

2015

**When Two Wrongs Make a Right: Deferred  
Action and the Rule of Law - A Response to  
Hiroshi Motomura**

Amanda Frost

# When Two Wrongs Make a Right: Deferred Action and the Rule of Law

## A Response to Hiroshi Motomura

Amanda Frost\*

### I. INTRODUCTION

Opponents of immigration reform have long argued that granting undocumented immigrants legal status violates the rule of law. Rule of law based objections were raised particularly loudly in response to President Obama's 2012 grant of deferred action to a category of undocumented immigrants who were brought to the United States as children, Deferred Action for Childhood Arrivals ("DACA"),<sup>1</sup> and to his expansion of deferred action in 2014 to the undocumented parents of U.S. citizens and legal residents, Deferred Action for Parents of Citizens and Lawful Permanent residents ("DAPA").<sup>2</sup> It is striking, therefore, that in his Foulston Siefkin Lecture at the Washburn University School of Law, Professor Hiroshi Motomura defended DACA and DAPA in part on the ground that granting quasi-legal status to some undocumented immigrants is actually *more* consistent with rule of law values than the status quo, thereby co-opting an argument long used to attack relief for the undocumented.<sup>3</sup>

This Essay examines these competing claims to the rule of law high

---

\* Professor of Law, American University Washington College of Law. I received valuable comments and suggestions from Mark Noferi, Jayesh Rathod, and Anita Sinha. I also wish to thank the editors of the Washburn Law Journal for their editorial assistance. Special thanks to Ann Garcia for her research assistance.

1. See Memorandum from Janet Napolitano, Sec'y of Homeland Sec., on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to The United States as Children at 1 (June 15, 2012), <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<http://perma.cc/2NZ8-6R96>].

2. See U.S. Citizenship & Immigration Services, EXEC. ACTIONS ON IMMIGRATION (Nov. 20, 2014), <http://www.uscis.gov/immigrationaction> [<http://perma.cc/4CRV-QHG4>].

3. See Hiroshi Motomura, *The President's Dilemma: Executive Authority, Enforcement, and the Rule of Law in Immigration Law*, 55 WASHBURN L.J. 1 (2015) [hereinafter Motomura, *The President's Dilemma*]. Professor Motomura has noted that opponents of deferred action consider it a violation of the rule of law. Hiroshi Motomura, *The President's Discretion, Immigration Enforcement, and the Rule of Law*, AM. IMMIGR. COUNCIL, at 2 ("Others, however, have cast [Deferred Action for Childhood Arrivals] and any other form of administrative relief as 'lawless' or contrary to the 'rule of law,' apparently believing that such measures would exceed the President's legal authority.") [hereinafter Motomura, *The President's Discretion*].

ground. Part II.A. of the Essay briefly defines what is meant by the term “rule of law” as used both by opponents of the President’s exercise of deferred action for undocumented immigrants, as well as by Professor Motomura and other supporters of these very same policies. Part II.B. then summarizes the rule of law objections raised by opponents of deferred action, and Part II.C. describes Professor Motomura’s rule of law arguments in favor of deferred action.

In Part III, I expand on Professor Motomura’s observations. Professor Motomura’s lecture focused on the benefits to the rule of law that come from setting clear priorities in the *enforcement* of immigration law. However, he did not discuss collateral benefits that result when undocumented immigrants are given the right to live and work in the United States legally. As described in this Part, bringing this population out of the shadows promotes the rule of law by reducing ongoing violations of labor, employment, housing, and criminal laws to which undocumented noncitizens are frequently subjected—violations that not only harm the undocumented, but also the legal immigrants and U.S. citizens with whom they live and work. Ironically, what opponents refer to as the President’s “lawless” act of giving undocumented immigrants legal permission to live and work in the United States will result in a net decrease in the violations of the law to which this population is subjected.

Part IV addresses the question posed by Part III: can two wrongs make a right? More than eleven million undocumented immigrants living in the United States are regularly the victims of illegal exploitation and abuse. The President responded to this situation by giving a significant percentage of this population the right to live and work in the United States temporarily. Opponents assert that deferred action is an unconstitutional bypass of the legislative process and undermines adherence to immigration laws, but they do not acknowledge that deferred action will almost certainly result in a net *decrease* in overall violations of the law. Part IV grapples with the question of whether these rule of law benefits outweigh the rule of law costs, and concludes that this dilemma illustrates why our broken immigration system needs a permanent, congressionally-created fix.

## II. RULE OF LAW AND DEFERRED ACTION

### *A. Defining Rule of Law*

Although the definition of “rule of law” is multifaceted and at

times contested,<sup>4</sup> Professor Richard Fallon has written that the term is most frequently understood to mean that the law “must be fixed and publicly known in advance of application, so that those applying the law, as much as those to whom it is applied, can be bound by it.”<sup>5</sup> In other words, “rule of law” typically refers to a legal system in which laws are both transparent and applied with a reasonable degree of consistency to everyone.<sup>6</sup> Accordingly, the rule of law is violated when the law is enforced arbitrarily, making it impossible to know who will be subject to it.<sup>7</sup> Most offensive to rule of law values is when enforcement varies depending on invidious categorization, such as race, sex, religion, or ethnicity—a particular risk in any legal system in which law enforcement is opaque and highly discretionary. As the Supreme Court declared in *Romer v. Evans*,<sup>8</sup> “[c]entral to both the idea of the rule of law and to our Constitution’s guarantee of equal protection is the principle that the government and each of its parts remain open on impartial terms to all who seek its assistance.”<sup>9</sup>

### *B. Rule of Law Arguments Raised by Opponents of Deferred Action*

In debates over U.S. immigration law and policy, the rule of law has most often been deployed by those who favor restricting immigration into the United States. The rule of law is touted as a reason to deny granting legal status—amnesty, as opponents call it—to those who entered the country illegally or who illegally overstayed their visas.<sup>10</sup> Rule of law values are also cited as a reason to deny undocumented immigrants driver’s licenses, welfare payments, housing, professional licenses, access to education, and other goods, services, and licenses commonly needed to live and thrive in the United States.<sup>11</sup>

4. Richard H. Fallon, Jr., “*The Rule of Law*” as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 1 (1997) (noting that the “precise meaning of the Rule of Law is perhaps less clear than ever before”); Hiroshi Motomura, *The Rule of Law in Immigration Law*, 15 TULSA J. COMP. & INT’L L., 139, 147 (noting that the term “rule of law” is “very malleable and often means what the speaker wants it to mean”).

5. Fallon, *supra* note 4, at 3.

6. *Id.* at 3–4. Professor Fallon acknowledges that the U.S. legal system, and particularly the U.S. system of administrative law, does not live up to this ideal. Indeed, Professor Fallon does not believe that any legal system could satisfy this particular rule of law ideal, and thus its definition must by necessity be more nuanced.

7. See *Papachirstou v. City of Jacksonville*, 405 U.S. 156, 171 (1972) (“[T]he rule of law implies equality and justice in its application.”).

8. 517 U.S. 620 (1996).

9. *Id.* at 633.

10. See, e.g., Carson Halloway, *Illegal Immigration and the Rule of Law*, (Dec. 1, 2010), <http://www.thepublicdiscourse.com/2010/12/2109/> [<http://perma.cc/HH3P-RT34>] (noting that opponents of amnesty believe it makes “a mockery of justice and law by rewarding lawbreaking”). “In general, it undoubtedly tends to undermine the rule of law when those who have violated any law escape unpunished. . . . [L]egal amnesty is even more problematic, because it involves the public authority *allowing* those who are *known* to have broken the law to escape unpunished.” *Id.*

11. See generally Kris W. Kobach, *Reinforcing the Rule of Law: What States Can and Should*

As expected, opponents of both DACA and DAPA have relied heavily on the rule of law as grounds for opposing these policy initiatives. In response to DAPA, then Speaker of the House John Boehner declared that “[t]his executive overreach is an affront to the rule of law and to the Constitution itself.”<sup>12</sup> Speaking in support of a bill that would have repealed DAPA, Representative Steve Scalise said, “The president thinks he can just sit in the Oval Office and make up his own laws. That’s not the way our system of government works.” He added, “This legislation says you can’t do that, Mr. President. There is rule of law.”<sup>13</sup> And the Complaint filed by Texas and twenty-five other States challenging the legality of DAPA asserted that, “This lawsuit is not about immigration. It is about the rule of law, presidential power, and enforcement of the U.S. Constitution.”<sup>14</sup>

Those objecting to deferred action on rule of law grounds make two points. First, they make the familiar argument that by granting undocumented immigrants quasi-legal status (albeit a temporary and revocable one) together with legal authorization to work in the United States, the President has undermined the force and effect of the statutory provisions that render their presence illegal, require their removal from the United States, and bar them from working.<sup>15</sup> From the opponents’ perspective, deferred action is antithetical to the rule of law because it gives benefits to people who willfully violated U.S. immigration laws, rewarding these lawbreakers for their bad acts.<sup>16</sup> It also has the collateral effect of encouraging others to violate the law,<sup>17</sup>

---

*Do to Reduce Illegal Immigration*, 22 GEO. IMMIGR. L.J. 459 (2008) (arguing that passage of state-level immigration legislation aimed at discouraging undocumented immigration bolsters the rule of law and suggesting a number of areas where states may constitutionally act in the field of immigration).

12. *An Affront to the Rule of Law and to the Constitution Itself*, SPEAKER.GOV (Jan. 14, 2015), <http://www.speaker.gov/press-release/affront-rule-law-and-constitution-itself> [<http://perma.cc/83HP-JT83>].

13. *House Rebukes Obama on Immigration*, WASH. TIMES, Dec. 4, 2014, <http://www.washingtontimes.com/news/2014/dec/4/house-set-to-rebuke-obama-on-immigration/?page=all> [<http://perma.cc/W2NJ-QM68>].

14. Am. Compl. for Declaratory and Inj. Relief at 3, *Texas v. United States (Texas I)*, 86 F. Supp. 3d 591 (S.D. Tex. 2014) (No. 1:14-cv-254).

15. See, e.g., Brief of the CATO Institute and Prof. Jeremy Rabkin as Amici Curiae in Support of Plaintiffs-Appellees at 10, *Texas v. United States*, 787 F.3d 733 (5th Cir. 2015) (“[Deferred Action for Parents of Americans and Lawful Permanent Residents (“DAPA”)] conflicts with five decades of congressional policy as embodied in the Immigration and Naturalization Act” (“INA”)) [hereinafter CATO Rabkin Amici]. “DAPA’s sweeping expansion of deferred action . . . undermines Congress’s comprehensive framework.” *Id.* at 33.

16. See, e.g., Press Release, H. Comm. on the Judiciary, *Texas Republicans Support ICE Agents Suing Administration Over Amnesty Program* (Aug. 23, 2012), <http://judiciary.house.gov/index.cfm/mobile/press-releases?ID=1B544CCD-B29D-736D-96C8-396075154027> [<http://perma.cc/26XQ-U2NY>] (quoting then-House Judiciary Committee Chairman Smith saying “The Obama administration’s amnesty program not only rewards lawbreakers, it also forces ICE agents to violate federal law.”).

17. See, e.g., Cari Kelly, *The DACA Magnet*, TAKE ACTION (July 18, 2014), <http://heritageaction.com/2014/07/daca-magnet/> [<http://perma.cc/8MSG-CX5F>] (“[T]he President’s

as well as demoralizing all those would-be immigrants who followed the law by remaining outside the United States and thus who were not in a position to reap the benefits granted to lawbreakers.<sup>18</sup> In short, deferred action, like any form of amnesty, prevents the law from being enforced in a predictable, consistent, and uniform manner by arbitrarily allowing some to violate the laws even while enforcing those same laws against others. Additionally, opponents of deferred action argue that giving legal status and benefits to undocumented immigrants undermines the legitimacy of *all* laws—immigration related or not—rendering it less likely that the law will be followed by the citizenry or applied in a fair, even-handed manner by those charged with administering it.<sup>19</sup>

Second, opponents of deferred action also contend that the *method* by which the Obama Administration granted undocumented immigrants the right to stay and work in the United States violated the rule of law.<sup>20</sup> They argue that by taking such unilateral action, the President circumvented his constitutional obligation to “take Care that the Laws be faithfully executed”<sup>21</sup> and to respect the separation of powers that gives Congress, and not the President, the authority to enact legislation.<sup>22</sup> These “second-order” rule of law arguments all raise the same rule of law concerns discussed above: by ignoring the limits on his legal authority, the President has acted as if he alone is not bound by the law (in this case the Constitution as well as federal immigration laws). Opponents further argue that as a result of DACA and DAPA, future Presidents are less likely to respect constitutional limits on their powers,

---

blatant refusal to enforce the law has, as anticipated, resulted in the more than 50,000 unlawful immigrants flooding the border.”).

18. See, e.g., Press Release, H. Comm. on the Judiciary, *Collateral Damage: President's Unilateral Actions Punish Legal Immigrants* (Dec. 4, 2014), <http://judiciary.house.gov/index.cfm/press-releases?id=21782655-651B-44F9-8230-FBAA001EA0C5> [<http://perma.cc/UJB8-KQC6>] (quoting House Judiciary Committee Chairman Goodlatte saying “President Obama’s unilateral immigration actions wrongfully punish legal immigrants who have played by the rules and waited in line for their turn to come to the United States. Not only does this send the message to the world that our immigration laws can be broken without consequence, it also shows that those who break our laws will be ushered to the front of the line. The President’s actions provide little incentive to follow our immigration laws and will undoubtedly encourage more illegal immigration.”).

19. See, e.g., *Border Security and Immigration Issues, Hearing before the Subcomm. on Immigration, Border Security, and Claims of the H. Comm. on the Judiciary*, 109<sup>th</sup> Cong. 2 (2006) (statement of James R. Edwards, Jr., Hudson Institute) (“Amnesty . . . is an affront to the rule of law because amnesty is an act whereby the civil government overlooks lawbreaking. Amnesty in effect rewards lawbreakers for their lawbreaking.”); Halloway, *Illegal Immigration and the Rule of Law*, *supra* note 10 (noting that opponents of amnesty believe it makes “a mockery of justice and law by rewarding lawbreaking”).

20. See, e.g., CATO Rabkin Amici, *supra* note 14, at 17 (arguing that DAPA violates the President’s duty to take care that the laws are faithfully executed).

21. U.S. CONST., art. II, § 3.

22. See Motomura, *The President’s Discretion, Immigration Enforcement, and the Rule of Law*, *supra* note 3, at 7.

and the public will be inclined to see all laws as subject to unilateral presidential revision.<sup>23</sup>

*C. Rule of Law Arguments Raised in Defense of Deferred Action.*

In his lecture, Professor Motomura has turned the tables on deferred action's opponents, asserting that deferred action *promotes* rule of law values by imposing transparency, predictability, and uniformity on enforcement decisions, thereby reducing the chances that the law will be applied in an arbitrary or discriminatory manner.

Professor Motomura observed that immigration officials currently exercise broad discretion that itself undermines rule of law values such as transparency and consistency.<sup>24</sup> At current funding and staffing levels, the government can deport only about four hundred thousand of the eleven million or so undocumented immigrants in the United States.<sup>25</sup> By necessity, then, federal officials must enforce immigration law selectively, picking and choosing which undocumented immigrants may stay and which must go. As the Supreme Court recently noted, a "principal feature of the removal system is the broad discretion exercised by immigration officials. Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all."<sup>26</sup>

Professor Motomura argues that the rule of law has suffered in this system in which the "law on the books" matters far less than the discretionary enforcement of that law. When broad discretion is exercised without clear, publicly available guidelines, it is reasonable to fear that the law will be administered arbitrarily and unjustly. As Professor Motomura explained, unfettered and opaque discretion can permit operation of the worst sorts of racial and ethnic biases, leading to enforcement primarily against non-white immigrants.<sup>27</sup> For example, he notes that even though "only about seventy-eight percent of unauthorized migrants in the United States were of Latino descent during the 2008-2012 period, greater than ninety-six percent of the total

---

23. See, e.g., *Unconstitutionality of Obama's Executive Actions on Immigration: Hearing Before the H. Comm. on the Judiciary*, 114th Cong. 6 (2015) (statement of Rep. Gowdy, Member, H. Comm. on the Judiciary) [http://judiciary.house.gov/\\_cache/files/acdada05-e0b6-4c8c-b6e3-29e347dd737a/114-3-93526.pdf](http://judiciary.house.gov/_cache/files/acdada05-e0b6-4c8c-b6e3-29e347dd737a/114-3-93526.pdf) [<http://perma.cc/K5A7-A3E3>] ("If this President's unilateral extraconstitutional acts are not stopped, future Presidents, you may rest assured, will expand that power of the executive branch, thereby threatening the constitutional equilibrium.")

24. See Motomura, *The President's Dilemma*, *supra* note 3, at 19 ("[T]he discretion that federal employees exercise to enforce—or not enforce—the law in any given setting, or against any person, is practically more important than the letter of the law.")

25. Memorandum from John Morton, Assistant Sec'y, U.S. Immigration & Customs Enforcement, on Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions (Aug. 20, 2010), <http://www.scribd.com/doc/36524371/John-Morton-Memo> [<http://perma.cc/PH5E-YMFU>].

26. *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012) (citation omitted).

27. Motomura, *The President's Dilemma*, *supra* note 3, at 17–18.

number of noncitizens removed in 2012 were of Latino descent.”<sup>28</sup> At the very least, enforcement of immigration law will be perceived as unjust and arbitrary if there are no clear and consistent guidelines for the exercise of that discretion.

In sum, Professor Motomura contends that DACA and DAPA serve rule of law values by ensuring that immigration enforcement is more transparent and consistent than it would be otherwise. DACA and DAPA also serve rule of law values by curbing the abuses of discretion that occurred in the previous system. As a result of DACA and DAPA, the public has clear, advance notice of which undocumented immigrants are subject to removal from the United States and which are not. Furthermore, immigration officials no longer have unfettered discretion to pick and choose who gets to stay and who will be prioritized for removal, which should help to prevent discrimination on the basis of race and ethnicity in the enforcement of immigration law.

### III. DEFERRED ACTION AND SECOND ORDER RULE OF LAW CONSEQUENCES

Professor Motomura’s arguments are focused almost entirely on how deferred action promotes the rule of law in the *enforcement* of immigration law. This Part expands on his point by describing how deferred action can promote the transparent and consistent enforcement of the law in areas outside of immigration enforcement, such as by preventing violations of employment, criminal, and housing laws to which undocumented citizens are often subjected. Because the rule of law is concerned with consistent, transparent application of *all* laws, and not just immigration law, granting undocumented immigrants the right to remain and work in the United States promotes the rule of law by reducing the legal violations that arise from their vulnerable status. Moreover, it is not just undocumented immigrants who will benefit, but also all those U.S. citizens and legal immigrants who suffer collateral damage from such violations.

#### *A. Reducing Violations of Labor and Employment Laws*

Employers violate criminal and civil laws when they knowingly employ an undocumented immigrant or fail to check the immigration status of any employee.<sup>29</sup> Undocumented immigrants may also violate

---

28. *Id.*

29. Immigration and Nationality Act § 274A(a)(1)(A), 8 U.S.C. § 1324A(a)(1)(A) (2012) (prohibiting the “knowing” hiring of a person not authorized to work in the United States);

the law by working.<sup>30</sup> Nonetheless, out of the approximately 11.3 million undocumented immigrants in the United States, an estimated eight million are currently working or looking for work, which means that undocumented immigrants make up approximately five percent of the U.S. labor force.<sup>31</sup> As these statistics show, a large majority of the undocumented population and their employers are violating the law either because the undocumented workers presented false papers to obtain their jobs, or employers hired them despite their unauthorized status. As has long been observed, employers benefit from the ready supply of labor provided by undocumented immigrants, and they know that enforcement of laws prohibiting employment of undocumented immigrants is lax, so they are willing to accept the risk of hiring an undocumented immigrant despite the legal prohibition against doing so.<sup>32</sup> As a result, to borrow Professor Motomura's words, there is a "large gap between immigration law on the books"—which provides few paths for noncitizens to legally live and work in the United States—with "immigration law in action"—in which the United States has "acquiesced, tolerated, and even invited this population to serve the workforce needs of the U.S. economy."<sup>33</sup> Deferred action, which grants currently-employed undocumented immigrants permission to stay in the United States and authorization to work, will therefore immediately put an end to millions of legal violations by employers and undocumented immigrants alike.

Deferred action can also reduce the frequency with which undocumented immigrants are exploited by their employers.<sup>34</sup> Employers must adhere to labor and employment laws for all their employees, regardless of immigration status.<sup>35</sup> In *Sure-Tan, Inc. v.*

---

§ 1324A(a)(1)(B)(requiring that employers verify an employee's eligibility to work in the United States).

30. 8 U.S.C. § 1324c (forbidding immigrants from tendering fraudulent documents, including work documents).

31. Jens M. Krogstad & Jeffrey S. Passel, *5 Facts about illegal immigration in the U.S.*, PEW RESEARCH CTR., <http://www.pewresearch.org/fact-tank/2015/07/24/5-facts-about-illegal-immigration-in-the-u-s/> [http://perma.cc/AE6X-DZMY].

32. See Motomura, *The President's Dilemma*, *supra* note 3, at 18–19 (noting that the law prohibiting the hiring and retention of unauthorized workers was "ineffective from the start, and as a practical matter it could not keep employers from hiring unauthorized workers"). See also Huyen Pham, *Private Enforcement of Immigration Laws*, 96 GEO. L.J. 777, 818 (2008) (noting that sanctions are rarely enforced, and concluding that "employers, knowingly or unknowingly, continue to hire large numbers of unauthorized workers").

33. Motomura, *The President's Dilemma*, *supra* note 3, at 19.

34. See, e.g., EUNICE HYUNHYE CHO & REBECCA SMITH, NAT'L EMP'T LAW PROJECT, WORKERS' RIGHTS ON ICE: HOW IMMIGRATION REFORM CAN STOP RETALIATION AND ADVANCE LABOR RIGHTS (2013), <http://www.nelp.org/content/uploads/2015/02/workers-rights-on-ice-retaliation-report-california.pdf> [http://perma.cc/7QJV-MFY9].

35. See *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984) ("The breadth of § 2(3)'s definition is striking: the [National Labor Relations] Act squarely applies to 'any employee.'").

*NLRB*,<sup>36</sup> the Supreme Court held that undocumented immigrants are “employees” under the National Labor Relations Act, and thus are protected by that law. The Court also ruled that employers are prohibited from reporting undocumented employees to immigration authorities in retaliation for union organizing activities.<sup>37</sup> In a host of cases, the lower federal courts of appeals have found that undocumented workers are protected by Title VII (which bans discrimination in the workplace on the basis of sex, race, ethnicity, and religion),<sup>38</sup> the Fair Labor Standards Act (which establishes minimum wage, overtime pay, recordkeeping, and youth employment standards),<sup>39</sup> and the National Labor Relations Act (which protects the rights of employees to engage in collective bargaining).<sup>40</sup> Despite these legal protections, studies show that undocumented immigrants are more likely to be victims of wage theft, to be subject to discrimination and harassment, and to be injured at the workplace than their documented counterparts.<sup>41</sup>

The cause of these frequent violations of labor and employment laws by the employers of undocumented immigrants is easy to understand. Undocumented immigrants may not be knowledgeable about their legal rights. Even when they do realize that their rights have been violated, they may reasonably fear that complaining about such violations will lead either to their deportation or, at the very least, to their termination and subsequent inability to find another job.<sup>42</sup> Likewise, employers are more likely to exploit their undocumented employees because they correctly believe that this subset of the labor force is unlikely to report them.<sup>43</sup> For these undocumented immigrants,

---

36. 467 U.S. 883(1984).

37. *Id.* at 884.

38. *EEOC v. Hacienda Hotel*, 881 F.2d 1505, 1517 (9th Cir. 1989).

39. *In re Reyes*, 814 F.2d 168, 170 (5th Cir. 1987) (“[I]t is well established that the protections of the Fair Labor Standards Act are applicable to citizens and aliens alike and whether the alien is documented or undocumented is irrelevant”).

40. *Warehouse & Office Workers’ Union v. NLRB*, 795 F.2d 705, 716 (9th Cir. 1986).

41. See NAT’L EMP’T LAW PROJECT, WORKPLACE VIOLATIONS, IMMIGRATION STATUS, AND GENDER: FINDINGS FROM THE 2008 UNREGULATED WORK SURVEY, (2011), [http://www.nelp.org/content/uploads/2015/03/Fact\\_Sheet\\_Workplace\\_Violations\\_Immigration\\_Gender.pdf](http://www.nelp.org/content/uploads/2015/03/Fact_Sheet_Workplace_Violations_Immigration_Gender.pdf) [<http://perma.cc/WDQ7-7FZK>] (finding that undocumented workers experience violations of wage and hour laws at higher rates than U.S.-born workers); see also Jayesh M. Rathod, *Immigrant Labor and the Occupational Safety and Health Regime*, 33 N.Y.U. REV. L. & SOC. CHANGE 479, 484 (2009), <https://socialchangenyu.files.wordpress.com/2012/09/rathod.pdf> [<http://perma.cc/DK3K-ALCQ>] (detailing recent trends in occupational fatalities and injuries among foreign-born workers in the U.S.).

42. See 22 U.S.C. § 7101(b)(17) (noting that victims of labor law violations are “often illegal immigrants” which means they are “repeatedly punished more harshly” than those who victimize them); see also Shannon Gleeson, *Labor Rights for All? The Role of Undocumented Immigrant Status for Worker Claims Making*, 35 LAW AND SOC. INQUIRY 561, 582–83 (2010) (finding that undocumented workers often feel reluctant to demand better workplace protections because of fear of deportation).

43. See *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1064 (9th Cir. 2011) (“While documented

labor and employment laws on the books provide little protection in practice. As Professor Linda Bosniak has observed, “the rights undocumented immigrants formally enjoy as persons and as residents are always held in the long shadow of the government’s immigration enforcement power.”<sup>44</sup>

The Supreme Court’s 2002 decision in *Hoffman Plastics Compounds, Inc. v. NLRB*<sup>45</sup> has compounded the problem. The Court held that the National Labor Relations Act did not permit an award of backpay to an undocumented worker fired in retaliation for organizing a union, reasoning that this would impermissibly conflict with laws prohibiting undocumented immigrants from working in the United States.<sup>46</sup> A few courts have extended the reasoning of *Hoffman Plastics* to bar relief under the Fair Labor Standards Act and other laws protecting employees.<sup>47</sup> Thus, even though employers are legally prohibited from retaliating against undocumented workers, *Hoffman Plastics* insulates employers from at least some of the consequences of being caught doing so—making it more likely such retaliation will continue.

Granting undocumented immigrants the right to remain in the United States and legal authorization to work will reduce the number of labor and employment law violations by giving undocumented workers the protection they need to report dangerous working conditions, wage theft, or other legal violations, or at the very least the option of finding a new job. Granted, there are many reasons such workers might nonetheless remain silent—such as fear of being unable to find another job, as well as the knowledge that their new lawful status is only temporary—but they are no longer uniquely vulnerable to exploitation as they were before deferred action gave them a quasi-legal status and authorization to work.

Moreover, it is not just undocumented immigrants who will benefit from the reduction in violations of labor, employment, tax, traffic, and other laws. U.S. citizens and legal residents regularly suffer collateral damage from the exploitation and abuse of the undocumented. When undocumented citizens are paid less than minimum wage, or are victims

---

workers face the possibility of retaliatory discharge for an assertion of their labor and civil rights, undocumented workers confront the harsher reality that, in addition to possible discharge, their employer will likely report them to the INS and they will be subjected to deportation proceedings or criminal prosecution”).

44. Linda Bosniak, *The Undocumented Immigrant: Contending Policy Choices*, in *DEBATING IMMIGRATION* 85, 87 (Carol M. Swain, ed. 2007).

45. 535 U.S. 137 (2002).

46. *Id.*

47. See, e.g., Jennifer M. Chacon, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 *FORDHAM L. REV.* 2977, 3001 (2006).

of wage theft, or are asked to work in unsafe conditions, legal immigrants and U.S. citizens may find themselves forced to work under the same conditions or even displaced from the work force altogether. As a recent report by the National Employment Law Project found, “As long as unscrupulous employers can exploit some low-wage workers with impunity, all low-wage workers suffer compromised employment protections and economic security.”<sup>48</sup> Accordingly, even if the United States chose not to protect undocumented immigrants from such violations—a course of action that courts, legislators, and policymakers have all wisely chosen not to take—giving the undocumented legal status promotes rule of law values by preventing collateral harm to the legal immigrants and U.S. citizens with whom they live and work.

DAPA and DACA might also protect U.S. employers from themselves. The legal violations that accompany the employment of undocumented workers are to some degree a collective action problem. Restaurants, construction companies, cleaning services, and farmers might all prefer to hire legal workers and pay them at least the minimum wage if only their competitors were forced to do so as well, so that they all faced the same costs of doing business. The rule of law breaks down when lawbreaking become ubiquitous, compelling the law-abiding to do so as well, even if only to keep up. President Obama made this same argument in a speech in January 2013 when he observed:

[Undocumented immigrants work in a] shadow economy, a place where employers may offer them less than the minimum wage or make them work overtime without extra pay. And when that happens, it’s not just bad for them, it’s bad for the entire economy, because all the businesses that are trying to do the right thing, that are hiring people legally, paying a decent wage, following the rules, they’re the ones who suffer. They have got to compete against companies that are breaking the rules. And the wages and working conditions of American workers are threatened too.<sup>49</sup>

### *B. Reducing Crime*

In addition to reducing violations of labor and employment laws, deferred action can reduce the commission of crimes against the undocumented. Undocumented immigrants are more likely to be victims of crimes, and less likely to report crimes or otherwise seek to protect themselves from future violations, because of their vulnerable status.<sup>50</sup> The problem is particularly severe for those undocumented

---

48. Cho & Smith, *supra* note 34 at 1.

49. President Obama Unveils His Proposals for Immigration Reform (Transcript), WASH. POST, (Jan. 29, 2013), [http://www.washingtonpost.com/politics/president-obama-discusses-his-proposals-for-immigration-reform-transcript/2013/01/29/73074f9c-6a3c-11e2-af53-7b2b2a7510a8\\_print.html](http://www.washingtonpost.com/politics/president-obama-discusses-his-proposals-for-immigration-reform-transcript/2013/01/29/73074f9c-6a3c-11e2-af53-7b2b2a7510a8_print.html).

50. See, Jacob Bucher, Michelle Manasse & Beth Tarasawa, *Undocumented Victims: An*

immigrants who are victims of domestic violence. In a survey of Latina women, 21.7% of those who were both undocumented and battered by their partners did not report the crime because they feared the immigration consequences of doing so.<sup>51</sup> Researchers further found that fear of being reported to immigration officials or being removed from the United States was either the “first or second most intimidating factor that kept battered immigrants from seeking services they needed to end the abusive relationship and create a safe and economically viable home apart from [their] abuser[s].”<sup>52</sup> Many of these women reported that their abusers were in a position to legalize their status (for example, by filing a petition on their behalf as their spouse), but did not do so. Many of their abusers threatened to report them to immigration authorities, exacerbating their fear of seeking help.<sup>53</sup>

Undocumented immigrants’ fear of deportation is easily exploited by strangers as well as by family. So-called “notarios” charge high prices in return for worthless “legal” or consulting services that they falsely claim will assist the undocumented to obtain legal status.<sup>54</sup> Occasionally, police and other government officials have demanded bribes in return for letting undocumented immigrants remain in the United States. Undocumented immigrants are also more likely to be the victims of burglaries or robberies that the perpetrators know will not be reported due to the victims’ immigration status.<sup>55</sup>

Granting the undocumented population deferred action increases the likelihood that they will trust authorities sufficiently to report crimes and seek assistance, and decreases the chances that they will be targets of these crimes. As in the employment context, removing the inherent vulnerability that comes with undocumented status will help to protect

*Examination of Crimes Against Undocumented Male Migrant Workers*, 7(2) SW. J. CRIM. JUST. 159 (2010) [http://swacj.org/swjcr/archives/7.2/Bucher%20Article%20\(3\).pdf](http://swacj.org/swjcr/archives/7.2/Bucher%20Article%20(3).pdf) [<http://perma.cc/7U5J-EHSL>] (finding that undocumented workers experience a high rate of victimization, yet are unlikely to report the crimes).

51. Mary Ann Dutton, Leslye E. Orloff & Giselle Aguilar Hass, *Characteristics of Help-Seeking Behaviors, Resource and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. & POL’Y 245, 293 (2000).

52. *Id.*

53. *Id.* at 292. Congress attempted to address some of these problems through the Violence Against Women Act (“VAWA”), one purpose of which was to allow “battered immigrant women to leave their batterers without fearing deportation.” *Id.* at 294 (quoting H.R. REP. NO. 103-395 (1993)). VAWA gave battered immigrants the right to file a petition on their own, without the need to rely on their batterer for assistance in legalizing their status.

54. *See, e.g., Fight Notario Fraud*, AM. B. ASS’N, [http://www.americanbar.org/groups/public\\_services/immigration/projects\\_initiatives/fightnotariofraud.html](http://www.americanbar.org/groups/public_services/immigration/projects_initiatives/fightnotariofraud.html) [<http://perma.cc/524B-GD8B>]; *see also* Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449, 1451–52 (2006).

55. Kittrie, *supra* note 54, at 1452; *see also* Megan Cassidy, *Phoenix Police: Armed Robber Targets Day Laborers with Promise of Work*, THE ARIZ. REPUBLIC (July 30, 2015, 7:53 PM), <http://www.azcentral.com/story/news/local/phoenix/2015/07/30/phoenix-police-armed-robber-lobo-bandit-targets-day-laborers-promise-work/30918721/> [<http://perma.cc/U6VV-GSMC>] (reporting on a robber who repeatedly targeted day laborers in Phoenix, Arizona).

this population from exploitation and abuse, reducing the overall number of criminal violations that would otherwise occur.

### *C. Reducing Housing Violations*

The same pattern can be found in the violation of housing laws. Myriad federal, state, and local laws regulate important aspects of housing. Thus, a landlord is under a legal obligation to provide safe, hygienic housing, to make repairs when necessary to maintain the unit's habitability, to enforce occupancy limits, and to avoid discrimination on the basis of race, color, religion, sex, familial status, or national origin.<sup>56</sup> For the most part, these laws protect undocumented immigrants as well as citizens and legal immigrants. And yet once again, undocumented immigrants are easily exploited because they reasonably fear the consequences of reporting a landlord for violating housing codes.<sup>57</sup> Landlords know that their undocumented tenants will not report on them, and thus have less incentive to provide safe, legal housing to this population.

### *D. Do Violations of Undocumented Immigrants' Legal Rights Raise Rule of Law Concerns?*

Violations of labor, employment, criminal, and housing laws are just a few examples of the ways in which undocumented immigrants are victims of the under-enforcement and inconsistent enforcement of the law—a situation that is by definition at odds with the rule of law ideal. As just explained, granting undocumented immigrants even temporary, quasi-legal status through deferred action will reduce the overall amount of legal violations, and thus will serve to promote the rule of law.

Opponents of deferred action might argue, however, that the rule of law does not require respecting the legal rights of undocumented immigrants. A few might even contend that because undocumented immigrants entered the United States illegally, they have no rights at all while in the United States. But it has long been established that even those who are in the United States illegally are protected by the U.S. Constitution,<sup>58</sup> as well as by employment, criminal, and housing laws.<sup>59</sup> Torts and crimes committed against undocumented immigrants are no

---

56. See Fair Housing Act, 42 U.S.C. 3604(a)-(d) (2006).

57. See, e.g., Mike King, *Lawmakers, Nail Slumlords*, ATL. J.-CONST. A19 (March 1, 2007) (editorial) ("Truth is, the slumlords love renting to illegal immigrants because they are less likely to complain about maintenance.").

58. *Wong Wing v. United States*, 163 U.S. 228 (1896).

59. See *supra* Part III.A.-C.

less serious simply because the victim does not have a legal right to be present in the United States. Just as trespassers have legal rights even while trespassing—and thus a land owner has a legal duty to avoid harming a trespasser through “willful or wanton misconduct”<sup>60</sup>—so too, undocumented immigrants cannot legally be abused or exploited while living in the United States. Thus, these violations of the laws—and the damage to the rule of law that occurs whenever a population is left vulnerable to such exploitation—is no less serious because the victims’ presence in the United States is itself a legal violation.

#### IV. DEFERRED ACTION AND THE RULE OF LAW

As this Essay has argued, Professor Motomura was justified in defending executive action as promoting rule of law values, not only for the reasons he gave—that it provides transparency and consistency in immigration enforcement—but also because it reduces the total number of legal infractions that would otherwise result were a large, undocumented population allowed to continue living in the United States without any legal status. The point is worth making, if only to demonstrate to opponents of DAPA and DACA that rule of law arguments cut both ways. Opponents of DACA and DAPA who claim to care about under-enforcement of immigration law should also be concerned that undocumented immigrants are frequent victims of violations of labor, employment, criminal, and housing laws. Accordingly, they must temper their rule of law critiques of deferred action by acknowledging that legal infractions are less likely—not more— if undocumented immigrants are given legal status.

And yet these rule of law debates are unsatisfying, and produce no winner of the roiling debate that surrounds immigration reform. Opponents of deferred action are not going to convince supporters that such reform is unnecessary because it violates the rule of law. Likewise, one cannot justify a rule giving undocumented immigrants permission to remain in the United States on the ground that it would promote rule of law values by decreasing violations of *other* laws to which the undocumented are particularly vulnerable. Indeed, such arguments come too close to the old adage that “two wrongs don’t make a right.” Of course we should find ways to protect the undocumented from violations of the law, but whenever possible those ways should themselves comport with the rule of law.

The real value in debating whether proponents or opponents of

---

60. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 58, at 397 (5th ed. 1984).

deferred action are entitled to the rule of law high ground is to demonstrate, once again, just how broken our immigration system really is. Opponents of deferred action argue that it violates the rule of law to give these lawbreakers permission to remain in the United States and authorization to work, and their arguments have resonated with some.<sup>61</sup> But they should acknowledge that even without deferred action these undocumented immigrants will continue to live and work in the United States, breaking the law and also subjected to lawbreaking by others who exploit their vulnerable status. Our immigration law is broken, and with it the rule of law, regardless of whether the executive grants undocumented immigrants deferred action or alternatively continues with the status quo. Only congressional action can restore the rule of law for the undocumented, as well as for those who work, employ, and interact with them on a daily basis.

#### V. CONCLUSION

This Essay in response to Professor Motomura's lecture makes two points. First, as Professor Motomura argues, rule of law values can be cited by both sides of the debate over deferred action. Professor Motomura asserts that deferred action promotes rule of law values in the enforcement of immigration law, co-opting the rule of law arguments usually made by opponents of immigration reform. This Essay builds on his observation by describing how granting undocumented immigrants deferred action can reduce legal violations by protecting them from exploitation. Accordingly, opponents to deferred action cannot cite to the rule of law without acknowledging that in the context of our current immigration system, rule of law values are at risk with or without deferred action.

Second, and more important, the fact that both sides to this debate have valid and powerful arguments to make regarding violations of the rule of law provides further evidence (if any is needed) that our current immigration system requires significant legislative overhaul. As Professor Motomura's lecture and this Essay both demonstrate, the current system is riddled with inconsistent and opaque enforcement of *many* laws, not only immigration laws, resulting in the widespread violation of laws intended to protect public health, safety, economic productivity, and to serve as a check on governmental power, among

---

61. See *Survey: Roughly Three-Quarters of Americans Favor Goals of Obama's Immigration Action*, PUB. RELIGION RES. INST. (Feb. 12, 2015), <http://publicreligion.org/research/2015/02/survey-roughly-three-quarters-favor-substance-behind-obamas-immigration-reform/#.VhFxiWI8zZp9> [<http://perma.cc/Y4TL-L73P>] (indicating that forty-two percent of Americans say that Obama should not have taken executive action on immigration).

others. For those who truly care about the rule of law, the solution is not to end deferred action, but rather to change the laws that compelled the President to take that action in the first place.