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CRIMINALIZING WORK AND NON-WORK: THE DISCIPLINING OF IMMIGRANT AND AFRICAN AMERICAN WORKERS

ABSTRACT

The realities of low-wage work in the United States challenge our basic notions of freedom and equality. Many low-wage workers share the condition of being stuck in jobs toiling excessive hours against their will for less than poverty wages in autocratic workplaces. Yet the racial politics of immigration and labor are often used to stir hostility between low-income United States citizens--especially African Americans--and undocumented immigrants. Perceived competition for jobs and racist stereotypes are exploited by opportunistic politicians and employers as well to produce frictions between workers who face similar conditions.

Still, there is a strong basis for undocumented and African American low-wage workers to unify. Both communities have experienced a deeply fraught relationship to freedom and coercion in which criminalization has figured prominently. This Article examines the similar attributes between two regimes of criminalization. The first regime is the Immigration Reform and Control Act of 1986 (“IRCA”), which has

resulted in the criminalization of work for undocumented immigrants. IRCA, enacted more than thirty years ago, was the first time that Congress prohibited employers from hiring workers who are unauthorized to work in the United States. The second regime is the criminalization of non-work (i.e., the condition of being unemployed or of quitting one's job to search for better employment elsewhere) for black workers in the post-Civil War South through the enforcement of vagrancy laws. A crucial feature of the Black Codes enacted after the Civil War to comprehensively restrict freed black men and women were vagrancy statutes that provided the coercive apparatus for pushing freed black men and women into forced labor.

This Article juxtaposes the two enforcement regimes and brings together two areas of literature to draw attention to intersecting features of criminalization. Foremost, the criminalization of work and non-work become instruments of employer control in which state power is placed into private hands to fracture worker unity, to terrorize workers, and to discipline workers. Further, both regimes of criminalization have depended on racialized narratives and stereotypes to rationalize criminalization. This Article draws these historical parallels with the hope that such a perspective can help build meaningful alliances between undocumented immigrants and African ***291** Americans to take apart systems of criminalization that advance exploitation, immobility, and inequality.

*293 I. INTRODUCTION

The realities of low-wage work in the United States challenge our basic notions of freedom and equality. Many low-wage workers toil excessive hours against their will for less than poverty wages in autocratic workplaces.[1] Other low-wage workers barely cobble a living on part-time work as employers drive labor costs down by discarding full-time jobs.[2] With weakened unions, the constant threat of outsourcing, and the ascendancy of a service economy built on low pay, the right to quit is more fiction than reality for many low-wage workers.[3]

These alarming trends hit undocumented immigrant workers especially hard. The Supreme Court has sanctioned the unequal status of undocumented immigrant workers in two cases.[4] According to some labor organizers and advocates, United

States immigration laws have spawned modern-day slave labor.[5]

In fact, "unfree" and "bound" labor in various forms, including slavery, has been a mainstay of the United States economy since the founding of this country.[6] A look at history and law reveals ***294** criminalization as a mode of labor regulation and racial control that was central to the project of maintaining a class of unequal and unfree black workers after slavery.[7] Post-Civil War, criminal laws proliferated to empower planters and other southern employers to restrict the mobility of newly freed black men and women who sought to reject "slavery's hours and slavery's pace."[8] This history of criminalization bears directly on the criminalization of African American communities today, resulting in the mass incarceration of black men and women,[9] the use of cheap prison labor by corporations,[10] and the freedom of private employers to discriminate against people who have criminal convictions.[11]

Criminalization also lies at the crux of modern immigration laws regulating undocumented workers. Over three decades ago, Congress enacted the Immigration Reform and Control Act of 1986 ("IRCA").[12] It was the first time Congress made the private workplace a direct site of immigration regulation by banning the employment of ***295** undocumented workers.[13] The "employer sanctions" provisions of IRCA prohibit employers from knowingly hiring or employing unauthorized workers.[14] IRCA also requires employers to verify whether an employee is authorized to work through the "I-9" documentation process and to maintain certain kinds of paperwork.[15] Employers who violate either the substantive or administrative provisions of IRCA are subject to civil and criminal penalties.[16] IRCA does not, however, impose criminal sanctions on undocumented workers who seek, solicit, or engage in employment.[17]

IRCA's employer sanctions regime is momentous not only as legislation promoting employer enforcement of immigration law. It is a potent instance of labor regulation bearing certain similarities to systems of criminalization invoked by employers to control black and poor white workers in earlier eras of United States history. Some commentators have begun to emphasize these shared characteristics, arguing that IRCA recalls or "perpetuates the shameful legacy of slavery in the U.S."[18] by handing over state enforcement powers to employers who wield such power to "terrorize [] workers and suppress worker dissent."[19] Labor organizers, unions, scholars, and lawyers publicize the "corrosive effects" of deputizing employers to enforce immigration laws in the workplace.[20] Unscrupulous employers can take advantage of their enforcement powers by selectively applying the I-9 documentation process to terminate unauthorized workers who ***296** protest exploitation, thereby squelching collective efforts to improve working conditions.[21]

Equally significant, and underscored by labor and immigration advocates, are the pernicious effects of IRCA on U.S.-born workers. Exploitation becomes universalized as employers use the criminalization of undocumented workers to systematically undermine the labor and employment rights of U.S.-born and other legalized workers in low-wage industries.[22] When employers use IRCA as a union-busting tool to purge the workplace of immigrant workers who support an organizing drive, all workers at the workplace--regardless of their immigrant or citizen status--are weakened.[23] When employers use their IRCA enforcement powers to intimidate undocumented workers into accepting sub-minimum wages and conditions, citizen and other legalized workers are also forced to compete in a race-to-the-bottom.[24] Based on the racial and economic stratification of jobs, the U.S.-born workers most likely harmed by IRCA's employer sanctions provisions come from communities of color. Low-wage employment falls disproportionately on African Americans, Latinos, and Asians, who often labor beside undocumented immigrant coworkers.[25]

***297** The use of criminal sanctions to terrorize and repress workers, to control their wage demands and working conditions, and to attack their mobility has deep historical roots.[26] This Article examines the similar attributes between the criminalization of work for undocumented immigrants under IRCA and the criminalization of non-work for black workers in the post-Civil War South. Specifically, this Article juxtaposes the two enforcement regimes and brings together two areas of literature to draw attention to intersecting features of criminalization, in which state power is used by private employers to discipline and control workers.

The Black Codes enacted by southern legislatures in 1865-1867 sought to comprehensively control and restrict freed black men and women in every aspect of life, especially as workers.[27] Vagrancy laws forcing newly freed Blacks into working for exploitative wages under inhumane conditions[28] were central to a system of criminalization aimed at preserving a captive workforce and abridging the political and social freedom of black people.[29]

This Article argues that IRCA's employer sanctions and the post-Civil War vagrancy statutes reflect one another in important ways. First and foremost, embedded in the criminalization of work and non-work are efforts to undercut workers' autonomy, even when employers are ostensibly targeted. This lies at the heart of both labor contexts. The autonomy at stake is the freedom to challenge work conditions directly through organizing or indirectly by "voting with your feet" through seeking better work elsewhere. The criminalization of work and non-work become instruments of

employer control in which state power is placed into private hands to suppress worker dissent, worker organizing, and worker radicalism. The price paid by workers is mobility, freedom, and autonomy.

***298** Second, employers use the criminalization of targeted groups of workers to repress broader groups of workers. Criminalization provides the coercive apparatus by which employers pit workers against one another and keep all workers in their place.

Third, the enforcement of IRCA against undocumented workers and the enforcement of the post-Civil War vagrancy statutes against black workers have depended on criminalization narratives for their effectiveness. These narratives exploit racist stereotypes to incite fear and resentment, and to rationalize criminalization. The criminalization narratives used to justify post-Civil War vagrancy statutes survive in present-day form to stigmatize African American workers and to obfuscate the impact of structural racism on the employment opportunities of African American communities.[30]

The criminalization of work for undocumented immigrants and of non-work for African Americans after the Civil War represent different experiences that cannot be conflated. The historical context of criminalization of non-work-- backed by systemic state and private violence--growing out of slavery has to be kept in mind.[31] This Article does not argue that the two systems of criminalization are identical, only that they share crucial features that illuminate how criminalization--i.e., state law enforcement power--is used to undermine equality, mobility, and freedom in specific labor contexts.

As well, workers under both systems of criminalization have not stood as passive victims. They have resisted by exercising agency and autonomy wherever possible and with great risk. Slavery "gave rise to numerous forms of black resistance."[32] After the Civil War, and even during post-Reconstruction,[33] black workers "resist[ed] plantation ***299** discipline"[34] through acts of labor militancy that included direct confrontation with employers, strikes, work stoppages, refusal to make contracts,[35] and participation in evolving grassroots movements.[36] Further, vagrancy and contract labor laws never succeeded in entirely cutting off black mobility.[37]

Similarly, undocumented workers continue to organize and join unions and workers' centers despite IRCA and threats of detention and deportation. They have participated in groundbreaking organizing campaigns in the janitorial, drywall, home care, domestic work, and food processing industries.[38] Their successes show that they can

be on the "leading edge" in establishing new forms of organizing that challenge the traditional labor law regime.[39] Some workers' centers seek to bridge the immigration divide by trying to unify undocumented immigrants as well as African American and Puerto Rican low-wage workers in community and workplace struggles.[40]

This Article draws historical parallels between undocumented workers under IRCA and black workers under the post-Civil War statutes with the hope that this can help workers find new ways to understand one another's experiences. Perhaps these parallels can contribute to a sense of shared identity that workers can draw upon in surmounting the politics of racial division. The repeal of IRCA's employer sanctions provisions will require broad groups of workers to engage in the fight for repeal. Addressing the economic ***300** marginalization of certain African American communities will require broad groups of workers to engage in the fight against structural racism. Status differentiation through criminalizing targeted classes of workers not only splinters workers, but also sanctions coercion, inequality, immobility, and exploitation. Viewing IRCA against the criminal laws that regulated black workers after slavery highlights shared characteristics between these enforcement regimes and will point to the alliances that must be forged between immigrant and citizen communities to defeat laws that hurt the interests of low-wage workers.

Part I of this Article examines the employer sanctions provisions of IRCA as a system of criminalization invoked by employers to discipline undocumented and citizen low-wage workers. Part II discusses post-Civil War criminal laws that regulated vagrancy, prohibited employers from recruiting another employer's workforce, and barred the interstate recruitment of black workers. Part III explores the similarities between IRCA and post-Civil War criminal laws in legalizing inequality and exploitation. This Article concludes by reflecting on the need for alliances between undocumented immigrants and African American communities that each have experienced their own history of criminalization in a work context. These alliances are needed to repeal IRCA's employer sanctions, to pursue common interests in other struggles both inside and outside the workplace, and to undo systems of criminalization that advance exploitation and oppression.

II. IRCA'S EMPLOYER SANCTIONS AS CRIMINALIZATION OF WORK

A. Employer Sanctions as Employer Swords

It is counter-intuitive that a law purporting to penalize employers has become a tool of intimidation wielded by unscrupulous employers against workers who assert their rights.[41] Most scholars and labor advocates who follow the intersection of labor and immigration laws agree that IRCA's employer sanctions regime has been disastrous for workers.[42] According to Professor Michael Wishnie, "IRCA's most ***301** pernicious consequence has been to strengthen the coercive power exercised by exploitative employers over non-citizens in the workplace, overwhelming any disincentive based on the risk of civil penalty and making employment of undocumented workers irresistible in low-wage, labor-intensive industries."[43]

"Employer sanctions" is a misnomer. IRCA deputizes employers to enforce immigration laws.[44] By empowering and requiring employers to check the immigration status of workers,[45] IRCA hands state power to employers that they can conveniently use against workers.[46] At the same time, the risk of IRCA penalties on employers who knowingly hire undocumented workers or who fail to comply with the I-9 verification requirements is slim.[47]

For law-breaking employers, the cost-benefit calculus of hiring undocumented workers and initially ignoring their obligation to verify the status of workers is undeniably appealing.[48] An employer might never mention anything about IRCA and the I-9 form, that is, until a ***302** worker or group of workers challenges the employer's failure to pay the minimum wage or overtime pay, or complains about safety violations, workloads, or discrimination.[49] Then the employer will resort to the I-9 form as a means to rid the workplace of undocumented workers who are deemed troublemakers and to intimidate other workers into submission.[50] If an employer filled out I-9 forms for workers at the time of their hire, he will hide behind the pretext of re-verifying work documents or social security numbers to avoid rehiring workers who protested exploitative demands, participated in labor disputes, or engaged in collective bargaining.[51] These manipulations of IRCA shut down organizing by sowing fear, insecurity, and division among workers.

The term "employer swords" reflects reality more accurately than "employer sanctions."[52] IRCA's apparatus of verifying work status rests in the control of employers; the exercise of this power is usually selective and strategic.[53] Exploitative employers turn a blind eye to immigration status as long as workers accommodate their demands.[54] As soon as workers organize or lodge complaints, employers can quickly resort to verifying immigration documents as an intimidation tactic. It is at work sites with the most radicalized workers where ***303** unscrupulous employers are likely to brandish the I-9 form as a sword.[55]

Employer exploitation under IRCA is not simply the product of cost-benefit calculations of individual employers or of lax penalties and inadequate enforcement against employers.[56] The power of employers to manipulate IRCA's employer sanctions provisions against workers is fixed in the law itself.[57] IRCA is structured in favor of employers.[58] The law incorporates an affirmative good-faith defense that releases an employer from liability under the "knowingly hire" provisions.[59] To qualify for the defense, an employer need only establish that he or she conducted an I-9 document check in good faith and that the documents tendered by the worker appeared to be genuine and to relate to that worker.[60] Compliance with the I-9 verification and ***304** paperwork requirements provides a structural loophole for employers to hire undocumented workers without detection.[61]

Professor Kitty Calavita explains that compliance with IRCA was redefined during the legislative process to include compliance with the I-9 paperwork requirements.[62] She argues that this generous definition of employer compliance actively buffers employers from prosecution under the "knowingly hire" provisions[63] and, at the same time, "guaranteed widespread violations" of IRCA by employers.[64] Compliance with the I-9 substitutes for compliance with the essence of IRCA--the ban against knowingly hiring unauthorized workers.[65]

The upshot was a toothless and symbolic law that conciliated two contradictory policies.[66] The resultant employer sanctions regime mollified employers who had an economic interest in hiring undocumented workers[67] and, at the same time, it gave the appearance of addressing the public's demand that Congress "turn off the spigot of jobs" for undocumented immigrants.[68] Proponents of enhanced employer sanctions assert that stiffer penalties and stronger enforcement against employers would help eradicate exploitation of ***305** undocumented workers.[69] However, contrary to this claim, the problem is IRCA itself.

B. Employer Sanctions as Criminalization of Work

> *Whether and how the state intervenes or abstains is expressed largely through legal rules and their enforcement (or deliberate nonenforcement) and so rests ultimately on its coercive power. Law is always coercive .... Nor is the law neutral: its rules, at any particular time, tend to favor to a greater or lesser degree one or the other party in any given labor*

relation.[70]

Just as Congress structured IRCA's employer sanctions to afford protection to employers, the Supreme Court has sided with employers in delineating the rights of undocumented workers at the intersection of IRCA and the National Labor Relations Act ("NLRA").[71] Both before and after the enactment of IRCA, the Court affirmed that undocumented workers have a right under the NLRA to organize and join unions.[72] However, the Court also held in *Sure-Tan* and *Hoffman* that undocumented workers, unlike other covered workers, are not entitled to back pay--even when their employers illegally retaliate against them for their organizing and union activities.[73] And in ***306** *Hoffman*, where an employee who had presented false documents to his employer was later illegally fired for joining a union, the Court expressly relied on IRCA to reach this result.[74] It found that the N.L.R.B. had no authority to award back pay relief to an undocumented worker because such relief was foreclosed by IRCA.[75]

Hoffman was especially harmful in drastically altering the legal terrain for undocumented workers.[76] By depriving undocumented workers of the right to back pay under the NLRA, *Hoffman* empowered employers to violate the NLRA and other employment laws with impunity for an entire class of workers. After *Sure-Tan*, some circuit courts continued to enforce the right of back pay for undocumented workers who had not been deported or removed from the United States.[77] These cases, however, were abrogated by *Hoffman*. In addition, three months after the *Hoffman* decision, the Equal Employment Opportunity Commission ("EEOC") rescinded its "Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws."[78] The rescission cast into uncertainty the availability of post-discharge back pay and other monetary relief for undocumented workers who are victims of discrimination.[79]

***307** The EEOC Enforcement Guidance[80] had concluded that undocumented workers were entitled to all forms of monetary relief, including post-discharge back pay.[81] Like the Second Circuit in *A.P.R.A. Fuel*[82] and the Ninth Circuit in *Local 12, Warehouse and Office Workers' Union*,[83] the EEOC had interpreted *Sure-Tan*'s limitation on back pay to apply only to workers who no longer remained in the United States.[84] The EEOC also determined that IRCA did not preclude back pay awards to undocumented workers in federal discrimination lawsuits.[85] Given the EEOC rescission and lack of controlling case law[86] on this very issue, the uncertainty whether undocumented workers who face discrimination will be treated the same as other victims of discrimination is extremely troubling.

***308** The outcomes in *Sure-Tan* and *Hoffman* condone inequality and exploitation.[87] These cases shift the incentive structure of the NLRA in favor of unscrupulous employers and solidify the unequal status of undocumented workers. Justice Breyer stated in his dissent in *Hoffman*:

> *Without the possibility of the deterrence that backpay provides, the Board can impose only future-oriented obligations upon law-violating employers--for it has no other weapons in its remedial arsenal. And in the absence of the backpay weapon, employers could conclude that they can violate the labor laws at least once with impunity*.[88]

Thus, law-breaking employers can profit from terrorizing and exploiting workers, and crushing worker resistance.

Worse, employers can strengthen their coercive power by simultaneously leveraging labor and immigration laws.[89] Take the case of an employer who uses IRCA's I-9 to retaliate against undocumented workers who organize. Although this practice unquestionably constitutes an unfair labor practice, the employer would neither have to reinstate the undocumented workers nor compensate them for back pay. By law, the employer suffers no meaningful labor liability for violating the law twice by using IRCA to bust unions.[90]

An equally harmful aspect of *Hoffman* is the Court's discourse of criminalizing work for undocumented workers--a discourse that erases the illegal conduct of employers, despite the intention of IRCA to focus on employers rather than workers.[91] Congress elected not to impose criminal sanctions on undocumented immigrants for working without authorization.[92] The Court in *Hoffman*, however, rationalized the denial of back pay by relying on the IRCA provisions that penalize the use of fraudulent documents for obtaining employment.[93] In ***309** *Hoffman*, although Mr. Castro had been illegally fired by his employer for joining a union, Chief Justice Rehnquist, writing for the majority, explained that Mr. Castro's use of false documents during the I-9 process constituted serious illegal conduct that should not be condoned by a back pay award.[94]

The Board had argued that IRCA did not make workers who used false documents ineligible for back pay awards.[95] Justice Rehnquist rejected this argument and found that upholding the Board's post-discharge back pay award would empower the Board

"to award backpay to an illegal alien for years of work not performed, for wages that could not lawfully have been earned, and for a job obtained in the first instance by a criminal fraud."[96]

Significantly, the majority opinion never addresses that failure to award back pay to Mr. Castro--unlawfully fired for exercising his right of freedom of association--would condone serious illegal conduct by his employer.[97] Justice Rehnquist dedicates only two sentences in the entire opinion, both occurring in the beginning, regarding the employer's retaliatory firing of Mr. Castro and three coworkers for supporting a union.[98] The law-breaking employer disappears from view, and the exclusive focus is Mr. Castro's unlawful immigration status and his use of a false work document.[99] For the majority, the "real criminal" is Mr. Castro, not Mr. Castro's employer.[100] The comments ***310** from Justices Rehnquist, Scalia, and Kennedy during oral argument evinced concerns that employers are the victims of (1) immigrant workers who break immigration laws and who, after termination, can make use of their unlawful status to avoid the duty to mitigate back pay damages by arguing that they cannot lawfully work in the United States, and (2) of unions that knowingly organize undocumented workers.[101]

It might be plausibly argued that Mr. Castro's employer would not have hired Mr. Castro had he known of Mr. Castro's use of false documents.[102] Yet this possibility should not erase the fact that Mr. Castro's employer violated the NLRA. Further, the majority opinion neglects to distinguish Mr. Castro's employer, who did not know of Mr. Castro's undocumented status when he hired and fired him, from employers who intentionally violate both IRCA and the NLRA.[103] Thus, the outcome would be no different for an undocumented immigrant worker whose employer "knowingly" hired her, intentionally violated IRCA by disregarding the I-9 requirements, and later used the I-9 as a pretext for a retaliatory firing. By elevating the illegal conduct of workers who use false documents over the illegal conduct of employers who simultaneously violate immigration and labor laws, the Court's discourse in effect "criminalize[s] work for the workers themselves,"[104] shifting attention and blame away from lawbreaking employers. Although IRCA on its face does not criminalize ***311** undocumented immigrants for working without authorization, there is a de facto criminalization of undocumented workers.[105]

This incongruity in the majority's analysis was not lost upon Justice Breyer. In his dissent, Justice Breyer acknowledged the particularly "perverse economic incentive" in favor of unscrupulous employers "[w]ere the Board forbidden to assess backpay against a *knowing* employer--a circumstance not before us today."[106] However, he

noted that even if the majority rule applied only to employers who did not knowingly hire unauthorized workers, undocumented workers as a class would be harmed because unscrupulous employers would be incentivized to take the risk of hiring undocumented workers and of violating their labor rights.[107]

Just as important, Justice Breyer rejected the majority's focus on worker criminality, noting that the narrative of "unlawfully earned wages and criminal fraud ... tell us only a small portion of the relevant story."[108] Rather, he explained, a back pay award would require an employer who violated the NLRA to compensate a worker whom the employer believed was authorized to work: "(1) for years of work that he would have performed, (2) for a portion of the wages that he would have earned, and (3) for a job that the employee would have held--had that employer not unlawfully dismissed the employee for union organizing."[109]

Post-*Hoffman,* two N.L.R.B. administrative law judges used Justice Breyer's distinction between "knowing" and "unknowing" employers to preserve a right of back pay for some undocumented workers.[110] The judges in *Imperial Buffet* and *Mezonos* found that ***312** undocumented workers could recover NLRA back pay if they had not violated IRCA and their employer was a "knowing" employer.[111] IRCA regulations define a "knowing" employer as one who possesses actual or constructive knowledge that an employee or prospective hire is unauthorized to work.[112] "Knowing" employers include those who fail to comply with the I-9 requirements or fail to do so within statutorily-mandated time frames; who improperly complete the I-9 form with intent or recklessness; who disregard information indicating a lack of authorization to work; who selectively target workers for verification or selectively time the demand for verification; who accept documentation that does not reasonably appear to be genuine; or who make I-9 verification requests for an illegitimate purpose, such as retaliation.[113]

Imperial Buffet and *Mezonos* reasoned that denying back pay liability in the circumstance of a knowing employer who has violated IRCA, where a worker has not done so, would reward employers for intentionally violating both IRCA and the NLRA.[114] The risks of such illegal employment practices would fall entirely on workers instead of their law-breaking employers.[115] However, this win for workers was short-lived. The N.L.R.B. reversed the ALJ's decision in *Mezonos*, finding that *Hoffman* categorically precludes back pay awards to undocumented workers even when it is the employer, and not the worker, who violates IRCA, because in either instance, the employment relationship is unlawful.[116] The Second Circuit affirmed ***313** the N.L.R.B.'s denial of back pay in *Palma v. N.L.R.B.*,[117] thus closing the

window for back pay for undocumented workers under the NLRA.

At stake in *Hoffman* is not only a set of legal rules but also a discourse or "use of language delineating a community and its interests."[118] According to Professor Lori Nessel, "IRCA upset the already precarious balance of 'membership and exclusion' under the prior immigration regime."[119] *Hoffman's* discourse of criminalization skews this balance dangerously further by sanctioning the inequality of undocumented immigrant workers through denial of the right to back pay. Unsurprisingly, *Hoffman* and its progeny have emboldened employers to aggressively use the law to disqualify undocumented workers from protections under wage and hour laws, health and safety standards, anti-discrimination laws, workers compensation, and even state personal injury claims.[120]

***314** For example, after the *Palma* decision in 2013, employers immediately challenged anew the right of undocumented workers to recover wages and overtime pay under the Fair Labor Standards Act ("FLSA") and state labor laws.[121] These challenges occurred despite a long line of precedent before and after *Hoffman* that strongly established the right of undocumented workers to recover wages owed for work performed.[122] Fortunately, these efforts have been unsuccessful.[123] Yet they are a reminder that the stability of long- ***315** settled precedent protecting undocumented workers is jeopardized as employers continually use their victories in *Hoffman* and its progeny to chip away at these protections. For undocumented workers, deepening exclusion and inequality loom as incessant threats.

C. Less Equal and Less Free

The IRCA employer sanctions regime and *Hoffman* and its progeny have "consigned millions of undocumented workers to the underground economy ... as employers use the law ... to intimidate and retaliate against workers ...."[124] If workers do not have a right to reinstatement and back pay, employers are empowered to crush worker dissent with little accountability.[125] Scholars and immigration experts note that IRCA and *Hoffman* have deterred immigrant workers from contacting government agencies to complain about unlawful employer activity, regardless of how severe the exploitation.[126] Given the risk of a retaliatory firing or an employer tip to ICE, the stakes for undocumented workers who try to enforce their labor and employment rights are extremely high.[127] IRCA has created a structure in which employers can fend off sanctions and fines while workers are made more vulnerable to exploitation, deportation, and even criminal prosecution.[128]

The result for undocumented workers is greater poverty, inequality, and immobility. The concrete workings of employer sanctions and *Hoffman* are lived by low-wage workers in complex ways as they try to exercise agency in an economic system that gives them little power.[129] Sometimes IRCA makes finding work harder and ***316** for that reason, undocumented immigrants will accept work despite how poor the conditions are.[130] Yet employers also have a strong incentive to hire undocumented workers over citizen workers because *Hoffman* and its progeny render undocumented workers more vulnerable and exploitable.[131] Further, to avoid competitive disadvantage, scrupulous employers also feel constrained to hire undocumented workers.[132] Widespread abuse and exploitation cause some undocumented workers to feel trapped and to refrain from quitting their jobs in search of alternative employment.[133] The increased "freedom" of employers to exploit undocumented workers makes it harder for workers to escape from unlawful working conditions. In this way, the right to quit and right to mobility are undermined.

Professor Maria Ontiveros, in arguing for the Thirteenth Amendment as a source of migrant worker protections, points out that the Supreme Court in *Pollock v. Williams*[134] singled out the right to change employers as central to preserving free labor.[135] Increasing numbers of scholars conclude that IRCA and *Hoffman* create a caste of legally exploitable workers that recalls the institution of slavery and its aftermath.[136] Some argue that denial of effective remedies for ***317** infringements of the workplace rights of undocumented workers violates the Thirteenth Amendment as undocumented workers are coerced into working below the floor for free labor.[137]

The corrosive effects of IRCA and *Hoffman* reverberate beyond undocumented workers because United States citizens and other legalized workers in low-wage jobs are made less free as well. An employer gains the upper hand over citizen and legalized immigrant workers by manipulating IRCA and violating the NLRA rights of undocumented workers.[138] The unequal status of undocumented workers damages the ability of citizen and legalized workers to more effectively organize by including undocumented workers when employers wield IRCA as a union-busting tool.[139] Cross-racial worker solidarity becomes that much more difficult to achieve.[140]

Labor organizers maintain that IRCA's "good faith defense" loophole, and the *Sure-Tan* and *Hoffman* decisions, empower employers to use the I-9 verification requirement to bust unions.[141] When an employer uses the I-9 process to intimidate or fire undocumented workers who support the union, the union is weakened because citizen and legalized immigrant co-workers are left more isolated and vulnerable as

well.[142] The right of freedom of association ***318** of all workers at a workplace--regardless of immigration status, race, or ethnicity--is undermined when an employer re-verifies documents to block reinstatement of workers who were illegally fired because they backed the union.[143] Consequently, IRCA has weakened the ability of unions to organize and to defend their members.[144]

The misuse of the I-9 form by employers during labor disputes, and other employer manipulations of immigration enforcement activities are recognized by the United States Department of Homeland Security ("DHS") and labor agencies.[145] The 2011 Revised Memorandum of Understanding ("MOU") between DHS and the United States Department of Labor ("DOL") and its Addendum[146] in 2016 seek to insulate immigration-related worksite laws and labor enforcement from "inappropriate manipulation" by employers and their surrogates.[147] According to the MOU and its Addendum, DHS agrees to refrain from immigration worksite enforcement activities at any workplace where there is an investigation of a labor dispute by the DOL, N.L.R.B., or EEOC.[148] This includes DHS refraining from conducting I-9 audits at such worksites.[149] Further, DHS agrees to "thwart attempts by other parties to manipulate its worksite ***319** enforcement activities for illicit or improper purposes," including "retaliat[ing] against employees for exercising labor rights, or otherwise frustrat[ing] the enforcement of labor laws."[150]

The destructive impact of IRCA and *Hoffman* extends beyond union-busting. The practical ability of citizen and legalized immigrant workers in low-wage industries to enforce their workplace rights is diminished as employers are incentivized by *Hoffman* to hire undocumented workers.[151] The threat that an employer can replace citizen and legalized immigrant workers with undocumented workers serves to pressure workers into laboring faster, longer, and cheaper in order to compete with undocumented workers.[152] Labor activists emphasize that when undocumented workers are deterred by IRCA and *Hoffman* from enforcing their rights, citizen and legalized workers stand on weaker ground to insist on the minimum wage and overtime pay, safe working conditions, reasonable working hours, and nondiscrimination;[153] they are threatened with termination or retaliation if "they don't work like an undocumented."[154] As Professor Ontiveros explains, they "either must accept similar employment conditions themselves or go without employment."[155] The ability of citizen workers in low wage industries to quit and find other employment becomes harder, and their mobility, flexibility, and control are also weakened.[156] Thus, the targeting of undocumented workers is used to ***320** discipline and control citizen and legalized immigrant workers in low-wage industries, undoubtedly resulting in greater numbers of lawless and autocratic workplaces. The "working class as a

whole" is harmed by the criminalization of undocumented immigrant workers.[157] The outcome of IRCA and *Hoffman* and its progeny is to universalize coercion, inequality, lack of freedom, and exploitation.

III. CRIMINALIZATION OF NON-WORK IN THE POST-CIVIL WAR SOUTH AND BEYOND

The racial politics of immigration and labor are often used to stoke hostility between low-income United States citizens--especially African Americans--and immigrant communities. Perceived competition for jobs between low-income citizens and undocumented immigrants, and the racist stereotyping of African Americans as "lazy workers" and of certain immigrants as "hard workers" are exploited by mainstream media, opportunistic politicians, and employers as well.[158] These stereotypes are internalized by workers and produce real frictions. A strong social science scholarship reveals that many African American workers in the South blame new Latino immigrants not only for taking jobs, but also for being too docile, and thus responsible for intensifying the pace of work and driving down wages.[159] At the same time, Latino immigrants blame African Americans for being lazy and unwilling to be productive.[160]

***321** Perceptions between African Americans and Asian immigrants are similarly pitched. Narratives of Asian immigrants as industrious, law-abiding "model minorities" from close-knit families are contrasted with narratives of African Americans as lazy individuals from broken homes that reject education and hard work.[161] Asian immigrants who become small business owners often reproduce in their workplaces the racial hierarchies that exist in society-at-large.[162]

Ethnic and racial hierarchies also punctuate the relationship between black immigrants and African Americans.[163] Despite experiencing discrimination in the United States based on their ***322** "blackness," some black immigrants elevate their ethnic and immigrant identities above their racial identity to distance themselves from African Americans.[164] Black Caribbean and sub-Saharan African immigrants sometimes use the narratives of immigrant work ethic to distinguish themselves from the stereotypes of laziness and criminality ascribed to African Americans.[165] Professor Mary Waters observes of West Indian immigrants, "The more immigrant or ethnic the immigrants are, the more likely they are to have access to jobs ... and the more likely employers are to prefer to hire them than native minorities."[166] At the same time, some African Americans may fault Caribbean and African immigrants as foreigners who fail to adequately understand the profound consequences of historical and structural

racism on African American communities.[167]

***323** Clearly, there is a pressing need for educational efforts aimed at giving different communities new ways of understanding one another's history in the United States to help workers surmount racism and division.[168] This Article suggests that shared ground between African Americans and immigrants can be built from understanding one another's fraught relationship to freedom and coercion as workers. The criminalization of work for undocumented immigrants shares some similarities to the criminalization of non-work for freed Blacks during and after Reconstruction. The shared reality is that both forms of criminalization have propped systems of compulsion and coercion.

The criminalization of work for undocumented immigrant workers has been used by employers as a coercive apparatus to keep immigrant--and citizen workers--in their place.[169] As a consequence of IRCA, both groups of workers have been made less free to resist exploitation and less free to search for better employment. The targeting of one group has helped turn many working class workers into captive workforces.

While not identical but resonant, a network of laws proliferated in the South that "worked to restrict the free market in labor" of black workers and contributed to their involuntary servitude between Reconstruction and World War II.[170] These laws formed the backbone of a coercive apparatus that sought to push black men and women back into forced labor, reinforced by restrictions on their mobility to seek alternative employment.[171] Criminalization of non-work or "the ***324** condition of being unemployed"[172] lay at the core of attempts to establish a kind of re-enslavement of freed black men and women.[173]

Legislatures throughout the South enacted Black Codes from 1865-1867 as a state response to white claims that newly freed black people had to be stringently controlled.[174] Many white planters, raising the fear that newly freed Blacks would refuse to work for them, enlisted the state's help in ensuring the availability of an exploitable workforce.[175] Laws governing vagrancy and labor contract enforcement--used to compel Blacks to work by criminalizing unemployment or the refusal to work--were prominent labor provisions in the Black Codes.[176] Additional laws were enacted to undercut the ability of black workers to seek better employment by punishing those who recruited black workers for jobs in other southern states or in the North. These consisted of anti-enticement statutes that prohibited an employer from "enticing" away another employer's laborers, and statutes that restricted agents who recruited black workers across state lines.[177]

This mesh of laws--vagrancy, contract enforcement, anti-enticement, and emigrant-agent restrictions--prevailed in one form or another in the South until World War II.[178] Together, they constituted ***325** the legal infrastructure for white planters to abridge the mobility and freedom of black workers,[179] thus establishing a "compulsory free labor system" to replace slavery.[180]

A. Criminalizing Non-Work: Vagrancy Statutes as Employer Swords

The vagrancy statutes of the post-war South were designed to ensure that white planters had cheap and exploitable labor. These laws directly regulated black workers and aided white planters in their efforts to maintain labor and racial control.[181] Narratives of black men and women as lazy or idle were used to lobby in support of labor-compelling laws.[182] By criminalizing the status of being unemployed or the refusal to work, vagrancy laws empowered sheriffs and police to "round up"[183] and arrest Blacks who did not have labor contracts.[184] Those who were convicted of vagrancy could be hired out as laborers to their former employers or to any employer willing to post bond or pay their fine.[185] Broad definitions of "vagrant" cast a wide dragnet.[186] For instance, Alabama's statute from 1866 defined "vagrant" as ***326** someone "having no visible means of support, or being dependent on his labor, lives without employment, or habitually neglects his employment ...."[187] In 1903, Alabama's new vagrancy statute was further broadened--a vagrant was defined as "any person wandering or strolling about in idleness, who is able to work, and has no property to support him; or any person leading an idle immoral, profligate life, having no property to support him ...."[188]

Regulating vagrancy operated in tandem with a system of compulsory labor contracts. The Black Codes frequently required black workers to enter into labor contracts, sometimes by a specific date at the beginning of each year.[189] Once a labor contract was signed, contract enforcement laws kicked in to penalize workers who broke their contracts, including criminal prosecution for breach of contract.[190] As William Cohen explains, "The contract system could work only if there was some way of forcing Blacks to sign labor agreements in the first place."[191] Vagrancy laws "served as a threat to those who might hesitate to enter into labor contracts."[192] Cohen notes that "[B]y the early twentieth century the vagrancy acts had become a mainstay of the system of involuntary servitude."[193]

However, the vagrancy statutes must be understood as more than labor-compelling

tools that coerced Blacks into working against their will. They also functioned as labor-disciplining tools.[194] The labor shortages that resulted from black migration after emancipation gave black workers a degree of bargaining leverage.[195] As a result, white ***327** planters found themselves confronting a rising tide of black labor militancy that threatened work stoppages and emigration.[196] Against this backdrop, southern legislatures enacted vagrancy laws to make being unemployed a crime.[197] By criminalizing non-work, unemployment, or the refusal to work for a particular employer, the vagrancy acts directly attacked the right of black workers to move freely and mobility was crucial to asserting one's freedom and control.[198] Laws restricting mobility arose because freed black men and women were moving to better their wages and job conditions, moving from one local employer--or planter--to another, moving back and forth between types of work, moving to reunite their families, and moving to find better opportunities for their children.[199]

Black laborers who wanted to resist by quitting to search for better employment, rather than capitulating to exploitative and oppressive employers, had to confront the specter of the vagrancy acts.[200] "[T]raveling in search of a new job would leave them vulnerable to arrest for vagrancy."[201] In effect, even temporary unemployment was illegal, and black workers could thus be forced to remain with their employers even after their labor contracts expired.[202] The vagrancy laws, by punishing those workers who dared to disobey the compulsory contract labor system,[203] aimed to make workers too scared to leave.[204] Racial control and labor repression were the desired ***328** results of undermining freedom and control through criminalizing non-work.

Moreover, the use of vagrancy laws to criminalize non-work rippled beyond the racial politics and political economy of the post-Civil War South. The South's system of "compulsory free labor" helped shape some of the vagrancy statutes enacted in the North during the late nineteenth century to control unemployed or underemployed white low-wage workers.[205] By the 1880s, modern vagrancy statutes regulating white workers had become widespread in the North.[206] Whether regulating beggars in cities or harvest workers in the Great Plains, the coercive and disciplinary functions of northern vagrancy laws enacted around the time of the Black Codes and afterwards were evident.[207]

Northern vagrancy statutes against begging--enacted between 1866 and 1885 in urban areas--subjected people who begged to punishments such as arrest, imprisonment, and forced labor.[208] Ablebodied persons prosecuted for begging were sentenced to "compulsory labor" in prisons or local workhouses.[209] Proponents of these laws harnessed a narrative in support of criminalization that derogatively ***329** lumped

beggars with vagabonds, vagrants, and "tramps."[210] According to this narrative, the crime committed by persons who begged was that they chose idleness over work; they disobeyed the rules of the marketplace by rejecting work, and instead supported themselves by deceiving, duping, or preying on the public.[211] Their problem was that they "lacked compulsion to work."[212]

Yet individuals who genuinely looked for work could still be arrested for vagrancy.[213] Labor advocates objected to the vagrancy laws as penal servitude because the laws violated one's basic right to travel in search of work and to ask for alms or support while doing so.[214] As with the southern vagrancy statutes, workers could be deterred by vagrancy laws from quitting to look for better employment because they could not lawfully support themselves in the interim by asking for alms.[215] Simply put, one could not choose to beg to avert giving in to an exploitative or oppressive employer.[216]

Revealing the disciplinary function of the criminal laws against begging, one report by charity reformers decried "[T]he existence of a 'large class who make begging a trade ... who will only do such work and at such wages as suit them.'"[217] The demographic reality of those who begged belied the reformers' narrative claims of idleness and deceit.[218] Most people begging for alms were low-wage workers--especially domestic workers and laborers--who teetered between jobs ***330** that paid too little to live on and chronic unemployment resulting from fluctuations in the economy.[219] Low-wage workers passed back and forth between the realms of working and begging.[220] For the working poor, begging could be a bridge to survival.[221] But with vagrancy laws criminalizing begging, low-wage workers were shorn of a crucial right of control--i.e., determining when to work and under what circumstances, and asserting an alternative means to survive.[222] In this way, criminalization helped perpetuate an employer-dominated labor market based on a system of substandard wages and conditions.

The coercive power of criminalization was similarly brought to bear on transient harvest workers in the Northern Plains during the early 1900s.[223] Here, vagrancy laws became a powerful weapon for suppressing the labor radicalism of harvest workers who were joining the ranks of the Industrial Workers of the World or its affiliate unions.[224] Professor Ahmed White explains that in North Dakota, local officials, police, and employers used vagrancy law to force harvest field hands into accepting prevailing wages, thus cutting off their right to hold out for better wages.[225] A harvest worker who came to town to find work but who held out for better wages was a sure target for arrest as a vagrant and risked going to jail or being run out of town.[226] Union and labor organizers in particular fell victim to arrest for vagrancy.[227] Local officials

and the police regarded them as outside "agitators" who tried to drive up wages by getting harvest workers to withhold their labor.[228] Vagrancy law became an effective instrument of coercion to ***331** accomplish the twin goals of driving transient harvest workers into low-wage employment and quashing unions and worker organizing.

The state, through criminalizing non-work--whether in the South or North-- handed tremendous power to employers to compel, control, and discipline workers. Vagrancy law was used to clamp down on workers who asserted their right to freedom, their right to search for better employment, and their right to say "no" to their employers.[229] In the case of black workers in the post-Civil War South, vagrancy law operated most perniciously by contributing to new forms of compulsory labor as part of the South's reconstructed labor system.[230]

B. Anti-Enticement Statutes: Swords Against Black Workers

Vagrancy laws in the post-Civil War South were complemented by laws that restricted competition between white planters for black workers.[231] These consisted of anti-enticement and emigrant agent laws.[232] Whereas vagrancy law regulated black workers, these laws targeted white behavior.[233] However, the end goal was the same--the private use of state power to rein in the freedom, mobility, and right of control by black workers.

By imposing prohibitively high licensing fees, emigrant agent laws aimed to outlaw labor brokers who recruited black workers for out-of-state employment.[234] These laws helped restrict large-scale outmigration.[235] Without the financial assistance, backing, and information about jobs supplied by labor brokers, migration by poor rural Blacks became more arduous.[236]

The anti-enticement statutes warrant special interest because, like IRCA, they regulated employer behavior.[237] Employers who recruited ***332** another employer's workers were subject to criminal prosecution for enticement.[238] These statutes made it a crime for an employer to "'hire away, or induce to leave the service of another,' any laborer 'by offering higher wages or in any other way whatsoever.'"[239] Anti-enticement laws sometimes functioned with the support of a system of documentation verification.[240] An employer who hired someone without proof of a discharge certificate from his or her previous employer could be prosecuted for enticement.[241]

Although regulating employers, the anti-enticement laws were more anti-Black and anti-worker than anti-employer. No doubt individual employers felt the teeth of these laws. But anti-enticement boosted the rights of the class of employers who depended on black workers. The anti-enticement laws created a right of security[242] for employers in black workers as property,[243] as well as a right of security in worker exploitation and oppression. An employer who offered higher wages and better working conditions to someone already under contract with another employer could be penalized more harshly than an employer who mistreated his or her workers.[244] Further, a laborer who left an employer to work for another employer offering higher wages could be forcibly returned to his or her former ***333** employer.[245] Employers wielded the threat of anti-enticement as a weapon not only against other employers, but also against their employees.[246] Black workers who quit to find better employment were harassed by their former employers with the threat of bringing charges of enticement against each new employer.[247]

The anti-enticement laws sought to "turn off the spigot of jobs" for black workers who asserted control by quitting for better employment. More than a century later, IRCA would be predicated on the same idea of "turning off the spigot of jobs" to illegalize the hiring of undocumented workers.

IV. DRAWING PARALLELS: CRIMINALIZING WORK AND NON-WORK

A. Captive Workers: State Power and Employers

Prohibiting work and requiring work appear to be polar opposites. Yet the modern-day criminalization of work for undocumented immigrant workers shares important features with the post-Civil War South's criminalization of non-work for black workers. Both systems of criminalization hand over state power to employers to control, repress, and coerce workers.[248] The result is similar: depriving workers of the right to freely sell their labor and granting employers a comprehensive power to exploit.[249] State power becomes an employer sword against workers.[250] Law-breaking employers invoke IRCA's ban on the employment of undocumented workers and the I-9 verification apparatus to coerce workers into capitulating to illegal working conditions.[251] They brandish IRCA and threats of arrest, detention, and deportation to rout undocumented workers who assert control by protesting abuses, organizing unions, or filing complaints with enforcement agencies.[252] Analogously, southern planters invoked vagrancy and contract labor laws to immobilize black workers from

***334** resisting exploitation and oppression, withholding their labor, or quitting in search of better opportunities.[253] Southern planters used these laws on an as-needed basis to maintain a captive workforce when it served their interests.[254]

Despite IRCA's purported focus on employers, "turning off the spigot of jobs" is deployed by employers to control and discipline workers. IRCA deters many undocumented workers from quitting to protest exploitation or discrimination because they are concerned that it will be difficult to find alternative employment or better employment.[255] An employer's threat to terminate enforces a similar deterrent effect. So too, the post-Civil War anti-enticement statutes, despite their focus on employers, were used to deprive black workers of a right of access to alternative employment.[256] Anti-enticement laws helped perpetuate a status quo of racial and labor repression, and inhumane working conditions.

Further, the perverse outcomes produced by the anti-enticement laws are paralleled by the decisions in *Sure-Tan* and *Hoffman*. Under anti-enticement laws, employers who offered better jobs were punished as culprits rather than exploitative and oppressive employers; under IRCA, *Sure-Tan*, and *Hoffman*, undocumented workers fare much worse under state enforcement powers than exploitative employers who break immigration and labor laws.[257] Blame is shifted from law-breaking employers to undocumented immigrant workers.

***335** Enforcement of both systems of criminalization relies on verification of worker status, which becomes an instrument of control in the hands of employers. IRCA's I-9 requirement of proof of authorization to work is leveraged offensively by unscrupulous employers to intimidate undocumented workers.[258] In a similar manner, proof of certificates of employment and of discharge were used to subject black workers who lacked these documents to arrest for vagrancy or violation of contract labor laws, and the workers could then be forcibly returned to their former employers or subjected to compulsory labor with other employers.[259]

For undocumented workers, *Sure-Tan* and *Hoffman* confer on lawbreaking employers virtually untrammeled power to retaliate against undocumented workers who organize.[260] For black workers, vagrancy, contract labor, and anti-enticement laws formed core components of a legal infrastructure that granted unchecked power to white planters and other employers.[261]

Whether criminalizing work or non-work, the consequence for workers has been less equality, less freedom, and more coercion. Douglas Hay and Paul Craven caution that

erecting a "dichotomous bright line between freedom and coercion ... misleads about the realities of both slavery and employment."[262] They state, "Coercion is a complex continuum of forms and practices."[263] The legal treatment of today's undocumented immigrant workers and of black workers after the Civil War underlines each group's fraught relationship to equality and freedom. Undocumented workers occupy a contradictory status before the Supreme Court; they are simultaneously equal and unequal in that they are protected under United States labor law but ***336** denied the right to back pay to which other workers are entitled.[264] Under IRCA it is not illegal for undocumented immigrants to accept employment, but it is illegal for employers to hire them. Black workers, too, occupied a contradictory status after the Civil War. The legal restrictions on their mobility created a system of "compulsory free labor"[265] that placed them in a "twilight zone" between freedom and slavery.[266] For both undocumented and black workers, state action has been as pivotal as private employer action in undermining equality, freedom, mobility, and control.

B. Narratives in Support of Criminalization

Whether criminalizing work through IRCA or non-work through vagrancy law, narratives of disobedience and disorder are harnessed to rationalize criminalization. For undocumented workers, the narrative focus is criminality. The emphasis on worker criminality in *Hoffman* endorses the narrative of undocumented workers as law-breakers who violate immigration laws, who defraud the public while duping employers, and who rob United States citizens of jobs while cheating other immigrants who play by the rules.[267]

***337** Black workers in the post-Civil War South contended with a different but overlapping narrative. Vagrancy laws rested on the claim that black workers threatened the southern social and economic order by their idleness and laziness.[268] Northern reformers feared that newly freed black men and women would irresponsibly exercise their new freedom by rejecting work,[269] and suggested that vagrancy law and compulsory contracts were needed to school them "in the ways of the market and the wage system."[270] These racist narratives of idleness, ***338** laziness, and personal irresponsibility continue to figure strongly against African Americans in current policy debates. Perhaps most notable is the stereotyping of African American women who receive welfare assistance as lazy "welfare queens," a dominant theme that helped push welfare reform through the enactment of the Personal Responsibility and Work Opportunity Act of 1996.[271]

Further, some perceive only a thin line between idleness and criminality. For example, one southern business owner decried, when trying to break the strike of black and white miners, "'Idleness' ... 'always begets crime.'"[272] For Justice Scalia, criminality also could beget idleness. During oral argument in *Hoffman*, Scalia commented that a "smart" undocumented worker would realize that he could exploit his lack of work authorization status to avoid a duty to mitigate back pay damages by arguing that he cannot lawfully work, and thus "just sit home and eat chocolates" and collect back pay.[273]

The narratives of criminality and idleness, although distinct, coincide. They identify disobedient outsiders who disrupt the social order, and who, therefore, must be controlled.[274] Policing the "criminality" of undocumented workers and the "work ethic" of African American workers has rested on the power of racialized narratives that excite fear and invite division.[275] These narratives of "loafers" and "lawbreakers"[276] have provided the pathos[277] and organizing principle for criminalization.

*339 C. The Rights of Other Workers

Criminalizing work and non-work share another crucial dimension: labor repression and the race-to-the bottom resound beyond "criminalized workers." Employers have always been cognizant "that the effect of a bounded sector under more coercive sanctions [is] to depress wages in the wider labor market as well."[278] Broader groups of workers are injured as employers use the criminalization of targeted workers to fracture worker unity, to sow division between workers, and to discipline workers, regardless of their citizenship or immigration status.

The recognition that IRCA hobbles the ability of unions to defend their members and to organize new members led the AFL-CIO to reverse its support of IRCA and to call for its repeal in 2000.[279] Organizers from independent worker centers and mainstream unions alike lament that IRCA and *Hoffman* are potent tools for busting unions and undermining the right of freedom of association.[280] As well, the criminalization of undocumented workers positions employers to dismantle labor standards for broader groups of workers. When undocumented workers are deterred from enforcing their rights against illegal employer conduct, citizens and legalized immigrant workers also have a harder battle enforcing their rights because they are pressured by employers to compete with undocumented workers.[281] And enmity is stoked as employers appeal to racist ***340** stereotypes of criminality and idleness to turn workers against one

another.[282]

Like IRCA, southern vagrancy laws could be used to break strikes and unions. The planter class feared the biracial coalition of black workers and poor white southerners.[283] Other southern employers also strived to defeat such coalitions with the help of elected officials and law enforcement.[284] One scholar provides an example from Alabama in which striking black and white miners in 1908 had surmounted racial division to maintain solidarity throughout their strike.[285] When other union-busting tactics fell short, the governor threatened to call upon the legislature to amend the vagrancy laws to authorize the arrest of striking black miners rendered "idle" by the strike.[286]

White workers could also seek to use vagrancy as a tool against black workers whom they regarded as competitors who depressed local wages.[287] In such instances, vagrancy appeared to be an attempt by white workers to drive black workers out of the local labor market. For instance, white longshoremen in New Orleans, who had united with black longshoremen to strike for better wages eight years earlier, called upon law enforcement in 1873 to "arrest as vagrants the 'low, ignorant negroes, who slept under tarpaulins and in barrel houses, and who ... could afford to work at lower than regular rates.'"[288] The ***341** police complied and arrested as many black longshoremen as they could.[289]

In both examples--Alabama and New Orleans--the use of vagrancy as a weapon against black workers and biracial organizing was accompanied by claims of white supremacy.[290] But labor repression in the service of white supremacy was used to bring down the wages of unskilled white laborers as well, forcing both Blacks and whites to work on terms dictated by employers.[291] Evidence suggests that the wage rates paid to black workers kept the bar low for white workers, even when employers gave them preference.[292] Often, though, southern planters preferred black laborers to white laborers because they perceived the latter as more demanding.[293]

Finally, as discussed earlier, the repressive function of southern vagrancy laws broadened beyond black workers, as these laws became a template for laws in the urban North and Northern Plains that ***342** criminalized people who begged, and unemployed and under-employed people.[294]

V. CONCLUSION

Despite strong evidence that IRCA's employer sanctions have had a disastrous effect on low-wage workers and labor standards, repeal of employer sanctions does not figure into immigration reform debates. Proposals from both parties in Congress typically seek to enhance the I-9 system of documentation rather than dismantle it.[295] The question faced by civil rights and immigrants' rights communities, workers' centers, trade unions, and other labor organizations is: what kind of worldview or framework is necessary for achieving the long-term goal of repealing employer sanctions? So long as IRCA is addressed only as immigration policy, the prospects for repeal will remain nonexistent because the attendant discourse reduces to divisive narratives of "insiders" and "outsiders" competing for jobs.[296] The resultant ***343** discussion fuels antagonism and fans tensions between African Americans and immigrant communities.

We thus need worker, community, legal, and media education projects that provide disenfranchised communities with new ways of understanding one another and can help build strategic alliances. This Article has attempted to examine IRCA through the prism of criminalization, and to juxtapose the modern day treatment of undocumented immigrant workers to the criminalization of black workers after the Civil War. Undeniably, these two experiences are distinct, not identical, and it would be inaccurate to equate them.[297] Yet new insights into shared histories of criminalization can help mend rifts between oppressed and exploited communities of color by breaking down misperceptions of one another. The parallels between criminalization of work and non-work point toward a deeper shared identity between African Americans and undocumented immigrants.[298] This common experience shows that criminalization has been used not only to perpetuate economic injustice, but also--more systemically--to undermine equality, mobility, and control. As a result, both communities share a highly fraught relationship to freedom and ***344** coercion. Perhaps this history and framework can contribute to a broadened worldview in which the self-interests of African Americans and low-wage immigrants of color not only intersect but converge to go beyond short-term pragmatic cooperation.[299]

Hoffman affirmed the criminalization of undocumented workers in denying them the right to back pay under the NLRA, thereby invigorating narratives and legal interventions that splinter workers.[300] In contrast, the D.C. Circuit in *Agri Processor Company v. N.L.R.B.*[301] engaged in an alternative legal discourse that promotes unity between workers when it affirmed a "community of interests" between undocumented workers and co-workers who were citizens or legalized workers.[302] Agri Processor, the employer, challenged the results of a union election, claiming both that undocumented workers were not covered under the NLRA, and could not be included in the same

bargaining unit with legal workers because they lacked a community of interest.[303] In essence, Agri Processor tried to use immigration status to drive a legal wedge between workers who had successfully unified.

The D.C. Circuit rejected both arguments, and in addressing "community of interest," found that Agri Processor "failed to show that the interests of undocumented workers *as employees* differ[ed] in any way from those of legal workers."[304] Agri Processor had argued that since the undocumented workers had no legitimate expectation of continued employment, they shared no community of interests with the ***345** authorized workers.[305] The D.C. Circuit denied this attempt to divide workers, instead finding that undocumented workers and legal workers in the bargaining unit were "identical" when the undocumented workers "receive the same wages and benefits as legal workers, face the same working conditions, answer to the same supervisors, and possess the same skills and duties."[306]

By stressing "sameness," *Agri Processor* took an important step toward a narrative in which the relationship between undocumented workers and citizens and other legalized workers is one of mutuality arising from a common plight and common interests.[307] Its conception of "community of interest" supported the ability, willingness, and struggle of workers to identify with one another across the divide of citizenship and immigration status.[308]

There is strong work carried on by workers, labor organizers, activists, and scholars that--like *Agri Processor*--counter the narratives of criminalization and division that IRCA's employer sanctions and *Hoffman* represent. A few examples from the author's experience include the work of the National Mobilization Against Sweatshops ("NMASS") and the Coalition to Protect Chinatown and the LES. NMASS, an independent workers' center in New York City, spearheads a campaign to bring together homecare workers from across the city. Comprised of Chinese, Caribbean, Puerto Rican, and African American women, NMASS organizes against mandatory ***346** unpaid overtime in the industry.[309] Similarly, the Coalition to Protect Chinatown and the LES unites low-income residents from New York's lower east side--Chinese immigrants and working-class African Americans, Puerto Ricans, and whites--to challenge municipal rezoning policies that promote gentrification and displacement.[310] In both areas of work, those who are most affected come to recognize over time through engagement, discussion, community education, and joint action that--regardless of race, ethnicity, culture, or immigration status--their respective self-interests can merge into common ground and shared identity.[311]

Scholars, journalists, and activists are also critical to this work. These efforts include the scholarship of Professors Jennifer Gordon and R.A. Lenhardt in untangling the complex interactions between ***347** African Americans and new Latino immigrant low-wage workers for a more nuanced understanding of the conflict between them and to better identify how these groups can unify.[312] Likewise, the research of Professors Angela Stuesse and Laura Helton in tracing the history of African Americans and Latino immigrants in Mississippi's poultry processing industry shows how "different points of entry into US systems of racial inequality and low-wage work" lead African American and Latino poultry workers to arrive at different interpretations of workplace abuses.[313] Understanding the "historical, structural, and personal rationale for these differences," rather than erasing them, they believe, can help forge collaboration.[314]

As well, African American journalists and activists urge African American communities against the dangers of immigrant scapegoating.[315] Some also criticize organized labor for abdicating its responsibility to construct alliances between immigrants and African Americans by addressing the needs of the black working class alongside organizing Latino and Asian immigrants.[316] Other labor commentators seek to publicize worker struggles in which African American, white, and Mexican slaughterhouse workers in the South ***348** organized together despite the use of racial division and immigration enforcement against them.[317]

This Article is a small piece of a larger effort to construct frameworks and narratives that support immigrants and citizens to come together to advance one another's rights--not just as a means for protecting citizens and other legalized workers[318]--but as a necessity based on mutuality arising from shared conditions and shared interests. This Article offers a historical perspective to help deepen a sense of shared identity between undocumented immigrants and African Americans. For it is relationships of shared identity-- rather than ones of pragmatism or even of solidarity--that hold the most promise for building alliances to take apart systems of criminalization.

Footnotes

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1 *See* VALERIE WILSON & JANELLE JONES, ECON. POLICY INST., WORKING HARDER OR FINDING IT HARDER TO WORK 1, 27-31 (2018); Meagan Day, *Working Hard, Hardly Working,* JACOBIN (Mar. 5, 2018), *https://www.jacobinmag.com/2018/03/labor-workforce-unemployment-overwork* [https://perma.cc/F4Y6-XWK9].

2 *See* Bertil Videt & Daniëlle de Winter, *Job Insecurity as the Norm*, BROKER (Mar. 10, 2014), *http://www.thebrokeronline.eu/Articles/Job-insecurity-as-the-norm#t8* [https://perma.cc/9PJP-C62U]. *See generally* LONNIE GOLDEN, ECON. POLICY INST., STILL FALLING SHORT ON HOURS AND PAY: PART-TIME WORK BECOMING NEW NORMAL (2016); *see also* LOUIS UCHITELLE, THE DISPOSABLE AMERICAN: LAYOFFS AND THEIR CONSEQUENCES (2006).

3 *See* Stanley Aronowitz et al., *Work, Work, and More Work: Whose Economic Rights?*, 16 CUNY L. REV. 391, 399-400 (2013).

4 *See* Hoffman Plastic Compounds, Inc. v. N.L.R.B., 535 U.S. 137 (2002); Sure--Tan, Inc. v. N.L.R.B., 467 U.S. 883 (1984). *See infra* Part II.B (discussing the impact of *Hoffman*).

5 *See* JUDITH P. MILLER ET AL., WORKERS RIGHTS PROJECT OF YALE LAW SCH., REPEALING IRCA LEGISLATIVE PACKAGE 5 (2005) (on file with author); *From Slavery to Employer Sanctions, The Modern-Day Slave Law*, BREAK THE CHAINS! (N.Y.C., N.Y.), May 1, 2017, at 2-3, http://cswa.org/wp-content/uploads/2017/05/2017-MAYDAY-newsletter-FINAL.pdf [https://perma.cc/9F4Q-T6M8] [hereinafter NMASS, BREAK THE CHAINS!].

6 DOUGLAS HAY & PAUL CRAVEN, *Introduction, in* MASTERS, SERVANTS, AND MAGISTRATES IN BRITAIN & THE EMPIRE 1562-1955, at 21-23, 26-28 (Douglas Hay & Paul Craven eds., 2004) (describing repressive master-servant law, indentured servants, convict labor, and slavery in the British Empire, including the early American colonies). *See generally* CHRISTOPHER L. TOMLINS, LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC (1993) (tracing the impact of British master-servant law in constructing the employment relationship in colonial America).

7 *See* Ahmed A. White, *A Different Kind of Labor Law: Vagrancy Law and the Regulation of Harvest Labor, 1913-1924*, 75 U. COLO. L. REV. 667, 677-81 (2004).

8 WILLIAM COHEN, AT FREEDOM'S EDGE: BLACK MOBILITY AND THE SOUTHERN WHITE QUEST FOR RACIAL CONTROL 1861-1915, at 14-15 (1991) [hereinafter COHEN, FREEDOM'S EDGE]. *See* William Cohen, *Negro Involuntary Servitude in the South, 1865-1940: A Preliminary Analysis*, 42 J.S. HIST. 31, 33-34 (1976) [hereinafter Cohen, *Involuntary Servitude*].

9 *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 60-61 (2010).

10 Heather Ann Thompson, *Why Mass Incarceration Matters: Rethinking Crisis, Decline, and Transformation in Postwar American History*, 97 J. AM. HIST. 703, 720-23 (2010).

11 *See id.* at 724; UCLA LABOR CTR. ET AL., READY TO WORK, UPROOTING INEQUITY: BLACK WORKERS IN LOS ANGELES COUNTY 31-32 (2017), https://www.labor.ucla.edu/wpcontent/uploads/2017/03/UCLA_BWC_report_5-3_27-1.pdf [https://perma.cc/3G7N-NDNR].

12 Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered statutes of 8 U.S.C.).

13 Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193, 193 (2007).

14 8 U.S.C. § 1324a(a)(1)(A) (2004).

15 *Id.* § 1324a(a)(1)(B).

16 *Id.* § 1324a(f).

17 Arizona v. United States, 567 U.S. 387, 404 (2012) (holding that an Arizona statute that made it a misdemeanor for undocumented immigrants to knowingly apply for or engage in work was preempted by IRCA).

18 MILLER ET AL., *supra* note 5, at 5; *see also* Maria L. Ontiveros, *Migrant Labour in the United States: Working Beneath the Floor for Free Labour?* (Univ. S.F. Sch. Law, Research Paper No. 2014-19, 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2457257 [https://perma.cc/RZ6S-US3V] [hereinafter Ontiveros, *Migrant Labour*]; Maria L. Ontiveros, *Is Modern Day Slavery a Private Act or a Public System of Oppression*, 39 SEATTLE U. L. REV. 665, 668-69 (2016) (examining the rhetoric of slavery used by immigrant workers and advocates).

19 Wishnie, *supra* note 13, at 216.

20 *Id.* at 211.

21 *See, e.g.*, MILLER ET AL., *supra* note 5, at 3; NMASS, BREAK THE CHAINS!, *supra* note 5, at 1-3; HAEYOUNG YOON ET AL., NAT'L EMP'T LAW PROJECT, WORKPLACE RIGHTS AND REMEDIES FOR UNDOCUMENTED WORKERS: A LEGAL TREATISE 1, 4-6 (2013) (on file with author; updated version forthcoming from publisher) [hereinafter NELP, WORKPLACE RIGHTS]; David Bacon & Bill Ong Hing, *The Rise and Fall of Employer Sanctions*, 38 FORDHAM URB. L.J. 77, 88-89 (2010); Kati L. Griffith, *Undocumented Workers: Crossing the Borders of Immigration and Workplace Law*, 21 CORNELL J.L. & PUB. POL'Y 611, 630-33 (2012); Leticia M. Saucedo, *Immigration Enforcement Versus Employment Law Enforcement: The Case for Integrated Protections in the Immigrant Workplace*, 38 FORDHAM URB. L.J. 303, 308-10 (2010).

22 *See infra* Part II.C (discussing the impact of IRCA and *Hoffman* on citizen and authorized workers).

23 *See infra* Part II.C.

24 *See infra* text accompanying notes 145-55 (discussing the impact of IRCA on the ability of U.S.-born and other legalized workers to enforce labor law standards).

25 *See* Llezlie Green Coleman, *Rendered Invisible: African American Low-Wage Workers and the Workplace Exploitation Paradigm*, 60 HOW. L.J. 61, 69-72 (2016) (discussing demographics of low-wage employment among African Americans). Coleman argues that the current paradigm for understanding workplace exploitation focuses on immigrant workers' exploitation, especially Latino workers, and has contributed to the invisibility of African American low-wage workers. *Id.* at 63-64.

26 *See supra* note 6 and accompany text; *infra* Part III (discussing vagrancy, contract labor, anti-enticement statutes, and emigrant agent laws in the post-Civil War South).

27 *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877, at 199-200 (updated ed. 2014); JOHN HOPE FRANKLIN, RECONSTRUCTION AFTER THE CIVILWAR 47-48 (3d ed. 2013).

28 *See infra* Part III.A.

29 *See* White, *supra* note 7, at 670, 679-80; Jonathan M. Wiener, *Class Structure and Economic Development in the American South, 1865-1955*, 84 AM. HIST. REV. 970, 981-83 (1979).

30 *See infra* text accompanying notes 158-67 (discussing derogative stereotyping of African American workers) and notes 268-71 (discussing the "welfare queen" narrative in the welfare reform debate).

31 *See* Jennifer M. Chacón, *Civil Rights, Immigrants' Rights, Human Rights: Lessons from the Life and Works of Dr. Martin Luther King, Jr.*, 32 N.Y.U. REV. L. & SOC. CHANGE 465, 466-69 (2008) (explaining that some critics of the contemporary immigrants' rights movement reject analogies between the present-day conditions of immigrants and the plight of African Americans in the South during the Jim Crow era). Some commentators maintain that comparisons between the two are unfounded because of "the historical asymmetries of the [two] movements," given the difference between voluntary migration and forced migration through slavery. *Id.* at 468.

32 FONER, *supra* note 27, at 436.

33 *But see id.* at 595 (Post-Reconstruction black rural laborers faced stiffened white resistance and heightened violence, making "collective action by rural laborers ... all but impossible."). Foner explains, "Time and again during the 1880s and 1890s, Southern sheriffs, backed by state militias, crushed efforts to organize agricultural workers." *Id.* Yet Blacks continued to assert their autonomy. *Id.*

34 *Id.* at 210, 573, 602; *see also infra* text accompanying note 196.

35 *See* FONER, *supra* note 27, at 281-82; Michael W. Fitzgerald, *John Hope Franklin and His* Reconstruction, *in* FRANKLIN, *supra* note 27, at 244.

36 Fitzgerald, *supra* note 35, at 244-45.

37 COHEN, FREEDOM'S EDGE, *supra* note 8, at xv-xvi (discussing Black resistance to "efforts to immobilize them"); Cohen, *Involuntary Servitude, supra* note 8, at 59-60 (explaining "the paradoxical situation whereby involuntary servitude coexisted with a good deal of black mobility" and "resourceful blacks could and did get around" the restrictions of that system).

38 *See, e.g.*, Ruth Milkman, *Immigrant Workers and the Future of American Labor*, 26 A.B.A. J. LAB. & EMP. L. 295, 295, 297 (2011); Kent Wong, *A New Labor Movement for a New Working Class: Unions, Worker Centers, and Immigrants*, 36 BERKELEY J. EMP. & LAB. L. 205, 206-07 (2014).

39 Milkman, *supra* note 38, at 295, 299.

40 *See infra* text accompanying notes 309-11.

41 *See* Stephen Lee, *Private Immigration Screening in the Workplace*, 61 STAN. L. REV. 1103, 1119-20, 1126 (2009).

42 *E.g.*, Saucedo, *supra* note 21, at 307; Wishnie, *supra* note 13, at 216; *see also* Jennifer J. Lee, *Redefining the Legality of Undocumented Work*, 106 CALIF. L. REV. 1617, 1628 (2018) (referring to the "disastrous effects" of IRCA).

43 Wishnie, *supra* note 13, at 215.

44 Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 HARV. C.R.-C.L. L. REV. 345, 348, 379 (2001); *see* Lee, *supra* note 41, at 1119-20.

45 Nessel, *supra* note 44, at 348, 379.

46 Wishnie, *supra* note 13, at 216; *see* Lee, *supra* note 41, at 1136-37.

47 Peter Brownell, *Employer Sanctions and the Wages of Mexican Immigrants,* 3 RUSSELL SAGE FOUND. J. SOC. SCI. 70, 72-74 (2017); Saucedo, *supra* note 21, at 307-08; *see also* David Bacon, *How Unions Help Immigrants Resist Deportations*, AM. PROSPECT (Feb. 13, 2018), http://prospect.org/article/how-unions-help-immigrants-resist-deportations [https://perma.cc/D3DS-9ASC] ("[F]ew employers pay [IRCA] penalties .... Even fewer are charged with violating federal law."); Muzaffar Chishti et al., *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 [https://perma.cc/D8KB-FRVZ] (discussing "checkered history" of enforcement of employer sanctions and possible shift by Trump administration); Natalie Kitroeff, *Workplace Raids Signal Shifting Tactics in Immigration Fight*, N.Y. TIMES (Jan. 15, 2018), https://www.nytimes.com/2018/01/15/business/economy/immigration-raids.html?smprod=nytcore-ipad&smid=nytcore-ipad-share [https://perma.cc/7CKY-9PHJ] (explaining that punishment of employers violating IRCA has historically been weak but noting Trump's current signaling of increased worksite raids toward the goal of prosecuting employers and detaining and removing undocumented workers).

48 Nessel, *supra* note 44, at 361; Wishnie, *supra* note 13, at 213.

49 Saucedo, *supra* note 21, at 320 n.93 (quoting JENNIFER GORDON, SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS 49-50 (2005) (regarding employers' manipulation of I-9 requirements in retaliation against workers)). *See, e.g.*, Imperial Buffet & Rest., Inc., No. 22-CA-27468, 2009 WL 2868889, at *39, *48-*49 (N.L.R.B. Sept. 4, 2009) (discussing employer's violation of IRCA verification requirements); Mezonos Maven Bakery, Inc., No. 29-CA-25476, 2006 WL 3196754, at *9 (N.L.R.B. Nov. 1, 2006) (finding that an employer violated IRCA when it demanded I-9 documents for an illegitimate purpose rather than for the purpose of good-faith compliance with IRCA).

50 Saucedo, *supra* note 21, at 307; Wishnie, *supra* note 13, at 215.

51 *See* REBECCA SMITH & EUNICE HYUNHYE CHO, NAT'L EMP'T LAW PROJECT, WORKERS' RIGHTS ON ICE, 4, 11-15 (2013) [hereinafter NELP, WORKERS' RIGHTS ON ICE] (providing case studies illustrating the employer use of reverification of I-9 forms to intimidate workers).

52 Nessel, *supra* note 44, at 362.

53 *Mezonos Maven Bakery, Inc.*, 2006 WL 3196754, at *9 ("[B]y conditioning reinstatement upon providing proof of documented status, the ... true motive was not to comply with the provisions of IRCA.").

54 *See* GORDON, *supra* note 49, at 49-50.

55 *See supra* text accompanying notes 48-51; Sewell Chan, *Teamsters and FreshDirect Spar Over Suspensions of Immigrant Workers*, N.Y. TIMES (Dec. 12, 2007, 12:08 PM), https://cityroom.blogs.nytimes.com/2007/12/12/teamsters-and-freshdirect-spar-over-suspensions-of-immigrant-workers/ [https://perma.cc/MP9W-UUR3] (highlighting the controversy surrounding an I-9 audit conveniently timed just before a union election); *see also* Muzaffar Chishti & Charles Kamasaki, *IRCA in Retrospect: Guideposts for Today's Immigration Reform*, 9 MIGRATION POL'Y INST., at 3 (2014).

56 Kitty Calavita, *Employer Sanctions Violations: Toward a Dialectical Model of White-Collar Crime*, 24 L. & SOC'Y REV. 1041, 1051-52 (1990).

57 *Id.* at 1058-59.

58 *Id.* at 1060 (arguing that the continued hiring of undocumented workers despite IRCA can be attributed to the structure of IRCA in carving out a good faith defense for employers, thus "ensuring that violations of the 'knowing hire' provision--the real meat of the law--would be virtually risk-free"); Brownell, *supra* note 47, at 72 (discussing the low risk of fines on employers because of the availability of the good faith defense).

59 8 U.S.C. § 1324a(a)(3) (2004). *See* Calavita, *supra* note 56, at 1058-60 (explaining that the purported congressional justification for the good faith defense was to protect innocent employers who might inadvertently discriminate based on nationality in an effort to comply with IRCA verification requirements). However, Professor Calavita observes that throughout the legislative debates Congress left untouched the question of whether the good faith defense would serve as a loophole that employers could use to avoid detection for hiring undocumented workers. *Id.* at 1060.

60 8 C.F.R. § 274a.2(b)(1)(ii)(A) (2017). There is no obligation on the employer to verify the authenticity of documents presented by workers. *See* Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1760 (2010) ("As long as employers check documents and do the paperwork, their risk of liability under [IRCA] is minimal. Further probing only opens them to discrimination claims.").

61 *See* Calavita, *supra* note 56, at 1060; Wishnie, *supra* note 13, at 210-11.

62 Calavita, *supra* note 56, at 1060. Making compliance easy and less onerous helped Congress to win the endorsement of IRCA's employer sanctions by the U.S. Chamber of Commerce, which had previously opposed the measure. *Id.* at 1058-59. *See also* Wishnie, *supra* note 13, at 201-02 (describing the compromise legislation that secured the support of the United States Chamber of Commerce, AFL-CIO, and other groups that had initially opposed employer sanctions).

63 Calavita, *supra* note 56, at 1042. Professor Calavita argues that the IRCA legislative process resulted in the enactment of a law "that not only insulate[s] offending employers from prosecution but in effect redefines them as compliers." *Id.*

64 *Id.* at 1065.

65 *Id.* at 1055, 1060.

66 *Id.* at 1060 (explaining how IRCA employer sanctions provisions ended up becoming "symbolic" and "toothless"); *see* Wishnie, *supra* note 13, at 201 (noting the dependence of agribusiness on undocumented workers and their concerns about the impact of employer sanctions).

67 Calavita, *supra* note 56, at 1065.

68 *Id.* at 1059; *see* Wishnie, *supra* note 13, at 195-96 (arguing that IRCA sought to diminish "the strength of the 'jobs magnet,' deterring unlawful immigration, and safeguarding wages and working conditions for U.S. workers.").

69 Editorial, *No Crackdown on Illegal Employers*, N.Y. TIMES (Mar. 20, 2017), https://www.nytimes.com/2017/03/20/opinion/no-crackdown-on-illegal-employers.html [https://perma.cc/UHA5-XSEQ]; *see* Wishnie, *supra* note 13, at 195 (arguing that the employer sanctions regime has made workplace exploitation of undocumented immigrants more prevalent).

70 HAY & CRAVEN, *supra* note 6, at 26.

71 *See infra* text accompanying notes 91-123 (discussing the impact of *Hoffman* in contributing to a discourse of criminalizing undocumented immigrant workers and incentivizing unscrupulous employers to violate the NLRA).

72 Hoffman Plastic Compounds, Inc. v. N.L.R.B., 535 U.S. 137, 152 (2002) (leaving undisturbed *Sure-Tan's* holding that undocumented workers are covered by the NLRA); Sure-Tan, Inc. v. N.L.R.B., 467 U.S. 883, 892-93 (1984) (holding that the NLRA applied to protect undocumented workers because there was no conflict with the Immigration and Nationality Act since, at the time, Congress had neither made it unlawful for employers to knowingly hire unauthorized workers nor made it a crime for undocumented workers to accept employment).

73 *Hoffman Plastic Compounds, Inc.*, 535 U.S. at 149; *Sure-Tan, Inc.*, 467 U.S. at 903 (for purposes of back pay under the NLRA, "employees must be deemed 'unavailable' for work ... during any period when they were not lawfully entitled to be present and employed in the United States.").

74 *Hoffman Plastic Compounds, Inc.*, 535 U.S. at 151.

75 *Id.* at 147-49.

76 Wishnie, *supra* note 13, at 212. Professor Wishnie explains that *Hoffman* "overturned decades of decisions by state and federal courts and agencies by exempting employers of undocumented workers from back pay liability." *Id.*

77 *See* N.L.R.B. v. A.P.R.A. Fuel Oil Buyers Grp., Inc., 134 F.3d 50, 56 (2d Cir. 1997); Local 512, Warehouse & Office Workers' Union v. N.L.R.B., 795 F.2d 705, 719-20 (9th Cir. 1986). *But see* Del Rey Tortilleria, Inc. v. N.L.R.B., 976 F.2d 1115, 1121-22 (7th Cir. 1992) (holding that IRCA precludes employees from receiving back pay for any period that they were not lawfully entitled to work in the United States).

78 U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC NO. 915.002, RESCISSION OF ENFORCEMENT GUIDANCE ON REMEDIES AVAILABLE TO UNDOCUMENTED WORKERS UNDER FEDERAL EMPLOYMENT DISCRIMINATION LAWS (June 27, 2002), https://www.eeoc.gov/policy/docs/undoc-rescind.html [https://perma.cc/F8GD-N9J6] [hereinafter EEOC RESCISSION].

79 The EEOC did not determine that undocumented workers are ineligible for back pay under federal discrimination statutes. It stated that it was reexamining its position on the issue. *Id.*

80 U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC NO. 915.002, ENFORCEMENT GUIDANCE ON REMEDIES AVAILABLE TO UNDOCUMENTED WORKERS UNDER FEDERAL EMPLOYMENT DISCRIMINATION LAWS (Oct. 26, 1999), https://www.eeoc.gov/policy/docs/undoc.html [https://perma.cc/4XZ7-4CSN] [hereinafter EEOC GUIDANCE].

81 *Id.* (explaining that undocumented workers are eligible for damages, back pay, and attorney's fees--with the narrow limitation that an undocumented worker would be ineligible for back pay relief only if she or he was no longer in the United States).

82 *A.P.R.A. Fuel Oil Buyers Grp., Inc.*, 134 F.3d at 54.

83 Local 512, Warehouse & Office Workers' Union v. N.L.R.B., 795 F.2d 705, 719-20 (9th Cir. 1986).

84 EEOC GUIDANCE, *supra* note 80.

85 *Id.*

86 *See* Rivera v. NIBCO, Inc., 364 F.3d 1057, 1061 (9th Cir. 2004) (barring employer from seeking discovery of workers' immigration status in a Title VII suit). The Ninth Circuit distinguished the NLRA from Title VII in explaining why it was doubtful that *Hoffman* controls on the issue of back pay for undocumented workers in Title VII suits. *Id.* at 1066-68. However, the Ninth Circuit did not decide this issue. *Id.* at 1069. *See also* De La Rosa v. N. Harvest Furniture, 210 F.R.D. 237, 238-39 (C.D. Ill. 2002) (noting that due to the difference between a court's authority under Title VII and that of the N.L.R.B. under the NLRA, it was not ready to conclude that *Hoffman* controlled in the Title VII context). *De La Rosa* concerned the discovery of immigration status in a suit alleging violations of the Fair Labor Standards Act, Title VII, and state labor laws, thus the Court did not decide the issue of post-discharge back pay in the context of Title VII. *Id. But see* Escobar v. Spartan Sec. Serv., 281 F. Supp. 2d 895, 897 (S.D. Tex. 2003) (holding that undocumented workers were barred by *Hoffman* from receiving back pay in Title VII suits).

87 Hoffman Plastic Compounds, Inc. v. N.L.R.B., 535 U.S. 137, 151 (2002); Sure-Tan, Inc. v. N.L.R.B., 467 U.S. 883, 906 (1984).

88 *Hoffman Plastic Compounds, Inc.*, 535 U.S. at 154 (citations omitted).

89 Griffith, *supra* note 21, at 631-32.

90 Nessel, *supra* note 44, at 368.

91 Calavita, *supra* note 56, at 1049.

92 Arizona v. United States, 567 U.S. 387, 405 (2012); Palma v. N.L.R.B., 723 F.3d 176, 184 (2d Cir. 2013).

93 *Hoffman Plastic Compounds, Inc.*, 535 U.S. at 148-49, 151.

94 *Id.* at 149.

95 *Id.*

96 *Id.*

97 The majority opinion notes the employer will not "get[] off scot-free"--he will still be subject to a cease and desist order, and he will be required to post a notice at the worksite about employee rights under the NLRA. *Id.* at 152.

98 *Id.* at 140.

99 *See* Nessel, *supra* note 44, at 367-68 (explaining that the limited back pay award to undocumented workers for a retaliatory discharge in the Second Circuit's *A.P.R.A. Fuel* decision undermines both the NLRA and IRCA "by focusing on the status of the wronged employee rather than on the wrongdoing employer, the latter of which is the intended target" of both statutes); Maria L. Ontiveros, *To Help Those Most in Need: Undocumented Workers' Rights and Remedies Under Title VII,* 20 N.Y.U. REV. L. & SOC. CHANGE 607, 616 (1994) (criticizing the focus on workers' immigration status rather than employers' illegal behavior).

100 *See* Calavita, *supra* note 56, at 1043-44 (citing to research attributing the often lenient treatment that "white collar offenders" receive to "the attitude of law enforcers that these are not 'real' criminals ...."). Professor Calavita draws on this research to support her conclusion that IRCA's employer sanctions provisions were "written so as to label all but a handful of the most blatant violators as 'compliers.'" *Id.* at 1045.

101 Ellen Dannin, *Hoffman Plastics as Labor Law-Equality at Last for Immigrant Workers?*, 44 U.S.F. L. REV. 393, 400-02 (2009) (containing an excellent deconstruction of the comments and questions of Justices Rehnquist, Scalia, and Kennedy at oral argument in *Hoffman*). Dannin details Rehnquist's concerns about rewarding immigrants who have broken the law by entering illegally, Scalia's concerns about whether undocumented workers could legally mitigate damages given their status, and Kennedy's concerns about whether unions are violating public policy by organizing undocumented workers. *Id.* Dannin notes that this approach shifted the blame to the immigrant worker and viewed the employer as the victim. *Id.* at 400.

102 *Hoffman Plastic Compounds, Inc.*, 535 U.S. at 141.

103 *Id.* at 141-42, 148.

104 Bacon & Hing, *supra* note 21, at 86 ("In fact, punishing employers, or threatening to do so, was always simply a mechanism to criminalize work for the workers themselves, and thereby force them to leave the country, or not to come in the first place.").

105 *See* Griffith, *supra* note 21, at 618; Nessel, *supra* note 44, at 368; Wishnie, *supra* note 13, at 193-94.

106 *Hoffman Plastic Compounds, Inc.*, 535 U.S. at 155-56 (Breyer, J., dissenting) (citation omitted).

107 *See id.* at 156 ("But even if limited to cases where the employer did not know of the employee's status, the incentive may prove significant ... the Court's rule offers employers immunity in borderline cases, thereby encouraging them to take risks, *i.e.*, to hire with a wink and a nod those potentially unlawful aliens whose unlawful employment (given the Court's views) ultimately will lower the costs of labor law violations.").

108 *Id.* at 160.

109 *Id.*

110 Imperial Buffet & Rest., Inc., No. 22-CA-27468, 2009 WL 2868889, at *56, *63 (N.L.R.B. Sept. 4, 2009); Mezonos Maven Bakery, Inc., No. 29-CA-25476, 2006 WL 3196754, at *13-14 (N.L.R.B. Nov. 1, 2006).

111 *Imperial Buffet & Rest., Inc.*, 2009 WL 2868889, at *63; *Mezonos Maven Bakery, Inc.*, 2006 WL 3196754, at *16.

112 8 C.F.R. § 274a.1(l)(1). Constructive knowledge is defined as "knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know" that a prospective employee is unauthorized to work. *Id.*

113 *See id.* § 274a.1(l); *Imperial Buffet & Rest., Inc.*, 2009 WL 2868889, at *39; *Mezonos Maven Bakery, Inc.*, 2006 WL 3196754, at *11.

114 *Imperial Buffet & Rest., Inc.,* 2009 WL 2868889, at *61 (citing A.P.R.A. Fuel Oil Buyers Grp., Inc., 320 N.L.R.B. 408, 415 (1995), *abrogated by Hoffman Plastic Compounds, Inc.*, 535 U.S. 137); *Mezonos Maven Bakery, Inc.*, 2006 WL 3196754, at *15-*16.

115 *Mezonos Maven Bakery, Inc.*, 2006 WL 3196754, at *16.

116 Mezonos Maven Bakery, Inc., 357 N.L.R.B. 376, 377 (2011). However, in a supplemental decision the N.L.R.B.

found that conditional reinstatement is an appropriate remedy where a knowing employer discharges an undocumented worker in violation of the NLRA. Mezonos Maven Bakery, Inc., 362 N.L.R.B. 360, 362 (2015).

117 Palma v. N.L.R.B., 723 F.3d 176, 185 (2d Cir. 2013).

118 JAMES D. SCHMIDT, FREE TO WORK: LABOR LAW, EMANCIPATION, AND RECONSTRUCTION, 1815-1880, at 4 (1998) (quoting Kathleen Brown, Good Wives, Nasty Wenches, and Anxious Patriarchs: Gender, Race, and Power in Colonial Virginia 5 (1996)). Schmidt explains his approach in studying the construction of different models of labor law in the North and South during Reconstruction: "In trying to understand the state by exploring law, I have envisioned law not so much as a set of legal rules but as a discourse or a language." *Id.*

119 Nessel, *supra* note 44, at 361.

120 NELP, WORKPLACE RIGHTS, *supra* note 21, at 6. *See also supra* text accompanying notes 76-86 (EEOC recession of enforcement guidance on remedies for undocumented workers) and *infra* text accompanying notes 121-23 (post-*Palma* efforts by employers to disqualify undocumented workers from the right to minimum wage and overtime pay under FLSA). Some lower courts, using Justice Breyer's distinction between "knowing" and "unknowing" employers, have preserved the right to recover back pay and future lost wages in tort actions for undocumented workers who are injured on the job. *See, e.g.*, Madeira v. Affordable Hous. Found., Inc., 469 F.3d 219, 239-40 (2d Cir. 2006) (finding that neither IRCA nor *Hoffman* precludes undocumented workers from recovering compensation for lost earnings under state tort and labor laws for work-related injuries); Guamamtario v. Sound Beach Partners, LLC., No. FBTCV126023901S, 2015 WL 467234, at *11 (Conn. Super. Ct. 2015) (holding that undocumented workers not precluded from lost wage claims in personal injury action, although evidence of immigration status may be relevant to issue of damages); Escamilla v. Shiel Sexton Co., 73 N.E.3d 663, 668-70 (Ind. 2017) (finding that decreased earning capacity claims under state tort law not preempted by IRCA or *Hoffman* but noting a trend of courts finding that immigration status is relevant to calculation of lost earnings, subject to an analysis of unfair prejudice); Rosa v. Partners in Progress, Inc., 868 A.2d 994, 1000-01 (N.H. 2005) (imposing liability on knowing employers for lost wages in tort action does not conflict with IRCA's policies); Balbuena v. IDR Realty LLC, 845 N.E.2d 1246, 1260 (N.Y. 2006) (allowing undocumented workers back pay remedy in personal injury case involving violation of state labor law); Macedo v. J.D. Posillico, Inc., 68 A.D.3d 508, 511 (N.Y. App. Div. 2009) (holding that an undocumented worker did not forfeit right to lost wages in personal injury action even though he used a false social security card because this did not induce his employer to hire him since the employer did not comply with IRCA in good faith); Coque v. Wildflower Estates Developers, Inc., 58 A.D.3d 44, 54 (N.Y. App. Div. 2008) (citation omitted) ("[T]he employee is not precluded, by virtue of his submission of a fraudulent document to the employer, from recovering damages for lost wages as a result of a workplace accident."); Grocers Supply, Inc. v. Cabello, 390 S.W.3d 707, 723-24 (Tex. Ct. App. 2012) (finding that Texas tort law was not preempted by IRCA or *Hoffman* in suit brought by motorist who was undocumented migrant).

121 *See* Rosas v. Alice's Tea Cup, LLC, 127 F. Supp. 3d 4, 8-9 (S.D.N.Y. 2015); Akin v. Anion of Greenlawn, Inc., 35 F. Supp. 3d 239, 240 (E.D.N.Y. 2014); Kim v. Kum Gang, Inc., No. 12 Civ. 6344(MHD), 2014 WL 2510576, at *1 (S.D.N.Y. June 2, 2014); Colon v. Major Perry St. Corp., 987 F. Supp. 2d 451, 456 (S.D.N.Y. 2013). *See also* Vallejo v. Azteca Elec. Constr., Inc., No. CV-13-01207-PHX-NVW, 2015 WL 419634, at *4-5 (D. Ariz. Feb. 2, 2015); Bautista Hernandez v. Tadala's Nursery, Inc., 34 F. Supp. 3d 1229, 1246-47 (S.D. Fla. 2014).

122 *See, e.g.*, Lamonica v. Safe Hurricane Shutters, Inc., 711 F.3d 1299, 1307 (11th Cir. 2013); Lucas v. Jerusalem Cafe, LLC, 721 F.3d 927, 933 (8th Cir. 2013); Patel v. Quality Inn S., 846 F.2d 700, 706 (11th Cir. 1988); Flores v. Albertsons, Inc., No. CV0100515AHM(SHX), 2002 WL 1163623, at *5 (C.D. Cal. Apr. 9, 2002); Contreras v. Corinthian Vigor Ins. Brokerage, Inc., 25 F. Supp. 2d 1053, 1058 (N.D. Cal. 1998); Montoya v. S.C.C.P. Painting

Contractors, Inc., 530 F. Supp. 2d 746, 750 (D. Md. 2008); Flores v. Amigon, 233 F. Supp. 2d 462, 464 (E.D.N.Y. 2002); Zeng Liu v. Donna Karan Int'l, Inc., 207 F. Supp. 2d 191, 192 (S.D.N.Y. 2002); Almanza v. Baird Tree Serv. Co., No. 3:10-CV-311, 2012 WL 4026933, at *3 (E.D. Tenn. Sept. 12, 2012).

123 *But see* Bermudez v. Karoline's Int'l Rest. Bakery Corp., No. CV 12-6245(LDW)(GRB), 2013 WL 6146083, at *1, *4 (E.D.N.Y. Nov. 21, 2013) (permitting employer discovery of immigration status in a FLSA action on the theory that *Palma* calls into question whether undocumented workers may bring FLSA claim to recover owed wages), *declined to follow by* Rodriguez v. Pie of Port Jefferson Corp., 48 F. Supp. 3d 424 (E.D.N.Y. 2014) (holding that undocumented workers who filed a FLSA action could not be compelled to respond to interrogatories concerning their immigration status).

124 NELP, WORKPLACE RIGHTS, *supra* note 21, at 6.

125 Wishnie, *supra* note 13, at 215-16.

126 *Id.* at 213; Griffith, *supra* note 21, at 630-31.

127 Saucedo, *supra* note 21, at 310.

128 *Id.* at 308-10, 320-21. Saucedo notes that few of the I-9 worksite audits of employers conducted under the Obama Administration resulted in protecting workers from exploitative employers. *Id.* at 307-08. She explains that employers rarely faced serious consequences from the I-9 worksite audits; on the other hand, the stakes for undocumented workers escalated because in addition to immigrants facing civil immigration violations, prosecutors also brought criminal charges against workers for identity theft, document fraud, or presenting false documents to employers. *Id.* at 308-09.

129 *See* Jennifer Gordon & R.A. Lenhardt, *Rethinking Work and Citizenship*, 55 UCLA L. REV. 1161, 1223 (2008) (cautioning against a deterministic view of African American and Latino workers, and explaining that both groups of workers "exercise a great deal of agency in the low-wage context" despite "their relative powerlessness in the economic structures in which they labor").

130 *See* Bacon & Hing, *supra* note 21, at 81; Gordon & Lenhardt, *supra* note 129, at 1220 (discussing support of families in native countries as one reason why undocumented migrants would be unwilling to decline work or to protest workplace abuses).

131 Calavita, *supra* note 56, at 1052-53; Nessel, *supra* note 44, at 350; Wishnie, *supra* note 13, at 213.

132 Wishnie, *supra* note 13, at 214.

133 PETER KWONG, FORBIDDEN WORKERS: ILLEGAL CHINESE IMMIGRANTS AND AMERICAN LABOR 173-74 (1997); Gordon & Lenhardt, *supra* note 129, at 1164.

134 Pollock v. Williams, 322 U.S. 4 (1944).

135 Ontiveros, *Migrant Labour, supra* note 18. Ontiveros quotes the Court in *Pollock v. Williams* to explain the importance of the right to change employers as central to maintaining a system of free and voluntary labor: "[T]he undoubted aim of the Thirteenth Amendment as implemented by the Anti Peonage Act was not merely to end slavery but ... to maintain a system of completely free and voluntary labor ... [I]n general, the defense against oppressive hours, pay, working conditions or treatment is the right to change employers." *Id.* at 17.

136 *Id.* at 18; Wishnie, *supra* note 13, at 216. *See* Bacon & Hing, *supra* note 21, at 94-95, 95 n.129 (discussing the connection between institutionalized racism and immigration enforcement as contributing to a modern "social caste system"); *see also* KWONG, *supra* note 133, at 174 (describing the impact of IRCA in pushing undocumented workers "further down into a sub-class of American society" and noting that one labor advocate has referred to IRCA as a "slave law").

137 Ontiveros, *Migrant Labour, supra* note 18.

138 Bacon & Hing, *supra* note 21, at 88-89, 91. See NELP, WORKERS' RIGHTS ON ICE, *supra* note 51, at 13-14, for examples of cases in which employers use IRCA to crush unionizing efforts, thus preventing workers from asserting their rights collectively regardless of immigration status.

139 *See* David Bacon, *Common Ground on the Kill Floor: Organizing Smithfield,* LABOR NOTES (Apr. 20, 2012), https://labornotes.org/blogs/2012/04/common-ground-kill-floor-organizing-smithfield [https://perma.cc/4QG7-H9FB] [hereinafter Bacon, *Common Ground*]; Bacon & Hing, *supra* note 21, at 89. See Chan, *supra* note 55, for a discussion of an I-9 audit that appeared to target union supporters just before an important union election, thus hurting the ability of all the workers at the worksite to form a union regardless of their immigration status.

140 Gordon & Lenhardt, *supra* note 129, at 1233.

141 Meeting Minutes of the Chinese Staff and Workers Association, "Break the Chains" Discussion, N.Y.C., N.Y. (July 30, 2017) (on file with author); *see* Chishti & Kamasaki, *supra* note 55, at 3; *see also* EUNICE HYUNHYE CHO & REBECCA SMITH, NAT'L EMP'T LAW PROJECT, WORKERS' RIGHTS ON ICE: CALIFORNIA REPORT 4 (2013) [hereinafter NELP, CALIFORNIA REPORT].

142 *See* Bacon, *Common Ground, supra* note 139.

143 Meeting Minutes of the Chinese Staff and Workers Association, *supra* note 141; *see also* NELP, CALIFORNIA REPORT, *supra* note 141, at 4, 8-9 (explaining how employers use I-9 reverification to undermine union organizing drives).

144 Bacon & Hing, *supra* note 21, at 89.

145 *See* DEP'T OF HOMELAND SEC. & DEP'T OF LABOR, REVISED MEMORANDUM OF UNDERSTANDING CONCERNING ENFORCEMENT ACTIVITIES AT WORKSITES (2011), https://www.dol.gov/asp/media/reports/dhs-dol-mou.pdf [https://perma.cc/6H23-DADC] [hereinafter MOU] (establishing a process for ensuring that worksite enforcement of immigration laws does not interfere with labor law enforcement, and for thwarting employers and others from inappropriate manipulation of immigration worksite enforcement to retaliate against workers).

146 DEP'T OF HOMELAND SEC. & DEP'T OF LABOR, ADDENDUM TO REVISED MEMORANDUM OF UNDERSTANDING CONCERNING ENFORCEMENT ACTIVITIES AT WORKSITES (2016), https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-4684/dolice_mou-addendum_w.nlrb_osha.pdf [https://perma.cc/4SPE-7SH2] [hereinafter MOU ADDENDUM] (extending the 2011 MOU to include the N.L.R.B. and EEOC as parties to the agreement).

147 *See* MOU, *supra* note 145.

148 MOU ADDENDUM, *supra* note 146.

149 NAT'L EMP'T LAW PROJECT, IMMIGRATION AND LABOR IN THE WORKPLACE: THE REVISED LABOR AGENCY-DHS MEMORANDUM OF UNDERSTANDING, FACT SHEET (2016), at 2.

150 MOU, *supra* note 145.

151 *See* NELP, CALIFORNIA REPORT, *supra* note 141, at 1 (concluding that the ability of unscrupulous workers to use immigration status to exploit immigrant workers "with impunity" will result in "all low-wage workers suffer [ing] compromised employment protections and economic security").

152 Meeting Minutes of the Chinese Staff and Workers Association, *supra* note 141.

153 *Id.*

154 *Id.*

155 *See* Ontiveros, *Migrant Labour, supra* note 18 (explaining the manner in which employers use immigrant guest workers to degrade working conditions for citizen workers).

156 *See* Angela Stuesse & Laura E. Helton, *Low-Wage Legacies, Race, and the Golden Chicken in Mississippi: Where Contemporary Immigration Meets African American Labor History*, S. SPACES (Dec. 31, 2013),

https://southernspaces.org/2013/low-wage-legacies-race-and-golden-chicken-mississippi-where-contemporary-immigration-meets [https://perma.cc/98J7-3X8R] (discussing the plight of U.S.-born workers remaining in the southern poultry industry after the entry of immigrant labor). Although not speaking in the context of IRCA, Stuesse explains that the presence of immigrant labor to fully staff production lines made it much more difficult for citizen workers to quit and find work at the same or other poultry plants. *Id.* This helped to deprive citizen-born poultry workers of flexibility and some control over their work lives. *Id.* Her point is relevant in the context of IRCA as well.

157 I borrow this language from Professor Heather Thompson. Thompson, *supra* note 10, at 716 ("[T]he national economy, and the American working class as a whole, feel the reverberations of the post-civil rights sixties turn to mass incarceration."). Professor Thompson makes a similar point about the impact of the punitive labor system adopted in the South after the Civil War--a system that created effects that rippled beyond the large numbers of Black Americans imprisoned by it. *Id.*

158 *See infra* text accompanying notes 181-84. *See also* Gordon & Lenhardt, *supra* note 129, at 1163-66, 1171-79 (summarizing social science research documenting tensions between African Americans and Latino workers and the role of employer bias); Stuesse & Helton, *supra* note 156 (describing stereotyping of African American and Latino workers in the poultry industry).

159 Gordon & Lenhardt, *supra* note 129, at 1171-72, 1226.

160 *Id.* at 1172.

161 *See* Kat Chow, *'Model Minority' Myth Again Used as a Racial Wedge Between Asians and Blacks*, NPR (Apr. 19, 2017, 8:32 AM), https://www.npr.org/sections/codeswitch/2017/04/19/524571669/model-minoritymyth-again-used-as-a-racial-wedge-between-asians-and-blacks [https://perma.cc/8FQJ-SYWD] (discussing use of the perceived success of Asian Americans to downplay racism against African Americans and other communities of color); Ann-Derrick Gaillot, *Black-Asian Animosity is an American Tradition*, OUTLINE (Apr. 6, 2017, 11:54 AM), https://theoutline.com/post/1351/black-asian-conflict-beauty-supply [https://perma.cc/H8QP-ZQNR] (comparing Asian model minority stereotype at odds with stereotypes of African Americans as well as noting tensions between Korean small business owners and African Americans); Jeff Guo, *The Real Reasons the U.S. Became Less Racist Toward Asian Americans*, WASH. POST (Nov. 29, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/11/29/the-real-reason-americans-stopped-spitting-on-asian-americans-and-started-praisingthem/?utm_term=.980786731f5c [https://perma.cc/V6LZ-GW8A] (describing the use of the Asian model minority narrative to shift the blame for African American poverty); Christine Huang, *The Toll of Historically Pitting Asians Against Blacks*, HUFFINGTON POST (Mar. 30, 2017), https://www.huffingtonpost.com/entry/the-toll-of-historically-pitting-asians-against-blacks_us_58d2b56ae4b062043ad4af1b [https://perma.cc/2D35-F9PP] (pitting of Asians against African Americans dates back to the Civil War and Reconstruction). *See generally* ELLEN D. WU, THE COLOR OF SUCCESS: ASIAN AMERICANS AND THE ORIGINS OF THE MODEL MINORITY (2014).

162 *See* MIRIAM CHING YOON LOUIE, SWEATSHOP WARRIORS: IMMIGRANT WOMEN WORKERS TAKE ON THE GLOBAL FACTORY 31-33 (2001); Gaillot, *supra* note 161.

163 *See* CANDIS WATTS SMITH, BLACK MOSAIC: THE POLITICS OF BLACK PAN-ETHNIC DIVERSITYY 10-12 (2014) (explaining how the influx of Afro-Latino, Afro-Caribbean, and African immigrants have complicated what it means to be "African American" or "Black"). Professor Watts Smith explains that examining the interactions between black immigrants and African Americans is crucial for understanding the conditions that can foster coalition

work based on a "pan-ethnic identity" as well as conditions that are likely to engender "interethnic distancing and intraracial conflict." *Id.* at 3-4.

164 *See* MARY C. WATERS, BLACK IDENTITIES: WEST INDIAN IMMIGRANT DREAMS AND AMERICAN REALITIES 341-43 (1999) [hereinafter WATERS, BLACK IDENTITIES]; Godfried Agyeman Asante, Becoming "Black" in America: Exploring Racial Identity Development of African Immigrants 53-55, 58, 62-63 (Apr. 2012) (unpublished M.A. thesis, Minnesota State University, Mankato) (on file with Cornerstone: A Collection of Scholarly and Creative Works for Minnesota State University, Mankato); *see also* Kathy-Ann C. Hernandez & Kayon K. Murray-Johnson, *Towards a Different Construction of Blackness: Black Immigrant Scholars on Racial Identity Development in the United States*, 17 INT'L J. MULTICULTURAL EDUC. 53 (2015) (discussing the personal positioning and re-positioning of identity from the perspective of foreign-born Black women in the Academy). This article offers a nuanced discussion of the complex processes and challenges of negotiating immigrant and racial identities in the United States. *Id.* at 65. The authors speak of moving away from a model of "mak[ing] a fixed choice between one 'Black' identity and another" toward that of "complementary worldviews" and "hybrid consciousness." *Id.* at 68.

165 *See* WATERS, BLACK IDENTITIES, *supra* note 164, at 7, 332-35, 341-43; Asante, *supra* note 164, at 30, 48, 55, 58, 62-63. *See also* Mary C. Waters et al., *Immigrants and African Americans*, 40 ANN. REV. SOC. 369, 372 (2014).

166 WATERS, BLACK IDENTITIES, *supra* note 164, at 331; Waters et al., *supra* note 165, at 380 (noting evidence suggesting that "many employers prefer immigrants--including black immigrants--to African Americans in lower-skilled jobs"); *see also* Hernandez & Murray-Johnson, *supra* note 164, at 63 (recounting experiences in which white colleagues expressed more positive attitudes to Caribbean immigrants than to African Americans).

167 *See* Asante, *supra* note 164, at 49-50 (explaining that a majority of the African interviewees in the study did not know about African American history prior to coming to the United States); Hernandez & Murray-Johnson, *supra* note 164, at 65 (discussing how one author's initial view of African Americans as not working hard enough changed over time as she began to see the "historical and present-day systematic racial inequities" at play in the United States).

168 Gordon & Lenhardt, *supra* note 129, at 1235-36 (explaining the critical importance of new community and education programs that promote conversations about race and immigration and "give each group insight into the other's experience and history with work in the United States" as "an essential first step in the process of identifying shared ground").

169 *See supra* Part II.C; Bacon & Hing, *supra* note 21, at 89.

170 Wiener, *supra* note 29, at 981. *See generally* Cohen, *Involuntary Servitude*, *supra* note 8.

171 *See* W.E. BURGHARDT DU BOIS, BLACK RECONSTRUCTION IN AMERICA 167-68 (1963); Wiener, *supra* note 29, at 985.

172 White, *supra* note 7, at 674 (discussing vagrancy law as a function of labor regulation and resting on "the criminalization of the condition of being unemployed or holding illegitimate forms or circumstances of employment"); *see* DU BOIS, *supra* note 171, at 166 (discussing the enactment of the Black Codes as premised on

the white belief that black men and women would not work without compulsion).

173 *See* David. E. Bernstein, *The Law and Economics of Post-Civil War Restrictions on Interstate Migration by African-Americans*, 76 TEX. L. REV. 781, 787-92 (1998) (discussing the Black Codes enacted after the Civil War to "prevent the emergence of a free labor market"). "The more severe laws practically recreated slavery for African-American agricultural workers ...." *Id.* at 787.

174 Cohen, *Involuntary Servitude, supra* note 8, at 34 (describing southern calls for laws to control black labor and to "require them to fulfill their contracts of labour on the farms"); *see also supra* note 27 and accompanying text.

175 *See* Bernstein, *supra* note 173, at 787, 790-92; White, *supra* note 7, at 679-81; Wiener, *supra* note 29, at 973-74.

176 COHEN, FREEDOM'S EDGE, *supra* note 8, 30-31; Cohen, *Involuntary Servitude*, *supra* note 8, at 34; White, *supra* note 7, at 680.

177 Cohen, *Involuntary Servitude, supra* note 8, at 33.

178 *Id.* at 35-36; White, *supra* note 7, at 680. As White explains, though some of these laws were nullified or repealed by Reconstruction, they were amended or resurrected as facially neutral laws. *Id. See also* Wiener, *supra* note 29, at 981.

179 Other laws that inhibited the free market in black labor included the criminal surety system, "which permitted convicts to serve their sentences laboring for private employers." Wiener, *supra* note 29, at 981. Debt peonage was also used to extract labor from individuals who owed a debt. Cohen, *Involuntary Servitude, supra* note 8, at 32.

180 COHEN, FREEDOM'S EDGE, *supra* note 8, at 7, 11. Cohen describes the system that was beginning to emerge at the close of the Civil War as a "compulsory free labor system." *Id.* at 11 (quoting William F. Messner, *Black Violence and White Response: Louisiana, 1862*, 41 J. S. HIST. 19, 34 (1975)).

181 *See id.* at xiii-xiv (describing the Black Codes and laws enacted between the 1870s and 1910 as a reassertion of white hegemony over freed black men and women).

182 *See infra* text accompanying notes 268-71 for discussion of racialized narratives in support of criminalization.

183 Cohen, *Involuntary Servitude, supra* note 8, at 33-34, 47-50; Wiener, *supra* note 29, at 981; *see* DU BOIS, *supra* note 171, at 173-75 (describing vagrancy acts enacted in Virginia, Florida, Georgia, Mississippi, South Carolina, and Alabama).

184 Cohen, *Involuntary Servitude, supra* note 8, at 47; *see* DU BOIS, *supra* note 171, at 167-71 (discussing examples of the requirement and impact of labor contracts for black workers in various southern states).

185 Cohen, *Involuntary Servitude, supra* note 8, at 34.

186 *Id.* at 47 (stating that the vagrancy statutes enacted in the former Confederate states in 1865 or 1866 "defin[ed] vagrancy in sweeping terms"). *See* DU BOIS, *supra* note 171, at 173-75.

187 Cohen, *Involuntary Servitude, supra* note 8, at 48; *see* DU BOIS, *supra* note 171, at 173-75 (describing vagrancy statutes right after the Civil War).

188 Cohen, *Involuntary Servitude, supra* note 8, at 48. Cohen states that the new vagrancy laws adopted in southern states between 1890 and 1910 survived largely intact into the 1960s. *Id.* at 48-49.

189 DU BOIS, *supra* note 171, at 168-71; Cohen, *Involuntary Servitude, supra* note 8, at 42.

190 Cohen, *Involuntary Servitude, supra* note 8, at 45.

191 *Id.* at 47; *see* Pete Daniel, *The Metamorphosis of Slavery, 1865-1900*, 66 J. AM. HIST. 88, 93-95 (1979) (discussing the labor-disciplining function of vagrancy laws and labor-compelling function of contract laws emerging from most post-plantation societies, including the United States South).

192 Cohen, *Involuntary Servitude, supra* note 8, at 49.

193 *Id.* at 50.

194 *See* Daniel, *supra* note 191, at 93-95.

195 *See* COHEN, FREEDOM'S EDGE, *supra* note 8, at 15-16 (at least with respect to the prompt payment of wages).

196 *See id.* at 14-16.

197 Kathy Roberts Forde & Bryan Bowman, *Exploiting Black Labor After the Abolition of Slavery*, CONVERSATION (Feb. 6, 2017, 10:39 PM), https://theconversation.com/exploiting-black-labor-after-the-abolition-of-slavery-72482 [https://perma.cc/4PX9-NSNF] (explaining that "vagrancy--the 'crime' of being unemployed," was the most "sinister crime" enumerated in the Black Codes, and "aimed at keeping freed people tied to their former owners' plantations and farms").

198 COHEN, FREEDOM'S EDGE, *supra* note 8, at 14, 30-31.

199 *Id.* at xvi, 14; *see also* Bernstein, *supra* note 173, at 783, 786.

200 *See* Cohen, *Involuntary Servitude, supra* note 8, at 51-52.

201 Bernstein, *supra* note 173, at 787.

202 *Id.*

203 COHEN, FREEDOM'S EDGE, *supra* note 8, at 30-31.

204 *See* Wiener, *supra* note 29, at 982 (describing vagrancy as among the laws limiting the mobility of southern black workers and the desires of the planter class in making most black workers "too frightened to leave" so that they would "remain in order to preserve the low-wage, labor-intensive system of production").

205 *See* Amy Dru Stanley, *Beggars Can't Be Choosers: Compulsion and Contract in Postbellum America*, 78 J. AM. HIST. 1265, 1272-74 (1992) (noting how northern charity reformers sought to compel able-bodied beggars to work by outlawing vagrancy to combat what they perceived as idleness). Professor Stanley explains that most of the people prosecuted under the vagrancy statutes were subsistence-wage workers, who were always on the brink of poverty, and passed back and forth between wage labor and begging. *Id.* at 1269. Professor Stanley argues that the coercive aspects of the South's reconstructed labor system "were carried back north" by northern charity reformers who had traveled extensively in the South, studying the transition from slavery to free labor. *Id.* at 1288. Professor Stanley maintains that these northern reformers were "[s]haped by their southern experience" and returned North to support vagrancy laws to outlaw begging and to compel beggars into work. *Id. See also* White, *supra* note 7, at 717-30 (describing the labor-disciplining functions of vagrancy acts in North Dakota during the first few decades of the twentieth century to undercut harvest workers who wanted to hold out for better wages and working conditions).

206 White, *supra* note 7, at 681.

207 *See id.* at 684-85 (discussing scholarly studies documenting the "labor-regulating functions" of modern vagrancy laws and their impact on repressing labor organizing and forcing workers into low-wage employment).

208 Stanley, *supra* note 205, at 1274.

209 *Id.* at 1273-74.

210 *Id.* at 1270. "Tramp" was a pejorative term used to label people who were unemployed and transient. *Id.*

211 *Id.* at 1270, 1272. Reformers held that wage laborers abided by the rules of the marketplace; in contrast, "The beggar was a dependent person who neither bought nor sold but preyed on others. The wage earner abided by the obligations of contract; the beggar eluded them." *Id.* at 1272.

212 *Id.* at 1273.

213 *Id.* at 1274 (explaining that labor advocates argued that the criminal laws against begging "violated the freedom of poor men honestly looking for work").

214 *See id.* at 1281 (noting that a labor spokesman's claim that it was free person's "irrevocable right to travel in search of work, and he should not be 'enslaved in the penitentiaries' because he asked for alms along the way").

215 *Id.* at 1274; *see also* White, *supra* note 7, at 677 (discussing vagrancy acts as means for regulating labor relations).

216 Stanley, *supra* note 205, at 1282. Stanley explains that as a result of the vagrancy laws, "[F]ree persons could not choose to beg instead of agreeing to work for low wages." *Id.*

217 *Id.*

218 *Id.* at 1269.

219 *Id.*

220 *Id.* at 1272.

221 *Id.*

222 *See id.* at 1281 (concluding that the vagrancy laws "revoked ... [the] formal right of free choice"-- referring to the right "to choose when, for how long, and for whom to labor").

223 White, *supra* note 7, at 670.

224 *Id.* at 670-71, 699-709.

225 *Id.* at 716-17 (providing examples in various cities and towns in North Dakota in which vagrancy law was used against field hands who sought to withhold their labor for better pay).

226 *Id.* at 718-19. Importantly, "Vagrancy was measured not simply by idleness, but by willingness to work at prevailing wages." *Id.* at 717.

227 *Id.* at 726.

228 *Id.* at 727 (quoting a state employment bureau director's complaint to police "that 'agitators' were forcing up wages by causing laborers to 'hold out'").

229 *Id.* at 716-17.

230 *Id.* at 679-81.

231 COHEN, FREEDOM'S EDGE, *supra* note 8, at 5 (discussing the competition and conflict between white planters who favored restricting black mobility and those who favored the out-migration of black workers); Wiener, *supra* note 29, at 981 ("[E]nticement statutes, [] made it a crime for one planter to hire laborers employed by another.").

232 Cohen, *Involuntary Servitude, supra* note 8, at 33.

233 *Id.* at 42.

234 Bernstein, *supra* note 173, at 791-93; Cohen, *Involuntary Servitude, supra* note 8, at 38-40.

235 Bernstein, *supra* note 173, at 782.

236 *Id.* at 781-82.

237 *Id.* at 791.

238 *Id.*; Cohen, *Involuntary Servitude, supra* note 8, at 35-36.

239 Wiener, *supra* note 29, at 974 (quoting Alabama's and Georgia's anti-enticement statutes); Cohen, *Involuntary*

Servitude, supra note 8, at 35 (quoting Georgia's anti-enticement statute).

240 Cohen, *Involuntary Servitude, supra* note 8, at 42 (describing the documentation system in South Carolina, Louisiana, Texas, and Arkansas).

241 *Id. See also* HAY & CRAVEN, *supra* note 6, at 34 (explaining the British colonial practice of requiring discharge certificates or testimonials from former employers was a common way of putting an employer who might try to "poach" another employer's workers on notice).

242 The notion of the right of security is drawn from SCHMIDT, *supra* note 118, at 5. Schmidt contrasts the right of workers to quit and the right of security for employers in unbreakable, definite contracts that interfered with the ability of workers to sell their labor freely. *Id.*

243 Cohen, *Involuntary Servitude, supra* note 8, at 35 (explaining that the enticement acts "re-created in modified form the proprietary relationship that had existed between master and slave"); *see also* Wiener, *supra* note 29, at 974 (describing informal agreements among white planters not to hire away one another's laborers because they saw black workers as "attached to the soil" and planters "as much their masters as ever").

244 *See* HAY & CRAVEN, *supra* note 6, at 34 (describing the implications of anti-enticement statutes under master and servant law throughout the British colonies).

245 Wiener, *supra* note 29, at 974.

246 *See* Cohen, *Involuntary Servitude, supra* note 8, at 37 (providing examples in North Carolina where anti-enticement was used by employers to threaten and harass black workers who had quit or run away).

247 *Id.*

248 *See supra* text accompanying notes 124-40, 195-202.

249 *See supra* Part II.C and text accompanying notes 170-80.

250 *See supra* text accompanying notes 44-47.

251 *See supra* text accompanying notes 48-51.

252 Wishnie, *supra* note 13, at 215-16.

253 *See supra* text accompanying notes 189-93, 199.

254 *See* Cohen, *Involuntary Servitude, supra* note 8, at 33 ("[T]he system of involuntary servitude that emerged after the Civil War was a fluid, flexible affair which alternated between free and forced labor in time to the rhythm of the southern labor market."). Cohen explains that southern employers had the "tools to compel labor" when labor was scarce; "[w]hen labor was plentiful," they did not need to resort to compulsion. *Id.*

255 *See supra* text accompanying note 130; *see also* Holloway Sparks, *Queens, Teens, and Model Mothers: Race, Gender, and the Discourse of Welfare Reform, in* RACE AND THE POLITICS OF WELFARE REFORM 171, 178-81 (Sanford F. Schram et al. eds., 2006).

256 *See supra* Part III.B.

257 *See* Brownell, *supra* note 47, at 73-74 (discussing low risk of fines on employers who violate IRCA's employer sanctions provisions and a "relatively small share of [INS and ICE] enforcement resources on employer sanctions"); Chishti & Kamasaki, *supra* note 55, at 5 (noting that funding for labor standards enforcement stagnated after IRCA and declined from 2001-2009); NELP, WORKERS' RIGHTS ON ICE, *supra* note 51, at 10-11 ("[W]orkers themselves have borne the punitive brunt of the employment sanctions regime."); Nessel, *supra* note 44, at 368 (noting that the NLRA back pay award is cheaper than unionization and thus insufficient to deter employer abuse); Saucedo, *supra* note 21, at 308 (explaining that IRCA's employer sanctions provisions have "created an employment structure in which employers set up mechanisms to protect themselves from the sanctions and enforcement, and at the same time make employees vulnerable to both immigration and non-immigration consequences of working without authorization"). Saucedo explains that few of the Obama Administration's worksite I-9 audits of employers under IRCA resulted in protecting workers against exploitative employers. *Id.* at 307-08.

258 *See supra* text accompanying notes 145-50.

259 *See supra* text accompanying notes 241, 245-46.

260 *See supra* text accompanying notes 88, 124-28.

261 *See* Cohen, *Involuntary Servitude, supra* note 8, at 33-34.

262 HAY & CRAVEN, *supra* note 6, at 28.

263 *Id.* at 27.

264 *See* Sure-Tan, Inc. v. N.L.R.B., 467 U.S. 883, 911-12 (1984) (Brennan, J., dissenting) (discussing the anomalous status of undocumented workers); *see also* Motomura, *supra* note 60, at 1726 (referring to role of "pervasive national

ambivalence about immigration" in shaping evolution of rights of undocumented migrants).

265 COHEN, FREEDOM'S EDGE, *supra* note 8, at 11.

266 Daniel, *supra* note 191, at 89, 98. *See* Cohen, *Involuntary Servitude, supra* note 8, at 33 ("[T]he system of involuntary servitude that emerged after the Civil War was a fluid, flexible affair which alternated between free and forced labor in time to the rhythm of the southern labor market.").

267 *See supra* text accompanying notes 91-101 (discussing the emphasis in *Hoffman* on the criminality of undocumented workers) and *infra* text accompanying note 273 (Justice Scalia's comments at oral argument in *Hoffman). See, e.g.*, U.S. Dep't of Justice, Attorney Gen., Memorandum for all Fed. Prosecutors (Apr. 11, 2017), https://www.justice.gov/opa/press-release/file/956841/download [https://perma.cc/DXB9-JWSG] (directing federal prosecutors to seek charges of aggravated identity theft against immigrants who use false documents). *See also* Nessel, *supra* note 44, at 390-91 (refuting claims that granting temporary or permanent work authorization for reporting workplace violations is a "reward for lawbreakers"); Lauren Gilbert, *The (Aristotelian) Rhetoric of Immigration Reform* (2013), https://ssrn.com/abstract=2283731 [https://perma.cc/X23F-4PC4] (discussing political rhetoric around immigration); Christopher Ingraham, *'Go Home and Get in Line': Fact-Checking Kris Kobach on DACA*, WASH. POST (Sept. 7, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/09/07/go-home-and-get-in-line-fact-checking-kris-kobach-on daca/?noredirect=on&utm_term=.0d10a54be8d1 [https://perma.cc/DG58-Q9BD] (debunking the claims that undocumented immigrants should get in line and wait their turn); Miriam Valverde, *Donald Trump's Misleading Claims About Immigration in State of the Union Address*, POLITIFACT (Jan. 31, 2018, 6:20 PM), https://www.politifact.com/truth-o-meter/article/2018/jan/31/donald-trumps-misleading-claims-about-immigration-/ [https://perma.cc/83UU-PM4H] (analyzing Trump's claims about immigrants taking jobs from the poorest Americans, and labeling immigrants as terrorists and gang members); *Immigration 101: Why Can't Immigrants Just "Get Legal",* [sic] *"Get in Line" and Get Their Papers?*, AMS. VOICE (July 25, 2017), https://americasvoice.org/blog/immigration-101-why-immigrants-cant-just-get-legal/ [https://perma.cc/5VL5-C847] (explaining the fallacy of "get-in-line" arguments); *Why Don't They Just Get in Line?: There is No Line for Many Unauthorized Immigrants*, AM. IMMIGRATION COUNCIL (Aug. 12, 2016), https://www.americanimmigrationcouncil.org/research/why-don%E2%C80%99t-they-just-get-line [https://perma.cc/6FYN-F4TD].

268 *See* COHEN, FREEDOM'S EDGE, *supra* note 8, at 14-15 (explaining how freed Blacks' rejection of the work forms of slavery and of "slavery's hours and slavery's pace" was perceived by whites as "idleness and indolence and served as confirmation that blacks needed white supervision"); Stanley, *supra* note 205, at 1285 (quoting the Freedmen's Bureau Chief as believing that "[I]dleness was an intractable problem and neither persuasion nor threats overcame the freedmen's reluctance to make contracts.").

269 *See* Stanley, *supra* note 205, at 1283 ("'Freedom does not mean the right to live without work at other people's expense,' the bureau declared in 1865."). The Bureau also proclaimed: "While the freedmen must and will be protected in their rights, they must be required to meet these first and most essential conditions of a state of freedom, *a visible means of support, and fidelity to contracts." Id.* Northern beggars, harvest workers, and transient people, too, were denounced as idle and lazy outcasts who menaced society by rejecting work. *Id.* at 1276, 1282; *see also* White, *supra* note 7, at 682-83 (social reformers referred to transient people who traveled by railroad as "tramps" and saw them as "criminals, moral degenerates, ethnic or genetic inferiors, and diseased outcasts who had either to be removed from society or saved from themselves by the harshest of policies.").

270 *See* Stanley, *supra* note 205, at 1289 (describing the comments of the Freedmen's Bureau Chief).

271 Sparks, *supra* note 255 (describing the racial politics of welfare reform and the dominating narrative of African American women as abusers of the welfare system).

272 Gerald Friedman, *The Political Economy of Early Southern Unionism: Race, Politics, and Labor in the South 1880-1953*, 60 J. ECON. HIST. 384, 402 (2000).

273 Transcript of Oral Argument at 32-33, Hoffman Plastic Compounds, Inc. v. N.L.R.B., 535 U.S. 137 (2002) (No. 00-1595). *See* Dannin, *supra* note 101, at 401 (analyzing Justice Scalia's concerns about mitigation of damages at the oral argument as "an argument to prevent a wily discriminatee from taking advantage of a hapless employer" and viewing the inability to mitigate damages through obtaining lawful employment as "essentially equivalent to or greater than the employer's original violation").

274 *See* Stanley, *supra* note 205, at 1272.

275 COHEN, FREEDOM'S EDGE, *supra* note 8, at 15-16. *See also* Gilbert, *supra* note 267.

276 Sparks, *supra* note 255, at 183 (explaining that the dominating narrative of welfare recipients as "loafers, lawbreakers, and immoral mothers" made it difficult for poor women of color who were welfare recipients to participate in the debate about welfare reform). Professor Sparks explains that non-citizens, particularly those from China, Hong Kong, and Taiwan, were also portrayed as cheating the welfare system. *Id.* at 181.

277 *See* Gilbert, *supra* note 267 (discussing the use of ethos (credibility of the speaker), pathos (emotional state of the audience), and logos (internal logic of an argument) in persuasion). Pathos rests on the use of emotion to stir an audience for a particular goal. *Id.* Gilbert suggests that all three tools are used in advancing xenophobia and restrictionist immigration policies. *Id.*

278 HAY & CRAVEN, *supra* note 6, at 32 (describing the purpose of master and servant law and the characteristics of indentured labor and other forms of bounded labor).

279 *See* Nancy Cleeland, *AFL-CIO Calls for Amnesty for Illegal U.S. Workers*, L.A. TIMES (Feb. 17, 2000), http://articles.latimes.com/2000/feb/17/news/mn-65389 [https://perma.cc/4AL9-NXXU]; *AFL-CIO: End Sanctions*, MIGRATION NEWS (Mar. 2000), https://migration.ucdavis.edu/mn/more.php?id=2037 [https://perma.cc/H5HU-WBNB].

280 Wishnie, *supra* note 13, at 212-214.

281 KWONG, *supra* note 133, at 174; *see also* Wishnie, *supra* note 13, at 213-14; *supra* text accompanying note 131.

282 Gordon & Lenhardt, *supra* note 129, at 1177-78; Stuesse & Helton, *supra* note 156.

283 *See* STEVEN HAHN, THE ROOTS OF SOUTHERN POPULISM: YEOMAN FARMERS AND THE TRANSFORMATION OF THE GEORGIA UPCOUNTRY, 1850-1890, at 204-25 (1983) (discussing challenges of the Republicans in forging unity between Blacks and white yeoman for electoral victories during Reconstruction).

284 *See* ROGER W. SHUGG, ORIGINS OF CLASS STRUGGLE IN LOUISIANA 301 (1968) (describing how the unified strike of black and white longshoremen in 1865 for increased wages most likely caused anxiety about the prospect of racial solidarity in labor organizing); Friedman, *supra* note 272, at 402 (describing Alabama governor's anti-union tactics in support of mine owners against striking black and white miners in 1908).

285 Friedman, *supra* note 272, at 402.

286 *Id.* at 402.

287 *See* SHUGG, *supra* note 284, at 301-02.

288 *Id.* at 302. Shugg explains that eight years after the black and white longshoremen had led their joint strike in 1865, the racial animosity of white workers had intensified and economic depression had exacerbated the competition for jobs. *Id.* at 301-02.

289 *Id.* at 302.

290 *See id.* (illustrating the racist statements made by white longshoremen seeking the arrest of black longshoremen); Friedman, *supra* note 272, at 402-03 ("[The Alabama governor] warned the union leadership that the [white] public was 'outraged at the attempts to establish social equality between white and black miners.'").

291 *See* SHUGG, *supra* note 284, at 302 (discussing white longshoremen's use of vagrancy laws against black longshoremen and noting that competition between black and white workers accrued to the benefit of employers in many sectors by reducing the wages of "the unskilled, white or black"); Friedman, *supra* note 272, at 403 (discussing the appeals to white supremacy in breaking up striking miners).

292 *See* JAMES L. ROARK, MASTERS WITHOUT SLAVES: SOUTHERN PLANTERS IN THE CIVIL WAR AND RECONSTRUCTION 165-66 (1977) (describing attempts by southern planters to recruit white immigrant workers in order to discipline or replace black workers). However, these attempts were largely unsuccessful because immigrants chose cities in the North over the South and those who stayed were "more expensive to feed and keep" than black workers. *Id.* at 167; SHUGG, *supra* note 284, at 302-03 ("[Steamboat companies] decided to discharge all Negroes and hire whites instead, but 'at the same wages as are now paid to black [workers].'"). Planters tried to recruit immigrant workers to the South to threaten or replace black workers but often the immigrants refused to remain in the South where they were treated similarly to black workers, and instead went elsewhere for better opportunities. *See id.* at 254-59 (describing attempted use of Chinese, German, and Irish immigrant workers in the South and refusal of immigrant workers to remain in the South as cheap labor).

293 *See* HAHN, *supra* note 283, at 163.

294 *See supra* text accompanying notes 205-30 (discussing vagrancy laws in the North and Northern Plains).

295 RUTH ELLEN WASEM, CONG. RESEARCH SERV., R42980, BRIEF HISTORY OF COMPREHENSIVE IMMIGRATION REFORM EFFORTS IN THE 109TH AND 110TH CONGRESSES TO INFORM POLICY DISCUSSIONS IN THE 113TH CONGRESS 19 (2013).

296 *See, e.g.,* Paul Bedard, *Expert: Amnesty, Illegal Immigration, Hits Black Wages Hardest*, WASH. EXAMINER (Mar. 16, 2016, 5:56 PM), https://www.washingtonexaminer.com/expert-amnesty-illegal-immigration-hits-black-wages-hardest [https://perma.cc/KKR7-F8FC]; A.J. Delgado, *Black Americans: The True Casualties of Amnesty*, NAT'L REV. (July 9, 2014, 8:09 PM), https://www.nationalreview.com/2014/07/black-americans-true-casualties-amnesty-j-delgado/ [https://perma.cc/ZPE8-FRHV]; P.R. Lockhart, *Trump Rhetoric Pits New Immigrants Against African Americans and Latinos*, MOTHER JONES (Aug. 14, 2017), https://www.motherjones.com/politics/2017/08/trump-rhetoric-pits-new-immigrants-against-african-americans-and-latinos/ [https://perma.cc/2SE7-Y2WH]; Fred Lucas, *How Illegal Immigration Harms Black Americans, According to Civil Rights Commissioner*, DAILY SIGNAL (Feb. 19, 2017), https://www.dailysignal.com/2017/02/19/how-illegal-immigration-harms-black-americans-according-to-civil-rights-commissioner/ [https://perma.cc/KFL9-DPJJ]; Steven Malanga, *The Rainbow Coalition Evaporates: Black Anger Grows as Illegal Immigrants Transform Urban Neighborhoods*, CITY J. (Winter 2008), https://www.city-journal.org/html/rainbow-coalition-evaporates-13062.html [https://perma.cc/Q53D-P7Z8]; Collier Meyerson, *Donald Trump is Trying to Play Black Americans*, NATION (Mar. 7, 2017), https://www.thenation.com/article/donald-trump-is-trying-to-play-black-americans/ [https://perma.cc/2ZWA-TQGR]. *See also* OPPORTUNITY AGENDA, BRIDGING THE BLACK-IMMIGRANT DIVIDE 1 (2007) (quoting Alan Jenkins, Executive Director of The Opportunity Agenda: "The mainstream media have fixated on potential points of black/immigrant tension, looking for a conflict storyline. And that storyline has been amply fed by conservative anti-immigrant groups intent on driving a wedge between the two communities."); PEW RESEARCH CENTER, THE STATE OF AMERICAN JOBS 48 (2016) (finding racial and ethnic differences in how workers view the impact of immigrants on United States jobs). "In 2016, whites are more likely than Hispanics and blacks to think that growing numbers of immigrants hurt workers: 54% of whites say that, compared with 44% of blacks and 18% of Hispanics." *Id.* at 48. Ten years ago, 64% of Blacks thought immigrants hurt U.S. workers. *Id.* The 20-point drop among Blacks in viewing immigrants as exerting a negative impact on jobs suggests new opportunities for organizing workers across race, ethnicity, and immigration-citizenship status. *Id.*; Chacón, *supra* note 31, at 467-68 (discussing the claims by some in the civil rights movement that legalizing unauthorized migrants conflicts with the needs of African Americans).

297 *See* Chacón, *supra* note 31, at 466-68 (explaining that some critics of the contemporary immigrants' rights movement reject analogies between the present-day conditions of immigrants to the plight of African Americans in the South during the Jim Crow era).

298 *See* Bill Fletcher Jr., *The Left and Labor Strategy*, JACOBIN (Apr. 2, 2014), https://www.jacobinmag.com/2014/04/the-left-and-labor-strategy [https://perma.cc/K4QU-LYJT] [hereinafter Fletcher, *Labor Strategy*] (discussing the need for the creation of a new identity for disenfranchised communities).

299 *See id.* (addressing the need for a worldview "through which workers can understand and change reality" by "helping people to understand the nature of the system, the nature of the enemy, the nature and scope of our allies and

potential allies, and the possible directions we can pursue towards or [sic] victories.").

300 *See* Palma v. N.L.R.B., 723 F.3d 176 (2d Cir. 2013); Mezonos Maven Bakery, Inc., 362 N.L.R.B. 360 (2015).

301 Agri Processor Co. v. N.L.R.B., 514 F.3d 1 (D.C. Cir. 2008).

302 *Id.* at 9; Motomura, *supra* note 60, at 1753.

303 The NLRA vests authority in the N.L.R.B. to determine whether a bargaining unit is appropriate for the purposes of collective bargaining. 29 U.S.C. § 159(b) (2012). "Community of interest" is the legal standard used by the N.L.R.B. for determining whether a bargaining unit, based on its composition of workers, is an appropriate unit for collective bargaining. *See Agri Processor Co.*, 514 F.3d at 8.

304 *Agri Processor Co.*, 514 F.3d at 9.

305 *Id.* at 3, 9. Agri Processor also argued a lack of community interest because including undocumented workers in the same bargaining unit diluted the votes of authorized workers. *Id.* at 9. The D.C. Circuit rejected this argument as well, holding that the votes of undocumented workers were just as valid as those of authorized workers since undocumented workers were indeed covered employees under the NLRA. *Id.*

306 *Id.* See Motomura, *supra* note 60, at 1752-54, for Professor Motomura's discussion of *Agri-Processor* as an example of citizen proxy arguments for protecting the rights of undocumented workers-i.e. that failure to do so "can harm coworkers who are U.S. citizens, lawful permanent residents, or otherwise working lawfully." Thus, he explains there are "practical ties between unauthorized migrants and other persons whose welfare depends on how the law treats the unauthorized." *Id.*

307 In this respect, the D.C. Circuit opinion appears to go beyond a citizen proxy argument for protecting the rights of undocumented workers.

308 *See* Gordon & Lenhardt, *supra* note 129, at 1236 (discussing "the role of law in the creation and perpetuation of the conflict that infects the relationship "between" African American and Latino immigrant low-wage workers, and the need for "legal interventions" to support cooperation between workers).

309 Interview by Shirley Lung, Professor, City University of New York School of Law, with JoAnn Lum, Program Director, NMASS, in N.Y.C., N.Y. (June 1, 2018) (describing NMASS's *Ain't I A Woman* Campaign organizing home care workers challenging mandatory 24-hour shifts for which they are not paid for the entire shift). *See, e.g.*, Caroline Lewis, *Round-the-Clock Care, Half-the-Clock Pay*, VILLAGE VOICE (Aug. 2, 2018), https://www.villagevoice.com/2018/08/02/round-the-clock-care-half-the-clockpay/ [https://perma.cc/EL2N-PMJR] (discussing the efforts of home care workers to challenge state regulations that permit employers to pay for only thirteen hours of each twenty-four hour shift).

310 *See* THE COLLECTIVE FOR CMTY., CULTURE AND THE ENV'T & PRATT CTR. FOR CMTY. DEV.,

PRESERVING AFFORDABILITY & AUTHENTICITY: RECOMMENDATIONS TO THE CHINATOWN WORKING GROUP (2013) (detailing the rezoning study and plan to preserve Chinatown, the Lower East Side, and surrounding areas); *CWG Rezoning Plan*, COALITION TO PROTECT CHINATOWN & LES, https://peoplefirstnyc.org/people-first-rezoning-plan/ [https://perma.cc/V9HJ-5PJ3] (last visited Aug. 21, 2018) (describing goals of the Coalition); *Open Letter to NY Elected Officials*, COALITION TO PROTECT CHINATOWN & LES (Sept. 28, 2016), https://peoplefirstnyc.org/2016/09/ [https://perma.cc/Q86K-8ZVC] (protesting city rejection of community-generated rezoning plan offered by Chinese, Latino, African American, and Caucasian residents in New York City's Manhattan Community Board 3).

311 For other examples of such work, see BLACK ALL. FOR JUST IMMIGRATION, CROSSING BOUNDARIES, CONNECTING COMMUNITIES: ALLIANCE BUILDING FOR IMMIGRANTS RIGHTS AND RACIAL JUSTICE 3 n.1 (profiling sixteen organizations engaged in "cross-racial alliance building"); Gordon & Lenhardt, *supra* note 129, at 1230-32; *see generally* KIRWAN INST. FOR STUDY OF RACE & ETHNICITY, AFRICAN AMERICAN-IMMIGRANT ALLIANCE BUILDING (2009) (highlighting opportunities and challenges of collaborative efforts between African American and immigrant communities in five grass-roots organizations working on issues ranging from human rights, infant mortality, workers' rights, and voter registration).

312 *See generally* Gordon & Lenhardt, *supra* note 129.

313 Stuesse & Helton, *supra* note 156.

314 *Id.*

315 *See* OPPORTUNITY AGENDA, *supra* note 296, at 20-21 (recommending approaches in the media and the press to advocate for unity between African Americans and immigrants). The Opportunity Agenda Report made recommendations for developing "a proactive strategy to influence readers of the black press" toward education efforts to overcome this divide. *Id.* at 20; Bill Fletcher Jr., *Anti-Immigrant in Black Face?*, BLACK COMMENTATOR (May 24, 2007), http://www.blackcommentator.com/231/231_cover_anti_immigrant_in_black_face_fletcher_ed_bd.html [https://perma.cc/5M24-EZT8]; Bill Fletcher Jr., *Choices for Black Labor*, BLACK COMMENTATOR (Jun. 21, 2007), http://www.blackcommentator.com/234/234_cover_story_choices_for_black_labor_fletcher_ed_bd.html [https://perma.cc/A44Y-R262].

316 *See* Fletcher, *Labor Strategy, supra* note 298 (discussing organized labor's recognition of the strategic importance of Latino and Asian immigrants but its failure to retain a specific focus on the black working class). Fletcher states, "Many of the efforts to organize immigrants, for instance, have paid little to no attention to the construction of alliances with African Americans." *Id.* This, he maintains, has increased tensions between African American and immigrant communities. *Id.*

317 *See* Bacon, *Common Ground, supra* note 139; David Bacon, *Unions Come to Smithfield*, AM. PROSPECT (Dec. 17, 2008), https://prospect.org/article/unions-come-smithfield [https://perma.cc/N44X-9NSU].

318 *See* Motomura, *supra* note 60, at 1751-54 (explaining "citizen proxy" theory for permitting unauthorized immigrant workers to "assert their rights obliquely" based on the notion that the welfare of citizens and other authorized workers "depends on how the law treats the unauthorized.").

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