



# Stanford Law Review

## PRIVATE IMMIGRATION SCREENING IN THE WORKPLACE

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*For over twenty years, our immigration laws have required employers to screen their workforces for “unauthorized” immigrants. But rather than punish employers for failing to carry out these duties, the Department of Homeland Security (DHS) has worked with employers to identify unauthorized workers for removal—even where it is abundantly clear that employers are reporting the very workers they unlawfully hired in the first place, and are doing so to retaliate against workers who assert labor and employment rights. How can a law that was designed to punish employers be used to reward them? This Article attempts to explain this counterintuitive result. Although the DHS-employer relationship appears to be contentious and antagonistic, that relationship can often be highly collaborative and mutually beneficial, where the DHS overlooks employer indiscretions in exchange for help identifying potentially removable immigrants. In this way, employers resemble other immigration screeners, like airport inspectors and state and local law enforcement officers, who assist the DHS by winnowing down to a manageable size the pool of potentially removable immigrants. This Article therefore argues that employers should be regulated as screeners where employers should be punished for using their screening authority beyond the scope of its intended use, which often means employers using reporting and the threat of reporting to avoid liability for labor and employment violations. Thus, while our immigration laws contemplate punishing employers at the front end for who they hire, this Article argues our laws should also punish employers at the back end for who they report. As one set of*

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*remedies, this Article proposes subjecting employers to possible audits if they report workers to the DHS, and applying the exclusionary rule against complicit immigration officials.*

INTRODUCTION.....	1104
I. EMPLOYERS AS IMMIGRATION SCREENERS .....	1110
A. <i>IRCA: Screening Out “Unauthorized” Workers</i> .....	1110
B. <i>The Challenges of Immigration Screening</i> .....	1113
C. <i>The Harms of Self-Serving Screening Decisions</i> .....	1119
1. <i>Legal harms</i> .....	1120
2. <i>Democratic harms</i> .....	1124
II. ENFORCEMENT REALITIES, RATIONALES, AND COLLABORATIONS .....	1126
A. <i>Underenforcement as Enforcement Policy</i> .....	1126
B. <i>Rationalizing a Necessary Evil</i> .....	1129
C. <i>Collaborations</i> .....	1134
III. ACCOUNTABILITY AND SCREENING DECISIONS .....	1137
A. <i>Legal and Democratic Accountability</i> .....	1138
B. <i>Proposed Remedies</i> .....	1141
1. <i>Auditing employer reports</i> .....	1142
2. <i>The exclusionary rule</i> .....	1143
CONCLUSION.....	1144

## INTRODUCTION

The latest figures place the unauthorized immigrant population at about 12 million.<sup>1</sup> Meanwhile, the Department of Homeland Security (DHS)<sup>2</sup> boasts that it removed over 275,000 noncitizens in 2007.<sup>3</sup> How does the DHS decide which of our nation’s 12 million unauthorized immigrants will be removed and which will remain? How do unauthorized immigrants enter the removal pipeline? Who actually makes these immigration decisions? While scholars have offered rich and textured analyses of the ever-expanding grounds for removing immigrants, surprisingly little attention has been paid to immigration screeners—the persons and institutions that assist the DHS in identifying candidates for removal. This Article focuses on one undertheorized site of

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1. JEFFREY S. PASSEL, PEW HISPANIC CENTER, *THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S.: ESTIMATES BASED ON THE MARCH 2005 CURRENT POPULATION SURVEY 1*, available at <http://pewhispanic.org/files/reports/61.pdf>.

2. Prior to 2003, the Immigration and Naturalization Service was the agency that carried out sanctions and workplace enforcement, and so my use of “INS” refers to that era of immigration enforcement. In 2003, the functions of the INS were transferred to the Department of Homeland Security (DHS). Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

3. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, ICE FISCAL YEAR 2007 ANNUAL REPORT: PROTECTING NATIONAL SECURITY AND UPHOLDING PUBLIC SAFETY, at iv (2007), available at [http://www.ice.gov/doclib/about/ice07ar\\_final.pdf](http://www.ice.gov/doclib/about/ice07ar_final.pdf). Immigration and Customs Enforcement (ICE) is housed within the DHS.

immigration screening and one particularly problematic set of immigration screeners: the workplace and our nation's employers.<sup>4</sup>

For over twenty years, our immigration policy has effectively conditioned access to work on proof of citizenship or lawful status. Passed in 1986, the Immigration Reform and Control Act (IRCA) prohibits our nation's employers from hiring anyone other than citizens or those otherwise "authorized" to work. It effectuates this mandate by requiring employers to screen their workforces and "verify" the immigration status of their workers.<sup>5</sup> Thus, along with port-of-entry inspectors, international carriers, asylum officers, and an increasing number of state and local law enforcement officers, employers assist the DHS in a screening capacity by identifying those immigrants who, in their judgment, ought to be reported to DHS officials for removal. Screeners in effect winnow down the universe of potentially unauthorized immigrants to a manageable size.

For immigration purposes, our nation's employers remain a significant and significantly misunderstood group of immigration decision makers. The sheer number of employers makes them significant. The number of public immigration officials within the DHS—the public agency charged with the duty of making immigration-screening decisions—is approximately 31,500.<sup>6</sup> But

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4. Employers have not, however, been undercriticized. Indeed, the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359, has generated an impressive body of work addressing the different ways in which the statute has proven to be ineffective. *See, e.g.*, Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955; Martha F. Davis, Lucas Guttentag & Allan H. Wernick, *Report of the Committee on Immigration and Nationality Law of the Association of the Bar of the City of New York: An Analysis of Discrimination Resulting from Employer Sanctions and a Call for Repeal*, 26 SAN DIEGO L. REV. 711 (1989); Cecelia Espenosa, *The Illusory Provisions of Sanctions: The Immigration Reform and Control Act of 1986*, 8 GEO. IMMIGR. L.J. 343 (1994); Jeffrey Manns, *Private Monitoring of Gatekeepers: The Case of Immigration Enforcement*, 2006 U. ILL. L. REV. 887; Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 HARV. C.R.-C.L. L. REV. 345 (2001); Huyen Pham, *The Private Enforcement of Immigration Laws*, 96 GEO. L.J. 777 (2008); Maurice A. Roberts & Stephen Yale-Loehr, *Employers as Junior Immigration Inspectors: The Impact of the 1986 Immigration Reform and Control Act*, 21 INT'L LAW. 1013 (1987); Juliet Stumpf & Bruce Friedman, *Advancing Civil Rights Through Immigration Law: One Step Forward, Two Steps Back?*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 131 (2002); Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193.

5. *See* Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359.

6. ICE and United States Citizenship and Immigration Services (USCIS) are the divisions within the DHS responsible for handling the majority of immigration-related decisions. According to the DHS, in 2007 ICE employed more than 16,500 people and USCIS employed more than 15,000 people. *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., USCIS ANNUAL REPORT FISCAL YEAR 2007, at 3 (2007), available at [http://www.uscis.gov/files/natedocuments/USCIS\\_annual\\_report\\_part1.pdf](http://www.uscis.gov/files/natedocuments/USCIS_annual_report_part1.pdf); U.S. IMMIGRATIONS & CUSTOMS ENFORCEMENT, *supra* note 3, at 1. The total number of public officials is at most 31,500 because USCIS employs both "federal and contract employees,"

because our immigration laws require all employers to verify the immigration status of their employees, even focusing on just a handful of the industries that have traditionally relied on immigrant labor reveals a startling reality: within the construction and manufacturing/production industries, for example, no fewer than *1.1 million employers*—private entities—must screen their employees to ascertain and verify immigration status.<sup>7</sup> This means that an at-best-loosely-organized group of private screeners is effectively deciding which immigrants in the workplace can stay and which should be reported for removal.

Despite the reach of their influence over immigration matters in the workplace, employers have nonetheless remained significantly misunderstood as decision makers. Employers are not uncommonly seen as the *targets* of regulation, where the primary regulatory challenge involves properly calibrating the level of enforcement against employers to deter them from hiring unauthorized immigrants.<sup>8</sup> This is not entirely surprising given IRCA's logic. Like other third-party liability schemes, it seeks to disrupt what can often be a collusive relationship. Many employers seek out low-wage unskilled labor, and many unauthorized immigrants in turn seek out work opportunities to support themselves and their families. But while it is true that IRCA formally prohibits employers from hiring unauthorized immigrants under threat of civil and criminal sanction, it has been so infrequently enforced that employers can escape detection in all but the most egregious circumstances.<sup>9</sup> As a result, the employer-worker relationship, while collusive, has become asymmetrical: unencumbered by the fear of being punished, employers can threaten to report workers for removal, whereas workers do not possess any similar ability to blow the whistle on employers. Therefore, in many instances, employers and

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demonstrating the extent to which public entities have come to rely on private actors. U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra*, at 3.

7. According to a recent report, in 2004 the six most immigrant-dependent industries, in decreasing order of dependence, were: (1) farming, fishing, and forestry; (2) construction; (3) building and grounds maintenance; (4) production (manufacturing); (5) food preparation and serving; and (6) transportation. See RANDY CAPPS, KARINA FORTUNY & MICHAEL FIX, TRENDS IN THE LOW-WAGE IMMIGRANT LABOR FORCE, 2000-2005, at 7 tbl.4 (2007), available at [http://www.urban.org/UploadedPDF/411426\\_Low-Wage\\_Immigrant\\_Labor.pdf](http://www.urban.org/UploadedPDF/411426_Low-Wage_Immigrant_Labor.pdf). According to the U.S. Census, in 2004 there were 760,400 and 339,100 "Construction" and "Manufacturing" establishments, respectively, which comes to just under 1.1 million total establishments. See U.S. CENSUS BUREAU, THE 2008 STATISTICAL ABSTRACT, TABLE 736: ESTABLISHMENTS, EMPLOYEES, AND PAYROLL BY EMPLOYMENT-SIZE CLASS AND INDUSTRY: 2000 TO 2004 (2008), available at <http://www.census.gov/compendia/statab/2008/tables/08s0736.pdf>.

8. See, e.g., Manns, *supra* note 4, at 931 ("The fundamental problem is that both employers of low-wage workers and undocumented aliens share a strong economic interest in engaging in formal compliance yet substantive subversion of the verification process."); Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1735-36 (2006).

9. See *infra* Part II.A.

employers alone decide which unauthorized immigrants in the workplace can remain, and which will be reported for removal.

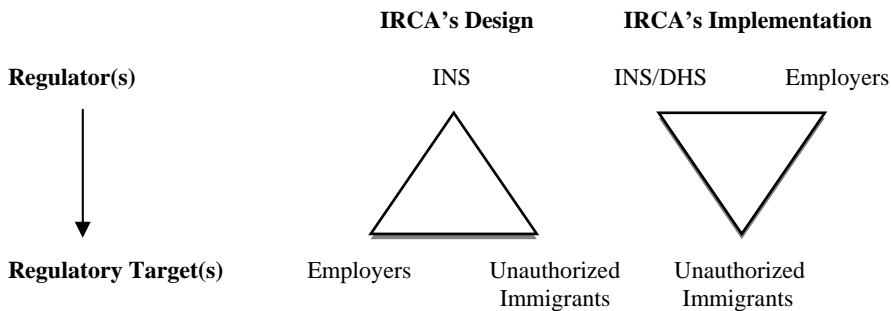
What has been the result? The immediate harms have been harsh and increasingly apparent. Within industries traditionally dependent on immigrant labor, employers recruit and hire unauthorized workers, and use their de facto immunity from sanctions to negotiate low wages, disregard workplace protections, and otherwise suppress worker dissent. Moreover, with increasing frequency, employers seem to be contacting the DHS to request that it inspect their own workplaces and detain and remove the same unauthorized workers they recruited and hired in the first place. And while some may reach out to the DHS as an attempt to carry out their screening duties in good faith, the growing anecdotal and empirical evidence suggests that many employers report workers in retaliation for unauthorized immigrants' attempting to assert their labor and employment rights. Employers, therefore, possess a great deal of discretion over whom they hire and whom they report, and in both instances it appears they exercise that discretion in a manner that elevates their interest in maximizing profit over the interests of advancing the goals of our nation's immigration and labor and employment laws. As Michael Wishnie explains, IRCA's perversity stems from "a law-breaking employer [who] may invoke the formidable powers of the government's law enforcement apparatus to terrorize its workers and suppress worker dissent under threat of deportation."<sup>10</sup>

Though we know what employers are supposed to do (verify the immigration status of their workers), and what they are instead more likely to do (hire unauthorized workers and threaten removal to gain a bargaining advantage), we know little about why the DHS continues to rely on employer "tips" and "leads," and we know even less about what the long-term effects will be on immigration. Finding a solution to the problem of exploitation requires, therefore, answering a whole series of questions that move us beyond a one-dimensional understanding of employers as regulatory targets engaging in lawless behavior.

Answering those questions requires us to first take account of the way IRCA has actually been implemented. I employ the following diagram for expositional help.

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10. Wishnie, *supra* note 4, at 216.

**Figure 1. Comparing IRCA's Design and its Implementation**

Taking seriously this “regulatory retriangulation,”<sup>11</sup> I provide in this Article a descriptive account of how employers have become not just agents of exploitation, but also agents of the State. I want to suggest that our nation’s employers are best understood as private immigration screeners<sup>12</sup> who identify potentially unauthorized immigrants within their workforces for removal. Just as port-of-entry inspectors screen for ineligible entrants, and state and local law enforcement officers screen investigatory targets for removable noncitizens, our nation’s employers screen their workforces for immigrants that lack authorization and are otherwise removable. Therefore, the DHS persists in working with (rather than completely against) employers because they provide a variety of screening services. Some of those services attach through the compulsion or encouragement of law, like examining documents and consulting databases to verify immigration status.<sup>13</sup> Other services, like

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11. While others have made passing note of this dynamic, I seek to fully elaborate the role transition undertaken by employers. *See* Nessel, *supra* note 4, at 360 (noting that while “IRCA was intended to punish employers” many INS initiatives have targeted only workers).

12. Huyen Pham has made an important first contribution by analyzing the costs and benefits of what she describes as the private enforcement of immigration laws. *See* Pham, *supra* note 4, at 783. But Pham expressly leaves open some of the theoretical questions this Article endeavors to answer:

This Article focuses on the efficacy of the shifting, but the phenomenon of private enforcement also raises similar legal and political questions: are governments also shifting political accountability for immigration law enforcement? If a private party violates civil rights laws, who should be held responsible for damages—the private party, the government requiring the private enforcement, both or none? Finally, should private parties be compensated in some way for their new enforcement responsibilities?

*Id.* at 783-84.

13. *See* Raquel Aldana, *Of Katz and “Aliens”: Privacy Expectations and the Immigration Raids*, 41 U.C. DAVIS L. REV. 1081, 1098-99 (2008); *see also* Press Release, Dep’t of Homeland Sec., DHS Highlights Best Practices for Maintaining Legal Workforces (July 26, 2006), *available at* [http://www.dhs.gov/xnews/releases/press\\_release\\_0966.shtm](http://www.dhs.gov/xnews/releases/press_release_0966.shtm) (explaining that DHS policy encourages employers to join the “Basic Pilot Employment Verification” program, which provides employers access to an internet-based federal database to help determine the work eligibility of their employees).

reporting the presence of unauthorized immigrants to the DHS<sup>14</sup> and coordinating workplace inspections and raids,<sup>15</sup> have emerged out of an evolved regulatory practice and culture of collaboration. But in any event, all these services permit employers to shape the conditions under which unauthorized immigrants remain in the United States and define the conditions triggering DHS detention and removal.

Having painted a descriptive reality where the DHS and our nation's employers collaboratively screen for unauthorized immigrants, I then turn to the normative implications that arise from such an arrangement. In particular, I focus on the consequences of this collaboration and argue that this informal regulatory partnership has exacted both legal and democratic costs. The legal costs are straightforward and concrete. Permitting employers to report—and use the threat of reporting against—workers effectively prevents workers from asserting labor and employment rights they would otherwise be entitled to assert. Such a practice also incurs democratic costs, which are no less troubling. Employer screening that proceeds on a self-serving basis incentivizes immigrant workers to embrace docility and avoid activity that draws attention, such as participating in a union drive or pressing claims for overtime pay. But the workplace remains one of the few social institutions where immigrant adults can encounter and develop meaningful relationships with nonfamily citizens, becoming in the process more integrated into their surrounding communities and larger society. Employer screening has therefore diminished the capacity of the workplace to provide more than just an opportunity to earn a paycheck. It injects the threat of removal as one more set of costs workers must bear in attempting to foster a sense of community and solidarity and investment.

Part of my ambition is to unsettle our notions surrounding the type of behavior we ought to reward when screening for unauthorized immigrants. Some have argued that unauthorized immigrants, who work hard and endure great difficulties, should, after a number of years, be permitted to regularize their status. This type of immigration policy rewards those who avoid attracting attention to themselves, and indeed, some have rationalized the removal of criminal noncitizens—who, at least in principle, have attracted substantial attention to themselves by virtue of their convictions—on precisely this ground.<sup>16</sup> The case of employer screening, however, suggests that rewarding this type of behavior in the workplace can have perverse consequences. Because employers are often regulated by workers who either report workplace violations to enforcement agencies, like the Department of Labor, or bring enforcement actions themselves, a screening system that rewards immigrant

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14. See Michael J. Wishnie, *Introduction: The Border Crossed Us: Current Issues in Immigrant Labor*, 28 N.Y.U. REV. L. & SOC. CHANGE 389, 389 (2004).

15. See Aldana, *supra* note 13, at 1100.

16. Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809 (2007).



workers who (quite reasonably) lay low to avoid removal, only encourages labor and employment violations and fosters a culture of lawlessness. This raises the troubling specter that employers will use unauthorized immigrants to diminish workplace protections for all workers, and that unauthorized immigrants will be discouraged from developing bonds with citizens within the workplace, one of the few social institutions that facilitates the integration of adult immigrants.

The balance of the Article proceeds as follows. Part I explains and develops the idea of employers as immigration screeners. After briefly summarizing IRCA's ambition of transforming employers into immigration screeners by regulating whom employers hired, this Part then marries this narrative to the prevailing scholarship surrounding immigration screening. The Part concludes by turning away from IRCA's design and toward an exploration of how it has actually been implemented. Here, I trace out the consequences of the DHS's virtual nonregulation of employer hiring decisions. I explain how this regulatory strategy has impoverished the workplace, both because it effectively suppresses the assertion of legal rights for labor and employment violations, and because it diminishes the democracy-enhancing potential of the workplace and obstructs the integration of immigrants into their surrounding communities.

Part II delves into the origins of the DHS's contemporary practice of nonenforcement. By disentangling the web of enforcement realities, rationales, and collaborations running throughout the workplace, I hope to explain why and how a law that was designed to punish employers has been implemented in a way that rewards them. Part III advances my prescriptive claims. Having zeroed in on the legal and democratic harms flowing from the workplace, this Part argues in favor of developing immigration policies that broaden their regulatory focus. Rather than focusing only on whom employers hire, I argue in favor of broadening our regulatory focus to account for whom employers report to the DHS for removal. Doing so will keep employers and complicit low-level DHS officials more accountable and will send the proper signals: namely that employers ought not use immigration laws to serve their own goals to the detriment of labor and employment protections and the workplace's potential to strengthen our democracy. I explore audits and the exclusionary rule as concrete examples of this shift towards greater accountability. I then conclude.

## I. EMPLOYERS AS IMMIGRATION SCREENERs

### A. IRCA: Screening Out "Unauthorized" Workers

Laws requiring employers to screen their workforces for unauthorized immigrants have appeared at the federal, state, and local levels in some form

for more than thirty years.<sup>17</sup> Though these laws differ in minor respects, they all operate in roughly the same manner: by prohibiting employers from hiring unauthorized immigrants, and by imposing verification duties on employers, where they must examine certain documents and determine whether their employees are authorized to work in the United States.

In 1971, California passed the nation's first employer sanctions law.<sup>18</sup> Under the threat of criminal penalties, California forbade employers from "knowingly" employing a noncitizen who was not entitled to lawful residence in the United States if such employment had "an adverse effect" on U.S. citizens and other lawful workers.<sup>19</sup> Employers were also subject to civil actions. Such proceedings could be initiated by anyone.<sup>20</sup> Before then, employers in California were free to hire unauthorized workers, and they did so openly and unapologetically.<sup>21</sup>

California's employer sanction laws eventually made their way to the U.S. Supreme Court in 1975, when several lawful migrant farmworkers sought to enjoin employers from hiring unauthorized workers. The lower courts had uniformly concluded that California's employer sanctions regime unconstitutionally encroached upon Congress's exclusive authority to regulate

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17. Scholars have made only passing reference to the idea that employers make immigration-related screening decisions regarding their workforce. See David A. Martin, *Eight Myths About Immigration Enforcement*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 525, 546 (2007) (characterizing IRCA and its verification requirements as requiring employers to engage in "immigration screening"); Stumpf & Friedman, *supra* note 4, at 137 (noting that IRCA "effectively makes employers parties to enforcement of the immigration laws affecting the labor market. Employers themselves become the primary method of screening the labor pool for employees that the State has not authorized to work" (citation omitted)); Eleanor Marie Lawrence Brown, *Outsourcing Immigration Compliance* 15 (Harvard Law Sch., Harvard Pub. Law Working Paper No. 08-12, 2008) (noting that employer sanctions statutes encourage employers to screen aliens for work permits and penalize employers when they fail to perform this function).

18. See CAL. LAB. CODE § 2805 (1983) (repealed 1988). Eleven other states and one city followed suit, including Connecticut, Delaware, Florida, Kansas, Maine, Massachusetts, Montana, New Hampshire, New Jersey, Vermont, Virginia, and Las Vegas. See KITY CALAVITA, CALIFORNIA'S "EMPLOYER SANCTIONS": THE CASE OF THE DISAPPEARING LAW 4 n.3 (1982). I focus on California because the decisional law addressing this particular pre-IRCA employer sanction law is well developed, and thus provides a useful window into the motivations, concerns, and anxieties of that period.

19. CAL. LAB. CODE § 2805(a)-(b) (1983) (repealed 1988).

20. *Id.* § 2805(c).

21. In the months leading up to section 2805's passage, the California Courts of Appeal rendered several decisions denying relief to citizen and otherwise lawful migrant farmworkers. Though courts consistently ruled against plaintiffs on the theory that regulating immigrants was a responsibility best left to the federal government, they often expressed dismay over what they understood to be a gaping hole in our nation's immigration laws. See, e.g., *Larez v. Oberti*, 100 Cal. Rptr. 57 (Ct. App. 1972); *Cobos v. Mello-Dy Ranch*, 98 Cal. Rptr. 131 (Ct. App. 1971). Although the decision in *Larez* was rendered after section 2805 was passed, the challenged activities occurred before its passage. See *Larez*, 100 Cal. Rptr. at 63 & n.5.

immigration.<sup>22</sup> The Supreme Court reversed in *De Canas v. Bica*, holding California's law to be valid and concluding that Congress had not intended for the "complete ouster of state power" in this area of regulation.<sup>23</sup> From a constitutional standpoint, *De Canas* is typically cited for the proposition that state and local—and not just federal—authorities possess the authority to regulate unauthorized immigrants. But its broader juridical implications reaffirm the principle that within our nation's immigration regime, public entities may continue to structure private relationships to achieve immigration ends.<sup>24</sup>

In 1986, Congress passed IRCA, which created for the first time a federal employer sanctions scheme.<sup>25</sup> IRCA prohibited employers from "knowingly" hiring immigrants who were not authorized to work. Importantly, it imposed screening responsibilities on employers, requiring them to verify the immigration status of their workers and to keep records on whom they hired. Anyone who secures a job in the United States must fill out the by-now-familiar I-9 form. This form verifies that the employee is authorized to work in the United States, must be completed within three days of hire, and must be supported by documentation establishing the worker's identity.<sup>26</sup> Under IRCA, employers face civil and criminal fines for failing to carry out these screening duties.

Congress transferred screening authority to employers because employment opportunities were understood to be "job magnets" drawing in a

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22. *See De Canas v. Bica*, 424 U.S. 351, 353-54 (1976).

23. *Id.* at 357. Justice Brennan, writing for a unanimous Court, explained that although the immigration power was federal in nature, states retained some authority to pass at least some measures affecting immigrants. California's decision to regulate immigrants, the Court explained, did not automatically become a "constitutionally proscribed regulation of immigration" at least where such regulation had "some purely speculative and indirect impact on immigration." *Id.* at 355. Thus, it was perfectly fine that California prohibited the hiring of noncitizens who "have no federal right to employment within the country" in order to "strengthen its economy." *Id.*

24. The last time state and local governments engaged in a coordinated campaign to structure private relationships for immigration purposes was during the early part of the twentieth century when several western states passed "alien land laws" prohibiting "aliens ineligible to citizenship" from obtaining any interest in land ownership. *See Oyama v. California*, 332 U.S. 633 (1948); *Morrison v. California*, 291 U.S. 82 (1934); *Cockrill v. California*, 268 U.S. 258 (1925); *Frick v. Webb*, 263 U.S. 326 (1923); *Webb v. O'Brien*, 263 U.S. 313 (1923); *Porterfield v. Webb*, 263 U.S. 225 (1923); *Terrace v. Thompson*, 263 U.S. 197 (1923).

25. IRCA also expressly overruled employer sanctions laws passed by state and local entities, including California's. *See* 8 U.S.C. § 1324a(h)(2) (2006) ("The provisions of [IRCA] preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens."). For excellent summaries of the tumultuous events leading up to the passage of IRCA and the difficulties of placating the diverse set of competing interests, see ARISTIDE R. ZOLBERG, *A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA* 354-75 (2006) and Wishnie, *supra* note 4.

26. *See* 8 U.S.C. § 1324a(b)(1)(C)(i)-(ii) (2006); 8 C.F.R. § 274a.2(a)-(b) (2009).

constant stream of unauthorized migration. Thus, targeting employers was central to Congress's strategy for regulating unauthorized immigration.<sup>27</sup> Employer sanctions prohibit immigrants from working without authorization and prohibit employers from hiring workers without first verifying the proffered documentation. Conditioning U.S. jobs on proof of authorization, so the logic went, would deter immigrants from coming to the United States for work reasons, encourage those that were here without meaningful job opportunities to return home, and over the long term reduce the rate of unauthorized migration. IRCA therefore created a segmented but seamless chain of liability. As the Supreme Court has noted, Congress created a sprawling statute putting both employers and workers on the hook by making it "impossible for an undocumented alien to obtain employment in the United States without *some party* directly contravening explicit congressional policies."<sup>28</sup>

### B. *The Challenges of Immigration Screening*

If employers perform screening duties, where do they fit within the larger universe of immigration screeners? In what ways do their challenges resemble those of other screeners, and in what ways do they stand apart? What kinds of behavior does employer screening reward and what does it punish?

In sizing up employer screening, it is useful to remind ourselves that nation's immigration laws orchestrate what has aptly been characterized as the project of "national self-definition."<sup>29</sup> At the highest level of abstraction, members select new members, and in the process argue about, negotiate, remember, and ultimately decide who "we" are as Americans.<sup>30</sup> And while many social institutions are swimming in the sort of political and legal discourse that invites arguments about "who we are" (schools, marriage, and the military come to mind), none quite so literally implicates the "we" question as do the laws regulating access to immigration and citizenship. This is why screening matters—it operationalizes our abstract ideas about who we are.

Within legal scholarship, few have addressed the empirical aspects of immigration screening. In a series of articles, Janet Gilboy thoughtfully addresses the challenges of screening entrants at international airports, perhaps the most obvious and familiar example of immigration screening. Primary line inspectors in airports must examine a traveler's documents and determine in a short period of time whether the entrant is eligible to enter on the basis of those

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27. See Wishnie, *supra* note 4, at 195-96.

28. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 148 (2002) (emphasis added).

29. Hiroshi Motomura, *Whose Alien Nation?: Two Models of Constitutional Immigration Law*, 94 MICH. L. REV. 1927, 1944 (1996).

30. BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* (rev. ed. 1991).

documents.<sup>31</sup> If the documents are valid and permit entry, the entrant is screened in. But if the entrant arouses suspicion, the inspector directs the entrant to secondary inspection where immigration officials can engage in more extensive questioning and perhaps search the entrant's baggage. Thus, for many entrants, primary inspectors constitute the main screening hurdle to be cleared in gaining entrance into the United States.<sup>32</sup>

Primary inspectors have to make very quick screening decisions and determine which of the hundreds of entrants they inspect daily are ineligible to enter. They look for signs that the entrant is not who she says she is. For example, an immigration agent may be more likely to screen in an entrant who can produce a letter of employment from a well-known employer than she is an entrant who is associated with an obscure one, or who produces no letter at all.<sup>33</sup> Similarly, an inspector might think nothing of a traveler fumbling the names of the relatives she is visiting, unless that traveler is a young woman,

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31. See Janet A. Gilboy, *Deciding Who Gets In: Decisionmaking by Immigration Inspectors*, 25 LAW & SOC'Y REV. 571, 590-91 (1991) [hereinafter Gilboy, *Deciding Who Gets In*]. Under screening procedures, the primary inspector either admits the entrant, or if her suspicions are aroused, directs the entrant to secondary inspection, where the secondary inspector can make a more thorough and comprehensive inquiry into the entrant's identity and motives. For a more detailed description, see *id.* at 574-77. Gilboy has written extensively about the regulatory challenges that flow from immigration inspection in the airport context. See Janet A. Gilboy, *Compelled Third-Party Participation in the Regulatory Process: Legal Duties, Culture, and Noncompliance*, 20 LAW & POL'Y 135 (1998) [hereinafter Gilboy, *Compelled Third-Party Participation*]; Janet A. Gilboy, *Implications of "Third-Party" Involvement in Enforcement: The INS, Illegal Travelers, and International Airlines*, 31 LAW & SOC'Y REV. 505 (1997) [hereinafter Gilboy, *Implications of "Third-Party" Involvement*].

32. To help deter these sorts of unauthorized entries, immigration officials enlist the help of airlines, which, much like employers, are required to examine and verify the travel documents of their passengers. See 8 U.S.C. § 1321(a) (2006). Airline sanction laws bear the same structural features of those creating employer sanctions—Congress has imposed a set of obligations onto a private entity, which is charged with the duty of carrying out a service traditionally carried out by a public entity. Airlines are fined for failing to determine that a passenger possessed improper documentation for entry into the United States, and in addition, face the responsibility of transporting the undesirable entrant out of the United States. See Gilboy, *Implications of "Third Party" Involvement*, *supra* note 31, at 509. The offending airline also incurs the costs associated with detention and custody, to the extent such costs arise. See *id.*

33. Gilboy notes that primary immigration inspectors exhibit a tendency to screen in entrants when they can furnish an employment letter from "respectable companies." She explains:

In these cases, there is a tendency for inspectors to rely on the company's own screening of job candidates. This is essential "surrogate screening," in which an earlier institution's decisionmaking is substituted for a fresh screening. Thus, decisions by other institutions, not within the legal system, come to affect legal decisionmaking.

Gilboy, *Deciding Who Gets In*, *supra* note 31, at 592. In the airport screening context, primary inspectors are well aware that it is their judgment that makes them valuable, and what subjects them to promotion or punishment. They are incentivized to overadmit with low-risk cases because "their judgment is likely to be called into question if they refer a series of perceived 'nothing' cases to secondary inspectors." *Id.* at 584.

from an Eastern European country with a burgeoning black market for overseas “nannies.”<sup>34</sup>

Immigration screening also takes place in the interior of the United States. For example, some scholars have noted that state and local law enforcement officers are increasingly providing screening services as our immigration regime fortifies its ties to the criminal justice system.<sup>35</sup> As the DHS has shifted its removal priorities towards criminal noncitizens, it has increasingly relied on the help of state and local law enforcement officers, who can cross-check the names of motorists in a computer database to ascertain whether those motorists have any continuing immigration violations.<sup>36</sup> Other jurisdictions have attempted to impose similar screening duties onto landlords and university officials.<sup>37</sup>

The workplace has long served as a site for screening immigrants, though this phenomenon has largely been appreciated within the context of the formal immigration system. Every year about 160,000 people immigrate each year because an employer has served as a sponsor,<sup>38</sup> highlighting the extent to which the workplace functions as a place where immigrants are screened into the United States and identified as potential citizens on the basis of their skills, talents, and efforts as workers. While Congress may be interested in identifying immigrants who might contribute to American workplaces and eventually become citizens, the costs required to undertake such an endeavor render impractical any policy that relies only on Congress, agencies, and other public entities. Therefore, Congress devolves some screening authority to employers who, in their capacity as current members of the national community, may sponsor new members, and in the process bear the costs of growing the polity. Employers seeking to sponsor and screen in employees (and not the State) must

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34. *See id.* at 590-91. In this “nanny” scenario, the inspector would direct the entrant to secondary inspection, where the secondary inspector could make a more thorough and comprehensive inquiry into the entrant’s identity and motives. For a more detailed description of the screening procedures, *see id.* at 574-77.

35. *See* Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 385 (2006); *see also* Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084 (2004).

36. Wishnie, *supra* note 35, at 1095-96.

37. *See* Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2060-65 (2008).

38. Another approximately 650,000 persons immigrate because a family member has sponsored them. *See* MIGRATION POLICY INST., FACT SHEET NO. 16, ANNUAL IMMIGRATION TO THE UNITED STATES: THE REAL NUMBERS 1 (2007), [hereinafter ANNUAL IMMIGRATION REPORT], available at [http://www.migrationpolicy.org/pubs/FS16\\_USImmigration\\_051807.pdf](http://www.migrationpolicy.org/pubs/FS16_USImmigration_051807.pdf). This is unsurprising given that one of the central goals of our immigration laws is to unite families. *See* Jennifer M. Chacón, *Loving Across Borders: Immigration Law and the Limits of Loving*, 2007 WIS. L. REV. 345, 358 (“Immigration laws are not blind to the rights and needs of families; indeed, family reunification is a central part of United States immigration law.”); *see also* Hiroshi Motomura, *We Asked for Workers, but Families Came: Time, Law, and the Family in Immigration and Citizenship*, 14 VA. J. SOC. POL’Y & L. 103 (2006).

spend time and money to review education credentials, skill sets, and references.<sup>39</sup> Just as important, employers are better able to evaluate such criteria. Microsoft and Oracle can more effectively identify competent high-skilled workers than can the agency for United States Citizenship and Immigration Services. From the State's perspective, transferring screening responsibilities to employers provides a cost-effective way to winnow down the universe of potential immigrants to a manageable size.

While immigration admission laws allow employers to screen immigrants to identify potential citizens, IRCA simultaneously requires them to screen their workforces for potentially unauthorized immigrants. While employers carry out both kinds of screening services, screening for unauthorized immigrants presents its own set of challenges. For one thing, screening for unauthorized immigrants presents a qualitatively different challenge from the type of screening that employers practice within the formal system. Identifying immigrants who might contribute to the workplace as legal permanent residents entails screening *in* candidates for admission, which requires them to review criteria—like skill sets and credentials and work history—over which employers possess some measure of expertise. By contrast, the task of identifying those immigrants already within the workplace who are unauthorized requires screening *out* candidates for removal, which effectively boils down to reviewing and comparing identification documents, a challenge that employers are not particularly well suited to carry out.<sup>40</sup> Given this distinction, employers who screen for unauthorized immigrants in the workplace, in many ways, have more in common with airport inspectors screening for suspicious entrants and state and local law enforcement officers screening for removable criminal convicts than they do with those employers who screen immigrants for admission.<sup>41</sup> Whereas employers are well suited to evaluate résumé criteria, they (nor law enforcement officers, landlords, and university officials for that matter) are particularly well suited to differentiate between authentic and fraudulent work documents.

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39. Those seeking to sponsor and screen-in family members must similarly internalize the cost of dependency, caretaking, and integration responsibilities. Family law scholars have developed this idea in the context of regulating families. See Martha L.A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2187 (1995) (explaining that caretaking responsibilities have been privatized, so that “[t]he ideology of the private family mandates that the unit nurture its members and provide for them economically”); Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 394-95 (2008) (“[P]erhaps the most important function that the family serves is the privatization of care for dependent members, usually children. The family—and parents, particularly—takes on this task, so that it is not primarily the public responsibility of the state.” (internal citations omitted)).

40. Importantly, some immigrants who are already within the United States can in certain instances adjust their status to that of a legal permanent resident. See, e.g., 8 U.S.C. § 1255(i) (2006).

41. See Stumpf, *supra* note 35, at 385; Wishnie, *supra* note 35.

Further complicating matters is the sheer heterogeneity of the unauthorized population. Recent studies estimate that about 1 to 1.5 million noncitizens remain in the United States under a “twilight status”—they have satisfied all of the requirements to become lawful permanent residents but must wait for their paperwork to be processed.<sup>42</sup> Moreover, unauthorized status by itself does not inexorably lead to the conclusion that a particular immigrant is necessarily inadmissible as a candidate for permanent residence and citizenship. For example, certain forms of relief, like cancellation of removal, require that unauthorized immigrants show among other things that they have been in the United States continuously for a period of ten years.<sup>43</sup> Neither does a noncitizen’s illegal status prevent her during the removal proceedings from asserting a right to remain if return to her sending country would mean, for example, she would be tortured or beaten on account of her religion.<sup>44</sup> Historical experience also demonstrates that Congress can and does regularize the status of many noncitizens for a variety of reasons, either for humanitarian purposes,<sup>45</sup> or as part of a larger attempt to reform our immigration laws, as it did with IRCA. Against this reality, unauthorized immigrants in the workplace face a powerful incentive to remain in the United States given that continuity of presence lies at the heart of all of these unauthorized channels towards citizenship.

This incentive to remain invisible stands in sharp contrast to the sorts of behavior our formal immigration system rewards. To immigrate through formal channels requires persistence, education, and creativity. As an immigrant, admission through the employer-based visa system can only be secured by exerting great effort in securing an employer in the United States who is willing to sponsor you. Therefore, formal immigration rewards those immigrants who actively engage and convince potential sponsors that they will make good workers and thus good citizens. The opposite is true for immigration through unauthorized channels. For unauthorized immigrants, once they enter or remain in the United States, they are incentivized to blend into their environments. They are incentivized to lay low, embrace subservience, and remain in the shadows of their communities because they seek not to garner attention and admission, but to avoid detection and removal.<sup>46</sup>

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42. See DAVID A. MARTIN, *TWILIGHT STATUSES: A CLOSER EXAMINATION OF THE UNAUTHORIZED POPULATION* (Migration Policy Inst. ed. 2005), available at [http://www.migrationpolicy.org/pubs/MPI\\_PB\\_6.05.pdf](http://www.migrationpolicy.org/pubs/MPI_PB_6.05.pdf).

43. INA § 240A(b)(1)(A), 8 U.S.C. § 1229b(b)(1)(A) (2006).

44. INA § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i) (2006).

45. See Motomura, *supra* note 37, at 2049 (identifying the Nicaraguan and Central American Relief Act and Haitian Refugee Immigration Fairness Act as examples of where “previously unlawful migrants were brought into the lawful fold”).

46. I thank David Sklansky for sharing this observation with me. See Plyler v. Doe, 457 U.S. 202, 218 (1982) (“Sheer incapability or lax enforcement of the laws barring entry into this country, coupled with the failure to establish an effective bar to the employment of undocumented aliens, has resulted in the creation of a substantial ‘shadow population’ of



To the extent that screening for unauthorized immigrants is defensible as a part of a larger interior enforcement strategy, that strategy's defensibility reaches its nadir in the workplace. For example, screening for unauthorized immigrants within the United States's interior has gained the most traction applied to the criminal justice system. Adam Cox and Eric Posner suggest that, rather than looking to an immigrant's educational background or work experience to determine admissibility, immigration judges quite rightly look to an immigrant's record of criminal convictions in determining whether that immigrant will be removed.<sup>47</sup> In explaining why an ex post system might be preferable to an ex ante system, Cox and Posner explain:

It is difficult to select desirable low-skilled workers on the basis of pre-entry information. There are few objective criteria like education or prior work history that would be reliable indicators of the ability of a low-skilled immigrant worker to be a productive employee in the United States. By contrast, an applicant's post-entry employment record is highly relevant, often fine-grained information.<sup>48</sup>

They further argue that our unauthorized immigration system permits and encourages immigration judges to look to the criminal justice system, which provides a quick and easy (albeit contested and contestable) way for federal, state, and local law enforcement officers to produce the relevant information (convictions) upon which removal decisions might be based.<sup>49</sup> The benefit of focusing enforcement efforts on noncitizens with criminal records is that it allows the DHS to "better screen out undesired types by waiting for noncitizens to commit crimes and expelling them."<sup>50</sup>

But employer tips and leads mean very little for a particular unauthorized worker's "desirability." The logical force of an ex post system of screening criminal noncitizens comes from what convictions presumably tell us about those who are screened out. Convictions serve as proxies. Noncitizens who commit crimes draw negative attention to themselves and are thus prime

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illegal migrants—numbering in the millions—within our borders.”).

47. Cox & Posner, *supra* note 16, at 809; *see also* Brown, *supra* note 17.

48. Cox & Posner, *supra* note 16, at 847.

49. For a thoughtful analysis of the ways in which discretionary deportation produces significant procedural consequences for those seeking relief from deportation, see Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611 (2006). Neuman notes that this discretion resembles traditional prosecutorial forms of discretion, including the authority to decide to bring or not bring removal actions against noncitizens. But it also includes forms of discretion that are unique to immigration law, such as relief from deportation. *See* Nessel, *supra* note 4, at 381 (“With respect to undocumented persons, the INS already relies upon prosecutorial discretion in deciding whom actively to deport based upon an evaluation of the size of the undocumented population, the economic and humanitarian reasons underlying their entrance into this country, the economic necessity for low-wage workers in the United States, and the limited funding available to the INS for use in deportation.” (internal citation omitted)).

50. Cox & Posner, *supra* note 16, at 846-47.

candidates for removal given their presumed “undesirability.”<sup>51</sup> This logic does not translate so easily from the criminal justice system to the workplace. An employer who reports unauthorized workers to the DHS has likely done so because those workers have drawn negative attention to themselves—but it is unlikely that the negative attention stems from the workers being shiftless or unreliable or belligerent. Indeed, in those cases, an employer can simply terminate those workers as it might, quite defensibly, terminate any workers exhibiting those characteristics.

So the question becomes, what kind of behavior would prompt an employer to go beyond termination and *report* the presence of unauthorized workers to the DHS? I want to suggest that immigrants who draw attention to themselves in this context do not carry the same presumption of “undesirability.” It will not infrequently be the case that an immigrant who draws attention to herself is doing so to correct labor and employment law violations in the workplace. In other words, the kind of behavior prompting an employer to report that worker to the DHS is the kind of behavior our labor and employment laws encourage. Therefore, immigrant dissent in the workplace does not suggest lawlessness. Indeed, given employers’ incentives to cheat and use their immigration authority to exploit their workforces, dissent can suggest the opposite. It can mean that immigrants are acting in defiance of lawlessness.

### C. *The Harms of Self-Serving Screening Decisions*

Employers are required to screen their workforces for unauthorized immigrants, but they don’t carry out these duties in good faith, at least within those industries traditionally dependent on low-wage labor. Part of the problem is that employers face no real threat of being sanctioned. The number of fines the INS and DHS have issued has been steadily declining. For example, in 1999, the number of notices of intent to fine totaled 417, but by 2001 it dropped to 105,<sup>52</sup> and by 2004, dropped further still to a measly 3 employers.<sup>53</sup>

How did this happen, and what are the consequences? In the following sections, I outline what I see as the primary consequences of this arrangement. Central to this story is the observation that the DHS has not only failed to enforce IRCA against employers, it has worked with them in identifying immigrants for removal. Moreover, the DHS has welcomed these “tips” and “leads” without much consideration of the conditions triggering or the

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51. I should be clear that I harbor some reservations about Congress’s attempts to criminalize an increasing number of activities, but I do agree with Cox and Posner that, at least as a descriptive matter, criminal convictions have served an ex post screening function.

52. Wishnie, *supra* note 14, at 393 n.25.

53. See Jennifer Gordon & R.A. Lenhardt, *Rethinking Working and Citizenship*, 55 UCLA L. REV. 1161, 1214 n.254 (2008) (citing GOV’T ACCOUNTABILITY OFFICE, IMMIGRATION ENFORCEMENT: WEAKNESSES HINDER EMPLOYMENT VERIFICATION AND WORKSITE ENFORCEMENT EFFORTS 35 (2005)).

consequences flowing from this assistance. As I show, the nonenforcement of IRCA against employers—and thus the ceding of far-reaching screening authority—has both legal and democratic costs.

### 1. *Legal harms*

Though I have yet to find an empirical study exploring employer reporting and the conditions triggering reporting, the existing empirical—and growing anecdotal—evidence all points to the same conclusion: within industries traditionally dependent on immigrant labor, employers report the presence of unauthorized workers as a way of escaping liability for labor- and employment-related workplace violations. To get a flavor of the nature of this abuse, consider the following examples. At a Minneapolis hotel, a group of hotel workers, citizens and noncitizens alike, had voted for union representation. But just as negotiations were set to begin, the employer contacted the then-INS, which staged a raid on the hotel and detained eight housekeepers.<sup>54</sup> Similarly, in New York City, several unauthorized garment workers, primarily from Latin America, Asia, and Eastern Europe, complained that the factory owner had been withholding overtime pay, which prompted the owner to request a raid of his own factory. Arresting nearly thirty workers, the INS declined to fine the owner for his cooperation.<sup>55</sup> Elsewhere in New York, the owner of an online grocery delivery service, who employed 900 workers, circulated a memo announcing a pending workplace inspection, causing nearly 100 workers to leave or never return. This highlights the reality that even just the threat of a pending workplace inspection is enough to quell any organizing activity.<sup>56</sup>

Although unauthorized immigrants are not entitled to backpay,<sup>57</sup> they still possess a panoply of other labor and employment rights.<sup>58</sup> But despite the existence of these rights, reporting and the threat of reporting effectively neutralize the ability of unauthorized workers to make this protection meaningful. The power that employers wield when they knowingly hire

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54. Philip Martin & Mark Miller, *Employer Sanctions: French, German and U.S. Experiences* 47 (Int'l Migration Papers, No. 36, 2000). This is an exceptional case where many of the immigrant workers were granted relief by the immigration judge. See *INS Grants Deportation Relief to Minneapolis Immigrant Workers Fired for Union Activities*, IMMIGRANTS' RIGHTS UPDATE, June 6, 2000, [http://www.nilc.org/immsemplymnt/wkplce\\_enfrcmnt/wkplcenfr012.htm](http://www.nilc.org/immsemplymnt/wkplce_enfrcmnt/wkplcenfr012.htm).

55. Wishnie, *supra* note 14, at 389.

56. See Nina Bernstein, *Groceries on the Computer, and Immigrants in the Cold*, N.Y. TIMES, Dec. 22, 2007, at B1; Nina Bernstein, *Warehouse Workers Quit In Immigration Inquiry*, N.Y. TIMES, Dec. 13, 2007, at B6.

57. See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 148-49 (2002).

58. See Christine N. Cimini, *Ask, Don't Tell: Ethical Issues Surrounding Undocumented Workers' Status in Employment Litigation*, 61 STAN. L. REV. 355, 357-58 n.8 (2008) (summarizing the various labor and employment claims available to unauthorized workers).

unauthorized immigrants has not been lost on the federal courts. Most notably, in *Rivera v. NIBCO, Inc.* the Ninth Circuit observed that in addition to retaliatory discharge, unauthorized workers face the “harsher reality that, in addition to possible discharge, their employer will likely report them to the INS and they will be subjected to deportation proceedings or criminal prosecution.”<sup>59</sup> In affirming the district court’s denial of the employer’s discovery requests pertaining to the plaintiffs’ immigration status, the Ninth Circuit concluded, “Granting employers the right to inquire into workers’ immigration status in cases like this would allow them to raise implicitly the threat of deportation and criminal prosecution every time a worker, documented or undocumented, reports illegal practices or files a Title VII action.”<sup>60</sup> Other courts have addressed similar scenarios and reached similar conclusions.<sup>61</sup>

These decisions highlight the degree to which employers and the DHS work collaboratively to detain and remove unauthorized immigrants despite apparent violations by the employers themselves. In *Montero v. INS*,<sup>62</sup> an unauthorized immigrant from Ecuador worked at a garment factory in New York, where she assisted in the efforts to organize workers, and joined a union in both an organizing and negotiating capacity. The employer threatened to report certain unauthorized workers to the INS. As the dispute escalated, the employer’s attorney contacted the INS, resulting in a workplace inspection, the immigrant’s arrest, and ultimately deportation.<sup>63</sup> Thus, the question is not whether employers in immigrant-dependent sectors knowingly hire unauthorized immigrants—they do—but rather, under what circumstances employers report their presence. Other anecdotal evidence confirms that reporting is a prominent tool that employers use to quash organizing efforts. Most recently, a DHS raid of a meatpacking plant in Iowa brought public attention to the unsafe conditions under which many unauthorized immigrants

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59. 364 F.3d 1057, 1064 (9th Cir. 2004).

60. *Id.* at 1065; *see also* *Does I thru [sic] XXIII v. Advanced Textile Corp.*, 214 F.3d 1058 (9th Cir. 2000). In *Advanced Textile Corp.*, the Ninth Circuit addressed whether plaintiffs could pursue labor violations anonymously, where plaintiffs were foreign workers who faced the possibility of deportation. Siding with the plaintiffs, the Ninth Circuit reasoned that the threat of deportation rendered “extraordinary” the nature of retaliation in this particular case. *Id.* at 1070-71.

61. For example, in *Singh v. Jutla*, an employer knowingly recruited and hired an unauthorized worker and contacted the INS only when the immigrant attempted to recover unpaid wages and overtime pay. 214 F. Supp. 2d 1056, 1057 (N.D. Cal. 2002); *see also* *Fuentes v. INS*, 765 F.2d 886, 887 (9th Cir. 1985), *vacated by* *Fuentes v. INS*, 884 F.2d 699 (9th Cir. 1988); *Contreras v. Corinthian Vigor Ins. Brokerage, Inc.*, 25 F. Supp. 2d 1053, 1055 (N.D. Cal. 1998) (holding that the plaintiff, a secretary without work authorization, could pursue FLSA where the employer reported the plaintiff to the INS in retaliation for her filing of a claim seeking unpaid wages and overtime pay). *But cf.* *Montero v. INS*, 124 F.3d 381 (2d Cir. 1997).

62. 124 F.3d 381 (2d Cir. 1997).

63. *Id.* at 382-84.

worked; several immigrants attested to lawlessness ranging from physical beatings to the denial of overtime pay. One unauthorized worker caught up in the raids explained that he often worked seventeen-hour days without breaks, noting that “[the employers] told us they were going to call immigration if we complained.”<sup>64</sup>

The few empirical studies that have examined the experiences of unauthorized immigrants in the workplace suggest a correlation between the practice of employer reporting and anti-union animus. In a study examining employers’ use of the threat of plant-closing to undermine unionizing efforts, Kate Bronfenbrenner found that such threats often occurred within the context of “other aggressive anti-union behavior by employers.” For example, nearly 75% of employers that threatened to report unauthorized immigrant workers to the then-INS for removal also utilized plant-closing as a threat, compared to only 46% of employers who had hired, but did not threaten to report, unauthorized immigrants.<sup>65</sup> Significantly, Bronfenbrenner’s study also found that the willingness of unauthorized workers to join unions or otherwise organize with their citizen coworkers increased the likelihood that employers would use the threat of reporting. While employers threatened to report unauthorized workers to the INS as a response to organizing activities in 7% of all unionizing campaigns, the rate jumps up to 52% when unauthorized immigrants belonged to the bargaining unit.<sup>66</sup> In other words, Bronfenbrenner’s study suggests that employers are reporting unauthorized immigrants because of the tactic’s convenience as an exit strategy from potentially ugly and expensive labor disputes.

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64. Julia Preston, *After Iowa Raid, Immigrants Fuel Labor Inquiries*, N.Y. TIMES, July 27, 2008, at A1. Jennifer Gordon’s work also speaks to this phenomenon. In her book, *Suburban Sweatshops*, which draws heavily from her experience organizing low-wage immigrant workers, Gordon details the “minimalist approach” that employers take to complying with IRCA’s verification duties. She observes:

If a worker presents documents that appear reasonably legitimate when she is hired, the employer records them on the I-9 form designed for the purpose, drops the form in a file, and thinks no more about it—until the day comes when such workers make some demand the employer wants to resist. It may be a simple request for a bathroom break or for overtime wages. More often, it comes as the first stirrings of a union organizing campaign. Suddenly, the employer remembers employer sanctions. If he had never filled out I-9 forms, he gets the urge to comply with the law, forcing all the workers to provide legal papers on the spot. If he has I-9 files, he begins to pay new attention to them, calling the Social Security Administration to check on the validity of numbers, demanding to see new versions of documents that have expired.

JENNIFER GORDON, *SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS* 49-50 (2005). Gordon further notes that “[e]mployer sanctions has [sic] become the perfect cloak under which to carry out an effective campaign of intimidation, sending the clear message that immigrant workers who organize are no longer the kind of immigrant workers who get jobs.” *Id.* at 50.

65. KATE BRONFENBRENNER, *UNEASY TERRAIN: THE IMPACT OF CAPITAL MOBILITY ON WORKERS, WAGES, AND UNION ORGANIZING* 46-47 (2000), available at <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1002&context=reports>.

66. *Id.* at 44.

Another study published by the Center for Urban Economic Development confirms the dangers that unauthorized immigrant workers face in the workplace. The results of a survey conducted with 1131 authorized and unauthorized immigrants in Chicago suggest that unauthorized workers experience unsafe working conditions more often than do authorized immigrants.<sup>67</sup> Despite the high incidence of unsafe working conditions, 94% of those unauthorized immigrants indicated that they did not report the unsafe working conditions to OSHA. Significantly, 62% of those workers indicated that their reason for not reporting related to either the fear of employer retaliation or to the fear of deportation.<sup>68</sup> The same study found that unauthorized immigrants, compared to their authorized counterparts, were more likely to experience wage and hour violations; 26% of undocumented workers alleged that they experienced nonpayment or underpayment of wages compared to only 9% of documented workers.<sup>69</sup>

Finally, Michael Wishnie provides an illuminating statistical profile of worksite enforcement in New York City, one of DHS's largest and busiest districts. By filing Freedom of Information Act and Freedom of Information Law requests, Wishnie obtained DHS worksite-enforcement data for a thirty-month period in the New York region revealing the deep entanglement between INS worksite enforcement and the presence of formal labor disputes. The data revealed that *more than half* of the raided worksites were subject to at least one formal complaint to, or investigation by, a labor agency.<sup>70</sup> Wishnie plausibly argues that the actual correlation between worksite enforcement and labor disputes is probably greater when one considers those workplaces that have been involved in less formal disputes such as union grievances, ongoing litigation, informal complaints, and complaints to related agencies, such as those addressing employment discrimination and workplace safety.<sup>71</sup>

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67. CHIRAG MEHTA ET AL., CTR. FOR URBAN ECON. DEV., UNIV. OF ILL. AT CHI., CHICAGO'S UNDOCUMENTED IMMIGRANTS: AN ANALYSIS OF WAGES, WORKING CONDITIONS, AND ECONOMIC CONTRIBUTIONS 27 (2002), *available at* [http://www.uic.edu/cuppa/uicued/Publications/RECENT/undoc\\_full.pdf](http://www.uic.edu/cuppa/uicued/Publications/RECENT/undoc_full.pdf).

68. Specifically, the report found that of the reasons identified, "32% relate to the fear that employers would punish workers for reporting the conditions" and "30% relate specifically to the fear that workers might be deported if they report the conditions." *Id.* at 28.

69. *Id.* at 29. The survey found that the disparities continued into other wage and hour allegations as well: 21% of undocumented workers alleged forced overtime compared to 16% of documented workers, and 18% of undocumented workers alleged working without breaks compared to 7% of documented workers. *Id.*

70. Wishnie, *supra* note 14, at 391-92.

71. *Id.* at 392.

## 2. *Democratic harms*

Permitting employers to screen for unauthorized immigrants has also generated democratic costs in the workplace. To appreciate these costs, I begin with the observation that the workplace provides more than just the opportunity to earn a paycheck. As Cynthia Estlund has capably shown, the workplace and jobs matter not only for the material resources they enable, “but also for the positive social ties, norms of reciprocity, and feelings of trust, mutual responsibility, and solidarity that they engender.”<sup>72</sup> The workplace brings people together and creates opportunities to develop a sense of collective identity.

For adult immigrants, the opportunities to develop a sense of collective identity that cuts across the lines of citizenship and immigration status remain sparse. Indeed, the workplace persists as one of the few areas of public life where adult unauthorized immigrants have the opportunity to meet and form bonds with citizens. As Cristina Rodríguez reminds us, “For immigrant children and the second generation, adaptation occurs in the public schools, but adult immigrants simply do not have access to such an assimilating institution.”<sup>73</sup> Therefore, permitting employers who knowingly hire unauthorized immigrants to set the terms of the workplace does more than just increase the likelihood of exploitation; it also decreases the possibility that adult immigrant workers will seek out or foster meaningful relationships with their citizen co-workers. This in turn discourages unauthorized immigrants from embracing a sense of identity as Americans or North Carolinians or workers or any other collective identity transcending citizenship and immigration status.

The associative obligations being undermined by employers embody more than just the wistful aspiration to build a sense of worker solidarity. This tangible sense of community often represents a persistent willingness and desire to transcend racial differences in the workplace, which if cultivated can generate the sort of social peace that our immigration policy must commit to achieving. For example, while more empirical research is required, initial sociological studies suggest that racial animus and resentment in the workplace exist at a relatively low level when compared to other social institutions occupying the same geographic space.<sup>74</sup> Permitting employers to report

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72. CYNTHIA ESTLUND, *WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY* 117 (2003).

73. Cristina M. Rodríguez, *Guest Workers and Integration: Toward a Theory of What Immigrants and Americans Owe One Another*, 2007 U. CHI. LEGAL F. 219, 237; see also JANELLE S. WONG, *DEMOCRACY'S PROMISE: IMMIGRANTS & AMERICAN CIVIC INSTITUTIONS* 173 (2006) (“Community organizations, such as labor organizations, workers’ centers, advocacy and social service organizations, ethnic voluntary associations, and religious institutions, may be more likely than parties to invest in long-term mobilization of immigrants.”).

74. Gordon and Lenhardt note that according to a study conducted by sociologist

unauthorized workers who organize with their citizen coworkers, therefore, suggests that those immigrants who are screened out are among the more racially literate.<sup>75</sup> Most unskilled immigrant workers are Latino, and they are coming to occupy jobs traditionally held by African Americans. In the process, they are being mapped onto a racial terrain,<sup>76</sup> and confronting conflict in the workplace.<sup>77</sup>

Certainly, the unauthorized status of many of these new Latino immigrants complicates our notions of a democratic community and its obligations. For some, it may seem strange to insist on facilitating the integration of those who have yet to be recognized as members of our national community. Yet, it would be equally strange to think that someday millions of these immigrant workers may become citizens and may be able to do so only after shunning the company of, and the attempts to organize by, their citizen coworkers. And it would be outright troubling to think that those unauthorized immigrants who never became citizens—because they were detected, screened out, and removed—missed out because they attempted to assert their rights and demonstrate a sense of investment in the workplace.

Thus, our current de facto system of screening the workplace for unauthorized immigrants reveals that there are times when we should not reward those who lay low. If immigrants are coming to the United States for job opportunities, and Congress has empowered employers to act as immigration screeners, then the case of private immigration screening in the workplace forces us to rethink the kind of immigrant behavior we ought to reward.

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Helen Marrow on relationships between black and immigrant workers in a large chicken-processing plant, “tensions in the poultry plant paled in comparison to those evident in the community at large. . . . Indeed, participants in Marrow’s study consistently ‘report[ed] positive relations among workers of different racial and ethnic backgrounds as well as a lack of racial discrimination.’” JENNIFER GORDON & R.A. LENHARDT, *CONFLICT AND SOLIDARITY BETWEEN AFRICAN AMERICAN AND LATINO IMMIGRANT WORKERS* 25 (2007) (alterations in original). For an excellent analysis of the difficulties of finding legal recourse for demonstrations of intergroup racial solidarity in the workplace, see Noah D. Zatz, *Beyond the Zero-Sum Game: Toward Title VII Protection for Intergroup Solidarity*, 77 *IND. L.J.* 63 (2002).

75. See Lani Guinier, *From Racial Liberalism to Racial Literacy: Brown v. Board of Education and the Interest-Divergence Dilemma*, 91 *J. AM. HIST.* 92 (2004).

76. See Devon W. Carbado, *Racial Naturalization*, 57 *AM. Q.* 633 (2005).

77. Gordon and Lenhardt explain that the tension between black citizens and Latino immigrants in the workplace derives in part from the different paths each group has taken to the workplace, which has produced different perspectives on the meaning of work. While both groups recognize that they are victimized by the same degrading and humiliating acts in the workplace, differing expectations impede the development of a true sense of solidarity. While Latino immigrant workers might be able to tolerate subpar conditions in exchange for the opportunity to earn wages that exceed many times over what they could make in their sending country, black citizen workers can barely tolerate still more proof that they have not yet achieved the fruits of full citizenship. See Gordon & Lenhardt, *supra* note 53, at 1202-19.



## II. ENFORCEMENT REALITIES, RATIONALES, AND COLLABORATIONS

IRCA required employers to hire only “authorized” workers, but today employers face almost no possibility of being punished for failing to carry out these duties. In the Subparts that follow, I explore the origins of this phenomenon and explain how and why it has persisted.

A. *Underenforcement as Enforcement Policy*

IRCA’s design and history suggests that Congress intended to deter unauthorized immigration by targeting employers. IRCA’s implementation history, however, demonstrates that from the very beginning the then-INS demonstrated a willingness to work with employers, rather than fully committing to a policy of targeting and punishing them.<sup>78</sup>

Legal scholarship confirms that employers, at least within traditionally immigrant-dependent industries, have continued to knowingly hire unauthorized immigrant workers. Kitty Calavita’s 1990 study remains an important and relevant explanation of this phenomenon. Conducting interviews with hiring managers at over one hundred southern California firms concentrated in sectors traditionally dependent on immigrant labor,<sup>79</sup> Calavita’s study establishes that nearly half of those managers suspected that they had hired unauthorized workers, and more than ten percent admitted outright that they had knowingly hired such workers.<sup>80</sup> Several insisted that they would continue to hire unauthorized workers despite IRCA’s prohibition, which suggests that a combination of competitive pressure and the then-INS’s

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78. Some have hinted at this culture of collaboration. For example, nearly twenty years ago, Kitty Calavita noted that early implementation efforts swam in a “spirit of cooperation . . . devoted to establishing rapport with employers and encouraging voluntary compliance with employer sanctions.” Kitty Calavita, *Employer Sanctions Violations: Toward a Dialectical Model of White-Collar Crime*, 24 *LAW & SOC’Y REV.* 1041, 1061 (1990). From a similar vantage point, Linda Bosniak observed that “[IRCA] creates a structured antagonism of interests between employers and the INS. Under the previous regime, . . . employers often cooperated with the INS during the agency’s workplace surveys because cooperation frequently meant less disruption of production and because they did not face any penalties for hiring undocumented workers.” Linda S. Bosniak, *supra* note 4, at 1035. Bosniak could not have predicted the degree to which government-employer cooperation would continue even in a post-IRCA world, though she did with great acumen identify those dynamics that would enable such cooperation. *See id.* at 1035-36 (noting that the relatively toothless wording of IRCA introduced “elements of direct conflict between employers and undocumented workers” and opining that it “will always be in the interest of an employer, when faced with the charge of knowingly hiring an undocumented alien, to deny awareness of the worker’s unauthorized status”).

79. Calavita identifies these industries as including the garment, construction, electronics, hotel, restaurant, food processing, and building and landscape maintenance industries. She excluded the agriculture industry because it was not subject to sanctions during the period of study, which was 1987-88. Calavita, *supra* note 78, at 1046-47.

80. *Id.* at 1050-51.

perceived impotence encouraged employers to disregard these duties.<sup>81</sup> Contrary to IRCA's design, employers in these industries have either ignored or willfully blinded themselves to the immigration status of their workers, screening in unauthorized immigrants. Thus, although IRCA's design and logic set out to narrow employer hiring decisions, agency enforcement policies have, paradoxically, enabled and broadened them.

Many features of the then-INS's enforcement policy were designed to send the message that employers would not be sanctioned as a part of its regulatory strategy. For example, as soon as IRCA was passed, the INS embraced a recruitment and hiring strategy that could best achieve a cordial, professional relationship with employers. It replaced law-and-order border enforcement officers, who historically had conducted confrontational and aggressive workplace raids, with high-achieving college graduates who offered a skill set geared towards conciliatory regulation. As one INS official remarked, "Sanctions demands [sic] in some way a new level of professionalism or sophistication. You must be better trained and more sensitive."<sup>82</sup> Indeed, INS guidelines instituted in the wake of IRCA's passage "stressed cooperation with business" and sought to avoid the possibility of "harassment and heavy-handed enforcement."<sup>83</sup> This shift in attitude did not go unnoticed by employers. As one restaurant industry representative observed, "Prior to [IRCA], the INS would come in and be belligerent. They are coming in today in a much more conciliatory way."<sup>84</sup> Over time, the INS has come to be concerned only with the most egregious accounts of hiring unauthorized workers—those where a raid stands to make a big political splash—so that the vast majority of employers are free to hire unauthorized workers without fear of sanction.<sup>85</sup>

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81. According to Calavita's study, well over half of the employers believed that other employers in similar industries hired unauthorized immigrants, while over thirty percent were "convinced" that the INS did not have the ability to enforce sanctions. *Id.* at 1053.

82. Jason Juffras, *IRCA and the Enforcement Mission of the Immigration and Naturalization Service*, in *THE PAPER CURTAIN: EMPLOYER SANCTIONS' IMPLEMENTATION, IMPACT, AND REFORM* 33, 40 (Michael Fix ed., 1991).

83. *Id.* at 41. As one scholar noted:

In the long run, the new recruitment policy for the Investigations Division may have a stronger impact on the agency when this large cohort of special agents begins to assume leadership posts. In the past, management positions in the INS have been dominated by former Border Patrol officers committed to an enforcement policy of raids and apprehensions. The recruitment of agents from different backgrounds, trained to regulate businesses instead of apprehend immigrants may erode that pattern and broaden the perspectives of agency managers.

*Id.* at 40-41.

84. *Id.* at 42 (internal quotations omitted).

85. As early as 1981, certain enforcement officials who supported employer sanctions attempted to assuage employer concerns by emphasizing the conciliatory nature of the new law. For example, Doris Meissner, then the acting Commissioner of the INS, stated that "implementation of the law is not designed to be and will not be antiemployer." Calavita, *supra* note 78, at 1058 (internal quotations and alterations omitted).

The possibility of employers being sanctioned became even more remote when Congress began expanding the grounds for removal on the basis of criminal convictions. As a result, the INS reallocated its resources to pursuing criminal noncitizens at the expense of targeting incompliant employers, and accordingly the number of workplace inspections dropped precipitously during the 1990s.<sup>86</sup> To be fair, at least some immigration officers, particularly at the more junior levels, expressed frustration with the statute itself during the early years of IRCA's implementation. They complained of the difficulty of proving that an employer had "knowingly" hired unauthorized workers.<sup>87</sup> Moreover, over time, some employers obtained congressional protection against sanctions, which could only have encouraged the INS as an agency to redirect its enforcement efforts away from employers and towards immigrants. But even if the INS's hands were tied in part because of the statute's narrower provisions, and even if the political power of some employers erected barriers to the full-fledged enforcement of sanctions, these factors alone cannot explain the extent to which INS and now DHS officials have continued to remain allied with employers against immigrants.

Puzzling enforcement policy decisions suggest that at least some of the prosecutorial impotence has been self-imposed. For example, consider the procedures for initiating contact with employers who are the targets of an investigation. Once the DHS decides to investigate a particular employer, it provides the employer with three-days notice that it plans to dispatch officers to question workers and audit the employer's records.<sup>88</sup> But if the DHS were serious about targeting employers for immigration law violations it might consider pursuing enforcement policies embraced by the Department of Labor (DOL), another agency charged with the responsibility of regulating the workplace. When the DOL investigates an employer for labor law violations, for example, it executes an unannounced visit, rather than providing employers with notice, which only provides an opportunity for employers to hide their tracks.<sup>89</sup>

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86. MARTIN & MILLER, *supra* note 54, at 2 ("Since removing criminal aliens wins the INS praise, while sanctions enforcement brings attacks from employers, worker groups, and politicians, removing criminal aliens has become the INS's highest priority."). While the INS investigated 15,000 employers in 1989, by 1995, the number had dropped to just 6000. On a related note, in 2004, the Immigration Control and Enforcement Bureau issued a total of three Notices of Intent to Fine, down from 417 just five years earlier. Gordon & Lenhardt, *supra* note 53, at 1214 n.254 (citing GOV'T ACCOUNTABILITY OFFICE, IMMIGRATION ENFORCEMENT: WEAKNESSES HINDER EMPLOYMENT VERIFICATION AND WORKSITE ENFORCEMENT EFFORTS 35 (2005)).

87. See Elizabeth Rolph & Abby Robyn, *Los Angeles: A Window on Employer Sanctions*, in THE PAPER CURTAIN: EMPLOYER SANCTIONS' IMPLEMENTATION, IMPACT, AND REFORM, *supra* note 82, at 97, 116.

88. The three-days-notice requirement was a part of the INS's larger plan to "signal[] a cooperative attitude toward employers in designing investigative procedures." Juffras, *supra* note 82, at 42.

89. See MARTIN & MILLER, *supra* note 54, at 32 (noting that DOL inspectors do not

Recent workplace enforcement activity by the DHS demonstrates a renewed interest in the workplace as a site for detaining unauthorized immigrants. Indeed, the number of unauthorized immigrants detained in the workplace has been steadily rising,<sup>90</sup> which suggests that the DHS has reprioritized enforcing immigration laws in the workplace.<sup>91</sup> Recent high-profile workplace raids, like those that occurred at various meatpacking plants belonging to the Swift meatpacking company, appear to bolster this idea.<sup>92</sup> But this reprioritization of the workplace as an enforcement objective has not punished employers—at least not as contemplated under IRCA.<sup>93</sup>

### B. *Rationalizing a Necessary Evil*

If employers possess serious incentives to hire unauthorized workers, why empower them to screen out the very workers they hope to hire? Why place the power to make decisions with serious immigration-related consequences in the hands of a decision maker with incentives to cheat? One pragmatic reason is to exploit the unique position that employers occupy in relation to unauthorized immigrants. Employers are, relative to immigration officials, in a better position to identify unauthorized immigrants.<sup>94</sup> If the putative reason that immigrants enter the United States is to search for work, under this logic at least some immigration enforcement authority ought to be transferred to employers because they will inevitably encounter unauthorized immigrants. In

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provide employers with notice when making inspections). An employer announcing a pending audit is usually enough to compel unauthorized workers to quit or stop coming to work. See Bernstein, *Groceries*, *supra* note 56, at B1; Bernstein, *Warehouse Workers*, *supra* note 56, at B6.

90. Motomura, *supra* note 37, at 2052. In 2003, the DHS made only 445 “administrative arrests,” but by 2007, that figure had risen to over 4000. U.S. Immigration & Customs Enforcement, Worksite Enforcement (Nov. 25, 2008), <http://www.ice.gov/pi/news/factsheets/worksite.htm>.

91. It remains to be seen whether the Obama administration will continue this trend.

92. In 2006, the DHS raided several meatpacking plants belonging to Swift & Company, detaining hundreds of unauthorized workers and culminating a ten-month investigation. See Aldana, *supra* note 13, at 1092-96.

93. See U.S. Immigration & Customs Enforcement, *supra* note 90 (“The presence of illegal aliens at a business does not necessarily mean the employer is responsible. Developing sufficient evidence against employers requires complex, white-collar crime investigations that can take years to bear fruit.”). While the presence of unauthorized workers at a particular worksite does not mean that the employer can be held liable under IRCA, as has been long recognized by scholars, many employers can comport with IRCA’s prohibition against hiring unauthorized workers as a matter of law while still knowingly hiring unauthorized workers as a matter of fact. See Calavita, *supra* note 78, at 1060 (“Through [IRCA’s] affirmative defense and good faith provisions, Congress guaranteed that conformity with the paperwork requirements would be taken as an indication of compliance, thereby ensuring that violations of the ‘knowing hire’ provision—the real meat of the law—would be virtually risk-free.”).

94. Some have characterized employers as “gatekeepers” in the larger system of unauthorized immigration. See Manns, *supra* note 4, at 893-94.

other words, employer screening is a necessary evil lodged in an immigration regime saddled with tradeoffs.

A regulatory strategy grounded in a worldview of necessary evils recognizes the difficulty of regulating employer hiring decisions. In this respect, IRCA mirrors other third-party regulatory schemes, where the government compels a well-positioned private entity to withhold a legitimate good or service which is necessary for others to engage in illegitimate activities. The duties that IRCA requires employers to carry out occupy the same universe as those required of other uniquely situated private parties: airlines must verify that their passengers possess valid documentation for entry into the United States,<sup>95</sup> banks must keep records and report suspicious activity indicative of money laundering,<sup>96</sup> employers must withhold taxes from their employees,<sup>97</sup> and firearms dealers must run background checks on buyers.<sup>98</sup> Our nation's anti-money-laundering<sup>99</sup> regime is particularly instructive. In seeking to disrupt criminal finance channels, the Treasury Department relies on banks, which possess a positional advantage in terms of the sorts of information they can access.<sup>100</sup> In the face of the robust growth banks have undergone, money laundering laws reject the notion that banks occupy a purely neutral position within the larger enterprise of drug and terrorism finance.<sup>101</sup> Even the

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95. See 8 U.S.C. § 1321(a) (2006).

96. See Mariano-Florentino Cuéllar, *The Tenuous Relationship Between the Fight Against Money Laundering and the Disruption of Criminal Finance*, 93 J. CRIM. L. & CRIMINOLOGY 311, 324 (2002).

97. See Leandra Lederman, *Statutory Speed Bumps: The Roles Third Parties Play in Tax Compliance*, 60 STAN. L. REV. 695, 698 (2007) (describing how tax law is structured so that employers must withhold taxes from their employees, and remit those taxes to the government, which suggests that “[s]tructural systems that engage third parties to help facilitate compliance with the federal income tax are thus highly successful”).

98. Brady Act, 18 U.S.C. § 922 (2006).

99. Ronald Noble and Court Golombic explain:

“Money laundering” as a criminal term first arose in the United States, in reference to the Mafia’s process of commingling illicit income, “dirty money,” with cash receipts of legitimate businesses in order to make the dirty money also appear legitimate, or “clean.” . . . Today, “money laundering” is used to describe the role Swiss banks played in providing secret accounts to protect the assets of Nazis during World War II. The term is also used to refer to the process of funneling foreign funds into the coffers of U.S. presidential candidates in alleged violations of U.S. laws. Whatever the context, money laundering involves disguising the source or use of illicitly derived money to make its subsequent use appear legitimate.

Ronald K. Noble & Court E. Golombic, *A New Anti-Crime Framework for the World: Merging the Objective and Subjective Models for Fighting Money Laundering*, 30 N.Y.U. J. INT’L L. & POL. 79, 79-80 (1997).

100. See *id.* at 92 (“Tainted funds must pass through banks and financial institutions at some point before the link between the funds and their criminal origin has become sufficiently attenuated.”).

101. Congress set out to rein in “the emerging class of professional money launderers comprising bankers, lawyers, accountants, and other professionals who [were] willing to look the other way for a price.” KRIS HINTERSEER, *CRIMINAL FINANCE: THE POLITICAL ECONOMY OF MONEY LAUNDERING IN A COMPARATIVE LEGAL CONTEXT* 193 (2002). As

Supreme Court has rejected the notion that banks are merely “bystanders” or “neutrals” in the fight against criminal finance.<sup>102</sup> Mapping a similar logic, IRCA sought to regulate employer hiring practices under the belief that preventing employers from making work a viable option for immigrants would deter unauthorized immigration.

Some scholars point out that it is employers’ unique position that makes them so difficult to regulate. Jeffrey Manns, for example, characterizes employers as “gatekeepers” who are compelled “to fill enforcement gaps” because of the ideal position that they occupy. Employers are in good position, relative to public enforcement officers, to identify unauthorized workers.<sup>103</sup> A third-party liability system like IRCA promises much needed and cost-effective support in deterring unauthorized immigration because employers can gain access to information (i.e., a worker’s immigration status) which is largely inaccessible to public officials.<sup>104</sup> But the same attributes that contribute to an employer’s appeal as a gatekeeper make public oversight challenging: an employer’s position permits her to shirk her duties without any real possibility of detection.<sup>105</sup>

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Hinterseer observes, globalization, technological innovation, and deregulation have created a banking culture that has become more “dynamic and aggressive,” which has meant “for regulators one of the fundamental challenges concerns how to create the appropriate incentives to ensure financial institutions adopt a compliance culture.” *Id.* at 338.

While Congress began targeting money laundering as early as 1970, it really stepped up its efforts in 1986 by passing the Money Laundering Control Act (MLCA), which for the first time truly incentivized banks and other financial institutions to aid the federal effort in fighting money laundering. Pre-MLCA, the public revelation that a financial institution had some association with a money laundering scheme meant that it had to contend only with negative media attention and diminished reputation. But post-MLCA, Congress ensured that these same institutions would incur serious, concrete costs, including a fine, which was either \$500,000 or twice the sum of the laundered money (whichever amount was greater), or up to twenty years of imprisonment. *See* 18 U.S.C. § 1956(a)(1)(B) (2006).

102. In upholding the constitutionality of these reporting and recordkeeping duties, the Supreme Court has noted:

Congress not illogically decided that if records of transactions of negotiable instruments were to be kept and maintained, in order to be available as evidence under customary legal process if the occasion warranted, the bank was the most easily identifiable party to the instrument and therefore should do the recordkeeping.

*Cal. Bankers Ass’n v. Shultz*, 416 U.S. 21, 49 (1974). The Court in *Shultz* went out of its way to disabuse the bank Petitioners of the notion that they were “complete bystanders” or “conscripted neutrals” but rather concluded that they were “parties to the instruments with a substantial stake in their continued availability and acceptance.” *Id.* at 48-49.

103. Manns, *supra* note 4, at 893, 895-98.

104. *Id.* at 898 (“Because of their commercial or professional relationships, gatekeepers may enjoy privileged access to information about prospective wrongdoing or skills that may allow them to process and recognize potential illegal acts in cost-effective ways.”).

105. Manns posits that monitoring duties could be shared with private entities, like unauthorized immigrants themselves or other firms, who could be incentivized to report employers that fail to carry out their verification duties. *See id.* at 945-60.

Beyond pragmatic considerations, an unmistakable aspect of IRCA's regulatory logic is grounded in a sense of moral responsibility. In the pre-IRCA era, as state and local communities like California grappled with the reality of unauthorized immigration, courts expressed great consternation over the callous and unregulated activities of employers. For example, several cases worked their way through the California court system during the early 1970s. These cases were brought by lawful workers against employers for hiring unauthorized immigrants. As one impassioned California court observed:

Despite decades of protest and officially expressed concern, there has been no solution to the dilemma posed by agriculture's heavy, short-term need for manpower and society's inability to absorb that manpower when agriculture's need is past. From Steinbeck's *Grapes of Wrath* to the present, the thin gruel of public welfare handouts has been farm labor's principal progress to the remote goal of social justice.<sup>106</sup>

Though more measured in its tone, the Supreme Court reflected a similar sentiment in *De Canas v. Bica*. The Court understood employer sanctions to be just one part of a larger worker-oriented regime, which regulated child labor, minimum wages, occupational health and safety, and workers' compensation. In the Court's eyes, the hiring of unauthorized immigrants no less threatened the livelihood of workers by "seriously depress[ing] wage scales and working conditions of citizens and legally admitted aliens."<sup>107</sup> In this way, IRCA resembles other workplace regulations.<sup>108</sup>

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106. *Diaz v. Kay-Dix Ranch*, 88 Cal. Rptr. 443, 448-49 (Ct. App. 1970). What is so interesting about *Diaz* is the lengths the court went to lay out the sort of legal sea change it envisioned as necessary to fight unauthorized immigration. It effectively sketched out the blueprints for our modern employer sanctions regime. The court was as specific about employer duties as it was casual about diminishing the constitutional rights of workers. Putting to one side "possible restrictions on inquiry emanating from civil rights legislation," *id.* at 599 n.12, the court would have employers conduct a "simple interrogation" at the workplace, which would require them to obtain and examine social security cards, along with birth certificates, vehicle operating licenses, and alien registration cards. *Id.* at 449-50. Like immigration officers, employers would be required "to determine the status, legal or illegal, of each new worker[.]" and would do so under the threat of punishment "by fine or jail." *Id.* at 450. In what can only be read as a judicial mandate to the legislature, the court suggests that "[m]ultiple injunctions covering a wide segment of California agriculture would have the cumulative effect of a statutory regulation, administered by the superior courts through the medium of contempt hearings." *Id.*

107. *De Canas v. Bica*, 424 U.S. 351, 357 (1976). It is well known as a historical matter that employers have favored unauthorized immigrant workers. As Aristide Zolberg observes, much of U.S. immigration policy has been informed by the clash between "capitalists eager to maximize their labor supply against defenders of the traditional boundaries of American society, whom historians subsequently labeled 'nativists,' and urban wage workers, who perceived immigrants as a threat to their living and an obstacle to the organization of a labor movement." ZOLBERG, *supra* note 25, at 5.

108. See Robert Bach & Doris Meissner, *Employment and Immigration Reform: Employer Sanctions Four Years Later*, in *THE PAPER CURTAIN*, *supra* note 82, at 285 ("IRCA reinforced the idea that labor market protections and immigration regulations are closely intertwined. Employers who hire illegal aliens benefit just as do those who offer

The early discourse suggested a concern with a culture of lawlessness surrounding employer hiring decisions. Consider the findings and recommendations of the Select Committee on Immigration and Refugee Policy (SCIRP Report), submitted to Congress in 1981, which identifies employers as encouraging the “illegal flow” of unauthorized immigration.<sup>109</sup> After observing that unauthorized immigrants work and live “at the mercy of unscrupulous employers,” the Report goes on to explain that what is “[m]ost serious is the fact that illegality breeds illegality.”<sup>110</sup> The SCIRP Report describes a culture of lawlessness, which is negotiated and reproduced within the hiring context, and then, like a contagion, migrates into other contexts:

The presence of a substantial number of undocumented/illegal aliens in the United States has resulted not only in a disregard for immigration law but in the breaking of minimum wage and occupational safety laws, and statutes against smuggling as well. As long as undocumented migration flouts U.S. immigration law, *its most devastating impact may be the disregard it breeds for other U.S. laws.*<sup>111</sup>

Perhaps most interestingly, despite the public indifference towards unauthorized immigrants that emerges periodically, IRCA’s passage also exhibited a palpable concern for the welfare of the unauthorized immigrants themselves. The SCIRP Report recognized the human costs of engaging in an interior enforcement strategy were not insubstantial, noting, “It is both more humane and cost effective to deter people from entering the United States than it is to locate and remove them from the interior.”<sup>112</sup> Moreover, the difficulty of distinguishing authorized from unauthorized workers has long been recognized (sometimes quite crudely) by courts as a problem for any effective interior immigration enforcement regime,<sup>113</sup> and has troubled scholars (often quite rightly) for the collateral damage that overzealous enforcement tends to generate.

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subminimum wages and poor working conditions. IRCA addressed the same issues of responsibility, burden sharing, competitiveness, and productivity that are inherent in any workplace-oriented legislation.”).

109. U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST: THE FINAL REPORT AND RECOMMENDATIONS OF THE SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY 41 (1981) [hereinafter SCIRP REPORT]. As others have pointed out, the SCIRP Report constituted the most significant study of the period leading up to IRCA’s passage. See Wishnie, *supra* note 4, at 194 n.4.

110. SCIRP REPORT, *supra* note 109, at 41.

111. *Id.* at 42 (emphasis added).

112. *Id.* at 47.

113. See, e.g., Diaz v. Kay-Dix Ranch, 88 Cal. Rptr. 443, 446-47 (Ct. App. 1970) (characterizing the “illegal entrant” or “wetback” as a “considerable force in the farm labor market” because “illegal entrants are able to blend into the local labor force”).



### C. Collaborations

Given the competitive market within which employers operate, the only costs they face for immigration law violations are those associated with re-recruiting, rehiring, and retraining new workers. Not only do these costs as a whole not outweigh the benefits of hiring workers who are willing to work “scared and hard,”<sup>114</sup> that employers—the putative regulatory targets of workplace raids—lodge objections within a vocabulary of replacement costs demonstrates the degree to which sanctions have disappeared as palpable threats.<sup>115</sup> Even where border enforcement officers conduct workplace raids—which certainly force employers to incur unwanted costs—many of these are conducted as “cooperative venture[s].”<sup>116</sup> Testifying before Congress, John Shandley, the Senior Vice President of Human Resources for Swift & Company, implored Congress to help find “*a collaborative way* of apprehending all potential illegal workers and criminals in order to minimize disruption to the company, the communities and the livestock producers.”<sup>117</sup> But Shandley’s call for a “collaborative way” offers as much descriptive substance as it does rhetorical flourish.

This collaboration, or partnership, which has emerged between our nation’s employers and the DHS highlights the ways in which immigration responsibilities have become privatized in some important ways. Administrative law and other public law scholars have long grappled with the consequences of, and tested out the assumptions embedded within, the allocation of power between public and private entities. The questions hanging over this body of work concern decision-making authority and its limitations,

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114. Motomura, *supra* note 37, at 2069 (quoting F. Ray Marshall, *Economic Factors Influencing the International Migration of Workers*, in *VIEWS ACROSS THE BORDER* 163, 169 (Stanley R. Ross ed., 1978)).

115. One of the primary concerns that the SCIRP Report focused on was the reality that employers could hire unauthorized immigrants and fear nothing more than the possibility of having to incur the cost of replacing removed unauthorized immigrant workers. As the SCIRP Report notes, “Even if an employer is found to be employing undocumented workers, the penalty is merely the cost of finding and training replacements. Furthermore, the employer is free to hire still more undocumented/illegal aliens without incurring any additional penalties.” SCIRP REPORT, *supra* note 109, at 61.

116. Nessel, *supra* note 4, at 359.

117. *Problems in the Current Employment Verification and Worksite Enforcement System, Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec. & Int’l Law of the H. Comm. on the Judiciary*, 110th Cong. 40 (2007) (statement of John Shandley, Senior Vice President of Human Resources, Swift & Company) (emphasis added), available at <http://judiciary.house.gov/hearings/printers/110th/34925.pdf>. Some have suggested that workplace enforcement in the form of sanctions and raids constitutes, at best, exercises of State power designed to achieve symbolic rather than actual enforcement goals. See Calavita, *supra* note 78, at 1060 (“Facing a contradiction between political and economic forces, legislators produced a law whose effect was to be solely symbolic.”); Pham, *supra* note 4, at 817 (“Measured over time, the real impact of employer sanctions may be a symbolic one.”).

and go to whether private entities should wield such authority, and if so under what conditions. Centering on those aspects of our culture and society that value collective decision making, these scholars often conclude that shifting towards a model of governance through private decision making unsettles democratic norms.<sup>118</sup>

Private decision making is a modern reality. Even a superficial examination of what we commonly believe to be paradigmatically “public” institutions reveals the degree to which public and private actors engage and are engaged by one another across a continuum of relationships.<sup>119</sup> Often, the State contracts out the provision of public services to private actors,<sup>120</sup> where the State acts as a consumer weighing different service-delivery options offered by competing private entities.<sup>121</sup> Examples of this sort of privatization scheme range from those that are fairly innocuous such as refuse collection<sup>122</sup> to those implicating more serious outcomes such as dispute resolution,<sup>123</sup> prison management,<sup>124</sup> military campaigns,<sup>125</sup> and overseas humanitarian aid delivery.<sup>126</sup>

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118. In a recent symposium examining privatization, Mark Moore observed that one of the challenges wrought by privatization involves the shifting of “the arbiter of value from a political process focused on defining collective ambitions and aspirations to an individual deciding whether something is good in his or her own (more or less selfish, hedonistic, and materialistic) terms.” Mark H. Moore, *Introduction: Public Laws in an Era of Privatization*, 116 HARV. L. REV. 1212, 1215 (2003).

119. As Martha Minow observes, the privatization phenomenon involves not one type, but rather a “continuum of relationships between government and private groups,” where the State encourages, exempts, funds, partners, and charters the private sector in order to serve the public’s various needs. Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1255 (2003).

120. The privatization literature’s center is occupied by discussions about governmental entities contracting out services to private actors, who are charged with the responsibility of delivering those services for the public’s benefit. See Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1286-89 (2003) (explaining that privatization in the American context often means contracting out public services to private entities).

121. The conceptualization of the state as a consumer also signifies a shift in our culture of governance where public actors evince a newfound faith in market-style competition as a way ensuring sound governance. See Minow, *supra* note 119, at 1230. That the state is increasingly turning to for-profit rather than nonprofit private entities demonstrates the extent to which market-style privatization has taken hold, even though strictly speaking, for-profit and nonprofit entities fall on the same side of the public/private divide. See Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 552 (2000).

122. *Id.* at 597.

123. Minow, *supra* note 119, at 1238-40.

124. See Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437 (2005). *But see* Alexander Volokh, *Privatization and the Law and Economics of Political Advocacy*, 60 STAN. L. REV. 1197 (2008).

125. P.W. SINGER, *CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY* (2003).

126. See Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and*

Other public-private collaborations proceed in a looser fashion, where the State retains no formal relationship with the private entity. One well-recognized example is the private police, where private security companies provide a wide range of “law and order” services traditionally performed by the public police, including the patrolling of neighborhoods with the purpose of “safeguarding private property against theft, trespass, or damage.”<sup>127</sup> Although formal agreements may exist, they often only bind the private companies to the consumers of these services, and not to the public police, which might otherwise impose public norms to which these private companies must comport. Other informal collaborations include those that have emerged in the war on terror. In what Jon Michaels dubs “handshake agreements,” phone companies and parcel delivery services have discreetly shared customer information with the executive.<sup>128</sup> Although these private companies are well situated to provide potentially helpful information in the fight against terrorism, Michaels observes that the absence of formal agreements and meaningful oversight “leaves Congress and the courts ill-equipped to weigh in on important policy considerations regarding the proper scope and calibration of counterterrorism and homeland security operations, not to mention ill-equipped to intervene to remedy individual instances or patterns of injustice.”<sup>129</sup> These sorts of opaque partnerships enable waste, corruption, and unjustified impositions of force, and provide the victims of such harm little recourse.

Beyond the curious exigencies of the war on terror, other informal collaborations have persisted in more familiar areas of public regulation. The criminal justice system’s reliance on informants, for example, represents a particularly costly public-private collaboration. Exploring the community and institutional consequences of informants or “snitches,” Alexandra Natapoff has persuasively shown that:

Active informants impose their criminality on their community, while at the same time compromising the privacy and peace of mind of families, friends, and neighbors. . . . In this scheme, the individual willing to sacrifice friends, family, and associates, fares better than the loyalist; the criminal snitch is permitted to continue violating the law even as those on whom he snitches are punished.<sup>130</sup>

It is within this type of collaboration that our nation’s employers and the DHS belong. Had IRCA been carried out in a manner consistent with its

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*the Problem of Accountability Under International Law*, 47 WM. & MARY L. REV. 135, 154 (2005).

127. Elizabeth E. Joh, *Conceptualizing the Private Police*, 2005 UTAH L. REV. 573, 611; Elizabeth E. Joh, *The Paradox of Private Policing*, 95 J. CRIM. L. & CRIMINOLOGY 49, 51-52 (2004).

128. Jon D. Michaels, *All the President’s Spies: Private-Public Intelligence Partnerships in the War on Terror*, 96 CAL. L. REV. 901, 904 (2008).

129. *Id.*

130. Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645, 649-50 (2004) (citations omitted).

structure and logic, we might tell a different privatization story. IRCA formally transferred to employers screening authority which was to be used to carry out a specific mandate: verify immigration status to exclude unauthorized workers from the workplace. But the collaboration that has emerged forces us to tell a story where employers use their screening authority to carry out their own agendas. And no DHS policy or practice signals to employers that they might be held to account for their decisions.

No mechanism—no statute, regulation, or contract—requires or even encourages employers to report the presence of unauthorized workers to the DHS. Rather, such a practice is purely the creation of a regulatory regime built on informal exchanges and mutually beneficial but less-than-transparent arrangements. Employers avoid potentially costly labor and employment disputes and low-level DHS officials can meet their quotas and bolster their removal numbers.

This collaboration has exacted a price that exceeds what we typically might expect of regulatory failure. To be sure, IRCA has failed to exclude unauthorized immigrants from the workplace, leaving the larger goal of deterring unauthorized migration hobbled and unfulfilled. But more than this, IRCA's nonenforcement has diluted the potency of labor and employment protections; discouraged unauthorized immigrants from taking an investment in the workplace; and strained already-tenuous cross-racial relationships in regions not yet accustomed to new Latino immigration. And while we may debate whether any of these costs are really too steep to bear, that too must be considered a cost of this collaboration. Because employers can deploy their immigration authority without any public oversight or scrutiny, the public lacks even a basic descriptive understanding to engage in the thornier normative aspects of immigration policy.

### III. ACCOUNTABILITY AND SCREENING DECISIONS

If employer decisions have generated difficult and in some cases perverse immigration consequences, then we should consider regulating our nation's employers as we would other categories of immigration decision makers. Where decision-making authority finds its way into private hands, public oversight should follow. As a first step, we must send the right signals. As Kenneth Bamberger observes:

The simplest way to reproduce the attentional effect of an external shock is to instruct a decisionmaker, at a discrete point in time, to focus on a particular decision. . . . Making individuals personally accountable for tasks signals the importance of the task and fosters a sense of responsibility for the outcome.<sup>131</sup>

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131. Kenneth A. Bamberger, *Regulation as Delegation: Private Firms, Decisionmaking, and Accountability in the Administrative State*, 56 DUKE L.J. 377, 440 (2006).

In the context of regulating unauthorized immigrants in the workplace, sending the right signals means shifting our focus. Our immigration laws focus exclusively on employer hiring decisions. But given the difficulties of regulating those decisions and employers' incentives to cheat, I want to suggest that increasing accountability in the workplace also means focusing on employer *reporting* decisions. We must prevent employers from reporting (or threatening to report) unauthorized immigrants in order to disrupt the suppression of labor and employment rights, and the undermining of citizen-noncitizen solidarity. Our immigration regime should send the signal that employers who abuse their power in this way will be held accountable and punished.

#### A. *Legal and Democratic Accountability*

The DHS's approach to sharing screening responsibilities with nonimmigration entities reflects the urgency with which it approaches the challenge of regulating unauthorized immigration. By compelling employers to verify the immigration status of their employees, Congress hoped to obviate the need for deportation—including the procedural formalities, and hence costs that come with it—by creating a regime that proceeded by self-execution. If interior enforcement responsibilities remained an exclusively public responsibility, regulating unauthorized immigrants in the workplace would require a massive reallocation of public resources towards investigating, charging, and prosecuting workplaces, a task Congress has long understood as impossible to execute. In the debate leading up to IRCA's passage, for example, the Senate report noted:

Reliance on direct enforcement alone would require massive increases in enforcement in the interior—in both neighborhoods and workplaces—as well as at the border. This would be more costly and intrusive, as well as less effective, than a program which combines direct enforcement at reasonable levels with a reduction in the incentives to enter the United States.<sup>132</sup>

Such an enforcement strategy would require a significant investment in time and resources, which ultimately detracts from the DHS's efficacy as an enforcement agency in other more high-stakes contexts.

Still, this informal partnership raises some troubling consequences. The reality is that the DHS simply cannot handle the challenge alone. It has come to rely on our nation's employers in wading through its reporting backlog and in strengthening its public image by more efficiently meeting quotas. Indeed, the DHS, as a matter of enforcement policy, appears to conduct no random worksite raids. Rather, it relies on frontline persons and entities to screen out potentially removable immigrants so that all investigations and enforcement

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132. IMMIGRATION REFORM & CONTROL, S. REP. NO. 98-62, at 8 (1983).

efforts flow from “specific intelligence obtained from a variety of sources.”<sup>133</sup> The persistent kernel of discomfort embedded within all privatization schemes is the potential for the private abuse of decision-making authority. “From the public law perspective, unconstrained discretion is dangerous,” Jody Freeman observes, because “[private] contractors make policy decisions rather than merely implement the choices of politically accountable bodies.”<sup>134</sup> A fear that troubles any society grounded in democratic principles remains the possibility that its members will suffer a fate they had no opportunity or ability to influence.<sup>135</sup> For precisely this reason, some argue against private prisons because prison managers are incentivized to fill as many cells as possible, rather than assessing whether the State’s legitimate interest in punishment has been served.<sup>136</sup> Others worry that NGO workers might condition access to humanitarian aid, such as food and supplies, on sexual favors.<sup>137</sup> Still others caution that managed-care organizations might deny medically necessary treatments to beneficiaries because such treatments are too expensive.<sup>138</sup> Thus, anxiety over the potential accountability deficit wrought by privatizing services lies at the center of much of privatization scholarship.

Public law scholars urge us to consider how abusive conditions would affect the most vulnerable among us. If we look to the margins and shadows of our communities, we must grapple with the reality that the failure to properly deliver or administer certain services stands to produce dire consequences “because those most directly affected by the services or failures to provide services are politically and economically ineffectual. Treatment of vulnerable populations simply does not work well in markets that depend upon consumer rationality or upon political processes that demand active citizen monitoring.”<sup>139</sup> Indeed, the contested services on which these marginalized (and often poor and nonwhite) communities rely usually implicate a broader debate that invites disagreement over the social meaning and community values those services are supposed to embody. Determining what quality education

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133. U.S. Immigration & Customs Enforcement, *supra* note 90.

134. Freeman, *supra* note 120, at 1344.

135. See MARTHA MINOW, PARTNERS, NOT RIVALS 3 (2002). In describing the challenges posed by public-private collaborations, specifically in the context of public funding for services administered by religious groups, Minow observes: “What remains troubling is the danger that the accumulation of specific decisions to privatize and to shift relationships between government and religion may end up altering our lives in ways we never have a chance to influence.” *Id.*

136. See Dolovich, *supra* note 124, at 462; see also Freeman, *supra* note 121, at 633 (“Private prison officials determine when infractions occur, impose punishments, and, perhaps most significantly, make recommendations to parole boards.” (citations omitted)).

137. Dickinson, *supra* note 126, at 158.

138. Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1383 (2003).

139. Minow, *supra* note 119, at 1262. For this reason, given the particular vulnerability of prisoners, some have argued that prison management should never be privatized. See Dolovich, *supra* note 124. *But see* Volokh, *supra* note 124.

means is very difficult, and the quest for deciding the baseline of human dignity that welfare benefits ought to enable offers no obvious conclusion. The indeterminacies surrounding these ideas militate in favor of preserving control over these ideas within the public sphere, so that they can be worked out through collective decision-making channels.<sup>140</sup>

Assessing the dangers of a particular privatization scheme can prove to be difficult because State entities, not uncommonly, project romanticized notions of accountability to justify the turn towards private decision making. For example, during the 1970s, crime rates had been steadily rising in the United Kingdom. In response, the UK engaged in a “responsibilization strategy” that resituated the State within a world where it shared crime control responsibilities with citizens and privately organized groups. Its mass-media campaign called upon ordinary citizens to realize their own responsibilities in engaging this matter of broad public concern.<sup>141</sup> But this campaign obfuscated the ways in which privatization threatened to redistribute policing services in a manner that ultimately harms the poorest and the least powerful, who are incapable of acting “responsibly” by purchasing security services.<sup>142</sup> Indeed, accountability itself is a lofty and vague idea, which can be deployed to serve contradictory causes. Homeowners who hire security companies could plausibly argue that, from their standpoint, privatization actually *increases* accountability.<sup>143</sup> Economic markets no less than public institutions, in the broadest sense, can ensure accountability through the disciplining effects of the market, “which tests the viability of ideas, products, and processes by their ability to attract and maintain a sufficient number of purchasers to meet costs and generate desirable profits.”<sup>144</sup>

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140. In creating a framework for identifying which types of privatization schemes ought to be subject to public oversight and regulation, Jody Freeman argues: “From the public law perspective, the inability to specify a task because it is value-laden, politically contentious, and complex militates in favor of government provision or very strenuous publicization efforts.” Freeman, *supra* note 120, at 1343. By “publicization,” Freeman means the transfer of public duties to private entities under the condition that those private entities “commit themselves to traditionally public goals as the price of access to lucrative opportunities to deliver goods and services that might otherwise be provided directly by the state.” *Id.* at 1285.

141. See David Garland, *The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society*, 36 BRIT. J. CRIMINOLOGY 445, 452-54 (1996). Garland notes, “These campaigns, which involve extensive mass media advertising or else the mass leafleting of households, aim to raise consciousness, create a sense of duty, and thus change practices.” *Id.* at 452.

142. Garland observes that “[o]nce ‘security’ ceases to be guaranteed to all citizens by a sovereign state, it tends to become a commodity, which, like any other, is distributed by market forces rather than according to need.” *Id.* at 463.

143. David Alan Sklansky, *Private Police and Democracy*, 43 AM. CRIM. L. REV. 89, 90 (2006).

144. Minow, *supra* note 119, at 1263.

If the DHS's primary mechanism for ensuring that employers faithfully carry out their screening duties is the threat of sanctions, one might ask whether we should apply sanctions more frequently and severely. In other words, if the problem has been that the DHS has only sparingly enforced IRCA, why not embrace a strategy where it regulated employer hiring decisions with vigor? While this seems like a logical and intuitive regulatory turn, history has shown that in this context, sanctions have proven to be an ineffective tool for adjusting employer behavior. In the early years of IRCA's implementation, for example, a 1990 GAO report found that employers had engaged in a "widespread pattern of discrimination" where even well-intentioned employers chose not to hire U.S. citizens and otherwise authorized "foreign-appearing, foreign-sounding" workers because it was simply easier not to hire than to run the risk of sanctions.<sup>145</sup> Thus, sanctions have proven to be a blunt mechanism for calibrating employer hiring practices. Too meek a threat of sanctions has led to worker exploitation, and too substantial a threat has led to widespread discrimination.

Unauthorized immigration is a complex phenomenon. Desperate to escape poverty in their sending countries, immigrants work in this country to support themselves and their families. Anxious to stay afloat in an increasingly turbulent economy, employers hire unauthorized immigrants to gain a bargaining advantage. Fearful of losing their jobs and simultaneously dependent on cheap goods and services, American consumers remain confused as to whether unauthorized immigrants help or hurt our economy. Given these competing and conflicting interests, any immigration policy shift will involve an inevitable set of trade-offs. But whatever distance separates Americans on a fair and sensible immigration policy, one thing that most if not all can agree on is that the exploitation of the most vulnerable among us advances no legitimate immigration goal. Therefore, if employers are reporting unauthorized immigrants as a way of avoiding liability for violations in the workplace—and using the threat of reporting to maintain exploitative conditions—and if the DHS is relying on employer reports as a way of identifying potentially removable immigrants in the workplace, then any serious reform efforts will require a shift in focus.

### B. *Proposed Remedies*

In this Subpart, I discuss two specific remedies: (1) subjecting employers who report unauthorized immigrants to the possibility of an audit, and (2) threatening the use of the exclusionary rule against low-level DHS officials who rely on such reports. Both of these remedies redirect our attention away

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145. U.S. GEN. ACCOUNTING OFFICE, IMMIGRATION REFORM: EMPLOYER SANCTIONS AND THE QUESTION OF DISCRIMINATION 1, 3 (1990), available at <http://archive.gao.gov/d24t8/140974.pdf>.



from the front end, when employers hire unauthorized workers, to the back end, when employers report workers. This shift is designed to signal to employers and low-level DHS decision makers that they cannot reap benefits from the suppression of dissent in the workplace and to remove the possibility of using the DHS as an escape hatch from labor and employment law violations.

### *1. Auditing employer reports*

In regulating employers, one modest solution might be to subject employers to an audit, where the possibility of being audited attaches when the employer reports to the DHS the presence of unauthorized immigrants. Scrutinizing reporting, rather than or in addition to hiring decisions, will encourage a change in behavior by employers who would otherwise usurp IRCA's screening authority for their own purposes. Presenting the threat of being audited would raise another set of costs employers would have to consider in hiring unauthorized workers. For some employers, these added costs would be enough to sufficiently deter them from hiring unauthorized immigrants at the outset—which is precisely what IRCA was designed to do in the first place.

But the more urgent change that an audit could engender concerns those employers who would persist in hiring unauthorized workers. It may be that a particular industry suffers from a labor shortage and needs workers irrespective of immigration status, or it may be that the employers possess a greater familiarity and comfort and desire to hire workers from certain immigrant communities. But whatever their reasons for hiring unauthorized workers, having hired them, employers cannot then turn around and use the threat of reporting as a way of exacting and escaping liability for exploitative workplace practices. This type of regulatory regime would send the message that exploitation will not be tolerated. Employers who knowingly recruit and hire unauthorized immigrants will no longer be able to use State power to justify low wages and unsafe workplace conditions. The possibility of an audit, which is triggered only by reporting, would send the signal to an employer that once she decides to hire an unauthorized immigrant, she will be no less subject to the collective bargaining process. This would reduce the likelihood of abuse in the workplace, because removing the possibility of workplace remedies ameliorates some of the bargaining advantage of hiring unauthorized immigrants.

Questions of institutional design can help calibrate the degree of punishment that reporting raises. One modest version might be to shame employers who engaged in reporting by publicly disclosing the results of the audit. This type of shaming punishment, where the public learns that a particular employer reported unauthorized workers as a form of retaliation, would invite negative media attention and adverse actions by organizations

representing labor and immigrant interests.<sup>146</sup> Another version might create an information-sharing system between the DHS and labor-enforcement agencies like the DOL and its state-level equivalents. Here, the DHS would pass along these reports to agencies like the DOL, which would conduct initial investigations. This too would send the message to employers that using State power for personal gain will not be tolerated.<sup>147</sup> Still another version would seek to monetarily punish employers, so that they would be subject both to any liability for workplace violations—like backpay or the denial of overtime pay—along with civil sanctions. A more robust version of this same idea might be to create a private right of action for the aggrieved worker, so that the unauthorized immigrant might be able to recover monetary damages or even a temporary or permanent visa.

Of course, even if employers could no longer report unauthorized immigrants, they would still be free to terminate them.<sup>148</sup> But if an employer terminated a worker as a form of retaliation for organizing with her coworkers or to recover unpaid wages and overtime pay, then that worker would be free to pursue remedies in court. In this scenario, immigration-related issues such as whether a particular worker had authorization to remain in the United States would be inapposite.<sup>149</sup> Here, the threat of these labor- and employment-law remedies would function as the accountability-ensuring mechanism by beginning to correct the IRCA-engendered asymmetry that grants employers whistleblower immunity regarding workers' status but denies the same to workers who are subject to employer lawlessness.<sup>150</sup>

## 2. *The exclusionary rule*

Our reform efforts should target low-level DHS decision making as well. Although employers have strong incentives to report unauthorized workers as a way of avoiding liability in the workplace, low-level DHS officials have a related incentive to rely on these reports to meet agency-imposed quotas. But DHS officials should not obtain the benefit of employers and their exploitative

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146. For an interesting exploration of the possibilities of using auditing to monitor executive discretion, see Mariano-Florentino Cuéllar, *Auditing Executive Discretion*, 82 NOTRE DAME L. REV. 227 (2006).

147. One interesting scenario might involve employers anonymously requesting the inspection of the workplaces of their competitors. This involves an interesting anticompetitive, rather than antiexploitation, rationale for the auditing system.

148. This is precisely the set of facts that caused *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), to come before the Court.

149. Revoking IRCA's employer sanctions provision would moot *Hoffman Plastic Compounds*'s holding that IRCA prohibits unauthorized immigrant workers from pursuing backpay. See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147-49 (2002) (explaining that IRCA changed the "legal landscape" by prohibiting whatever power the NLRB had to order backpay awards to unauthorized immigrant workers).

150. See Preston, *supra* note 64, at A1.

practices. One suggestion would be for immigration judges to apply the exclusionary rule to any removal proceedings that rely on evidence obtained from the type of employer reporting discussed above. At least one recent immigration decision reflects this idea in principle. *In re Herrera-Priego*, an unpublished immigration decision, involved precisely the sort of employer reporting that has skewed the process by which immigrants are screened out of the workplace. In *Herrera-Priego*, a garment factory owner denied the workers overtime as required by law. When the workers filed grievances, the employer discharged the workers who had filed complaints. As the labor dispute unfolded and union representatives pressed for reinstatement of the aggrieved workers, the employer, looking for an easy exit, contacted the INS to request a raid of his own factory. The INS raided the factory, detained several workers for deportation, and declined to sanction the employer in exchange for his cooperation.<sup>151</sup> During removal proceedings, two of the workers successfully suppressed evidence and terminated proceedings because the INS agents violated an internal enforcement policy that required enforcement officers to confirm whether a tip was proffered to quell a labor dispute.<sup>152</sup> Central to the decision was the observation that the enforcement policy “was designed to protect fundamental labor rights.”<sup>153</sup>

*Herrera-Priego* hints at what kind of reform might be possible by sending the right set of signals to employers. Instead of permitting employers to hire unauthorized immigrants with the expectation that they can always report those immigrants should the immigrants attempt to vindicate their workplace rights, the principles embodied by *Herrera-Priego* foreclose reporting as an escape hatch. This puts employers to a choice: either they screen for unauthorized immigrants in good faith when making hiring choices, or they knowingly hire unauthorized immigrants and face all of the limitations imposed by labor and employment law.

#### CONCLUSION

In this Article, I have focused on the widespread problem of our nation's employers hiring and exploiting and reporting unauthorized immigrant workers. This point matters, I have contended, because the identity of those making immigration decisions affects the identities of those who ultimately join our communities. Thinking about employers as private decision makers presents an opportunity to reexamine a regime floating in a state of

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151. *In re Herrera-Priego*, Decision and Order of the Immigration Judge (July 10, 2003) (on file with author).

152. Operations Instruction 287.3a provides that “whenever information received from any source creates suspicion that an INS enforcement action might involve the Service in a labor dispute, a reasonable attempt should be made by Service enforcement officers to determine whether there is a labor dispute in progress.” *Id.* at 4.

153. *Id.* at 24.

disrepair.<sup>154</sup> It seems that even immigrants who are authorized to work in the United States with the primary objective of serving the greater American public may quickly find themselves being coerced into doing work that benefits their employers to the public's detriment.<sup>155</sup> Moreover, recent reports of low-level corruption within our nation's immigration regime have been emerging; in one particularly troubling incident, an immigration officer conditioned the processing of an immigrant's green card application on sexual favors.<sup>156</sup> Recent scholarship has empirically demonstrated the sheer arbitrariness of asylum determinations, where the difference between life and death sometimes turns on which judge is assigned a particular case.<sup>157</sup> All of these examples suggest that problems of accountability pervade our immigration regime. Developing levers for ensuring accountable decision making within the workplace, therefore, is an important first step in bringing other areas of immigration law in line.

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154. David Sklansky argues that the "paramount benefit of studying private security . . . is the new insight we can gain into old, familiar problems: the regulation of public police, the limits of state action, and the affirmative duties of government." David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1171 (1999); see also Charlie Savage, Nina Bernstein & Robert Gebeloff, *Vetted Judges More Likely to Reject Asylum Bids*, N.Y. TIMES, Aug. 24, 2008, at A17.

155. For example, under the J-1 visa system, foreign doctors who come to the United States for further medical training are given the option of staying permanently if they agree to provide medical care to poorer, underserved communities for a period of years. At the conclusion of their service, these doctors are given the opportunity to obtain permanent residency and eventually citizenship. But supervising physicians might direct the J-1 foreign doctors away from the intended communities, and toward more affluent communities, where they can perform more expensive procedures for patients with more comprehensive insurance coverage. See Marshall Allen, *Indentured Doctors*, LAS VEGAS SUN, Sept. 30, 2007, at A1 ("There is a financial motive to work the foreign doctors long hours outside the underserved areas: The J-1 doctor makes the most money for his boss by performing higher-paying procedures in hospitals or clinics that serve patients with good insurance coverage. Or, J-1 doctors can be used to rake in revenue through multiple call shifts—12- or 24-hour hospital assignments during which they admit and treat walk-in patients.").

156. Nina Bernstein & Angelica Medaglia, *An Agent, a Green Card, and a Demand for Sex*, N.Y. TIMES, Mar. 21, 2008, at A1.

157. See Jaya Ramji-Nogales, Andrew I. Schoenholtz & Phillip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2008).

