SHIFTING THE BLAME? RE-EVALUATING CRIMINAL PROSECUTION FOR EMPLOYERS OF UNDOCUMENTED WORKERS

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ABSTRACT

It is easy to buy into the idea that prosecuting corporate employers of undocumented workers is an equitable alternative to mass raids where undocumented workers are arrested and placed in removal proceedings. The media response after a highly publicized set of ICE raids in August 2019 reflects an emerging consensus that the DOJ and federal agencies should mete out the consequences of working without authorization equally between employees and their corporate employers using the criminal employer sanctions provisions of immigration laws. Prosecuting employers, goes the argument, will "shift the blame" for the crime of undocumented work to an entity or person who is profiting from wrongdoing. Prosecutions could also be used to punish employers who are exploiting undocumented workers. This Note argues that criminal employer sanctions cannot be used to protect workers, and they cannot provide meaningful accountability for the "crime" of undocumented work. Criminal employer sanctions are rooted in a legislative design that intends to punish workers, despite the law's emphasis on employers. In practice, criminal employer sanctions accomplish their goal of punishing workers by triggering firings and mass arrests as prosecutors build their case against an employer, disincentivizing prosecutors from achieving lasting accountability for corporate actors or improvements in worker protection. In lieu of criminal employer sanctions, this Note supports solutions that relocate the power of naming and preventing the harms of undocumented work to those who are most at risk for exploitation. It presents three alternatives for immigration and criminal justice reform advocates who are searching for solutions: rights-based discourse, enfranchising workers through unions and localities, and using state power to resist criminal employer sanctions and legalize aspects of undocumented work.

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INTRODUCTION

On Wednesday, August 7, 2019, U.S. Immigration and Customs Enforcement ("ICE") agents arrested 680 workers in seven chicken processing plants across the state of Mississippi who were suspected of working without authorization.[1] ICE bused arrestees who could not prove their work authorization to an empty Mississippi Air National Guard hangar to process them for immigration violations. As of November 2019, 119 of the migrants arrested faced immigration-related criminal charges.[2] Three attorneys from the public defender's office in Jackson, Mississippi, represent more than half of the defendants, and the office has sought help from other public defender offices throughout Mississippi and the United

1. Rogelio V. Solis & Jeff Amy, *Largest US Immigration Raids in a Decade Net 680 Arrests*, ASSOCIATED PRESS (August 7, 2019), https://apnews.com/bbcef8ddae4e4303983c91880559cf23.

2. Press Release, U.S. Att'ys Off., S. Dist. of Miss., 119 Illegal Aliens Prosecuted for Stealing Identities of Americans, Falsifying Immigration Documents, Fraudulently Claiming to be U.S. Citizens, Other Crimes (Nov. 7, 2019), https://www.justice.gov/usao-sdms/pr/119-illegal-aliens-prosecuted-stealing-identities-americans-falsifying-immigration.

States to defend the charges.[3] U.S. Attorney for the Southern District of Mississippi Mike Hurst, who oversaw the migrants' prosecution, promised that the U.S. Department of Justice ("DOJ") would vigorously prosecute employers who violated immigration laws.[4] A year later, four former employees at the chicken processing plants were indicted on criminal charges related to the August 2019 raid, [5] but no criminal charges were filed against the seven corporate employers targeted in the raid.

Observers outraged by dramatic ICE sweeps have pled for a more humanitarian enforcement alternative that does not criminalize migrants, especially those who work in industries vital to the nation's economy like construction and food production.[6] After the Mississippi raids, countless news outlets accused the Trump administration of focusing on individual violations of federal law while neglecting its responsibility to prosecute employers of undocumented workers.[7] These journalistic challenges form part of the broader outcry that the Trump administration declined to prosecute white-collar crime in favor of low-level drug crime and immigration enforcement.[8] They suggest that corporate crime is allowed to run unchecked while the brunt of criminal punishment is borne by working-class Americans.[9] They are troubled by the arrests of hundreds of undocumented

3. Rachel Zohn, *Recent ICE Raids Overload Mississippi Legal System*, U.S. NEWS & WORLD REP. (Oct. 18, 2019), https://www.usnews.com/news/best-states/articles/2019-10-18/recent-ice-raids-by-us-immigration-and-customs-enforcement-overload-mississippi-legal-system.

4. Bobby Harrison & Michelle Liu, *Mike Hurst, the Federal Prosecutor Who Oversaw Chicken Plant Raids, Has Long Been Tough on Undocumented People — But Less So on Businesses That Hire Them*, MISS. TODAY (Aug. 15, 2019), https://mississippitoday.org/2019/08/15/mike-hurst-the-prosecutor-who-oversaw-chicken-plant-raids-has-long-been-tough-on-the-undocumented-but-less-so-on-businesses-that-hire-them/.

5. Press Release, U.S. Att'ys Off., S. Dist. of Miss., Managers, Supervisors, and Human Resource Personnel Indicted for Immigration Crimes and Other Federal Crimes Stemming from Largest Single-State Worksite Enforcement Action in Nation's History (Aug. 6, 2020), https://www.justice.gov/usao-sdms/pr/managers-supervisors-and-human-resource-personnel-indicted-immigration-crimes-and-other.

6. Editorial, *ICE Sweeps are Cruel. Without Immigration Reform, They're Pointless, Too.*, WASH. POST (Aug. 11, 2019), https://www.washingtonpost.com/opinions/ice-sweeps-are-cruel-without-immigration-reform-theyre-pointless-too/2019/08/11/88d212b8-bad4-11e9-bad6-609f75bfd97f_story.html.

7. *See, e.g.*, Nomaan Merchant, *ICE Raids Raise Question: What about the Employers?*, ASSOCIATED PRESS (Aug. 14, 2019), https://apnews.com/e7113c50a6fd4d2688fc2f2b8a9a91cd; Renae Merle, *As Workplace Raids Multiply, Trump Administration Charges Few Companies*, WASH. POST (Aug. 9, 2019), https://www.washingtonpost.com/business/2019/08/09/workplace-raids-multiply-trump-administration-charges-few-companies/; Asher Stockler, *Undocumented Workers Provide Employers With Little Risk, Large Reward*, NEWSWEEK (Aug. 16, 2019), https://www.newsweek.com/undocumented-workers-ice-mississippi-raids-koch-hsi-1454807; State of the Union, *Tapper: Why No Charges against Businesses in ICE Raids?*, CNN (Aug. 11, 2019), https://www.cnn.com/videos/us/2019/08/11/acting-border-patrol-chief-mark-morgan-intv-ice-raids-targeting-illegal-immigrants-no-employers-sot-sotu-vpx.cnn. For an example of how this argument has been raised before the Mississippi raids, see Maria Echaveste, *Target Employers*, AM. PROSPECT (Oct. 24, 2005), https://prospect.org/api/content/09136016-6469-5ad5-8b0f-a4d502275dcd/.

8. Brandon L. Garrett, *Declining Corporate Prosecutions*, 57 AM. CRIM. L. REV. 109, 110–11 (2020).

9. *See* Harrison & Liu, *supra* note 4 ("Since the raids, immigration-rights advocates and critics of the Trump Administration's policies have questioned whether the five companies employing workers at the seven plants raided last week will also be held criminally liable . . . .").

workers while employers like Koch Foods, one of the raided chicken processing plants, are not held accountable for profiting off of undocumented work.[10]

A pattern of prosecutions that functionally "blam[es] immigrants and poor people" instead of corporate criminal actors cannot be reconciled with a desire for equal treatment under the law.[11] The firestorm of criticism arising from the Mississippi raids reflects an emerging public consensus that the DOJ and other federal agencies should mete out the consequences of working without authorization equally between employees and their corporate employers.[12] *U.S. News & World Report* lauded this consensus as a rare example of political unity across party lines: "Immigration advocates and enforcement agents may not agree on much, but there is one group that the two sides have long pushed to put under greater scrutiny: the employers who hire workers who are in the country illegally."[13]

At first glance, prosecuting employers who hire undocumented workers[14] cures the worst inequities of the Trump administration's massive ICE raids. Employers may have greater resources to defend against criminal charges than undocumented workers, many of whom are paid low wages and must rely on overworked public defenders. Through prosecution, corporations are forced to disgorge the benefits they have reaped from undocumented work in the form of fines and penalties.[15] Prosecuting employers gives the appearance of equity in the criminal justice system, while still deterring undocumented workers from working without authorization. Further, prosecutors can use their discretion to go after employers who endanger their workers through exploitative practices. When viewed in this light, criminal employer sanctions are a powerful tool in the quest for greater corporate accountability.

But this rosy view ignores the historical roots and contemporary function of criminal employer sanctions. The purpose of this Note is to challenge the

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10. *See* Merle, *supra* note 7.

11. THE BIG SHORT (Paramount Pictures 2015).

12. *See, e.g.*, Adolfo Flores & Hamed Aleaziz, *Hundreds of Employees Were Arrested in an ICE Raid. The Bosses Went Home Without a Charge.*, BUZZFEED NEWS (Aug. 9, 2019), https://www.buzzfeednews.com/article/adolfoflores/ice-raids-employers-arrest-charges-immigrants-business ("[T]he risk and exposure the employer faces has no point of comparison with the devastation that happens to the employees' lives and these communities in the aftermath of these raids.").

13. Alan Neuhauser, *ICE Puts Employers in its Crosshairs*, U.S. NEWS & WORLD REP. (Jan. 22, 2018), https://www.usnews.com/news/national-news/articles/2018-01-22/is-ice-finally-targeting-employers-of-illegal-workers.

14. The terms "undocumented," "unauthorized," and "illegal" are all used interchangeably to describe migrants who either arrive in the United States without legal immigrant or nonimmigrant status or whose status lapses while they are still in the country. Each of these terms carries different connotations which signal the speaker's political position in contemporary immigration debates. *See, e.g.*, Gene Demby, *In Immigration Debate, "Undocumented" Vs. "Illegal" Is More Than Just Semantics*, NAT'L PUB. RADIO (Jan. 30, 2013), https://www.npr.org/sections/itsallpolitics/2013/01/30/170677880/in-immigration-debate-undocumented-vs-illegal-is-more-than-just-semantics. I use the term "undocumented" because of its clear association to the world of migrant work—migrants are often asked to show documentation proving their ability to work legally in the United States, and those who work with falsified documents can be charged with "document fraud," among other charges.

15. *See* 8 U.S.C. § 1324a(e)(4)–(6).

consensus that employer prosecution is an appropriate alternative to our current system and put forth solutions that are designed to better protect undocumented workers. Prosecuting employers for immigration-related crimes creates vast collateral consequences that do not appear in other forms of corporate prosecution. This Note seeks to challenge the progressive position that advocates for prosecuting corporate crime and explain why this impulse may be misguided in the setting of immigration law. Criminal sanctions for employers do not actually function by "shifting the blame" for unauthorized work from employee to employer. The goal of this Note is not to decry corporate criminal prosecution as a whole, but to examine assumptions about how criminal law functions in this context and imagine new ways to achieve just distributive effects.

Criminal prosecution of employers for employing undocumented people cannot be extricated from the criminalization of migrants as a whole. Part I describes the basic structure of the laws criminalizing employers for hiring undocumented people, also known as "employer sanctions," and gives a short history of their origin in the Immigration Reform and Control Act ("IRCA") and enforcement under the three most recent presidential administrations. Part II presents three reasons why prosecution is inadequate as a means of redress for the "crime" of employing undocumented workers and responds to potential concerns about the consequences of eliminating employer sanctions. First, criminal sanctions are not useful as a prosecution tool because they have confusing and conflicting formulations about who the perpetrators and victims of undocumented work actually are. Second, the investigation of criminal employer sanctions cases inevitably leads to the firing, arrest, and deportation of undocumented workers without establishing protections for future workers. To illustrate this point, this Note focuses on some of the approaches that federal prosecutors have used in prosecuting corporations for immigration violations using data from deferred and non-prosecution agreements from 2009 to 2019.[16] Third, employer sanctions cannot be redeemed as a regulatory tool to protect exploited migrant workers. The tools of federal prosecution are not politically neutral means of preventing impunity for corrupt corporate behavior. Prosecuting employers myopically attempts to address the problem of exploitation while failing to understand exploitative employer-employee relationships as symptomatic of larger inequalities.

Part III imagines alternatives that immigrant rights advocates can explore in their effort to stop the abuse, criminalization, and deportation of migrant workers.

16. It is difficult to make sweeping judgments about an entire category of criminal prosecution, and I recognize that every case brought against employers is different. Many cases of this type involve difficult questions of bias, criminality, and guilt, especially when immigration-related violations are perpetrated along with other violations such as tax and document fraud. I make my arguments about an "archetypal case" that I have observed in every criminal case I have reviewed under the employer sanctions statutes: corporations plead guilty to violating one of the employer sanctions laws in exchange for cooperation (often receiving a deferred prosecution agreement or plea agreement), while undocumented workers are fired, arrested, and placed in removal proceedings, or criminally charged.

This Part endorses equity for populations most affected by the application of employer sanctions, freedom from exploitation for undocumented people, and a rule of law that is thoughtfully designed to achieve just ends. It does not provide policy solutions with an aim to reduce immigration to the United States or prevent noncitizens from competing with citizens for employment. The policy solutions this Note addresses are intended to empower migrant workers (regardless of immigration status) to resist and prevent some of the exploitation that arises when workers are placed in vulnerable positions and cannot speak out against employers for fear of being reported to government authorities. It explores universal human rights language, worker enfranchisement, and state and corporate resistance as alternatives to corporate prosecution.

I. A BRIEF HISTORY OF CRIMINAL EMPLOYER SANCTIONS

A. Legal Structure of Criminal Sanctions for Employers

It is not a crime for undocumented people to work in the United States. Obtaining work by using false documents is criminalized, but migrants do not commit a crime simply by attempting to find work in the United States.[17] Although undocumented workers can face negative immigration consequences—like inability to adjust their status—by working unlawfully,[18] criminal sanctions for hiring undocumented people are reserved for employers.[19] Sanctions, though not directly targeted at undocumented workers, harm undocumented workers indirectly by making it undesirable for employers to hire them.[20] This flawed design makes employer sanctions irredeemable as a means to protect undocumented people.

Federal prosecutors rely on two primary statutory provisions within the Immigration and Nationality Act to sanction employers of undocumented workers: 8 U.S.C. §§ 1324 and 1324a.[21] These employer sanctions statutes are not the only tools that prosecutors use in crafting a case against employers of unauthorized migrants. For example, prosecutors often charge employers with crimes such as document fraud[22] or identity theft.[23] However, this Section focuses on the two

17. *See* Geoffrey Heeren, *The Immigrant Right to Work*, 31 GEO. IMMIGR. L.J. 243, 244 (2017) ("When states tried to keep out or drive out immigrants by restricting their job opportunities through licensing, permitting, or zoning laws, federal courts routinely struck down these efforts."). Not all courts have expressed a migrant's right to work in the same generous terms. *See* Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 148 (2002) ("Under the IRCA regime, it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies. Either the undocumented alien tenders fraudulent identification, which subverts the cornerstone of IRCA's enforcement mechanism, or the employer knowingly hires the undocumented alien in direct contradiction of its IRCA obligations.").

18. Arizona v. United States, 567 U.S. 387, 404–05 (2012).

19. Heeren, *supra* note 17, at 244.

20. *See* David Bacon & Bill Ong Hing, *The Rise and Fall of Employer Sanctions*, 38 FORDHAM URB. L.J. 77, 81 (2010).

21. 8 U.S.C. §§ 1324, 1324a.

22. 18 U.S.C. § 1546.

23. *Id.* § 1028.

employer sanctions statutes within the Immigration and Nationality Act, as prosecutors' other tools are beyond the scope of this Note.[24]

Section 1324 contains felony penalties for any person who either "conceals, harbors, or shields" undocumented people from detection or "encourages or induces" an undocumented person to enter and live in the United States.[25] It is enforced against employers and corporations as well as individuals.[26] Employers who violate this provision can face harsh penalties, including fines and imprisonment of up to five years, so it may function as an effective deterrent.[27]

Section 1324a specifically criminalizes a "pattern or practice" of employers who knowingly "hire . . . recruit or refer for a fee" undocumented workers.[28] Section 1324a applies equally to natural persons, employers, and corporations.[29] The statute also provides for civil fines and liability for employers who employ unauthorized workers[30] and enables the Attorney General to seek an injunction in district court to enjoin the employment of unauthorized individuals.[31] To comply with § 1324a, all employers must examine workers' employment authorization and identity documents and attest to their validity.[32] Employees must also attest that they are authorized to work in the United States.[33] The statute contains a "[g]ood faith compliance" defense to civil liability that excuses a "technical or procedural failure" to meet the verification requirements if there is a good faith effort to comply,[34] but this good faith compliance provision does not apply to pattern-or-practice violators under subsection (f).[35] Under the criminal penalty provisions in subsection (f), employers can be fined a maximum of $3,000 for each unauthorized migrant they employ and can be imprisoned for a maximum of six months.[36]

Sections 1324 and 1324a were signed into law by President Reagan as part of the Immigration Reform and Control Act of 1986 ("IRCA").[37] The law did not affect employers who had hired unauthorized workers before the enactment of the

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24. *See* ANDORRA BRUNO, CONG. RSCH. SERV., R40002, IMMIGRATION-RELATED WORKSITE ENFORCEMENT: PERFORMANCE MEASURES ii (2015) ("Criminal investigations may result in defendants being charged with crimes beyond unlawful employment and being subject to the relevant penalties for those violations.").

25. 8 U.S.C. § 1324(a)(1)(A)(iii)–(iv).

26. *See* United States v. Kim, 193 F.3d 567, 573 (2d Cir. 1999) ("[Section] 1324, on its face, does not restrict the persons within its reach. It applies to '[a]ny person' who, *inter alia*, knowingly harbors an illegal alien. . . . [T]he evolution of § 1324(a)(i)(A)(iii) to its present form makes clear that Congress intended it to cover employers.").

27. 8 U.S.C. § 1324(a)(1)(B)(ii), (a)(3)(A).

28. *Id.* § 1324a(f)(1). For a comprehensive analysis of § 1324a, see BRUNO, *supra* note 24.

29. *Id.* § 1324a(a) ("It is unlawful for a person or other entity . . . .").

30. *Id.* § 1324a(e)(4)–(6).

31. *Id.* § 1324a(f)(2).

32. *Id.* § 1324a(b)(1).

33. *Id.* § 1324a(b)(2).

34. *Id.* § 1324a(b)(6)(A).

35. *Id.* § 1324a(b)(6)(C).

36. *Id.* § 1324a(f)(1).

37. Robert G. Heiserman & Rebecca P. Burdette, *Employer Sanctions Under the Immigration Reform and Control Act of 1986*, 15 COLO. LAW. 2199, 2199 (1986).

IRCA.[38] Originally, the law called for a unit within the now-defunct U.S. Immigration and Naturalization Service to prosecute violations.[39] The criminal portions of the IRCA did not go into full effect until 1988, after a twelve-month adjustment period to educate employers about their obligations under the new law.[40]

Scholars have characterized the IRCA and its criminal employer-sanctions provisions as an outgrowth of negative public opinion towards migrants that, among other things, blamed undocumented workers for the recession of the 1980s. Stanford immigration law professor Jayashri Srikantiah writes that the IRCA reflected "a conception of undocumented migrants as lawbreakers . . . imposing criminal penalties on employers who hired them."[41] The conception of migrants as lawbreakers who drained the U.S. job market was common in Supreme Court jurisprudence in the years leading up to the passage of the IRCA.[42]

Courts have read the legislative intent of employer sanctions in somewhat conflicting ways. In *Hoffman Plastic Compounds v. NLRB*, the Supreme Court denied back pay to an undocumented migrant worker under the National Labor Relations Act, holding that the "IRCA 'forcefully' made combating the employment of illegal aliens central to '[t]he policy of immigration law.'"[43] In 2012, a federal court found that the "purpose of this aspect of the IRCA was to control illegal immigration by imposing 'penalties for employers who knowingly hire undocumented aliens, thereby ending the magnet that lures them to this country.'"[44] In the same year, however, the Supreme Court held in *Arizona v. United States* that the "IRCA's framework reflects a considered judgment that making criminals out of aliens engaged in unauthorized work—aliens who already face the possibility of employer exploitation because of their removable status—would be inconsistent with federal policy and objectives."[45] The promise that the IRCA's employer criminal sanctions do not criminalize migrant workers, while admirable, is a hollow one, as methods of sanctions enforcement after the IRCA's passage have consistently demonstrated.

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38. *Id*.

39. *Id*. at 2200.

40. *Id*.

41. Jayashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 B.U. L. REV. 157, 190 (2007).

42. *Id*. at 190 n.186 (collecting cases); *see*, *e.g*., INS v. Delgado, 466 U.S. 210, 223 (1984) (Powell, J., concurring) ("One of the main reasons [undocumented migrants] come—perhaps the main reason—is to seek employment."); United States v. Brignoni-Ponce, 422 U.S. 873, 878–79 (1975) ("[T]hese aliens create significant economic and social problems, competing with citizens and legal resident aliens for jobs, and generating extra demand for social services.").

43. 535 U.S. 137, 147 (2002) (citation omitted).

44. United States v. Henderson, 857 F. Supp. 2d 191, 199 (D. Mass. 2012) (quoting H.R. REP. No. 99-682, pt. 1, at 45 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5649–50).

45. Arizona v. United States, 567 U.S. 387, 405 (2012).

B. Worksite Enforcement Across Administrations

Although employer sanctions were enacted in 1986, there was minimal enforcement of immigration-related violations until the middle years of the George W. Bush administration. The creation of ICE in 2003 allowed for greater policing within the United States, and presidents have engaged in the "ritualized spectator sport" of border policing by arresting employees in their workplaces across the country.[46] Criminal sanctions for employers of unauthorized workers can carry symbolic value when coupled with highly visible ICE raids, but civil sanctions can also be employed with relatively little fanfare. President Bush, for example, pioneered ICE's visible worksite enforcement "raid" model. President Obama instead relied on civil enforcement actions, instituting audits to remove unauthorized employees from company payrolls. President Trump embraced the ICE "raid" model from the Bush presidency, while appearing to increase criminal penalties against employers in the latter years of his term.

1. The Bush Administration (2001–2009)

The Bush administration oversaw the creation of tools that would be most crucial to the enforcement of employer sanctions: ICE and the modern version of E-Verify. ICE is a law enforcement agency within the Department of Homeland Security ("DHS") that was originally intended to "prevent acts of terrorism by targeting the people, money, and materials that support terrorist and criminal activities," but whose mission has expanded drastically to carry out immigration enforcement across the nation.[47] E-Verify is the electronic employment verification system that employers use to verify whether employees are authorized to work in the United States. The system compares data that employees submit to demonstrate their eligibility for employment with databases maintained by the Social Security Administration and DHS.[48] It also places employers under the supervision of an E-Verify Monitoring and Compliance Unit within ICE.[49] At least twenty-two states have mandated some form of the program.[50]

On May 12, 2008, ICE carried out what it called "the largest criminal worksite enforcement ever in the United States."[51] ICE agents arrested 389 workers at the

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46. PETER ANDREAS, BORDER GAMES: POLICING THE U.S.-MEXICO DIVIDE x (2000).

47. Heather Timmons, *No One Really Knows What ICE is Supposed to Be. Politicians Love That*, QUARTZ (July 7, 2018), https://qz.com/1316098/what-is-ice-supposed-to-do-the-strange-history-of-us-immigration-and-customs-enforcement/.

48. Elizabeth Brown & Inara Scott, *Sanctuary Corporations: Should Liberal Corporations Get Religion?*, 20 U. PA. J. CONST. L. 1101, 1115 (2018).

49. *Id.* at 1116.

50. Rebecca Beitsch, *In Targeting Undocumented Workers, Some Legislators Want Employers to Do More*, PEW CHARITABLE TRS. (Feb. 14, 2017), http://pew.org/2l8JYq1.

51. Muzaffar Chishti & Claire Bergeron, *Iowa Raid Raises Questions about Stepped-Up Immigration Enforcement*, MIGRATION POL'Y INST. (June 16, 2008), https://www.migrationpolicy.org/article/iowa-raid-raises-questions-about-stepped-immigration-enforcement.

Agriprocessors meat packaging plant in Postville, Iowa.[52] To accommodate the massive size of the federal proceedings, judges held court on the grounds of the National Cattle Congress in Waterloo, Iowa, and defense attorneys were asked to represent up to ten individuals at once in mass hearings.[53] Those arrested made up almost one-tenth of the population of Postville.[54] Simultaneously, federal authorities investigated complaints of severe worker abuse and child labor law violations at Agriprocessors.[55] The federal investigation included counts against executives for harboring illegal aliens for profit and violations of the child labor laws.[56] Prosecutors later dropped all of the IRCA charges against executives,[57] and the executives were acquitted of all child-labor charges at trial in 2010.[58]

Overall, President Bush relied much more heavily on criminal arrests of employers and administrative arrests of undocumented migrant employees than civil penalties to enforce his worksite enforcement strategy. In fiscal year 2008, the Bush administration issued eighteen final orders against employers for employing undocumented people, with total administrative fines equaling $675,209, but completed 5184 administrative arrests and 1103 criminal arrests in the same year.[59]

2. The Obama Administration (2009–2017)

The Obama administration had no interest in being associated with mass ICE raids like that of Postville. After an ICE raid in Washington State during the first month of Obama's term led to the arrests of twenty-eight workers, DHS Secretary Janet Napolitano revealed she had not been informed of the raid prior to its execution and called for a review of the raid.[60] A source for the *New York Times* stated that Secretary Napolitano was "not happy" because the raid was "inconsistent with her position, and the president's position on these matters."[61]

Distaste for ICE raids did not mean that President Obama ceased to enforce employer sanctions, however. During the Obama administration, large "gun-wielding" raids by ICE were replaced with "silent raids," where government agents audited employers' hiring practices, triggering the firing of thousands of workers.[62] According to the

52. Julia Preston, *Inquiry Finds Under-Age Workers at Meat Plant*, N.Y. TIMES (Aug. 5, 2008), https://www.nytimes.com/2008/08/06/us/06meat.html.

53. Chishti & Bergeron, *supra* note 51.

54. Allison L. McCarthy, *The May 12, 2008 Postville, Iowa Immigration Raid: A Human Rights Perspective*, 19 TRANSNAT'L L. & CONTEMP. PROBS. 293, 295 (2010).

55. Preston, *supra* note 52.

56. Jennifer Ludden, *Kosher Meat Plant Faces Child Labor Allegations*, NAT'L PUB. RADIO (Sept. 10, 2008), https://www.npr.org/templates/story/story.php?storyId=94449437; McCarthy, *supra* note 54, at 297.

57. McCarthy, *supra* note 54, at 297.

58. Ashby Jones, *Slaughterhouse Manager Acquitted of Child-Labor Charges*, WALL ST. J. (June 8, 2010), https://www.wsj.com/articles/BL-LB-29746.

59. BRUNO, *supra* note 24, at 5–6.

60. *Secretary Seeks Review of Immigration Raid*, N.Y. TIMES (Feb. 26, 2009), https://www.nytimes.com/2009/02/26/washington/26immig.html.

61. *Id.*

62. Bacon & Hing, *supra* note 20, at 77.

Obama White House website, ICE audited more than 8900 employers suspected of hiring unauthorized migrants and imposed more than $100 million in civil sanctions against employers.[63] President Obama's immigration enforcement platform acknowledged that these sanctions should also be used against "employers who hire undocumented workers to skirt the workplace standards that protect all workers," promising to increase penalties for these employers.[64] Though civil audits often did not lead to deportations of undocumented workers, these workers were still fired, even at workplaces where employees enjoyed better-than-average pay and working conditions.[65] Data from the Corporate Prosecution Registry shows that eighty-seven companies were prosecuted for immigration violations between 2009 and 2016 under the Obama administration.[66]

3. The Trump Administration (2017–2021)

The Trump administration used a variety of enforcement methods to prevent undocumented people from arriving and working in the United States. At the start of his term in early 2018, the National Immigration Law Center suggested that Trump's administration appeared to be combining the approaches of Obama and Bush, targeting both undocumented people and their employers.[67] Massive raids in 2017 and 2018 usually involved highly visible ICE personnel arresting suspected undocumented workers (a hallmark of the Bush administration), with promises of pending prosecution for employers.[68] In January 2018, after ICE raided ninety-eight 7-Eleven convenience stores in seventeen states and arrested twenty-one individuals,[69] ICE Director Tom Homan stated that the raids "send a strong message to U.S. businesses that hire and employ and [sic] illegal workforce . . . if you are found to be breaking the law, you will be held accountable."[70]

In August 2019, the Trump administration broke the record set by the 2008 Postville raid with raids across seven cities in southern Mississippi, as described in

63. *Immigration: Cracking Down on Employers Hiring Undocumented Workers*, WHITE HOUSE, https://obamawhitehouse.archives.gov/issues/immigration/strengthening-enforcement (last visited Oct. 31, 2019).

64. *Id*.

65. Bacon & Hing, *supra* note 20, at 84 ("The softer, gentler approach to employer sanctions enforcement implemented by the Obama administration may appear more humane on the surface. After all, auditing and firing is accomplished without guns, handcuffs, or detention. However, the result—loss of work—is not necessarily softer or gentler for the thousands of fired workers who have been working to support their families.").

66. *Corporate Prosecution Registry*, DUKE UNIV. SCH. OF L. & LEGAL DATA LAB, UNIV. OF VA. ARTHUR J. MORRIS L. LIBR. http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/index.html (last visited Dec. 15, 2019).

67. Neuhauser, *supra* note 13.

68. *Id*.

69. Muzaffar Chishti, Sarah Pierce & Jessica Bolter, *Shifting Gears, Trump Administration Launches High-Profile Worksite Enforcement Operations*, MIGRATION POL'Y INST. (Jan. 24, 2018), https://www.migrationpolicy.org/article/shifting-gears-trump-administration-launches-high-profile-worksite-enforcement-operations.

70. Neuhauser, *supra* note 13.

the Introduction.[71] In August 2020, ICE officials and the U.S. Attorney for the Southern District of Mississippi held a press conference announcing the indictments of four former managers and human resources staff of the chicken processing plants for harboring illegal immigrants under § 1324 and document fraud.[72] U.S. Attorney Mike Hurst said in a press conference announcing the indictments, "[T]oday marks another step in ensuring that justice is fairly and impartially done, no matter the law-breaker."[73] The delayed indictments may have appeased the outcry to target employers in the days after the raids, but they did not erase any of the costly consequences for the migrants arrested in the raids.[74]

White-collar crime scholar Brandon Garrett's *Declining Corporate Prosecutions* argues that the Trump administration "swung away from large-scale corporate prosecutions" and "weakened" the corporate prosecution function.[75] Garrett came to this conclusion after analyzing corporate criminal enforcement using empirical data from the first twenty months of the Trump administration and examining institutional changes in Trump's DOJ, such as a high turnover rate and vacancies in key white-collar criminal enforcement positions.[76] The reality of DOJ corporate prosecutions stood in stark contrast to the rhetoric used by Hurst and officials from DHS and ICE in the indictment press release. The question, then, is why the Trump administration prosecuted employers for immigration violations but declined to prosecute other types of corporate crime. The remainder of this Note attempts to show how the enforcement of criminal employer sanctions, regardless of administration, creates collateral consequences that are not relevant where other forms of corporate prosecution are concerned. Significant imbalances and distributive effects exist between corporations and the undocumented workers they employ. Increasing employer sanctions will not equalize the punishment for the "crime" of working without authorization.

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71. *See supra* Introduction.

72. Jacob Gallant & David Kenney, *One Year Later: ICE Gives Updates on August 2019 ICE Raids*, WLOX (Aug. 6, 2020), https://www.wlox.com/2020/08/06/one-year-later-ice-gives-updates-august-ice-raids/; U.S. Att'ys Off., S. Dist. of Miss., *supra* note 5.

73. U.S. Att'ys Off., S. Dist. of Miss., *supra* note 5.

74. *See* Michelle Liu, *Families Search for Answers Following Immigration Raids; 680 People Working at Food Processing Plants Detained*, MISS. TODAY (Aug. 7, 2019), https://mississippitoday.org/2019/08/07/families-scramble-for-answers-following-immigration-raids-680-people-working-at-food-processing-plants-detained/ (quoting a local immigration attorney in Jackson, Mississippi, who said, "Kids [were] calling us on the first day of school, wondering if their parents were caught up in the raids."); Emily Wagster Pettus, *4 Poultry Plant Execs Indicted After 2019 Immigration Raid*, ASSOCIATED PRESS (Aug. 7, 2020), https://apnews.com/article/mississippi-u-s-news-indictments-immigration-arrests-379d2f4210e2a9b299c18aad54f1e0f0 (quoting U.S. Representative Bennie Thompson, "With hundreds left behind, it's clear that working families, rather than the employers taking advantage of these families, are the ones that continue to suffer from the effects of this raid.").

75. Garrett, *supra* note 8, at 113.

76. *Id.* at 110, 113. Recent data continues to support Garrett's conclusions. *See* TRAC REPORTS, *Corporate and White-Collar Prosecutions At All-Time Lows* (Mar. 3, 2020), https://trac.syr.edu/tracreports/crim/597/ ("The latest available case-by-case records from the Department of Justice (DOJ) show that the prosecution of white-collar offenders in January 2020 reached an all-time low since tracking began during the Reagan Administration.").

II. ISSUES PLAGUING PROSECUTION OF EMPLOYER SANCTIONS

Some immigration advocates think that those who employ undocumented migrants should not be punished because they are operating within a system that leaves them no other choice; without comprehensive immigration reform, most employers cannot employ migrant workers legally.[77] This is a valid perspective considering that Congress has not overhauled the structure of immigration law since 1986, but this Note's position against criminalizing the employment of undocumented people is more fundamental. Criminal sanctions for employers of undocumented people are deceptively designed and fail to provide an actual means of redress for either of their supposed victims: undocumented people who are exploited, and the U.S. populace at large. Employer sanctions suffer from structural weaknesses that do not facilitate meaningful corporate accountability, and their collateral consequences are so great for the undocumented people employed by corporate perpetrators that they are irredeemable as a means of labor protection.

A. Criminal Sanctions for Employers are Structurally Flawed

Employer sanctions are counterintuitive pieces of criminal legislation: they are explicitly designed to change the behavior of someone who is *not* the criminal defendant. Ultimately, the goal of employer sanctions is not to reform, punish, or rehabilitate the employers; it is to force criminal defendants to cease hiring undocumented workers. The writers of the IRCA and employer sanctions did not want to burden American businesses, but encourage them to fire undocumented people or report them to government officials.[78] This legislative intent makes the argument that enforcing criminal sanctions will shift the brunt of criminal consequences to corporations untenable.

Although migrants bear the brunt of employer sanctions, the enforcement of criminal employer sanctions cannot fully override larger economic and social factors that encourage (or force) migrants to enter the United States.[79] George Mason University Law Professor Ilya Somin argues from a law-and-economics perspective that increasing criminal prosecution of employers will not stop migrant workers from seeking labor; rather, it will only "forcibly reduce" the employment options available to them.[80] Somin poses the following hypothetical:

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77. *See infra* Section II.C for scholarship supporting corporations' right to civil disobedience by employing migrant workers.

78. Bacon & Hing, *supra* note 20, at 84–85 ("Congress believed that most Americans were convinced that a crisis over undocumented immigration—especially undocumented *Mexican* migration—existed and that something had to be done. By 1986 federal employer sanctions were enacted as the major feature of reform.").

79. Betsy Cooper & Kevin O'Neil, *Lessons From The Immigration Reform and Control Act of 1986*, MIGRATION POL'Y INST. 8 (August 2005), https://www.migrationpolicy.org/research/lessons-immigration-reform-and-control-act-1986 ("Despite IRCA's employer sanctions statute, demand for unauthorized immigrant workers remains a central factor in unauthorized immigration."); Bacon & Hing, *supra* note 20, at 86.

80. Ilya Somin, *If You Oppose Punishing and Deporting Undocumented Workers, You Should Also Oppose Punishing Employers that Hire Them*, VOLOKH CONSPIRACY (Aug. 11, 2019), https://reason.com/2019/08/11/

> Imagine that a person named Bob is seeking work to escape poverty and support his family. Congress enacts a bill known as Bob's Law. Under this legislation, Bob is allowed to live wherever he wants, and law enforcement agencies are forbidden to punish him for taking any job that might be offered him. But there's a catch: any business that hires Bob will be severely sanctioned for doing so, even though Bob himself will not be (perhaps they must pay a large fine, or the owner must go to prison, or both). Moreover, Congress earmarks funds for a special Bob's Law Enforcement Budget (BLOB), which can only be spent on prosecuting Bob's Law violators, so that officials will have a strong incentive to actually go after employers who dare hire Bob, as opposed to letting them off the hook. Formally, Bob's Law doesn't constrain Bob in any way. The only people who can be punished are the employers who hire him. But, in reality, the law consigns Bob to a life of poverty and desperation.[81]

Somin's hypothetical shows why ramping up enforcement resources to prosecute employers must leave migrants worse off in the long run. Unauthorized migrants who need to work will still work because of economic need—they will simply take jobs at lower wages with less labor protections.[82] The greatest consequences of enforcement do not fall on corporate criminal defendants, but on the stream of migrants they employ.

After identifying the ultimate "perpetrator" of the harm in criminal sanctions, it is equally difficult to pin down the imagined "victims" of the criminal conduct. Depending upon the formulation, the victims of the crime of illegally employing undocumented people are undocumented workers themselves who suffer from exploitation, or alternatively the American people who are harmed by the presence of undocumented people in the country competing in the labor force.[83] If the victims of criminal employer sanctions are undocumented workers, as articulated by the Obama administration and others, then one must ask whether this form of redress is hurting or harming victims.[84] If the victims are the American people, who are collectively harmed by the law-breaking employer and employee, the picture becomes no clearer. In defending the Mississippi ICE raids, U.S. Customs and Border Protection ("CBP") Chief Mark Morgan argued that the actions of undocumented people in their efforts to get jobs are not a "victimless crime" because they steal the identities of Americans and commit document fraud in order to gain

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if-you-oppose-punishing-and-deporting-undocumented-workers-you-should-also-oppose-punishing-employers-that-hire-them/.

81. *Id.*

82. Bacon & Hing, *supra* note 20, at 81.

83. Bill Ong Hing, *Beyond DACA—Defying Employer Sanctions Through Civil Disobedience*, 52 U.C. DAVIS L. REV. 299, 323–24 (2018) ("When he campaigned for the presidency, Trump regularly described unauthorized workers as an economic threat who are 'taking our manufacturing jobs,' 'taking our money,' and 'killing us.'" (citation omitted)).

84. *See infra* Section II.C.

employment.[85] If we take Morgan's defense seriously, it becomes unclear why employers are punished at all, unless they are accomplices to the scheme of "defrauding" Americans. Both of these characterizations are unpersuasive.

B. Employers Are Not Held Accountable Through Criminal Sanctions

Despite confusion about whether criminal sanctions target the appropriate wrongdoers to protect the right victims, it is still worth analyzing how criminal sanctions work in practice to evaluate whether they are salvageable as a migrant-protection strategy. Like many other criminal provisions targeting corporate crime, employer criminal sanctions provisions lack prosecutorial "bite" due to structural weaknesses that disincentivize prosecutors from maintaining cases. Criminal employer sanctions are extremely under-enforced, partially due to the difficulty of proving scienter in the corporate context. Minimal enforcement efforts end in plea deals, deferred prosecution agreements, or non-prosecution agreements. These agreements accomplish sanctions' ultimate goal of deterring migrant workers through the raids, audits, and firings that occur in the early stages of a case. It is impossible for prosecutors to target corporate wrongdoing without turning migrant workers into collateral damage as the prosecution builds its case and the employer seeks to minimize punishment.

Prosecutions for violations of § 1324a are extremely rare.[86] Although there were over ten million undocumented migrants residing in the United States in 2017,[87] the DOJ has rarely pursued more than fifteen cases annually under these provisions since they were first enacted in 1986.[88] For comparison, the DOJ prosecuted over 120,000 cases of illegal entry and re-entry in the period between April 2018 and March 2019 alone.[89] Syracuse University's Transactional Records Access Clearinghouse database tracks both corporate and individual prosecutions of § 1324a with data provided by the DOJ.[90] In the period from 2010 to 2019, there were ten to fifteen prosecutions (including both individuals and corporations) per year.[91] The table below shows the annual numbers of prosecutions of individuals

85. State of the Union, *supra* note 7.

86. For a comprehensive analysis of the under-enforcement of employer sanctions since their enactment in 1986, see Peter Brownell, *The Declining Enforcement of Employer Sanctions*, MIGRATION POL'Y INST. (Sept. 1, 2005), https://www.migrationpolicy.org/article/declining-enforcement-employer-sanctions.

87. Jens Manuel Krogstad, Jeffrey S. Passel & D'Vera Cohn, *5 Facts about Illegal Immigration in the U.S.*, PEW RSCH. CTR. (June 12, 2019), https://www.pewresearch.org/fact-tank/2019/06/12/5-facts-about-illegal-immigration-in-the-u-s/.

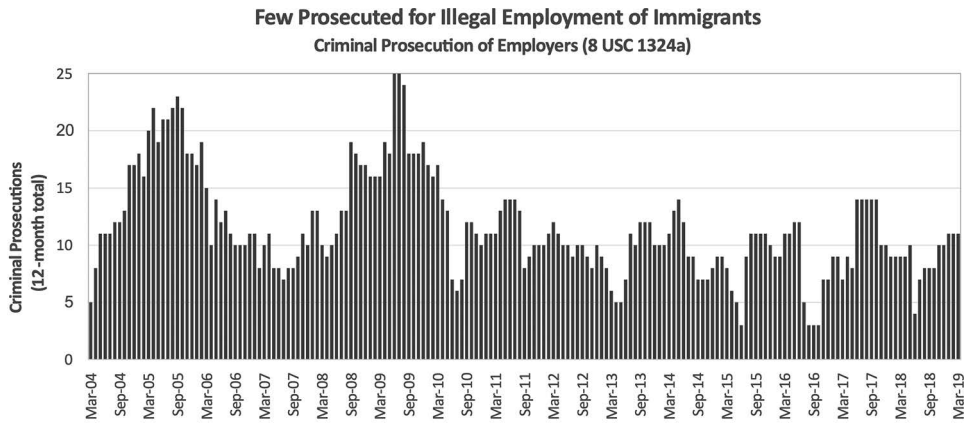
88. *Few Prosecuted for Illegal Employment of Immigrants*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, SYRACUSE UNIV. (May 30, 2019) [hereinafter *Few Prosecuted*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE], https://trac.syr.edu/immigration/reports/559/.

89. *Id.*

90. *TRAC Free Monthly Bulletins*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, SYRACUSE UNIV., https://trac.syr.edu/tracreports/bulletins/ (last visited Apr. 1, 2020).

91. *Few Prosecuted*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, *supra* note 88.

and corporations under § 1324a for each month from March 2004 through March 2019.



Source: Transactional Records Access Clearinghouse

From April 2018 to March 2019, only eleven individuals and zero companies were prosecuted by the Trump Administration for employing undocumented people.[92] In the remainder of fiscal year 2019, the DOJ prosecuted ten additional cases under § 1324a, which are not reflected in the data above.[93]

According to the Corporate Prosecution Registry, a corporation has never been convicted at trial of immigration-related crimes since the Registry began collecting data.[94] As mentioned above, prosecutors pursuing a § 1324a charge must prove that a person or corporation has engaged in a "pattern or practice" of hiring, recruiting, or referring for a fee undocumented workers.[95] Evidence that an employer "knowingly" employed undocumented people (i.e., the scienter element) is difficult for prosecutors to acquire in the corporate setting, especially when many large corporations contract their hiring and employment of laborers to external labor contractors or do not have an employer-employee relationship with undocumented workers.[96] From 2009 to 2019, ninety-five corporations were prosecuted for "immigration" violations, which is an umbrella term that the Corporate Prosecution Registry uses to refer to violations of § 1324, § 1324a, and other criminal provisions such as visa fraud.[97] During that time, seven prosecutions resulted in a non-prosecution agreement, two resulted in deferred prosecution agreements, and two were dismissed; the remaining prosecutions ended with plea deals.[98]

92. *Id.*
93. *Id.*
94. *Corporate Prosecution Registry*, *supra* note 66.
95. 8 U.S.C. § 1324a(a), (f).
96. Merchant, *supra* note 7 ("The 'knowingly' term has proved to be a huge defense for employers. . . . The employer says, 'I'm sorry, I didn't know they were unauthorized.'").
97. *Corporate Prosecution Registry*, *supra* note 66.
98. *Id.*

Unfortunately, most plea deals signed with individuals or corporations are either nonpublic or contain very little information about the background and facts of an individual case. Instead, non-prosecution and deferred-prosecution agreements between prosecutors and corporations attach a set of stipulated facts in the event of any further prosecutions. The Corporate Prosecution Registry obtains and publishes these agreements between prosecutors and corporations after requesting them under the Freedom of Information Act.[99] Most criminal cases are the result of DHS investigations that involve audits of company records or agents searching for undocumented aliens on company property.[100] In every deferred-prosecution or non-prosecution agreement brought under § 1324 or § 1324a in the last decade, all undocumented employees were terminated voluntarily by companies in the early stages of criminal investigation.[101] In many cases, mass arrests and detentions of employees by ICE were part and parcel of the criminal investigation.[102]

A review of these cases leads to a core truth about how criminal sanctions work: prosecutors want to prevent undocumented work, not exploitation. This outcome is not confined to criminal prosecutions. During the Obama administration, companies also used the mass firing of employees as a successful strategy to evade civil fines under § 1324a.[103] Further review of the deferred-prosecution and non-prosecution agreements from 2009 through 2019 also reveals that agreements reached between prosecutors and corporations *never* obligated the corporations to take any affirmative actions to improve conditions for workers. Companies were only obligated to adopt stricter standards for "discovering" undocumented workers, such as E-Verify or internal audits.[104] Non-prosecution agreements that force companies to change their behavior are illuminating because they reveal exactly the types of wrongdoing that prosecutors hope to prevent in the future—the agreements mandate compliance with § 1324a, not the creation of better working conditions.

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99. *Id.* ("All of the information contained on this website is publicly available, and was gathered from federal docket sheets, press releases, prosecutor's offices, as well as from FOIA requests.").

100. *See, e.g.*, Press Release, U.S. Att'ys Off., S. Dist. of Tex., Waste Management to Forfeit $5.5 Million for Hiring Illegal Aliens (Aug. 29, 2018), https://www.justice.gov/usao-sdtx/pr/waste-management-forfeit-55-million-hiring-illegal-aliens (stating that Homeland Security Investigations discovered sixteen illegal aliens and verified one hundred employees as fraudulently documented as a result of executing search warrants on company property).

101. *Corporate Prosecution Registry*, *supra* note 66.

102. *Corporate Prosecution Registry*, *supra* note 66; *see, e.g.*, Letter from Kenneth Magidson & Robert P. Rutt, U.S. Att'ys Off., S. Dist. of Tex., to Dennis Cain, ABC Pro. Tree Servs., Inc., Exhibit A (May 14, 2012), https://docplayer.net/13866023-May-14-2012-non-prosecution-agreement-abc-professional-tree-services-inc.html ("In March 2008, agents conducted traffic stops on ABC Professional Tree Services crews and detained a total of twenty-five employees who were determined to be unlawfully present in the United States.").

103. Bacon & Hing, *supra* note 20, at 102.

104. *See, e.g.*, Letter from Phillip A. Talbert & Christopher S. Hales, U.S. Att'ys Off., E. Dist. of Cal., to Neal Stephens & Grant Fondo, Counsel for Mary's Gone Crackers, Inc., Attachments B and C (July 15, 2016), https://www.justice.gov/usao-edca/file/878526/download (requiring Corporate Compliance Program with E-Verify and Corporate Compliance Reporting).

Finally, a company only incurs civil or criminal liability under § 1324a when it hires, recruits, or refers undocumented people.[105] The language of the statute suggests a traditional employer-employee relationship or a recruitment relationship, which does not capture the increasingly large number of alternative employment situations. Scholars have argued that this provision does not reach self-employed migrants[106] or migrants who are independent contractors, for example.[107] The regulations implementing the IRCA also exclude "domestic service in a private home that is sporadic, irregular[,] or intermittent" from the definition of employment.[108] Although these loopholes render sanctions inapplicable to the employers of large portions of migrants employed in alternate economies, this reality also suggests possibilities for protections other than sanctions.[109] Neither the structure nor the enforcement of criminal employer sanctions works to protect undocumented workers because, as the next section argues, criminal prosecution is not the proper tool for migrant labor protection.

C. Employer Criminal Sanctions Are Not Labor Protection

One powerful argument against eliminating the prosecution of employers who employ undocumented people arises in situations where employers are perpetrating a variety of harms that society feels needs to be punished. Both the Obama[110] and Trump[111] administrations, for example, invoked criminal employer sanctions as a regulatory tool to protect victims of the harms perpetrated by exploitative employers. These situations range from employers paying lower wages and providing lower standards of workplace safety, to more dangerous abuses like human trafficking where employees do not have the right to leave or are forced to work against their will. What tools other than criminal punishment can stop these abuses? Moving away from prosecution could, for some, lead to the conclusion that employers who are exploiting their undocumented workers have impunity for their egregious actions. But, as this Section explains, employers typically respond to prosecutions of this type by firing or deporting workers who are exploited—rather than improving working conditions for those workers—making it an

105. 8 U.S.C. § 1324a(a)(1).

106. Michael Mastman, *Undocumented Entrepreneurs: Are Business Owners "Employees" under the Immigration Laws?*, 12 N.Y.U. J. LEGIS. & PUB. POL'Y 225, 252 (2008).

107. *See* Heeren, *supra* note 17, at 245–46 ("The independent contractor exception opens a vast swath of occupations for unauthorized immigrant workers; landscapers, general contractors, barbers, and home health care workers are all examples of occupations commonly structured as independent contractors.").

108. 8 C.F.R. § 274a.1(h) (2020).

109. For a deeper explanation of the possibilities for protection, see *infra* Part III.B.

110. WHITE HOUSE, *supra* note 63.

111. Aliyah Veal, *U.S. Attorney in Mississippi to 'Aliens,' Employers: 'We're Coming After You'*, JACKSON FREE PRESS (Aug. 7, 2019), http://www.jacksonfreepress.com/news/2019/aug/07/us-attorney-mississippi-aliens-employers-were-comi/. In a press conference on the day of the Mississippi ICE raids, Hurst declared, "For those who take advantage of illegal aliens, to those who use illegal aliens for competitive advantage or to make a quick buck, we have something to say to you. If we find that you have violated federal criminal law, we're coming after you." *Id.*

ineffective means of redress. This Section also questions whether prosecuting employers for anti-impunity reasons relies too heavily on the assumption that the criminal justice system is a politically neutral and effective means of making victims whole.

1. Employer Sanctions Were Not Intended to Protect Undocumented Workers

The origin and purpose of employer criminal sanctions within the IRCA was never to protect workers, unlike other pieces of migrant protection legislation, such as the Migrant and Seasonal Agricultural Workers Protection Act of 1995.[112] Claims about using § 1324a to protect workers are almost always coupled, in the same breath, with claims about removing the employer "magnet" for undocumented people.[113] The nonpartisan Congressional Research Service even makes this point explicit in its report on worksite enforcement operations from 1999 to 2014, writing, "[I]t can be argued that the ultimate test for any approach to worksite enforcement by DHS or DOL is whether it helps reduce the size of the unauthorized labor force in the United States."[114]

Acting CBP Chief Mark Morgan endorsed the theory of criminal sanctions as labor protection in an interview with journalist Jake Tapper in August 2019 where he argued in defense of the Mississippi raids:

> I think that the American people need to understand . . . exactly what's happening. So these individuals seeking a better life first are being exploited by the cartels to come here . . . once they come into the United States, then they're further exploited by United States companies by paying reduced wages.[115]

Immediately after this statement, Morgan corrected Tapper's use of the word "undocumented" to describe the migrants arrested in the raids.[116] Morgan insisted that the correct adjective was "illegal" because the migrants who were arrested as part of the raids had committed the crime of entering the country illegally.[117] When faced with a video clip of an eleven-year-old child begging the government to release her father, who had been arrested as part of the raid, Morgan pointed out that although the girl was upset, her father had "committed a crime."[118]

As the interview described above shows, prosecuting employers for labor violations leads to all actors being equally culpable in the name of enforcing the "rule of law." Under this logic, if employers and employees are both guilty of wrongdoing (exploitation and working without documents, respectively), both must be

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112. *See supra* Section I.A; 29 U.S.C. § 1801 ("It is the purpose of this chapter to . . . assure necessary protections for migrant and seasonal agricultural workers . . . .").

113. Echaveste, *supra* note 7.

114. BRUNO, *supra* note 24, at 13.

115. State of the Union, *supra* note 7.

116. *Id*.

117. *See supra* note 14 (explaining the political controversy around the use of the words "undocumented" and "illegal").

118. State of the Union, *supra* note 7.

punished to the fullest extent of the law. The argument that prosecutors should "shift the burden" from employees to employers is ultimately an argument for selective prosecution in reverse, asking prosecutors to simply target other wrongdoers who are more capable of managing the consequences of prosecution. It is fundamentally impossible, however, to have your cake and eat it too. A law that criminalizes and deports workers or forces them to search for another—perhaps more vulnerable—working situation cannot be a genuine form of protection.[119]

It is useful to compare criminal prosecution under § 1324a to other large-scale criminal investigations to show how prosecution fails to protect undocumented workers from becoming collateral damage. Take for example labor trafficking, which is governed by a different set of laws under the Trafficking Victims Protection Reauthorization Act ("TVPRA"), but is still enforced via criminal prosecution to effectively punish the traffickers.[120] Trafficking cases have focused heavily on the phenomenon of sex trafficking, to the exclusion of labor trafficking, so they may be a less viable protection to undocumented workers in the first place.[121] Unlike criminal prosecution under § 1324a, undocumented workers who are trafficked ostensibly can gain permanent legal status in the form of a trafficking or "T" visa in exchange for cooperating in the prosecution of their traffickers.[122]

Another apt comparison is the prosecution of drug cartels. One attorney questioned why employers were not prosecuted for immigration-related offenses and complained that "justice is administered . . . the same way it's administered in every other area of law. . . . The lower-level person, the drug dealer, for example, he goes to jail. The distributor doesn't go to jail. He gets fined."[123] What this example fails to recognize is that the "lower-level" drug dealer may have the option of testifying about the crimes of his employer in exchange for a reduced sentence or lack of prosecution altogether. In the case of employer sanctions, however, this option does not exist. Undocumented workers are constantly vulnerable to termination or deportation simply by their presence in the workplace. There is no way that an undocumented person can escape criminalization or shift the prosecution onto their employer, even if the employer has committed other exploitative acts. Due to the constant threat of discovery and deportation, undocumented workers cannot be witnesses in criminal prosecutions unless they cooperate with the prosecutor as part of a trafficking investigation, as described above.

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119. *See* review of cases in Section I.A *supra*.

120. *See* 22 U.S.C. §§ 7101–7110. Section 7108 details the criminal enforcement provisions of the TVPA.

121. Srikantiah, *supra* note 41, at 177–78.

122. *Id*. at 175; *see also Victims of Human Trafficking: T Nonimmigrant Status*, U.S. CITIZENSHIP & IMMIGR. SERVS. (May 10, 2018), https://www.uscis.gov/humanitarian/victims-of-human-trafficking-and-other-crimes/victims-of-human-trafficking-t-nonimmigrant-status (defining T Nonimmigrant Status). Although it is promising in practice as a way to keep key witnesses in the United States during the prosecution of their traffickers, the promise of a T visa is elusive and may only be granted to "iconic" trafficking witnesses that appear to have exercised no agency in their decision to come and work in the United States. *See* Srikantiah, *supra* note 41, at 195–201.

123. Stockler, *supra* note 7.

2. Criminal Law Is Not the Proper Tool for Protecting Undocumented Workers from Abusive Employers

Like scholars of criminal law, human rights law scholars have struggled with the problem of whether declining to prosecute will lead to impunity for wrongdoers.[124] In contrast to the world of criminal employer sanctions, international human rights law has witnessed an enormous rise in the use of criminal law to redress "crimes against humanity" over the last several decades.[125] In this context, scholars urge that the use of criminal law to prosecute crimes against humanity may actually distract from the larger systemic inequalities that are at play in determining who has the power to exploit and prosecute. For example, studies of the International Criminal Court ("ICC") show that the ICC has regularly chosen political leaders from the Global South as targets for prosecution, but has found it difficult to prosecute powers from the Global North like the United States.[126] The use of international criminal law as an anti-impunity tool ignores—to its detriment—the global geopolitical realities that actually influence who the ICC targets.[127] The hopeful reliance on international criminal law to stop wrongdoing is an attempt to "divorc[e] law from politics," which is almost impossible in a system that is dependent upon support from major world powers like the United States for its legitimacy.[128] Anti-impunity for some is always impunity for others; to ignore this would be to ignore the distributive power of law and how the choice of who to punish is a product of design.

In the realm of immigration law, using individual criminal prosecutions to stop individual instances of migrant exploitation may distract from or hinder the larger issues behind why such exploitation persists: the lack of comprehensive immigration reform and the inability for migrants to obtain status or work authorization. For example, many scholars agree that millions of farmers were forced to leave family farms in Mexico in the 1990s after free trade provisions in NAFTA exposed Mexican markets to heavily subsidized U.S. staple crops, collapsing local markets for those commodities.[129] This inequitable trade policy paired with severe

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124. *See* ANTI-IMPUNITY AND THE HUMAN RIGHTS AGENDA 3 (Karen Engle, Zinaida Miller & D.M. Davis eds., 2016) (cautioning "against accepting a crude binary between anti-impunity and impunity, particularly if the latter is defined only by the absence of a criminal prosecution").

125. Karen Engle, *A Geneaology of the Criminal Turn in Human Rights*, *in* ANTI-IMPUNITY AND THE HUMAN RIGHTS AGENDA 15, 15 (Karen Engle, Zinaida Miller & D.M. Davis eds., 2016).

126. Vasuki Nesiah, *Doing History with Impunity*, *in* ANTI-IMPUNITY AND THE HUMAN RIGHTS AGENDA 95, 100–01 (Karen Engle, Zinaida Miller & D.M. Davis eds., 2016).

127. *Id.* at 101.

128. *Id.* at 114.

129. *See, e.g.*, Timothy A. Wise, *The Impacts of U.S. Agricultural Policies on Mexican Producers*, *in* SUBSIDIZING INEQUALITY: MEXICAN CORN POLICY SINCE NAFTA 163, 165 (Jonathan Fox & Libby Haight eds., 2010), https://www.wilsoncenter.org/publication/subsidizing-inequality-mexican-corn-policy-nafta-0 (mapping influx of imported agricultural goods from the U.S. to Mexico after NAFTA); Erik Loomis, *How Trade Deals and Immigration Laws Hurt Workers—Mexican Workers*, THE NEW REPUBLIC (Mar. 14, 2018), https://newrepublic.com/article/147450/trade-deals-immigration-laws-hurt-workersmexican-workers; Renée

restrictions on legal immigration led to a large increase in undocumented migration from Mexico to the United States.[130] Prosecuting individual food processors, which is a major area of ICE worksite enforcement, therefore does not affect the core structural reasons why so many Mexican workers were forced to leave their homes and farms and take jobs in the U.S. food system in the first place.[131]

Examples like these raise the question of whether criminalization is capable of neutrally creating optimal outcomes in a sphere of law that has been consistently shaped by nativist impulses and desires to remove "illegal" migrants who offer unskilled labor in the United States.[132] Because criminal prosecution of employers is almost always intermingled with job loss or arrest for the employees in question, clinging to criminal justice solutions may place too much faith in the system. If the argument advanced by critical race theorists that criminal law is structured as a form of racial control is accepted,[133] it seems improbable that criminal employer sanctions can somehow subvert the purpose of such law by protecting exploited people of color.

It is undoubtedly horrific and unsettling to consider the depths of exploitation that undocumented workers such as domestic workers, sex workers, and agricultural workers have endured due to their inability to seek outside intervention. This Note does not diminish the reality of those horrors. Instead, it asks whether there are other ways to imagine anti-impunity for the perpetrators of such harms. Anthropologist Mahmood Mamdani's critique of the tribunal-centric response to the atrocities committed in apartheid South Africa urges us to think about whether to define responsibility for "mass violence"—in this case the racist and discriminatory regime of apartheid—as "criminal or political."[134] If the responsibility for preventing mass violence and human rights violations lies in the political sphere, then policymakers must envision what reforms would disrupt the political power imbalance between undocumented people and exploitative employers. For Mamdani, the "object [of political reform] is not punishment, but a change of rules; not state creation, but state reform."[135]

Alexander, *Want to Understand the Border Crisis? Look to American Corn Policy*, THE COUNTER (July 24, 2018), https://thecounter.org/border-crisis-immigration-mexican-corn-nafta/ (discussing the fall in local prices and subsequent migration of Mexican farmers).

130. Salomon Cohen, *CAFTA: What Could It Mean for Migration?*, MIGRATION POL'Y INST. (Apr. 1, 2006), https://www.migrationpolicy.org/article/cafta-what-could-it-mean-migration.

131. *See* Preston, *supra* note 52; Liu, *supra* note 74. Both the Postville and Mississippi ICE worksite enforcement actions took place at food processing plants. *See also* DOUGLAS S. MASSEY, JORGE DURAND & NOLAN J. MALONE, BEYOND SMOKE AND MIRRORS: MEXICAN IMMIGRATION IN AN ERA OF ECONOMIC INTEGRATION 156–63 (2002) (examining immigration management in Mexico).

132. *See* Srikantiah, *supra* note 41, at 188–89 ("The term 'illegal alien' now also carries undeniable racial overtones and is typically associated with the stereotype of an unskilled Mexican male laborer.").

133. *See, e.g.*, Alec Karakatsanis, *The Punishment Bureaucracy: How to Think about "Criminal Justice Reform"*, YALE L.J. F. 848, 851 (2019).

134. Mahmood Mamdani, *Beyond Nuremberg: The Historical Significance of the Post-Apartheid Transition in South Africa*, *in* ANTI-IMPUNITY AND THE HUMAN RIGHTS AGENDA 329, 330 (Karen Engle, Zinaida Miller & D.M. Davis eds., 2016).

135. *Id.* at 354. Later in the same conference proceeding, Douglas Moyn wrote, "For of course, the alternative to anti-impunity (or any other agenda) is not doing nothing; it is doing something else." *Id.* at 69.

III. IF NOT PROSECUTION, THEN WHAT? FRAMING PRELIMINARY IDEAS FOR SOLUTIONS

So far, this Note has argued that using criminal employer sanctions to shift the blame of undocumented work from vulnerable workers to exploitative corporations is not a viable strategy for advocates. How, then, can advocates and citizens respond to massive raids like those in Mississippi in August 2019? It is not enough to avoid action because the enforcement of criminal employer sanctions is too flawed. In the absence of comprehensive immigration reform, advocates must still combat harms against undocumented workers ranging from wage theft to labor trafficking. The most effective policies empower undocumented workers to create bottom-up solutions to exploitation and relocate political power from the state to an organized undocumented workforce. Some preliminary solutions for immigrant rights advocates include: (a) using rights-based language to bring attention to the (mis)treatment of workers; (b) enfranchising workers in localities and unions to combat exploitative practices; and (c) using powerful state and corporate resources to shield workers from federal immigration enforcement.

A. Rights-Based Language and Discourse

Criminal law normatively shapes our conceptions about which behaviors damage individuals and society. Prosecution is one way of identifying harms done to society and taking steps to redress those harms, but this normative work is done in a variety of fields, each with their own lexicon and language. Using rights-based language to bring attention to the (mis)treatment of workers has a number of advantages. Critiquing the exploitation of undocumented workers through the lens of human rights facilitates coalition-building across borders to identify similar harms occurring globally. Understanding the pervasive threat of criminalization and exploitation that undocumented workers face may be easier with language that can be communicated on an international stage.

States' "ability to deny Third World migrants access to naturalization" is a "legal and internationally sanctioned means of discrimination" that diminishes undocumented people's access to human rights.[136] Allison McCarthy, writing immediately after the Postville, Iowa, raids in 2008, called for treatment of the raids as a human rights issue rather than merely a domestic labor or immigration issue.[137] The right to immigrate has been recognized as a "moral" human right that is grounded within other recognized rights, such as internal freedom of movement, freedom of religion, freedom of association, and freedom of expression.[138] Worker

136. Harsha Walia & Proma Tagore, *Prisoners of Passage: Immigration Detention in Canada*, *in* BEYOND WALLS AND CAGES: PRISONS, BORDERS, AND GLOBAL CRISIS 74, 83 (Jenna M. Loyd, Matt Mitchelson & Andrew Burridge eds., 2012) (internal citation omitted).

137. McCarthy, *supra* note 54, at 306.

138. Kieran Oberman, *Immigration as a Human Right*, *in* MIGRATION IN POLITICAL THEORY: THE ETHICS OF MOVEMENT AND MEMBERSHIP 32, 33, 35 (Sarah Fine & Lea Ypi eds., 2016).

exploitation is a powerful demonstration of the harms that occur when the human right to immigrate is infringed.

Geoffrey Heeren has suggested that the immigrant "right to work" is also grounded in American constitutional law through natural law concepts and the Fourteenth Amendment Due Process Clause.[139] He points to late-nineteenth and early-twentieth century Supreme Court jurisprudence striking down states' attempts to restrict employment for migrant workers because the right to work was an "essential part of [their] rights of liberty and property, as guaranteed by the fourteenth amendment."[140] Heeren claims that because the right for noncitizens to work was historically protected and not seriously eroded until the 1970s and 1980s, the Due Process right to work is "objectively, deeply rooted" in Fourteenth Amendment protection under the standard of *Washington v. Glucksberg*.[141]

The major limitation of co-opting the language of human rights to protect undocumented workers is that, as discussed above in Section II.C, the current international human rights regime may favor criminal prosecution as a means of redress for violations. This raises parallel concerns about the adequacy of criminal prosecution tools on an international scale. Migrant communities are using rights-based language, however, to draw attention to their treatment through alternative models that lie outside of international criminal courts.

One such model is Tribunal 12, a people's tribunal convened in Stockholm, Sweden, which placed symbolic adjudicatory power in the hands of migrants most affected by their exclusion.[142] Tribunal 12 was organized in the style of the International War Crimes Tribunal set up by Bertrand Russell and Jean-Paul Sartre in 1967, which had no "juridical authority," and heard moral claims, not legal ones.[143] Tribunal 12 set up a mock jury and witnesses made up of representatives of migrant populations from four continents to consider the difficult task of assigning responsibility for the thousands of migrant deaths that occurred as the European Union refused entry to asylum seekers.[144] Under the theme "We Accuse Europe," the tribunal called out the "violation of human rights and the systematic mistreatment of refugees, migrants and asylum seekers."[145] This model was designed to "trust and accept" the testimony of migrants and demonstrate how

139. Heeren, *supra* note 17, at 251.

140. *Id.* at 251 n.57 (quoting Powell v. Pennsylvania, 127 U.S. 678, 684 (1888)).

141. *Id.* at 247 (quoting Washington v. Glucksberg, 521 U.S. 702, 703 (1997)).

142. Jennifer Allsopp, *Tribunal 12: Migrants' Rights Abuses in Europe*, OPENDEMOCRACY (May 15, 2012), https://www.opendemocracy.net/en/5050/tribunal-12-migrants-rights-abuses-in-europe/.

143. Jamie H. Trnka, *"We Accuse Europe": Staging Justice for Refugees, Migrants and Asylum Seekers in Europe*, CRITICAL STAGES: IATC J. (Dec. 2016), http://www.critical-stages.org/14/we-accuse-europe-staging-justice-for-refugees-migrants-and-asylum-seekers-in-europe/.

144. *Id.*

145. Allsopp, *supra* note 142. To read the jury's verdict in Tribunal 12, see *Tribunal 12: The Verdict*, ICORN (May 14, 2012), https://www.icorn.org/article/tribunal-12-verdict.

human rights violations against migrants arriving on European shores were not addressed by international human rights institutions.[146]

Models like Tribunal 12 can be crucial for helping to identify forms of redress that would be most desirable for populations undergoing systemic exploitation. They "demand a politics of listening that looks to realizing justice both in and beyond the law, based on our common experiences of loss and vulnerability."[147] Peoples' tribunals and restorative justice models have the potential to remedy the power imbalances that exist in prosecution systems by allowing migrants to create and demand their own preferred forms of redress on a public stage.

B. Enfranchisement of Workers in Localities and Unions

Suffrage and union membership can serve as institutional bulwarks against corporate exploitation and division of different groups of marginalized people. The prosecution model is the ideal tool for immigration restrictionists who want to use employer sanctions on corporate and individual "wrongdoers" who violate immigration laws. This model positions the state as a protective device between the American people and the "criminal" immigrants who are deemed a threat by the nature of their presence and work in the United States. For those on the other end of the political spectrum who are concerned about the possible exploitation of workers, an embrace of the prosecution method ignores two core ways that marginalized people have sought to protect their rights: democratic voting and union membership.

Some scholars believe that noncitizen voting in localities will disrupt the cycles of inequality between migrants and citizens who live together in the same geographic area.[148] This proposal draws on the histories of alien suffrage in the United States in the nineteenth century.[149] Between 1877 and 1926, various states slowly abolished the practice of alien suffrage.[150] Advocacy for immigrant voting has taken place largely at the local level.[151] In New York City, noncitizen parents of children were able to run for, vote in, and be leaders of local school boards.[152] Similarly, noncitizen participation and leadership in local elections would allow

146. Trnka, *supra* note 143.

147. Dianne Otto, *Impunity in a Different Register: People's Tribunals and Questions of Judgment, Law, and Responsibility*, *in* ANTI-IMPUNITY AND THE HUMAN RIGHTS AGENDA 291, 293–94 (Karen Engle, Zinaida Miller & D.M. Davis eds., 2016).

148. *See, e.g.*, Monica W. Varsanyi, *Fighting for the Vote: The Struggle against Felon and Immigrant Disenfranchisment*, *in* BEYOND WALLS AND CAGES: PRISONS, BORDERS, AND GLOBAL CRISIS 266, 270–73 (Jenna M. Loyd, Matt Mitchelson & Andrew Burridge eds., 2012).

149. *Id.* at 270; *see also* AZIZ RANA, THE TWO FACES OF AMERICAN FREEDOM 237 (2010) (explaining how suffrage laws promoted immigration and how their gradual elimination was one of the first signs of "retreating settler politics").

150. Varsanyi, *supra* note 148, at 271.

151. *Id.*

152. *Id.* at 271–72.

important stakeholders to have a voice in the policies that most affect their daily lives as workers.

Other scholars espouse the same democratic ideal through a lens of union membership across borders. Labor and immigration law scholar Jennifer Gordon proposes a concept of "transnational labor citizenship," an immigration status that would "entitle the holder to come and go freely between the sending country and the United States, and to work in the United States without restriction."[153] Gordon argues that workers cannot rely on robust enforcement to ensure better working conditions for undocumented people, so workers must be allowed to press for decent work through joining a transnational union in both sending and receiving countries.[154] Immigration status would be contingent upon joining these labor organizations and would not be tied to an individual employer.[155] Gordon's proposal goes beyond just empowering undocumented people to refuse substandard working conditions—she envisions that transnational citizenship would help to unite all workers in the United States "across the boundaries of nationality, race, and immigration status."[156]

Nontraditional workplace structures like cooperatives could also offer protection to undocumented workers. Migrants in these nontraditional employer-employee relationships lie further from the reach of criminal employer sanctions,[157] so workplace structures like cooperatives that are owned and operated by their employees have significant potential for improving work conditions for undocumented people. Cooperatives provide an "exit strategy from precarious employment relations, as well as a community and sanctuary for those within the workplace who are undocumented."[158] Cooperatives require a degree of outside community investment and support, however, which may be difficult to build when members face the fear of deportation.[159]

C. Resisting Employer Sanctions

The two options described above provide alternatives that, while comprehensive, assume a locus of political power in human rights regimes and labor organizations that does not fully reflect the reality of the situation in the United States. In a world where corporate criminal sanctions have been embraced by several administrations, it is worth thinking about solutions that presume the existence of corporate sanctions and allow other actors—including state and corporate actors—to step in on behalf of the undocumented people that these sanctions target.

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153. Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503, 563 (2007).

154. *Id.* at 567.

155. *Id.*

156. *Id.* at 569.

157. *See* Mastman, *supra* note 106, at 252; Heeren, *supra* note 17, at 245–46.

158. Taylor Maschger, *The Importance of Immigrant Worker Cooperatives*, COMMODITIES, CONFLICT, & COOP. (2017), https://sites.evergreen.edu/ccc/labor/immigrant-worker-cooperatives/.

159. *Id.*

1. State Agencies and Localities

States and localities have vast police powers that they can marshal to protect undocumented workers without encroaching upon or preempting federal immigration law. Temple Law Professor Jennifer J. Lee has developed a typology of methods of "undocumented work resistance" that states and cities can use, in conjunction with worker organizing, to advance the legality of undocumented work.[160] States and localities can enact (a) recognition measures that recognize legal aspects of undocumented work such as access to professional licenses, tax credits, state public benefits, and the formation of worker cooperatives;[161] (b) protection measures that "increase or facilitate the exercise of rights available to undocumented workers;"[162] and (c) noncooperation measures such as prohibiting local government officials from asking about immigration status or assisting federal government officials in carrying out federal worksite enforcement.[163]

Former Board of Immigration Appeals judge and special counsel to the House Subcommittee on Immigration, Border Security, and Claims Nolan Rappaport noted that "[t]he government has had more than 30 years to make the sanctions work, and it hasn't happened."[164] Rappaport argues that the answer to the problem of exploitation of migrant workers is to abandon the enforcement powers of the DOJ under employer sanctions and shift instead to enforcement actions by the Department of Labor ("DOL") to eliminate what he terms the "exploitation magnet."[165] Rappaport makes a strong point: it is possible that the enforcement powers of the DOJ are too intertwined with those of ICE, and it may be more effective to protect workers from exploitation by situating government enforcement within another agency exclusively designed to protect workers.[166] If the DOL declines to vigorously enforce labor laws, however, state and local agencies that protect workers can take civil action against employers of undocumented workers who commit labor violations, rather than rely on criminal prosecution. These actions would fall into category (b) of the typology created by Lee.

In October 2017, California passed a "noncooperation" law that directs the activities of employers interacting with ICE and other enforcement agencies,

160. Jennifer J. Lee, *Redefining the Legality of Undocumented Work*, 106 CALIF. L. REV. 1617, 1629 (2018).

161. *Id*. at 1630.

162. *Id*. at 1636.

163. *Id*. at 1639. For more on the 287(g) program, which facilitates the cooperation of federal and local law enforcement agencies to carry out interior immigration enforcement, see generally *Fact Sheet: The 287(g) Program: An Overview*, AM. IMMIGR. COUNCIL (July 2, 2020), https://www.americanimmigrationcouncil.org/research/287g-program-immigration.

164. Nolan Rappaport, *To Tackle Illegal Immigration, Go After the Employers*, THE HILL (Nov. 6, 2017), https://thehill.com/opinion/immigration/358892-to-tackle-illegal-immigration-go-after-the-employers.

165. *Id*.

166. *See id*. Rappaport's argument finds support in a Memorandum of Understanding signed in 2011 between the DHS and DOL that prevents ICE from conducting worksite enforcement actions on employers who are currently under investigation by the DOL for labor law violations. *See* BRUNO, *supra* note 24, at 10.

exemplifying actions states may take under category (c) of Lee's typology.[167] California Law AB 450, the Immigrant Worker Protection Act ("AB 450"), prohibits employers from "provid[ing] voluntary consent to an immigration enforcement agent to enter any nonpublic areas of a place of labor," unless "the immigration enforcement agent provides a judicial warrant."[168] After the DOJ attempted to enjoin this provision under the Supremacy Clause, the Ninth Circuit upheld the constitutionality of AB 450, holding that the law neither conflicted with federal law nor "regulated" the federal government under the doctrine of intergovernmental immunity.[169] The United States filed a petition for certiorari for the case in October 2019, which was denied on June 15, 2020.[170]

2. Corporate Resistance

If the trends in lax corporate prosecution for immigration violations continue, corporations can wield their relative strength in the face of criminal law to deliberately employ undocumented people and shield them from federal immigration enforcement. Business professors Elizabeth Brown and Inara Scott propose that corporations can resist criminal sanctions (and the simultaneous criminalization of their employees) when faced with prosecution by arguing that they employ, house, or otherwise protect undocumented workers in accordance with their sincerely held religious beliefs under the capacious protection of the Religious Freedom Restoration Act ("RFRA").[171] Sanctuary businesses like restaurants,[172] taxis,[173] and software companies[174] could argue that they have a sincerely held religious belief that requires them to provide protection to undocumented people. While the government has a compelling interest in enforcing immigration laws, conducting aggressive worksite enforcement is not the least restrictive means of advancing that interest, as required by RFRA.[175] This theory draws support from the Supreme Court's decision in *Burwell v. Hobby Lobby Stores, Inc*., where the Court established that a closely held corporation could not be compelled to provide certain forms of birth control coverage for its employees based upon its religious beliefs opposing birth control.[176]

Professor Bill Ong Hing urges corporations to make good on their commitment to support beneficiaries of the Deferred Action for Childhood Arrivals ("DACA")

167. Immigrant Worker Protection Act, ch. 492, Cal. Stat. (A.B. 450) (2017) (codified in scattered sections of CAL. GOV'T CODE and CAL. LAB. CODE).

168. CAL. GOV'T CODE § 7285.1(a).

169. United States v. California, 921 F.3d 865, 880 (9th Cir. 2019).

170. United States v. California, No. 19-532, 2020 WL 3146844, at *1 (U.S. June 15, 2020).

171. Brown & Scott, *supra* note 48, at 1117, 1125.

172. *Id*. at 1127.

173. *Id*. at 1126.

174. *Id*. at 1128.

175. *Id*. at 1134–35.

176. *Id*. at 1123; 573 U.S. 682, 736 (2014).

program, collectively known as "Dreamers,"[177] by engaging in civil disobedience and deliberately employing DACA recipients in protest against the arbitrary termination of DACA.[178] While some corporations risk the criminal penalties of employer sanctions for reasons of economic expediency (e.g., it is cheaper for employers to hire undocumented people and pay them substandard wages and benefits), Hing argues that other corporations can, with full knowledge of the criminal penalties that might be levied against them, risk criminal sanctions to express their moral opposition to the removal of Dreamers and other migrant populations.[179] This method of resistance against employer sanctions may be particularly appropriate considering the decline in corporate prosecutions that Brandon Garrett identified under the Trump administration.[180] The great limitation of both corporate sanctuary and corporate civil disobedience is that they place the ultimate decision to protect undocumented workers within the hands of corporations, which already have vast discretion over the fate of vulnerable undocumented workers. Because both rights-based discourse and enfranchisement of workers in their homes and workplaces place decision-making power squarely within the hands of those who are most affected by the collateral consequences of employer sanctions, they are stronger solutions than these stopgap measures of corporate resistance.

CONCLUSION

After analyzing the weaknesses in the prosecution of corporate crime, white-collar crime expert Brandon Garrett argues that the United States sorely needs a stronger prosecution mechanism for corporations.[181] Garrett's conclusion has been echoed by immigration lawyers and journalists alike after massive ICE raids,[182] but this Note argues that employing undocumented workers is fundamentally different from other types of white-collar crime. Regardless of the efficacy of prosecution for financial crimes, immigration-related corporate crime is not best solved using the tools of prosecution.

Greater enforcement of criminal employer sanctions will force undocumented people into lower-paying jobs in the name of protecting Americans from the consequences of undocumented work. Sanctions also allow corporations to directly transfer the consequences of their criminality to undocumented people. Because criminal employer sanctions are not capable of being used as effective labor

177. *See* Fact Sheet, *The Dream Act, DACA, and Other Policies Designed to Protect Dreamers*, AM. IMMIGR. COUNCIL (Aug. 27, 2020), https://www.americanimmigrationcouncil.org/research/dream-act-daca-and-other-policies-designed-protect-dreamers.

178. Hing, *supra* note 83, at 313.

179. *Id.* at 318–19.

180. *See supra* Section I.B.3; Garrett, *supra* note 8, at 110.

181. BRANDON GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS 273 (2014) ("The distinctive purpose of the criminal law is lost when prosecutors fail to impose effective consequences on the most serious corporate violators.").

182. *See* Merchant, *supra* note 7.

protection, immigrant rights advocates should push back against the rhetoric that justifies employer sanctions for this purpose. Although it is rational to worry about how eliminating employer sanctions could present impunity for employers who commit egregious harms against their undocumented employees, it is worth thinking about how attempting to prevent impunity on a case-by-case basis could actually detract from the political organizing needed to transform the conditions that allow employers to commit these harms—the lack of pathways to legal status for undocumented workers in the United States.

Questioning the efficacy of prosecution and punishment as a means of redress forces policymakers to reconceptualize how best to protect workers like those rounded up in the August 2019 Mississippi raids. In lieu of criminal employer sanctions, solutions should be adopted that relocate the power of naming and preventing the most egregious harms of undocumented work to those most affected by those harms. Undocumented workers can situate their experiences within a global, widely-accepted language of human rights violations, and rally support for more robust protection from exploitative employers. Workers should be empowered to self-protect through democratic participation in local elections and membership in unions, including transnational unions. Finally, states and corporations can use the significant powers granted by federalism and the Constitution to "redefin[e] the legality" of undocumented work.[183]

Scholar and activist Audre Lorde reminds us that "the master's tools will never dismantle the master's house."[184] The IRCA's criminal employer sanctions operate as feeble "master's tools" designed to punish employees for the crime of undocumented work. While the goal of "shifting the blame" of criminal sanctions from employee to employer is admirable, immigrant rights advocates should structure legal solutions that are grounded in a vision for migrant work that is free of ICE raids, labor trafficking, and the criminalization of undocumented work altogether.

183. Lee, *supra* note 160, at 1618.

184. AUDRE LORDE, SISTER OUTSIDER: ESSAYS AND SPEECHES 112 (2007) (emphasis omitted).