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Why Protect Unauthorized Workers? Imperfect Proxies, Unaccountable Employers, and Antidiscrimination Law's Failures

Angela D. Morrison
Texas A&M University School of Law, angela.morrison@law.tamu.edu

WHY PROTECT UNAUTHORIZED WORKERS? IMPERFECT PROXIES, UNACCOUNTABLE EMPLOYERS, AND ANTIDISCRIMINATION LAW'S FAILURES

Angela D. Morrison*

This Article explores a gap in the scholarship regarding the unauthorized workplace. It describes and names the two main justifications on which advocates and courts have relied to extend federal antidiscrimination protections to unauthorized workers. First, the proxy justification insists that workplace protections must include unauthorized workers because their protection is necessary to protect U.S. citizen and authorized workers. Second, the deterrence/accountability justification states that workplace protections must include unauthorized workers because it will deter employers from future violations of antidiscrimination laws and hold them accountable for violations of immigration law. While these justifications have led to some protection for workers, especially under federal antidiscrimination laws, unauthorized workers have still found themselves without full remedy. The existing scholarship attributes this to the Supreme Court's decision in Hoffman Plastic Compounds, Inc. v. NLRB and its emphasis on the Immigration Reform and Control Act of 1986 (IRCA)'s prohibition on hiring unauthorized workers.

This Article argues that attributing the lack of full remedy solely to Hoffman is an incomplete account. It ignores the role that antidiscrimination law's two primary, normative principles play in the justification's limitations. First, anticlassification's status-neutral and individually-focused

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principles exacerbate the stereotyping effects of the proxy justification, which results in limited access to remedies and misapplication of legal doctrines. Antisubordination also fails to achieve full protection for unauthorized workers. It can be difficult to get buy-in to the idea that workers who are unauthorized should be protected because antisubordination principles, unlike anticlassification principles, do not protect all workers regardless of status. Its historical reliance on immutability also means that courts and some policy makers may resist protecting unauthorized workers because they view immigration status as changeable. This also can lead to further stereotyping. Accordingly a fuller account of the unauthorized workplace shows that the proxy and accountability/deterrence justifications' failure to fully protect unauthorized workers is not only the result of IRCA and immigration policy. The drawbacks of anticlassification and antisubordination principles lead to less robust protections for unauthorized workers, too.

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INTRODUCTION

The main justifications for protecting unauthorized workers under federal antidiscrimination laws have failed to provide full protection for those workers. Unauthorized workers are more vulnerable to unlawful discrimination in the workplace and face more challenges to claims-making under federal antidiscrimination laws than their authorized counterparts. The prevailing justifications that advocates and scholars' have developed has contributed to this. But the justifications are not solely responsible for the lack of protections. The justifications developed in the context of existing antidiscrimination law. Antidiscrimination law's two main normative principles made room for the gaps in protection that unauthorized workers face.

The Supreme Court in *Hoffman Plastic Compounds, Inc. v. NLRB* held that a noncitizen worker who lacked immigration status was not entitled to remedy under the National Labor Relations Act (NLRA).[1] The Court reasoned that awarding an unauthorized worker backpay under the NLRA would "subvert" the immigration enforcement goals of the Immigration Control Act of 1986 (IRCA).[2] Scholars have documented how this decision made unauthorized workers more vulnerable to workplace abuses.[3]

Scholars and advocates, then, have focused on why, despite IRCA, federal workplace laws still protect unauthorized workers.[4] Two main justifications have emerged. First, workplace protections must include unauthorized workers because their protection is necessary to protect U.S. citizen and authorized workers. I call this the proxy justification. Second, workplace protections must include unauthorized workers because it will

[1] Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 140 (2002).

[2] *Id.* at 149–50.

[3] *See, e.g.,* Leticia M. Saucedo, *The Making of the "Wrongfully" Documented Worker,* 93 N. CAR. L. REV. 1505 (2015); Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 UNIV. CHI. LEGAL FORUM 193; Kathleen Kim, *Beyond Coercion*, 62 UCLA L. REV. 1558 (2015); 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); Kati L. Griffith, *Undocumented Workers: Crossing the Borders of Immigration and Workplace Law*, 21 CORNELL J. L. & POL'Y 611 (2012).

[4] *See, e.g.,* Keith Cunningham-Parmeter, *Redefining the Rights of Undocumented Workers*, 58 AM. L. REV. 1361 (2009); Griffith, *supra* note 3; Angela D. Morrison, *Executive Estoppel, Equitable Enforcement, and Exploited Immigrant Workers*, 11 HARV. L. & POL'Y REV. 295, 297 (2017).

hold employers accountable and deter future violations of the workplace and immigration laws. I call this the accountability and deterrence justification.

These justifications have led to some protection for workers, especially under federal antidiscrimination laws.[5] Virtually every court to have considered the issue since *Hoffman Plastics* has found that unauthorized workers have standing to sue their employers for violations of federal antidiscrimination laws.[6] But the proxy justification and the accountability/deterrence justification have resulted in unauthorized workers being less protected than their authorized counterparts. The proxy justification means that unauthorized workers only get treated the same as authorized workers up to a point. If the main reason to protect unauthorized workers is to protect authorized workers, then anything that implicates only the workers' immigration status means that unauthorized workers will lose the protection the proxy justification provides.[7]

The accountability/deterrence justification opens the door to two stereotypes that exist about unauthorized—that they are essentialized workers willing to take the jobs that authorized workers won't, or that they are criminals who broke the law to take jobs from authorized workers. On the one hand, placing unauthorized workers in the role as victims of abusive employers potentially robs them of their agency and reinforces stereotypes about immigrant workers as an exploitable, subservient workforce.[8] On the other hand, it also sets up a "comparative culpability analysis" that invites courts to view unauthorized workers as criminals and, therefore, less deserving of protection.[9] Kathleen Kim has called this latter stereotype "complicity framing."[10]

This Article argues that the failures of the proxy and accountability/deterrence justification are not traceable only to IRCA and *Hoffman*. Instead, the normative underpinnings of federal antidiscrimination

[5] *See* discussion *infra* Part II.

[6] *See* discussion *infra* Part II.

[7] *See*, *e.g.*, Escobar v. Spartan Sec. Serv., 281 F. Supp. 2d 895, 897 (S.D. Tex. 2003) (denying full remedy to unauthorized workers because of their unauthorized status).

[8] Saucedo, *The Employer Preference for the Subservient Worker*, *supra* note 3, at 970 (describing the stereotype of the subservient, immigrant worker); Jennifer J. Lee, *Outsiders Looking In: Advancing the Immigrant Worker Movement Through Strategic Mainstreaming*, 5 UT. L. REV. 1063, 1070 (2014) (noting the dangers generally of relying on a narrative of unauthorized workers as passive victims).

[9] Kim, *supra* note 3, at 1580.

[10] *Id.*

law—anticlassification and antisubordination—can explain why the justifications fail to fully protect unauthorized workers who experience unlawful discrimination. Anticlassification's status-neutral and individually-focused principles exacerbate the proxy justifications' role in making workers more vulnerable to attacks that they should be treated differently because they lack immigration status. That anticlassification theory is individually-focused also means it reinforces complicity framing.

Antisubordination also fails to achieve full protection for unauthorized workers. It can be difficult to get buy-in to the idea that workers who are unauthorized should be protected because antisubordination principles, unlike anticlassification principles, do not protect all workers regardless of status. Its historical reliance on immutability also means that courts and some policy makers may resist protecting unauthorized workers because they view immigration status as changeable. This also can lead to further complicity framing.

Thus, the proxy and accountability/deterrence justifications' failure to fully protect unauthorized workers is not only the result of IRCA and immigration policy. The drawbacks of anticlassification and antisubordination principles lead to less robust protections for unauthorized workers, too.

This Article proceeds in five parts. In Part I, it describes IRCA and explains how IRCA's enforcement has contributed to the vulnerability of unauthorized workers in the workplace. Part II introduces the proxy and accountability/deterrence justifications and demonstrates how courts have used those justifications to determine federal antidiscrimination laws apply to unauthorized workers. Part III outlines the limits of the justifications in terms of access to full remedy and increased vulnerability in the workplace. Part IV explains the antisubordination and anticlassification principles and how they have been used to justify antidiscrimination law and policy. In Part V, the article concludes that the antidiscrimination and antisubordination principles exacerbate and contribute to the proxy and accountability/deterrence justifications' failures.

I. IRCA'S EMPLOYMENT BAN, ITS ENFORCEMENT, AND THE EMPLOYER RESPONSE

Congress passed the Immigration Reform and Control Act (IRCA) in 1986.[11] IRCA changed existing immigration law in three significant ways. First, it created a legalization program for individuals who have been in the United States without immigration status since 1982.[12] Second, it reformed existing legal immigration programs, including creating the H2-A nonimmigrant visa for temporary agricultural workers,[13] providing for adjustment of status for agricultural workers in the United States who performed seasonal agricultural work,[14] and the visa waiver pilot program.[15] Finally, IRCA, for the first time, regulated the employer/employee relationship based on the employee's immigration status.[16] It barred employers from hiring workers who were in the country without authorization.[17]

Congress relied on two main rationales to ban the employment of unauthorized workers. First, Congress sought to reduce irregular migration.[18] Many believed that that the United States served as a "jobs magnet" for unauthorized immigrants and that unauthorized immigration would decrease if Congress penalized employers who hired unauthorized migrants.[19] Second, some in Congress also believed that the presence of unauthorized immigrants in the workforce "had significant negative effects for domestic workers, especially 'low-income, low-skilled Americans, who are the most likely to

[11] Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359.

[12] *Id.* § 201. The program is also known as the "Reagan Amnesty."

[13] *Id.* § 301.

[14] *Id.* § 302.

[15] *Id.* § 313.

[16] Saucedo, *The Making of the "Wrongfully" Documented Worker, supra* note 3, at 1506–07.

[17] IRCA § 101 (codified at 8 U.S.C. § 1324a (2018)).

[18] Saucedo, *The Making of the "Wrongfully" Documented Worker, supra* note 3, at 1512; Wishnie, *supra* note 3, at 203 (quoting H.R. REP. NO. 99-682(I) (1986) and citing S. REP. NO. 99-132 (1985)).

[19] *See, e.g.,* Wishnie, *supra* note 3, at 195 (citing U.S. Immigration Policy and the National Interest: The Final Report and Recommendations of the Select Commission on Immigration and Refugee Policy with Supplemental Views by Commissioners, 97th Cong., 1st Sess. 11 (Mar. 1, 1981)); Saucedo, *The Making of the "Wrongfully" Documented Worker, supra* note 3, at 1512–14.

face direct competition' from the undocumented."[20] In sum, Congress hoped to deter extralegal migration and "safeguard[] wages and working conditions for U.S. workers."[21]

IRCA created an employment authorization regime which requires that employers verify an employee's identity and work authorization status.[22] The Act also imposes civil and criminal penalties on employers who fail to verify an employee's identity and work authorization status, knowingly hire "unauthorized" noncitizens, or continue to knowingly employ unauthorized noncitizens.[23] IRCA defines an unauthorized noncitizen[24] as a noncitizen who "is not at that time either (A) . . . lawfully admitted for permanent residence, or (B) authorized to be so employed by this Act or by the Attorney General."[25]

Although IRCA does not impose criminal penalties for working without authorization, it includes provisions that penalize individuals who present fraudulent documents to obtain work.[26] These sanctions are in addition to

[20] Wishnie, *supra* note 3, at 195 (quoting Immigration and Reform Control Act of 1985, S. REP. NO. 99-132 (1985)).

[21] *Id.* at 195–96, 203–04. Wishnie also notes that "there was a political rationale for employer sanctions." *Id.* at 196. IRCA also included a legalization program that made three million people eligible for immigration status. *Id.* So, "IRCA promised both legalization and increased enforcement—politically something for all sides." *Id.*

[22] IRCA § 101 (codified at 8 U.S.C. § 1324a(b) (2018)).

[23] *Id.* (codified at 8 U.S.C. § 1324a(a) (2018)).

[24] This article uses the term "noncitizen" rather than "alien."

[25] IRCA § 101 (codified at 8 U.S.C. § 1324a(h)(3) (2018)).

[26] *Id.* § 103 (codified at 18 U.S.C. § 1546(b) (2018)):

> (b) Whoever uses —
>
> (1) an identification document, knowing (or having reason to know) that the document was not issued lawfully for the use of the possessor,
>
> (2) an identification document knowing (or having reason to know) that the document is false, or
>
> (3) a false attestation,
>
> for the purpose of satisfying a requirement of section 274A(b) of the Immigration and Nationality Act, shall be fined in accordance with this title, or imprisoned not more than two years, or both.
>
> Noncitizens who violate this provision also face additional immigration penalties—they are inadmissible and removable.

immigration penalties for unauthorized work that the Immigration and Nationality Act already included.[27] Still, as Leticia Saucedo notes, at the time that Congress passed IRCA, IRCA's sanctions were "aimed at employers."[28]

Nonetheless, employers successfully lobbied to weaken some of IRCA's sanctions and the federal government, for the most part, has focused its enforcement on employees, rather than employers.[29] In response to employers' lobbying, Congress amended the statute to allow employers to correct "technical or procedural" violations of IRCA's document verification requirements.[30] Employers who make "a good faith attempt to comply with the requirement" have ten days to fix the error after notice by the federal government.[31]

One of the results has been uneven enforcement of IRCA's provisions against employers. During the 1990s, audits of employers' compliance with IRCA's document verification program declined 77%, warnings to employers declined 62%, and final orders against employers in administrative proceedings declined 82%.[32] From 2000 to 2014, although the numbers of final orders and civil fines against employers increased, the number of employers who were subject to fines were only .02% of employers in the United States.[33] More recently, ICE has claimed that it increased employer audits by 340% in 2018 as compared to 2017.[34]

Criminal prosecutions of employers are rarer. Between April 2018 and March 2019, only eleven employers were criminally prosecuted for

Immigration & Nationality Act (INA) §§ 212(a)(3)(C), 237(a)(6)(C) (codified at 8 U.S.C. §§ 1227(a)(3)(C), 1182(a)(6)(C) (2018)).

[27] INA § 245(c)(2) (codified at 8 U.S.C. § 1255(c)(2) (2018)) (prohibiting the adjustment of status of any noncitizen who continues in or accepts unauthorized employment).

[28] Saucedo, *The Making of the "Wrongfully" Documented Worker, supra* note 3, at 1513.

[29] *Id.* at 1513–14.

[30] *Id.* at 1514 (citing Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, § 411, 110 Stat. 3009-546, 3009-666 (1996) (codified at 8 U.S.C. § 1324c(a)(6) (2018)).

[31] INA § 274A (codified at 8 U.S.C. § 1324a(b)(6) (2018)).

[32] Wishnie, *supra* note 3, at 209 (citing GAO statistics for the period from 1990 to 2003).

[33] ANDORRA BRUNO, CON. RESEARCH SERV., IMMIGRATION-RELATED WORKSITE ENFORCEMENT: PERFORMANCE MEASURES 4 (2015).

[34] ICE, *HSI FY2018 Achievements, Worksite Enforcements* (Aug. 7, 2019), https://www.ice.gov/features/worksite-enforcement.

employing unauthorized workers.[35] In 2015, the Congressional Research Service concluded that "[v]iewed more broadly, ICE administrative and criminal arrests in worksite enforcement operations represent a very small percentage of the potential population of violators."[36] Thus, on the one hand, IRCA's prohibition on employing unauthorized workers is underenforced.

On the other hand, legacy INS and ICE have consistently focused enforcement efforts on employees who violate IRCA's fraudulent document provisions. Workplace raids during the Bush administration led mainly to the arrests of workers who used false documents to obtain work, leaving employers relatively unaffected.[37] The same held true during the first term of the Obama administration.[38] And that pattern has re-emerged under the Trump administration. In 2018, the Trump administration charged 666 workers with criminal violations, an increase of 812% from the prior year.[39] A more recent workplace raid in Mississippi in 2019 resulted in the arrest of 680 workers.[40] To the extent that ICE has engaged in worksite enforcement, then, its efforts have largely centered on workers, not employers.

The federal government's subsequent under- and over-enforcement of IRCA's provisions have created an opening for employers to develop an exploitable workforce; this results from both the criminalization of undocumented work and a perception of unauthorized workers as subservient.[41] First, the de facto criminalization of unauthorized work makes the status of unauthorized workers more precarious.[42] Because the government prosecutes workers for document-related crimes the "mere act

[35] TRAC Immigration, *Few Prosecuted for Illegal Employment of Immigrants* (May 30, 2019), https://trac.syr.edu/immigration/reports/559/.

[36] BRUNO, *supra* note 33, at 8.

[37] Kim, *supra* note 3, at 1574.

[38] Alan Gomez, *Feds Targeting More Worksites Crack Down on Undocumented Workers but not their Employers*, USA TODAY (Dec. 11, 2018), https://www.usatoday.com/story/news/nation/2018/12/11 /donald-trump-targeted-more-worksites-undocumented-immigrantsimmigration-and-customs-enforcement/2263656002/.

[39] *Id.*

[40] Henry Grabar, *After ICE*, SLATE (Aug. 18, 2019, 7:00 p.m.), https://slate.com/news-and-politics/2019/08/ice-raids-mississippi-chicken-plants-aftermath-children.html.

[41] Saucedo, *The Employer Preference for the Subservient Worker*, *supra* note 3, at 970; Griffith, *supra* note 3, at 629–35; Wishnie, *supra* note 3, at 211–13; Morrison, *supra* note 4, 297, 321; Kim, *supra* note 3, at 1573–75.

[42] Kati L. Griffith & Shannon M. Gleeson, *The Precarity of Temporality: How Law Inhibits Immigrant Worker Claims*, 39 COMP. LAB. L. & POL'Y J. 111, 121–22 (2017).

of working, which requires inventing or borrowing a Social Security number, also places unauthorized migrants at risk of arrest."[43]

And given employers' role in the enforcement of immigration law through IRCA's required document verification process, unauthorized workers may view their employers as part of the immigration enforcement regime.[44] As a result, employers have more power over unauthorized workers who have used false identity documents to obtain their employment because they fear their employers will report them for criminal prosecution.

Through her fieldwork, anthropologist Sarah Horton has documented the increased vulnerability that using false identity documents has created for unauthorized workers as compared to workers who are able to work unauthorized but under the table:

> [M]igrant farm-worker interviewees told me that unauthorized workers were not the most disadvantaged category of workers in the fields. As I conducted interviews about the causes of workplace accidents and why injured migrants chose not to pursue workers' compensation claims, interviewees pointed to one particular category of worker as the most vulnerable: *los que trabajan los papeles de otros* (those who work under other people's papers). Interviewees told me that it was this particular subset of unauthorized workers who did not take breaks, who did not report their injuries to supervisors, and who did not collect workers' compensation when injured.[45]

Workers become not only deportable but also what Horton terms "denounce-able."[46] Workers are denounce-able when they use false identity documents in the document verification process because at any moment they fear their employer could report them to ICE for criminal prosecution.[47] Thus,

[43] Sarah B. Horton, *From "Deportability" to "Denounce-ability:" New Forms of Labor Subordination in an Era of Governing Immigration Through Crime*, 39(2) POLAR 312, 314 (2016).

[44] Griffith & Gleeson, *supra* note 42, at 123.

[45] Horton, *supra* note 43, at 315.

[46] *Id.* at 314.

[47] *Id.* at 314. Sarah Horton also describes the process through which individuals obtain false identity documents. *Id.* at 316–17. The workers she interviewed prefer "identity loan." *Id.* Because the workers are concerned that buying false documents on the open market with a made-up social security number could inadvertently result in actual identity theft, the workers borrow a friend or

workers, at best, fear that they will lose their jobs, and, at worst, that their employers will report them to ICE should they complain about their working conditions.[48] The result is that employer power in the workplace is enhanced.[49]

Second, the vulnerability of unauthorized workers has created a perception among employers that unauthorized workers, particularly unauthorized Latinx workers, are more subservient.[50] In turn, employers engage in practices that create "unwanted jobs" and target vulnerable workers for their perceived subservience.[51] Employers have done this through network hiring, job structuring that leads to segregation through pay rates and conditions of employment, and hiring only perceived unauthorized workers for certain jobs.[52] The vulnerability this creates has meant that unauthorized workers face pay discrimination, working conditions that are unsafe, harassment that includes sexual assault, and retaliation—all based on their national origin or sex. [53]

family member's valid identity documents for the purposes of the employment verification process. *Id.* at 317.

[48] Griffith & Gleeson, *supra* note 42, at 123.

[49] *Id.* at 121.

[50] Saucedo, *The Employer Preference for the Subservient Worker*, *supra* note 3, at 970.

[51] *Id.* at 976–80.

[52] *Id.* at 976–80. As Saucedo notes, employers use national origin as a proxy for immigration status. *Id.* at 970. Accordingly, these practices include not just unauthorized workers, but Latinx workers as a whole. *Id.*

[53] *See, e.g.*, Scott Soriano, *The Rape Crisis Among California's Farm Workers*, CAPITOL WEEKLY (Jan. 9, 2020), https://capitolweekly.net/the-rape-crisis-among-californias-farm-workers/ (reporting that "nearly 51,000 farm worker women have been sexually assaulted or raped through coercion or blackmail" many of whom lack work authorization); Mica Rosenberg & Cristina Cooke, *Allegations of Labor Abuses Dogged Mississippi Plant Years Before Immigration Raids*, REUTERS (Aug. 9, 2019), https://www.reuters.com/article/us-usa-immigration-koch-foods/allegations-of-labor-abuses-dogged-mississippi-plant-years-before-immigration-raids-idUSKCN1UZ1OV (describing a suit a meat processing company settled with the EEOC for $3.75 million which included allegations that unauthorized workers were subjected to sexual and physical assaults, and threats to turn them over to immigration authorities if they complained); Eli Rosenberg, *How a Worker Who Survived a Catastrophic Building Collapse Ended up in ICE Detention*, WASH. POST (Nov. 25, 2019), https://www.washingtonpost.com/business/2019/11/25/how-worker-who-survived-catastrophic-building-collapse-ended-up-ice-detention/ (describing an unauthorized worker who was placed in removal proceedings after reporting his employer for labor and safety violations). I have previously collected cases and news articles in my scholarship. *See* Angela D. Morrison, *Free Trade, Immigrant Workers, and Employment Discrimination*, 67 KAN. L. REVIEW 237, 240–41 nn. 13–16 (2018) (citing EEOC v. Global Horizon, Inc., 7 F. Supp. 3d 1053, 1059–65

In summary, IRCA made it unlawful for employers to hire unauthorized workers but did not make it unlawful for employees to work without authorization. Nonetheless, Congress has enacted laws that criminalize using false documents or misrepresenting one's immigration status to obtain employment. The result has been underenforcement of IRCA against employers and overenforcement of criminal laws against unauthorized workers. In turn, unauthorized workers have been increasingly viewed as both criminal and as exploitable, thereby intensifying employer power in the unauthorized workplace.

II. CURRENT JUSTIFICATIONS FOR PROTECTING UNAUTHORIZED WORKERS UNDER FEDERAL ANTIDISCRIMINATION IN EMPLOYMENT LAWS

Although unauthorized workers have successfully argued that they are protected under federal antidiscrimination laws, courts have failed to provide full protection to unauthorized workers. Just over a decade after Congress enacted IRCA, the Supreme Court decided *Hoffman*, in which it found an unauthorized worker was not entitled to backpay because of his unauthorized status.[54] Advocates and scholars worked to develop legal justifications to

(D. Haw. 2014) (alleging that the employer subjected Thai noncitizen workers to abusive terms and conditions of employment due to their national origin); SOUTHERN POVERTY L. CTR. & ALA. APPLESEED, UNSAFE AT THESE SPEEDS: ALABAMA'S POULTRY INDUSTRY AND ITS DISPOSABLE WORKERS 39–40 (2013) (describing workers in the Alabama Poultry Industry who reported harassment and dangerous and undesirable work assignments due to their national origin); SOUTHERN POVERTY L. CTR., CLOSE TO SLAVERY: GUESTWORKER PROGRAMS IN THE UNITED STATES 31–33 (2013) (describing noncitizen workers with guest-worker status who experienced pay discrimination based on their national origin or gender); Sasha Khoka, *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 (describing female, agricultural workers who were afraid to report sexual assaults because of their unauthorized status); *Rape on the Night Shift* (PBS Frontline 2015) (reporting about sexual assaults of noncitizen custodial workers); MARY BAUER & MÓNICA RAMIREZ, INJUSTICE ON OUR PLATES: IMMIGRANT WOMEN IN THE FOOD INDUSTRY 22–29, 41–47 (2010) (describing retaliation, harassment, and wage theft that noncitizen women faced in the workplace)); *See also* Angela D. Morrison, *Executive Estoppel, Equitable Enforcement, and Exploited Immigrant Workers*, 11 HARV. L. & POL'Y REV. 295, 297, 320–21 & 321 nn. 177 & 179 (2017) (collecting cases and media reports).

[54] Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002).

distinguish workers seeking protection under Title VII from workers seeking protection under the NLRA.

Title VII of the Civil Rights Act of 1964,[55] prohibits employers from discriminating against workers on the basis of sex, race, national origin, color, or religion.[56] Those protections include prohibitions on subjecting an employee to a hostile work environment or harassment, disciplining an employee, terminating an employee, or subjecting an employee to different terms or conditions of employment.[57] Title VII similarly prohibits employers from retaliating against employees who exercise their rights under Title VII.[58] Other federal antidiscrimination statutes protect employees from discrimination on the basis of disability or age.[59]

The Supreme Court has not addressed directly whether IRCA bars unauthorized workers from seeking relief under federal antidiscrimination laws. But the Supreme Court's 2002 decision in *Hoffman Plastic Compounds v. NLRB* did address whether unauthorized workers could obtain relief for their employers' violations of the National Labor Relations Act. [60] In *Hoffman Plastic Compounds*, a group of workers had participated in a union organizing campaign at the company's production plant.[61] The company subsequently laid off the workers who participated in the campaign.[62] The NLRB eventually determined that the company had laid off the workers because of their union organizing activities, a violation of the NLRA.[63] The NLRB ordered the company to remedy the violation, including that the company reinstate and provide backpay to the workers it unlawfully laid off.[64]

[55] Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e–2 et seq. (2018).

[56] 42 U.S.C.§ 2000e-2(a).

[57] 42 U.S.C. § 2000e-2(a)(2).

[58] 42 U.S.C. § 2000e-3(a).

[59] *See generally* Title I of the Americans with Disabilities Act of 1990, as amended, 42 U.S.C. § 12101 et seq. (2012); Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 et seq. (2012).

[60] Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 140 (2002).

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.* at 140–41.

An administrative law judge held hearings to determine the amount of backpay the company owed to each worker.[65] During the hearings, one worker testified that he lacked immigration status and admitted that he used someone else's birth certificate to obtain the documents he needed to work in the United States.[66] The NLRB awarded the worker backpay, reversing the ALJ's decision to deny backpay, for the period from when the company laid off the worker to when it discovered the worker lacked immigration status.[67] When the case reached the Supreme Court, the Court held the National Labor Relations Board lacked authority under the National Labor Relations Act to award backpay to an unauthorized worker.[68] The Court pointed to IRCA to support its decision, writing "allowing the Board to award backpay to [unauthorized noncitizens] would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA."[69]

Subsequent to the Court's decision in *Hoffman*, employers argued that federal antidiscrimination laws either do not apply to unauthorized workers because the employment relationship was not valid in the first instance[70] or that *Hoffman* limits the remedy to which workers are entitled.[71] For the most part, employers have been unsuccessful with the former argument[72] and successful with the latter.[73] Given the success of the latter argument, employers use the reasoning in *Hoffman* to argue that because the decision

[65] *Id.* at 141.

[66] *Id.*

[67] *Id.* at 141–42.

[68] *Id.* at 152.

[69] *Id.* at 151.

[70] *See, e.g.*, Def.'s Mem. in Supp. of Mot. for Summ. J. at 14–18, EEOC v. Restaurant Co., 490 F. Supp. 2d 1039 (D. Minn. Dec. 4, 2006) (No. 05-1656) (arguing that employee lacked standing and was not an "employee" as defined by Title VII because employee was unauthorized).

[71] *See, e.g.*, Def.'s Br. as to Pls.' Emp. Based Remedies at 6–7, Chellen v. John Pickle Co., 344 F. Supp. 2d 1278 (N.D. Okla. 2004) (No. 02-cv-85), 2004 WL 3342323.

[72] *See, e.g.*, Iweala v. Operational Tech. Servs., Inc., 634 F. Supp. 2d 73 (D.D.C. 2009) (employer unsuccessfully argued employee had no standing to bring Title VII claim because she was lacked immigration status); EEOC v. Restaurant Co., 490 F. Supp. 2d 1039 (D. Minn. 2007) (employer unsuccessfully argued the EEOC did not have authority to bring suit because worker claiming discrimination was unauthorized); EEOC v. Phase 2 Invests., Inc., 310 F. Supp. 3d 550 (D. Md. 2018)(same).

[73] *See, e.g.*, Escobar v. Spartan Sec. Serv., 281 F. Supp. 2d 895, 897 (S.D. Tex. 2003); *Restaurant Co.*, 490 F. Supp. 2d at 1047; *Phase 2 Invests.*, 310 F. Supp. 3d at 580.

limits the remedies to which unauthorized workers are entitled, discovery into workers' immigration status is warranted.[74]

When courts have determined workplace laws extend their protections to unauthorized workers, they have relied on two justifications.[75] The first justification, the "proxy" justification, is that to ensure the protection of authorized workers, that is, United States citizens and noncitizens with authorization, in the workplace, workplace protections must extend to unauthorized workers.[76] The second justification, the "deterrence and accountability" justification, looks at the impact on employers' overall compliance with federal workplace laws.[77] Under this justification, courts protect unauthorized workers because to do otherwise would allow employers to evade accountability and would fail to deter employers from engaging in discrimination in the future.[78]

But the justifications do not provide full protection to workers, as described below.[79] First, the justifications can increase vulnerability in the

[74] *See, e.g.*, Br. of Appellant at 17–19, 27–29, Rivera v. NIBCO, 364 F.3d 1057 (9th Cir. 2004) (No. 02–36155), 2003 WL 22670387.

[75] Morrison, *supra* note 4, at 297, 303–05, 312; This article looks at workers who fit within the antidiscrimination statutes' definitions of "employee." Many unauthorized workers do not meet the threshold definition of employee because they are relegated to contingent work. Geoffrey Heeren describes the gaps in IRCA that have resulted in unauthorized workers becoming subordinate in the workplace, "the primary impact of employer sanctions is not to ban unauthorized workers from working, but to relegate them to contingent positions where they do not receive the rights and protections that traditional employees take for granted." Geoffrey Heeren, *The Immigrant Right to Work*, 31 GEO. IMM. L. J. 243, 246 (2017). He outlines three main exemptions in IRCA that allow employers to escape sanctions: (1) independent contractors are not employees under IRCA; (2) IRCA does not apply to self-employed entrepreneurs; and (3) sporadic, irregular, or intermittent domestic service in a private home is not considered employment under IRCA. *Id.* at 245–46. As a result, unauthorized workers in contingent positions do not enjoy the rights associated with a formal employment relationship, namely, "minimum wage and overtime, Social Security and other retirement benefits, unemployment insurance, workers' compensation, collective bargaining rights, and the protection of federal antidiscrimination laws." *Id.* at 246.

[76] Although no scholars have labeled this justification as the proxy argument, some scholars have described aspects of it when discussing the unauthorized workplace. Morrison, *supra* note 4, at 297, 312 (noting the chilling effect on U.S. citizen workers of failing to protect noncitizen workers); *see also* Lee, *supra* note 8, at 1076 (noting "the interpretive frame of the universal worker has also resonated with the courts by connecting the legal plight of immigrant workers to the greater good of all workers"); HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 156 (2014).

[77] Morrison, *supra* note 4, at 297, 303–05.

[78] *Id.* at 297, 303–11.

[79] *See* discussion *infra* Part II.C.

workplace because they reinforce harmful stereotypes about unauthorized workers as either subservient or criminal. Second, the justifications result in limited access to remedies because the proxy justification only extends protections to unauthorized workers to the extent necessary to protect authorized workers.

A. The Proxy Justification

There are two strands to the proxy justification. First, failing to protect unauthorized workers from discrimination in a specific workplace will deteriorate employment conditions for all workers in that workplace. As Hiroshi Motomura has noted, "courts sometimes recognize that unauthorized workers have workplace rights and remedies because any other outcome will harm citizens and noncitizens who are working lawfully in the same workplace."[80]

Similarly, courts and advocates sometimes assert that allowing unauthorized workers to assert workplace claims protects citizen and authorized workers because it reduces unauthorized immigration over the long term.[81] According to proponents of this justification, reducing unauthorized migration will result in more jobs for the authorized workforce.[82]

Second, barring unauthorized employees from bringing claims would also chill others' claims under federal antidiscrimination laws. This undermines all workers' employment rights because federal workplace laws rely on workers to act as private attorney generals for enforcement.[83] The court in *EEOC. v. Restaurant, Co.*, relied, in part, on this justification when it determined that the plaintiff had standing to pursue her Title VII claim even though she was unauthorized.[84] There, the employee alleged that her supervisor subjected her to a hostile work environment based on her sex and that her employer failed to promote her after she complained about her

[80] MOTOMURA, *supra* note 109. Motomura views this as "a strong sign that unauthorized workers are integrated into their workplaces." *Id.*

[81] Stephen Lee explains this viewpoint without adopting it and instead questions whether granting workplace rights to unauthorized workers has reduced unauthorized migration. Stephen Lee, *Screening for Solidarity*, 80 UNIV. CHI. L. REV. 225, 232–34 (2013).

[82] *Id.* at 233.

[83] Morrison, *supra* note 4, at 303–05, 311–15.

[84] EEOC. v. Restaurant, Co., 490 F. Supp. 2d 1039, 1047 (D. Minn. 2007).

supervisor's harassment.[85] The employer argued that the employee was not entitled to bring a Title VII claim because she "may be" unauthorized.[86] In holding that unauthorized workers have standing to bring Title VII claims, the court wrote, "Congress intended to empower individuals to act as private attorneys general in enforcing the provisions of Title VII . . . . [A] ruling that undocumented workers could not pursue civil rights claims on their own behalf would likely chill these important actions."[87]

Courts rely on similar reasoning to bar discovery into employees' immigration status.[88] In *Rivera v. NIBCO, Inc.*, the Ninth Circuit affirmed the district court's grant of a protective order that prohibited the employer from conducting discovery about the employees' immigration status.[89] The workers in *Rivera* were Latina and Southeast Asian women who had limited English proficiency.[90] The employer required the women to take a basic job skills exam administered only in English, even though the women's job duties did not require English proficiency.[91] When the women did not perform well on the test, the employer demoted or transferred them to undesirable jobs, and eventually the employer fired them.[92] During a deposition, the employer asked one of the women where she was married and born.[93] Her attorney instructed her not to answer and requested a protective order to prevent inquiry into the women's immigration status and into information likely to lead to discovery of the women's immigration status.[94]

When the court granted the protective order, it emphasized the chilling effect that allowing discovery would have on not just unauthorized workers, but also on authorized workers: "[e]ven documented workers may be chilled by the type of discovery at issue here."[95] It concluded that allowing discovery

[85] *Id.* at 1043–44.

[86] *Id.* at 1047.

[87] *Id.*

[88] *See, e.g.*, Rivera v. NIBCO, Inc., 364 F.3d 1057, 1065 (9th Cir. 2004).

[89] *Id.* at 1057.

[90] *Id.* at 1061.

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *Id.* at 1065. Other cases rely on similar reasoning that points out the impact on authorized employees' reporting of Title VII violations. *See, e.g.*, EEOC v. Kovacevich "5" Farms, No. 1:06-cv-0165, 2007 WL 1599772, *3–*5 (E.D. Cal. June 4, 2007) (denying employer's motion to compel

into immigration status would "unacceptabl[y] burden the public interest" in light of Title VII's "dependence on private enforcement[.]"[96] The U.S. district court for the District of Columbia adopted similar reasoning when it granted a protective order that barred the employer from discovery into the employee's immigration status, writing the "chilling effect disadvantages all workers as it makes it less likely that discriminatory practices will come to light and be appropriately dealt with in a court of law."[97]

B. The Deterrence and Accountability Justification

Deterrence and accountability as a justification stems from the idea that protecting unauthorized workers from unlawful discrimination is necessary to hold employers fully accountable under both antidiscrimination laws and IRCA.[98] Moreover, accountability is important because it deters future violations of the law.[99] In *EEOC v. Restaurant Co.*, the court relied on deterrence and accountability when it found that unauthorized workers may bring Title VII claims, "[t]he Court also considers the need to reduce employer incentives to hire undocumented workers because of their inability to enforce their rights."[100] The *Rivera* court also highlighted accountability and deterrence as justifications for protecting unauthorized workers: "Congress has armed Title VII plaintiffs with remedies designed to punish

responses to interrogatories that would result in information about employees' immigration status); EEOC v. First Wireless Grp., 225 F.R.D. 404, 406 (E.D.N.Y. 2004) (granting protective order to bar inquiry into immigration status); EEOC v. Bice of Chi., 229 F.R.D. 581, 583 (N.D. Ill. 2005).

[96] *Rivera*, 364 F.3d at 1065–66.

[97] EEOC v. SOL Mexican Grill LLC, No. 18-2227, 2019 WL 2896933, at *2 (D.D.C. June 11, 2019); *See also* EEOC v. Maritime Autowash, Inc., 820 F. Supp. 3d 662, 670 (J. Niemeyer, concurring) (concurring in decision to enforce EEOC's subpoena to investigate allegations that employer discriminated against unauthorized worker based on national origin only because "the record plausibly suggests that the employer has engaged in a practice or pattern of discrimination that adversely affects other employees who *are* authorized to work in the United States.").

[98] *See, e.g.,* Kati L. Griffith, *Discovering "Immployment" Law: The Constitutionality of Subfederal Immigration Regulation at Work,* 29 YALE L. & POL'Y REV. 389, 431 (2011); Kathleen Kim, *The Trafficked Worker as Private Attorney General: A Model of Enforcing the Civil Rights of Undocumented Workers*, 2009 U. CHI. LEGAL F. 247, 308 (2009); Cunningham-Parmeter, *supra* note 4, at 1374–75.

[99] Morrison, *supra* note 4, at 297, 303–05.

[100] EEOC. v. Restaurant, Co., 490 F. Supp. 2d 1039, 1047 (D. Minn. 2007).

employer who engage in unlawful discriminatory acts, and to deter future discrimination both by the defendant and by all other employers."[101]

Other courts have relied on the deterrence and accountability justification. In *EEOC v. Maritime Autowash, Inc*., the EEOC applied to enforce its administrative subpoena that sought information from an employer alleged to have discriminated against an unauthorized worker based on his national origin.[102] The employee alleged that after he was hired, his manager told him that his name did not match his social security number.[103] So the employee said that the manager told him to get new documents with a new name.[104] The employee did.[105] After a DHS audit, the employee claimed the company owner and a manager gave all of the Hispanic employees $150 for a one-time bonus and said that they should use them to get new documents with new names.[106] The employer rehired the employees.[107] Subsequently, the employees complained to the employer that Hispanic employees faced "longer working hours, shorter breaks, lack of proper equipment, additional duties, and lower wages."[108] The employer fired them.[109]

When the employer resisted the subpoena and the EEOC sought enforcement, the employer argued that the EEOC had no basis to issue the subpoena because an unauthorized worker had no "standing or right to seek remedies under Title VII[.]"[110] The court rejected that argument writing, the employer "is asking the court for carte blanche to both hire [unauthorized workers] and then unlawfully discriminate against those it unlawfully hired.

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[101] 364 F.3d at 1067.

[102] EEOC v. Maritime Autowash, Inc., 820 F.3d 662, 663 (5th Cir. 2016). After the EEOC finished its investigation, it found cause to believe that the employer violated Title VII and filed a lawsuit against the company for discriminating against a class of employees on the basis of national origin and race. EEOC v. Phase 2 Invests., 310 F. Supp. 3d 550 (D. Md. 2018). The suit settled and resulted in a consent decree. EEOC, *Maritime Autowash Will Pay $300,000 in EEOC Race and National Origin Discrimination Case* (Dec. 19, 2018), https://www1.eeoc.gov//eeoc/newsroom/release/12-19-18.cfm?renderforprint=1.

[103] *Maritime Autowash*, 820 F.3d at 663.

[104] *Id.*

[105] *Id*.

[106] *Id.*

[107] *Id.*

[108] *Id.* at 664.

[109] *Id.* at 663.

[110] *Id*. at 664.

[The employer] would privilege employers who break the law above those who follow the law."[111]

Officials at the agencies that enforce antidiscrimination laws, also rely on this justification to refrain from asking workers about their immigration status. Shannon Gleeson interviewed government officials at state and federal agencies that enforce workplace rights, including the EEOC.[112] When Gleeson asked an EEOC official why the agency did not ask claimants about their immigration status, he asserted that allowing employers to evade workplace laws would create incentives for employers to evade immigration laws: "if his agency were not allowed to enforce the rights of all workers, employers would be emboldened to hire undocumented workers solely 'with the intent of exploiting them.'"[113] And this would "reinforce the demand for undocumented labor."[114]

Relying on the proxy justification and the accountability/deterrence arguments has meant that advocates have been successful in arguing that federal antidiscrimination laws include in their protection unauthorized workers.[115] Although these justifications lead to some workplace protections for unauthorized workers, they also limit the workers' exercise of their rights. As the next section shows, these justifications ultimately harm the rights of unauthorized workers. They reinforce notions that unauthorized workers are less morally deserving of the court's protection than authorized workers and subject unauthorized workers to scrutiny not faced by authorized workers seeking to assert their workplace rights.

[111] *Id*. at 668. In the subsequent litigation on the merits of the claim, the district court relied on the Fourth Circuit's language, in part, to decide that discriminating against an unauthorized employee on the basis of race, national origin, or participation in an EEOC investigation is an unlawful practice under Title VII. EEOC v. Phase 2 Invs. Inc., 310 F. Supp. 3d 550, 579–80 (D. Md. 2018). The lower court also pointed to the importance of deterring other employers from engaging in similar conduct. *Id*. at 580.

[112] Shannon Gleeson, *Means to an End: An Assessment of the Status-blind Approach to Protecting Undocumented Worker Rights*, 57 SOCIO. PERSPECTIVES 301, 301 (2014).

[113] *Id.* at 310.

[114] *Id.*

[115] Morrison, *supra* note 4, at 302–20 (2017) (describing existing workplace protections for noncitizens under federal law). The only exception is that noncitizen workers do not receive the same protection from the Immigration Reform and Control Act's (IRCA) unfair immigration-related employment practices. INA § 275B, 8 U.S.C. § 1324b (2018) (prohibiting employer discrimination against authorized employees on the basis of national origin and citizenship).

C. The Limits of Current Justifications for Protecting Unauthorized Workers

Viewing unauthorized workers as proxies for United States citizen workers and authorized workers, may provide some protection for workers but it also makes unauthorized workers more vulnerable. Likewise, focusing on employer accountability and deterrence also results in unauthorized workers receiving less protection than authorized workers. First, the deterrence and accountability justification reinforces stereotypes about immigrant workers, and, unauthorized workers, in particular. It casts the unauthorized worker in either the role of the subservient and exploited worker, or as a criminal. Second, the proxy justification shifts the focus from the protected worker part of the employee's identity to the unauthorized part of the employee's identity. It emphasizes how unauthorized employees are different from authorized employees, that is, in the legality of their employment relationship in the first place. The result is more vulnerability in the workplace and limited access to remedies.

1. More Vulnerability in the Workplace

The narratives that flow from the accountability/deterrence justification result in more workplace vulnerability for unauthorizes workers. The narrative frames the harm as the employer's failure to obey *immigration* laws not employment laws. Relying on a narrative that "focuses on immigrant workers as victims of criminal employers who fail to obey the rule of law"[116] can create "stereotypes and classes of outsiders, resulting in disfavoring immigrant workers who do not fit the role of the 'good immigrant'—the iconic hard worker or victim."[117]

Three problems flow from this framing.[118] First, it provides an incentive for employers to show that an employee is not a "good immigrant" because the employee violated criminal laws. It thereby emphasizes the viewpoint that unauthorized workers are criminals who broke the law to obtain

[116] Lee, *supra* note 8, at 1070.

[117] *Id.* at 1066; *see also* Rebecca Sharpless, "*Immigrants are not Criminals": Respectability, Immigration Reform, and Hyperincarceration*, 53 HOUS. L. REV. 691, 706–11 (2016) (describing generally the limitations and harmful effects of the deserving/undeserving immigrant narrative).

[118] Lee, *supra* note 8, at 1096–101.

employment.[119] As described below,[120] that can lead to limited remedies in antidiscrimination claims, it also, as Lee notes, feeds into the general "criminalization hysteria" surrounding immigrants.[121] This results in a cycle in which immigrant workers are targeted for enforcement actions rather than employers.[122] Second, unauthorized workers "may have to act the part of the powerless victim to achieve results, although that may be contrary to their personal empowerment."[123] It can also mean that the abuse must be egregious enough that the workers can cast themselves as powerless victims.

Third, casting unauthorized workers solely as victims of unscrupulous employers makes them into "essentialized workers who are divorced from their individual characteristics as human beings[.]"[124] This plays into the stereotype of the subservient immigrant worker who will take the jobs that authorized workers will not—for lower wages and under more dangerous conditions.[125] Employers, then, can take advantage of the stereotype and use it to justify their treatment of unauthorized workers, casting unauthorized workers as freely consenting to the conditions and lower wages.[126] This narrative regularly appears in media reports about workplace raids. For example, in 2018, ICE conducted a raid on a worksite in Mount Pleasant, Iowa.[127] ICE arrested thirty-two employees, but not the employer.[128] NPR interviewed an employer in the town about unauthorized workers and the employer responded that businesses needed immigrant workers because businesses had difficulty filling jobs with authorized workers, "It is so hard to get people in the door just to sit down and interview . . . You're afraid

[119] *Id.* at 1098.

[120] *See supra* Part II.B.

[121] Lee, *supra* note 8, at 1098.

[122] *See generally* Saucedo, *The Making of the "Wrongfully" Documented Worker, supra* note 3; Angela D. Morrison, *Free Trade, Immigrant Workers, and Employment Discrimination*, 67 U. KAN. L. REV. 237 (2018).

[123] Lee, *supra* note 8, at 1099.

[124] *Id.* at 1098.

[125] *Id.* at 1098–99; *see also* Saucedo, *The Employer Preference for the Subservient Worker, supra* note 3, at 970.

[126] Saucedo, *The Employer Preference for the Subservient Worker, supra* note 3, at 976–80; Kim, *supra* note 3, at 1580.

[127] Jim Zarroli, *With Workers Hard to Find, Immigration Crackdown Leaves Iowa Town in a Bind*, NPR (May 21, 2019), https://www.npr.org/2019/05/21/725096578/with-workers-hard-to-find-immigration-crackdown-leaves-iowa-town-in-a-bind.

[128] *Id.*

you're going to scare them off. Any little thing that you do, they won't show up for the first day of work."[129] Other recent media reports reflect the same narrative. A *New York Times* article had the following lede: "As a tight labor market raises costs, employers say the need for low-wage help can't be met by the declining ranks of the native-born."[130] And after workplace raids in poultry processing plants in Mississippi in 2019, people in the towns affected by the raids reported that they didn't believe that workers who were U.S. citizens would remain in the jobs because "of the simple fact that the jobs are hard . . . [i]t's something they didn't see themselves doing growing up. Something they don't want to do" and "American-born residents 'didn't want to work, period.'"[131] These narratives reinforce the stereotype that unauthorized workers will take jobs that authorized workers will not—at lower wages and under more dangerous conditions.

In short, the justifications play into stereotypes about unauthorized workers. Because of their unauthorized status, they are viewed as lawbreakers, on the one hand, but because of their employers' actions they are viewed as exploitable victims, on the other hand. The stereotypes work to shore up the employer-created narratives that unauthorized workers consent to unequal work conditions, including harassment, low wages, and unsafe work environments.

2. Limited Access to Remedies

The proxy justification has led to limited access to remedies. It has resulted in the misapplication of the after acquired evidence doctrine and the mixed motive defense. And that misapplication matters because it has chilled employees from pursuing their workplace rights in the first instance or in foregoing full remedy for their employers' violations. The misapplication of doctrines in the Title VII context stands in contrast to how courts apply similar doctrines in the FLSA context.

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[129] *Id.*

[130] Eduardo Porter, *Short of Workers, U.S. Workers Builders and Farmers Crave More Immigrants*, N.Y. TIMES (Apr. 3, 2019), https://www.nytimes.com/2019/04/03/business/economy/immigration-labor-economy.html.

[131] Richard Fausset, *After ICE Raids, a Reckoning in Mississippi's Chicken Country*, N.Y. TIMES (Dec. 28, 2019), https://www.nytimes.com/2019/12/28/us/mississippi-ice-raids-poultry-plants.html.

The difference between authorized workers and unauthorized workers has resulted in courts misapplying legal doctrines, such as the after-acquired evidence doctrine and Title VII's mixed motive defense. In Title VII litigation, employers may assert a defense to limit liability for illegally terminating an employee when they subsequently learn that an employee engaged in employment-related misconduct.[132] Normally, an employer must prove "by a preponderance of the evidence" that it would have terminated the employee had it known about the misconduct.[133] When an employer successfully proves that it would have fired the employee, front pay and reinstatement become unavailable to the employee, and backpay is limited to the period prior to the employer discovering the misconduct.[134] But some courts have used the doctrine to limit recovery despite the difficulty of proving that the worker's unauthorized status would have resulted in the worker's termination or to bar a plaintiff's claims entirely because the employee lacked work authorization.[135] Thus, courts' focus on the unauthorized status of the workers short-circuits the burden of proof that the court would require if the employee were authorized.

Another doctrine that courts misapply to unauthorized workers is the mixed motive defense. If an employer's actions were motivated both by a discriminatory reason and another non-discriminatory reason, an employer is still liable under Title VII.[136] However, an employer may avoid damages and some equitable relief if the employer proves that it would have taken the unlawful employment action anyways because of the nondiscriminatory reason:

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[132] Christine N. Cimini, *Undocumented Workers and Concepts of Fault: Are Courts Engaged in Legitimate Decisionmaking?*, 65 VAND. L. REV. 389, 445 (2012).

[133] Rivera v. NIBCO, Inc., 364 F.3d 1057, 1070–71 (9th Cir. 2004).

[134] Joseph Spadola, *An Ad Hoc Rationalization of Employer Wrongdoing: The Dangers of the After-Acquired Evidence Defense*, 102 CAL. L. REV. 691, 696 (2012).

[135] Cimini, *supra* note 132, at 445–47.

[136] 42 U.S.C. § 2000e-2(m) (2018). Regarding the mixed motives analysis, the statute provides:

> (m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices
>
> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

> (B) On a claim in which an individual proves a violation . . . and [an employer] demonstrates that the [employer] would have taken the same action in the absence of the impermissible motivating factor, the court—
>
> (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim . . . ; and
>
> (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or [backpay].[137]

Under this doctrine, then, the employer should be required to show that it took the action, in part, because of the worker's unauthorized status.

But some courts have not required that employers show they took the action because of the employee's status, and instead have determined that the unauthorized status, itself, forecloses backpay. For example, although the court in *Escobar v. Spartan Security Service*[138] held that Title VII applied to an employee who was unauthorized when he worked for the employer,[139] the court determined the employee could not recover backpay for the period during which he was not authorized to work.[140] Other cases similarly have found that the EEOC may not seek backpay or reinstatement when the employee is unauthorized.[141] In these cases, the court did not require the employer to prove that it would have taken the action because of the workers' immigration status or that it was motivated, in part, by the workers' status.[142] Moreover, because the cases involve hostile work environments, it would be difficult if not impossible, for the employers to make that showing.

The misapplication is significant because it disincentivizes workers from bringing claims. Lack of immigration status chills workers from bringing

[137] *Id.* § 2000e-5(g)(B)(2)(ii).

[138] Escobar v. Spartan Security Service, 281 F. Supp. 2d 895 (S.D. Tex. 2003).

[139] *Id.* at 897.

[140] *Id.*; *see also* EEOC v. Restaurant Co., 490 F. Supp. 2d 1093, 1047 (D. Minn. 2007) (noting that while unauthorized workers have standing to sue for Title VII violations, they may be precluded from "certain remedies.").

[141] *See, e.g.*, EEOC v. Phase 2 Invs. Inc., 310 F. Supp. 3d 550, 580 (D. Md. 2018).

[142] *Id.*

claims in the first place,[143] but the lack of remedy further deters workers. As Kati L. Griffith and Shannon M. Gleeson note "unauthorized employees are also disincentivized from claiming because there is little clarity about whether they have the same rights to monetary remedies . . . as compared to their authorized counterparts."[144] It matters that courts have prevented unauthorized workers from achieving full remedy because it prevents them from bringing claims.

In other cases, the EEOC or the worker pre-emptively decide not to pursue remedies to avoid discovery into the worker's immigration status.[145] In *EEOC v. DiMare Ruskin*, the EEOC alleged that supervisors subjected two female farmworkers to a hostile work environment because of sex. [146] The conduct included one supervisor telling one of the women that he wanted to kiss her all over, including her breasts, and that he would never stop pursuing her; it also included one supervisor forcing one of the woman's hand to his crotch.[147] The EEOC moved for a protective order to bar the employer from asking about the employees' immigration status.[148] The court granted it.[149] As part of its reasoning, the court wrote, "[t]his case deals with sexual harassment and unlawful termination for refusing to comply with a supervisor's sexual advances. All individuals, both citizens and immigrants,

[143] Griffith & Gleeson, *supra* note 42, at 121–22 (summarizing the literature and citing Shannon M. Gleeson, *Labor Rights for All? The Role of Undocumented Immigrant Status for Worker Claims Making*, 35 LAW & SOC. INQUIRY 561, 563, 594 (2010); SHANNON M. GLEESON, PRECARIOUS CLAIMS: THE PROMISE AND FAILURE OF WORKPLACE PROTECTIONS IN THE UNITED STATES 125–27 (2016); SUNAINA MAIRA, RADICAL DEPORTATION: ALIEN TALES FROM LODI AND SAN FRANCISCO IN THE DEPORTATION REGIME: SOVEREIGNTY, SPACE, AND THE FREEDOM OF MOVEMENT 301 (Nicholas DeGenova & Nathalie Peutz eds., 2010)). *See also* Leticia M. Saucedo, *Immigration Law Enforcement Versus Employment Law Enforcement: The Case for Integrated Protections in the Workplace*, 38 FORDHAM URB. L.J. 303, 310 (2010) (describing how fear of detection makes unauthorized workers afraid to report discrimination in the workplace); Jayesh M. Rathod, *Beyond the "Chilling Effect": Immigrant Worker Behavior and the Regulation of Occupational Safety & Health*, 14 EMP. RTS. & EMP. POL'Y J. 267, 271–74 (2010).

[144] Griffith & Gleeson, *supra* note 42, at 124.

[145] *See, e.g.,* EEOC v. DiMare Ruskin, Inc., 2:11-CV-158, 2012 WL 12067868 at *2 (M.D. Fla. Feb. 15, 2012).

[146] *Id.*

[147] Complaint and Demand for Jury Trial at *4–5, EEOC v. DiMare Ruskin, Inc., 2:11-CV-158, 2012 WL 12067868.

[148] *DiMare Ruskin*, 2012 WL 12067868, at *3.

[149] *Id.* at *5.

are protected from unlawful employment discrimination under Title VII."[150] But the court premised its grant on the workers' foregoing their right to backpay, reinstatement, or front pay, concluding "since [the workers] are not seeking backpay, front pay, or reinstatement, the [workers'] immigration status is irrelevant as to damages calculations."[151] Thus, plaintiffs often do not seek the full array of available remedies when they do bring claims. They forego seeking backpay, front pay, and reinstatement;[152] all of which are remedies to which successful Title VII plaintiffs are entitled.[153]

In contrast, unauthorized workers who pursue claims under the Fair Labor Standards Act (FLSA),[154] are not subject to the same limitations.[155] For example, in *Lamonica v. Safe Hurricane Shutters*, the Eleventh Circuit upheld the district court's judgment as a matter of law in which the lower court had awarded actual and liquidated damages to unauthorized workers who had proved their employer violated the FLSA.[156] The employer had argued that the doctrine of *in pari delicto*, "which states that 'a plaintiff who has participated in wrongdoing may not recover damages resulting from the wrongdoing'" barred one of the workers from recovering liquidated damages because he had used a false social security number when he applied for the job.[157] The *in pari delicto* doctrine is similar to the after-acquired evidence and mixed motive defenses in that it focuses on employee wrongdoing to limit employer liability, and the employer bears the burden of proof.[158] To

[150] *Id.* (citing Espinoza v. Farah Mfg. Co., 414 U.S. 86, 95 (1973)).

[151] *Id.*

[152] *See* EEOC v. SOL Mexican Grill LLC, No. 18-2227, 2019 WL 2896933, at *4 (D.D.C. June 11, 2019) (noting that the EEOC explained it was "not 'seeking back pay, front pay, or reinstatement'"); *see also* Rivera v. NIBCO, Inc., 364 F.3d 1057, 1069 (9th Cir. 2004) ("No backpay award has been authorized in this litigation. Indeed, the plaintiffs have proposed several options for ensuring that . . . no award of backpay is given to any undocumented [noncitizen] in this proceeding.").

[153] 42 U.S.C. § 2000e-5(g).

[154] Fair Labor Standards Act of 1938 (FLSA), Pub. L. 75–718, (codified as amended at 29 U.S.C. § 203).

[155] *See, e.g.*, Rodriguez v. Pie of Port Jefferson Corp., 48 F. Supp. 3d 424 (S.D.N.Y. 2014) (barring discovery into immigration status because FLSA permitted and IRCA did not prohibit unauthorized workers from seeking backpay as a remedy under FLSA).

[156] Lamonica v. Safe Hurricane Shutters, 711 F.3d 1299, 1299 (11th Cir. 2014).

[157] *Id.* at 1306.

[158] *See id.* at 1308 (stating that the *in pari delicto* analysis requires a focus on the wrongdoing of the employee).

succeed under the doctrine, an employer must demonstrate two things: (1) the employee "bears at least substantially equal responsibility for the violations he seeks to redress, and (2) preclusion of the suit would not substantially interfere with the statute's policy goals."[159] Rejecting the employer's argument, the court reasoned that the worker's use of a false social security number did not show that the worker bore responsibility for the FLSA violation because the misrepresentation had nothing to do with the employer's failure to comply with the FLSA.[160]

Moreover, just as courts in Title VII litigation use the proxy and the accountability/deterrence justifications, so too do courts in FLSA litigation. For example, in *Zeng Lui v. Donna Karan International, Inc.*, the court cited the chilling effect that allowing discovery, even if relevant, into the workers' immigration status would have on plaintiffs in the future.[161] And in *Lucas v. Jerusalem Café, LLC*, the court reasoned that unauthorized employees could seek remedy under the FLSA because it was necessary to hold employers accountable under both IRCA and the FLSA.[162] Accordingly, courts in FLSA cases rely on the same justification as courts in Title VII cases, but unauthorized workers in FLSA cases do not experience the same limited access to remedies.

Why do the justifications lead to full access to remedies under the FLSA, but limited access under Title VII? The different treatment could be attributed to the difference in backpay under the FLSA as compared to backpay under Title VII. Under the FLSA, the court awards backpay for work already performed,[163] while under Title VII, the court awards backpay as make-whole

[159] *Id.*

[160] *Id.* at 1308–09; *see also* Vallejo v. Azteca Elec. Constr., Inc., No. CV-13-01207-PHX-NVW, 2015 WL 419634 at *5 (D. Ariz. 2015) (rejecting employer defense of *in pari delicto* based on worker's unauthorized immigration status). *Cf.* Zeng Liu v. Donna Karan Int'l, Inc., 207 F. Supp. 2d 191, 192 (S.D.N.Y. 2002) (granting protective order that barred discovery into noncitizen's immigration status because immigration status is irrelevant to FLSA claims); Rengifo v. Erevos Enters., Inc., No. 06 Civ. 4266(SHS)(RLE), 2007 WL 894376, at *3 (S.D.N.Y. Mar. 20, 2007) (same).

[161] 207 F. Supp. 2d at 193 ("[T]here would still remain 'the danger of intimidation, the danger of destroying the cause of action' and would inhibit plaintiffs in pursuing their rights.").

[162] Lucas v. Jerusalem Café, LLC, 721 F.3d 927, 936–37 (8th Cir. 2013); *see also* Colon v. Major Perry St. Corp., 987 F. Supp. 2d 451, 462–63 (S.D.N.Y. 2013) (holding unauthorized workers may seek remedy under the FLSA because to do otherwise would provide incentives for employers to violate FLSA and IRCA).

[163] *Lamonica*, 711 F.3d at 1308.

relief for work that the worker would have performed but for the employer's discriminatory action.[164] Also, under the FLSA, a court must award backpay when a worker proves a violation, while under Title VII, the court may award backpay in its discretion.[165] But as the Court emphasized in *Albemarle Paper Co., Inc. v. Moody*, courts should rarely deny backpay in a Title VII case and the presumption is that courts will award backpay as part of the statutory scheme to make workers whole.[166] In effect, then, courts should approach the award of backpay under Title VII and the FLSA similarly.

Moreover, just like Title VII, the FLSA provides for both legal and equitable remedy:

> Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages.[167]

Thus, to the extent that the availability of equitable relief opens the door to discovery into immigration status or allows complicity framing, it would be expected that courts would find immigration status relevant but too prejudicial or bar relief to equitable relief based on the workers' unauthorized status. But, as described above, that is not what courts are doing. What explains the different treatment? One explanation may lie in the normative underpinnings of antidiscrimination law, in particular, anticlassification principles.

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[164] *See* 42 U.S.C. § 2000e-5(g)(1) ("[T]he court may . . . order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission.").

[165] Albemarle Paper Co. v. Moody, 422 U.S. 405, 416–18 (1975).

[166] *Id*. at 421 ("It follows that, given a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.").

[167] 29 U.S.C. § 216(b).

III. THE ANTICLASSIFICATION AND ANTISUBORDINATION FRAMEWORKS

The antisubordination and anticlassification theories evolved as ways to explain the normative values that underlie equal protection and antidiscrimination law generally.[168] Scholars who focus on workplace discrimination law have borrowed from anticlassification and antisubordination scholarship to describe the normative goals of Title VII and other federal antidiscrimination in employment laws.[169] In effect,

[168] Jack M. Balkin and Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 10 (2003) ("Both antisubordination and anticlassification might be understood as possible ways of fleshing out the meaning of the antidiscrimination principle, and thus as candidates for the 'true' principle underlying antidiscrimination law"); *see also* Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 UNIV. OF CHI. L. REV. 235 (1971) (describing first the antisubordination and anticlassification frameworks in the context of employment laws); Samuel R. Bagnestos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1 (2006).

[169] *See, e.g.*, Fiss, *supra* note 168, at 265; Bagnestos, *supra* note 168, at 41; Catherine Fisk, *The Anti-Subordination Principle of Labor and Employment Law Preemption*, 5 HARV. L. & POL'Y REV. 17, 44 (2011); Bradley A. Areheart, *The Anticlassification Turn in Employment Discrimination Law*, 63 ALA. L. REV. 955, 955 (2012); *see also* Stephanie Bornstein, *Antidiscriminatory Algorithms*, 70 ALA. L. REV. 519, 544 (2018) (stating "the debate over how to balance anticlassification and antisubordination principles has dominated much of the discussion of antidiscrimination law" and arguing that a third principle, antistereotyping, is emanant in antidiscrimination law).

This article separates the antisubordination and anticlassification frameworks for ease of analysis. However, antidiscrimination scholars have noted that the two theories often work in tandem to support antidiscrimination norms. *See, e.g.*, Areheart, *supra*, at 963 (noting that the two theories often overlap and are not neatly categorical). As Jack Balkin and Reva Siegel explain, at the time that Owen Fiss articulated the antisubordination theory, antidiscrimination scholars "understood the anticlassification and antisubordination principles to have divergent practical implications for the key issues of the moment: The anticlassification principle impugned affirmative action, while legitimating facially neutral practices with a racially disparate impact, while the antisubordination principle impugned facially neutral practices with a racially disparate impact, while legitimating affirmative action." Balkin & Siegel, *supra* note 168, at 12.

Nonetheless, scholars subsequently have noted that they overlap and that they do not always serve cross-purposes. Mary Anne Case offers two examples of how the anticlassification and antisubordination worked together to support arguments that prohibiting same-sex marriage was a form of sex discrimination and that pregnancy discrimination is a form of sex discrimination. Mary Anne Case, *"The Very Stereotype the Law Condemns": Constitutional Sex Discrimination as a Quest for Perfect Proxies,* 85 CORNELL L. REV. 1447, 1473–74 (2000). Some scholars argued that prohibiting same sex marriage was sex discrimination because "restricting entry into marriage to two persons of different sexes had the intent and effect of subordinating women." *Id.* at 1473. As

anticlassification views the normative goal of federal antidiscrimination laws as achieving a status-neutral workplace, that is, one in which employers do not take an individual's membership in a particular group into account when making decisions.[170] Antisubordination theory, on the other hand, theorizes that to achieve antidiscrimination law's equality goals, policy makers must take status into account.[171] Because historic structural inequity has created a lack of opportunities and employers act on unconscious biases, decisionmakers must consider how membership in a subordinated group has impacted opportunity to effectively remedy discrimination.[172]

A. Anticlassification Theory

Under the anticlassification framework, society will have achieved equality when individuals are no longer categorized based on their racial, gender, ethnic, or other identity.[173] It prohibits decisionmakers from giving *any* group preferential treatment. Under an anticlassification framework, preferential treatment such as affirmative action programs would exacerbate the goal of antidiscrimination laws.[174] How society historically has treated the group is irrelevant.[175] Anticlassification theory's normative goal is a color- and sex- blind society.[176]

Anticlassification theory's focus is on individual rights—both with respect to the employer discriminating and the employee who has suffered

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Case points out, the argument not only relies on the subordinating effect on women, but also on the idea that the constraint of the full expression of "human emotions, behavior and relationships" injures everyone—not just women. *Id.* at 1473 n.130 (citing Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 188, 232 (1988)). Regarding pregnancy discrimination, scholars argued for "an androgynous prototype" with sex-neutral rules, but the purpose of those rules was to "get the court out of the business of reinforcing traditional sex-based family roles and to alter the workplace so as to keep it in step with the increased participation of women." *Id.* at 1474 (quoting Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 352 (1985)).

[170] *See* discussion *infra* Part III.A.

[171] *See* discussion *infra* Part III.B.

[172] *See* discussion *infra* Part III.B.

[173] Areheart, *supra* note 169, at 963–64; *see also* Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1005 (1986) (describing the framework as "anti-differentiation").

[174] Areheart, *supra* note 169, at 963.

[175] *See id.*

[176] *See generally*, *id.* at 963–64; Colker, *supra* note 173, at 1006.

the discrimination.[177] First, it focuses on the employer's motivation and does not consider the structural issues in society that have created the opportunity for discrimination[178] Second, it looks at how the discrimination affected the individual who was discriminated against and not at the group effects of the discrimination.[179] Accordingly, discrimination is unlawful under the anticlassification theory when it arises from "invidious motivation" and similarly situated individuals are treated dissimilarly.[180]

Title VII can be read as an anticlassificationist law. Most obviously, Title VII makes it unlawful for employers to discriminate against workers because of the workers' sex, race, color, religion, or national origin.[181] It even explicitly prohibits employers from "classif[ying] [their] employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect [the employee's] status as an employee, because of" a protected characteristic.[182] This language is anticlassificationist on its face.[183] And the Supreme Court acknowledged Title VII's anticlassification principles in *McDonald v. Santa Fe Trail Transportation Co.* when it determined that Title VII "prohibits racial discrimination in private employment against white persons upon the same standards as racial discrimination against nonwhites."[184]

There are at least four explanations for why courts and policy makers have grounded antidiscrimination policy in anticlassification theory. First,

[177] Colker, *supra* note 173, at 1005–06.

[178] *Id.* at 1005; *see also* Llezlie Green Coleman, *Disrupting the Discrimination Narrative: An Argument for Wage and Hour Laws' Inclusion in Antisubordination Advocacy*, 14 STANFORD J. CIV. R. & CIV. LIB. 49, 71 (2018) (noting that proving discrimination under Title VII is more complicated than proving wage theft under FLSA because Title VII's formal equality structure requires plaintiffs to prove discriminatory motive on the part of the employer).

[179] Colker, *supra* note 173, at 1005.

[180] *Id.* at 1005–06.

[181] 42 U.S.C. § 2000e-2(a) (2018).

[182] *Id.*

[183] Areheart, *supra* note 169, at 969. Although, as described below, Title VII's language can also be read as focusing on antisubordination goals, it is unlawful to deprive employees of employment "opportunities" on the basis of one of the protected categories. 42 U.S.C. § 2000e-2(a). As described below, *infra* Part III.B, antisubordination theory has as one of its goals, not just equal treatment, but equal opportunity.

[184] McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 280, 286 (1976), *cited by* Areheart, *supra* note 169, at 969–70.

anticlassification theory appeals to policy makers and courts because it seems to represent a "basic notion of fairness" that is easy to administer.[185] Treating everyone the same, regardless of their individual traits or characteristics, is easier than effecting substantive equity for subordinated groups.[186] The Court's reasoning in *Young v. United Parcel Service*[187] is an example of the Court effectuating formal equality over substantive equality.[188] In *Young*, the employer did not allow a pregnant employee, whose doctor imposed lifting restrictions, to work due to the restrictions.[189] The employee alleged that the employer had accommodated other employees who had non-pregnancy-related lifting restrictions but failed to accommodate her lifting restrictions.[190] The Court held that pregnant employees could state a prima facie case of sex discrimination under Title VII if they show an "employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers."[191] So, while Title VII mandates that employers must treat employees equally, employers do not have to create targeted programs that benefit workers who have vulnerabilities that make the workplace more challenging for them than their co-workers.[192] As long as the employer treats all employees the same, the employer has not unlawfully discriminated.

Second, the anticlassification principle can appear to be value neutral.[193] It treats the harm of discrimination as the same for everyone.[194] Since the harm is the same, courts can treat individuals the same, including in their

[185] Areheart, *supra* note 169, at 996.

[186] *Id.* (citing David S. Schwartz, *When is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697, 1777–78 (2002)).

[187] Young v. United Parcel Service, Inc., 135 S. Ct. 1338 (2015).

[188] This example comes from Trina Jones. Trina Jones, *Title VII At 50: Contemporary Challenges for U.S. Employment Discrimination Law*, 6 ALA. CIV. RIGHTS & CIV. LIBERTIES L. REV. 45, 71 (2014).

[189] 135 S. Ct. at 1344.

[190] *Id.*

[191] *Id.* at 1354.

[192] Jones, *supra* note 188, at 71. Of course, the ADA does require employers to make reasonable accommodations for workers who have a disability. 42 U.S.C. § 12112.

[193] Areheart, *supra* note 169, at 997.

[194] *Id.* at 998–99.

access to remedy and distribution of remedy.[195] Third, if the law benefits everyone equally, then it is more likely to gain widespread support among the public.[196] When individuals can see that they stand to benefit directly from the law, they are more likely to support it.[197] The public also is more likely to support a law that equally benefits everyone because it avoids a perception that some people benefit from the law at the expense of others. [198] An example of this is the backlash against the ADA and the ADA Amendments Act (ADAAA).[199] Since the ADA and ADAAA protections apply only to individuals with a qualifying disability, their scope is limited.[200] This can result in a perception that the ADA and ADAAA are programs that provide special benefits to a minority group at the expense of those not in the group.[201]

Finally, anticlassification theory does not require policy makers and courts to grapple with the structural causes of discrimination. It does not assign fault, other than to the individual decisionmaker who acted discriminatorily.[202] Because the discrimination is the sole fault of the individual decisionmaker, policy makers and courts do not have to acknowledge the continued, systemic subordination of particular groups.[203]

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[195] *Id.* (quoting Matthew Scutari, Note, "*The Great Equalizer": Making Sense of the Supreme Court's Equal Protection Jurisprudence in American Public Education and Beyond*, 97 GEO. L.J. 917, 928–29 (2009)).

[196] *Id.* at 997–98.

[197] *Id.*

[198] Areheart, *supra* note 169, at 998.

[199] ADA Amendments Act of 2008, Pub. L. No. 110–325, 122 Stat. 3553 (codified at 42 U.S.C. §§ 12101–12113); Michelle A. Travis, *Disqualifying Universality Under the Americans With Disabilities Act Amendment Act*, 2015 MICH. ST. L. REV. 1689 (2015).

[200] Areheart, *supra* note 169, at 998 (citing Michelle A. Travis, *Lasing Back at the ADA Backlash: How the Americans With Disabilities Act Benefits Americans Without Disabilities*, 76 TENN. L. REV. 311, 312 (2009)).

[201] Travis, *supra* note 199, at 1756–58. Travis does not use the term "anticlassification" but instead uses the term universal; she argues that the ADA and ADAAA are statutes that provide universal protection, but because of employers' efforts and lobbying, courts have narrowed the definition of a "qualified individual" to sort out and narrow the application of the ADA and ADAAA to people who should otherwise qualify for the statutes' protections. *Id.* at 1750–59.

[202] Areheart, *supra* note 169, at 999 (quoting Jack M. Balkin, *Plessy, Brown, and Grutter: A Play in Three Acts*, 26 CARDOZO L. REV. 1689, 1711 (2005)).

[203] *Id.*; *see also* Jones, *supra* note 188, at 73 ("It is simply more pleasant and easier all around to think that we are, or have obtained, our better selves, than to continue the hard and challenging work of grappling with our continuing imperfections.").

As Llezlie Green Coleman notes, advocates and scholars have adopted this approach because it is "more palatable within the eagerly-embraced 'post-racial' narrative."[204]

B. Antisubordination Theory

Antisubordination theory presumes that not everyone is similarly situated.[205] Therefore, it is not enough for decisionmakers to treat everyone equally; they may need to treat subordinated groups more favorably than privileged groups because subordinated groups have experienced a lack of opportunities.[206] Accordingly, the approach supports that the legal regime should directly redress the disparities experienced by subordinated groups.[207] Further, employer policies and decisions that reinforce hierarchy based on a subordinating characteristic, such as race or sex, are unlawful regardless of whether the policies and decisions are facially neutral.[208]

In contrast to anticlassification theory, antisubordination theory is "a group-based perspective, in two ways."[209] The first way antisubordination theory is group-based is that "it focuses on society's role in creating subordination."[210] The second way in which antisubordination theory is group-based is that it examines how the subordination "affects, or has affected, groups of people."[211] Because antisubordination theory is group-

[204] Coleman, *supra* note 178, at 77 (quoting Samuel R. Bagnestos, *Universalism and Civil Rights (with Notes on Voting Rights After* Shelby*)*, 123 YALE L.J. 2838, 2842 (2014)).

[205] Areheart, *supra* note 169, at 963–64. "As elaborated by Fiss and subsequent proponents, including Catharine MacKinnon, Charles Lawrence, Derrick Bell, Laurence Tribe, and Kenneth Karst, [antisubordination] is variously called the antisubordination principle, the antisubjugation principle, the equal citizenship principle, or the anticaste principle." Balkin & Siegel, *supra* note 168, at 9 (citing DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987); KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION (1989); CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32–45 (1987); CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 117 (1979); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 16–21, at 1043–52 (1978); Charles R. Lawrence III, *The Id, The Ego, And Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317, 319 (1987)).

[206] Areheart, *supra* note 169, at 964.

[207] Colker, *supra* note 173, at 1007–08.

[208] *Id.*

[209] *Id.* at 1008.

[210] *Id.* at 1008–09.

[211] *Id.* at 1009.

based, it shifts the focus from the impact on individual workers to the impact on the group as a whole.[212] As a result, it looks to group identity and traits to determine whether that identity or trait is the basis of the subordination.[213]

While Title VII is primarily associated with anticlassification principles, it does include some antisubordination principles.[214] At least four antisubordination provisions and policies are associated with Title VII: (1) "the history of discrimination faced by African Americans motivated Congress to pass the statute[;]" (2) affirmative action to allow "a forbidden trait" to "sometimes be taken into account" to remedy past subordination; (3) the disparate impact provisions; and (4) classifying employees to reasonably accommodate them to prevent subordinating behavior.[215] The disparate impact provisions, in particular, present a model of proof that relies on antisubordination principles because it requires employers to address policies that have a discriminatory effect even if they are facially neutral.[216]

The Americans with Disabilities Act[217] primarily derives from antisubordination principles: Congress noted the history of discrimination against people with disabilities, the structural barriers people with disabilities encounter that lead to discrimination, and it requires not just equal opportunity but reasonable accommodation.[218] Similarly, the Age Discrimination in Employment Act (ADEA)[219] is based on antisubordination principles because it applies only to individuals over the age of forty whose employer has discriminated against them because of their age.[220] And Congress enacted the ADEA because of a history of employers discriminating against older employees.[221]

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[212] *See id.* at 1007–08.

[213] *Id.* at 1007–08; Areheart, *supra* note 169, at 963–64.

[214] Areheart, *supra* note 169, at 970.

[215] *See id.* at 970–72; *see also* Bornstein, *supra* note 169, at 542 ("Title VII recognizes both the anticlassification principle, in its prohibition of disparate treatment, and the antisubordination principle, in its prohibition of unjustified disparate impact.").

[216] Saucedo, *The Employer Preference for the Subservient Worker*, *supra* note 3, at 1019.

[217] Americans with Disabilities Act of 1990, Pub. L. No. 101–336, 104 Stat. 327, *amended by* ADA Amendments Act of 2008, Pub. L. No. 110–325, 122 Stat. 3533 (codified as amended at 42 U.S.C. §§ 12102–12103 (2009)).

[218] Areheart, *supra* note 169, at 973–75.

[219] Age Discrimination in Employment Act of 1967, Pub. L. No. 90–202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621–634 (2012)).

[220] Areheart, *supra* note 169, at 972.

[221] *Id.* at 972–73.

Many scholars have argued that antisubordination principles would better address discrimination. [222] Because antisubordination requires courts and policy makers to address the structural causes of discrimination, it better prevents and addresses unconscious or more subtle forms of bias.[223] It also allows courts to address actions that appear to be neutral but result in a discriminatory impact on subordinated groups because antisubordination's goal is to address the causes of subordination.[224] Importantly, it requires the decisionmaker to explicitly consider the subordination and society's role in creating the subordination.[225] In the context of racial discrimination, this requires that policy makers "adequately grapple with the systemic vestiges of slavery, Jim Crow, and racial animosity that contribute to the continued subordination of members of racial and ethnic minorities."[226] And it avoids essentializing members of subordinated groups. It instead requires that policy makers and decisionmakers consider the ways in which intersectionality, such as race and class, exacerbates the subordination.[227]

[222] *See, e.g.*, Coleman, *supra* note 178, at 85 ("Anti-subordination is a critical tenet of the critical race theory movement and has found support among constitutional law scholars and others committed to the law and legal institutions' ability to not just prevent discrimination but to elevate the social, economic, and political positions of subordinated groups."); Balkin & Siegel, *supra* note 168, at 9 n.2 (citing scholars who write in the antisubordination tradition).

[223] Bagnestos, *supra* note 168, at 5–10.

[224] Areheart, *supra* note 169, at 971 (discussing Title VII's disparate impact doctrine); Bagnestos, *supra* note 168, at 5–10 (discussing Title VII's disparate impact doctrine); *see also* Saucedo, *The Employer Preference for the Subservient Worker*, *supra* note 3, at 1019 (same).

[225] Areheart, *supra* note 169, at 1005–06 (discussing the implications of the anticlassification turn in employment discrimination and its effect on the consideration of race). Areheart writes:

> even if we reach a place where racism no longer impairs the opportunities available to minorities, social and economic deprivations will continue to do so by reinforcing stereotypes and thus possibly inflaming racist predispositions. We might desire to pay attention to such conditions/deprivations for reasons that are non-instrumental (for example, that they tend to cause misery).

Id.

[226] Coleman, *supra* note 178, at 68.

[227] *See id.*

IV. THE ANTISUBORDINATION AND ANTICLASSIFICATION FRAMEWORKS EXACERBATE THE SHORTCOMINGS OF THE PROXY AND ACCOUNTABILITY/DETERRENCE JUSTIFICATIONS

The limits of the justifications for protecting unauthorized workers can be traced to or at least related to the justifications' reliance on anticlassification and antisubordination principles. First, the proxy justification relies directly on anticlassification theory. In a sense, it is blind to status. It requires the court and policy makers to provide the same protection to unauthorized workers as to authorized workers, regardless of that workers' immigration status. It also is focused on how the unlawful discrimination affects the individual worker. Courts are concerned with whether the employer discriminated against the individual worker—defined by whether the employer treated the unauthorized worker differently from a similarly situated individual based on the worker's race, gender, national origin, color, or religion.[228]

The *McDonnell-Douglas* burden-shifting analysis is an example of how the Court has operationalized anticlassificationist principles.[229] To demonstrate a prima facie case of discrimination where there is no direct evidence of discrimination, the employee must show that (1) the employee was qualified for the position; (2) that the employee belonged to a protected category; (3) the employer failed to promote or hire the employee, or disciplined or fired the employee; and (4) the employer treated someone not in the protected category more favorably or left the position open.[230] If the employee demonstrates the prima facie case, the burden shifts to the employer to proffer a legitimate, non-discriminatory reason for its action.[231] At that point, the employee must show that the employer's proffered reason was pretextual.[232] The *McDonnell-Douglas* burden-shifting analysis is anticlassificationist on its face as it explicitly names the wrong as treating an

[228] *See, e.g.*, EEOC v. Phase 2 Invs., Inc., 310 Fed. Supp. 3d 550, 576 (D. Md. 2018) ("[Title VII] authorized suits against employers for discrimination on the basis of race, color, national origin, religion or sex. It did not restrict the class of persons who could bring such suits by citizenship or immigration status.").

[229] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

[230] *Id.* at 802.

[231] *Id.* at 802–03.

[232] *Id.* at 804.

employee differently based on the employee's status and views the goal of Title VII as achieving a race-neutral workplace.[233]

This works against unauthorized workers because a worker must be similarly situated to other workers—and unauthorized workers are differently situated from authorized workers with respect to their immigration status. For example, in *Egbuna v. Time-Life Libs., Inc.*, the Fourth Circuit emphasized the unauthorized status of an employee when it decided the employee could not assert a prima facie case of employment discrimination.[234] The employee had previously worked for the company and resigned from his job because he planned to return to his home country.[235] During his employment, his visa had expired, but the company did not note its expiration.[236] After the employee decided not to return to his home country, he asked the company to reinstate him into his job.[237] The employee alleged that the company had agreed to hire him but then rescinded the offer because the company discovered he had cooperated with the EEOC in a sexual harassment investigation.[238]

In *Egbuna*, the Fourth Circuit used the anticlassification principles announced in *McDonnell-Douglas* to determine that the employee's lack of work authorization meant that he was unqualified for the position and ended its inquiry at step one of the prima facie case.[239] As the dissent pointed out, the employer did not find out that the employee was unauthorized until after it had made its decision.[240] So the majority misapplied the after-acquired evidence doctrine.[241] The result is that even when an employer has intentionally discriminated against an employee, it can avoid any liability based on the employee's unauthorized status. This can be traced to

[233] *Id.* at 801 ("[Title VII's goals involve] societal as well as personal interests on both sides of this equation. The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through *fair and racially neutral* employment and personnel decisions") (emphasis added).

[234] Egbuna v. Time-Life Libs., Inc., 153 F.3d 184, 187 (4th Cir. 1998).

[235] *Id.* at 185.

[236] *Id.*

[237] *Id.*

[238] *Id.* at 186.

[239] *Id.* at 188.

[240] *Id.* at 189 (Ervin, J., dissenting).

[241] *Id.*

antidiscrimination law's reliance on the anticlassification principle of treating similarly situated individuals equally.

The proxy justification's reliance on anticlassification theory's status-neutral and individually-focused principles leads to other justification's failures. Although courts are blind to the workers' status in determining whether workers can sue employers who violate Title VII, that blindness can mean that policy makers do not have to consider whether unauthorized workers "in society are subordinated, or, if so, how bad the subordination has been."[242] This can leave unanswered the role that the workers' status played in making the worker more vulnerable. It also increases the likelihood that the focus will remain on individual workers and how they should reform to comply with immigration laws, rather than a change to the policies and structures that have led to the vulnerability.[243]

For example, in *EEOC v. Switching Systems Division of Rockwell International, Corp.*, the employer terminated a group of employees who had falsely stated on their employment application that they were United States citizens or provided incorrect social security numbers.[244] The company's policies set out offenses that could subject an employee to discipline or termination, which included falsifying employment applications or questionnaires.[245] At the time that the company fired the workers, some had subsequently obtained immigration status.[246] Two other employees who had provided false information were only disciplined—one was a United States citizen and the other's nationality was unknown.[247] The EEOC alleged that the company fired the immigrant employees because of their national origin.[248] In rejecting the EEOC's claim, the court relied on the employees' unauthorized status at the time of their application to shift blame for the decision from the employee to the employer, "because of [the employee's]

[242] Areheart, *supra* note 169, at 999 (quoting Jack M. Balkin, *Plessy Brown, and Grutter: A Play in Three Acts*, 26 CARDOZO L. REV. 1689, 1711 (2005)).

[243] *Cf.* Sharpless, *supra* note 117, at 707–08 (describing the limitations of respectability politics and its role in "reinforc[ing] and reproduc[ing] existing social and economic inequalities in our society").

[244] EEOC v. Switching Sys. Div. of Rockwell Int'l, Corp., 783 F. Supp. 369, 370 (N.D. Ill. 1992).

[245] *Id.*

[246] *Id.* at 370–71.

[247] *Id.* at 371.

[248] *Id.* at 369–70.

lack of citizenship status, [she] was compelled to falsify information in order to secure employment. If [she] had been a United States citizen when she made application, then presumably she would not have falsified her application, and she would still have a job with defendant."[249]

Further, anticlassification's status-neutral and individually focused principles leave unexamined the structural causes of the discrimination the worker suffered: "the mainstream perception becomes that the exploitation of immigrant workers is entirely the result of private actions."[250] It also can exacerbate the discrimination the worker may experience as a result of the workers' statutorily protected class, especially race, gender, and national origin.

And, as described above, the failure to account for those intersections can limit access to remedies.[251] Because unauthorized workers forego remedies to avoid discovery into their immigration status, it also means that courts often leave unexamined the role the employer played in creating the vulnerability.[252] That can impact what workers can recover in punitive damages.[253]

Second, the employer accountability justification implicates anticlassification's focus on "invidious motivations." Inclusion of unauthorized workers in the coverage of federal antidiscrimination laws is justified only when the employer intentionally discriminates on the basis of a protected characteristic. This limits the full application of federal antidiscrimination laws with respect to unauthorized workers. It calls into question, not just employers' motivations, but also whether unauthorized workers are at fault. Kathleen Kim has shown how this framing results in a belief that the worker is complicit in the unauthorized work: "the worker's affirmative wrongdoing evidence[s] his collusion in the unlawful employment arrangement, thereby precluding him from obtaining relief."[254] Because the theory looks at the motivations of employers, it invites courts to also look at the motivations of workers.

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[249] *Id.* at 375.

[250] Lee, *supra* note 8, at 1100.

[251] *See* discussion *supra* Part II.C.

[252] Saucedo, *The Employer Preference for the Subservient Worker*, *supra* note 3, at 968–70 (arguing that employers rely on the under-enforcement of workplace laws and over-enforcement of immigration laws to cultivate an exploitable workforce made up of primarily unauthorized workers).

[253] Punitive damages are available to a Title VII plaintiff. 42 U.S.C. § 1981a(a)(1).

[254] Kim, *supra* note 3, at 1580.

An example of this appears in *Cazorla v. Koch Foods of Mississippi, LLC*.[255] The Fifth Circuit determined that a group of presumptively unauthorized workers' pending U-visa applications were probative of the workers' motives behind reporting workplace harassment to the EEOC.[256] Noncitizens who are the victim of a crime, provide assistance or who are willing to provide assistance to a law enforcement agency investigating or prosecuting the crime, and who have suffered substantial physical or mental abuse as a result of the crime can apply for a U-visa.[257] The workers in the poultry plant alleged action that would not only be sexual and racial harassment under Title VII but also would violate criminal laws:

Supervisors allegedly groped female workers, and in some cases assaulted them more violently; offered female workers money or promotions for sex; made sexist and racist comments; punched, elbowed, and otherwise physically abused workers of both sexes; and demanded money from them in exchange for permission for bathroom breaks, sick leave, and transfers to other positions. . . . When workers complained or resisted, [company] managers allegedly ignored them, and some debone supervisors allegedly retaliated by docking their pay; demoting, reassigning, or firing them; and threatening to physically harm them or have them arrested or deported.[258]

While the court acknowledged that "substantial evidence suggests that serious abuse is all too common in many industries reliant on immigrant workers, including the modern-day poultry industry[,]" it did not form a significant part of the court's reasoning, nor did the court state how the workers' unauthorized status could have led to the discrimination.[259] Instead, the court elided the status, mentioning only "immigrant" workers, which is closely associated with protected characteristics under Title VII, national origin, and race/ethnicity.[260] And when it mentioned the workers' unauthorized status, it focused on their compliance with immigration laws, writing: "we find it plausible that some undocumented immigrants might be

[255] Cazorla v. Koch Foods of Miss., LLC., 838 F.3d 540 (5th Cir. 2016).

[256] *Id.* at 558–59. The Court ultimately reversed the order that required the EEOC to turn over discovery related to the U-visas because it would harm the public interest (not the individual worker's interests), but still found that the individual workers would have to turn over anonymized U- visa applications. *Id.* at 563–64.

[257] Immigration and Nationality Act, § 101(a)(15)(U), 8 U.S.C. § 1101(a)(15)(U) (2012).

[258] *Cazorla*, 838 F.3d at 544–45.

[259] *Id.* at 558.

[260] *Id.*

tempted to stretch the truth in order to obtain lawful status" despite noting the multiple checks on fraud in the U-visa process.[261]

Unfortunately, antisubordination theory does not provide a complete foundation for including unauthorized workers in antidiscrimination law's protections. First, antisubordination theory, out of necessity, emphasizes the subordinated status of groups of workers. And that can require advocates to portray subordinated workers as powerless in ways that conflict with workers' own perceptions of themselves and lived experiences.[262] This is not to say that workers do, in fact, lack autonomy and agency. Indeed, researchers have documented the ways in which noncitizens' individual precarity has spurred collective action that propels greater agency.[263] Other scholars have described the ways in which claim-making can empower workers because it erases one of the contributors to subordination, silence.[264] Instead, the narrative that advocates sometimes must adopt to position their clients as victims of unscrupulous employers to get buy-in from the decisionmaker can exacerbate the effect that the accountability and deterrence justification has

[261] *Id.* at 558–59.

[262] *See, e.g.*, Sarah Morando Lakhani, *Producing Immigrant Victims' "Right" to Legal Status and the Management of Uncertainty*, 38 LAW & SOCIAL INQUIRY 442, 453–60 (2013) (describing the challenge for advocates in creating "clean victim" narratives in which the client is the subject of "nonmutual control" by their abusers so that unauthorized immigrant clients can receive U-visas based on their status as victims of crime).

Mary Anne Case has also argued that antisubordination's focus on groups rather than individual effects could lead some courts and policy makers to revert to "a separate but equal" approach to resolving discrimination. She asserts that one of the main proponents of the antisubordination strand in the constitutional law of sex discrimination was Justice Rehnquist. Case, *supra* note 169, at 1475. He objected to striking down laws just because they classify women differently from men but noted that the law must subordinate women for it to count as unlawful sex discrimination. *Id.* As Case notes, the problem with Rehnquist's approach is that it leads to a "vision of separate (but equal) spheres" that ignores the demeaning and subordinating effect of insisting that "individuals of either sex" must match the stereotype associated with their sex. *Id.* This is because it "is inconsistent with the equality of rights which pertains to citizenship, National and State, [and] the personal liberty enjoyed by everyone within the United States." *Id.* at 1476 (quoting Plessy v. Ferguson, 163 U.S. 537, 555 (Harlan, J. dissenting), *overruled by*, Brown v. Bd. of Educ., 347 U.S. 483 (1954)).

[263] Marcel Paret & Shannon Gleeson, *Precarity and Agency Through A Migration Lens*, 20 CITIZENSHIP STUDIES 277 (2016).

[264] Llezlie Green Coleman, *Exploited at the Intersection: A Critical Race Feminist Analysis of Undocumented Latina Workers and the Role of the Private Attorney General*, 22 VA. J. OF SOCIAL POL'Y & THE LAW 397 (2015).

of casting unauthorized workers as subservient workers who are there for employers to exploit.[265]

A second major drawback of antisubordination theory is that it requires policy makers to recognize subordinated groups as worthy of protection. Ira Katzelson provides an example of this drawback in the context of the New Deal workplace laws—the Fair Labor Standards Act and National Labor Relations Act.[266] Initially southern legislators supported the laws because they did not require southern legislators to recognize the subordinated status of most African American workers, but their support waned once Congress tried to include African Americans in the New Deal laws' coverage.[267] Katzelson shows that the New Deal workplace laws successfully made it through Congress because even though there was little union presence in the South, "[t]he South was willing to support [the Democratic industrial constituencies'] wishes provided these statutes did not threaten Jim Crow. So southern members traded their votes for the exclusion of farmworkers and maids, the most widespread black categories of employment, from the protections offered by these statutes."[268] Katzelson traces the decline in Southern legislators' support for labor laws as evidenced in the Labor-Management Relations Act, in part, to labor unions' "increasing, unexpected success in the South" and to non-Southern new deal liberals' press for "a more expansive federal administration to advance labor interests without relenting where race intersected with labor[.]"[269] Further, Katzelson explains that Southern legislators "now had good reason to fear that labor organizing might fuel civil rights activism."[270]

Scholars have noted similar patterns in advocating for immigrant rights.[271] Maria Olivares has described the limits of adopting such rhetoric to argue for noncitizen rights.[272] She attributes the failure of interest

[265] *See* discussion *supra* Part II.B.; Lakhani, *supra* note 262, at 453–60.

[266] IRA KATZELSON, WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA 55 (2005).

[267] *Id.*

[268] *Id.*

[269] *Id.* at 67–68.

[270] *Id.* at 68.

[271] *See, e.g.*, Mariela Olivares, *Narrative Reform Dilemmas*, 82 MO. L. REV. 1089, 1136 (2017).

[272] *Id.* at 1136 (quoting Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1349 (1988)).

convergence as the primary cause because the majority perpetually views noncitizens as outsiders whose interests do not match those of the majority: "[a]s long as immigrants remain outsiders and their interests do not adequately converge with the interests of the majority . . . traditional reform frameworks are futile."[273] The rhetoric about immigrants in general positions them as outsiders whose interests are different from U.S. citizens.[274] When advocates use the proxy justification to argue that Title VII and other antidiscrimination laws to protect unauthorized workers, the justification breaks down because unauthorized workers do differ from their authorized counterparts.[275] And the majority, at least for now, is not interested in recognizing that difference as one that deserves protection.[276] Thus, even though being unauthorized does make it more likely that workers will face unlawful discrimination on the basis of a protected characteristic, the unauthorized part of the workers' identity makes it less likely that policy makers and courts will acknowledge the subordination.

Third, courts and policy makers may resist relying on antisubordination principles because they view it as unfair to make employers responsible for implementing change when the problem stems from larger societal structures.[277] For example, even though the ADA is based on antisubordination principles, courts have been reluctant to require employers to provide accessible transportation despite that it would not cause an undue burden on employers.[278] Courts' reluctance to hold employers responsible for problems they view as societal, means that the accountability/deterrence justification provides a way for courts to engage in complicity framing to assign fault not to the employer but to the worker.[279]

Finally, antisubordination historically has relied on immutability as part of the justification for protection, and that can create challenges for workers who have a characteristic, such as lack of immigration status, that society believes is within the workers' control. In the context of Constitutionally

[273] *Id.*

[274] *Id.*

[275] *See* discussion *supra* Part II.C.

[276] *See* discussion of IRCA *supra* Part I.

[277] Bagnestos, *supra* note 168, at 42–43.

[278] *Id.* at 43.

[279] *See, e.g.*, Escobar v. Spartan Sec. Serv., 281 F. Supp. 2d 895, 897 (S.D. Tex. 2003) (holding that even if the employer acted wrongly by subjecting the employee to sexual harassment and retaliation, the employee could not claim backpay because he was unauthorized).

protected statuses, Trina Jones outlines four factors on which courts have relied to determine protected status: "(1) immutability; (2) visibility; (3) relevancy; and (4) a pervasive history of discrimination."[280] With respect to immutability in the context of employment discrimination, Owen Fiss identifies it as one of the principle drivers of "the sense of unfairness engendered by the [use of race] as the basis of an employment decision."[281] Fiss points out that immutability is related to the "absence of individual control."[282] It is unfair to judge individuals on something that is outside of their control because society values the idea that individual control "provides the prospect for upward mobility."[283] This idea allows society to rationalize "the unequal distribution of status and wealth among people in the society."[284] Failure becomes a problem within an individual's own control.[285] Immutability's service to the idea of individual control also assumes that "the allocation of scarce employment opportunities represent, to some extent, a reward."[286] Though scholars have challenged these factors, especially immutability and visibility, courts and policy makers continue to use them as an analytical tool.[287]

In sum, anticlassification and antisubordination theories reinforce the limits of the justifications immigration advocates and scholars have put forward as reasons to include unauthorized workers within the protection of federal antidiscrimination law. They lead to limited remedies and more vulnerability in the workplace.

V. CONCLUSION

This article has described the ways in which the main justifications for protecting unauthorized workers have failed to provide full protection. Those justifications rest on advocates and scholars' efforts to distinguish federal antidiscrimination plaintiffs from the unauthorized worker in *Hoffman*. It has

[280] Jones, *supra* note 188, at 63 (citing Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135, 146 (2011)).

[281] Fiss, *supra* note 168, at 241. The other attribute Fiss identified was relevancy—i.e., "race is not considered an accurate predictor of [an individual's] productivity." *Id.*

[282] *Id.*

[283] *Id.*

[284] *Id.*

[285] *Id.*

[286] *Id.*

[287] Jones, *supra* note 188, at 63.

meant that unauthorized workers are positioned as proxies for United States workers and workers with authorization. It also has led advocates to emphasize employers' lawbreaking and the need to hold them accountable to deter future violations. These justifications have provided some protection for unauthorized workers. But they have led to limits on remedies and fed into harmful stereotypes about unauthorized workers. But it is not only these justifications that have resulted in this harm.

This article has highlighted how the two main antidiscrimination frameworks exacerbate the limitations of justifications used to protect unauthorized workers. Anticlassification theory's status-neutral and individually-focused principles intensify the differences between authorized workers and their authorized colleagues that already limit full remedy under the proxy justification. Similarly, anticlassification's status-neutral and individually-focused principles reinforce harmful stereotypes that lead to complicity framing. Antisubordination's emphasis on membership in a subordinated group, antisubordination's need for majority buy-in, and antisubordination's historical reliance on immutability also contribute to the accountability/deterrence justification's amplification of unauthorized workers' vulnerability.

While this article has focused on unauthorized workers' inability to achieve full remedy under federal antidiscrimination law, anticlassification and antisubordination's limitations also likely contribute to other vulnerable workers' inability to achieve full remedy under antidiscrimination laws due to imperfect proxies. For example, formerly incarcerated individuals face challenges similar to unauthorized workers when it comes to asserting Title VII race discrimination claims. They are often subject to complicity framing[288] and that could be due to anticlassification's focus on the individual claimant. Caregivers, too, have difficulty fitting their claims into the existing framework for gender discrimination claims under Title VII.[289] Thus, this article's insights on the failures of anticlassification and antisubordination principles in the context of the unauthorized workplace could also provide

[288] Kimani Paul-Emile, *Beyond Title VII: Rethinking Race, Ex-Offender Status, And Employment Discrimination in The Information Age*, 100 VA. L. REV. 893, 920–27 (2014) (describing the bars to claims-making under Title VII that formerly incarcerated individuals face).

[289] Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J.L. REFORM 371 (2001); *see also* Joan C. Williams & Stephanie Bornstein, *Caregivers in the Courtroom: The Growing Trend of Family Responsibilities Discrimination*, 41 U.S.F. L. REV. 171 (2006) (describing increased litigation under Title VII involving caregivers).

insights for scholars and advocates addressing the challenges other vulnerable workers face.