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The Precarity of Temporality: How Law Inhibits Immigrant Worker Claims

Abstract

In this article, we propose that temporary immigrant workers in the United States face unique law-induced challenges to claimsmaking when compared to other categories of workers with precarious immigration statuses, such as unauthorized workers and H-2 guest workers. We present a systematic comparison of each group, drawing on a review of the existing literature and a new pilot study, to examine how the challenges facing each set of immigrants overlap in some ways, but are unique in others. We conclude that particular differences in U.S. immigration law categories (unauthorized, H-2 guest workers, and temporary immigrant workers) may shape how immigrants on the ground interact with broader legal regimes, such as criminal, employment, and administrative law. In turn, these differing legal institutional contexts affect how immigrants weigh the prospect of coming forward with a workplace law claim against their employers.

Keywords

temporary immigrant workers, immigration, workplace law, claims

Disciplines

Immigration Law | Labor and Employment Law | Unions

Comments

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THE PRECARIETY OF TEMPORALITY: HOW LAW INHIBITS IMMIGRANT WORKER CLAIMS

Kati L. Griffith[†] and Shannon M. Gleeson^{††}

I. INTRODUCTION

U.S. workplace law provides a wide range of rights for the subset of workers who fall within the legal definitions of “employee.” It provides employees with the right to minimum wages for the hours they work. It promises employees a modicum of health and safety in the workplace. It promotes collective activity among employees to improve wages and working conditions, and it prohibits many forms of employment discrimination against employees.

The primary enforcers of U.S. workplace law are the employees themselves, typically through employee-initiated claims against their employers to executive agencies and/or judicial forums.¹ While some government-initiated enforcement initiatives do exist,² the vast majority of claims still originate from individual claims by employees. Given employees’ central enforcement role in ensuring employer compliance, some scholars refer to employees as “private attorneys general,” who simultaneously

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1. See Kati L. Griffith, *Discovering “Immigration” Law: The Constitutionality of Subfederal Immigration Regulation at Work*, 29 *YALE L. & POL’Y REV.* 389, 431 (2011) (“An in-depth examination of the legislative history, language, and case law involving [FLSA and Title VII] demonstrates that Congress intended to . . . encourage employee-initiated complaints and to discourage employee fear of coming forward. The statutes’ reliance on employee-initiated complaints is manifest.”).

2. The U.S. Department of Labor Wage and Hour Division under David Weil, for instance, extended government-initiated enforcement initiatives. See David Weil, *Strategic Enforcement in the Fissured Workplace*, in *N.Y.U. 68th ANN. CONFERENCE LAB., WHO IS AN EMPLOYEE AND WHO IS THE EMPLOYER?* (Kati L. Griffith & Sam Estreicher eds., 2015).

enforce workplace law on behalf of themselves and the broader public interest.³ Others refer to the employee claims-driven rationale of U.S. workplace law as “bottom-up enforcement,” in contrast to top-down government-initiated enforcement.⁴

In recent decades, law and society scholars have revealed that non-citizen workers in the United States face unique challenges to workplace law claimsmaking against their employers. The bulk of this literature focuses on the ways that the more than eight million workers who lack immigration authorization to be present in the United States (“unauthorized workers”)⁵ are inhibited from claimsmaking. Gleeson’s work on immigration status as “a precarity multiplier,” for instance, has identified the pervasive fear of deportation as an inhibitor to employee claimsmaking against employers.⁶ This body of work has highlighted the combined force of the criminal justice and immigration enforcement systems (the *crimmigration* regime) as the primary legal institutional space for understanding inhibitors to “unauthorized” employee claimsmaking.

When scholars have considered claimsmaking inhibitors for low-wage “authorized” immigrant workers they have tended to spotlight temporary migrant worker programs, which are employment-based migration management systems designed to fill alleged labor shortages. Scholars studying the United States have concentrated extensively on low-wage employer-sponsored guest workers, such as H-2A agricultural workers and H-2B workers in seasonal industries.⁷ Because these workers’ immigration authorization is explicitly tied to an employer’s sponsorship, this body of

3. Llezlie Green Coleman, *Exploited at the Intersection: A Critical Race Feminist Analysis of Undocumented Latina Workers and the Role of the Private Attorney General*, 22 VA. J. SOC. POL'Y & L. 397, 400, 421 (2015) (referring to employees as “private attorney generals”); Kati L. Griffith, *U.S. Migrant Worker Law: The Interstices of Immigration Law and Labor and Employment Law*, 31 COMP. LAB. L. & POL'Y J. 125, 160 (2009) (same); Kathleen Kim, *The Trafficked Worker as Private Attorney General: A Model of Enforcing the Civil Rights of Undocumented Workers*, 2009 U. CHI. LEGAL F. 247, 308 (2009) (same).

4. See Charlotte S. Alexander & Arthi Prasad, *Bottom-Up Workplace Law Enforcement: An Empirical Analysis*, 89 IND. L.J. 1069, 1070–74 (2014).

5. See, D’Vera Cohn & Jeffrey S. Passel, *Size of U.S. Unauthorized Immigrant Workforce Stable After the Great Recession*, PEW RES. CTR. 2 (Nov. 3, 2016), http://assets.pewresearch.org/wp-content/uploads/sites/7/2016/11/02160338/LaborForce2016_FINAL_11.2.16-1.pdf.

6. See SHANNON GLEESON, *PRECARIOUS CLAIMS: THE PROMISE AND FAILURE OF WORKPLACE PROTECTIONS IN THE UNITED STATES* 7 (2016).

7. See generally Griffith, *supra* note 3. See also discussion and citations in Section III.B. *infra*. Besides H-2 guest workers, there has been growing attention on workplace problems in the J-1 cultural exchange program. See, e.g., Catherine Bowman & Jennifer Bair, *From Cultural Sojourner to Guestworker? The Historical Transformation and Contemporary Significance of the J-1 visa Summer Work Travel Program*, 58 LAB. HIS. 1, 16 (2017); Nicole Durkin, *All Work and Not Enough Pay: Proposing a New Statutory and Regulatory Framework to Curb Employer Abuse of the Summer Work Travel Program*, 81 GEO. WASH. L. REV. 1294, 1297–99 (2013); Patricia Medige & Catherine Bowman, *U.S. Anti-Trafficking Policy and the J-1 Visa Program: The State Department’s Challenge from Within*, 7 INTERCULTURAL HUM. RTS. L. REV. 103, 125–26 (2012).

work has zeroed in on the ways immigration law deters employee claimsmaking by delegating enhanced power to employers. The filtering of immigration regulation through employers and the employment arena—what Griffith calls *immployment* law⁸—is the central legal institutional context for understanding inhibitors to employee claimsmaking against employers for this group of authorized non-citizens in the United States.

Scholars studying Canada—which has a far larger guest worker program than does the United States—have similarly examined the experiences of temporary migrant worker (guest worker) programs. Some view, for example, the Canadian Seasonal Agricultural Worker Program (SAWP) and Foreign Worker Program (FWP) as superior to the U.S. versions because of increased governmental oversight. However, programs like these still grant employers a problematic role in immigration regulation. Canadian employers do not directly sponsor workers in the same way that U.S. H-2 employers do. Nonetheless, they exert control over the workforce through contract requirements⁹ and the evaluations they provide to government decision-makers about the worker's performance.¹⁰ This research has shown that different employment-based temporary migrant worker programs impose different conditions, which result in different forms of precarity.¹¹

This article builds on this prior work, but considers a group of “authorized” immigrant workers in the United States that studies of employee claimsmaking have overlooked. It focuses on a group of authorized temporary immigrants that are *not* part of labor market-based migration management systems. Specifically, the article analyzes the situation of the approximately one million workers who have been granted a discretionary and temporary reprieve from deportation for humanitarian concerns or some

8. See, e.g., Griffith, *supra* note 1.

9. See Tanya Basok & Ana López-Sala, *Rights and Restrictions: Temporary Agricultural Migrants and Trade Unions' Activism in Canada and Spain*, 17 J. OF INT'L MIGRATION AND INTEGRATION 1271 (2015).

10. See Leigh Binford, *From Fields of Power to Fields of Sweat: The Dual Process of Constructing Temporary Migrant Labour in Mexico and Canada*, 30 THIRD WORLD Q. 503, 514 (2009) (recounting a temporary worker's feeling that workers would “get sent back to Mexico” if they engaged in claimsmaking against their employers).

11. See Judy Fudge, *Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers*, 34 COMP. LAB. L. & POL'Y J. 95 (2012) (exploring the nexus between precarious migrant status and precarious employment in three different Canadian temporary migrant worker programs). A wide body of research has also examined the challenges associated with temporary workers in Europe, in which non-EU workers often fall in and out of status, and are subject to significant immigration surveillance. See, e.g., Kitty Calavita, *Braceros and Guestworkers in the United States and Spain: A Political and Contextual Analysis of Difference*, 21 ÉNDOXA: SERIES FILOSÓFICAS 197 (2006); Stephen Castles, *Guestworkers in Europe: A Resurrection?*, 40 INT'L MIGRATION REV. 741 (2006). Additional work in the Middle East and North Africa has shown the extreme precarity of guest workers, especially in places where entire economies rely heavily on this labor, where the mechanisms for worker rights are minimal, and where the mechanisms for deportation are swift and have little regard for civil and human rights. See NATASHA ISKANDER, *CREATIVE STATE: FORTY YEARS OF MIGRATION AND DEVELOPMENT POLICY IN MOROCCO AND MEXICO* (2015).

other public interest.¹² These temporary immigrants¹³ do not have an existing path to legal permanent residency or eventual citizenship. They can apply for work authorization, but their legal presence in the United States is not tied to their employment or labor market considerations in any way. By considering claimsmaking inhibitors for this understudied group of temporary immigrants in the United States, the article builds on the work of Goldring, and others, who have called for intense study of the ramifications of a the wide ranging and diverse types of precarious migratory statuses.¹⁴

Authorized immigrant workers who are not part of a guest worker program warrant enhanced scholarly attention (hereafter referred to as “temporary immigrants” or “temporary immigrant workers”). A group of authors has begun to unravel the mechanisms of precarity for temporary immigrants in the United States.¹⁵ Menjívar likens the experience of these immigrants to being in a space of “suspended legality,” or a “legal limbo.”¹⁶ Heeren’s taxonomy of various non-guest worker immigration categories—such as parole, Deferred Action and Temporary Protected Status—shows that, despite some differences, the temporary immigrant categories he highlights all share the common feature of being “temporary, tenuous, and tentative.”¹⁷ Consistent with this view, Chacón has observed that temporary work authorization and a temporary reprieve from deportation do not “offer a shield” from workplace exploitation.¹⁸ There has been little theorizing, however, about how the “legal limbo” of temporary immigrants interacts

12. Geoffrey Heeren, *The Status of Nonstatus*, 64 AM. U. L. REV. 1115, 1145, 1147–49, 1155, 1158, 1160–62 (2015) (estimating that there are close to one million individuals in some form of temporary legal limbo).

13. We refer to these individuals as “immigrants” even though U.S. immigration law considers them to be “non-immigrants.” See 8 U.S.C. § 1101(a)(15). We do this because, despite this legal definition, “immigrants” is colloquially understood to include foreign-born non-citizen workers. See D. Carolina Núñez, *War of the Words: Aliens, Immigrants, Citizens, and the Language of Exclusion*, 2013 B.Y.U. L. REV. 1517, 1526–41 (2013) (illustrating the widespread colloquial usage); *Immigrant*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/immigrant> (last visited Apr. 6, 2017); Cohn & Passel, *supra* note 5 (referring to technical “non-immigrants” as immigrants).

14. Luin Goldring, Carolina Berinstein & Judith K. Bernhard, *Institutionalizing Precarious Migratory Status in Canada*, 13 CITIZENSHIP STUD. 239 (2009).

15. See generally Leisy Abrego & Sarah M. Lakhani, *Incomplete Inclusion: Legal Violence and Immigrants in Liminal Legal Statuses*, 37 L. & POL'Y 265 (2015); Jennifer Chacón, *Producing Liminal Legality*, 92 DENV. U. L. REV. 709, 710 (2015) (unpacking “the legal mechanisms that produce liminal legality.”). This work draws on Turner’s concept of liminality. VICTOR TURNER, *THE FOREST OF SYMBOLS: ASPECTS OF NDEMBU RITUAL* (1967). It also pulls from Coutin’s concept of liminal legality. SUSAN B. COUTIN, *LEGALIZING MOVES: SALVADORAN IMMIGRANTS’ STRUGGLE FOR U.S. RESIDENCY* (2000); Susan B. Coutin, *Denationalization, Inclusion, and Exclusion: Negotiating the Boundaries of Belonging*, 7 IND. J. OF GLOBAL LEGAL STUD. 585 (2000).

16. Cecilia Menjívar, *Liminal Legality: Salvadoran and Guatemalan Immigrants’ Lives in the United States*, 111 AM. J. SOC. 999, 1003, 1008 (2006). See also Agnieszka Kubal, *Conceptualizing Semi-Legality in Migration Research*, 47 LAW & SOC’Y REV. 555, 556–57 (2013) (citing a number of scholars and noting terms such as “in-betweens,” “liminal migrants,” “civically stratified,” and “quasi-legal.”).

17. Heeren explains that they do not have “status” as that concept is described under federal immigration law, but they also do not have “no status.” Heeren, *supra* note 12, at 1132.

18. Chacón, *supra* note 15, at 718.

with employee claimsmaking, the motor of the workplace law enforcement scheme in the United States.

In this article, we propose that temporary immigrant workers in the United States face unique law-induced challenges to claimsmaking when compared to other categories of workers with precarious immigration statuses,¹⁹ such as unauthorized workers and H-2 guest workers. We present a systematic comparison of each group, drawing on a review of the existing literature and a new pilot study, to examine how the challenges facing each set of immigrants overlap in some ways, but are unique in others. We conclude that particular differences in U.S. immigration law categories (unauthorized, H-2 guest workers, and temporary immigrant workers) may shape how immigrants on the ground interact with broader legal regimes, such as criminal, employment, and administrative law. In turn, these differing legal institutional contexts affect how immigrants weigh the prospect of coming forward with a workplace law claim against their employers.

While the *crimmigration* regime is the central legal institutional context inhibiting claimsmaking behavior for unauthorized workers, and *immemployment* regime inhibitors are dominant for H-2 guest workers, temporary immigrants reveal the primacy of a different legal institutional space. We propose that administrative (rather than enforcement and employment related) processes of immigration law—and the bureaucratic steps required to grant both temporary reprieves from deportation and work authorizations—is a primary legal institutional context for understanding law-induced inhibitors to temporary immigrant workers' claimsmaking. We dub this arena the *adminigration* regime. In doing so, we expose the ways that the legal environment can generate workplace precarity that inhibits claimsmaking for authorized non-citizen employees, even when an immigrant's employment status has no formal relationship to his or her immigration status.

We do not argue that law and legal regimes represent the only inhibitors to claimsmaking. Moreover, we do not contend that one can fully differentiate these institutional spaces of *crimmigration*, *immemployment*, and *adminigration* from each other.²⁰ Instead, our goal is to establish that law's

19. We use "precarious immigration status" in a similar way to Goldring and Landolt. See Luin Goldring & Patricia Landolt, *Caught in the Work–Citizenship Matrix: The Lasting Effects of Precarious Legal Status on Work for Toronto Immigrants*, 8 GLOBALIZATIONS 325, 328 (2011) (defining it as "the absence of key rights or entitlements usually associated with the full or nearly full status of citizenship and permanent residence . . . includes 'documented' but temporary workers . . . [and includes] gradations and multidimensionality of non-citizenship and 'illegality.'").

20. See Marcel Paret & Shannon Gleeson, *Precarity and Agency Through a Migration Lens*, 20 CITIZENSHIP STUDIES 277 (2016) (discussing the interactive processes that foster precarity); Kati L. Griffith, *Laborers or Criminals?: The Impact of Crimmigration on Labor Standards Enforcement*, in THE CRIMINALIZATION OF IMMIGRATION: CONTEXTS AND CONSEQUENCES (2014) (discussing the relationship between the *crimmigration* regime and the *immemployment* law regime).

imprint on non-citizen employees' claimsmaking exists on a continuum and each immigration category is likely to pose its own distinctive barriers to employee claimsmaking.²¹

The remainder of the article proceeds as follows. Section II will provide a brief overview of the process of employee claimsmaking in the U.S. workplace law context. It will also describe how scholars have broadly conceptualized inhibitors to employee claimsmaking against their employers. This framework informs our subsequent analysis of the ways that an individual's immigration category under U.S. immigration law may exacerbate some of these dynamics. Section III will specify how differing legal institutional contexts shape claimsmaking inhibitors for unauthorized workers and employer-sponsored H-2 guest workers. This analysis and a systematic survey of the existing scholarship illustrates that a dominant focus on unauthorized workers and employer-sponsored H-2 guestworkers has led to a dominant focus on the *crimmigration* and *immemployment* legal regimes.

Section IV will consider the specific case study of workers with Temporary Protected Status (TPS), in hopes that it will provide insight about potential claimsmaking inhibitors for the broader group of temporary immigrants in the United States. As mentioned above, there are about one million non-guest worker temporary immigrants in the United States. There is an alphabet soup of immigration law designations that fit this category, including several forms of deferred action, humanitarian parole and Convention Against Torture beneficiaries. While there are differences among various types of temporary immigrant workers, they all share a temporary reprieve from deportation and the possibility of a temporary work authorization.²²

Taking on the specific case of TPS is justified because it is one of the most populous categories. About a third of the population of temporary immigrants have TPS.²³ By definition, TPS is a form of temporary humanitarian relief made available to individuals who have been present in the United States for a designated time period, do not have a criminal history,

21. See generally Kara Cebulko, *Documented, Undocumented and Liminality Legal: Legal Status During the Transition to Adulthood for 1.5-Generation Brazilian Immigrants*, 55 SOC. Q. 143 (2014) (suggesting that immigrants, too, see a hierarchy of statuses that ranges from unauthorized, to liminal status, to legal permanent resident/citizenship status.).

22. The population of temporary immigrants has grown in recent years. Temporary immigrant programs, such as the Deferred Action for Childhood Arrivals (DACA) program—whose beneficiaries are popularly known as the “Dreamers”—grew under President Obama’s administration. See Chacón, *supra* note 14, at 713. See also Heeren, *supra* note 12, at 1181 (“The embattled state of immigrant rights and benefits is perhaps part of the reason why nonstatus has become the default answer to the immigration policy debate. Nonstatus comes with minimal rights and benefits, although even those have provoked an outcry.”).

23. CARLA N. ARGUETA, CONG. RESEARCH SERV., RS20844, TEMPORARY PROTECTED STATUS: CURRENT IMMIGRATION POLICY AND ISSUES 4 (2017), <https://fas.org/sgp/crs/homsec/RS20844.pdf> (estimating that there are 378,000).

and are from certain countries. The administration can designate countries as TPS eligible if they are experiencing severe environmental problems, wars or other extraordinary and temporary conditions. TPS beneficiaries from El Salvador, Honduras, and Haiti account for 90% of the TPS population in the United States.²⁴ TPS holders share many similarities with the other individuals who have some form of temporary reprieve from deportation and temporary work authorization. Although it is named Temporary Protected Status, TPS offers “no formal legal immigration status, much less a path to citizenship.”²⁵ Once individuals receive TPS, they are eligible to apply for Employment Authorization Documents (EADs) to work in the United States for a specified period of time.²⁶ The U.S. Department of Homeland Security, in consultation with the U.S. Secretary of State, has the discretion to renew or remove a country’s TPS designation.²⁷

Investigating the case of TPS workers has the added benefit of evaluating proposed changes to the H-2 guest worker program. If advocates succeed in gaining more visa portability for H-2 workers,²⁸ the legal institutional context that H-2 workers experience would look more like the context that temporary immigrant workers experience under TPS. Thus, the more we learn about TPS workers, the more we learn about the potential future of low-wage guest work in the United States.

Our theoretical framework draws on more than a dozen interviews with legal experts who advise temporary immigrant workers in the New York City (NYC) area and the authors’ pilot study of fourteen in-depth interviews with TPS workers in NYC during the summer of 2016.²⁹ Before concluding, Section V will discuss the challenges and benefits of examining legal regimes

24. El Salvador has 195,000, Honduras has 57,000, and Haiti has 50,000). ARGUETA, *supra* note 23. See also Robert Warren & Donald Kerwin, *A Statistical and Demographic Profile of the US Temporary Protected Status Populations from El Salvador, Honduras, and Haiti*, 5 J. ON MIGRATION AND HUMAN SECURITY 577, 579 (2017).

25. Chacón, *supra* note 15, at 722.

26. U.S. CITIZENSHIP & IMMIGRATION SERV., *Temporary Protected Status*, <https://www.uscis.gov/humanitarian/temporary-protected-status#Countries%20Currently%20Designated%20for%20TPS> (last updated Mar. 6, 2017).

27. Congress, with the Immigration Act of 1990, created Temporary Protected Status (TPS). ARGUETA, *supra* note 23, at 2–4.

28. See, e.g., LEVELING THE PLAYING FIELD: REFORMING THE H-2B PROGRAM TO PROTECT GUESTWORKERS AND U.S. WORKERS 12 (Penn State Univ. & Nat. Guest Worker Alliance Eds. 2012); Cathleen Caron, *Portable Justice, Global Workers, and the United States*, 40 CLEARINGHOUSE REV. 549, 549–55 (2007); Andrew J. Elmore, *Egalitarianism and Exclusion: U.S. Guest Worker Programs and a Non-Subordination Approach to the Labor-Based Admission of Nonprofessional Foreign Nationals*, 21 GEO. IMMIGR. L.J. 521, 528–29 (2007); Matthew Lister, *Justice and Temporary Labor Migration*, 29 GEO. IMMIGR. L.J. 95, 116–17 (2014); Michael Wishnie, *Labor Law After Legalization*, 92 MINN. L. REV. 1446, 1455–56 (2008); Michelle Chen, *Carnivals are No Picnic for Migrant Workers*, HUFF. POST (Oct. 28, 2013), http://www.huffingtonpost.com/michelle-chen/carnivals-are-no-picnic-f_b_3832823.html.

29. Griffith and Gleeson worked with a number of New York City-based legal services providers to spread the word about the opportunity to voluntarily participate in a one-hour interview with one of the project’s Research Assistants. All information related to the identity of the interviewees is confidential.

as sources of precarity and, by extension, as inhibitors to employee claimsmaking.

II. WORKPLACE LAW CLAIMSMAKING PROCESS

Claimsmaking in the U.S. workplace law context typically means that an employee, or a group of employees, brings claims against the employer(s) to a court, or an executive agency. Relevant workplace law agencies include the U.S. Department of Labor, the National Labor Relations Board, the Equal Employment Opportunity Commission, and their state and local equivalents.³⁰ Even though there are differing enforcement schemes based on the legal and geographic jurisdictions,³¹ they are all bottom-up enforcement schemes that rely heavily on employee accounts.

In this article, we isolate inhibitors to claimsmaking, which is the final stage of the traditional three-stage “naming, blaming and claiming” model of the dispute pyramid.³² In the first phase, the naming phase, an individual has to be able to see a situation as “injurious” under the law.³³ The second and third phases move the aggrieved worker closer to action. During the second blaming phase, a worker must be able to identify another entity as at “fault,” rather than internalize the wrong.³⁴ Then, in the third phase, the individual makes an actual claim to denounce the harm and try to remedy the injury against him or her.³⁵

We do not dispute the necessity of employees’ knowledge of their rights and employees’ identification of the employer as the party who is at fault. Nonetheless, here we assess inhibitors to claimsmaking (the third stage) as this allows us to carefully consider the impact of legal regimes on an individual’s ability to convert knowledge of their workplace law rights into an actual claim against his/her employer.

30. See, e.g., Shannon Gleeson, *Means to An End: An Assessment of the Status-Blind Approach to Protecting Undocumented Worker Rights*, 57 SOC. PERSP. 301, 304–06 (2014); Candice S. Thomas, “Immigration” Law: The Determination of Remedial Measures for Undocumented Workers in the Workplace, 83 U. CIN. L. REV. 1009, 1018–24 (2015).

31. Protections of employees derive from a wide array of federal, state and city laws, such as “living wage” laws that have proliferated in recent years. See, e.g., Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 50–53 (2016); Richard C. Schragger, *Mobile Capital, Local Economic Regulation, and the Democratic City*, 123 HARV. L. REV. 482, 584–513 (2009).

32. William Felstiner and others first developed the basic framework of naming, blaming and claiming to describe how problems evolve into legal claims. William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming*, 15 LAW & SOC’Y REV. 631, 636 (1980).

33. *Id.* at 634–36. Alexander and Prasad differentiate substantive versus procedural legal knowledge. The former is key especially for the naming phase of claimsmaking, since workers must first know what their basic rights are under the law. The latter is necessary for determining *how* to vindicate those rights. Alexander & Prasad, *supra* note 4, at 1093–97.

34. See Felstiner, Abel & Sarat, *supra* note 32, at 635–36.

35. *Id.*

This article considers how employees with three different precarious immigration statuses interface with three known inhibitors to employee claimsmaking: (1) how difficult an employee believes it will be to find a new job in the event the employee is terminated, (2) an employee's feeling of powerlessness when an employment dispute arises, and (3) the lack of meaningful affirmative incentives to make a claim against an employer. After briefly describing these dynamics in this Section, the Sections below will use these frames to illustrate how a worker's immigration law category (unauthorized worker, H-2 guest worker, and temporary immigrant worker) may intensify each of these three dynamics in some circumstances.

First, employees who do not feel like they can find employment in the face of job loss may be inhibited from claiming against their employers. Despite formal legal protections against employer retaliation in the face of claimsmaking, retaliation protections are no guarantee against job loss or immigration arrests. In this vein, Hirschman's insights about "exit," "voice" and "loyalty"³⁶ are relevant to understanding potential inhibitors to employee claiming against employers.³⁷ In Hirschman's heuristic, workers who face problems have three choices: exiting the employment relationship, voicing their concerns (claiming), or exhibiting loyalty through inaction. Thus, perceived restraints on exit from the employment relationship, or continued loyalty to an employer, can mitigate against making a claim for workplace law enforcement against an employer. These dynamics, of course, affect many employees engaged in low-wage and precarious employment. As we will elaborate upon below, however, we consider how unauthorized, H-2 and temporary immigrant workers may have different views about their job mobility and employer loyalty due, at least in part, to their different legal postures.

Second, imbalances of power between employers and employees, or what the New Dealers referred to as "inequality of bargaining power" between the parties to an employment relationship, can also mitigate against employee-initiated claimsmaking against an employer.³⁸ Undoubtedly, a feeling of powerlessness can inhibit employee claimsmaking against an employer, even in cases of the most egregious of workplace law violations. In the analysis below, we build on Anderson's work, which suggests that a

36. ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

37. See, e.g., Felstiner, Abel & Sarat, *supra* note 32, at 633 n.5 ("Our perspective is influenced by the work of . . . economists concerned with responses to consumer dissatisfaction (e.g. Hirschman, 1970) . . .").

38. See, e.g., Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 BERKELEY J. EMP. & LAB. L. 71, 78 (2014).

worker's immigration status can enhance these power balances in unique ways.³⁹

Third, scholars have identified the lack of incentives, or forceful disincentives, as key to understanding inhibitors to claimsmaking. Alexander and Prasad, for instance, identify several incentives and disincentives that workers consider before engaging in claiming behavior, such as fears of employer retaliation if they dare to do so and the likelihood of potential monetary gains if the worker's claim is successful.⁴⁰ Their findings suggest that unauthorized workers may face a disproportionate amount of employer retaliation as compared to their authorized counterparts, thereby reducing their incentives to come forward.⁴¹ In our analysis below, we consider how three different immigration law categories may pose unique sets of disincentives and perceptions about the consequences of employer retaliation.

III. *CRIMMIGRATION* AND *IMMPLOYMENT* REGIMES AS INHIBITORS

In this Section we apply the broad claimsmaking dynamics outlined in Section II to the particular circumstances of unauthorized workers and H-2 guest workers. Through this comparison, we conclude that the *crimmigration* and *immployment* law regimes are central to understanding the workplace precarity more broadly, and claiming inhibitors more specifically, of these two groups.

A. *Unauthorized Workers*

1. *Crimmigration*

For unauthorized workers, a central inhibitor to claiming is the *crimmigration* regime.⁴² The intensified blending of criminal and immigration regulation communicates that unauthorized individuals could be

39. Bridget Anderson, *Migrations, Immigration Controls and the Fashioning of Precarious Workers*, 24 WORK, EMP. & SOC'Y 300 (2010).

40. Alexander & Prasad, *supra* note 4, at 1089–97.

41. *Id.* at 1091, 1074 (stating that unauthorized workers, women and workers with low education levels “were less likely to make claims” and “the most likely to experience retaliation”).

42. There are three central actors in the *crimmigration* enforcement and deportation apparatus. Courts, including criminal courts and the U.S. Department of Justice's civil immigration courts, play a role in setting the conditions for and activating deportations from the country. *See, e.g.*, DANIEL KANSTROOM, *AFTERMATH: DEPORTATION LAW AND THE NEW AMERICAN DIASPORA* 169–75 (2012). The U.S. Department of Homeland Security's (DHS's) Immigration and Customs Enforcement agency (ICE) is tasked with detection, apprehension and deportation of unauthorized immigrants. Local police officers, through coordinated efforts with DHS, have also increasingly played a role in the immigration enforcement machinery. DORIS M. PROVINE ET AL., *POLICING IMMIGRANTS: LOCAL LAW ENFORCEMENT ON THE FRONT LINES* 117–46 (2016).

deported at any time for any reason. This dynamic enhances employer power in the workplace and can foster employee perceptions that they cannot challenge the employer in any way, or freely leave the current employment relationship.

The existing literature's dominant attention on the unauthorized workforce is undoubtedly merited. Conservative estimates suggest that there are at least 8 million unauthorized employees currently laboring in the United States. While this workforce⁴³ represents a small slice of the overall U.S. labor force (an estimated 5%), in some industries, unauthorized workers constitute a significant percentage.⁴⁴ At minimum, they are 17% of the agriculture industry and 13% of the construction industry.⁴⁵

Moreover, the literature's emphasis on the *crimmigration* regime as a key legal institutional context for understanding the precarity of the unauthorized population is also warranted. The boundary between criminal law and immigration law has become increasingly blurred in the last decade,⁴⁶ so much so that Juliet Stumpf's 2006 conceptualization of "*crimmigration*" law has gained wide usage nationally and internationally.⁴⁷ There are a number of reasons for this *crimmigration* turn. Because of federal legislative changes in 1996, more and more crimes can lead to immigration problems and more and more immigration-related activities can result in criminal court prosecution.⁴⁸ Moreover, state and local anti-immigrant legislation, as well as local policing of immigrants, increasingly have played a role in the immigration enforcement and deportation machinery.⁴⁹

While the *crimmigration* regime affects all non-citizens, even legal permanent residents who can become deportable if convicted of certain misdemeanors or crimes,⁵⁰ the *crimmigration* turn has unique relevance for

43. Cohn & Passel, *supra* note 5.

44. *See id.* at 8–15.

45. *See id.* at 7–8.

46. Julia Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. UNI. L. REV. 367, 379–81 (2006).

47. *See e.g.*, Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 AM. CRIM. L. REV. 105, 110, 178 (2012); Boldizsar Nagy, *Hungarian Asylum Law and Policy in 2015-2016: Securitization instead of Loyal Cooperation*, 17 GERMAN L.J. 1033, 1041, 1082 (2016).

48. *See* KEVIN R. JOHNSON, THE "HUDDLED MASSES" MYTH: IMMIGRATION AND CIVIL RIGHTS 8 (2004) (arguing that "tough on crime" measures which increased in the 1990s lead to punishment for "criminal aliens."); Douglas S. Massey & Karen A. Pren, *Unintended Consequences of U.S. Immigration Policy: Explaining the Post-1965 Surge from Latin America*, 38 POPULATION DEV. REV. 11, 15–6 (2012).

49. *See generally* CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, *CRIMMIGRATION LAW* (2015); JOHNSON, *supra* note 48, at 42–45.

50. There are several "criminal" exclusions that would render any non-citizen deportable, including a broad range of "aggravated felonies." 8 U.S.C. § 1101 (2017); 8 U.S.C. § 1227 (2017). Aggravated felonies range from serious crimes such as murder and drug trafficking, to comparatively less serious misdemeanors such as filing a false tax return, theft, or battery. 8 U.S.C. § 1101 (2017); 8 U.S.C. § 1227 (2017).

the unauthorized population. The “punitive turn” of legal control,⁵¹ described by Stuart, Armenta and Osborne, heightens the looming threat of deportation through such things as home arrests, immigration raids, and state and local anti-immigrant policymaking.⁵² As the work of Gleeson has illustrated, the “looming risk of discovery and deportation” exacerbates unauthorized workers’ “aversion to conflict” and ability to speak up in the face of workplace rights violations.⁵³ Similarly, Maira contends that the “deportation regime” inhibits unauthorized workers from mobilizing their workplace rights.⁵⁴ The *crimmigration* regime intensifies inequality of bargaining power in the workplace by adding potential deportation threats to the list of “multifaceted mechanisms of employer retaliation.”⁵⁵

The authors’ pilot study in the New York City metropolitan area provided some illustrations of this *crimmigration* dynamic. For example, Mackenzy, a TPS holder from Haiti, described how she felt when she was unauthorized: “[W]hen I didn’t yet have papers, each time I saw a police officer, my heart broke. This thing kept me on edge, I always knew, I always knew that they’ll arrest me, they’ll deport me, they’ll return me to Haiti.”⁵⁶ Mackenzy also described the need to be on constant alert for those who might take advantage of her vulnerable situation as an unauthorized person: “[i]t is something that’s very sad for people who are illegal, you see . . . there are a lot of people, too, who profit off of us to make money, to make people fear, especially when it comes to deportation.” Receiving Temporary Protected Status brought her relief from these fears.⁵⁷

2. *Immemployment*

Prior literature identifies the interaction between immigration regulation and the employment arena, or *immemployment* law, as an additional legal institutional context that has implications for unauthorized workers’ claimsmaking. The melding of immigration regulation and employment communicates that an employee’s U.S. workplace law claim may somehow

51. Forrest Stuart, Amada Armenta & Melissa Osborne, *Legal Control of Marginal Groups*, 11 ANN. REV. LAW SOC. SCI. 235, 237–38 (2015).

52. Bridget Anderson, Matthew J. Gibney & Emanuela Paoletti, *Citizenship, Deportation and the Boundaries of Belonging*, 15 CITIZENSHIP STUD. 547, 549–63 (2011).

53. Shannon Gleeson, *Labor Rights for All? The Role of Undocumented Immigrant Status for Worker Claims Making*, 35 LAW & SOC. INQUIRY 561, 563, 594 (2010); accord GLEESON, *supra* note 6, at 125–27.

54. Sunaina Maira, *Radical Deportation: Alien Tales from Lodi and San Francisco*, in THE DEPORTATION REGIME: SOVEREIGNTY, SPACE, AND THE FREEDOM OF MOVEMENT 301 (Nicholas De Genova & Nathalie Peutz eds., 2010).

55. GLEESON, *supra* note 6, at Table 2C.

56. Interview by Kennys Lawson with Mackenzy Doe, Temp. Protected Status Holder, in New York, New York (July 14, 2016).

57. *Id.*

result in immigration consequences. While these enforcement arenas are technically separate, and both the U.S. Department of Labor and U.S. Immigration and Customs Enforcement unit follow distinct organizational missions, the exploitation of labor claims to advance deportation cases is unfortunately not without precedent.

For unauthorized workers, private employers may appear like an arm of the immigration enforcement state. Unauthorized employees may fear employers as immigration enforcers, or may simply not want to rock the boat and risk losing their jobs. An employee's perception that employers are immigration enforcers restrains employee voice in the workplace and enhances already significant imbalances in power between employers and employees—two dynamics that exacerbate inhibitions to claimsmaking. Indeed, Sexsmith's recent study of unauthorized immigrant dairy workers in upstate New York describes the "*constrained* loyalty to paternalistic farmers" that can mitigate against claimsmaking by unauthorized workers.⁵⁸

The perception that employers are immigration enforcers is not completely unfounded. U.S. employers do have some power over immigration enforcement as part of a general trend toward the devolution and privatization of immigration control. Starting in 1986,⁵⁹ the United States placed employer-employee relations at the heart of immigration enforcement. It gave employers the role of verifying the work authorization status of each of its employees and created sanctions for employers who knowingly hire unauthorized immigrant workers.⁶⁰ While employers are currently under no legal requirement to report unauthorized immigrants to immigration authorities, their role in the employee verification process obscures the waters as it fosters the perception that employers are part of the immigration enforcement regime.

The *immigration* regime may also inhibit claimsmaking for unauthorized workers because of a perception that workplace law protections are less robust for unauthorized employees. Indeed, unauthorized employees do not have the right to get their jobs back if they are illegally fired for making a workplace law complaint. This is the case because U.S. immigration law prevents an employer from knowingly employing an unauthorized employee.

58. Kathleen Sexsmith, *Exit, Voice, Constrained Loyalty, and Entrapment: Migrant Farmworkers and the Expression of Discontent on New York Dairy Farms*, 20 CITIZENSHIP STUD. 311, 311 (2016) (italics in original).

59. Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324 (1986).

60. Kati L. Griffith, *Immigration Advocacy As Labor Advocacy*, 33 BERKELEY J. EMP. & LAB. LAW 73, 83–84 (2012); Sarah Horton, *From "Deportability" to Denounce-ability: New Forms of Labor Subordination in an Era of Governing Immigration Through Crime*, 39 POL. AND LEGAL ANTHROPOLOGY REV. 312 (2016).

Moreover, unauthorized employees are also disincentivized from claiming because there is little clarity about whether they have the same rights to monetary remedies in successful workplace law cases, as compared to their authorized counterparts. A 2002 U.S. Supreme Court decision, *Hoffman Plastic v. NLRB*, concluded that while unauthorized employees had the labor law “right” to engage in collective activity under the National Labor Relations Act, they did not have access to the “remedy” of backpay to compensate them for the wages they lost because they were illegally fired.⁶¹ *Hoffman* is “a powerful legal symbol” that “sends a message of exclusion to undocumented workers,” even though they have workplace law rights on the books.⁶² Why claim if retaliation is possible and the remedy for the workplace law violation is unclear?⁶³ Thus, even unauthorized employees who are aware of their rights under workplace law and know that the employer is the party to blame for the particular injustice, may be inhibited from claimsmaking because they lack the proper incentives.

The uncertain relationship between immigration enforcement and the employment sphere creates an additional disincentive for this group. Unauthorized employees may fear that all branches of government, even workplace law agencies who enforce the law on behalf of employees, engage in immigration enforcement. Indeed, U.S. Department of Labor (DOL) staff members recently lamented that some unauthorized employees were so scared of immigration enforcement that they ran away from DOL staff and “declin[ed] to accept back wages owed to them” under workplace law.⁶⁴ Therefore, while workplace law agencies have made efforts to clarify the separation between workplace law and immigration law enforcement in the United States,⁶⁵ some unauthorized immigrants are still fearful.

61. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144–52 (2002).

62. Ruben J. Garcia, *Ten Years after Hoffman Plastic Compounds, Inc. vs. NLRB: The Power of a Labor Law Symbol*, 21 CORNELL J.L. & PUB. POL'Y, 659, 662 (2012); Charlotte S. Alexander, *Explaining Peripheral Labor: A Poultry Industry Case Study*, 33 BERKELEY J. EMP. & LAB. L. 353, 384–85, (2012) (describing how *Hoffman Plastics* creates precarity for poultry workers as it creates a “barrier” for poultry workers attempting to challenge their precarious situations and attain protection and stability).

63. See Kati L. Griffith, *When Federal Immigration Exclusion Meets Subfederal Workplace Inclusion: A Forensic Approach to Legislative History*, 17 N.Y.U. J. LEGIS. & PUB. POL'Y 881, 882 (2014) (“In the last decade there has been widespread and inconsistent adjudication of this issue in courts across the country”).

64. Sam Levin, *Immigration Crackdown Enables Worker Exploitation, Labor Department Staff Say*, THE GUARDIAN (Mar. 30, 2017), <https://www.theguardian.com/us-news/2017/mar/30/undocumented-workers-deportation-fears-trump-administration-department-labor>.

65. See Gleeson, *supra* note 30, at 301–20; Stephen Lee, *Monitoring Immigration Enforcement*, 53 ARIZ. L. REV. 1089, 1130–36 (2011); Kati L. Griffith, *ICE Was Not Meant to be Cold: The Case for Civil Rights Monitoring of Immigration Enforcement at the Workplace*, 53 ARIZ. L. REV. 1137 (2011).

B. H-2 Guest Workers

1. *Immemployment*

While the *crimmigration* regime is the dominant institutional space for “(re)creating the regime of deportability” for unauthorized immigrants, employers’ role in immigration authorization, the *immemployment* legal regime, is the dominant factor shaping low-wage H-2 guest worker precarity in the United States.⁶⁶

Even though the population of H-2 guest workers is relatively small, as compared to unauthorized and temporary immigrant workers, scholars have studied this group because they represent the entire population of low-wage guest workers in the United States. The H-2 program is the only program to allow “no skills required” foreign workers to the United States to fill labor shortages temporarily. In 2014, the U.S. government issued 240,620 H-2A (Seasonal Agricultural Workers) and 105,416 H-2B (Seasonal Non-Agricultural Workers) visas.⁶⁷ The numbers of H-2 workers are higher in practice because these numbers of newly granted visas do not include visa reissuances for existing H-2 workers.⁶⁸ Moreover, guest worker programs have received intense international scholarly attention because they represent a growing model worldwide.⁶⁹

The particular legal structure of the H-2 program in the United States creates conditions that may intensify an H-2 worker’s feelings of “loyalty” to an employer in some cases, and fear of an employer’s power in others.⁷⁰ Both of these sentiments are not conducive to claimsmaking, which requires an employee to be willing to make a claim against the employer. There are three main *immemployment* mechanisms that work against claimsmaking for H-2 workers: employer sponsorship, employers’ central role in enforcing immigration law, and debt servitude to an employer.

Employer sponsorship, and thus a lack of visa portability, gives employers enormous power over H-2 workers. Thus, it could be a key factor in driving claiming behavior for H-2 workers. For both the H-2A and H-2B

66. Tonya Basok, Daniele Belanger & Eloy Rivas, *Reproducing Deportability: Migrant Agricultural Workers in South-western Ontario*, 40 J. ETHNIC & MIGRATION STUD. 1394, 1397 (2014).

67. John Teke & Waleed Navarro, *Nonimmigrant Admissions to the United States: 2015*, DEP’T OF HOMELAND SEC. 4 (Dec. 2016), https://www.dhs.gov/sites/default/files/publications/Nonimmigrant_Admissions_2015.pdf.

68. *Id.* at 2.

69. See, e.g., Christina Gabriel, *Managed Migration and the Temporary Labour Fix*, in LIBERATING TEMPORARINESS? 99–125 (Leah F. Vosko, Valerie Preston & Robert Latham eds. 2014).

70. Elmore, *supra* note 28, at 536 (“The centrality of the employer in guest worker programs . . . [heightens] the coercive power an employer has over a nonprofessional worker not to complain about or leave an exploitative work relationship”); Jennifer Lee, *Private Civil Remedies: A Viable Tool for Guest Worker Empowerment*, 46 LOY. L.A. L. REV. 31, 44 (2012) (stating that the “underlying structural flaw of guest worker programs remains intact—having workers tied to a single employer by a temporary visa”).

programs, a foreign guest worker can only gain entry if sponsored by a U.S.-based employer. Once in the United States, the H-2 guest worker's legal status is tied to the sponsoring employer and cannot be transferred to a separate employer without permission from the original sponsoring employer, the new sponsoring employer, and the U.S. government.⁷¹ If the relationship between the employer and H-2 worker terminates, the H-2 worker must return to her country of origin within days.⁷²

This relationship of adhesion is exacerbated further by the fact that an H-2 employer is under no obligation to renew a worker's contract and can blacklist an entire sending community by refusing to recruit in that region moving forward.⁷³ For these reasons, the extant literature on the H-2 guest worker programs in the United States contain a heavy critique of the lack of visa portability to new employers as a driving factor of worker exploitation.⁷⁴

Another *immigration*-related legal mechanism that works against employee claimsmaking is that the H-2 program requires employers to play a direct role in immigration enforcement. Specifically, the H-2 immigration regulations dictate that an employer must notify the U.S. Department of Homeland Security (DHS) and the DOL within two days if the employment relationship terminates before the scheduled end date.⁷⁵ The employer's role in initiating the deportation machinery is unique in this context. As discussed in the prior section, employers of unauthorized workers do not have any direct reporting requirements to DHS. If H-2 workers terminate the employment relationship before they are half way through their contract terms, they not only risk deportation, they also lose reimbursement for their initial transportation fees and the promise that they will receive at least three-fourths of the originally contracted wages.⁷⁶

Additionally, debt servitude to employers, which is built into the legal structure of the H-2 program, exacerbates the power imbalance between

71. Alex Nowrasteh, *How to Make Guest Worker Visas Work*, CATO INST. 5–12 (Jan. 31, 2013), https://object.cato.org/sites/cato.org/files/pubs/pdf/pa719_1.pdf.

72. Similar challenges exist for other categories of guest workers, including “high-skilled” H1-B workers, and certain foreign students, but we do not address those categories here. See Maria Linda Ontiveros, *H-1B Visas, Outsourcing and Body Shops: A Continuum of Exploitation for High Tech Workers* (Univ. San Francisco Law Research Paper No. 2016-21, 2016), <https://papers.ssrn.com/abstract=2827789>.

73. Patricia Medige, *Perspectives on the Bush Administration's New Immigrant Guestworker Proposal: Immigrant Labor Issues*, 32 DENV. J. INT'L L. & POL'Y 735, 738 (2004).

74. See, e.g., Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503, 558 (2007); Michael Holley, *Disadvantaged by Design: How the Law Inhibits Agricultural Guest Workers from Enforcing Their Rights*, 18 HOFSTRA LAB. & EMP. L.J. 575, 595 (2001); Emily B. White, *How We Treat Our Guests: Mobilizing Employment Discrimination Protections in a Guest Worker Program*, 28 BERKELEY J. EMP. & LAB. L. 269, 271 (2007).

75. 20 C.F.R. §655.20(y); 20 C.F.R. 655.122(n).

76. 20 C.F.R. § 655.20; 20 C.F.R. § 655.1304.

employers and employees,⁷⁷ thereby inhibiting claimsmaking.⁷⁸ Employers often pay an H-2 guest worker's transportation and recruitment fees and then deduct these amounts from the H-2 worker's pay.⁷⁹ This sometimes means that the H-2 worker is not receiving any payment, or very minimal payment, until the debt is paid off.⁸⁰ Some critics of the program characterize the relationship between employers and their H-2 employees as "modern-day servitude."⁸¹ Others have argued that it rises to the level of involuntary servitude in violation of the Thirteenth Amendment of the U.S. Constitution.⁸² While debt is also a problem for unauthorized workers who often rely on a sophisticated industry of clandestine transport and false documents, debt servitude is built into the legal structure of H-2 guest work.⁸³

Lee and others have highlighted how the H-2 program stokes a "climate of fear [that] can be created by the employers' implicit – and sometimes even explicit – threats to call DHS, the existence of a blacklist, or even the mere fact that the employer holds the 'deportation card.'"⁸⁴ Fear alone, however, is not the only inhibitor to claiming for low-wage H-2 guest workers in the United States. Whereas the threat of deportability is a salient factor for unauthorized workers, employers are the over-riding source of power for guest workers who are tied to them. Therefore, H-2 workers have much to lose by engaging in claimsmaking against their employers, who are ultimately the linchpins to both their continuing work opportunity and legal status in the United States.

To be sure, guest workers must navigate tricky terrain to maintain their desirability in order to, at best, be retained and, at worst, not blacklisted for the next season. As a result, they may avoid claimsmaking in order to avoid

77. Kati L. Griffith, *Globalizing U.S. Employment Law Through Foreign Law Influence: Mexico's Foreign Employer Provision and Recruited Mexican Workers*, 29 COMP. LAB. L. & POL'Y J. 383, 387–90 (2008); Bruce Ashby, Note, *Indentured Guests—How the H-2A and H-2B Temporary Guest Worker Programs Create the Conditions for Indentured Servitude and Why Upfront Reimbursement for Guest Workers' Transportation, Visa, and Recruitment Costs is the Solution*, 38 U. MEM. L. REV. 893, 909–15 (2008).

78. Michael Holley, *Disadvantaged by Design: How the Law Inhibits Agricultural Guest Workers from Enforcing Their Rights*, 18 HOFSTRA LAB. & EMP. L.J. 575, 596 (2001); Jennifer Lee, *Private Civil Remedies: A Viable Tool for Guest Worker Empowerment*, 46 LOY. L.A. L. REV. 31, 43 (2012).

79. S. POVERTY LAW CTR., CLOSE TO SLAVERY: GUESTWORKER PROGRAMS IN THE UNITED STATES 2 (2007).

80. *See, e.g.,* *Recinos-Recinos v. Express Forestry, Inc.*, No. 05-1355, 2006 U.S. Dist. LEXIS 56178, at *2–*6, *18–*24 (E.D. La. Aug. 11, 2006).

81. Lisa Guerra, *Modern-Day Servitude: A Look at the H-2A Program's Purposes, Regulations and Realities*, 29 VT. L. REV. 185, 214 (2004).

82. Maria L. Ontiveros, *Noncitizen Immigrant Labor and the Thirteenth Amendment: Challenging Guest Worker Programs*, 38 U. TOL. L. REV. 923, 928 (2007).

83. THE MIGRATION INDUSTRY AND THE COMMERCIALIZATION OF INTERNATIONAL MIGRATION (Thomas Gammeltoft-Hansen & Ninna Nyberg Sorensen eds., 2013).

84. Lee, *supra* note 70, at 43. For more on blacklisting and guest worker fear, see LANCE COMPA, HUMAN RIGHTS WATCH, UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS 41–43, 221–23 (Cynthia Brown ed. 2000).

employer retaliation and also compete with a vast pool of workers who court a complex system of formal and informal brokers. With their fieldwork, Basok and colleagues similarly make this observation about guest workers in the Canadian context. They refer to employers as central to furthering “the threat of deportation as a technology of discipline” for temporary guest workers in Canada.⁸⁵

IV. *ADMINISTRATION* REGIME AS INHIBITOR: THE CASE OF TPS WORKERS

In this Section we examine the case of workers with Temporary Protected Status (TPS). As previewed in the Introduction, TPS provides temporary protection from deportation and temporary work authorization for individuals from designated countries that are experiencing severe environmental problems, wars, or other “extraordinary and temporary conditions.”⁸⁶ Habitual residents from such TPS designated countries who meet certain physical presence requirements in the United States and do not have a criminal history, are eligible for this type of temporary relief.

Whereas the threat of everyday deportability is a dominant reality for unauthorized immigrants, and the employer relationship is central for H-2 guest workers, the administrative immigration process carries unique claimmaking inhibitors for TPS holders. Thus, as we will elaborate upon below, the case of TPS workers illuminates the prominence of a previously overlooked precarious legal institutional space: the administrative immigration (*adminigration*) regime in the United States. Moreover, analysis of the TPS case reveals that the *adminigration* regime is important on its own, but also in relationship to the *crimmigration* and *immemployment* regimes discussed above.

A. *Administrative Immigration Processes*

The priorities of immigration agency administrators, not employers or law enforcement agents, determine whether TPS holders will remain in the United States and whether they will gain work authorization. As a result, the *adminigration* regime is key to understanding the unique form of temporality and precarity for TPS holders.

The structure of the TPS program demonstrates the prominence of the federal executive branch’s immigration agency prerogatives. The Secretary

85. Basok, Belanger & Rivas, *supra* note 66. Migrants also co-construct this by self-disciplining and disciplining others. For more on the idea of self-disciplining see Valeria Ottonelli & Tiziana Torresi, *Inclusivist Egalitarian Liberalism and Temporary Migration: A Dilemma* 20 J. POL. PHIL. 202, 209–14 (2012) (stating that temporary immigrants accept intolerable conditions in exchange for resources they can eventually bring to their origin countries).

86. 8 U.S.C. § 1254a; Chacón, *supra* note 16, at 722 (2015).

of the DHS is in charge of designating and renewing a country's eligibility for TPS. The U.S. Citizenship and Immigration Services agency (USCIS), which is the administrative side of DHS, processes applications for TPS and work authorization, as well as renewals of such grants.⁸⁷ Thus, immigration agency administrators, not employers, are central to the work authorization process for TPS workers.

Administrative immigration processes foster a feeling of "temporariness" in the TPS community, and may deepen a TPS worker's sense of powerlessness when faced with a workplace law abuse. Individuals undoubtedly weigh these dynamics as they consider engaging in the lengthy, and often ambiguous, adversarial process of making a claim against their employers. While the length of time guest workers have in the United States is written into their work contracts, for TPS workers, the length of their temporary reprieve may vary from country to country. And, as has happened recently for Haitian immigrants, a TPS designation can be shortened without notice. While the temporary nature of unauthorized life is similar in that it has no definite end, the clearly defined temporal bounds of TPS life have a sense of certain eventual end.

Given this legal institutional "*adminigration*" context, TPS workers are uniquely subject to a sometimes fickle presidential administration, deepening a feeling of no permanent future in the U.S.⁸⁸ With no clear future in the United States, some TPS workers may choose to endure exploitative conditions—and hence avoid engaging in claimsmaking. Karl, for instance, described work stocking shelves as an inevitable "hell," adding that "[t]here's no respect; there's not a lot of money."⁸⁹ While the low-wage market is limiting for all groups of marginalized workers, TPS poses a particular constraint in that it provides no future pathway to permanent residence, further complicating any opportunity for occupational mobility. Therefore, Karl continued working there in part because he perceived that there were no other options. Many of these workers seek short-term gains in order to return to their country of origin eventually, even if this is not the preferred route and for some could mean violence or death.

Other administrative processes—in particular TPS' frequent renewal deadlines—stoke anxiety and fear in this population, which mitigate against claimsmaking. TPS workers face the challenge of a finite time period of reprieve from deportation (ranging from six to eighteen months depending

87. U.S. CITIZENSHIP & IMMIGRATION SERV., *Humanitarian*, <https://www.uscis.gov/humanitarian> (last visited Feb. 13, 2017); U.S. CITIZENSHIP & IMMIGRATION SERV., *What We Do*, <https://www.uscis.gov/about-us/what-we-do> (last updated Jul. 14, 2015).

88. Gleeson, *supra* note 53, at 589–92.

89. Interview by Kennys Lawson with Karl Doe, Temp. Protected Status Holder, in New York, New York (August 8, 2016).

on the country).⁹⁰ With these short grants, they must regularly reapply, and often pay hefty fees to do so.⁹¹ The uncertainty about how long this “administrative grace” will last, Chacón argues, fosters instability in the lives of TPS workers and other “liminal legal subjects.”⁹² They, in essence, work and live “[l]ife with an expiration date.”⁹³ This complicates the process of claimsmaking, which requires a willingness to participate in public and adversarial agency and/or judicial forums.

Further stoking anxiety for this population are the often long-delayed administrative decisions about whether to renew a country’s TPS designation until the last minute. TPS recipients must wait until close to the expiration deadline that the administrative agency set for their country to find out whether the agency will renew their TPS designation.⁹⁴ Menjívar’s path breaking work on Salvadoran and Guatemalan workers confirms that the TPS deadlines create “enormous anxiety” and “accentuate[] these immigrants’ precarious situation” in their lives and work. Abrego and Lakhani’s study of TPS workers also points to renewals as a central source of precarity.⁹⁵ Along similar lines, Hallett highlights how the uncertainty of the renewal process means that TPS workers work within the unstable context of the “always imminent termination of their work permits.”⁹⁶

The uncertainty about the termination of TPS altogether, even when the administrative bureaucracy is proceeding as planned, can cause significant anxiety in the face of immense pressure to provide for one’s family. Martha, for example, reported that she received her initial paperwork to renew her TPS and was eagerly awaiting fingerprints at the time of our interview. When asked if she felt positive about her case moving forward, she worriedly explained that concern about a positive outcome weighed heavily on her. “I am praying for it. That the Lord give me that piece of paper and I keep

90. 8 U.S.C. § 1254a (2016); Madeline Messic & Claire Bergeron, *Temporary Protected Status in the United States: A Grant of Humanitarian Relief that Is Less than Permanent*, MIGRATION POLICY INST. (Jul. 2, 2014), <http://www.migrationpolicy.org/article/temporary-protected-status-united-states-grant-humanitarian-relief-less-permanent>.

91. TPS holders who are reapplying for TPS designation must pay an \$85 biometric services fee (if over age 14) and a \$410 fee for Form I-765 if he or she wants continued employment authorization. U.S. CITIZENSHIP & IMMIGRATION SERV., *I-821, Application for Temporary Protected Status*, <https://www.uscis.gov/i-821> (last updated Dec. 22, 2016); U.S. CITIZENSHIP & IMMIGRATION SERV., *Our Fees*, <https://www.uscis.gov/forms/our-fees> (last updated Jan. 5, 2017); U.S. CITIZENSHIP & IMMIGRATION SERV., *Temporary Protected Status*, <https://www.uscis.gov/humanitarian/temporary-protected-status#Countries%20Currently%20Designated%20for%20TPS> (last updated Mar. 6, 2017).

92. Chacón, *supra* note 15, at 716.

93. Miranda Cady Hallett, *Temporary Protection, Enduring Contradiction: The Contested and Contradictory Meanings of Temporary Immigration Status*, 39 L. & SOC. INQUIRY 621, 635–38 (2014).

94. Chacón, *supra* note 15, at 722–23 (stating that TPS recipients need “to wait until very near the expiration date of their temporary protections to determine whether the Executive Branch plans to extend that date.”).

95. See Leisy Abrego & Sarah M. Lakhani, *Incomplete Inclusion: Legal Violence and Immigrants in Liminal Legal Statuses*, 37 L. & POL’Y 265, 279 (2015).

96. Hallett, *supra* note 93, at 630.

working, working because my entire family counts on me. My kids count on me. My mother . . . counts on me.”⁹⁷

A legal advocate who works with TPS beneficiaries described the time period before renewal dates as one that stokes “panic about whether TPS will be extended.”⁹⁸ Gabriel, a TPS holder who was relatively content with his working conditions during the summer of 2016, expressed concern about the future of TPS after the November 2016 U.S. Presidential elections. He queried, “I would like to know will they continue to renew TPS for Haitians, no matter who the President is, whether Republican or Democrat?”⁹⁹

Because it is short-term and subject to renewal by the Secretary of Homeland Security, TPS is subject to often highly volatile national politics and the ability of civil society to effectively lobby for renewal.¹⁰⁰ Indeed, recent reports suggest that the President Trump’s DHS may not renew a number of countries’ TPS designations, a threat made all the more real by the recent rescission of the Deferred Action for Childhood Arrivals program. Such an act would render many of these individuals deportable. Currently Haiti’s TPS designation is renewed for only six months, and the future of El Salvador and Honduras TPS holders remains unclear.

While deportation is an acute fear for unauthorized workers, TPS workers face the fear of not being renewed and thus falling into unauthorized status, all while being fully identified to the federal government and, thus, more easily deportable. Indeed, some reports suggest that the Trump administration might use TPS records to more efficiently identify and deport former TPS holders after it terminates the program.¹⁰¹

In the subsection below, we specifically examine how these *adminigration* processes interact with the *crimmigration* regime in ways that intensify precarity for this population.

97. Interview by Jessica Santos with Martha Doe, Temp. Protected Status Holder, in New York, New York (June 20, 2016).

98. *Jody Mashek Explains Temporary Protected Status*, AM. FRIENDS SERV. COMM. (Aug. 6, 2010) <https://www.afsc.org/story/jody-mashek-explains-temporary-protected-status> (“And of course this process has the potential to create fear in people. They may be grateful to have the chance to be able to work in this country legally, but at the same time, there’s always that panic about whether TPS will be extended.”).

99. Interview by Kennys Lawson with Gabriel Doe, Temp. Protected Status Holder, in New York, New York (July 7, 2016).

100. Chacón, *supra* note 15, at 711; Heeren, *supra* note 12, at 1175 (“Every year or two, the individuals with DED and its statutory cousin, TPS, wait anxiously to learn whether their status will be extended for another period. The existence of their status is year-to-year—dependent on political whims.”).

101. See Gutiérrez Warns Those with DACA or TPS to Prepare For the Worst (July 12, 2017), available at <https://gutierrez.house.gov/media-center/press-releases/guti-rrez-warns-those-daca-or-tps-prepare-worst>.

B. Crimmigration

Federal administrative immigration processes hold the key to designating TPS for an individual, but these dynamics should be considered in relationship to the *crimmigration* regime discussed in Section III. If a TPS holder loses TPS, the *crimmigration* regime becomes an inevitability. A key aspect of the liminality of TPS holders' existence is that they often fall in and out of status as they await extension and renewal, subjecting them to deportability and job loss.¹⁰² Therefore, TPS workers' experience with the immigration regulatory regime can also foster a fear of deportation, even if they are not presently deportable.¹⁰³ This may lead to workers self-regulating to avoid certain risks that they perceive as possibly leading to deportation. In turn, these workers may be dissuaded against rocking the boat by making a workplace law claim against their employers.

A Haitian TPS holder we interviewed during the summer of 2016, Magalie, communicated her feeling, in anticipation of a new Presidential administration, that she might lose her status. Her approach was to work with the lawyer and then just "let God do whatever it's going to do."¹⁰⁴ Many workers with TPS, like Magalie, have previous unauthorized experience in the United States and, thus, know what it feels like to be central targets of the *crimmigration* regime.¹⁰⁵ Given a political environment where anti-immigrant sentiment abounds (even in a diverse city like New York) and the expanding and multilayered *crimmigration* enforcement context, TPS workers may experience heightened concerns around deportation.¹⁰⁶

Another inhibitor to claimsmaking for TPS workers is heightened anxiety and deportation fears because they are subject to government monitoring. If a TPS worker misses a TPS renewal deadline, she becomes unauthorized.¹⁰⁷ The government knows a lot more about a TPS worker who falls out of the TPS designation than it knows about an unauthorized immigrant worker who entered without inspection and has never connected

102. See, e.g., Menjivar, *supra* note 16, at 1008 (stating "a situation of 'liminal legality' is neither unidirectional nor a linear process, or even a phase from undocumented to documented status, for those who find themselves in it can return to an undocumented status when their temporary statuses end. When Central Americans are granted temporary legality, they are conferred the right to work and reside in the United States without access to social services. In some cases, they are later given the opportunity to renew their permits. However, when the renewed permits expire, these immigrants slip back into the realm of nonlegality.").

103. Abrego & Lakhani, *supra* note 95, at 267.

104. Interview by Jessica Santos with Magalie Doe, Temp. Protected Status Holder, in New York, New York (June 21, 2016).

105. *Id.*

106. See Abrego & Lakhani, *supra* note 95, at 276.

107. See U.S. CITIZENSHIP & IMMIGRATION SERV., *Temporary Protected Status*, <https://www.uscis.gov/humanitarian/temporary-protected-status#Countries%20Currently%20Designated%20for%20TPS> (last updated Mar. 6, 2017).

to the immigration law enforcement scheme. The government has former TPS holders' fingerprints in the system and knows their names, addresses, and other identifying personal information.¹⁰⁸ Some TPS holders who become unauthorized may be in an even more precarious situation than H-2 workers who become unauthorized. TPS holders are more likely to have children with them, as compared to H-2 workers,¹⁰⁹ and thus may have more difficulty distancing themselves from the address and identifying information they have on file with the government.

One of our interviewees, Mackenzy, talked about fears regarding governmental surveillance. Mackenzy, a TPS holder at the time of our interview, noted that she was originally hesitant to apply for TPS because many others in her Haitian community saw it as a mechanism for governmental monitoring and surveillance. She said, "people spread fear, arguing that the [TPS] papers were so that [the U.S. government] can identify Haitians that are living in the country in order to deport them. And this is why there were some people who did not do it."¹¹⁰ However, the fears that Mackenzy reported are likely warranted. Heeren's work goes so far as to say that TPS and other forms of temporary relief are "essentially a registration program" for the government that allows for surveillance over this population.¹¹¹

Furthermore, because of widespread confusion about the meaning of liminal statuses, such as TPS, TPS holders are sometimes perceived as unauthorized by employers. Menjívar and Abrego,¹¹² and later, Abrego and Lakhani, develop the concept of "legal violence." According to these authors, legal violence blocks these immigrants' mobility, causes instability, and fosters fear of deportation. Abrego and Lakhani argue that "widespread misinformation" among employers and the public more broadly about these liminal statuses, and the false perception that TPS workers are unauthorized, "may cause immigrants harm."¹¹³

108. See Abrego & Lakhani, *supra* note 95, at 279.

109. Compare Cecilia Menjívar, *Temporary Protected Status in the United States: The Experiences of Honduran and Salvadoran Immigrants*, CTR. FOR MIGRATION RESEARCH (May 2017), available at http://ipsr.ku.edu/migration/pdf/TPS_Report.pdf (referring to sixty-one percent of TPS respondents living with children in the U.S.) with Jill H. Wilson, *Immigration Facts: Temporary Foreign Workers*, BROOKINGS INST., (June 18, 2013), available at <https://www.brookings.edu/research/immigration-facts-temporary-foreign-workers/> (referring to twenty-four percent of H-2 workers with families in the U.S.).

110. Interview by Kennys Lawson with Mackenzy Doe, Temp. Protected Status Holder, in New York, New York (July 14, 2016).

111. Heeren, *supra* note 12, at 1132.

112. Cecilia Menjívar & Leisy J. Abrego, *Legal Violence: Immigration Law and the Lives of Central American Immigrants*, 117 AM. J. SOC. 1380 (2012).

113. Abrego & Lakhani, *supra* note 95, at 267.

C. Immployment

The *adminigration* processes described above also interact with the *immloyment* legal regime in ways that heighten inequality of power between employers and TPS employees and exacerbate the propensity for TPS workers to feel heightened loyalty to their employers. The nature of TPS disciplines recipients' work lives¹¹⁴ by fostering a feeling that exiting existing employment is difficult and may lead to unemployment. One of our interviewees, Karl, described the feeling of job scarcity for low-wage TPS holders in the following way: "I got my paper. I took the first job, I don't care, whatever the job [] is. The first job, I will take it."¹¹⁵ In contrast, recent studies of high-skilled workers who transitioned from unauthorized to temporary status through the Deferred Action for Childhood Arrivals (DACA) program suggest that the change, at least temporarily, improved job prospects and working conditions.¹¹⁶

TPS workers may be uniquely disadvantaged in the labor market, heightening their sense of loyalty, for a number of reasons. Employers may have reasons to prefer authorized employees who do not have TPS, over TPS holders. Under U.S. immigration law, employers are allowed to exercise these preferences. An employer can legally prefer to hire a legal permanent resident or U.S. citizen, over a TPS recipient.¹¹⁷

Moreover, an employer may have law-induced reasons not to hire a TPS holder. The uncertain details of the TPS renewal process can create confusion and understandable fears of potential liability among employers and human resources professionals. Under immigration law, employers are required to verify the work authorization of their employees. However, because the U.S. government often announces renewals of a country's TPS designation close to the termination deadline, a TPS worker may have an expired work authorization card (EAD), even though she is still authorized to work. This means that an employer, confronted with an expiration date on an EAD, is legally obligated to re-verify the TPS worker's work authorization. Some employers, or human resources professionals, just do not know the proper

114. Hallett, *supra* note 94, at 622 (referring to TPS as disciplining recipients' work lives).

115. Interview by Kennys Lawson with Karl Doe, Temp. Protected Status Holder, in New York, New York (Aug. 8, 2016).

116. Center for American Progress, *New Study of DACA Shows Positive Economic and Educational Outcomes*, (October 2016), available at <https://www.americanprogress.org/issues/immigration/news/2016/10/18/146290/new-study-of-daca-beneficiaries-shows-positive-economic-and-educational-outcomes>.

117. Unlike Legal permanent residents, citizens and other specified groups TPS recipients are not "protected individuals" with respect to 8 USC 1324b(a)(1)(B) (prohibiting employer discrimination on the basis of citizenship status in recruiting, hiring or referring for a fee).

procedures for these situations and insist on an “unexpired card,” which is often simply not available to the worker.¹¹⁸

The Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC),¹¹⁹ regularly confronts this kind of employer confusion. One of the “Frequently Asked Questions” for OSC is what the TPS worker should show to be able to continue to work in the face of a TPS renewal but an expired EAD.¹²⁰ OSC directs TPS workers in this situation to provide the employer with the expired employment authorization card and a copy of the (dense and complicated) *Federal Register* notice indicating an automatic continuation for individuals from the designated country.¹²¹

A review of OSC’s publically available reporting on its phone intakes suggests, however, that it is not uncommon for employers to mistakenly suspend workers who have expired Employment Authorization Documents but are nationals of countries with TPS extensions.¹²² Even when a TPS worker follows the OSC FAQ advice and provides the employer with the proper *Federal Register* notice, employers sometimes are unaware that this is sufficient to comply with immigration law’s employee verification requirements.¹²³ Moreover, the phone intakes suggest that the TPS renewal process’ interface with the electronic employee verification (E-Verify) system may be confusing for some employers.¹²⁴ Ultimately, without a contract, these workers often have few other recourses once terminated.

Abrego and Lakhani’s interviews with TPS workers also confirmed the common perception that employers are often reluctant to “deal with the paperwork” related to Employment Authorization Documents.¹²⁵ Even more striking is Hallett’s finding that employers may sometimes prefer unauthorized workers (who have work authorization papers that appear valid on their face and that do not have termination dates) over TPS workers who have EADs with termination dates.¹²⁶ In our own work, we encountered similar perceptions such as Heloise, a TPS holder who discussed the difficulty of looking for work. She described confronting employers who seemed hesitant to hire her because they simply did not understand what TPS

118. DEP’T JUSTICE, *Frequently Asked Questions (FAQs)*, <https://www.justice.gov/crt/frequently-asked-questions-faqs#lpr> (last updated Jan. 31, 2017).

119. OSC is an agency within the U.S. Department of Justice. 8 U.S.C. § 1324b(c).

120. DEP’T JUSTICE, *supra* note 118.

121. *Id.*

122. DEP’T JUSTICE, *Telephone Interventions*, <https://www.justice.gov/crt/osc-telephone-interventions-0> (last updated Feb. 23, 2017) (referring to telephone intervention on Oct. 6, 2011).

123. *Id.* (referring to telephone intervention on Sept. 10, 2010); *Id.* (referring to telephone intervention on January 7, 2009); *Id.* (referring to telephone intervention on Jan. 29, 2009).

124. *Id.* (referring to telephone intervention on Nov. 24, 2008).

125. See Abrego & Lakhani, *supra* note 94, at 276–79, 287.

126. Hallett, *supra* note 93, at 630.

was.¹²⁷ She faced similar challenges when she found a job and her TPS came close to expiring:

They had told me that I need to bring it in before I start work again. My supervisor even told me that if it expired, I would not be able to work . . . I was being pressured. Not too hard, but to make sure that I have it . . . you have to be on top of your thing.¹²⁸

For workers transitioning into TPS from a previous unauthorized status, similar complications emerged. Mackenzy explained, “It was a headache for me at work to bring my real working papers because they didn’t know under what status I was working.”¹²⁹

Karl also feared retaliation and unemployment, and expressed hesitance about complaining about workplace issues to an employer. When asked about complaints, Karl’s response was “I don’t talk to my co-workers. I have a philosophy about jobs. We [go] there to work. We finish working . . . You go home.”¹³⁰ Karl asserted that you never should talk about problems at work because, if you do, “they are going to fire you.”¹³¹

V. LAW-INDUCED INHIBITORS: SOME CAVEATS

This article has considered how three broad legal regimes shape the lives of three groups of workers with uncertain futures under U.S. immigration law: unauthorized immigrants, H-2 guest workers, and immigrants who have been granted Temporary Protected Status. It has demonstrated that the law creates conditions of precarity for each group of workers, however in different ways and through different institutional mechanisms.

We do not intend to assert that legal regimes can paint the full picture of precarity for non-citizen workers. Even though we have centered our analysis on how legal regimes block claimsmaking, we acknowledge that the law can sometimes empower these workers to make claims under the right conditions.¹³² Moreover, with our laser focus on the legal institutional context, we do not mean to deny the myriad other factors that influence employees’ rights mobilization, such as gender, race, religion, class, and

127. Interview by Jessica Santos with Heloise Doe, Temp. Protected Status Holder, in New York, New York (July 21, 2016). *See also id.* (“And I was looking for job, but it was tough. Because certain places, I don’t think they know what was the TPS at the moment, or I don’t know because it’s temporary it probably catches them. . .”).

128. Interview by Jessica Santos with Heloise Doe, Temp. Protected Status Holder, in New York, New York (July 21, 2016).

129. Interview by Kennys Lawson with Mackenzy Doe, Temp. Protected Status Holder, in New York, New York (July 14, 2016).

130. Interview by Kennys Lawson with Karl Doe, Temp. Protected Status Holder, in New York, New York (Aug. 8, 2016).

131. *Id.*

132. GLEESON, *supra* note 6, at 76–78.

geography.¹³³ As Rathod reminds us, there is a “rich interplay” between an employee’s immigration status and their other characteristics, as well as broader structural dynamics.¹³⁴

In a similar vein, low-wage workers “in increasingly Latino-ized occupations” may have internalized a devaluation of their work that inhibits claimsmaking, regardless of their current immigration status.¹³⁵ Moreover, Herrera’s recent work with nonindigenous and indigenous Latino day laborers in Oakland, California helpfully demonstrates variation even within Oakland’s Latino day laborer community.¹³⁶ In doing so, he exposes that “illegality” is highly “racialized.”¹³⁷

These complexities notwithstanding, we maintain that the particulars of the legal institutional environment facing different categories of immigrant workers demands scrutiny. A worker’s position vis-à-vis immigration law and broader legal institutional contexts—while certainly racialized—is undoubtedly a relevant factor in immigrant workers’ lives and decision-making processes.¹³⁸ Immigration status, similar to race, class and gender, operates as a “master status” in the workplace.¹³⁹ It is a designation provided by law,¹⁴⁰ but it also shapes how an individual interacts with the law. As Armenta finds in her ethnography of policing, “laws converge to systematically criminalize and punish Latinos in the United States.”¹⁴¹

Immigration law, along with other aspects of law that touch upon an individual’s experience (such as *adminigration* processes, *crimmigration* and *immemployment*), can help set the broad dimensions of precarity for immigrant workers. Indeed, some scholars of stratification and inequality have begun to characterize legal control as “a premier stratifying institution.”¹⁴² A non-citizen employee’s position vis-à-vis the law is even more salient in the

133. Chacón, *supra* note 15, at 731, 753 (referring to these as “overlapping forms of liminality” and noting that “intersectional vulnerabilities compound the destabilizing effects of each form of liminality”).

134. Jayesh M. Rathod, *Beyond the “Chilling Effect”: Immigrant Worker Behavior and the Regulation of Occupational Safety & Health*, 14 EMP. RTS. & EMP. POL’Y J. 267, 293 (2010); Jayesh M. Rathod, *Danger and Dignity: Immigrant Day Laborers and Occupational Risk*, 46 SETON HALL L. REV. 813 (2016).

135. See Leticia M. Saucedo, *The Browning of the American Workplace: Protecting Workers in Increasingly Latino-ized Occupations*, 80 NOTRE DAME L. REV. 303 (2004). See also Lisa Catanzarite, *Dynamics of Segregation and Earnings in Brown-Collar Occupations*, 29 WORK AND OCCUPATIONS 300, 306 (2002).

136. Juan Herrera, *Racialized Illegality: The Regulation of Informal Labor and Space*, 14 LATINO STUD. 320, 325–38 (2016).

137. *Id.* at 323–25.

138. See generally Menjivar & Abrego, *supra* note 112 (discussing ways that immigration status shapes experience).

139. Shannon Gleeson & Roberto Gonzales, *When Do Papers Matter? An Institutional Analysis of Undocumented Life in the United States*, 50 INT’L MIGRATION 1, 3 (2012).

140. Gleeson, *supra* note 53, at 563.

141. Amada Armenta, *Racializing Crimmigration Structural Racism, Colorblindness, and the Institutional Production of Immigrant Criminality*, 3 SOC. RACE & ETHNICITY 82, 82, 92–3 (2016).

142. Stuart, Armenta & Osborne, *supra* note 51, at 241.

current uncertain and hostile political context surrounding immigration law and policy.¹⁴³ Conditions for non-citizen workers have undoubtedly worsened under President Trump's administration.¹⁴⁴

VI. DISCUSSION AND CONCLUSION

In sum, this article draws from a number of different sources to develop a theory of law-induced inhibitors to claimsmaking for temporary immigrant workers in the United States, including: a survey of the legal landscape and law review literature; studies (mostly ethnographic) of the nature of precarity for TPS workers and other temporary immigrants; socio-legal studies of legal mobilization generally, and particularly with respect to unauthorized workers and low-wage guest workers; and preliminary data from the authors' pilot study of workers in New York City who have TPS.

Our intent was to highlight that the form and mechanism of precarity differs for three groups of non-citizen workers (unauthorized, H-2 guest workers, temporary immigrant workers). Each of these categories of worker interfaces distinctly with the institutional spaces of *crimmigration*, *immployment* and *adminigration* processes. In doing so, we do not argue that one of the three groups we examine is necessarily more precarious than the other. We also do not contend that these institutional spaces can be considered in isolation, but rather that they intersect with each other in different ways depending on a non-citizen individual's immigration law category. Indeed, the case of TPS shows how the *adminigration* regime interacts with both *crimmigration* and *immployment* dynamics.

This article's observations contribute to three distinct literatures. First, similar to Goldring,¹⁴⁵ Anderson,¹⁴⁶ Menjívar and others, our theoretical framework speaks to strains of the migration scholarship that are too often focused on the binary of un/authorized status. It builds on Goldring's notion of "conditionality" by highlighting how states, even outside of the guest worker/labor migration policy arena, can shape temporary migrant workers' precarity in unique ways.¹⁴⁷ It builds on Menjívar's observation that one's position vis-a-vis immigration law is "paramount" to the lives and work of

143. GLEESON, *supra* note 6, at 133–36.

144. Lisa Desjardins, *What is Donald Trump's 10-Point Immigration Plan?*, PUB. BROAD. SERV. (Sept. 1, 2016), <http://www.pbs.org/newshour/updates/donald-trumps-10-point-immigration-plan>.

145. See Goldring, Berinstein & Bernhard, *supra* note 14.

146. Anderson, *supra* note 39.

147. Luin Goldring, *Resituating Temporariness as the Precarity and Conditionality of Non-citizenship* in *LIBERATING TEMPORARINESS; MIGRATION, WORK AND CITIZENSHIP IN AN AGE OF INSECURITY IN CANADA* (VOSKO, PRESTON & LATHAM EDS.) (2014).

temporary immigrants by unraveling how TPS may interact with broader legal regimes in ways that inhibit employee claimsmaking.¹⁴⁸

Second, the article engages theories of claimsmaking, which have well-established the challenges facing unauthorized workers and H-2 guest workers in coming forward, but have heretofore poorly theorized the limitations that authorized, but temporary, non-guest workers face. And lastly, the article contributes an institutional analysis of social stratification through the law. It concentrates especially on three intersecting contexts of inequality: the criminalization of immigration enforcement, the administrative state, and immigration regulation in the employment sphere. In the current period of increased policing, along with a backing away from humanitarian relief (most notably with regards to refugees, but also other humanitarian categories such as TPS), the negative effects of these legal institutional dynamics are likely to intensify.

We advocate for future research that considers how the inhibitors identified here interact with the actual decision-making processes of workers. Rather than simply complicate classical dispute pyramid models of naming, blaming, and claiming, we argue that it is crucial to dissect the actual decision-making process for workers whose choices drive the claims-driven bottom-up system of workplace law enforcement in the United States. Some of these dynamics are likely to parallel challenges in other arenas of rights enforcement, such as crime reporting.

We offer a few additional suggestions for ground-up studies of workers' decision-making moving forward. First, future studies should not assume that unauthorized workers will always be the least likely to make claims against their employers, as compared to TPS workers and H-2 workers. In our analysis, we did highlight some formidable inhibitors for unauthorized employees' claimsmaking, such as fear of the *crimmigration* regime's deportation machinery. It is plausible, however, that unauthorized workers may be *more* likely than TPS and H-2 workers to make claims against their employers in some circumstances. The uncertainty and surveillance mechanisms of TPS and the subordinated status of H-2 workers vis-à-vis their employers pose challenges to claimsmaking that unauthorized workers do not face and that may limit opportunities to voice dissent. Unauthorized individuals, who are not registered with the government, and are in effect "free agents" in the labor market, do not experience these same dynamics.

Indeed, a core finding of psychological studies on decision-making, especially the loss aversion heuristic, suggests that researchers should be careful about making the assumption that unauthorized workers suffer the

148. Menjivar, *supra* note 16, at 1003.

greatest inhibitors to workplace law claimsmaking.¹⁴⁹ Simply put, this perspective conveys that individuals are more risk averse in their decision-making when they perceive that they will potentially lose something by taking the risk, than when they perceive that they could gain something.¹⁵⁰ As Weyland characterized it when applying this theory to explain risky decisions by Latin America political leaders in the 1980s and 1990s, “[c]rises trigger bold actions, while better times induce risk aversion.”¹⁵¹

If TPS workers view claimsmaking as associated with a potential loss of their Temporary Protected Status, they may have a unique claiming inhibitor that unauthorized workers (who do not have even temporary immigration authorization) do not confront.¹⁵² This may be the case even if TPS workers have knowledge of their rights and even if the disincentives to claimsmaking are reduced through additional legally mandated remedies and protections against retaliation. The status quo is a key reference point for decision-makers and they will “defend it more fiercely against threats of losses.”¹⁵³ Relatedly, this theory would predict that political upheaval and the threat of an imminent end to the TPS program could lead to more risk taking, such as engaging in a workplace law complaint.

Second, the cross-border lives of immigrants in general should be considered as this dynamic no doubt shapes their decision-making about whether to engage in claimsmaking against their employers. Indeed, many of the interviewees in our pilot study often referred to their connections to their birth country. Sociologists have long examined the impact of a “dual frame of reference” on immigrant behavior building on classic work by Michael Piore.¹⁵⁴ Recent work by Julia Gelatt weighs the competing ties and norms that immigrants rely on (either home-country or destination-country) when

149. Kahneman and Tversky first presented the loss aversion heuristic, which is a subset of their “prospect theory.” Amos Tversky & Daniel Kahneman, *Prospect Theory: An Analysis of Decision Under Risk*, 47 *ECONOMETRICA* 263, 263–65 (1979).

150. See Amos Tversky & Daniel Kahneman, *Advances in Prospect Theory: Cumulative Representation of Uncertainty*, 5 *J. RISK UNCERTAINTY* 297, 297–99 (1992); Amos Tversky & Daniel Kahneman, *The Psychology of Preferences*, 246 *SCI. AM.*, Jan. 160, 160 (1982); Tversky & Kahneman, *supra* note 149, at 263–65.

151. Kurt Weyland, *The Political Fate of Market Reform in Latin America, Africa, and Eastern Europe*, 42 *INT’L STUD. Q.* 645, 648 (1998).

152. Kahneman and Tversky’s work, and the experiments and field studies that followed, challenges some rational choice assumptions that individuals (when properly informed) make decisions about what is in their self-interest after they comprehensively calculate all of the relevant incentives and disincentives. Rational choice theories “make unrealistic assumptions about human capacities for processing information.” KURT WEYLAND, *THE POLITICS OF MARKET REFORM IN FRAGILE DEMOCRACIES: ARGENTINA, BRAZIL, PERU, AND VENEZUELA* 38 (2002). In contrast to these rational choice assumptions, these scholars posited that people use “cognitive shortcuts,” what they and others call “heuristics,” to make decisions about the likely outcomes of their behavior. See Cass R. Sunstein, *Lecture, Moral Heuristics and Moral Framing*, 88 *MINN. L. REV.* 1556, 1558 (2004) (characterizing heuristics as playing a “pervasive role” in legal judgments).

153. WEYLAND, *supra* note 152, at 40.

154. MICHAEL J. PIRE, *BIRDS OF PASSAGE: MIGRANT LABOR AND INDUSTRIAL SOCIETIES* (1979).

evaluating their social condition.¹⁵⁵ Gelatt confirms that in many cases immigrant workers simultaneously endure low-status jobs for the sake of their children and other social obligations, but are not necessarily satisfied or content in evaluating their condition. This means that the cross-border lives of immigrants—and their related family concerns—no doubt shape their decision-making and sense of well-being.

Moving forward, it is our hope that this article's theoretical framework can set the stage for an empirical research agenda that does the following. We must seek out measures of immigration status that not only go beyond the authorized/unauthorized divide and beyond the guest worker context, but also which interrogate the multifaceted forms of temporariness as sources of precarity. Quantitative survey data that can capture these distinct immigration law categories will continue to be important, insofar as it is collected in an ethical and reliable way that preserves confidentiality. Nonetheless, qualitative interviews with individuals who are in temporary non-guest worker immigration categories like TPS are crucial, even if they do not form a majority or even a large section of the non-citizen population. Finally, we advocate for a cross-disciplinary approach which examines both social and structural factors (e.g., at the level of the government and the market) that shape workplace precarity and the migrant decision-making process.

155. Julia Felatt, *Looking Down or Looking Up: Status and Subjective Well-Being Among Asian and Latino Immigrants in the United States*, 47 INT'L MIGRATION REV. 39 (2013).

