America: Land of Opportunity or Exploitation?

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NOTES

AMERICA:
LAND OF OPPORTUNITY OR EXPLOITATION?

I. INTRODUCTION

Most of us remember learning in grade school that the United States of America was a new country made up of immigrants who came to this land of opportunity with a shared hope—some of freedom, some of a longing to work, and some to join their loved ones. With this new start, the immigrants brought with them an abundance of diverse traditions and a longing to become citizens of the New World. Many Americans look at the United States as a “melting pot” of nationalities, races, religions, and heritages. As of 1990, fifty-five million people immigrated to the United States from every part of the globe.¹

Many first- and second-generation Americans recall their parents and grandparents beaming as they related how the Statue of Liberty welcomed them as new immigrants to America. However, although the famous words associated with the Statue of Liberty have not changed,²


² The New Colossus, a famous sonnet, written by Emma Lazarus in 1883, was inscribed on a bronze plaque and placed on the inner walls of the Statue of Liberty’s pedestal in 1903. http://www.nps.gov/stli/html (last visited Mar. 29, 2002). The words on the plaque “ha[ve] come to symbolize the statue’s universal message of hope and freedom for immigrants coming to America and people seeking freedom around the world.” Id.

A mighty woman with a torch, whose flame [i]s the imprisoned lightning, and her name
Mother of Exiles. . . . “Give me your tired, your poor, [y]our huddled masses yearning to breathe free, [t]he wretched refuse of your teeming shore; [s]end these, the homeless, tempest-tost to me, I lift my lamp beside the golden Door!”

the open arm policy of the United States has changed dramatically, especially toward those immigrating to find work.³

The immigration policy of the United States reflects a deep-seated national ambivalence. On the one hand, we pride ourselves on our heritage as a nation of immigrants, as a refuge for "huddled masses yearning to breathe free." On the other hand, our laws have often manifested other, less generous themes—occasionally even outright hostility—in the nation’s response to migration.⁴

The United States has, for over a century, limited immigration.⁵ As a result, many foreigners either come to, or stay in, the country illegally.⁶


⁴. MARTIN, supra note 3 (citation omitted).

The perception of immigrants as a labor source rather than as future members of our society creates a marginalized subclass of the general population. Undocumented workers are marginalized due to their fear of deportation in combination with cultural, linguistic, and educational barriers. Indeed, even without additional barriers, undocumented workers maintain an existence far from the economic and social center of our society as a result solely of their illegal status.

⁵. MARTIN, supra note 3.

In 1875 Congress enacted the first enduring federal controls on the migration of aliens, beginning with attention to special categories that were seen to pose various kinds of dangers. Prostitutes, criminals, paupers, and Chinese laborers were among the earliest groups forbidden to enter. Anarchists joined the list around the turn of the century. [Also, ] [e]xtensive additional controls were enacted... in 1917, in the midst of World War I.

Id.
Their reasons for coming are the same as those of immigrants of the past—freedom, work, and to join loved ones.

The U.S. government regulates immigration and sets policies to address illegal immigration through federal statutes. However, current labor and employment law policy is inadequate in dealing with the undocumented worker. Proper remedies for employees who are victims of discrimination or unfair labor practices should include unconditional backpay and reinstatement, but courts have held that awarding such remedies to undocumented workers is contrary to immigration policy. For example, "an illegal alien [cannot] sue his former employer for alleged illegal retaliation under Title VII of the Civil Rights Act." Therefore, inconsistencies and gaps in case law are created when courts attempt to reconcile federal labor and employment law with immigration law. Each federal agency is concerned with enforcing its own federal purpose, such as preventing unfair labor practices, discouraging discrimination, or preserving jobs for Americans. The full enforcement of one policy conflicts with the purposes of the others.

Although many scholars have supported a uniform labor, employment, and immigration policy, there is no consensus on how to

6. See IMMIGRATION & NATURALIZATION SERV., Illegal Alien Resident Population, (reporting that the illegal immigrant population between 1992 and 1996 was estimated to be growing by about 275,000 people each year), http://www.ins.usdoj.gov/graphics/aboutins/statistics/illegalalien/index.htm (last visited Nov. 12, 2001) [hereinafter INS, Illegal Population].

7. This note uses the term "undocumented worker" to mean a worker who is a non-citizen who has entered the United States without inspection or has violated or overstayed the terms of his or her visa.

8. See discussion infra Part III.


10. Similarly, each state is concerned with its own goals and disregards the goals of the federal system. For example, despite strict requirements of immigration laws, states such as Texas that rely heavily on undocumented immigrant labor often follow a "no questions asked policy" when it comes to hiring these workers. In 1996, the INS estimated that Texas had over 600,000 undocumented workers holding jobs picking fruit, working in packing plants, cleaning hotel rooms, or sorting out damage from natural disasters. City politicians in Dallas, Texas have secretly opposed INS crackdowns on illegal workers because of the inevitable damage to the local economy and small businesses such crackdowns would produce.

Dunne, supra note 3, at 638 (footnotes omitted).
accomplish such a goal.\textsuperscript{11} This note proposes a solution that combines the purposes, policies, and enforcement mechanisms of both federal labor and employment law with immigration law. The proposed solution allows each to complement the other through a federal limited amnesty program.

There is an urgent need to address the issue of undocumented workers because of the continuing influx of immigrants.\textsuperscript{12} As of 1996, there were over five million illegal aliens in the United States,\textsuperscript{13} including over two million overstays.\textsuperscript{14}

The United States has a large undocumented alien population living and working within its borders. Many of these people have been here for a number of years and have become a part of their communities. Many have strong family ties here which include U.S. citizens and lawful residents. They have built social networks in this country. They have contributed to the United States in myriad ways, including providing their talents, labor and tax dollars.\textsuperscript{15}

\begin{footnotesize}
\begin{enumerate}
\item E.g., William J. Murphy, Immigration Reform Without Control: The Need for an Integrated Immigration-Labor Policy, 17 SUFFOLK TRANSNAT'L L. REV. 165, 177 (1994) (arguing Congress should find a way to make immigration and labor law statutes compatible); Alan A. Stevens, Comment, Give Me Your Tired, Your Poor, Your Destitute Laborers Ready to Be Exploited: The Failure of International Human Rights Law to Protect the Rights of Illegal Aliens in American Jurisprudence, 14 EMORY INT'L L. REV. 405, 408 (2000) (arguing Congress should extend Title VII protection to undocumented workers).
\item See Dunne, supra note 3, at 624 & n.8 ("In 1996, about 916,000 legal immigrants entered the United States.").
\item The U.S. Census bureau predicts that by the year 2050 Hispanics can be the largest minority in this country, tripling in size to 98.2 million, or twenty-four percent of the total population. Also, the Asian and Pacific Islander population is expected to more than triple in size to nine percent of the total population.
\item California is the leading state of residence, with 2.0 million, or 40 percent of the undocumented population. The 7 states with the largest estimated numbers of undocumented immigrants—California (2.0 million), Texas (700,000), New York (540,000), Florida (350,000), Illinois (290,000), New Jersey (135,000), and Arizona (115,000)—accounted for 83 percent of the total population in October 1996. The 5.0 million undocumented immigrants made up about 1.9 percent of the total U.S. population, with the highest percentages in California, the District of Columbia, and Texas.
\item Id. ("About 2.1 million, or 41 percent, of the total undocumented population in 1996 [were] nonimmigrant overstays."). An overstay is an alien who "entered legally on a temporary basis and failed to depart." Id.; see also Stevens, supra note 11, at 433.
\item H.R. REP. No. 99-682(I), at 49 (1986).
\end{enumerate}
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Despite their contributions to American society, many undocumented alien workers live in fear of deportation or retaliation and do not seek redress when victimized by their employers.16

Current labor and employment laws do not respond effectively to the complex issues that have developed in the area of illegal immigration. Because undocumented workers are inevitably a component of the American workforce, courts must afford them protection. "Continuing to ignore this situation is harmful to both the United States and the aliens themselves."17 Current remedies offered by labor and employment law are ineffective when the employee is an undocumented worker. The current immigration policy has failed to achieve its own goal of curbing illegal immigration. Moreover, inconsistency between the federal laws is detrimental to both employers and undocumented workers.18

This note explores the inconsistencies created by federal labor, employment, and immigration laws, and suggests a solution to reconcile these laws by granting protected class status to undocumented workers. The proposed solution involves the granting of citizenship, by way of amnesty, to an undocumented worker after he or she files a good faith unfair labor practice or discrimination claim, along with certain other requirements.19 Generally, the National Labor Relations Board (NLRB) and the federal courts do not distinguish between documented and undocumented workers, while the Equal Employment Opportunity Commission (EEOC) makes such a distinction.20 The solution proposed by this note is a logical step to resolving the conflicting issues presented by the enforcement of current labor and employment laws, and immigration laws. The solution satisfies the purposes and policies of labor and employment law by reducing the incentive for employers to engage in unfair labor practices, violations of fair labor standards, and discrimination. Ultimately, the proposed solution satisfies immigration policy by protecting jobs for U.S. citizens and deterring illegal immigration.

16. Id.
17. Id.
18. "'W ith the passage of recent immigration laws, employers find themselves faced with burdensome and often unrealistic requirements, while on the other [hand], undocumented workers employed illegally find themselves devoid of labor law protections." Dunne, supra note 3, at 625-26 (footnote omitted).
19. See discussion infra Part IV.
Most illegal aliens come to the United States to seek employment;\(^2\) therefore, it is necessary to harmonize federal statutes to form a coherent federal policy. Undocumented workers, because of fear of deportation, are vulnerable to discrimination and unfair labor practices because they are not likely to report such illegal behavior. The unwillingness to report such illegal practices creates an incentive for employers to hire undocumented workers, rather than U.S. workers, because undocumented workers are more easily exploited.\(^2\)

Congress should not delay in undertaking comprehensive labor reform aimed at reconciling it with immigration policy. Such reform should include full rights and remedies to all workers, while simultaneously curbing illegal immigration. Without these rights and remedies, employers will continue to hire and employ undocumented workers because the savings realized by employing them offsets the penalties imposed by immigration laws.\(^2\)

Only an integrated labor, employment, and immigration law protection scheme can respond to the problem of employer mistreatment of undocumented workers. The solution proposed by this note would be effective because it would: (1) decrease the incidences of labor law violations under the National Labor Relations Act (NLRA),\(^2\) the Fair Labor Standards Act of 1938 (FLSA),\(^2\) and Title VII of the Civil Rights Act of 1964 (Title VII);\(^2\) (2) decrease illegal immigration, which has been mandated by the Immigration and Nationality Act (INA);\(^2\) and, (3) reduce the incentive for, and punish, an employer that hires undocumented workers, which is mandated by the Immigration Reform

\(^2\) Dunne, *supra* note 3, at 634 ("There is little dispute that the prospect of employment is the primary incentive for illegal immigration to the U.S.").

\(^2\) For example, in August 1995, government officials raided a garment sweatshop in El Monte, California, where Thai immigrants were held in conditions similar to slavery and forced to sew for only $1.60 per hour. George White, *Workers Held in Near-Slavery, Officials Say*, L.A. TIMES, Aug. 3, 1995, at A1. At the sweatshop, workers lived and worked in a gated complex surrounded by barbed wire and spiked fences. *Id.* One worker said he worked seventeen hours a day and slept in a twenty-eight square foot workroom area "on a blanket on the floor under a stairwell, located near sewing equipment." *Id.* Another worker said she labored for $500 to $600 per month in order to pay off her $5,000 debt owed to the smugglers who brought her into the United States. *Id.* At the ensuing trial, two of the sweatshop operators were sentenced to six years in federal prison and ordered to pay $4.5 million in back wages to the workers. Michael Krikorian, *2 Brothers Sentenced to 6 Years in Thai Slavery Case*, L.A. TIMES, Apr. 30, 1996, at B3.

\(^2\) See Dunne, *supra* note 3, at 626.


\(^2\) *Id.* §§ 201-219.


Each federal agency and federal law addresses one or more issues relating to the problems of illegal immigration and undocumented workers. However, as a whole, each fails to adequately address the problem of reducing undocumented workers’ susceptibility to discrimination and unfair labor practices without conflicting with U.S. immigration policy. Since the 1980s, with the decision in Sure-Tan, Inc. v. NLRB, and the passage of IRCA, the issues of illegal immigration and undocumented workers have been problematic for courts. The solution proposed by this note is innovative, yet grounded in solid precedent.

Part II of this note explores the rights and protections afforded to undocumented workers in the United States by current labor, employment, and immigration laws. Part III explores the continuing inconsistencies and inadequacies in deterring and remedying illegal labor and employment violations against undocumented aliens in the U.S. workplace. Part IV sets forth a proposed solution to the existing inconsistencies between federal policies, and results in an effective and complementary labor, employment, and immigration policy for undocumented workers.

II. THE RIGHTS AND PROTECTIONS AFFORDED TO UNDOCUMENTED WORKERS IN THE UNITED STATES

The term “immigrant” is defined as every alien except one who is within a class of nonimmigrant aliens, such as ambassadors, aliens traveling within the United States (with no intention of abandoning their

31. As one commentator explains:
[Undocumented workers’] precarious position under prevailing immigration laws leaves them further vulnerable to exploitation and abuse by their employers. . . . [T]hese immigrants are often subjected to abysmal working conditions, often physically and sexually abused throughout their passage into the United States and disproportionately paid substandard wages. In particular, harassment of immigrant women may be prevalent.
Stevens, supra note 11, at 434 (footnotes omitted).
32. See discussion infra Part II.A.
native countries), aliens who seek to enter into valid marriages with U.S. citizens, and the parents of aliens.\textsuperscript{34} An unauthorized alien is defined by IRCA as an alien who is not “lawfully admitted for permanent residence, or . . . authorized to be so employed by this chapter or by the Attorney General.”\textsuperscript{35} There is debate over whether “undocumented alien” and “illegal alien” are equivalent terms;\textsuperscript{36} however, this note uses them interchangeably. It is also necessary to define the word “employee.” The NLRA includes an unauthorized alien within its definition of employee.\textsuperscript{37} Similarly, according to the FLSA, an employee is “any individual employed by an employer.”\textsuperscript{38}

An “undocumented worker” is one who is not a citizen or national of the United States and is neither lawfully admitted for permanent residence, nor authorized by law to work.\textsuperscript{39} Undocumented aliens are generally afforded the same substantive rights as U.S. citizens because undocumented aliens are defined as employees. “However, the technical inclusion of undocumented workers as a protected category does not mean the employer’s violation will be remedied. The undocumented worker first must demonstrate that affording him a remedy under either the FLSA or the NLRA is consistent with the underlying purpose of the INA.”\textsuperscript{40} Federal discrimination laws, according to the EEOC, protect all


\textsuperscript{35} Id. § 1324a(h)(3) (1994).

\textsuperscript{36} Curran, supra note 1, at 59 n.2. However, it makes more sense in many cases to use the term “undocumented” vs. “illegal” alien, because, technically an undocumented alien cannot reasonably be called the latter until a proceeding or administrative determination has ascertained his or her status as “illegal.” The reasons for lack of documentation could be valid and widely varied, including loss or theft of documentation, pending status, or valid refugee or asylee status.

\textsuperscript{37} 29 U.S.C. § 152(3) (1994). According to the NLRA, among other things, [t]he term “employee” shall include any employee, and shall not be limited to the employees of a particular employer, unless [the Act] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

\textsuperscript{38} Id. § 203(e)(1). “This definitional framework—a broad general definition by several specific exceptions—strongly suggests that Congress intended an all encompassing definition of the term ‘employee’ that would include all workers not specifically excepted.” Patel v. Quality Inn S., 846 F.2d 700, 702 (11th Cir. 1988).


\textsuperscript{40} Dunne, supra note 3, at 657 (footnote omitted).
employees, regardless of their immigration status. However, because IRCA states that unauthorized workers are unable to legally work in the United States, these workers are unable to object to hiring discrimination practices.

Typical remedies under federal law include backpay, reinstatement, attorneys' fees, and punitive damages. There are two types of reinstatement, unconditional and conditional. Unconditional reinstatement is a remedy commonly awarded to documented employees. Conditional reinstatement, however, is an offer of reinstatement only after the employee presents, within a reasonable time, a completed INS Form I-9 sufficient to establish his or her work eligibility under IRCA. Backpay is money awarded to reflect wages lost from the date the employee was unlawfully fired. It is awarded until the employee is reinstated subject to IRCA's verification requirements, the employee procures other employment, or the employee is unable to establish, after a reasonable time, that he or she is authorized to work in the United States.

According to a memorandum from the NLRB's General Counsel, the NLRB determines employer liability for unfair labor practices independent of citizenship or immigration status. After finding an employer liable, and if the employer knowingly hired an undocumented worker, the NLRB seeks full remedies, such as reinstatement and backpay. However, if an employer learned of the worker's undocumented status after the illegal firing, the NLRB seeks conditional reinstatement and limited backpay. Punitive damages and attorneys' fees are additional remedies available to a claimant employee.

42. NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc., 134 F.3d 50, 57 (2d Cir. 1997); see also Board Issues Guidance on Reinstatement, Back Pay for Undocumented Aliens, 9 MICH. EMP. L. LETTER (Vercruysee Metz & Murray, Bingham Farms, MI), Feb. 1999, at 6-7 [hereinafter Vercruysee].
43. See A.P.R.A. Fuel Oil, 134 F.3d at 57; Vercruysee, supra note 42, at 6-7.
44. See A.P.R.A. Fuel Oil, 134 F.3d at 57; Vercruysee, supra note 42, at 7.
Failure to establish and document the work eligibility of all employees is illegal under IRCA. Additionally, the employer may be liable for backpay as the result of an NLRB investigation.

A. Current Immigration Law and Policy

Over a century ago, the United States Supreme Court recognized the power of every nation to prohibit the entrance of foreigners.\(^\text{50}\) "The application of many statutory provisions turns on the distinction, and the degree of constitutional protection afforded to an alien may also be affected by whether that individual is in exclusion or deportation proceedings."\(^\text{51}\) Illegal immigration is a major national concern.\(^\text{52}\) In 1986, the Immigration and Naturalization Service (INS) reported that illegal alien apprehensions had reached an all-time high.\(^\text{53}\)

1. Immigration and Naturalization Service

"[N]early all of the authority to administer and enforce the immigration laws is vested in the attorney general, who in turn delegates most of his or her responsibilities to other officials in the Department of Justice."\(^\text{54}\) The administration of immigration law was traditionally the duty of the Treasury Department.\(^\text{55}\) However, in 1903, Congress delegated the responsibility to the newly created Department of Labor (DOL).\(^\text{56}\) The DOL formed the INS in 1933.\(^\text{57}\) The INS remained part of the DOL until 1940, when it was reorganized to become part of the Department of Justice.\(^\text{58}\)

\(^{50}\) Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1891).

\(^{51}\) MARTIN, supra note 3.

\(^{52}\) For example, in October 1996, there were approximately five million undocumented immigrants residing in the United States; and, the illegal immigrant population was estimated to be growing by 275,000 people each year. INS, Illegal Population, supra note 6.


\(^{54}\) MARTIN, supra note 3.


\(^{56}\) Id.

\(^{57}\) Murphy, supra note 11, at 170.

\(^{58}\) See Murphy, supra note 11, at 170 n.25.
Congress granted power to the INS, under the INA, to deny aliens entrance into the United States and to deport those deemed to have entered the country illegally. The INS performs investigations concerning illegal aliens, carries out enforcement of current immigration law, and conducts examinations of persons arriving at more than two hundred designated ports of entry. The underlying purpose of the INA is to preserve jobs for American workers by controlling immigration.

Unfortunately, the INS does not have the resources to keep up with its immense workload without the aid of other agencies. The INS is notorious for its understaffing, and, even when staffing is increased, it rarely grows in accordance with the workload. The amounts available for interior enforcement operations, immigration adjudication, education and training, and other important functions continue to be quite restricted.

The INS has closed its eyes to the problem of illegal immigrants in the workplace; in recent years, it has been the Service’s last priority.

59. 8 U.S.C. §§ 1225-1227 (1994); see also id. § 1182(a) (1994 & Supp. 2001) (listing the general classes of aliens ineligible to receive visas and therefore excluded from admission into the United States for reasons such as infection with a dangerous, contagious disease and criminal convictions).

60. MARTIN, supra note 3. “The Border Patrol, a separate enforcement arm of the INS, is charged with the duty to police our extensive national boundaries and apprehend people attempting clandestine entries.” Id.

61. Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 893 (1984). The Court noted that the central concern of the INA was determining the terms and conditions of admission of aliens to this country. Id. at 892 (citing De Canas v. Bica, 424 U.S. 351 (1976)).

62. Orlow, supra note 55, at 935 (“For example, in the 1970’s the staff of the INS increased by forty-five percent, yet the Service’s workload rose—depending upon the statistics analyzed—anywhere from 100 to 900 percent.”).

63. Peter H. Schuck, Introduction: Immigration Law and Policy in the 1990s, 7 YALE L. & POL’Y REV. 1, 9 (1989) ("The great bulk of recent INS budget increases has been earmarked for the Border Patrol."). The President’s Fiscal 2002 Immigration Budget provides for additional funding to be used “to effectively regulate the border[,] deter and dismantle smuggling or trafficking of aliens in the interior of the United States, as well as other immigration-related crime[,] identify and remove incarcerated criminal aliens from the United States[,] and reduce immigration benefit fraud and other document abuse.” OFFICE OF PUB. AFFAIRS, IMMIGRATION & NATURALIZATION SERV., Executive Summary: The President’s Fiscal 2002 Immigration Budget (Apr. 9, 2001), http://www.ins.gov. The INS requested $380 million in enhancements for the 2002 fiscal year, with $171 million allocated to border management. Id.


[T]he INS focus, at least for the months ahead, appears to be less on worksite enforcement and raids and more on curbing alien smuggling and deporting criminal aliens. It may be that the INS no longer has the financial resources for aggressive worksite enforcement and is concentrating its resources on preventing the more egregious activity.
For example, the DOL is not acting upon its authority to check and subpoena INS 1-9 forms.65 Other federal agencies, such as the NLRB, are not aiding the INS in its effort to curb undocumented workers.

2. Immigration Reform and Control Act of 1986

The passage of IRCA66 had various implications, such as sanctions against the employers of undocumented workers, a limited antidiscrimination provision, and an amnesty program legalizing aliens who had been in the United States unlawfully prior to January 1, 1982.67 Before the passage of IRCA, it was legal to hire unauthorized workers. IRCA made it illegal to knowingly employ illegal aliens, and created sanctions for those who knowingly violated the Act.68 Under IRCA, employers must check certain documentation of citizenship or immigration status for all employees.

The purpose of IRCA is to punish employers, not illegal aliens, by imposing sanctions upon employers for the knowing employment of illegal aliens.69 IRCA provides for a graduated scale of penalties for violations of the statute, which includes the issuance of cease and desist orders and fines.70 However, “the employer sanctions scheme has done little to rectify the ‘embarrassing secret’ of immigration—that illegal immigrants play an invaluable role in our daily lives.”71 President George W. Bush recently criticized sanctioning employers for hiring

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65. What’s Happening in Employment Law, 5 ARIZ. EMP. L. LETTER (Lewis and Roca, LLP, Phoenix, AZ), Dec. 1998, at 7-8 [hereinafter Lewis]. The DOL is closing its eyes to illegal immigrant workers by not routinely checking INS 1-9 forms because the DOL wants all workers, even those who work illegally, to come forward and report unlawful wage practices. Id.


67. MARTIN, supra note 3.


69. See Maria L. Ontiveros, To Help Those Most in Need: Undocumented Workers’ Rights and Remedies Under Title VII, 20 N.Y.U. REV. L. & SOC. CHANGE 607, 616 (1993-1994). The Act does not punish undocumented workers who seek or take employment. Id. at 612. However, this fact does not mean that undocumented workers will not be subject to penalties for being in the country illegally under immigration laws.

70. For the first offense, fines range from $250 to $2000 for each alien hired; for a second offense, fines are between $2000 and $5000 for each alien employed; and, a third offense results in penalties of $3000 to $10,000 for each alien hired. 8 U.S.C. § 1324a(e)(4) (1994). The failure to complete and maintain proper paperwork carries a fine of $100 to $1000 for each individual with respect to whom the violation occurred. Id. § 1324a(e)(5). Employers are sanctioned with criminal penalties for repeated violations; criminal penalties are fines of up to $3000 for each unauthorized alien and/or six months imprisonment. Id. § 1324a(f)(1).

71. Dunne, supra note 3, at 626-27.
“somebody [who] is willing to do . . . work . . . others in America aren’t willing to do.”

The language of IRCA does not expressly repeal or amend the protections previously granted by the courts to unauthorized aliens. The Act was passed due to the continuing concern that immigration law was ineffective at keeping undocumented workers from entering the U.S. workforce.

The passage of IRCA represented a significant shift in U.S. policy addressing illegal immigration. Congress recognized the extensive connection between illegal immigration and the availability of employment in the United States. IRCA identified employer sanctions as the most effective means of reducing the rising numbers of undocumented workers entering the country. When courts attempt to reconcile labor and employment laws with immigration laws, they often look to IRCA’s legislative history.

Supporters of IRCA claim that the sanctions imposed should deter employers from hiring undocumented workers, and, in turn, eliminate the workers’ incentive to immigrate to the United States. However, IRCA has not met the goal of decreasing illegal immigration to the United States. Employers continue to hire undocumented aliens.

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73. See IRCA, Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified in scattered sections of 7, 8, 18, 20, 29, and 42 U.S.C.); Murphy, supra note 11, at 175 (stating that IRCA does not deal with the remedies already granted by courts to undocumented aliens under the NLRB and FLSA).
74. See Murphy, supra note 11, at 172-73.
75. Dunne, supra note 3, at 655.
76. Id.
77. IRCA’s legislative history includes the following:
   [T]he committee does not intend that any provision of this Act would limit the powers of State or Federal labor standards agencies . . . to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by these agencies. To do otherwise would be counter-productive of our intent to limit the hiring of undocumented employees and the depressing effect on working conditions caused by their employment.
78. See Murphy, supra note 11, at 165. However, some argued that the passage of IRCA would actually increase illegal immigration. Id. at 166. They were concerned that the Act would strip the illegal workers of labor law protections and consequently give employers an incentive to hire illegal aliens. Id.
79. In a study of southern Californian businesses, “[n]early half of the study participants stated that they thought they currently employed undocumented workers, and 80 percent said that IRCA had not affected in any way the type of worker they were currently hiring.” Ontiveros, supra note 69, at 609 (footnote omitted). Employers tend to ignore IRCA because of “a perceived lack of enforcement” and the low fines are not enough to deter employers from getting the benefits of employing these workers. Id.
because enforcement of the sanctions is sporadic and penalties are low compared to the financial benefits realized. Difficulties in enforcement have called IRCA’s value into question. Among IRCA’s shortfalls is the fact that the Act fails to provide funds for the INS to enforce the new policies.

3. The Illegal Immigration Reform and Immigrant Responsibility Act

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IRIRA) added changes to employers’ hiring procedures. The Act removed certain documents from the list of what is acceptable for the employment verification process and revised document fraud provisions. Criminal penalties were established for a number of activities engaged in by both employers and illegal aliens. For example, employers that knowingly and purposely hire ten or more undocumented workers over a one-year period are subject to criminal penalties. However, this penalty scheme has not been particularly effective because the enforcement capabilities of the INS are limited.

B. Current Federal Labor and Employment Law Policy

Undocumented workers are currently in the same position occupied by U.S. workers before the adoption of protective labor and employment statutes. “The dilemma of facing a choice between remaining silent in the face of exploitation or speaking out and risking the loss of a job underlies statutory anti-retaliation provisions under which an employer is prevented from terminating an employee solely for bringing a labor or

80. Id.
83. Id. § 412, 110 Stat. at 3666.
84. Id. § 211, 110 Stat. at 3569.
85. See Dunne, supra note 3, at 654.
86. See supra notes 62-63 and accompanying text.
87. Dunne, supra note 3, at 629.
employment claim against the employer. Employees denied protection must choose between the necessity of keeping their jobs and "the value of demanding that [their] employer[s] comply with the law." Neither documented nor undocumented workers should be forced to make such a decision.

1. National Labor Relations Act

The purpose of the National Labor Relations Board (NLRB) is to enforce the National Labor Relations Act (NLRA), which was enacted to curb unfair labor practices throughout the workplace by ensuring employees' rights to freely associate, self-organize, and designate representatives for the collective bargaining process. "[T]he NLRB has struggled to determine the appropriate remedy for 'undocumented' aliens ...." In a memorandum, the NLRB stated that it would "seek reinstatement and back pay for undocumented aliens unless ... [the employer shows] through independent evidence that the employee's documentation was fraudulent or that his work authorization has lapsed." The NLRB General Counsel advised that the Board should seek an unconditional reinstatement order for an illegally discharged undocumented alien, but if an employer demonstrates that the individual is unauthorized to work in the United States, the Board should seek a conditional reinstatement. However, even then, the employer is liable for the unfair labor practices and backpay up to the date of the illegal firing.

During an unfair labor practice proceeding, the NLRB determines liability independent of citizenship or immigration status. An effort to

88. Id.
89. Id.
90. Id.
92. Id. § 151.
94. Id. ("The Board's general counsel, Fred Feinstein, ... recently issued a memorandum to his subordinates with instructions on how to handle reinstatement and back pay issues for undocumented aliens."). An employer's compliance with IRCA is relevant only after liability is established, and at the subsequent compliance hearing when backpay is determined by the Board. Feinstein Memo, supra note 45.
95. Feinstein Memo, supra note 45.
96. Littler Mendelson, supra note 93.
97. See Feinstein Memo, supra note 45.
admit evidence of an employee’s work authorization status is usually opposed by the NLRB attorney. "Congress has made it clear that it wishes all persons with information about such [unfair labor] practices to be completely free from coercion against reporting them to the Board." The General Counsel’s memorandum instructs NLRB attorneys to seek the same remedies for undocumented workers as those sought on behalf of documented workers if an employer knowingly hires undocumented workers. The Board was concerned that unless employers are deterred from hiring undocumented workers, through the imposition of backpay liability, "unscrupulous employers would hire undocumented aliens because they could terminate them with no risk of backpay as soon as union activity commenced [and] IRCA’s fines for improper hiring might be considered by those employers... a reasonable ‘cost of doing business.’" Therefore, there is a need for an integrated labor, employment, and immigration policy.

2. Fair Labor Standards Act of 1938

Congress enacted the Fair Labor Standards Act of 1938 (FLSA) to eliminate substandard working conditions. The DOL enforces the FLSA and addresses such issues as minimum wages, workers’ ages, and maximum workweek hours. The FLSA worker protection provisions mandate that employers maintain health and safety standards, disability insurance, and protections against child labor. Employees, including undocumented workers, can bring court actions against their employers to recover unpaid wages, liquidated damages, and attorneys’ fees. Undocumented workers may also be awarded backpay and

98. See id.
100. See Feinstein Memo, supra note 45.
101. Littler Mendelson, supra note 93.
103. Id. § 202(a). The FLSA was enacted in part to eliminate “labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.” Id.
104. Id. § 204.
105. Id. §§ 206, 207, 212.
106. See generally id. §§ 201-219.
107. Patel v. Quality Inn S., 846 F.2d 700, 702 (11th Cir. 1988) (indicating that Congress’s intent was to include undocumented workers within the definition of employee because the FLSA did not expressly exclude illegal aliens from its definition).
punitive damages because "the protections provided by the FLSA apply to undocumented aliens" and "nothing in the [FLSA] purports to limit the remedy available to any of the workers it covers." The FLSA also imposes criminal sanctions upon employers that violate the Act.

Enforcement of the FLSA can be effectuated only if employees feel free to approach officials with their complaints. To ensure that employees feel safe in bringing grievances, the DOL has ceased routinely checking INS I-9 Forms when on-site to investigate a worker wage and hour complaint. "The DOL has determined that [the] policy [of checking INS I-9 forms] may have a chilling effect on employee wage and hour complaints, particularly from illegal workers."

3. Title VII and the Equal Employment Opportunity Commission

The Equal Employment Opportunity Commission (EEOC) and the courts extend the protection of the federal antidiscrimination laws to illegal aliens employed in the United States. "Courts have reasoned that including illegal aliens within the coverage of antidiscrimination laws removes their most attractive feature—their willingness to work in substandard conditions." Anti-retaliation provisions are intended to offer victims "unfettered access to statutory remedial mechanisms." The desirability of ending discrimination is not lessened simply because the victims of discrimination are undocumented workers; the likelihood

110. Id. at 1056.
111. Patel, 846 F.2d at 705.
114. Lewis, supra note 65, at 7-8.
115. Id.
116. 42 U.S.C. § 2000e-4 (1994). "The EEOC is a federal agency responsible for enforcing laws prohibiting employment discrimination and harassment because of race, color, sex, religion, national origin, age (40 and over) and physical or mental disability." Grossman, supra note 41, at 34. These laws must be obeyed by all employers with fifteen or more employees, employment agencies, unions, and local, state, and federal agencies. Id. The purpose of the EEOC is to enforce Title VII, which is intended to deter discrimination, penalize employers, and compensate victims for discriminatory activity. Ontiveros, supra note 69, at 625.
118. Id.
of discrimination is increased because the employer knows that the punishment is minimal.\textsuperscript{120}

According to the EEOC guidance issued on October 26, 1999, all workers, regardless of documentation, are entitled to the remedies for unlawful discrimination provided under Title VII.\textsuperscript{121} The remedies include backpay, reinstatement, and other appropriate relief. The EEOC has a liberal view on the issue of backpay. The guidelines state that undocumented workers are entitled to backpay, unless they are "unavailable for work."\textsuperscript{122}

The illegal alien victimized by discrimination is generally entitled to the same types of remedies, both punitive and compensatory, as a legal employee, but there are exceptions.\textsuperscript{123} If a worker is unable to satisfy the requirements of IRCA\textsuperscript{124} because he or she is undocumented, the worker is left without a remedy and may be subject to deportation. However, in the case of retaliatory discrimination, the undocumented worker is afforded greater protection.\textsuperscript{125} The reasoning behind this policy is to discourage discrimination based on citizenship status.\textsuperscript{126} Although the undocumented worker should not have been hired under standards implemented by IRCA, he or she is protected by the EEOC. This dichotomy creates a no-win situation for the employer: the employer

\textsuperscript{120} Ontiveros, supra note 69, at 609 (discussing employers’ perceived lack of enforcement of penalties); see also discussion supra note 70 (discussing a sampling of the fines imposed by IRCA on an employer in violation of the Act). An employer performing a cost/benefit analysis may come to the conclusion that it is cheaper to hire undocumented rather than documented workers and risk the low probability of fines. An employer will also take into consideration the fact that undocumented workers may be afraid to complain out of fear of being deported, therefore making them exploitable.

\textsuperscript{121} U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, U.S. DEP’T OF LABOR, NOTICE NO. 915.002, ENFORCEMENT GUIDANCE ON REMEDIES AVAILABLE TO UNDOCUMENTED WORKERS UNDER FEDERAL EMPLOYMENT DISCRIMINATION LAWS (1999), http://www.eeoc.gov/docs/undoc.html [hereinafter EEOC GUIDANCE]. Traditional EEOC remedies under Title VII include reinstatement, backpay, front pay, and compensatory and punitive damages. See Grossman, supra note 41, at 15. The remedies are designed to accomplish two purposes: deterrence of discrimination and compensation of victims. EEOC GUIDANCE, supra note 121.

\textsuperscript{122} EEOC GUIDANCE, supra note 121 (defining “unavailable for work” as being out of the country).

\textsuperscript{123} EEOC Guidance on Undocumented Workers, 10 TEX. EMP. L. LETTER, (Clark, West, Keller, Butler & Ellis, LLP, Dallas, Tex.), Nov. 1999 [hereinafter Clark]. The remedy of reinstatement applies to undocumented aliens hired after the enactment of the IRCA if they can satisfy the law’s verification requirements within a reasonable amount of time. Id.

\textsuperscript{124} See discussion supra Part II.A.2; see also discussion infra Part IV.B.4.

\textsuperscript{125} See Grossman, supra note 41, at 26. For example, it is unlawful to threaten to report, or to actually report, an undocumented worker to INS because he or she opposed unlawful discrimination or participated in a proceeding under antidiscrimination laws. Id. at 27. If an undocumented worker is retaliated against, he or she is entitled to damages without regard to his or her work status. Id.

\textsuperscript{126} Id. at 24.
cannot fire the undocumented alien for fear of penalties imposed by the EEOC for retaliation, but the employer can be sanctioned under IRCA for continuing to employ the undocumented worker.

The paradox created by the conflicting policies of the EEOC and IRCA is yet another example of glaring inconsistencies created by the lack of integration of federal policies in the United States. Unfair labor practices go unpunished as employers continue to hire undocumented workers, who usually do not report the acts out of fear of retaliation; and, jobs for American workers are lost. The inconsistency results from conflicting federal policies within the same agency—the INS seeks to curb illegal immigration to preserve jobs for Americans, but does not strictly enforce or monitor illegal employment.

III. THE INCONSISTENCIES RESULTING FROM THE LACK OF AN INTEGRATED LABOR, EMPLOYMENT, AND IMMIGRATION POLICY

Although undocumented workers are afforded the same substantive rights as documented employees, the ability of undocumented workers to enforce those rights is limited by the fear of deportation and the fact that remedies are either limited or nonexistent. Undocumented workers face a “Catch-22” when deciding whether to remain silent and subject themselves to exploitation or assert their rights and subject themselves to deportation. Society’s “perception of immigrants as a labor source rather than as future members of society creates a marginalized subclass of the general population.” This view creates a class vulnerable to exploitation by employers looking solely at the bottom line. The result warrants the grant of “protected class” status to undocumented workers.

Although Congress may have intended for the NLRA, FLSA, and IRCA to complement one another, the goal has not been achieved. The agencies fail to work together. For example, the INS ignores the problems of undocumented workers in the workplace. Currently, the last priority of the INS is to decrease, through the utilization of labor and

127. Id. at 23.
128. Dunne, supra note 3, at 628.
129. Id. at 630. There is a segment of U.S. jobs that many American workers view as undesirable.
130. See discussion supra Part II.B.1.
131. See discussion supra Part II.B.2.
132. See discussion supra Part II.A.2.; see also discussion infra Part IV.B.4.
employment laws, the high number of illegal aliens.\textsuperscript{133} When each agency works to further only its own particular goals, while simultaneously ignoring the concerns of other agencies, the result is conflict among the courts.

This section discusses how the interpretations of current law by agencies and courts have created inconsistencies among the circuit courts. This section also explores the implications of the recent Supreme Court holding in \textit{Hoffman Plastic Compounds, Inc. v. NLRB},\textsuperscript{134} which purports to resolve the issue of availability of backpay remedies to undocumented workers, at least in the context of the NLRA.\textsuperscript{135} Undocumented workers are deemed to be entitled to the protection of labor and employment laws because they are employees,\textsuperscript{136} but the circuit courts are split in fashioning remedies consistent with labor, employment, and immigration law. Enforcement of penalties for labor and employment violations is in constant conflict with an effective immigration policy. Complex questions surround the remedies available to undocumented workers subjected to unfair labor practices and discrimination. Many legal authorities, including the majority in \textit{Hoffman}, question whether the granting of remedies is consistent with immigration law in light of IRCA.\textsuperscript{137}

\textbf{A. Pre-IRCA}

In \textit{Sure-Tan, Inc. v. NLRB},\textsuperscript{138} decided before the enactment of IRCA\textsuperscript{139} and before it was illegal to hire undocumented workers, the Supreme Court upheld a limited backpay award for undocumented aliens, but fashioned its own remedy.\textsuperscript{140} The Court held that

\begin{itemize}
  \item \textsuperscript{133} See Schoonover \& Hyland, supra note 64, at 262 ("[T]he INS focus, at least for the months ahead, appears to be less on worksite enforcement and raids and more on curbing alien smuggling and deporting criminal aliens.").
  \item \textsuperscript{134} 122 S. Ct. 1275 (2002).
  \item \textsuperscript{135} \textit{Id.} at 1283 (finding that "awarding backpay to illegal aliens runs counter to policies underlying IRCA [...] the award lies beyond the bounds of the [NLRB's] remedial discretion").
  \item \textsuperscript{136} See supra notes 36-37 and accompanying text (including undocumented workers as within the definition of "employee" by the NLRA and FLSA).
  \item \textsuperscript{137} \textit{Hoffman}, 122 S. Ct. at 1283 ("[A]warding backpay to illegal aliens runs counter to policies underlying IRCA . . . ").
  \item \textsuperscript{138} 467 U.S. 883 (1984).
  \item \textsuperscript{139} See discussion supra Part II.A.2.; see also discussion infra Part IV.B.4.
  \item \textsuperscript{140} \textit{Sure-Tan}, 467 U.S. at 890. The employer was found to have violated the NLRA "by requesting the INS to investigate the status of their Mexican employees 'solely because the employees supported the Union' and 'with full knowledge that the employees in question had no papers or work permits.'" \textit{Id.} at 888 (citation omitted).
\end{itemize}
“reinstatement would be proper only if the discharged employees were legally present and free to be employed in the United States when they presented themselves for reinstatement.” The Supreme Court rejected the Seventh Circuit’s attempt to provide the workers with even a minimal remedy. The workers were never legally employed; therefore, they were left without a backpay remedy. Because the undocumented workers left the United States in an attempt to avoid deportation, the Court reasoned that the remedy of reinstatement was also inappropriate because it would encourage undocumented workers to return to the United States and violate immigration law.

B. Post-IRCA

In deciding Sure-Tan, Inc. v. NLRB, the Court created a loophole—workers were awarded a remedy even if they illegally remained in the United States. By making the employment of undocumented workers illegal, IRCA closed the loophole. However, even after the enactment of IRCA, the NLRB maintained its stance that limited backpay awards were proper. The NLRB continued to order backpay awards “limited to the period between the discharge and the date the [workers] are reinstated or when, after a reasonable period of time, they are unable to produce the documents enabling the employer to meet its obligations under IRCA to verify their eligibility for employment in the United States.”

Courts are left to determine the rights of undocumented workers, and the remedies available to them, because there is no integration of federal labor, employment, and immigration laws addressing such rights. For example, an employer is held accountable by the NLRB for an unfair labor practice and is liable for damages for refusing to bargain with a union because some employees who voted for the union are undocumented aliens. The Ninth Circuit held that a union election is valid even though some of the voting employees’ documentation status

141. Id. at 889.
142. Id. at 904-05.
143. See id. at 887, 904.
145. Id. at 889.
147. Id.
148. NLRB v. Kolka, 170 F.3d 937, 940 (9th Cir. 1999).
can be challenged under IRCA. In addition, an employee can seek punitive damages from an employer that retaliates against the employee for filing an unpaid wages claim under the FLSA. After-acquired evidence of undocumented worker status is not a bar to a discrimination claim. Furthermore, an undocumented worker may be entitled to temporary partial disability benefits subsequent to his or her termination, as well as other benefits usually given to documented workers.

The Seventh Circuit, in *Del Rey Tortilleria, Inc. v. NLRB,* denied the NLRB’s petition for enforcement of its remedy order and held that in light of *Sure-Tan,* undocumented workers were not entitled to backpay. The court followed the Supreme Court’s holding in *Sure-Tan* that the burden is on the employee to prove entitlement to backpay by showing that he or she is “lawfully entitled to be present and employed in the United States.” The court noted that workers would not be unduly burdened by fulfilling such requirements when seeking a backpay award.

The Second Circuit, in *NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.,* affirmed a limited remedy awarded to an undocumented employee where the employer knowingly hired undocumented workers. The Board awarded reinstatement, conditioned upon the employee’s presentation of documents supporting work eligibility, and backpay from the date of unlawful discharge until the qualification for future employment, reinstatement, or the expiration of a reasonable time.

149. *Id.*
154. 976 F.2d 1115 (7th Cir. 1992).
155. *Id.* at 1120-21, 1123. “On remand, they will have the opportunity to establish when they became entitled to receive back pay.” *Id.* at 1123.
156. *Id.* at 1119 (emphasis added) (quoting *Sure-Tan,* Inc. v. *NLRB,* 467 U.S. 883, 903 (1984)).
157. *Id.* at 1123.
158. 134 F.3d 50 (2d Cir. 1997).
159. *Id.* at 52.
to comply with IRCA standards. The Second Circuit distinguished the case from Sure-Tan, stating that the workers had not been deported, but instead remained in the country. The court held that the remedy promotes the shared policy goals of both the NLRA and IRCA. The court announced that "failure to enforce any back pay remedies would encourage employers to compare the expense of IRCA's fines to the expenses of [backpay] and the advantage gained in resisting unions, and potentially to decide that the risk of IRCA's penalties are worth incurring."

The Fourth Circuit was the first appellate court to look at the effect of IRCA on Title VII in Egbuna v. Time-Life Libraries, Inc. The court ruled that an undocumented employee is not entitled to protection under Title VII because of IRCA's prohibition on hiring undocumented workers. The plaintiff alleged that the employer refused to rehire him in retaliation for his corroboration of another employee's sexual harassment complaint. The Fourth Circuit held that the worker could not demonstrate that he was a victim of discrimination because at the time that he sought reinstatement, he was unqualified for the desired position due to his failure to possess documentation authorizing him to work in the United States. The court reasoned that extending Title VII protection to an undocumented worker would place an employer in a no-win situation: sanctions for both hiring and failing to hire.

The Eleventh Circuit was confronted with a similar issue in Patel v. Quality Inn South. The court held that an undocumented worker had a right to sue under the FLSA and that the remedy did not conflict with immigration law. The court reasoned that if IRCA was intended to limit the rights of undocumented workers under the FLSA, Congress would have explicitly stated so in the statute. The Eleventh Circuit also explained that nothing in the legislative history of IRCA suggests that

160. Id. at 57.
161. Id. at 55 (reasoning that the purpose of IRCA is to punish employers, not the undocumented workers). The court further stated that the award would not induce undocumented workers to return to the country and break the immigration laws. Id. at 60.
162. Id. at 57.
163. A.P.R.A. Fuel, 134 F. 3d at 57.
164. 153 F.3d 184 (4th Cir. 1998).
165. Id. at 187-88.
166. Id. at 185.
167. Id. at 187.
168. Id. at 188.
169. 846 F.2d 700 (11th Cir. 1988).
170. Id. at 701.
171. Id. at 704.
the Act was meant to limit undocumented workers’ rights under the FLSA. The court further reasoned that there was no conflict with immigration law because the employee was asking for money for work already performed rather than backpay for the period after discharge. The court rejected the argument that the worker was “unavailable for work.” Thus, the undocumented worker was entitled to the full range of remedies available under the FLSA, including backpay and overtime.

C. Hoffman Plastic Compounds, Inc. v. NLRB

In March 2002, the United States Supreme Court, in Hoffman Plastic Compounds, Inc. v NLRB, reversed the D.C. Circuit’s affirmation of an NLRB limited remedy award to an undocumented worker. In 1992, the NLRB held that the employer illegally discharged four workers because of their involvement in NLRA-protected union organizing activities. At the 1993 compliance hearing to determine the amount of backpay owed to the employees, it became known that one of the workers was undocumented. In light of Sure-Tan and IRCA, the administrative law judge (ALJ) found that the NLRB could not award backpay or reinstatement. In 1998, the NLRB reversed part of the ALJ’s decision and awarded the undocumented worker backpay plus interest for the period from the illegal firing to the date the employer discovered that the employee was undocumented. The employer argued that undocumented workers could not be awarded backpay because it was illegal to hire them in the first place. The D.C. Circuit agreed with the decision of the NLRB and rejected the employer’s
argument, but limited the backpay award to the period between the firing and the discovery of the employee’s undocumented work status.185

The Supreme Court held that undocumented workers are not entitled to backpay because such remedies conflict with immigration law, particularly IRCA.186 The Court stated that Congress “expressly made it criminally punishable for an alien to obtain employment with false documents.”187 The Court noted that it has consistently set aside remedies awarded to employees, regardless of documentation status, when the employees were “guilty of serious illegal conduct in connection with their employment.”188 The “illegal conduct” at issue was that the employee was working while undocumented.189 The Court stated further that it had “no reason to think that Congress nonetheless intended to permit backpay where but for an employer’s unfair labor practices, an alien-employee would have remained in the United States illegally, all the while successfully evading apprehension by immigration authorities.”189

Before Hoffman, courts were presented with myriad conflicting rules and policies concerning undocumented workers in the United States. The courts struggled with interpreting several federal statutes enforced by different federal agencies.191 The Supreme Court may have settled the issue of backpay, but how the decision will affect actions

185. Id.
186. Hoffman, 122 S. Ct. at 1278. “[A]warding backpay in a case like this not only trivializes the immigration laws, it also condones and encourages future violations.” Id. at 1284.
187. Id. at 1283.
188. Id. at 1280. The Court relied on cases such as NLRB v. Fansteel Metallurgical Corp., where the Court set aside an NLRB award because the Court did not want to “compel employers to retain persons in their employ regardless of their unlawful conduct . . . [such as] trespass or violence against the employer’s property.” Id. (citing NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 257-58 (1939)). The Court also cited its decision in Southern S.S. Co. v. NLRB, where the Court set aside an NLRB reinstatement award with backpay because the employees “strike on shipboard had amounted to a mutiny in violation of federal law.” Id. (citing S. S.S. Co. v. NLRB, 316 U.S. 31, 47 (1942)).
189. See id. at 1280.
190. Id.
191. If the NLRB and courts continue to ignore workers’ immigration status when fashioning a remedy, they will be closing their eyes to the purposes and objectives of federal immigration laws. As a result, the NLRB and the courts will encourage illegal immigration and undocumented labor. However, if the NLRB and the courts deny all rights and remedies to undocumented workers, they will be closing their eyes to the purposes and objectives of federal labor and employment law, and, as a result, they will be encouraging employer violations and poor working conditions. Thus, courts are left with little choice—choose one law or the other to follow, or do the legislature’s job and fashion remedies according to a judicially-integrated labor, employment, and immigration policy.
taken by federal agencies remains to be seen. The best solution is a coherent labor, employment, and immigration policy that is easy to enforce and is enforced equally by all agencies. An integrated policy will effectively and efficiently achieve the purposes of both areas of the law.

IV. PROPOSED SOLUTION

Traditional labor and employment remedies seek to accomplish two goals: deterrence of violations and victim compensation. The desired goal of reducing violations should not be affected by the victim’s documentation status. Additionally, the goal of compensating victims with backpay and reinstatement has generally been limited to people who are “available for work.” Whether traditional remedies apply to undocumented workers is unclear because of inconsistencies in the application of current legal doctrine.

In order for federal labor and employment agencies to enforce their respective policies, they must be able to penalize employers that harm their employees, whether documented or not. In fashioning remedies, courts and agencies are unable to adequately reconcile immigration law with labor and employment law. The legislature must directly address this problem. To meet its objective of deterring illegal immigration, the INS must reduce the incentive for illegal aliens to enter the United States to seek employment.

The solution proposed by this note meets two main objectives. First, employers are punished for, and therefore deterred from, violating federal labor and employment laws with respect to all of their employees. Second, illegal immigration, resulting from a desire to find

192. Though the circuit courts have generally held limited backpay and reinstatement remedies to be consistent with immigration laws, there is an inconsistency about how to fashion such awards, if they are awarded at all. Courts grant backpay and other remedies at their discretion, based on the fact that IRCA penalizes the employers and not the undocumented aliens. However, courts and the NLRB pay scant attention to the fact that the INS may eventually penalize the illegal aliens by deporting them. Whether courts and agencies follow Hoffman or distinguish the case on its facts remains to be seen. However, prompt action by Congress would eliminate the need to make such decisions.


194. Some federal agencies and courts do not distinguish between workers based on documentation status and award the same remedies to both documented and undocumented workers, thereby ignoring immigration policy. Others make a distinction and limit remedies, thereby ignoring the policies behind labor and employment statutes.
work in the United States, decreases significantly because there is no incentive for employers to hire undocumented workers.

A. Proposed Solution Overview

The proposed integrated labor, employment, and immigration law solution calls for blanket amnesty for any undocumented worker after he or she files a good faith unfair labor practice or discrimination claim. The worker-claimant is granted full citizenship rights, subject to a thorough background check.

The AFL-CIO issued a statement recognizing the contributions of undocumented workers, and advocated a program of blanket amnesty for all illegal immigrants. Such a drastic measure is not necessary. To achieve the goals of current labor, employment, and immigration laws, this note’s proposed solution is more than adequate because it decreases violations of federal law. Conversely, the drastic measure advocated by the AFL-CIO only exacerbates the problem of illegal immigration. For example, aliens would continue to enter the United States after the granting of blanket amnesty because aliens would reason that as long as they remain in the United States for a significant length of time, another amnesty program is likely to be offered. Therefore, the limited amnesty program proposed by this note is the best solution.

One commentator proposes granting deferred action status or temporary visas to undocumented workers. However, for aliens committed to remaining in the United States, these proposals simply prolong the inevitable result—an illegal overstay. Since deferred action is within the discretion of the INS, undocumented workers may remain


AFL-CIO supports a new amnesty program that would allow these members of local communities to adjust their status to permanent resident and become eligible for naturalization. . . . Immediate steps should include legalization for three distinct groups of established residents . . . . Immigrant workers make enormous contributions to our economy and society, and deserve the basic safety net protections that all other workers enjoy. The AFL-CIO continues to support the full restoration of benefits that were unfairly taken away through Federal legislation in 1996, causing tremendous harm to immigrant families.

Id. Recently, the AFL-CIO reaffirmed its position that “undocumented workers and their families should be provided permanent legal status through a new legalization program.” AFL-CIO, Immigration (July 31, 2001), available at http://www.aflcio.org/publ/estatements/jul2001/immigr.htm.


197. Id. at 387.
hesitant to file claims against their employers for fear of deportation. Amnesty, conditioned on the filing of a good faith claim, alleviates this fear by bestowing full citizenship rights upon the worker-claimant. With such rights, the worker-claimant continues to contribute to the workforce, and benefits from the same status afforded to U.S. citizens. The proposed solution is an effective resolution to the problem of overstays.

Undocumented workers must be classified as a “protected class.” These employees are subject to exploitation in areas such as wages, working hours, and working conditions. The exploitation of undocumented workers adversely affects the work environment of documented workers, who may remain silent when their own rights are violated for fear of being replaced by undocumented employees.

Under the limited amnesty program, an undocumented worker qualifies for protected class status by bringing a good faith unfair labor practice or discrimination claim. The worker would not necessarily have to win his or her claim. The proposed solution is limited to good faith claims because courts, agencies, and employers should not be inundated with frivolous, expensive, and time-consuming suits as a result of claims made by illegal aliens motivated by the desire to qualify for the limited amnesty program.

The limited amnesty program is consistent with current labor policy because an undocumented worker who files a good faith unfair labor practice or discrimination claim is advocating for the good of the entire workforce. The primary objective of labor and employment law is deterrence of unfair labor practices and discrimination. The only way to meet this objective is to allow all employees to enforce their rights. If courts continue to withhold these rights from undocumented workers by limiting remedies, the employers’ incentives to hire undocumented workers remain and jobs for American workers are lost. The limited amnesty program helps enforce labor and employment laws. Currently, documented workers self-police the laws by bringing unfair labor practice claims against their employers when the workers believe their rights have been violated. In contrast, when the rights of undocumented workers are violated, government agencies are left with the task of discovering violations. The proposed solution shifts some of the policing

198. A good faith claim is one with “[a] state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one’s duty or obligation, . . . (4) absence of intent to defraud or to seek unconscionable advantage.” BLACK’S LAW DICTIONARY 701 (7th ed. 1999).
to the undocumented workers and alleviates some of the burden placed upon the often overworked and underfunded agencies.

B. Precedent Supporting the Limited Amnesty Program

Precedent supports the granting of limited amnesty or similar relief to illegal aliens. One of the largest amnesty programs was offered in 1986 with the enactment of IRCA; the INA granted amnesty to approximately two and one-half million illegal aliens. In addition to IRCA’s amnesty program, the INA has suspended deportation hearings and granted citizenship status to illegal immigrants in various situations. The type of relief is based on the classification of illegal aliens as a “protected class.” Such individuals received protected class status as the result of a finding that they were susceptible to, and the victims of, exploitation.

1. Those in Need of a Safe Haven and Refugees

Generally, illegal aliens caught entering the United States are returned to their countries, but some are permitted to stay. For example, under the Cuban Adjustment Act of 1966, all Cuban asylum seekers who reach U.S. soil are given “preferential treatment by enabling them to enter the United States and achieve permanent-resident status through a special process not offered to other refugees.” Cubans are not required to apply for political asylum or prove their refugee status.

Significant numbers of refugees can qualify for asylum. Under the Refugee Act of 1980, Congress declared that the United States would aid those persecuted in their home countries. The objectives of [the] Act are to provide a permanent and systematic procedure for the admission to this country of refugees of special humanitarian concern to the United States, and to provide comprehensive and uniform provisions

199. See discussion supra Part II.A.2.; see also discussion infra Part IV.B.4.
203. Id. at 906.
205. Id. § 101(a).
for the effective resettlement and absorption of those refugees who are admitted."²⁰⁶

Individuals, who flee their countries but fail to establish refugee status, may qualify for the Extended Voluntary Departure (EVD) program.²⁰⁷ The EVD program has been labeled as "the closest the Government has come to providing a safe haven."²⁰⁸ The program provides deportation protection to individuals from certain countries.²⁰⁹ The determination is made by the Attorney General based, in part, on the level of danger in that country.²¹⁰

Temporary Protected Status (TPS),²¹¹ provided through IMMACT,²¹² creates a form of safe haven for illegal immigrants present in the United States.²¹³ Similarly, the Attorney General grants TPS on a discretionary basis, contingent on several factors.²¹⁴ A person is permitted to remain where to do so "does not conflict with United States interests, where ongoing armed strife within a country threatens the safety of persons who would otherwise be returned, where a natural disaster prevents a country from being able to provide for returning citizens, or where there are extraordinary circumstances in a country."²¹⁵

2. Victims of Abuse

Victims of domestic and child abuse are another example of illegal aliens afforded protected class status. They are a protected class because public policy mandates ending violence against all women and children, regardless of their residency status. U.S. immigration law once compounded the problems caused by the victimization of battered immigrant women because an abusive spouse could "condition sponsorship of his wife's petition for lawful permanent residence on her

²⁰⁶. *Id.* § 101(b).
²⁰⁸. *Id.* ("As a discretionary measure, it allows the Attorney General and the State Department to take into account foreign policy issues rather than purely humanitarian concerns.").
²⁰⁹. *Id.* at 293 n.155.
²¹⁴. *Id.* at 294-95.
²¹⁵. *Id.* at 295 (citing Pub. L. No. 101-649, 104 Stat. 5030 (1990)).
remaining in the abusive relationship." The problem is addressed by IMMACT, which allows "an abused spouse [to] petition without her U.S.-citizen/resident spouse’s cooperation if she entered into her marriage in good faith and if she or her child was subjected to battering or extreme cruelty by the citizen or resident spouse." Despite IMMACT’s protections, problems persisted for abused spouses and children. The abuser remained an integral part of the immigration process, which the Violence Against Women Act (VAWA) attempted to overcome. VAWA allows "battered immigrant women [to] self-petition for lawful permanent residence instead of depending on their abusers’ sponsorship." The purpose behind VAWA is to eliminate domestic abuse and protect those most vulnerable, such as illegal immigrants fearing deportation as a result of coming forward.

3. Marriage and Children

A U.S. citizen or an alien who is a lawful permanent resident may file a petition with the Attorney General to obtain immigration status for his or her spouse. Prior to 1986, the couple was simply interviewed by the INS to determine the validity of the marriage. If the marriage was

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218. Id. at 380.


220. Lilienthal, supra note 216, at 1598.

221. “The legislative history of the VAWA makes clear that ‘[t]he purpose of permitting self-petitioning is to prevent the citizen or resident from using the petitioning process as a means to control or abuse an alien spouse.’” Id. (quoting H.R. REP. NO. 103-395, at 37 (1993)).


determined to have been in good faith, the immigrant spouse qualified for unconditional permanent residency.225

In 1986, Congress passed the Immigration Marriage Fraud Amendments (IMFA)226 to counter the problem of immigrants entering into sham marriages to receive priority immigration status. Under the IMFA, a person petitioning as an immigrant spouse is admitted as a conditional resident alien after his or her initial petition is approved.227 To initiate removal of the conditional status, the couple is required to file a petition within ninety days of the second anniversary of obtaining the status.228 The alien spouse can be deported if the petition is not timely filed. After the petition is filed, the INS interviews the couple to determine if the union is a bona fide marriage; failure to attend the personal interview may result in deportation.229 If the INS finds that the marriage was entered into solely for the purpose of obtaining legal status, the Service must terminate the resident status, subjecting the alien to deportation proceedings.230

Under the Fourteenth Amendment to the United States Constitution, “all persons born . . . in the United States . . . are citizens of the United States.”231 Thus, when a child is born in the United States, that child is a citizen regardless of the fact that his or her parents are illegal immigrants.232 This method of granting citizenship creates a substantial incentive for immigrants to enter or remain in this country illegally.

The Child Citizenship Act of 2000233 grants automatic citizenship to most children born in foreign countries who are adopted by a U.S. citizen if three requirements are met.234 Prior to the Act, citizenship for

225. Id.
228. Id. § 1186a(d)(2)(A). The INS can terminate the conditional status before the completion of the two-year period if the marriage is determined to be a sham used to confer a beneficial immigration status upon the alien. Id. § 1186a(b)(1)(A)(i).
229. Id. § 1186a(c)(1)(B)-(3)(B), (d)(a)(A).
230. Id. § 1186a(b).
234. Id. The conditions are:
   (1) [a]t least one parent of the child is a citizen of the United States, whether by birth or naturalization[;]
   (2) [t]he child is under the age of eighteen years[;]
these children was not automatic. INS backlogs cause the citizenship application process to take up to one year, or longer in some instances. Representative William Delahunt (D.-Mass.) explained that the policy behind the Act is "as much about promoting adoption as it [is about] reducing barriers."  

4. The Immigration Reform and Control Act

The Immigration Reform and Control Act (IRCA) legitimized the status of millions of undocumented aliens. "Congress acknowledged that legalization, not deportation, [was] the most appropriate solution." The most significant of the three legalization programs passed through IRCA was the granting of amnesty to undocumented aliens. The second program allowed for the acquisition of lawful permanent residency if the applicant had been engaged in certain agricultural work for at least ninety days. Finally, legalization was available for a specified group of Cubans and Haitians.

C. Applying Protected Class Status to Undocumented Workers

Employers have an incentive to hire undocumented workers because they work for very little pay, do not complain to authorities about the substandard conditions with which they are faced, and are willing to take jobs that many Americans prefer to avoid. The need for immigrant labor is well established. "By failing to recognize and

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(3) [t]he child is residing in the United States in the legal and physical custody of the citizen parent pursuant to a lawful admission for permanent residence.


236. Id. (quoting Rep. William Delahunt (D.-Mass.)).


239. Requirements for legalization include: continuous residence in the United States from January 1, 1982; physical presence in the United States since November 6, 1986 to the date of application; and, general admissibility as an immigrant. 8 U.S.C. § 1255a(a) (1994 & Supp. 2001).


241. § 202, 100 stat. at 3359.

242. Dunne, supra note 3, at 636.

243. See, e.g., id. at 638 (pointing out that states such as Texas rely heavily on undocumented immigrant labor). "In 1996, the INS estimated that Texas had over 600,000 undocumented workers
openly address economic reliance on immigrant labor, politicians rob immigrants of the opportunity for lawful employment at prevailing wages, and, at the same time, contribute to their exploitation." Because undocumented workers are subject to exploitation by unscrupulous employers, these employees should be recognized as a class of immigrants in need of protected class status.

D. Informing Undocumented Workers of the Program

It may be difficult, initially, to inform undocumented workers about the limited amnesty program because many undocumented workers are unable to speak or read English. Therefore, steps must be taken to ensure that these workers are aware of their rights and informed and educated about the program.

Government officials have the authority to enter an employer's property to inform workers about their rights. Therefore, upon implementation of the proposed solution, government agencies, such as the NLRB and EEOC, would play a pivotal role in work-site execution of the solution and dissemination of information. In addition, labor unions would be encouraged to distribute information about how to bring a good faith claim to all employees—including undocumented workers. Furthermore, employers would be required to post signs in the workplace, in the native languages of their workers, describing the program and informing the undocumented workers of their rights under the program.

Unfortunately, many employers prey on the uninformed worker. The above channels of information dissemination aim to deter employers from acting in such an unscrupulous manner by educating employees

holding jobs picking fruit, working in packing plants, cleaning hotel rooms, or sorting out damage from natural disasters." Id.

244. Id.

245. See, e.g., State v. Shack, 277 A.2d 369, 374 (N.J. 1971) (holding that an employer of migrant workers cannot restrict an organization funded pursuant to a federal statute from entering onto the employer's land for the purpose of aiding migrant farmworkers, a group in need of such assistance due to the potential for exploitation).

246. Similar to the Occupational Safety and Hazards Act of 1970, 91 Pub. L. No. 596, 84 Stat. 1590 (codified at 29 U.S.C. §§ 651-678), notification requirements, postings, and information about the limited amnesty program must also be made available in languages other than English. See, e.g., OSHA, Logging Operations, Inspection Procedures and Interpretive Guidance, (Directive No. CPL 2-1.19, Mar. 17, 1995), at (J)(22), http://www.osha.gov ("Training materials used must be appropriate in content and vocabulary to the educational level, literacy, and language skills of the employees being trained[,] [f]or example, that could include the availability of training material and instructions in the native language of the non-English speaking employee.").
about the law. These notification procedures will heighten awareness of employee rights among all employees, not just the illegally employed.

E. The Process of the Limited Amnesty Program

The limited amnesty program is available to an undocumented worker who files a good faith discrimination claim under Title VII or a good faith unfair labor practice claim under the NLRA. The claim need not be successful, but it must be meritorious. While the claim is pending, the petition for citizenship is initiated.

The citizenship application process is dependent upon a background check, consistent with those already performed on legal aliens applying for citizenship. For example, the background check would include criminal checks. Citizenship is temporarily denied pending further investigation if the undocumented worker is suspected of terrorist activities. An ancillary benefit of such investigatorial practices is the identification of illegal aliens, within U.S. borders, who would otherwise remain undetected.

While the background investigation is being performed, the undocumented worker’s claim continues on the merits. Once the worker is granted citizenship, he or she is granted full remedies, such as

247. There are services available to assist undocumented aliens at no-charge or at a low cost, and these services must be made available to the undocumented workers in the limited amnesty program. Such organizations may include: The Workplace Project, InterAction, National Council of La Raza, Mi Casa-Su Casa, and Northern California Coalition for Immigrant Rights. “When government agencies fail to fulfill their obligations, legal services centers are often the first, and sometimes the only, organizations to challenge them.” Jennifer Gordon, We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change, 30 HARV. C.R.-C.L. L. REV. 407, 422 (1995). Legal aid societies, receiving funds from Legal Services Corporation, are generally limited to assisting U.S. citizens and eligible aliens. 45 C.F.R. § 1626.3-.4 (2000). However, legal services should be extended to the undocumented worker “at least for the limited purpose of assisting undocumented workers with valid labor and employment law claims.” Dunne, supra note 3, at 673.

248. See supra note 198 (defining “good faith” claim).

249. The authors suggest background checks including, but not limited to, health-related issues, criminal convictions, and security clearance. In light of the terrorist events of September 11, 2001, such investigations would be conducted in accordance with recommendations made by the United States Attorney General, who is given wide discretion in matters of national security.

250. See, e.g., 8 U.S.C. § 1182(a)(2) (1994 & Supp. 2001) (classifying as excludable, for example, aliens convicted of crimes of moral turpitude, aliens with multiple criminal convictions, aliens who are controlled substance traffickers, and aliens who are prostitutes).

251. See USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001). The USA PATRIOT Act expands the class of immigrants subject to deportation based on suspicion of terrorist activities; further, immigrants facing deportation proceedings, based on these suspicions, may be detained indefinitely. See generally id.
reinstatement and backpay. The new citizen obtains all the rights and responsibilities, without limitation, attendant to his or her status (e.g., the right to vote, the obligation to pay taxes, the protection of the U.S. Constitution). However, if the worker is not granted citizenship based on the background check, remedies are limited to those currently allowed by law, and the illegal alien is deported or prosecuted, depending on the circumstances of the denial of citizenship.

F. Ramifications of the Limited Amnesty Program

The possible negative aspects of the limited amnesty program proposed by this note are far outweighed by its potential benefits.

1. Benefits of the Limited Amnesty Program

Unfair labor practice charges will decrease because employers no longer have an incentive to hire undocumented workers. As a result, American jobs are protected. Arguably, many Americans do not seek jobs held by undocumented workers, which means that there remains a need for undocumented workers to fill those positions. However, without the availability of the cheap labor provided by the exploitable workers, employers are forced to adhere to minimum working standards set by federal labor laws, particularly the FLSA.252 As a result of enhanced working standards, the once undesirable jobs become more attractive to Americans and other documented workers.

The respective labor, employment, and immigration agencies, such as the NLRB, EEOC, and INS, would no longer need to ignore the undocumented worker’s status when investigating complaints or determining citizenship. In enacting the limited amnesty program, Congress takes an affirmative step in combating the problem of inconsistent purposes and implementation of the labor, employment, and immigration laws. The limited amnesty solution ends the confusion and debate concerning remedies available to undocumented workers, such as backpay and reinstatement.253 The undocumented worker would be a U.S. citizen entitled to the same protections and remedies as any other documented worker in the United States.

253. While Hoffman Plastic Compounds, Inc. v. NLRB, 122 S. Ct. 1275 (2002), purportedly resolves the circuit split on the issue of backpay, it remains to be seen how federal agencies will apply the holding. Congress, rather than the courts, should unambiguously resolve whether remedies are available to undocumented workers through legislation.
The limited amnesty program decreases illegal immigration to the United States, which curbs the growth of the country's population. By granting citizenship to eligible undocumented workers, the employer's incentive to hire and exploit them is removed. Therefore, illegal immigration decreases because illegal immigrants are not able to find work.

Finally, acts of violence against illegal workers will likely decrease because documented workers will not fear losing their jobs to undocumented workers. By enforcing employment rights for all employees, regardless of documentation status, the workforce as a whole benefits from the decrease of unfair labor practices, discrimination, and substandard working conditions.

2. Drawbacks of the Limited Amnesty Program

There are a few negative effects that may result from the proposed limited amnesty program. However, the effects are temporary and make little difference in the overall scheme of immigration. Upon implementation of the program, it is likely that the number of unfair labor practice and employment claims will rise as many undocumented workers file claims solely for the purpose of receiving amnesty. The rise in the number of claims filed will result in an increased demand on the processing and investigatory functions of certain federal agencies—the NLRB, EEOC, and INS. Demand on the agencies will be temporary. Employers no longer have incentives to hire and exploit undocumented workers because there is a greater chance that the employers will be reported and sanctioned for their illegal actions. Additionally, there will still be some undocumented workers who will not file claims due to a lingering fear of deportation.

V. CONCLUSION

The limited amnesty program proposed by this note offers a permanent solution to the exploitation of illegal aliens in the workplace by granting amnesty, which is limited to undocumented workers who file good faith claims based on labor and employment law violations. The program rewards the reporting of employer violations with citizenship, and, as a result, avoids conflict with immigration law. In order for federal labor and employment agencies to enforce their respective policies, they must be able to penalize employers by compensating employees whose rights have been violated.
Only an integrated labor, employment, and immigration law solution can effectively reconcile the purposes of federal labor and employment law with immigration law. It is time for Congress to build a bridge for opportunity and stop encouraging exploitation.

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