker population found that labor trafficking victims affected 30 percent while 55 percent were victims of other labor abuses.[66] The study indicated that unauthorized status was likely the highest contributing factor in the vulnerability of workers to trafficking.[67] A study of Los Angeles' low-wage workers also found that 75.6 percent of undocumented workers in Los Angeles worked off the clock without pay and over 85.2 percent did not receive overtime pay.[68] A report on Chicago's undocumented immigrant population revealed that 26 percent of undocumented workers received no payment or underpayment of wages.[69] And while many of these workers reported unsafe work conditions,[70] they were significantly underrepresented in filing claims with the Occupational Safety and Health Administration (OSHA).[71] Their reasons for not reporting safety issues to OSHA included (a) the belief that OSHA would not do anything, (b) fear of employer retaliation, and (c) fear of deportation.[72] The day laborer population, of which undocumented workers make up 75 percent, also faces employment abuses.[73] Almost half of this population experiences wage theft[74] and denial of food and water while on the job.[75] Many of these workers are threatened with deportation and experience verbal and physical harassment by their employers.[76]

B. Specific Coercion

In 2008, the TVPA was amended to clarify that compelling labor through threats of any legal proceeding, whether "administrative, civil, or criminal,"[77] could

66. SHELDON X. ZHANG ET AL., THE ANNALS OF THE AMERICAN ACADEMY, ESTIMATING LABOR TRAFFICKING AMONG UNAUTHORIZED MIGRANT WORKERS IN SAN DIEGO 65 (May 2014).
67. *Id.*
68. RUTH MILKMAN ET AL., UCLA LAB. CTR., WAGE THEFT AND WORKPLACE VIOLATIONS IN LOS ANGELES: THE FAILURE OF EMPLOYMENT AND LABOR LAW FOR LOW-WAGE WORKERS 46–48 (2010), http://www.labor.ucla.edu/downloads/wage-theft-and-workplace-violations-in-los-angeles-2/.
69. Chirag Mehta et al., *Chicago's Undocumented Immigrants: An Analysis Of Wages, Working Conditions, and Economic Contributions*, U. OF ILL. AT CHI. CTR. FOR URBAN ECON. DEV. 29 (2002), http://www.urbaneconomy.org/sites/default/files/undoc_wages_working_64.pdf.
70. *Id.* at 27.
71. *Id.* at 29. *See generally* OSHA Act, 29 U.S.C. §§ 651–678 (2012).
72. Mehta, *supra* note 69, at 28.
73. ABEL VALENZUELA JR. ET AL., UCLA CTR. FOR THE STUDY OF URBAN POVERTY, ON THE CORNER: DAY LABOR IN THE UNITED STATES 17 (Jan. 2006), http://www.sscnet.ucla.edu/issr/csup/uploaded_files/Natl_DayLabor-On_the_Corner1.pdf.
74. *Id.* at 14–15.
75. *Id.*
76. *Id.* at 14–15, 22.
77. 18 U.S.C. § 1589(c)(1) (2012).

constitute a violation of forced labor. Thus, an employer's threat to deport—an administrative proceeding—as a means of coercing undocumented workers to comply with exploitive working conditions may constitute impermissible legal coercion pursuant to the TVPA.

When an employer's specific coercive threat is intended to keep workers in forced labor, the TVPA can intervene to remedy the exploitation by providing workers with immigration relief.[78] For example, in *Garcia v. Audobon*, undocumented workers hired to repair apartments damaged by Hurricane Katrina alleged that their employer forced them to work without pay by threatening to report them to law enforcement and evict them from their employer-provided housing.[79] A federal judge certified the plaintiffs for U visas finding the complaint stated a prima facie claim of involuntary servitude as defined under the TVPA.[80] The court recognized that "legal coercion was used against the Plaintiffs to continue working without pay" and that the defendants engaged in a "pattern of conduct . . . to force the plaintiff-employees to work by taking advantage of the plaintiff-employees undocumented immigration status."[81] The court also found that the plaintiffs demonstrated sufficient physical or mental suffering based on "the living conditions they were forced to endure," which included needing "to find food 'in the trash,'" and making them feel ashamed and distressed from malnourishment.[82]

An employer's threat of deportation also constitutes unlawful retaliation when made in response to a worker's complaint under employment and labor laws.[83] The

78. Immigration and Nationality Act §§ 101(a)(15)(T)–(U) (2014).

79. Complaint at 14–16, Garcia v. Audubon Cmty's Mgmt., LLC, No. 08-1291, 2008 WL 1774584 at *1 (E.D. La. Mar. 17, 2008) (noting that plaintiff's employers threatened to call law enforcement on multiple occasions, as well as to evict them from their housing).

80. Order, Garcia v Audubon Cmty.'s Mgmt., LLC, No. 08-1291, 2008 WL 1774584 at *1, (E.D. La. Apr. 14, 2008) (certifying the plaintiffs as victims of crime for U-Visa purposes, given plaintiffs had made a prima facie showing that they had been victims of involuntary servitude).

81. *Id.* at *5.

82. *Id.* at *7.

83. *See* Rivera v. NIBCO, Inc., 364 F. 3d 1057, 1064 (9th Cir. 2004) ("While documented workers face the possibility of retaliatory discharge for an assertion of their labor and civil rights, undocumented workers confront the harsher reality that, in addition to possible discharge, their employer will likely report them to the INS and they will be subjected to deportation proceedings or criminal prosecution."); Singh v. Jutla & C.D. & R's Oil, Inc., 214 F. Supp. 2d 1056, 1059–62 (N.D. Cal. 2002) (denying defendant employer's motion to dismiss after plaintiff undocumented alien employee stated a claim for retaliatory reporting under the FLSA); Contreras v. Corinthian Vigor Ins., 25 F. Supp. 2d 1053, 1055, 1060 (N.D. Cal. 1998) (denying defendant employer's motion to dismiss after plaintiff employee sought punitive damages and alleged that her employer violated FLSA by reporting her to the INS in retaliation for her claim to collect unpaid wages). *See generally* 8 U.S.C. § 1227(a)(1)(B) (making individuals who are present in the United States without lawful status deportable).

worker can receive damages for such retaliatory conduct under the FLSA and Title VII.[84] And if the worker brings a claim against his or her employer, the U.S. Department of Homeland Security (DHS) may exercise prosecutorial discretion to defer removal proceedings until the completion of the civil proceedings.[85] The removal proceedings may still be initiated at the close of the civil proceedings, however, which may prevent workers from asserting claims against their employers at the outset.

C. Structural Coercion

While immigration law permits redress for undocumented workers explicitly threatened with deportation by employers, they are left without remedy when they acquiesce to substandard working conditions under the implicit threat of immigration enforcement. The undocumented worker may be just as unwillingly bound to an exploitive employment arrangement as the trafficked worker. Yet, as with wage slavery, exploitation in the undocumented workplace persists under the illusion of consent and contract.

1. Federal Workplace Immigration Enforcement

Workplace immigration enforcement first became official federal policy in 1986 with the passage of the Immigration Reform and Control Act of 1986 (IRCA).[86] The Act intended to curb unauthorized migration by deterring employers from hiring undocumented immigrants.[87] IRCA made it unlawful for employers to knowingly hire unauthorized aliens, transferring immigration

84. *Id.*

85. Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, to All Field Office Dir.'s, Special Agents in Charge and Chief Counsel, U.S. Immigration & Customs Enforcement (June 17, 2011), *available at* http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf (discussing how ICE officers, special agents, and attorneys should use their prosecutorial discretion to prevent immigration enforcement from hampering the ability of individuals to call the police); Revised Memorandum of Understanding Between John Morton, Dir., U.S. Immigr. and Customs Enforcement, Dep't of Homeland Sec. and M. Patricia Smith, Solicitor of Labor, Dep't of Labor (Dec. 07, 2011), *available at* http://www.dol.gov/asp/media/reports/DHS-DOL-MOU.pdf.

86. Pub. L. No. 99-603, 100 Stat. 3359 (1986).

87. 8 U.S.C. § 1324a (2012). Hiring workers unauthorized to work in the United States was not illegal until IRCA passed in 1986. *See* Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 892–93 (1984); Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 147 (2002) (stating that IRCA makes "combating the employment of illegal aliens central to [t]he policy of immigration law" (quoting INS v. Nat'l Ctr. for Immigrants' Rights, Inc., 502 U.S. 183, 194 & n.8 (1991))) (internal quotation marks omitted).

enforcement functions to the workplace.[88] IRCA requires employers to screen their employees for work authorization[89] and sanctions employers who knowingly hire undocumented immigrants.[90] By designating employers as immigration enforcers, IRCA creates an implicit coercive choice for undocumented workers: comply with exploitation or object and risk deportation.[91] Almost thirty years later years later, IRCA's objectives have not been achieved. IRCA has failed to limit an increasing undocumented population, and even more disconcerting, some unscrupulous employers have misused their IRCA-conferred immigration screening power to threaten undocumented workers who refuse to comply with exploitive working conditions with deportation.[92]

The implementation of IRCA has intensified in recent years. Under the Bush Administration, ICE carried out IRCA's mandate primarily through worksite raids.[93] ICE swept workplaces populated by undocumented immigrants, enforced employment verification laws, and arrested those who failed to comply.[94] These raids led to the mass firing and deportation of unauthorized workers without regard to the exploitation they may have experienced in their work situations.[95] Those who employed the undocumented workers remained largely unaffected.[96] Even as late as 2008, when ICE expressed a commitment to

88. 8 U.S.C. § 1324(a) (2012).
89. 8 U.S.C. § 1324a(b) (2012).
90. *Id.* § 1324a(e)(4)(A) (civil fines); *id.* § 1324a(f)(1) (criminal prosecution for employers who engage in a pattern or practice of violations).
91. *See, e.g.*, Montero v. INS, 124 F.3d. 381, 385 (2nd Cir. 1997) (reasoning that "[w]hether or not an undocumented alien has been the victim of unfair labor practices, such an alien has no entitlement to be in the United States," and holding that information about immigration status from employers in violation of labor laws can form a basis for deportation). *See also* Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 HARV. C.R.–C.L. L. REV. 345, 361 (2001) ("[T]he only workers at risk of deportation for unauthorized employment are those reported by the employer in retaliation for protected organizing activities . . . ."). *See generally* Stephen Lee, *Private Immigration Screening in the Workplace*, 61 STAN. L. REV. 1103 (2009) (suggesting that by transferring immigration enforcement to the workplace, IRCA turns employers into immigration enforcers).
92. *See generally* Lee, *supra* note 91; Michael J. Wishnie, *The Border Crossed Us: Current Issues in Immigrant Labor,* 28 N.Y.U. REV. L. & SOC. CHANGE 389 (2004).
93. ICE is a division of the U.S. Department of Homeland Security (DHS) created in 2003 to conduct extensive investigations for security purposes. ICE's primary goals are to prevent illegal border activity, terrorism, and the migration and continued presence of illegal immigrants in the United States. *Who We Are,* U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, http://www.ice.gov/about (last visited July 24, 2015).
94. Kathleen Kim, *The Trafficked Worker as Private Attorney General: A Model for Enforcing the Civil Rights of Undocumented Workers*, U. CHI. LEGAL. F. 247 (2009).
95. *Id.*
96. *Id.* at 269 ("[W]orkplace raids have had the heaviest impact on the workers, rather than criminal employers: 'Although prosecutions continue, the raids have mostly affected workers, not employers.'") (footnote omitted).

targeting employers and protecting workers, less than 2.5 percent of the individuals arrested as a result of ICE work-site enforcements were employers.[97]

The current administration has continued to emphasize the importance of the workplace in its interior immigration enforcement strategy,[98] specifically by focusing on employer audits.[99] In response to criticisms of high-visibility raids and an increased ICE budget,[100] the Obama administration reduced the number of "headline-making factory raids" and replaced them with audits or "silent raids."[101] Workplace audits require ICE to conduct lengthy investigations of employers' employment records to verify the availability and authenticity of their employees' immigration status and identification documents.[102] The Administration claims that audits discourage employers from hiring undocumented immigrants they might later exploit and victimize.[103] Nonetheless, audits result in massive discharges of many undocumented workers and may increase discrimination as employers avoid hiring immigrants.[104] Furthermore, as a result of these

97. There were more than 6,000 arrests made, but only 135 of these were arrests of employers. *Fact Sheet: Worksite Enforcement Strategy*, U.S. DEP'T OF HOMELAND SECURITY (2009), http://www.ice.gov/doclib/news/library/factsheets/pdf/worksite-strategy.pdf.

98. ANDORRA BRUNO, CONG. RESEARCH SERV., R40002, IMMIGRATION-RELATED WORKSITE ENFORCEMENT: PERFORMANCE MEASURES (2013) (discussing the U.S. Immigration and Customs Enforcement's (ICE) immigration worksite enforcement priorities); Memorandum from Marcy M. Forman, Dir., Office of Investigations, ICE, on Worksite Enforcement Strategy 2 (Apr. 30, 2009), *available at* http://www.ice.gov/doclib/foia/dro_policy_memos/worksite_enforcement_strategy4_30_2009.pdf ("The criminal prosecution of employers is a priority [for] worksite enforcement . . . and interior enforcement [of immigration laws]." (footnote omitted)).

99. *See* Forman, *supra* note 98, at 2–3 (noting that the agency plans to improve its auditing program and hire more auditors); Janet Napolitano, Sec'y of the U.S. Dep't of Homeland Sec., Statement Before Senate Committee on Homeland Security and Governmental Affairs (May 3, 2011), *available at* http://www.dhs.gov/news/2011/05/03/secretary-janet-napolitano-senate-committee-homeland-security-and-governmental ("Since January 2009, ICE has audited more than 4,600 employers suspected of employing unauthorized workers, debarred more than 315 companies and individuals, and imposed approximately $59 million in financial sanctions - more than the total amount of audits and debarments during the entire previous administration.").

100. ICE's budget increased significantly from $3.3 billion in Fiscal Year 2003 (during the Bush Administration) to $5.7 billion in Fiscal Year 2010 (during the Obama Administration). HEATHER J. CLAWSON ET AL., HUMAN TRAFFICKING INTO AND WITHIN THE UNITED STATES: A REVIEW OF THE LITERATURE (Aug. 2009), *available at* http://aspe.hhs.gov/hsp/07/HumanTrafficking/LitRev.

101. Julia Preston, *Illegal Workers Swept from Jobs in "Silent Raids,"* N.Y. TIMES, July 10, 2010, at A1.

102. *Id.*

103. *Id.*

104. *Talking Points Regarding I-9 Audits*, NAT'L IMMIGR. L. CTR. (2011), http://www.nilc.org/document.html?id=356.

worksite enforcement actions, undocumented workers who might otherwise have sought redress for workplace abuses have also been detained and deported.[105]

Workplace audits have increased during the Obama administration, "quadrupl[ing] the number of employer audits" conducted under the Bush Administration.[106] In 2011, ICE conducted audits of employee files at almost 2500 companies.[107] As a result of these inspections, there were 713 criminal arrests, 221 of which were of owners, managers, or supervisors facing charges of harboring or knowingly hiring unauthorized workers, among others.[108] The remaining arrests were of workers facing charges of aggravated identity theft and Social Security fraud.[109] Although the number of worker prosecutions has decreased since the end of the Bush Administration, the pervasiveness of workplace audits reinforces the employers' power over undocumented workers—an employer can fire those workers it suspects of being unauthorized and can determine which workers to bring to the attention of ICE. Audits thus perpetuate the vulnerability of undocumented workers who may accept substandard working conditions under the threat of immigration enforcement.[110]

E-Verify is another workplace immigration enforcement tool that may lead to the mistreatment of workers. E-Verify is an electronic database verification system that allows employers to "authenticate applicable [identity] documents rather than merely visually scan them for genuineness."[111] This program was first authorized as a voluntary pilot program pursuant to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 and it has been continually

105. Immigration and Customs Enforcement, *Fact Sheet: Worksite Enforcement* (May 23, 2012), http://www.millerlawoffices.com/publications/ICE/ICE%20Fact%20Sheet%20Worksite%20Enforcement.pdf ("[Homeland Security Investigations (HSI)] will continue to administratively arrest, and subsequently process for removal, illegal workers that it encounters during worksite enforcement investigations."); Rebecca Smith, Ana Avendaño, & Julie Martinez Ortega, *ICED Out: How Immigration Enforcement Has Interfered with Worker's Rights*, NAT'L EMP'T LAW PROJECT (Oct. 2009), http://nelp.3cdn.net/75a43e6ae48f67216a_w2m6bp1ak.pdf; *Over-Raided, Under Siege: U.S. Immigration Laws and Enforcement Destroy the Rights of Immigrants*, NAT'L NETWORK FOR IMMIGRANT AND REFUGEE RIGHTS 1–46 (Jan. 2008), http://173.236.53.234/~nnirrorg/drupal/sites/default/files/undersiege_web.pdf.

106. Brian Bennett, *Republicans Want a Return to Workplace Immigration Raids*, L.A. TIMES (Jan. 27, 2011), http://articles.latimes.com/2011/jan/27/nation/la-na-immigration-raids-20110127.

107. Immigration & Customs Enforcement, *Fact Sheet: Worksite Enforcement*, MILLER LAW OFFICES (2012), http://www.millerlawoffices.com/publications/ICE/ICE%20Fact%20Sheet%20Worksite%20Enforcement.pdf.

108. *Id.*

109. *Id.*

110. Rose Arrieta, *"Silent Raids": ICE's New Tactic Quietly Wreaks Havoc on Immigrant Workers*, IN THESE TIMES (Jan. 27, 2011, 12:22 PM), http://www.inthesetimes.com/working/entry/6895/silent_raids.

111. Lozano v. City of Hazleton, 620 F.3d 170, 200 (3d Cir. 2010).

reauthorized to the present. Recent comprehensive immigration reform (CIR) legislative proposals have included provisions mandating the use of E-Verify and many immigration experts anticipate that it will be mandatory in the near future.[112] The expanded use of E-Verify reinforces the employer's role as immigration officer by raising the visibility of their "ministerial function" to check the immigration status of their employees and "to serve the ends of immigration control" by terminating workers that may be unauthorized.[113]

Critics of E-Verify point out that erroneous identifications have caused employers to fire or decline to hire foreign-born, but otherwise authorized workers.[114] While CIR plans hope to offset this consequence with additional due process protections,[115] such plans fail to address the potential unintended consequences of the program's implementation. Critics claim that the impending mandate of E-Verify will incentivize employers to strategize around E-Verify implementation by increasingly classifying workers as independent contractors rather than employees, paying workers off the books, or subcontracting with labor contractors to avoid liability for employment violations.[116]

The federal government has developed some immigration enforcement exceptions for aggrieved undocumented workers to counteract the incentives for employers to mistreat them. A recently renewed Memorandum of Understanding between the Department of Labor (DOL) and ICE prevents ICE from enforcing immigration violations in workplaces that the DOL is investigating based on worker complaints.[117] For those workers who assert complaints, these measures are an important and perhaps necessary response given the traditional civil rights framework that requires private plaintiffs to act as private attorneys general in order to hold perpetrators accountable.[118] Such a model, however, inevitably fails to protect the numerous workers who remain chilled from asserting their rights. Additionally, one scholar notes that the federal government's

112. Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013).

113. Juliet P. Stumpf, *Getting to Work: Why Nobody Cares About E-Verify (and Why They Should)*, 2 U.C. IRVINE L. REV. 381, 395 (2012). *See generally* Immigration and Nationality Act § 237(a), 8 U.S.C. § 1227(a) (2012).

114. JOSH STEHLIK ET AL., NAT'L IMMIGRATION LAW CTR., VERIFICATION NATION: HOW E-VERIFY AFFECTS AMERICA'S WORKERS 1 (Aug. 2013), www.nilc.org/document.html?id=957.

115. *Id.*

116. *Fact Sheet: E-Verify Program: Hurting Workers, Business and our Economic Recovery*, NAT'L EMP'T LAW PROJECT 2 (2011), http://nelp.org/content/uploads/2015/03/EverifyHurting WorkersBusinessandourEconomicRecovery.pdf.

117. Revised Memorandum of Understanding, *supra* note 85. *See also* Julie Braker, *Navigating the Relationship Between the DHS and the DOL: The Need for Federal Legislation to Protect Immigrant Workers' Rights*, 46 COLUM. J.L. & SOC. PROBS. 329 (2013).

118. *See generally* Kim, *supra* note 94.

increasing reliance on local authorities to enforce immigration law circumvents their efforts to protect complainant workers when local law enforcement misperceives them as "criminal aliens" and then hands them over to ICE.

Last November, the Obama administration announced the Executive Action on Immigration, which provides temporary immigration reprieve to a large subset of the undocumented population.[119] The executive action plan includes an extension of the already existing Deferred Action for Childhood Arrivals (DACA) for undocumented individuals brought to the U.S. as children and Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) for undocumented parents of citizen and LPR children.[120] These administrative measures are predicted to assist an estimated 4.4 million undocumented immigrants in the U.S. with relief from deportation and work authorization.[121] The executive's immigration action seems to acknowledge the structural constraints on undocumented workers that current immigration restrictions produce. For example, in promoting its plan, the Obama administration has stated that its benefits include increasing public safety by bringing vulnerable communities out of the shadows and permitting a large portion of the undocumented workforce to contribute more meaningfully to the economy. Yet, as administrative tools, DAPA and DACA provide only a temporary stay on deportation. Without congressional action, such measures cannot substitute the long-term stability that visas provide as a real pathway to citizenship. Moreover, twenty-six states have challenged the legality of DAPA and DACA in federal court. Judge Hanen of the Southern District of Texas issued an injunction on the implementation of the programs. The programs remain at a standstill until the Fifth Circuit issues a decision on the federal government's appeal of the injunction. If resolved in favor of the administration, the rollout of DAPA and extended DACA will be a positive advancement for those undocumented workers who are eligible. Those ineligible, however, will remain highly vulnerable to workplace exploitation, particularly when immigration policy continues to mandate immigration enforcement activities that target the workplace.

119. *Executive Actions on Immigration*, U.S. CITIZENSHIP AND IMMIGR. SERVICES, http://www.uscis.gov/immigrationaction (last updated Apr. 4, 2015).

120. *Id.*; *Frequently Asked Questions: The Obama Administration's DAPA and Expanded DACA Programs*, NAT'L IMMIGR. L. CTR., http://www.nilc.org/dapa&daca.html (last updated Mar. 13, 2015).

121. *Frequently Asked Questions*, *supra* note 120.

2. Subfederal Immigration Workplace Enforcement

Of more timely significance is the increasing involvement of state governments in the regulation of undocumented workers.[122] Federal preemption doctrine, while steadfast in cases that involve sweeping state immigration laws, is weak when it comes to state level employment regulations that resemble IRCA.[123] *Chamber of Commerce v. Whiting*[124] challenged the constitutionality of the Legal Arizona Workers Act (LAWA). LAWA supplemented IRCA's employer sanctions scheme by providing for the suspension and revocation of employers' business licenses when they knowingly hired unauthorized aliens. LAWA also required all employers in Arizona to utilize E-Verify to verify the employment eligibility of their hired employees. In response to a federal preemption challenge, the Supreme Court held that the suspension and revocation of business licenses fell within IRCA's savings clause and, therefore, was not preempted. The Court also found that mandating Arizona employers to utilize E-Verify was not preempted and did not conflict with federal law. Twenty states have mandated E-Verify for certain categories of employers, while California and Illinois have prohibited employers from using it. The acceptance of federal immigration enforcement norms into state regulation of workplaces reinforces the systemic power imbalance between undocumented workers and their employers.

3. Criminalization of Undocumented Workers

The expansive workplace immigration enforcement regime has a collateral consequence—the criminalization of undocumented workers who increasingly use the fraudulent document market to gain employment.[125] Evidence of an undocumented workers' fraud in obtaining employment may negate his or her eligibility to receive full workplace remedies. In *Hoffman Plastic Compounds, Inc. v. NLRB*,[126] the Supreme Court denied the traditional award of back pay and reinstatement to an undocumented worker who was fired in retaliation for his organizing activity.[127] Although the plaintiff's organizing activity was protected under the NLRA,[128] the Court determined that his fraudulent conduct in procuring his

122. *See infra* Part II.C.2.
123. *Compare* Chamber of Commerce v. Whiting, 131 S. Ct. 1968 (2011) *and* Arizona v. United States, 132 S. Ct. 2492 (2012). *See infra* Part II C.2.
124. 131 S. Ct. 1968.
125. BRUNO, *supra* note 98.
126. 535 U.S. 137, 140 (2002).
127. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 140 (2002).
128. *Id.* at 140–41.

job precluded a full NLRA remedy.[129] According to the Court, the immigration enforcement objectives of IRCA's employer sanctions and document fraud provisions took precedence over the NLRA.[130] Thus, while the Court maintained that the undocumented plaintiff was an employee with specific rights, it denied him the remedies to effectuate those rights.[131]

Such reasoning invokes a "comparative culpability" analysis.[132] In other words, the plaintiff's fraud in obtaining the job constituted misconduct greater than that of the employer in firing the plaintiff for his organizing activity. To take this analysis a step further, the culpability of the plaintiff also tends to show his *complicity* in the unauthorized work arrangement. The worker's affirmative conduct in acquiring the job through fraud exacerbated his illegal status, further justifying the Court's prioritization of immigration enforcement goals over labor rights.[133] This logic suggests a contract-based view of the undocumented workplace—the worker freely consented to the unlawful employment arrangement, thus nullifying his right to a full legal remedy.

This complicity framing has been raised in other post-*Hoffman* court decisions. For example in *Ambrosi v. 1085 Park Avenue LLC.*,[134] the plaintiff, an undocumented worker, alleged labor code violations and common law negligence, and sought damages including future lost wages.[135] The plaintiff had obtained the job through fraudulent means—namely, the use of a falsified Social Security card.[136] Citing *Hoffman Plastics* and IRCA's prohibition on obtaining employment using false documents, the New York district court dismissed the plaintiff's claims for future lost wages because of his status as an undocumented alien who knowingly used fraudulent documentation to obtain employment with the defendant.[137] Put differently, the worker's affirmative wrongdoing evidenced his collusion in the unlawful employment arrangement, thereby precluding him from obtaining relief.

129. *Id.* at 151.
130. *Id.* at 151–52.
131. Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 891 (1984) ("The breadth of § 2(3)'s definition is striking: the [NLRA] squarely applies to 'any employee.'").
132. Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside of the Law,* 59 DUKE L.J. 1723 (2010) (describing the Court's opinion in *Hoffman* as comparing the relative culpability of the employer versus employee). *See also* Christine N Cimini, *Undocumented Workers and Concepts of Fault: Are Courts Engaged in Legitimate Decisionmaking?*, 65 VAND. L.R. 389 (2014) (evaluating concepts of fault in cases that address disputes between undocumented workers and their employers).
133. *See id.* at 149.
134. No. 06-CV-8163, 2008 WL 4386751, at *1 (S.D.N.Y. Sept. 25, 2008).
135. *Id.*
136. *Id.* at *13–14.
137. *Id.* at *13.

Another example of the complicity framing appears in *Salas v. Sierra Chemical*,[138] a California case where the undocumented plaintiff was injured on the job.[139] When the plaintiff attempted to return to the job, his employer failed to make reasonable accommodations for his disability and refused to rehire him.[140] The plaintiff sued his employer under California's Fair Employment and Housing Act.[141] The court dismissed the case, the appeals court affirmed, and the California Supreme Court reversed in part and remanded.[142] The plaintiff had used a false social security number to obtain the employment.[143] Both the trial and appeals courts had barred the plaintiff's claim on two grounds.[144] First, the "after-acquired-evidence" doctrine prohibited his rehiring since the plaintiff had no right to be rehired given his fraudulent procurement of the job.[145] Second, the "unclean hands" doctrine prevented the plaintiff's recovery since his misrepresentation of his immigration status exposed his employer "to penalties for submitting false statements to federal agencies."[146] While the California Supreme Court held that these doctrines were not a complete defense to the plaintiff's FEHA claim, it found that those unauthorized to work may be denied back pay due to their unlawful status.

Even in the absence of overt fraudulent conduct, undocumented workers can be denied certain labor remedies simply by virtue of their unlawful status. Recently, the Second Circuit in *Palma v. NLRB*[147] found undocumented workers to be categorically barred from receiving backpay for NLRA violations even if they did not use false documents to obtain the job. In its reasoning, the Second Circuit adopted a narrow reading of *Hoffman*, concluding that the illegality of the employment relationship itself precluded backpay: "[T]he direct conflict[] between IRCA and awards of backpay is equally applicable to aliens who did not gain their jobs through such fraud."[148] Recalling language from *Hoffman,* the *Palma* court found that IRCA superceded the NLRA: "[A]n award [of] backpay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy."[149] The *Palma* court prioritized immigration

138. 59 Cal. 4th 407 (2014), *cert. denied*, 135 S. Ct. 755 (2014).
139. *Id.* at 414.
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.* at 415.
144. 129 Cal. Rptr. 3d 263, 272, 275 (Cal. Dist. Ct. App. 2011).
145. *Id.* at 270–73.
146. *Id.* at 274–75.
147. 723 F.3d 176 (2d. Cir. 2013).
148. *Id.* at 183.
149. *Id.* at 184.

enforcement over labor remedies regardless of the plaintiff's fault. In this way, the relative culpability of the employer versus the worker became irrelevant to the analysis. However, the court's decision remains consistent with a complicity framing. The worker freely entered an unlawful employment relationship, assumed its risks, and is therefore disqualified from accessing remedies for those risks.

III. UNDOCUMENTED WORKERS: BEYOND COERCION

According to free labor norms (as outlined in Part I), the systemic workplace violations and suppression of workplace rights experienced by undocumented workers (as discussed in Part II) might be regarded as coerced labor—the antithesis of free labor, which historically demanded the law's intervention. Recognizing the structural inequities between employers and wage earners that coerced wage earners to submit to exploitive employment terms, regulations entered the workplace to set minimum fair labor standards and to permit collective bargaining. In a departure from free labor ideology, labor advocates observed that coercion also operated structurally and indirectly giving the appearance of a worker's voluntariness, but in reality, undermining the worker's freedom.[150]

A theory of structural coercion in the undocumented workplace places greater emphasis on the ways in which immigration restrictions create and maintain power inequities between employers and their workers. A structural coercion analysis diverts attention away from the employer's specific conduct and the employee's possible consent and focuses instead on whether the structure of immigration laws coerced the workers into accepting exploitive work arrangements.[151] Appropriate legal interventions then might seek to rectify this power imbalance through the elimination of worksite immigration enforcement policies and practices, and the provision of broad legalization options to undocumented workers.[152] Yet currently, outside the narrow circumstances under which an

150. *See generally* KARL MARX, CAPITAL: A CRITIQUE OF POLITICAL ECONOMY 9 (Frederick Engels ed., Samuel Moore & Edward Aveling trans., Random House 1906) (1867) (describing the semblance of the worker's consent to the labor relationship, when in fact this relationship is exploitive since it is the capitalist who owns all the means of production). *See also* Nancy Holmstrom, *Exploitation*, 7 CANADIAN J. PHIL. 353, 359 (1977) ("It is the fact that the [capitalist's] income is derived through forced, unpaid, surplus [wage] labor . . . which makes [wage labor] exploitative.").

151. *See, e.g.*, Robert Mayer, *Guestworkers and Exploitation*, 67 REV. POL. 311, 318 (2005) ("In guestworker transactions, for example, host employers are able to exploit foreign labor because the host government is using its coercive power to block other options, such as permanent residency with equal rights. The guests are not forced to come by the hosts, but they are forced to choose from a constrained set of options, the best of which may result in others gaining at their expense.").

152. A number of comprehensive immigration reform proposals are now undergoing congressional consideration, including proposals from the White House and a bipartisan Senate group. While

undocumented worker might be eligible to receive a T or U visa, stable immigration relief is not provided.

The availability of T or U visas when an undocumented worker is a victim of an employer's specific coercive conduct highlights the persistence of contract principles in the undocumented workplace. Specific coercion can negate consent and invalidate the contract, while structural coercion cannot. Moreover, because aggressive workplace immigration enforcement increases the use of fraud by undocumented workers to obtain employment, their illegality heightens. Evidence of a worker's "unclean hands" in the process of acquiring work reinforces the worker's consent to exploitive employment arrangements and forecloses his or her ability to make coercion claims and receive full redress. Absent a worker's fraud, the unlawfulness of the employment relationship alone indicates the workers complicity, rendering the worker incoercible, thereby precluding relief.

Understanding the ways in which coercion permeates the undocumented workplace raises a free labor problem. The freedom from coercion vision of free labor regards free labor as both a negative and positive freedom. In the negative sense, it means a prohibition on illegitimate coerced labor. In the positive sense, it means that workers should have the ability to assert free labor rights. This requires that workers have the "power below to give employers the incentive above to ensure a supply of jobs that rise above servitude—jobs that do not entail a harsh overlordship or unwholesome conditions of work."[153] Free labor is possible only through the exercise of free labor rights: "[N]o right will assist a subordinate group unless the members of that group are actually permitted to exercise the right."[154] In the undocumented workplace, immigration workplace enforcement creates workplace harms and negates remedies for those harms, impeding free labor for undocumented workers in both negative and positive senses.

both proposals include legalization programs for the current undocumented population, both also aim to increase workplace immigration enforcement through an expansion of E-Verify and increased penalties for worker fraud in obtaining employment. The Protect our Workers From Exploitation and Retaliation Act would expand U visa relief to undocumented workers who make a "bona fide workplace claim." POWER Act, H.R. 2169, 112th Cong. (2011); POWER Act, S.1195, 112th Cong. (2011). While this bill died in Congress in 2011, it is being considered again in light of comprehensive immigration reform. *See generally* Saucedo, *supra* note 6 (proposing expanded U-Visa relief as an organizing tool for victims of labor exploitation).

153. Pope, *supra* note 32, at 1566 (quoting Pollock v. Williams, 322 U.S. 4, 18 (1944)) (internal quotation marks omitted).

154. *Id.* at 1563.

CONCLUSION

The tension between workplace rights and immigration enforcement has been a persistent reality for undocumented workers. While most workplace laws protect workers both with and without status, immigration enforcement policies and practices have been implemented in a manner that subordinates their workplace rights. This Article has suggested that the systemic coercive harms produced by this reality raise a more profound normative challenge—that is, the structural constraints of immigration restrictions on undocumented workers renders them unfree in the workplace. This Article, thus, begins the conversation around the strained relationship between the Thirteenth Amendment guarantee of free labor and workplace immigration enforcement. Future exploration of this relationship may reveal stronger normative grounding to reassess the institutional design of immigration enforcement to preserve our constitutional and moral commitments to free labor.