

# MONITORING IMMIGRATION ENFORCEMENT

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*More than two-thirds of the unauthorized immigrant population—roughly 8 million out of 11.2 million—is in our nation’s workforce, and growing evidence suggests that unauthorized workers are more likely than their authorized counterparts to experience workplace-related violations. Although scholars have begun shifting their focus to the agencies empowered to regulate immigrants in the workplace, important questions remain unanswered. Why, for example, has the Department of Labor, our nation’s top labor enforcement agency, struggled to protect unauthorized workers against this exploitation despite the scope and seriousness of the problem? And why has Immigration and Customs Enforcement, our nation’s top immigration enforcement agency, resisted taking into account the labor consequences of their actions? Our ignorance is becoming increasingly indefensible given that agencies often have the final word within an immigration universe characterized by legislative stasis. A closer look reveals a peculiar dynamic: ICE has relatively little interest in regulating the relationship between employers and unauthorized workers, while the DOL has a relatively high interest but lacks the autonomy to effectively do so—a dynamic that tends to foster interagency conflict, ultimately enabling the problem of labor exploitation to persist. What is the way out? Borrowing the insights of administrative law scholars, this Article argues that increasing the ability of the DOL to monitor immigration enforcement decisions can help minimize the externalities that ICE actions ordinarily force the DOL to absorb. This monitoring framework constrains*

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*the ex ante stage of decisionmaking, complements existing immigration scholarship (which has tended to focus on ex post remedies like expanding the ability of the DOL to issue temporary visas), and pushes back on ICE's law enforcement culture (which has traditionally resisted the incorporation of labor norms). Moreover, the monitoring framework is able to track evolving problems of coordination and to identify emerging vulnerabilities as the Executive's immigration enforcement authority continues to grow and outpace the development of adequate constraints on the exercise of that authority.*

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## INTRODUCTION

More than two-thirds of the total unauthorized immigrant population—roughly 8 million out of 11.2 million—is in our nation's workforce,<sup>1</sup> and growing evidence suggests that unauthorized workers are more likely than their authorized

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1. See PEW RESEARCH CTR., UNAUTHORIZED IMMIGRANT POPULATION: NATIONAL AND STATE TRENDS, 2010, at 1 (2011), available at <http://pewhispanic.org/files/reports/133.pdf>. Although this class of noncitizens is often referred to by a variety of names, I use the term “unauthorized” because it avoids the untoward normative implications of the term “illegal” alien or immigrant and it better comports with the relevant statutory provision than the term “undocumented.” See 8 U.S.C. § 1324a(h)(3) (2006) (“[T]he term ‘unauthorized alien’ means, with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General.”).

counterparts to experience labor violations.<sup>2</sup> Determining where immigration law ends and where labor law begins can be difficult.<sup>3</sup> Scholars have recently begun grappling with questions related to the promises and the perils associated with the agencies empowered to regulate immigrants in the workplace.<sup>4</sup> This conversation merits greater attention given that agencies increasingly have the final word within an immigration system characterized by legislative stasis.<sup>5</sup> A closer look at the agencies populating this system reveals a contentious and negotiable set of relationships. This is an area of regulation filled with turf battles, where some agencies lose power<sup>6</sup> and others are created to fill vacuums,<sup>7</sup> and where agencies

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2. See CHIRAG MEHTA ET AL., UNIV. OF ILL. AT CHI., CTR. FOR URBAN ECON. DEV., CHICAGO'S UNDOCUMENTED IMMIGRANTS: AN ANALYSIS OF WAGES, WORKING CONDITIONS, AND ECONOMIC CONTRIBUTIONS 27 (2002), available at [http://www.urbanecconomy.org/sites/default/files/undoc\\_wages\\_working\\_64.pdf](http://www.urbanecconomy.org/sites/default/files/undoc_wages_working_64.pdf).

3. So persistent is this indeterminacy that even mere shifts in emphasis by experts are deemed noteworthy. Prior to being appointed Immigration and Naturalization Service ("INS") commissioner, Doris Meissner noted that in regard to the Immigration Reform and Control Act of 1986 ("IRCA"), "When enacted, employer sanctions were perceived as labor-related immigration law. In retrospect, it is increasingly clear that they are, and should be treated as, immigration-related labor law." Robert Bach & Doris Meissner, *Employment and Immigration Reform: Employer Sanctions Four Years Later*, in THE PAPER CURTAIN: EMPLOYER SANCTIONS' IMPLEMENTATION, IMPACT, AND REFORM 281, 291 (Michael Fix ed., 1991).

4. See, e.g., Jayesh M. Rathod, *Immigrant Labor and the Occupational Safety and Health Regime*, 33 N.Y.U. REV. L. & SOC. CHANGE 479 (2009); Leticia M. Saucedo, *Immigration Enforcement Versus Employment Law Enforcement: The Case for Integrated Protections in the Immigrant Workplace*, 38 FORDHAM URB. L.J. 303 (2010). For the most part, scholars have focused on the role that private organizations can play in facilitating the assertion of labor rights. See, e.g., Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503 (2007); Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407 (1995); see also, e.g., JANELLE S. WONG, DEMOCRACY'S PROMISE: IMMIGRANTS AND AMERICAN CIVIC INSTITUTIONS (2006); S. Karthick Ramakrishnan & Celia Viramontes, *Civic Spaces: Mexican Hometown Associations and Immigration Participation*, 66 J. SOC. ISSUES 155 (2010). But see Janice Fine & Jennifer Gordon, *Strengthening Labor Standards Enforcement Through Partnerships and Workers' Organizations*, 38 POL. & SOC'Y 552, 560-62 (2010) (advocating for a model of labor enforcement where public agencies partner with private organizations).

5. See Cristina M. Rodríguez, *Constraint through Delegation: The Case of Executive Control over Immigration Policy*, 59 DUKE L.J. 1787, 1796-1803 (2010) (describing the current immigration system as suffering from problems of "stasis").

6. After being lodged in the Department of Labor ("DOL") for the first half of the 20th century, the Immigration and Naturalization Service was transferred to the Department of Justice in 1940. Reorganization Plan No. V, 5 Fed. Reg. 2223 (June 14, 1940).

7. The INS was dissolved in 2002 and replaced by several new agencies within the newly created Department of Homeland Security. See Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended in scattered sections of 6 U.S.C.).

wrangle for supremacy and hurl accusations of sabotage at one another.<sup>8</sup> They even impersonate one another from time to time.

Consider the following examples. A cheese manufacturer in Tennessee knowingly hired several unauthorized migrant workers and then refused to pay them. The workers staged a protest, were detained by Immigration and Customs Enforcement (“ICE”), and eventually obtained U visas<sup>9</sup> to assist in the prosecution of the employer. Meanwhile, the U.S. Attorney filed charges against those same workers for using fraudulent social security numbers to obtain employment.<sup>10</sup> One hand takes what the other gives. In another case, unauthorized workers in Goldsboro, North Carolina gathered for what appeared to be a mandatory safety training conducted by the Occupation Safety and Health Administration (“OSHA”). Upon arrival, the workers were detained by ICE officials who had posted notices in a strategy of bait-and-switch, causing OSHA officials—who had no knowledge of the meeting—to immediately set out on a campaign to repair damaged relationships with the surrounding unauthorized community.<sup>11</sup> In still other cases, immigration officials have responded to employer “tips” and “leads” even where it is abundantly clear that the employer is trying to report (and thus deport) the very unauthorized workers it knowingly hired in the first place.<sup>12</sup> In these cases and others, immigration enforcement agency officials could have considered the labor consequences of their decisions but chose not to do so, while labor agency officials would have preferred to coordinate enforcement efforts but were powerless to force any such conversation.<sup>13</sup>

Against this backdrop, two questions concerning agency coordination emerge as central to solving the puzzle of workplace enforcement. First, why has the Department of Labor, our nation’s top labor enforcement agency, struggled to protect unauthorized workers against exploitative practices despite the scope and seriousness of the problem? And second, why has ICE, our nation’s top immigration enforcement agency, resisted taking into account the labor

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8. See KITTY CALAVITA, *INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S.* 113–14 (1992).

9. These are temporary visas, created under the Victims of Trafficking and Violence Protection Act, which provide to the victims of certain crimes in exchange for help prosecuting the perpetrator. See *Victims of Trafficking and Violence Protection Act of 2000*, Pub. L. No. 106-386, § 1513(a)(2)(B), 114 Stat. 1464, 1534 (codified as amended at 8 U.S.C. § 1101 (2006)).

10. See Monica Mercer, *Cases Highlight Competing Interests in Immigration Policy*, CHATTANOOGA TIMES FREE PRESS, Mar. 9, 2010, <http://www.timesfreepress.com/news/2010/mar/09/cases-highlight-competing-interests-in/>.

11. See Steven Greenhouse, *An Immigration Sting Puts Two Federal Agencies at Odds*, N.Y. TIMES, July 16, 2005, at A11 [hereinafter Greenhouse, *Immigration Sting*]; Steven Greenhouse, *U.S. Officials Defend Ploys to Catch Immigrants*, N.Y. TIMES, Feb. 11, 2006, at A8 [hereinafter Greenhouse, *Officials Defend Ploys*].

12. See Stephen Lee, *Private Immigration Screening in the Workplace*, 61 STAN. L. REV. 1103, 1120–23 (2009).

13. See REBECCA SMITH ET AL., *ICED OUT: HOW IMMIGRATION ENFORCEMENT HAS INTERFERED WITH WORKERS’ RIGHTS* 15–28 (2009), available at [http://nelp.3cdn.net/75a43e6ae48f67216a\\_w2m6bp1ak.pdf](http://nelp.3cdn.net/75a43e6ae48f67216a_w2m6bp1ak.pdf).

consequences of its actions?<sup>14</sup> The answers to these questions can be traced to a peculiar dynamic: ICE, whose primary mission is to target noncitizens for detention and deportation, has relatively little interest in regulating the employer–unauthorized worker relationship, while the DOL has a relatively high interest but lacks the autonomy to effectively do so. Although ICE and the DOL are both charged with the duty of regulating employers for hiring unauthorized workers, their relationship has largely been an asymmetric one. ICE has been able to effectively dictate the terms of our nation’s workplace enforcement strategy and has largely been resistant or indifferent to the labor consequences of its decisions. Taken together, these dynamics, especially when combined with other exacerbating factors,<sup>15</sup> tend to disrupt agency coordination and enable labor exploitation to persist.

Moreover, traditional administrative law fixes do not offer easy or obvious solutions to the problem of asymmetric enforcement authority in the workplace. For example, as administrative law scholars well know, the President is free to use his oversight and monitoring powers to coordinate the enforcement priorities of the various agencies within the executive branch of the federal government. And President Obama has, more than his predecessors, demonstrated a willingness to use this power to bring immigration enforcement goals in line with labor enforcement goals. This oversight power, combined with the election of a President sympathetic to the interests of unauthorized workers and the appointment of a Secretary of Labor who shares those sympathies, *should* spell the end of the Department of Homeland Security’s (“DHS”) triumph over the DOL and the displacement of labor interests in the workplace. Yet, there are plenty of signs that DHS officials, who are steeped in a work culture geared toward law-and-order methods of regulation, have resisted the President’s entreaty to consider the labor consequences of their enforcement decisions. Change at the top offers no guarantee that change will easily follow at the bottom, at least in the divided world of workplace regulation.

Another administrative law fix with intuitive appeal is agency splitting—the breaking apart of an agency and reallocation of authority. If the problem is that DHS tends to target unauthorized workers to the exclusion of the employers who hire and exploit these workers, then agency-splitting advocates would suggest

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14. Similar questions concerning mission orientation, enforcement discretion, and unauthorized migration could be posed of the U.S. Attorneys’ Offices. *See, e.g.,* Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1 (1971); Ellen S. Podgor, *Department of Justice Guidelines: Balancing “Discretionary Justice,”* 13 CORNELL J.L. & PUB. POL’Y 167 (2003). Still, the bulk of this Article focuses on the enforcement constraints imposed on ICE in order to minimize distractions from the primary purpose of this Article, which is to develop the monitoring framework in the context of workplace enforcement. Questions concerning how labor agencies interact with U.S. Attorneys’ Offices, and the consequences that flow from such interactions, are better left to be answered as a part of my larger project examining the intersection of labor, immigration, and criminal law. *See infra* Part IV.

15. In prior work, I address some of the consequences of allowing employers to screen their workers for immigration status. *See Lee, supra* note 12. This Article moves up the lens of analysis to focus on the agencies themselves.

transferring the latter power to labor agencies like the DOL, an agency with a mission orientation that might better accommodate an enforcement mandate involving employers. But past administrative experiments that even suggested that the DOL was empowered to directly regulate employers for immigration violations proved costly; often, labor officials ended up alienating unauthorized workers, the very cross-section of workers interagency collaboration should protect.<sup>16</sup>

What is the solution? In this Article, I argue that one potential solution to the persistent problem of asymmetric workplace regulation is interagency monitoring—empowering labor agencies, like the DOL, to monitor DHS to ensure that immigration officials account for the labor consequences of their enforcement decisions. Although immigration scholars are still struggling to understand the dynamics affecting agency interactions, this Article borrows insights developed by administrative law and other public law scholars who have been exploring these dynamics for years. In doing so, I explain that for most of its history, ICE has resisted targeting employers because doing so has rarely meshed well with its primary mission of detaining and removing noncitizens. Interagency monitoring provides an opportunity to achieve the kind of balancing act that immigration enforcement demands: It allows the DOL to indirectly inject workers' interests into the workplace enforcement process without incurring the costs that flow from a direct intervention.

Examining workplace enforcement through the lens of interagency monitoring offers at least three benefits to existing immigration scholarship. First, it provides a vocabulary and framework to help refine our understandings of why prior attempts by the Executive to coordinate agency actions have failed.<sup>17</sup> Developing a clearer picture of these coordination challenges is all the more important given that statutory reform remains elusive in this political environment. Second, it supplements the efforts made by a small but growing number of immigration scholars who have argued in favor of expanding the role of labor agencies in workplace enforcement. Although the details differ, the proposals offered by these scholars all share one common feature: expanding the ability of labor agencies to issue temporary visas to victims of workplace crimes.<sup>18</sup> When ICE investigates a workplace and arrests unauthorized workers, some or all of these workers may be entitled to temporarily (and perhaps permanently) adjust their status despite their having engaged in unauthorized work. These visas intervene at the *ex post* stage and act as a check against screening errors. Interagency monitoring offers an alternative vision that focuses on constraining DHS decisions at the *ex ante* stage with the hope that doing so will force ICE officials to meaningfully coordinate their enforcement efforts from the beginning and not later down the line as an afterthought. Third and finally, interagency monitoring offers an institutional design account of an area of law that has been

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16. See *infra* Part I.C.2.

17. See *infra* Part III.B.

18. See Kathleen Kim, *The Trafficked Worker as Private Attorney General: A Model for Enforcing the Civil Rights of Undocumented Workers*, 2009 U. CHI. LEGAL F. 247, 308; Leticia M. Saucedo, *A New "U": Organizing Victims and Protecting Immigrant Workers*, 42 U. RICH. L. REV. 891, 935–44 (2008).

scrutinized primarily for its substantive shortcomings.<sup>19</sup> Holding the substance of the formal law as a constant, this Article examines the pressures, incentives, and constraints affecting agency interactions and how these interactions in turn change the scope of relief available under labor law.

As this Article explains, the core of the problem is that ICE operates within an enforcement vacuum. For much of its history, ICE has been largely insulated against meaningful oversight as to its workplace enforcement decisions, enabling its officers to rely on tips, leads, and other information without considering whether an investigation enables a bad-actor employer to escape liability for labor violations or chills the reporting of labor violations by unauthorized workers. An *ex ante* solution, therefore, slows the process of moving from the receipt of information to implementing a full-blown investigation. For overzealous ICE officials, interagency monitoring induces a stop-and-think effect by requiring ICE officials to coordinate with the DOL officials who, by virtue of their worker-oriented mission, are focused on precisely those dynamics ICE officials are likely to resist or ignore. And for well-intentioned ICE officials who have no desire to allow immigration law to displace labor law, monitoring also offers the benefit of the DOL's expertise, which can counteract the blind spots that develop within ICE's field of vision.

To be clear, I am not suggesting that the *ex ante* solution should displace the *ex post* visa solution. The two strategies apply pressure at different stages of enforcement, and I see them as complementary. But the monitoring solution does offer something that the other model does not: it helps minimize the "downstream" effects of enforcement decisions.<sup>20</sup> In other words, ICE's unconstrained enforcement power has generated externalities that impact the DOL, chill the reporting of labor violations, and ultimately frustrate the DOL's ability to identify exploitative employers.

This Article proceeds as follows. Part I sets out to show that (1) in theory, ICE and the DOL are empowered to jointly regulate the workplace on relatively equal terms; but (2) in practice, workplace enforcement powers have been distributed asymmetrically between immigration and labor agencies, mostly because of the different informational challenges facing each agency; (3) a part of this pathology can be traced to the lack of effective oversight; and (4) traditional administrative law solutions, like executive oversight or agency splitting, do not present viable options. Taken together, these observations lead to the conclusion that the DOL and other labor agencies face near-insurmountable obstacles in detecting employers who exploit unauthorized workers, and this detection problem can be traced to ICE's ability to make enforcement decisions with little DOL input.

Of course, problems of interagency coordination are not new. In Part II, I show that similar regulatory problems in other contexts have been addressed through monitoring arrangements, where one agency monitors the decisions made by the lead agency. Specifically, this body of literature grapples with the problem

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19. See, e.g., Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1746–62 (2010).

20. See *infra* Part III.D.

of an agency shirking enforcement goals because those goals present a mismatch with its mission orientation.<sup>21</sup> In this scenario, officials in the lead agency resist, ignore, or fail to fully appreciate their secondary obligations for reasons of work culture or expertise (or both). The monitoring agency, therefore, seeks to remind the lead agency—either through gentle nudging or through the coercion of law—that they must fulfill enforcement obligations, even secondary ones.

Part III then examines the case of workplace enforcement through the lens of interagency monitoring. Here, I explain that the goal of regulating employers has presented a mismatch given ICE's primary mission orientation of identifying and removing noncitizens, an orientation that has proven to be fairly resistant to labor norms and goals. Over the course of the last quarter century, labor and immigration officials have made some efforts to coordinate their enforcement strategies. This Part also explains why worksite enforcement strategies continued to displace labor law despite these coordination efforts. As I explain, whether and to what extent immigration officials considered the labor consequences of their enforcement decisions was a matter that was largely left to self-regulation. Labor officials lacked the ability to monitor the process by which immigration officials moved from targeting a workplace to investigating it. This is precisely the sort of problem that interagency monitoring can help solve. By allowing the DOL to exercise oversight at the enforcement stage, immigration officials are forced to consider the secondary and complementary interests bound up in labor enforcement. I also identify and allay some concerns about expanding the DOL's role at the *ex ante* enforcement stage.

In addition to easing longstanding interagency conflicts, Part IV explains that the monitoring framework provides another benefit: It helps identify emerging vulnerabilities in workplace enforcement. The tensions that have characterized relationships between immigration and labor agencies will inevitably migrate as the number of agencies involved in workplace enforcement increases. Specifically, the growing involvement of criminal law enforcement officials—especially local law enforcement officers—creates more opportunities for bad-actor employers to suppress labor dissent *by way of* state criminal laws.<sup>22</sup> Although many scholars have done work at the intersection of labor and immigration law, and of immigration law and criminal law, I explain that one area that we can ignore only at our peril is the intersection of labor, immigration, and criminal law. I then conclude.

## I. ASYMMETRIC ENFORCEMENT AUTHORITY

For the last quarter century, our nation's interior immigration enforcement strategy has been fixated on employers and has tried to prevent them from hiring unauthorized migrants. This Part teases out one strand of this history

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21. One example to which these scholars often point is a pro-energy agency ignoring its congressionally imposed environmental obligations, with the solution being to empower pro-environmental agencies to act as a monitor—an agency that encourages (and in some cases forces) the lead agency to account for the environmental consequences of its decisions. *See infra* Part II.

22. *See infra* Part IV.



that has often been overlooked: Congress envisioned this strategy to be jointly implemented by immigration agencies *and* labor agencies. In practice, however, immigration agencies—first the Immigration and Naturalization Service and now ICE—have been able to dictate the terms of this interagency relationship. Moreover, traditional administrative fixes, like presidential monitoring and agency splitting, have proven to be ineffective.

#### *A. Workplace Enforcement and Interagency Coordination*

Congress passed the Immigration Reform and Control Act in 1986.<sup>23</sup> One of its central purposes was to target employers as a part of the federal strategy to deter unauthorized migration. Prior to 1986, employers could hire workers without regard to immigration status. Thereafter, employers were prohibited from hiring workers without first verifying their immigration status. Failing to carry out these verification duties could result in civil penalties, and knowingly hiring unauthorized workers could lead to criminal penalties.<sup>24</sup> The decision to target employers was grounded in the logic that prohibiting employers from hiring unauthorized migrants would disable the “magnet” that attracted unauthorized migrants in the first place.<sup>25</sup>

By disabling this magnet, Congress endeavored to both deter unauthorized migration and protect U.S. workers against the harm of depressed wages caused by an influx of unauthorized workers willing to work for less. Preventing employers from hiring unauthorized workers would dry up job opportunities, which would remove any incentive for the unauthorized worker to migrate in the first place. At the same time, regulating hiring decisions also constricted an employer’s ability to exploit workers—authorized and unauthorized.

Lawmakers were well aware of the administrative challenges of implementing the employer sanctions provision. Three in particular stood out. First, although IRCA’s sanctions provision applied to all U.S. employers, it would have been impossible for the INS to audit even a significant minority of U.S. employers.<sup>26</sup> Resource, time, and political constraints required the INS to make hard choices among a variety of potential enforcement targets. As a result, there

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

24. 8 U.S.C. § 1324a(a) (2006) (summarizing the grounds of liability); *id.* § 1324a(e)(4)–(5) (summarizing civil penalties); *id.* § 1324a(f) (summarizing criminal penalties).

25. For a more comprehensive history of IRCA and employer sanctions generally, see Lee, *supra* note 12, at 1110–13, 1126–37; Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193, 198–204.

26. This challenge persists today given the large number of unauthorized immigrants within U.S. borders. As Jeffrey Manns observes, “[ICE] lacks the manpower, resources, and means to track down on its own the vast majority of undocumented aliens who do not register.” Jeffrey Manns, *Private Monitoring of Gatekeepers: The Case of Immigration Enforcement*, 2006 U. ILL. L. REV. 887, 937.

was an overriding sense that the INS would and should target employers in those industries most dependent on unauthorized labor.<sup>27</sup>

A second concern was whether the INS was adequately equipped to effectively carry out IRCA's new enforcement mandate against employers. Up until that point, the INS's enforcement efforts focused primarily on unauthorized immigrants. Targeting employers meant that the INS staff needed to reorient their efforts to focus on citizens, and indeed, required changing and supplementing agency staff.<sup>28</sup> In the years immediately following IRCA's passage, the INS tailored its hiring priorities in order to build a staff with the requisite expertise to carry out this new mandate.

Third and finally, the legislative activity surrounding the passage of IRCA suggests that Congress anticipated coordination problems, and accordingly, created a regulatory scheme that involved collaborations across the administrative state.<sup>29</sup> The legislative history reflects a congressional desire for this new set of immigration laws to mesh with existing labor laws.<sup>30</sup> Equally clear was Congress's desire for the INS to work with the DOL in developing an enforcement strategy. Employers who sought out unauthorized workers often did so because such a workforce tended to be more compliant and less likely to assert labor rights.

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27. IRCA was largely based on the findings of the Select Commission on Immigration and Refugee Policy. *See Lee, supra* note 12, at 1133 n.109; *see also* U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST: THE FINAL REPORT AND RECOMMENDATIONS OF THE SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY (1981).

28. *See Lee, supra* note 12, at 1127 (describing the INS's preference for hiring high-achieving college graduates to replace former border patrol guards in order to foster a more professional and civil relationship with employers as it attempted to implement IRCA).

29. *See* Kati L. Griffith, *Discovering "Immigration" Law: The Constitutionality of Subfederal Immigration Regulation at Work*, 29 YALE L. & POL'Y REV. 389, 442-43 (2011).

30. The House Judiciary Committee Report explains:

It is not the intention of the Committee that the employer sanctions provisions of the bill be used to undermine or diminish in any way labor protections in existing law, or to limit the powers of federal or state labor relations boards, labor standards agencies, or labor arbitrators to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by existing law.

H.R. REP. NO. 99-682, pt. 1, at 58 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5662; *see also* H.R. REP. NO. 99-682, pt. 2, at 8-9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5757, 5758 ("[T]he committee does not intend that any provision of this Act would limit the powers of State or Federal labor standards agencies such as the Occupational Safety and Health Administration, the Wage and Hour Division of the Department of Labor, the Equal Employment Opportunity Commission, the National Labor Relations Board, or Labor arbitrators, in conformity with existing law, to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by these agencies. To do otherwise would be counter-productive of our intent to limit the hiring of undocumented employees and the depressing effect on working conditions caused by their employment.").

Therefore, given the likelihood that an employer who violates U.S. immigration laws (by hiring unauthorized workers) would also violate U.S. labor laws (by exploiting those workers), the legislative history strongly suggests that Congress intended for the DOL to play a complementary role in regulating employers.<sup>31</sup> Indeed, IRCA explicitly empowered the DOL to review an employer's immigration-related documents as a part of its labor enforcement efforts.<sup>32</sup>

Another provision further supports the conclusion that Congress intended for a collaborative process to prevail in the implementation of employer sanctions. IRCA contained a self-study reporting provision, which requires the President to produce a "comprehensive immigration-impact report" every three years.<sup>33</sup> The congressional commentary surrounding this provision reflects Congress's preference for coordinated enforcement efforts. The presidential reporting requirement was designed, in part, to remedy the informational problems associated with a decentralized immigration system that relied on four separate cabinet-level agencies to implement immigration-related policy.<sup>34</sup> Given the entrenched interests of each agency, the House Report observed: "Because of this diversification and the importance attached by each to its responsibilities, any attempt to establish meaningful flexibility in this country's immigration program is difficult."<sup>35</sup> After summarizing and bemoaning the various failed attempts to consolidate immigration authority into a single entity, the House Report concluded that the President's triennial findings would enable the political branches "to consider possible changes to them with the benefit of reliable and detailed data."<sup>36</sup> Therefore, the allocation of worksite enforcement authority to both immigration and labor agencies was driven in part to encourage agencies to coordinate their efforts to overcome the regulatory challenges attendant to a fragmented immigration system.

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31. The House Judiciary Committee Report notes:

In order to assist employers in meeting their responsibilities under this legislation, the Attorney General is required to develop and disseminate forms to employers, referrers and recruiters. These forms will then be executed by employers, referrers and recruiters, as well as the person employed or referred and retained for inspection by INS *and the Department of Labor*.

H.R. REP. NO. 99-682, pt. 1, at 56-57 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5660-61 (emphasis added).

32. See 8 U.S.C. § 1324a(b)(3) (2006) ("After completion of such form in accordance with paragraphs (1) and (2), the person or entity must retain a paper, microfiche, microfilm, or electronic version of the form and make it available for inspection by officers of the Service, the Special Counsel for Immigration-Related Unfair Employment Practices, or the Department of Labor . . ." (emphasis added)).

33. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 401(a), 100 Stat. 3359, 3440 (codified at 8 U.S.C. § 1364(a) (2006)).

34. See H.R. REP. NO. 99-682, pt. 1, at 89 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5693 (noting that immigration policies are carried out by the Departments of State, Justice, Health and Human Services, and Labor). Today, five cabinet-level agencies now regulate immigration with the creation of the Department of Homeland Security.

35. *Id.*

36. *Id.*

### *B. Asymmetric Enforcement Power*

Both ICE and the DOL lay claim to important regulatory authority over employers in terms of dealings with unauthorized workers. Under U.S. immigration laws, ICE has the power to punish employers for hiring unauthorized workers.<sup>37</sup> Under U.S. labor laws—most relevantly the Fair Labor Standards Act<sup>38</sup> and the Occupational Safety and Health Act<sup>39</sup>—the DOL has the power to punish employers for workplace violations such as the nonpayment of overtime pay or exposing workers to unsafe conditions. In theory, this regulatory overlap creates conditions amenable to the joint, robust, and balanced policing of the workplace. In practice, however, the regulation of the workplace has been skewed in favor of immigration enforcement goals. Labor enforcement goals, to the extent they are considered at all, are often relegated to being an afterthought. This asymmetric allocation of power has allowed ICE to dictate whether and to what extent labor enforcement goals are met. As I explain below, the DOL has been largely powerless to disrupt this arrangement because of the different information-related challenges facing each agency.

The DOL relies heavily on worker-initiated complaints to identify potential bad-actor employers. Therefore, a key part of the DOL's regulatory strategy involves conveying accurate information to unauthorized workers about the beneficial services it offers. For obvious reasons, ICE does not rely on (nor does it expect) unauthorized workers to report employers. The very nature of ICE's law enforcement mission often leads it to employ campaigns of *misinformation*—elaborate ruses designed to lure unauthorized immigrants out of the shadows and into the open for detention and deportation. The tension generated by these very different approaches often has the effect of sending mixed signals to unauthorized immigrants, which ultimately impedes the DOL's ability to reach and gain the trust of unauthorized workers harmed in the workplace.

Unauthorized immigrants do not often interact with public entities or other “law-wielding” entities. They avoid them. This, I am sure, surprises no one. But what might be underappreciated is the degree to which this distrust of immigration officials impedes the ability of “status-indifferent” or “status-neutral” public entities to help unauthorized migrants assert their rights. By “status-indifferent,” I mean those agencies that are interested in helping unauthorized immigrants assert their rights or obtain benefits to which they are entitled without regard to their immigration status. Several agencies and institutions have no interest in a person's immigration status, nor should they in the vast majority of cases. The challenge for these agencies, then, is to find ways to signal to

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37. 8 U.S.C. § 1324a(a)(1)(A)–(B) (2006) (prohibiting the hiring of “unauthorized” noncitizens and imposing a mandatory verification requirement on all employers). An employer may also be punished for recruiting unauthorized migrants for work. *See id.* § 1324(a)(1)(A)(iv) (subjecting to criminal penalties anyone who “encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law”).

38. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (2006).

39. Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651–678 (2006).

unauthorized migrants that receiving help and aid from these agencies will not lead to adverse immigration consequences.

Although immigration scholars are at the very early stages of developing a full picture of how unauthorized immigrants receive and sort information,<sup>40</sup> a patchwork of reports, studies, and articles provides an important and useful glimpse of the challenges agencies and other entities face in reaching unauthorized immigrants. Consider the following examples. The Census Bureau is housed in the Department of Commerce and carries out the decennial task of gathering information about the U.S. population and economy. Encountering information pertaining to an individual's immigration status is incidental to the Census Bureau's primary task of ensuring an accurate accounting of the national population. But unauthorized immigrants are often unsure of this fact, thus requiring the Bureau to actively work to convey to residents that any information pertaining to their unauthorized status will not be shared with ICE.<sup>41</sup> The costs of conveying this "friendly" message are borne in specific ways, especially as those messages confront the challenges of working across language differences. Even if an unauthorized immigrant is willing to complete a census survey, getting the process started requires having bilingual speakers. In multi-racial and multi-ethnic Queens, New York, for example, census workers have been forced to go out in groups that possess at least one Mandarin and one Korean speaker.<sup>42</sup>

State and local law enforcement entities have also grappled with the challenges of communicating with and responding to the needs of immigrant communities. Despite all of the attention that state and local entities have received for the anti-immigrant ordinances passed by certain localities,<sup>43</sup> the reality is much more complicated. Indeed, many state and local law enforcement officers have exhibited ambivalence toward the local enforcement of immigration laws. Although mainstream understandings of this issue tend to paint local law enforcement officials as openly embracing the responsibility of enforcing immigration laws,<sup>44</sup> the reality is that police departments are much more mixed on the issue. A 2008 national study surveyed police chiefs from all around the country and found that more than half of the respondents characterized gaining the trust of immigrant communities as a priority for fear that failing to maintain such trust

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40. See Adam B. Cox, *Immigration Law's Organizing Principles*, 157 U. PA. L. REV. 341, 387–89 (2008) (identifying some areas of immigration law that could benefit from a more robustly developed set of information policies in relation to immigrants).

41. See Fernanda Santos, *Door to Door, City Volunteers Try to Break Down Resistance to the Census*, N.Y. TIMES, Apr. 1, 2010, at A15 ("Illegal immigrants must be told, sometimes repeatedly, that the Census Bureau does not share information about individuals with any other government agency.").

42. See *id.*

43. See Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2055–56 (2008) (summarizing some recent efforts).

44. See, e.g., Randal C. Archibold, *Arizona Law Is Stoking Unease Among Latinos*, N.Y. TIMES, May 28, 2010, at A11.

would dry up community contacts, which are often the gatekeepers for investigating local street crimes.<sup>45</sup>

Banks have also been active in trying to pierce through the veil of distrust. Unlike the Census Bureau and local law enforcement agencies, whose interest in unauthorized migrants flows from a broadly-conceived public mandate, banks, as private actors, are interested in unauthorized immigrants for their potential as consumers of financial services.<sup>46</sup> Still, although banks are not public entities, they provide financial services that enable unauthorized workers to access and enjoy a more mainstream version of American social life. This, in part, explains why federal bank regulators have repeatedly stated that banks are not required to make distinctions on the basis of immigration status.<sup>47</sup>

In theory, expanding the distribution of information could help correct unauthorized migrants' mistaken (but understandable) belief that no public entity says what it means or does what it says. One might be tempted to conclude that the Census Bureau and the police need only get their message out and dial up their public relations campaigns. In other areas of the law, institutions—both private

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45. See SCOTT H. DECKER ET AL., ARIZ. STATE UNIV., IMMIGRATION AND LOCAL POLICING: RESULTS FROM A NATIONAL SURVEY OF LAW ENFORCEMENT EXECUTIVES 2 (2008), available at <http://ccj.asu.edu/research/immigration-research-section/current-project/immigration-and-local-policing-results-from-a-national-survey-of-law-enforcement-executives/view>. Sanctuary policies represent the most robust of this kind of local sentiment. A recent study by the Homeland Security Advisory Council confirms this finding. In a study evaluating the effects of the federal government's Secure Communities program, the Council observed that the program had unintended local impacts:

Secure Communities and other federal enforcement and removal programs do not operate in a vacuum. In many localities, police leaders have said that immigration enforcement policies are disrupting police-community relationships that are important to public safety and national security. Law enforcement experts have stated that the trust that exists between police and immigrant communities can take years to develop and can remain tenuous despite the hard work of local law enforcement agencies.

HOMELAND SEC. ADVISORY COUNCIL, U.S. DEP'T OF HOMELAND SEC., TASK FORCE ON SECURE COMMUNITIES FINDINGS AND RECOMMENDATIONS 24 (2001), available at <http://www.dhs.gov/xlibrary/assets/hsac-task-force-on-secure-communities-findings-and-recommendations-report.pdf>; see also Rose Cuison Villazor, *What Is a "Sanctuary"?*, 61 SMU L. REV. 133, 133-37 (2008).

46. Instead of seeking to build a trusting relationship with unauthorized migrants for the benefit of authorized immigrant and citizen members of the community, banks' profit-maximizing impulse has kept their focus squarely on the unauthorized. As Ezra Rosser notes, "Today big banks, hungry for new growth areas, are clamouring to offer wire-transfer services to immigrants." Ezra Rosser, *Immigrant Remittances*, 41 CONN. L. REV. 1, 32 (2008) (quoting *Into the Fold: Americans Without Bank Accounts*, ECONOMIST, May 6, 2006, at 76).

47. These regulators, for the most part, seem to be agnostic toward the issue of banking the unauthorized, but to the extent they support it, it seems that mainstreaming these financial relationships facilitates the detection of fraud and money laundering. See John Coyle, *The Legality of Banking the Undocumented*, 22 GEO. IMMIGR. L.J. 21, 44-45 (2007).

and public—often send signals that help decision-makers make better decisions.<sup>48</sup> But the challenge faced by entities like the Census Bureau, certain local police, and banks, is that when they send signals into the world, they can never be sure that they reach their intended audience. How can one tell whether someone is unauthorized, authorized, a citizen, or a noncitizen? And with the patchwork of agencies carrying out immigration-related duties, unauthorized immigrants have a hard time discerning which signals are genuine and which conceal ulterior motives. Thus, a dilemma emerges: Status-blind agencies speak but can never be sure who is listening, while unauthorized immigrants are listening, but can never be sure who is speaking.

Even if a public entity is willing to internalize the costs of disseminating its friendly message, there is no guarantee that the intended audience will play the role of willing recipient. Immigrants can develop negative views and preconceptions toward public officials in their sending countries, which can foment distrust of U.S. officials. The challenge of breaking down the preconceived notion held by immigrants is not entirely unfamiliar to regulators. It is often articulated in terms of being a problem of culture or, more specifically, of immigrants having to overcome cultural barriers. Although there are dangers to relying too heavily on the explanatory powers of culture,<sup>49</sup> where an immigrant hails from a country where corruption pervaded public life and where police officers and bank officials were viewed as the causes and beneficiaries of this corruption, she might reasonably conclude that similar officials cannot be trusted in the United States.<sup>50</sup> In the parallel context of providing the benefits of police

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48. See Matthew C. Stephenson, *A Costly Signaling Theory of "Hard Look" Judicial Review*, 58 ADMIN. L. REV. 753, 767–75 (2006) (arguing that in the context of hard look review of administrative decisions, agencies can signal to reviewing courts their strong endorsement of a proposed policy by developing a high-quality record); see also Russell Korobkin, *In Praise of Law School Rankings: Solutions to Coordination and Collective Action Problems*, 77 TEX. L. REV. 403, 409 (1998) (arguing that one underappreciated function served by the *U.S. News & World Report* law school rankings is that they enable a high-achieving student to signal to future employers that "he is brainy or clever enough to be accepted by a more selective school").

49. Leti Volpp makes the important point that cultural explanations, especially those that characterize immigrants as deviant, can be problematic for reasons of essentialism. See Leti Volpp, *Feminism Versus Multiculturalism*, 101 COLUM. L. REV. 1181, 1186–87 (2001).

50. Indeed, this is a part of the guidance that police officers receive to prepare for policing in immigrant communities. For example, one set of guidelines explains:

A lack of trust towards government and public institutions, particularly banks, is shared by many immigrant groups. Because of the sometimes corrupt and unstable situations in their native countries, immigrants oftentimes do not trust banks to safeguard and protect their money. As a result, many immigrants keep their money and valuables at home or at their businesses, thus making them vulnerable to crime.

INT'L ASS'N OF CHIEFS OF POLICE, POLICE CHIEFS GUIDE TO IMMIGRATION ISSUES 21 (2007), available at <http://www.theiacp.org/Portals/0/pdfs/Publications/PoliceChiefsGuidetoImmigration.pdf>; see also DECKER ET AL., *supra* note 45, at 4 ("Gaining cooperation . . . from immigrants, whether in the country legally or not, can be a difficult issue for law enforcement, which may face distrust, fear, or hostility from such groups.").

protection, “immigrants are less likely than the general population to report to the police situations in which they have been victims or witnesses to crime.”<sup>51</sup>

Given these informational challenges, those agencies whose investigative responsibilities depend on the cooperation of unauthorized immigrants are at a distinct disadvantage to those agencies that can carry out their missions independent of such cooperation. The DOL is uniquely dependent on tips, leads, and other external sources of information for initiating workplace investigations. Although it possesses the authority to investigate employers based on internally developed information, the majority of the DOL’s investigations begin in response to complaints filed by workers alleging labor violations against their employers.<sup>52</sup> Therefore, should the practice of reporting bad-actor employers be chilled—which happened in the past in response to certain ICE enforcement strategies—one practical consequence would be that employers could violate the labor rights of their unauthorized workers knowing that there was little to no chance of being investigated. In this way, the regulatory power wielded by the DOL and ICE is asymmetric. In theory, each agency possesses independent and equally legitimate authority to regulate employer relationships with unauthorized workers, but the reality has been that ICE dictates whether and to what extent the DOL is able to punish employers for exploiting their unauthorized workers.

The enforcement practices of the previous administration provide the clearest example of such a dynamic. Under the Bush administration, ICE implemented an employer-friendly workplace enforcement strategy under which it largely ignored bad-actor employers and, in fact, welcomed tips and leads from employers even when the surrounding facts strongly suggested that they were reporting the very unauthorized workers they hired in the first place.<sup>53</sup> This practice, not surprisingly, had the effect of inducing a compliant and exploitable workforce, but it also exacerbated the DOL’s already difficult task of building trust with unauthorized workers. Indeed, as a general matter, the DOL has sought to distance itself from ICE for fear that it would be mistaken for sharing the same

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51. DECKER ET AL., *supra* note 45, at 4. Generally speaking, it is not uncommon for different groups to be informed by different networks of information. In a recent work, Russell Robinson makes just such claims in developing his theory of perceptual segregation—i.e., the phenomenon that blacks and whites can witness the same personal interaction, but come away with entirely different conclusions as to that interaction’s racial implications. See Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1120–22 (2008). He explains that blacks and whites not uncommonly develop notions and theories on race in different environments. *Id.* In describing a world in which blacks and whites access “racialized pools of information,” *id.* at 1122, Robinson’s observations help explain why an unauthorized migrant may live in the United States for years and still exhibit reluctance to trust or interact with public entities.

52. One U.S. Government Accountability Office report estimates that nearly three-fourths of all DOL investigations originate with a complaint. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-962T, FAIR LABOR STANDARDS ACT: BETTER USE OF AVAILABLE RESOURCES AND CONSISTENT REPORTING COULD IMPROVE COMPLIANCE 7 (2008), available at <http://www.gao.gov/new.items/d08962t.pdf>.

53. See Lee, *supra* note 12, at 1120–23.



interests as immigration enforcement agencies.<sup>54</sup> Without the benefit of workers calling in complaints, identifying specific bad-actor employers becomes all the more difficult, leaving the DOL with blunter investigatory instruments, such as random audits. Given the imperfect nature of the information flowing through immigrant communities, unauthorized migrants are just as likely to see these sorts of interagency collaborations as adverse to their interests rather than for what they really are.<sup>55</sup> These stories punctuate the point that, in many cases, an unauthorized immigrant need not have actually had a negative interaction with public entities to develop a distrust of them. Even second-hand experiences, those that come to the employee via organizational networks, can have the effect of pushing unauthorized immigrants deeper into the margins of society.<sup>56</sup>

### *C. The Shortcomings of Traditional Fixes*

In theory, the regulation of workplaces should be a joint endeavor with input from both immigration enforcement and labor enforcement agencies. In practice, however, such an arrangement has been hard to realize. Here, I explain why two traditional fixes—executive monitoring and agency splitting—provide incomplete solutions to the challenges of interagency coordination.

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54. In testimony before the House Subcommittee on Immigration and Claims, Richard M. Stana, Director of Justice Issues at the GAO, stated:

Labor officials will not delve into worksite immigration matters if it would have a detrimental effect on Labor's primary mission of enforcing worker protection laws. *If employees perceived that Labor investigators were trying to determine their immigration status and possibly report those who may be unauthorized to INS, it would have a "chilling effect" on employees' willingness to report workplace violations.*

U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-02-861T, IMMIGRATION ENFORCEMENT: CHALLENGES TO IMPLEMENTING THE INS INTERIOR ENFORCEMENT STRATEGY 7 (2002) (emphasis added), available at <http://www.gao.gov/new.items/d02861t.pdf>.

55. As one labor organizer observed, "Each agency attracts their [sic] own audience. For example, if the DOL holds a community meeting, no one will attend. [The community] sees the INS as government, and synonymous with all other government agencies." Shannon Gleeson, *Organizing for Immigrant Labor Rights: Latino Immigrants in San Jose and Houston*, in CIVIC HOPES AND POLITICAL REALITIES: IMMIGRANTS, COMMUNITY ORGANIZATIONS, AND POLITICAL ENGAGEMENT 107, 121 (S. Karthick Ramakrishnan & Irene Bloemraad eds., 2008) (second alteration in original).

56. Work on legal readings—the meaning that people attach to those legal structures based on their experiences and perspectives—helps clarify this point. In the context of workplace antidiscrimination policies, Fuller, Edelman, and Matusik explain that such policies are designed "to signal legitimacy" or "to send a message of compliance with law and some degree of fairness." Sally Riggs Fuller et al., *Legal Readings: Employee Interpretation and Mobilization of Law*, 25 ACAD. MGMT. REV. 200, 205 (2000). If the signaled message of fairness deviates from the employee's discrimination-imbued reality, the employee is likely to judge the employer (the legal structure) more harshly. *See id.* For this reason, state labor entities are not uncommonly seen as more trustworthy from the perspective of the unauthorized immigrant community. As Shannon Gleeson observes, "Compared to federal agencies, . . . state agencies are the preferred route because of their more robust protections, increased accessibility, and a lingering concern over potential information sharing between federal agencies and immigration authorities." Gleeson, *supra* note 55, at 119.

*1. Constraints on Executive Oversight*

Ordinarily, when an agency begins veering from its mission, the Executive can right the course through its oversight powers. But a variety of constraints prevent the Executive from effectively overseeing ICE workplace enforcement decisions.

As a constitutional matter, the President's primary form of oversight is his ability to influence the heads of agencies through the appointment power.<sup>57</sup> Administrative law scholars have explained that Presidents can influence agencies through a variety of sub-constitutional channels as well.<sup>58</sup> But as the history of workplace enforcement has shown, the Executive faces real constraints when trying to steer enforcement strategy.

Soon after taking office, President Obama offered some initial thoughts on the kind of reform he envisioned. Importantly, he acknowledged that employers often "us[e] illegal workers in order to drive down wages—and often times mistreat those workers."<sup>59</sup> But what was of particular interest to defenders of immigrant rights everywhere was what the President said next. Even while the nation awaited comprehensive immigration reform, President Obama assured us that administrative changes were afoot: "DHS is already in the process of cracking down on unscrupulous employers, and, in collaboration with the Department of Labor, working to protect those workers from exploitation."<sup>60</sup> The President has

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57. See U.S. CONST. art. II, § 2, cl. 2 ("[H]e shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by Law . . .").

58. For example, Presidents can issue formal directives, which are "generally styled as memoranda to the heads of departments[] instructing one or more agencies to propose a rule or perform some other administrative action within a set period of time." Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2285 (2001). In less formal ways, Presidents can nudge agency action with speeches, ceremonies, news conferences, and radio addresses. *Id.* at 2299. Kagan explains that this was particularly true of President Clinton:

In event after event, speech after speech, Clinton claimed ownership of administrative actions, presenting them to the public as his own—as the product of his values and decisions. He emerged in public, and to the public, as the wielder of "executive authority" and, in that capacity, the source of regulatory action.

*Id.* at 2300. Far from acting as a mere overseer of agency processes and policy choices, which some have argued best describes the role that the President ought to play in the administrative state, on Kagan's account, Presidents have increasingly acted like and held themselves out as "deciders." See Peter L. Strauss, *Overseer, or "The Decider?" The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 745 (2007).

59. President Barack Obama, Remarks After Meeting with Members of Congress to Discuss Immigration (June 25, 2009) (transcript available at [http://www.whitehouse.gov/the\\_press\\_office/Remarks-by-the-President-after-meeting-with-members-of-Congress-to-discuss-immigration](http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-after-meeting-with-members-of-Congress-to-discuss-immigration)).

60. *Id.* It remains to be seen how long this will last. Having assumed control of the House of Representatives, Republicans have signaled a desire to return to targeting

repeatedly signaled to defenders and advocates of immigrants' rights that his administration will use labor law and policy to inform immigration law and policy. As he envisions it, ICE and the DOL will come together and create a workplace enforcement regime that jointly regulates employers for "hiring and exploiting" unauthorized workers.<sup>61</sup> The numbers seem to bear out the President's vision. Since President Obama has taken office, the number of worksite raids has diminished. During fiscal year 2009, for example, the number of unauthorized immigrants arrested through worksite raids dropped 70%, from 5184 to 1644, while the number of employers who have been audited has doubled to 1444.<sup>62</sup> But this shift in workplace enforcement strategy is not nearly as strident as these numbers suggest. Three reasons should give us pause.

First, although President Obama's employer-centric approach to worksite enforcement better comports with IRCA's overall purpose than President Bush's worker-focused approach, the total numbers of investigations are still quite modest in historical terms.<sup>63</sup> Second, this renewed focus on employers must compete with the ongoing enforcement goal of targeting criminal noncitizens.<sup>64</sup> Put differently, even as the President shifts priorities within workplace enforcement policy, such a shift must work against an overall congressional preference to punish criminal noncitizens. This is a trend that began in the years immediately following the

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workers instead of employers. See Brian Bennett, *Republicans Want a Return to Workplace Immigration Raids*, L.A. TIMES, Jan. 27, 2011, <http://articles.latimes.com/2011/jan/27/nation/la-na-immigration-raids-20110127>.

61. See President Barack Obama, Remarks on Comprehensive Immigration Reform (July 1, 2010) (transcript available at <http://www.whitehouse.gov/the-press-office/remarks-president-comprehensive-immigration-reform>) ("That's why businesses must be held accountable if they break the law by deliberately *hiring and exploiting* undocumented workers. We've already begun to step up enforcement against the worst workplace offenders." (emphasis added)); see also U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, ICE STRATEGIC PLAN FY 2010–2014, at 6 (2010), available at <http://www.ice.gov/doclib/news/library/reports/strategic-plan/strategic-plan-2010.pdf> ("[E]nforcing the immigration-related employment laws is a critical component of border security. . . . Criminal investigations will increasingly focus on employers *who abuse and exploit workers* or otherwise engage in egregious conduct." (emphasis added)).

62. See N.C. Aizenman, *Latinos Increasingly Critical of Obama's Record on Immigration*, WASH. POST, Mar. 20, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/19/AR2010031904676.html>.

63. Testifying before Congress in October 2011, Deputy Director John Morton indicated that ICE had already investigated over 3000 workplaces. See *U.S. Immigration and Customs Enforcement: Priorities and the Rule of Law: Hearing Before the Subcomm. on Immigration Policy and Enforcement of the H. Comm. on the Judiciary*, 112th Cong. 5 (2011) (statement of John Morton, Director, U.S. Immigration and Customs Enforcement). By contrast, in 1990, the INS investigated nearly 10,000 employers. See Peter Brownell, *The Declining Enforcement of Employer Sanctions*, MIGRATION POL'Y INST. (Sept. 2005), <http://www.migrationinformation.org/Feature/display.cfm?id=332>.

64. Recent enforcement guidelines issued by DHS "reflect[] a renewed Department-wide focus targeting criminal aliens and employers who cultivate illegal workplaces by breaking the country's laws and knowingly hiring illegal workers." Press Release, U.S. Dep't of Homeland Sec., Fact Sheet: Worksite Enforcement Strategy (Apr. 30, 2009), available at <http://www.ice.gov/doclib/news/library/factsheets/pdf/worksite-strategy.pdf>.

passage of IRCA. Although the INS had a fresh mandate to target employers, with an increasing national focus on criminal immigrant offenders, and the relative ease with which those offenders could be identified and deported, the INS found itself in a position to obtain supplemental funding to pursue those immigrants tied up in drug trafficking. In 1988, just two years after the passage of IRCA, the INS received \$52.4 million to bolster its officer core and buy equipment to monitor the border.<sup>65</sup> In 1989, the INS received another \$16.9 million, also to be used toward drug enforcement—an amount that comprised 84% of the increase in congressional appropriations received by the INS that year.<sup>66</sup>

Third and finally, it is almost certainly the case that shifting workplace enforcement in a more labor-centric direction will require more than the occasional directive. The growing anecdotal evidence paints a picture of immigration agency officials resisting anything other than heavy-handed law enforcement tactics.<sup>67</sup> In other words, even as Presidents and high-ranking administration officials change, agencies and their bureaucrats largely stay the same. In the dawning weeks of the Obama administration, ICE officers raided Yamato Engine Specialists in Bellingham, Washington without notifying DHS's central office.<sup>68</sup> ICE had previously arrested an unauthorized immigrant with a criminal history who had worked at Yamato, which led to an investigation and the eventual raid. That same day, ICE issued a press release touting this raid as a part of ICE's "dramatically enhanced . . . efforts to combat the unlawful employment of illegal aliens in the United States."<sup>69</sup> Although DHS Secretary Napolitano eventually ordered a review of that incident, and of immigration enforcement guidelines generally, the

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65. See Jason Juffras, *IRCA and the Enforcement Mission of the Immigration and Naturalization Service*, in *THE PAPER CURTAIN*, *supra* note 3, at 33, 49.

66. *Id.* Today, federal immigration crimes comprise more than half of the federal criminal docket. See Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. L. REV. 1281, 1281–82 (2010).

67. This conclusion becomes even firmer when considering the historical ambivalence toward labor consequences evinced by ICE's predecessor agency, the Immigration and Naturalization Service. See CALAVITA, *supra* note 8, at 131–36.

68. In a similar act of defiance, during the early days of the Obama administration, a district director in the state of Washington ordered a raid of a manufacturing plant and issued a press release touting this act, despite the President's shift in workplace enforcement policy. See Manuel Valdes, *Napolitano Orders Review of Bellingham Immigration Raid*, SEATTLE TIMES, Feb. 25, 2009, [http://seattletimes.nwsourc.com/html/localnews/2008785918\\_webraid25m.html](http://seattletimes.nwsourc.com/html/localnews/2008785918_webraid25m.html). Upset by this administration's approach to immigration enforcement, the union representing ICE agents cast a unanimous "vote of no confidence" and demanded the resignation of ICE's director, John Morton. Jerry Seper, *Agents' Union Disavows Leaders of ICE; Sees Support for "Amnesty"*, WASH. TIMES, Aug. 10, 2010, at 1; see also Jerry Markon, *Calls For His Resignation 'Just Part of the Territory,' Says ICE Director Morton*, WASH. POST, July 19, 2010, at A13; Press Release, Am. Fed'n of Gov't Emps., Nat'l Council 118 – Immigration and Customs Enforcement, Vote of No Confidence in ICE Director John Morton and ICE ODPP Assistant Director Phyllis Coven (June 25, 2010), *available at* <http://www.cis.org/articles/2010/259-259-vote-no-confidence.pdf>.

69. Press Release, U.S. Immigration and Customs Enforcement, 28 Illegal Workers at Bellingham Company Arrested in ICE Operation (Feb. 24, 2009), <http://www.ice.gov/news/releases/0902/090224bellingham.htm>.

Bellingham example highlights how agencies—in the absence of costly oversight and top-down executive directives—will pursue “low-hanging fruit.”<sup>70</sup>

Questions of implementation have persisted throughout President Obama’s tenure in office. As Congress continues to suffer from legislative gridlock, the President has tried to achieve through administrative channels what Congress refuses to correct through statutory reform. For example, in August 2011, the President announced that DHS would review removal cases involving noncitizens without criminal records<sup>71</sup> and high-achieving, undocumented youth on a case-by-case basis.<sup>72</sup> Importantly, those noncitizens who receive the benefit of this exercise of discretion become eligible for work authorization.<sup>73</sup> While this policy shift sends a friendly signal to the President’s constituents—immigrants’ rights activists and sympathizers—the results of implementation have thus far been mixed. Predictably, implementation efforts have been slowed by skepticism, resentment, and resistance within ICE’s low-level workforce. A recent account suggests that agents have found the guidelines to be unwieldy and at odds with what they see as the fundamental purpose of immigration law—namely the detention and removal of noncitizens.<sup>74</sup> As a result, those noncitizens who have gathered community support and garnered media attention seem to be faring well under the policy shift,<sup>75</sup> whereas the more anonymous members of the

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70. Ginger Thompson, *Immigration Agents to Turn Their Focus to Employers*, N.Y. TIMES, Apr. 30, 2009, at A19; see also Valdes, *supra* note 68. ICE ultimately secured convictions against some of the corporate directors of Yamato Engine Specialists. See Press Release, U.S. Immigration and Customs Enforcement, Directors of Washington Company Plead Guilty to Felony Immigration Violations: Pair Admits They Allowed Submission of False Immigration Forms for Employees (Aug. 18, 2009), <http://www.ice.gov/news/releases/0908/090818seattle.htm>.

71. See *Frequently Asked Questions on the Administration’s Announcement Regarding a New Process to Further Focus Immigration Enforcement Resources on High Priority Cases*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, <http://www.ice.gov/doclib/about/offices/ero/pdf/immigration-enforcement-facts.pdf> (last visited Sept. 12, 2011) [hereinafter *FAQ on High Priority Cases*].

72. In this regard, the policy is a response to Congress’s failure to pass the DREAM Act, a bill that would allow high-achieving, undocumented college students and graduates to adjust their status. See Robert Pear, *Fewer Youths to Be Deported in New Policy*, N.Y. TIMES, Aug. 19, 2011, at A1.

73. See *FAQ on High Priority Cases*, *supra* note 71, at 2 (noting that while work authorization is not automatic, “[p]er longstanding federal law, individuals affected by an exercise of prosecutorial discretion will be able to request work authorization”).

74. The president of the American Federation of Government Employees, the union that represents ICE agents, has insisted that the guidelines “cannot be effectively applied in the field” and are objectionable because they “take away officers’ discretion and establish a system that mandates that the nation’s most fundamental immigration laws are not enforced.” Julia Preston, *Obama Policy On Deporting Used Unevenly*, N.Y. TIMES, Nov. 13, 2011, at A16. As one immigrant rights advocate observes, “This is a classic example of leadership saying one thing and the rank and file doing another.” *Id.*

75. For example, Manuel Guerra, who has been fighting removal for the past five years, was one of the first to benefit from the shift. See Julia Preston, *U.S. Issues New Deportation Policy’s First Reprieves*, N.Y. TIMES, Aug. 23, 2011, at A15. Guerra is also a high-achieving student, who has benefitted from the support of the wider “DREAMer” community. See Gabriela Garcia, *Great News! Dream Leader Manuel Guerra Will Stay in*

undocumented community remain at the mercy of individual officials in field offices.<sup>76</sup> Presidential oversight, therefore, provides a costly and incomplete mechanism for harmonizing the immigration and labor enforcement goals that arise in the workplace.

## 2. *The Limits of Agency Splitting*

Another prevalent mechanism for policing incompliant agencies is agency splitting. Where an agency has difficulties reconciling multiple enforcement responsibilities, splitting relieves the agency of the responsibility that most directly conflicts with the agency's primary mission orientation. This administrative fix resolves the problem of conflict and tension by transferring enforcement responsibilities to an agency that is unburdened by the conflict of interests. Most people associate agency splitting with the federal government's response to the 2010 BP oil spill,<sup>77</sup> but such an administrative fix is actually quite familiar to students and scholars of immigration law.

The history of immigration enforcement is filled with agency splitting and reorganization. In 1913, Congress abolished the Bureau of Immigration and Naturalization and transferred its authority to two newly created administrative entities: the Bureau of Immigration and the Bureau of Naturalization.<sup>78</sup> As the nature of the subdivision would indicate, the Immigration Bureau was relieved of any responsibility over those matters concerning the naturalization of noncitizens. In response to this reorganization, the head of the newly created Immigration Bureau commented that because the Bureau of Immigration and Naturalization "never took an active part in the enforcement of [naturalization] laws . . . the provision of law constituting the division of separate bureau is welcomed as a wise adjustment of the public business."<sup>79</sup> In 1933, U.S. immigration agencies underwent another significant reorganization. Twenty years after the Bureau of Immigration and Naturalization was divided into two separate agencies—one addressing immigration enforcement and the other overseeing naturalization—the two agencies were reconsolidated to form the INS.<sup>80</sup>

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*the US, Says Attorney*, CHANGE.ORG (Aug. 23, 2011), <http://news.change.org/stories/great-news-dream-leader-manuel-guerra-will-stay-in-the-us-says-attorney>.

76. See Susan Carroll, *New Immigration Policy Too Late for Sick Teacher: Man Deported to Spain Despite Clean Record, Job*, HOUS. CHRON., Aug. 27, 2011, at 1.

77. As a part of its responsibilities, the Minerals Management Service ("MMS") was empowered to oversee both the revenue-collection process for oil rigs and the enforcement of safety and environmental laws against those same rigs, goals that for obvious reasons tend to conflict. In response to the spill, the federal government split apart the MMS. John M. Broder, *U.S. to Split Up Agency Policing the Oil Industry*, N.Y. TIMES, May 12, 2010, at A1.

78. CONG. RESEARCH SERV., 96TH CONG., HISTORY OF THE IMMIGRATION AND NATURALIZATION SERVICE 19 (Comm. Print 1980) [hereinafter HISTORY OF THE INS].

79. See *id.* at 19–20.

80. See Exec. Order No. 6166 (June 10, 1933), available at <http://www.archives.gov/federal-register/codification/executive-order/06166.html>. While it is not entirely clear why our immigration agencies were reorganized, a few reasons can be inferred. For one thing, it apparently saved costs by evincing sensitivity to the growing

In the INS, the public found a sense of continuity as that agency came to regulate most of the major immigration-related activities. For 70 unbroken years, even as structural changes occurred at the margins<sup>81</sup> and as statutory law was revised and perfected, the same agency absorbed mandates, chased regulatory benchmarks, developed a mission orientation, and negotiated a work culture all its own. In 2002, the INS was dissolved under the Homeland Security Act.<sup>82</sup> Importantly, its dissolution was in part a response to the critique that an agency that fulfilled both “enforcement” and “services” functions could not manage either effectively.<sup>83</sup> By separating out these functions, Congress signaled in unambiguous terms that the primary purpose of the newly created ICE was the enforcement of immigration laws against noncitizens.<sup>84</sup> The reorganization ushered in by the

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wariness of governmental waste. *See* HISTORY OF THE INS, *supra* note 78, at 41 (“When INS was created, the annual budget of the two previously existing services was reduced by about \$1,500,000, necessitating a reduction in the workforce.”). For another, it seemed like a response to the growing concern over the administrative challenges of naturalization. *See id.* (noting that the reorganization “followed several years of concern by the Bureau of Immigration that naturalization standards should be tightened”).

81. In 1940, Congress transferred the INS into the Department of Justice and although the transfer left the INS intact, it marked a shift in thinking. *See* Reorganization Act of 1939, Pub. L. No. 76-19, 53 Stat. 561. Although the regulatory challenges arising from immigration were long conceived primarily in terms of work and labor, empowering the DOJ to manage the INS (and its resources) signaled very clearly that immigration posed an additional set of challenges associated with global conflict and national security. Beyond worrying about whether immigrant workers were driving down wages for U.S. citizen workers, the INS also faced the challenge of screening for and excluding, or detecting and deporting, any foreign elements that might surreptitiously cross U.S. borders to threaten the nation.

82. Homeland Security Act of 2002, Pub. L. No. 107-296, § 471, 116 Stat. 2135, 2205 (codified as amended at 6 U.S.C. § 291 (2006)).

83. *See* Eric Schmitt, *Vote in House Strongly Backs an End to I.N.S.*, N.Y. TIMES, Apr. 26, 2002, at A1. The INS was empowered to serve two distinct sets of functions—one involving what might be loosely characterized as an “enforcement” function and another pertaining to a “services” function. The Homeland Security Act of 2002 abolished the agency and reallocated authority along these lines. *See* 6 U.S.C. § 291(a) (2006) (abolishing the INS); *id.* § 542 (requiring the President to submit a reorganization plan regarding the agencies affected by the Act). Importantly, the Act prohibited the President from combining, joining, or consolidating the functions of the newly created Bureau of Citizenship and Immigration Services (“USCIS”) and Bureau of Border Security, the latter of which eventually became the U.S. Customs and Border Protection agency. *See id.* § 291(b). Our immigration system as currently designed, then, segregates enforcement and services functions so that ICE serves the former function and USCIS fulfills the latter.

84. After the passage of the House Bill approving the passage of the INS, then-Attorney General John Ashcroft remarked, “It is time to separate fully our services to legal immigrants, who helped build America, from our enforcement against illegal aliens, who violate the law.” Schmitt, *supra* note 83. Post-reorganization, ICE’s orientation surely reflects this initial sentiment: “As the largest investigative arm of the [DHS, ICE] aggressively uses critical immigration and customs authorities to protect the American people from the illegal introduction of goods and the entry of terrorists and other criminals seeking to cross our Nation’s borders.” U.S. DEP’T OF HOMELAND SEC., BUDGET-IN-BRIEF: FISCAL YEAR 2010, at 63 (2009), available at [http://www.dhs.gov/xlibrary/assets/budget\\_bib\\_fy2010.pdf](http://www.dhs.gov/xlibrary/assets/budget_bib_fy2010.pdf). It is worth pointing out that the enforcement–services distinction is

Homeland Security Act was, therefore, a rejection of an immigration system where an agency's multiple goals threatened to undermine the effective pursuit of either goal.

Against this history of reorganization, why not attempt a similar reorganization in the context of workplace enforcement? Why not simply transfer IRCA enforcement responsibility from ICE to the DOL? Some reform-minded individuals have floated this exact idea.<sup>85</sup> But in the context of workplace enforcement, employing this fairly typical administrative fix would lead to the counterintuitive result of likely *weakening* labor protections for unauthorized migrants. An administrative experiment explored during the Clinton administration suggests that this would almost certainly be the case. From 1992 to 1998, the INS and the DOL coordinated their worksite enforcement efforts in such a way that required the DOL to review employer records for immigration violations whenever

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a loose one because there are inevitably some cases that defy easy characterization. See David A. Martin, *Immigration Policy and the Homeland Security Act Reorganization: An Early Agenda for Practical Improvements*, 80 INTERPRETER RELEASES 601, 602 (2003) (“[S]ome functions, particularly inspections at the ports of entry (which can include attention to asylum claims), are not easily pigeonholed as either service or enforcement.”). As one commission on immigration reform observed:

[P]lacing incompatible service and enforcement functions within one agency creates problems: competition for resources; lack of coordination and cooperation; and personnel practices that both encourage transfer between enforcement and service positions and create confusion regarding mission and responsibilities. Combining responsibility for enforcement and benefits also blurs the distinction between illegal migration and legal admissions.

*Alternative Proposals to Restructure the Immigration and Naturalization Service: Hearing Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 105th Cong. 109–10 (1998) (statement of Susan Martin, Former Director, U.S. Commission on Immigration Reform); see also Martin, *supra*, at 602 (“Extensive reorganization of the INS has been debated and planned for since at least 1998. Virtually all plans called for some kind of split between immigration enforcement functions and immigration service functions.” (citations omitted)).

85. Peter Brownell has argued that empowering the DOL to play a “larger enforcement role” in formulating immigration-related workplace enforcement policies would improve workplace enforcement:

[B]ecause DOL has no mandate to enforce immigration laws directed against aliens, there would be no temptation to shift a greater share of enforcement resources toward that disenfranchised group. Rather, DOL has understood for some time that the effective enforcement of labor law requires that immigrants feel safe in calling to complain about labor standards violations.

Brownell, *supra* note 63. Robert Bach and Doris Meissner have made a similar suggestion. Bach & Meissner, *supra* note 3, at 299 (“The government’s modest level of resources for sanctions could be leveraged more effectively if DOL inspectors had enforcement authority similar to that of the INS.”). Meissner, of course, went on to become the INS commissioner in the Clinton administration.



it investigated worksites for wage and hour violations.<sup>86</sup> By engaging in the direct enforcement of immigration laws against individual employers, the DOL unwittingly undermined its ability to enforce labor laws against employers more generally.<sup>87</sup> Therefore, empowering the DOL would be an improvement in workplace enforcement to the extent that such an arrangement would better align enforcement goals with mission orientation. Unlike ICE, the DOL has a long history of regulating employers, so there would be no fear of agency shirking. But transferring enforcement authority to the DOL would solve one problem while creating another. Expanding the DOL's enforcement authority would deter many unauthorized migrants from reporting labor violations given that they would face an unattractive menu of options: They can either continue to suffer labor violations *or* report their employers to the DOL for these labor violations, which under this arrangement would also invite scrutiny of the employer's compliance with immigration law. Therefore, expanding the DOL's ability to directly regulate employers for immigration violations—which agency splitting would do—solves the shirking problem, but only at the cost of deterring unauthorized workers from reporting labor violations committed by their employers.<sup>88</sup>

## II. INTERAGENCY MONITORING

In the context of workplace enforcement, here is the central dilemma: Although ICE is empowered to regulate employers in a manner that accommodates labor goals, it tends to ignore these goals. Meanwhile, although the DOL enjoys joint regulatory power in theory, the allocation of enforcement authority is asymmetric in practice. Executive oversight can be costly, and agency splitting proves to be not much of a solution at all. Giving the DOL direct immigration enforcement authority would solve the agency-shirking problem, but only at the risk of chilling the reporting of labor violations, which on balance would probably *weaken* labor protections for unauthorized migrants.

But what if the DOL were given *indirect* enforcement authority? What if workplace enforcement authority remained with ICE, but the DOL and other labor agencies were empowered to monitor ICE's enforcement decisions, thus indirectly

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86. See Memorandum of Understanding Between the Immigration and Naturalization Serv., Dep't of Justice, and the Employment Standards Admin., Dep't of Labor (June 11, 1992), *reprinted in* 113 Daily Lab. Rep. (BNA) D-1.

87. See Michael J. Wishnie, *Immigrant Workers and the Domestic Enforcement of International Labor Rights*, 4 U. PA. J. LAB. & EMP. L. 529, 547–48 (2002).

88. Since 1998, the DOL has been prohibited from examining an employer's hiring records where the investigation arose from a complaint of labor violations. See 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) [hereinafter 1998 MOU], *available at* <http://www.nilc.org/immsemplmnt/emprights/MOU.pdf>. This information firewall helps insulate against the perception that labor agencies share with immigration agencies the sensitive immigration-related information of workers. See Philip Martin & Mark Miller, *Employer Sanctions: French, German and U.S. Experiences* 34–35 (Int'l Migration Branch of Int'l Labour Office, Working Paper No. 36, 2000) (noting that during the 1990s, "the Department of Labor provided few tips to the INS because it feared that workers would be afraid to cooperate in wage and other labour law investigations").

affecting the outcome? Over the years, a body of literature has emerged where scholars have grappled with questions of interagency coordination and have focused on whether tinkering with agency arrangements can affect how any one agency makes decisions.<sup>89</sup> This scholarship is useful for helping to solve the quandary presented by workplace enforcement. These scholars have framed the problem as follows: Because agencies are saddled with multiple and often conflicting goals, in some instances, empowering agencies (i.e., monitoring agencies) to monitor the decisions of other agencies (i.e., lead agencies) can help deter these lead agencies from pursuing certain enforcement or regulatory goals at the expense of others. Environmental law scholars have been particularly sensitive to this dynamic given that many pro-energy agencies, like the Federal Energy Regulatory Commission (“FERC”), would almost certainly make decisions that furthered energy goals at the expense of environmental ones if left to their own devices.<sup>90</sup> This theory tends to build on two interrelated observations: First, that principals (like the Executive, Congress, and courts) have had mixed success in influencing the actions taken by subordinate agencies;<sup>91</sup> and second, that the conflicting goals are so interrelated that transferring one goal to another agency is rendered impracticable.<sup>92</sup> Against this background, these scholars have argued that agencies can fill this oversight gap. J.R. DeShazo and Jody Freeman have demonstrated that enabling pro-environment federal and state agencies to serve an ex ante monitoring function has forced FERC to consider environmental goals that they would have otherwise ignored or of which they would have been ignorant.<sup>93</sup> In this example, the monitoring agencies remind FERC of its environmental obligations, thus preventing it from claiming ignorance and, at the very least, forcing FERC to justify its actions.<sup>94</sup>

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89. See, e.g., Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201; Anne Joseph O’Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CALIF. L. REV. 1655 (2006); Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749 (2003).

90. See J.R. DeShazo & Jody Freeman, *Public Agencies as Lobbyists*, 105 COLUM. L. REV. 2217, 2239–41 (2005) (describing how the FERC resisted or was blind to the environmental effects of their decisions on account of agency culture and expertise).

91. See Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENVTL. L. REV. 1, 9 (2009) (“Economists and political scientists have developed an extensive literature examining the problems of principal–agent interactions, with specific applications for governmental and non-profit organizations. That literature provides us with some important insights into the nature and logic of how agencies tasked with multiple goals are likely to function.”); see also DeShazo & Freeman, *supra* note 90, at 2241–52 (discussing the ways in which congressional, executive, and judicial oversight have proven to be ineffective in ensuring that FERC take into account the environmental consequences of its actions).

92. See Biber, *supra* note 91, at 33–34 (describing the difficulty of separating interconnected and interrelated goals).

93. See DeShazo & Freeman, *supra* note 90, at 2222–28.

94. See *id.* at 2272–80 (presenting empirical evidence that the passage of the Electric Consumers Protection Act, which required FERC to consult certain pro-environment agencies, affected FERC’s compliance with its environmental obligations). Eric Biber has pointed to examples where monitoring agencies wield more than hortatory

Interagency monitoring, therefore, sets out to solve a particular type of problem: Although Congress has empowered an agency to enforce a particular mandate, that agency has ignored or otherwise shirked its duty to enforce that mandate. A system of lateral oversight can help solve the shirking problem where vertical oversight has proven to be ineffective (for whatever reason) and where the mandate presents a mismatch with the agency's primary mission orientation. If agencies, over time, tend to evade their secondary obligations, one solution is to empower other agencies to act as monitors. Within the interagency monitoring framework, oversight responsibilities are assumed by an agency "that has a different mission . . . that . . . will not interfere with, and may even promote, innovation in the measurement of the 'secondary' goal."<sup>95</sup> As scholars have pointed out, lateral monitoring schemes have appeared throughout the administrative state and across decisionmaking schemes. In some cases, agencies monitor relatively open licensing processes,<sup>96</sup> while in other instances, agencies are charged with monitoring the traditionally more cloistered process of enforcement.<sup>97</sup> The relative ubiquity of such schemes highlights the importance of understanding how agencies interact with one another, and not just with the political branches, courts, and the public.

In assessing an agency's primary mission orientation, proponents of the interagency monitoring framework in other contexts have tended to focus on a few sources of information and agency characteristics. First, an agency's enabling act offers a natural starting point given that it provides the statutory justification for, and structural blueprints to, an agency's existence. It is particularly useful when examining it both within the context of the historical circumstances leading up to an enabling act's passage and against subsequent acts imposing additional duties onto the agency.<sup>98</sup> Because agencies absorb additional responsibilities over time,

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authority. In some instances, agencies have been subject to lawsuits for failing to comply with certain mandates. See Biber, *supra* note 91, at 45–57.

95. Biber, *supra* note 91, at 41. DeShazo and Freeman go a bit further and recommend giving monitoring duties to agencies whose mandates not only do not conflict with the decisionmaking agency's secondary goal, but "which derive relevant expertise and interests from their own statutory mandates, to lobby the implementing agency." DeShazo & Freeman, *supra* note 90, at 2221.

96. DeShazo & Freeman, *supra* note 90, at 2267–70.

97. For example, the EPA and the Food and Drug Administration ("FDA") are both empowered to regulate pesticides in food. By statute, the EPA is empowered to set the tolerable limits of "pesticide chemical residue," 21 U.S.C. § 342(a)(2)(B) (2006), while the FDA is empowered by regulation to recall or seize food, or impose penalties, where food contains such residue beyond tolerable limits, see 21 C.F.R. § 7.1 (2011). See also Keith Bradley, *The Design of Agency Interactions*, 111 COLUM. L. REV. 745, 750–51 (2011) (describing this joint regulatory scheme).

98. For example, in explaining the modern quandary that FERC faces, DeShazo and Freeman tell a story that begins with FERC's predecessor agency, the Federal Power Commission ("FPC"). Created by Congress in 1920—a time well before the emergence of the environmental movement—"the FPC's original statutory mission was unmistakably propower." DeShazo & Freeman, *supra* note 90, at 2236. Although much of the public today expects—and many environmental protection statutes require—those agencies to consider the harmful environmental impact of their decisions, this was not the case for much of those agencies' histories. Well before the advent of the environmental protection

an agency's mission orientation can change in response to shifting political winds and acts taken by subsequent Congresses. Assessing an agency's bureaucratic culture can also help fill in important details. Understanding how agencies and their officials understand themselves—and how they perceive other agencies and *their* officials—helps establish whether an agency exhibits preferences for certain types of enforcement goals over others.<sup>99</sup> Finally, an agency's mission orientation is often tied to the scope of its expertise. The FERC example is again instructive. For several decades in the middle of the 20th century, the FERC maintained an entire division of field personnel who were all professional engineers. By contrast, during this same period, the FERC contained no division devoted to fisheries or recreational interests that could weigh in on the environmental considerations associated with a particular licensing proposal.<sup>100</sup> In this sense, expertise captures an agency's capacity, as opposed to willingness, to take on and effectively implement additional duties.

A mismatch occurs when a particular enforcement goal contradicts or stands in tension with an agency's mission orientation.<sup>101</sup> The mismatch problem presents a reality where “there are multiple sets of interests that a policy cannot trade off against each other in a predictable way.”<sup>102</sup> The nature of the enforcement goals, and more importantly, the metrics used to measure the successful implementation of those goals, can exacerbate this phenomenon. Eric Biber suggests that over time, in the context of land management, enforcement distortions will emerge that favor producing timber because the quantifiable nature

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moment, it is clear that the FPC approached hydropower licensing decisions with a distinctly propower bent. As DeShazo and Freeman observe, the FPC sought to “develop[] hydropower to meet the needs of a growing economy,” and as history has shown, the majority of licenses the FPC ultimately approved occurred during this period. *Id.* at 2237–38; *see also* Biber, *supra* note 91, at 17–18 (explaining that the U.S. Forest Service was created at the turn of the 20th century primarily to engage in timber production, which is an objective that stands in tension with modern environmental goals of accounting for how timber production decisions might adversely impact diversity of wildlife and plant species, facilitate soil erosion, and taint scenery).

99. *See* Richman, *supra* note 89, at 786–93 (describing the career trajectories taken by federal investigative agents and federal prosecutors, the different acculturation processes involved in each, and how this difference can lead to culture clashes).

100. DeShazo & Freeman, *supra* note 90, at 2239. Creating no capacity to generate or absorb the insights regarding the environmental consequences of licensing decisions enabled the FERC to disregard this ambiguous set of duties in favor of pursuing a propower agenda.

101. One of criticisms levied against the FBI in the wake of 9/11 was the FBI's failure to gather intelligence. But the FBI's culture was much more primed to serve a traditional law enforcement function than it was to carry out an intelligence-gathering mission, and indeed, as an agency, it was predisposed to taking a less-than-robust approach to intelligence gathering. During the 1970s, abuses of civil liberties by the FBI had surfaced and as a result, it began steering clear of domestic intelligence activities. *See* Luis Garicano & Richard A. Posner, *Intelligence Failures: An Organizational Economics Perspective*, 19 J. ECON. PERSP. 151, 163–64 (2005).

102. Bradley, *supra* note 97, at 773.

of clear-cutting better lends itself to demonstrating agency success.<sup>103</sup> Producing timber generates a clear, unambiguous, and easily quantifiable outcome. By contrast, whether or not a particular parcel of land has retained its aesthetic beauty is an issue that can be resolved only through a subjective assessment relying on largely qualitative factors.<sup>104</sup>

The methods of interagency monitoring vary. Some are hortatory. Others subject the lead agency to the possibility of some greater set of consequences ranging from political embarrassment<sup>105</sup> to court-enforceable affirmative obligations.<sup>106</sup> But all interagency collaborations have the potential to create uncomfortable moments, which is a part of the point. Forcing agencies to work together pushes lifelong bureaucrats to confront their blind spots and biases and often demands that they justify an action that they would otherwise never think to explain.<sup>107</sup> These relationships can have a stop-and-think effect on agency officials and, over the long term, improve outcomes by introducing new perspectives, which can help fight groupthink and mitigate the possibility of capture.<sup>108</sup>

Of course, interagency collaborations are not always antagonistic and can evolve over time. What begins as an “unnatural act” can eventually establish a new “natural.”<sup>109</sup> Even while highlighting the cultural chasm that separates investigative agents from prosecutors, Daniel Richman cautions against “underestim[ing] the unifying influence of a shared commitment to ‘getting the bad guys,’ hardened by the adversarial process, nurtured by mutual respect and

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103. See Biber, *supra* note 91, at 25–27 (suggesting that the “readily quantifiable” task of overseeing timber harvests and the largely subjective task of preserving “scenic and aesthetic qualities” of affected lands interacted in a way that created a structural environment that increased the attractiveness of timber production).

104. See Biber, *supra* note 91, at 12–13. Luis Garicano and Richard Posner make a similar argument in the context of combating terrorism. Garicano & Posner, *supra* note 101, at 164 (noting that the FBI’s investigative success has traditionally been measured in terms of arrests and convictions, which matches up poorly with the enterprise of intelligence gathering given that success in that context involves detecting plots before such activity reaches the level of a prosecutable crime). The diminished capacity for oversight is often one of the trade-offs involved in disaggregating enforcement authority. While such a design handicaps a principal’s powers of oversight, it often creates a competitive environment among agents, which creates incentives for the agents to produce better outcomes while deepening and broadening their expertise. See Gersen, *supra* note 89, at 214–15 (arguing that judicial deference is one reward that might be offered to agencies in exchange for developing expertise in certain regulatory areas).

105. See DeShazo & Freeman, *supra* note 90, at 2235–36 (identifying political embarrassment as one consequence of an agency failing to fulfill a statutory mandate).

106. See Biber, *supra* note 91, at 52–57.

107. See EUGENE BARDACH, GETTING AGENCIES TO WORK TOGETHER: THE PRACTICE AND THEORY OF MANAGERIAL CRAFTSMANSHIP 232 (1998).

108. See O’Connell, *supra* note 89, at 1675–78 (discussing the potential benefits of having multiple agencies pursuing the same regulatory goal).

109. Eugene Bardach explains, “Interagency collaboration, the joke goes, is an unnatural act committed by non-consenting adults. Learning how to do it takes time and a willingness to make the effort—even a willingness to understand that a problem exists for which time and effort are required.” BARDACH, *supra* note 107, at 263.

need, and on occasion lubricated by alcohol.”<sup>110</sup> Ultimately, this highlights the malleable and context-specific nature of conflict in the interagency context. Although shared moral commitments and off-duty revelry may be enough to overcome the differences separating federal prosecutors and investigative agents, in other contexts more structured interactions may be needed in order to foster a genuine culture change.

### III. MONITORING WORKPLACE ENFORCEMENT DECISIONS

So far, I have endeavored to show that (1) workplace enforcement power is distributed asymmetrically between immigration and labor agencies, in significant part because informational challenges; (2) the most obvious administrative solutions are not viable options; and (3) similar regulatory problems in other contexts have been dealt with through interagency arrangements where one agency monitors the decisions of the lead agency. In this Part, I begin to make the case that similar arrangements can help solve the asymmetry endemic to workplace enforcement. I want to suggest that regulating the type of information ICE relies on can help minimize the likelihood that immigration law will be co-opted to displace labor law. I make this normative move with some level of trepidation. In particular, I am sensitive to the fact that there is still much to be learned in terms of how the DOL *actually* interacts with ICE and other immigration enforcement agencies.<sup>111</sup>

At the same time, what we *do know* about the labor conditions experienced by unauthorized workers and about the types of worksites that are investigated for the presence of unauthorized workers<sup>112</sup> strongly suggests that ICE officials would not have considered investigating a particular worksite but for the receipt of a tip or a lead. Moreover, President Obama’s shift in workplace enforcement—choosing, in principle, to harmonize immigration and labor law, instead of using the former to displace the latter—and the fading possibility of comprehensive immigration reform make it worthwhile to have the normative discussion to inform reform-minded individuals in a position to make prescriptive changes.

#### A. Mission Mismatch

In the context of workplace enforcement, the reality has been that ICE possesses a fair amount of autonomy in deciding how to implement this interior enforcement strategy. This has been true since at least the middle of the 20th

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110. Richman, *supra* note 89, at 792.

111. The most comprehensive examination of interagency coordination in the context of the immigration enforcement in the workplace is Kitty Calavita’s excellent work on the Bracero guestworker program, which was administered 50 years ago. *See* CALAVITA, *supra* note 8. Any modern insights we could extrapolate from Calavita’s fine study would be limited by both the sheer antiquity of that interagency experiment and the fact that the INS has since been dissolved and replaced by DHS.

112. *See* Lee, *supra* note 12, at 1120–23.

century, when the INS and the DOL (along with the Departments of State and Agriculture) jointly administered the Bracero guestworker program.<sup>113</sup>

Kitty Calavita's *Inside the State: The Bracero Program, Immigration, and the I.N.S.* provides perhaps the most detailed examination of the INS's inner workings, and in particular, how it "wrangled" with other agencies like the DOL over enforcement policies.<sup>114</sup> Calavita traces out the different fault lines cutting through our immigration system during the 1950s and 1960s. As she explains, the INS faced

a bureaucratic dilemma related to its unenviable mandate to control illegal immigration despite the powerful economic forces driving that migration. Securing growers' cooperation in using braceros rather than illegal workers—cooperation that was contingent on the INS providing growers with "a seemingly endless army of cheap, unorganized workers"—was the immigration agency's response to this institutional dilemma.<sup>115</sup>

Particularly illuminating was Calavita's review of the internal memoranda and internal reports exchanged and compiled during the administration of the program. These documents revealed clashing views of immigrants and the overarching purpose of immigration regulation. For example, the DOL perceived a general reluctance on the part of the INS to take seriously labor considerations attendant to the presence of unauthorized workers.<sup>116</sup> In the words of a former Deputy General Counsel, "The INS doesn't care about what labor unions think. By and large, it's a conservative organization."<sup>117</sup> By contrast, the INS was interested in working with the DOL but only to the extent that doing so could help keep the number of unauthorized migrants to a minimum.<sup>118</sup>

The kind of work culture an agency fosters and the management structures it selects may prevent agency staff from fully appreciating the urgency or significance of secondary goals. Since its creation in 1933, the INS employed deportation as a key strategy in the pursuit of unauthorized immigrants. Then in 1986, more than 50 years after its inception, the INS inherited the responsibility of

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113. Admittedly, the challenges of administering a guestworker program and an employer sanctions scheme are not identical. In particular, immigration officials can keep track of and monitor workers in guestworker programs, whereas IRCA's employer sanctions scheme relieves immigration officials of this duty by foisting onto employers the duty to screen and monitor workers. Still, the two programs pose similar regulatory challenges to the extent that both are subject to manipulation by employers. It is on this basis that I borrow observations about agency interactions developed in the Bracero context to explain similar interactions in the modern employer sanctions context.

114. See CALAVITA, *supra* note 8, at 113.

115. *Id.* at 9.

116. See *id.* at 145. "The INS reaction to unions was not confined to semantics," according to Calavita. *Id.* She explains that the INS willingly facilitated the entry of guestworkers to provide relief for growers facing striking workforces. *Id.*

117. *Id.*

118. In response to the gradual dismantlement of the Bracero program, INS began ramping up its efforts to detain and deport undocumented immigrants. Between 1965 and 1970, the number of apprehensions tripled. See *id.* at 151.

punishing employers for immigration-related violations as a part of the comprehensive changes generated by IRCA.<sup>119</sup> Put differently, IRCA posed a new enforcement challenge to the INS: It asked an agency, which had spent nearly half a century building an expertise on how to detain, exclude, and deport *noncitizens*, to begin regulating employers, who were almost always *citizens*.<sup>120</sup> Moreover, this set of enforcement targets wielded much more power and resources and, not surprisingly, demonstrated a greater ability and willingness to protest.<sup>121</sup> Taken together, these dynamics suggest that the task of implementing an employer-centric, interior enforcement strategy would require INS officials to expand the boundaries of their traditional mission orientation.

The goal of transforming INS's mission found something less than resounding success. During the years immediately following the passage of IRCA, the DOL sent referrals to the INS identifying employers who had been found to be in violation of labor laws, which is useful information given the strong association, within certain industries, between labor violations and immigration violations. But some studies of the early post-IRCA years noted that there was rarely any follow-up on these referrals, and it further suggested that a part of the reason may have been INS indifference or antagonism toward these referrals. Michael Fix and Paul Hill found that the DOL's complaint-driven approach to workplace investigation, for example, may not have meshed with many INS offices, which embraced a "police model" of simply raiding workplaces upon receiving a tip.<sup>122</sup> As one INS agent explained, "[The] DOL picks up paperwork violations, and we don't do paperwork violations."<sup>123</sup>

### ***B. Agency Coordination Without Agency Monitoring***

Here, I discuss two important attempts to coordinate immigration and labor enforcement activities. At a glance, these interagency arrangements evince

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119. Moreover, as I explain in other work, IRCA was the result of changing public attitudes toward employers. As the public became increasingly concerned with the growing unauthorized population, more and more states passed employer sanctions laws. See Lee, *supra* note 12, at 1110–13. Employers shouldered a significant amount of blame for public dissatisfaction with the immigration system as they were seen as benefitting from and sometimes facilitating unauthorized migration. See *id.* at 1132–43.

120. *Id.* at 1127 (describing INS's attempts to change its workplace culture to accommodate the new mandate).

121. See Martin & Miller, *supra* note 88, at 32 (“[I]nstead of dealing primarily with individuals who were often not US citizens and who tended not to protest poor service and inconsistent advice, the INS in sanctions enforcement had to deal with US employers who had in-house attorneys and often close contact with political leaders.”); see also Lee, *supra* note 12, at 1113–19 (describing the challenges associated with immigration screening); Wishnie, *supra* note 25, at 210 (“[E]mployer sanctions target *employers*, not undocumented immigrants, by obligating employers to verify status and to refuse to hire unauthorized workers. Federal immigration authorities have traditionally targeted *non-citizens*, however, and this reorientation may not be fully embraced within the immigration agency . . .” (emphasis added)).

122. Michael Fix & Paul Hill, *Implementing Sanctions: Reports from the Field*, in THE PAPER CURTAIN, *supra* note 3, at 65, 80–81.

123. *Id.* at 80.



some of the qualities arising from interagency monitoring arrangements developed in other areas of law. But a closer look reveals that these shared qualities are in appearance only. Immigration scholars have rightly pointed out that these coordination attempts served to further suppress labor rights,<sup>124</sup> but a point that has not yet been given full expression is that this suppression can be traced to the existence of only minimal monitoring power. As a result, ICE has for much of its history evaded meaningful oversight in the context of workplace enforcement, and it has tended to resist or ignore the labor consequences of its workplace enforcement decisions.

One effort at coordinating immigration and labor enforcement goals has involved restricting the kind of information on which ICE can rely in making enforcement decisions. The Department of Justice's 1996 issuance of Operating Instruction 287.3a was designed to prevent the INS from "unknowingly becoming involved in a labor dispute."<sup>125</sup> The instruction advised, but did not require, the officer to affirmatively ask the informant whether a labor dispute was in progress or to consult with the NLRB or the DOL as to whether the particular employer had a history of labor violations. Importantly, the instruction reaffirmed its advisory nature by acknowledging that ICE ultimately possesses the authority to enforce immigration laws even where doing so would undermine labor protections.<sup>126</sup>

An example of the second type of interagency coordination has involved Memoranda of Understanding ("MOU") harmonizing the various enforcement goals of agencies. The INS and the DOL entered into just such a MOU in 1998.<sup>127</sup> During the Clinton administration, the INS and the DOL made an effort to coordinate their regulatory efforts, and the 1998 MOU detailed, among other things, the kind of information the agencies would share with one another.<sup>128</sup> It noted in particular that the INS was required to share with the DOL any information suggesting that a particular employer may have violated any labor-related statutes falling within DOL's jurisdiction.<sup>129</sup> The wording of this provision is ambiguous,<sup>130</sup> and the anecdotal evidence suggests that ICE has alerted the DOL only after a workplace has already been investigated.

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124. See Wishnie, *supra* note 87, at 547-48.

125. INS Operations Instruction 287.3a, *reprinted in* 74 INTERPRETER RELEASES 199 (1997) [hereinafter O.I. 287.3a].

126. See *id.* ("Generally there is no prohibition for enforcing the Immigration and Nationality Act, even when there may be a labor dispute in progress.").

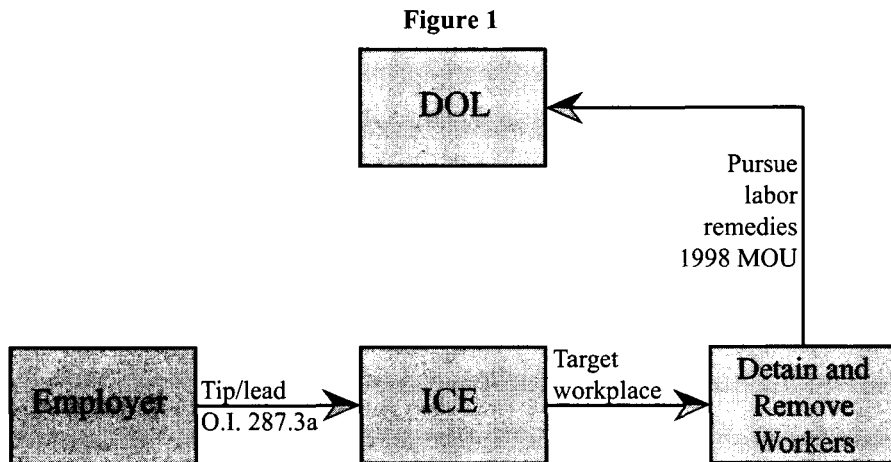
127. 1998 MOU, *supra* note 88.

128. It also explained that certain types of information *would not* be shared. For example, the DOL's Wage and Hour Division was required to review an employer's immigration-related documentation during the course of its own investigation *except* where the investigation was based on a complaint alleging labor violations. See *id.* at 6.

129. *Id.* at 7.

130. See *id.* ("When INS obtains or receives information during the course of its worksite enforcement activities which indicates a possible violation of statutes within the jurisdiction of the DOL, the INS shall expeditiously notify the District Director of the appropriate [Employment Standards Administration] field office covering the area in which the suspected violation occurred.").

Both of these arrangements have failed to promote the goal of harmonizing immigrant enforcement and labor enforcement goals because neither gives labor officials meaningful monitoring authority. Neither the operating instructions nor the MOU enables labor officials to force the uncomfortable conversation needed to impose a stop-and-think effect on immigration officials. In the absence of regular such interactions, even immigration officials with capacious understandings of immigration enforcement can succumb to blind spots and indifference, which can emerge within all organizational contexts.<sup>131</sup> Ultimately, they highlight the absence of the kind of mechanism that is required to have the desired effect: giving the DOL monitoring ability at the pre-enforcement stage. Only by moving in the direction of an *ex ante* constraint (as opposed to the 1998 MOU, which is *ex post* in nature) that can be enforced by an external source (as opposed to the operating instruction, which provides internal guidance) can any interagency arrangement hope to influence ICE. The figure below further illustrates this concept.



To appreciate the shortcomings of these constraints, consider the following example: In 2005, 48 immigrant workers in Goldsboro, North Carolina came across several posted fliers promoting what was billed as a mandatory health and safety training session by the Occupational Safety and Health Administration. Upon arrival at the meeting, the workers were promptly detained for removal by several DHS officials who had represented themselves as OSHA officials to lure these workers out of the shadows.<sup>132</sup> The DOL insisted that it was not involved in planning this sting operation and set out immediately to clarify to surrounding immigrant communities that DHS had conducted the investigation all on its

131. Indeed, these administrative fixes have been seized upon by immigrant rights activists concerned with deterring ICE from making workplace enforcement decisions that ignore the labor consequences. See NAT'L IMMIGRATION LAW CTR., ISSUE BRIEF: IMMIGRATION ENFORCEMENT DURING LABOR DISPUTES (2009), available at [http://www.nilc.org/dc\\_conf/flashdrive09/Worker-Rights/emp20\\_labordispute-infobrief-2009-11-06.pdf](http://www.nilc.org/dc_conf/flashdrive09/Worker-Rights/emp20_labordispute-infobrief-2009-11-06.pdf).

132. See Greenhouse, *Immigration Sting*, *supra* note 11; Greenhouse, *Officials Defend Ploys*, *supra* note 11.

own.<sup>133</sup> The operating instruction proved to be no deterrent in this case because it impinges on ICE's ability to make enforcement decisions only where a labor dispute is in progress,<sup>134</sup> which was not the case here. Moreover, although ICE was not co-opted into suppressing labor rights in that particular case, its actions certainly undermined the DOL and the state labor agency's long-term efforts to promote and facilitate the reporting of labor violations by unauthorized migrants in North Carolina. The Goldsboro example also highlights the gaps and shortcomings of the 1998 MOU. Immigration officials were required to share information regarding labor violations discovered in the course of worksite investigations. The MOU did *not* require these officials to consider whether their enforcement decisions would generate negative labor consequences. In other words, to the extent ICE considered whether their actions would displace labor law, the MOU forced them to do so only after the fact. This arrangement did not force immigration officials at the *ex ante* stage to consider the externalities they would impose onto the DOL, the NLRB, or other labor enforcement agencies, thus demonstrating a limited ability to encourage ICE to think beyond its narrow mission orientation. Permitting workers in removal proceedings to pursue labor remedies ultimately imposes costs on employers and not ICE. And whatever gains that were realized in punishing an individual employer had to be weighed (to the extent they were at all) against the setbacks the DOL experienced by having to quash any misinformation within immigration communities about its relationship to ICE and about whether reporting a labor violation will actually lead to the removal of that worker.

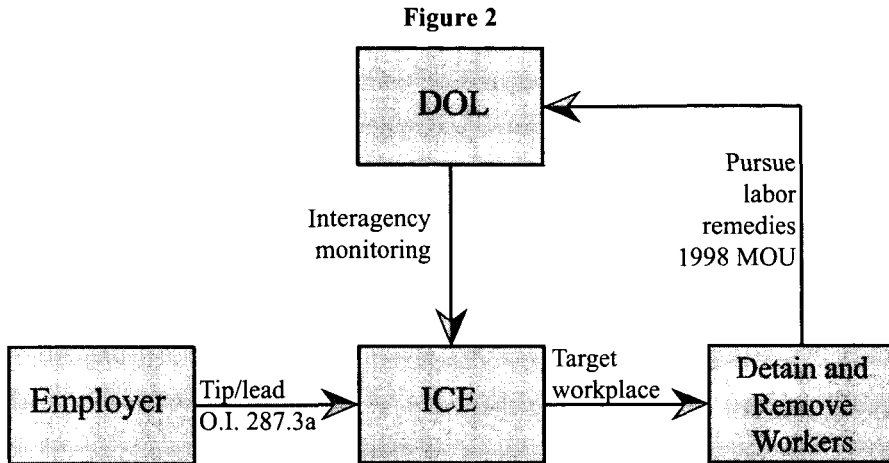
### *C. Implications for Redesigning Workplace Monitoring*

The ineffectiveness of current monitoring arrangements suggests that reform-minded individuals could benefit from thinking carefully about increasing the DOL's ability to affect enforcement decisions *ex ante*—that is, before ICE begins moving from the target stage to the enforcement stage. Doing so will reduce the likelihood that ICE officials will simply resolve ambiguities in favor of swift enforcement and create a more effective means for forcing officials to stop and think. I have included a graphical depiction below to further illustrate this point.

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133. One union official noted: "The word being brought back to worksites after a scam like this is that OSHA can't be trusted. That kind of perception diminishes OSHA's ability to do the critical work of protecting America's labor force." Greenhouse, *Immigration Sting*, *supra* note 11.

134. The ICE officer must also feel compelled to pursue this line of questioning on the snitch. In any event, a clever employer is going to be able to circumvent this operating instruction by not volunteering any information about the labor dispute.



Conceptualizing labor agencies as monitors can help refine existing arguments in favor of expanding the role of labor and employment agencies within the immigration universe. For example, Leticia Saucedo has argued in favor of expanding the ability of agencies like DOL and the EEOC to utilize the U visa as a means for collective resistance by workers against employers.<sup>135</sup> She and others have argued that increasing the degree of coordination between immigration enforcement and labor enforcement agencies is crucial to enabling unauthorized workers to assert their work-related rights.<sup>136</sup> The monitoring framework acknowledges, first, that any partnership entered into by these agencies in the context of workplace enforcement will almost certainly involve disagreement, negotiation, and perhaps even resentment between the bureaucrats populating these agencies, and second, that these tensions nevertheless can be productive if structured properly.<sup>137</sup>

How should this relationship be structured? Historically, interagency arrangements have been either easily circumvented by bad-actor employers (e.g.,

135. See Saucedo, *supra* note 18, at 944–51.

136. See *id.* at 941 (arguing that such partnerships “can eradicate exploitative employment practices without exposing workers to deportation threats”); see also Rathod, *supra* note 4, at 555–56 (arguing in favor of a MOU between OSHA and DHS requiring DHS to refrain from conducting a worksite raid while the target worksite is being investigated by OSHA).

137. One DOL official described the process of engaging DHS as “slowly breaking down a building, brick by brick.” Interview with DOL Official (June 23, 2011) (conducted on condition of anonymity). This official continued:

DHS is married to its police power, as is DOL, but our mandate is different. Just as DHS is so gung ho about its mission, DOL is gung ho about ours. Our investigators can’t do their job if workers fear that investigators are somehow undercover ICE agents. It impedes the enforcement of our labor laws. . . . [Secretary of Labor Hilda Solis] has been adamant about displacing workers’ fears, and this MOU is a tool in that fight.

*Id.*

O.I. 287.3a) or incomplete in their reach (e.g., the 1998 MOU) and thus failed to compel ICE to take seriously what are (from its perspective) secondary labor goals. Therefore, monitoring offers a way for agencies like the DOL to influence the process by which ICE moves from receiving information to actually targeting and investigating that worksite. It must be able to force immigration officials to stop and think.

Although the precise contours of worksite reformation are beyond the scope of this Article, it is worth elaborating on how monitoring adjustments could place greater pressure on ICE officials to take the labor consequences of their decisions seriously. One robust form of monitoring would require ICE to obtain permission from the DOL before investigating a particular workplace. If, for example, ICE received a tip that a particular employer had hired unauthorized workers, before proceeding to investigate the workplace, ICE officials would have to confer with the DOL and other labor agencies to determine whether a labor-related complaint had been filed against the employer.<sup>138</sup> In other words, the DOL would have to affirmatively consent to the investigation before ICE could proceed. Such an arrangement would also serve to constrain the overzealous decisions of officials blinded by their mission orientation. Drawing inspiration from the Fourth Amendment example, this type of ex ante check would act as a constraint on the exercise of executive power.<sup>139</sup> In a twist on the rationale that police officers are likely to see probable cause where none exists, history has shown that ICE officials are likely to ignore signs of labor exploitation where plenty exist.

Another, perhaps more politically feasible alternative would be to require ICE officials to conduct a pre-investigation check to determine whether a particular worksite is subject to a labor dispute. Given that a bad-actor employer would not likely offer up information about an ongoing labor dispute (thus evading the reach of Operating Instruction 287.3a), the labor complaint database provides an important data point for ICE to consider before making an enforcement decision. Such a monitoring scheme would require the creation of a database that could be updated by the various federal labor agencies, who are in a position to collect such information.<sup>140</sup> Regardless of the precise contours of such an arrangement, collecting and making available such information can make meaningful the protections promised (but not delivered) by O.I. 287.3a.

The benefits of interagency monitoring extend beyond the narrow context of any individual enforcement decision. Rather, over the long-term, structured

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138. See Michael J. Wishnie, *Introduction: The Border Crossed Us: Current Issues in Immigrant Labor*, 28 N.Y.U. REV. L. & SOC. CHANGE 389, 390–93 (2004) (identifying the strong correlation between worksite raids and the presence of formal labor complaints having been filed against those worksites).

139. See Cynthia Lee, *Package Bombs, Footlockers, and Laptops: What the Disappearing Container Doctrine Can Tell Us About the Fourth Amendment*, 100 J. CRIM. L. & CRIMINOLOGY 1403, 1410 (2010).

140. Scholars have advocated for the development of a similar sort of information database in other contexts. See, e.g., Alejandro E. Camacho, *Adapting Governance to Climate Change: Managing Uncertainty Through a Learning Infrastructure*, 59 EMORY L.J. 1, 65 (2009) (arguing that a “publicly accessible clearinghouse for information sharing” can help reduce the uncertainty that impedes effective climate change regulation).

interactions between agencies can productively inform the formation of strategy and policy as these agencies discuss enforcement goals and compliance definitions. Several years after IRCA was passed, different agencies began assessing whether and to what extent employers were complying with the prohibition against hiring unauthorized workers. The INS and the DOL each conducted their own studies, with the INS finding a 70–80% compliance rate and the DOL determining a 40% compliance rate.<sup>141</sup> The DOL deemed an employer to be noncompliant if, after a workplace investigation, it sent a notice to the INS of the possible presence of an immigration-related violation. Although these two agencies could not agree on the meaning of employer compliance, this disagreement created the opportunity for what has been referred to in another context as a reason-producing conversation;<sup>142</sup> it forced each agency to reconsider and refine its approach to a common goal.

Reforms in the mold of *ex ante* monitoring offer a complement to the U visa model of reform, the benefits of which attach at the *ex post* stage.<sup>143</sup> For example, the President has activated the DOL's ability to certify U visas.<sup>144</sup> While this laudable step provides much-needed relief to exploited workers, the relief is ultimately limited in scope. For one thing, with eight million unauthorized migrants in the workforce and an annual U visa limit of 10,000,<sup>145</sup> it is almost certainly the case that many unauthorized workers who have experienced labor violations will not gain the benefit of a U visa. Moreover, the language of the statute does not expressly recognize the unique set of harms unauthorized migrants experience on account of their vulnerable status in the workplace. Rather, unauthorized workers have been able to attain relief through the application of more generalizable harms, which are applied to their specific circumstances.<sup>146</sup>

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141. See Martin & Miller, *supra* note 88, at 31–32. According to Martin and Miller's study, the U.S. General Accounting Office also conducted its own study and found a 50% compliance rate. See *id.* at 32 (noting that the GAO surveyed 6000 of the nation's six million non-farm employers and found that only 50% were in compliance).

142. In developing his theory of covering, Kenji Yoshino argues that coerced assimilation should be rejected where there is no supporting reason or where there is a reason that has been deemed illegitimate. See KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* 26–27 (2006).

143. See Saucedo, *supra* note 18, at 913–14, 942–43. The *ex ante/ex post* distinction is not a firm one as it is applied to the case of U visas. It is, of course, entirely possible for the DOL to screen detained workers for U visa eligibility at the back end as a part of a larger enforcement strategy that would coordinate with DHS at the front end. It remains to be seen whether the 2011 MOU binding DHS and the DOL will lead to greater *ex ante* coordination in this respect. But whether the *ex ante* coordination is given expression through the U visa framework, or through some other monitoring framework, the larger point this Article seeks to develop is that DHS's enforcement discretion in the workplace should be constrained in some capacity in the first instance.

144. See Press Release, U.S. Dep't of Labor, U.S. Labor Department to Exercise Authority to Certify Applications for U visas (Mar. 18, 2010) [hereinafter DOL to Exercise Authority], available at <http://www.dol.gov/opa/media/press/opa/OPA20100312.htm>.

145. See 8 U.S.C. § 1184(p)(2)(A) (2006).

146. A noncitizen is eligible for a U visa where she possesses "information concerning criminal activity." *Id.* § 1101(a)(15)(U)(i)(II). The statute defines "criminal activity" as

While such a solution is workable, such relief rests largely within the scope of the enforcement discretion of immigration officials—which is precisely what the interagency monitoring framework attempts to constrain.<sup>147</sup> Therefore, unless and until Congress amends the scope of the statutory language, the ability of unauthorized workers to obtain U visa relief will continue to be circumscribed by the generosity of executive discretion.<sup>148</sup> In this sense, monitoring and temporary visas apply pressure on enforcement decisions from either side in the hopes of deterring overreaching. But in another sense, ex ante monitoring can cure one set of pathologies that ex post visas cannot: It can help minimize the externalities that ICE actions can impose on other agencies downstream.<sup>149</sup> A part of the problem with the current arrangement is that the DOL exerts little influence over ICE enforcement decisions *and*—as was evident from the Goldsboro worksite raid—it is forced to internalize the costs of overzealous worksite raid decisions. So long as ICE remains the lead agency in the context of workplace enforcement and operates free from constraint, it will almost certainly continue to exercise its enforcement discretion in a manner that best serves its interests at the expense of those of the DOL.<sup>150</sup> Because the immigration bureaucracy is comprised of multiple agencies,

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involving one or more of the following or any similar activity in violation of Federal, state, or local criminal law: 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 attempt, conspiracy, or solicitation to commit any of the above mentioned crimes.

*Id.* § 1101(a)(15)(U)(iii).

147. ICE does not possess a monopoly over the visa certification process. Under federal regulations, the DOL and the EEOC are also empowered to certify a worker's eligibility for U visa relief. See 8 C.F.R. § 214.14(a)(2) (2011) ("*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 . . . the Equal Employment Opportunity Commission, and the Department of Labor.").

148. See Saucedo, *supra* note 4, at 319 (advocating for a statutory amendment that would expressly include extortion, witness tampering, obstruction of justice, and perjury as qualifying crimes under the TVPA).

149. For example, one "downstream" consequence of the increase in DHS enforcement activity is a concomitant increase in cases that must be adjudicated before immigration judges, who are overseen by the Department of Justice. See Mariano-Florentino Cuéllar, *The Political Economies of Immigration Law*, 1 U.C. IRVINE L. REV. (forthcoming 2012) (manuscript at 31).

150. Other areas of administrative law reflect the importance of the initial enforcement decision, particularly where an agency faces a series of decisions related to the same regulatory matter. In the related context of environmental regulation, Alejandro Camacho points out that

[i]n most instances, virtually all agency attention and resources are directed at the initial decision, regardless of how little information there is to make the decision. Once an initial decision is made, whether regarding an individual project or an entire program, the agency rarely

tension and disharmony will persist as constitutive features of the administration of U.S. immigration laws. Framed this way, interagency monitoring offers one way to harness the tension and diversity of viewpoints into something productive.<sup>151</sup> Therefore, my argument is that interagency tension can be productive *provided* that we can find an arrangement where labor agencies can exert greater influence over ICE's workplace enforcement decisions. Put differently, monitoring requires embracing interagency tension while simultaneously reallocating power.

Over the long term, structured experimentation can benefit policymakers by providing them with an empirical record on which they can make more informed choices.<sup>152</sup> Where two agencies vie for favorable public perception, this sort of arrangement can increase an agency's willingness to expose its otherwise shadowy, internal decisionmaking process. For example, during the final years of the Bush administration, reports emerged of widespread abuses of unauthorized migrant rights, ranging from unsafe workplace conditions to mass deportation hearings.<sup>153</sup> During such a moment, the public and Congress are primed to reward those officials and entities who have worked in the service of affirming rights. During that moment, had our administrative state been structured so that the DOL played a more prominent role in the regulation of unauthorized workers, one can imagine the DOL seizing that opportunity to distance itself from DHS, seeking out more resources to carry out its own mandate, and allying itself with those elected officials who felt pressure to respond to the abuses. In a study of interagency coordination among state agencies, Eugene Bardach observes:

Almost nothing about the bureaucratic ethos makes it hospitable to interagency collaboration. . . . Making the transition

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revisits it in any systematic way to adjust the decision or learn from its successes or limitations for future actions.

Alejandro E. Camacho, *Transforming the Means and Ends of Natural Resources Management*, 89 N.C. L. REV. 1405, 1414 (2011) (citations omitted).

151. Alejandro Camacho's work is again instructive. He argues that the "exceptional uncertainty" posed by climate change is forcing scholars and governmental officials to rethink how and why climate change-related information ought to be shared. Camacho, *supra* note 140, at 7. Specifically, he advocates for the adoption of a "learning infrastructure" where "legislators [establish] and promote use of a shared information infrastructure that provides regulators opportunities to learn from the knowledge and experience of other regulators and respond to rapid changes in natural systems, scientific knowledge, and technology." *Id.*

152. In the context of the dual enforcement of antitrust laws, William Kovacic observes:

One way to test the merits of different implementation options is to conduct a natural experiment with more than one technique. Experimentation generates an empirical basis for determining what the long-term enforcement should be. Actual experience provides insights for adjusting the mix of enforcement institutions by revealing which techniques are successful and which are not.

William E. Kovacic, *Downsizing Antitrust: Is It Time to End Dual Federal Enforcement?*, 41 ANTITRUST BULL. 505, 518 (1996).

153. See SMITH ET AL., *supra* note 13, at 15–29 (summarizing various instances where ICE during the years 2005 to 2008 engaged in enforcement activity that undermined labor rights).



from an existing way of doing agency business to a new and more collaborative way requires actors to withdraw at least temporarily from the bureaucratic ethos. They must spurn something they may have at least respected if not cherished.<sup>154</sup>

Recently, DHS and the DOL produced a new MOU superseding prior coordination policies.<sup>155</sup> Certain features of this MOU reflect an Executive desire to coordinate workplace enforcement decisions at the front end of the investigation process. One provision in particular seems promising as a mechanism for interagency monitoring: The MOU prohibits ICE “from engaging in civil worksite enforcement activities at a worksite that is the subject of an existing DOL investigation of a labor dispute during the pendency of the DOL investigation and any related proceeding.”<sup>156</sup> This provision suggests that DHS’s enforcement agenda must yield to labor goals in workplaces where the DOL has already asserted jurisdiction. Such an arrangement mirrors many of the kinds of interagency monitoring schemes that have developed in other areas of law. By recasting the DOL’s jurisdiction as impregnable, the MOU forces DHS to accommodate labor law’s interest in protecting unauthorized workers *as workers*, before allowing DHS to pursue immigration law’s interest in them as unauthorized, and hence potentially removable, migrants. In this respect, the MOU attempts to cure the asymmetric enforcement authority that has troubled workplace enforcement policy for years. The MOU is written in a way that divests DHS of its ability to displace the enforcement of labor goals, at least where the DOL gets there first.<sup>157</sup>

Importantly, the MOU leaves open the possibility that the displacement will run in the other direction in all other circumstances. In worksites where employers are using the unauthorized status of their workers to suppress labor dissent and the DOL has *not* initiated an investigation (or where a labor investigation has been initiated but by a corresponding state agency), DHS largely remains free to harmonize immigration and labor goals as it sees fit. While other provisions in the MOU encourage, or perhaps even require, DHS to consult with the DOL before conducting a worksite investigation, these arrangements give the DOL what might generously be described as hortatory monitoring power. For example, the MOU requires ICE to give the DOL notice of pending workplace enforcement activity, unless doing so would violate federal law or otherwise compromise the investigation.<sup>158</sup> For its part, the DOL agrees to facilitate this process by providing ICE with information regarding its own enforcement activities to avoid the sort of confusion and conflict that can displace the DOL’s

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154. See BARDACH, *supra* note 107, at 232.

155. Revised Memorandum of Understanding Between U.S. Dep’t of Homeland Sec. and U.S. Dep’t of Labor (Mar. 31, 2011), *available at* [http://www.dol.gov/\\_sec/media/reports/hispaniclaborforce/dhs-dol-mou.pdf](http://www.dol.gov/_sec/media/reports/hispaniclaborforce/dhs-dol-mou.pdf).

156. *Id.* at 2.

157. The MOU also specifically prohibits ICE from engaging in the kinds of impersonation tactics used in the Goldsboro, North Carolina investigation. *See id.* at 3 (“Under no circumstances will ICE personnel engaged in enforcement activities at a worksite suggest that they represent or act for DOL absent the express approval of DOL.”).

158. *See id.*

labor enforcement goals.<sup>159</sup> Therefore, while this recent attempt to harmonize these competing goals recognizes discrete moments where DHS can be estopped from displacing labor enforcement goals, it remains to be seen whether such an intervention is enough to force DHS officials to absorb these labor-centric norms.

#### *D. The Limitations of Labor Agencies*

A question embedded within the interagency monitoring framework is whether an agency like the DOL can be trusted to protect the interests of unauthorized workers. Although the DOL's primary mission is to protect workers against work-related exploitation, historically, the DOL has privileged the interests of citizen workers over noncitizen workers. This suggests that DOL officials might be tempted to shirk their monitoring duties to the extent that a particular workplace inspection implicates unauthorized workers *and only* unauthorized workers. Despite the status-neutral nature of U.S. labor laws, the immigration enforcement origins of the DOL do give some traction to the concern that it maintains a citizen-centric orientation.<sup>160</sup> At least three reasons help assure that such a distortion, to the extent it exists, will not be overly pronounced.

First, it is not entirely clear that the DOL and other labor agencies will necessarily privilege the interests of citizens over noncitizens, even given the resource constraints that those agencies face. Although the descriptive picture is still developing, at least some of the social science literature suggests that labor agency bureaucrats have folded unauthorized migrants into their mandate, embraced the status-neutral nature of labor protections, and given little to no weight to the perceived moral unworthiness of these migrant workers. As Shannon Gleeson has demonstrated, labor agency officials have gone to great lengths to *not* ask any question that might elicit disqualifying information about a worker's

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159. *See id.*

160. Immigration enforcement's labor origins maintain an evocative quality. In recent testimony before the House Judiciary Committee, a former ICE officer concluded his largely anti-Obama testimony with a reference to the DOL's immigration past. Retired special agent Michael Cutler provided the following testimony:

A final point. Prior to the Second World War, *the Department of Labor* was responsible for enforcing our immigration laws. The concern was that an influx of foreign workers would drive down wages and worsen the working conditions of the American worker. . . . Effective worksite enforcement can protect our nation and our workers and turn off the power to the magnet that draws so many illegal aliens to our country.

*ICE Worksite Enforcement—Up to the Job?: Hearing Before the Subcomm. on Immigration Policy and Enforcement of the H. Comm. on the Judiciary*, 112th Cong. 97 (2011) (statement of Michael W. Cutler, Senior Special Agent (Ret.), Immigration and Naturalization Service) (emphasis added).

immigration status.<sup>161</sup> These interactions are filled with what King-Kok Cheung might refer to as “articulate silences.”<sup>162</sup>

Second, organized labor’s position on immigration policy has shifted over the last several decades, and certainly since the DOL last wielded primary immigration enforcement authority. Therefore, to the extent that DOL officials are inclined to respond more favorably to citizen workers, the interests of many citizens are tied to their unauthorized counterparts. Given the declining number of unionized workplaces, labor organizations have increasingly (if begrudgingly) embraced unauthorized workers as allies and not competitors.<sup>163</sup> Of course, the organized labor community is heterogeneous and the debate over where unauthorized workers belong within this community (if at all) is far from settled.<sup>164</sup> But even this initial shift enables the DOL to pursue labor enforcement strategies on the assumption that in at least some contexts, the benefits of expanding the rights of unauthorized workers will redound to workers more broadly.

A third reason the DOL will be unlikely to shirk on immigration-related workplace enforcement duties is the budget increase that would likely follow any such expansion of authority. As others have pointed out, Congress has increasingly devoted funds toward interior enforcement strategies.<sup>165</sup> Indeed, one program within the U.S. workplace enforcement scheme that has actually received an increase in funding is the U visa.<sup>166</sup> Given that this represents one area of the labor and criminal law intersection that finds some degree of synergy, it is not surprising that the DOL recently began exercising its authority to certify U visas.<sup>167</sup>

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161. See Shannon Gleeson, “To Protect One, We Must Protect All”: Bureaucratic Scripts for Protecting Undocumented Workers 14–15 (Feb. 18, 2011) (unpublished manuscript, presented at Immigration Law Symposium, University of California, Irvine, School of Law) (on file with author).

162. See KING-KOK CHEUNG, *ARTICULATE SILENCES: HISAYE YAMAMOTO, MAXINE HONG KINGSTON, JOY KOGAWA* (1993).

163. See Statement of the Executive Council on Immigration, AFL–CIO (Feb. 16, 2000), <http://www.aflcio.org/aboutus/thisistheaflcio/ecouncil/ec0216200b.cfm> (calling for legal reforms that extend full labor protections to undocumented workers); see also Christopher L. Erickson et al., *Justice for Janitors in Los Angeles: Lessons from Three Rounds of Negotiations*, 40 *BRIT. J. INDUS. REL.* 543 (2002); Catherine Fisk & Michael Wishnie, *The Story of Hoffman Plastic Compounds, Inc. v. NLRB: Labor Rights Without Remedies for Undocumented Immigrants*, in *LABOR LAW STORIES* 399 (Laura Cooper & Catherine Fisk eds., 2005).

164. See Marc Santora, *Immigration: From Talking Point to Sore Point*, N.Y. *TIMES*, Nov. 1, 2007, at A1 (noting that labor unions remain resistant to liberal immigration policies).

165. For example, ICE and CBP have a combined operating budget of \$15 billion. See U.S. DEP’T OF HOMELAND SEC., *BUDGET-IN-BRIEF: FISCAL YEAR 2008*, at 19 (2007), available at [http://www.dhs.gov/xlibrary/assets/budget\\_bib-fy2008.pdf](http://www.dhs.gov/xlibrary/assets/budget_bib-fy2008.pdf). By comparison, the INS’s budget in 1998 was \$3.6 billion. See Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 *DUKE L.J.* 1563, 1571–73 (2010) (discussing rising trend of immigration enforcement).

166. See Teresa Watanabe, *U.S. Officials Boost Efforts to Protect Immigrant Crime Victims*, L.A. *TIMES*, Aug. 2, 2010, at A1.

167. See DOL to Exercise Authority, *supra* note 144.

To be clear, empowering the DOL does not represent a silver bullet. As with any change at the level of culture and group identity, reform-minded individuals must take the long view. And because it is both infeasible and impracticable to give the DOL immigration enforcement authority, we are left with ICE, enforcement discretion, and an assortment of questions as to how best to deter the exercise of discretion that perpetuates workplace exploitation. But giving the DOL the power to monitor and constrain the exercise of that discretion is an important start. It invites us to think more carefully about how peer agencies, and not just principals, can police the overreaching of ICE officials.

#### IV. EVOLVING MONITORING CHALLENGES

Within the interagency monitoring framework, changing the culture of the lead agency largely depends on sharing information and empowering other agencies to shape decisions that are being made on the basis of that information. Empowering federal labor agencies to monitor the types of information ICE receives has the potential to guide ICE workplace enforcement actions in a manner more consistent with IRCA. But this monitoring framework also points the way to other areas where labor law faces the threat of displacement on account of immigration enforcement tactics.

Local law enforcement entities have played an increasingly large role in regulating immigrants, and in the process, have begun to undermine the assertion of workplace-related rights. One of the key challenges thus far has been forcing ICE to become more discriminating in the tips and leads it relies on when targeting a workplace. Up until now, the primary concern has been ensuring that ICE does not unreflectively act on an employer tip given the strong incentives employers have to report unauthorized workers at the first sign of labor-oriented activity. But local immigration enforcement creates more potential sources of information on which ICE can rely when targeting a workplace. As local immigration enforcement becomes more prevalent, crafty employers can report incompliant workers to local law enforcement officers who are not covered by reporting restrictions. A recent dispute case in Tennessee exemplifies this dynamic.

Durrett Cheese Sales hired a number of unauthorized workers from Mexico to perform a variety of jobs within its factory, including slicing, packaging, and processing cheese for sale.<sup>168</sup> These workers performed several weeks' worth of work for which they were not paid.<sup>169</sup> After several weeks without pay, these workers organized themselves to protest their nonpayment, at which point the supervisors fired the workers, ordered them off company property, and promptly contacted the local sheriff's department. When the officers arrived, the supervisors informed them that the workers were undocumented (and that they should therefore be reported to ICE) and provided them with the relevant

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168. *Montano-Perez v. Durrett Cheese Sales, Inc.*, 666 F. Supp. 2d 894, 897 (M.D. Tenn. 2009).

169. *Id.* The workers also experienced other harms. For example, their supervisor made "offensive and potentially humiliating comments . . . about their race, national origin, intelligence, language, and customs, among other things." *Id.*

paperwork to facilitate this process.<sup>170</sup> The workers were detained, and although no state charges were filed against them, a captain in the sheriff's department reported these workers to ICE.<sup>171</sup>

The *Durrett* case highlights the evolving difficulties of policing the information that ICE relies on in carrying out its immigration duties. Until now, regulatory fixes have focused on constraining the behavior of ICE officials or employers and have not had the opportunity to squarely confront a third-party state entity that simply "impose[s] the will" of the bad-actor employer.<sup>172</sup> At the moment of confrontation, had the Durrett supervisor reported the workers to ICE—and had the receiving officer suspected that Durrett was in the midst of a labor dispute—in theory, ICE would have had to withhold or delay action under existing operating instructions.<sup>173</sup> But because ICE was notified of these workers by way of local law enforcement officers, employers are able to circumvent any restrictions developed between ICE and the DOL. Given the growing number of local jurisdictions embracing an anti-immigrant posture, a low-level ICE official would have little or no reason to suspect that the information she is receiving is tainted or that acting on the tip enables an employer to escape liability for labor violations. The challenge moving forward, therefore, involves designing monitoring arrangements that help ensure that both ICE and local entities internalize labor enforcement norms.<sup>174</sup>

It is worth highlighting that the *Durrett* example involved local law enforcement officers carrying out immigration-related duties that were completely independent of any federal source. Although immigration enforcement authority is typically understood to fall within the federal government's plenary power—and thus preemptive of state efforts to encroach on such power—local police face no comparable constraints when obtaining immigration-related information while carrying out routine policing duties.<sup>175</sup> In these situations, given that local law

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170. *Id.* at 898; *see also* Complaint, *Durrett Cheese Sales*, 666 F. Supp. 2d 894 (No. 3:08-1015), available at [http://www.splcenter.org/sites/default/files/Durrett\\_Complaint.pdf](http://www.splcenter.org/sites/default/files/Durrett_Complaint.pdf).

171. *Durrett Cheese Sales*, 666 F. Supp. 2d at 897.

172. *Id.* at 902 (“[T]hroughout the entire process, the County Defendants simply imposed the will of the Durrett Defendants, which was to permanently remove the plaintiffs from the premises (and, perhaps, the country) because the plaintiffs had complained about pay.”).

173. *See* O.I. 287.3a, *supra* note 125.

174. It is worth noting that a second and related monitoring challenge grows out of the increase in federal prosecutions of immigration crimes. In the *Durrett Cheese Sales* case, although the suit between the workers and the employer and sheriff defendants settled, the U.S. Attorney in the Eastern District of Tennessee charged those same immigrants for using false social security numbers to obtain employment. *See* Mercer, *supra* note 10.

175. *See* Cristina M. Rodríguez et al., *Legal Limits on Immigration Federalism*, in *TAKING LOCAL CONTROL: IMMIGRATION POLICY ACTIVISM IN U.S. CITIES AND STATES* 31, 46 (Monica W. Varsanyi ed., 2010) (explaining that while “these ancillary enforcement measures will compromise trust between the police and immigrant communities, these laws are not susceptible to legal challenge on their face and are reflective of standard practice”). In 2002, the Office of Legal Counsel of Department of Justice issued a controversial opinion explaining that state and local entities had the “inherent” authority to arrest

enforcement officers, like those in the Coffee County Sheriff's Department, will be acting independently of federal authority, federal agencies will have no legal basis on which they can prevent these enforcement officers from acting on the immigration-related information they gather.

One specific context in which this may play out is in 287(g) agreements. In 1996, Congress amended the Immigration and Nationality Act to permit federal immigration officials to enter into an agreement with state or local law enforcement officers, which effectively deputizes them to carry out immigration enforcement duties.<sup>176</sup> In 2002, the Executive began entering into Memoranda of Agreement ("MOA") with local jurisdictions interested in carrying out immigration duties. By 2009, DHS had 66 active agreements with state and local law enforcement agencies in 23 states and 833 active 287(g) officers.<sup>177</sup> This program, along with other local immigration enforcement strategies,<sup>178</sup> is a part of

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individuals for immigration violations. See Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep't of Justice, to the U.S. Attorney Gen., Non-Preemption of the Authority of State and Local Law Enforcement Officials to Arrest Aliens for Immigration Violations 13 (Apr. 3, 2002), available at <http://www.aclu.org/FilesPDFs/ACF27DA.pdf>. See also CONG. RESEARCH SERV., RL 32270, ENFORCING IMMIGRATION LAW: THE ROLE OF STATE AND LOCAL LAW ENFORCEMENT 6-8 (2009), available at <http://www.au.af.mil/au/awc/awcgate/crs/rl32270.pdf> (summarizing the 2002 memo and explaining how it departed from prior OLC opinions).

176. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 U.S.C.). The relevant provision is codified at 8 U.S.C. § 1357(g) (2006). Although § 1357(g) specifically names the Attorney General, this along with other immigration enforcement duties were transferred to the Department of Homeland Security under the Homeland Security Act. See 6 U.S.C. § 251 (2006).

177. See OFFICE OF INSPECTOR GEN., DEP'T OF HOMELAND SEC., OIG-10-63, THE PERFORMANCE OF 287(g) AGREEMENTS 2 (2010) [hereinafter PERFORMANCE OF 287(g) AGREEMENTS], available at [http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG\\_10-63\\_Mar10.pdf](http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG_10-63_Mar10.pdf).

178. Two are worth highlighting. The Secure Communities program allows partnering jurisdictions to access a biometric database that includes information about the immigration status of the people local officers detain. Under the program, local law enforcement agencies submit the fingerprints of the arrestee, and if they match those of someone in the database with a criminal record, the arresting officers will be notified. See *Secure Communities: A Fact Sheet*, IMMIGRATION POLICY CTR. (Nov. 4, 2010), <http://www.immigrationpolicy.org/just-facts/secure-communities-fact-sheet>. The Secure Communities program has emerged as a central part of the Obama administration's strategy for targeting noncitizens who have been convicted of a removable crime. According to a recent study, 83% of people arrested through this program are placed in detention as opposed to only 62% of individuals arrested through other channels. AARTI KOHLI ET AL., CHIEF JUSTICE EARL WARREN INST. ON LAW & SOC. POLICY, SECURE COMMUNITIES BY THE NUMBERS: AN ANALYSIS OF DEMOGRAPHICS AND DUE PROCESS 2 (2011), available at [http://www.law.berkeley.edu/files/Secure\\_Communities\\_by\\_the\\_Numbers.pdf](http://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf). DHS aims to cover 100% of jurisdictions by 2013. See *Secure Communities Deployment as of January 7, 2010*, available at <http://www.ice.gov/doclib/secure-communities/pdf/sc-dep.pdf>. The other enforcement strategy is the Criminal Alien Program where local jail officials hold arrestees until ICE can screen them. *Fact Sheet: Criminal Alien Program*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT (Mar. 29, 2011), <http://www.ice.gov/news/>

a larger interior enforcement strategy that has been embraced by both President Bush and President Obama: ramping up efforts to target criminal noncitizens through partnerships with local law enforcement agencies.

In theory, 287(g) agreements present an opportunity to mitigate the *Durrett* problem. If the problem is that bad-actor employers are able to circumvent informational constraints by providing tips and leads through local police, then the contract-driven nature of 287(g) agreements provides a potential fix: DHS could simply write into the MOA terms the requirement that local agencies refrain from exercising its federally conferred immigration authority if doing so would perpetuate labor violations. These entities would have to promise not to use their immigration authority to subvert labor protections as a condition of receiving that authority. But the 287(g) program has reflected significant implementation problems. A core challenge has been to ensure that local officers exercise their delegated authority in a manner that actually furthers the program's purpose.<sup>179</sup> As is the case with many of these partnerships, acting under federally conferred immigration authority enables local law enforcement officers to do more. They can undertake actions that would otherwise be prohibited if they were acting under their traditional state criminal law enforcement authority.<sup>180</sup> Although reform efforts may be underway,<sup>181</sup> the reality is that DHS already faces considerable

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library/factsheets/cap.htm. See also Chacón, *supra* note 165, at 1582–98 (summarizing other federally initiated local immigration enforcement programs).

179. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-109, IMMIGRATION ENFORCEMENT: BETTER CONTROLS NEEDED OVER PROGRAM AUTHORIZING STATE AND LOCAL ENFORCEMENT OF FEDERAL IMMIGRATION LAWS 15 (2009), available at <http://www.gao.gov/new.items/d09109.pdf> (noting that one problem has been the lack of instructions as to how 287(g) authority should be exercised by state and local entities); see also PERFORMANCE OF 287(g) AGREEMENTS, *supra* note 177, at 8–9 (noting that although the purpose of 287(g) partnerships is to identify and remove “criminal aliens who pose a threat to public safety or a danger to the community” the OIG’s findings “do not show that 287(g) resources have been focused on aliens who pose the greatest risk to the public”). Recently, Congress conditioned the appropriation of funds on DHS terminating 287(g) agreements with any jurisdictions found to be in violation of the terms of the delegation. See Department of Homeland Security Appropriations Act of 2010, Pub. L. No. 111-83, tit. II, 123 Stat. 2142, 2148–49 (2009) (“For necessary expenses for enforcement of immigration and customs laws, detention and removals, and investigations; . . . *Provided further*, That none of the funds provided under this heading may be used to continue a delegation of law enforcement authority authorized under section 287(g) of the Immigration and Nationality Act (8 U.S.C. § 1357(g)) if the Department of Homeland Security Inspector General determines that the terms of the agreement governing the delegation of authority have been violated[.]”). For a discussion of principal-agent problems in the context of public administration, see Avinash Dixit, *Incentives and Organizations in the Public Sector: An Interpretive Review*, 37 J. HUM. RESOURCES 696 (2002).

180. See Eagly, *supra* note 66, at 1339 (“Police need not rely on the criminal law if they can arrest, detain, and search with their immigration powers. Furthermore, because the police can access law enforcement with fewer procedural restraints on the immigration side without invoking their criminal powers, they may be incentivized to proceed as immigration enforcers rather than criminal enforcers.”).

181. Press Release, U.S. Dep’t of Labor, Secretary Napolitano Announces New Agreement for State and Local Immigration Enforcement Partnerships & Adds 11 New

challenges in ensuring that local law enforcement officers comport with federal priorities.<sup>182</sup>

### CONCLUSION

Several agencies must grapple with the phenomenon of unauthorized migration, and as a result, these agencies often stand at cross-purposes. In this Article, I have endeavored to show that, although these tensions have generated some pathologies in the context of workplace enforcement, they need not always be counterproductive. Specifically, I have argued that empowering the Department of Labor and other labor agencies to monitor immigration enforcement decisions at the *ex ante* stage can help reduce externalities that impact such agencies. Doing so can also draw into sharper relief emerging vulnerabilities as labor law, immigration law, and criminal law continue to find common ground. There is still much to be learned, but in the meantime, this Article urges reform-minded individuals interested in improving workplace enforcement to consider *ex ante* monitoring options as one way to disrupt and prod the current system-wide stasis.

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Agreements (July 10, 2009), *available at* [http://www.dhs.gov/ynews/releases/pr\\_1247246453625.shtm](http://www.dhs.gov/ynews/releases/pr_1247246453625.shtm).

182. This dynamic has been reproduced within other local enforcement programs as well. One study found that the most noticeable consequence of a local jurisdiction's participation in the Criminal Alien Program partnership was the increase of class-C misdemeanor arrests of Latinos. This class of misdemeanor—typically public intoxication or a minor traffic violation—exacts a punishment in the form of a fine not to exceed \$500, which when combined with the spike in arrests of Latinos strongly suggests race-based policing rather than the prioritization of those criminal noncitizens threatening public safety. *See* TREVOR GARDNER II & AARTI KOHLI, CHIEF JUSTICE EARL WARREN INST. ON RACE, ETHNICITY & DIVERSITY, THE C.A.P. EFFECT: RACIAL PROFILING IN THE ICE CRIMINAL ALIEN PROGRAM 5 (2009), *available at* [http://www.law.berkeley.edu/files/policybrief\\_irving\\_FINAL.pdf](http://www.law.berkeley.edu/files/policybrief_irving_FINAL.pdf).