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A NEW “U”: ORGANIZING VICTIMS AND PROTECTING IMMIGRANT WORKERS

Leticia M. Saucedo *

INTRODUCTION

This article explores the viability and potential effectiveness of immigration law’s U visa to contribute to the protection of groups of workers in substandard and dangerous workplaces. Immigration law has increasingly become an obstacle to the enforcement of employment and labor law to protect immigrant workers. Moreover, employment and labor law, with their individual rights frameworks, have proven blunt instruments in eradicating the type of subordinating, sometimes slave-like conditions of immigrant workers, especially those in low-wage industries. The federal government recently issued long-awaited regulations governing U nonimmigrant visas for certain crime victims.¹ Several of the enumerated eligible crimes in the U visa statutory provisions encompass labor exploitation.² The U visa regulations demonstrate how the interplay between employment and immigration law can provide the protection that immigrants need as a prerequisite to remedy workplace wrongs.

* Associate Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas; J.D., 1996, Harvard Law School. I thank Fran Ansley, Annette Appell, Maria Blanco, Kate Kruse, Gary Sapp, David Thronson, William Tamayo, and Michael Wyatt for their comments on earlier drafts of this article. Thanks also to participants of the SALT Cover Workshop at the 2008 AALS Annual Meeting for their suggestions and comments. My research assistant, Judy Cox, provided excellent research assistance. I owe much gratitude to the Boyd faculty community for continued support and encouragement.

1. The Department of Homeland Security (“DHS”), through the United States Citizenship and Immigration Services (“USCIS”), issued the U visa regulations on September 17, 2007, and it became effective thirty days after its approval. *See New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status*, 72 Fed. Reg. 53,014 (Sept. 17, 2007) (to be codified in scattered parts of 8 C.F.R.).

2. *See id.* at 53,036.

The U visa grants nonimmigrant status to victims of crime who have “suffered substantial physical or mental abuse as a result of” being victims of criminal activity, and who have been, will be, or are being cooperative with law enforcement officials in the investigation or prosecution of the crime.³ Initially, the government implemented the statute to protect domestic violence or sex crime victims because the legislation was a companion to the Violence Against Women Act for which women’s groups advocated.⁴ The legal scholarship addressing U visa implementation has focused on this group of crime victims as individual victims.⁵ A minority of scholarship has addressed the use of the U visa or any other visa status to protect against workplace crimes.⁶ As yet, no scholarship has directly suggested the U visa serve as a foundation for enhancing the collective rights of immigrant workers in substandard workplaces. This article addresses the viability of the U visa as a vehicle for creating power for the collective in the context of a regulatory scheme that recognizes the existence of criminal activity in immigrant-dominated workplaces.

Part I of this article documents the varying aspects of government activity that elevate the immigrant community’s fears, and proposes the U visa as the civil rights-conferring mechanism to empower workplace immigrants. Part II provides the statutory background for the U visa, and explains its dual identity as both a law enforcement and protection vehicle for individual crime vic-

3. 8 U.S.C. § 1101(a)(15)(U) (2000).

4. See Violence Against Women Act of 1994, Pub. L. No. 103-222, 108 Stat. 1902 (codified as amended at 42 U.S.C. § 13931 (2000)).

5. See, e.g., Nora V. Demleitner, *Immigration Threats and Rewards: Effective Law Enforcement Tools in the “War” on Terrorism?*, 51 EMORY L.J. 1059 (2002); Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449 (2006); Lori A. Nessel, *Forced to Choose: Torture, Family Reunification, and United States Immigration Policy*, 78 TEMP. L. REV. 897 (2005).

6. See, e.g., Bruce Goldstein et al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. REV. 983 (1999); Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503 (2007); Laura Ho, Catherine Powell & Leti Volpp, *(Dis)Assembling Rights of Women Workers Along the Global Assembly Line: Human Rights and the Garment Industry*, 31 HARV. C.R.-C.L. L. REV. 383 (1996); Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 HARV. C.R.-C.L. L. REV. 345, 393 (2001) (suggesting the need for a new visa modeled after the S and T visas to protect undocumented workers seeking to exercise their labor rights); Leticia M. Saucedo, *The Browning of the American Workplace: Protecting Workers in Increasingly Latino-ized Occupations*, 80 NOTRE DAME L. REV. 303 (2004); Julie A. Su, *The Progressive Critique of the Current Socio-legal Landscape: Corporations and Economic Justice*, 4 SEATTLE J. SOC. JUST. 237 (2005).

tims. Part III analyzes the use of the U visa as a means for protection within the labor and employment enforcement scheme. It analyzes the cases in which workplace violations overlap with the U visa enumerated crimes, and concludes that labor and employment agencies can support U visa protection for undocumented workers. Part IV takes the analysis one step further, arguing that the Department of Labor (“DOL”) and the Equal Employment Opportunity Commission (“EEOC”) should use the U visa mechanism as part of a broader strategy for protecting collective rights of immigrants in exploitative workplaces. It analyzes the viability of the U visa as a tool for establishing such a collective right. Part V recommends U visa provision fixes to strengthen the effectiveness of a U visa strategy for supporting collective rights.

I. THE CURRENT LANDSCAPE: GOVERNMENT ACTIVITY ENGENDERING COLLECTIVE IMMIGRANT COMMUNITY FEARS

Over the past several years, undocumented workers have faced workplace disenfranchisement as a result of the Supreme Court’s opinion in *Hoffman Plastics Compounds, Inc. v. N.L.R.B.*, which effectively limited undocumented workers’ rights to organize in the workplace, and forced them deeper into the shadows.⁷ Federal government workplace raids,⁸ efforts to use the Social Security system to identify and purge undocumented workers from payrolls,⁹ and increasing enforcement efforts are all also aimed at curbing undocumented immigration.¹⁰ Those most affected and with the fewest avenues for recourse in the law include workers whose employers take advantage of their status and fail to pay adequate (or any) wages, discriminate openly in the workplace, and violate labor and safety laws with impunity because of weak laws and weak employer enforcement efforts.

7. *Hoffman Plastics Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 151–52 (2002); see also Saucedo, *supra* note 6, at 304–05 (discussing the dramatic increase of Latino workers in certain occupations and the subsequent worsening of salary and working conditions).

8. See *infra* text accompanying notes 22–28.

9. See *infra* text accompanying notes 58–71.

10. See *infra* text accompanying notes 49–57.

A. *Hoffman as a Basis of Immigrant Community Fears*

When the Supreme Court decided in *Hoffman* that an undocumented worker did not have the right to backpay for work not performed or to reinstatement in a dispute arising under the National Labor Relations Act (“NLRA”), it effectively neutralized attempts to organize low-wage workers in “brown collar” industries.¹¹ In *Hoffman*, an undocumented worker, Juan Castro, sued Hoffman Plastic Compounds for unfair labor practices under the NLRA when the company fired him for organizing activities.¹² The National Labor Relations Board (“NLRB”), understanding the importance of protecting undocumented workers in order to uphold the principle of collective bargaining free from employer pressures, sided with Castro. It awarded him sufficient damages to deter the company from taking advantage of its leverage over undocumented and immigrant workers.¹³ The Supreme Court disagreed, concluding that undocumented workers could not avail themselves of some of the remedies in labor law if they were in the country illegally.¹⁴ The Court’s opinion specifically addressed the limited remedial powers of the NLRB in granting backpay for work not performed.¹⁵ Because the NLRB did not have the power to grant backpay when the worker lacked work authorization, the Supreme Court reversed the backpay award granted to the employee.¹⁶ Since *Hoffman*, courts have ruled that other employment statutes, such as Title VII and the Fair Labor Standards Act (“FLSA”), could be read broadly to include remedies that the judiciary had the power to enforce such as backpay, front pay, and compensatory and punitive damages.¹⁷ Nonetheless, the im-

11. See *Hoffman*, 535 U.S. at 149; see also Gordon, *supra* note 6, at 539 n.122 (discussing the Supreme Court’s ruling in *Hoffman*).

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

13. *Id.* at 140–42.

14. *Id.* at 146.

15. *Id.* at 142–44.

16. *Id.* at 145–46.

17. See, e.g., *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1068 (9th Cir. 2004) (affirming a protective order prohibiting NIBCO from using the discovery process to inquire into the plaintiffs’ immigration status, and finding that *Hoffman* did not apply to undocumented workers in Title VII actions because a district court, unlike the NLRB, has the authority and the remedial discretion to interpret both Title VII and IRCA); *Flores v. Amigon*, 233 F. Supp. 2d 462, 464–65 (E.D.N.Y. 2002) (granting a protective order prohibiting discovery into Plaintiff’s immigration status because *Hoffman* was not relevant to claims for unpaid wages under the FLSA); *Zeng Liu v. Donna Karan Int’l, Inc.*, 207 F. Supp. 2d 191, 192 (S.D.N.Y. 2002) (denying discovery into Plaintiff’s immigration status because *Hoffman*

pact of *Hoffman* has devastated workers' organizing efforts. Because *Hoffman* left undocumented workers without a viable remedy for an employer's unlawful employment practices during an organizing campaign, the decision effectively shut out this group of workers from participating in collective bargaining activities. Even the most egregious workplace abuses that could be ameliorated through enforcement of labor or employment laws, or through collective bargaining, would not be challenged because undocumented workers are afraid to complain.¹⁸

The "brown collar" industries—those populated by recently arrived immigrant workers—are especially hard hit by fears over employer retaliation because newly arrived immigrant workers in these industries are more than likely undocumented.¹⁹ Over the past decade, the meatpacking, poultry, manufacturing, construction, service, and domestic industries have joined agriculture as the predominantly immigrant workforces.²⁰ The influx has occurred in other industries as well. The racial makeup of the six workers killed in the recent mining accident in Utah illustrates the turning of the American workforce to brown.²¹

did not necessarily apply to FLSA actions to recover backpay for work actually performed); *Flores v. Albertsons, Inc.*, No. CV0100515, 2002 WL 1163623, at *5 (C.D. Cal. Apr. 9, 2002) (denying Defendant's discovery of documents to determine whether Plaintiffs were using false social security numbers because FLSA protections "are available to citizens and undocumented workers alike," and *Hoffman* did not bar undocumented employees from recovering unpaid wages for work actually performed).

18. See Leticia M. Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 OHIO ST. L.J. 961, 968 (2006); see also Nessel, *supra* note 5, at 347–49.

19. Saucedo, *supra* note 6, at 304.

20. RAKESH KOCHHAR, PEW HISPANIC CENTER, *THE OCCUPATIONAL STATUS AND MOBILITY OF HISPANICS* 3 Fig. 1 (Dec. 15, 2005), available at <http://pewhispanic.org/files/reports/59.pdf> (showing Hispanics outnumber Whites, Blacks, and Asians in farming, construction, and production industry); Randy Capps, *U.S. Immigrant Workers and Families: Demographics, Labor Market Participation, and Children's Education*, 14 VA. J. SOC. POL'Y & L. 170, 192–93 (2007) ("Agriculture has, for decades, had a large migrant population that includes many undocumented workers, but the numbers of lower-skilled immigrants are increasing rapidly in a wide variety of industries such as construction, manufacturing, and services. . . . For instance, in 2002, 42% of private household workers and 37% of farming and forestry workers were immigrants."); Saucedo, *supra* note 6, at 307.

21. Three of the miners trapped in the workplace accident in the heavily white state were Mexican nationals. Garance Burke, *Accident Highlights Latino Influx into the State's Mining Industry*, BOSTON.COM, Aug. 10, 2007, available at http://www.boston.com/news/nation/articles/2007/08/10/accident_highlights_latino_influx_into_the_states_mining_industry/.

B. *The ICE Raids as a Basis of Immigrant Community Fears*

Recent Immigration and Customs Enforcement (“ICE”) raids in low-wage workplaces have compounded the negative effects of *Hoffman*, leaving workers feeling even more vulnerable.²² ICE strategy has focused on traditionally immigrant-dominated industries such as meatpacking, construction, poultry processing, and service.²³ ICE has calculated raids to instill fear in both employers and employees in such workplaces. When ICE officials raided Swift meatpacking facilities last December, they surrounded plants, sealed off entrances, and rounded up the entire workforce regardless of documentation status.²⁴ Citizens and non-citizens alike were detained for up to ten hours before they were allowed to leave.²⁵

Workplace raids have combined with the home raids of ICE’s Operation Return to Sender to exacerbate fears in the immigrant community.²⁶ The raids have torn apart mixed-status families and have violated citizens’ and legal permanent residents’ rights. Several organizations have filed lawsuits on behalf of both documented and undocumented immigrants and labor unions affected

22. See, e.g., Nicole Gaouette, *Six Meat Plants are Raided in Massive I.D. Theft Case*, L.A. TIMES, Dec. 13, 2006, at A18; Press Release, Dep’t of Homeland Sec., Remarks by Secretary of Homeland Security Michael Chertoff, Immigration and Customs Enforcement Assistant Secretary Julie Myers, and Federal Trade Commission Chairman Deborah Platt Majoras at a Press Conference on Operation Wagon Train, Dec. 13, 2006, http://www.dhs.gov/xnews/releases/pr_1166047951514.shtm. See generally Raquel E. Aldana, *Of Katz and Aliens: Privacy Expectations and the Immigration Raids*, 41 U.C. DAVIS L. REV. (forthcoming 2008).

23. See, e.g., KOCHHAR, *supra* note 20, at Fig.1. (showing Hispanic outnumber Whites, Blacks, and Asians in farming, construction and production industries); Andrea Hopkins, *Immigration Raids Koch Foods Ohio Chicken Plant*, REUTERS.COM, Aug. 28, 2007, <http://www.reuters.com/article/newsOne/idUSN2825845020070828> (explaining that more than 160 workers were arrested on charges of false use of social security numbers, fraud, and identity theft); Gerald Miller, *Agents Arrest 56 Workers*, RENO GAZETTE-JOURNAL, Sept. 28, 2007, at 1A (explaining that ICE raided eleven McDonald’s franchises and arrested and detained fifty-six workers suspected of illegal status); Liza Porteus, *Feds Raid Six Swift and Company Meatpacking Plants in Apparent Illegal Immigration Search*, FOX NEWS.COM, Dec. 12, 2006, <http://www.foxnews.com/story/0,2933,236044,00.html>.

24. Marc Cooper, *Lockdown in Greeley: How Immigration Raids Terrorized a Colorado Town*, THE NATION, Feb. 26, 2007, at 11.

25. *Id.*; see also Complaint at 11, United Food & Commercial Workers Int’l Union v. U.S. Dep’t of Homeland Sec., No. 2-07CV-188-J, 11 (N.D. Tex. Sept. 12, 2007) [hereinafter United Food Complaint] (describing the detention of workers in the Swift plant).

26. See Nina Bernstein, *Immigration Raids Single Out Hispanics, Lawsuit Says*, N.Y. TIMES, Sept. 21, 2007, at B3, available at http://www.nytimes.com/2007/09/21/nyregion/21raids.html?_r=1&ex=1191038400&en=e3559da5c8a2a0ea&ei=5070&emc=eta1&oref=slogin.

by the raids.²⁷ As a result of the raids on six Swift plants, ICE made more than 1100 administrative arrests and 150 criminal arrests.²⁸ During the raids, all of the workers were “told to remain in specific locations for interrogation, and were not free to leave those areas, regardless of their citizenship or immigration status.”²⁹ The lawsuits allege that the arrests were not supported by “reasonable suspicion based upon articulable facts that they were immigrants present in the United States in violation of the Immigration and Nationality Act or otherwise subject to seizure.”³⁰ The lawsuits allege that the ICE raids violated 8 U.S.C. § 1357(a)(2), which gives immigration officers the power to arrest “any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest.”³¹ The statute allows ICE detentions for deportation only if there is a reasonable suspicion, based upon specific and articulable facts, that the person is present in the United States in violation of the Immigration and Nationality Act (“INA”).³² As the lawsuit argues, ICE’s

policy and practice of engaging in mass warrant less group detention of all workers during work-place enforcement activities without reasonable suspicion based upon articulable facts that such detained workers are immigrants present in the United States in violation of the Immigration and Nationality Act violate 8 U.S.C. § 1357 and the Fourth and Fifth Amendments to the United States Constitution.³³

The lawsuit also challenges on Fourth and Fifth Amendment grounds ICE’s authority to conduct warrant less searches.³⁴

27. See, e.g., Complaint at 2, *Aguilar v. Dep’t of Homeland Sec.*, No. 07-Civ-8224 (S.D.N.Y. Sept. 20, 2007); *United Food Complaint*, *supra* note 25, at 10 (challenging raids at six Swift meat producing companies in the United States); Complaint at 1–2, *Mancha v. U.S. Dep’t of Homeland Sec.*, No. 1:06-CV-2650-TWT (N.D. Ga. Nov. 1, 2006) (challenging home raids resulting from initial ICE operation seeking undocumented workers at a poultry plant in Stillmore, Georgia).

28. See *United Food Complaint*, *supra* note 25, at 10–11.

29. *Id.* at 11.

30. *Id.*

31. 8 U.S.C. § 1357(a)(2) (2000).

32. *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975) (holding that an investigative stop near border for questioning about immigration status is allowed if the officer has specific, articulable facts that would reasonably warrant suspicion of illegal status).

33. *United Food Complaint*, *supra* note 25, at 13.

34. *Id.* at 13–14.

Legal scholar Raquel Alana notes that both the warrantless and the administrative warrant searches have tested the limits of the Fourth Amendment even when they are targeted at undocumented immigrants.³⁵ ICE officials can raid workplaces with some degree of impunity,³⁶ however, because of the limited scope of the Fourth Amendment in protecting immigrants and the erosion of privacy expectations in the workplace.³⁷ Alana concludes that workers may be unable to challenge government workplace searches individually because of wide leeway granted to ICE in seeking out undocumented workers.³⁸ This relative inability of undocumented immigrants to seek constitutional remedies renders them powerless.

C. Legislative and Regulatory Bases of Immigrant Community Fears

In addition to the above factors raising the fears of immigrants, the failure of comprehensive immigration reform,³⁹ the passage of border enforcement legislation,⁴⁰ the enactment of the REAL ID Act,⁴¹ and the impending implementation of regulations governing no-match letters⁴² signal to undocumented immigrants that

35. See generally Aldana, *supra* note 22.

36. *Id.* at 116 (“The threshold for a *Katz* reasonable expectation of privacy in a worker’s immigration status is likely quite high in light of the heavily regulated nature of workplace immigration enforcement that allows unregulated databases, compels employer ‘collaboration,’ and sanctions general warrants.”).

37. *Id.* at 115 (“Such erosion occurs through statutes authorizing the creation of databases from which ICE has easy access to obtain civil warrants to conduct raids without particularized suspicion.”).

38. *Id.* at 155. Aldana notes that broader considerations, such as effects on community or protections of vulnerable groups, should be considered in curtailing police power through the Fourth Amendment. *Id.* at 154–55.

39. See, e.g., Comprehensive Immigration Reform Act of 2007, S. 1348, 110th Cong. (2007), available at <http://www.govtrack.us/congress/bill.xpd?bill=s110-1348>; (failing to receive enough votes to be considered in the Senate); Klaus Marre, 46-53, *Immigration Bill Goes Down in Defeat*, THE HILL.COM, June 28, 2007, <http://thehill.com/leading-the-news/immigration-bill-goes-down-in-defeat-2007-06-28.html>.

40. See, e.g., Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638 (2006), available at <http://www.govtrack.us/congress/bill.xpd?bill=h109-6061>; Suzanne Gamboa, *House Approves 700-Mile Border Fence*, BOSTON.COM, Sept. 15, 2006, http://www.boston.com/news/nation/washington/articles/2006/09/15/house_approves_700_mile_border_fence/.

41. See Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief 2005, Pub. L. No. 109-113, 119 Stat. 231 (2005) available at <http://www.govtrack.us/congress/bill.xpd?bill=h109-1268>.

42. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. 45,611 (Aug. 15, 2007) (to be codified at 8 C.F.R. § 274a). The AFL-CIO, the ACLU,

they should stay in the shadows when it comes to workplace abuses.

The failure of comprehensive immigration reform left the immigrant community demoralized. Congress failed to reach a compromise that would protect both our borders and legalize already present undocumented immigrants.⁴³ The failure to enact legislation would not have been so devastating if so many immigrants and their supporters had not fought so hard for changes in the immigration system.⁴⁴ The immigrant marches in major cities around the country in 2006 and 2007 created both publicity and hope for the immigrant community that legislation would produce changes.⁴⁵ The equally well-publicized defeat of comprehensive immigration reform made all Latinos, regardless of immigration status, perceive an increase in discrimination against Hispanics.⁴⁶

The enactment of REAL ID reflects the sentiment that undocumented immigrants should not have the same privileges, such as driver's licenses, as their native-born neighbors.⁴⁷ States have had mixed reactions, sometimes seeking tiered status drivers' licenses for undocumented immigrants, as a way of ameliorating REAL ID's effects.⁴⁸

the National Immigration Law Center, and other organizations recently won a preliminary injunction halting the enactment of the regulations pending a hearing on their constitutionality. See *AFL-CIO v. Chertoff*, No. C07-04472, 2007 WL 2972952 (N.D. Cal. Oct. 10, 2007) (enjoining and restraining the Department of Homeland Security and the Social Security Administration from implementing the Final Rule of "Safe-Harbor Procedures for Employers Who Receive a No-Match Letter").

43. See Carl Hulse & Robert Pear, *Immigration Bill Fails to Survive Senate Vote*, N.Y. TIMES, June 28, 2007, at A1, available at <http://www.nytimes.com/2007/06/28/washington/28cnd-immig.html>

44. Kevin R. Johnson & Bill Ong Hing, *The Immigrant Rights Marches of 2006 and the Prospects for a New Civil Rights Movement*, 42 HARV. C.R.-C.L. L. REV. 99, 99-101 (2007).

45. *Id.*

46. Pew Hispanic Center, 2006 National Survey of Latinos: The Immigration Debate, 13, available at <http://pewhispanic.org/files/reports/68.pdf>.

47. See Emergency Supplement Appropriations Act for Defense, the Global War on Terror and Tsunami Relief 2005, Pub. L. No. 109-13, § 202(c)(2)(B), 119 Stat. 231 (2005) (requiring a state to verify evidence of lawful immigration status before issuing a driver's license or identification card to any person) (codified in 49 U.S.C. § 30301 under Statutory Notes).

48. See, e.g., Danny Hakim, *Spitzer Tries New Tack on Immigrant Licenses*, N.Y. TIMES, Oct. 28, 2007, at A27, available at http://www.nytimes.com/2007/10/28/nyregion/28spitzer.html?_r=2&oref=slogin.

Collaborations between local law enforcement and federal immigration authorities also create anxieties among immigrant advocates and communities. Agreements developed under section 287(g) of the INA deputize trained local law enforcement authorities to act as immigration officers to investigate, apprehend, and detain undocumented residents.⁴⁹ Localities in twelve states have enacted such programs with over 400 local law enforcement officials trained under the program.⁵⁰ Legal scholars have analyzed the federal government's attempts at federal-state collaboration and have opined on their effects on individual rights, separation of powers, and increased efforts by localities to regulate immigration. Huyen Pham, for example, argues that the federal government's attempts to seek cooperation from local law authorities in immigration enforcement violates federalism principles, especially those of the responsiveness of local governments to their constituencies.⁵¹ Requiring cooperation in the name of federal preemption that requires cooperation over immigration policy creates policies that no longer reflect local preferences.⁵² Such cooperation diminishes the ability of local law enforcement authorities to maintain open contact between local law enforcement and immigrants who fear deportation, even as they are victimized.⁵³ Local involvement in federal government activities, such as raids, may lead to further distrust of local police in immigrant communities.⁵⁴ Such activity leaves immigrants vulnerable and without recourse.⁵⁵ Michael Wishnie further argues that the push toward local and state involvement in immigration enforcement creates a risk of racial profiling, which affects immigrant communities

49. See 8 U.S.C. § 1357(g) (2000) (mandating the performance of immigration officer functions by state officers and employees).

50. U.S. Immigration and Customs Enforcement, Partners: Law Enforcement: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act, http://www.ice.gov/partners/287g/section287_g.htm?searchstring=287%20g (stating that localities in Alabama, Arizona, California, Colorado, Florida, Georgia, Massachusetts, North Carolina, New Hampshire, Oklahoma, Tennessee, and Virginia have signed section 287(g) agreements).

51. Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1397–1404 (2006).

52. *Id.* at 1398.

53. See *id.* at 1399–1400.

54. See, e.g., Parastoa Hassouri, CLEAR Act Will Muddy Relationships Between Police and Immigrants, ACLU N.J., <http://www.aclu-nj.org/issues/immigrantrights/clearact/willmuddyrelations.htm> (suggesting the Criminal Alien Removal Act, an Act which calls for cooperation between local police and immigration officials, will undermine the trust and confidence of immigrant communities in local law enforcement).

55. See *id.*

throughout society, including the workplace.⁵⁶ Such practices, in turn, foster further distrust in the immigrant community.⁵⁷ There is no doubt that public collaborations between federal immigration officials and local law enforcement affect the relationships between local governments and their immigrant constituencies and increase fear levels in those communities.

Finally, the impending enactment of Department of Homeland Security (“DHS”) regulations governing Social Security Administration (“SSA”) no-match discoveries indicates that the federal government intends to make employers more accountable for their hiring practices. The regulations punish employers by imputing constructive knowledge to an employer that ignores SSA no-match letters and hires an undocumented worker.⁵⁸ Under current practice, an employer may receive notice from the SSA that an employee’s name and social security number do not match the Social Security database information.⁵⁹ The SSA’s notice to the employer downplays the possibility that a mismatched social security number signals undocumented immigration status. An employer is not legally required to do anything with the information because it cannot assume that an illegal act led to the “no-match.”⁶⁰ A number of innocent reasons, including name change after marriage, clerical mistakes, or database errors, could account for the no-match. Under the proposed DHS rule, however, the employer is required to seek clarification from the employee or to fire the employee if no clarification is forthcoming within ninety days of the receipt of a no-match letter.⁶¹ If the employer fails to follow certain procedures, moreover, DHS could impute to the employer constructive knowledge that an employee did not

56. See Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1104–05 (2004).

57. See *id.* at 1115.

58. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. 45,611 (Aug. 15, 2007) (to be codified at 8 C.F.R. pt. 274a).

59. See 20 C.F.R. § 422.120(a) (2007).

60. The Social Security Administration’s 2006 model no-match letter states several reasons for a mismatch that are all unrelated to immigration status, including typographical errors, name changes, or incomplete Form W-2’s. See Employer Correction Request, Social Security Admin., available at <http://www.ssa.gov/employer/SSAsampleLetter.pdf>; see also *AFL-CIO v. Chertoff*, No. C07-00472, 2007 WL 2972952 (N.D. Cal. Oct. 10, 2007) (enjoining and restraining the Department of Homeland Security and the Social Security Administration from implementing the Final Rule of “Safe-Harbor Procedures for Employers Who Receive a No-Match Letter”).

61. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. at 45,612–13.

have work authorization and prosecute the employer accordingly.⁶² Specifically, an employer would have to check its records to determine the source of the mismatch.⁶³ If the mismatch is not the employer's fault, the employer must request that the employee confirm the information and advise the employee to resolve the matter with the SSA within ninety days of the receipt of the no-match letter.⁶⁴ If the employer cannot resolve any discrepancy within the ninety days, it must fill out a new I-9 form for the employee to prove identity and work authorization.⁶⁵ The employer must fill out the new I-9 to maintain a safe-harbor from DHS prosecution for knowingly hiring illegal aliens even if the discrepancy is due to SSA error.⁶⁶ The DHS rule threatens to presume employer knowledge based on the employer's actions after receiving a SSA no-match letter and an accompanying DHS letter.⁶⁷ The DHS letter warns employers that if they "elect to disregard the SSA no-match notice . . . and if it is determined that some employees listed in the enclosed letter were not authorized to work, the Department of Homeland Security could determine"⁶⁸ that the employer violated immigration law "by knowingly continuing to employ unauthorized persons."⁶⁹ The rule threatens civil and criminal sanctions as a consequence.⁷⁰

Recently, a judge granted a temporary injunction against the implementation of the regulations to a group of civil rights and labor organizations challenging the proposal.⁷¹ The DHS subse-

62. *Id.* at 45,613; *see also* *AFL-CIO*, 2007 WL 2972952, at *3-4; Press Release, Nat'l Immigration Law Ctr., Preliminary Injunction Issued: Court Blocks Government from Implementing Flawed Social Security "No-Match" Rule, Oct. 10, 2007, available at http://www.nilc.org/immseplymnt/SSA_Related_Info/ssa006.htm.

63. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. at 45,624 (to be codified 8 C.F.R. § 274a.1(1)(2)(i)(A)).

64. *Id.* (to be codified at 8 C.F.R. § 274a.1(1)(2)(i)(B)).

65. *Id.* (to be codified at 8 C.F.R. § 274a.1(1)(2)(iii)(A)(2)).

66. *Id.*; *see also* 8 U.S.C. § 1324a(a)(1)(A) (2000) (making it illegal to knowingly hire illegal aliens). An employer is also liable for "continu[ing] to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment." 8 U.S.C. § 1342a(a)(2) (2000).

67. *See* Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. at 45,624 (to be codified at 8 C.F.R. § 274a.1(1)(2)(ii)(B), (iii)(A)).

68. *AFL-CIO v. Chertoff*, No. C07-04472, 2007 WL 2972952, at *3 (N.D. Cal. Oct. 10, 2007) (citing to sample proposed DHS letter accompanying SSA no-match letters).

69. *Id.* at *3.

70. *Id.*

71. A number of groups, including the AFL-CIO, the San Francisco Labor Council, the Central Labor Council of Alameda County, the San Francisco Building and Construction Trades Council, represented by the ACLU, the National Immigration Law Center, and

quently withdrew the proposed regulations. Notwithstanding its withdrawal, the fact of the proposal itself may give employers much greater power over workers who have questionable Social Security numbers. With a proposal looming, submissive workers are more likely to escape employer scrutiny than workers who complain about their workplace conditions.

D. *Proposed Local Enforcement of Immigration Law as a Basis of Immigrant Community Fears*

Recent state and local enforcement ordinances, such as the one enacted in Hazleton, Pennsylvania, further increase the anxiety of immigrant communities. Attempts by municipalities and states to regulate and punish undocumented residents instill fear even if they are ultimately held unconstitutional.⁷² The specter of onerous regulations is demonstrated by the volume of proposed state and local legislation over the past year. Approximately 570 pieces of legislation were considered at the state and local level in 2006, most of which were unfavorable to immigrants.⁷³

E. *The U Visa as a Counteracting Force to Ameliorate Immigrant Community Fears*

To the extent that *Hoffman* represents a backlash against the immigrant community—reflected in consequences such as the

several private law firms filed a lawsuit and a motion for preliminary injunction alleging that the rule contravenes the governing statute, is arbitrary and capricious under the Administrative Procedure Act, and is outside of the scope of authority of both the DHS and the Social Security Administration. See *AFL-CIO*, 2007 WL 2972952, at *1. The district court granted a preliminary injunction. *Id.*

72. See, e.g., HAZLETON, PA., ORDINANCE 2006-13 § 7 (2006), available at http://www.hazletoncity.org/090806/2006-13%20_Landlord%20Tenant%20Ordinance.pdf (requiring prospective tenants of rental properties to obtain an occupancy permit and requires “proper identification showing proof of legal citizenship and/or residency” before a person can obtain an occupancy permit); HAZLETON, PA. ORDINANCE 2006-18 §§ 4, 5 (2006), available at http://www.hazletoncity.org/090806/2006-18%20_Illegal%20Alien%20Immigration%20Relief%20Act.pdf (making it illegal for any business to knowingly employ an illegal immigrant and for any person or business entity that owns a dwelling to harbor an illegal immigrant); HAZLETON, PA., ORDINANCE 2006-19 § 2 (2006), available at http://www.smalltowndefenders.com/090806/2006-19%20_Official%20English.pdf (declaring English as the official language of Hazleton); see also *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 554 (M.D. Pa. 2007) (holding that the immigration ordinance of Hazleton violated the Supremacy Clause).

73. National Immigration Law Center, *Immigration Was Key in 2006 State Legislation and Ballot Measures*, 21 IMMIGRANTS RIGHTS UPDATE (Mar. 29, 2007), available at http://www.nilc.org/immspb/sf_benefits/sfbps003.htm.

failure of comprehensive immigration reform—it needs a counteracting force that will provide immigrant workers with adequate leverage. This would define them as workers rather than immigrants. This article proposes that such leverage comes in the form of legal status as a form of reparation for suffering exploitation rising to the level of criminal activity.⁷⁴ A legalization mechanism takes immigration status out of competition in the labor market, just as the labor movement advocated taking wages out of competition through the FLSA.⁷⁵ The idea—with the U visa serving as the template and the mechanism for achieving legalization—is that once immigration status becomes a non-issue, the types of abuses that result in involuntary servitude, peonage, or labor exploitation will also disappear. To the extent that a U visa remedy can help workers gain some leverage in the workplace, it will counteract the current sentiment among defenseless, undocumented workers.

Although it is not a traditional remedy under either Title VII or the FLSA, granting U visa status should be considered as part of the make-whole structure in workplace violation cases. The courts have the ability under Title VII, for example, to provide broad remedies aimed at making the discrimination victim whole. Section 706(g)(1) of the Civil Rights Act of 1964 states:

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, . . . or any other equitable relief as the court deems appropriate.⁷⁶

Pursuant to this language, a court may structure an order that requires employers to help U visa victims obtain legal status as a necessary prerequisite to making the plaintiff whole and to deter future discrimination. Requiring legal status as part of a make-whole remedy recognizes the particular vulnerabilities of newly arrived immigrant workers, and provides them with legal tools to gain leverage in the employer-employee relationship. Although

74. See *supra* text accompanying notes 1–6.

75. NELSON LICHTENSTEIN, *THE STATE OF THE UNION: A CENTURY OF AMERICAN LABOR* 220 (2002).

76. 42 U.S.C. § 2000e-5(g)(1) (2000). Such relief is also available in adverse impact cases. See, e.g., *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415–24 (1975).

the cooperation of several parties, including the EEOC and United States Citizenship and Immigration Services ("USCIS"), is important to a final grant of U nonimmigrant status, requiring the employer to take responsibility for guiding the application process is equivalent to an employer posting public notice of its discriminatory practice on its premises. It shifts the cost of the discriminatory practice onto the employer.

F. *The U Visa as a Legalization and Civil Rights Vehicle*

The idea of legalization as a civil right, especially for workers whose labor sustains the low-wage labor market, has been addressed by several legal scholars. Kevin Johnson writes that open borders provide leverage for workers and, at the same time, comport with the purposes of free trade agreements between the United States, Canada, and Mexico.⁷⁷ Inherent in this open borders argument is the notion that a workforce must have the ability to travel legally and freely across borders. Linda Bosniak notes that legalization and concepts of citizenship by extension center the debate about membership in a community and concomitant privileges in our society.⁷⁸ Jennifer Gordon argues that transnational labor citizenship should be the governing rights-conferring principle for immigrant workers in the United States.⁷⁹ One should not underestimate, however, the power that a worker gains from having legal status, especially citizenship. Jennifer Gordon has written that citizenship rights are traditionally articulated in terms of membership and its privileges.⁸⁰ Such approach fails to consider that workers' rights transcend borders in ways that other rights do not. Gordon's proxy for citizenship rights is transnational labor rights, or labor citizenship, which, in essence, bestows a worker with rights traditionally reserved for citizens in the workplace.⁸¹ Gordon's working assumption is that transnational labor rights accrue to the collective, and it is through the collective that an individual undocumented worker

77. KEVIN R. JOHNSON, OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS 131–67 (2007); see also Kevin R. Johnson, *Open Borders?*, 51 UCLA L. REV. 193 (2003).

78. LINDA BOSNIAK, THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP 18–20 (2006).

79. See Gordon, *supra* note 6, at 504.

80. Gordon, *supra* note 6, at 512–14.

81. *Id.* at 510–12.

has access to protection because she is part of a broader class of workers that as a group “refuse to work under conditions that violate the law or labor agreements.”⁸² Short of the transformation of the labor movement in the direction toward transnationalism, however, undocumented workers currently in the United States will continue to rely on legalization to undo both fears and possible exploitation resulting from undocumented status.

Legalization provides workers with an enforceable right to organize and to collectively bargain. Recall that the Supreme Court’s *Hoffman* decision called into question the rights of undocumented workers.⁸³ Although the Court did not deny that undocumented workers had either a right or a remedy for an employer’s unfair labor practices, it limited the type of remedy that was available.⁸⁴ Thus, for all practical purposes, undocumented workers were left unprotected against unfair labor practices during an organizing campaign. Legalization, therefore, makes the *Hoffman* holding superfluous because, through a change in immigration status, *Hoffman* no longer limits an immigrant’s options. Legalization also dispenses with questions about whether undocumented status precludes other workplace rights, such as the right to workers’ compensation, unemployment benefits, or freedom from discrimination.⁸⁵ Therefore, legalization becomes the method by which workers theoretically obtain some freedom from labor exploitation.

Of course, the assumption is that with legalization an immigrant will benefit from many of the membership rights that immigration scholars have noted exist with citizenship.⁸⁶ As we have experienced with the civil rights movement of African-Americans, however, those rights remain elusive for minorities in

82. *Id.* at 509–10.

83. *See supra* notes 11–16 and accompanying text.

84. *Cf. Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 151–52 (2002).

85. Courts have held that undocumented workers continue to have such rights, although they are regularly attacked as special privileges for undeserving, undocumented workers. *See, e.g., Rivera v. NIBCO*, 364 F.3d 1057, 1064–67 (9th Cir. 2004) (holding that *Hoffman* did not apply in Title VII cases and refusing to allow discovery on immigration status); *De La Rosa v. N. Harvest Furniture*, 210 F.R.D. 237, 238–39 (C.D. Ill. 2002) (holding that *Hoffman* was not “dispositive of the issues raised in the motion to compel” discovery of immigration status in a Title VII action); *Flores v. Albertson’s, Inc.*, No. CV-0100515, 2002 WL 1163623, at *5 (C.D. Cal. Apr. 9, 2002) (finding *Hoffman* inapplicable to an FLSA action and refusing employer discovery requests regarding employees’ immigration status).

86. *See, e.g., BOSNIAK, supra* note 78, at 18–20.

the United States.⁸⁷ In short, the label of legal status in no way guarantees a transformation to a non-exploitative workplace. Similar to the African-American civil rights experience, the immigrant civil rights experience may begin with governmentally recognized abolition of labor exploitation and eventually lead to workplace parity. Today's immigrants recognize that legal status allows for fuller participation in the political, social, and economic life of their communities in the United States. This was evident in the march slogans proclaiming: "Today We March, Tomorrow We Vote."⁸⁸ A visa, such as a U visa, does not confer any type of civil right on an individual immigrant. The U visa may be an initial step on the path to legalization, and then toward creating the foundation for a broader civil rights movement for Latinos and other immigrants.

II. THE U VISA STATUTORY BACKGROUND

Congress authorized the U visa in the Victims of Trafficking and Violence Protection Act of 2000 ("TVPA").⁸⁹ The U visa concept was introduced in the context of battered immigrant women and was discussed in that section of the Act known as the Battered Immigrant Women Protection Act of 2000.⁹⁰ It includes a goal of fighting labor exploitation.⁹¹ The Act's dual goals of fighting crime and aiding victims were accomplished through a visa that identified certain crime victims and offered them legal status in return for cooperating with law enforcement officials in the investigation of crimes.⁹² A U visa grantee has four years of non-

87. See generally Jennifer Gordon & R.A. Lenhardt, *Citizenship Talk: Bridging the Gap Between Immigration and Race Perspectives*, 75 *FORDHAM L. REV.* 2493 (2007) (discussing the relationship between citizenship, race, and full participation in societal rights); Jennifer Gordon & R.A. Lenhardt, *Rethinking Work and Citizenship*, 55 *UCLA L. REV.* ___ (forthcoming 2008).

88. Ali Noorani, *Race, Class, and the Emergence of an Immigrant Rights Movement in the United States*, 31 *FLETCHER F. OF WORLD AFF.* 185, 196 (2007).

89. See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000).

90. See Battered Immigrant Women Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1518, (codified as amended at 8 U.S.C. § 1101 (2000)).

91. *Id.* § 1513, 114 Stat. at 1535 (codified as amended at 8 U.S.C. § 1101 (2000)); Victims of Trafficking and Violence Protection Act of 2000, § 102, 114 Stat. at 1466 (codified as amended at 22 U.S.C. § 7101 (2000)).

92. 8 U.S.C. § 1101(a)(15)(U)(i)(I)-(III) (2000).

immigrant legal status in the United States.⁹³ Moreover, the U visa holder may seek permanent resident status three years after the granting of the U visa.⁹⁴

A. *Meeting Law Enforcement Goals*

A major constituency behind the development of the U visa is law enforcement at local, state, and federal levels. The Act's purpose is to further law enforcement goals and objectives against crime in immigrant communities. The visa was created to

strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, trafficking of aliens, and other crimes described in section 101(a)(15)(U)(iii) of the Immigration and Nationality Act committed against aliens, while offering protection to victims of such offenses in keeping with the humanitarian interests of the United States. This visa will encourage law enforcement officials to better serve immigrant crime victims and to prosecute crimes committed against aliens.⁹⁵

The purpose of the statute focused on the victim status of cooperating witnesses by "[c]reating a new nonimmigrant visa classification [that] will facilitate the reporting of crimes to law enforcement officials by trafficked, exploited, victimized, and abused aliens who are not in lawful immigration status. It also gives law enforcement officials a means to regularize the status of cooperating individuals during investigations or prosecutions."⁹⁶

The enumerated crimes for which victims who suffer substantial physical or mental abuse may seek legal status as protection range from gender violence to labor exploitation. They include the following crimes or similar criminal activity:

rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; or at-

93. *See id.* § 1184(p)(6).

94. *See id.* § 1255(m).

95. Battered Immigrant Women Protection Act of 2000, § 1513(a)(2)(A), 114 Stat. at 1533-34 (codified at 8 U.S.C. § 1101 (2000)).

96. Victims of Trafficking and Violence Protection Act of 2000, § 1513(a)(2)(B), 114 Stat. at 1534 (codified as amended at 8 U.S.C. § 1101 (2000)).

tempt, conspiracy, or solicitation to commit any of the above mentioned crimes.⁹⁷

B. *The U Visa's Dual Identity*

1. Preventing Domestic and Sexual Violence

The prevalent U visa crime victim paradigm involves a female domestic or sexual violence victim who will not come forward to denounce her abuser for fear of retaliation or fear of contact with law enforcement. U visa protection was created, in part, to protect victims within traditionally vulnerable immigrant communities. In a sense, the paradigmatic U visa grantee is the essentialized victim of bad behavior as described by legal scholar Leti Volpp.⁹⁸ Volpp argues against the stereotype of domestic or sexual violence as cultural⁹⁹ and of the victim as passive, disempowered, and worth of protection.¹⁰⁰ The U visa crime victim paradigm is often gendered, as is evident from the types of crimes—rape, sexual assault, trafficking, slavery—for which there is protection. The victim is one who is forced into sex-related activities such as prostitution through indentured servitude or trafficking. This, it seems, is the disempowered, worthy victim the legislation aimed to protect. The Department of State's *Trafficking in Persons Report* notes several different forms of trafficking, many of which are gender-specific. For example, it lists girls in domestic servitude, forced child labor, and prostitution as the forms of trafficking that victimize vulnerable populations.¹⁰¹ The TVPA, the companion to the U visa enabling legislation, specifically names sex trafficking in the definition of severe forms of trafficking:

The term "severe forms of trafficking in persons" means—(A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or (B) the recruitment, harboring,

97. 8 U.S.C. § 1101(a)(15)(U)(iii) (2000).

98. See Leti Volpp, *Blaming Culture for Bad Behavior*, 12 YALE J.L. & HUMAN. 89 (2000) (arguing that the behavior of minority or devalued communities tends to be explained as culturally influenced); Leti Volpp, *Migrating Identities: On Labor, Culture, and Law*, 27 N.C. J. INT'L L. & COM. REG. 507, 510–13 (2002).

99. Volpp, *Blaming Culture*, *supra* note 98 at 89–90.

100. See *id.* at 509.

101. U.S. DEPT. OF STATE, *TRAFFICKING IN PERSONS REPORT 18–28* (2007), <http://www.state.gov/documents/organization/82902.pdf>.

transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subsection to involuntary servitude, peonage, debt bondage, or slavery.¹⁰²

The language and ensuing government campaigns regarding trafficking make enforcement officials think twice about spending resources on other forms of labor exploitation. In the T visa context, all cases prosecuted by the Department of Justice (“DOJ”) in fiscal year 2004 involved sexual exploitation.¹⁰³

2. Addressing Labor Exploitation

The U visa was, in fact, developed to protect victims of labor exploitation in addition to victims of domestic or gender violence. A mechanism parallel to the U visa provision, the T visa was developed in the Act for victims of severe forms of human trafficking for either labor or sexual exploitation purposes.¹⁰⁴ It tracks the enumerated crimes in the U visa provisions, specifically, involuntary servitude and trafficking. The TVPA contains language and definitions of these crimes that are useful for understanding the overall purpose and intended use of the U visa. Among the congressional findings outlining the need for protection are the following:

(3) Trafficking in persons is not limited to the sex industry. This growing transnational crime also includes forced labor and involves significant violations of labor, public health, and human rights standards worldwide.

(4) Traffickers primarily target women and girls, who are disproportionately affected by poverty, the lack of access to education, chronic unemployment, discrimination, and the lack of economic opportunities in countries of origin. Traffickers lure women and girls into their networks through false promises of decent working conditions at relatively good pay as nannies, maids, dancers, factory workers, restaurant workers, sales clerks, or models. Traffickers also buy chil-

102. Victims of Trafficking and Violence Protection Act of 2000, § 103(8), 114 Stat. at 1470 (codified as amended at 22 U.S.C. § 7102(8)–(9) (2000)).

103. TRAFFICKING IN PERSONS REPORT, *supra* note 101, at 243; *see also* Dina Francesca Haynes, (Not) Found Chained to a Bed in a Brothel: Conceptual, Legal, and Procedural Failures To Fulfill the Promise of the Trafficking Victims Protection Act, 21 GEO. IMMIGR. L.J. 337, 353–56 (2007) (noting government actors’ service to sex crimes and victimization in their enforcement of the TVPA).

104. Victims of Trafficking and Violence Protection Act of 2000, § 107(e), 114 Stat. at 1477–79 (codified as amended at 8 U.S.C. § 1101(a)(15)(T) (2000)).

dren from poor families and sell them into prostitution or into various types of forced or bonded labor.

....

Trafficking for such purposes as involuntary servitude, peonage, and other forms of forced labor has an impact on the nationwide employment network and labor market. Within the context of slavery, servitude, and labor or services which are obtained or maintained through coercive conduct that amounts to a condition of servitude, victims are subjected to a range of violations.¹⁰⁵

The definitions of labor exploitation in the Act also provide some insight into the types of activities that Congress sought to target.

The term “involuntary servitude” includes a condition of servitude induced by means of—(A) any scheme, plan, or pattern intended to cause a person to believe that, if the person did not enter into or continue in such condition, that person or another person would suffer serious harm or physical restraint; or (B) the abuse or threatened abuse of the legal process.

....

The term “coercion” means—(A) threats of serious harm to or physical restraint against any person; (B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or (C) the abuse or threatened abuse of the legal process.

....

The term “debt bondage” means the status or condition of a debtor arising from a pledge by the debtor of his or her personal services or of those of a person under his or her control as a security for debt, if the value of those services as reasonably assessed is not applied toward the liquidation of the debt or the length and nature of those services are not respectively limited and defined.¹⁰⁶

Thus, while both the U and T visas further the purpose of protecting battered women and children, they were also meant to prevent labor exploitation, as is evident from the definitions above.

105. *Id.* § 102(b), 114 Stat. at 1466–67 (codified as amended at 22 U.S.C. § 7101(b) (2000)).

106. *Id.* § 103, 114 Stat. at 1469 (codified at 22 U.S.C. § 7102 (2000)).

Labor exploitation in sweatshops was the prototypical form of subordination at the time that Congress debated the TVPA.¹⁰⁷ One major impetus for the TVPA was the discovery in 1995 of illegal sweatshops operating out of apartment buildings in El Monte, California.¹⁰⁸ Widespread publicity about the slave-like conditions in the sweatshops led to reforms.¹⁰⁹

After Congress implemented the TVPA, the DOJ, charged with prosecuting trafficking and related federal crimes, created a worker exploitation task force to screen for trafficking cases.¹¹⁰ High level officers of agencies such as the DOL and the EEOC participated in the task force.¹¹¹ The government's Trafficking in Persons 2005 annual report notes the DOL's involvement in low-wage industry investigations:

The DOL's Wage and Hour Division is taking aggressive action to identify and eliminate abusive labor practices that affect the most vulnerable in our society. Investigators focus on low-wage industries where labor trafficking victims are most often found. And Wage and Hour staff works with the consulates of Mexico and other countries, along with NGOs, to reach out to immigrant communities.¹¹²

The language of the TVPA, the agencies' recognition that labor exploitation crimes require collaboration to combat, and their continued involvement in enforcing their own laws to eradicate labor abuses all demonstrate that the Act had roots in labor exploitation prevention even as it professed a purpose to protect battered women and children.

C. The Gap in Workplace Protection: Government Failure to Enact U Visa Regulations

DHS, the agency responsible for implementing the U visa, did not issue regulations until September 2007, seven years after the enactment of legislation authorizing U visas.¹¹³ The interim regu-

107. See, e.g., *Bureerong v. Uvawas*, 922 F. Supp. 1450, 1458 (C.D. Cal. 1996).

108. See Julie A. Su, *supra* note 6, at 238, 240–42.

109. See *id.* at 241–42.

110. See CIVIL RIGHTS DIVISION, U.S. DEP'T OF JUSTICE, TRAFFICKING IN PERSONS AND WORKER EXPLOITATION, Task Force, <http://www.usdoj.gov/crt/crim/tpwetf.htm> (last visited Feb. 13, 2008).

111. *Id.*

112. TRAFFICKING IN PERSONS REPORT, *supra* note 101, at 247.

113. See Press Release, Legal Momentum, U Visa Regulations Released (Sept. 5, 2007),

lations were the product of several years of negotiation and consultation with battered women's and immigrants' advocacy groups.¹¹⁴ The regulations themselves reflect such consultation. The proposed regulations take into account, for example, the need to keep families of victims together as much as possible. They allow for more than one direct victim of a crime,¹¹⁵ and prohibit only family members who perpetrate domestic violence or trafficking crimes from qualifying for derivative status.¹¹⁶

In the absence of implementing regulations and official application forms, the USCIS granted eligible victims deferred action status, which allowed them to remain in the country with employment authorization until their applications were finally adjudicated.¹¹⁷ Immigrant advocates and attorneys filed their own versions of applications seeking deferred action in this interim period. Over 7000 such applications were filed, and about 5800 were accepted for deferred action during the seven year period before the interim regulations were released.¹¹⁸ Many, if not the majority, of the applicants were victims of domestic or gender violence. During this period, the federal government conducted very little community outreach to inform the public of the different contexts for which the U visa was available. In particular, governmental labor and employment agencies did not regularly participate as law enforcement agencies willing or able to issue law enforcement certifications to eligible victims who cooperated.

D. *The Law Enforcement Certification as a Part of Labor and Employment Law Enforcement Tools*

Cooperation with law enforcement is an eligibility requirement for the granting of a U visa. The statute requires a U visa applicant to obtain a law enforcement certification ("LEC") from a law enforcement official that the crime victim/applicant has been, is,

available at <http://www.legalmomentum.org/site/News2?page=NewsArticle&id=5797>.

114. *Id.*

115. See 72 Fed. Reg. 53,014, 53,017 (Sept. 17, 2007) (to be codified at 8 C.F.R. § 214.14(a)(14)(i)).

116. *Id.* at 53,025.

117. See New Classification for Victims of Criminal Activities; Eligibility for "U" Non-immigrant Status, 72 Fed. Reg. 53,013, 53,015 (Sept. 17, 2007).

118. USCIS, FACT SHEET, USCIS PUBLISHES RULE FOR NONIMMIGRANT VICTIMS OF CRIMINAL ACTIVITY (Sept. 5, 2007), available at http://www.uscis.gov/files/pressrelease/U-VisaFS_05Sep07.pdf.

or is likely to be helpful in the investigation or prosecution of one of the enumerated crimes.¹¹⁹ The certification must be from “a Federal, State, or local law enforcement official, prosecutor, judge, or other Federal, State, or local authority investigating” one or more of the enumerated crimes or similar criminal activity.¹²⁰ The Act itself does not define law enforcement agency nor does it specify which law enforcement agencies are qualified to provide the needed law enforcement certification to U visa applicants. The interim regulations identify the head of the certifying agency or a designated official as the appropriate person to sign the LEC, presumably in an attempt to regulate the flow of visa certifications.¹²¹

III. THE LABOR AND EMPLOYMENT PROTECTIONS IN THE INTERIM REGULATIONS

Can the EEOC and DOL take the lead in providing protection to undocumented workers through the use of U visas? This question has two dimensions: (1) do these agencies have criminal investigative jurisdiction?; and (2) should these agencies, in addition to facilitating individual relief, act as the catalyst for collective change in their enforcement capacities? The U visa regulations confirm that both the EEOC and DOL have the authority to issue LECs for victims. This section explores how that authority arises for each agency. It also analyzes a set of cases in which labor and employment violations overlap with U visa enumerated crimes.

A. *The Broad Power of Labor and Employment Agencies to Investigate U Visa Enumerated Crimes and Provide LEC's*

The interim regulations specifically state that agencies such as the EEOC and the DOL qualify as law enforcement agencies that can issue LECs.¹²² The relevant provision states:

119. 8 U.S.C. § 1184(o)(1) (2000).

120. *Id.*

121. *See* 72 Fed. Reg. 53,014, 53,023 (Sept. 17, 2007) (to be codified at 8 C.F.R. § 214.14(c)(2)(i)).

122. *Id.* at 53,019.

[A] certifying agency means a Federal, State, or local law enforcement agency, prosecutor, judge, or other authority, that has responsibility for the investigation or prosecution of a qualifying crime or criminal activity. This definition includes agencies that have criminal investigative jurisdiction in their respective areas of expertise, including, but not limited to, child protective services, the [EEOC] and the [DOL].¹²³

The regulations broadly define the parameters of an investigation or prosecution, stating that the clause “investigation or prosecution” means “the detection or investigation of a qualifying crime or criminal activity” in addition to “the prosecution, conviction, or sentencing of the perpetrator of the qualifying crime or criminal activity.”¹²⁴ This definition is key because it means that an agency such as the EEOC that does not have explicit criminal prosecutorial powers can still investigate what would be considered a crime or criminal activity, even if no formal prosecution arises out of the investigation. More importantly, the victim who cooperates would still be eligible for an LEC from the EEOC under this interpretation. Because the EEOC’s charge includes broad investigatory powers in its pursuit of discrimination claims, the agency is well-placed to protect victims who come forward to vindicate all of their rights, whether criminal or civil.

There may be an argument that only criminal law enforcement agencies with criminal prosecutorial authority have jurisdiction and authority to issue LECs. In the face of such an argument, this article provides legal analysis to support the interpretation that the EEOC and the DOL are among those considered proper law enforcement agencies under the Act. Similar state and local labor and employment government agencies should also be considered law enforcement agencies because they have similar interests in protecting workplace victims regardless of immigration status.

Both the EEOC and the DOL have civil investigative authority over cases which overlap with the crimes enumerated in the U visa provisions. The EEOC’s investigative jurisdiction over workplace discrimination and harassment, for example, means that the EEOC has jurisdiction over workplace sexual harassment investigations, which could involve the enumerated crimes of rape,

123. *Id.*

124. *Id.* at 53,020.

sexual assault, sexual exploitation, or abusive sexual contact. The EEOC may also investigate discrimination claims that involve involuntary servitude, peonage, trafficking, or obstruction of justice. The DOL has similar criminal and civil investigative authority. This section reviews the types of cases that necessitate this authority. It also addresses the possible parameters of the U visa for immigrants who seek to vindicate their rights in the workplace.

B. *The EEOC and DOL's "Criminal Investigative Jurisdiction"*

1. The DOL's Jurisdiction

The DOL enforces the FLSA, which governs minimum and overtime wages. The DOL has the power to investigate and prosecute certain labor violations, including wage and hour, child labor, homework, agricultural labor, and overtime violations.¹²⁵ The congressional findings in the FLSA demonstrate the government's purpose of lessening the effects of poor labor conditions on interstate commerce. The findings state:

[T]he existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers causes . . . commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States.¹²⁶

The FLSA gives DOL investigators the authority to enforce the wage and hour provisions of the Act, and to seek information about the employer's intent in its failure to pay proper wages.¹²⁷

Importantly, DOL investigators have criminal investigative power because the statute itself has a criminal penalty provision. Section 216 of the FLSA states that "[a]ny person who willfully violates any of the [section 215 provisions] shall upon conviction thereof be subject to a fine of not more than \$10,000, or to impris-

125. See 29 U.S.C. § 211 (2000).

126. Fair Labor Standards Act of 1938, ch. 676, Pub. Law. No. 110-80 § 2, 52 Stat. 1060, 1060 (1938) (codified as amended at 29 U.S.C. § 202(a) (2000)).

127. 29 U.S.C. § 211(a) (2000).

onment for not more than six months, or both.”¹²⁸ A finding of willfulness is in order when “considering all of the facts and circumstances, the employer knew its conduct was prohibited or showed reckless disregard for the requirements of the Act.”¹²⁹ In order to determine willfulness, the DOL can investigate a variety of employer activities including the sale of goods made in violation of wage and hour provisions, minimum and overtime violations, retaliation against complaining employees, child labor violations, and recordkeeping violations.¹³⁰ Pursuant to statute and a series of memorandums of understanding, if the DOL finds violations that rise to the level of criminal activity, it can turn the investigation over to the DOJ, the FBI, or the Inspector General for prosecution.¹³¹

The DOL has broad subpoena power as it carries out its investigations, which the courts can enforce.¹³² Section 211 of the FLSA gives the agency the right to “gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this [Act].”¹³³ Its subpoena powers are as broad as those bestowed upon the Federal Trade Commission (“FTC”), which extend to questioning witnesses and document production “relating to any matter under investigation.”¹³⁴

In the last decade or so, the DOL has become increasingly vigilant in policing labor abuses in low-wage industries. The DOL has taken three important steps that inure to the benefit of low-wage workers even as they were taken to protect interstate commerce. In 1995, the DOL Wage and Hour Division issued a directive prioritizing complaints that concern the safety or welfare of workers on a “worst-first” basis.¹³⁵ Such complaints include slavery, peon-

128. *Id.* § 216.

129. THE FAIR LABOR STANDARDS ACT 1003 (Ellen C. Kearns ed. 1999) [hereinafter Kearns]; *see also* 29 C.F.R. § 578.3(c) (2006).

130. 29 U.S.C. §§ 206, 207, 212, 215 (2000).

131. *See* Kearns, *supra* note 129, at 102, n.154; *cf.* 28 U.S.C. § 516 (2000) (stating that the DOJ represents the United States where federal government is a party, unless statute states otherwise).

132. *See* 29 U.S.C. §§ 209, 211 (2000).

133. *Id.* § 211a. Section 211 provides, in addition that the DOL may “question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this [Act], or which may aid in the enforcement of the provisions of this [Act].” *Id.*

134. *See* 15 U.S.C. § 49 (2000) (FTC); 29 U.S.C. § 209 (DOL).

135. Kearns, *supra* note 129, at 46–47.

age, or hazardous occupation violations.¹³⁶ The DOL has also conducted “directed investigations” of targeted industries with a reputation for hiring undocumented workers on the theory that wage and hour violations against this vulnerable group of workers depresses wages.¹³⁷ Expecting that enforcement will drive down incentives to hire undocumented workers, the DOL has implemented a strategy to target egregious employers. The DOL’s underlying motivation is to eliminate vulnerable workers from the workforce so as to eradicate wage and hour violations.¹³⁸ The agency has also collaborated with the DOJ’s worker exploitation task force, which is aimed at ferreting out particularly egregious workplace violations that approximate trafficking or involuntary servitude.¹³⁹

DOL investigators may refer violations of other crimes to appropriate agencies. For example, the DOL signed a memorandum of understanding with the Immigration and Naturalization Service (“INS”) (now the DHS) in 1998. It specifies the circumstances under which the DOL will share information with the INS about violations of immigration law. The memorandum also prevents INS from responding with raids when the DOL is conducting wage and hour violations or when a labor dispute is in progress.¹⁴⁰ The DOL also has a memorandum of understanding with the FBI calling for cooperation in criminal violations related to the Involuntary Servitude and Slavery Act, the Farm Labor Contractor Registration Act, and the FLSA.¹⁴¹

After the *Hoffman* decision, the DOL issued a statement of its intention to continue to protect undocumented workers from exploitative labor practices on the theory that such protection keeps employers from hiring undocumented workers. The DOL website addresses *Hoffman*, noting its negligible effect on DOL enforcement activities:

136. *Id.* at 47.

137. *Id.* at 48.

138. *Id.* at 48–49.

139. U.S. Dep’t of Justice, Trafficking in Persons and Worker Exploitation Task Force, available at <http://www.usdoj.gov/crt/crim/tpwetf.htm> (last visited Feb. 13, 2008).

140. Memorandum of Understanding Between the Immigration and Naturalization Serv., Dep’t of Justice, and the Employment Standards Admin., Dep’t of Labor (Nov. 23, 1998), available at <http://www.dol.gov/esa/whatsnew/whd/mou/nov98mou.htm>.

141. Kearns, *supra* note 129, at 51–52 (citing DEP’T OF LABOR, FIELD OPERATIONS HANDBOOK § 50f17 (1983)).

The Supreme Court's decision does not mean that undocumented workers do not have rights under other U.S. labor laws. In *Hoffman Plastics*, the Supreme Court interpreted only one law, the NLRA. The DOL does not enforce that law. . . . The Department's Wage and Hour Division will continue to enforce the FLSA and MSPA [Migrant and Seasonal Agricultural Workers Protection Act] without regard to whether an employee is documented or undocumented. Enforcement of these laws is distinguishable from ordering back pay under the NLRA.¹⁴²

The DOL has both the will and the authority to determine whether facts underlying low-wage worker abuses rise to the level of criminal intent. Violations of the FLSA extend to activities that are similar enough to the enumerated U visa violations to merit DOL law enforcement investigation.

2. The EEOC's Criminal Investigative Jurisdiction

The EEOC has investigative powers similar to the DOL and even broader remedial authority. Because the EEOC shares both investigative and prosecutorial powers with the DOJ, however, the EEOC must turn over to the DOJ's Civil Rights Division investigations that reach criminal proportions. That the two departments share this duty within the context of employment discrimination does not detract from the EEOC's mission of investigating both civil and criminal activities arising out of the same set of facts.

The EEOC also has broad administrative subpoena power. Section 709(a) of Title VII states:

In connection with any investigation of a charge filed under [§ 706], the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this [title] and is relevant to the charge under investigation.¹⁴³

As long as an underlying charge

142. DEPT OF LABOR, FACT SHEET #48: APPLICATION OF U.S. LABOR LAWS TO IMMIGRANT WORKERS: EFFECT OF HOFFMAN PLASTICS DECISION ON LAWS ENFORCED BY THE WAGE AND HOUR DIVISION (2007), available at <http://www.dol.gov/esa/regs/compliance/whd/whdfs48.htm> [hereinafter FACT SHEET # 48].

143. 42 U.S.C. § 2000e-8(a) (2000).

identif[ies] the groups of persons that [the EEOC] has reason to believe have been discriminated against, the categories of employment positions from which they have been excluded, the methods by which the discrimination may have been effected, and the periods of time in which [the EEOC] suspects the discrimination to have been practiced,¹⁴⁴

the subpoena should be valid.¹⁴⁵

The EEOC's subpoena power is important because it facilitates the obtainment of information for investigation as well as subsequent prosecution of a claim. The scope of the EEOC subpoena determines the amount and type of information that may be gathered, and may even be broader than the claims ultimately submitted to a court.¹⁴⁶ The issuance of a subpoena subject to an investigation at the point that the EEOC suspects a violation means that once a cooperative victim witness makes an allegation, the agency may follow up on the allegation by seeking information from the employer.¹⁴⁷ As long as the information that the EEOC seeks is relevant and material to the underlying charges, the agency's subpoena power is valid.¹⁴⁸ Therefore, if a worker alleges facts that underlie an enumerated crime then the EEOC has the power to investigate that crime.

As the cases discussed below illustrate, many of the situations that the EEOC investigates parallel the enumerated crimes of the U visa provisions.¹⁴⁹ The key question for investigation purposes is whether the relevance and materiality required to exercise subpoena power are broad enough to cover the elements of the activities that make them criminal—arguably they are. For example, in a rape charge involving discrimination, the EEOC will need to investigate facts concerning the rape. Or, for example, the facts underlying a discrimination claim may be the same facts

144. EEOC v. Shell Oil Co., 466 U.S. 54, 73 (1984).

145. See, e.g., *id.* at 65.

146. See, e.g., BARBARA T. LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1726–27 (C. Geoffrey Weinck et al. eds. 2007).

147. See *Brock v. Local 375, Plumbers Int'l*, 860 F.2d 346, 348 (9th Cir. 1988) (stating that suspicion of violation can trigger agency subpoena power).

148. EEOC v. United Air Lines, Inc., 287 F.3d 643, 649 (7th Cir. 2002). The EEOC can enforce its subpoena as long as it is within the agency's authority and is not too indefinite. *Id.* (quoting EEOC v. Tempel Steel Co., 814 F.2d 482, 485 (7th Cir. 1987)). The subpoena must also "throw light upon the correctness of the return." *Id.* (quoting U.S. v. Arthur Young & Co., 465 U.S. 805, 813 n.11 (1984)).

149. See *infra* notes 154–78 and accompanying text.

underlying an involuntary servitude claim.¹⁵⁰ Because the EEOC's purpose involves serving the public interest in eradicating discriminatory practices, its subpoena power has been interpreted quite broadly.¹⁵¹

C. *Employment and Labor Cases Involving U Visa Enumerated Criminal Activities*

The cases that the EEOC and the DOL have pursued on behalf of immigrant workers parallel several of the enumerated categories for which U visa protection is available. These include instances of trafficking, peonage, sexual harassment, rape, sexual assault, and obstruction of justice. Debt peonage and involuntary servitude, for example, correspond to FLSA violations related to minimum wage or overtime payment. For example, the FLSA requires that employers keep track of the hours worked by employees on a weekly basis.¹⁵² In an extreme case, the employer fails to pay her sweatshop workers at least the minimum wage per hour for work performed. DOL investigators have the power to investigate the length of time of the violation, the intent of the employer, and whether the employer threatened the employee to keep him from reporting violations.¹⁵³ The set of cases discussed here, while not exhaustive, provides an adequate understanding of the problems the U visa can relieve as part of an overall remedy for workplace victims.

1. Trafficking

In one example of an EEOC investigation laying the foundation for a U visa remedy, the agency filed suit for sex discrimination against a poultry processor. In 2002, the agency settled *EEOC v.*

150. Such was the case in *Chellen v. John Pickle Co.*, discussed in detail below. *See infra* notes 158–78 and accompanying text. There the employer threatened the workers with deportation when they began to complain about their conditions. The company used the local police to intimidate the employees into submission. The company also tried to put a group of workers on a plane home to show workers the consequences of complaining about their conditions. Even though the plaintiffs had legal status, they were so uninformed of their workplace rights that they rightfully feared they would lose their legal immigration status should they lose employment sponsorship. The stigma of undocumented status actually kept them in their slave-like conditions longer than they should have endured.

151. *See* LINDEMANN, *supra* note 146, at 1727–29.

152. *See* 29 C.F.R. § 552.110 (2007).

153. *See id.* §§ 211(a), 215(a)(3).

DeCoster, a lawsuit alleging that a class of Mexican female poultry plant workers were trafficked into the country.¹⁵⁴ Workers complained of repeated rape and sexual harassment by supervisors and coworkers.¹⁵⁵ The trafficked workers were then allegedly threatened with termination, deportation, and further harassment if they complained or cooperated with the EEOC's investigation.¹⁵⁶ In addition to settling the suit for \$1,525,000, the EEOC cooperated with federal agencies and local law enforcement to obtain T visas and eventual permanent residency for the plaintiffs.¹⁵⁷ The sexual harassment and rape claims, as well as the retaliation/obstruction of justice claims, are forms of criminal activity for which U visa, in addition to T visa, protection is available.

Chellen v. John Pickle Co. illustrates even more directly the interplay between immigration law, criminal activity, and employment and labor law violations.¹⁵⁸ There, the EEOC and a group of Indian plaintiffs sued a Tulsa-based petrochemical company for violations of both Title VII and the FLSA.¹⁵⁹ The company had recruited East Indian workers to the United States to work with its business interests in the Middle East.¹⁶⁰ The company claimed it was bringing the already skilled workers into the United States to train with the company so that they could work faster, more efficiently, and learn about the American work ethic.¹⁶¹ An Indian

154. Complaint at 1, *EEOC v. DeCoster*, No. C02-3077MWB (N.D. Iowa Sept. 26, 2002); see also Press Release, EEOC and DeCoster Farms Settle Complaint for \$1,525,000 (Sept. 30, 2002), available at <http://www.eeoc.gov/press/9-30-02-b.html> [hereinafter EEOC Press Release #1].

155. *DeCoster*, at *3.

156. *Id.*

157. *Id.*; see also EEOC Press Release #1, *supra* note 154.

158. See 344 F. Supp. 2d 1278, 1278–91 (N.D. Okla. 2004); see also *Chellen v. John Pickle Co.*, 446 F. Supp. 2d 1247 (N.D. Okla. 2006) (describing the damages stage of the litigation). The case was litigated in the post-*Hoffman* era when federal agencies were assessing the effects of *Hoffman* on their ability to protect undocumented workers. See, e.g., U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION DIRECTIVE 915.002, RESCISSION OF ENFORCEMENT GUIDANCE ON REMEDIES AVAILABLE TO UNDOCUMENTED WORKERS UNDER FEDERAL EMPLOYMENT DISCRIMINATION LAWS (2002), available at <http://www.eeoc.gov/policy/docs/undoc-rescind.html> [hereinafter RESCISSION OF ENFORCEMENT GUIDANCE] (reiterating that the *Hoffman* decision did not “call[] into question the settled principle that undocumented workers are covered by the federal employment discrimination statutes” while at the same time rescinding the guidance with respect to available remedies); FACT SHEET #48, *supra* note 142.

159. *Chellen*, 344 F. Supp. 2d at 1279.

160. *Id.* at 1280.

161. *Id.* at 1281.

recruiter charged the employees large sums of money for the opportunity to work in the United States.¹⁶² They were told that they would be getting permanent work in the United States.¹⁶³ The recruiting company sought B1 or B2 business visitor visas for them, rather than the H2B visa, which would take longer to acquire.¹⁶⁴ The recruiter then created a contract with the John Pickle Co. under which Pickle would pay the recruiter “training” wages for the employees’ work.¹⁶⁵ The wages were then deposited into employees’ accounts in India.¹⁶⁶

Once the workers arrived in the United States, they were forced to perform work that had nothing to do with their welding and steel fabrication skills. They spent time performing janitorial duties, kitchen duties, and yard work.¹⁶⁷ They were also assigned duties such as sandblasting, painting, and insulation work, all of which are typically assigned to the least skilled and lowest paid employees.¹⁶⁸ The workers lived and ate on company premises.¹⁶⁹

The company required the workers to convert a warehouse into a dormitory space for their living arrangements.¹⁷⁰ The company locked up the Indian workers’ passports, visas, airline tickets, and entry/departure documents and required the workers to seek permission before leaving the company premises.¹⁷¹ The company told the workers that they could face arrest, investigation, or deportation if they left the property without proper documentation.¹⁷² It also posted a guard at the main gate and a notice in the dormitory warning the workers that failure to seek permission before leaving the premises could lead to return to India.¹⁷³ When some workers did escape, the company threatened the rest of the workers with deportation.¹⁷⁴ It warned the workers that departure from the company was a “strict violation of your U.S. entry

162. *Id.* at 1280.

163. *Id.*

164. *Id.* at 1282.

165. *Id.*

166. *Id.* at 1282–83.

167. *Id.* at 1284.

168. *Id.*

169. *Id.* at 1285.

170. *Id.* at 1284.

171. *Id.* at 1286.

172. *Id.*

173. *Id.*

174. *Id.*

visa and makes you subject to criminal prosecution.”¹⁷⁵ After a group of plaintiffs submitted a letter complaining of their status and working conditions, the company attempted to send some of the workers back to India. After the company sought local law enforcement support, a local car accompanied the workers to the airport. The company’s planned “private deportation” failed only because the DHS intervened.¹⁷⁶ After finally leaving the premises *en masse*, the plaintiffs succeeded in obtaining T visas.¹⁷⁷ They are now working as skilled welders making almost twenty dollars per hour.¹⁷⁸

These workers are the quintessential exploitable workforce. They arrive in the United States under false or fraudulent promises, are threatened with deportation or detention if they complain or try to leave, and are involuntarily held in isolation in a foreign land without access to information about their rights. This represents the clearest example of the type of victim for whom relief should be available and whom government labor and employment agencies should have a duty to protect. The EEOC likely investigated all of the underlying facts of this case as it developed its own discrimination claim. Presumably, the DOL also had the opportunity to investigate the criminal elements of the plaintiffs’ FLSA claims. Both agencies are integral to the eradication of labor exploitation in the workplace. Federal law enforcement certification is a necessary predicate to a U visa, which ultimately offers the opportunity to regain leverage in the workplace so that employees can fight such exploitation on a more level playing field.

2. Peonage/Involuntary Servitude

As with trafficking, the facts of debt peonage and involuntary servitude cases can provide the basis for a discrimination or wage claim. The involuntary servitude provision in the U visa extends to certain FLSA violations for nonpayment of wages. Involuntary servitude is considered a federal crime under 18 U.S.C. § 1584.¹⁷⁹

175. *Id.*

176. *Id.*

177. *Id.* at 1287. It is unclear which agency signed the LEC for the plaintiffs’ T visa applications.

178. *Id.*

179. 18 U.S.C. § 1584 (“Whoever knowingly and willfully holds to involuntary servitude

The DOJ provides some guidance on how § 1584 should be interpreted:

[Involuntary servitude is] hold[ing] a person in a condition of slavery, that is, a condition of compulsory service or labor against his/her will . . . by actual force, threats of force, or threats of legal coercion. Section 1584 also prohibits compelling a person to work against his/her will by creating a "climate of fear" through the use of force, the threat of force, or the threat of legal coercion . . . which is sufficient to compel service against a person's will.¹⁸⁰

One example of legal coercion is a threat to call immigration officials if an employee refuses to work.¹⁸¹ The Supreme Court has affirmed that threats of deportation in the workplace could be considered a form of slavery or involuntary servitude. In *United States v. Kozminski*, Justice O'Connor noted that "it is possible that threatening . . . an immigrant with deportation could constitute the threat of legal coercion that induces involuntary servitude."¹⁸²

Involuntary servitude includes forcing or coercing employees to work without pay or without adequate pay. In their investigative capacity, DOL officials can seek information about the extent to which nonpayment is an issue among employees.¹⁸³ If investiga-

or sells into any condition of involuntary servitude, any other person for any term, or brings within the United States any person so held, shall be fined under this title or imprisoned not more than 20 years, or both. If death results from the violation of this section, or if the violation includes kidnapping or an attempt to kidnap, aggravated sexual abuse or the attempt to commit aggravated sexual abuse, or an attempt to kill, the defendant shall be fined under this title or imprisoned for any term of years or life, or both.")

180. U.S. DEP'T OF JUSTICE, INVOLUNTARY SERVITUDE, FORCED LABOR, and SEX TRAFFICKING STATUTES ENFORCED, available at <http://www.usdoj.gov/crt/crim/1581fin.htm> (last visited Feb. 13, 2008) [hereinafter DOJ INVOLUNTARY SERVITUDE].

181. *Id.*

182. *United States v. Kozminski*, 487 U.S. 931, 948 (1988). Other courts have followed this precedent. *See, e.g.*, *United States v. Lee*, 472 F.3d 638, 640, 645 (9th Cir. 2006) (holding that federal government had jurisdiction to convict defendant who was accused of holding workers in involuntary servitude in part by threatening deportation); *United States v. Veerapol*, 312 F.3d 1128, 1130-32 (9th Cir. 2002) (upholding involuntary servitude conviction where employer forced worker to work in restaurant and at home on threat of deportation); *Humphries v. Various Federal USINS Employees*, 164 F.3d 936, 944, 946 (5th Cir. 1999) (reversing involuntary servitude claim dismissal in which plaintiff claimed that INS and FBI made several "threats of deportation if he did not continue to work for them"); *United States v. Alzanki*, 54 F.3d 994, 1004-05 (1st Cir. 1995) (upholding conviction of involuntary servitude where employer threatened domestic worker with deportation); *Kimes v. United States*, 939 F.2d 776, 777 (9th Cir. 1991) (upholding involuntary servitude conviction based in part on deportation threats).

183. *See, e.g.*, *Viciedo v. New Horizons Computer Learning Ctr. of Columbus*, 246 F. Supp. 2d 886, 890 (S.D. Ohio 2003).

tors find that employers willfully and purposefully failed to pay workers and intended to withhold payment before the work started, investigators have the right to pursue criminal violations.¹⁸⁴

In *Bureerong v. Uvawas*, a group of immigrants sued their sweatshop owner for wage and hour violations incurred as a result of an involuntary servitude scheme.¹⁸⁵ The sweatshop owners held their workers captive in an El Monte, California apartment without allowing them any freedoms.¹⁸⁶ Not only were they kept under lock and key behind gated doors, but they were also threatened physically and psychologically.¹⁸⁷ Julie Su, one of the attorneys for the workers, described their captivity:

The workers labored over eighteen hours a day in a compound enclosed by barbed wire. Armed guards imposed discipline. Crowded eight to ten into bedrooms built for two, rats crawled over them during their few precious hours of sleep. . . . Their captors, who supervised garment production and enforced manufacturer specifications and deadlines, ruled through fear and intimidation. Workers were forbidden to make unmonitored phone calls or write uncensored letters, and were forced to purchase goods from their captors, who charged four to five times the market price for food, toiletries, and other daily necessities. Living under the constant threat of harm to themselves and to their families in Thailand, they labored over sewing machines in dark garages and poorly lit rooms, making clothes for brand name manufacturers sold in some of the biggest retail stores in America.¹⁸⁸

Bureerong exemplifies the type of intimidation and legal coercion that many immigrant workers experience when they complain about workplace conditions or pay.

The involuntary servitude parallels exist for Title VII as well as for the FLSA. In *EEOC v. Trans Bay Steel Co.*, a recently settled case, a group of Thai welders were recruited to the United States and held in involuntary servitude.¹⁸⁹ They were told they

184. 29 C.F.R. § 790.4(a) n.17 (2006).

185. See 922 F. Supp. 1450, 1459 (C.D. Cal. 1996).

186. *Id.* at 1459–60.

187. Julie Su, *El Monte Thai Garment Workers: Slave Sweatshops, NO SWEAT: FASHION, FREE TRADE AND THE RTS. OF GARMENT WORKERS*, 1997, available at <http://sweatshopwatch.org/index.php?s=68>.

188. *Id.*

189. Consent Decree at 2, *EEOC v. Trans Bay Steel Co.*, 2:06-CV-07766-CAS-JTL (C.D. Cal. Dec. 8, 2006).

would be arrested or turned over to immigration authorities if they tried to leave the premises. Although they were sponsored for skilled welding work, they were forced in some cases to work for Thai restaurants or perform other menial work. The court entered a consent decree in the case, ordering, among other things, employer sponsorship in the immigration system so that immigrants could continue to work in the United States.¹⁹⁰ These cases are also ripe for EEOC investigation where the plaintiffs claim of differential treatment or discriminatory employment practices. In such cases, the threat of legal coercion may arise as retaliation in the employment discrimination investigation.

3. Rape, Sexual Assault, and Sexual Harassment

Cases in which rape, sexual assault, or abusive sexual contact are alleged fall within the realm of sexual harassment, which the EEOC has the authority and responsibility to target and investigate. The EEOC must investigate charges of sexual harassment and, as a federal agency, may refer to the DOJ or some other criminal enforcement agency any signs of criminal activity it finds during its investigation.

Other forms of sexual harassment, such as quid pro quo harassment, sexual advances, gender-based animosity, and sexually charged hostile environments, should trigger an EEOC investigation to determine whether the activity rises to the level of an enumerated sex crime or similar criminal activity. The key component of such harassment arises in the particularly vulnerable situation of newly arrived immigrant women.¹⁹¹ A recent study found that ninety percent of farm worker women suffered sexual harassment on the job.¹⁹² Women in other low-wage professions have similar experiences.¹⁹³ Several recently settled EEOC cases

190. Press Release, EEOC, EEOC Resolves Slavery and Human Trafficking Suit Against Trans Bay Steel for an Estimated \$1 Million (Dec. 8, 2006), available at <http://www.eeoc.gov/press/12-8-06.html>.

191. See, e.g., Xóchitl Castañeda & Patricia Zavella, *Changing Constructions of Sexuality and Risk: Migrant Mexican Women Farmworkers in California*, 8 J. LATIN AM. ANTHROPOLOGY 126, 126–27, 141–42 (2003).

192. See Southern Poverty Law Center, *New Project Aims for Harassment-Free Workplace*, SPLCENTER.ORG, Mar. 14, 2006, http://www.splcenter.org/legal/news/article.jsp?site_area=1&aid=169 (noting that immigrant women in other workplaces face sexual harassment issues).

193. See *id.* (noting that immigrant women in other workplaces also face sexual harassment issues).

illustrate that the intersection of immigration status and sexual harassment in the workplace proves particularly egregious for women in low-wage industries. In *EEOC v. Grace Culinary Systems, Inc.*, the EEOC settled a claim alleging that twenty-two Latino women in a food processing company were sexually harassed over a period of several years.¹⁹⁴ They allegedly suffered sexual groping and requests for sex, and those who refused were given menial tasks or more difficult assignments.¹⁹⁵ Other women who refused were allegedly fired.¹⁹⁶

In *DeCoster*, discussed above in the trafficking context, the EEOC investigated and found sufficient evidence to sue the company for sexual harassment, including rape and sexual abuse.¹⁹⁷ The underlying sex crimes were investigated in order to uncover sufficient facts for a sexual harassment claim based on a hostile work environment. Moreover, the company allegedly “threatened retaliation if [the plaintiffs] complained of such conduct.”¹⁹⁸ The workers ultimately received T visas because they had been trafficked into the United States in addition to being sexually assaulted. Now that the U visa interim regulation is in place, they can provide the same kind of protection without the need to prove the elements of severe forms of trafficking.¹⁹⁹

Women in sexual harassment situations do not have to be undocumented in order for intimidation and coercion to manifest

194. Press Release, EEOC, EEOC Obtains \$1 Million for Low-Wage Workers Who Were Sexually Harassed at Food Processing Plant (June 1, 2000), available at <http://www.eeoc.gov/press/6-1-00.html> [hereinafter EEOC Press Release #2].

195. *Id.*

196. *Id.*

197. See *supra* notes 154–57 and accompanying text.

198. EEOC Press Release #1, *supra* note 154.

199. See 72 Fed. Reg. 53,014, 53,037 (Sept. 17, 2007) (to be codified at 8 C.F.R. § 214.14(b)); see also *infra* Part IV.C. Other examples of sexual harassment cases in which U visas could be made available to a group of women include *EEOC v. Harris Farms, Inc.*, No. 1:02-cv-06199, 2005 WL 2071741, at *1 (E.D. Cal. Aug. 25, 2005) and *EEOC v. Tanimura & Antle, Inc.*, No. 5:99-cv-20088 (S.D. Cal. Feb. 5, 1999). In *EEOC v. Harris Farms*, the EEOC received a \$994,000 verdict for the plaintiff in a sexual harassment/rape case. The defendant in this case attempted to discover the immigration status of the plaintiff at trial. In *EEOC v. Tanimura & Antle*, the EEOC charged supervisors in a lettuce growing operation with sexual assault and quid pro quo sexual harassment of its female agricultural workers. Latina agricultural workers were required to perform sexual favors in return for keeping their jobs. The company settled the case for \$1.9 million and agreed to conduct extensive anti-discrimination training in its operations. Press Release, EEOC, EEOC and Tanimura and Antle Settle Sexual Harassment Case in the Agricultural Industry (Feb. 23, 1999), available at <http://www.eeoc.gov/press/2-23-99.html> [hereinafter EEOC Press Release #3].

themselves.²⁰⁰ Currently, in a mixed-status workplace, the EEOC may choose to represent women who have legal status in order to avoid any immigration-related discovery issues that may arise. The reality, however, is that if intimidation and coercion exist for those with legal status, the threat is exponentially greater for those without. In the recently settled case of *EEOC v. Caesars Entertainment, Inc.*, the EEOC sued on behalf of a class of Latino kitchen workers who were sexually harassed by supervisors.²⁰¹ The EEOC claimed that the women were subject to repeated and severe sexual harassment—the type that rises to the level of criminal activity.²⁰² The EEOC charged the supervisors with forcing women to have sex under the threat of firing.²⁰³

The threat of deportation would have lingered with these women even if the named plaintiffs had employment authorization in the United States. All of the women were monolingual Spanish speakers and had trouble communicating with upper level managers who supervised the offending supervisors.²⁰⁴ The supervisors took advantage of what they perceived as the victims' inability to defend themselves because of their tenuous immigration status and lack of English proficiency.²⁰⁵ They allegedly forced the women to engage in sexual intercourse at work and performed other lewd acts with them.²⁰⁶ When the plaintiffs did complain, they suffered retaliation through demotions, wage losses, discipline, further harassment, and discharge.²⁰⁷ Anna Park, the EEOC regional counsel who oversaw the settlement, noted that “[i]n a case like this where many of the workers were monolingual Spanish speakers, victims of sexual harassment often feel further isolated, marginalized, and unable to vindicate their rights.”²⁰⁸

200. The U visa and law enforcement certification can still be useful in these cases. *See infra* section V.A.

201. Complaint at 1–3, *EEOC v. Caesars Entm't, Inc.*, No. 2:05-CV-0427-LRH-PAL (D. Nev. Mar. 31, 2005) [hereinafter *Caesars Complaint*].

202. *Id.*

203. *Id.*

204. Press Release, EEOC, *Caesars Palace to Pay \$850,000 for Sexual Harassment and Retaliation* (Aug. 20, 2007), available at <http://www.eeoc.gov/press/8-20-07.html> [hereinafter *EEOC Press Release #4*].

205. *See id.*

206. *Caesars Complaint*, *supra* note 201, at 4.

207. *EEOC Press Release #4*, *supra* note 204.

208. *Id.*

It is apparent both in the complaint and in the ultimate resolution of the case that the EEOC had to investigate facts that could have led to criminal charges. Therefore, plaintiffs without immigration status are eligible for U visa status by cooperating with the EEOC in the final resolution of the case.²⁰⁹ *Caesars Palace* illustrates how a victim that has legal status may nonetheless be coerced into exploitative situations based on fears for family or loved ones.²¹⁰ U visa availability and the EEOC LECs are necessary protection mechanisms in these cases.

4. Obstruction of Justice

The “obstruction of justice” violations enumerated in the U visa provision parallel FLSA and Title VII prohibitions against workplace retaliation in the form of abuse of the legal process.²¹¹ Many of the cases that the EEOC and the DOL investigate involve allegations of retaliation by employers who threaten to call immigration officials and risk deportation of employees who complain to authorities about workplace violations.²¹² The DOL’s investigative power in this area is broad because the DOL seeks to protect workers who come forward with complaints and who can help prosecute DOL violations.²¹³ In the immigrant community, one of the ways that unscrupulous employers can take advantage of the legal system is to misrepresent legal consequences by threatening a complaining worker with deportation once a worker has filed charges. If the threat rises to the level of abuse of the legal proc-

209. See 8 U.S.C. § 1101(a)(15)(U)(iii) (2000) (providing the terms for eligibility for U visa status).

210. See, e.g., Saucedo, *supra* note 18, at 970 (listing factors that prevent even documented workers from complaining at work); Saucedo, *supra* note 6, at 315 (“The current immigration law framework engenders fear in a population that does not understand immigration law and its evolving standards.”).

211. Compare 8 U.S.C. § 1101(a)(15)(U)(iii) (2000), with 29 U.S.C. § 215(a)(3) (2000).

212. See, e.g., *Gomez v. F & T Int’l, LLC*, 842 N.Y.S. 2d 298, 300 (N.Y. App. Div. 2007) (refusing to allow defendant to seek information about plaintiff’s immigration status after plaintiffs filed wage claim because to do so would intimidate plaintiffs from pursuing a legitimate claim); Complaint at 1, 3, *EEOC v. Glenview Car Wash*, No. 1:05-cv-05568 (N.D. Ill. Sept. 27, 2005) (alleging retaliation against male employees by subjecting them to termination); Consent Decree at 3, *EEOC v. DeCoster*, No. 3:02-cv-03077-MWB (N.D. Iowa Oct. 3, 2002) (alleging retaliation against Mexican workers); Consent Decree ¶ 2, *EEOC v. Holiday Inn Express Hotel & Suites, Inc.*, 0:00-cv-00034-DSD-JMM (D. Minn. Jan. 11, 2000) (alleging retaliatory reporting of employees of Mexican nationality to the INS).

213. See 29 U.S.C. § 1855(a) (2000).

ess, DOL investigators can pursue criminal charges for retaliation under the FLSA.²¹⁴

The U visa interim regulations state that, for U visa purposes, a victim of obstruction of justice, and of similar “victimless” crimes, is an alien who

has been directly and proximately harmed by the perpetrator of the witness tampering, obstruction of justice, or perjury; and . . . [t]here are reasonable grounds to conclude that the perpetrator committed the [offense], at least in principal part, as a means: (1) [t]o avoid or frustrate efforts to investigate, arrest, prosecute, or otherwise bring to justice the perpetrator for other criminal activity, or (2) [t]o further the perpetrator’s abuse or exploitation of or undue control over the [alien] through manipulation of the legal system.²¹⁵

This definition encompasses the type of activity endemic in low-wage labor and employment discrimination cases in which immigrants file claims and then are asked for proof of valid immigration status in order to keep their jobs. These retaliatory activities are arguably covered in the realm of activities that make a plaintiff a victim of witness tampering, obstruction of justice, or perjury, which are all U visa enumerated crimes.

The EEOC’s experiences with retaliation cases demonstrate how employers tend to utilize immigration status in exploring other discrimination-based complaints such as sexual harassment. The facts in *EEOC v. The Restaurant Company* show how undocumented employees respond to the implicit threats of deportation.²¹⁶ In that case, Mariano Centeno, a Perkins manager, made sexual advances to Maria Torres several times over the course of her employment.²¹⁷ Torres tried to resist his advances. After she complained to the restaurant’s general manager, she said that she feared that Centeno would turn her in to immigration officials and have her deported if she complained.²¹⁸

214. *Id.* §§ 215(a)(3), 216(a), 1855(a) (2000).

215. New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status, 72 Fed. Reg. 53,014, 53,037 (Sept. 17, 2007) (to be codified at C.F.R. § 214.14(a)(14)(ii)).

216. See *EEOC v. The Restaurant Co.*, 448 F. Supp. 2d 1085 (D. Minn. 2006).

217. *Id.* at 1086.

218. *Id.* If an investigation of the allegation proved that Centeno made such threats, the company could be liable for obstruction of justice at the very least, or liability for forced labor. Because these facts were not developed in the case, however, it is not clear whether the EEOC conducted such an investigation.

The company placed Torres on a leave of absence until she could prove legal status, and it began to question her legal status during discovery after she pressed her sexual harassment claim in court.²¹⁹ At that point, the company crossed the line, taking advantage of her fear of deportation by forcing her to prove her status in retaliation for pressing her claims. Under the current U visa regulatory scheme, this amounts to obstruction of justice as defined by the interim regulations.²²⁰ First, an allegation was made that her supervisor used her illegal status to manipulate her into sexual exploitation.²²¹ Second, the company sought discovery regarding her immigration status.²²² In this case, the EEOC was granted a protective order that prohibited the restaurant from seeking information from Torres about her immigration status.²²³ Under the current visa regulations, as long as the EEOC investigated the obstruction of justice or forced labor allegations, it could provide an LEC for Torres's U visa application.²²⁴

Even if the threat of deportation does not rise to the level of forced labor, it can subordinate an employee to such a degree that the employee might as well be coerced into continuing to work for the employer. Psychological coercion in the immigrant workplace is a phenomenon that has not received much attention in the legal or social science literature. Sociologists have observed how employers seek out immigrant workers because they are more subservient due, in part, to their fears of deportation. In one study, sociologists Waldinger and Lichter found that employers explicitly referred to their preference for undocumented immigrants who were afraid to resist coercion because of their status.²²⁵ This preference can surface, often subtly, in how an employer signals to an employee that she seeks compliance and submissiveness.²²⁶

219. *Id.*

220. *See* Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. at 53,014-15.

221. *See The Restaurant Co.*, 448 F. Supp. 2d at 1086.

222. *See id.* at 1086-87.

223. *Id.* at 1088.

224. *See* Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. at 53,014.

225. *See* ROGER WALDINGER & MICHAEL I. LICHTER, HOW THE OTHER HALF WORKS: IMMIGRATION AND THE SOCIAL ORGANIZATION OF LABOR 160-61 (2003).

226. *Id.* at 156-57.

Even less egregious cases, however, can amount to obstruction of justice. For example, in *EEOC v. City of Joliet*, the court granted the EEOC a protective order prohibiting the employer from compelling the plaintiffs to complete and sign federal immigration employment, or I-9, forms.²²⁷ The court was persuaded by the fact that, although the employer had been in business since 1989, it had never required its employees to fill out I-9 forms at the beginning of their employment.²²⁸ The court was not persuaded by the employer's argument that when it conducted an audit after charges were filed, it found that the I-9's for all of its employees were missing and that it was simply trying to comply with the law.²²⁹ The court found the timing too close to be coincidental,²³⁰ noting that the employer's actions would be

interpreted by any reasonable undocumented plaintiff or class member as nothing less than the first step towards being discharged, reported to the Department of Homeland Security as an undocumented alien, or both. . . . The most onerous consequence will be . . . loss of job, arrest, detention and ultimately deportation. The intimidating effect of such conduct is hard to exaggerate.²³¹

In granting the EEOC's motion for a protective order, the court implied that allowing the employer to ask about immigration status so long after the employee was hired was tantamount to obstruction of justice.²³² As the court noted, "[t]his step [of requiring I-9's] alone might be sufficient to end the lawsuit regardless of its merits."²³³ To the extent, then, that an employer's, or its attorney's, tactics include intimidation through investigation of immigration status, the EEOC or the DOL would have the foundation for an investigation that could result in a U visa for the targeted employees.

Of course, not all such cases will rise to that level. In some cases, either the underlying claim is not similar enough to the enumerated U visa crimes, or the employer's attorney has made the argument that immigration status is necessary to pursue a

227. See *EEOC v. City of Joliet*, 239 F.R.D. 490, 491-92, 494 (N.D. Ill. 2006).

228. *Id.* at 492.

229. *Id.*

230. *Id.*

231. *Id.* at 493.

232. See *id.* at 493-94.

233. *Id.* at 493.

claim.²³⁴ While this argument has been dismissed repeatedly by courts in employment discrimination and wage cases,²³⁵ there may be some legitimate reason related to the claim that an employer could seek an employee's immigration status. In that case, the court could grant discovery and it would be difficult to prove an obstruction of justice claim.

Even if the court grants a protective order against an employer seeking immigration status information after a workplace complaint has been lodged, an obstruction of justice investigation does not automatically follow. As ICE raids increase in number, employers will need to comply with immigration enforcement efforts to rid the workplace of undocumented workers. An employer that is simply responding to ICE requests in seeking immigration status information should be shielded from obstruction of justice investigations in an EEOC or DOL investigation of a workplace dispute. Similarly, if DHS rules are ultimately implemented, an employer may need to act in the face of Social Security no-match letters by requiring an employee to offer supplemental or corrected information or risk employer sanctions. If the employer is acting solely to comply with these federal agencies, the employer should not face an investigation. This type of situation is distinguishable from the *Joliet* case, in which the timeframe for the employer's investigation was too close to the workplace complaint to disavow intent to intimidate complaining employees.²³⁶

On the other hand, courts are increasingly convinced that the Supreme Court's *Hoffman* decision denying back pay and other remedies to an undocumented immigrant does not apply to discrimination and wage cases.²³⁷ Thus, as precedent builds, an em-

234. See, e.g., *Galaviz-Zamora v. Brady Farms, Inc.*, 230 F.R.D. 499, 502 (W.D. Mich. 2005) (concluding that the plaintiffs' immigration status is not relevant in showing standing or damages).

235. See, e.g., *id.* at 503 (granting protective order preventing employer from conducting discovery with respect to plaintiff's immigration status); *Flores v. Amigon*, 223 F. Supp. 2d 462, 464-65 (E.D.N.Y. 2002) (granting the plaintiff's motion for protective order).

236. See *Joliet*, 239 F.R.D at 492.

237. See, e.g., *Rivera v. NIBCO*, 364 F.3d 1057 (9th Cir. 2004) (doubting that *Hoffman* applies to Title VII cases); *Singh v. Jutla*, 214 F. Supp. 2d 1056, 1059 (N.D. Cal. 2002) (holding that employer who calls INS in retaliation for employee filing a wage and hour claim violated the FLSA); *Flores*, 233 F. Supp. 2d at 464 (granting a protective order prohibiting discovery into the plaintiff's immigration status because *Hoffman* was not relevant to claims for unpaid wages under the FLSA); *Zeng Liu v. Donna Karan Int'l, Inc.*, 207 F. Supp. 2d 191, 192 (S.D.N.Y. 2002) (questioning the applicability of *Hoffman* to the FLSA and denying the employer's request for discovery of immigration status); *Flores v.*

ployer that attempts to seek a plaintiff's immigration status after a claim is made may leave itself open to obstruction of justice investigations in workplace disputes.

These cases illustrate the extent to which the EEOC must investigate facts that also support allegations of criminal activity, even when the EEOC does not have a direct mandate to pursue criminal charges in federal court. More important to immigrant workers, because sexual harassment and immigration status collide in particularly egregious ways on account of the power dynamics between supervisors and workers in low-wage industries,²³⁸ workers need protection outside the remedies of injunctive relief and monetary damages. In order to truly effect the purpose of Title VII and of the FLSA, employment and labor law enforcement agencies must seek to provide legal protection to individuals who will then be able to reenter the workplace with some degree of leverage to counteract the unbalanced power dynamics for women in low wage industries. The U visa can provide that kind of remedy and ultimately, legal protection, in the form of legal status and employment authorization. To the extent that the EEOC does investigate the possibility of sexual harassment or assault, it should be amenable to providing the victim with an LEC, even if it does not ultimately pursue a sexual harassment claim.

IV. OPERATIONALIZING U VISA PROTECTION

The immigrant civil rights literature contrasts with legal scholarship surrounding crime and trafficking victims, which analyzes legal status as the quid pro quo for law enforcement cooperation.²³⁹ Civil rights for victim immigrants are not articu-

Albertson's, Inc., No. CV0100515AHM(SHX), 2002 WL 1163623, at *5 (C.D. Cal. Apr. 9, 2002) (holding that *Hoffman* did not bar undocumented employee from recovering unpaid wages for work actually performed because "FLSA protections are available to citizens and undocumented workers alike").

238. See, e.g., William Tamayo, *The Role of the EEOC in Protecting the Civil Rights of Farm Workers*, 33 U.C. DAVIS L. REV. 1075, 1079-80 (commenting on the EEOC's need to reach out to immigrant farm worker women, who are most vulnerable to sexual harassment because of their immigration status, their poverty, and their lack of knowledge, about their rights); Maria Ontiveros, *Lessons from the Fields: Female Farmworkers and the Law*, 55 MAINE L. REV. 157, 178-79 (noting that although Title VII should protect female farm workers, the law's focus on one factor at a time ignores the intersectionality of sex, national origin, and immigration status as the basis for discrimination).

239. Compare Volpp, *supra* note 98, with Orde F. Kittrie, *Federalism, Deportation, and*

lated, as such, within the U visa framework. This is in part because many rights are traditionally reserved for full members of our national community.²⁴⁰ Non-citizens have less than full rights because they have less of a claim to full membership.²⁴¹ In the current paradigm, the protection that comes with U visa nonimmigrant status is considered less a rights-conferring instrument than a law-enforcement tool.²⁴² Consequently, the important connection between U visa protection and the inherent leveraging power in the workplace that comes with legalization is not explicit. Nora Demleitner notes that offering legalization in the form of nonimmigrant visas such as the S, T, and U reinforces law enforcement's goal of garnering cooperation from traditionally silent immigrant communities.²⁴³ She argues, moreover, that this emphasis on law enforcement's goal, rather than the rights-conferring nature of the protection, creates perverse incentives to cooperate in order to stay in the country.²⁴⁴ Because the focus is not on giving the worker an empowerment tool, workers that are crime victims continue to seek visas as victims and not as potential rights bearers. This dynamic continues to discourage empowerment strategies such as workplace organizing.²⁴⁵ Demleitner argues that the fact that law enforcement determines which potential applicants have provided information necessary to merit law enforcement certification of cooperation skews the process, places too much power in the hands of law enforcement, and leads to abuses.²⁴⁶

The literature analyzing the rights-conferring functions of legalization or citizenship also contrasts with the literature addressing U visas as part of a protection scheme for domestic or sex violence victims. Lori Nessel notes that immigration relief, such as the U visa, which protects women fleeing domestic violence situations, recognizes the importance of family reunifica-

Crime Victims Afraid to Call the Police, 91 IOWA L. REV. 1449, 1463–64 (2006).

240. See generally Linda Bosniak, *Constitutional Citizenship Through the Prism of Alienage*, 63 OHIO ST. L.J. 1285 (2002) (discussing the relationship between citizenship and rights).

241. See *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950).

242. 8 U.S.C. § 1101(a)(15)(U) (2000).

243. Demleitner, *supra* note 5, at 1073–75.

244. *Id.*

245. Volpp, *Migrating Identities*, *supra* note 98, at 509.

246. Demleitner, *supra* note 5, at 1085–86.

tion.²⁴⁷ U visa provisions, and the accompanying interim regulations, allow for the inclusion of immediate family members in applications and in subsequent applications for adjustment of status to permanent residency. Adult U visa recipients may seek derivative status for their spouses and children.²⁴⁸ Minor U visa recipients under age twenty-one may seek derivative status for spouse, children, unmarried siblings under age eighteen at the time of application, and parents.²⁴⁹ In arguing for similar provisions for torture victims in asylum law, Nessel concludes that

[i]n order for U.S. immigration policies to appear to be humanitarian in nature, they must be seen as bestowing mercy upon the more deserving immigrants. . . . [I]mmigration legislation aimed at victims of domestic violence and human trafficking is premised on a view of women (and children) as innocent victims in need of mercy, including family reunification.²⁵⁰

This perception about the victims on whom legal status is bestowed could potentially conflict with the rights-conferring paradigm of legalization as a right, or a reparation, that grants leverage in the workplace to immigrant workers as a class. The latter may be more threatening than the former; however, the former is much more collective and less individualistic than the latter. The legal literature in neither the immigration nor the domestic violence fields captures the nuances of workplace versus home-based criminal activity even though both the statute and the regulations contemplate protection for both.²⁵¹ The following section discusses the power of the U visa as a rights-conferring device for victims of labor exploitation, one that confers rights that inure to a class of workers, namely immigrant workers.

247. See Nessel, *supra* note 5, at 938.

248. New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. 53,014, 53,039 (Sept. 17, 2007) (to be codified at 8 C.F.R. § 214.14(f)).

249. *Id.* This type of provision is virtually unique in immigration law, allowing immigration status to flow from a child to a parent and not the other way around. See David B. Thronson, *You Can't Get Here From Here: Toward a More Child-Centered Immigration Law*, 14 VA. J. SOC. POL'Y & L. 58, 62 (2006).

250. Nessel, *supra* note 5, at 936–37. Nessel also argues that a similar humanitarian policy in the workplace requires the provision of a special visa for workers to be able to vindicate their workplace rights. Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 HARV. C.R.-C.L. L. REV. 345, 359–61 (2001).

251. See 8 U.S.C. § 1101(a)(15)(U)(ii) (2000) (making no distinction between workplace and home-based criminal activity); Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg.

A. *The U Visa As a Tool for Collective Workplace Change*

Can the existence of U visa status provide incentive for workplace organization? There are two underlying questions here. First, can the U visa be used by a class of workers to protect against labor exploitation? Second, can the prospect of obtaining legalization and the protection that legal status affords encourage immigrant workers to organize in particularly egregious settings? This is an area where immigrants may, and have, learned from the experience of the African-American civil rights movement or from their own organizing experiences from their home countries. In New Orleans, immigrant workers joined together to challenge exploitative practices, and at the same time joined with African-Americans seeking to establish humane labor practices that protect all workers.²⁵²

In especially egregious situations, such as the *John Pickle* case, or the *Bureerong* case, it was not a guarantee of legal status, but rather the most unbearable conditions, that forced workers to come forward and complain about labor and employment violations. There are cases, however, that are between the garden variety labor and employment violations and the especially egregious cases, in which the possibility of a U visa may give a set of workers added impetus to join together to repel exploitative conditions. Once they have joined, moreover, they create the atmosphere for organizing and collective bargaining around other workplace terms and conditions. The prospect of a collective right of the brown-collar worker, hired in part because of employer expectation of subservience and submissiveness, makes the U visa mechanism an attractive organizing strategy.

Of course, the U visa, as currently configured and used, is geared toward individuals rather than a group of workers. Each individual victim must apply for U visa nonimmigrant status, and must separately cooperate with law enforcement agencies to fulfill the requirements of the LEC.²⁵³ In some instances, such as the *Bureerong* case, a group of workers will get visas based on their

53,014, 53,036 (Sept. 17, 2007) (to be codified at 8 C.F.R. § 214.14(a)(9) (2007) (same)).

252. See, e.g., Complaint at 2–3, *Castellanos v. Decatur Hotels, LLC*, No. 06-4340 (E.D. La. Aug. 24, 2006), available at https://secure.splcenter.org/pdf/dynamic/legal/Decatur_Amended_Complaint.pdf.

253. See 8 U.S.C. § 1101(a)(15)(U)(i)(III) (2000).

individual participation in the investigation and prosecution of the case.²⁵⁴

Notwithstanding, the purpose of the U visa in protecting workers and empowering them to come forward would be met equally in the workplace if groups of workers suffering the effects of labor exploitation were eligible for U visas. Recall that one of the purposes of the U visa is to help law enforcement meet its goals by encouraging undocumented victims to come forward with information that will lead to a prosecution.²⁵⁵ In employment discrimination cases, for example, an investigator must not only take testimony from the complaining victim, but also seek out corroborative witnesses to testify.²⁵⁶ Those witnesses are often afraid to come forward because of the threat of retaliation. For an undocumented worker, retaliation in the form of discharge has deeper consequences because the worker must now find a new job without documents. The possibility of a U visa may help groups of workers overcome their fears if the process is simplified. If a group of workers comes forward, for example, they can act in a representative capacity, just as named plaintiffs do in a class action lawsuit. The unnamed plaintiffs can remain in the background and still be eligible for U visas if they are willing to step forward at the request of a law enforcement official. In this way, both purposes of the statute—cooperation and protection—are met even though not all victims are made available to testify.

B. *The U Visa as a Vehicle for State Legislative Protection of Classes of Workplace Victims*

The most obvious form of labor exploitation covered by the U visa statute and its regulations is trafficking. Trafficking is one of the enumerated U visa crimes.²⁵⁷ It can be a state offense as well as a federal one.²⁵⁸ While the related T visa requires that a victim demonstrate that she is the victim of a “severe form of trafficking,” the U visa requires that the victim show that she was

254. Su, *supra* note 6, at 242.

255. Eligibility for “U” Nonimmigrant Status, 72 Fed. Reg. at 53,014.

256. See EEOC, EEOC’s Charge Processing Procedures, http://www.eeoc.gov/charge/overview_charge_processing.html (last visited Feb. 13, 2008).

257. 8 U.S.C. § 1101(a)(15)(U)(iii) (2000).

258. *Id.*

merely the subject of trafficking.²⁵⁹ Because the U visa provision also covers similar activity, a victim can define trafficking according to state law. As many as twenty-five states now have trafficking statutes, some of which cover labor exploitation as a form of trafficking.²⁶⁰

The Nevada legislature recently passed an anti-trafficking law making it a crime to transport an undocumented person into the state with the intent to violate any state or federal labor law.²⁶¹ This broad definition covers the types of subordination that state and federal labor laws may address but that do not necessarily rise to the level of the severe forms of trafficking that the TVPA targets. For example, the Nevada statute arguably covers in its trafficking definition a situation in which workers were brought into the state to perform subminimum wage jobs or were not paid for their work once completed. The statute also arguably covers cases in which the employer enticed employees to enter the state to work in a discriminatory work environment. For example, a worker brought into the state to suffer workplace sexual harassment could have a trafficking claim. By virtue of its extensive coverage, state trafficking legislation may provide protections omitted by the federal trafficking statute. In other words, a worker can seek legalization through the U visa provisions even in cases where she cannot demonstrate that she has suffered severe forms of trafficking.

C. *The U Visa as the Impetus for Building Creative Alliances Among Agencies*

DeCoster discussed above, exemplifies how U visa protection can be used proactively by workers and their advocates.²⁶² Recall that in *DeCoster* the EEOC investigated and found violations of anti-discrimination laws arising from the exploitation of vulnerable immigrant workers.²⁶³ ICE recently conducted a raid at the

259. Compare *id.* § 1101(a)(15)(T)(i)(I) (“severe form of trafficking”), with *id.* § 1101(a)(15)(U)(iii) (listing trafficking as an enumerated crime).

260. See CENTER FOR WOMEN POLICY STUDIES, REPORT CARD ON STATE ACTION TO COMBAT INTERNATIONAL TRAFFICKING 5 (2007), available at <http://www.centerwomenpolicy.org/documents/ReportCardonStateActiontoCombatInternationalTrafficking.pdf>.

261. See NEV. REV. STAT. § 200.468 (2007).

262. See *supra* notes 154–57 and accompanying text.

263. See *supra* note 154 and accompanying text.

same DeCoster Farm operation the EEOC had sued.²⁶⁴ During the raid, more than fifty undocumented workers were arrested and sent to detention centers across Iowa.²⁶⁵ In lieu of such raids, especially in workplaces where previous labor and employment violations have occurred, workers should be able to support ICE or a governmental employment agency by providing information that will point them toward particularly egregious employers or past violators. This type of partnership can secure workers' legal status and cooperation from law enforcement before the raids occur. As a result, ICE and labor and employment agencies can eradicate exploitative employment practices without exposing workers to deportation threats.

The workplace raids as they are currently conducted exemplify the short-sightedness of immigration enforcement without the coordination of labor and employment law enforcement agencies. If a company has committed past violations, the workplace should be investigated first to determine whether there are violations for which victims can seek U visa status. At the very least, the EEOC must be able to investigate the employer's practices once a raid occurs to determine whether any of the potential deportees are eligible for crime victim status. This type of protocol is especially salient in cases like *DeCoster* where the EEOC has found sufficient cause to file a complaint against the company for activity that would amount to eligible criminal activity under the U visa provisions.

Even without a protocol, however, workplace raids should trigger employment and labor violation investigations. Under the U visa regulations, a cooperating crime victim can seek U visa non-immigrant status from outside the United States while a removal proceeding is pending or after a removal order has been issued.²⁶⁶ Even if a crime victim is wrongfully deported after an ICE raid, that worker conceivably still has the power to seek redress by cooperating with the EEOC or DOL in an investigation of potential

264. Associated Press, *ICE Arrests 51 Workers at DeCoster Egg Farms*, CRESTON NEWS ADVERTISER, Sept. 14, 2007, http://www.crestonnewsadvertiser.com/articles/2007/09/14/news/state_news/9-14ia-decoster-immigrat3.txt.

265. *Id.*

266. See New Classification for Victims of Criminal Activity; Eligibility for "U" Non-immigrant Status, 72 Fed. Reg. 53,014, 53,037 (Sept. 17, 2007) (to be codified at 8 C.F.R. § 214.14(c)(1)).

crimes related to labor or employment law violations.²⁶⁷ This provision empowers workers transnationally, and should have the added benefit of facilitating investigations and prosecutions in particularly egregious cases.

D. Effect of U Visa Status on Discovery Issues: The U Visa as a Deterrent to Unnecessary Discovery in Workplace Disputes

In those cases where an employer has either threatened an employee with deportation as part of a workplace dispute or has retaliated against an employee complaining of labor or employment discrimination violations, the U visa should be made available to shield employees from further retaliation or deportation. It is already unlawful for an employer to call immigration authorities in retaliation for an employee's assertion of labor or employment rights.²⁶⁸ As discussed above, this type of employer activity is akin to obstruction of justice or abuse of process, both of which are enumerated U visa crimes.²⁶⁹

Legal status can make a difference in a worker's perception of the risk in going forward with a labor or employment claim. The promise of legal status can assuage a fearful employee facing unduly burdensome requests for information about immigration status during the discovery stages of litigation. Although many courts refuse to allow employers to seek such information,²⁷⁰

267. See *id.* at 53,037–38 (to be codified at 8 C.F.R. § 214.14(c)(1)(ii)).

268. See, e.g., 29 U.S.C. § 215(a)(3) (2000) (prohibiting retaliation against workers attempting to assert their rights under the FLSA); *id.* § 158(a)(3) (prohibiting workplace discrimination against employees organizing in the workplace); 42 U.S.C. § 2000e-3(a) (2000) (prohibiting retaliation against workers who seek redress for discrimination or who cooperate with anti-discrimination efforts); see also *Sure-Tan v. N.L.R.B.*, 467 U.S. 883, 894–96 (1984) (noting that an employer's call to INS about complaining workers during an organizing drive constituted constructive discharge in violation of section 8(a)(3) of the NLRA); *Singh v. Jutla & C.D. & R's Oil, Inc.*, 214 F. Supp. 2d 1056, 1061–62 (N.D. Cal. 2002) (denying motion to dismiss on FLSA suit by an employer who called INS in retaliation for employee filing a wage and hour claim); Michael J. Wishnie, *Emerging Issues for Undocumented Workers*, 6 U. PA. J. LAB. & EMP. L. 497, 503 (2004) (noting that “[i]t is axiomatic that employers may not retaliate against their employees for activities protected under labor and employment laws”).

269. See *supra* text accompanying note 21.

270. See, e.g., *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1074–75 (9th Cir. 2004) (holding that *Hoffman* did not apply in Title VII cases and refusing to allow discovery on immigration status); *Galaviz-Zamora v. Brady Farms, Inc.*, 230 F.R.D. 499, 501–02 (W.D. Mich. 2005) (holding that it was not persuaded that immigration status was relevant to FLSA and related claims); *Flores v. Amigon*, 233 F. Supp. 2d 462, 464–65 (E.D.N.Y. 2002) (holding that *Hoffman* does not apply in FLSA actions and granting a protective order from dis-

other courts have been swayed by the argument that employers need such information to determine potential liability.²⁷¹ Immigration status has become a defense to employment law claims, especially after the *Hoffman* decision.²⁷² If information about legal status is pursued during discovery, undocumented claimants have sought protective orders, refused to answer on Fifth Amendment grounds, or simply dropped their claims. Sometimes, the employer will have already retaliated by seeking re-verification of authorization to work after a claimant has filed a charge of discrimination or some other labor violation.²⁷³

Under the newly issued U visa regulations, the EEOC or the DOL can now start an investigation surrounding the circumstances of the employer's information gathering, and issue a law enforcement certification when they suspect that the employer has violated obstruction of justice provisions of the statute. The commentary to the U visa interim rule defines the victim of an obstruction of justice, and the related witness tampering and perjury crimes, as one who is "harmed when a perpetrator commits one of the three crimes in order to avoid or frustrate the efforts of law enforcement authorities."²⁷⁴ Such crimes also involve victims "who are harmed when the perpetrator uses the legal system to exploit or impose control over them."²⁷⁵ Under either of these definitions, a worker in an employment or labor dispute who is subsequently asked about immigration status may be considered

covery of immigration status); *De La Rosa v. N. Harvest Furniture*, 210 F.R.D. 237, 238-39 (C.D. Ill. 2002) (holding that *Hoffman* was not "dispositive of the issues raised in the motion to compel" discovery of immigration status in a Title VII action); *Zeng Liu v. Donna Karan Int'l, Inc.*, 207 F. Supp. 2d 191, 192-93 (S.D.N.Y. 2002) (questioning the applicability of *Hoffman* to the FLSA and denying the employer's request for discovery of immigration status); *Flores v. Albertson's, Inc.*, No. CV:0100515, 2002 WL 1163623, at *5 (C.D. Cal. Apr. 9, 2002) (finding *Hoffman* inapplicable to an FLSA action and refusing employer discovery requests regarding employees' immigration status); *Gomez v. F & T Int'l LLC*, 842 N.Y.S. 2d 298, 301-03 (N.Y. App. Div. 2007) (refusing to allow defendant to seek information about plaintiffs' immigration status after plaintiffs filed a wage claim because to do so would intimidate plaintiffs from pursuing a legitimate claim).

271. See, e.g., *Flores v. Limehouse*, No. 2:04-1295, 2006 WL 1328762, at *1 (D.S.C. May 11, 2006) (ordering plaintiffs to respond to questions about immigration status before denying defendants' summary judgment motion based on plaintiffs' undocumented status).

272. See, e.g., Patrick H. Hicks & Deborah L. Westbrook, *Immigration Status as a Defense to Employment-Law Claims*, 15 NEV. LAW. 26 (2007), available at <http://www.nvbar.org/Publications/Nevada%20Lawyer%20Magazine/2007/May/immigration.htm>.

273. See *id.*

274. New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. 53,014, 53,017 (Sept. 17, 2007).

275. *Id.*

a victim. The latter definition especially fits the discovery scenario in which a worker pursuing a claim in litigation must seek a protective order or risk deportation for pursuing the claim. Issuance of a U visa makes the exercise of seeking immigration status irrelevant to a case by taking immigration status out of the equation in labor and employment cases. By avoiding discovery sidetracks into immigration issues, such protection refocuses the litigation back on the underlying labor and employment conditions for which the worker seeks redress.

V. BEYOND THE BASICS: U VISA FIXES THAT WILL FURTHER EMPOWER CLASSES OF IMMIGRANT WORKERS

A. *Restructure the U Visa Provisions to Provide Protection to a Class*

The current structure of U visa protection is individualized. A victim of an enumerated crime who suffers substantial mental and physical abuse is granted nonimmigrant status.²⁷⁶ This individualized structure ignores the collective effects of activities related to crimes such as involuntary servitude, obstruction of justice, peonage, slave trade, and trafficking. A shift in the focus of the U visa's purpose from a law enforcement tool to a protection/rights-conferring mechanism may require that U visa protection be extended to include victims who, while suffering from employer abuses, may not be needed to cooperate with law enforcement authorities. In many cases, law enforcement will need only a few of the victims to testify about a scheme or crime. The rest of the victims may not be certified if there is no reason for law enforcement to use their stories. Thus, from a scheme that has entrapped hundreds of victims, only a handful may receive law enforcement certification, depending on how broadly law enforcement officials exercise their discretion.

There are several possible ways to restructure the U visa provision to capture groups of victims in a workplace abuse situation. First, victims who do not come forward first can still be considered direct victims who are presumptively willing to cooperate after the first set of victims cooperates and an investigation or con-

276. See 8 U.S.C. § 1101(a)(15)(U)(i) (2000).

viction demonstrates a criminal violation. Second, victims who suffer but are not among the first to come forward can be considered indirect victims of the criminal activity. Third, a class mechanism can be included in the U visa provision to allow for law enforcement certification of a group of victims once an investigation or prosecution demonstrates criminal activity. The interim regulations provides at least some support, and perhaps the mechanism, for achieving the first two of these suggestions. A legislative fix is necessary for the third.

1. Direct Victims

Once an investigation uncovers a group of workers who suffered from workplace abuses that amount to criminal activity, the EEOC or the DOL can issue LECs to group members on the presumption that each individual member of the group is willing to cooperate with law enforcement officials in the investigation or prosecution of the crime. The current U visa provision requires neither that a victim actually cooperates nor that a prosecution actually occurs.²⁷⁷ The certification of groups of workers can occur, therefore, without any change in the current statutory or regulatory scheme.

2. Indirect Victims/Bystander Liability

Victims of employer abuse could be considered indirect victims when they are part of a class but cannot show that they were directly harmed, were not among the first to come forward, or have left the employer because of the abuse stemming from criminal activity. One of the issues in the U visa provision that the interim regulations clarified was the definition of “victim.”²⁷⁸ The commentary to the regulations state that the USCIS will interpret “victim” broadly, in furtherance of Attorney General Guidelines that define “victim” for the purposes of victim and witness assistance.²⁷⁹ The Attorney General Guidelines provide for bystander

277. A law enforcement certification requires a statement that the victim “has been helpful, is being helpful, or is *likely to be* helpful’ in the *investigation or* prosecution of [enumerated] criminal activity.” 8 U.S.C. § 1184(p)(1) (Supp. V 2005) (quoting 8 U.S.C. § 1101(a)(15)(U)(i)(III) (2000)) (emphasis added).

278. See Eligibility for “U” Nonimmigrant Status, 72 Fed. Reg. at 53,036–37 (to be codified at 8 C.F.R. § 214.14(a)(14)).

279. See *id.* at 53,016–17; OFFICE FOR VICTIMS OF CRIME, DEP’T OF JUSTICE, ATTORNEY

victim status in some cases. The Guidelines state that “there may be circumstances in which a bystander does suffer an unusually direct injury, and Department personnel have the discretion to treat this bystander as a victim.”²⁸⁰ The DHS interim rule on the U visa provision states accordingly that “USCIS does not anticipate approving a significant number of applications from bystanders, but will exercise its discretion on a case-by-case basis to treat bystanders as victims where that bystander suffers an unusually direct injury as a result of a qualifying crime.”²⁸¹ This standard is similar to bystander liability in tort law, which allows a plaintiff who has suffered extreme emotional distress and who is in the vicinity to recover for her injury.²⁸²

In the workplace context, this type of liability exists, for example, when an employer retaliates by threatening to call immigration officials against one victim and induces such a chilling effect on the rest of the employees that they are forced into submission. Crimes like obstruction of justice have a broad chilling effect on all workers who know about an employer’s threats to call immigration status into question. Therefore, the whole group of affected workers who suffer workplace abuses should be covered by the U visa provision as indirect victims when an employer threatens to call immigration officials as an impendence for continued work or in retaliation for employee grievances.

3. Class Law Enforcement Certification

Currently, a law enforcement agency must individually certify each applicant’s victim status and the willingness to cooperate.²⁸³ A class-based certification mechanism would benefit a whole group of victims even though they are not all needed to testify or provide information about an employer’s unlawful activity. This type of mechanism would operate similarly to the certification of class action status.²⁸⁴ Once the EEOC or DOL identify a class of

GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE 9 (2005), available at <http://www.ojp.usdoj.gov/olp/final.pdf>.

280. OFFICE FOR VICTIMS OF CRIME, *supra* note 279, at 10.

281. Eligibility for “U” Nonimmigrant Status, 72 Fed. Reg. at 53,016.

282. See RESTATEMENT (SECOND) OF TORTS § 46 (1965).

283. See 8 U.S.C. § 1184(p)(1) (Supp. V. 2005).

284. See Russell J. Weintraub, *Choice of Law as an Impediment to Certifying a National Class Action*, 46 S. TEX. L. REV. 893, 894–95 (2005) for a brief description of the class action certification process.

victims, the agencies would act on a presumption that class members were willing to cooperate in the investigation or prosecution of a given violation and its underlying criminal activity. Class law enforcement certification has the advantage of efficiency while at the same time protecting a broader group of workers than the individual cooperation model. It also encourages collective activity on the assumption that a group of workers facing the same or similar workplace abuses will cooperate with each other, and bolster each other's claims for legalization because of their victim status. This is the first step in garnering rights for a group of workers, assuming that legalization provides sufficient protection from future abuse to risk stepping forward with a claim.

Another virtue of the class action mechanism in U visa provisions is that it addresses systemically the issue of labor exploitation. Group certification allows workers to collaborate with each other to publicly denounce employer practices. The alternative—individual adjudication—masks the systemic nature of employer schemes involving crimes such as debt peonage, involuntary servitude, or sexual discrimination offenses. A class mechanism would allow labor and employment agencies to focus on the employment structures that facilitate exploitation of immigrant workers. It would create a pool of workers from which federal agencies could draw testimony about unlawful employment practices. Moreover, it would fulfill the legislation's purpose of protecting victims by targeting the exploitative practices that affect groups of workers.

In the *Caesars Palace* harassment/rape case, for example, had the EEOC filed a class action complaint, or one on behalf of the Jane Doe undocumented victims, these victims could have sought U visa status with the EEOC's assistance.²⁸⁵ More importantly, victims with undocumented immediate relatives could seek U visa status for their undocumented spouses and children, whose claims are derivative to those of the principal victim.²⁸⁶ Although

285. See *supra* notes 201–03 and accompanying text.

286. See 8 U.S.C. § 1101(a)(15)(U)(ii) (2000) (allowing derivative status for relatives of enumerated crime victims when necessary to avoid extreme hardship); Eligibility for “U” Nonimmigrant Status, 72 Fed. Reg. at 53,036–37 (to be codified at 8 C.F.R. § 214.14(a)(14)(i)) (providing for derivative status when the direct victim is deceased, incompetent, or incapacitated); *id.* at 53,039 (to be codified at 8 C.F.R. § 214.14(f)(1)) (allowing an alien who has been granted U-1 status to petition for derivative status for certain relatives).

the regulations remain silent about whether a victim must be undocumented, the purpose of the Act in preventing labor exploitation would certainly continue to be met if undocumented immediate relatives of victims in mixed status families were allowed U visa nonimmigrant status.

a. Remove the Caps on TVPA to Accommodate the Numbers of Exploited Workers in Brown Collar Industries

Currently, the INA caps U visas at 10,000 per year.²⁸⁷ Although the current visa caps have not been met in any year since the implementation of the TVPA in 2000,²⁸⁸ the enactment of regulations and the implementation of an immigration form and process for adjudicating augur an increase in the number sought. Moreover, if the focus of the program was expanded to more traditional labor and employment settings, the program's capacity would need to expand. Legal scholar Orde Kittrie notes that the visa cap does not nearly cover the estimated number of immigrant crime victims every year.²⁸⁹ The fact that T visas are capped at 5000 and U visas are capped at 10,000 means that less than ten percent of the estimated 200,000 immigrant crime victims each year can take advantage of this legalization opportunity.²⁹⁰ Even though T and U visas provide a path to citizenship, and, therefore, full participation in civil society, the law enforcement objective of the statute is reflected in the limited number of visas available. Kittrie argues that the U visa path to legalization is too limited to make an impact on the number of affected victims.²⁹¹ The simple fix is to increase the caps on the number of victims allowed to legalize as a result of their crime victim status. A fix that would interfere less with the current scheme and, at the same time, advance the purpose of the Act of preventing labor exploitation would count only the first principal victim to step forward in a group workplace situation; the rest would be considered

These provisions create a series of anomalies that are beyond the scope of this article, but which deserve mention as possible complications in a strategy to confer benefits on immediate relatives of a victim who is not herself undocumented.

287. 8 U.S.C. § 1184(p)(2) (Supp. V 2005).

288. FACT SHEET, *supra* note 118.

289. See Kittrie, *supra* note 5, at 1465–66.

290. See *id.* at 1464–65.

291. *Id.* at 1465.

as derivatives, who are not counted against the cap in the typical U visa situation.²⁹²

b. Provide an Expedited Method of LPR and Citizenship Status to Lessen the Time that it Takes for a Victim to Become Involved in the Civic Life of His or Her Community

For eligible crime victims, the U visa application process currently takes approximately six months.²⁹³ Once a U visa applicant receives nonimmigrant status, she must wait three years to adjust status to lawful permanent resident.²⁹⁴ A lawful permanent resident must then wait five years to apply for citizenship.²⁹⁵ This means that the time between the victimization and the point at which a victim has citizenship rights can last from eight to nine years. This period of incorporation is exceedingly long, especially if the goal of the Act is to protect victims from re-victimization by helping them come out of the shadows of American existence. A more effective way of avoiding a shadowed existence for victims is to expeditiously integrate them in the civic life of their communities. Workers especially need to perceive that they can participate actively and freely in the democratic affairs of their community in order to strengthen collective efforts.

c. Provide a Private Right of Action for U Visa-Eligible Victims

Both Title VII of the Civil Rights Act of 1964, as amended, and the FLSA provide for private rights of action against employers who violate the statutes.²⁹⁶ Inserting a similar type of private

292. See 8 U.S.C. § 1184(o)(2)(B) (Supp. V 2007) for a description of how derivatives do not count against the 10,000 U visa cap.

293. This estimate is based on the author's experience with U visa deferred action filings. The recently enacted regulations may speed the process, although the Vermont Service Center, the processing unit for U visa applications, indicates a processing time of more than six months for related I-360 petitions for domestic violence victims. See USCIS, *Processing Times and Case Status* <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=189cf48f42466110VgnVCM1000004718190aRCRD&vgnnextchannel=54519c7755cb9010VgnVCM10000045f3d6a1RCRD> (last visited Feb. 13, 2008).

294. 8 U.S.C. § 1255(m)(1) (Supp. V 2005).

295. 8 U.S.C. § 1427(a) (2000).

296. See 29 U.S.C. § 216(b) (2000); 42 U.S.C. § 2000e-5(f)(1) (2000). *But see* Alder v. Moore, 527 U.S. 706, 712 (1999) (finding the FLSA's private right of action provision inapplicable to state employers on account of the Constitution's grant of sovereign immunity to the States).

right of action for crime victims in the workplace (as well as in the domestic violence context) would give victims further incentive to come forward with claims, which, in turn, will help eradicate the more exploitative conditions that exist in brown collar and other immigrant-dominated workplaces.

A similar private right of action was inserted into the TVPA for trafficking victims in 2003.²⁹⁷ It provides a civil remedy for trafficking, which ultimately gives a trafficking victim much more control in the prosecution of cases.²⁹⁸ While the U and T visas confer access to the political community through legal status, a private right of action “has the broad potential of augmenting a [crime victim’s] claim to membership in the political community through enforcement of individual civil rights.”²⁹⁹

With the type of prosecutorial control that trafficking victims currently exercise, U visa-eligible crime victims can incorporate private lawsuits into a broader strategy of targeting and eliminating exploitative work conditions, especially in particularly egregious workplaces. For example, in the trafficking context, a private right of action gives plaintiffs the ability to develop the parameters of each of the elements of severe forms of trafficking. The criminal prosecution of trafficking is currently limited by the Supreme Court’s holding in *United States v. Kosminski*, which requires coercion through actual or threatened use of physical force or the legal process against the victim.³⁰⁰ A civil suit under the trafficking statute would give plaintiffs the opportunity to litigate the different forms of coercion including psychological coercion, that lead to involuntary servitude or debt peonage.³⁰¹ In the civil context, U visa-eligible victims can test the parameters of both the federal law and the various state laws that have defined “trafficking” and “involuntary servitude.”

297. See Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 4, 117 Stat. 2875, 2878 (2003) (codified as amended at 18 U.S.C. § 1595(a)(2000)).

298. See Kathleen Kim & Kusia Hreshchyshyn, *Human Trafficking Private Right of Action: Civil Rights for Trafficked Persons in the United States*, 16 HASTINGS WOMEN’S L.J. 1, 4 (2004).

299. *Id.* at 5.

300. See *United States v. Kozminski*, 487 U.S. 931, 952 (1988). *But see* *United States v. Marcus*, 487 F. Supp. 2d 289, 302 (E.D.N.Y. 2007) (refusing to adopt *Kozminski*’s interpretation of the TVPA on account of Congress’s enactment of 18 U.S.C. § 1589); *United States v. Bradley*, 390 F.3d 145, 150 (1st Cir. 2004) (“Section 1589 was intended [] to counter [*Kozminski*].”).

301. See Kim & Hreshchyshyn, *supra* note 298, at 34–35.

A private right of action would also empower crime victims to seek remedies that neither the criminal justice system, labor and employment law, nor the tort law scheme can seek directly. For example, in the *DeCoster* case, in which female employees were trafficked and sexually assaulted,³⁰² the EEOC could have sought compensatory and punitive damages based on the women's pay scale at the time of the violations.³⁰³ It is less clear that the women would have been able to recover higher punitive awards than the current Title VII caps for the sexual assault claims that were also criminal offenses³⁰⁴ or that they would have been able to recover such damages in a criminal prosecution. A private right of action under a U visa scheme would have allowed such recovery.³⁰⁵

Most importantly, a private right of action would complement the legalization framework by granting broader access to a legal system than traditionally available to most newly arrived immigrants.

B. *Incorporating U Visa Eligibility Screening Procedures into Labor Department and EEOC Investigation Protocols*

Traditionally, neither the DOL nor the EEOC have made it a practice to seek information about the immigration status of claimants that file charges with either agency. The rationale for not seeking immigration status information is two-fold. First, both agencies maintain the position that they are not prohibited from seeking redress for undocumented workers. After the Supreme Court issued its decision in *Hoffman*, each agency issued its interpretation of the effects on their operations. Both opined that the decision had no effect on their authority over employer violations that concerned undocumented workers.³⁰⁶ Because

302. See *supra* notes 154–57 and accompanying text.

303. See 42 U.S.C. § 1981(a) (2000).

304. See *id.* § 1981a(b)(3) (2000).

305. Kim and Hreshchyshyn make a similar argument in favor of the private right of action for T visa recipients. See Kim & Hreshchyshyn, *supra* note 298, at 16. (“While a criminal court cannot order non-economic damages, civil litigation can achieve substantial deterrence of trafficking activity through high punitive awards.”).

306. See, e.g., FACT SHEET #48, *supra* note 142 (“The Supreme Court’s decision does not mean that undocumented workers do not have rights under other U.S. labor laws. . . . The Department’s Wage and Hour Division will continue to enforce the FLSA and MSPA without regard to whether an employee is documented or undocumented.”); RESCISSION OF ENFORCEMENT GUIDANCE, *supra* note 158 (“The Supreme Court’s decision in *Hoffman* in

there is no need for the information, both agencies instructed their investigators not to seek the information unnecessarily.³⁰⁷ Second, because both agencies are subject to Freedom of Information Act requests,³⁰⁸ the danger for each agency was that the gathering of such private information during an investigation would result in information unnecessarily being made public.

Because the U visa interim regulations specifically mention the EEOC and the DOL as criminal investigating agencies that can provide LECs to cooperating crime victims, both agencies should revisit their "don't ask don't tell" policies with respect to immigration status. Each agency should create a protocol for gathering the information at some point soon after an investigation reveals employment and labor violations that parallel the enumerated criminal activity in the U visa provisions. This likely means that a separate meeting about immigration status should be introduced into an investigator's protocol after an allegation and a response have been received. It could be that, in the case of the EEOC, the meeting occurs before mediation so that the employee knows the possibility of legalization exists, and she need not fear further investigation or discovery should the case go forward. Alternatively, an agency could simply provide LECs and immigration information across the board, recommending to all parties that they seek immigration-related advice. Either way, the protective purpose of the U visa statute, as well as the proposed rights-conferring function of the provision, can be achieved.

CONCLUSION

This article has shown the power of the U visa in creating pockets of protection among immigrant workers who suffer workplace abuses, whether or not those abuses result in criminal prosecutions. The U visa can also provide the foundation for uniting workers traditionally left out of collective activity in the workplace because it provides otherwise unavailable protection

no way calls into question the settled principle that undocumented workers are covered by the federal employment discrimination statutes and that it is as illegal for employers to discriminate against them as it is to discriminate against individuals authorized to work.").

307. See RECISSION OF ENFORCEMENT GUIDANCE, *supra* note 158.

308. See 5 U.S.C. § 522(f)(1) (2000).

from obstruction of justice or attempts to use a worker's immigration status to retaliate or otherwise intimidate workers in a discrimination or labor case. The U visa regulations have made it explicit that eradicating labor exploitation is a key component of the U visa provision.³⁰⁹ By specifically including both the EEOC and the DOL as examples of law enforcement agencies tasked with providing certifications to cooperating victims, the regulations open the door to a potentially empowering legalization mechanism for undocumented workers. With a few fixes, the U visa could very well encourage the type of worker solidarity that exploitative workplaces require for change.

309. See New Classification for Victims of Criminal Activity; Eligibility for "U" Non-immigrant Status, 72 Fed. Reg. 53,014, 53,014 (Sept. 17, 2007).
