Chapter Seven

Laborers or Criminals? The Impact of Crimmigration on Labor Standards Enforcement

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> Soon after Alabama passed its crimmigration law in the Spring of 2011, an undocumented immigrant worker named Hortensia felt its impact. When she was not paid for her landscaping work, she attributed her employer's behavior to Alabama's crimmigration law. As she stated, the law "gives him the power ... You're listening on the TV and the radio, knowing how little we can defend ourselves as immigrants now.... [T]here is no one to defend me." She reported that it was not worth making a complaint about the failure to receive wages for the work she had performed. As she put it, "You can't fight with anyone if you aren't legal, and that's why he didn't pay us.... We haven't gone to the court because it's like we have no case because we're illegal. We're afraid to do it." (Southern Poverty Law Center, 2012, pp. 11–12)

As we examine the criminalization of immigration, commonly referred to as "crimmigration" (Stumpf, 2006), it is essential to consider its impact on other areas of law and policy that involve immigrants but are not traditionally thought of as formal elements of either criminal law or immigration law. Why? As Hortensia's story illustrates, crimmigration may unexpectedly affect protections and rights that relate to immigrants' experiences but come from other areas of law and policy. This chapter explores the impact of crimmigration on labor standards enforcement. By labor standards enforcement, the chapter refers mainly to the wage and hour, health and safety, anti-employment discrimination, and collective activity protections that emerge when an employee performs labor for an employer. At the federal level, the statutes that provide these rights include the National Labor Relations Act (1935), the Fair Labor Stan-

dards Act (1938), the Civil Rights Act (1964), the Occupation Safety and Health Act (1970) and the Migrant and Seasonal Agricultural Workers Protection Act (1983). Most of these federal protections have state counterparts that provide equal or greater protections. Thus, labor standards protections generally come from the labor and employment law regime and arise because of the existence of an employment relationship, regardless of immigration status. As this chapter will illustrate, the crimmigration dynamic threatens to negatively affect these longstanding and baseline workplace protections in a number of ways.

While crimmigration threatens the labor standards of immigrants and non-immigrants alike, the crimmigration threat is felt most acutely by those immigrant workers who labor in the United States without sufficient immigration authorization to do so ("undocumented workers"). Thus, the chapter will focus on crimmigration as it affects the significant number of undocumented workers in the United States. Hortensia is not alone. A recent study by the Pew Hispanic Center concluded that the number of undocumented immigrants in the United States labor force reached eight million in 2010 (Passel & Cohn, 2011, p. 17). Some analysts believe that this is a very conservative estimate and that the undocumented workforce is actually much larger (Feltman, 2008, p. 80). Undocumented workers are concentrated in low-wage jobs. Indeed, the percentage of undocumented workers is highest in the farming (25%), building, grounds-keeping and maintenance (19%), construction (17%) and food preparation and serving (12%) occupations (Passel & Cohn, 2009, p. 15). Some analysts estimate that undocumented workers constitute more than a quarter of the meatpacking and chicken processing industries in the United States (Ordoñez, Hall, & Alexander, 2010).

Undocumented workers merit special attention when examining crimmigration's effects on labor standards enforcement, not only because of their significant presence in low-wage industries. When compared to low-wage documented workers, undocumented workers experience violations of their labor standards protections at higher rates (Bernhardt et al., 2009). Some of the most widely-publicized and extreme forms of workplace law violations involving low-wage immigrant workers have come from the meatpacking and chicken processing industries. An immigration raid at Agriprocessor's Iowa meatpacking plant in May 2008, for example, exposed major violations of workplace protections. Among other things, the search warrant alleged extensive injuries, child labor violations, sexual harassment, employment discrimination and failure to pay proper wages (Preston, 2008). These working conditions are consistent with an earlier and widely-publicized Human Rights Watch report about working conditions in the meatpacking industry. The re-

port characterized jobs in the meatpacking industry as the "most dangerous factory jobs in the country" (as cited in Compa & Fellner, 2005). Injuries in meatpacking plants, according to the report, commonly include "cuts, amputations, skin disease, permanent arm and shoulder damage, and even death from the force of repeated hard cutting motions" (Compa, 2004, p. 29).

What Is Crimmigration in the Labor Context?

Many aspects of crimmigration have been aptly characterized by the other authors of this volume. Nonetheless, very few scholars and analysts have focused on the labor-related aspects of crimmigration. This chapter first describes several characteristics of the crimmigration phenomena that are unique to the labor context. In Part II, it then elaborates the underappreciated consequences of these aspects of crimmigration on undocumented workers' wage, health and safety, employment discrimination and collective activity protections (labor standards enforcement).

Both the federal government and subfederal governments (states, cities and other types of local governments) have brought crimmigration enforcement directly into the workplace in a number of ways. As a result, the nature of immigration enforcement in the workplace has increasingly included norms, procedures, enforcement tactics and sanctions from the criminal law context. In 1986, the federal government introduced crimmigration into the labor context for the first time. That year, the U.S. Congress passed the Immigration Reform and Control Act, commonly referred to by its initials, "IRCA" (1986). This long-debated federal legislation represented the first time that the federal government explicitly aimed to regulate immigration flows via the workplace, rather than solely at the borderlands and through other types of interior enforcement measures.

While IRCA's sanctions primarily targeted employers' behavior, this federal immigration law created new criminal sanctions for both employees and employers. The U.S. Congress did not make the act of working without immigration authorization an illegal act. Instead, through an amendment, it instituted criminal penalties for employees who knowingly use fraudulent documents to gain employment (IRCA, 1986, §1324c(a); Hoffman Plastic Compounds, Inc. v. N.L.R.B., 2002, p. 149). Thus, employees who provide false identification documents to their employers are subject to sanctions. These penalties add to the myriad other ways that criminal law intertwines with immigration enforcement measures against undocumented immigrant workers.

IRCA's verification requirements and sanctions, however, illustrate that employers are the primary focus of IRCA's enforcement measures. Before IRCA, employers did not have to check whether their employees had proper immigration authorization to work in the United States. Because of IRCA, employers must verify that each employee has proper immigration authorization to work through the use of an I-9 form or an electronic verification system (E-Verify). Employers also face potential civil and criminal sanctions for knowingly hiring an undocumented worker. Specifically, IRCA provides criminal sanctions for employers who have a pattern or practice of knowingly employing undocumented workers (§ 1324a(f), 1986). Employers who knowingly hire undocumented workers can be fined up to $3,000 for each undocumented worker and/or face imprisonment for up to six months (IRCA, § 1324a(f)(1), 1986). Along with these criminal penalties, employers can be charged with other kinds of crimes "such as document fraud or harboring unauthorized aliens, and [can be] subject to the relevant penalties for those violations" (Bruno, 2012, p. 5).

The federal government is not alone in its efforts to bring crimmigration enforcement into the workplace. Subfederal governments have also brought crimmigration into the labor context in recent years through a variety of immigration regulatory measures and workplace-based enforcement actions. The laws of a number of states, for example, contain criminal penalties for employers who employ undocumented immigrants. A few examples include Fla. Stat. Ann., §448.09, 2010, Va. Code Ann., §40.1-11.1, 2010, W. Va. Code Ann., §21-1B-5, 2010, Colo. Rec. Stat. Ann., §8-2-122(4), 2010, Idaho Code Ann., §44-1005, 2012 and Iowa Code Ann., §715A.2A 2010. In addition, some localities have entered into agreements with the federal government, often referred to as "287g agreements," which allow local law enforcement officers to enforce some elements of immigration law (Vazquez, 2011, p. 658; Illegal Immigration Reform and Immigrant Responsibility Act [IIRIRA], § 1357(g), 1996).

For both the federal and subfederal governments, crimmigration enforcement efforts in the workplace sometimes take the form of surprise raids of workplaces by law enforcement officers and civil or criminal arrests in the wake of those raids. After the large-scale immigration raid of Agriprocessor's meatpacking plant described above, several supervisors were arrested and almost 300 undocumented immigrant workers were convicted of both immigration and criminal charges. The majority of these workers were sentenced to five months in prison. Many of them were then deported from the United States upon the completion of their incarceration (Preston, 2008).

Immigration cases constitute a significant portion of the federal government's criminal prosecutions each year in the United States. In fact, just over thirty percent of all federal prosecutions involve immigration matters. This percentage is higher than the percentage for any other type of federal criminal prosecution. Not surprisingly, therefore, the Immigration and Customs Enforcement Agency (ICE) is now the most significant investigative branch of the U.S. Department of Homeland Security (Stumpf, 2008, p. 1589). As the chapter will elaborate upon in Part II, mounting crimmigration pressures on both employers and employees at the federal and subfederal levels threaten to affect labor standards enforcement in a number of ways. The potential consequences of crimmigration in the labor context are all-too-often underappreciated aspects of the crimmigration story.

What Are the Potential Consequences of Crimmigration in the Labor Context?

Crimmigration may affect labor standards enforcement because it alters the set of incentives of both employers and employees. Incentives and disincentives play an important role in the development and enforcement of laws in the United States. Indeed, laws largely intend to "regulate[] behavior by generating incentives" and thus do not rely exclusively on "the direct exertion of coercive force" (Cox, 2008, p. 387). Crimmigration creates incentives for bad apple employers to discriminate against job applicants that "look foreign." Crimmigration in the labor context also fosters employer incentives to reduce workers' collective action efforts and potential complaints about wages, health and safety, and employment discrimination through immigration enforcement threats. Similarly, it establishes disincentives for employees to come forward to government authorities to complain about their employers' violations of their workplace protections.

These incentives and disincentives are important to highlight because the fundamental rationale underlying workplace protections for wages, health and safety, anti-discrimination and collective activity is that the law should create disincentives for employers to fail to provide these protections and should create incentives for employees to come forward when their protections have been violated. Rather than relying on government inspectors to police workplaces, U.S. labor and employment law largely relies on the power of employer disincentives and on the workers themselves to act as "private attorneys general"

who come forward to notify government officials about potential violations of their rights (Griffith, 2011, pp. 431–36).

Crimmigration and Employer Discrimination

Crimmigration pressures from both the federal and subfederal levels may encourage risk-averse employers to steer away from Latino and other minority job applicants. This practice would violate employees' civil rights protections. As long as potential employees have proper work authorization, both Title VII of the Civil Rights Act and IRCA prohibit employers from favoring one national origin over another (Civil Rights Act, §2000e-2, 1964; IRCA, §1324b(a)(1), 1986). It is reasonable to conclude that if an employer faces potential criminal liability for hiring an undocumented worker, he or she may be nervous about hiring "foreign-sounding" or "foreign-looking" applicants who have proper work authorization. Instead of risking criminal liability, risk-averse employers may prefer to hire white, or "non-foreign-seeming," workers. In this way, crimmigration may unintentionally promote employment discrimination against Latino applicants and other minorities by creating problematic incentives to avoid hiring foreign employees.

The creation of additional burdens on employers in the immigration enforcement context encourages employment discrimination. When Congress enacted IRCA, it acknowledged that too many burdens on employers could lead to unwanted employment discrimination. As a result, it included a number of safeguards against employment discrimination based on national origin and citizenship status (IRCA, §1324b(a)(1), 1986). It also created an Office of the Special Counsel for Immigration-Related Unfair Employment Practices to enforce IRCA's employment discrimination protections. As I have argued elsewhere based on a review of IRCA's legislative history, "Congress arguably kept burdens on employers minimal, at least in part, to reduce incentives for employers to discriminate." Thus, the combined federal and subfederal crimmigration activity "raises the stakes for employers," creating additional incentives to discriminate against employees based on race, national origin and citizenship status (Griffith, 2011, p. 423). These incentives are in tension with Title VII of the Civil Rights Act as well as IRCA's protections against employment discrimination.

Crimmigration and Employer Retaliation

Crimmigration may affect labor standards enforcement by emboldening some bad apple employers to use immigration threats to retaliate against undocumented immigrant employees who are organizing collectively with their co-workers, or who may complain to government officials about violations of their workplace rights. The labor standards protections discussed here explicitly forbid employers from retaliating against employees who make complaints about potential violations of their wage, health and safety, anti-discrimination and collective activity protections (Civil Rights Act, §2000e-3(a), 1964; Fair Labor Standards Act [FLSA], §215(a)(3), 1938; Occupational Safety and Health Act [OSHA], §660(c), 1970; National Labor Relations Act [NLRA], §158(a)(4), 1935). Employers who retaliate against their employees by actually calling federal or subfederal enforcement officers, or by threatening to call these officials, endanger these baseline workplace protections.

Workers faced with the potential consequence of not only deportation, but also criminal sanctions, are more disinclined to join their co-workers in collective efforts to improve working conditions and to complain to government officials when their workplace rights are violated. As a federal appeals court judge put it, as compared to their documented counterparts, "undocumented workers confront the harsher reality that, in addition to possible discharge, their employer will likely report them to the [immigration authorities] and they will be subjected to deportation proceedings or criminal prosecution" (Rivera v. NIBCO, Inc., 2004, p. 1064). As a result, these workers are less likely to fulfill their crucial roles as private attorneys' general in the labor standards enforcement scheme.

The recent crimmigration trend to involve subfederal law enforcement officers in immigration enforcement threatens to be particularly problematic. Professor Stephen Lee has recently uncovered the ways in which some employers may use local law enforcement officers to retaliate against their undocumented immigrant employees. According to Lee, "crafty employers can report incompliant workers to local law enforcement officers" who then report the workers to federal immigration authorities. Thus, crimmigration enforcement by local officers further bolsters "the strong incentives employers have to report unauthorized workers at the first sign of labor-oriented activity" and has "begun to undermine the assertion of workplace-related rights" (2011 p. 1132).

Lee's invocation of a recent example from Tennessee illustrates this new subfederal crimmigration dynamic well (2011, pp. 1132–36). A cheese factory hired a number of undocumented workers and subsequently failed to comply

with wage laws to compensate these workers for their work. The workers engaged in collective activity at their workplace to try to pressure their employer to pay them for the work they performed. In response, the employer called in subfederal criminal law officers and reported that the workers were undocumented immigrants. The subfederal criminal law officers detained the workers and contacted federal immigration authorities.

While there are numerous anecdotal reports and examples in the case law of this practice by some bad apple employers (Lee, 2009, p. 1120; Rivera v. NIBCO, Inc., 2004, p. 1064), there is very little empirical data on the frequency of employer retaliation in the crimmigration context. A three-city survey conducted in 2009, however, illustrated that employers who retaliate in low-wage industries often retaliate by threatening to call immigration authorities when faced with collective activity in the workplace or potential workplace law complaints (Bernhardt et al., 2009, pp. 24–25). Moreover, according to the Human Rights Report about the meatpacking industry referenced above, employers too often take advantage of immigrants' "vulnerabilities," which include "limited English skills; uncertainty about their rights; alarm about their immigration status if they are undocumented workers" (as cited in Compa & Fellner, 2005).

Crimmigration and the Culture of Fear

Crimmigration may not only affect labor standards enforcement by creating problematic incentives for employers to engage in employment discrimination, by encouraging new forms of employer retaliation, or by bringing subfederal law enforcement officers into the mix. Crimmigration may also affect labor standard enforcement by further fostering a culture of fear in immigrant communities. In this way, crimmigration has a powerful symbolic effect even when it does not directly affect employers' behavior or specific immigration enforcement initiatives in the workplace. As Hortensia said in the opening paragraph, "because we're illegal ... [w]e're afraid to" complain about our employer's failure to pay us for the work that we completed. In her words, Alabama's crimmigration law "gives him [the employer] the power" to fail to pay his undocumented immigrant workers if he so desires (Southern Poverty Law Center, 2012, pp. 11–12). Undocumented immigrants' fear of coming forward and organizing collectively with fellow workers because of immigration consequences is noted extensively by scholars and worker advocates (Griffith, 2012, pp. 633–35).

Heightened fear among immigrants reduces their incentives to come forward when they experience even the most severe abuses of their workplace protections. It also affects their incentives to engage in collective activity and the overall bargaining power of workers vis-à-vis their employers. These trends further weaken organized labor's efforts in the workplace. Professor Hila Shamir's proposal to bring labor norms into anti-trafficking law has recently highlighted, in a different context, that the criminalization of immigrant workers increases fear among workers and weakens workers' bargaining power. As a response, she proposed an innovative and inclusive approach to trafficking law which "focuses attention on elements of the legal order that shape workers' bargaining power, such as labor and employment laws, national immigration regimes, criminal law, welfare law, and private law background rules" (2012, p. 94).

Discussion Questions

1. What are the specific ways that crimmigration law affects the labor context?
2. Are you convinced of this chapter's claim that crimmigration negatively affects labor standards enforcement? Why or why not?
3. Current comprehensive immigration reform proposals do not explicitly address immigration law's effects on the wages, working conditions and collective activity protections of immigrant workers. Should they? Why or why not?
4 Assume for the purposes of this final question that you believe that comprehensive immigration reform proposals need to address the problems raised in this chapter; what explicit proposals should be added to new legislation that could deal with the specific problems raised in this chapter?

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