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## Executive Estoppel, Equitable Enforcement, and Exploited Immigrant Workers

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# Executive Estoppel, Equitable Enforcement, and Exploited Immigrant Workers

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Angela D. Morrison\*

## INTRODUCTION

Unauthorized workers in abusive workplaces have found themselves in a tug-of-war between federal agencies that seek to protect the workers under federal workplace laws on the one hand, and federal agencies that seek to prosecute or deport the workers on the other hand. Federal law contains a host of workplace protections designed to prohibit workplace abuses and to protect workers.<sup>1</sup> The protections extend not only to citizens and workers with employment authorization but also to unauthorized workers.<sup>2</sup> Moreover, Congress has recognized the vulnerability of unauthorized workers by providing, through statute, a means for exploited workers who lack federal employment authorization to obtain employment authorization and immigration status.<sup>3</sup>

Nonetheless, federal prosecutors and immigration judges in the Department of Justice (DOJ) and trial attorneys with Immigration and Customs Enforcement (ICE), a division within the Department of Homeland Security (DHS), have acted in contravention of congressional intent and other executive agencies that provide protections to exploited workers. Workers have been swept up in ICE immigration raids of abusive employers and then prosecuted or placed in removal proceedings.<sup>4</sup> Workers who have obtained law

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<sup>1</sup> See Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1 et seq. (2012); Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U.S.C. § 201 et seq. (2016). For further discussion of these statutes, see *infra* Part II. See also Kati L. Griffith, *Discovering Immigrant Law: The Constitutionality of Subfederal Immigration Regulation at Work*, 29 YALE L. & POL'Y REV. 389 (2011) (demonstrating that Congress has repeatedly intended to provide broad protections to workers through federal employment regulation); Leticia Saucedo, *A New "U": Organizing Victims and Protecting Immigrant Workers*, 42 U. RICH. L. REV. 891, 894 n.17 (2008) [hereinafter Saucedo, *A New "U"*] (describing post-*Hoffman* decisions in which federal workplace protections were extended to unauthorized workers).

<sup>2</sup> See discussion *infra* notes 77–80, 84–101 and accompanying text.

<sup>3</sup> See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified in scattered sections of 8, 18, 20, 22, 27, 28, 42, and 44 U.S.C.) [hereinafter TVPA of 2000].

<sup>4</sup> See, e.g., Rebecca Smith et al., *Iced Out: How Immigration Enforcement Has Interfered with Workers' Rights*, AFL-CIO (2009), <http://digitalcommons.ilr.cornell.edu/laborunions/29> [<https://perma.cc/SYC4-9VEV>] (describing instances in which workers reported workplace violations and then were put into removal proceedings by ICE); *Workers on the Front Lines*,

enforcement certificates that attest they are victims of crimes still have faced immigration judges and ICE trial attorneys who have denied the workers' requests to terminate proceedings, administratively close their removal cases, or continue their cases.<sup>5</sup> Still other workers who have come forward on their own to report workplace violations have been turned over for criminal prosecution or placed in removal proceedings, even though there is ongoing civil litigation with respect to their employers' workplace practices.<sup>6</sup>

Other scholars have examined the incongruity of treating workers as both victims and criminals and have proposed solutions focusing on changes in law or policy related to the inconsistent treatment. Stephen Lee has correctly identified the asymmetry in enforcement power between the Department of Labor (DOL) and ICE as a contributing factor in the DOL's failure to protect unauthorized workers.<sup>7</sup> He proposes a policy change to empower DOL to monitor ICE's workplace enforcement efforts.<sup>8</sup> Leticia Saucedo suggests amending federal criminal law and strengthening the federal law providing immigration status to certain victims of crimes.<sup>9</sup>

My proposal adds to the discussion in two ways. First, it explains the doctrinal basis for treating unauthorized workers as victims rather than perpetrators, thereby supporting proposed changes to policy and law. Second, it proposes solutions based on equitable concepts in current law—prosecutorial discretion and estoppel—for individual workers in the absence of any changes to law or policy.

This article begins by explaining and providing context about the rise in the prosecution of exploited workers in Part I. In Part II, I demonstrate that Congress manifested a clear intent to protect, not prosecute, exploited workers through four statutory schemes: Title VII of the Civil Rights Act of 1964, the Fair Labor Standards Act (FLSA), the Immigration Reform and Control Act (IRCA), and the Victims of Trafficking and Violence Protection Act of 2000. Part III addresses potential solutions for workers who find themselves caught up in ICE or DOJ prosecutions after reporting abusive workplaces.

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POWER CAMPAIGN, <http://thepoweract.org/worker-stories> [<https://perma.cc/Y9FV-P7YU>] (describing workers who have been caught up in ICE raids of abusive employers and then placed in removal proceedings).

<sup>5</sup> See, e.g., AM. IMMIGRATION LAWYERS ASS'N, INFO NET DOC. NO. 11110947, HOLDING DHS ACCOUNTABLE ON PROSECUTORIAL DISCRETION (2011) (collecting cases where ICE did not exercise prosecutorial discretion including cases where noncitizen had a law enforcement certificate, certifying eligibility for a U visa).

<sup>6</sup> See, e.g., EUNICE HYUNHYE CHO & REBECCA SMITH, NAT'L EMP'T LAW PROJECT, WORKERS RIGHTS ON ICE: HOW IMMIGRATION REFORM CAN STOP RETALIATION AND ADVANCE LABOR RIGHTS, CAL. REPORT (2013) (collecting case stories of workers who reported workplace violations under various federal employment laws and were placed in removal proceedings or criminally prosecuted).

<sup>7</sup> See Stephen Lee, *Monitoring Immigration Enforcement*, 53 ARIZ. L. REV. 1089, 1100–01 (2011).

<sup>8</sup> *Id.* at 1113–16.

<sup>9</sup> See Leticia M. Saucedo, *Immigration Enforcement Versus Employment Enforcement: The Case for Integrated Protections in the Immigrant Workplace*, 38 FORDHAM URB. L.J. 303, 317 (2010) [hereinafter Saucedo, *Immigration Enforcement Versus Employment Enforcement*].

The equitable exercise of prosecutorial discretion could help workers who have no affirmative relief under current law successfully avoid the most serious consequences of criminal prosecution or deportation. Furthermore, for workers who have received a certification from a federal agency like the DOL or the Equal Employment Opportunity Commission (EEOC) finding they are victims of qualifying criminal activity and cooperated with law enforcement in the investigation or prosecution of the crime, I outline a new type of estoppel—executive estoppel—that may prevent their continued prosecution or removal proceeding. Finally, I conclude with thoughts about how these principles can apply more broadly outside the area of immigration and workplace law.

### I. FERTILE GROUND FOR EXPLOITATION

The combination of tighter border controls, limited options for status regularization, and increased prosecutions of noncitizens for status-related crimes has left workers without work authorization increasingly vulnerable to employer exploitation. Over the last thirty years, Congress has passed increasingly tighter border controls while at the same time limiting the options for legal migration.<sup>10</sup> The past decade also has seen a precipitous rise in the federal prosecution of noncitizens for immigration status-related crimes.<sup>11</sup> Moreover, as Jennifer Chacón has noted, the way in which these crimes have been prosecuted and the narrative that has developed around them has meant that undocumented workers have been mistakenly identified as the “criminal alien.”<sup>12</sup> Gender and racial stereotypes regarding who is a victim and who is a criminal also play into the narrative.<sup>13</sup> That many work-

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<sup>10</sup> See Kathleen Kim, *The Coercion of Trafficked Workers*, 96 IOWA L. REV. 409, 415 (2011).

<sup>11</sup> Criminal immigration convictions have risen by 121% as compared to ten years ago and 1144% as compared to twenty years ago, despite a decrease in convictions over the last two years. See TRAC IMMIGRATION, *Criminal Immigration Convictions Drop 20 Percent*, TRANS-ACTIONAL RECORDS ACCESS CLEARINGHOUSE (June 12, 2015), <http://trac.syr.edu/immigration/reports/392> [<https://perma.cc/3UA2-597Y>].

<sup>12</sup> Jennifer Chacón, *Tensions and Trade-Offs: Protecting Trafficking Victims in the Era of Immigration Enforcement*, 158 U. PA. L. REV. 1609, 1628–36 (2010). Fatma E. Marouf has pointed out the inaccuracy and the problematic deployment of terms such as “criminal alien” and “illegal alien.” See Fatma E. Marouf, *Regrouping America: Immigration Policies and the Reduction of Prejudice*, 15 HARV. LATINO L. REV. 129, 155 (2012) (arguing that new policies on prosecutorial discretion may “lead to grouping those with any kind of conviction into a category called ‘criminals,’ ignoring how undocumented immigrants are uniquely vulnerable to certain kinds of criminal charges based on both their lack of legal status or their ethnicity or race”); Fatma Marouf, *No Human Being Is “Illegal,”* L.V. REV. J. (June 22, 2012), <http://www.reviewjournal.com/opinion/no-human-being-illegal> [<https://perma.cc/JA8D-CZ8Z>] (pointing out that the term “illegal alien” is inaccurate grammatically because “illegal” describes acts, not people, and is inaccurate as a legal matter since the term inaccurately assumes lack of immigration status is a criminal violation).

<sup>13</sup> See Kim, *supra* note 10, at 445 (describing the “discriminatory preferences for the ‘innocent’ victim, who also happens to be female and passive, rather than the ‘criminal’ alien, who is often male, assertive, and brown”).

ers enter into the employment relationship voluntarily and often provide the false documentation themselves leads to an inaccurate perception that both the unauthorized workers and the employer stand to gain by deliberately flouting immigration laws.<sup>14</sup> Yet, even when the employer subjects these workers to an abusive environment and the employment arrangement becomes coercive, the workplace abuses are ignored and the workers are seen “as illegal aliens first and foremost, subject to deportation.”<sup>15</sup>

The ongoing criminal and immigration prosecution of unauthorized workers also involves federal agencies with virtually unfettered discretion in decisions about whom to prosecute.<sup>16</sup> It takes place in a criminal court system in which most prosecutions end in a plea bargain.<sup>17</sup> In the immigration context, it takes place in a court system that provides truncated due process rights, assuming the noncitizen even gets an immigration hearing.<sup>18</sup> Furthermore, immigration policing remains “one of the few areas where the courts and the executive branch continue to expressly sanction the use of racial profiling.”<sup>19</sup> These conditions—the inaccurate stereotype of the “criminal alien,” the increased prosecution of immigration status crimes, and unfettered discretion—have left unauthorized workers particularly vulnerable to workplace exploitation.

Although the large-scale worksite enforcement actions of the first decade of the twenty-first century and their attendant prosecutions of workers for identity theft<sup>20</sup> and en masse criminal proceedings<sup>21</sup> have declined, there are several indications DHS has focused on prosecuting workers instead of employers.<sup>22</sup> For example, in March 2013, the type of immigration crime “showing the greatest increase in prosecutions—up twenty percent—compared to one year ago was Title 18 U.S.C Section 1028 that involves

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<sup>14</sup> See *id.*

<sup>15</sup> *Id.*

<sup>16</sup> See Ingrid V. Eagly, *Prosecuting Immigration*, 104 Nw. U. L. REV. 1281, 1291–93 (2010).

<sup>17</sup> See Rachel Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 909–11 (2009) [hereinafter Barkow I].

<sup>18</sup> See Jennifer Lee Koh, *Waiving Due Process (Goodbye): Stipulated Orders of Removal and the Crisis in Immigration Adjudication*, 91 N.C. L. REV. 475, 485–92 (2013) (providing an overview of the lack of resources and lack of due process afforded in immigration proceedings).

<sup>19</sup> Jennifer M. Chacón, *The Transformation of Immigration Federalism*, 21 WM. & MARY B. RTS. J. 577, 606 (2012).

<sup>20</sup> See, e.g., Peter R. Moyers, *Butchering Statutes: The Postville Raid and the Misinterpretation of Federal Criminal Law*, 32 SEATTLE U. L. REV. 651 (2009) (arguing that federal prosecutors incorrectly charged workers with violating the federal statute providing for the prosecution of aggravated identity theft). Moyers was proved correct in his interpretation when the Supreme Court decided *Flores-Figueroa v. United States*, 556 U.S. 646 (2009).

<sup>21</sup> See Moyers, *supra* note 20, at 675–76.

<sup>22</sup> See *Taking Action on Immigration: Strengthening Enforcement*, WHITE HOUSE, [www.whitehouse.gov/issues/immigration/strengthening-enforcement](http://www.whitehouse.gov/issues/immigration/strengthening-enforcement) [https://perma.cc/ZR7U-V86G] (last accessed Jan. 11, 2017).

'[f]raud and related activity—id documents.'"<sup>23</sup> DHS referred one hundred percent of those prosecutions.<sup>24</sup>

Moreover, ICE's webpage addressing worksite enforcement still employs terminology that demonstrates a view of unauthorized workers as criminal. In ICE's description of its efforts to target "abusive or exploitative employers," ICE argues that "[b]y uncovering such violations, ICE can send a strong deterrent message to other employers who knowingly employ *illegal aliens*."<sup>25</sup> That ICE still views such workers as "illegal" rather than individuals worthy of protection is further demonstrated by its lopsided enforcement efforts. On its website, ICE announces it "made 452 criminal arrests tied to worksite enforcement investigations."<sup>26</sup> Yet less than forty percent of those arrests—179—were of owners or management level employees.<sup>27</sup> In addressing the harm in employing unauthorized workers, ICE writes, "Illegal aliens often turn to criminal activity, including document fraud, Social Security fraud or identify theft to obtain employment. It can take years for identity theft victims to repair the damage."<sup>28</sup> Rather than addressing the harm to the workers, ICE casts unauthorized workers as criminals. To the extent that ICE talks about harms to the community, it argues that innocent businesses are the real victims of exploitative employers: "Responsible employers who conduct their business lawfully are put at an unfair disadvantage when they try to compete with unscrupulous businesses. The unscrupulous businesses may gain a competitive edge by not paying their unauthorized workers prevailing wages and benefits."<sup>29</sup>

Indeed, Saucedo has explained the impact of workplace-focused enforcement efforts on individual workers: "ICE acknowledges it will continue to enforce removals of workers caught up in their investigations of employer violations. Even though the [Obama administration] portrays deportations as incidental consequences of its focus on employers, thousands of workers have been affected."<sup>30</sup>

And there is reason to believe that more workers will be affected with the recent change in administration. Throughout his 2016 presidential campaign, Donald Trump vowed to deport millions of unauthorized immi-

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<sup>23</sup> TRAC IMMIGRATION, *Immigration Prosecutions for March 2013*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (May 9, 2013), <http://trac.syr.edu/tracreports/bulletins/immigration/monthlymar13/fil/> [<https://perma.cc/Q93F-CCRY>].

<sup>24</sup> *Id.*

<sup>25</sup> *Worksite Enforcement*, U.S. IMMIGR. & CUSTOMS ENF'T, [www.ice.gov/worksite/](http://www.ice.gov/worksite/) [<https://perma.cc/UP2E-4YHQ>] (emphasis added).

<sup>26</sup> *Fact Sheet: Worksite Enforcement*, IMMIGR. & CUSTOMS ENF'T (April 1, 2013), <https://www.ice.gov/factsheets/worksite> [<https://perma.cc/AM5Y-GKYS>].

<sup>27</sup> *See id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Saucedo, *Immigration Enforcement Versus Employment Enforcement*, *supra* note 9, at 308.

grants.<sup>31</sup> Two of the ten points in Trump's immigration plan focus on reducing the number of unauthorized *and authorized* immigrant workers in the United States.<sup>32</sup> Trump also plans to "immediately terminate President Obama's" deferred action for childhood arrivals (DACA) and the currently enjoined deferred action for parents of Americans and legal residents programs (DAPA).<sup>33</sup> Once Trump terminates those programs, the over 1.2 million individuals who currently have work authorization due to DACA<sup>34</sup> will be stripped of their ability to work with authorization. That leaves many more workers at risk of removal due to investigations into employer violations of federal immigration law.

When federal prosecutors within the DOJ and DHS seek to prosecute or deport workers who come forward to report employers for violating federal workplace laws, they exhibit a similar failure to recognize the worker as a victim of exploitation. The result has been the criminal prosecution of unauthorized workers for offenses such as identity theft, false use of a social security number, and other document fraud offenses based on the workers' use of false documents to obtain employment.<sup>35</sup>

To illustrate the impact workforce-based immigration enforcement has on individual workers' ability to enforce their workplace rights, imagine two different workplace scenarios involving unauthorized workers. In the first, imagine a chicken-processing plant in Iowa. The work is dangerous, dirty, and does not require specialized skills to complete. To maintain adequate profit margins, the company pays the lowest possible wages to its workers and does not provide many benefits. Over the years, the company has hired monolingual Spanish speakers from a particular region in Guatemala to work on the kill floor. The company's human resources department does not inquire too closely into the workers' immigration status beyond collecting the documents the employer must verify for the required DHS form. Nonetheless, it is common knowledge throughout the company that almost all of

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<sup>31</sup> Amy B. Wang, *Donald Trump Plans to Immediately Deport 2 Million to 3 Million Undocumented Immigrants*, WASH. POST (Nov. 14, 2016), [https://www.washingtonpost.com/news/the-fix/wp/2016/11/13/donald-trump-plans-to-immediately-deport-2-to-3-million-undocumented-immigrants/?utm\\_term=.3e95a3d490d7](https://www.washingtonpost.com/news/the-fix/wp/2016/11/13/donald-trump-plans-to-immediately-deport-2-to-3-million-undocumented-immigrants/?utm_term=.3e95a3d490d7) [https://perma.cc/4Q7W-P33Q].

<sup>32</sup> The 10 Point Plan includes the following points: "Turn off the jobs and benefits magnet. Many immigrants come to the U.S. illegally in search of jobs, even though federal law prohibits the employment of illegal immigrants. . . . Reform legal immigration to serve the best interests of America and its workers, keeping immigration levels within historic norms." *Immigration*, TRUMP/PENCE, <https://www.donaldjtrump.com/policies/immigration> [https://perma.cc/REU7-88PE].

<sup>33</sup> *Id.*

<sup>34</sup> U.S. CITIZENSHIP & IMMIGRATION SERVS., NUMBER OF I-821D, CONSIDERATION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS BY FISCAL YEAR, QUARTER, INTAKE, BIOMETRICS AND CASE STATUS: 2012-2016 (JUN. 30) (Sep. 13, 2016), [https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca\\_performancedata\\_fy2016\\_qtr3.pdf](https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca_performancedata_fy2016_qtr3.pdf) [https://perma.cc/2UR9-WSGY].

<sup>35</sup> Saucedo, *Immigration Enforcement Versus Employment Enforcement*, *supra* note 9, at 308–09.

the Guatemalan workers are, in fact, working without any sort of immigration authorization.

Although the workers labor for ten to twelve hours a day, the employer pays them for only eight hours. When one of the workers complains to human resources about the underpayment, the human resources manager tells him, “If you report this to anyone, they will have to ask you about your immigration papers. That might cause some problems for you, and you could end up getting deported.” Word quickly spreads throughout the plant that anyone who reports the wage theft to government authorities will get deported. Finally, one worker, Gustavo, musters up his courage and files a complaint with the DOL and a suit against the employer for violating the Fair Labor Standards Act. Once the employer finds out about the suit, the employer calls ICE and reports that Gustavo is currently working without authorization. ICE arrests Gustavo and places him in removal proceedings.

A second type of scenario can arise in which a worker receives an initial certification from one federal agency that she qualifies for a visa based on being the victim of a workplace crime but is criminally prosecuted by DOJ or put in removal proceedings by ICE because she obtained work using false identification documents.<sup>36</sup>

A typical scenario could play out like this: Ulu works in a restaurant as a server, is unauthorized, and used fraudulent documents to obtain work. One of the supervisors at the restaurant begins to sexually harass the female workers. He propositions them repeatedly and calls them demeaning names. The supervisor forces some of the women, including Ulu, to go into an office with him and he rapes them.<sup>37</sup> After each rape, the supervisor threatens the women and tells them that if any of them reports him, “you will be thrown in jail for being illegal.” Ulu becomes part of an EEOC investigation into a Title VII hostile work environment at the restaurant. Because of the rape and Ulu’s cooperation with the investigation, the EEOC certifies her as a victim of a qualifying workplace crime which certification she submits to USCIS to obtain a U visa.<sup>38</sup> Before her U visa is processed by USCIS, the

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<sup>36</sup> See *id.* (describing federal criminal prosecutions of workers for identity theft and other status offenses after a workplace raid or reporting a workplace violation).

<sup>37</sup> See, e.g., *Rape on the Night Shift* (PBS Frontline 2015) (documenting sexual assaults of female, immigrant custodial workers by shift supervisors).

<sup>38</sup> Victims of certain crimes who lack immigration status may apply for a visa that allows them to live and work in the United States for a period of four years. Immigration and Nationality Act (INA) § 101(a)(15)(U), 8 U.S.C. § 1101(a)(15)(U) (2012 & Supp. I 2014). Among the list of qualifying crimes are crimes which may occur in the workplace such as “rape; . . . trafficking; . . . sexual assault; abusive sexual contact; . . . sexual exploitation; . . . peonage; involuntary servitude; . . . unlawful criminal restraint; . . . felonious assault; . . . obstruction of justice; . . . fraud in foreign labor contracting . . .” § 101(a)(U)(iii), § 1101(a)(U)(iii) (Supp. 2013–14). A law enforcement agency must certify that the noncitizen was a victim of the crime, “has been helpful, is being helpful, or is likely to be helpful . . . [to the agency] investigating or prosecuting” the crime. § 101(a)(U)(i)(III), § 1101(a)(U)(i)(III) (2012). The regulations define “certifying agencies” and specifically include the EEOC and the DOL. 8 C.F.R. § 214.14(a)(2) (2016). One of the most important benefits of the U visa is that it allows



employer reports Ulu to ICE for document fraud. In turn, ICE refers Ulu to DOJ for prosecution.

Thus, Gustavo and Ulu are both victims of workplace exploitation and criminal or immigration defendants. Someone like Ulu who was raped in the workplace could apply for a U visa; someone like Gustavo would not qualify because he suffered mere wage theft. Even workers like Ulu, who qualify for immigration relief, are still subject to removal for being unauthorized or subject to criminal prosecution for using fraudulent identity documents.<sup>39</sup> Gustavo has no path to lawful immigration status while Ulu is on her way but faces barriers due to her prosecution. Because congressional intent is to protect, not prosecute, workers like Gustavo and Ulu, both should be able to draw on equitable concepts for protection from the harshest consequences of prosecution.

## II. CONGRESSIONAL INTENT TO PROTECT, NOT PROSECUTE, EXPLOITED WORKERS

Congress has expressed a clear intent to protect, not prosecute, victims of workplace abuses. Four statutory schemes express this intent: the federal anti-discrimination statutes as exemplified in Title VII of the Civil Rights Act of 1964,<sup>40</sup> the Fair Labor Standards Act (FLSA),<sup>41</sup> the Immigration Reform and Control Act (IRCA),<sup>42</sup> and the Victims of Trafficking and Violence Protection Act of 2000 (TVPA).<sup>43</sup> Together these acts protect victims of workplace abuses and illustrate congressional intent to protect those workers in three ways. First, Congress intended to hold employers accountable for violations of federal workplace laws. Second, to ensure employer accountability, Congress intended to encourage employees who have suffered abuses to come forward and report their employers. Finally, while IRCA by itself may suggest that Congress intended that unauthorized workers ultimately be deported, as discussed below, through the subsequent passage of the TVPA

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a noncitizen to adjust her status to that of permanent legal resident after three years. INA § 245(m)(1)(A), 8 U.S.C. § 1255(m)(1)(A) (2012).

<sup>39</sup> See *infra* Part II.D.

<sup>40</sup> See, e.g., *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 183 (2009) (Stevens, J., dissenting) (disagreeing with majority decision and noting the Court has “long recognized that our interpretations of Title VII’s language apply ‘with equal force in the context of age discrimination, for the substantive provisions of the ADEA, were derived *in haec verba* from Title VII” (quoting *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985))); *Carparts Distrib. Ctr. v. Automotive Wholesaler’s Ass’n*, 37 F.3d 12, 16 (1st Cir. 1994) (noting that the court looks to Title VII for guidance in interpreting the ADA); *Krouse v. American Sterilizer Co.*, 984 F. Supp. 891, 913 n.17 (W.D. Pa. 1996) (noting that because of the similarities in the definition of “employer” in the ADA, ADEA, and Title VII, case law interpreting any of those statutes is relevant); *West v. Russell Corp.*, 868 F. Supp. 313, 317 (M.D. Ala. 1994) (applying a Title VII framework to analyze an ADA claim of discrimination).

<sup>41</sup> Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U.S.C. §§ 201–62 (2012).

<sup>42</sup> Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.) (2012).

<sup>43</sup> TVPA of 2000.

and related legislation, Congress intended to protect workers who have suffered egregious workplace abuses from deportation.

However, the prosecution of workers who have reported violations of workplace protections undermines these congressional purposes. It discourages employees from coming forward, it incentivizes employers to create exploitable workforces so they can evade liability under federal labor and employment laws, and it puts obstacles in the path of workers who could regularize their immigration status.

*A. Congress Intended to Hold Employers Accountable for Violations of Federal Workplace Laws*

Both Title VII and the FLSA hold employers accountable by allowing victims of discrimination, wage theft, or retaliation to bring civil suits against their employers.<sup>44</sup> Title VII prohibits employers from failing to hire an applicant, discharging an employee, or discriminating against an employee with respect to the terms, pay, or conditions of employment because of the applicant or employee's race, color, religion, sex, or national origin.<sup>45</sup> The FLSA requires that employers pay a minimum wage to employees,<sup>46</sup> prohibits employers from paying different wages based on sex,<sup>47</sup> and limits the number of hours employers can require employees to work during the week without overtime pay.<sup>48</sup> Both statutory schemes include a range of remedies with the specific goals of deterring employers from violating workers' rights and holding employers accountable when they discriminate or engage in wage theft.<sup>49</sup>

Courts have explained that Title VII depends primarily on individual workers to judicially enforce it.<sup>50</sup> Section 706 of Title VII authorizes individuals to bring a suit alleging unlawful discrimination.<sup>51</sup> Indeed, the Court regularly has noted that Congress counted on individual workers to enforce Title VII's provisions as private attorneys general to not only vindicate their

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<sup>44</sup> See 42 U.S.C. § 2000e-5(f)(1) (2012) (providing for a private right of action for employment discrimination); 29 U.S.C. § 216(b) (2012) (providing for a private right of action under the FLSA).

<sup>45</sup> See 42 U.S.C. § 2000e-2(a).

<sup>46</sup> See 29 U.S.C.A. § 206 (West 2016).

<sup>47</sup> See *id.*

<sup>48</sup> See *id.* § 207 (Westlaw) (also containing prohibitions on child labor); 29 U.S.C.A. § 212 (West 2016).

<sup>49</sup> See Civil Rights Act of 1991, 42 U.S.C.A. § 1981a (West 2016) (explaining Title VII remedies); 29 U.S.C.A. § 216(b) (Westlaw) (explaining FLSA remedies).

<sup>50</sup> See, e.g., *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1067 (9th Cir. 2004) (citing *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 63 (1980); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 45 (1974)).

<sup>51</sup> See Civil Rights Act of 1964, Title VII, § 706(f)(1), *amended by* 42 U.S.C. § 2000e-5(f)(1) (2012).

own injuries “but also [to] vindicate[ ] the important congressional policy against discriminatory employment practices.”<sup>52</sup>

The remedies those private attorneys general may seek add teeth to the enforcement scheme and demonstrate congressional desire to hold employers accountable. Initially, Title VII allowed plaintiffs to recover only equitable remedies such as back pay and injunctive relief.<sup>53</sup> Nonetheless, Congress intended these remedies to allow courts to fashion relief that would make victims whole and hold employers accountable:

The provisions of this subsection [706(g)—addressing relief] are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible . . . . [T]he scope of relief . . . is intended to make the victims of unlawful discrimination whole, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been if not for the unlawful discrimination.<sup>54</sup>

Through the Civil Rights Act of 1991,<sup>55</sup> Congress amended Title VII’s remedial provisions and provided a means for litigants to recover not only equitable remedies but also compensatory and punitive damages.<sup>56</sup> The Act contained limitations on the amount of compensatory and punitive damages that each claimant may recover, which ranges from fifty thousand to three hundred thousand dollars, depending on the size of the employer.<sup>57</sup> Impor-

<sup>52</sup> *Alexander*, 415 U.S. at 45. See generally Charlotte S. Alexander, *Anticipatory Retaliation, Threats, and the Silencing of the Brown Collar Workforce*, 50 AM. BUS. L.J. 779, 782–85 (2013) [hereinafter Alexander, *Anticipatory Retaliation*].

<sup>53</sup> See Civil Rights Act of 1964, Pub. L. No. 88-352, § 706, 78 Stat. 241, 259.

<sup>54</sup> Equal Employment Opportunities Act of 1972, Pub. L. No. 92-261, 118 CONG. REC. 7539, 7565 (1972).

<sup>55</sup> See Civil Rights Act of 1991, 42 U.S.C.A. § 1981a (West 2012). The Act provides for recovery by complaining individuals for intentional discrimination:

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act, and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed under subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

42 U.S.C.A. § 1981a(a)(1).

<sup>56</sup> See 42 U.S.C.A. § 1981a(a)(1). Compensatory damages include “future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life and other nonpecuniary losses.” 42 U.S.C. § 1981a(b)(3).

<sup>57</sup> See *id.* § 1981a(b)(3)(A)–(D) (limiting damages to \$50,000 for employers with more than fourteen but fewer than 101 employees, \$100,000 for employers who have more than 100 but fewer than 201 employees, \$200,000 for employers who have more than 200 but fewer than 501 employees, and \$300,000 for employers who have more than 500 employees).

tantly, because litigants could now seek non-equitable remedies, the Act also provided for a jury trial.<sup>58</sup>

One of the main goals of Congress in passing the Civil Rights Act of 1991 was to expand the remedies available to victims of intentional discrimination. In enacting the Civil Rights Act of 1991, Congress made findings regarding the reasons underlying the Act:

The Congress finds that—

(1) additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace; . . . and

(3) legislation is necessary to provide additional protections against unlawful discrimination in employment.<sup>59</sup>

It also listed the need for additional remedies as one of the purposes for the Act:

The purposes of this Act are—

(1) to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace; . . . and

(4) to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.<sup>60</sup>

These findings and purposes show that the Civil Rights Act of 1991 was meant to provide more remedies to victims of discrimination and expand the coverage of Title VII. Furthermore, as the Ninth Circuit has noted, the remedies were “designed to punish employers who engage in unlawful discriminatory acts, and to deter future discrimination both by the defendant and by all other employers.”<sup>61</sup> The protections apply not only to citizen workers, but, as discussed below, also to noncitizen workers.

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<sup>58</sup> “If a complaining party seeks compensatory or punitive damages under this section— (1) any party may demand a trial by jury; and (2) the court shall not inform the jury of the limitation described in subsection (b)(3) of this section.” *Id.* § 1981a(c). When Congress amended Title VII in 1972, Senator Ervin of North Carolina proposed an amendment that would have provided for jury trial even though only equitable remedies were available at the time: “Upon demand of any party, the issues of fact arising in any civil action brought under the provisions of this Act or the provisions of Title VII of the Civil Rights Act of 1964 shall be determined by a jury.” 118 CONG. REC. 4829, 4919 (1972).

The amendment failed. 118 CONG. REC. at 4920 (fifty-six against, thirty for, and fourteen abstentions). Senator Ervin’s stated purpose in proposing the amendment was “to make certain that litigants who are summoned under this act to the Federal courts shall have the right to demand a trial by jury on the issues of fact, and to make certain that there shall be citizen participation in the enforcement of the provisions of this bill.” 118 CONG. REC. at 4920.

<sup>59</sup> Civil Rights Act of 1991, Pub. L. No. 102–166, § 105 Stat. 1071, sec. 2.

<sup>60</sup> *Id.* at sec. 3.

<sup>61</sup> *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1067 (9th Cir. 2004).

The FLSA also relies on workers for its effective enforcement.<sup>62</sup> Section 216 of the FLSA provides that “[a]n action to recover the liability prescribed in [the Act] may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.”<sup>63</sup> It too provides strong remedial relief.<sup>64</sup> Accordingly, Congress designed Title VII and FLSA enforcement schemes that created private attorneys general who could seek broad remedies in order to hold employers accountable.

IRCA likewise focuses on employer accountability.<sup>65</sup> IRCA, similar to Title VII and the FLSA, allows individual suits for violations of its retaliation and discrimination provisions.<sup>66</sup> And, while individuals cannot sue employers who hire unauthorized employees, the DOJ can seek both criminal and civil penalties against such employers.<sup>67</sup> IRCA prohibits employers from hiring unauthorized workers,<sup>68</sup> makes it unlawful for employers to discriminate against authorized workers on the basis of national origin and citizenship status,<sup>69</sup> and proscribes employers from engaging in document discrimination.<sup>70</sup> It also contains retaliation provisions.<sup>71</sup> IRCA’s provisions, however, should not be read as an invitation for employers to exploit unauthorized workers.<sup>72</sup> Instead, IRCA stands for the proposition that Congress intended to hold employers accountable. Allowing employers to get around the accountability by deporting their way out of the problem undermines that accountability.

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<sup>62</sup> See *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1333–34 (2011). See generally Alexander, *Anticipatory Retaliation*, *supra* note 52, at 782–85.

<sup>63</sup> 29 U.S.C. § 216(b) (2012).

<sup>64</sup> See *id.* (providing for legal damages for the recovery of employees’ “unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages” for violations of the FLSA’s wage and hour provisions, and providing for “legal or equitable relief . . . including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages” for violations of the anti-retaliation provision of the FLSA).

<sup>65</sup> Immigration Reform and Control Act, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

<sup>66</sup> See INA § 274B, 8 U.S.C. § 1324b (2012).

<sup>67</sup> See INA § 274A, 8 U.S.C. § 1324a.

<sup>68</sup> See *id.*

<sup>69</sup> See INA § 274B(a)(1), 8 U.S.C. § 1324b(a)(1).

<sup>70</sup> See INA § 274B(a)(6), 8 U.S.C. § 1324b(a)(6) (explaining that an employer’s “request . . . for more or different documents than are required under [8 U.S.C. § 1324a] or refusing to honor documents tendered that on their face reasonably appear to be genuine shall be treated as an unfair immigration-related practice if made for the purpose or with the intent of discriminating against an individual [on the basis of their national origin]”).

<sup>71</sup> See INA § 274B, 8 U.S.C. § 1324b. IRCA prohibits discrimination on the basis of national origin and citizenship status, bars retaliation and intimidation against employees who file a complaint, and proscribes employers from requesting different documentation or documentation beyond that required under IRCA. See INA § 274B(a)(1), (5), (6), 8 U.S.C. § 1324b(a)(1), (5), (6).

<sup>72</sup> See *infra* notes 84–101 and accompanying text.

Congress intended IRCA to “control illegal immigration to the U.S.”<sup>73</sup> One of the primary ways that Congress chose to do so was through employment provisions that sought to diminish employment as a “magnet that attracts aliens here illegally.”<sup>74</sup> IRCA imposes civil and criminal penalties on employers who “knowingly” hire workers who lack employment authorization.<sup>75</sup> Employers who violate IRCA’s provisions are subject to civil and even criminal penalties.<sup>76</sup> Thus, just as Congress did with Title VII and the FLSA, Congress designed an enforcement scheme in IRCA that focuses on employer accountability.

Similarly, while not making it unlawful for employees to work without authorization, IRCA includes provisions imposing civil fines, immigration-related consequences like removal, or criminal penalties on individuals who use fraudulent documentation to obtain work.<sup>77</sup> Also, unauthorized workers are not defined as “protected individuals” under the Act and may not seek recourse under IRCA’s anti-retaliation and anti-discrimination provisions.<sup>78</sup> The Supreme Court in *Hoffman Plastic Compounds, Inc. v. NLRB* emphasized these two provisions in determining that an unauthorized worker who committed document fraud to obtain employment could not avail himself of back pay under the National Labor Relations Act.<sup>79</sup>

At first glance, the Court’s decision seems to undermine an argument of strong congressional intent to hold employers accountable for workplace violations of Title VII or the FLSA when the victim is an unauthorized immigrant. Nonetheless, there are several reasons to believe that Congress still intended to hold employers accountable. First, the House Committee Report

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<sup>73</sup> H.R. REP. NO. 99-682, pt. I, at 45 (1986).

<sup>74</sup> *Id.* at 46.

<sup>75</sup> INA § 274A, 8 U.S.C. § 1324a. To ensure that employers do not “knowing[ly]” hire unauthorized workers, IRCA has an employment verification system that requires employers to check the employee’s government-issued identity documents to verify the employee’s authorized status. *See* INA § 274A(b), 8 U.S.C. § 1324a(b).

<sup>76</sup> Among the penalties for employers who “knowing[ly]” hire unauthorized workers are: (1) civil penalties ranging from up to two thousand dollars for a first time violation to up to ten thousand dollars for three or more violations, and (2) criminal penalties ranging from a fine of up to three thousand dollars per unauthorized worker to a misdemeanor conviction carrying six months in jail for “a pattern or practice of violations.” INA § 274A(e)–(g), 8 U.S.C. § 1324a(e)–(g). Employers who engage in document discrimination, retaliation, or national origin discrimination are subject to fines, INA § 274B(g)(2), 8 U.S.C. § 1324b(g)(2), and an award of attorney’s fees, INA § 274B(h), 8 U.S.C. § 1324b(h). Because IRCA only protects authorized workers, as discussed *infra*, IRCA’s remedies for retaliation and discrimination do not evince the same congressional intent to provide broad protection as those of Title VII and the FLSA.

<sup>77</sup> *See* INA § 274C, 8 U.S.C. § 1324c. Under IRCA, it is a federal crime for a person to use an identification document that she knows is false to obtain employment, or to falsely attest that she is authorized to work in the United States. 18 U.S.C. § 1546(b). The criminal penalties include up to five years in prison. 18 U.S.C. § 1546(b).

<sup>78</sup> INA § 274B(a)(3), 8 U.S.C. § 1324b(a)(3). IRCA includes the following within the definition of protected individuals: a citizen or national of the United States, a nonimmigrant with work authorization, refugees/asylees, and legal permanent residents, unless they failed to apply for naturalization within six months of being eligible or applied on a timely basis but have not been naturalized within two years after the date of application. *See id.*

<sup>79</sup> 535 U.S. 137 (2002).

on IRCA stated the committee did not intend for IRCA to undermine protections under existing workplace laws:

It is not the intention of the Committee that the employer sanctions provisions of the bill be used to undermine or diminish in any way labor protections in existing law, or to limit the powers of federal or state labor relations boards, labor standards agencies, or labor arbitrators to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by existing law.<sup>80</sup>

Two other aspects of IRCA's legislative history also demonstrate congressional intent to hold employers accountable for violations of workplace laws, even when the worker is unauthorized.<sup>81</sup> First, when Congress enacted IRCA, it also increased funding of the DOL's Wage and Hour Division for additional enforcement of the FLSA's overtime regulations.<sup>82</sup> By strengthening enforcement of the FLSA while at the same time creating penalties for hiring unauthorized workers, Congress sent a message to employers to "pay the price either through IRCA penalties or wage enforcement actions brought on behalf of unauthorized workers."<sup>83</sup>

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<sup>80</sup> H.R. REP. NO. 99-682, pt. I, at 58 (1986).

<sup>81</sup> See, e.g., Christine N. Cimini, *Undocumented Workers and Concepts of Fault: Are Courts Engaged in Legitimate Decisionmaking?*, 65 VAND. L. REV. 389, 398–99 (2012); Keith Cunningham-Parmeter, *Redefining the Rights of Undocumented Workers*, 58 AM. U. L. REV. 1361, 1374–75 (2009) (discussing the legislative history of IRCA).

<sup>82</sup> Cunningham-Parmeter, *supra* note 81, at 1374–75 (citing IRCA, Pub. L. No. 99-603, § 111(d)).

<sup>83</sup> *Id.* at 1375. In his critique of Cunningham-Parmeter's view that limiting the remedial rights of unauthorized workers will harm the workers, Eric Posner reinforces this point (i.e., that the message Congress sent to employers through IRCA and the FLSA amendments was to comply or face civil and criminal penalties). Eric A. Posner, *The Institutional Structure of Immigration Law*, 80 U. CHI. L. REV. 289, 309 (2013). Posner correctly asserts that "employers do not share the government's interests in excluding foreign workers, and still less the government's interest in workplace safety. Delegation to employers thus inevitably leads to perverse outcomes unless the government modifies employers' incentives." *Id.* However, Posner's argument that recognizing labor and other workplace rights for unauthorized workers is not necessarily the solution to the problem ignores the underlying policies of federal workplace laws and IRCA. As he notes, increasing workplace protections would make unauthorized workers less appealing to employers because employing them would cost more and encourage "whistle-blowing or facilitat[e] unionization," which would result in reduced employer demand for unauthorized workers, thereby harming the workers and U.S. consumers. *Id.* at 309–10. This is problematic, he concludes, because it is "in tension with the traditional illegal immigration system, which provides work and potentially a path to citizenship to unskilled foreign workers with no attachment to this country." *Id.* at 310.

The observation that U.S. immigration policy has historically favored looking the other way when it comes to unauthorized workers in order to reap economic benefits is not inaccurate. See, e.g., HIROSHI MOTOMURA, *IMMIGRATION OUTSIDE THE LAW* 31 (2014) (noting that "the US [sic] economy has long had a nearly insatiable desire for a flexible, pliant, and inexpensive labor force supplied by immigration, including unauthorized migrants"). Posner's conclusion fails, however, to recognize the purpose of IRCA, which was to deter employers from employing unauthorized workers. It was precisely the draw of an exploitable workforce for employers that the statutory scheme sought to interrupt. Moreover, as discussed in this section, it ignores the relationship between IRCA and the federal workplace laws.

Second, when Congress enacted IRCA's anti-discrimination provisions it implicitly endorsed the notion that Title VII's protections extend to unauthorized workers. Congress expressed concern that IRCA's other provisions would mean that employers would discriminate against employees who were "foreign-looking" or "foreign-sounding" and so included anti-retaliation and anti-discrimination provisions.<sup>84</sup> Significantly, although Congress chose not to include unauthorized workers within IRCA's protections,<sup>85</sup> it has done nothing to exclude such workers from Title VII. Furthermore, IRCA states it has "no effect on EEOC authority."<sup>86</sup> Accordingly, Congress impliedly did not intend for IRCA to diminish Title VII's protections.<sup>87</sup>

Besides IRCA's legislative history, the *Hoffman* decision itself and post-*Hoffman* decisions similarly demonstrate that Congress wanted employers held accountable when they violate the workplace rights of unauthorized workers. The *Hoffman* Court made clear that IRCA did not erase the employer accountability embodied in the National Labor Relations Act (NLRA). The Court noted that even though an unauthorized employee could not seek back pay as a remedy that "does not mean that the employer gets off scot-free [for violating labor laws]."<sup>88</sup>

As Keith Cunningham-Parmeter suggests, "*Hoffman* is less concerned with how remedial limitations harm unauthorized immigrants than with the damage done to the workplace protection at issue."<sup>89</sup> He concludes extending *Hoffman*'s bar on back pay for unauthorized workers would gut both the anti-discrimination intent of Title VII and the wage protections of the FLSA.<sup>90</sup> Because the remedial scheme of Title VII is so important to effectively deterring employers from discriminating against employees and a ban on back pay would leave "unauthorized workers with no viable remedy in most Title VII cases," reading IRCA to prohibit back pay to unauthorized workers asserting a Title VII claim would undermine Title VII's enforcement goal.<sup>91</sup> Indeed, unauthorized workers may still assert claims under Title VII

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<sup>84</sup> Cunningham-Parmeter, *supra* note 81, at 1375 (quoting U.S. GEN. ACCOUNTING OFFICE, REPORT TO THE CONGRESS, GAO/GGD-90-62, IMMIGRATION REFORM: EMPLOYER SANCTIONS AND THE QUESTION OF DISCRIMINATION 41-42 (1990)); *see also* Griffith, *supra* note 1, at 418.

<sup>85</sup> Cunningham-Parmeter, *supra* note 81, at 1375.

<sup>86</sup> *Id.* at 1376 (quoting 8 U.S.C. § 1324b (2006)).

<sup>87</sup> *See id.* at 1375-78.

<sup>88</sup> *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 152 (2002).

<sup>89</sup> Cunningham-Parmeter, *supra* note 81, at 1386.

<sup>90</sup> *See id.* at 1379-90, *see also* discussion *infra* Part II.B.

<sup>91</sup> Cunningham-Parmeter, *supra* note 81, at 1380-86. After *Hoffman*, the EEOC rescinded prior guidance that had explicitly stated unauthorized workers were entitled to back pay under Title VII. *See* EEOC, DIRECTIVE 915.002, RESCISSION OF ENFORCEMENT GUIDANCE ON REMEDIES AVAILABLE TO UNDOCUMENTED WORKERS UNDER FEDERAL EMPLOYMENT DISCRIMINATION LAWS (2002), <https://www.eeoc.gov/policy/docs/undoc-rescind.html> [https://perma.cc/9Q2S-773F]. The directive takes no position on whether such workers post-*Hoffman* may claim back pay but states the EEOC's commitment "vigorously to pursue charges filed by any worker covered by the federal employment discrimination laws, including charges brought by undocumented workers," and to "seek appropriate relief consistent with the Supreme Court's ruling in *Hoffman*. Enforcing the law to protect vulnerable workers, particularly low income and immigrant workers, remains a priority for EEOC." *Id.* The DOL has taken a similar posi-



and most courts have determined they may seek the full range of Title VII's remedies.<sup>92</sup>

Likewise, IRCA does not mean that FLSA remedies are unavailable to unauthorized workers. The FLSA, like Title VII, depends on its remedial scheme to achieve its substantive purpose.<sup>93</sup> As a result, denying workers remedy under the statute would “undermine the statute’s ability to attain its stated purpose.”<sup>94</sup> Congressional intent to provide strong remedies to all workers, even unauthorized workers, who are the victims of wage and hour theft, is also demonstrated by the non-discretionary nature of back pay awards under the FLSA, which unlike back pay in Title VII and the NLRA are mandatory.<sup>95</sup> Courts have found that unauthorized workers who bring FLSA claims are entitled to the Act’s full range of remedies because to do otherwise would reward the employer’s illegal conduct.<sup>96</sup> In *Lucas v. Jerusalem Café, LLC*, a jury found in favor of a group of unauthorized workers, affirming that the employer had violated the FLSA, and the district court awarded the workers actual damages for unpaid wages, liquidated damages, legal fees, and expenses.<sup>97</sup> The Eighth Circuit, in upholding the damages award, reasoned that despite the workers’ unauthorized status, the employers still had to comply with federal employment law.<sup>98</sup> The court also considered the impact of *Hoffman* on the workers’ ability to recover damages and agreed with the Eleventh Circuit that “IRCA does not express Congress’ clear and manifest intent to exclude undocumented aliens from the protection of the FLSA.”<sup>99</sup> Instead, the court determined that taking the legislative intent of IRCA and FLSA together means that employers must “provide fair working conditions and wages” even to unauthorized workers.<sup>100</sup>

Of course, the strong protections provided by federal employment law do not mean that employers must hire unauthorized workers in the first

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tion post-*Hoffman*, stating, “The Department’s Wage and Hour Division will continue to enforce the FLSA and MSPA without regard to whether an employee is documented or undocumented. Enforcement of these laws is distinguishable from ordering back pay under the NLRA. . . . The Department of Labor is still considering the effect of *Hoffman Plastics* on other labor laws it enforces, including those laws prohibiting retaliation for engaging in protected conduct.” DOL, *Fact Sheet #48: Application of U.S. Labor Laws to Immigrant Workers: Effect of Hoffman Plastics decision on laws enforced by the Wage and Hour Division* (2008), <https://www.dol.gov/whd/regs/compliance/whdfs48.htm> [https://perma.cc/827H-6VJX].

<sup>92</sup> Even post-*Hoffman*, unauthorized workers are still considered employees and so while not able to gain reinstatement or back pay under the NLRA, the National Labor Relations Board may still enjoin an employer’s unlawful activities under the NLRA. *See, e.g., Agri Processor Co. v. NLRB*, 514 F.3d 1, 7–8 (D.C. Cir. 2008).

<sup>93</sup> *See Alexander, Anticipatory Retaliation*, *supra* note 52, at 810–13; Cunningham-Parmeter, *supra* note 81, at 1389.

<sup>94</sup> Cunningham-Parmeter, *supra* note 81, at 1389.

<sup>95</sup> *Id.*

<sup>96</sup> *See, e.g., Lamonica v. Safe Hurricane Shutters*, 711 F.3d 1299, 1306 (11th Cir. 2013) (finding that a worker’s unauthorized status does not bar recovery under the FLSA).

<sup>97</sup> 721 F.3d 927, 932 (8th Cir. 2013).

<sup>98</sup> *See id.* at 933.

<sup>99</sup> *Id.* at 935 (quoting *Lamonica*, 711 F.3d at 1308).

<sup>100</sup> *Id.* at 936–37.

place. Indeed, to do so would violate IRCA's provisions.<sup>101</sup> Rather, once someone who is unauthorized is already in the workplace, the principles underlying these three statutory schemes mean that employers cannot subject their unauthorized employees to an abusive work environment. Therefore, when employers do violate federal workplace laws, Congress intended that the employers be held accountable.

*B. Congress Intended to Encourage Employees to Report Violations of Federal Workplace Laws*

Congress included several provisions in Title VII and the FLSA so that workers will come forward to report employer violations of those laws. By encouraging employees to come forward, the provisions also mean that employers who violate the laws are held accountable.<sup>102</sup>

Title VII<sup>103</sup> and the FLSA<sup>104</sup> encourage employees to report violations of federal workplace law in three ways. First, the statutes include anti-retaliation provisions<sup>105</sup> that sweep more broadly in their protections and remedies than the underlying substantive provisions. Second, courts grant protective orders prohibiting employers from inquiring about employees' immigration status to employees who report employer violations of Title VII and the FLSA. Third, both statutory schemes also provide for recovery of attorney's fees.<sup>106</sup> These provisions protect and offer incentives for employees who expose employer violations.

Title VII protects workers in the United States from some forms of discrimination in employment.<sup>107</sup> Section 703 of Title VII makes it illegal for an employer to discriminate against an employee on the basis of the employee's race, color, religion, sex, or national origin.<sup>108</sup> Unlawful discrimination encompasses a range of actions that an employer may undertake based

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<sup>101</sup> See INA § 274A(a), 8 U.S.C. § 1324a(a); see also *Chaudhry v. Mobil Oil Corp.*, 186 F.3d 502 (4th Cir. 1999) (finding that an employee who was not authorized for work in the United States could not assert a failure to hire claim under Title VII and the Age Discrimination in Employment Act because the employee was not a "qualified employee").

<sup>102</sup> See, e.g., *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1333 (2011) (noting that the anti-retaliation provisions help to ensure the enforcement of the FLSA); *Thompson v. North American Stainless, LP*, 562 U.S. 170, 173–74 (2011) (finding the same for Title VII).

<sup>103</sup> 42 U.S.C. §§ 2000e–2000e17 (2012).

<sup>104</sup> 29 U.S.C. §§ 201–262 (2012).

<sup>105</sup> See Griffith, *supra* note 1, at 434–37.

<sup>106</sup> *Id.* at 432–33.

<sup>107</sup> 42 U.S.C. § 2000e-e17.

<sup>108</sup> *Id.* § 2000e-2(a)(1).

(a) Employer practices

It shall be an unlawful employment practice for an employer—

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . .

*Id.*

on an employee's protected status, including failure to hire, termination of employment, failure to promote, or altering an employee's terms and conditions of employment.<sup>109</sup> Besides prohibiting discrimination on account of race, religion, sex, national origin, Title VII contains provisions prohibiting retaliation:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this title.<sup>110</sup>

Through its anti-retaliation provision, Title VII protects employees who oppose unlawful discrimination and those who participate in an investigation into employer conduct made illegal under the Act.<sup>111</sup> In *Crawford v. Metropolitan Government of Nashville and Davidson County*, the Supreme Court found that Title VII's opposition clause protected an employee who was fired after she reported sexual harassment to her employer in response to the employer's inquiry during an internal investigation.<sup>112</sup> The Court reasoned that to find otherwise would discourage most employees from reporting workplace discrimination because they would fear retaliation without remedy.<sup>113</sup>

Similarly, the Court has found that unlike Title VII's "substantive prohibitions," which only prohibit employer actions that affect the terms and conditions of employment, the anti-retaliation provisions prohibit any employer action that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."<sup>114</sup> In reaching its decision, the Court highlighted the different purposes of the anti-discrimination provisions and the prohibition on retaliation in Title VII to demonstrate congressional intent.<sup>115</sup> The Court noted that the anti-discrimination provisions sought to ensure a workplace free from sex, race, color, national origin, and religion-based discrimination.<sup>116</sup> Because that part of Title VII seeks to prevent injury to employees based on their protected status, the Court reasoned that all that Congress needed to do was to prohibit such discrimination.<sup>117</sup>

On the other hand, Title VII's prohibition on retaliation is designed to ensure the elimination of discrimination by encouraging employees to report violations of Title VII.<sup>118</sup> To achieve that end, Congress could not just limit

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<sup>109</sup> *Id.* § 2000e-2(a).

<sup>110</sup> *Id.* § 2000e-3(a).

<sup>111</sup> *See id.*

<sup>112</sup> 555 U.S. 271, 279–80 (2009).

<sup>113</sup> *Id.* at 279.

<sup>114</sup> *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 68 (2006).

<sup>115</sup> *See id.* at 62.

<sup>116</sup> *See id.* at 63.

<sup>117</sup> *See id.*

<sup>118</sup> *See id.*; see also Alexander, *Anticipatory Retaliation*, *supra* note 52, at 783 (noting that "between 1997 and 2011, the number of civil rights employment lawsuits filed by private

the retaliation prohibition to employer conduct that affects the employee's terms and conditions of employment, but had to include a broader range of conduct because an employer could still "effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm *outside* the workplace."<sup>119</sup> Therefore, to fully effect congressional intent in eliminating unlawful employer practices, Title VII prohibits all employer conduct that could discourage employees from reporting violations.<sup>120</sup> In other words, Congress intended the retaliation provisions to reach more broadly than the discrimination provisions and protect workers not just from unlawful discrimination but from any action that would dissuade them from reporting.

Likewise, in *Thompson v. North American Steel Co.*, the Supreme Court reaffirmed that the anti-retaliation provisions of Title VII prohibits a broader range of employer conduct than the anti-discrimination provisions because congressional intent was to encourage employees to report.<sup>121</sup> North American Steel Company argued that its termination of the fiancé of a female employee who had complained about sex discrimination did not violate the retaliatory provisions of Title VII because it did not take action against the complaining party but rather a third party.<sup>122</sup> The Court rejected the argument because "a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired."<sup>123</sup> Accordingly, the Court has clearly stated that the anti-retaliation provisions of Title VII are broad and Congress intended them to encourage employees to report their employers' violations of Title VII.

The FLSA likewise has broad anti-retaliation provisions in addition to its minimum wage standards, overtime requirements, and equal pay provisions.<sup>124</sup> Section 215 of the Act makes it unlawful for an employer:

to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted any proceeding under or related to [the FLSA], or has testified or is about to testify in such proceeding, or has served or is about to serve on an industry committee.<sup>125</sup>

The FLSA's retaliation provision, like Title VII's, was specifically designed to encourage employees to report their employers' violations of the Act. The Supreme Court has noted that the FLSA prohibits "labor conditions detrimental to the maintenance of the minimum standard of living necessary for

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plaintiffs was more than fifty-one times the number filed by the U.S. Equal Employment Opportunity Commission").

<sup>119</sup> *Burlington*, 548 U.S. at 63.

<sup>120</sup> *Id.*

<sup>121</sup> 562 U.S. 170 (2011).

<sup>122</sup> *See id.* at 174.

<sup>123</sup> *Id.*

<sup>124</sup> *See* 29 U.S.C.A. §§ 206, 207 (West 2016).

<sup>125</sup> 29 U.S.C. § 215(a)(3) (2012).

health, efficiency, and general well-being of workers.”<sup>126</sup> It affirmatively sets “forth substantive wage, hour, and overtime standards.”<sup>127</sup> And, like Title VII, the FLSA counts on workers reporting violations to ensure the effective enforcement of its provisions.<sup>128</sup>

The Court has confirmed that Congress intended that the FLSA encourage employees to come forward. In *Kasten v. Saint-Gobain Performance Plastics Corp.*, the Court rejected an employer’s argument that it did not retaliate against an employee because the employee only complained orally and not in writing, in part, because Congress intended the anti-retaliation provision to prevent workers from being afraid to come forward and “quietly to accept substandard conditions.”<sup>129</sup> Further underscoring that Congress intended that the FLSA’s anti-retaliation provision encourage workers to come forward is that it provides for broader relief than the substantive provisions. Pursuant to section 216(b), employees may seek equitable remedies in addition to legal remedies when they experience retaliation.<sup>130</sup> In an FLSA suit requesting a preliminary injunction restraining further retaliation from an employer, the Eleventh Circuit noted that including equitable remedies served the provision’s purpose of inducing employees to report violations of the Act.<sup>131</sup>

Congressional intent that workers report workplace abuses without fear of retaliation has also formed the basis for courts to regularly grant protective orders prohibiting discovery into workers’ immigration status. For example, in *Rivera v. NIBCO, Inc.*, the Ninth Circuit recognized that allowing employers to request information related to workers’ immigration status in discovery would chill millions of unauthorized workers from reporting their employers’ violation of Title VII and other workplace laws.<sup>132</sup> Moreover, the court noted that it could have a similar impact on workers with immigration status and even citizens might balk at having their own immigration status examined in a public setting.<sup>133</sup> Accordingly, the attendant “chilling effect such discovery [into immigration status] could have on the bringing of civil rights actions unacceptably burdens the public interest.”<sup>134</sup>

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<sup>126</sup> *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1333 (2011) (quoting 29 U.S.C. § 202(a)).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*; see also Alexander, *Anticipatory Retaliation*, *supra* note 52, at 782–83 (“[B]etween 2000 and 2011, private plaintiffs filed thirty-seven times the number of Fair Labor Standards Act (FLSA) lawsuits than did the U.S. Department of Labor.”).

<sup>129</sup> *Kasten*, 131 S. Ct. at 1333 (quoting *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960)).

<sup>130</sup> The FLSA provides that “[a]ny employer who violates the [retaliation provisions of the FLSA] shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of [the retaliation provisions of the FLSA], including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages.” 29 U.S.C. § 216(b) (2012).

<sup>131</sup> See *Bailey v. Gulf Transp., Inc.*, 280 F.3d 1333, 1335 (11th Cir. 2002).

<sup>132</sup> 364 F.3d 1057, 1064–65 (9th Cir. 2004).

<sup>133</sup> *Id.* at 1065.

<sup>134</sup> *Id.*; see also *Reyes v. Snowcap Creamery, Inc.*, 898 F. Supp. 2d 1233, 1236 (D. Colo. 2012) (finding the prejudice to the plaintiff in an FLSA suit and the chilling effect of disclo-

Title VII and the FLSA also encourage employees to come forward by allowing for the recovery of attorney's fees.<sup>135</sup> Title VII allows the court to award attorney's fees to the prevailing party.<sup>136</sup> One of the reasons that Title VII provides for attorney's fees is to encourage employees to report violations and enforce their rights. For example, in the section-by-section analysis of the Civil Rights Act of 1991, Congress specifically noted that Title VII included recovery of interest on attorney's fees as part of the remedies because failure to do so would have "a chilling effect on the 'private attorneys general' policy of federal civil rights laws."<sup>137</sup>

The attorney's fee provision in the FLSA is even stronger than that in Title VII, as it requires the court to award attorney's fees to a prevailing plaintiff.<sup>138</sup> The legislative history for this provision also demonstrates that Congress intended that it encourage employees to come forward:

[Employees] themselves . . . [can] maintain an action in any court to recover the wages due them and in such a case the court . . . shall also allow a reasonable attorney's fees and assess the court costs against the violator of the law so that employees will not suffer the burden of an expensive lawsuit.<sup>139</sup>

Therefore, to secure full enforcement of Title VII and the FLSA, Congress needed workers to come forward to report employer violations. To effect this intent, Congress included anti-retaliation provisions in each statute to allay employee fears of further harm and provided for the recovery of attorney's fees to induce workers to come forward.

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sure outweighed any probative value in disclosure of immigration file); *David v. Signal Int'l, LLC*, 257 F.R.D. 114, 125–26 (E.D. La. 2009) (prohibiting discovery into immigration status in an FLSA suit due to the chilling and in terrorem effect); *EEOC v. Restaurant Co.*, 490 F. Supp. 2d 1039, 1047 (D. Minn. 2007) (denying defendant's motion to dismiss Title VII lawsuit based on employee's unauthorized status because "Civil Rights actions are necessary to forward the policies of Title VII, and a ruling that undocumented workers could not pursue civil rights claims on their own behalf would likely chill these important actions."). *But see, e.g., Bermudez v. Karoline's Int'l Rest. Bakery Corp.*, No. 12-6245, 2013 WL 6146083, at \*5 (E.D.N.Y. Nov. 21, 2013) (permitting discovery into FLSA plaintiff's immigration status because although the chilling effect of discovery "is a legitimate, though not uncontroversial concern" it did not outweigh the defendant's need for the information).

<sup>135</sup> See 42 U.S.C. § 2000e-(k) (2012) (recovery of attorney's fees to the prevailing party in a Title VII action); 29 U.S.C. § 216(b) (2012) (recovery of attorney's fees in an FLSA action); P.L. 102-166, H.R. REP. NO. 102-40, pt. II, at 34 (1991).

<sup>136</sup> 42 U.S.C. § 2000e-(k) ("In any action or proceeding under [Title VII] the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs.").

<sup>137</sup> P.L. 102-166, H.R. REP. NO. 102-40, pt. II, at 34 (1991).

<sup>138</sup> See 29 U.S.C. § 216(b) ("[T]he court in [an FLSA] action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.").

<sup>139</sup> Griffith, *supra* note 1, at 431 n.202 (quoting 83 CONG. REC. 9264 (1938) (statement of Rep. Michael Feighan)).

C. *Congress Intended to Protect Workers Who Report Egregious Workplace Abuses from Deportation*

Congress also intended to protect unauthorized workers who report the most severe forms of employer abuse by providing a means for those workers to obtain authorized immigration status. Through the Victims of Trafficking and Violence Protection Act of 2000, Congress created two new nonimmigrant visas, one for victims of trafficking and other coercive employment practices, and one for victims of a broad range of criminal activity.<sup>140</sup> The U visa is available to noncitizens who have been the victims of certain crimes.<sup>141</sup> The T visa is available to victims of a severe form of human trafficking.<sup>142</sup> Both visas provide a method for some unauthorized workers who are subjected to workplace abuses to obtain status.

U visas are generally available to noncitizens who suffer workplace abuses that rise to the level of criminal activity. A noncitizen may receive a U nonimmigrant visa if she can demonstrate four things: (1) that she “has suffered substantial physical or mental abuse as a result of having been a victim of criminal activity”; (2) that she “possesses information concerning criminal activity”; (3) that she “has been helpful, is being helpful, or is likely to be helpful [to federal, state, or local law enforcement officials, prosecutors or judges] . . . investigating or prosecuting criminal activity”; and (4) that “the criminal activity . . . violated the laws of the United States or occurred in the United States (including in Indian country and military installations) or the territories and possessions of the United States.”<sup>143</sup> A number of crimes are defined as qualifying criminal activity under the statute, including crimes that can occur in the workplace.<sup>144</sup>

Through the creation of the U nonimmigrant visa, Congress expressly intended to “strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, [and] trafficking of aliens, . . . while offering protection to victims of such offenses in keeping with the humanitarian interests of the United States.”<sup>145</sup> Another purpose of the visa was to “facilitate the reporting of crimes to law enforcement officials by trafficked, exploited, victimized, and abused aliens who are not in lawful immigration status. It also gives law enforcement officials a

<sup>140</sup> TVPA of 2000. The Act contains three subdivisions: Division A is the Trafficking Victims Protection Act of 2000, and section 107(e) created the T nonimmigrant visa; Division B is the Violence Against Women Act of 2000, and Title V, section 1513 created the U nonimmigrant visa; Division C contains miscellaneous provisions.

<sup>141</sup> INA § 101(a)(15)(U), 8 U.S.C. § 1101(a)(15)(U) (2012).

<sup>142</sup> INA § 101(a)(15)(T), 8 U.S.C. § 1101(a)(15)(T).

<sup>143</sup> INA § 101(a)(15)(U)(i)(I)–(IV), 8 U.S.C. § 1101(a)(15)(U)(i)(I)–(IV).

<sup>144</sup> INA § 101(a)(15)(U)(iii), 8 U.S.C. § 1101(a)(15)(U)(iii) (including “rape; torture; trafficking; . . . sexual assault; abusive sexual contact; prostitution; sexual exploitation; . . . being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; . . . witness tampering; obstruction of justice; perjury; fraud in foreign labor contracting. . . .”); see also Saucedo, *Immigration Enforcement Versus Employment Enforcement*, *supra* note 9, at 311.

<sup>145</sup> TVPA of 2000, *id.* at § 1513(a)(2)(A), 1533.

means to regularize the status of cooperating individuals during investigations or prosecutions.”<sup>146</sup>

In keeping with the U visa’s intent to facilitate law enforcement’s investigations into underlying criminal activities, noncitizens applying for a U nonimmigrant visa must provide USCIS with a certification from a law enforcement agency that states the noncitizen “‘has been helpful, is being helpful, or is likely to be helpful’ in the investigation or prosecution of criminal activity.”<sup>147</sup> A U nonimmigrant must also have not committed certain acts that would make her inadmissible, such as criminal activity or drug offenses, or fall within other grounds of inadmissibility, such as being likely to become a public charge or having a communicable disease of public health concern.<sup>148</sup> However, the Secretary of Homeland Security has the discretion to waive any grounds of inadmissibility, with a very limited exception.<sup>149</sup> In addition to more traditional law enforcement agencies like the DOJ, DHS, or local police agencies, among the law enforcement agencies that can sign the law enforcement certificate are the EEOC and the DOL.<sup>150</sup>

Noncitizens who have been a victim of a severe form of human trafficking may apply for a T nonimmigrant visa.<sup>151</sup> A “severe form[ ] of trafficking in persons” is defined not only as sex trafficking, but also as “the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.”<sup>152</sup> A T visa applicant must show that she is present in the United States on account of the trafficking,<sup>153</sup> and that she “has complied with any reasonable request for assistance in the Federal, State, or local investigation or prosecution of acts of trafficking or the investigation of crime where acts of trafficking are at least one central reason for the commission of that crime.”<sup>154</sup> Unlike a U visa applicant, a T visa applicant is not required to submit a law enforcement certificate. However, “statements from . . . law enforcement officials that the alien has complied with any reasonable request for assistance in the investigation or prosecution of crimes such as kidnapping, rape, slavery, or other forced labor offenses . . . shall be considered.”<sup>155</sup>

Noncitizens who receive a U or T visa are also eligible for work authorization.<sup>156</sup> Both U and T nonimmigrant status lasts for a period of four

<sup>146</sup> *Id.* at § 1513(a)(2)(B), 1534.

<sup>147</sup> INA § 214(p)(1), 8 U.S.C. § 1184(p)(1) (2006).

<sup>148</sup> INA § 212, 8 U.S.C. § 1182 (2012).

<sup>149</sup> USCIS may not waive the inadmissibility ground for noncitizens who participated in “Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing.” INA § 212(a)(3)(E), 8 U.S.C. § 1182(a)(3)(E).

<sup>150</sup> 8 C.F.R. § 214.14(a)(2) (2016).

<sup>151</sup> INA § 101(a)(15)(T), 8 U.S.C. § 1101(a)(15)(T) (2012).

<sup>152</sup> 22 U.S.C. § 7102(8) (2012).

<sup>153</sup> INA § 101(a)(15)(T)(i)(II), 8 U.S.C. § 1101(a)(15)(T)(i)(II).

<sup>154</sup> INA § 101(a)(15)(T)(i)(III)(aa), 8 U.S.C. § 1101(a)(15)(T)(i)(III)(aa).

<sup>155</sup> INA § 214(o)(6), 8 U.S.C. § 1184(o)(6) (2006).

<sup>156</sup> 8 C.F.R. § 274a.12(a)(16), (19) (2016).



years.<sup>157</sup> Importantly, both U and T nonimmigrants can permanently regularize their status by applying for adjustment of status, i.e., to become a legal permanent resident, after three years,<sup>158</sup> or in the case of T nonimmigrants once the law enforcement agency certifies that the underlying trafficking case is closed.<sup>159</sup>

Congress's creation of two categories of visas to regularize the status of otherwise unauthorized workers who have suffered workplace abuses demonstrates its intent to protect, not prosecute, vulnerable workers. First, in passing the Victims of Trafficking and Violence Protection Act of 2000, Congress found that "[t]rafficking in persons . . . includes forced labor and involves significant violations of labor, public health, and human rights standards worldwide."<sup>160</sup> This shows that Congress viewed violations of workplace laws as significant enough to include them among the list of activities the Act condemns.

In passing the Act, Congress also indicated that it was concerned with treating victims of labor exploitation as criminals based only on crimes related to the exploitation.<sup>161</sup> Specifically, it found that victims of severe forms of trafficking should not be "inappropriately incarcerated, fined or otherwise penalized solely for unlawful acts committed as a direct result of being trafficked, such as using false documents, entering the country without documentation, or working without documentation."<sup>162</sup>

Second, in passing the Violence Against Women Act of 2000, which created the U nonimmigrant visa, Congress expressed similar concerns and made similar findings. It emphasized the protective and humanitarian role the U visa should serve for unauthorized immigrants: "[t]he purpose . . . is to create a new nonimmigrant visa . . . that will strengthen the ability of law enforcement agencies to detect, investigate, and prosecute [crimes against noncitizens] . . . while offering protection to victims of such offenses in keeping with the humanitarian interests of the United States."<sup>163</sup> Congress also found that regularizing the status of unauthorized victims of workplace exploitation would encourage victims to come forward:

Creating a new nonimmigrant visa classification will facilitate the reporting of crimes to law enforcement officials by trafficked, exploited, victimized, and abused aliens who are not in lawful immigration status. It also gives law enforcement officials a means to

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<sup>157</sup> INA § 214(p)(6), 8 U.S.C. § 1184(p)(6) (2006); INA § 214(o)(7)(A), 8 U.S.C. § 1184(o)(7)(A) (2006).

<sup>158</sup> INA § 245(m), 8 U.S.C. § 1255(m) (2012); INA § 245(l), 8 U.S.C. § 1255(l) (2012).

<sup>159</sup> INA § 245(l), 8 U.S.C. § 1255(l).

<sup>160</sup> TVPA of 2000, at § 102(b)(3), 1466.

<sup>161</sup> *Id.* at § 102(b)(19), 1468.

<sup>162</sup> *Id.*

<sup>163</sup> See Violence Against Women Act of 2000, Pub. L. No. 106-386, div. B, tit. V § 1513(a)(2)(A), 8 U.S.C. § 1101 note.

regularize the status of cooperating individuals during investigations or prosecutions.<sup>164</sup>

That Congress also allowed the DHS Secretary to waive almost all grounds of admissibility for U visa applicants<sup>165</sup> shows Congress wanted to remove any barriers to regularizing such workers' status. This further supports that Congress wanted to encourage workers who have suffered the most egregious abuses to come forward.

Finally, Congress also expressed its intent to protect vulnerable workers through the criminal provisions it enacted as part of the Victims of Trafficking and Violence Act of 2000. It included within the definition of "coercion": "the abuse or threatened abuse of the legal process."<sup>166</sup> In 2008, it amended the definition of "the abuse or threatened abuse of the legal process" in the criminal statute to define it as "the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action."<sup>167</sup> Congress also defined the range of harm to include "nonphysical harms that are legally sufficient to establish forced labor includ[ing] 'psychological, financial, or reputational harm.'"<sup>168</sup> Congress similarly included within the definition of legal coercion "compelling labor through threats of any legal proceeding, whether 'administrative, civil, or criminal', [t]hus, threats of deportation . . . also qualify as a prohibited means of legal coercion."<sup>169</sup> The language of the TVPA, its amendments, and the Violence Against Women Act of 2000 show that Congress was aware that unauthorized workers were in the workplace, were vulnerable to exploitation, and thus deserved protection.<sup>170</sup>

<sup>164</sup> *Id.* at § 1513(a)(2)(C).

<sup>165</sup> INA § 212(d)(14), 8 U.S.C. § 1182(d)(14) (2012).

<sup>166</sup> TVPA of 2000, at § 103(2)(C), 22 U.S.C. § 7102(2) (2012).

<sup>167</sup> 18 U.S.C. § 1589(c)(1) (2012).

<sup>168</sup> Kim, *supra* note 10, at 451 (quoting 18 U.S.C. § 1589(c)(2)).

<sup>169</sup> *Id.* (quoting 18 U.S.C. § 1589 (c)(1)).

<sup>170</sup> The way in which the TVPA of 2000 defines victims worthy of protection is not without its problems. As Kim has noted, the key to claiming protection under the TVPA of 2000 is the "dyadic relationship of perpetrator to victim." *Id.* at 470. While the INA itself can be seen as creating structural coercion by forcing unauthorized workers into accepting substandard working conditions out of fear that reporting workplace violations will lead to their removal due to their unlawful status, unauthorized immigrants may not claim protection based on coercion or abuse of the legal process as defined in the TVPA based on an abusive workplace and their unauthorized status alone. *Id.* at 470–71.

Instead, the TVPA "requires that the employer *intentionally* take advantage of a worker's vulnerabilities to exploit." *Id.* at 470–71 (emphasis added). In such circumstances, the worker's only recourse may be the U visa. But as Saucedo has noted, that too has its limits. *See Saucedo, Immigration Enforcement Versus Employment Law Enforcement, supra* note 9, at 312. Unlike the T visa, the U visa does not specifically provide for immunity from prosecution for fraudulent identity documents, its annual quota of only ten thousand per fiscal year means that most applicant must wait years before receiving the visa, and the definition of crime, while inclusive of many types of workplace crimes, could be expanded to include wage and hour violations, discrimination, and collective bargaining violations. *Id.* at 312, 319.

*D. Prosecuting Workers Contradicts Congressional Intent*

When DOJ criminally prosecutes workers or DHS seeks the deportation of workers who have come forward to report workplace abuses, it contradicts congressional intent. Such prosecutions discourage employees from coming forward, incentivize employers to use DOJ or DHS to escape liability and to further exploit marginalized workers, and put a barrier in the path to status regularization that Congress intended to create through the U and T nonimmigrant visas.

Prosecutions of workers have chilled their reporting of employer violations of workplace laws. Workers have become increasingly afraid to report their employers because of government prosecutors' "added leverage to seek convictions" against the unauthorized workers when they report.<sup>171</sup> For example, ICE raided Houston-area employment agencies that, according to a DHS official, "delivered illegal workers to greedy restaurant owners around the country."<sup>172</sup> The workers were forced "to put in 12-hour days, labored six days a week and were not paid overtime or allowed to keep tips or gratuities."<sup>173</sup> While ICE arrested the owners of the employment agency and twenty-one owners and managers of restaurants who employed the workers, ICE also arrested at least eleven workers, too.<sup>174</sup>

In addition to criminal prosecutions, employers can threaten unauthorized workers with deportation. Courts have acknowledged this dynamic in immigrant workplaces.<sup>175</sup> In *Rivera*, the Ninth Circuit reasoned, "Granting employers the right to inquire into workers' immigration status in [federal employment discrimination suits] would allow them to raise implicitly the threat of deportation and criminal prosecution every time a worker, documented or undocumented, reports illegal practices."<sup>176</sup> Various news reports over the past decade have reported on workers in several industries who were threatened with deportation by their employers and therefore hesitated

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<sup>171</sup> Saucedo, *Immigration Enforcement Versus Employment Law Enforcement*, *supra* note 9, at 308.

<sup>172</sup> James Pinkerton, *Chinatown Raid Targets Exploitation of Illegal Workers*, Hous. CHRON. (Jan. 30, 2014), <http://www.chron.com/news/houston-texas/houston/article/Chinatown-raid-targets-exploitation-of-illegal-5188938.php> [<https://perma.cc/4KLS-RY8G>] (quoting Brian Moskowitz, Special Agent in Charge of Homeland Security Investigations in Houston).

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*; see also Jonathan Dienst & Greg Cergol, *Feds Raid Nearly a Dozen Long Island 7-Elevens in Illegal Immigration Probe: Officials*, NBC N.Y. (June 17, 2013), <http://www.nbcnewyork.com/news/local/Human-Smuggling-Investigation-7-Eleven-Long-Island-Federal-Agents-Police-211793521.html> [<https://perma.cc/59SQ-HP9S>] (describing ICE workplace raid in which ICE arrested not only the owners and managers but also some of the workers whom the owners and managers exploited).

<sup>175</sup> See *Bailey v. Gulf Transp.*, 280 F.3d 1333, 1335 (11th Cir. 2002) (collecting cases).

<sup>176</sup> *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1065 (9th Cir. 2004); cf. *Cordova v. R & A Oysters, Inc.*, No. 14-0462-WS-M, 2016 WL 951570 (S.D. Ala. Mar. 8, 2016) (recognizing that allowing employers to revoke employees' temporary work visas in response to worker retaliation complaints would "condone prior violations of [the Fair Labor Standards Act] and encourage future violations.") (quoting *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 151 (2002)).

to report workplace violations.<sup>177</sup> These fears have, in fact, led to underreporting, thereby undermining Congress's intent to encourage workers to report workplace abuses.<sup>178</sup>

Employee fears have also allowed employers to cultivate exploitable workforces. Leticia Saucedo has ably explored employers' creation of a subservient, "brown-collar" workplace and potential theories of liability for employment discrimination for creating such workplaces.<sup>179</sup> She argues that employers prefer an exploitable, subservient workforce and as a result create jobs that United States citizens will not take as a means to hire only vulnerable workers.<sup>180</sup> Employers do this through network hiring, paying low wages, creating undesirable working conditions for the targeted jobs, "de-skilling" jobs, and avoiding hiring United States born workers for the jobs.<sup>181</sup>

DHS's and DOJ's increased enforcement has further "facilitate[d] [workers'] exploitation rather than prevent[ed] it"<sup>182</sup> and allowed employers to evade accountability for workplace abuses. Lee has described how employers have capitalized on the perception of unauthorized workers as "criminal aliens" in their use of local law enforcement to crack down on unauthorized workers seeking to vindicate their workplace rights.<sup>183</sup> Some employers have also been able to escape liability under employment laws due to their employee's violation of immigration laws. Those employers have convinced judges that the employee is unworthy of protection because she engaged in criminal acts such as presenting false documents or entering

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<sup>177</sup> See, e.g., Michelle Chen, *Carwash Workers and Capitol Hill: Immigration in Limbo*, IN THESE TIMES (Sep. 11, 2013), [http://inthesetimes.com/working/entry/15563/carwashes\\_and\\_capitol\\_hill\\_immigration\\_in\\_limbo](http://inthesetimes.com/working/entry/15563/carwashes_and_capitol_hill_immigration_in_limbo) [<https://perma.cc/8GEC-M45H>] (describing carwash workers afraid to report safety and wage violations for fear of deportation); 41 Action News Staff, *KCK Roofing Company Owners Indicted in Undocumented Workers Kickback Threat*, KSHB KAN. CITY (June 14, 2016), <http://www.kshb.com/news/region-kansas/kck/kck-roofing-company-owners-indicted-in-undocumented-workers-kickback-threat> [<https://perma.cc/NG5Z-47UT>] (describing construction workers who were afraid to report employer exploitation because employers had threatened them with deportation); Sasha Khokha, *Silenced By Status, Farm Workers Face Rape, Sexual Abuse*, NPR (Nov. 5, 2013), <http://www.npr.org/2013/11/05/243219199/silenced-by-status-farm-workers-face-rape-sexual-abuse> [<https://perma.cc/2KUL-P3EX>] (attributing failure of female farmworkers initially to report their employer's sexual assaults to the farmworkers' fear of deportation).

<sup>178</sup> Griffith, *supra* note 1, at 437–38 (describing the evidence that workers have resisted reporting violations out of fear of deportation); see also Alexander, *Anticipatory Retaliation*, *supra* note 52, at 780–81.

<sup>179</sup> See Leticia M. Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 OHIO ST. L.J. 961 (2006); Leticia M. Saucedo, *Three Theories of Discrimination in the Brown Collar Workplace*, 2009 U. CHI. LEGAL F. 345 (2009).

<sup>180</sup> See Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, *supra* note 179, at 973.

<sup>181</sup> *Id.* at 976–80; see also Alexander, *Anticipatory Retaliation*, *supra* note 52, at 810–13 (discussing the susceptibility of brown collar workers to employer threats and the impact on the workers' ability to assert their legal rights).

<sup>182</sup> Kim, *supra* note 10, at 415.

<sup>183</sup> Stephen Lee, *Workplace Enforcement Workarounds*, 21 WM. & MARY B. RTS. J. 549, 564–67 (2012).

without inspection.<sup>184</sup> Kathleen Kim has argued that despite workplace protections, “[U]ndocumented workers remain severely constrained in the exercise of their free labor rights” due to threats of criminal prosecution and deportation.<sup>185</sup>

Moreover, workers who have been deported, are in detention, or are in prison for a criminal conviction will find it difficult if not impossible to assert their rights as private attorneys generals through a Title VII or FLSA suit.<sup>186</sup> A criminal conviction for document fraud will also make it difficult for an unauthorized worker to obtain a U or T nonimmigrant visa as document fraud is a ground of inadmissibility under the Immigration and Nationality Act.<sup>187</sup> Furthermore, if the unauthorized noncitizen is unable to obtain a U visa before her immigration proceedings finalize,<sup>188</sup> she will have a difficult time completing the process from outside the country. The prosecution of unauthorized workers who report violations of workplace laws, then, contradicts congressional intent as expressed through Title VII, the FLSA, IRCA, and the Victims of Trafficking and Violence Protection Act of 2000.

### III. CONGRESSIONAL INTENT TO PROTECT EXPLOITED WORKERS SUPPORTS THE USE OF EQUITABLE PROSECUTION AND EXECUTIVE ESTOPPEL

Because Congress intended to protect, not prosecute, workers, the agencies charged with enforcing the statutory schemes should protect exploited workers. This part will explain what the current barriers are to workers receiving that protection and propose two solutions—equitable prosecution and executive estoppel—to overcome those barriers.

Despite clear congressional intent that unauthorized workers be protected, not prosecuted, when they suffer workplace abuses, not all workers have a firm footing under current law to prevent their prosecutions. Some individual workers may qualify for U or T visas if they are the victims of other crimes in the workplace like a severe form of human trafficking, rape,

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<sup>184</sup> Cimini, *supra* note 81, at 411–14 (describing cases in which courts denied workers’ FLSA claims, tort-based lost wages claims, or workplace injury claims due to the workers’ presenting false employment documents (IRCA-fraud) or unlawful presence).

<sup>185</sup> Kathleen Kim, *Beyond Coercion*, 62 UCLA L. REV. 1558, 1569 (2015).

<sup>186</sup> See discussion *supra* Part II.B.

<sup>187</sup> See INA § 212(a)(2)(A) (2012), 8 U.S.C. § 1182(a)(2)(A) (encompassing crimes involving moral turpitude). *But see supra* notes 162–63 and accompanying text (stating the Attorney General may waive grounds of inadmissibility); INA § 212(a)(3)(D)(iv), 8 U.S.C. § 1182(a)(3)(D)(iv) (allowing the Attorney General to waive most grounds of inadmissibility for a U nonimmigrant applicant if it is in the public interest); TVPA of 2000, at § 107(e)(3) (containing specific provisions that prevent the criminal prosecution of individuals that were directly related to the trafficking).

<sup>188</sup> This is a real possibility given the ten thousand limit per year on U nonimmigrant visas and that USCIS ran out of visas for FY 2016 less than three months after the first day of the fiscal year. See *USCIS Approves 10,000 U Visas for 7th Straight Fiscal Year*, USCIS (Dec. 29, 2015), <https://www.uscis.gov/news/uscis-approves-10000-u-visas-7th-straight-fiscal-year> [<https://perma.cc/QSM6-EGPT>].

battery or assault, kidnapping, or abusive sexual contact. Ulu, the restaurant worker, would fall into this category.

But workers like Gustavo, who suffer more run-of-the-mill workplace violations such as unlawful discrimination in hiring, promotion, termination, or wage violations, without more, will not qualify for immigration relief and must remain in their unauthorized status and subject to deportation.<sup>189</sup> This can interfere with their ability to pursue their workplace rights and rewards the employers who exploited them.

Two possible solutions drawing on equitable concepts in current law exist to address these concerns. First, requesting the equitable exercise of prosecutorial discretion could minimize the more severe harms that would result from criminal prosecution or removal proceedings for any worker who has come forward to report workplace abuses. Second, executive estoppel—that is, estopping the actions of DHS or DOJ because another executive agency like the EEOC or the DOL has certified the unauthorized worker as a qualifying victim of crime or trafficking—would assist those workers who have suffered the most egregious workplace abuses.

#### A. *Prosecutors Should Exercise Equitable Enforcement Through Prosecutorial Discretion*

For a worker like Gustavo, who will be unable to qualify for the U or T visa, requesting that a DOJ prosecutor or ICE attorney equitably exercise prosecutorial discretion may be his only option. Prosecutors with the U.S. Attorney's Office should exercise their discretion to avoid or mitigate the impact of prosecution on unauthorized workers at several stages: the charging decision, plea-bargaining, and sentencing. Prosecutors, immigration judges, and officers with ICE can similarly exercise their discretion at different stages in removal proceedings, including the decision to issue a Notice to Appear in Removal Proceedings, the grant of deferred action, the termination of immigration proceedings, and the administrative closure of immigration cases.

A prosecutor's equitable use of discretion is not just a matter of agency grace. First, the structural limits of prosecutorial discretion demonstrate it is bounded and guided by congressional intent. Second, both DHS and DOJ have internal guidelines and have entered into memoranda of understanding that should lead to prosecutors equitably exercising their discretion. Finally, prosecutors' ethical guidelines support the equitable exercise of discretion.

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<sup>189</sup> See discussion *supra* Part II.D. Currently, there are few empirical studies that consider how widespread the problem is. See Kati L. Griffith, *Undocumented Workers: Crossing the Borders of Immigration and Workplace Law*, 21 CORNELL J.L. & PUB. POL'Y 611, 615–17 (2012). Further, the Supreme Court affirmed the Fifth Circuit's decision to enjoin the Obama administration from exercising prosecutorial discretion on a class-wide basis for almost 4.4 million people in the country without authorization. *United States v. Texas*, 131 S. Ct. 2271 (2016), *aff'g* 809 F.3d 134 (5th Cir. 2015). As a result, those individuals will “remain highly vulnerable to workplace exploitation.” Kim, *supra* note 185, at 1578.

1. *The Structural Limits of Prosecutorial Discretion Support Its Equitable Exercise*

Although a prosecutor's decision whether to prosecute is generally unreviewable, structural limits support the equitable exercise of that discretion. Those limits are based on separation of powers principles, including the prosecutor's role as an executive actor, structural roles in criminal proceedings, and the prosecutor's delegated authority.

It is generally accepted that a federal prosecutor's decision whether to prosecute is unreviewable.<sup>190</sup> Most courts base their deference to prosecutorial charging decisions in the separation of powers doctrine.<sup>191</sup> Because such decisions go to enforcement choices, they are viewed as firmly within the realm of executive power.<sup>192</sup> Courts anchor this view in the "Take Care" clause of the United States Constitution.<sup>193</sup>

Nonetheless, because DOJ and DHS are federal executive agencies, the Constitution places structural limits on what they can do. Because the basis for deference relies on the agency as an executive actor,<sup>194</sup> deference to agency discretion should apply only when it is consistent with that role. Furthermore, in the criminal context, separation of powers requires "a strict division of authority among the three branches . . . that give[s] each branch a strong check on the others in criminal proceedings. Indeed, convictions require all three branches of government to agree, as well as the approval of a jury."<sup>195</sup> In immigration proceedings, while enforcement and adjudication authority rests with the executive agency, "the internal law of administration"—including structural separation and supervision within an agency—is a critically important means of checking agencies and holding bureaucrats accountable.<sup>196</sup> And, in both criminal and immigration prosecutions, the agency's authority is limited to that prescribed by Congress. Recently, in *Arlington v. FCC*, the Supreme Court reaffirmed that federal agencies' role in administering congressional statutes is "prescribed by Congress, so that when they act improperly, no less than when they act beyond their jurisdiction, what they do is ultra vires."<sup>197</sup>

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<sup>190</sup> See, e.g., Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1044 (2006) [hereinafter Barkow II]; Barkow I, *supra* note 17, at 874–75; Eagly, *supra* note 16, at 1320–21; Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Development*, 6 SETON HALL CIR. REV. 1, 3 (2009); Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 286 (2010).

<sup>191</sup> See Krauss, *supra* note 190, at 10 (citing cases demonstrating this deference).

<sup>192</sup> See *id.*; see also Barkow I, *supra* note 17, at 876.

<sup>193</sup> Krauss, *supra* note 190, at 10 (citing U.S. CONST. art. II, § 3). The "Take Care" clause provides the President "shall take Care that the Laws be faithfully executed." See U.S. CONST. art. II, § 3.

<sup>194</sup> Barkow I, *supra* note 17, at 876.

<sup>195</sup> Barkow II, *supra* note 190, at 994.

<sup>196</sup> Barkow I, *supra* note 17, at 887.

<sup>197</sup> *Arlington v. FCC*, 133 S. Ct. 1863, 1869 (2013) (applying *Chevron* deference to agency interpretation of jurisdiction to act because it was not contrary to clear congressional intent).

The structural limits placed on prosecutorial discretion, then, mean that DOJ and DHS must exercise it in a manner consistent with congressional intent. As discussed above,<sup>198</sup> Congress intended to protect workers like Gustavo from abusive employers and to hold employers accountable when they violate workplace laws. When a prosecution conflicts with that intent and impedes the effective enforcement of workplace laws, that prosecution is not one in which all three branches of government agree because it is contrary to congressional intent.

As a result, executive actors in both the criminal court system and immigration system are obligated to take account of that intent when exercising their authority. First, a worker like Gustavo has a strong argument that criminal prosecutors should exercise their discretion and decline to bring charges in the first instance. If the equities are such that a criminal prosecution is necessary, the prosecutor should exercise her discretion in a manner that mitigates the consequences of any criminal conviction through creative plea-bargaining and sentencing agreements that would avoid a conviction resulting in automatic removal.

Second, in immigration proceedings, DHS attorneys and officers should exercise their discretion and grant deferred action or decline to place the worker in immigration proceedings in the first place. Immigration judges who work for the DOJ should also exercise their authority in keeping with congressional intent and consider administratively closing cases in which a worker is in a situation like Gustavo's. This recognizes the structural limits placed on executive agencies and allows them to exercise their discretion in a manner that is consistent with the separation of powers theory that forms the basis of the agencies' authority to act in the first place.

## 2. *Internal Guidelines and MOUs Support the Equitable Exercise of Discretion*

Both DOJ and DHS have internal guidelines, and DHS has entered into a Memorandum of Understanding (MOU) with the DOL that governs how the agencies exercise their discretion.<sup>199</sup> As a whole, the guidelines support prosecutors' use of discretion in instances where enforcing the law conflicts with congressional intent to protect the persons whom the enforcement agency seeks to prosecute.

The *Attorney General Guidelines for Victim and Witness Assistance* recognizes that victims of trafficking may be both victims and have criminal culpability and calls for prosecutors to take account of that duality.<sup>200</sup> It

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<sup>198</sup> See discussion *supra* Part II.

<sup>199</sup> See DEP'T. OF HOMELAND SECURITY & DEP'T. OF LABOR, REVISED MEMORANDUM OF UNDERSTANDING BETWEEN THE DEPARTMENTS OF HOMELAND SECURITY AND LABOR CONCERNING ENFORCEMENT ACTIVITIES AT WORKSITES (Dec. 7, 2011), <https://www.dol.gov/asp/media/reports/DHS-DOL-MOU.pdf> [<https://perma.cc/4925-RABZ>] [hereinafter MOU].

<sup>200</sup> U.S. DEP'T. OF JUSTICE, ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE 12 (2011 ed.) (Rev. May 2012), [https://www.justice.gov/sites/default/files/olp/docs/ag\\_guidelines2012.pdf](https://www.justice.gov/sites/default/files/olp/docs/ag_guidelines2012.pdf) [<https://perma.cc/M8NJ-6RVL>].



advises that a victim should be treated as a victim “despite any legal culpability that the victims may have for ancillary offenses, such as immigration or prostitution crimes.”<sup>201</sup> Similarly, the Attorney General’s guidelines inform department personnel that “[i]f a victim or witness is pursuing legal [immigration] status, Department personnel should provide when warranted by the circumstances, the supporting documentation that must come from law enforcement.”<sup>202</sup> Both of these guidelines suggest that prosecutors should also exercise their discretion equitably when considering whether and how to charge a worker like Gustavo who is both a victim and a perpetrator.

DHS’s guidelines are much clearer. The most recent memorandum on the exercise of prosecutorial discretion explicitly directs DHS personnel to consider exercising prosecutorial discretion based on the noncitizen’s “status as a victim, witness or plaintiff in civil or criminal proceedings.”<sup>203</sup> It sets out a description of the ways in which the agency may exercise its discretion:

In the immigration context, prosecutorial discretion should apply not only to the decision to issue, serve, file, or cancel a Notice to Appear, but also to a broad range of other discretionary enforcement decisions, including deciding: whom to stop, question, and arrest; whom to detain or release; whether to settle, dismiss, appeal, or join in a motion on a case; and whether to grant deferred action, parole, or a stay of removal instead of pursuing removal in a case.<sup>204</sup>

Based on DHS’s guidelines, the Executive Office for Immigration Review (the division within DOJ in which Immigration Judges are based) issued guidelines for immigration judges regarding when they may exercise their discretion to continue cases or administratively close a case.<sup>205</sup> The guidelines direct immigration judges to administratively close cases or ask DHS attorneys whether they wish to dismiss a case due to DHS’s announced enforcement priorities.<sup>206</sup>

Furthermore, the DOL and DHS MOU shows DHS’s exercise of prosecutorial discretion should serve to emphasize the agency’s role in protecting, not prosecuting, workers like Gustavo. It provides that when DOL has an ongoing investigation at a worksite, ICE agrees to avoid worksite enforcement activities.<sup>207</sup> Likewise, ICE will allow DOL to interview any

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 12–13.

<sup>203</sup> DEP’T. OF HOMELAND SECURITY, POLICIES FOR THE APPREHENSION, DETENTION AND REMOVAL OF UNDOCUMENTED IMMIGRANTS 6 (Nov. 20, 2014), [www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf) [https://perma.cc/G3M3-QJ J9].

<sup>204</sup> *Id.* at 2.

<sup>205</sup> EXEC. OFFICE FOR IMMIGRATION REVIEW, OPERATIONS & PROCEDURES MEMORANDUM 15-01: HEARING PROCEDURES FOR CASES COVERED BY NEW DHS PRIORITIES AND INITIATIVES (Apr. 6, 2015).

<sup>206</sup> *Id.*

<sup>207</sup> See MOU, *supra* note 199.

workers ICE detains because of worksite enforcement activities.<sup>208</sup> Importantly, the MOU includes a provision that “ICE agrees to consider DOL requests that ICE grant a temporary law enforcement parole or deferred action to any witness needed for a DOL investigation of a labor dispute during the pendency of the DOL investigation and any related proceeding where such witness is in the country unlawfully.”<sup>209</sup> Therefore, taken together, the MOU and DHS and DOJ’s guidelines support the equitable exercise of prosecutorial discretion in cases where workers come forward to report workplace abuses.<sup>210</sup>

### 3. *Prosecutorial Ethics Support the Equitable Exercise of Discretion*

Finally, prosecutors have ethical obligations they must follow, both as attorneys and, specifically, as government attorneys who serve the public interest. Leslie Griffin has explored those constraints and what they mean for prosecutorial discretion.<sup>211</sup> She argues that the ethics governing prosecutorial discretion require “public moral judgment, a judgment rooted in prosecutorial practice and experience.”<sup>212</sup> They require, in short, that prosecutors pay attention to office policy and procedures and consult with or ask for review of discretionary decisions to ensure they exercise public moral judgment.<sup>213</sup>

This idea, based on a public prosecutor’s ethical obligations, also supports the exercise of equitable discretion in cases like Gustavo’s. DOJ and DHS, as set forth above, have policies which encourage the use of prosecutorial discretion when a worker has been the victim of a workplace crime. This idea also suggests that a prosecutor who is aware that the worker has reported workplace violations and is involved in litigation to enforce his rights should consult with the other agencies involved, like the EEOC or DOL, to ensure that his prosecution will not impede their activities. Thus,

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<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> The Due Process Clause may also require that the agencies—in particular, DHS—follow their guidelines in exercising discretion. The Ninth Circuit Court of Appeals recently held that DHS abused its discretion when it did not follow its own regulations governing the wholly discretionary decision of whether to reinstate removal against a noncitizen. *See Villa-Anguiano v. Holder*, 727 F.3d 873, 880–82 (9th Cir. 2013). As the *Villa-Anguiano* court noted, “Due process, in turn, entitles an unlawfully present alien to consideration of issues relevant to the exercise of an immigration officer’s discretion.” *Id.* at 881. Although the guidelines discussed here do not have the force of law that regulations do, they may provide the basis for a limited argument rooted in due process. A minimum level of due process requires that agencies at least consider all the factors they have deemed relevant through their own guidelines when they choose to exercise prosecutorial discretion that results in an action by the agency. *Id.* At least one of those relevant factors is whether the worker was the victim of an exploitative workplace and came forward to report the abuses. *Id.*

<sup>211</sup> *See generally* Leslie C. Griffin, *The Prudent Prosecutor*, 14 *GEO. J. LEGAL ETHICS* 259 (2001).

<sup>212</sup> *Id.* at 307.

<sup>213</sup> *See id.*

even though a worker like Gustavo may have no permanent immigration remedy, he is not without recourse. The structural limits on prosecutorial authority, internal guidelines and memoranda, and prosecutorial ethics all weigh in favor of the exercise of equitable prosecution.

### B. Courts Should Recognize Executive Estoppel

For a noncitizen who has a U visa law enforcement certificate from a federal agency like the EEOC or the DOL, estoppel should provide a solution to stop both her criminal prosecution and her deportation. Because estoppel traditionally involves one party estopping another based on the actions previously taken by that party, this section also traces why estoppel is appropriate when one party is seeking to estop the action of one federal agency based on a factual determination or action by another federal agency. It bases the argument on both the principles underlying equitable estoppel and regulatory estoppel.

Equitable estoppel is a judicially-developed doctrine that allows a court to exercise its “equitable power to estop a party from raising a particular claim or defense” and it “operates apart from any underlying statutory scheme.”<sup>214</sup> Courts may estop a party from asserting a claim or defense when the party has made a misrepresentation of fact that the other party reasonably relied on to its detriment.<sup>215</sup> But, when the government is a party, the individual seeking estoppel must demonstrate “affirmative misconduct.”<sup>216</sup>

One way to demonstrate affirmative misconduct on the part of the government is to rely on an agency’s affirmative representation of the law or fact-finding. This is based on a form of equitable estoppel that applies when an agency has violated its own “law”—regulatory estoppel.<sup>217</sup> Agency law can encompass everything “from legislative regulations, interpretive rules, forms and pamphlets directed to the public, internal ‘housekeeping’ rules and operating manuals, and unwritten agency customs to oral representation by lower-level . . . staff.”<sup>218</sup> Peter Raven-Hansen has concluded that regulatory estoppel applies “if the private reliance interest in agency obedience to its own law outweighs the public interest in those legislative policies that would be affected by regulatory estoppel in a given case.”<sup>219</sup> In other words, regulatory estoppel is primarily concerned with fairness to the individual being harmed by the agency’s incorrect application of the law.

Executive estoppel where one executive agency has acted in contravention of another fits within the underlying purposes of both equitable and

<sup>214</sup> *Kosakow v. New Rochelle Radiology Assocs.*, 274 F.3d 706, 724 (2d Cir. 2001).

<sup>215</sup> *Id.* at 725 (citing *Heckler v. Community Health Servs.*, 467 U.S. 51, 59 (1984)).

<sup>216</sup> *See, e.g., Morgan v. Heckler*, 779 F.2d 544, 545 (9th Cir. 1985).

<sup>217</sup> Peter Raven-Hansen, *Regulatory Estoppel: When Agencies Break Their Own “Laws,”* 64 *TEX. L. REV.* 1, 2–3 (1985).

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 4.

regulatory estoppel: to enforce repose, to establish uniformity in the application of laws, and to ensure fairness.<sup>220</sup> The application of executive estoppel also recognizes the role of agency expertise. Finally, it meets the requirements of affirmative misconduct and reliance because it promotes obedience to the law and is in keeping with separation of power principles. Executive estoppel should apply, then, under circumstances in which one agency has made a finding or taken action consistent with congressional intent, the party relied on the first agency's finding, and a second agency takes action that undermines the first agency's finding or action.

1. *Executive Estoppel Fits Within the Purposes of Traditional Estoppel Doctrines*

Stopping one agency of the executive branch, ICE or DOJ, from prosecuting workers who come forward to report violations of workplace laws and are certified as victims of a workplace crime by another federal agency would serve the purposes of estoppel. Estoppel doctrines have developed to serve three main purposes: to enforce repose, to establish uniformity in the application of laws, and to ensure fairness. Courts favor enforcing repose in the context of administrative fact-finding:

[G]iving preclusive effect to administrative fact-finding serves the value underlying general principles of estoppel: enforcing repose. This value, which encompasses both the parties' interests in avoiding the cost and vexation of repetitive litigation and the public's interest in conserving judicial resources . . . is equally implicated whether fact-finding is done by a federal or a state agency.<sup>221</sup>

Thus, when a federal agency makes a finding of fact, efficiency goals and litigation costs weigh in favor of giving that finding final effect. Accordingly, Justice Douglas, in his dissent from *INS v. Hibi*, argued that estoppel should apply to administrative agencies when they engage in conduct that is contrary to congressional intent and results in harm: "The Court's opinion ignores the deliberate—and successful—effort on the part of agents of the Executive Branch to frustrate the congressional purpose and to deny substantive rights to Filipinos such as respondent by administrative fiat, indicating instead that there was no affirmative misconduct involved in this case."<sup>222</sup>

In a situation like Ulu's, a federal agency within the same branch of government has engaged in administrative fact finding to determine that Ulu is a "qualifying victim of crime" and that she cooperated in the agency's investigation of the crime under the provisions of the Immigration and Na-

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<sup>220</sup> See discussion *supra* Part III.A.

<sup>221</sup> *University of Tenn. v. Elliott*, 478 U.S. 788, 798 (1986) (citation omitted).

<sup>222</sup> *INS v. Hibi*, 414 U.S. 5, 11 (1973) (Douglas, J., dissenting).

tionality Act.<sup>223</sup> The law enforcement certificate, then, shows that one federal agency already made a factual determination that the employer exploited the worker in ways that would fall within the definitions of labor exploitation or coercion. Thus, the executive has already determined that the individual was a victim of labor exploitation deserving of protection based on the same operative facts.<sup>224</sup> Traditional notions of estoppel support that the worker should not have to re-litigate this in a criminal or immigration enforcement proceeding. Nor does the executive prosecuting the worker on one hand while certifying the worker as a victim on the other hand serve the efficiency goals of repose. Instead, according to the EEOC's determination that Ulu is a qualifying victim of crime final effect better serves the principle of repose.

At least one court has applied estoppel against the DHS in a similar situation involving two parts of the administration—DOJ and DHS. In *Amrollah v. Napolitano*,<sup>225</sup> the Fifth Circuit applied collateral estoppel against the United States Citizenship and Immigration Services (USCIS), a sub-agency of the DHS. In earlier proceedings with the DOJ, the noncitizen had applied for asylum and admitted that he had supported the mujahedeen movement.<sup>226</sup> Even though this could have disqualified the noncitizen from eligibility for asylum, the immigration judge granted his asylum application and the government did not appeal.<sup>227</sup> The USCIS later denied the noncitizen's application for permanent residence "based on the support he had provided to the mujahedeen movement."<sup>228</sup> The Fifth Circuit decided the agency was precluded from finding the noncitizen ineligible "because his grant of asylum necessarily included a determination that he did not provide material support to a terrorist organization or member of such an organization,"<sup>229</sup> and "the [immigration judge's] ruling that [the noncitizen] [could receive asylum relief] necessarily included, under the structure of the statute, a finding that [the noncitizen] did not provide support to an individual or organization that engaged in terrorist activities."<sup>230</sup> Other instances of courts estopping an agency based on its prior actions include cases where the DHS unreasonably delayed making a decision on an application.<sup>231</sup>

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<sup>223</sup> INA § 101(a)(15)(U), 8 U.S.C. § 1101(a)(15)(U) (2012) (setting forth the requirement that the certifying agency find that the noncitizen was a victim of qualifying criminal activity and that she cooperated in the investigation or prosecution of the crime).

<sup>224</sup> See discussion *supra* Part II.D.

<sup>225</sup> *Amrollah v. Napolitano*, 710 F.3d 568, 573 (5th Cir. 2013).

<sup>226</sup> *Id.* at 570.

<sup>227</sup> *Id.* at 573.

<sup>228</sup> *Id.* at 570.

<sup>229</sup> *Id.* at 571.

<sup>230</sup> *Id.* at 572–73.

<sup>231</sup> See, e.g., *Wang v. Chertoff*, 676 F. Supp. 2d 1086, 1109–13 (D. Idaho 2009) (citing *Tang v. Chertoff*, 493 F. Supp. 2d 148 (D. Mass. 2007)) (discussing several other cases in which courts found DHS or legacy INS's delay unreasonable under the APA); see also *Silva v. Bell*, 605 F.2d 978 (7th Cir. 1979); *Amanjee v. Chertoff*, No. S-08-0499-JAM, 2009 WL 3476666 (E.D. Cal. Feb. 11, 2009); *Alibeik v. Chertoff*, No. C-07-1938-EDL, 2007 WL 4105527 (N.D. Cal. Nov. 16, 2007); *Galvez v. Howerton*, 503 F. Supp. 35 (C.D. Cal. 1980); *Paunescu v. INS*, 75 F. Supp. 2d 896 (N.D. Ill. 1999); *Marcetic v. INS*, No. 97-C-7018, 1998 WL 173129 (N. D. Ill. 1998).

In several areas of federal jurisprudence, including estoppel, another underlying principle is to ensure consistency in the interpretation and the application of federal law.<sup>232</sup> Although the Constitution does not explicitly require uniformity in the interpretation of federal law,<sup>233</sup> the uniform interpretation of federal laws, at a minimum, is necessary to safeguard other constitutional and statutory rights.<sup>234</sup> As set forth above, congressional intent to protect, not prosecute, workers like Ulu is clear.<sup>235</sup> Uniform and consistent interpretation and application of the four statutory schemes—Title VII, FLSA, IRCA, and the Victims of Trafficking and Violence Protection Act<sup>236</sup>—require that the immigration court or federal court estop attempts by ICE or DOJ to prosecute workers for whom the EEOC or another federal agency has signed a law enforcement certificate. Finally, as a doctrine, estoppel is “invoked to avoid injustice in particular cases.”<sup>237</sup> The prosecution of workers whose employers have turned them over to ICE or DOJ for prosecution requires the invocation of estoppel because rather than punishing the wrongdoer it allows the wrongdoer to escape liability.<sup>238</sup>

## 2. *Executive Estoppel Recognizes Agency Expertise*

In addition to the traditional theories of equitable estoppel supporting a theory of executive estoppel when one agency acts in contravention of a finding by another, agency expertise also weighs in favor of executive estoppel. The Supreme Court has noted that it is the delegation by Congress to the agency for fact-finding based on the agency’s expertise that supports the finality of the agency’s fact-finding:

Congress intended the boards (and like administrative representatives) to be *the* fact-finders within their area of competence, . . . .  
In light of [prior case law’s] evaluation of the statutory policy, we should not squint to give a crabbed reading to the [agency’s] au-

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<sup>232</sup> See, e.g., Martha Dragich, *Uniformity, Inferiority, and the Law of the Circuit Doctrine*, 56 LOY. L. REV. 535, 536 (2010) (citing Paul J. Mishkin, *The Federal “Question” in the District Courts*, 53 COLUM. L. REV. 157, 159 (1953)) (stating uniformity is a “necessary corollary to supremacy”). In *University of Tennessee v. Elliott*, the Court noted:

The Full Faith and Credit Clause is of course not binding on federal courts, but we can certainly look to the policies underlying the Clause in fashioning federal common-law rules of preclusion. “Perhaps the major purpose of the Full Faith and Credit Clause is to act as a nationally unifying force,” and this purpose is served by giving preclusive effect to state administrative fact-finding rather than leaving the courts of a second forum, state or federal, free to reach conflicting results.

478 U.S. 788, 799 (1996) (quoting *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 289 (1980) (White, J., concurring in judgment)).

<sup>233</sup> Dragich, *supra* note 232, at 540.

<sup>234</sup> *Id.* at 541.

<sup>235</sup> See discussion *supra* Part II.

<sup>236</sup> See discussion *supra* Part II.D.

<sup>237</sup> See *Heckler v. Community Health Servs.*, 467 U.S. 51, 59 (1984).

<sup>238</sup> See *supra* Part II.D (employer incentives to evade workplace laws by reporting unauthorized workers when they complain).

thority where it has stayed within its sphere, but should accept it as the primary fact-finding tribunal whose factual determinations . . . must be received, if valid, in the same way as those of other courts or of the independent administrative agencies. Under the more modern view, the findings of the latter, at least when acting in an adjudicatory capacity, are considered final, even in a suit not directly related to the administrative proceeding, unless there is some good reason for a new judicial inquiry into the same facts.<sup>239</sup>

This principle applies to the factual findings made by the agency, even if the agency had no authority to decide the legal issue.<sup>240</sup> So long as the agency is acting within its sphere of expertise, the courts and, at a minimum, other agencies should defer to the findings of fact made by that agency.<sup>241</sup> Requiring that law enforcement agencies like DOJ or ICE defer to the factual findings of labor enforcement agencies when the decisions involve a determination of who is the victim of a workplace crime and who is the perpetrator recognizes each agency's expertise.<sup>242</sup>

### 3. *Executive Affirmative Misconduct and Exploited Workers' Reliance on Executive Actions Require Executive Estoppel as a Remedy*

When an agency takes action that directly conflicts with another agency's determination that a worker ought to be protected, the worker should be able to show affirmative misconduct and reliance. The requirement that a litigant seeking estoppel against the government show affirmative misconduct and reliance serves two main purposes—it promotes obedience to the law and respects separation of powers. In cases where a litigant seeks estoppel against a private party, courts have found that the party to be estopped has engaged in misrepresentation if the misrepresentation is definite or “a misrepresentation by silence,” even in the absence of the intent to deceive.<sup>243</sup> However, the “[g]overnment may not be estopped on the same terms as any other litigant.”<sup>244</sup> Estoppel against the government requires “affirmative misconduct” on the part of the government and a

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<sup>239</sup> *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 421 (1966) (quoting *United States v. Utah Constr. & Mining Co.*, 339 F.2d 606, 618 (Ct. Cl. 1965) (Davis, J., dissenting)).

<sup>240</sup> *Id.* at 419.

<sup>241</sup> *Cf. Dragich, supra* note 232, at 555 (“The enactment of federal statutes governing an increasing array of issues—pursuant to Congress’s expansive power under the Commerce Clause—itself indicates a desire for uniformity of federal laws across the country.”).

<sup>242</sup> *Cf. Lee, supra* note 7, at 1092 (contrasting DOL’s role as the “nation’s top labor enforcement agency” with ICE’s “primary mission” of “target[ing] noncitizens for detention and deportation”).

<sup>243</sup> *See Kosakow v. New Rochelle Radiology Assocs.*, 274 F.3d 706, 726 (2d Cir. 2001) (citing RESTATEMENT (SECOND) OF TORTS § 894(1), cmt. b).

<sup>244</sup> *See Heckler v. Community Health Servs.*, 467 U.S. 51, 60 (1984).

showing that the “wrongful act will cause a serious injustice, and the public’s interest will not suffer undue damage by imposition of liability.”<sup>245</sup>

The Supreme Court has stated that the reason for more narrow application of equitable estoppel against the government is that “[w]hen the [g]overnment is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined.”<sup>246</sup> Thus, in *INS v. Hibi*, the Court did not apply estoppel against the government for its failure to publicize that Filipino nationals who served in the U.S. armed forces during World War II were eligible for naturalization in the United States and its failure to provide consular officials in the Philippines to adjudicate the naturalization applications.<sup>247</sup> Similarly, in *Heckler v. Community Health Services*, the Court held that although a medical provider had relied on the Secretary of Health, Education, and Welfare’s intermediary’s advice, the Secretary’s subsequent, contrary finding was not subject to equitable estoppel.<sup>248</sup> The Court determined that the provider had an affirmative duty to educate itself through the relevant statutes and regulations.<sup>249</sup> Therefore, both *Hibi* and *Heckler* demonstrate that promoting obedience to the law is a primary motivation for requiring a litigant to demonstrate affirmative misconduct when she seeks to estop the government.

Another objection to applying equitable estoppel against the government is based “on the concern that courts would violate the separation of powers if they were to estop an agency from enforcing legislative policies just because the agency had violated its own rules.”<sup>250</sup> But such concerns are “neutralized” if the agency’s action violates a regulation or rule with the force and effect of federal legislation because “the court faces competing legislative claims and must of necessity choose between them.”<sup>251</sup> Although applying estoppel may result in blocking the legislative policy underlying the agency’s action, not estopping the agency’s action also may result in violating a legislative “policy of equal dignity.”<sup>252</sup>

For example, in the immigration context, courts have estopped legacy INS from denying benefits to applicants based on the agency’s failure to follow its own guidelines in processing citizenship applications where those guidelines conformed to congressional policy.<sup>253</sup> In *Harriott v. Ashcroft*, the Eastern District of Pennsylvania estopped legacy INS from denying an applicant’s derivative citizenship application on the basis that the applicant had

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<sup>245</sup> See *Morgan v. Heckler*, 779 F.2d 544, 545 (9th Cir. 1985).

<sup>246</sup> *Heckler*, 467 U.S. at 60.

<sup>247</sup> 414 U.S. 5, 8–9 (1973).

<sup>248</sup> See *Heckler*, 467 U.S. at 65–66.

<sup>249</sup> *Id.*

<sup>250</sup> Raven-Hansen, *supra* note 217, at 14.

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> See, e.g., *Harriott v. Ashcroft*, 277 F. Supp. 2d 538, 543–45 (E.D. Pa. 2003) (citing *In re* Petition of Tubig, 559 F. Supp. 2d 2, 3–4 (N.D. Cal. 1981)).



aged out—i.e., turned eighteen.<sup>254</sup> The applicant had filed his application around one year prior to turning eighteen but instead of acting on the application within sixty days, as required by legacy INS's internal guidelines, INS delayed processing the application until after the applicant turned eighteen.<sup>255</sup> The court estopped the INS because it inexplicably deviated from its internal guidelines and, but for the deviation, the applicant would have been statutorily eligible for citizenship since he was under eighteen.<sup>256</sup> Because the guidelines served a congressional policy of ensuring children did not age out before their application was processed, legacy INS's actions conflicted with congressional policy. Thus, legacy INS's violation of the guidelines demonstrated affirmative misconduct.

Therefore, courts have asserted two reasons to support that the concept a litigant must demonstrate affirmative misconduct to estop the government—to promote obedience to the law and separation of powers concerns. Estopping the prosecution of workers who have cooperated in the investigation of workplace abuses promotes obedience to the law and recognizes the separation of powers concerns. On the other hand, prosecuting workers whose employers have turned them over for prosecution incentivizes the employers to flout workplace laws.<sup>257</sup> Moreover, prosecuting workers who have suffered workplace abuses and received a certification from another federal agency that they deserve protection undermines congressional intent to protect those workers.<sup>258</sup>

These two points also may demonstrate “affirmative misconduct” on the part of agency attorneys who prosecute workers like Ulu despite another federal agency having determined the worker is deserving of protection. That another federal agency signed a law enforcement certificate or granted a nonimmigrant visa because the worker was deserving of protection, seems to be the type of reliance that would deprive the worker of fair warning about whether her conduct was criminal or deportable. Instead of providing a warning to the worker about the potential consequences of coming forward, federal agencies have encouraged workers to report their employers for violating federal workplace laws. To then turn around and prosecute the worker after she comes forward is inconsistent with the executive's prior assurances that she can safely come forward to report.<sup>259</sup>

Finally, despite the more stringent requirements that a party must meet to raise an estoppel defense against the government, courts have estopped

<sup>254</sup> *Id.* at 544–45.

<sup>255</sup> *Id.* at 543.

<sup>256</sup> *Id.* at 544.

<sup>257</sup> See discussion *supra* Part II.D.

<sup>258</sup> See discussion *supra* Part II.D.

<sup>259</sup> For example, an EEOC pamphlet informs noncitizen workers that the “EEOC is a ‘Certifying Agency’ for U Visas.” EEOC, *EEOC Opens ‘New Frontier’ In War Against Human Labor Trafficking* (Aug. 2013), [http://www.eeoc.gov/eeoc/publications/upload/brochure-human\\_trafficking.pdf](http://www.eeoc.gov/eeoc/publications/upload/brochure-human_trafficking.pdf) [<https://perma.cc/KU2J-ALFA>]. “This means that EEOC can help workers who are victims of certain crimes apply to remain in the U.S. and continue to work, as long as, they cooperate with law enforcement authorities.” *Id.*

the government from criminally charging parties because a party relied on the government's prior interpretations of the law. In *United States v. Pennsylvania Industrial Chemical Corporation*, the Supreme Court found that a criminal defendant could raise equitable estoppel as a defense in a criminal proceeding. The government had alleged, in part, that the company's failure to obtain a permit to discharge waste violated the Rivers and Harbors Act of 1899.<sup>260</sup> One of the arguments that the company raised was that the Army Corps of Engineers had "consistently construed" the River and Harbors Act in a way that prohibited the discharge of only "those deposits that would impede or obstruct navigation, thereby affirmatively misleading [the company] into believing that a . . . permit was not required as a condition to discharges of matter involved in this case."<sup>261</sup> The Court agreed that the company should be able to present evidence of its reliance on the Corps' guidance in support of its defense to the charge:

Thus, to the extent that the regulations deprived [the Company] of fair warning as to what conduct the Government intended to make criminal, we think there can be no doubt that traditional notions of fairness inherent in our system of criminal justice prevent the Government from proceeding with the prosecution.<sup>262</sup>

As the Court's decision shows, a criminal defendant's ability to demonstrate reliance on the government's consistent interpretation of a statute can support estoppel against the government.<sup>263</sup>

Workers who come forward and report violations of workplace laws to one federal agency also can demonstrate reliance on the government's consistent interpretation of the U visa statutes in particular. Besides the EEOC's and DOL's encouragement of workers to come forward to report abuses,<sup>264</sup> DHS has also provided publically available guidelines that encourage workers to come forward and report crime.<sup>265</sup> Furthermore, other law enforcement agencies, including DOJ, heavily lobbied for the creation of the U visa to encourage victims to come forward to report violations of the law.<sup>266</sup>

Thus, under the theory of executive estoppel, the individual seeking estoppel demonstrates affirmative misconduct and reliance when she shows

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<sup>260</sup> 411 U.S. 655, 656–58 (1973).

<sup>261</sup> *Id.* at 659–60.

<sup>262</sup> *Id.* at 674 (citing Frank C. Newman, *Should Official Advice Be Reliable?—Proposals as to Estoppel and Related Doctrines in Administrative Law*, 53 COLUM. L. REV. 374 (1953); Note, *Applying Estoppel Principles in Criminal Cases*, 78 YALE L.J. 1046 (1969)).

<sup>263</sup> *Penn. Indus. Chem. Corp.*, 411 U.S. at 674.

<sup>264</sup> See discussion regarding retaliation *supra* Part II.B. See also discussion *supra* note 259.

<sup>265</sup> See, e.g., *Victims of Criminal Activity: U Nonimmigrant Status*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (July 28, 2016), <https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status> [<https://perma.cc/44HH-VCGF>] ("Don't be afraid to ask for help: Immigration relief is available for victims of trafficking, domestic violence, and other crimes.").

<sup>266</sup> See Saucedo, *A New "U," supra* note 1, at 908.

one executive agency has made a decision that contradicts another agency's prior action or fact determination, the decision is contrary to a congressional policy, and the executive has consistently interpreted the statute in a manner consistent with the prior agency's action or fact determination. As discussed above, this is consistent with the underlying reasons for the affirmative misconduct requirement—it promotes obedience to the law and is in keeping with separation of powers concerns. Accordingly, in situations like Ulu's where the worker has received a law enforcement certificate from a federal agency, the worker will be able to demonstrate affirmative misconduct and reliance.

#### CONCLUSION

When federal agencies choose to criminally prosecute or seek the removal of unauthorized workers who have experienced workplace abuses, the agencies contravene congressional intent. The criminal and immigration prosecution of such workers discourages employees from reporting violations of workplace law, lets employers evade accountability for their illegal conduct, and makes it difficult, if not impossible, for workers who would otherwise qualify for immigration relief to obtain it. Instead of protecting the workers as Congress intended, the agencies are playing into the hands of employers who seek to capitalize on the workers' vulnerable status.

This article has proposed two solutions for unauthorized workers who find themselves being prosecuted or in removal proceedings after reporting workplace abuses. First, unauthorized workers who have come forward to report employer violations of federal workplace laws but do not otherwise qualify for relief under the Victims of Trafficking and Violence Protection Act of 2000 should qualify for the equitable use of prosecutorial discretion. Second, unauthorized workers who have received certifications from other executive agencies that they qualify as the victims of workplace crimes should be able to estop their prosecution or removal. Ensuring the equitable enforcement of workplace laws complies with congressional intent and serves the public interest in safe and fair workplaces.

Finally, while this article has focused on a particular context—that of unauthorized workers caught between two federal agencies—executive estoppel has broader application and can provide solutions for other individuals or entities facing a similar tug-of-war. It could provide a means for whistleblowers who come forward to one federal agency to report their employers for violating federal law to estop their prosecution by another agency. Executive estoppel could also apply when an individual or entity receives directives from one federal agency to comply with a contract but faces fines or the loss of a contract from another federal agency because those directives conflict with the second agency's policies. Given the prevalence of the administrative state and the degree to which agency decisions to protect or prosecute impact individual citizens and entities, executive estoppel and the equitable use of prosecutorial discretion will serve as an important check on any abuses.