EMPLOYMENT LAW REMEDIES FOR ILLEGAL IMMIGRANTS

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I. INTRODUCTION

Illegal immigration is one of the prominent issues in the 2008 presidential and congressional elections.[1] A sizable number of American citizens are justifiably upset at the number of immigrants who illegally enter and subsequently work in this country. These undocumented workers often labor for sub-standard wages in terrible conditions.[2] And the federal government seems largely unwilling, or perhaps unable, to expend the necessary resources, develop policy positions, and enforce existing immigration laws to slow the tide of illegal immigration into this country and reduce the number of undocumented workers working illegally in this country.

The Immigration Reform and Control Act of 1986 (IRCA) imposes criminal and civil penalties on employers who knowingly hire undocumented workers that are not authorized to work in the United States.[3] Employers must verify an employee's work authorization documents at the outset of the employment relationship to ensure that the employee is legally able to work in this country.[4] The IRCA forbids an unauthorized worker's presentment of fraudulent work authorization documents to avoid the employer verification system outlined by the statute.[5] The Department of Homeland Security's Immigration and Customs Enforcement (ICE) enforces the IRCA.[6] In spite of

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1. This Article is based, in part, on material presented at the State Bar of Texas Labor & Employment Law Section Annual Update & Skills Conference on October 6, 2006, in Santa Fe, New Mexico, and a News Scholars Workshop Session at the Southeastern Association of Law Schools Annual Meeting on August 3, 2007, in Amelia Island, Florida. Thanks to those who participated in these presentations.

2. *See* María Pabón López, *The Intersection of Immigration Law and Civil Rights Law: Noncitizen Workers and the International Human Rights Paradigm*, 44 BRANDEIS L.J. 611, 616-17 (2006).

3. *See* 8 U.S.C. § 1324a(a), (e), (f) (2000).

4. *See* § 1324a(a)(1)(B)(i), (b)(1)(A).

5. *See* § 1324c(a); 18 U.S.C. § 1546(b) (2000).

6. *See* Homeland Security Act of 2002 §§ 441, 451, 471, 6 U.S.C. §§ 251, 271, 291 (Supp. II 2002). Under the IRCA as originally enacted, the Immigration and Naturalization Service (INS) investigated and

the IRCA and its enforcement regime, however, the undocumented worker problem persists.[7]

In 2006 and 2007, the United States Congress exerted considerable efforts to pass comprehensive federal legislation that would provide a pathway toward legalized immigration status for millions of illegal immigrants living in this country.[8] But the legislation ultimately failed.[9] Even if immigration reform soon allows a legalized status opportunity for individuals who initially came into this country illegally, a great number of people will continue to live and work in this country illegally.[10] Namely, some current illegal immigrants will not obtain the legalized status or will lose such status after obtaining it.[11] Moreover, because of the relative strength of the U.S. economy, citizens from other countries will continue to come to the United States and work illegally, and will thus bypass legal immigration procedures.[12]

Given the current and future illegal immigrant population in this country, should labor and employment laws apply to undocumented workers? If an employer violates federal employment and labor laws by firing an undocumented worker because of his race, refusing to pay the worker a minimum wage, or penalizing the worker for engaging in union-organizing activity, should the undocumented worker have the same right to relief as an authorized worker under Title VII of the Civil Rights Act of 1964, the Fair Labor Standards Act, and the National Labor Relations Act? Ultimately, should immigration status matter?

Generally the law should make no distinction between the labor and employment law rights of undocumented workers and documented workers, except when such an alignment does not further the policy goal of decreasing the number of people illegally working in this country. To the extent that such an alignment does not further this overall objective, undocumented workers

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enforced workplace violations involving the employment of undocumented workers. *See* 6 U.S.C. §§ 271-298 (2000). On March 1, 2003, the INS was transferred from the Department of Justice to the Department of Homeland Security. *See* Homeland Security Act of 2002 §§ 441, 451, 471. ICE is now the sub-agency within the Department of Homeland Security that investigates workplace violations of IRCA. *Id.*

7. *See* 8 U.S.C. § 1324a(a), (e), (f) (2000).

8. *See* Comprehensive Immigration Reform Act of 2007, S. 1639, 110th Cong. (2007); Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2007).

9. *See* S. 1639; S. 2611.

10. *See* CONGRESSIONAL BUDGET OFFICE, COST ESTIMATE: SENATE AMENDMENT 1150 TO S.1348, THE COMPREHENSIVE IMMIGRATION REFORM ACT OF 2007 (2007), *available at* http://www.cbo.gov/ftpdocs/81xx/doc8179/SA1150_June4.pdf [hereinafter CBO COST ESTIMATE].

11. *See id.*

12. *See id.* The Congressional Budget Office's (CBO) analysis of the Comprehensive Immigration Reform Act of 2007, as revised by a Senate amendment, estimated that approximately 3.9 million illegal immigrant workers would gain legal status from 2008 to 2017. *See id.* The CBO also estimated that the bill's increased border and immigration enforcement measures would reduce illegal immigration, cut the annual flow of illegal immigrants by one-fourth, and reduce the projected undocumented population by 1.5 million in 2017. *See id.* Such reduction would be offset by about 1 million guest-workers and dependents who overstay their visas and become illegal immigrants. *See id.* Nothing in the ten-year projection indicates that the bill would entirely eliminate the illegal immigrant population in this country. *See id.*

should not have the rights and remedies available to lawful workers. The American judicial system should not encourage those from other countries to gain the benefits of our legal system by blatantly violating our laws. This perspective, however, differs from those scholars and commentators who justify protecting illegal immigrants based on international human rights principles or a new conception of transnational labor citizenship.[13]

The important public policy question is whether strong enforcement of labor and employment laws for undocumented workers can truly be part of the solution to the illegal immigration conundrum that exists in twenty-first century America. This Article strives to contribute to an answer.

II. THE CURRENT LAW

In *Hoffman Plastic Compounds, Inc. v. NLRB*, the Supreme Court of the United States held that the National Labor Relations Board (NLRB) could not award back pay to an undocumented worker who had proven that his employer had discharged him for engaging in union-organizing activities in violation of the National Labor Relations Act (NLRA).[14] In a 5-4 decision, the Court ruled that the NLRB did not have the authority to award back pay to an undocumented worker because such an award would undermine the IRCA's immigration policies.[15] The Court stated that an illegal immigrant may work in the United States without either the employer or the illegal immigrant violating the IRCA.[16] But the Court found that Congress could not have intended to allow the NLRB discretion to award back pay "to an undocumented worker who did not perform any work during the back pay period, could not *legally* have worked during the back pay period, and committed a crime by . . . obtaining the job through falsified documents."[17]

The dissenters saw things differently. They focused on the idea that a back pay remedy has important deterrence purposes for employers who violate federal labor laws.[18] A back pay award requires the employer to pay a monetary penalty for violating the law and thus encourages compliance.[19] If an employer knows that it will not be required to provide back pay when it illegally fires an undocumented worker, the employer might have an incentive to hire undocumented workers instead of authorized workers because the labor law violations will cost it less.[20] Moreover, the dissenters argued that unlawfully earned wages and criminal fraud by undocumented workers do not help resolve the back pay question because an employer might have believed,

13. *See, e.g.*, López, *supra* note 2, at 615.
14. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 151-52 (2002).
15. *Id.* at 148-52.
16. *Id.* at 148.
17. *Id.* at 148-49.
18. *Id.* at 153-54.
19. *Id.* at 154-55.
20. *Id.* at 155-56.

albeit in error, that the undocumented worker could lawfully work in the United States, and the enforcement of a back pay award makes the employer pay a meaningful monetary penalty for violating an important labor law.[21] The dissenters also noted that the IRCA itself does not state how an IRCA violation affects the enforcement of other laws such as the NLRA.[22]

For the most part, the courts and the Department of Labor (DOL) have distinguished the *Hoffman* decision in the context of the Fair Labor Standards Act (FLSA).[23] The FLSA generally requires that employers pay a minimum wage to all employees and overtime wages to nonexempt employees.[24] The DOL asserts that the FLSA provides core labor protections for vulnerable workers and, thus, that immigration status does not affect the remedies available to a worker who suffers an FLSA violation.[25] The DOL distinguishes the *Hoffman* decision because the Supreme Court in that case was concerned about awarding back pay "for years of work not performed, for wages that could not lawfully have been earned."[26] In contrast, under the FLSA, the employee or the DOL may seek back pay "for hours an employee has *actually worked*, under laws that require payment for such work."[27]

The federal district courts that have considered whether undocumented workers are entitled to unpaid wages under the FLSA have generally ruled that such workers are entitled to their *earned* wages under the law.[28] These courts typically rely on the distinction between the *Hoffman* "no work performed" and

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21. *Id.* at 160.

22. *Id.* at 154-55.

23. *See* U.S. DEP'T OF LABOR, FACT SHEET #48: APPLICATION OF U.S. LABOR LAWS TO IMMIGRANT WORKERS: EFFECT OF *HOFFMAN PLASTICS* DECISION ON LAWS ENFORCED BY THE WAGE AND HOUR DIVISION, http://www.dol.gov/ esa/regs/compliance/whd/whdfs48.pdf (last visited June 4, 2008).

24. *See id.*

25. *See id.*

26. *See id.* (quoting *Hoffman*, 535 U.S. at 149).

27. *See id.*

28. *See* Zavala v. Wal-Mart Stores, Inc., 393 F. Supp. 2d 295, 325 (D.N.J. 2005) (holding that undocumented workers, who have already performed work, are not denied relief because of their undocumented status); Flores v. Albertsons, Inc., No. CV0100515AHM(SHX), 2002 WL 1163623, at *5 (C.D. Cal. Apr. 9, 2002) ("*Hoffman* does not establish that an award of unpaid wages to undocumented workers for work actually performed runs counter to IRCA."); Singh v. Jutla & C.D. & R's Oil, Inc., 214 F. Supp. 2d 1056, 1058-59 (N.D. Cal. 2002) (holding that undocumented workers are covered by the FLSA, and recognizing that a right of action for undocumented workers under the FLSA is not inconsistent with IRCA); Liu v. Donna Karan Int'l, Inc., 207 F. Supp. 2d 191, 192 (S.D.N.Y. 2002) (expressing the idea that back pay under FLSA for work actually performed is distinguishable from the *Hoffman* situation); Flores v. Amigon, 233 F. Supp. 2d 462, 464 (E.D.N.Y. 2002) (holding that the application of *Hoffman* is limited to cases in which back pay is claimed for work not performed); Martinez v. Mecca Farms, Inc., 213 F.R.D. 601, 604-05 (S.D. Fla. 2002) (holding that *Hoffman* does not prevent illegal immigrants from recovering FLSA remedies for work already performed). *But cf.* Renteria v. Italia Foods, Inc., No. 02C495, 2003 WL 21995190, at *6 (N.D. Ill. Aug. 21, 2003) (holding, in light of *Hoffman*, that undocumented workers can recover compensatory damages under FLSA, but not other remedies like front pay or back pay that would undermine the policies of IRCA).

the FLSA "work performed" scenarios.[29] These courts also note that the FLSA text does not define covered employees based on immigration status.[30]

The work performed distinction is not available in Title VII discrimination cases brought by undocumented workers. It seems fairly clear that the public policy reasons for precluding back pay recovery in NLRA cases are present to the same degree in Title VII cases. Permitting an undocumented worker to recover back pay under Title VII poses the same problems as it does under the NLRA because it awards back pay to an undocumented worker who did not perform any labor, who will have illegally earned his wages, and who committed fraud by obtaining the job using false documents.[31] Moreover, there is no principled reason for concluding that protecting all individuals equally from unlawful discrimination, regardless of immigration status, is any more important than protecting all individuals equally from retaliation for engaging in union-organizing activities, regardless of immigration status. Both are laudable goals, yet they must yield to immigration policy.

Nonetheless, the courts that have evaluated whether *Hoffman* precludes undocumented workers from seeking Title VII back pay have generally been reluctant to find it unavailable.[32] Sometimes these courts focus on slight textual differences between the NLRA and the relevant statute, and avoid the underlying question of whether providing the same remedies to undocumented workers promotes sound immigration policy.[33] For example, in *Rivera v. NIBCO*, a national origin discrimination action asserted by plaintiffs suspected by the employer to be undocumented, the Ninth Circuit indicated that *Hoffman* does not control in the Title VII context because of three key differences between the NLRA and Title VII.[34] First, though the availability of private actions under the NLRA is severely limited, Title VII depends primarily on private actions for enforcement.[35] Second, Title VII plaintiffs may seek remedies like compensatory and punitive damages, which are aimed at punishing and deterring employers from engaging in unlawful Title VII discrimination.[36] But similar punitive and deterrent remedies are not available under the NLRA.[37] Finally, *Hoffman* concerned limits on the remedial discretion of an administrative agency—the NLRB.[38] In contrast, a federal court, not an administrative agency, has the authority to decide whether a Title

29. *See Zavala*, 393 F. Supp. 2d at 322.

30. *See id.* Under the FLSA, an "employee" is any individual employed by the employer. *See* 29 U.S.C. § 203(e)(1) (2000).

31. *See Hoffman*, 535 U.S. at 148-49.

32. *See, e.g.*, Rivera v. NIBCO, Inc., 364 F.3d 1057, 1061 (9th Cir. 2004) (affirming an order prohibiting an inquiry into immigration status).

33. *See, e.g., id.* at 1068-70.

34. *Id.* at 1067-68 ("We seriously doubt that *Hoffman* is as broadly applicable as NIBCO contends, and specifically believe it unlikely that it applies in Title VII cases.").

35. *Id.* at 1067.

36. *Id.*

37. *See id.*

38. *Id.* at 1068.

VII statutory violation warrants a back pay award.[39] Due to the broad nature of a federal court's authority to award back pay and interpret Title VII, the *Rivera* court deemed the *Hoffman* rationale irrelevant.[40]

State employment law remedies are all over the map regarding undocumented workers whose state law employment rights have been violated. Indeed, various laws within a state often conflict. For example, Texas employment laws vary on whether immigration status matters for purposes of obtaining certain benefits.[41] The Texas Unemployment Compensation Act contains a particular provision that prohibits unauthorized workers from drawing unemployment benefits, regardless of whether such workers meet all other eligibility requirements.[42] The rationale is that wages from unauthorized workers are illegally paid and earned and, therefore, are not supposed to be reported to the Texas Workforce Commission.[43] Moreover, to be able to collect unemployment benefits, a worker has to be "available" for full-time work.[44] And a person who is not authorized to work in the United States is not available for work as required by the statute.[45] In contrast, immigration status does not appear to matter when undocumented workers bring tort cases against their employer.[46] In *Tyson Foods v. Guzman*, a Texas appellate court rejected the argument that *Hoffman* precluded the jury from awarding damages for lost earning capacity to an undocumented worker.[47] The appellate court held that

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39. *See id.* at 1068-69.

40. *See id.* at 1074-75. In *Rivera*, the court's reasoning that *Hoffman* turned on the limited, statute-specific authority of the NLRB, which does not constrain federal courts in Title VII cases, has also been used by other courts in Title VII cases as a rationale for not applying *Hoffman* in the Title VII context. *See, e.g.*, De La Rosa v. N. Harvest Furniture, 210 F.R.D. 237, 238-39 (C.D. Ill. 2002). Not all courts, however, have eschewed applying *Hoffman* to Title VII cases. In *Escobar v. Spartan Security Service*, a plaintiff sued his former employer for sexual harassment and retaliation in violation of Title VII. Escobar v. Spartan Sec. Serv., 281 F. Supp. 2d 895, 896 (S.D. Tex. 2003). At the time of his termination, the plaintiff was not authorized to work in the United States. *Id.* at 897. By the time he brought his Title VII lawsuit, however, he had secured the right to legally work in the United States. *Id.* On a motion for summary judgment, the employer argued that the plaintiff's sexual harassment and retaliation claims should have been dismissed because he was not entitled to any remedy under *Hoffman* due to his prior undocumented status. *Id.* at 896. The court denied the summary judgment motion because the plaintiff's prior undocumented status did not prevent him from recovering certain Title VII remedies like reinstatement or front pay because he had secured the right to legally work in the United States. *Id.* at 897. However, the court dismissed the plaintiff's back pay claim because, under *Hoffman*, a back pay remedy is unavailable to a Title VII plaintiff who is undocumented during the time of his employment. *Id.* The court only briefly discussed why *Hoffman* applies in the Title VII context. *Id.* The court was apparently influenced by the plaintiff's concession that his back pay claim should have been dismissed under the *Hoffman* rationale. *Id.*

41. *See* TEX. LAB. CODE ANN. § 207.043 (Vernon 2006); Ibarra v. Tex. Employment Comm'n, 598 F. Supp. 104, 106-07 (E.D. Tex. 1984).

42. *See* TEX. LAB. CODE ANN. §§ 201.001, 207.043(a).

43. *See* TEX. WORKFORCE COMM'N, ESPECIALLY FOR TEXAS EMPLOYERS 121 (2d ed. 2002), *available at* http://www.twc.state.tx.us/news/efte/tocmain.html.

44. *See* Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 146-50 (2002) (holding that wages earned by illegal immigrants were illegal and, thus, that back pay would not be awarded even though the illegal immigrant had been wrongfully terminated); TEX. WORKFORCE COMM'N, *supra* note 43, at 121.

45. *See* TEX. WORKFORCE COMM'N, *supra* note 43, at 121.

46. *See* Tyson Foods, Inc. v. Guzman, 116 S.W.3d 233, 242-44 (Tex. App.—Tyler 2003, no pet.).

47. *Id.* at 244.

Texas law does not require citizenship or a work authorization permits as a prerequisite to recover damages for lost earning capacity.[48]

Given the uncertainty encompassing federal and state law in this area, management attorneys have latched on to *Hoffman* to inquire into an employment law plaintiff's immigration status during litigation.[49] The liberal discovery rules under the Federal Rules of Civil Procedure arguably favor discovery of immigration status during pretrial litigation in employment cases.[50] If the *Hoffman* decision applies to a particular employment claim, the relevancy standard is satisfied because a plaintiff's immigration status affects the settlement value of a case.[51] This outcome occurs even though immigration status relates merely to damages, not liability.[52] In general, discovery is not limited to relevant evidence of liability but includes damages as well.[53] Most courts that address whether a defendant is entitled to discovery of a plaintiff's immigration status, however, tend to either bar discovery on relevancy grounds or prevent discovery during the liability phase of litigation because discovery may be reopened after a liability finding to determine damages.[54]

III. THE PUBLIC POLICY QUESTION

Recent efforts regarding comprehensive immigration reform legislation fail to fully address the rights and remedies available to undocumented workers under various labor and employment laws.[55] Congress should clarify this issue

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48. *Id.*

49. *See* Kiren Dosanjh Zucker, *From* Hoffman Plastic *to the After-Acquired Evidence Doctrine: Protecting Undocumented Workers' Rights Under Federal Anti-Discrimination Statutes*, 26 WHITTIER L. REV. 601, 604-05 (2004).

50. *See id.* at 609-15.

51. Colindres v. Quietflex Mfg., 86 Empl. Prac. Dec. (CCH) P41873, 2004 U.S. Dist. LEXIS 27982, at *12-13 (S.D. Tex. Apr. 19, 2004). In *Colindres*, Judge Rosenthal compelled the plaintiffs, who asserted Title VII and FLSA claims, to produce a list of the undocumented plaintiffs who had asserted back pay claims for time not worked. *Id.* In doing so, Judge Rosenthal noted that the information was relevant under *Hoffman* because it enabled the defendant-employer to evaluate the case. *Id.* at *10-13.

52. *See* Avila-Blum v. Casa de Cambio Delgado, Inc., 236 F.R.D. 190, 191 (S.D.N.Y. 2006).

53. *See id.* at 191-92.

54. *See id.* (barring discovery into immigration status during the liability phase of litigation with prospect that the issue could be reopened at a later stage of the proceeding as appropriate in relation to damages); EEOC v. First Wireless Group, Inc., 225 F.R.D. 404, 405-06 (E.D.N.Y. 2004); Liu v. Donna Karan Int'l, Inc., 207 F. Supp. 2d 191, 192-93 (S.D.N.Y. 2002); Topo v. Dhir, 210 F.R.D. 76, 78 (S.D.N.Y. 2002); Flores v. Albertsons, Inc., No. CV0100515AHM(SHX), 2002 WL 1163623, at *5 (C.D. Cal. Apr. 9, 2002); *Judge Blocks Questions About Immigrants Citing Recent Attention to Immigrants*, DAILY LAB. REP., Mar. 23, 2006, at A-4 (stating that the question of a plaintiff's immigration status is not relevant under the FLSA to claims for overtime pay because undocumented workers are protected under the FLSA as employees just as much as documented workers are).

55. In 2006 and 2007, the Senate considered, but did not pass, the comprehensive immigration reform bills. *See* Comprehensive Immigration Reform Act of 2007, S. 1639, 110th Cong. (2007); Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2007). Both bills involved a new guest worker program for unskilled workers and a legalized status for undocumented workers present in this country with a potential pathway to citizenship. S. 1639, S. 2611. The proposals clarified that guest workers are employees for FLSA purposes but did not clarify whether those workers had the same employment rights under other

in future federal legislation. Specifically, Congress could adopt a general federal employment law policy that immigration status either does or does not matter for purposes of enforcing the rights and awarding the remedies available under federal labor and employment law statutes.[56] Alternatively, Congress could make individual decisions on each federal labor and employment law statute by balancing American immigration policy with the goals of the underlying federal labor or employment law statute. Finally, Congress could address whether federal policy about liability and remedies for undocumented workers preempts conflicting state laws or is simply limited to federal labor and employment law statutes.[57]

The choices facing our representatives are difficult, but they must be confronted. In crafting the law, our representatives should focus on what is best for the American worker.[58] This aim must be the preeminent policy goal. The hiring of undocumented workers in large numbers decreases wages, standards of living, and working conditions for authorized workers. Providing complete rights and remedies to undocumented workers may be justified because it removes an incentive for an employer to hire an undocumented worker. Plenary rights and remedies could, thus, theoretically aid in the task of decreasing illegal immigration rates. Other suggested grounds for providing employment law rights and remedies to undocumented workers, however, are not justified.

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state and federal laws. *See* S. 1639, S. 2611.

56. *See* Jessica Sharron, Comment, *Passing the Dream Act: Opportunities for Undocumented Americans*, 47 SANTA CLARA L. REV. 599, 620-25 (2007). California law states that immigration status is irrelevant for purposes of liability under state labor and employment laws, but denies reinstatement and back pay remedies to undocumented workers in order to comply with the *Hoffman* decision. *See* CAL. LAB. CODE § 1171.5 (West 2003); Farmer Bros. Coffee v. Workers' Comp. Appeal Bd., 35 Cal. Rptr. 3d 23, 27-30 (Cal. Ct. App. 2005).

57. *See generally* DeCanas v. Bica, 424 U.S. 351, 354 (1976) (holding that immigration legislation is exclusively within the federal powers). In most jurisdictions, prior to *Hoffman*, an undocumented worker was an employee for purposes of workers' compensation law and therefore entitled to benefits. *See* Reinforced Earth Co. v. Workers' Comp. Appeal Bd., 749 A.2d 1036, 1038 (Pa. Commw. Ct. 2000); Del Taco v. Workers' Comp. Appeals Bd., 94 Cal. Rptr. 2d 825, 827-28 (Cal. Ct. App. 2000); Artiga v. M.A. Patout & Son, 671 So. 2d 1138, 1139 (La. Ct. App. 1996); Lang v. Landeros, 918 P.2d 404, 405-06 (Okla. Civ. App. 1996). However, there were some notable exceptions. In 1999, the Virginia Supreme Court held that under the IRCA, an illegal immigrant could not lawfully contract for hire and, thus, could not be an employee under the Virginia Workers' Compensation Act. *See* Granados v. Windson Dev. Corp., 509 S.E.2d 290, 292-93 (Va. 1999). The Virginia legislature overruled the *Granados* decision by statute in 2000. *See* VA. CODE ANN. § 65.2-101 (2003). Wyoming consistently holds that an undocumented worker cannot be an employee for purposes of Wyoming workers' compensation law. *See* Felix v. State *ex rel.* Wyo. Workers' Safety & Comp. Div., 986 P.2d 161, 163-64 (Wyo. 1999). Despite some states' preferences to allow undocumented workers to recover workers' compensation benefits, some jurisdictions are open to the argument that undocumented status prevents the recovery of benefits that compensate for loss of prospective earning capacity. *See* Tarango v. State Indus. Ins. Sys., 25 P.3d 175, 178 (Nev. 2001) (noting that undocumented workers are not entitled to vocational rehabilitation benefits because of conflict with federal immigration policy).

58. *See* Bill Ong Hing, *The Case for Amnesty*, 3 STAN. J. C.R.-C.L. 233, 250-51 (2007). The American worker should include both U.S. citizens and non-U.S. citizens who are legally present in this country and legally working. *Id.*

Some scholars have claimed that equality and fairness principles are the proper motivations for providing such rights and that a new international paradigm should be developed to provide civil rights for non-U.S. citizens.[59] Professor María López argues that the future of non-citizens' civil rights in the United States rests in an international human rights paradigm—domestic courts hold actors accountable for international human rights violations against non-citizens.[60] Moreover, under an international human rights paradigm, individuals and organizations would have standing to bring their grievances to international human rights tribunals to protect the rights of non-U.S. citizens when the domestic courts will not do so and when the legislative process has failed to address the inequalities affecting non-citizens' daily lives.[61] Professor López's argument is bolstered by a recent advisory opinion from an international court advocating equal labor and employment law rights for undocumented workers under international law principles.[62]

Professor Jennifer Gordon proposes a concept called "transnational labor citizenship," which would provide transnational status to work among different countries regardless of national citizenship status.[63] This concept is based on the idea that the only way to construct a genuine floor on working conditions, within the context of strong competition, is to link worker self-organization with the enforcement power of the state in a way that crosses borders just as workers do.[64] The framework for developing this transnational labor citizenship would be established through multilateral negotiations among participating countries.[65] For example, the United States and Mexico could negotiate a transnational labor agreement with input from non-governmental organizations in the labor and migration fields.[66] Transnational labor organizations in the United States and Mexico would play important roles in the process, both individually and through a coordinating body.[67] The benefits of having this transnational status would include the rights to travel freely and work in both countries and to permanently reside over time.[68] The certification for this status by the Mexican government would depend on the migrant's joining a Mexican independent transnational labor organization and then

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59. *See* López *supra* note 2, at 615.

60. *Id.*

61. *Id.*

62. Judicial Condition and Rights of Undocumented Migrants, Advisory Opinion OC-18/03 (Inter.-Am. Ct. H.R. Sept. 17, 2003), *available at* http://www.corteidh.or.cr/docs/opiniones/seriea_18_ing.pdf. In a 2003 advisory opinion, the Inter-American Court of Human Rights declared that under fundamental international law principles, undocumented workers acquire the same labor and employment law rights as citizens and individuals working legally in a country because of their "worker" status. *See id.*; RICHARD CARLSON, EMPLOYMENT LAW 71 (2005).

63. *See* Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503, 504 (2007).

64. *Id.* at 565.

65. *See id.* at 565-66.

66. *See id.*

67. *See id.*

68. *Id.* at 567.

joining a local transnational labor organization in the United States upon entering the U.S. work force.[69] Workers would take a solidarity oath as a condition of membership: they would promise to not take a job that violates basic workplace laws or that pays less than the minimum wage set by the transnational labor organization, to report employer violations, and to not cross picket lines.[70] Transnational labor organization membership would be available to anyone willing to comply with the oath.[71] In short, Professor Gordon imagines a loosely organized grouping of non-governmental organizations and community-based workplace groups forming an international union of workers in various countries.[72]

With all due respect to these eminent scholars, ceding power to an international body to adjudicate the employment rights of illegal immigrants working on American soil would be unwise. Furthermore, the United States should not give up on the current immigration paradigm. While a complete solution to the current illegal immigration problem might not exist, the problem can be curtailed if political, economic, law enforcement, and social resources are properly applied. Indeed, for a whole host of reasons, especially national security, our representatives must tackle the problem. This country must set appropriate limits and regulations on immigration to benefit our economy and our citizens, and then exercise the political and economic will to enforce those regulations. Although guaranteeing the same employment and labor law rights to both legal and undocumented workers could further the goal of decreasing illegal immigration, it is a small piece to the puzzle.

Indeed, the illegal immigration puzzle has many pieces, all of which must be carefully combined to resolve the problem. The fundamental issue, of course, is the economic disparity between the United States and the developing countries from which the illegal immigrants depart. The magnetic pull that our economy provides will be lessened only if these countries develop an economy that provides decent wages to its citizens who are willing to work. The United States and the international community can help these developing countries with initiatives such as ending debt restructuring practices, which create perverse economic incentives for developing countries.[73]

Additionally, the federal government must demonstrate a commitment to securing the border with Mexico. Despite an increase in Border Patrol agents since 9/11, border apprehensions have decreased over the last six years.[74] Convictions of human smugglers and traffickers are also down.[75] Both the

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69. *Id.*
70. *Id.*
71. *See id.*
72. *Id.* at 561-85.
73. *See id.*
74. *See* JIM KESSLER & BEN HOLZER, THIRD WAY, A HECK OF A JOB ON IMMIGRATION ENFORCEMENT 2 (2006), *available at* http://www.thirdway.org/data/product/file/38Immigration_Enforcement_Report.pdf.
75. *See id.*

federal legislative and executive branches must make additional efforts to address this problem.[76]

More emphasis must also be placed on penalizing employers for hiring undocumented workers—monetary sanctions, criminal penalties, and possible business license revocation.[77] Until very recently, criminal and civil actions against employers that knowingly hire undocumented workers were almost nonexistent.[78] In 2002, the INS, in its last year, brought only twenty-five criminal cases against employers.[79] And only 485 undocumented workers were arrested and processed for deportation in those cases.[80] In the 2004 fiscal year, only forty-six employers were convicted for employing undocumented workers.[81] Even though ICE is now placing more emphasis on work-site enforcement, it clearly lacks the resources needed to effectively enforce the law against employers who violate it.[82] This deficiency must change in the future. Employers should face stiffer penalties for breaking illegal immigrant workplace laws, and the government should actually enforce these laws.

To be fair, American employers are currently caught between Scylla and Charybdis. The IRCA requires employers to verify any new hire's eligibility to work in the United States by examining the prospective employee's work authorization documents.[83] Amazingly, employees may use twenty-nine different documents to prove work eligibility in the United States.[84] With the proliferation and sophistication of modern counterfeiting and the common-sense realization that employers cannot possibly be counterfeiting experts, many honest employers find themselves employing illegal workers.[85] This problem is exacerbated by the twenty-nine possible work-authorizing

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76. *See, e.g.*, Karen Werner, *Senate Adopts Border Security Provision with Remaining Funds for Verification System*, DAILY LAB. REP., July 27, 2007, at A-5. Congress may be getting the message because on July 26, 2007, the Senate adopted an amendment to fiscal year 2008 appropriations legislation that provided $3 billion in funds for enhanced border security. *See id.*

77. *See* 2007 Ariz. Sess. Laws 279. Dismayed by the federal government's refusal to address the immigration problem, Arizona Governor Janet Napolitano signed the Legal Arizona Workers Act into law on July 2, 2007. *See id.* Under the Arizona law, it is unlawful for an employer to knowingly or intentionally employ an illegal immigrant. *See* ARIZ. REV. STAT. ANN. § 23-212(A) (2007). Initial violations result in temporary suspension of an employer's license to conduct business. *See* § 23-212(F). Repeat violations lead to permanent revocation of a license. *Id.* The act applies to offenses committed after January 1, 2008. § 23-212(D). Business and immigrant groups have filed lawsuits challenging the constitutionality of the act. *See* Michael R. Triplett, *Groups File New Challenge to Arizona Worksite Law After Judge Tosses Earlier Suit*, DAILY LAB. REP., Dec. 11, 2007, at A-14.

78. *See No More Slaps on Wrist for Work-Site Violations*, KANSAS CITY STAR, June 26, 2007, at B9.

79. *Id.*

80. *Id.*

81. *See* KESSLER & HOLZER, *supra* note 74, at 6-7.

82. *See* Fawn Johnson, *Senators Grill Administration Officials on Worksite Enforcement of Immigration Law*, DAILY LAB. REP., June 20, 2006, at AA-1. In 2005, only 90 ICE agents were devoted to worksite enforcement, according to Government Accountability Office Statements. *Id.*

83. *See* 8 U.S.C. § 1324a(b)(1)(A) (2000).

84. *See* JON KYL, UNITED STATES SENATE REPUBLICAN POLICY COMMITTEE, ALIEN WORK-AUTHORIZATION VERIFICATION: CAN THIS BROKEN SYSTEM BE FIXED? 3 (2006), *available at* http://rpc.senate.gov/public/_files/Feb2806WorkAuthLBAddendum.pdf.

85. *See* Johnson, *supra* note 82, at AA-1.

documents and the possibility of a national origin discrimination case for employers who push too hard when verifying an individual's work authorization status.[86] In sum, Congress must develop a more streamlined, efficient, and effective verification system, including expansion of the basic pilot program to create a mandatory electronic verification process that is phased in over a number of years.[87] The system should also limit the number of documents that may be used to prove work eligibility, and it should move toward a one-document verification system—a tamper-proof, biometric national work authorization card with a hologram.[88]

Finally, U.S. citizens must educate themselves about the myth propagated by many corporations and politicians that illegal immigrants do jobs that Americans just will not do anymore, and they should petition for change.[89] The myth is only partly true. As Professors Gordon and Saucedo have described in their respective scholarship, U.S. corporations have largely succeeded in de-skilling work, reducing wages, and stripping benefits from traditional blue collar jobs so that these jobs, which were once very desirable to American citizens, are no longer attractive to the average American worker.[90] The meat-packing industry is a prime example.[91] Meat-packing jobs were middle-class, blue-collar jobs thirty years ago, but today these jobs are often filled by undocumented workers who work at or below the minimum wage in horrible working conditions.[92] The American public, at least certain segments of it, has been largely complicit in this endeavor.[93] Consumers have readily accepted lower costs for goods and services in exchange for looking the other way as these middle class jobs vanish.[94] And employers have certainly taken advantage of the lower costs associated with the hiring undocumented workers.[95]

If the government maintains and strengthens the pillars of the current immigration enforcement system—border and workplace enforcement—could clarifying the employment law rights and remedies of undocumented workers, in combination with the aforementioned improvements, have any effect on the

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86. *See* Johnson, *supra* note 82, at AA-1.

87. *See* June Kronholz, *Business Groups Fault U.S. Plan to Identify Illegal Workers*, WALL ST. J., Mar. 16, 2006, at B1. The basic pilot program, now known as E-Verify, has faults and loopholes that must be corrected as part of any expansion. *Id.*

88. *See* Lawrence E. Dube, *Witnesses, House Panel Members Question Systems for Verifying Employment Eligibility*, DAILY LAB. REP., June 8, 2006, at A-9.

89. *See* Leticia M. Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 OHIO ST. L.J. 961, 961-62 (2006).

90. *See* Gordon, *supra* note 63, at 549-50; Saucedo, *supra* note 89, at 962.

91. *See* Chris Kutalik, *Immigrant Workers Buck Long Slide in Meatpacking Raids Follow as Backlash*, LAB. NOTES, Feb. 2007, *available at* http://labornotes.org/node/522.

92. *See id.*

93. *See id.*

94. *See* Saucedo, *supra* note 89, at 964.

95. *See* Kronholz, *supra* note 87.

illegal immigration problem? There is a puncher's chance.[96] Providing certain employment law rights and remedies to undocumented workers is unlikely to influence an immigrant's decision to illegally enter the United States for work. But it might affect employer decision-making on hiring of undocumented workers. An employer who knows that it will not be able to abuse and take advantage of a hired undocumented worker—because the undocumented worker can enforce his employment law rights just like an authorized worker—will be less likely to hire that worker. Consider the situation in which the undocumented worker proves a Title VII violation and seeks back pay. While it may seem unwise to provide a remedy to an undocumented worker for a time period when the worker could not have been legally employed in the country, the fortuity of the undocumented worker's immigration status should not let the offending employer off the hook. Even if policymakers decide that undocumented workers should not recover these lost wages, the employer should be required to pay the amount of the lost wages as a penalty to the government. This penalty decreases the employer's incentive to hire undocumented workers in the first place.

IV. CONCLUSION

For now, the preferred approach is to work within the confines of the current immigration structure. The U.S. government passes laws that separate legal and illegal workers, and then enforces those laws against the illegal workers and employers who knowingly break the law by hiring them. Future adjustments to the immigration laws should make it easier for employers to determine if an illegal worker has applied for a job. When these laws fail and an illegal worker obtains a job, the labor and employment law standards in this country do not cease to exist. Employers should pay the same price when they violate the standards, regardless of the aggrieved victim's immigration status. In combination with other improvements to our immigration system, perhaps these changes will help solve the illegal immigration problem.

America is, at its heart, an immigrant nation, and the reality of the American dream is what separates us from other nations. The United States will continue to welcome and embrace those individuals who legally come to this country to find a better life for themselves and their families. Due to global economic forces, however, citizens of other countries will inevitably come here and work illegally. And the government should do all it can to address this

96. Legal rights on a piece of paper do not necessarily lead to the exercise of those rights. An undocumented worker's access to legal education about workplace rights and legal representation regarding enforcement of those rights, limited temporal deportation protection for undocumented workers who exercise their rights, and increased administrative enforcement against employers who abuse and violate an undocumented worker's rights are all issues that the United States must address if strengthened protections are to have any effect on the illegal immigration problem.

problem. Providing undocumented workers with labor and employment law rights may play a small role in the solution to this complex problem.