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THE MAKING OF THE "WRONGFULLY" DOCUMENTED WORKER*

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INTRODUCTION

The world of work has changed dramatically for immigrants since the enactment of the Immigration and Nationality Act ("INA") in 1952[1] and its 1965 amendment.[2] Since the late 1940s, Congress contemplated worksite immigration enforcement as a way to deal with undocumented immigration.[3] In 1986, Congress enacted the Immigration Reform and Control Act ("IRCA"),[4] which amended the INA and, for the first time, implemented a worksite enforcement

1. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.).

2. Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.).

3. The calls were in response to a growing number of temporary workers admitted through the Bracero Program, which produced more than four million temporary workers between 1942 and 1964. *See* PHILIP MARTIN, PROMISE UNFULFILLED: UNIONS, IMMIGRATION AND THE FARM WORKERS 48 (2003).

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

system and employer sanctions for knowingly hiring undocumented workers.[5] Since then, the federal government's focus on worksite immigration enforcement has been on employers. Nonetheless, there has been a gradual and subtle shift over the decades from a discussion about the use of an employer sanction system designed to dissuade employers from recruiting foreign labor to present-day calls for criminalizing unauthorized work at the state level. Importantly, this shift in focus is not reflected in the federal law, which sanctions employers for knowingly hiring undocumented workers but not employees for performing undocumented work. Employers have succeeded in weakening the provisions created to dissuade them from hiring undocumented workers, thus shifting the scrutiny, at least at the state level, to the workers themselves. Calls for regulating immigration by criminalizing the worker have increased.[6] The result is an expanding deportation (and now detention) apparatus increasingly focusing on undocumented workers.[7] State efforts to criminalize the use of false identifying information to obtain work exemplify this gradual shift to a focus on workers.

How did we get here? This Article focuses on the criminalization of false use of Social Security numbers or other employment authorization documents for work and proceeds in three parts. Part I follows the transformation of temporary work in the United States from a legal guestworker-type program to the development of the federal employer sanctions system to deal with the failures of past guestworker programs. This Part demonstrates the consequences of the employer sanctions system and the Supreme Court's approach to federal and state roles in worksite immigration enforcement. It then introduces Congress's enactment of identity theft laws and their effect on worksite enforcement. Part II demonstrates how the workers themselves have increasingly become the targets of enforcement. It reveals the move over the past decade by states to enact identity theft statutes that include the false use of identifying information for work. Part III explores whether states' attempts to criminalize the use of false Social Security numbers for work are preempted, given Congress's dual purpose to regulate immigration in the workplace and to protect individuals from identity theft. The Article concludes with a call for a return to Congress's intent of disincentivizing the

5. *Id*. § 101, 8 U.S.C. § 1324a (2012).

6. *See* Janice Kephart, *Fixing Flores: Assuring Adequate Penalties for Identity Theft and Fraud*, CENTER FOR IMMIGR. STUD. (Jan. 2010), http://cis.org/Flores-Figueroa.

7. *See infra* Part I.D.

employer preference for undocumented workers rather than placing the blame on the workers who are drawn into the migration stream.

I. THE DEVELOPMENT OF WORKPLACE IMMIGRATION REGULATION AT THE FEDERAL LEVEL

A. The Making of the Temporary Worker Through Immigration Regulation in Twentieth Century Immigration Law

Several scholars have written about the sometimes-conflicting goals of temporary worker and contract labor programs to (1) provide a steady labor supply to some of the most needy industries (mostly agricultural), (2) protect jobs for available U.S. workers, and (3) regulate immigration into the United States.[8] Through these programs, the interests of labor and the interests of employers who need the temporary labor are mediated by federal agencies, namely the Department of Labor ("DOL") and the Department of Homeland Security ("DHS"), or its predecessor, the Immigration and Naturalization Service ("INS").[9] In ongoing negotiations over the need and the number of immigrants required to fill positions, the related goals of adequate employment law enforcement and preservation of living wage standards for the available jobs have become secondary to the twin goals of preserving jobs for Americans and immigration enforcement.

Calls for worksite immigration regulation to dissuade employers from hiring undocumented workers occurred against this backdrop. In response to these competing goals, legislators not only restricted immigration but also tried to regulate private actors by, for example, making it a crime to harbor illegal aliens.[10] While the concept of employer sanctions was floated in legislative proposals leading up to the first comprehensive immigration law in 1952, none were successful.[11] Nonetheless, the debates leading up to the Immigration

8. *See, e.g.*, George C. Kiser, *Mexican American Labor Before World War II*, 2 J. MEX. AM. HIST. 122, 131–32 (1972).

9. *See* KITTY CALAVITA, INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION AND THE I.N.S. 181 (2d ed. 2010).

10. *See* Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 274, 66 Stat. 163, 228–29 (codified as amended at 8 U.S.C. § 1324(a)). The provision makes it an immigration violation to bring an alien into the United States other than through a designated port of entry, or to otherwise induce, transport, conceal, harbor, or shield an undocumented person in the United States. *Id.*

11. CONG. RESEARCH SERV., R55-752, 96TH CONG. REP. ON TEMPORARY WORKER PROGRAMS: BACKGROUND AND ISSUES 39–40 (Comm. Print 1980) [hereinafter CRS WORKER] ("Attempts to pass legislation prohibiting the employment of and establishing

and Nationality Act of 1952 and its 1965 amendment mirrored the later discussions over the efficacy of worksite immigration enforcement that led to employer sanctions in 1986.[12]

B. The 1952 and 1965 Immigration and Nationality Acts

Congress formally debated guestworker programs as part of immigration law in the early 1950s. Before then, guest workers were considered the product of contract labor agreements and not necessarily part of the immigration regulatory scheme. Part of the debate at the time was whether authority over a guestworker program should rest with the DOL or INS.[13] This debate reflected the tug-of-war between the DOL and INS over the use of the immigration system enforcement mechanisms to regularize Mexican workers for employers.[14] This recurring debate assumed Mexicans would enter the United States to work and return to Mexico after the work was completed.[15] Mexican labor, in other words, was cast in the debates as transient or temporary, as evidenced by their status under the then-existing Bracero Program.[16] When Congress enacted the H-2 provision of the Immigration and Nationality Act of 1952 allowing for guest workers,[17] there was much lobbying for folding the Bracero Program,[18] authorized under a separate contract labor agreement and

penalties for the harboring of illegal aliens in 1951 and 1952 were only partially successful . . . . [During debates,] Senator Paul Douglas offered an amendment to provide penalties for the employment of illegal aliens . . . . It was resoundingly defeated.").

12. *See infra* Part I.C.

13. CALAVITA, *supra* note 9, at 123–27 (discussing the INS "wrangling" with the DOL over control of the guestworker program).

14. MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF AMERICA 152–53 (William Chafe et al. eds., 2004).

15. This characterization of Mexican labor as transient or temporary was cast early in the history of federal immigration regulation, in part because immigration regulation divided into a two-tiered bureaucracy. The Bureau of Immigration within the Department of Labor regulated temporary workers from Mexico and other parts of the Western Hemisphere. *See* DANIEL J. TICHENOR, DIVIDING LINES: THE POLITICS OF IMMIGRATION CONTROL IN AMERICA 168 (2002); Leticia M. Saucedo, *Mexicans, Immigrants, Cultural Narratives and National Origin*, 44 ARIZ. ST. L.J. 305, 321–33 (2012).

16. TICHENOR, *supra* note 15, at 152, 173.

17. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 101, 66 Stat. 163, 168 (codified at 8 U.S.C. § 1101(a)(15)(H)(ii) (2012)).

18. For a more in-depth discussion of the Bracero Program, see generally DEBORAH COHEN, BRACEROS: MIGRANT CITIZENS AND TRANSNATIONAL SUBJECTS IN THE POSTWAR UNITED STATES AND MEXICO (2011) (describing the development of the Bracero Program as a bilateral agreement between the United States and Mexico and the responses of American and Mexican workers to the Program).

legislation, into the proposed guest worker provisions. Congress ultimately declined.[19]

During this period, the calls for curbing undocumented immigration were growing. President Truman advocated for employer sanctions—harsh and stiff penalties for employers who knowingly hired undocumented workers—as well as increased immigration authority to inspect workplaces without warrants.[20] Employer sanctions were hotly debated and ultimately defeated by a large margin.[21] After much debate, the 1952 Act included a compromise: the criminalization of the willful importation, transportation, or harboring of illegal aliens.[22] This crime was considered a felony punishable by a $2,000 fine or imprisonment of up to five years, or both.[23] The provision was initially introduced as a penalty for employers who actively engaged in recruiting and bringing workers into the country.[24] After much lobbying, however, employment of undocumented workers was specifically exempted from the harboring definition.[25]

After Congress enacted the 1952 Act, proposals to curtail undocumented immigration from Mexico continued to emerge.[26] Around the same time, the immigration agency began a massive deportation campaign known as Operation Wetback.[27] Proposals for employer sanctions again surfaced, with the purpose of encouraging employers to use the Bracero Program—rather than undocumented workers—for their labor needs.[28] These proposals were defeated, in part because employers strongly objected to government intrusion into the worksite.[29] At the time, employers and government agencies still considered contract labor programs outside the realm of traditional immigration regulation.[30]

19. CRS WORKER, *supra* note 11, at 53.

20. *Id*. at 38.

21. *Id*. at 39–40.

22. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 274, 66 Stat. 163, 228–29 (codified as amended at 8 U.S.C. § 1324).

23. *Id*.

24. CRS WORKER, *supra* note 11, at 39–40.

25. *Id*. at 40.

26. JUAN RAMÓN GARCIA, OPERATION WETBACK: THE MASS DEPORTATION OF UNDOCUMENTED WORKERS IN 1954, at 161 (1980).

27. *Id.* at 169, 183.

28. *Id.* at 160–61.

29. *Id.* at 161–63.

30. *See* TICHENOR, *supra* note 15, at 150–51 (describing the two-tiered immigration regulation system consisting of permanent immigration on the one hand and temporary labor programs on the other).

The 1965 Act abolished the long-held tradition of national origins quotas embedded in immigration law.[31] The law is seen as a triumph of liberalism over the conservative restrictionist views that excluded generations of Asians and others from a rightful place in the migration stream.[32] The law also limited the number of immigrant visas available for unskilled manual work, a decision that mostly affected Mexican workers.[33] Furthermore, the 1965 Act was not generous to temporary workers, in part because of the heavy pressure from organized labor and others to end foreign-contract labor programs. During the hearings on the 1965 Act, the AFL-CIO urged that any amendments to the Act allow only for permanent and not temporary immigration for work.[34] The House Report on the 1965 amendments also clarified that there was no path to permanent status in the proposed preference categories that were to replace national origins quotas.[35] The Senate Report on the 1965 amendments was also silent on the subject of temporary agricultural labor, noting that "[t]he bill specifically provides that skilled or unskilled labor of a temporary or seasonal nature is not to be entitled to any preference under the selection system for the allocation of immigrant visas."[36]

To ensure that the temporary Mexican labor program was not simply replaced with a path to permanent residence, the 1965 Congress imposed caps on the immigrant visas available to the western hemisphere countries.[37] The move was made in the name of

31. Congress enacted emergency national origins quotas in 1921, which were set to expire on June 30, 1922. Emergency Quota Act, Pub. L. No. 67-5, § 5, 42 Stat. 5, 7 (1921). Congress then made quotas permanent in the 1924 Immigration Act, which set the annual quota of any nationality at two percent of the number of immigrants from that country resident in the U.S. in 1890. Immigration Act of 1924, Pub. L. No. 68-139, § 11(a), 43 Stat. 153, 159 (codified as amended in scattered sections of 8 U.S.C.). The INA of 1965 finally abolished the national origins quotas. Immigration and Nationality Act of 1965, Pub. L. No. 89-236, § 201(e), 79 Stat. 911, 911 (codified as amended in scattered sections of 8 U.S.C.) ("The immigration pool and the quotas of quota areas shall terminate June 30, 1968.").

32. Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273, 276 (1996).

33. *See* Immigration and Nationality Act of 1965, Pub. L. No. 89-236, § 3, 79 Stat. 911, 912–14 (codified as amended at 8 U.S.C. § 1153(a) (2012)); *see also* MARC R. ROSENBLUM ET AL., CONG. RESEARCH SERV., R42560, MEXICAN MIGRATION TO THE UNITED STATES: POLICY AND TRENDS 7–8 (2012) (discussing how an increased push for Mexican migration coincided with the reduced availability of visas for those workers).

34. CRS WORKER, *supra* note 11, at 68.

35. *Id.* at 68–69.

36. *Id*. at 69.

37. Douglas A. Massey & Karen A. Pren, *Unintended Consequences of US Immigration Policy: Explaining the Post-1965 Surge from Latin America*, 38 POPULATION & DEV. REV. 1, 1 (2012).

fairness. Congress denounced the inequity of imposing caps on the rest of the world while leaving the Western Hemisphere relatively free of such regulation.[38] The 1965 Congress ignored, however, the level of regulation occurring both through temporary work programs and through inadmissibility provisions aimed at controlling Mexican immigration. Once the temporary programs were eliminated and caps placed on immigration, the rise of undocumented immigration was inevitable. Sociologist Douglas Massey notes that while the numbers of legal immigrants remained fairly constant between 1965 and 1985, the number of temporary workers decreased and the numbers of illegal entrants increased at roughly the same levels.[39] According to Massey's calculations, the temporary worker population went from about 450,000 in 1955 to almost zero by 1968, while the undocumented population went from about 50,000 to about 400,000 by 1975.[40]

C. The Immigration Control and Reform Act of 1986

By 1986, the consequences of failing to create a viable legal path for immigration workers coming to the United States from Mexico were evident, although their implications were highly contested. On the one hand, immigration advocates joined with employers and others to push for a path to permanent residence and citizenship.[41] On the other hand, restrictionists called for increased border enforcement and employer sanctions to curb illegal immigration flows.[42] The result was again a compromise.

In the Immigration Reform and Control Act of 1986,[43] Congress finally implemented the employer sanctions provisions that had been debated since the 1950s.[44] The main provision states that "[i]t is unlawful for a person or other entity . . . to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien . . . with respect to such employment."[45]

38. *Id*. at 3.
39. *Id*. at 4.
40. *Id*.
41. CALAVITA, *supra* note 9, at 182–83.
42. TIMOTHY J. HENDERSON, BEYOND BORDERS: A HISTORY OF MEXICAN MIGRATION TO THE UNITED STATES 113 (Jürgen Buchenau ed., 2011).
43. Immigration Reform and Control Act of 1986 ("IRCA"), Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of U.S.C.).
44. *Id*. § 101, 8 U.S.C. § 1324a (2012); CALAVITA, *supra* note 9, at 182 ("[T]he political engine in IRCA was the employer sanctions provision, making it illegal to knowingly employ unauthorized workers.").
45. IRCA § 101, 8 U.S.C. § 1324a(a)(1)(A).

The statute also calls for sanctions for a "pattern and practice" of activity that shows regular, repeated, and intentional activities related to knowingly hiring undocumented workers.[46] Therefore, the statute explicitly and clearly placed the onus on employers to ensure that unauthorized hiring ceased. At the time, Congress intended this section of the statute to apply to employers, who were responsible for verifying employment.[47] The statute imposed clear sanctions for breach of this new responsibility.[48]

The statute's fraud provision was likewise aimed at employers.[49] The provision makes it a felony offense to use a false identification document, or misuse a real one, for the purpose of satisfying the employer's verification requirements.[50] This provision requires all employers to verify and document that all of their employees have the legal right to work in the United States.[51] The fraud subsection penalizes fraud in the *employer*'s use of documents to satisfy the verification requirements.[52] Recall that Congress's purpose was to dissuade *employers* from pulling illegal immigrants into the country for employment.[53] Thus, the provision achieves Congress's intent to place responsibility on employers to document their employees' work authorization to the federal government.[54]

At the time of deliberation, the employer sanctions provision was promoted as one of several effective tools for shutting down illegal immigration.[55] By including worksites in the immigration enforcement scheme, immigration regulation would surely become more efficient and effective.[56] Employers were not so enthusiastic about their proposed responsibilities for immigration regulation, in large part because the statute proposed to make them responsible for the

46. IRCA § 101, 8 U.S.C. § 1324a(f).

47. For discussion of congressional purpose and intent, see *Arizona v. United States*, 132 S. Ct. 2492, 2504 (2012).

48. IRCA § 101, 8 U.S.C. § 1324a.

49. IRCA § 103, 18 U.S.C. § 1546(b).

50. IRCA § 103, 18 U.S.C. § 1546(b).

51. IRCA § 103, 18 U.S.C. § 1546(b).

52. IRCA § 103, 18 U.S.C. § 1546(b). The provision imposes a fine or imprisonment to anyone who uses "(1) an identification document, knowing (or having reason to know) that the document was not issued lawfully for the use of the possessor, (2) an identification document knowing (or having reason to know) that the document is false, or (3) a false attestation" to verify employment authorization. IRCA § 103, 18 U.S.C. § 1546(b)(1)–(3).

53. *See supra* notes 43–48 and accompanying text.

54. IRCA § 103, 18 U.S.C. § 1546(b).

55. *See* S. REP. NO. 98-62, at 7–8 (1983) (describing the congressional plan to discourage immigration through broader enforcement coupled with an employer sanctions system).

56. CALAVITA, *supra* note 9, at 182.

migration flow.[57] After some advocacy during the deliberation over the efficacy of employer sanctions, Congress weakened the provision with a safe harbor amendment for employers that requested documentation from workers regardless of its validity.[58]

In 1990, Congress added some enforcement teeth by giving the INS the authority to assess monetary penalties against an employer for failure to comply with the employer sanctions provisions, whether such failure was willful or reckless.[59] In 1996, however, the employer sanctions provisions were further weakened. With the Sonny Bono Amendment—named after its sponsor—Congress allowed employers to correct "technical or procedural" I-9 employee verification document violations if they resulted from a "good faith" effort to comply with employment verification requirements and so long as the mistakes were corrected within ten days of notice by Immigration and Customs Enforcement ("ICE").[60]

The employer sanctions regulations now provide a safe harbor for employers who did not "knowingly hire" undocumented workers.[61] This was done at the behest of employers who argued that they should not be held strictly liable for criminal fines and sanctions.[62] The regulation states:

> An employer or a recruiter or referrer for a fee for employment who shows good faith compliance with the employment verification requirements of § 274a.2(b) of this part shall have established a rebuttable affirmative defense that the person or entity has not violated section 274A(a)(1)(A) of the Act with respect to such hiring, recruiting, or referral.[63]

In response to concerns that an employer sanctions system would incentivize the creation of systems to produce and distribute false documents, IRCA also included fraud provisions sanctioning individuals who use false or fraudulent documents to obtain employment.[64] The penalties for workers include civil fines,[65]

57. *Id*.

58. *Id.* at 183; Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 101(a)(1), 100 Stat. 3360, 3360–61 (codified at 8 U.S.C. § 1324a(a)(3)).

59. Immigration Act of 1990, Pub. L. No. 101-649, § 544, 104 Stat. 4978, 5057–59 (codified at 8 U.S.C. § 1324c).

60. Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, § 411, 110 Stat. 3009-546, 3009-666 (1996) (codified at 8 U.S.C. § 1324a(b)(6)).

61. CALAVITA, *supra* note 9, at 182.

62. *Id.* at 182–83.

63. 8 C.F.R. § 274a.4 (2014).

64. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 103, 100 Stat. 3360, 3360–61 (codified at 18 U.S.C. § 1546(a)).

immigration penalties,[66] and criminal sanctions.[67] Importantly, Congress limited both the immigration penalties and the enforcement of fraud to enforcement by federal agencies.[68]

Given the congressional purpose to focus on employer sanctions, ICE has used its discretion in worksite enforcement to rely heavily on immigration penalties and civil sanctions rather than criminal sanctions.[69] ICE priorities have also changed with administrations. For example, in 1999, enforcement focused on employers who practiced a pattern of knowingly hiring undocumented workers and on employers who abused workers and violated various employment laws.[70] After the terrorist attacks in 2001, worksite enforcement activities shifted to removal of undocumented workers from military bases and airports.[71] According to a Congressional Research Service ("CRS") report, between 2003 and 2012 ICE brought 20,631 administrative (civil) charges, compared to 5,131 criminal charges in worksite enforcement operations.[72] Since 2008, the numbers of both civil and criminal charges have diminished significantly, reflecting ICE's renewed focus on employers.[73] In 2012, almost half of the criminal arrests in worksites were of managerial employees, indicating the arrests were for knowingly hiring unauthorized workers.[74] As a recent CRS report noted, "ICE administrative and criminal arrests in

65. 8 U.S.C. § 1324c(d)(3) (2012).

66. *Id.* § 1227(a)(3)(C)(i) (making "[a]n alien who is the subject of a final order for violation of section 1324c of this title [] deportable"); *id.* § 1182(a)(6)(C) (making those who make false claims to citizenship, including for purposes of employment verification, inadmissible).

67. *Id.* § 1324a(d)(2)(F) (limiting criminal sanctions to specified federal statutes and requiring that information provided for employment verification "not be used for law enforcement purposes, other than for enforcement of this chapter or sections 1001 [relating to false statements], 1028 [relating to fraud in connection with identity documents], 1546 [relating to fraud in immigration documents], and 1621 [relating to perjury] of title 18").

68. *See id.* § 1324a(b)(5) (limiting use of the Form I-9 attestation form "and any information contained in or appended to such form" to "enforcement of this chapter and sections 1001, 1028, 1546, and 1621 of title 18"); *id*. § 1324a(d)(2)(F).

69. *See* TICHENOR, *supra* note 15, at 262–63 (describing the lax employer sanctions policies that developed from the inception of the legislation); *see also* Kitty Calavita, *Employer Sanctions Violations: Toward a Dialectical Model of White-Collar Crime*, 24 LAW & SOC'Y REV. 1041, 1049–55 (1990) (describing how low level fines and sanctions correlate with widespread disregard of the employer sanctions provisions by employers).

70. ANDORRA BRUNO, CONG. RESEARCH SERV., R40002, IMMIGRATION-RELATED WORKSITE ENFORCEMENT: PERFORMANCE MEASURES 2 (2013) [hereinafter CRS REPORT].

71. *Id*. at 5.

72. *Id.*

73. *See id.* at 7.

74. *Id*. at 8.

worksite enforcement operations represent a very small percentage of the potential population of [immigration] violators."[75] At the high mark of administrative arrests in 2008, for example, ICE arrested 5,184 people at worksites.[76] That year there were an estimated 8.3 million undocumented immigrants in the United States.[77]

Today, the executive branch, in implementing IRCA, has shifted the focus back to employer responsibility through strong labor and employment enforcement that parallels the immigration enforcement scheme.[78] This approach aims to become an integrated part of the federal plan to deter undocumented employment. As one commentator noted:

> Enforcement activity by the [DOL] is also relevant to a discussion of federal efforts to curtail unauthorized employment. DOL, which is responsible for enforcing minimum wage, overtime pay, and related requirements, focuses a significant percentage of its enforcement resources on low-wage industries that employ large numbers of immigrant—and presumably large numbers of unauthorized—workers.[79]

Enforcement of employment laws sends a signal to employers that the federal government will use multiple enforcement mechanisms to hold employers accountable. Recently, the Obama administration initiated the development of an interagency taskforce, including the Department of Labor, Department of Homeland Security, Department of Justice, Equal Employment Opportunity Commission, and National Labor Relations Board to ensure that undocumented workers did not bear the brunt of enforcement efforts against unauthorized immigration.[80] Among its priorities, the Work Group will seek to ensure that "federal enforcement authorities are not used by parties seeking to undermine worker protection laws by enmeshing immigration authorities in labor disputes."[81] This shift in enforcement priorities acknowledges that employers have developed strategies to exploit workers and deter them from asserting their rights, despite the

75. *Id*.

76. *Id.*

77. JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CTR., A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES 12 (2009).

78. *See Fact Sheet: Establishment of Interagency Work Group for the Consistent Enforcement of Federal Labor, Employment and Immigration Laws* , U.S. DEP'T OF LAB., http://www.dol.gov/dol/fact-sheet/immigration/interagency-working-group.htm (last visited Apr. 28, 2015) [hereinafter *DOL Fact Sheet*].

79. CRS REPORT, *supra* note 70, at i.

80. *DOL Fact Sheet*, *supra* note 78.

81. *Id*.

emphasis in immigration law on an employer sanctions worksite enforcement regime.[82]

D. The Evolution of Agency Immigration Regulation from Border Apprehensions to Interior Enforcement and Deportations

Over the past twenty years, immigration enforcement has shifted from the border to the interior. The immigration system consists of two agencies, ICE[83] and Customs and Border Patrol ("CBP").[84] ICE conducts interior enforcement efforts while CBP conducts enforcement at border points within 100 miles of the border.[85] Apprehensions moved from the border to the interior starting in the 1990s, and, by 2011, interior apprehensions amounted to almost half of the total.[86] Coincidentally, this shift correlates with increased state interest in immigration regulation.

The Obama administration has overseen the largest number of deportations in the history of immigration enforcement.[87] The administration has deported more immigrants in its first five years than the Bush administration did in its eight-year tenure.[88] More than 4.5 million noncitizens have been deported from the United States since 1996, when Congress passed very restrictive immigration legislation.[89] Since then, formal removals have increased from approximately 70,000 in 1996 to 420,000 in 2012.[90] This growth in

82. *Id.*

83. *See Enforcement and Removal Operations*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/ero (last visited Apr. 28, 2015).

84. U.S. CUSTOMS & BORDER PROTECTION, http://www.cbp.gov (last visited Apr. 28, 2015); *CBP Through the Years*, CUSTOMS & BORDER PROTECTION, http://www.cbp.gov/about/history (last visited Apr. 28, 2015).

85. *See Enforcement and Removal Operations*, *supra* note 83; 8 C.F.R. § 287.1(a)(2) (2014).

86. *See* Massey & Pren, *supra* note 37, at 15, 27.

87. Alejandra Marchevsky & Beth Baker, *Why Has President Obama Deported More Immigrants Than Any President in US History?*, NATION (Mar. 31, 2014), http://www.thenation.com/article/179099/why-has-president-obama-deported-more-immigrants-any-president-us-history.

88. MARC ROSENBLUM & DORIS MEISSNER, MIGRATION POLICY INST., THE DEPORTATION DILEMMA: RECONCILING TOUGH AND HUMANE ENFORCEMENT 1 (2014), *available at* http://www.migrationpolicy.org/research/deportation-dilemma-reconciling-tough-humane-enforcement.

89. *See* Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996); *see also*, ROSENBLUM & MEISSNER, *supra* note 88, at 1 ("More than 4.5 million noncitizens have been deported from the United States since Congress passed sweeping legislation in 1996 to toughen the nation's immigration enforcement system.").

90. ROSENBLUM & MEISSNER, *supra* note 88, at 1.

deportations is mostly from interior enforcement activities.[91] The increased enforcement mechanism could not be carried out through ICE enforcement alone since there are only slightly over 20,000 ICE enforcement personnel throughout the country.[92] To address this shortfall, Congress and the executive branch established collaborative programs with state and local governments to identify and hold undocumented immigrants who end up in local jails.[93] Programs like Secure Communities[94] led to a massive increase in the numbers of undocumented immigrants arrested and held for ICE authorities.[95] The Criminal Alien Program ("CAP"), a program within ICE responsible for identifying removable noncitizens in state and local jails and prisons, produced the vast majority of deportations in the last decade.[96] The program relies on local and state penal institutions to share lists of detainees who may be removable.[97]

Sociologists Massey and Pren explain that while the shift to interior enforcement and deportations was rooted in a desire for security and the fear of terrorism, it resulted in the massive deportations of Latinos:

> In the 1990s the Cold War was replaced by the threat of terrorism. The Anti-Terrorism and Effective Death Penalty Act of 1996 and the 2001 Patriot Act intensified border enforcement and, more importantly, brought about a sharp rise in deportations from the United States. Deportations replaced border apprehensions as the visible manifestation of the Latino threat. Although the resulting feedback look was not as powerful as the apprehension-based loop that prevailed from

91. Massey & Pren, *supra* note 37, at 15.

92. *See History of ICE*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/history (last visited Apr. 28, 2015).

93. *Secure Communities*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/secure-communities (last visited Apr. 28, 2015).

94. *Id*.

95. *See id*. The Obama administration recently discontinued the Secure Communities program and replaced it with the Priority Enforcement Program. *See* Memorandum, Jeh Johnson, U.S. Dep't of Homeland Sec., Secure Communities 1–3 (Nov. 20, 2014), *available at* http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf.

96. *See The Criminal Alien Program (CAP): Immigration Enforcement in Prisons and Jails*, AM. IMMIGR. COUNCIL, http://www.immigrationpolicy.org/just-facts/criminal-alien-program-cap-immigration-enforcement-prisons-and-jails (last visited Apr. 28, 2015) (describing the CAP program as responsible for the largest number of noncitizen apprehensions).

97. *Id*. ("Penal institutions that participate in CAP share information about their inmates with ICE and allow ICE agents to interview suspected removable immigrants.").

> 1965 to 1995, it was potent nonetheless and deportations expanded even as apprehensions fell in the decade after 2000.[98]

The growing criticism of the federal government's interior enforcement efforts led the Obama administration to rescind its enforcement policies.[99] On November 20, 2014, DHS discontinued its Secure Communities program, replacing it with a Priority Enforcement Program.[100] Under the new program, the federal government will advise local and state law enforcement authorities that it will seek the transfer to federal immigration authorities of only those who are national security risks or who have been convicted of high-priority crimes.[101] These crimes include gang-related offenses; offenses classified as felonies in the convicting jurisdiction, other than a state or local offense for which an essential element was the alien's immigration status; and aggravated felonies, as that term is defined in the immigration statute.[102] Under this new program, the question remains whether immigration status will be considered an essential element of state identity theft convictions for use of false information for work.

98. Massey & Pren, *supra* note 37, at 23.

99. The criticism over programs such as Secure Communities arose not just from advocates but also from the judicial branch. Courts throughout the United States questioned the constitutionality of the federal government's detainer request policies, which required local and state law enforcement agencies to detain undocumented noncitizens after arrest. *See* Johnson, *supra* note 95, at 2 n.1 (citing Miranda-Olivares v. Clackamas Cnty., No. 3:12-cv-02317-ST, 2014 WL 1414305, at *1 (D. Ore. Apr. 11, 2014) (holding that county violated the Fourth Amendment by honoring an ICE detainer that did not provide probable cause regarding removability); Morales v. Chadbourne, 996 F. Supp. 2d 19, 29 (D.R.I. 2014) (holding that detention under an immigration detainer "for purposes of mere investigation is not permitted"); Moreno v. Napolitano, No. 11 C 5452, 2014 WL 4814776, at *1, *5 (N.D. Ill. Sept. 29, 2014) (allowing plaintiffs' claim that ICE's detainer procedures violate probable cause requirements); Villars v. Kubiatoski, No. 12 CV 4586, 2014 WL 1795631, at *10 (N.D. Ill. May 5, 2014) (allowing Fourth Amendment claims that ICE detainer was issued without probable cause of an immigration violation); Uroza v. Salt Lake City, No. 2:11CV713DAK, 2013 WL 653968, at *6–7 (D. Utah Feb. 21, 2013) (denying dismissal on qualified immunity grounds where plaintiff claimed that immigration detainer without probable cause); Galarza v. Szalczyk, No. 10-cv-06815, 2012 WL 1080020, at *15 (E.D. Pa. March 30, 2012) (denying qualified immunity to immigration officials who issued immigration detainer without probable cause), *rev'd on other grounds*, 745 F.3d 634 (2014) (reversing district court's finding of no municipal liability)).

100. Johnson, *supra* note 95, at 1–3.

101. *See id*. at 2.

102. Memorandum, Jeh Johnson, U.S. Dep't of Homeland Sec., Policies for the Apprehension, Detention and Removal of Undocumented Immigrants 3 (Nov. 20, 2014), *available at* http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.

The Supreme Court has addressed the treatment of undocumented workers in several cases that ultimately limit the ability of federal and state governments to read employer sanctions provisions expansively. The next section discusses the most important of these cases.

E. The Supreme Court Cases on Worksite Immigration Enforcement

Employers continue to be the focus of the employer sanctions provisions. The Supreme Court continues to limit the authority of federal agencies and the states to sanction employees. The Court has used statutory interpretation principles as well as constitutional structural arguments grounded in federalism to enforce this limited state authority at the same time that it has confirmed the federal nature of immigration regulation.

1. *Hoffman Plastic Compounds v. NLRB* (2002)

In *Hoffman Plastic Compounds v. NLRB*,[103] the Supreme Court decided the contours of workplace rights available to undocumented workers.[104] Although IRCA's employer sanctions prohibited the knowing employment of unauthorized workers, the statute did nothing to diminish the workplace protections of undocumented workers; in fact, post-IRCA decisions in several fields of employment and labor law reaffirmed the principle that employment and labor law remedies were available to all workers regardless of immigration status.[105] The issues in *Hoffman* tested this principle.

Hoffman arose out of an unfair labor practice claim alleging the employer had retaliated against several workers for participating in a labor organizing drive.[106] The NLRB ruled in favor of the workers, including Jose Castro.[107] At a subsequent hearing to determine

103. 535 U.S. 137 (2002).

104. *Id*. at 150–52.

105. *See, e.g.*, NLRB v. APRA Fuel Oil Buyers Grp., Inc., 134 F.3d 50, 56 (2d Cir. 1997) (holding that IRCA "did not diminish the Board's power to craft remedies for violations of the NLRA"), *abrograted by* Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002); Patel v. Quality Inn S., 846 F.2d 700, 703 (11th Cir. 1988) (rejecting the argument that Congress did not intend to cover undocumented workers as "contrary to the overwhelming weight of authority"); EEOC v. Switching Sys. Div. of Rockwell Int'l Corp., 783 F. Supp. 369, 374 (N.D. Ill. 1992) ("Plaintiff plainly is correct that Title VII's protections extend to aliens who may be in this country either legally or illegally."). *But see* Egbuna v. Time-Life Libraries, Inc., 153 F.3d 184, 186–87 (4th Cir. 1998) (holding that plaintiff had no cause of action seeking reinstatement because of his expired work authorization).

106. *Hoffman*, 535 U.S. at 140.

107. *Id.*

damages, Castro testified that he was not authorized to work in the United States and that he had used the birth certificate of a U.S. citizen friend to obtain employment.[108] The administrative law judge found that Castro was not entitled to back pay or reinstatement as a result of his testimony.[109] The NLRB reversed as to backpay and the Supreme Court granted certiorari.[110]

The Supreme Court vacated the backpay award, reasoning that the policy rationales behind IRCA's employer sanctions provisions were not within the ambit of the NLRB's expertise and, therefore, the NLRB's decision was not entitled to deference from the Court.[111] The Court noted that IRCA made workplace immigration enforcement central to immigration policy.[112] Changes in the 1986 law included the establishment of an employer verification system, the imposition of civil and criminal penalties for knowingly hiring undocumented workers, and a prohibition on the use of false documents to obtain employment.[113] The Court noted:

> Under the IRCA regime, it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies. Either the undocumented alien tenders fraudulent identification, which subverts the cornerstone of IRCA's enforcement mechanism, or the employer knowingly hires the undocumented alien in direct contradiction of its IRCA obligations.[114]

In this instance of potentially contravening federal policies, the Court found that the agency's adherence to one federal policy potentially undermined the other.[115] It noted that the federal law established the penalties for fraudulent identification to obtain work and that the NLRB's position would undermine immigration policy, including the policy stated in the statute to criminalize the use of fraudulent documents for work.[116] The Court's reasoning left the federalism structure intact: Because the policies under review were both federal, the Court did not need to address the preemptive

108. *Id*. at 141.
109. *Id*.
110. *Id*. at 141–42.
111. *Id*. at 149.
112. *Id*. at 147–48.
113. *Id*.; Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 101, 100 Stat. 3359, 3360–63 (codified as amended at 8 U.S.C. § 1324a (2012)).
114. *Hoffman*, 535 U.S. at 148.
115. *Id*. at 149.
116. *Id*. at 150–51.

authority of the federal government over the states in immigration regulation.

2. *Flores-Figueroa v. United States* (2009)

In this case, the Supreme Court interpreted the federal aggravated identity theft statute that is mirrored in many state identity theft laws.[117] The provision imposes a mandatory jail sentence for certain predicate crimes if the accused "knowingly . . . uses, without lawful authority, a means of identification of another person."[118] The statute requires proof that the defendant committed a predicate crime involving some sort of fraud.[119] The predicate crimes listed in the statute include immigration violations in which the federal government is the victim of the fraudulent activity, such as the use of counterfeit visas to seek entry into the United States.[120] Notably, however, none of the enumerated predicate crimes specifically involve the use of false Social Security numbers to obtain work.[121] After his employer reported to ICE that Flores-Figueroa had submitted a counterfeit Social Security number and alien registration cards, the federal government charged him with two immigration offenses.[122] The immigration offenses included entering the United States without inspection and misusing immigration documents.[123] The government also charged him with aggravated identity theft, the crime at issue in the case.[124]

Using statutory interpretation methods, the Supreme Court held that the provision requires the government to show that the defendant knew that the identity he was using actually belonged to another person.[125] The mere use of a false Social Security number for

117. Flores-Figueroa v. United States, 556 U.S. 646, 647 (2009); *see also* 18 U.S.C. § 1028A(a) (2012) (creating additional penalties for identity theft committed in connection with certain enumerated felonies). For an example of such a state statute, see ARIZ. REV. STAT. ANN. § 13-2009 (2010).

118. 18 U.S.C. § 1028A(a)(1).

119. *Id.* § 1028A(a), (c).

120. *Id.* § 1028A(c); *see also id*. § 1546(a) (prescribing fine or imprisonment for up to twenty-five years for creating counterfeit visas).

121. *Id.* § 1028A(c).

122. *Flores-Figueroa*, 556 U.S. at 649.

123. *Id.* (noting charges for violation of 8 U.S.C. §1325(a), entrance without inspection, and 18 U.S.C. § 1546(a), misuse of immigration documents).

124. *Id.*

125. *Id.* at 657.

identification purposes, in other words, was insufficient to sustain a conviction.[126]

While the Court did not dwell on the predicate immigration offenses at issue in the case, they are important for their focus on the federal government as the victim of these offenses. In each of the predicate offenses—entry without authorization and misusing immigration documents—the fraud is alleged to be against the government and not against an individual.[127] Through these identity theft statutes, Congress has spoken as to the level and degree of sanction for using false documents before the federal government.[128] Like employer sanctions in the immigration statute, in other words, Congress has circumscribed when a defendant should face an aggravated identity theft conviction for immigration violations. Both of these offenses are clearly immigration-related.[129] Entering the United States without inspection is a misdemeanor offense that carries a six-month sentence and a fine if convicted.[130] Misusing immigration documents for an immigration benefit is much more circumscribed than general document fraud and specifically affects the federal government's regulation of immigration.

3. *Chamber of Commerce v. Whiting* (2011)

In this case, the Supreme Court used statutory interpretation principles to interpret the licensing exception of the employer sanctions provisions of IRCA in favor of state regulation.[131] The provision at issue preempts "any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ . . . unauthorized aliens."[132] The Arizona legislature passed the Legal Arizona Workers Act[133] providing that the licenses of employers who knowingly hired undocumented workers would be suspended or revoked.[134] The Court read the

126. *See id*. at 647 (holding that the aggravated identity theft statute requires knowledge that the "means of identification . . . belonged to another" (internal quotation marks omitted)).

127. *See* 8 U.S.C. § 1325(a) (2012) (entering the United States without inspection); 18 U.S.C. § 1546(a) (misusing immigration documents).

128. *See* 8 U.S.C. § 1325(a); 18 U.S.C. § 1546(a).

129. *See* 8 U.S.C. § 1325(a); 18 U.S.C. § 1546(a).

130. 8 U.S.C. § 1325(a).

131. Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1973 (2011).

132. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 101, 100 Stat. 3359, 3368 (codified at 8 U.S.C. § 1324a(h)(2)).

133. Legal Arizona Workers Act, ch. 279, 2007 Ariz. Sess. Laws 1312 (codified as amended at ARIZ. REV. STAT. ANN. §§ 23-211, -212, -212.01 (2010)).

134. ARIZ. REV. STAT. ANN. §§ 23-212.F.1.(d), -212.F.2.

federal statute as expressly exempting from preemption the type of statute that Arizona implemented because it was within the exception that Congress provided in the federal statute.[135]

Notably, the Court's rationale referred both to the federal power to regulate immigration and the state's authority to regulate the employment relationship to protect workers within the state.[136] The Court noted that this shared authority was much clearer before Congress enacted IRCA in 1986 and occupied the field of immigration regulation in the workplace through its employer sanctions provisions.[137] The Court's opinion provides some guidance about the preemptive authority of congressional action.[138] Here, the Court noted that Congress specifically exempted licensing power from its worksite immigration enforcement scheme.[139] This exemption made state regulation of business licenses possible.[140]

While the Court's opinion may seem to offer broad powers to the states to regulate at the intersection of state police power and immigration regulation, its subsequent opinion in *Arizona v. United States*[141] reinforced the principle of federal authority over immigration regulation and its preemptive power.

4. *Arizona v. United States* (2012)

Importantly, in *Arizona v. United States*, the Supreme Court struck down a state law provision criminalizing unlawful work for employees.[142] The majority reasoned that because the purpose of the employer sanctions provision was to sanction the employer and not the employee, and because congressional action preempts state action when it comes to workplace immigration regulation, the state's employee sanctions provision was invalid.[143] The Court noted that "[p]roposals to make unauthorized work a criminal offense were debated and discussed during the long process of drafting IRCA . . . [b]ut Congress rejected them."[144] State efforts to circumvent

135. *Whiting*, 131 S. Ct. at 1973.
136. *Id*. at 1974.
137. *Id*. at 1974–75.
138. *See id*. at 1977–87.
139. *Id*. at 1977–78.
140. *Id*. at 1987.
141. 132 S. Ct. 2492 (2012).
142. *Id*. at 2510.
143. *Id*. at 2505.
144. *Id*. at 2504 (citation omitted).

congressional intent by criminalizing work based on immigration status are, therefore, preempted.[145]

Justice Scalia, in dissent, notably argued that for structural constitutional and extra-constitutional reasons (including the need to balance federal sovereignty with the sovereignty of the states), the states should be allowed to regulate immigrants' workplace activity.[146] Scalia argued that the majority made unsupported assumptions about congressional intent in deciding that state employee sanctions are preempted.[147] Commenting on the significance that the majority placed on Congress's 1986 efforts to penalize employers for the hiring of undocumented workers, he noted that express preemption over employer sanctions does not necessarily preclude state regulation.[148] Instead, specifically preempting punishment for employers implies a lack of preemption for those who seek employment.[149]

Justice Scalia provided an alternative reading of congressional intent in implementing employer sanctions provisions at the same time that Congress rejected employee sanctions:

> There is no more reason to believe that this rejection was expressive of a desire that there be no sanctions on employees, than expressive of a desire that such sanctions be left to the States. To tell the truth, it was most likely expressive of what inaction ordinarily expresses: nothing at all.[150]

Justice Scalia's dissent signals deep divisions about the roles of the states and the federal government in immigration regulation. It also provides fodder for states' arguments that they should be able to enforce criminal identity theft statutes for false use of Social Security numbers as a form of employee sanction because of congressional silence on the issue.

While the Court struck down the Arizona provision criminalizing unauthorized work,[151] the question remains as to the effect of *Arizona v. United States* on similar efforts to regulate immigration through other state laws. Arizona's own statute criminalizing use of false identity to obtain work[152] is currently being challenged by a group of

145. *Id*. at 2505.
146. *See id*. at 2511–12 (Scalia, J., concurring in part and dissenting in part).
147. *Id*. at 2514.
148. *Id*. at 2519–20.
149. *Id*.
150. *Id.* at 2520.
151. *Id*. at 2505 (majority opinion).
152. ARIZ. REV. STAT. ANN. §§ 13-2008(A), 13-2009(A)(3) (2010).

individuals and immigrant organizations, and a federal district court has issued a preliminary injunction against its enforcement.[153]

F. The Criminalization of Identity Theft and the Victimization of Individuals at the Federal Level: The Identity Theft and Assumption Deterrence Act of 1998

Congress arguably left open the possibility for states to regulate immigration through identity theft statutes by amending the federal identity theft statute to provide broader protections for individuals. This section explores Congress's amendments and its intent.

In 1998, Congress passed the Identity Theft and Assumption Deterrence Act,[154] aimed at providing remedies to individual victims of identity theft or fraud.[155] According to the Senate Report on the 1998 legislation, the previous versions of identity theft statutes did not provide effective remedies to individuals but instead focused on the effects of fraud or identity theft on institutions such as banks, credit card companies, and the federal government.[156] The previous versions of the statute also focused on theft of documents rather than the other forms of acquiring and appropriating individuals' identity information.[157] The 1998 Act added to the existing identity theft statute a provision prohibiting:

> knowingly transfer[ring], possess[ing], or us[ing], without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law.[158]

This provision, therefore, effectively expanded potential victimhood to persons whose identity was used in the commission of any federal crime or state or local felony.[159]

The 1998 Act expanded the scope of identity theft in another important way. The previous version of the statute made the transfer, production, or possession of fraudulent documents a federal crime if

153. Puente Ariz. v. Arpaio, No. CV-01356-PHX-DCG, 2015 WL 58671, at *1 (D. Ariz. Jan. 5, 2015) (granting a preliminary injunction).

154. Pub. L. No. 105-318, 112 Stat. 3007 (1998) (codified as amended at 18 U.S.C. § 1028 (2012)).

155. *See* S. REP. NO. 105-274, at 4–8 (1998).

156. *See id*. at 6.

157. *See id*. at 5.

158. 18 U.S.C. § 1028(a)(7).

159. *See id*.

it affected interstate commerce or the mails.[160] The 1998 amendments added the "use" of fraudulent "means of identification" to the definition of document and identity fraud, expanding the ambit of potential criminal defendants.[161] The Senate Report stated that "such inclusion automatically makes identity information crimes subject to the exclusion (section 212(a)(2)) and deportation (section 237(a)(2)) provisions of the Immigration and Nationality Act."[162] While Congress understood the immigration consequences of this provision of the statute, it saw no need to interfere with its already-existing penalty structure for employment verification fraud.[163]

The expansion of the federal identity theft crime has facilitated the construction of the identity theft victim as anyone whose personal information has been used in any way. In other words, the taking of identity includes the taking of anything virtual or otherwise that might elicit the essence of that person. The federal statute continues to require, as an element of the crime, an unlawful taking of a benefit such as money, credit, or services. Arguably, there is no taking of a benefit in the act of using a false Social Security number to obtain employment.

Anti-immigrant sentiment often drives attempts to categorize the use of false identity for work as a crime. After the identity theft law was enacted in 1998, advocates continued to seek a specific statutory provision that addressed false use of Social Security numbers specifically for work.[164] Advocates such as the Center for Immigration Studies ("CIS") have been outspoken in their intent to target immigrants with this provision.[165] The CIS, for example, in a recent call for further changes to the federal identity theft statute, noted that the fraudulent use of identity information for work was one form of identity theft that native-born individuals do not commit:

> Illegal aliens engage in varieties of identity fraud Americans are unlikely to commit, including illegally applying for U.S. IDs

160. S. REP. NO. 105-274, at 10–11.

161. *Id*.

162. *Id*.

163. *See id*.

164. *See* RONALD W. MORTENSEN, CTR. FOR IMMIGRATION STUDIES, ILLEGAL, BUT NOT UNDOCUMENTED: IDENTITY THEFT, DOCUMENT FRAUD, AND ILLEGAL EMPLOYMENT 16 (June 2009), *available at* http://www.cis.org/sites/cis.org/files/articles/2009/back809.pdf.

165. *See id*.

> such [as] passports or driver's licenses, as well as using those IDs to obtain jobs they are not authorized to have.[166]

The CIS concluded its analysis of identity fraud by noting that the statute should clearly state that use of identity information for work-related purposes is a crime.[167] It called for a "fix" to the statute that would "ensure persons who commit identity theft or fraud for the purpose of unauthorized employment or hiring or harboring unauthorized employees are punishable under both [18 U.S.C.] Sections 1028 and 1028A."[168] Such a fix would actually change the scope of the statute and redefine and expand the traditional forms of identity theft to reach false use of a Social Security number for work. Nothing in the statute currently requires such an interpretation.[169] Moreover, while the legislative history makes mention of immigration fraud, it does not list the false use of Social Security numbers for employment as a specific danger it seeks to avoid.[170]

The CIS position does not make sense in the context of a system intended to focus on the harm to the institution or person receiving and processing the information (i.e., the bank, the credit card company, or the government) due to the unlawful appropriation of a benefit (i.e., money, credit, or services).[171] In the workplace context, the use of false identifying information is collateral to the employer-employee relationship,[172] which is itself more of a contract for labor than an exchange of benefits. The nature of the employment relationship, in other words, takes the use of false identifying information to obtain work outside the realm of the Identity Fraud and Assumption Deterrence Act, which addresses the harm to an individual related to the taking of a benefit.[173] Nothing in the federal

166. Kephart, *supra* note 6, at 2.

167. *Id*.

168. *Id*.

169. *See* 18 U.S.C. § 1028(a)(7) (2012) (requiring intent to "commit, or to aid or abet, or in connection with" a violation of federal law or a felony under state or local law).

170. *Cf.* S. REP. NO. 105-274, at 7–8 (1998) (describing several forms of identity theft, including theft of information for nefarious reasons such as the usurpation of a person's credit or financial accounts, or to run up debt). Notably, the Report does not allude to the false use of Social Security numbers for work as a danger that the Senate sought to protect against. *See id*.

171. *See supra* notes 154–59 and accompanying text.

172. Arguably, the master-servant relationship is a form of a contractual relationship in which a service is exchanged for payment. The identity of the parties does not define the relationship as much as the exchange of payment for services.

173. *Cf.* S. REP. NO. 105-274, at 4–6 (1998) (identifying Act's purpose as preventing theft of identifying information for purposes of racking up victims' credit card debt or facilitating organized crime, but not for obtaining work).

statute explicitly changes the comprehensive workplace immigration regulation scheme created and refined by Congress over the years.[174] Even when Congress enacted the Immigration Reform and Control Act of 1986, it understood that false use of Social Security numbers for work should not be penalized.[175] Accordingly, Congress amended the Social Security fraud provisions to ensure that immigrants legalized under the 1986 Act would not run afoul of those provisions.[176]

Nonetheless, since the passage of the Identity Theft and Assumption Deterrence Act, states have enacted provisions in their identity theft statutes to cover the false use of identifying information for work. Arguably, convictions under these statutes can be treated as felonies relating to immigration offenses, which are considered aggravated felonies under the federal aggravated identity theft statute.[177] The following Part describes state efforts to expand the definition of identity theft to cover immigration regulation in the workplace.

II. THE STATES' ATTEMPTS TO REGULATE "WRONGFUL" DOCUMENTATION IN EMPLOYMENT

A. State Identity Theft Statutes

Over the past decade or so, states have enacted or amended identity theft statutes to criminalize the false use of Social Security numbers or other identifying information for employment. Such laws are ostensibly and sometimes explicitly aimed at reserving jobs for the native-born, majority-white populations in those states.[178] These laws have been enacted in the midst of growing rhetoric that immigrants are "taking our jobs," a frustration with the federal government's

174. *See* 18 U.S.C. § 1028.

175. *See* 42 U.S.C. § 408(e).

176. *Id*. (exempting certain noncitizens from the definition of fraud under the Social Security Act).

177. See *infra* Part II.A for a discussion of state statutes creating identity theft felonies. The federal aggravated identity theft statute states that conviction of a felony that can be categorized as a felony relating to immigration offenses is an aggravated felony. *See* 8 U.S.C. § 1028A(c)(10).

178. *See* Nigel Duara, *Judge Blocks Arizona ID Theft Law Targeting Job-Seeking Immigrants*, L.A. TIMES (Jan. 6, 2015), http://www.latimes.com/nation/la-na-ff-arizona-immigrants-20150106-story.html (describing how the Maricopa County Sheriff's Department used the Arizona identity theft statute to target undocumented immigrants in the workplace). *See generally* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993) (providing a critical-race-theory analysis of the ways in which laws and the legal system maintain white privilege in the form of rights and property).

failure to effectively control the border, and a growing sense of moral superiority over those who have the "wrong documents."[179] Against this background of rhetoric against undocumented immigration, the criminalization of false identities for work has infiltrated the state criminal regulation landscape, either through legislation, judicial opinions, or both. This section explores these laws and their possible effects on workplace relations and on the environment created in the shadow of the law in immigrant workplaces.

To date, eleven states—Alabama, Arizona, Georgia, Iowa, Michigan, Mississippi, Nebraska, North Dakota, South Carolina, Utah, and Wisconsin—have enacted laws or amended already-existing laws to define identity theft as the use of false identifying information to obtain employment.[180] All have passed such statutes since the enactment of the federal Identity Theft and Assumption Deterrence Act.[181] Of these eleven states, five—Alabama, Arizona, Georgia, South Carolina, and Utah[182]—also passed general anti-

179. For an example of such rhetoric see *Illegal Aliens Taking U.S. Jobs*, FED'N FOR AM. IMMIGR. REFORM, http://www.fairus.org/issue/illegal-aliens-taking-u-s-jobs (last updated Mar. 2013).

180. Act of May 14, 2012, No. 2012-368, 2012 Ala. Acts 919, 920 (codified as amended at ALA. CODE § 13A-8-192 (2012)); Legal Ariz. Workers Act, ch. 279, 2007 Ariz. Sess. Laws 1312 (codified as amended at ARIZ. REV. STAT. ANN. §§ 23-211, -212, -212.01 (2010)); Illegal Immigration Reform and Enforcement Act of 2011, No. 252, § 4, 2011 Ga. Laws 794, 800 (codified at GA. CODE ANN. § 16-9-121.1 (2011)); Act of Apr. 21, 2003, ch. 49, § 1, 2003 Iowa Acts 92, 92 (codified as amended at IOWA CODE § 715A.8 (2015)); Act of June 30, 2006, No. 246, § 5, 2006 Mich. Pub. Acts 687, 687 (codified as amended at MICH. COMP. LAWS § 445.65 (2006)); Act of April 24, 2003, ch. 562, § 8, 2003 Miss. Laws 968, 975 (codified as amended at MISS. CODE ANN. § 97-45-19 (2011)); Act of May 26, 2009, § 10, 2009 Neb. Laws 252, 255–56 (codified as amended at NEB. REV. STAT. § 28-638 (Supp. 2014)); Act of Mar. 27, 2013, ch. 107, § 1, 2013 N.D. Laws 413, 413–14 (codified as amended at N.D. CENT. CODE § 12.1-23-11 (2013)); Financial Identity Fraud and Identity Theft Protection Act, No. 190, § 8, 2008 S.C. Acts 1583, 1608–09 (codified as amended at S.C. CODE ANN. § 16-13-510 (2013)); Act of Feb. 13, 2009, ch. 164, § 1, 2009 Utah Laws 623, 623 (codified as amended at UTAH CODE ANN. § 76-6-1102 (West 2009)); Act of July 24, 2003, No. 36, § 22, 2003 Wis. Sess. Laws 465, 468 (codified as amended at WIS. STAT § 943.201 (2015)).

181. *See supra* note 180. This Article discusses the redefinition of identity theft to include the use of false information to obtain work. Some states, such as Missouri and Minnesota, have instead, or also, interpreted their forgery statutes to criminalize the use of false information to obtain work instead. *See, e.g.*, Minnesota v. Reynua, 807 N.W.2d 473, 477–78 (Minn. Ct. App. 2011) (interpreting state forgery law to include the use of false documents to obtain employment); Missouri v. Diaz-Rey, 397 S.W.3d 5, 9–10 (Mo. Ct. App. 2013) (holding that state forgery law was not preempted by federal immigration where a job applicant used a false Social Security number). Iowa criminalizes the use of false information to obtain work in both its forgery and identity theft statutes. *See* IOWA CODE § 715.A8(2) (2003).

182. Beason-Hammon Alabama Taxpayer and Citizen Protection Act, No. 2011-535, 2011 Ala. Laws 888 (codified at ALA. CODE §§ 31-13-1 to 31-13-30, 32-6-9 (2011))

immigration statutes.[183] These state legislatures explicitly targeted unauthorized immigration as they enacted identity theft provisions related to obtaining work. For example, the statute amending Arizona's identity theft and aggravated identity theft statutes was entitled "Employment of Unauthorized Aliens."[184] The Georgia statute was entitled the "Illegal Immigration Reform and Enforcement Act of 2011."[185] As these statutory titles demonstrate, the intent as well as the effect of the legislatures was to criminalize immigrants' use of "wrong" documents in the workplace, regardless of harm to any particular victim.

In a particularly expansive move, several states have defined identity theft to include the use of a dead or fictitious person's identity. The Arizona statute criminalizes knowingly taking or possessing the identifying information of a real, *fictitious*, or dead

(providing for various anti-immigration measures); Support Our Law Enforcement and Safe Neighborhoods Act, ch. 113, 2010 Ariz. Sess. Laws 450 (codified in scattered sections of ARIZ. REV. STAT. ANN. §§ 11, 13, 23, 28, 41 (2010)) (requiring, among other measures, "a reasonable attempt . . . to determine the immigration status of the person" "for any lawful stop, detention or arrest" by law enforcement officials "where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States"); Illegal Immigration Reform and Enforcement Act of 2011, No. 252, 2011 Ga. Laws 794 (codified in scattered sections of GA. CODE ANN. (2011)) (providing for various anti-immigration legislation, including authorizing law enforcement officers to investigate immigration status of certain individuals); Act of June 27, 2011, No. 69, 2011 S.C. Acts 325 (codified in scattered sections of S.C. CODE ANN. §§ 6, 8, 16, 17, 23, 41 (2012)) (providing for legislation similar to Arizona's Act, including authorizing law enforcement officials to check the immigration status of certain individuals); Utah Immigration Accountability Enforcement Act, ch. 18, 2011 Utah Laws 228 (codified in scattered sections of UTAH CODE ANN. §§ 63G, 63I, 63J, 67, 76, 77 (West 2011)).

183. Bills were introduced in five states—Iowa, Michigan, Mississippi, Nebraska, and Wisconsin—but they did not become law. *See* H.R. 629, 84th Gen. Assemb., Reg. Sess. (Iowa 2011); H.B. 4305, 96th Leg., Reg. Sess. (Mich. 2011); H.R. 54, 2011 Leg., Reg. Sess. (Miss. 2011); Neb. Leg. 48, 102nd Leg., 1st Sess. (Neb. 2011); A.B. 173, 100th Leg., Reg. Sess. (Wis. 2011).

184. Employment of Unauthorized Aliens Act, ch. 152, sec. 1, § 13-2008, 2008 Ariz. Sess. Laws 641, 641–42 (codified at ARIZ. REV. STAT. ANN. § 13-2008 (2010)). In addition to adding employment to the forms of identity theft prosecutable in Arizona, the statute clarified the scope of the Legal Arizona Workers Act. *Compare* Legal Arizona Workers Act, ch. 279, 2007 Ariz. Sess. Laws 1312 (codified as amended at ARIZ. REV. STAT. ANN. §§ 23-211 to 23-214) (prohibiting employers from knowingly or intentionally hiring an unauthorized alien and requiring employee identity verification), *with* Employment of Unauthorized Aliens Act, ch. 152, §§ 3–6, 2008 Ariz. Sess. Laws 641, 642–652 (codified as amended at ARIZ. REV. STAT. ANN. §§ 23-211 to 23-214) (amending Arizona statutes relating to employment of unauthorized aliens). The identity theft provisions are currently being challenged in federal court, which has issued a preliminary injunction against their implementation. *See infra* notes 276–84 and accompanying text.

185. 2011 Ga. Laws 794 (codified as amended in scattered sections of GA. CODE. ANN.).

person without permission to obtain or continue in employment.[186] The Georgia legislature, mirroring the Arizona legislation, enacted a statute similar in its expansiveness.[187] Georgia's statute created the offense of aggravated identity fraud if a person "willfully and fraudulently uses any counterfeit or fictitious identifying information concerning a real, fictitious, or deceased person with intent to use such counterfeit or fictitious identifying information for the purpose of obtaining employment."[188] This expansion goes beyond the federal statute in two ways. First, it punishes the use of a fictitious person's identity. Second, it punishes the use of such identity for employment.

Five states—Nebraska, Wisconsin, Mississippi, Michigan, and North Dakota—have enacted or amended statutes that criminalize the false use of identifying information for employment as identity theft independently of anti-immigrant legislation.[189] These statutes vary in their scope and breadth. Nebraska's statute, like the Arizona and Georgia statutes, criminalizes the taking or possession of a real or fictitious person's identifying information to obtain or continue in employment.[190] Criminal impersonation was already in the statute when the Nebraska legislature added a provision criminalizing "[k]nowingly provid[ing] false personal identifying information or a false personal identification document to an employer for the purpose of obtaining employment."[191] Also like Arizona and Georgia, the Wisconsin statute, enacted in 2003, makes the use of the personal identifying information of an existing or dead person to obtain employment a felony; but, unlike those states, the Wisconsin statute does not penalize the use of a fictitious person's identity.[192] Mississippi's statute, enacted in 2003, prohibits obtaining another

186. ARIZ. REV. STAT. ANN. § 13-2008. This definition is more expansive than the definition that the Supreme Court endorsed in *Flores-Figueroa.* There, the Court decided that to qualify for an aggravated felony for immigration purposes, the defendant had to know that the Social Security number he was using actually belonged to someone else. *See supra* Part I.E.2.

187. *See* Illegal Immigration Reform and Enforcement Act of 2011, No. 252, 2011 Ga. Laws 794 (codified as amended in scattered sections of GA. CODE. ANN.).

188. GA. CODE. ANN. § 16-9-121.1 (2011).

189. Act of June 30, 2006, No. 246, 2006 Mich. Pub. Acts 687 (codified as amended at MICH. COMP. LAWS § 445.65 (2006)); Act of April 24, 2003, ch. 562, § 8, 2003 Miss. Laws 968, 975–76 (codified as amended at MISS. CODE ANN. § 97-45-19 (2011)); Act of May 26, 2009, No. 155, § 10, 2009 Neb. Laws 252, 255–56 (codified as amended at NEB. REV. STAT. § 28-638 (Supp. 2014)); Act of March 27, 2013, ch. 107, 2013 N.D. Laws 413 (codified at N.D. CENT. CODE § 12.1-23-11 (2013)); Act of July 24, 2003, No. 36, §§ 15–24, 2003 Wis. Sess. Laws 465, 467–68 (codified at WIS. STAT. §§ 943.201 to 943.203 (2015)).

190. NEB. REV. STAT. § 28-639 (Supp. 2014).

191. *Id.* § 28-638.

192. *See* WIS. STAT. § 943.201.

person's identifying information with the intent to unlawfully use the information for employment.[193] Michigan's statute, enacted in 2004, prohibits the use of personal identifying information of another with intent to defraud or violate the law to obtain employment.[194]

Whether or not as part of anti-immigration legislation, state legislatures have come to define identity theft much more broadly in the last decade or so. The legislative history of the North Dakota identity theft statute is a clear illustration of the change in perspective on the use of false Social Security numbers for work by immigrants.[195] The statute states that a person is guilty of identity theft "if the person uses or attempts to use any personal identifying information of an individual, living or deceased, without the authorization or consent of the individual, in order . . . to obtain or continue employment."[196] The previous statute criminalized the unauthorized use of a person's identifying information to obtain credit, services, or something of value without consent or through misrepresentation about consent.[197] When the bill amending the then-existing statute was introduced in January 2013, the amendment added a criminal penalty for using the personal identifying information of another to interfere with a contractual or service agreement.[198] Although the proposed amendment did not originally include the use of personal identifying information to obtain employment, it was changed to include the "obtain or continue employment" language and reintroduced on January 30, 2013.[199] The testimony of P. Grossman, Director of the Consumer Protection and Antitrust Division of the Office of the Attorney General, to the Senate Judiciary Committee explains why his office supported the amendment to the bill:

> The landscape has changed since the identity theft statute was first enacted. At that time ID theft involved the theft of

193. Act of Apr. 24, 2003, ch. 562, § 8, 2003 Miss. Laws 968, 975–76 (codified at MISS. CODE. ANN. § 97-45-17).

194. Identity Theft Protection Act, No. 452, § 5, 2004 Mich. Pub. Acts 1856, 1857 (codified at MICH. COMP. LAWS §§ 445.61 to 445.77).

195. *See* H.B. No. 1280, Legislative History, 63rd Legis. Assemb., Reg. Sess. (N.D. 2013), *available at* http://www.legis.nd.gov/files/resource/63-2013/library/hb1280.pdf?20140609095843 (containing testimony and minutes relating to the proposed anti-theft statute).

196. N.D. CENT. CODE § 12.1-23-11 (2013).

197. N.D. CENT. CODE § 12.1-23-11 (2011) (amended 2013); *see also Bill Versions for House Bill 1280*, N.D. LEGISLATIVE BRANCH, http://www.legis.nd.gov/assembly/63-2013/bill-index/bi1280.html (last visited Apr. 28, 2015) (providing information and marked-up version of House Bill 1280).

198. *See* H.B. No. 1280, Legislative History, 63rd Legis. Assemb., Reg. Sess. (N.D. 2013), *available at* http://www.legis.nd.gov/files/resource/63-2013/library/hb1280.pdf?20140609095843.

199. *See id*.

> personal identifying information for monetary or financial gain. Now, identities are stolen for other purposes, including obtaining employment, initiating or cancelling service contracts, committing a criminal offense in another person's name, or impersonating an individual by e-mail, website, or social media to harass, harm, defraud, intimidate or threaten another person.[200]

The bill essentially made it easier to prosecute the "wrongful" use of documents by eliminating the element of economic loss to the individual whose identifying information has been used. This type of expansion of the identity theft definition—here, and in the other statutes described above—facilitates an understanding of the false use of a Social Security number for work as a form of theft, even when the individual victim has suffered no real economic harm.

B. Other State Criminal Offenses

While this Article focuses on identity theft statutes, it deserves mentioning that states have enacted criminal statutes that apply more broadly to the use of false Social Security numbers. In Idaho, for example, the legislature amended an existing law to make it a crime to knowingly make a false, fictitious, or fraudulent statement or representation in an attestation or to knowingly provide a false Social Security number.[201] In Utah, the legislature enacted a statute directing state agencies to use DHS databases to verify the lawful presence of individuals applying for federal, state, or local benefits, licenses, or home loans.[202] Minnesota and Missouri both have forgery statutes that courts have interpreted as applying to false information to obtain work.[203] False citizenship claims are considered criminal offenses under these statutes.[204]

California's penal code includes a general statute criminalizing false claims to citizenship or alien status.[205] This provision was

200. *Id*.

201. Act of Apr. 11, 2011, ch. 281, § 1, 2011 Idaho Sess. Laws 760, 762 (codified at IDAHO CODE ANN. § 67-7903 (2012)).

202. Construction Licensees Related Amendments, ch. 413, § 14, 2011 Utah Laws 2932, 2953 (codified as amended at UTAH CODE ANN. § 63G-11-104 (West 2011)).

203. *See, e.g.*, Minnesota v. Reynua, 807 N.W.2d 473, 476–78 (Minn. Ct. App. 2011) (interpreting state forgery law to include the use of certain false documents to obtain employment); Missouri v. Diaz-Rey, 397 S.W.3d 5, 7 (Mo. Ct. App. 2013) (holding that a job applicant who uses forged documents—such as a Social Security card—may commit the crime of forgery under state law).

204. MINN. STAT. ANN. § 171.22 (West 2011); MO. ANN. STAT. § 575.060 (West 2014).

205. CAL. PENAL CODE § 114 (West 2014).

originally enacted through the initiative process as part of California's Proposition 187 in 1995.[206] That proposition was focused on limiting immigrant use of public government resources.[207] This provision survived the constitutional challenge that defeated much of the rest of the proposition,[208] providing an impetus for states to consider criminalizing immigration-related behavior. The California statute was re-enrolled into the Criminal Justice Realignment Act of 2011, which amended the penal code to define as a felony the use of false documentation to conceal citizenship or alien status.[209] These statutes focus on the outcome of false use of Social Security numbers, rather than the act itself. They criminalize the use of false information to make citizenship claims or to hide immigration status. In this way, even though they are general in nature, states can use these statutes to target use of false Social Security numbers in the workplace.

C. Judicial Opinions Interpreting General Identity Theft Statutes

At the judicial level, at least ten state courts have begun to interpret general identity theft laws (those that do not explicitly criminalize the use of false identifying information for employment) to include the use of false identifying information for work.[210] In each of the cases, the courts view false use of identifying information as a form of theft in which such information is used to fraudulently obtain a benefit such as credit, money, goods, services, or other property, or simply to commit unlawful activity.[211] Sometimes, as in the case of Colorado, the courts merely state in dictum or assume without holding, that using false identity documents to obtain employment

206. Cal. Prop. 187, §§ 2, 3 (1994), *available at* http://repository.uchastings.edu/cgi/viewcontent.cgi?article=2103&context=ca_ballot_props; Jeffrey R. Margolis, *Closing the Doors to the Land of Opportunity: The Constitutional Controversy Surrounding Proposition 187*, 26 MIAMI INTER-AM. L. REV. 363, 376–77 (1995).

207. *See* Margolis, *supra* note 206, at 367–69.

208. *See* League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755, 786 (C.D. Cal. 1995).

209. CAL. PENAL CODE § 114 ("Any person who uses false documents to conceal his or her true citizenship or resident alien status is guilty of a felony, and shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 for five years or by a fine of twenty-five thousand dollars ($25,000).").

210. Case law in California, Colorado, Illinois, Indiana, Kansas, Michigan, New York, Ohio, Oregon, Washington, and Wisconsin have found that the false use of identifying information for employment is a crime covered by the state's general identity theft statute. *See infra* Part II.C.2.

211. *See, e.g.*, State v. Madrigal, 776 N.W.2d 301, No. 08-1623, 2009 WL 3086558 (Iowa Ct. App. 2009) (unpublished table decision).

violates existing general identity theft statutes.[212] In other cases, the courts make arguments that describe how the use of false Social Security numbers in the workplace violates the general statute.[213] These arguments focus on two main elements of the crime. The courts either define the harm element by interpreting employment as a form of money, services or property, or they focus on the "intent to harm" element, interpreting the actual use of false information as proof of intent without regard to actual harm or injury. This section discusses how the courts analyze these elements.

1. Interpreting Employment as Money, Services, or Property

The prototypical case comes from Wisconsin, where the defendant was convicted under the general identity theft statute[214] for using false identity documents for work.[215] The defendant argued that there was no intrinsic benefit or value in a job offer, as that is only the opportunity for work, and not a benefit in and of itself.[216] The court did not agree and instead noted that what the worker "ultimately sought and obtained was the compensation and other economic benefits that flowed from the employment. Obviously these were things of value within the meaning of [Wisconsin Identity Theft Statute]."[217]

The same type of analysis has occurred in courts in Iowa, Illinois, and Kansas. In Iowa, for example, where the legislature enacted both an identity forgery statute and an identity theft statute, the courts have interpreted these statutes to prohibit the use of false information

212. *See, e.g.*, People v. Gutierrez, 222 P.3d 925, 944 (Colo. 2009) (en banc) (suppressing evidence regarding the use of a false Social Security number for work because there was no probable cause and assuming that such false use of a Social Security number would violate the state's identity theft laws); *see also* Peopla v. Perez, No. 10CA0587, 2013 WL 1908991, at *8 (Colo. App. 2013) (holding that the prosecution failed to present evidence that a false Social Security number provided the defendant the ability to work or that the employer could not have hired him without a valid Social Security number), *cert. granted*, No. 13SC465, 2013 WL 6795153 (Colo. Dec. 23, 2013).

213. See *infra* Part II.C.1 for a discussion of how courts determine that false use of Social Security numbers for employment violates general identity theft statutes.

214. WIS. STAT. § 943.201(2) (2015) ("Whoever intentionally uses or attempts to use any personal identifying information or personal identification document of an individual to obtain credit, money, goods, services or anything else of value without the authorization or consent of the individual and by representing that he or she is the individual or is acting with the authorization or consent of the individual is guilty of a Class D felony.").

215. *See* State v. Ramirez, 2001 WI App 158, ¶ 18, 633 N.W.2d 656, 662.

216. *See id.* ¶ 7, 633 N.W.2d at 659.

217. *Id.* ¶ 7, 633 N.W.2d at 659–60.

to obtain work. In *State v. Madrigal*,[218] the Iowa Court of Appeals reviewed an ineffective assistance of counsel claim for a defendant convicted of the identity theft statute, which, in relevant part, reads, "A person commits the offense of identity theft if the person fraudulently uses or attempts to fraudulently use identification information of another person, with the intent to obtain credit, property, services, or other benefit."[219] In analyzing the ineffective assistance of counsel claim, the court determined that the statute applied to Madrigal's use of another's identity to obtain work.[220] In the court's words, "[t]he purchase of the identity information is not criminalized, but it is the subsequent acts of fraudulently using it to obtain a benefit that are penalized."[221] The court then explained that employment was in and of itself a benefit.[222]

The Illinois Appellate Court evaluated a general identity fraud statute that has since been repealed[223] and replaced with a nearly identical statute.[224] In *People v. Montoya*,[225] the court held that the defendant " 'fraudulently obtained' both money and services . . ." during the course of her employment in violation of the statute, merely by posing as someone else to obtain work.[226] The current statute states that "a person commits identity theft when he or she knowingly . . . uses any personal identifying information or personal identification document of another person to fraudulently obtain credit, money, goods, services, or other property."[227] While the current statute does not explicitly criminalize the use of a false identity to obtain employment, case law interpreting the previous and very similar statute includes employment in the interpretation of the term "money or services."[228]

218. 776 N.W.2d 301, No. 08-1623, 2009 WL 3086558 (Iowa Ct. App. 2009) (unpublished table decision).

219. IOWA CODE § 715A.8(2) (2015).

220. *See Madrigal*, 2009 WL 3086558, at *1–2.

221. *Id*. at *2.

222. *Id*. at *2 n.4 ("Section 715A.8(2) [of the Iowa Code] applies when the person intends to obtain 'credit, property, services, or other benefit.' Property is defined in section 702.14 to include 'anything of value.' The wages received by Madrigal would be considered property under the statute.").

223. *People v. Montoya*, 868 N.E.2d 389, 392–95 (Ill. App. Ct. 2007); *see* 2011 Ill. Legis. Serv. 97-597 (West) (repealing 720 ILL. COMP. STAT. ANN. 5/16G-15(a)(q) (West 2003)).

224. 720 ILL. COMP. STAT. ANN. 5/16-30(a)(1) (West Supp. 2014).

225. 868 N.E.2d 389.

226. *Id.* at 394.

227. 720 ILL. COMP. STAT. ANN. 5/16-30(a)(1).

228. *See Montoya*, 868 N.E.2d at 391–94.

In Kansas, an appellate court interpreted the statute's use of the term "property" to include the benefits of employment.[229] The statute at the time, general in its application, referred to identity theft as "knowingly and with intent to defraud for economic benefit, obtaining, possessing, transferring, using or attempting to obtain, possess, transfer or use, one or more identification documents or personal identification number of another person other than that issued lawfully for the use of the possessor."[230] The statute defined "intent to defraud" as "an intention to deceive another person, and to induce such other person, in reliance upon such deception, to assume, create, transfer, alter or terminate a right, obligation or power with reference to property."[231] In *State v. Meza*,[232] the defendant used another person's Social Security number to induce the employer into believing she had employment authorization.[233] In interpreting its general statute, the court defined the benefits surrounding employment as something akin to property.[234] Employee benefits and state and federal regulatory protections, in other words, were property rights attached to the job.[235] Like the other courts using this logic, by framing employment as a form of property, the court could easily conclude that the defendant fraudulently obtained that property.

2. Employer or Federal Government as the Victim of Fraud; Use of False Information as Proof of Intent to Harm

In contrast, cases in other states have held that using someone else's documents for work meets the general identity theft statute's requirement for intent to harm or defraud another person.[236] In these cases, the employer is viewed as the aggrieved party.[237] In a prototypical case, the Oregon Court of Appeals, interpreting the state's general identity theft statute,[238] held that the "intent to defraud includes an intent to cause injury to another's legal rights or interests" and concluded that misrepresentation on an I-9 form signaled intent

229. State v. Meza, 165 P.3d 298, 301–02 (Kan. Ct. App. 2007).
230. KAN. STAT. ANN. § 21-4018(a) (Supp. 2004) (repealed 2011).
231. *Id.* § 21-3110(9) (repealed 2011).
232. 165 P.3d 298 (Kan. Ct. App. 2007).
233. *Id*. at 301.
234. *Id.* at 301–02.
235. *Id*. at 302.
236. *See, e.g.*, State v. Alvarez-Amador, 232 P.3d 989, 992 (Or. Ct. App. 2010).
237. *See, e.g.*, *id*. at 991.
238. OR. REV. STAT. § 165.800 (2013).

to defraud the federal government.[239] The court also noted that the defendant, by misrepresenting his employment eligibility, also had intent to defraud the employer.[240] Courts have reached similar conclusions in Indiana, Ohio, and Washington. In Indiana, for example, the appellate court focused on the harm to the employer, "who was subject to potential penalties for hiring a person who was not legally permitted to work" in finding the defendant guilty of identity theft.[241] Likewise, in a Washington case where the defendant used a fictitious person's identity, the court held that the harm to the employer was the employer's inability to know the true identity of its employee.[242] The court stated:

> Big Cherry Orchards is legally obligated to ensure that each of its employees has sufficient legal status to obtain employment in the United States. If, in fact, Mr. Tinajero was not authorized to work in the United States, Big Cherry Orchards could incur potential liability for employing him. To avoid potential liability, Big Cherry Orchards must know the true identity of its employees. Although it is unclear what Mr. Tinajero's legal status was at the time that he was employed, it can be inferred that through his use of forged documents, he intentionally deprived Big Cherry Orchards of information that may have been material to his hiring.[243]

In Ohio, the court of appeals focused on the harm to a school district when an employee used someone else's Social Security number to obtain employment.[244] The court noted that the identity theft statute did not require "a theft."[245] Instead, according to the court, it merely required a showing that "the value of the credit, property, services, debt, or other legal obligation *involved* in the violation is greater than $100,000" for the offense to be considered a felony.[246] The court then noted that the legal obligation involved was

239. *Alvarez-Amador*, 232 P.3d at 992.

240. *Id*.

241. Bocanegra v. State, 969 N.E.2d 1026, 1029 (Ind. Ct. App. 2012). Ironically, an employer is not subject to federal penalties unless the employer *knowingly* hired an unauthorized employee. *See* 8 U.S.C. § 1324a(a)(1) (2012).

242. State v. Tinajero, 228 P.3d 1282, 1284–85 (Wash. Ct. App. 2009).

243. *Id*. (citations omitted). In this case the court interpreted the state's statute, which states, "A person is guilty of unlawful possession of fictitious identification if the person possesses a personal identification card with a fictitious person's identification with intent to use such identification card to commit . . . forgery." WASH. REV. CODE. ANN. § 9A.56.320(4) (West 2013).

244. State v. Roberts, 2005-Ohio-28U, 2005 WL 23358, at ¶¶ 32–42.

245. *Id*. ¶ 39.

246. *Id*.

the money that the school district paid the employee for her services, which totaled more than $100,000.[247]

In California, one court analyzed the identity theft statute to include the use of false identifying information even if there is no intent to harm a victim and no harm is caused.[248] A California appellate court reasoned that use of false identifying information was in and of itself a harm that the legislature meant to remedy.[249] This holding is broad enough to cover the false use of a Social Security number to obtain work.

As shown in this analysis of court arguments, when courts show their reasoning, they tend to interpret the general statutes in one of two ways. When statutes require the taking of a benefit—such as money, services, or property—as an element, the courts will interpret employment as a form of benefit covered under the statute. When the statute requires intent to harm, courts will read the actual use of false information as proof of intent, sometimes without regard to harm or injury.

The courts' rationales for applying general identity theft statutes in the workplace mirror the arguments of legislatures that have specifically defined use of false information in the workplace as identity theft. The very act of using false information to obtain work is considered fraud, with or without a specific harm to a victim, in states with companion anti-immigrant statutes. The harm is assumed in these statutes—whether it be the loss of jobs otherwise available to state residents, or the injury to an employer that does not know the true identity of its worker. Alternatively, employment takes the place of money, services, or property, as a form of benefit at risk of theft.

Applying identity theft statutes in the workplace has dire consequences for immigrants. Not only do they face removal—a possible desired consequence of such statutes—but they are vulnerable to workplace exploitation. The following section describes such consequences.

247. *Id*.

248. People v. Hagedorn, 25 Cal. Rptr. 3d 879, 887–88 (Cal. Ct. App. 2005).

249. *See id*. The court noted that "[i]n light of the indisputable evil to be remedied with respect to identity theft, the Legislature rationally appears to have concluded that willfulness, when coupled with use for an unlawful purpose, provides a sufficient mens rea for the offense, and that no injurious intent or result is required." *Id.*

D. Potential Problems with Expanding State Definitions of Identity Theft to Include the Workplace

The problems with expanding state definitions are two-fold. First, criminalization of the false use of Social Security numbers for employment subjects immigrant workers to both criminal and immigration sanctions. Second, it makes immigrant workers even more vulnerable to workplace exploitation. This section reviews the consequences of criminalization for immigrant workers.

1. Criminalization of Immigration-Related Activities Subjects Immigrant Workers to Both Criminal and Immigration Sanctions

Scholars writing at the intersection of immigration and criminal law have noted the consequences of increasing criminalization of immigrant identity and immigration-related activity.[250] There are several ways that the overlap between immigration and criminal law affects immigrants. At the federal level, undocumented immigrants especially face criminal sanctions for immigration-related activity such as illegal entry into the United States, illegal re-entry after deportation, or smuggling.[251] The imposition of new sanctions and the expansion of existing sanctions have exponentially increased the numbers of immigration-related convictions in the federal system.[252] Immigration crimes "now constitute over half of the federal criminal workload."[253] Illegal re-entry convictions made up a significant portion of the 100,000 immigration prosecutions in fiscal year 2013.[254] The Transactional Records Access Clearinghouse ("TRAC"), a data gathering organization at Syracuse University, lists over thirty federal

250. *See, e.g.*, Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1831 (2007); Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 616 (2003) (describing scholars' efforts documenting the trend to criminalize immigrants); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 369 (2006).

251. Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1281 (2010).

252. *See id*.

253. *See id*. at 1281–82; *see also* David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157, 166–75 (2012) (documenting the rise of federal immigration prosecutions).

254. *See At Nearly 100,000, Immigration Prosecutions Reach All-Time High in FY 2013: Illegal Re-entry Prosecutions Jump 76% During Obama Administration*, TRACIMMIGRATION (Nov. 25, 2013), http://trac.syr.edu/immigration/reports/336/.

criminal statutes most frequently used in immigration prosecutions.[255] These include identity theft and aggravated identity theft.[256]

Another form of overlap between immigration and criminal law involves the ways in which state criminal violations and convictions increasingly carry immigration consequences, regardless of congressional intent. The most dire immigration consequences involve removability for running afoul of one of several enumerated deportability or inadmissibility grounds in the immigration statute.[257] With respect to identity theft convictions, a noncitizen can be removed for a conviction of a crime involving moral turpitude or an aggravated felony involving fraud or theft.[258] Some courts have held convictions for identity theft crimes to be crimes involving moral turpitude under the immigration statute.[259] The Ninth Circuit, for example, recently upheld the finding of an Arizona district court that a conviction under the Arizona identity theft statute for use of another person's identification was a crime of moral turpitude.[260] In that case, the defendant was found guilty of identity theft for using another person's Social Security number to obtain employment.[261] An identity theft conviction can also be an aggravated felony, as defined by the immigration statute: the statute makes a noncitizen deportable for an aggravated felony conviction if she is convicted of a theft offense for which the sentence exceeds one year,[262] and a noncitizen can also be deportable for a crime involving fraud or deceit for which the loss to the victim (or to the federal government) exceeds ten thousand dollars.[263] Criminalization of false use of Social Security numbers for work could have elements that match either one of these deportable crimes.

255. *Criminal Statutes Most Frequently Used in Immigration Prosecution*, TRACIMMIGRATION, https://trac.syr.edu/immigration/aboutLaw/ (last visited Apr. 28, 2015).

256. *See id*.

257. *See* 8 U.S.C. §§ 1182(a)(2)–(10), 1227 (2012) (listing the different forms of inadmissibility and deportability in the immigration statute).

258. *See id.* § 1182(a)(2) (providing that aliens are inadmissible if they have been convicted of, or admit to committing, a crime of moral turpitude); *id*. § 1227(a)(2)(A)(i) (providing that aliens are deportable if they are convicted of a crime involving moral turpitude within five years of admission); *id*. § 1227(a)(2)(A)(iii) (providing that aliens are deportable if they are convicted of an aggravated felony).

259. *See, e.g.*, Ibarra-Hernandez v. Holder, 770 F.3d 1280, 1282 (9th Cir. 2014) (per curiam).

260. *Id.*

261. *Id*.

262. 8 U.S.C. § 1101(a)(43)(G).

263. *Id*. § 1101(a)(43)(M).

Importantly, working without employment authorization is not, in and of itself, a deportability or inadmissibility ground. Because false use of Social Security numbers for work are not an actual ground for inadmissibility or deportability, a state's criminalization of use of false information to obtain employment may actually circumvent congressional intent to sanction employers—and not employees—for unauthorized work.[264] In the current political climate, however, the federal government's priorities reflect an emphasis on the removal of criminal aliens.[265] An undocumented worker convicted of identity theft under a state statute for use of a false Social Security number to obtain employment, therefore, now becomes a criminal alien subject to removal, without regard to how the sanctions in the workplace have shifted from employer to employee.

A third form of overlap between immigration and criminal law that has immigration consequences involves interaction between the enforcement of state criminal laws and federal immigration enforcement efforts. Until recently, the federal government actively pursued an enforcement program it called Secure Communities, which called for a partnership between federal, state and local law enforcement agencies to identify undocumented persons under arrest or in custody.[266] Under Secure Communities, state and local authorities would share fingerprints with ICE, which could take immigration enforcement action against priority removal targets.[267] Under Secure Communities, ICE prioritizes "the removal of individuals who present the most significant threats to public safety as determined by the severity of their crime, their criminal history, and other factors—as well as those who have repeatedly violated immigration laws."[268] The Secure Communities infrastructure exists today in all fifty states.[269] According to ICE, more than 283,000 convicted criminal aliens have been removed since the inception of Secure Communities in 2008.[270] Although Secure Communities has been discontinued,[271] one can see how state and local authorities

264. *See id*. §§ 1182, 1227.

265. *See* Johnson, *supra* note 102.

266. On November 20, 2014, President Obama announced the replacement of Secure Communities with a new enforcement priority program, the Priority Enforcement Program, aimed at limiting removal to those who have been convicted of certain high-priority crimes. *See id*.

267. *Secure Communities*, *supra* note 93.

268. *Id*.

269. *Id.*

270. *Id*.

271. Johnson, *supra* note 95.

might use federal enforcement priorities to advance their own strategies for deporting immigrants.

State enforcement of anti-immigrant legislation in Arizona exemplifies how identity theft statutes that cover the workplace interact with federal enforcement and create problems for undocumented workers.[272] When Arizona enacted its Legal Arizona Workers Act,[273] Maricopa County Sheriff Joe Arpaio announced that he would use his authority under the statute to establish a "criminal employment squad" and conduct workplace raids to find undocumented workers who used false Social Security numbers to obtain work.[274] Once undocumented workers were arrested under the statute, the Sheriff's Department would turn them over to ICE for removal.[275] The Sheriff's strategy fulfilled the local law enforcement agency's objective of deporting undocumented workers, even though the local agency lacks actual removal authority.[276]

A recent lawsuit filed to enjoin the state of Arizona from enforcing its identity theft provisions demonstrates how state enforcement harms immigrant workers.[277] The lawsuit was filed by Puente Arizona, a community-based immigrant rights organization in

272. The Justice Department investigated the Maricopa County Criminal Employment Squad, along with other Department units, and found that its practices discriminated against Latinos on the basis of race and national origin. *See* Letter from Thomas Perez, Assistant Attorney Gen., U.S. Dep't of Justice, to Bill Montgomery, Cnty. Attorney, Maricopa Cnty. (Dec. 15, 2011), *available at* http://www.justice.gov/crt/about/spl/documents/mcso_findletter_12-15-11.pdf.

273. 2007 Ariz. Sess. Laws 1312 (codified at ARIZ. REV. STAT. ANN. §§ 13-2009, 23-211 to -214 (2010)).

274. Jacques Billeaud, *Joe Arpaio Closing Controversial Immigration Squad*, HUFFINGTON POST (Dec. 18, 2014), http://www.huffingtonpost.com/2014/12/18/joe-arpaio-immigrants_n_6349204.html (explaining how the squads were shut down after the sheriff's office was stripped of special federal immigration powers). Sheriff Arpaio is infamous for using his office to carry out anti-immigrant policies. *See* Joe Hagan, *The Long Lawless Ride of Sheriff Joe Arpaio*, ROLLING STONE (Aug. 2, 2012), http://www.rollingstone.com/culture/news/the-long-lawless-ride-of-sheriff-joe-arpaio-20120802.

275. For a description of the Maricopa County Sheriff Office's use of identity theft arrests to effect removal, see Terry Greene Sterling, *The Handcuffing of Sheriff Joe*, NAT'L J. (Aug. 2, 2014), http://www.nationaljournal.com/magazine/the-handcuffing-of-sheriff-joe-20140731.

276. *Id.*; *see also* 8 U.S.C. § 1227(a) (2012) ("Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of [several] classes of deportable aliens.").

277. *See* Plaintiff's Motion for Preliminary Injunction & Memorandum of Points & Authorities at 1–2, Puente Arizona v. Arpaio, No. 2:14-CV-01356-DCG (D. Ariz. Aug. 7, 2014).

Phoenix.[278] The lawsuit asserts that its members will suffer significant hardship if the state provisions are enforced.[279] Puente Arizona members testified through declarations that they feared arrest and, therefore, were reluctant to exercise their labor rights as a result of Arizona's enforcement of its provisions.[280] Some of the declarations described the experience of being arrested and detained for violating the state's worker identity provisions.[281] The lawsuit claims that the implementation of the identity theft provisions has "created a state scheme for regulating the employment of undocumented workers."[282] Sheriff Arpaio claimed the statute provided his department the legal authority to establish a criminal employment squad to carry out workplace raids and arrest workers on identity theft charges.[283] Consequently, the fears of immigrant rights organizations that local law enforcement authorities would use such statutes to enforce removal through attrition were realized. The Department conducted over eighty raids and arrested more than 790 workers through the operation of its criminal employment squad[284] before a federal district court recently enjoined the practice.[285]

The Arizona case and its effects—both in implementation and enforcement of the statute—is generalizable to the rest of the states that have enacted or interpreted their identity theft statutes to apply to the use of false information to obtain employment. By enacting these statutes, states have made criminals of immigrants who use false information of real or fictitious individuals to gain or keep employment. In doing so, they have claimed authority—whether directly, as with Sheriff Arpaio in Arizona, or indirectly, by simply claiming an interest in the purely criminal aspects of identity theft—over the treatment of undocumented workers in the workplace.

278. *See* Complaint for Declaratory & Injunctive Relief at 3–4, Puente Arizona v. Arpaio, No. 2:14-CV-01356-DCG (D. Ariz. June 18, 2014). A description of Puente Arizona, its mission, and its activities can be found at http://www.puenteaz.org.

279. *See* Complaint for Declaratory & Injunctive Relief, *supra* note 278, at 2.

280. Plaintiff's Motion for Preliminary Injunction & Memorandum of Points & Authorities, *supra* note 277, at 23.

281. *Id*. at 25.

282. *Id*. at 2.

283. *Id*. at 8–10.

284. *See* Press Release, ACLU, Coalition Files New Suit to Halt Arpaio's Workplace Raids (June 18, 2014), *available at* http://www.acluaz.org/issues/press-releases/2014-06/4687.

285. *See* Order at 30, Puente Arizona v. Arpaio, No. 2:14-CV-01356-DCG (D. Ariz. Jan. 5, 2015).

2. Criminalization of an Otherwise Legal Activity—Employment—Makes Immigrant Workers More Vulnerable

Because immigrant workers risk criminal conviction as well as removal for working without proper documentation, they endure terms and conditions of employment that are worse than those of their native-born counterparts. For example, employers can, and have, exposed them to more dangerous conditions (such as those that expose workers to extreme heat or toxic substances),[286] and even seek them out for undesirable jobs.[287] Additionally, immigrant workers suffer labor law violations at a higher rate than their native-born counterparts.[288] Immigrants work disproportionately in low-wage industries marked by poor conditions.[289] At times, employer mistreatment of immigrant workers rises to the level of criminal activity.[290] However, because undocumented workers fear retaliation for seeking protection from abusive employers they frequently fail to report exploitation and abuse.[291] An employer may feel emboldened knowing that an undocumented worker is less likely to bring charges or report abuse or crime for fear of criminal sanctions or deportation.[292] Real fears of criminal and immigration sanctions, therefore, create vulnerabilities for immigrant workers in ways that their native-born counterparts do not experience.

Recently, the state of California enacted or interpreted state statutes that illustrate both the vulnerability of undocumented workers and the need for their protection in employment regulation.

286. *See* Pia Orrenius & Madeline Zavodny, *Do Immigrants Work in Riskier Jobs?*, 46 DEMOGRAPHY 535, 535–36 (2009) (noting that immigrant workers suffer injuries at a rate higher than all workers).

287. *See* ROGER WALDINGER & MICHAEL I. LICHTER, HOW THE OTHER HALF WORKS: IMMIGRATION AND THE SOCIAL ORGANIZATION OF LABOR 156–57 (2003).

288. ANNETTE BERNHARDT ET AL., BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES 42–48 (2009), *available at* http://www.nelp.org/page/-/brokenlaws/BrokenLawsReport2009.pdf?nocdn=1.

289. *See* Orrenius & Zavodny, *supra* note 286, at 536.

290. *See, e.g.*, United States v. Askarkhodjaev, 444 F. App'x 105, 105–06 (8th Cir. 2011) (upholding an indictment on criminal charges, including fraud in foreign labor contracting, for employer's scheme to recruit and exploit recruited workers).

291. *See, e.g.*, Teresa Scherzer, Reiner Rugulies & Niklas Krause, *Work-Related Pain and Injury and Barriers to Workers' Compensation Among Las Vegas Hotel Room Cleaners*, 95 AM. J. PUB. HEALTH 483, 485–86 (2005) (finding that only twenty percent of immigrant hotel workers who had experienced work-related pain filed claims "for fear of getting in trouble" or being fired).

292. *See, e.g.*, EUNICE CHO & REBECCA SMITH, WORKERS' RIGHTS ON ICE: HOW IMMIGRATION REFORM CAN STOP RETALIATION AND ADVANCE LABOR RIGHTS 2 (2013), *available at* http://www.nelp.org/page/-/Justice/2013/Workers-Rights-on-ICE-Retaliation-Report.pdf?nocdn=1.

The California legislature enacted three statutes in 2013 in response to growing concern over the workplace exploitation of immigrant workers.[293] In 2014, the California legislature passed a bill further defining the rights and remedies available to immigrant workers who suffered workplace retaliation.[294] These new laws include specific protections for immigrant workers who exercise their workplace rights against employer retaliation.[295] Among other protections, the four laws protect workers against immigration-related discrimination and threats and clearly define the types of information an employer can deem misrepresentation in an employment relationship.[296]

The first of these laws, AB 263, provides Labor Code protections against retaliation for immigrant workers.[297] The Legislature noted the vulnerability of immigrant workers in the employment relationship in its declaration of purpose for the statute:

> Low-wage, often immigrant, workers are the most frequent victims of wage theft and are also exposed to the greatest hazards at work . . . . Far too often, when workers come forward to expose unfair, unsafe, or illegal conditions, they face retaliation from the employer . . . . Where there are immigrant workers involved, employer retaliation often involves threats to contact law enforcement agencies, including immigration enforcement agencies, if a worker engages in protected conduct.[298]

AB 263 created new Labor Code section 1019, which makes it unlawful for an employer or any other person to participate in an "unfair immigration-related" practice against a worker in retaliation for exercising a legal right or for conducting protected activity.[299]

293. *See* Act of Oct. 11, 2013, ch. 732, 2013 Cal. Stat. 5311 (codified as amended at CAL. LAB. CODE §§ 98.6, 98.7, 1019, 1024.6, 1102.5, 1103 (West 2014)); Act of Oct. 5, 2013, ch. 577, 2013 Cal. Stat. 4679 (codified as amended at CAL. BUS. & PROF. CODE §§ 494.6, 6103.7, CAL. LAB. CODE §§ 98.6, 224, 1102.5); Act of June 28, 2014, ch. 79, 2014 Cal. Stat. 95 (codified as amended at CAL. LAB. CODE §§ 98.6, 1019, 1024.6).

294. *See* Act of June 28, 2014, ch. 79, 2014 Cal. Stat. 95 (codified as amended at CAL. LAB. CODE §§ 98.6, 1019, 1024.6).

295. *See infra* notes 297–314 and accompanying text.

296. *See infra* notes 297–314 and accompanying text.

297. Act of Oct. 11, 2013, ch. 732, 2013 Cal. Stat. 5311 (codified as amended at CAL. LAB. CODE §§ 98.6, 98.7, 1019, 1024.6, 1102.5, 1103).

298. *See id*. § 1, 2013 Cal. Stat. at 5313.

299. CAL. LAB. CODE § 1019 (defining an "unfair immigration-related practice" as including any of the following activities taken for retaliatory purposes: (1) "Requesting more or different documents than are required under [federal immigration law], or a refusal to honor documents tendered pursuant to [federal law] that, on their face, reasonably appear to be genuine"; (2) "Using the federal E-Verify system to check the employment authorization status of a person at a time or in a manner not required under

Protected activity includes actions that undocumented workers would not typically take because of their vulnerable status.[300] The statute also allows an employee to file a civil action for equitable relief and damages for an unfair immigration-related practice and allows a court order to suspend an employer's business license based on the number of violations of the statute.[301]

In a signal to employers that the practice of discharging employees who provided false work authorization would not be tolerated, the law added new Labor Code section 1024.6.[302] The provision prohibited an employer from discharging or discriminating, retaliating, or taking any adverse action against an employee because the employee updates or attempts to update his or her personal information.[303]

The second law, SB 666, suspends or revokes the license of a business found by the courts to engage in such retaliation or in unfair immigration-related discrimination for retaliatory purposes.[304] It also defines an "adverse action" as:

> Reporting or threatening to report an employee's, former employee's, or prospective employee's suspected citizenship or immigration status, or the suspected citizenship or immigration status of a family member of the employee, former employee, or prospective employee, to a federal, state, or local agency because the employee, former employee, or prospective employee exercises a right [under the Labor Code or other relevant statutes].[305]

[federal law] or not authorized under any memorandum of understanding governing the use of the federal E-Verify system"; (3) "Threatening to file or the filing of a false police report"; or (4) "Threatening to contact or contacting immigration authorities").

300. *Id*. (explaining that protected activity includes: "(1) Filing a complaint or informing any person of an employer's or other party's alleged violation of this code or local ordinance, so long as the complaint or disclosure is made in good faith[;] (2) Seeking information regarding whether an employer or other party is in compliance with this code or local ordinance[;] (3) Informing a person of his or her potential rights and remedies under this code or local ordinance, and assisting him or her in asserting those rights"). The statute also creates a civil penalty for retaliating against a worker who complains about unpaid wages. *See id*. § 98.6.

301. *Id.* § 1019

302. Act of Oct. 11, 2013, ch. 732, § 5, 2013 Cal. Stat. 5311, 5317 (codified as amended at CAL. LAB. CODE § 1024.6).

303. CAL. LAB. CODE § 1024.6 This statute was amended in 2014 to clarify that personal information includes one's Social Security number. *See infra* notes 309–12 and accompanying text (describing the importance of AB 2751).

304. Act of Oct. 5, 2013, ch. 577, § 1, 2013 Cal. Stat. 4679, 4680 (codified at CAL. BUS. & PROF. CODE § 494.6(a)).

305. CAL. LAB. CODE § 244(b).

In addition, SB 666 makes it a "cause for suspension, disbarment, or other discipline" for any California licensed attorney to report or "threaten to report suspected immigration status of a witness or party to a civil or administrative action or his or her family member" because the person "exercises or has exercised a right related to his or her employment."[306]

The third piece of legislation, AB 524, clarifies that a threat to report any individual's immigration status or suspected immigration status in order to obtain his or her property may constitute criminal extortion.[307] This law was enacted to target employers who refused to pay workers their wages and instead threatened to call immigration authorities.[308]

While these three statutes address some of the vulnerabilities of immigrant work, the fourth law, AB 2751, which clarifies and expands protections and remedies available for unfair immigration-related employment practices, is of most interest because it signals the current legislative purpose with respect to the use of false Social Security numbers to obtain work.[309] The statute makes clear that, whether or not it is considered a crime, an employer cannot cite false use of a Social Security number as the basis for an employment decision once an employee seeks to correct work authorization information.[310] Prior to the enactment of this legislation, AB 263 had added section 1024.6 to the Labor Code, prohibiting an employer from terminating or otherwise retaliating against employees who sought to update personal information, "unless [those] changes [were] directly related to the skill set, qualifications, or knowledge required for the job."[311] AB 2751 clarifies this provision by explaining that the scope of the protection for updates of personal information includes only work authorization, such as "a lawful change of name, Social

306. CAL. BUS. & PROF. CODE § 6103.7.

307. Act of Oct. 5, 2013, ch. 572, 2013 Cal. Stat. 4657 (codified as amended at CAL. PENAL CODE § 519). Extortion is defined as "the obtaining of property from another, with his consent, . . . induced by a wrongful use of force or fear, or under color of official right." CAL. PENAL CODE § 518.

308. *See California Legislature Passes Historic Laws Protecting Immigrant Workers from Abusive Employers*, TEAMSTERS (Sept. 12, 2013), http://teamster.org/content/california-legislature-passes-historic-laws-protecting-immigrant-workers-abusive-employers (describing the impetus for the legislation).

309. *See* Act of June 28, 2014, ch. 79, 2014 Cal. Stat. 95 (codified as amended at CAL. LAB. CODE §§ 98.6, 1019, 1024.6).

310. *Id*. § 3 (codified at CAL. LAB. CODE § 1024.6).

311. Act of Oct. 11, 2013, ch. 732, Cal. Stat. 5311, 5313 (codified as amended at CAL. LAB. CODE § 1024.6).

Security number, or federal employment authorization document."[312] While employers can still discipline or terminate employees for making false statements about educational qualifications or criminal history, they simply cannot retaliate against employees who seek to revise their immigration or work authorization status. This clarification highlights the vulnerabilities of immigrant workers in the employment relationship and at the same time declares that in the state of California, false use of a Social Security number for work will not be a basis for sanction, at least not in the Labor Code.

The California statutes described here respond to very real and commonplace examples of immigrant worker exploitation, such as employers refusing to pay for a worker's labor or calling immigration authorities in retaliation for workplace complaints.[313] Immigrant worker fear of retaliation is heightened in those states where the very act of working without proper documents is criminalized. Exploitation in those states reflects the shift from employer to employee sanctions in ways that create a true second-class status in the workplace. It also reflects a changing landscape that makes employment more difficult, dangerous, and exploitative for immigrant workers.[314]

III. THE LEGAL AND POLICY IMPLICATIONS OF STATE DEFINITIONS OF IDENTITY THEFT FOR EMPLOYMENT

As states move to criminalize false use of Social Security numbers and other identifying information for employment, they risk running afoul of congressional intent to ensure that workplace enforcement focuses on employer sanctions and not on worker sanctions. The structural argument for the preemptive effect of congressional activity seems strong after the Supreme Court's

312. Act of June 28, 2014, ch. 79, § 3, 2014 Cal. Stat. 95 (codified as amended CAL. LAB. CODE § 1024.6).

313. *See, e.g.*, Complaint for Damages, Arias v. Angelo, No. 13-CV-00904 (E.D. Cal. May 8, 2013) (alleging employer retaliation through threatening to report to federal authorities and withholding of payment and benefits to the employee); Jennifer Medina, *Immigrant Worker Firings Unsettle a College Campus*, N.Y. TIMES (Feb. 1, 2012), http://www.nytimes.com/2012/02/02/us/after-workers-are-fired-an-immigration-debate-roils-californiacampus.html?_r=0&pagewanted=print; Cynthia Moreno, *Immigrants to Benefit from "Protection" Bills*, VIDA EN EL VALLE (June 5, 2013), http://www.vidaenelvalle.com/2013/06/05/1528966/immigrants-to-benefit-from-protection.html; Press Release, Cal. Rural Legal Assistance Found., Immigrant Worker Sues Dairy and Its Counsel for Contacting ICE in Retaliation for Asserting His Rights (May 8, 2013), *available at* http://www.crlaf.org/sites/all/files/content/uploads/pressreleases/2013/130508-pr_ICE.pdf.

314. CHO & SMITH, *supra* note 292, at 1–2.

reaffirmation of the federal government's exclusive authority over immigration regulation, including worksite enforcement efforts.[315] Congress has also, however, spoken on the issue of identity theft, opening up the possibility for states to participate in federal enforcement schemes to protect individuals from identity theft harm.[316]

How might we reconcile these statutes with each other? More importantly, what does federal regulation in these two arenas mean for the possibility of state regulation? In implementing identity theft laws that implicate worksite immigration regulation, states might argue that they are merely aiding congressional efforts to both protect identity theft victims and identify those who are in the country illegally. This Part analyzes these arguments and their implications in the legal and policy realm. First, this Part will analyze the problem through the lens of structural federalism principles involving preemption. It will then focus on congressional purpose in enacting identity theft statutes and worksite immigration regulation.

A. Does State Criminalization of Use of False Social Security Numbers for Employment Violate the Supremacy Clause?

It is a well-settled proposition that federal government activity in the regulation of immigration preempts state activity, either because Congress has occupied the field or because state statutes irreconcilably conflict with congressional acts. Even before the federal government enacted federal immigration statutes, the Supreme Court pronounced immigration regulation a domain belonging exclusively to Congress.[317] Once Congress passed a federal immigration statute, the Supreme Court pronounced the enactment of federal immigration law as an embodiment of the federal plenary power.[318] Since then, the Supreme Court has consistently held that federal immigration regulation trumps state regulation, either

315. *See* Arizona v. United States, 132 S. Ct. 2492, 2499 (2012).

316. *See* S. REP. NO. 105-274, at 4–6 (1998).

317. *See, e.g.*, Chy Lung v. Freeman, 92 U.S. 275, 279 (1876) (striking down a California statute seeking to restrict Chinese immigration); Henderson v. Mayor of New York, 92 U.S. 259, 272–75 (1876) (invalidating state immigration statutes). *See generally* Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 61 DUKE L.J. 251 (2011) (discussing federal preemption over state immigration schemes).

318. *See generally Arizona*, 132 S. Ct. 2942 (2012) (reiterating the historical preemptive power of federal immigration regulation); Fong Yue Ting v. United States, 149 U.S. 698 (1893) (finding the federal government has the exclusive authority to regulate registration and removal of noncitizens); Chae Chan Ping v. United States, 130 U.S. 581 (1889) (finding the federal government has the exclusive authority to exclude noncitizens).

through field or conflict preemption, or both.[319] As the Supreme Court recently noted in *Arizona v. United States*, "Federal governance of immigration and alien status is extensive and complex."[320] Both of these attributes make it that much more difficult for states to enter the field of immigration regulation.

The federal government's worksite immigration enforcement scheme is broad and far-reaching. Several Supreme Court opinions, including those discussed in Part I.E. of this Article, set out the contours of the federal government's preemptive effect on state activity in the worksite enforcement arena. Specifically, in *Arizona v. United States*, the Supreme Court noted that, with respect to worksite enforcement, "IRCA's framework reflects a considered judgment that making criminals out of aliens engaged in authorized work—aliens who already face the possibility of employer exploitation because of their removable status—would be inconsistent with federal policy and objectives."[321] With this pronouncement the Court struck down state efforts to criminalize unauthorized work. The question is whether the Supreme Court's rationale applies to indirect regulation through criminal statutes such as the identity theft statutes discussed here.

B. Do the Federal Identity Theft Statutes Offer a Space for State Involvement in Worksite Enforcement?

Unlike the state statutes that specifically define false use of identifying information to obtain employment as identity theft, the federal identity theft statute is silent.[322] It does not specifically include a provision that defines the act of using a false identity to obtain employment as either identity theft or aggravated identity theft. Instead, the federal aggravated identity theft statute references the immigration statute and penalizes the use of false documents belonging to another person for identification relating to citizenship, immigration documents such as passports or visas, or for immigration-related activities.[323] To the extent these areas implicate immigration regulation, they remain exclusively federal in nature.

There is another indicator that Congress contemplated leaving the enforcement in worksite fraud provisions to federal authorities. In its employer sanctions provisions, Congress restricted the use of

319. *See, e.g.*, *Arizona*, 132 S. Ct. at 2502.
320. *Id*. at 2499.
321. *Id*. at 2504.
322. *See* 18 U.S.C. § 1028 (2012).
323. *See id*. § 1028(a)(6), (7), (9), (10).

information provided in the employment verification process to "enforcement of this chapter and sections 1001 [relating to fraud against the federal government], 1028 [the federal identity fraud provision], 1546 [relating to immigration fraud], and 1621 [relating to perjury in a federal tribunal] of title 18."[324] The purpose of this provision was to limit the scope of crimes to which information provided through the employment verification process could apply. Notably, state laws were not included in that scope. Several other sections of the employer sanctions provisions of the statute limit the use of documents provided to verify employment to enforcement.[325] In addition, Congress contemplated that in the future the executive branch could require new or different documents for employment verification. Contemplating that eventuality, Congress enacted the following provision:

> If the system requires individuals to present a new card or other document (designed specifically for use for this purpose) at the time of hiring, recruitment, or referral, then such document may not be required to be presented for any purpose other than under this chapter (or enforcement of sections 1001, 1028, 1546, and 1621 of title 18) nor to be carried on one's person.[326]

Congress understood that its employer sanctions provisions would inevitably lead to the use of false identity documents.[327] Congress ultimately dealt with the problem by exempting the practice from criminalization. At the same time that Congress legalized a generation of undocumented immigrants when it included a legalization provision in its IRCA, Congress exempted false use of Social Security numbers for work from the definition of fraud in the Social Security statute.[328] At the time, Congress understood that without the exemption, the vast majority of immigrants seeking legalization could potentially face criminal sanctions for fraud under the Social Security Act. This indicates that Congress's purpose was not to make criminals out of those employees who worked with false identification documents.

That being said, the federal government has filed criminal charges and litigated cases against immigrants who have used false Social Security numbers to obtain work, to varying degrees of

324. 8 U.S.C. § 1324a(b)(5).
325. *Id*. § 1324a(d)(2)(C), (G).
326. *Id*. § 1324a(d)(2)(G).
327. *See* S. REP. NO. 98-62, at 34 (1983).
328. *See* 42 U.S.C. § 408(e).

success.[329] The facts of *Flores-Figueroa v. United States*, discussed earlier in this Article,[330] demonstrate how broadly federal prosecutors have interpreted the federal identity theft statutes.[331] The Court, in response, noted examples of classic cases of identity theft, including dumpster diving and computer hacking, signaling that immigrants using false Social Security numbers for work were outside the scope of Congress's intended targets.[332]

C. Are the States Regulating Immigration Indirectly by Enacting Identity Theft for Employment Statutes?

The federal identity theft statute notwithstanding, the states cannot regulate immigration through the back door any more than they can through a mirror-image theory, which "rests on the erroneous premise that Congress has implicitly authorized state enforcement of federal immigration law."[333] The question in the interpretation of these state statutes is whether the state statute was enacted or interpreted to promote or enforce an immigration-regulation purpose. In other words, did the legislatures pass such statutes criminalizing the act of working without proper documentation as a way to enforce immigration regulation? To the extent those statutes were enacted to target immigrants, the Court's pronouncement in *Arizona v. United States*[334] would seem to apply. If the reason for the interpretation of the statute was to target undocumented immigration, it may be that the statute is preempted by the federal scheme to regulate immigration in the workplace, which includes specific sanctions for the use of false documents to obtain work.[335] This is the case with the Arizona and Georgia statutes, for example, which evince in their titles the intent to target and criminalize unauthorized work.[336] This may also be the case with the rest of the statutes that were enacted in the place of more general

329. *See, e.g.*, Flores-Figueroa v. United States, 556 U.S. 646, 657 (2009); Response of Defendants at 15, United States v. Moreno-Lopez, No.: 4:09-cr-00021 (E.D. Tenn. May 19, 2010).

330. *See supra* notes 117–30 and accompanying text.

331. *See supra* notes 122–24 and accompanying text.

332. *Flores-Figueroa*, 556 U.S. at 655.

333. Chin & Miller, *supra* note 317, at 252. The mirror-image theory posits that states should be able to enact and enforce criminal immigration laws as long as they further the purposes of federal immigration statutes. *Id.* Professors Chin and Miller critique this mirror-image theory of state regulation. *See id.*

334. 132 S. Ct. 2492 (2012).

335. *See* 18 U.S.C. § 1546(a), (b) (2012).

336. *See supra* notes 182–85 and accompanying text.

anti-immigrant statutes, if their legislative histories betray a purpose to regulate immigration.[337]

What about statutes that are more indirect or whose silence has been interpreted by courts to apply to the use of false information to obtain employment? Legal scholars have argued that federal law should preempt indirect statutes that criminalize behavior related to immigration status. Professors Chin and Miller, for example, argue that such indirect state attempts to "mirror" federal statutes through criminal law as a way of furthering federal purpose or intent fall outside the scope of the state police power.[338] They argue that in criminalizing behavior that is related to immigration status, the states must demonstrate how such status is related to a legitimate state interest other than the desire to regulate immigration.[339] The mirror-image theory fails to provide a legitimate state interest in an independent state police power if it is premised on deriving its authority from federal authority.[340] They conclude that the states can only prosecute those crimes that fall within their sovereign authority.[341] With respect to constitutionality, therefore, "[t]hat one government enacts a law within its exclusive jurisdiction does not enlarge the constitutional authority of the other."[342]

Regulation of immigration is a different premise from a state using its police power to regulate immigrants within its boundaries. Historically, the Supreme Court has drawn a distinction between state statutes that purport to regulate immigration—which are invalid—and state statutes that affect immigrants without necessarily affecting immigration regulation. The Supreme Court most recently addressed the difference in *Arizona v. United States*,[343] holding that state immigration regulation of unauthorized work through criminalization was preempted.[344]

Courts that have addressed this problem of indirect state regulation in other contexts have held that a preemption analysis should consider not just the text of a state statute but its purpose and effect as well.[345] Courts determine the practical impact of the statute when weighing the preemptive effect of a congressional statutory

337. *See supra* Part II.B.
338. Chin & Miller, *supra* note 317, at 259.
339. *Id.* at 312.
340. *Id.*
341. *Id.*
342. *Id.*
343. 132 S. Ct. 2492 (2012).
343. *Id*. at 2510.
345. Gade v. Nat'l Solid Waste Mgmt. Ass'n, 505 U.S. 88, 105 (1992).

framework.[346] Ultimately, a state law cannot "frustrate the operation of federal law," whether directly or indirectly, even when the legislature "had some other purpose in mind other than one of frustration."[347] This line of cases indicates that whether or not the states had a purpose to regulate immigration or to encourage self-deportation of undocumented immigrants, their entry into the immigration regulation field through criminalization of workplace misrepresentation would be preempted. Congress did not explicitly or implicitly open the door to state immigration regulation when it expanded its federal identity theft statute to include the use of false information and to provide individuals with remedies.

In sum, to the extent that *federal* identity theft laws create crimes for *immigration-related* fraud, the federal jurisdiction remains exclusively federal. No state purpose, direct or indirect, gives it the power to supersede the federal immigration scheme. Given Congress's occupation of the immigration regulation field, states should not be allowed to mirror the federal identity theft crimes, even if Congress decided not to preempt general state identity theft statutes. Criminalizing identity theft in general has different implications than criminalizing the use of false information to obtain employment. To the extent that Congress maintains preemptive authority over immigration regulation, the subset of workplace identity theft remains in the hands of the federal government, to the exclusion of the states.

CONCLUSION

This Article has introduced the history of employer sanctions provisions and the role of worksite immigration regulation to demonstrate how the criminalization of unauthorized work was outside the scope of congressional intent when the employer sanctions framework was established. The failure of past Congresses to adequately resolve the struggles between employers pulling workers into the United States and enforcement efforts to dissuade the pull have resulted in a decades-long public discussion about undocumented immigration. The discussion has led to the current efforts to define the use of false documents for work as a form of identity theft. Ultimately, the criminalization of unauthorized work through state identity theft statutes operates to criminalize behavior

346. *Id*. at 106.
347. Perez v. Campbell, 402 U.S. 637, 651–52 (1971).

not intended to be sanctioned under former or current immigration schemes.

While this criminalization at the state level aids and abets administrative decisions to turn from apprehensions to detention and deportation as the principal means of immigration regulation in the United States, it does little to heed congressional calls for an employer-focused sanctioning mechanism. The increasing scrutiny on the unauthorized worker follows the pattern of immigration regulation over temporary workers in the United States and the diminishing protections for an already vulnerable population. This Article has demonstrated how the interaction between state criminal laws and federal law regulating immigration make the current deportation scheme today's de facto temporary worker program. One prescription lies in invalidating the employment provisions in state identity theft statutes. Statutes that effect immigration regulation through criminal law are arguably unconstitutional for structural reasons: they encroach on congressional and executive authority, prosecutorial discretion, and sovereignty-related concerns that belong to the federal government.[348] More importantly, they perpetuate a line of reasoning that contradicts the very basis of worksite immigration enforcement: to make employers accountable for unauthorized work.

348. *See generally* Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law*, 119 YALE L.J. 458 (2009) (engaging in a thoughtful description of the contours of executive and congressional powers over immigration regulation and their preemptive power).