

# Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform

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## I. INTRODUCTION

It is not the intention of the Committee that the employer sanctions provisions of the [Immigration Reform and Control Act] be used to undermine or diminish in any way labor protections in existing law . . . .<sup>1</sup>

Immigration law fictions range from nebulous abstractions to outright distortions and misrepresentations. They are often used to achieve ends that would be unthinkable in other areas of American law and popular belief.<sup>2</sup>

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<sup>1</sup> H.R. REP. NO. 99-682, pt. 1, at 58 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5662. The House Education and Labor Committee Report on the Immigration Reform and Control Act ("IRCA") states:

In addition, the committee does not intend that any provision of this Act would limit the powers of State or Federal labor standards agencies such as . . . the National Labor Relations Board . . . in conformity with existing law, to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by these agencies. To do otherwise would be counter-productive of our intent to limit the hiring of undocumented employees and the depressing effect on working conditions caused by their employment.

*Id.*, pt. 2, at 8-9, *reprinted in* 1986 U.S.C.C.A.N. 5649, 5758.

<sup>2</sup> Ibrahim J. Wani, *Truth, Strangers, and Fiction: The Illegitimate Uses of Legal Fiction*

In a garment sweatshop in New York City, management instituted a requirement that its employees work forty-nine hours a week without overtime pay. The largely immigrant workforce's attempt to unionize in response to the company's unilateral action was met with a flagrant anti-labor campaign. This campaign prompted the filing of five separate unfair labor practice charges with the National Labor Relations Board ("NLRB").<sup>3</sup> After an investigation, the Regional Director of the NLRB issued a lengthy complaint finding that there was good cause to prosecute the company for its egregious violations of the National Labor Relations Act ("NLRA").<sup>4</sup> As alleged by the NLRB, the company repeatedly threatened to call the Immigration and Naturalization Service ("INS") if the workers persisted in their union campaign.<sup>5</sup> The unionization effort was ultimately successful. The NLRB conducted a union representation election at the garment factory, and the Regional Director certified the union as the exclusive bargaining agent for the workers. However, in the midst of the union's efforts to gain recognition and management's determination to avoid unionization, the employer's attorney, who happened to be the former District Director of the INS in New York City, violated the protections guaranteed by the NLRA and actually contacted the INS to report that there might be undocumented workers at the company.

It would be unusual for a company to risk sanctions by reporting its own workers to the INS.<sup>6</sup> However, after the employer contacted the INS, the agency arranged for a consensual search of the employer's business, notifying management in advance as to the date and time of the visit.<sup>7</sup>

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in *Immigration Law*, 11 CARDOZO L. REV. 51, 53 (1989).

<sup>3</sup> *Montero v. INS*, 124 F.3d 381, 382 (2d Cir. 1997).

<sup>4</sup> National Labor Relations Act (NLRA) of 1935, ch. 372, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151-169 (1994)). Included in the NLRB complaint were charges that the company deprived workers of benefits and overtime pay; fired, laid off, and refused to reinstate union supporters; threatened to close the garment factory and/or fire employees who engaged in protected concerted activity; promised additional benefits if the workers would repudiate the union; physically assaulted one union supporter; instructed workers not to wear pro-union shirts; demanded that workers reveal the identity of pro-union colleagues; and unlawfully interrogated employees about their union affiliation. See Order Further Consolidating Cases, Consolidated Amended Complaint and Notice of Hearing at 7-19, *STC Knitting Mills, Inc.* (No. 29-CA-16950) (unpublished NLRB order filed Jan. 15, 1993) (on file with author).

<sup>5</sup> Order Further Consolidating Cases, Consolidated Amended Complaint and Notice of Hearing at 7, *STC Knitting Mills, Inc.* (No. 29-CA-16950). The Supreme Court recognizes that, regardless of immigration status, an employer who threatens to contact the INS or constructively discharges a worker by instigating an INS investigation in retaliation for exercising protected labor rights commits an unfair labor practice prohibited by the NLRA. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984). For further discussion of *Sure-Tan* and its progeny, see *infra* Part II.

<sup>6</sup> Pursuant to the Immigration Reform and Control Act (IRCA) of 1986, Pub. L. No. 99-603, § 101(a)(1), 100 Stat. 3359, 3360, any employer who knowingly hires undocumented workers is subject to monetary sanctions. Immigration and Nationality Act (INA) § 274A, 8 U.S.C. § 1324a (1994). Thus, the employer was inviting a fine by reporting its undocumented workers to the INS.

<sup>7</sup> See *Montero*, 124 F.3d 383-84.

Conveniently, on the prearranged date of the INS raid, pro-management undocumented workers were told not to report to work.<sup>8</sup> When the undocumented union supporters showed up for work that day, INS officers intercepted, questioned, and arrested them. After the raid, based upon additional charges filed by the union, the NLRB amended its complaint to add new allegations of unfair labor practices. These practices included the employer contacting the INS, initiating an investigation of union supporters, and detaining and constructively discharging the union supporters.<sup>9</sup> While the employer's conduct was clearly prohibited by the NLRA, the Board of Immigration Appeals' ("BIA") decision to admit the illegally obtained evidence for the purpose of deporting the workers was upheld in *Montero v. INS* by the Court of Appeals for the Second Circuit.<sup>10</sup> Notwithstanding the national labor protections guaranteed to all workers regardless of their immigration status, the INS used the evidence obtained in violation of the NLRA to deport the undocumented factory workers who supported the union.

Undocumented workers by definition occupy a precarious position in U.S. society: their very presence at the workplace is at the same time unlawful and necessary to perform the most difficult work at the lowest wages.<sup>11</sup> Excluding the undocumented from labor and employment protection statutes allows employers to exploit undocumented workers with impunity and has a chilling effect upon the rights of all workers. Recognizing this, the various federal labor and employment protection statutes

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<sup>8</sup> Brief of Amicus Curiae Asian American Legal Defense and Education Fund at 3, *Montero* (No. 96-4130); see also Elizabeth Ruddick, *Silencing Undocumented Workers: U.S. Agency Policies Undermine Labor Rights and Standards*, IMMIGR. NEWSL., June 1996, at 1, 10.

<sup>9</sup> Order Further Consolidating Cases, Consolidated Amended Complaint and Notice of Hearing at 19-20, *STC Knitting Mills, Inc.* (No. 29-CA-16950).

<sup>10</sup> See *Montero*, 124 F.3d at 384-86. The Second Circuit held that evidence obtained as a result of the employer's violation of the NLRA is admissible against the undocumented worker in deportation proceedings even where the basis for the raid itself is the employer's NLRA violation. See *id.* at 384-85; see also *infra* notes 132-152 and accompanying text.

<sup>11</sup> The INS estimates that about 5 million undocumented immigrants resided in the United States as of October 1996. IMMIGRATION & NATURALIZATION SERV., U.S. DEP'T OF JUSTICE, ILLEGAL ALIEN RESIDENT POPULATION, <http://www.ins.usdoj.gov/graphics/aboutins/statistics/illegalalien/index.htm> (last modified Dec. 20, 2000). However, the results of the 2000 census have prompted experts to now estimate the undocumented population at 7.1 to 9 million people. Susan Sachs, *A Hue, and a Cry, in the Heartland*, N.Y. TIMES, Apr. 8, 2001, § 4, at 5. As one INS employee explains, "If you go to any hotel, any restaurant, any mall, you're going to see illegal workers." Jerd Smith, *Working in the Shadows Illegal Aliens a Fact of Life in Colorado's Economy*, ROCKY MTN. NEWS, Apr. 18, 1999, at 1. John Fraser, Acting Assistant Secretary in the Employment Standards Administration of the Department of Labor, states: "[N]ew unskilled immigrants, both legal and illegal, tend to congregate in low-wage, low-skill jobs in marginally profitable, low-capital, small, often new and family-run enterprises; in temporary, seasonal, or irregular employment; and in the underground economy." Maria Isabel Medina, *The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud*, 5 GEO. MASON L. REV. 669, 691 (1997).

are generally interpreted to apply equally to all workers, regardless of immigration status.<sup>12</sup>

Yet, in seeming contradiction to the inclusive statutes governing the workplace, in 1986 Congress enacted the Immigration Reform and Control Act ("IRCA"),<sup>13</sup> which made it unlawful for employers to hire undocumented immigrants.<sup>14</sup> This dramatic and sweeping legislation served to expand the INS's jurisdiction from the nation's borders to the workplace and "deputized" employers to act as the government's agents in policing the workplace. This overlap of immigration and labor laws in the employment setting highlights the tension between the nation's broad national labor goals and restrictionist immigration policy.

Using *Montero* as a prism through which to analyze the contradictions in the implementation of statutory schemes, this Article examines the interplay of labor and immigration laws as it affects undocumented persons in the workplace. I argue that cases such as *Montero* perpetuate a system that guarantees undocumented workers protection from exploitative employer practices, but leaves them without meaningful remedies and vulnerable to deportation if they assert their protected rights. Ironically, this gap between undocumented workers' rights and remedies creates a perverse incentive for unscrupulous employers to seek out these workers, undermining not just labor policy but immigration goals as well.

Recent decisions interpreting the applicability of labor law to undocumented workers shows that labor law's promise of meaningful protection from exploitation in the workplace remains illusory. Although the NLRB has recently declared that the NLRA and the IRCA must be read in harmony as "complementary elements of a legislative scheme explicitly intended, in both cases, to protect the rights of employees in the

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<sup>12</sup> E.g., *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984) (holding that undocumented workers are protected by the NLRA); *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973) (undocumented workers included within the meaning of "employee" under Title VII of the Civil Rights Act of 1964); *Patel v. Quality Inn S.*, 846 F.2d 700 (11th Cir. 1988) (holding that undocumented workers should be considered "employees" within the meaning of the Fair Labor Standards Act). In many states undocumented workers are also entitled to workers compensation if injured on the job, regardless of their immigration status. E.g., *Dowling v. Slotnik*, 712 A.2d 396, 398 (Conn. 1998) (holding that claim for work-related injury by undocumented worker is within limits of Workers' Compensation Act); *Reinforced Earth Co. v. Workers' Comp. Appeal Bd. (Astudillo)*, 749 A.2d 1036 (Pa. Commw. Ct. 2000) (holding that injured worker is entitled to workers compensation benefits despite unlawful immigration status where neither state nor federal law prohibited receiving benefits); see also *infra* note 197. But see *Granados v. Windson Dev. Corp.*, 509 S.E.2d 290 (Va. 1999) (holding that "employee" under Virginia's Workers' Compensation Act does not include undocumented workers). The Virginia Workers' Compensation Act defines an employee as "[e]very person, including a minor, in the service of another under any contract of hire." *Id.* at 293. The court reasoned that the IRCA barred the employment of undocumented workers and therefore any contract for hire entered into by an unauthorized worker is void and unenforceable. *Id.*

<sup>13</sup> Immigration Reform and Control Act (IRCA) of 1986, Pub. L. No. 99-603, 100 Stat. 3359.

<sup>14</sup> See *supra* note 6.



American workplace,"<sup>15</sup> immigration law is enforced and interpreted in such a way as to render any NLRA remedies meaningless for aggrieved workers who lack proper immigration status. Recognizing that accommodation of both statutes requires the INS to address status issues facing undocumented workers, I argue that the INS should exercise greater prosecutorial discretion in this area. Specifically, I look to the way that the INS has implemented protections under the Violence Against Women Act of 1994 ("VAWA")<sup>16</sup> as a model for the use of deferred action status to effectuate justice.<sup>17</sup> Alternatively, I suggest legislative changes in order to harmonize immigration and labor policy goals, and argue that an INS retreat from the workplace accompanied by stricter enforcement of labor laws for all workers would further immigration policy goals. In addition, the Article's final section raises broader issues concerning the reliance on "fiction" in immigration law and questions the morality of criminalizing and punishing those who live and work among us.

Part II begins with an overview of the pre-IRCA treatment of undocumented workers under the NLRA.<sup>18</sup> Through an examination of the Supreme Court's decision in *Sure-Tan, Inc. v. NLRB*,<sup>19</sup> this Part explores the anomalous situation created by the Court's interpretation of the NLRA to provide workplace rights but not remedies for undocumented workers. The section then analyzes the way in which the Ninth Circuit in *Local 512, Warehouse and Office Workers' Union v. NLRB (Felbro)*,<sup>20</sup> blunted the *Sure-Tan* holding by interpreting it to bar remedies only when undocumented workers had left the country and were therefore unavailable for work. Notably, this jurisprudence developed in the context of immigration law's silence with respect to regulating the workplace.

Part III critiques the legislation that allowed the INS to begin regulating employment settings and explores changes in the immigration regime that have affected employment rights and remedies for undocumented workers. It then sets forth and examines three reasons that the IRCA has been ineffective in stemming unlawful immigration:

<sup>15</sup> A.P.R.A. Fuel Oil Buyers Group, Inc., 320 N.L.R.B. 408 (1995); see also *infra* Part IV.A.

<sup>16</sup> See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, §§ 40001-40703, 108 Stat. 1796, 1902-55. VAWA is Title IV of this larger act.

<sup>17</sup> See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 40701, 108 Stat. 1796, 1953-54 (amending INA § 204(a)(1), 8 U.S.C. § 1154(a)(1) (1994)); see also 8 C.F.R. § 204.2 (2000).

<sup>18</sup> Although a full discussion of all relevant federal employment laws is beyond the scope of this Article, courts have also struggled to resolve analogous issues concerning the rights and remedies available to undocumented workers under Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 266 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1994)), and the Fair Labor Standards Act (FLSA) of 1938, ch. 676, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201-219 (1994)). See *supra* note 12 and *infra* notes 27, 74, and 94 for further discussion of the interplay between immigration law and employment protection statutes.

<sup>19</sup> 467 U.S. 883 (1984).

<sup>20</sup> 795 F.2d 705 (9th Cir. 1986).

(1) Congress's failure to take into account global factors affecting decisions to migrate, (2) the INS's lack of enforcement of employer sanctions, and (3) the IRCA's role in fostering employer exploitation of undocumented workers, thereby increasing the demand for such workers. By analyzing the INS's retreat from enforcing employer sanctions in general, I argue against the notion that the INS's overall goal is to remove all deportable aliens and instead show that the IRCA is being used to undermine labor law protections. While the INS currently gives lower priority to worksite enforcement, its willingness to commence deportation proceedings based upon information obtained through an unscrupulous employer's violation of labor law means that the IRCA remains a powerful tool of exploitation. Accepting, for the moment, existing immigration enforcement goals, I argue that meaningful labor rights for all workers and less INS regulation of the workplace would make undocumented workers less vulnerable to exploitation and ultimately less desirable to employers.<sup>21</sup> Making undocumented workers harder to exploit and less appealing to employers would advance the goals of both labor and immigration laws.

Part IV explores the growing conflict in the circuit courts over how to reconcile national labor law's coverage of undocumented workers with immigration law's prohibition on unauthorized employment. Through case studies, this section explores the unique and conflicted legal status occupied by undocumented workers, who are barred from entering the country, protected from illegal conduct in the workplace, and yet unable to take advantage of these legal rights because of the courts' failure to shield them from deportation.<sup>22</sup> For example, recent decisions in the Second Circuit grant undocumented workers remedies for violations of labor laws, yet simultaneously condone the INS's initiation of deportation proceedings based solely on information obtained through a violation of labor laws.<sup>23</sup> While I advocate stricter enforcement of labor laws without regard to immigration status, this section critiques the shortcomings of an

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<sup>21</sup> While a normative discussion of what form long-term immigration policy goals should take is beyond the scope of this Article, I argue that the role of work in forging communities within the country should impact the membership rights afforded undocumented workers. See *infra* Part VI.

<sup>22</sup> Professor Linda Bosniak has referred to the status of undocumented workers as embodying a "clash between membership and exclusion." Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 Wis. L. Rev. 955, 1007; see also Kevin R. Johnson, *Los Olvidados: Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement*, 1993 BYU L. Rev. 1139, 1221 (referring to the "perplexing duality of the undocumented—outsiders in this country unlawfully and, at the same time, present in society").

<sup>23</sup> Compare *Montero v. INS*, 124 F.3d 381 (2d Cir. 1997), with *NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50 (2d Cir. 1997). Seemingly contradicting *Montero*, the *A.P.R.A. Fuel* decision handed down just three months after that case made the Second Circuit the first federal court of appeals since the passage of the IRCA in 1986 to award backpay to undocumented workers under the NLRA. See *A.P.R.A. Fuel*, 134 F.3d at 57–58.

approach that seeks to address labor law remedies without acknowledging the need for a change in immigration laws or procedures. Through the circuit court cases, this section explores the fictions that permeate immigration law and conflict with illusory promises of protection from workplace exploitation. Examining these courts' refusal to exclude unlawfully obtained evidence from workers' deportation proceedings, this section deconstructs a number of assumptions underlying immigration and labor law jurisprudence. For example, I revisit the longstanding fiction that deportation proceedings bear closer resemblance to civil rather than criminal actions. Furthermore, I examine these courts' unwillingness to recognize the collaboration between employers and the INS in enforcing workplace immigration laws. I argue that cases such as *Montero* perpetuate legal fiction because the courts deciding these cases lack an understanding of the ways in which the INS exercises its discretion in deciding whom to target for deportation.

Part V sets forth proposals for harmonizing labor and immigration policies. This section examines and critiques recent instances of the INS accommodating the goals of national labor policy by exercising its broad discretionary powers. While I view these actions as positive steps, I argue that INS initiatives to date fall short of fully harmonizing the underlying policies of the nation's labor and immigration laws. Using the INS's treatment of VAWA self-petitioners without lawful status as an example, I propose and critique methods of providing meaningful relief to undocumented workers who seek to vindicate their labor rights, without undermining national immigration policies.

Relying upon the INS's exercise of discretion is inherently precarious: this discretion is bound to be impacted by economic and political trends. Therefore, this Part alternatively advocates legislative action creating a new visa category to provide deportation protection for undocumented workers who wish to pursue their guaranteed labor rights. In discussing the contours of this legislation, this section explores existing statutory provisions providing lawful status in exchange for assisting the government with criminal prosecutions. It also explores recently enacted legislation providing lawful status for victims of alien trafficking who assist in prosecution of their smugglers.

Part VI deconstructs the assumptions underlying the premise that labor policy should cede to national immigration goals. Exploring the moral values underlying immigration law enforcement policies and drawing upon literature exploring the connection between work and dignity, I question the morality of punishing those who are here working. I argue that just as work defines a person's sense of worth, an individual's work within the country should play a larger role in defining that individual's value to the community, as well as the obligations that the nation owes to the worker.

II. THE IMMIGRATION REGIME BEFORE THE IMMIGRATION REFORM AND CONTROL ACT: THE SUPREME COURT INTERPRETS THE NATIONAL LABOR RELATIONS ACT TO GUARANTEE RIGHTS BUT NOT REMEDIES FOR UNDOCUMENTED WORKERS

Until the IRCA's passage in 1986, the Immigration and Nationality Act ("INA") was silent as to the employment of undocumented workers.<sup>24</sup> Within this context, the courts were faced with interpreting whether the NLRA was intended to protect all workers regardless of immigration status and, if so, whether remedies would be available to all workers for violations of guaranteed statutory rights. In *Sure-Tan, Inc. v. NLRB*, the Supreme Court made clear that the definition of "employee" under the NLRA included undocumented workers,<sup>25</sup> and that these workers could not be discriminated against because of their union activities.<sup>26</sup> However, while guaranteeing statutory protection to all workers, the Supreme Court severely curtailed available remedies for undocumented workers, creating a disturbing gulf between protection and remedy.

In coming to its conclusion in *Sure-Tan*, the Court relied upon the NLRA's broad definition of the term employee, as well as NLRB precedent holding that undocumented workers were employees within the meaning of the NLRA.<sup>27</sup> After finding that including undocumented workers within the coverage of the NLRA furthered the goals of our national labor policy, the Court noted, "Counterintuitive though it may be, we do not find any conflict between application of the NLRA to undocu-

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<sup>24</sup> See *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892-93 (1984).

<sup>25</sup> *Id.* at 891-92.

<sup>26</sup> *Id.* at 893-94. In *Sure-Tan*, the NLRB found that the employer's reporting to the INS certain employees long known to be undocumented immigrants, in retaliation for their engaging in union activities, constituted an unfair labor practice. *Id.* at 887-88. The NLRB concluded that the employees had been constructively discharged and issued a remedial order including conditional reinstatement and backpay. *See id.* at 888-89. The court of appeals enforced the NLRB's order but modified the remedy to provide, inter alia, a six-month minimum backpay award to the undocumented workers who had voluntarily departed from the United States rather than face deportation by the INS. *See NLRB v. Sure-Tan, Inc.*, 672 F.2d 592, 603, 606 (7th Cir. 1982).

<sup>27</sup> *Sure-Tan*, 467 U.S. at 891. In cases arising under Title VII of the Civil Rights Act of 1964, the Supreme Court had interpreted the term "employee" to include undocumented workers. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973). However, courts remain divided as to whether undocumented workers are entitled to full Title VII remedies. *See infra* notes 74, 94. For example, in *EEOC v. Tortilleria "La Mejor"*, 758 F. Supp. 585 (E.D. Cal. 1991), the court held that the definitions of "employee" and "individual" include undocumented workers. *See id.* at 587-90. In sharp contrast, in *Egbuna v. Time-Life Libraries, Inc.*, 153 F.3d 184 (4th Cir. 1998) (en banc), *cert. denied*, 525 U.S. 1142 (1999), the court held that an undocumented job applicant is not "qualified" for employment and therefore not entitled to Title VII remedies when seeking the anti-retaliation protection provided by Title VII. *See id.* at 186-88. For an in-depth analysis of the coverage of undocumented workers under Title VII, 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 (1994).

mented aliens and the mandate of the Immigration and Nationality Act.”<sup>28</sup> As articulated by Justice O’Connor in the majority opinion:

Application of the NLRA helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment. If an employer realizes that there will be no advantage under the NLRA in preferring illegal aliens to legal resident workers, any incentive to hire such illegal aliens is correspondingly lessened. In turn, if the demand for undocumented aliens declines, there may then be fewer incentives for aliens themselves to enter in violation of the federal immigration laws.<sup>29</sup>

The Court then turned to the issue of remedies and examined the lower court order that the discriminatees be awarded a minimum of six months’ backpay.<sup>30</sup> In examining the remedies available to the undocumented discriminatees who had left the country, Justice O’Connor stated that the appellate court’s formulation of a six-month minimum backpay award without regard to the employees’ actual economic losses or legal availability for work exceeded the court’s limited authority under the NLRA.<sup>31</sup> The Court held that, just as the NLRB’s reinstatement order was conditioned upon the legal reentry of the employees into the country, the employees must also be deemed “unavailable” for work during any pe-

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<sup>28</sup> *Sure-Tan*, 467 U.S. at 892.

<sup>29</sup> *Id.* at 893–94. Because the *Sure-Tan* workers voluntarily left the country after INS apprehension (rather than waiting to be deported by the government and thus barred from re-entering for five years), the employer had argued that, notwithstanding its admitted anti-union animus, it did not constructively discharge the workers when it reported them to the INS because this was not the proximate cause of the employees’ departure from the United States. *Id.* at 894–95. Rather, the employer asserted, it was the immigration status of the employees that was the proximate cause of their departure. *Id.* at 895. However, given the circumstances of the case (for example, the employer’s anti-union animus, its prior knowledge of the immigration status of the workers, and its decision to report the workers to the INS only after the union’s electoral victory), the Court held that the employer’s action was a retaliatory constructive discharge in violation of section 8(a)(3) of the NLRA. *Id.* at 894–95. This section of the NLRA makes it an unfair labor practice for an employer “by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.” 29 U.S.C. § 158(a)(3) (1994).

<sup>30</sup> The Seventh Circuit assumed that the discharged employees would end up bereft of remedy because reinstatement was conditioned upon the employees’ ability to re-enter the country legally and the employees were to be considered “unavailable” for purposes of computing backpay during any period in which they were not lawfully present in the country. *See Sure-Tan*, 672 F.2d at 604–06. Believing that the employees were entitled to a remedy, and that a monetary remedy was necessary in order to deter unlawful conduct in the future, the court set a minimum award of six months backpay. *Id.* at 606.

<sup>31</sup> *Sure-Tan*, 467 U.S. at 898–99.

riod when they were not lawfully entitled to be present and employed in the United States.<sup>32</sup>

In his dissent, Justice Brennan explained the dilemma created by the majority's decision. The majority's reasoning created a "disturbing anomaly," whereby undocumented workers are "employees" within the meaning of the NLRA, and thereby entitled to all of its protections, but are effectively deprived of any remedy despite a clear violation of the NLRA by their employer.<sup>33</sup> Justice Brennan noted the total contradiction in the majority's opinion:

Once employers, such as petitioners, realize that they may violate the NLRA with respect to their undocumented alien employees without fear of having to recompense those workers for lost backpay, their "incentive to hire such illegal aliens" will not decline, it will increase. And the purposes of both the NLRA and the [INA] that are supposedly served by today's decision will unquestionably be undermined.<sup>34</sup>

Two years later, the Ninth Circuit in *Local 512, Warehouse and Office Workers' Union v. NLRB (Felbro)*,<sup>35</sup> blunted the *Sure-Tan* opinion by interpreting that case to bar an award of backpay to undocumented discriminatees only when the discriminatees were outside of the country with no lawful basis to reenter. The *Felbro* court rejected the NLRB's position that an employee must prove her legal presence in this country before an employer who has violated the NLRA is compelled to reinstate the employee or provide backpay.<sup>36</sup>

The Ninth Circuit also premised its post-*Sure-Tan* decisions on the pre-1986 immigration regime that was silent with regard to the employment of undocumented workers. In doing so, the court echoed the Supreme Court's observation in *Sure-Tan* that "[t]he employment of undocumented workers is 'peripheral' to the INA. There is no provision 'in

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<sup>32</sup> See *id.* at 902-05.

<sup>33</sup> *Id.* at 911 (Brennan, J., concurring in part and dissenting in part).

<sup>34</sup> *Id.* at 911-12.

<sup>35</sup> 795 F.2d 705 (9th Cir. 1986).

<sup>36</sup> *Id.* at 717. The court noted that the Supreme Court "gave no indication that it was overruling a significant line of precedent that disregards a discriminatee's legal status, as opposed to *availability to work*, in determining his or her eligibility for backpay." *Id.* Similarly, in *Bevles Co. v. Teamsters Local 986*, 791 F.2d 1391 (9th Cir. 1986), *cert. denied*, 484 U.S. 985 (1987), the court declined to overturn an arbitrator's award of reinstatement and backpay to discharged undocumented workers who remained in the United States. The court distinguished *Sure-Tan* from the case before it because the *Sure-Tan* discriminatees had left the country and "unconditional reinstatement and backpay would have encouraged their illegal reentry." *Id.* at 1393. The court concluded that the Bevles workers had not been subject to any INS proceedings, meaning that "awards of reinstatement and backpay [would] not require that they reenter the country illegally" and would not encourage a violation of or conflict with the INA. *Id.*

the INA making it unlawful for an employer to hire an alien who is present or working in the United States without appropriate authorization.”<sup>37</sup>

### III. THE ENACTMENT AND ENFORCEMENT OF THE IRCA: EMPOWERING THE INS TO REGULATE THE WORKPLACE AT THE EXPENSE OF LABOR AND IMMIGRATION POLICY GOALS

The Supreme Court's statements in *Sure-Tan* regarding the immigration regime's peripheral concern with unauthorized employment, as reiterated by the Ninth Circuit in *Felbro* and *Bevles Co., Inc. v. Teamsters Local 986*,<sup>38</sup> proved short lived. Later that same year Congress drastically amended the INA by enacting the IRCA, which signaled a new direction for INS enforcement. First, the IRCA gave certain undocumented immigrants who had resided continuously in the country since 1982 the opportunity to obtain legal status through an amnesty program.<sup>39</sup> Second, Congress enacted a series of employer sanctions in the belief that employment attracts undocumented workers to the United States, and that only by punishing employers for hiring undocumented workers could workers' unauthorized entry into the country be deterred.<sup>40</sup> For the first

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<sup>37</sup> *Felbro*, 795 F.2d at 719 (quoting *Sure-Tan*, 467 U.S. at 892-93 (citations omitted)). In *Bevles*, a different panel from this same court of appeals also relied on *Sure-Tan*: "For whatever reason, Congress has not adopted provisions in the INA making it unlawful for an employer to hire an alien who is present and working in the United States without appropriate authorization." *Bevles*, 791 F.2d at 1393 (quoting *Sure-Tan*, 467 U.S. at 892-93).

<sup>38</sup> 791 F.2d 1391 (9th Cir. 1986), *cert. denied*, 484 U.S. 985 (1987).

<sup>39</sup> The IRCA actually contained two separate but related programs aimed at identifying and legalizing undocumented migrants who could prove that they entered the United States prior to January 1, 1982 and maintained a continuous physical presence since the enactment of the IRCA. Immigration Reform and Control Act (IRCA) of 1986, Pub. L. No. 99-603, §§ 201, 302, 100 Stat. 3359, 3394, 3417. The application period for those eligible under the main program, set forth in section 201 of the IRCA, lasted for one year. See INA § 245A(a)(1)(A), 8 U.S.C. § 1255a(a)(1)(A) (1994). The second legalization program was for special agricultural workers ("SAWs") and lasted for eighteen months. See INA § 210(a)(1)(A), 8 U.S.C. § 1160(a)(1)(A); see also IMMIGRATION & NATURALIZATION SERV., U.S. DEP'T OF JUSTICE, THIS MONTH IN IMMIGRATION HISTORY: MAY 1987, at <http://www.ins.gov/graphics/aboutins/history/may1987.htm> (last modified May 1, 2000).

<sup>40</sup> In addition to signaling a new approach to immigration policy, the IRCA legislation was broad enough to impact both the federal district courts and numerous other federal agencies, including the Department of Health and Human Services (the Health Care Financial Administration, the Division of State Legalization Assistance, the Office of Refugee Resettlement, the Family Support Administration, and the U.S. Public Health Service, Office of Refugee Health), the Department of Labor (the Office of Federal Contract Compliance Programs, and the Wage and Hour Division), the General Accounting Office, the Federal Social Security Administration, the Department of Education, the Federal Equal Employment Opportunity Commission, the Department of Agriculture (Food and Nutrition Service), the Census Bureau, the Department of Housing and Urban Development, and the Department of State (Bureau of Migration and Refugee Affairs). MICHAEL C. LEMAY, ANATOMY OF A PUBLIC POLICY: THE REFORM OF CONTEMPORARY AMERICAN IMMIGRATION LAW 100-01 (1994).

time, the IRCA made it illegal for an employer to knowingly hire an undocumented worker.<sup>41</sup>

Despite the IRCA's highly touted objectives at the time of enactment, it is widely acknowledged that the law has been ineffective in curbing illegal immigration into the United States.<sup>42</sup> While commentators differ on the underlying reasons for the IRCA's failure, at least three major explanations are offered: (1) global factors that continue to push immigrants out of the sending countries, (2) insufficient INS enforcement of employer sanctions (whether for fiscal or moral reasons), and (3) the creation of incentives for unscrupulous employers to pursue an undocumented workforce by undermining undocumented workers' ability to access workplace protection statutes. Each of these reasons is addressed in turn.

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<sup>41</sup> Pursuant to the INA, the employer is required to examine the employee's documents to ensure that she is authorized to work in the United States. INA § 274A(b), 8 U.S.C. § 1324a(b) (1994). Next, the employer must execute an I-9 form with the INS to attest, under penalty of perjury, that the employer did in fact examine and verify the authorization of the employee. *See* 8 U.S.C. § 1324a(b)(1). If the employer fails to comply with this procedure, it is subject to sanctions pursuant to §§ 1324a(e)(4), 1324a(e)(5), and 1324a(f). Pursuant to § 1324a(e)(4), the employer is ordered to cease hiring, recruiting, or referring illegal employees in violation of §§ 1324a(a)(1)(A) and 1324a(a)(2). If sanctioned under this provision, the employer is fined a civil monetary penalty and ordered to pay:

- (i) not less than \$250 and not more than \$2,000 for each unauthorized alien with respect to whom a violation of either such subsection occurred;
- (ii) not less than \$2,000 and not more than \$5,000 for each such alien in the case of a person or entity previously subject to one order under this paragraph, or
- (iii) not less than \$3,000 and not more than \$10,000 for each such alien in the case of a person or entity previously subject to more than one order under this paragraph.

*Id.* § 1324a(e)(4)(A). There is also a defense for employers who can demonstrate that they exercised good faith in complying with the statute. *Id.* § 1324a(a)(3).

<sup>42</sup> According to the U.S. Commission on Immigration Reform, the IRCA is not enforced effectively. U.S. COMM'N ON IMMIGRATION REFORM, U.S. IMMIGRATION POLICY: RESTORING CREDIBILITY (1994). "After an initial decline in border apprehensions, the number of apprehended migrants began to climb and returned to almost pre-IRCA levels, with 1.3 million apprehensions in 1995." MEXICO/U.S. BINATIONAL STUDY ON MIGRATION, BINATIONAL STUDY: MIGRATION BETWEEN MEXICO AND THE UNITED STATES 3 (1997). "In October 1996, INS released its latest estimates of the illegal alien population in the United States: some five million undocumented migrants reside in the United States, a number growing by approximately 275,000 annually." U.S. COMM'N ON IMMIGRATION REFORM, BECOMING AN AMERICAN: IMMIGRATION AND IMMIGRANT POLICY 104 (1997); *see also* Cecelia M. Espenosa, *The Illusory Provisions of Sanctions: The Immigration Reform and Control Act of 1986*, 8 GEO. IMMIGR. L.J. 343 (1994) (finding that employer sanctions have failed to reduce the undocumented workforce). *But see* Stephen H. Legomsky, *Employer Sanctions: Past and Future*, in *THE DEBATE IN THE UNITED STATES OVER IMMIGRATION* 171 (Peter Duignan & L.H. Gann eds., 1998). Professor Legomsky criticizes the use of statistics regarding the size of the undocumented population as a barometer of the effectiveness of employer sanctions. According to Legomsky, it is difficult to know what the undocumented population is now, or what it used to be. *Id.* at 177. He also points out that "time comparisons reveal little about causation," since the undocumented population might have risen even more were it not for employer sanctions. *Id.*



### A. Global Factors Influencing Migration

The IRCA is premised upon the belief that employment is the magnet that pulls immigrants to the United States. The Act aims to discourage employers from hiring undocumented workers and thus reduce the incentive for immigrants to come to the United States.<sup>43</sup> However, by focusing solely on the lure of employment, the IRCA ignores a myriad of other factors affecting migration in the modern world, such as "changing world population demographics, . . . increasingly inequitable distribution of wealth," and technological advancements that make it easier and less expensive for people to travel great distances.<sup>44</sup> These trends affecting migration patterns are not new phenomena but rather the latest phase in a long historical process.<sup>45</sup> Economists and social scientists offer numerous theories for understanding the process of migration and the outlook for the future.<sup>46</sup> Given the complex factors influencing migration, however,

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<sup>43</sup> See H.R. REP. NO. 99-682, pt. 1, at 45-46 (1986), *reprinted in* 1986 U.S.C.A.N. 5649, 5649-50. The purpose of the legislation was "to close the back door on illegal immigration so that the front door on legal immigration may remain open. The principal means of closing the back door . . . is through employer sanctions." *Id.*; see also LEMAY, *supra* note 40, at 72 (analyzing assumptions behind the IRCA, including the belief that illegal immigration is primarily due to economic factors pulling immigrants to the United States rather than political and economic conditions pushing people out of their home countries).

<sup>44</sup> See Christopher W. Rudolph, *Globalization, Sovereignty, and Migration: A Conceptual Framework*, 3 UCLA J. INT'L L. & FOREIGN AFF. 325, 330-31 (1998-1999); see also STEPHEN CASTLES & MARK MILLER, *THE AGE OF MIGRATION: INTERNATIONAL POPULATION MOVEMENTS IN THE MODERN WORLD* 104 (2d ed. 1998) (discussing international migration as largely a consequence of "the differentials in life expectancy, demography, economic structure, social conditions and political stability between the industrial democracies and most of the rest of the world").

<sup>45</sup> See PETER STALKER, *WORKERS WITHOUT FRONTIERS: THE IMPACT OF GLOBALIZATION ON INTERNATIONAL MIGRATION* 10 (2000) ("Globalization is not a monolithic, unstoppable juggernaut, but rather a complex web of interrelated processes—some of which are subject to greater control than others.").

<sup>46</sup> As summarized by Stalker, the predominant theoretical models for modern migration are: neoclassical economic theory (considering "differences in supply and demand for labor in sending and receiving countries" and concluding that workers move in response to higher wages); new economics of migration (migration decisions are not made by individuals, but by families or households); dual labor market theory (migration is viewed not as an intermediate phase, but rather a "permanent and necessary feature of modern industrial societies"); world-systems theory (describing "how flows of capital, goods, and labor fit together and are interlinked" and how, in poor countries, capitalist "penetration destroys traditional sources of income" and at the same time creates a stream of mobile labor, some of which flows into the international migration workforce). *Id.* at 131-32.

Rather than accept any one theory as adequate explanation for the interaction and interdependence of globalization and migration, Nikos Papastergiadis offers this definition of turbulence: "Turbulence is not just a useful noun for describing the unsettling effect of an unexpected force that alters your course of movement; it is also a metaphor for the broader levels of interconnection and interdependency between the various forces that are in play in the modern world." NIKOS PASTERGIADIS, *THE TURBULENCE OF MIGRATION: GLOBALIZATION, DETERRITORIALIZATION, AND HYBRIDITY* 4 (2000); see also ALEJANDRO PORTES & RUBEN G. RUMBAUT, *IMMIGRANT AMERICA: A PORTRAIT* 224 (1990) (arguing that the "push-pull" theory of migration fails to take into account "differences among collectivities, primarily nation-states, in the size and directionality of migrant flows, and differ-

any attempt to decrease unlawful immigration would require a multifaceted approach that recognizes the global interdependency of these forces. For example, it has been suggested that “[s]tabilizing economic growth and democracy may be the most effective long-term means of reducing migration pressures.”<sup>47</sup> Stephen Castles and Mark Miller advise that only through reforming international trade policies, providing development assistance to underdeveloped economies, creating “free-trade areas and regional political communities,” and improving relations between target countries and sending countries can the United States hope to reduce the pace of international migration.<sup>48</sup> As long as great economic disparities exist between the United States and the countries from which the immigrants emigrate, immigrants will continue to be “pushed” here regardless of domestic law enforcement efforts.<sup>49</sup> Given all the factors influencing world migration, it is not surprising that the IRCA’s simplistic approach of criminalizing the employment of undocumented workers has failed to reduce the undocumented population in the United States.<sup>50</sup>

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ences among *individuals* within the same country or region in their propensities to migrate”).

<sup>47</sup> Susan Martin, Politics and Policy Responses to Illegal Migration in the U.S., Address at the Conference on Managing Migration in the 21st Century (June 21–23, 1998), at <http://migration.ucdavis.edu/mm21/Susan.html>; see also EVERARD MEADE, SPECIAL REPORT: CONGRESS REVIEWS THE INS INTERIOR ENFORCEMENT STRATEGY (1999) (arguing that economic development in “migrant sending countries” would both reduce pressure to migrate to the United States and increase demand for American consumer goods and other exports in the developing world). According to Stalker, notwithstanding the fact that industrial nations will also want a supply of cheap immigrant labor, “the supply could dry up if closer and deeper integration of economies promotes economic development in poorer countries that eventually blunts the incentive to emigrate.” STALKER, *supra* note 45, at 139.

<sup>48</sup> CASTLES & MILLER, *supra* note 44, at 291–93.

<sup>49</sup> See Guillermina Jasso et al., *The Changing Skill of New Immigrants to the United States: Recent Trends and Their Determinants*, in ISSUES IN THE ECONOMICS OF IMMIGRATION, 185, 219 (George J. Borjas ed., 2000) (discussing the results gleaned from INS data for 1972–1990, which indicate that a “higher per capita income in the origin country leads to a statistically significant drop in out-migration rates”).

<sup>50</sup> Nikos Papastergiadis calls for a new cross-disciplinary approach to address migration problems, noting that

Migration studies are no longer confined to the domain of sociology, demography, politics and economics. Key contributions have also been made by anthropology, history, psychology, geography, philosophy, cultural studies and art criticism. . . . Concepts like deterritorialization and hybridity do not reside exclusively in any particular discipline, they have served as “bridging concepts,” extending the parameters of analysis and highlighting a mode of explanation which is alert to the role of difference and contingency in contemporary society.

PAPASTERGIADIS, *supra* note 46, at 5.

*B. Lack of Enforcement of Employer Sanctions Provisions*

The INS's enforcement priorities change from year to year along with the political climate in the United States.<sup>51</sup> Since the IRCA's passage in 1986, worksite enforcement has at times been a high priority for the INS.<sup>52</sup> However, in recent years, the INS has distanced itself from Congress's notion of punishing employers and has instead instituted a series of cooperative industry-wide approaches.<sup>53</sup>

For example, in Operation Vanguard,<sup>54</sup> the INS initiated a cooperative venture with employers to target the Midwest meatpacking industry, notorious for its grueling, low-paid work and the dangerous working conditions faced by its largely immigrant workforce.<sup>55</sup> Rather than sur-

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<sup>51</sup> "Although the [immigration reform] debate can be framed in the cool language of economics and demographics, immigration remains a highly emotional subject, with immigration policy a window into the national psyche." LEMAY, *supra* note 40, at 4 (quoting 9 IN DEFENSE OF THE ALIEN, at ix (Lydio Tomasi ed., 1987)). Additionally, the growing proportion of immigrant voters and presence of undocumented workers in the country has resulted in a simultaneous increase in sensitivity to multicultural concerns and anti-immigrant backlash in the national political arena. See CASTLES & MILLER, *supra* note 44, at 268-73. According to Castles and Miller, issues such as illegal migration and undocumented workers have influenced major party platforms and candidate selection, as parties make efforts either to capture immigrant voting blocks or, conversely, to capture voters opposed to immigrant-friendly policies. See *id.*

<sup>52</sup> See, e.g., Legomsky, *supra* note 42, at 187 (noting that, in February 1996, "the Justice Department stepped up its enforcement efforts, doubling the number of employer sanctions investigators").

<sup>53</sup> See *Immigration and Naturalization Service's Interior Enforcement Strategy: Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 106th Cong. (1999) (statement of Muzaffar A. Chishti, Director, Immigration Project, Union of Needletrades, Industrial and Textile Employees), *microformed on* CIS No. 2000-H521-91 (Cong. Info. Serv.). In his testimony before Congress, Mr. Chishti commended the INS for "moving away from its focus on workplace raids," but strongly disagreed with new initiatives "seeking increased employer cooperation in INS audits and surveys, and increasing cooperation between INS and local law enforcement and community agencies." *Id.* at 94. Based on past experience in which local police have substituted ethnicity and race for reasonable cause, Mr. Chishti warns that these new cooperative ventures may well lead to civil rights violations. See *id.*

<sup>54</sup> Since March 1999, the INS has focused its interior enforcement efforts on worksite enforcement initiatives in industries that employ large numbers of Latino workers. Operation Vanguard has been labeled "racist" for "target[ing] Spanish and Latino members of the community." Scott Bauer, *Governor's Task Force on INS Enforcement Meets*, ASSOCIATED PRESS NEWSWIREs, Sept. 29, 1999. By 1997, Latinos constituted an estimated fifty to eighty percent of the meatpacking workforce in the Great Plains states. See Donald Kerwin, *The Fight for Dignity: Immigrant Laborers in the Restructured American Economy*, IN ALL THINGS, Mar. 2000, [http://www.jesuit.org/JCOSIM/in\\_all\\_things/march\\_2000/five.html](http://www.jesuit.org/JCOSIM/in_all_things/march_2000/five.html).

<sup>55</sup> See Kerwin, *supra* note 54.

Workers in . . . meatpacking plants suffer from repetitive motion injuries; accidental "cuttings" by co-workers on crowded lines; company doctors and nurses who do not honestly diagnose and treat medical problems; verbal abuse; inhuman line speeds; inadequate breaks; extreme working temperatures; poor benefits; no job security; insufficient housing; paycheck deductions for uniforms and equipment; and underpayment of wages.

prise raids of individual meatpacking plants or aggressive enforcement of employer sanctions, Operation Vanguard directs the INS to simultaneously target all meatpacking plants in a specific region.<sup>56</sup> Each employer within the region is subject to a review of its records on employees' immigration status. The INS then alerts the employer of any workers who appear to be without lawful employment authorization and suggests that the employer discharge those workers. If the employer agrees to the firings, the INS takes no further action, either to sanction the employer or to deport the workers.

This strategy is difficult to comprehend on statutory, economic, or moral grounds. To paraphrase Professor Linda Bosniak, with the enactment of the IRCA, the border law became a labor law as well.<sup>57</sup> While the IRCA was intended to punish employers, initiatives such as Operation Vanguard target only workers. Moreover, workplace strategies such as Operation Vanguard focus not on the border but on creating an unemployed underclass within our borders, often inflicting economic harm on employers and draining community resources. The unemployed, non-deported, discharged workers remain a part of our society, and are pushed further underground, where they are that much more vulnerable to exploitation by unscrupulous employers seeking to circumvent labor laws.<sup>58</sup>

In a further development of its policies, the INS now claims to "turn a blind eye" to the workplace,<sup>59</sup> citing a lack of funding to enforce employer sanctions.<sup>60</sup> Nonenforcement may also be due to a favorable econ-

*Id.*

<sup>56</sup> David Bacon, *INS Declares War on Labor*, NATION, Oct. 25, 1999, at 18; *Immigration: In the Vanguard*, ECONOMIST, Oct. 16, 1999, at 31 (characterizing Operation Vanguard as a "gentler new way of doing things").

<sup>57</sup> Bosniak, *supra* note 22, at 1041.

<sup>58</sup> See Bacon, *supra* note 56, at 19 ("Operation Vanguard's most serious effect may be the way it undermines the ability of isolated immigrants to organize."). According to a union organizer working to organize the meatpacking workers in Nebraska:

The companies already buy people off when they begin to organize, threaten workers with immigration raids, fire people and even bring in workers from the border in a crisis. Operation Vanguard gave the companies a big gift on top of all this—almost all our leaders had to find jobs elsewhere.

*Id.*

<sup>59</sup> Louis Uchitelle, *I.N.S. Is Looking the Other Way as Illegal Immigrants Fill Jobs*, N.Y. TIMES, Mar. 9, 2000, at C1 (citing INS statistics showing that arrests of undocumented workers for deportation dropped to about 8600 in 1999 as compared with 22,000 two years earlier).

<sup>60</sup> See, e.g., U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-99-33, ILLEGAL ALIENS: SIGNIFICANT OBSTACLES TO REDUCING UNAUTHORIZED EMPLOYMENT EXIST 16 (1999) ("Relative to other enforcement programs in INS, worksite enforcement has received a relatively small portion of INS' staffing and enforcement budget."). INS worksite program officials indicate that "[e]ven with a two- or three-fold increase in staffing levels, INS would still only be able to investigate a small portion of the estimated number of employers who may have unauthorized aliens and remove only a fraction of the estimated number of unauthorized alien workers." *Id.* at 18; see also Martin, *supra* note 47 ("Enforcement is

omy or the forceful moral imperative of work.<sup>61</sup> Yet, regardless of the extent of INS enforcement, the IRCA remains a powerful tool for employers seeking a docile workforce.<sup>62</sup> In fact, the INS itself has recently admitted that the only workers at risk of deportation for unauthorized employment are those reported by the employer in retaliation for protected organizing activities or "that kind of stuff."<sup>63</sup>

*C. The IRCA Is a Powerful Tool for the Unscrupulous Employer That Wishes to Hire and Exploit Undocumented Workers*

By penetrating the spheres in which the undocumented actually function, the IRCA upset the already precarious balance of "membership and exclusion" under the prior immigration regime.<sup>64</sup> According to Professor Bosniak, the cost to employers of doing without undocumented workers will often outweigh the potential penalty for hiring them. As in other contexts, "[e]mployers are willing to absorb . . . regulatory fines as part of the normal costs of doing business."<sup>65</sup> While the IRCA may have

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shared by the Justice Department and the Labor Department, but neither have sufficient staff resources to investigate even the most at-risk employers."). According to George Regan, the INS began to "re-deploy Border Patrol resources to border control activities in 1995" resulting in a sharp reduction "of Border Patrol involvement in worksite enforcement from approximately 30 percent of the total worksite program to less than 5 percent." *Combating Illegal Immigration: A Progress Report: Hearing Before the Subcomm. on Immigration and Claims, Comm. on the Judiciary, 105th Cong. 2* (1997) (statement of George Regan, Acting Associate Commissioner, Enforcement, Immigration and Naturalization Service).

<sup>61</sup> According to Professor Medina, employing undocumented workers carries a forceful moral imperative, and the resulting moral tension surrounding IRCA's employer sanctions creates hesitancy on the part of prosecutors, judges, and society at large. *See* Medina, *supra* note 11, at 672.

<sup>62</sup> "Wing Lam, the executive director of the Chinese Staff and Workers' Association [of] New York refers to the 'employer sanctions' legislation as 'the slave law.'" PETER KWONG, *FORBIDDEN WORKERS: ILLEGAL CHINESE IMMIGRANTS AND AMERICAN LABOR* 174 (1997). Explaining why employers turn away workers with lawful status in favor of the undocumented, Lam states that the undocumented are usually

young, compliant, and willing to work long hours. But if a worker cannot produce documentation, the boss says he will do him a favor and hire him. Because the boss is doing the worker such a big favor, the worker is expected not to mind being paid less—say, 20–30 percent less.

*Id.*

<sup>63</sup> Uchitelle, *supra* note 59.

<sup>64</sup> Bosniak, *supra* note 22, at 1041. Professor Bosniak predicted that employer sanctions would result in the adoption of workplace practices involving greater domination of undocumented workers. The IRCA has been ineffective in curbing unlawful immigration and has given employers a powerful new tool with which to further exploit low wage workers. *See id.* at 1006–09.

<sup>65</sup> *See id.* at 1015. The Occupational Safety and Health Act (OSHA) of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (codified as amended in scattered sections of 29 U.S.C.), provides an example of a regulatory regime in which employers are willing to incur fines as a cost of business. In describing the limited enforcement powers under the Act, Jennifer

"shifted the calculus of costs involved in the workplace for all its participants," these new costs largely harm the undocumented worker and labor union, while benefiting the employer.<sup>66</sup>

Employer sanctions, more appropriately referred to as "employer swords," have exacerbated the very conditions that supporters claimed would be redressed with the IRCA's passage.<sup>67</sup> Therefore, organized labor, one of the most powerful forces behind the IRCA's enactment, has recently called for the Act's repeal and a blanket amnesty for all undocumented workers.<sup>68</sup> In calling for an end to employer sanctions, John

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Gordon points out that the Occupational Safety and Health Administration has extremely limited numbers of inspectors. 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, 419 (1995). She also notes that the Act sets forth minimal fines, which can be "'abated' if the condition is fixed before a certain date." *Id.* (citation omitted). Therefore, "employers have no incentive to maintain health and safety standards in the absence of an OSHA order to do so. Paying OSHA fines and penalties is often cheaper for an employer than complying with the law." *Id.*

<sup>66</sup> Bosniak, *supra* note 22, at 1040. Professor Bosniak explains that over the long run most employers will continue to rely on undocumented workers, and most of those workers will continue to make themselves available for hire. These undocumented workers also face the most oppressive working conditions. For example, they are five times more likely to be paid sub-minimum wages than American-born workers. *See* IMMIGRATION & NATURALIZATION SERV., U.S. DEP'T OF JUSTICE, REPORT ON THE LEGALIZED ALIEN POPULATION 40 (1992). Not surprisingly, these undocumented workers are disproportionately represented in sweatshops. *See* U.S. GEN. ACCOUNTING OFFICE, GAO/HRD-88-130BR, SWEATSHOPS IN THE U.S.: OPINIONS ON THEIR EXTENT AND POSSIBLE ENFORCEMENT OPTIONS 34 (1988).

<sup>67</sup> As Gordon explains:

The *real* burden of employer sanctions, however, is not borne by employers. In practice, employer sanctions empower employers to terrorize their workers. Frequently, employers in the underground economy ignore sanctions or accept false documents when they hire their workers. Later, when immigrants attempt to organize or otherwise defend their rights, employers suddenly "realize" that they must comply with employer sanctions, and fire anyone who cannot provide valid documents to fill out an I-9 form. If the immigrants press matters any further, employers often threaten to turn them in to the Immigration and Naturalization Service. Thus, these sanctions have enabled employers to maintain an intimidated workforce and cheap labor pool whose members never complain to the authorities about mistreatment.

Gordon, *supra* note 65, at 414 n.27. Furthermore,

INS enforcement activity creates conditions which intimidate workers from organizing against exploitative working conditions. If speaking out could mean deportation, workers are less likely to voice their concerns. Even more insidiously, employers frequently call the INS on themselves if they suspect that employees may be preparing to engage in collective action or a union drive, knowing that there will be other eager workers to take their place.

Kerwin, *supra* note 54.

<sup>68</sup> The sharp turnaround coincides with business groups' interest in legislative changes allowing for greater employment-based immigration. According to Frank Sharry, Executive Director of the National Immigration Forum, "[This has] the makings of a business-labor compact that could draw new immigration policies for the next decade." Steven Green-

Wilhelm, Chairman of the AFL-CIO's Committee on Immigration Policy and President of the Hotel Employees and Restaurant Employees Union explained: "The present system doesn't work and is used as a weapon against workers."<sup>69</sup> According to union officials, "a new policy [is] needed because employer sanctions . . . failed to stem the tide of immigration and because immigrants [represent] such a large part of the work force in dozens of industries."<sup>70</sup>

#### IV. JUDICIAL ATTEMPTS TO RECONCILE THE NATIONAL IMMIGRATION AND LABOR STATUTES HAVE PROVED UNAVAILING

While criminalizing the employment of undocumented workers, Congress retained the NLRA's protections for those workers. In enacting the IRCA, Congress explicitly acknowledged the necessity for workplace protections of undocumented workers.<sup>71</sup> These contradictory messages on labor and immigration have resulted in conflicting rulings from the courts and the NLRB. Initially, the IRCA's enactment spurred the NLRB to adopt a restrictive rule denying important remedies to undocumented workers.<sup>72</sup> As a result, many feared that the courts would reexamine *Sure-Tan* in light of the new immigration regime's prohibition on unauthorized employment.<sup>73</sup> Giving credence to these fears, the Seventh Circuit interpreted *Sure-Tan* in light of the IRCA to bar employees from receiving

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house, *Labor Urges Amnesty for Illegal Immigrants*, N.Y. TIMES, Feb. 17, 2000, at A26.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> See *supra* note 1.

<sup>72</sup> Based on the *Sure-Tan* decision, the NLRB general counsel instructed that any undocumented worker hired after November 6, 1986 would not be entitled to backpay or reinstatement unless the employee could file a form I-9 with the employer evidencing lawful immigration status. Memorandum from the NLRB General Counsel to Regional Directors et al. (Sept. 1, 1988), 1988 WL 236182.

<sup>73</sup> See Bosniak, *supra* note 22, at 1033 (cautioning that, "[w]hile some courts may continue to recognize the need, as a matter of policy, to extend remedies for violations of employment-related rights to undocumented workers, their ability to act will be constrained by the employer sanctions provisions"); see also Robin Alexander, *The Right of Undocumented Workers to Reinstatement and Back Pay in Light of Sure-Tan, Felbro, and the Immigration Reform and Control Act of 1986*, 16 N.Y.U. REV. L. & SOC. CHANGE 125 (1987-1988); John F. Barmon, *The Seventh Circuit Explains Why There Is No Harm in Exploiting Undocumented Workers: Del Rey Tortilleria, Inc. v. NLRB*, 24 U. MIAMI INTER-AM. L. REV. 567 (1993); Richard E. Blum, *Labor Standards Enforcement and the Realities of Labor Migration: Protecting Undocumented Workers After Sure-Tan, the IRCA, and Patel*, 63 N.Y.U. L. REV. 1342 (1988); Daniel R. Fjelstad, Comment, *The National Labor Relations Act and Undocumented Workers: Local 512 v. NLRB After the Immigration Reform and Control Act of 1986*, 62 WASH. L. REV. 595 (1987); Michelle McAloon, *Working but Not "Available to Work": Reconciling the Rights of Undocumented Laborers with the Immigration Reform and Control Act of 1986*, 15 CHICANO-LATINO L. REV. 92 (1994); Catherine L. Merino, *Compromising Immigration Reform: The Creation of a Vulnerable Subclass*, 98 YALE L.J. 409 (1988).

backpay for any period when they were not lawfully entitled to be present and employed in the United States.<sup>74</sup>

In 1997, two Second Circuit cases called attention to the gulf between immigration law's aspiration to end unauthorized migration and the gritty day-to-day reality of the undocumented workers' ongoing presence in the workplace. While both cases involved an unscrupulous employer's attempt to use the immigration law as a shield from compliance with national labor law, the interplay of immigration and labor law arose in different contexts. In *NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.*,<sup>75</sup> the court faced the issue of whether an employer, who knowingly hired an undocumented worker in violation of the immigration law, should be protected from liability when it engages in a retaliatory discharge prohibited by the NLRA. In *Montero v. INS*,<sup>76</sup> the court was called upon to determine whether information that was obtained solely as the result of a labor law violation should be admitted into evidence for the purpose of deporting the undocumented worker.

*A. The Impact of the A.P.R.A. Fuel Decision for Undocumented Workers: Eloquent Language but Illusory Remedies*

In *A.P.R.A. Fuel Oil Buyers Group, Inc.*, the NLRB departed from its previous post-IRCA policy of denying remedies to workers who could

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<sup>74</sup> *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115, 1121 (7th Cir. 1992). The courts have been equally confounded as to the coverage and remedies available to undocumented workers under the other national employment protection statutes. For example, in *Patel v. Quality Inn South*, 846 F.2d 700 (11th Cir. 1988), the court relied upon *Sure-Tan* to hold that undocumented workers were entitled to coverage under the Fair Labor Standards Act, notwithstanding the IRCA. *See id.* at 703. With regard to remedies, the *Patel* court went beyond *Sure-Tan* by awarding backpay to undocumented workers who had left the country. Whereas the Court in *Sure-Tan* held that the undocumented workers (who had been deported) were unavailable for work and therefore not entitled to backpay under the NLRA, the court in *Patel* viewed the case as involving a claim for backpay for hours actually worked. *Id.* at 705-06. The court concluded that awarding backpay to undocumented workers was entirely consistent with the INA, including the IRCA, because it decreases the economic incentive for employers to hire undocumented workers. *Id.* at 704. Similarly, in a case involving an employer reporting its undocumented worker to the INS in retaliation for her bringing an action before the Department of Labor for unpaid wages, the court held that the anti-retaliation provisions of the FLSA apply equally to undocumented workers. *Contreras v. Corinthian Vigor Ins. Brokerage, Inc.*, 25 F. Supp. 2d 1053, 1056 (N.D. Cal. 1998). In *EEOC v. Tortilleria "La Mejor"*, 758 F. Supp. 585 (E.D. Cal. 1991), the court was faced for the first time with interpreting whether Title VII's employment discrimination protections extended to undocumented workers in light of the IRCA. Relying upon *Sure-Tan*, *Patel*, and the plain meaning of the statute at issue, the court held that undocumented workers were included within the term "employee" for Title VII purposes as well. However, as discussed *supra* note 27 and *infra* note 94, a divided Fourth Circuit has recently held that the IRCA statutorily precludes coverage of undocumented workers under Title VII.

<sup>75</sup> 134 F.3d 50 (2d Cir. 1997).

<sup>76</sup> 124 F.3d 381 (2d Cir. 1997).



not prove lawful immigration status.<sup>77</sup> Faced with the issue of whether the alleged unlawful status of the workers obviated the employer's obligation to comply with traditional make-whole remedies available pursuant to the NLRA, the Board seized the opportunity to reconcile the underlying policy goals of the NLRA and the IRCA.<sup>78</sup>

As presented to the NLRB, the basic facts were not in dispute. There was no question as to the employer's knowledge of the workers' undocumented immigration status.<sup>79</sup> Furthermore, in an earlier decision, the NLRB had found that neither of the workers would have been discharged but for their ongoing union activities and that both discharges violated section 8(a)(3) of the NLRA.<sup>80</sup>

In addressing the issue of appropriate remedies, the general counsel argued that, at a minimum, the NLRB should order reinstatement, conditioned on the undocumented workers' ability within a reasonable period to establish eligibility to work in the United States pursuant to the INA.<sup>81</sup> In addition, the general counsel urged that backpay be awarded from the date of the workers' unlawful discharges until the earliest of the following: "their lawful reinstatement; their failure within a reasonable time to seek approval from the INS to work; the INS's rejection of their request for permission to work; or the Union's failure, within 14 days of a request by the [employer], to refer an applicant for hire."<sup>82</sup>

<sup>77</sup> 320 N.L.R.B. 408, 415 (1995). For prior policy, see Memorandum from the NLRB General Counsel to Regional Directors et al., *supra* note 72. After *A.P.R.A. Fuel*, the general counsel of the NLRB issued new guidelines. See Memorandum from Fred Feinstein, General Counsel, NLRB, to Regional Directors et al. (Dec. 4, 1998), <http://www.lawmemo.com/emp/nlrb/GC98-15.htm>. Pursuant to the new memorandum, "[r]egions should seek an unconditional reinstatement order absent an affirmative showing by the respondent that a discriminatee is unauthorized to work in this country." *Id.*

<sup>78</sup> *A.P.R.A. Fuel*, 320 N.L.R.B. at 408; see also *S. S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942) (noting that when a case involves the intersection of two federal statutes, the Board should harmonize the two laws to "accommodat[e] . . . one statutory scheme to another").

<sup>79</sup> *A.P.R.A. Fuel*, 320 N.L.R.B. at 409 ("The [company] hired [both workers] after each of them explicitly informed it that he was not eligible for lawful employment in the United States based on immigration status."). In *Hoffman Plastic Compounds, Inc. v. NLRB*, 208 F.3d 229 (D.C. Cir. 2000), *aff'd*, 237 F.3d 639 (D.C. Cir. 2001) (en banc), the undocumented worker used another's birth certificate to obtain employment. *Id.* at 232. The employer claimed that it had no knowledge of the worker's undocumented status until he admitted it at a compliance proceeding held to establish the proper method for computing backpay. See *Hoffman Plastic Compounds, Inc.*, 326 N.L.R.B. 1060, 1062 (1998). The Board afforded the employer the benefit of the after-acquired evidence doctrine and terminated the backpay award as of the date the employer learned that the worker misrepresented his immigration status. *Id.* The circuit court upheld the limited backpay award pursuant to *A.P.R.A. Fuel*. *Hoffman Plastic Compounds, Inc.*, 208 F.3d at 242; see also *infra* note 98.

<sup>80</sup> See *A.P.R.A. Fuel Oil Buyers Group, Inc.*, 309 N.L.R.B. 480, 495-96 (1992), *aff'd*, 28 F.3d 103 (2d Cir. 1994). Both discharges occurred approximately one month after the employer learned of its employees' union activities and in an atmosphere of "pervasive" and "flagrant" unfair labor practices. *Id.* at 481 (citation omitted).

<sup>81</sup> *A.P.R.A. Fuel*, 320 N.L.R.B. at 409.

<sup>82</sup> *Id.* at 410. The discharged undocumented workers would then continue to receive backpay until the applicant referred by the union was hired. *Id.* The general counsel analo-

In contrast, the employer argued that, under the IRCA, undocumented immigrants are legally ineligible to work in the United States and, accordingly, the NLRB should no longer view them as employees within the meaning of the NLRA.<sup>83</sup> The employer claimed that the IRCA preempted the NLRB's authority to order reinstatement or backpay as remedies for undocumented immigrants, even as a remedy for unfair labor practices.<sup>84</sup>

The NLRB disagreed, noting that the IRCA and the NLRA "must be read in harmony as complementary elements of a legislative scheme explicitly intended, in both cases, to protect the rights of employees in the American workplace."<sup>85</sup> In referring to a "mutuality of purpose,"<sup>86</sup> the NLRB concluded that the best way to effectuate the policies of the immigration and labor statutes was by "vigorously enforcing the NLRA, including providing traditional Board remedies, with respect to all employees, to the extent that such enforcement does not require or encourage unlawful conduct by either employers or individuals."<sup>87</sup> After reviewing the Supreme Court's reasoning in *Sure-Tan*, the circuit court decisions in *Felbro* and *Del Rey Tortilleria*, and the legislative history behind the IRCA, the NLRB ordered the employer to offer reinstatement to the undocumented workers.<sup>88</sup> However, the NLRB conditioned the reinstatement upon the workers' ability to comply with immigration verification procedures set forth by the IRCA.<sup>89</sup> The NLRB also fashioned a backpay award, following the advice of the general counsel, that would start to accrue on the date of discharge, and cease upon the earlier of either the employer's reinstatement of the worker (subject to compliance with the requirements of the IRCA) or the worker's failure after a reasonable time to produce the documents required by the IRCA for employment.<sup>90</sup>

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gized ordering the employer to hire an applicant referred by the union to the "affirmative race-conscious relief ordered in cases of patterns of discrimination found under Title VII of the Civil Rights Act of 1964." *Id.* at 409.

<sup>83</sup> *Id.* at 410.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 408.

<sup>86</sup> *Id.* at 411.

<sup>87</sup> *Id.*

<sup>88</sup> *See id.* at 411-13, 417.

<sup>89</sup> *Id.* at 417.

<sup>90</sup> *Id.* at 408. The NLRB's decision was premised on the fact that the undocumented immigrants were not doing anything illegal by remaining in the country, as opposed to the undocumented workers in *Sure-Tan* who had left the United States and would have had to violate the law to re-enter. *See id.* at 415. While a full discussion of more recent enactments is beyond the scope of this Article, it could be argued that this distinction is no longer valid in light of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended in scattered sections of 8 U.S.C. and 18 U.S.C.). *See* INA § 212(a)(6)(A), 8 U.S.C. § 1182(a)(6)(A) (1994 & Supp. V 1999) (creating a new ground for inadmissibility for aliens present without admission or parole). Arguably, for undocumented workers who unlawfully enter the United States after April 1997 (the effective date of this provision), their mere presence in the country is an ongoing violation of the immigration laws.

The Second Circuit adopted the NLRB decision in *A.P.R.A. Fuel*, aptly characterizing the issue as “whether an employer who knowingly hires undocumented aliens can use the immigration laws as a shield to avoid liability for the employer’s later retaliatory discharge of the employees in violation of the [NLRA].”<sup>91</sup> In affirming the NLRB decision, the court of appeals noted that, while the IRCA ended the INA’s silence with respect to employers who hire unauthorized immigrants, “IRCA [did] not materially change the policy considerations underlying the previous decisions.”<sup>92</sup> Ultimately, the court held that the IRCA does not preclude the NLRB from fashioning appropriate remedies when undocumented workers’ NLRA rights are violated, and the NLRB’s conditional reinstatement and backpay orders in this instance were appropriate.<sup>93</sup>

The decision in *A.P.R.A. Fuel* is important for its holding that even after passage of the IRCA, undocumented workers are not barred from traditional NLRB remedies.<sup>94</sup> However, the decision falls short of truly

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<sup>91</sup> NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc., 134 F.3d 50, 52 (2d Cir. 1997).

<sup>92</sup> *Id.* at 55. “Congress sought to reduce the availability of jobs for undocumented workers without adversely affecting working conditions within those jobs.” *Id.* The court relied upon the House Judiciary Committee Report on the IRCA, which specifically states that IRCA was not intended to narrow the employee definition under the NLRA or to “‘limit the powers’ of the Board ‘to remedy unfair practices committed against undocumented employees.’” *Id.* at 56 (citations omitted).

<sup>93</sup> *Id.* at 57.

<sup>94</sup> *A.P.R.A. Fuel* stands in sharp contrast to the Fourth Circuit’s interpretation of the IRCA’s impact on undocumented workers’ rights under national employment protection statutes. In *Egbuna v. Time-Life Libraries, Inc.*, 153 F.3d 184 (4th Cir. 1998) (en banc), cert. denied, 525 U.S. 1142 (1999), a sharply divided Fourth Circuit interpreted the IRCA as “statutorily disqualif[ying] any undocumented alien from being employed as a matter of law.” *Id.* at 187. In response to the undocumented worker’s allegation that the company unlawfully refused to rehire him in retaliation for his involvement in another worker’s discrimination suit, the majority held that his undocumented status rendered him ineligible for the anti-retaliation protections of Title VII. See *id.* at 187–88. According to the court, “When the applicant is an alien, being ‘qualified’ for the position is not determined by the applicant’s capacity to perform the job—rather, it is determined by whether the applicant was an alien authorized for employment in the United States at the time in question.” *Id.* at 187. Judge Ervin, joined by three fellow dissenters, noted that the majority’s interpretation of Title VII’s requirement that an applicant be “qualified for work” would extinguish an undocumented alien’s rights under the Age Discrimination in Employment Act and the Americans with Disabilities Act. *Id.* at 189 (Ervin, J., dissenting). He went on to note that the majority’s interpretation of the IRCA would preclude undocumented workers from FLSA or NLRA coverage as well, a proposition at odds with congressional intent and case law in other circuits interpreting the intersection of IRCA and federal labor laws. *Id.*

However, on October 26, 1999, the Equal Employment Opportunity Commission (“EEOC”), the agency responsible for administering Title VII, rejected the *Egbuna* court’s reasoning and instead relied upon *A.P.R.A. Fuel* to guarantee remedies to aggrieved undocumented workers under Title VII. According to the EEOC, “where an undocumented worker is found to have been a victim of employment discrimination, remedy awards can and should fulfill the goals of the employment discrimination statutes without undermining the purposes of the immigration laws.” EEOC, 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>.

The Supreme Court has declined to review *Egbuna* and has instead allowed the confusion in the circuits over the interplay of the IRCA and labor and employment laws to

harmonizing immigration and labor policies for a number of reasons. First, the limited backpay award provided for by the court must be analyzed within the broader context of the shortcomings of the NLRA's remedial scheme in deterring unlawful employer conduct. Even when immigration status is not an issue, the NLRA backpay award has been criticized as inadequate to deter employer misconduct because it costs the employer far less than unionization.<sup>95</sup> As a result, a limited backpay award for aggrieved workers who cannot obtain employment authorization within a reasonable time will further undermine the NLRA, because the unscrupulous employer will view it as an even cheaper mechanism for union avoidance.

Second, the limited backpay award defeats the spirit both of the NLRA and the IRCA by focusing on the status of the wronged employee rather than on the wrongdoing employer, the latter of which is the intended target both of the NLRA and the IRCA.<sup>96</sup> Similarly, a conditional reinstatement order will prove meaningless in most cases because undocumented immigrants will be unable to produce valid employment authorization. Finally, it is likely that the after-acquired evidence doctrine<sup>97</sup> will be interpreted to limit further the backpay awarded to un-

flourish. For example, in *NLRB v. Kolkka*, 170 F.3d 937, 940 (9th Cir. 1999), the Ninth Circuit ruled that the participation of undocumented workers in union representation was valid, even if their employee status may have been subject to challenge under the IRCA. However, the Second Circuit recently held that an employer's shielding of an undocumented worker constituted "harboring an illegal alien" as prohibited by section 274(a)(1)(A)(iii) of the INA. See *United States v. Kim*, 193 F.3d 567, 569 (2d Cir. 1999).

<sup>95</sup> As Jennifer Gordon has observed, it is cheaper for a company to fire union supporters and be found guilty of committing unfair labor practices under the NLRA than it is to recognize a union. The worst case scenario for the employer is that she is found guilty and has to pay back wages and reinstate the union organizer. However, due to the lengthy nature of NLRB proceedings, it is likely that the union will have been defeated long before the worker is back on the job. See Gordon, *supra* note 65, at 424. In the words of Paul Weiler, the limited backpay awards available to illegally fired workers are "hardly a meaningful deterrent to an employer determined to keep a union out of its plant by fair means or foul." PAUL C. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* 234 (1990). In critiquing the backpay remedy, Jamin Raskin comments: "It is difficult to imagine a sweeter deal from the management perspective: in return for paying an employee's regular salary, it breaks up the union campaign, ejects the pro-union nuisance, and sends the proper message about labor organizing to the work force." Jamin B. Raskin, *Reviving the Democratic Vision of Labor Law*, 42 HASTINGS L.J. 1067, 1079 (1991) (reviewing WEILER, *supra*).

<sup>96</sup> See Ontiveros, *supra* note 27, at 616. According to Ontiveros, the courts' focus on the worker's immigration status (rather than on the employer's action) is both analytically incorrect and unduly prejudicial. As a matter of law, the employer's discriminatory conduct cannot be transformed by the worker's immigration status. Furthermore, the focus on the immigration status of the worker reinforces notions of "otherness" thereby devaluing the harm done to her. *Id.*

<sup>97</sup> After-acquired evidence means evidence relating to an employee's bad acts that would have resulted in that employee's termination if the information had been known at the time of the firing. See *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 356-63 (1995). In *McKennon*, the Supreme Court unanimously held that after-acquired evidence of wrongdoing may be used to limit an employee's recovery of backpay from the date of the unlawful discharge to the date that the information is uncovered. See *id.* at 362.

documented workers who fail to disclose their undocumented status at the time of hire.<sup>98</sup>

Because a limited backpay award undermines the goal of deterring unlawful conduct, the International Ladies' Garment Workers' Union ("ILGWU") has proposed more meaningful remedies. For example, the Union suggested that the NLRB rely upon the standard of actual availability, rather than legal availability, when computing backpay.<sup>99</sup> By ordering the traditional remedies of reinstatement and backpay without regard to the immigration status of the worker, the Board would shift to the employer the burden of raising immigration status as a defense at the

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In order for an employer to utilize the after-acquired evidence doctrine, "it must first establish that the [employee's] wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge." *Id.* at 362–63. In *Sheehan v. Donlen Corp.*, 173 F.3d 1039 (7th Cir. 1999), the court held that

the inquiry focuses on the employer's actual employment practices, not just the standards established in its employee manuals, and reflects a recognition that employers often say they will discharge employees for certain misconduct while in practice they do not. Proving that the same decision would have been justified . . . is not the same as proving that the same decision would have been made.

*Id.* at 1048 (citations omitted).

<sup>98</sup> See, for example, the dicta in *A.P.R.A. Fuel Oil Buyers Group, Inc.*, 320 N.L.R.B. 408, 416 (1995), and the holding in *Hoffman Plastic Compounds, Inc. v. NLRB*, 208 F.3d 229 (D.C. Cir. 2000), *aff'd*, 237 F.3d 639 (D.C. Cir. 2001) (en banc), the latter affirming the NLRB's limited award of backpay only for "the period beginning with [the employee's] unlawful termination and ending on the date [the employer] learned of his undocumented status." *Id.* at 242. While the *Hoffman* court registered its "disagreement with [the employer's] characterization of this case as a dispute between 'an innocent employer' and an employee who has no legal right to be in this country and who obtained his job through fraud," *id.* at 233, it nevertheless affirmed the Board's application of the after-acquired evidence rule. *Id.* at 243. Employers are rarely sanctioned under the IRCA because it is difficult to prove that they "knowingly" employ undocumented workers. A feigned lack of knowledge about an undocumented workforce insulates employers from IRCA penalties, and also provides an after-acquired evidence defense to limit remedies for violating labor and employment protection statutes. See, e.g., *infra* note 241. In *Robinson v. Shell Oil*, 519 U.S. 337 (1997), the Supreme Court cautioned against construing statutory antidiscrimination statutes in such a way as to vitiate protection and found that narrowly defining the term "employees" under Title VII to exclude former employees would create a "perverse incentive for employers to fire employees who might bring Title VII claims." *Id.* at 345–46. By the same logic, reconciling the labor and immigration statutes in such a way as to severely limit remedies creates a perverse incentive for employers to look the other way when hiring undocumented workers because it results in immunity from both the immigration and labor laws.

<sup>99</sup> Applying a standard of "legal" availability to determine whether undocumented workers should be entitled to remedies for violations of their workplace rights ignores the reality of their "actual" presence in the workforce. This approach reminds us once again that fictions are "more pervasive, insidious and entrenched" in immigration law than in other areas of the law, and are used here to bridge the gap between ideology and reality. Wani, *supra* note 2, at 53; cf. *Granados v. Windson Dev. Corp.*, 509 S.E.2d 290 (Va. 1999) (ignoring the reality of an employee's work-related injury, and finding that an undocumented worker injured on the job cannot receive workers' compensation benefits because any contract for hire entered into by an undocumented worker is void and unenforceable).

compliance hearing.<sup>100</sup> In instances where the employer raises the immigration status of the worker at an earlier stage, ILGWU suggested that the NLRB provide for alternative remedies when reinstatement could not be lawfully accomplished. For example, the NLRB could utilize backpay as the substitute remedy for reinstatement in the case of a worker who cannot lawfully be rehired because of immigration status.<sup>101</sup> The backpay would run until the worker obtains work authorization and is reinstated, or until the employer can establish that the undocumented worker would have been terminated for nondiscriminatory reasons,<sup>102</sup> whichever comes first.

There is precedent for the NLRB ordering alternative remedies when the employer could not legally reinstate the worker, and when it has also been shown that but for the worker's protected activity, the employer would have continued to employ her regardless of legal status.<sup>103</sup> Because of the public interest at stake, the NLRB has also recognized the importance of not allowing the employer "to profit from his own wrongful misconduct and be wholly exonerated from the Act's sanctions because the

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<sup>100</sup> This is essentially the position adopted by the NLRB general counsel after *A.P.R.A. Fuel*. See Memorandum from Fred Feinstein to Regional Directors et al., *supra* note 77 ("Questions concerning reinstatement are only appropriately raised in a compliance proceeding.").

<sup>101</sup> This was one of the remedies suggested by the ILGWU (now the Union of Needletrade, Industrial and Textile Employees ("UNITE")) in *A.P.R.A. Fuel*. See Brief Amicus Curiae of International Ladies' Garment Workers' Union at 26, 35-41, *A.P.R.A. Fuel Oil Buyers Group, Inc.*, 320 N.L.R.B. 408 (1995) (No. 29-CA-15517) (on file with author). However, the idea of using backpay as a substitute remedy might be difficult to accord with the Supreme Court's decision in *Sure-Tan*, discussed *supra* Part II. In *Sure-Tan*, the Court struck down as speculative a backpay remedy that the circuit court had formulated to assure that the undocumented discriminatees who had left the country would receive some compensation. Furthermore, even in the case of documented workers, the backpay award is a small deterrent to unscrupulous employers. See *supra* note 95 and accompanying text. For that reason, many commentators have called for the reform of the NLRA to include stricter penalties. A common proposal is that the NLRA be amended to provide for a multiple damage award, such as those used in fair labor standards and antitrust law. See, e.g., Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1790 (1983) (noting also that such measures have never fared well before Congress because of the entrenched assumption that NLRB remedies should be reparative rather than punitive).

<sup>102</sup> As advocated by the ILGWU, various factors could be taken into account in assessing whether the employer would likely have discharged the undocumented worker for nondiscriminatory reasons: for example, the average length of a worker's employment at the company, or any action by the employer to require I-9 forms for all employees followed by the discharge of any who failed to provide the required immigration documentation along with the I-9 form. See Brief Amicus Curiae of International Ladies' Garment Workers' Union at 26, 35-41, *A.P.R.A. Fuel* (No. 29-CA-15517).

<sup>103</sup> For example, in cases involving illegally discharged drivers who lacked valid licenses, the NLRB has ordered employers to provide backpay until the workers could be legally reinstated as drivers (upon obtaining licenses) or transferred to substantially equivalent non-driving positions (if the employees could not obtain licenses), or until the drivers obtain substantially equivalent employment elsewhere. *De Jana Indus., Inc.*, 305 N.L.R.B. 845 (1991); *Future Ambulette, Inc.*, 293 N.L.R.B. 884 (1989), *enforced as modified*, 903 F.2d 140 (2d Cir. 1990).

employee likewise was at fault.”<sup>104</sup> Alternative remedies are appropriate in instances when the employer has knowingly participated in violating the IRCA, has violated the NLRA, and subsequently seeks immunity from NLRB remedies on the ground that the law did not permit him to hire the undocumented worker in the first place.<sup>105</sup>

### B. *Montero v. INS: The Remedy Is Deportation*

In *Montero*, the Second Circuit took the issue of “protection” through the looking glass by condoning the INS’s deportation of undocumented workers when the employer reports the workers to the INS in retaliation for exercising their statutory and constitutional rights to organize.<sup>106</sup> As in *Sure-Tan*, the employer in *Montero* contacted the INS in retaliation for organizing efforts by undocumented workers<sup>107</sup>—conduct that is plainly unlawful under the NLRA.<sup>108</sup> However, unlike the *Sure-Tan* workers who immediately agreed to depart the United States once they were apprehended by the INS, *Montero* challenged the INS’s efforts to deport her on both policy and legal grounds. As a matter of policy, *Montero* argued that her deportation would be contrary to and violate the terms of the NLRA.<sup>109</sup> She also argued that the INS’s introduction of evidence into the deportation proceeding when that evidence was obtained through the employer’s breach of the NLRA violated the INA itself.<sup>110</sup> According to *Montero*, the INS’s action in undertaking a

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<sup>104</sup> *Fairview Nursing Home*, 202 N.L.R.B. 318, 325 n.36 (1973), *enforced*, 486 F.2d 1400 (5th Cir. 1973), *overruled on other grounds*, *Parker-Robb Chevrolet, Inc.*, 262 N.L.R.B. 402 (1982).

<sup>105</sup> For an example of an instance in which the court ensured that an unscrupulous employer was not able to use the IRCA to shield itself from labor law remedies, see *Bertelsen v. Agricultural Labor Relations Board*, 29 Cal. Rptr. 2d 204 (Ct. App. 1994). The *Bertelsen* court upheld the Agricultural Labor Relations Board’s (“ALRB”) order of reinstatement and backpay to undocumented farmworkers who had been discharged in retaliation for engaging in protected concerted activity. *Id.* at 205. In holding that the state was not preempted by the IRCA from providing such remedies to workers regardless of their immigration status, the court examined the issue of availability for work in the context of undocumented workers. The court relied upon a post-*Sure-Tan* ALRB decision that had “concluded that the Legislature intended that undocumented agricultural workers [in California] were to be protected ‘agricultural employees’ under the [Agriculture Labor Relations Act].” *Id.* at 208 (citations omitted). The ALRB also “concluded that as a matter of legislative intent there was no difference in remedial relief based on a worker’s immigration status.” *Id.* (citations omitted).

<sup>106</sup> *Montero v. INS*, 124 F.3d 381 (2d Cir. 1997); *cf. Velasquez-Tabir v. INS*, 127 F.3d 456 (5th Cir. 1997) (holding that evidence obtained as a result of an unfair labor practice is admissible in a civil proceeding to assess a fine against the undocumented immigrant for working without INS authorization).

<sup>107</sup> Order Further Consolidating Cases, Consolidated Amended Complaint and Notice of Hearing at 7–9, *STC Knitting Mills, Inc.* (No. 29-CA-16950) (unpublished NLRB order filed Jan. 15, 1993) (on file with author).

<sup>108</sup> See *Sure-Tan, Inc., v. NLRB*, 467 U.S. 883, 895–96 (1984).

<sup>109</sup> *Montero*, 124 F.3d at 384.

<sup>110</sup> *Montero* argued that the Board of Immigration Appeals’ decision was contrary to

workplace investigation and raid, based solely on a tip from the former INS district director representing that employer in the midst of an intense labor dispute, followed by the INS's initiation of deportation proceedings against her based solely on evidence obtained from the raid, constituted precisely the sort of activity contemplated and prohibited by the IRCA.<sup>111</sup>

Montero's legal argument was that the information obtained by the INS as a result of the employer's retaliatory reporting should have been suppressed because the INS agent who received the tip from the employer either knew or should have known that this information was being provided in violation of the NLRA.<sup>112</sup> According to Montero, in light of the IRCA, the only reason that her employer would alert the INS to the presence of undocumented workers at its own company would be that the employees were engaged in a protected activity, for which they could not be lawfully fired.<sup>113</sup> Therefore, she argued that the INS agent who received the "unusual" notice from the employer knew or should have known that the employer was attempting to involve the INS in an activity barred by the NLRA. By pointing out the INS's complicity, Montero argued that the INS raid constituted a sufficiently egregious violation of her statutory and First Amendment rights to trigger the exclusionary rule in her deportation proceeding.<sup>114</sup>

The Second Circuit rejected Montero's arguments and affirmed the Board of Immigration Appeals' decision to admit the unlawfully obtained evidence into the deportation proceeding.<sup>115</sup> The court acknowledged wrongdoing by the employer, but not by the INS. Instead, the court characterized Montero's claim as one of an "entitlement"<sup>116</sup> to remain in the United States, concluding that "excluding evidence of an alien's illegal presence in the United States because the evidence was obtained in connection with the unfair labor practice of an employer is wholly inconsis-

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section 274A of the INA, which Congress declared must not "be used to undermine or diminish in any way labor protections in existing law." *Id.* (emphasis added) (quoting H.R. REP. NO. 99-682, pt. 1, at 58 (1986), reprinted in 1986 U.S.C.A.N. 5649, 5662).

<sup>111</sup> *Id.*

<sup>112</sup> *See id.*

<sup>113</sup> *See id.* at 385.

<sup>114</sup> Montero relied upon the Supreme Court's language in *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984), suggesting that the exclusionary rule could apply in deportation proceedings if there were "egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained." *Id.* at 1050-51; *see also infra* notes 126-141. While leaving open the question of whether an egregious violation of the Fourth Amendment would trigger the exclusionary rule, the court of appeals in *Montero* held that the exclusionary rule would not apply to a violation of First Amendment rights. *Montero*, 124 F.3d at 386. The *Montero* court interpreted *Lopez-Mendoza* to mean that, beyond violations of the Fourth Amendment, the exclusionary rule applies, if at all, to deprivations that affect the fairness or reliability of the deportation proceeding. *See id.*

<sup>115</sup> *See Montero*, 124 F.3d at 387.

<sup>116</sup> As stated by the court, "Whether or not an undocumented alien has been the victim of unfair labor practices, such an alien has no entitlement to be in the United States." *Id.* at 385.



tent with enforcement of the INA."<sup>117</sup> The court also deemed the suppression of illegally obtained evidence in deportation proceedings as creating an "impediment to the deportation of illegal aliens."<sup>118</sup>

### 1. Underlying Fictions: Deportation Is Not Punishment

For undocumented workers like Montero who are facing deportation as a result of an employer's unlawful actions under the NLRA, the exclusionary rule offers little protection. The Supreme Court held, in *INS v. Lopez-Mendoza*, that the exclusionary rule is generally inapplicable in deportation proceedings because such proceedings are deemed civil, rather than criminal, matters.<sup>119</sup> Although this conclusion is largely regarded as a legal fiction,<sup>120</sup> viewing deportation not as a punishment but as a means of enforcing a regulatory scheme means that lesser constitutional protections apply.<sup>121</sup> According to the Supreme Court, "The purpose of deportation is not to punish past transgressions but rather to put an end to a continuing violation of the immigration laws."<sup>122</sup> In stark contrast to this characterization of deportation proceedings as civil matters, undocumented workers are widely viewed as criminals and their presence in the community is analogized to hazardous waste, contraband explosives, and drugs.<sup>123</sup> Regardless of the work undocumented workers have contributed or the lives they have built, their very presence violates

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> See *Lopez-Mendoza*, 468 U.S. at 1038-39.

<sup>120</sup> See, e.g., *Scheidemann v. INS*, 83 F.3d 1517, 1531 (3d Cir. 1996) (Sarokin, J., concurring) ("[N]ow is the time to wipe the slate clean and admit to the long evident reality that deportation is punishment."); Wani, *supra* note 2, at 103 ("The civil/criminal distinction is a meaningless legal fiction that should not be used as the determinant of a crucial constitutional protection."); Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1 (1984) (discussing the legal fiction that deportation is not punishment); see also Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97 (1998). The reality that deportation is often the harshest punishment of all has been articulated in dissenting opinions over the years. See, e.g., *Harisiades v. Shaughnessy*, 342 U.S. 580, 598 (1952) (Douglas, J., dissenting); *Fong Yue Ting v. United States*, 149 U.S. 698, 732 (1893) (Brewer, J., dissenting) (describing deportation as banishment).

<sup>121</sup> See, e.g., *Lopez-Mendoza*, 468 U.S. at 1038-39; *Harisiades*, 342 U.S. at 594 (deportation is a civil, not a criminal punishment); *Fong Yue Ting*, 149 U.S. at 730 (deportation is not banishment but merely method for enforcing immigration laws).

<sup>122</sup> See *Lopez-Mendoza*, 468 U.S. at 1039.

<sup>123</sup> *Id.* at 1046. The *Lopez-Mendoza* Court reasoned: "[N]o one would argue that the exclusionary rule should be invoked to prevent an agency from ordering corrective action at a leaking hazardous waste dump . . . or to compel police to return contraband explosives or drugs to their owner if the contraband had been unlawfully seized." *Id.* Bill Ong Hing explains that this demonization and dehumanization of immigrants silences them, since "dehumanization allows the powers-that-be to categorize the immigrant at will, allowing them to ignore the idealism, the goals, the aspirations, the dreams of the immigrant, the images of the Statue of Liberty." Bill Ong Hing, *The Immigrant as Criminal: Punishing Dreamers*, 9 HASTINGS WOMEN'S L.J. 79, 83 (1998).

the nation's sovereign right to determine who can enter the country.<sup>124</sup> Depictions of the undocumented as criminals notwithstanding, their deportation is not recognized as punishment and therefore most constitutional protections do not apply.<sup>125</sup> In the context of "civil" deportation proceedings, the *Lopez-Mendoza* Court decided that the exclusionary rule is not applicable except in cases that present "egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained."<sup>126</sup>

The judicial refusal to recognize the harshness of deportation has been sharply criticized over the years.<sup>127</sup> Given the increasingly harsh "criminalization of immigration law,"<sup>128</sup> this supposition must be reevalu-

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<sup>124</sup> The executive branch has been accorded unusual deference in immigration matters because of the plenary power doctrine and embedded notions of the primacy of sovereignty. See, e.g., *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953) (holding that "the power to expel or exclude aliens [is] a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control"); *Fong Yue Ting*, 149 U.S. at 711-12 (finding that the power to expel foreigners is also a power affecting international relations and extending plenary power doctrine to deportation context); *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581 (1889).

The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of anyone.

*Id.* at 609. But cf. *Rosales-Garcia v. Holland*, 238 F.3d 704, 719-21 (6th Cir. 2001) (contextualizing the political climate in which the Supreme Court decided *Mezei* and debunking the antiquated notion that that excludable aliens have no rights under the Fifth Amendment). For comprehensive discussion and criticism of the plenary power doctrine, see Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255; and Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990).

<sup>125</sup> For example, immigrants have no statutory right to free counsel in removal proceedings and extremely limited protection under the exclusionary rule. See INA § 240(b)(4)(A), 8 U.S.C. § 1229a(b)(4)(A) (Supp. V 1999) ("[T]he alien shall have the privilege of being represented, at no expense to the Government."); INA § 292, 8 U.S.C. § 1362 ("In any removal proceedings . . . , the person concerned shall have the privilege of being represented (at no expense to the Government)."); see also *Lopez-Mendoza*, 468 U.S. at 1038 ("Consistent with the civil nature of the proceeding, various protections that apply in the context of a criminal trial do not apply in a deportation hearing."); *supra* note 121. For a discussion of the tensions created by the INS's use of criminal investigatory techniques in "civil" deportation matters, see Lenni B. Benson, *By Hook or by Crook: Exploring the Legality of an INS Sting Operation*, 31 SAN DIEGO L. REV. 813 (1994).

<sup>126</sup> *Lopez-Mendoza*, 468 U.S. at 1050-51; see also 28 C.F.R. § 68.40(b) (2001) ("All relevant material and reliable evidence is admissible, but may be excluded if its probative value is substantially outweighed by unfair prejudice or confusion of the issues.")

<sup>127</sup> See *supra* text accompanying note 120.

<sup>128</sup> Medina, *supra* note 11, at 676. Professor Medina argues that the United States has increasingly looked to criminal law to address the dilemma of undocumented immigration. Most notably, the IIRIRA created a host of new criminal offenses for aliens who flee from

ated. At a minimum, the civil/criminal paradigm should be expanded to accommodate a "quasi-criminal" administrative model that would allow for the exclusionary rule in cases that impose deportation as a punishment.<sup>129</sup> In other administrative contexts, courts have applied the exclusionary rule selectively, depending upon whether the proceeding was intended to punish or to remedy ongoing violations.<sup>130</sup> Still, such a rule would most likely benefit only those caught at the intersection of criminal and immigration laws. For the undocumented worker who engages in protected labor activities, deportation would probably not be viewed as punishment even in this flexible, quasi-criminal model.<sup>131</sup> Furthermore, labor and immigration laws often come into conflict because of the con-

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an immigration checkpoint "in excess of the legal speed limit," 18 U.S.C. § 758 (Supp. V 1999); knowingly make false claims to citizenship to obtain a benefit or employment in the United States, *id.* § 1015(e); or vote in federal elections, *id.* § 611. Other sections of the IIRIRA enhance criminal penalties for alien smuggling and for fraudulent use of documents. See generally Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305 (2000). Pauw argues that in some cases, the statutory framework is inherently penal. For example, "a person convicted of an 'aggravated felony' is deportable" without any possibility of a waiver, even in the most compelling of circumstances. *Id.* at 338. In addition to the efforts to criminalize immigration law, the INS is also increasingly collaborating with the police and other law enforcement agencies in order to carry out its mandate. Pursuant to section 133 of the IIRIRA, state and local police and sheriffs' departments may be deputized to perform immigration law enforcement. See INA § 287(g), 8 U.S.C. § 1357(g) (Supp. V 1999). In analyzing INS sting operations, Professor Benson argues that the INS's use of undercover actions amounts to the use of criminal enforcement techniques in civil proceedings, thereby rendering the deportation proceeding a hybrid, neither civil nor criminal. See Benson, *supra* note 125, at 848. Challenging the characterization of deportation proceedings arising from sting operations as civil, Professor Benson argues for greater procedural due process protections. *Id.*

<sup>129</sup> See Pauw, *supra* note 128, at 333 (rejecting the "all or nothing" approach and arguing for additional constitutional safeguards in "quasi-criminal" cases—that is, civil proceedings in which punishment is imposed). According to Pauw,

even if there is a viable sense in which deportation can be regarded as non-punitive, that does not mean that deportation is always non-punitive. As the recent amendments to our immigration laws make clear, there are a variety of circumstances in which deportation must be regarded as punishment because the sanction cannot be justified in terms of its remedial purpose.

*Id.* at 332.

<sup>130</sup> See, e.g., *Smith Steel Casting Co. v. Brock*, 800 F.2d 1329 (5th Cir. 1986). The *Smith* court analyzed *Lopez-Mendoza* in the context of Occupational Safety and Health Administration proceedings and held that the exclusionary rule does not apply in proceedings conducted for the purpose of correcting violations of occupational safety and health standards. However, the court held that the exclusionary rule does apply where the object of the proceedings is to punish the employer for past violations of OSHA regulations. See *id.* at 1334.

<sup>131</sup> Pauw, for example, notes that there is a remedial purpose in protecting the integrity of the immigration system: "Thus those individuals without proper documents . . . can be . . . removed for remedial purposes, even if they are otherwise desirable as residents." Pauw, *supra* note 128, at 332–33. Pauw further argues that "[i]n some cases incapacitation may be taken as a legitimate remedial measure to protect other members of the community." *Id.*

duct of an unscrupulous employer. Therefore, the exclusionary rule, whether civil or criminal, may be inapplicable as long as the employer who subverts labor law protections is viewed as a private actor.

## 2. *The Civil Exclusionary Rule: Whose Egregious Conduct Was It?*

In *Lopez-Mendoza*, the Supreme Court applied a balancing test, adopted from *United States v. Janis*,<sup>132</sup> that "weigh[s] the likely social benefits of excluding unlawfully seized evidence" (deterrence of unlawful police conduct) against costs likely to be incurred (loss of probative evidence and secondary costs resulting from less accurate adjudication).<sup>133</sup> In analyzing the deterrence value of applying the exclusionary rule in deportation proceedings, the Court in *Lopez-Mendoza* focused on the ease with which the INS can remove aliens from the country, regardless of the applicability of the exclusionary rule.<sup>134</sup> The Court also found little deterrence value in the exclusionary rule because the INS has its own scheme in place to deter Fourth Amendment violations.<sup>135</sup> Ironically, the Supreme Court nevertheless found "unusual and significant" social costs in applying the exclusionary rule in deportation proceedings.<sup>136</sup> This analysis of social costs reflects the negative image of the alien as criminal, roaming free, with the INS helpless to stop the crime.<sup>137</sup> Additionally, the Court found that the economic costs of applying the exclusion-

<sup>132</sup> 428 U.S. 433 (1976) (examining the applicability of the exclusionary rule in federal civil tax assessment proceedings following the unlawful seizure of evidence by state officials).

<sup>133</sup> See *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1041 (1984).

<sup>134</sup> Over 97.5% of "illegal aliens" arrested by the INS agree to depart voluntarily without a formal hearing. See *id.* at 1044. Therefore, applying the exclusionary rule would not deter unlawful INS conduct because the arresting INS agent would know that, in all likelihood, the alien would not have a hearing or contest the INS conduct. See *id.* Similarly, because of the lack of constitutional protections in deportation proceedings, the *Lopez-Mendoza* Court found that the INS could establish alienage easily without the suppressed evidence: given the civil nature of the deportation proceeding, an adverse inference could be drawn from the alien's silence if he or she were questioned as to his immigration status and refused to answer. *Id.* at 1043.

<sup>135</sup> See *id.* at 1044; see also *Velasquez-Tabir v. INS*, 127 F.3d 456 (5th Cir. 1997) (applying the balancing test articulated in *Lopez-Mendoza*). The *Velasquez-Tabir* court found little deterrence value in excluding evidence provided in violation of the NLRA because an unfair labor practice committed by the employer could be sanctioned pursuant to the NLRA. See *id.* at 460. The traditional "sanctions" available to an aggrieved worker under the NLRA are backpay and/or reinstatement. See *supra* notes 95-98. However, when the aggrieved worker is undocumented, available remedies are extremely limited, and thus sanctions under the NLRA provide little deterrence to the unscrupulous employer. See *supra* notes 77-98.

<sup>136</sup> *Lopez-Mendoza*, 468 U.S. at 1046.

<sup>137</sup> *Id.* at 1047 ("The constable's blunder may allow the criminal to go free, but we have never suggested that it allows the criminal to continue in the commission of an ongoing crime. When the crime in question involves unlawful presence in this country, the criminal . . . should not go free within our borders.").

ary rule in deportation proceedings would be great.<sup>138</sup> Therefore, in light of these factors, and based on the facts of the case before it,<sup>139</sup> the *Lopez-Mendoza* Court found the exclusionary rule inapplicable.<sup>140</sup> Despite this outcome, the Court's "egregious violation" language has received much attention in the years since *Lopez-Mendoza*, as the circuit courts have struggled to decide what circumstances would justify applying the exclusionary rule in deportation proceedings.<sup>141</sup>

In *Montero*, for instance, the INS's conduct in instituting a workplace raid based solely on information that it knew or should have known was being provided in violation of the law clearly violated the NLRA. Furthermore, in committing this unfair labor practice, the employer intended not just to retaliate against individual undocumented employees,

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<sup>138</sup> *Id.* at 1048–49 (arguing that the INS needs a streamlined process for deportation since the Agency apprehends over one million deportable aliens every year).

<sup>139</sup> *Lopez-Mendoza's* arrest (and admission of unlawful presence) was the result of a warrantless, non-consensual search of his place of employment by the INS. The other petitioner in the case (*Sandoval-Sanchez*) was arrested as a result of an INS workplace raid with employer consent, and subsequent detention of workers thought to be undocumented. *Id.* at 1035–38.

<sup>140</sup> A full discussion of the applicability of the exclusionary rule to deportation proceedings is beyond the scope of this Article. The *Montero* case, however, presents an even stronger argument for the exclusionary rule than existed in the *Lopez-Mendoza* case itself. *Montero* differed from *Lopez-Mendoza* in two essential aspects. First, whereas *Lopez-Mendoza* involved solely the immigration statute, *Montero* required the court to reconcile two competing statutes. As the Supreme Court explained in *Southern Steamship Co. v. NLRB*, 316 U.S. 31 (1942), when a case involving the intersection of two federal statutes arises, the adjudicator must "accommodat[e] . . . one statutory scheme to [the] other." *Id.* at 47. Second, the *Lopez-Mendoza* Court found it significant that the INS had its own system in place for deterring Fourth Amendment violations. In contrast, the NLRA—the second statute at issue in *Montero*—has no provisions for adequately deterring unlawful conduct by employers. The remedies available for violations of the NLRA do not sufficiently deter the unscrupulous employer. See *supra* notes 94–98. But cf. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 904 (1984) ("Any perceived deficiencies in the NLRA's existing remedial arsenal can only be addressed by congressional action."); *Montero v. INS*, 124 F.3d 381, 385 (2d Cir. 1997) ("To the extent that these sanctions are insufficiently severe to deter such conduct, that concern must be addressed to the Congress and not the courts.").

<sup>141</sup> For example, the Ninth Circuit has developed an "egregious violation" exception to the general rule that the exclusionary rule does not apply in deportation proceedings. See, e.g., *Orhorhaghe v. INS*, 38 F.3d 488, 501 (9th Cir. 1994) (holding that searches and seizures "based on the unfounded and unwarranted assumption that people with certain foreign-sounding names are likely to be illegal aliens, constituted egregious Fourth Amendment violations"); *Gonzales-Rivera v. INS*, 22 F.3d 1441 (9th Cir. 1993) (holding that searches and seizures based solely on Latino appearance constitute egregious violation of Fourth Amendment); *Arguelles-Vasquez v. INS*, 786 F.2d 1433, 1435 (9th Cir. 1986) (holding that a seizure based solely on Latino appearance constitutes an "egregious violation" of the Fourth Amendment, warranting suppression under the exclusionary rule), *vacated as moot*, 844 F.2d 700 (9th Cir. 1988). For criticism of the Ninth Circuit's approach, see, for example, *Judy C. Wong, Egregious Fourth Amendment Violations and the Use of the Exclusionary Rule in Deportation Hearings: The Need for Substantive Equal Protection Rights for Undocumented Immigrants*, 28 COLUM. HUM. RTS. L. REV. 431, 434 (1997) (arguing that the Ninth Circuit's egregious violation exception is based on a tenuous reading of the dictum in *Lopez-Mendoza* and arguing instead for recognition of a substantive right to be free from racial discrimination for all persons).

but to defeat the unionization effort underway at the factory.<sup>142</sup> Even if a union has won an election, an employer that discharges undocumented workers who are key union supporters has weakened the union's bargaining power in contract negotiations. Undocumented workers will be too fearful to strike when the consequences of engaging in unionizing activities have been so emphatically demonstrated. Beyond the loss of employment, the threat of deportation alone can be an important tool for the unscrupulous employer seeking to undermine the NLRA's guarantees of workplace dignity.<sup>143</sup> Recognizing the context in which these issues arise, courts have held that an employer who calls the INS to retaliate against an employee for engaging in protected activity violates the NLRA, regardless of whether the INS responds.<sup>144</sup> However, the reason that the employer's action intimidates the workforce, and thereby undermines the goals of the NLRA, is the INS's willingness to respond.<sup>145</sup>

Furthermore, by analyzing the *Montero* situation under separate statutory regimes rather than as an integrated matter that requires the reconciliation of different statutory policies, the Second Circuit artificially separated the employer's misdeeds from the complicity of the INS. The *Montero* court's holding, that evidence obtained in violation of *Montero*'s rights was admissible in her deportation proceeding, was based upon the assumption that the INS played no role in violating the NLRA, since the employer had violated *Montero*'s rights and it was not a party to the deportation proceeding.<sup>146</sup> The court reasoned that "excluding evidence of an alien's illegal presence in the United States because the evidence was obtained in connection with the unfair labor practices of an employer is wholly inconsistent with enforcement of the INA."<sup>147</sup> The court rejected, without analysis, *Montero*'s argument that the INS's complicity was crucial to the employer's illegal activity.<sup>148</sup>

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<sup>142</sup> Paul Weiler explains that the real purpose of unlawful discharges is to break the momentum of the union's organizing campaign. "By the time the discharged employee has been reinstated, much of the union's support may have melted away, and the election may thus have been lost." Weiler, *supra* note 101, at 1788.

<sup>143</sup> Professor Bosniak notes that "[w]hile [the undocumented] formally are afforded the minimum rights of personhood under the law, they lie entirely outside the law's protections for many purposes, and they live subject to the fear of deportation at virtually all times." Linda S. Bosniak, *Opposing Prop. 187: Undocumented Immigrants and the National Imagination*, 28 CONN. L. REV. 555, 576-77 (1996) (citations omitted). She concludes, "It would be hard to find a group of people who live further at the margins, or closer to 'the bottom,' than the undocumented." *Id.* at 577.

<sup>144</sup> See *Sure-Tan*, 467 U.S. at 883.

<sup>145</sup> Perhaps as a result of *Montero*, the INS dramatically revised its internal policies for handling INS investigations in the midst of a labor dispute. See *infra* notes 165-168 and accompanying text.

<sup>146</sup> *Montero v. INS*, 124 F.3d 381, 386 (2d Cir. 1997).

<sup>147</sup> *Id.* at 385.

<sup>148</sup> See *id.* at 386. While strong policy arguments exist for excluding unlawfully provided evidence in deportation proceedings, a successful exclusionary rule defense would require a showing that the employer's unlawful actions could be imputed to the INS. An unlawful search or seizure by a private party does not violate the Fourth Amendment.

Notably, the *Montero* court failed to assess the impact of the IRCA on the employer's efforts to police the workplace. By deputizing employers to implement immigration policy in the workplace, the IRCA empowers employers to act as the INS's agents in carrying out the statutory policy. If employers are the INS's agents, then the INS must share responsibility for, or at least acknowledge a role in, the employers' misdeeds in carrying out the statutory mandate. Given that a symbiotic relationship exists between the INS and employers in effectuating immigration policies in the workplace, the court should have evaluated the actual role of the INS.<sup>149</sup> Rather than simply dismissing the employer's conduct as a private matter, the court should have recognized the relationship between these two statutory schemes and their implementation.<sup>150</sup>

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Walter v. United States, 447 U.S. 649 (1980). However, Fourth Amendment protections do attach when a private party acts as an "instrument or agent" of the state in effecting a search or seizure. *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971). The Ninth Circuit has held that the government must be involved "either directly as a participant or indirectly as an encourager" of the private citizen's actions before the private actor can be deemed an instrument of the state. *United States v. Gumerlock*, 590 F.2d 794, 800 (9th Cir. 1979) (en banc). "The requisite degree of governmental participation involves some degree of knowledge and acquiescence in the search." *United States v. Walther*, 652 F.2d 788, 792 (9th Cir. 1981) (citing *United States v. Sherwin*, 539 F.2d 1, 6 (9th Cir. 1976)). "[T]he critical factors in the 'instrument or agent' analysis are: (1) the government's knowledge and acquiescence, and (2) the intent of the party performing the search." *Id.* In *Walther*, the Ninth Circuit found that a situation in which federal agents stood guard while a hotel owner searched a guest's room was sufficient to qualify as government action. In *Montero*, determining the level of governmental knowledge and acquiescence required the court to consider the facts in the context of the union organizing drive. As *Montero* argued, the only reason for an employer to contact the INS to report its own workers would be to circumvent labor laws. *See Montero*, 124 F.3d at 385. The employer then must have intended to help the federal authorities enforce the immigration laws, since it is only through governmental enforcement of immigration laws that the employer could serve its own purposes. *See id.*

<sup>149</sup> Cf. *Montero*, 124 F.3d at 384. However, even if the court had found that the INS played a role in violating the statute, it is not clear how that would have impacted the decision. For example, in *Westover v. Reno*, 202 F.3d 475 (1st Cir. 2000), the court found that an INS agent's actions in arresting the petitioner without obtaining a warrant "appear[ed] from the record to be in direct violation of the [INA]." *Id.* at 480. Nevertheless, the court found that a "mere statutory argument" cannot invalidate removal proceedings. *Id.* "Certain actions by the INS in this case raise concerns, but in the end those actions are not relevant to the legitimate basis for the removal order." *Id.* at 477. In *Westover*, the petitioner was seeking to have the removal proceedings terminated because of unlawful INS conduct. Because the BIA did not rely upon evidence acquired at the time of the statutorily invalid arrest, the First Circuit did not have to decide the "more difficult question" as to whether unlawfully obtained evidence should be suppressed from a removal proceeding. *Id.* at 479.

<sup>150</sup> In *Velasquez-Tabir v. INS*, 127 F.3d 456 (5th Cir. 1997), the court followed *Montero* and refused to exclude evidence obtained in violation of the NLRA from an administrative INS proceeding. As in *Montero*, the court failed to realize the way in which exploitative employers utilize the INS in order to circumvent coverage guaranteed by the NLRA. The court's statement that "there may be little deterrence to employers by excluding evidence in proceedings not involving the employers," *id.* at 460, is short-sighted. The *Velasquez-Tabir* court failed to recognize that employers are able to utilize the INA as a vehicle for undermining labor law only because the INS acts upon the unlawfully obtained evidence. When the INS acts upon such evidence, it lends credence to employers' threats to notify the INS if workers attempt to unionize.

Barring the INS from using illegally obtained evidence would not create an impediment to the INS's ability to deport illegal aliens. Rather, the INS would simply be in the same position it would have been in had it not received the illegally obtained evidence.<sup>151</sup> As *Montero* illustrates, meaningful protection under the NLRA must necessarily extend beyond NLRA remedies and provide protection from deportation. *Sure-Tan* clearly demonstrates that once the INS removes workers to their home countries, no backpay or reinstatement orders are available under the NLRA, leaving the exploitative employer unpunished.<sup>152</sup> Because the courts refuse to interpret overlapping labor and immigration laws in a way that guarantees meaningful protection to all workers regardless of immigration status, changes are needed in immigration policy, legislation, or both.

#### V. PROPOSALS FOR POLICY AND LEGISLATIVE CHANGE WITHIN THE CONFINES OF THE EXISTING IMMIGRATION REGIME

The question of availability of remedies for undocumented workers under the NLRA cannot be severed from the issue of immigration status under the INA. Ultimately, the question of remedies depends upon status issues that can only be resolved by the INS. If our national labor policy seeks to protect the rights of undocumented workers, the INS, along with labor law regulating agencies, must address the current lack of meaningful remedies. INS involvement in this process is critical because providing a full remedy necessitates altering the immigration status of the undocumented worker who has been the subject of a labor law violation. Any true accommodation of regulatory schemes requires the INS to heed both Congress's admonition that the immigration law not be used to undermine or diminish labor law protections, as well as the Supreme Court's directive in *Southern Steamship Co. v. NLRB*<sup>153</sup> that an administrative agency, in carrying out its duties, should consider the overall scope of congressional purpose and accommodate "one statutory scheme to another" when necessary.<sup>154</sup>

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<sup>151</sup> In reality, the INS would not have moved to deport *Montero* were it not for the violation of the NLRA. The Agency currently conducts few workplace raids. *See supra* notes 53-56 and accompanying text. However, by continuing to perform raids in response to employer requests, the INS has eviscerated the labor law protections that Congress explicitly sought to preserve when enacting IRCA. *See supra* note 1.

<sup>152</sup> *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 903-04 (1984).

<sup>153</sup> 316 U.S. 31 (1942).

<sup>154</sup> *Id.* at 47.



A. *Prosecutorial Discretion as a Means for Harmonizing Labor and Immigration Policy*

Notwithstanding the difficulty of employing the civil exclusionary rule in cases such as *Montero*, the INS maintains the discretionary authority to disregard any information obtained in violation of labor laws. By incorporating such authority into its policies, the INS could ensure that immigration laws are not utilized to circumvent national labor policy. Additionally, such an approach would render the exclusionary rule issue moot, because the INS would not institute deportation proceedings based on information obtained in violation of labor laws. However, as explored below, the exercise of discretion is inherently precarious and susceptible to the influence of fluctuations in the economy or the political climate.

Contrary to popular belief, it is not the duty of the INS to remove all undocumented persons from the country. Rather, the INS has a significant degree of prosecutorial discretion in enforcing the immigration laws and should utilize that discretion so as not to undermine labor and employment laws.<sup>155</sup> With respect to undocumented persons, the INS already relies upon prosecutorial discretion in deciding whom actively to deport based upon an evaluation of the size of the undocumented population, the economic and humanitarian reasons underlying their entrance into this country, the economic necessity for low-wage workers in the United States, and the limited funding available to the INS for use in deportation.<sup>156</sup>

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<sup>155</sup> Administrative agencies exercise substantial discretion when prioritizing enforcement actions. See Sidney A. Shapiro & Randy S. Rabinowitz, *Punishment Versus Cooperation in Regulatory Enforcement: A Case Study of OSHA*, 49 ADMIN. L. REV. 713, 729 (1997) (examining OSHA's discretion to determine enforcement actions and arguing that inspectors should be given greater training and subsequent discretion to employ cooperative or punitive approaches depending upon the regulated entity's good faith attempt at compliance). Bo Cooper, General Counsel, INS, has recently stated that "the INS has prosecutorial discretion to place a removable alien in proceedings, or not to do so." Memorandum from Bo Cooper, General Counsel, INS 1, reprinted in 77 INTERPRETER RELEASES 961 (2000). Former INS Commissioner Doris Meissner advised that "[s]upervisors should ensure that front-line investigators understand that it is not mandatory to issue a [charging document] in every case where they have reason to believe that an alien is removable, and agents should be encouraged to bring questionable cases to a supervisor's attention." Memorandum from Doris Meissner, Commissioner, INS, to Regional Directors et al. 5 (Nov. 17, 2000) (on file with author).

<sup>156</sup> See, e.g., Memorandum from Bo Cooper, *supra* note 155, at 3.

Because . . . the INS does not have the resources fully and completely to enforce the immigration laws against every violator, it exercises prosecutorial discretion thousands of times every day. INS enforcement priorities, including the removal of criminal aliens and the deterrence of alien smuggling, are examples of discretionary enforcement decisions on the broad, general level that focus INS enforcement resources in the areas of greatest need.

*Id.*

Notwithstanding the recent legislative changes that greatly curtailed the INS's ability to exercise discretion in many areas,<sup>157</sup> the INS retains discretion in prioritizing whom to target for removal from the large class of removable aliens in the United States. Notably, Congress has left the Agency's discretion intact, while stripping courts of judicial review<sup>158</sup> and immigration judges of their discretionary ability to grant relief from deportation through the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA").<sup>159</sup> Therefore, in the new immigration re-

The majority of INS enforcement resources are devoted to preventing illegal entry, through the activities of the Border Patrol and the Inspections program. The Investigations program, which consumes fewer than one-fifth of INS enforcement resources, has the primary responsibility for identifying and apprehending those who are in the United States illegally. The Investigations program is also responsible for worksite enforcement, which includes enforcing the IRCA requirements that employers hire only U.S. citizens or authorized aliens and verifying their employment eligibility.

U.S. GEN. ACCOUNTING OFFICE, GAO/HEHS-98-20, H-2A AGRICULTURAL GUESTWORKER PROGRAM: CHANGES COULD IMPROVE SERVICES TO EMPLOYERS AND BETTER PROTECT WORKERS 31 (1997). "Worksite enforcement consumed less than 4 percent of INS enforcement activities in fiscal year 1996." *Id.* On May 22, 1998, the INS introduced new procedures to be followed during worksite raids, including requirements that INS officers issue warnings before raiding employers suspected of violating the IRCA, obtain formal approval for raids from INS headquarters or regional offices, bring along "community liaison officers," and "avoid contentious circumstances," such as raiding restaurants during lunch or dinner hours. Memorandum from Michael A. Pearson, Executive Associate Commissioner, Office of Field Operations, INS, to Regional Directors at 3, 4, attachment B at 2 (May 22, 1998), *reprinted in* 75 INTERPRETER RELEASES 987 app. (1998).

<sup>157</sup> The IIRIRA mandates detention in many instances. *See* INA § 235(b)(1)(B)(iii) (IV), 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (Supp. V 1999). In addition, the IIRIRA revokes many discretionary waivers, including those previously available to long-time lawful permanent residents facing removal because of past convictions. *See infra* note 159.

<sup>158</sup> Section 242 of the INA governs judicial review of removal orders. 8 U.S.C. § 1252 (Supp. V 1999). This section strips the federal courts of their ability to review most immigration decisions. The INA now prohibits judicial review in many instances, including the Attorney General's discretionary decisions regarding detention or release, INA § 236(e), 8 U.S.C. § 1226(e); the Attorney General's decisions regarding voluntary departure, INA § 240B(e), (f), 8 U.S.C. § 1229c(e), (f); and the Attorney General's decisions about any discretionary form of relief except asylum, INA § 242(a)(2)(B), 8 U.S.C. § 1252(a)(2)(B). In addition to removing judicial review of most immigration decisions made by the Attorney General, the INS had taken the position that the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996 and IIRIRA also stripped the federal courts of jurisdiction to rule on the legality of the statutory provisions themselves. However, in a 5-4 decision on June 25, 2001, the Supreme Court ruled that the district courts retained jurisdiction pursuant to 28 U.S.C. § 2241 (1994) to decide habeas corpus challenges involving pure questions of law. *INS v. St. Cyr*, No. 00-767, 2001 WL 703922, at \*5-\*6 (U.S. June 25, 2001). For a critique of the lack of judicial review of immigration matters, see M. Isabel Medina, *Judicial Review—A Nice Thing? Article III, Separation of Powers and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 29 CONN. L. REV. 1525 (1997); and Hiroshi Motomura, *Judicial Review in Immigration Cases After AADC: Lessons from Civil Procedure*, 14 GEO. IMMIGR. L.J. 385 (2000).

<sup>159</sup> For example, immigration judges can no longer grant discretionary relief to long-time lawful permanent residents who face deportation because of an aggravated felony. *See, e.g.*, INA § 240A(a)(3), 8 U.S.C. § 1229b(a)(3) (Supp. V 1999); INA § 240A(b)(1) (C), 8

gime, the INS's exercise of prosecutorial discretion is often the only means for averting the harsh consequences of deportation.<sup>160</sup> Pursuant to its prosecutorial authority, the INS can decide not to target certain industries for worksite raids.<sup>161</sup> Furthermore, even after issuing a charging document, the INS retains discretion to cancel removal proceedings before jurisdiction vests with the immigration court.<sup>162</sup>

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U.S.C. § 1229b(b)(1)(C) (making aggravated felons ineligible for cancellation of removal); INA § 240B(a)(1), 8 U.S.C. § 1229c(a)(1) (making aggravated felons ineligible for voluntary departure); INA § 249, 8 U.S.C. § 1259 (making aggravated felons ineligible for registry); *cf. St. Cyr*, 2001 WL 703992, at \*12-\*16 (holding that IIRIRA's revocation of discretionary relief under INA § 212(c) for criminal aliens does not apply retroactively to aliens who pleaded guilty to deportable crimes in reliance on the availability of 212(c) relief). Furthermore, section 306(a)(2) of the IIRIRA has severely curtailed judicial review of denials of discretionary relief. 8 U.S.C. § 1252.

<sup>160</sup> See Letter from Robert Raben, Assistant Attorney General, Office of Legislative Affairs, to Congressman Barney Frank (Jan. 19, 2000), *reprinted in* 77 INTERPRETER RELEASES 217, 219 (2000).

The INS exercises prosecutorial discretion with respect to many enforcement decisions. For example, the INS exercises prosecutorial discretion when deciding whether to initiate a removal case, to allow an alien to withdraw an application for admission, to grant voluntary departure, or to defer enforcement action. Similarly, the INS may parole an inadmissible alien into the United States for "urgent humanitarian reasons or significant public benefit." We also agree that more can be done to encourage these uses of prosecutorial discretion to avoid unnecessary hardship.

*Id.*

<sup>161</sup> The INS now concentrates on arresting and deporting criminal aliens, rather than deporting undocumented workers. See Uchitelle, *supra* note 59. Robert L. Bach, INS Associate Commissioner for Policy and Planning has stated that "[i]t is just the market at work, drawing people to jobs, and the I.N.S. has chosen to concentrate its actions on aliens who are a danger to the community." *Id.* INS's general counsel recently described prosecutorial discretion:

The INS has the discretionary authority not to arrest [an alien believed to be in the United States in violation of the INA], even if there is probable cause to believe he is in the United States unlawfully. If the INS encounters several aliens and has probable cause to believe all of them are present unlawfully, the INS has the discretionary authority to arrest some of them, but not others . . . .

Memorandum from Bo Cooper, *supra* note 155, at 6.

<sup>162</sup> 8 C.F.R. § 239.2(a)(7) (2000) specifies that an INS officer can cancel a notice to appear if "[c]ircumstances of the case have changed after the notice to appear was issued to such an extent that continuation is no longer in the best interest of the government." Former Commissioner Meissner explained:

Even when an immigration officer has reason to believe that an alien is removable and that there is sufficient evidence to obtain a final order of removal, it may be appropriate to decline to proceed with that case . . . . The INS may exercise its discretion throughout the enforcement process. Thus, the INS can choose whether to issue an NTA [notice to appear], whether to cancel an NTA prior to filing with the immigration court or move for dismissal in immigration court, whether to detain (for those aliens not subject to mandatory detention), whether to offer an alternative to removal such as voluntary departure or withdrawal of an application for admission, and whether to stay an order of deportation.

The INS should exercise its prosecutorial discretion to reconcile important statutory schemes, thereby effectuating meaningful workplace protection.<sup>163</sup> As *Montero* illustrates, agency discretion is necessary to avoid nullifying labor law protections. Absent formal agency recognition of the need to reconcile overlapping statutes and the importance of vigorous labor law enforcement, such discretion rests solely with the initial officer who decides whether to apprehend the undocumented worker.<sup>164</sup>

The INS has demonstrated a willingness to exercise its discretion to prevent entanglement in labor disputes by revising its operations instruction on how to handle information received during such disputes.<sup>165</sup> The operations instruction explicitly acknowledges the possibility that the INS will become entangled in labor disputes if employers use the Agency as a tool to blackmail workers. To avoid this result, INS officers receiving workplace-related complaints are instructed to inquire as to whether a labor dispute is in progress,<sup>166</sup> whether the informant is or was employed

Memorandum from Doris Meissner to Regional Directors et al., *supra* note 155, at 6 (citations omitted).

<sup>163</sup> Congress must find a way to make labor law statutes and immigration laws "compatible in practice." William J. Murphy, Note, *Immigration Reform Without Control: The Need for an Integrated Immigration-Labor Policy*, 17 SUFFOLK TRANSNAT'L L. REV. 165, 177 (1994) (arguing that the only viable and effective way to achieve such a policy is to make exploitative employers duly liable under both the NLRA and FLSA). In *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997), the Supreme Court, in interpreting a provision of Title VII of the Civil Rights Act of 1964, looked to the statute's purpose and emphasized the importance of considering practical consequences in the labor and employment context when "[m]aintaining unfettered access to statutory remedial mechanisms" is at stake. *Id.* at 346.

<sup>164</sup> Susan Martin, Director of the 1997 Commission on Immigration Reform, has pointed out that no one has responsibility for coordinating the entire removal process. Martin, *supra* note 47. According to Martin, "Often, those responsible for apprehension pick up persons whom other players in the process would consider low priorities (for example, someone who has a pending application for legal status that is likely to be approved) because they are more readily identifiable." *Id.*

<sup>165</sup> The INS's revised operations instruction states:

When information is received concerning the employment of undocumented . . . aliens, consideration should be given to whether the information is being provided to interfere with the rights of employees to form, join or assist labor organizations or to exercise their rights not to do so; to be paid minimum wages and overtime; to have safe work places; to receive compensation for work related injuries; to be free from discrimination based on race, gender, age, national origin, religion, handicap; or to retaliate against employees for seeking to vindicate these rights.

INS Operations Instructions § 287.3a (as revised in 1996).

<sup>166</sup> The operations instruction continues:

Whenever information received from any source creates a suspicion that an INS enforcement action might involve the Service in a labor dispute, a reasonable attempt should be made by Service enforcement officers to determine whether a labor dispute is in progress. The Information Officer at the Regional Office of the National Labor Relations Board can supply status information on unfair labor practice charges or union election or decertification petitions that are pending involving most private sector, non-agricultural employers. Wage and hour informa-

at the worksite in question (or by a union representing workers at the worksite); and, if applicable, whether the informant is or was employed (or is related to anyone employed) in a supervisory or managerial capacity.<sup>167</sup> The INS also instructs officers to ask the informant if the workers being reported have raised complaints or grievances about hours, working conditions, discriminatory practices, union representation or actions, or whether they have filed workers' compensation claims.<sup>168</sup>

While at first glance the operations instruction appears to reconcile the competing immigration and labor policy goals at stake, it ultimately fails because it contains no enforcement mechanism. Pursuant to the operations instruction, when an INS officer believes that information "may have been provided in order to interfere with or to retaliate against employees for exercising their rights," the officer should seek guidance from the District Counsel and approval from the Assistant District Director for Investigations or an assistant chief patrol agent.<sup>169</sup> However, the operations instruction explicitly states that "there is no prohibition for enforcing the Immigration and Nationality Act, even when there may be a labor dispute in progress."<sup>170</sup> Ultimately, the INS operations instruction falls short of harmonizing labor and immigration policy goals because the INS refuses to concede the importance of giving undocumented workers the opportunity to vindicate fully their statutory labor and employment rights. Indeed, as interpreted by the Second Circuit, "the purpose of this revision was to ensure the safety of INS agents attempting to enforce the employer sanctions provision. The [operations instruction] in no way suggests that the INS believes that undocumented aliens should be shielded from deportation simply because they are engaged in a labor dispute."<sup>171</sup>

While the revised operations instruction provides much-needed guidance, the INS's recent workplace raid and arrest of over 190 Latino workers in the midst of a unionization effort at a Nebraska meatpacking plant illustrates the instruction's shortcomings.<sup>172</sup> Despite the instruction

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tion can be obtained from the United States Department of Labor (Wage and Hour Division) or the state labor department.

*Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* The operations instruction also addresses the situation in which the INS learns of a labor dispute (or the employer's use of the immigration laws in retaliation for protected activity) only after taking action. In such a situation, the lead immigration officer must ensure to the extent possible that any aliens necessary to the prosecution of any employer violations are not removed from the country without notifying the law enforcement agency that has jurisdiction over these violations. The determination of whether to hold detainees or allow interviews by investigators or attorneys is to be made on a case-by-case basis. *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Montero v. INS*, 124 F.3d 381, 385 (2d Cir. 1997).

<sup>172</sup> See *Worker Organization Investigating INS Raid on Meatpacking Plant*, U.S.

to avoid intrusive worksite enforcement efforts when a union organizing drive is underway, the INS raided the meatpacking plant with full knowledge of the organizing effort led by the United Food and Commercial Workers International Union ("UFCW") and Omaha Together One Community.<sup>173</sup>

Unfortunately, even if the INS were to exercise its discretion by refusing to act upon information obtained in violation of the labor laws, absent the grant of employment authorization, the workers would still be left without meaningful remedies for the labor law violations.<sup>174</sup>

### *B. Deferred Action Status for Undocumented Workers Wishing to Pursue Guaranteed Labor Rights*

By using deferred action status, the INS could provide temporary immigration status and employment authorization to undocumented workers seeking protection from workplace violations.<sup>175</sup> INS guidelines initially mandated that the INS District Director recommend consideration for deferred action whenever removal "would be unconscionable because of the existence of appealing humanitarian factors."<sup>176</sup> Because of the mandatory tenor of this guideline, as well as the humanitarian factors set forth in the operations instruction, the Ninth Circuit held that deferred action existed to benefit the alien, rather than to promote administrative convenience.<sup>177</sup> Finding that deferred action most closely resembled a substantive right, the court held that the denial of deferred action would be subject to judicial review and would not stand if it were arbitrary and capricious and an abuse of discretion.<sup>178</sup> The INS subsequently shielded its deferred action decisions from judicial review by

NEWSWIRE, Dec. 7, 2000.

<sup>173</sup> In a December 5, 2000 press release by Nebraska Appleseed, the vice president of the UFCW said, "These workers [are] twice victimized—once by the greed of the packing companies and then by immigration laws that terrorize[ ] workers in the exercise of their legitimate rights under the law." *Id.*

<sup>174</sup> The INS's general counsel explained that

the fact that a violation of the immigration laws is a continuing violation leads to practical difficulties with the exercise of prosecutorial discretion. In particular, an INS decision to forego placing an alien . . . in proceedings does not cure the violation . . . .

. . . .

. . . so the alien remains in a continuing, difficult state of limbo and illegality.

Memorandum from Bo Cooper, *supra* note 155, at 10.

<sup>175</sup> "Deferred action status" refers to an administrative choice to give some cases lower priority for removal. INS Operations Instructions § 242.1A(22) (rescinded 1997).

<sup>176</sup> *Nichols v. INS*, 590 F.2d 802, 805 n.9 (9th Cir. 1979) (quoting INS Operations Instructions § 103.1(a)(1)(ii) (1975)).

<sup>177</sup> *See id.* at 807.

<sup>178</sup> *Id.* at 808.

amending its operations instruction. It is now explicitly stated that any decision as to deferred action is discretionary and that the granting of deferred action does not confer any substantive right on the alien.<sup>179</sup> The INS removed any reference to the unconscionability of the action.<sup>180</sup> The operations instruction makes clear that humanitarian factors remain a part of the consideration not because of concern for the alien, but rather because sympathy for the alien might result in negative publicity or adverse case law.<sup>181</sup>

Notably, however, the INS now takes into account whether the alien's continued presence in the United States is needed by local, state, or federal law enforcement agencies pursuing civil or criminal investigations or prosecutions.<sup>182</sup> Given the INS's stated concern with assisting in civil or criminal law enforcement activities, a strong argument can be made that deferred action status should be granted for undocumented workers who are willing to assist in prosecution of unscrupulous employers. However, because this is a discretionary decision the question still remains as to whether undocumented workers are deemed sympathetic enough to warrant a "dispensation of mercy."<sup>183</sup>

<sup>179</sup> Compare INS Operations Instructions § 103.1(a)(1)(ii) (1975) ("[The district director] shall recommend consideration for deferred action."), with INS Operations Instructions § 242.1A(22) (rescinded 1997) ("The district director may, in his or her discretion, recommend consideration of *deferred action*, an act of administrative choice to give some cases lower priority and in no way an entitlement, in appropriate cases."). The current guidelines explicitly state that "no alien has the right to deferred action." INS Standard Operating Procedures for Enforcement Officers, pt. X.

<sup>180</sup> See INS Standard Operating Procedures for Enforcement Officers, pt. X.

<sup>181</sup> See INS Operations Instructions § 242.1A(22)(C) (rescinded 1997), directing officers to consider the "likelihood that because of the sympathetic factors in the case, a large amount of adverse publicity will be generated." Currently included in the non-exclusive list of factors to be considered are "the likelihood of ultimately removing the alien"; "the presence of sympathetic factors which . . . could result in a distortion of the law"; "whether or not the individual is a member of a class of deportable aliens whose removal has been given a high enforcement priority"; and "whether the alien's continued presence in the U.S. is desired by local, state, or federal law enforcement authorities for purposes of ongoing criminal or civil investigation or prosecution." INS Standard Operating Procedures for Enforcement Officers, pt. X(B).

<sup>182</sup> INS Standard Operating Procedures for Enforcement Officers, pt. X(B).

<sup>183</sup> For eloquent language on the role of mercy in immigration decisions and the judiciary's ability to intervene when justice requires it, see *Perales v. Casillas*, 903 F.2d 1043 (5th Cir. 1990). According to the majority, "Granting an illegally present alien permission to remain and work in this country is a dispensation of mercy, and as no one is entitled to mercy, there are no standards by which judges may patrol its exercise." *Id.* at 1051. However, in a lone dissent, Judge Goldberg relied upon William Shakespeare's Portia for the meaning of mercy:

The quality of mercy is not strain'd,  
It droppeth as the gentle rain from Heaven  
Upon the place beneath: it is twice blest;  
It blesseth him that gives and him that takes;  
'Tis mightiest in the mightiest; it becomes  
The throne'd monarch better than his crown . . .  
Mercy is above this sceptred sway;

*1. The INS's Implementation of the Violence Against Women Act's Immigration Provisions as a Model for Effectuating Justice in the Workplace*

The INS's actions in the context of domestic violence exemplify the Agency's use of discretion to effectuate justice.<sup>184</sup> In response to growing concern over domestic violence in the United States, Congress enacted VAWA in 1994.<sup>185</sup> VAWA addresses the powerless situation of undocumented battered spouses. Batterers often refuse to assist the undocumented spouse in legalizing her status, thereby keeping her in fear of deportation. As with the abusive employer, the abusive spouse utilizes the immigration laws both as a sword and a shield—threatening to call the INS if the undocumented spouse leaves the relationship while at the same time violating the law with impunity, knowing the battered spouse is too fearful to report the abuse. Congress addressed the plight of such battered spouses by amending the INA to allow battered spouses of citizens or lawful permanent residents to self-petition for lawful status.<sup>186</sup>

While non-battered spouses with approved petitions filed by lawful permanent residents have no legal basis to be in this country while awaiting visas, historically the INS has not targeted them for removal.<sup>187</sup> In light of the decrease in workplace raids, the INS's current treatment of undocumented workers is somewhat similar. However, the policy decision not to target undocumented workers for removal does not provide a basis for employment authorization. In contrast, the INS has made a decision to grant battered spouses deferred action status and to allow bat-

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It is enthroned in the hearts of kings,  
It is an attribute to God himself.

*Id.* at 1053 (Goldberg, J., dissenting). In the words of Judge Goldberg, "Inspiring our constitution, mercy emanates from the empyrean, not from the executive branch, or in this case, the attorney general's scepter." *Id.* For further discussion of the moral issues animating immigration law, see *infra* Part VI.

<sup>184</sup> The INS's implementation of VAWA presents a clear example of the Agency's ability to provide discretionary relief to protect a vulnerable population. While I do not intend to equate physical violence against a spouse with exploitation in the workplace, the same principles of power and control often animate both situations.

<sup>185</sup> Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, §§ 40001-40703, 108 Stat. 1796, 1902-55.

<sup>186</sup> INA § 204(a)(1)(A)(iii), 8 U.S.C. § 1154(a)(1)(A)(iii) (1994) (spouses of citizens); INA § 204(a)(1)(B)(ii), 8 U.S.C. § 1154(a)(1)(B)(ii) (spouses of lawful permanent residents); 8 C.F.R. § 204.2(c) (2000). This self-petitioning process is an exception to the normal procedures for family-based immigration. Prior to the enactment of VAWA, the battered spouse could not gain lawful status unless the citizen or lawful permanent resident spouse petitioned the INS on her behalf. These provisions allow the abused spouse to self-petition without involving the abusive spouse.

<sup>187</sup> However, pursuant to IIRIRA, the spouses of lawful permanent residents who remain in the country without legal status face a three- or ten-year bar to admission if they depart from the United States and subsequently seek to return. See INA § 212(a)(9)(B)(i), 8 U.S.C. § 1182(a)(9)(B)(i) (Supp. V 1999).



tered spouses to apply for employment authorization while they await visas.<sup>188</sup> This ability to lawfully seek employment allows the battered spouse to remain apart from her abuser.<sup>189</sup> The INS should respond to workplace exploitation of immigrants in a similar manner.

The INS should grant deferred action status and employment authorization to undocumented workers who wish to pursue their guaranteed labor and employment rights. Enactment of such a policy is permissible under the current immigration regime, and granting deferred action status to undocumented workers seeking to vindicate labor rights is one way that the Agency could encourage exploited workers to come forward, thereby allowing for the vigorous enforcement of labor and employment laws. Additionally, the aggressive enforcement of labor and employment laws would further the underlying goals of immigration policy by making undocumented workers less appealing to employers. While such action is within the Agency's range of discretion, it is unlikely to occur unless the image of the undocumented worker is changed in our national psyche.<sup>190</sup> At present, except for the extreme cases of exploitation that receive media attention, society generally does not sympathize with undocumented workers.<sup>191</sup> Most view undocumented workers as villains who steal American jobs.<sup>192</sup> As discussed in Part VI of this

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<sup>188</sup> Pursuant to INS regulations, once a battered spouse makes a prima facie showing of eligibility for an approved petition, the INS grants deferred action status. See 8 C.F.R. § 204.2(c) (2000). Once the INS grants deferred action status, the applicant may be granted employment authorization upon a showing of economic necessity. 8 C.F.R. § 274a.12(c)(14) (2000).

<sup>189</sup> While one could argue that battered spouses of lawful permanent residents gain an advantage not afforded to non-battered spouses of lawful permanent residents, in reality, the INS can only deport a small percentage of deportable aliens and must therefore make policy decisions about which aliens to target.

<sup>190</sup> See *infra* Part VI.C.

<sup>191</sup> The case of the forty-nine abused deaf Mexicans who were forced to sell trinkets on the subway, turn over their wages, and live in slave-like conditions in Queens exemplifies the extreme cases that attract media attention. The undocumented workers were held in detention for a year while assisting in the prosecutions of their eight bosses. Ultimately, after aggressive efforts by counsel for the American Civil Liberties Union and immigrant rights advocates, the government agreed to allow the Mexicans to remain in the United States. Mirta Ojito, *U.S. Permits Deaf Mexicans, Forced to Peddle, to Remain*, N.Y. TIMES, June 20, 1998, at A1 [hereinafter Ojito, *U.S. Permits Deaf Mexicans to Remain*]; Mirta Ojito, *Out of Servitude, Deaf Mexicans Languish in Limbo of Motel*, N.Y. TIMES, Mar. 22, 1998, § 1, at 35 [hereinafter Ojito, *Out of Servitude*].

<sup>192</sup> See, e.g., THE FED'N FOR AM. IMMIGRATION REFORM, IMMIGRATION AND JOB DISPLACEMENT (1999), <http://www.fairus.org/html/04172910.htm> ("The critical potential negative impacts of immigrants are displacement of incumbent worker groups from their jobs and wage depression for those who remain in the affected sectors." (quoting INS, THE TRIENNIAL COMPREHENSIVE REPORT ON IMMIGRATION (1999))). According to the Federation for American Immigration Reform, "immigration has been responsible for forty to fifty percent of the wage depression in recent decades." *Id.*; see also PETER BRIMELOW, ALIEN NATION, at xv (1995). Brimelow characterizes current immigration policy as "Adolf Hitler's posthumous revenge on America" and refers to the assertion that immigration benefits the economy as a myth. *Id.* at 139. According to Brimelow, recent immigrants are much more likely to drain resources than to contribute to the economy. See *id.* at 151-

Article, until society reconceptualizes the moral, economic, and political dimensions of migration, the immigration regime will continue to focus on combating undocumented immigration.<sup>193</sup>

## 2. *Rewarding Lawbreakers or Pursuing Important Labor Policy Goals?*

Critics will quickly characterize the grant of employment authorization (whether temporary or permanent) to undocumented workers as a reward for lawbreakers. Whereas VAWA offers a remedy to family-based immigrants who presumably would have obtained legal status but for the abusive spouse's refusal to commence the petition process, my proposal could be viewed as "rewarding" undocumented workers who would not have obtained legal status but for their employer's unlawful actions. My response to this characterization of my proposal is twofold: First, characterizing enforcement of labor and employment laws as "rewarding" undocumented workers is problematic.<sup>194</sup> The only way to strictly enforce

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52. Julian Simon, however, argues that the influx of immigrants into the U.S. workforce may actually decrease the unemployment rates in the nonimmigrant population because immigrant consumption benefits the entire economy. JULIAN SIMON, *THE ECONOMIC CONSEQUENCES OF IMMIGRATION* 225-35 (1999). Likewise, because many immigrants start their own businesses, the rhetoric suggesting that newly arriving undocumented workers displace or adversely affect the wages of citizen workers is misguided. *Id.* at 78-79, 262. Moreover, because undocumented workers tend to shy away from governmental assistance programs for fear of being apprehended and because of the 1996 changes in the INA that disqualify such immigrants from receiving public benefits, illegal immigration often results in a net overall gain to the national economy. *Id.* at 314, 318-19. Simon further argues that the federal income tax and Social Security contributions of undocumented workers "considerably exceed[ed] the cost of the services they use[d]." *Id.* at 318; *see also* CASTLES & MILLER, *supra* note 44 at 182 (noting that the last twenty years of literature supports the notion that "immigration causes no crowding-out on the labor market and does not depress the income of nationals" (quoting *TRENDS IN INTERNATIONAL MIGRATION: ANNUAL REPORT 1993* (1994))); Edward P. Lazear, *Diversity and Immigration*, in *ISSUES IN THE ECONOMICS OF IMMIGRATION* 117, 131 (George Borjas ed., 2000) (using census data to demonstrate the overall economic benefit of immigration due to increased consumption and international movement of goods). *See generally* ARGUING IMMIGRATION (Nicolaus Mills ed., 1994).

<sup>193</sup> *See, e.g.*, Johnson, *supra* note 22, at 1218. Professor Johnson notes that while untrue, the conventional wisdom about "illegal aliens" (i.e., that they take jobs, victimize citizens, and strain social services) persists and influences lawmakers and policymakers. *Id.* Such views persist because the undocumented live in isolation and secrecy, due to the omnipresent threat of deportation, and Johnson argues that the popular image will not be transformed until the undocumented can overcome the state of fear in which they live. *Id.* at 1232; *see also* Kevin R. Johnson, *An Essay on Immigration, Citizenship, and U.S./Mexico Relations: The Tale of Two Treaties*, 5 SW. J.L. & TRADE AM. 121, 125 (1998).

<sup>194</sup> For a discussion of the problems inherent in characterizing employment rights for undocumented workers as a "reward" for illegal immigration, *see* Peter Margulies, *Stranger and Afraid: Undocumented Workers and Federal Employment Law*, 38 DEPAUL L. REV. 553 (1989). Professor Margulies argues that "[b]y focusing on undocumented workers, the reward theory neglects the role of domestic employer demand in promoting illegal immigration." *Id.* at 555. According to Margulies, "Instead, the effect of employment law remedies on employer demand for undocumented labor should shape the interac-

employment and labor laws is to empower all workers to report employers who violate the law.<sup>195</sup> While initially it might appear that undocumented workers are being rewarded because they have been victimized by unfair labor practices, the effect of an INS policy to ignore evidence that results from an unfair labor practice,<sup>196</sup> or to grant deferred action status, would be to lessen the financial incentive for employers to hire undocumented workers, thereby furthering the goals of immigration law.<sup>197</sup>

Second, to the extent that providing discretionary status and employment authorization to undocumented workers is viewed as a reward,

tion of immigration policy and employment law." *Id.*

<sup>195</sup> The Department of Labor and the INS recently acknowledged the broader policy purposes served by guaranteeing confidentiality in complaint-driven labor investigations. On November 23, 1998, the Department of Labor's Employment Standards Administration ("ESA") entered into a memorandum of understanding with the INS. Pursuant to this agreement, Labor Department investigators, when responding to workers' complaints alleging labor violations, will no longer refer suspected violations of immigration laws to the INS. Memorandum of Understanding to Enhance Worksite Enforcement Sanctions and Labor Standards (Nov. 23, 1998), <http://www.ins.usdoj.gov/graphics/publicaffairs/backgrounds/laborbg.htm>.

<sup>196</sup> Such a policy could be modeled on the existing statutory provision that precludes the INS from removing a battered spouse based solely upon information provided by the abuser. Section 384(a) of the IIRIRA provides:

[I]n no case may the Attorney General, or any other official or employee of the Department of Justice (including any bureau or agency of such Department)—

(1) make an adverse determination of admissibility or deportability of an alien . . . using information furnished solely by—

(A) a spouse or parent who has battered the alien or subjected the alien to extreme cruelty.

8 U.S.C. § 1367(a) (Supp. V 1999).

<sup>197</sup> This same tension between rewarding undocumented workers by allowing them to receive remedies related to their illegal employment and rewarding employers who hire undocumented workers by granting them immunity from the requirements of labor statutes plays out in the context of workers' compensation cases as well. *See, e.g., Reinforced Earth Co. v. Workers' Comp. Appeal Bd. (Astudillo)*, 749 A.2d 1036 (Pa. Commw. Ct. 2000). In *Astudillo*, an employer challenged an award of the Workers' Compensation Appeal Board to an undocumented worker, arguing that even if benefits were not precluded by the IRCA, the court should employ a public policy exception that had been previously applied to preclude benefits in the context of an escaped prisoner. *Id.* at 1038. In an earlier case, the court held that to grant workers' compensation benefits to an escaped prisoner would have rewarded him for his prison escape, in contravention of public policy. *Graves v. Workmen's Comp. Appeal Bd. (Newman)*, 668 A.2d 606 (Pa. Commw. Ct. 1995). In rejecting the employer's call to extend the escaped prisoner exception to the context of undocumented workers, the court stated that

it would not serve "public policy" to deny workers' compensation benefits to an illegal alien merely because of their immigration status . . . . Further, to do so would potentially subvert any public policy against illegal immigration because employers may actively seek out illegal aliens rather than citizens or legal residents because they will not be forced to insure against or absorb the costs of work-related injuries.

*Astudillo*, 749 A.2d at 1039.

it is also important to note that immigration status has frequently been conferred as a reward in the past. For example, 55,000 people per year are awarded permanent residency by winning a lottery.<sup>198</sup> The IRCA provided a broad amnesty program that allowed undocumented workers who had resided in the United States for at least four years to obtain permanent residency.<sup>199</sup>

Similarly, in certain instances, the INS has allowed undocumented immigrants to remain in the country, either temporarily or permanently, in exchange for their assistance in prosecuting unscrupulous employers who have abused them. A recent example of this involves the highly publicized case of deaf undocumented Mexicans who were forced to work long days peddling trinkets on the New York City subways for grossly subminimal wages. The Mexicans were enslaved, living in substandard overcrowded apartments, and were subject to beatings if they did not sell enough trinkets.<sup>200</sup> This situation persisted until one of the undocumented workers risked deportation by going to the police with a note requesting help.<sup>201</sup> After a raid on the apartments where they were housed, these undocumented workers were taken into INS custody, where they remained for a year while the ringleaders were criminally prosecuted.<sup>202</sup> In return for assisting in the criminal prosecutions, the undocumented workers were rewarded with lawful immigration status<sup>203</sup> pursuant to the "S" visa category.<sup>204</sup>

<sup>198</sup> See INA § 201(e), 8 U.S.C. § 1151(e) (1994); INA § 203(c), 8 U.S.C. § 1153(c).

<sup>199</sup> INA § 245A, 8 U.S.C. § 1255a (1994).

<sup>200</sup> Ojito, *U.S. Permits Deaf Mexicans to Remain*, *supra* note 191.

<sup>201</sup> Ojito, *Out of Servitude*, *supra* note 191.

<sup>202</sup> Ojito, *U.S. Permits Deaf Mexicans to Remain*, *supra* note 191.

<sup>203</sup> *Id.*

<sup>204</sup> The "S" visa has been referred to as a "snitch" visa. A state or federal law enforcement agency must apply for the visa on the alien's behalf, certifying the need for and nature of the proposed cooperation, and providing certain required information. The Attorney General must then make certain findings before the application can be submitted to the INS. Included within the necessary findings are the requirements that the alien possess "critical reliable information concerning a criminal organization or enterprise," that the alien is willing to testify, and that the alien's presence in the United States is essential to the criminal investigation or prosecution. INA § 101(a)(15)(S), 8 U.S.C. § 1101(a)(15)(S) (1994). If the INS approves the application, the alien may be admitted for three years. INA § 214(k)(3), 8 U.S.C. § 1184(k)(3) (Supp. V 1999). After admission pursuant to an "S" visa, if the alien has supplied information that has substantially contributed to the success of a criminal or terrorist investigation or prosecution, the Attorney General may adjust the alien's status to that of a lawful permanent resident. INA § 245(j), 8 U.S.C. § 1255(j) (Supp. V 1999). No more than 200 aliens per fiscal year can receive "S" visas to assist in criminal prosecutions. INA § 214(k)(1), 8 U.S.C. § 1184(k)(1) (Supp. V 1999). No more than fifty aliens per fiscal year can receive "S" visas to assist in terrorist prosecutions. *Id.*; see also Christina M. Ceballos, Comment, *Adjustment of Status for Alien Material Witnesses: Is It Coming Three Years Too Late?*, 54 U. MIAMI L. REV. 75 (1999). Ceballos argues against the INS's position that the recipient of an "S" visa must wait three years before being able to adjust status to lawful permanent resident. *Id.* at 89. Ceballos critiques the waiting period as an arbitrary INS policy not required by statute or regulation that causes dire consequences for alien material witnesses and their families, who must wait to become permanent residents. *Id.* at 91, 95; see also Constance Emerson Crooker, *The "S"*

*C. Providing Lawful Status in Exchange for Assistance in Labor Law Prosecutions: Using the "S" and "T" Visas as Models for Congressional Action*

Because of the uncertainties associated with relying upon the INS to exercise its discretion in order to further labor law policies, Congress should create a new visa category to provide immigration status to workers seeking to vindicate their rights under labor laws. Adding to the existing "S" visa, which provides status in exchange for assistance in criminal prosecutions,<sup>205</sup> former President Clinton signed legislation creating a new "T" visa for victims of human trafficking.<sup>206</sup> In an effort to combat human trafficking, the new visa category protects from traffickers victims who are forced into the sex trade or involuntary servitude under threat of reprisals and deportation. The models of the "S" and "T" visas provide a useful framework for the labor law context. As with criminal prosecution, undocumented workers who are willing to assist in prosecuting employers for civil, labor, or employment law violations should be given lawful immigration status in return.<sup>207</sup> Amending the INA in such a

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*Stands for Snitch*, CHAMPION, Nov. 1997, at 29 (urging criminal defense attorneys to pursue "S" visas for undocumented clients when the prosecution wants their testimony).

<sup>205</sup> See *supra* note 204.

<sup>206</sup> See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 107(e)(1), 114 Stat. 1464, 1477. Section 107(e) provides for the "Protection and Assistance for Victims of Trafficking" through the creation of a new nonimmigrant "T" visa for an alien who is a victim of trafficking in persons; is in the United States as a result of having been trafficked here; has assisted in the investigation or prosecution of trafficking or is under fifteen years of age; and would suffer extreme hardship upon removal. 8 U.S.C.A. § 1101(a)(15)(T)(i) (West 2001). The legislation contains an annual cap of 5000 "T" visas for trafficking victims. *Id.* § 1184(n)(2). Pursuant to section 107(f), the Attorney General has the authority to adjust the status of a "T" visa holder to that of a permanent resident if the alien has been physically present for a continuous period of at least three years since the granting of a "T" visa; "has, throughout such period, been a person of good moral character"; has assisted in the investigation or prosecution of trafficking acts; or would suffer extreme hardship upon removal. *Id.* § 1255(l)(1). An annual cap of 5000 is also placed on adjustment of status for trafficking victims. *Id.* § 1255(l)(3)(A).

<sup>207</sup> This proposal is similar to one recently advanced by the AFL-CIO, which formerly was a strong supporter of the IRCA's enactment but now is a firm believer that "employer sanctions, as a nationwide policy applied to all workplaces, has failed and should be eliminated." AFL-CIO, *Executive Council Actions—Immigration* (Feb. 16, 2000), <http://www.afcio.org/publ/estatemnts/feb2000/immigr.htm>. The AFL-CIO seeks

the enactment of whistleblower protections providing protected immigration status for undocumented workers who report violations of worker protection laws or cooperate with federal agencies during investigations of employment, labor and discrimination violations. Such workers should be accorded full remedies, including reinstatement and backpay. Further, undocumented workers who exercise their rights to organize and bargain collectively should also be provided protected immigration status.

*Id.* At the same time, the labor umbrella organization is urging the adoption of criminal penalties "to punish employers who recruit undocumented workers from abroad for the

way would be consistent with the goals of the IRCA. The IRCA was premised upon the belief that the only way to deter illegal immigration is to penalize the employer. Actively prosecuting employers who exploit undocumented workers would reduce the incentive to hire undocumented workers.<sup>208</sup>

Providing undocumented workers with employment authorization (even if only during the pendency of an NLRB investigation) would render many of the legal issues arising from the tension between labor and immigration law moot. For example, if undocumented workers were given employment authorization, they would be entitled to traditional remedies under the NLRA, and the INS would be free to commence removal proceedings after the NLRB matter is resolved and the temporary authorization expires.<sup>209</sup> There would be less incentive for employers to violate the NLRA if they faced the threat of having to pay backpay awards to aggrieved workers. The workers would not have permanent legal status, but would have a tool to redress violations of their statutory rights. Furthermore, both the INS and the aggrieved workers would face the same conditions they would have faced but for the employer's unlawful conduct.

For example, in a situation such as the one present in *Montero*, the employer's call to the INS would trigger INS contact with the NLRB in order to determine, per the INS's revised operating instruction, whether a labor dispute was underway.<sup>210</sup> The NLRB would then sponsor the employees in seeking status and employment authorization. This employee protection could be achieved through deferred action status or could instead be modeled on the existing "S" or "T" visa categories that allow

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purpose of exploiting workers for economic gain." *Id.*

<sup>208</sup> See Ontiveros, *supra* note 27, at 629. According to Professor Ontiveros, the number of undocumented people entering the United States will not decline until job opportunities decrease or until undocumented workers become prohibitively expensive to employ. *Id.* Assuming the country truly wants to stem the tide, fewer undocumented workers will be employed only if employers are punished fully for exploiting them. Subjecting discriminating employers to costly remedies serves the underlying purpose of the IRCA because doing so reduces job opportunities for undocumented immigrants and thus reduces their incentive to illegally immigrate. *Id.*

<sup>209</sup> As a practical matter, given INS priorities regarding whom to deport, it is unlikely that the undocumented workers would ultimately be placed in removal proceedings. Rather, such undocumented workers would be in the same position they were in prior to the employer's unfair labor practices. However, this approach still leaves undocumented workers vulnerable to deportation, *see supra* note 143 and accompanying text, a result that runs counter to principles of community membership and justice, *see infra* Part VI.C. Indeed, it has been argued that those who are employed in the United States should be entitled to permanent lawful immigration status. *See, e.g.,* Jenny Schulz, *Grappling with a Meaty Issue: IIRIRA's Effect on Immigrants in the Meatpacking Industry*, 2 J. GENDER RACE & JUST. 137, 159 (1998) (proposing a system whereby anyone working in the United States would be given the opportunity to obtain permanent legal status, with every employer limited to a reasonable number of new employees per year). The AFL-CIO has also called for a broad amnesty for undocumented workers. AFL-CIO, *supra* note 207.

<sup>210</sup> *See supra* notes 165-168 and accompanying text.

witnesses in criminal prosecutions to obtain visas if they are sponsored by a law enforcement organization or are necessary for the prosecution.<sup>211</sup> The workers would be legally available for work and therefore entitled to traditional NLRA remedies. While employers could raise the temporary nature of the employees' availability as a defense to a reinstatement order in a compliance proceeding, backpay would not be tolled. The issue of the admissibility into deportation proceedings of evidence that was gained by unfair labor practices would thus be moot.<sup>212</sup>

## VI. THE MORALITY OF PUNISHING WORKERS BECAUSE OF IMMIGRATION STATUS

Thus far, I have presented proposals for advancing labor policy without fundamentally altering the existing immigration regime. However, absent a reconceptualization of the relationship between work and membership, immigration enforcement goals will continue to trump workplace justice. While this Article does not address the broader question of what our overall immigration policy goals ought to be,<sup>213</sup> my proposals

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<sup>211</sup> See *supra* notes 204, 206.

<sup>212</sup> In 1995, immigration and labor advocates representing migrant farmworkers and other low-wage immigrant workers urged the NLRB, the Department of Labor, and the INS to enact a similar policy to protect undocumented workers who wished to file labor complaints. The advocates called upon the INS to grant temporary immigration status to aggrieved undocumented workers who would be witnesses or plaintiffs in labor actions. In the case of undocumented workers who were out of the country, the advocates urged INS to grant parole status so that the workers could lawfully reenter for trial or deposition. See Letter from Rebecca Smith, Attorney, Evergreen Legal Services et al., to Maria Echaveste, Administrator, Wage and Hour Division, U.S. Dep't of Labor et al. 6 (Jan. 4, 1995) (on file with author). The proposal was modeled on the anti-retaliation provisions of the Migrant and Seasonal Agricultural Worker Protection Act ("AWPA"), 29 U.S.C. § 1855(a) (1994). The AWPA's anti-retaliation provision provides that

No person shall intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any migrant or seasonal agricultural worker because such worker has, with just cause, filed any complaint or instituted, or caused to be instituted, any proceeding under or related to this chapter, or has testified or is about to testify in any such proceedings, or because of the exercise, with just cause, by such worker on behalf of himself or others of any right or protection afforded by this Act.

*Id.* The proposed language reads:

Any worker who has, with just cause, filed any complaint or instituted or caused to be instituted any proceeding for the enforcement of his or her rights under any state or federal labor protective statute or has testified or is expected to testify in any proceedings, or communicated to any person his or her intention to initiate such proceedings, shall be granted voluntary departure and work authorization pursuant to 8 C.F.R. § 274a.12(c)(12) for the time in which his or her presence in the United States is necessary, including deposition, hearing or trial.

Letter from Rebecca Smith et al. to Maria Echaveste et al., *supra*.

<sup>213</sup> My focus in this Article is limited to the treatment of undocumented workers within

are premised on the notion that immigration enforcement goals should cede to labor law policy. The question then becomes why work should outweigh the competing societal interest in regulating immigration.

### A. *The Role of Work in Forging Communities*

Work has been described as “a fundamental dimension of human existence”<sup>214</sup> that “can instill a purpose to life and imbue it with meaning.”<sup>215</sup> Thus, beyond its remunerative value, work affords a means to self-worth and dignity.<sup>216</sup> Various international human rights instruments recognize work as a fundamental human right.<sup>217</sup> Religious leaders have

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our borders. In urging those who oppose subordination of undocumented workers to address also broader questions of whether our borders should be regulated at all, Professor Bosniak warns that “[t]he two commitments (against marginalization of persons and for borders around the community) are mutually incompatible, at least where the status of the undocumented immigrants are concerned.” Bosniak, *supra* note 143, at 593. Bosniak also emphasizes, “Addressing the status of undocumented immigrants requires progressives—activists and scholars alike—to confront important tensions within our own commitments . . . concerning the normative significance of national boundaries.” *Id.* at 559. *But see* Owen Fiss, *The Immigrant as Pariah*, in *A COMMUNITY OF EQUALS: THE CONSTITUTIONAL PROTECTION OF NEW AMERICANS 3* (Joshua Cohen & Joel Rogers eds., 1999). Fiss explicitly states that his essay criticizing laws barring immigrants from working, receiving social benefits, or obtaining educational benefits is not meant to “surreptitiously question[ ] the validity of laws regulating the admission of immigrants to this country. . . . My point is not to subvert the admission process or otherwise open the borders, but rather to insist that laws regarding admission cannot be enforced or implemented in ways that would transform immigrants into pariahs.” *Id.* at 16.

<sup>214</sup> David L. Gregory, *Catholic Labor Theory and the Transformation of Work*, 45 WASH. & LEE L. REV. 119, 130 (1988).

<sup>215</sup> C. John Cicero, TNS, Inc.—*The National Labor Relations Board’s Failed Vision of Worker Self-Help to Escape Longterm Health Threats from Workplace Carcinogens and Toxins*, 24 STETSON L. REV. 19, 80 (1994).

<sup>216</sup> In the words of Howard Lesnick, “the central idea of [an alternative consciousness of work] is that part of your being a person is bound up with wanting to work, with wanting to be useful, with wanting to express your energy, your creativity, your connection to other people.” *Id.* at 90 (quoting Howard Lesnick, *Artists, Workers and the Law of Work: Keynote Address*, 16 J. ARTS MGMT. & L. 39 (1986)).

<sup>217</sup> *See, e.g.*, International Covenant on Economic, Social and Cultural Rights, Jan. 3, 1976, art. 6, 993 U.N.T.S. 3 (“The States Parties to the present Covenant recognize the right to work.”); Universal Declaration of Human Rights, art. 23, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., Supp. No. 13, at 71, 74, U.N. Doc. A/810 (1948) (“Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment. . . . Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity.”); RYSZARD CHOLEWINSKI, *MIGRANT WORKERS IN INTERNATIONAL HUMAN RIGHTS LAW: THEIR PROTECTION IN COUNTRIES OF EMPLOYMENT* (1997); Neil A. Friedman, Comment, *A Human Rights Approach to the Labor Rights of Undocumented Workers*, 74 CAL. L. REV. 1715 (1986); Berta Esperanza Hernandez-Truyol & Kimberly A. Johns, *Global Rights, Local Wrongs, and Legal Fixes: An International Human Rights Critique of Immigration and Welfare “Reform,”* 71 S. CAL. L. REV. 547, 549, 587 (1998) (arguing that the right to work embodies a right to fair working conditions, fair wages, and protection from unemployment, and describing the juxtaposition of the two narratives of immigration to the United States as welcomeness and exclusion); *see also* Alan A. Stevens, Comment, *Give Me Your Tired, Your Poor, Your Destitute Laborers Ready to Be Exploited: The Fail-*



gone so far as to define unionization as "an objective duty" and the "only effective way of assuring the protection of human dignity and self-determination in the workplace."<sup>218</sup> Similarly, the right to unionize has been hailed as a fundamental human and civil right.<sup>219</sup> Work is also "a source of community,"<sup>220</sup> and its influence extends beyond the individual or the workplace and permeates and shapes the broader society.<sup>221</sup> Furthermore, because "work creates a moral environment, and its influence extends to nearly every sphere of life,"<sup>222</sup> the regulations applied to the workplace impact and embody our social values.<sup>223</sup>

### *B. The Resurgence of the Labor Movement and Its Changing Relationship with Undocumented Workers*

The NLRA was enacted to allow workers to gain equality in the workplace.<sup>224</sup> Representing the most radical of all the New Deal legisla-

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*ure of International Human Rights Law to Protect the Rights of Illegal Aliens in American Jurisprudence*, 14 EMORY INT'L L. REV. 405 (2000) (critiquing the failure both of international human rights laws and of employment antidiscrimination laws to protect undocumented workers from abuse); Fang-Lian Liao, Note, *Illegal Immigrants in Garment Sweatshops: The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights*, 3 SW. J.L. & TRADE AM. 487 (1996). Liao argues that illegal immigrants in sweatshops should be considered enslaved pursuant to the prohibition against slavery and servitude found in Article 4 of the Universal Declaration of Human Rights "when they have no choice but to work in atrocious conditions" or to be "reported to the authorities and deported." *Id.* at 502. "Sweatshops are breeding grounds for the enslavement of human beings, and as such, those individuals who condone or turn a blind eye to sweatshops are promoting slavery." *Id.*

<sup>218</sup> Statement of Southern U.S. Bishops on J.P. Stevens Company, Seton Hall University Institute on Work, <http://www.shu.edu/programs/work/CathTch.html> (last visited Mar. 12, 2001).

<sup>219</sup> See David L. Gregory, *The Right to Unionize as a Fundamental Human and Civil Right*, 9 MISS. C. L. REV. 135, 149 (1988).

<sup>220</sup> C. John Cicero, *The Classroom as Shop Floor: Images of Work and the Study of Labor Law*, 20 VT. L. REV. 117, 124 (1995).

<sup>221</sup> James A. Gross, *The Broken Promises of the National Labor Relations Act and the Occupational Safety and Health Act: Conflicting Values and Conceptions of Rights and Justice*, 73 CHI.-KENT L. REV. 351, 379 (1998) ("The primary purpose of a national labor policy should be to find a moral basis for achieving human dignity, solidarity, and justice for all parties at the workplace and in the larger communities affected by what goes on at the workplace."). As Professor Vicki Schultz explains, "Just as paid work has been a crucial component of citizenship, it has also been an important building block for community. . . . The rhythms, social relationships, and institutions of work provide important foundations for community stability." Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1888 (2000).

<sup>222</sup> Thomas C. Kohler, *The Overlooked Middle*, 69 CHI.-KENT L. REV. 229, 233 (1993) (citation omitted).

<sup>223</sup> See, e.g., Schultz, *supra* note 221, at 1928-29 (suggesting that paid work is "the only institution that can be sufficiently widely distributed to provide a stable foundation for a democratic order"). According to Schultz, work is one of the only institutions in which diverse groups of people can gain respect for one another through shared experiences. *Id.* at 1885.

<sup>224</sup> See Gross, *supra* note 221, at 351-52 (arguing that protecting the right of workers to participate in decisions affecting their workplace lives is essential to democracy, and

tion,<sup>225</sup> the NLRA was meant to "expand[ ] the political freedom of workers and the democratic control that they exercise over their productive and social lives."<sup>226</sup> However, within three years of the NLRA's enactment, the Supreme Court began a process that has been referred to as the "deradicalization" of labor law.<sup>227</sup> While union membership in the mid-1950s comprised nearly 35% of non-agricultural workers,<sup>228</sup> by 1980, the union density rate had dropped to 21%,<sup>229</sup> and by 1996, private-sector union membership comprised merely 10.2% of non-agricultural workers.<sup>230</sup> The decline of the labor movement has been attributed to diverse factors including employer hostility;<sup>231</sup> adverse decisions from the judi-

critiquing the NLRA and OSHA, explaining why each has failed to live up to its initial promises). In analyzing the underlying values of the NLRA when enacted, Gross comments that "[t]he NLRA . . . confirmed that a fully human life requires . . . rights to meaningful work; . . . to pay sufficient to ensure a life of human dignity for a worker and his or her family; to form and join labor organizations; and to participate in the workplace decisions affecting their lives." *Id.* at 377.

<sup>225</sup> See Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978).

<sup>226</sup> Raskin, *supra* note 95, at 1073. Raskin describes the state of working conditions on the eve of the NLRA's passage:

[A] bare fifteen percent of the private sector work force belonged to a union. In those days when the doctrine of employment at-will was king and unions had no legal standing on corporate property, employers resisting union drives could simply fire pro-union workers, lock labor organizers out of the corporate premises, threaten the work force, refuse to bargain, and if worse came to worst, drive the workers out on strike and hire permanent replacements. Leaving aside the ready option of criminal violence against insubordinate employees, employers had at their disposal a full panoply of effective union-busting techniques completely lawful within the regime of contract and property rights.

*Id.* at 1067-68 (citations omitted).

<sup>227</sup> See Klare, *supra* note 225. Cicero explains that beginning with *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938), the Supreme Court "sent a reassuring message to industrialists that the order of the workplace had not changed radically and that the prerogatives of production and ownership remained intact." Cicero, *supra* note 215, at 76. According to Cicero, "Although section 13 of LMRA explicitly provides that the law should not be 'construed so as either to interfere with or impede or diminish in any way the right to strike,' the *Mackay Radio* Court relied on unspoken but preexisting premises concerning 'inherent' employer rights to do exactly that." *Id.*

<sup>228</sup> Charles B. Craver, *Why Labor Unions Must [and Can] Survive*, 1 U. PA. J. LAB. & EMP. L. 15, 16 (1998).

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> See Klare, *supra* note 225, at 291. Klare concludes that

the indeterminacy of the text and legislative history of the Act, the political circumstances surrounding its passage, the complexity and fluidity of working-class attitudes toward collective bargaining and labor law reform during the period, and the hostility and disobedience of the business community make it clear that there was no coherent or agreed-upon fund of ideas or principles available as a conclusive guide in interpreting the Act. The statute was a texture of openness and divergency, not a crystallization of consensus or a signpost indicating a solitary direction for future development.

ary and the NLRB;<sup>232</sup> congressional failure to legislate, appropriate, and investigate the shortcomings in enforcement of the NLRA;<sup>233</sup> inadequate remedies;<sup>234</sup> globalization of the economy;<sup>235</sup> and organized labor's failure to reach out to the changing workforce (including both women and immigrants).<sup>236</sup>

As part of its recent resurgence, organized labor has made a complete about-face in the way it views immigrants in the workplace. While the AFL-CIO was one of the biggest supporters of the IRCA legislation,

*Id.*; Weiler, *supra* note 101, at 1779–81 (documenting the dramatic increases in employer violations of the NLRA). Weiler concluded that “[s]uch a widespread pattern of employer intimidation has ramifications that reach far beyond the units in which discharges actually occur. It fosters an environment in which employees will take very seriously even subtle warnings about the consequences of joining a union.” *Id.* at 1781.

<sup>232</sup> See Gross, *supra* note 221, at 358 (pointing to the Reagan (and subsequent Bush) administration's anti-regulatory ideology and noting that “a presidential administration can make or change agency policy without legislative action through its power to appoint agency members”); Klare, *supra* note 225; see also JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 4 (1983). Atelson argues that courts have relied upon “unexamined values and unarticulated assumptions” to construe narrowly workers' rights under the NLRA. *Id.* For example, notwithstanding section 7's unconditional grant to employees of the right to engage in collective action, unauthorized strikes are either prohibited or limited to a narrow set of circumstances. *Id.* According to Atelson, this dissonance between the statute's broad language and “labor law” as interpreted by the courts can be explained by the “unexpressed assumptions that production must be maintained and that the integrity of the bargaining system must be protected even from expressions of employee outrage.” *Id.*

<sup>233</sup> See Gross, *supra* note 221, at 360–63 (while it has been clear since enactment of the NLRA that the remedies available were insufficient to achieve the Act's goals, Congress has failed to enact stronger sanctions for violations of the NLRA).

<sup>234</sup> See Weiler, *supra* note 101, at 1774 (stating that the remedies available under the NLRA do not and cannot “stem the resulting tide of abuses” and advocating major reform of the representation system); see also Raskin, *supra* note 95, at 1085–87. Raskin also advocates radical changes in the remedial arsenal for violations of the NLRA. For example, Raskin calls upon Congress to utilize a rebuttable presumption that any employer discharge of workers during an organizing campaign is unlawful and therefore barred. *Id.* at 1085. Raskin continues his legislative call for action by stating that “to fortify this system of burden shifting, Congress should amend the Racketeer Influenced and Corrupt Organizations Act (RICO) to make violation of section 8(a)(3) of the Wagner Act a predicate act sufficient to trigger the RICO statute.” *Id.* at 1086. According to Raskin,

This change would classify two or more serious unfair labor practices as a pattern of “racketeering activity,” giving U.S. Attorneys the power to prosecute offenders, seize property “acquired or maintained” in violation of law, and invoke RICO's forfeiture provisions. It also would give “any person injured” as a result of the business' pattern of unfair labor practices, such as workers illegally fired, an action for treble damages.

*Id.* (citations omitted). In the immigration context, corporations and individuals providing janitorial and custodial services (unsuccessfully) attempted to utilize the RICO statute to punish a competitor company for an alleged practice of hiring undocumented workers in violation of the INA. See *Sys. Mgmt., Inc. v. Loisel*, 91 F. Supp. 2d 401 (D. Mass. 2000); see also *infra* note 237.

<sup>235</sup> See Gordon, *supra* note 65, at 414–15, 424; see also RICHARD B. FREEMAN & JAMES MEDOFF, WHAT DO UNIONS DO? 221–45 (1984).

<sup>236</sup> See, e.g., Cicero, *supra* note 220, at 132–33.

it is now calling for the law's repeal.<sup>237</sup> Similarly, the International Brotherhood of Teamsters has for the first time voiced public support for undocumented workers and the reforms advocated by the AFL-CIO.<sup>238</sup> Thus, organized labor has recognized that immigrants, whether documented or not, are a large part of the workforce. By viewing the prerequisite to union membership as work rather than immigration status, organized labor builds community and furthers the vision of dignity that lies at the heart of the original labor legislation.

### C. *Immigration Fictions and the Dynamics of Membership*

Until immigration policy reflects the important role that work plays in establishing membership in the community, the concept of workplace protection will remain fictional. Notably missing from any debate about employer sanctions has been a discussion of the important moral issues at stake.<sup>239</sup> As a moral matter there can be no question that working within

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<sup>237</sup> See, e.g., Michael Bologna, *AFL-CIO: AFL-CIO Pressing Gore to Address Protection of Immigrants in Speech During Convention*, DAILY LAB. REP., Aug. 3, 2000, at AA-1 (reporting that the AFL-CIO has called for the end of employer sanctions and full workplace rights for all workers, regardless of immigration status and is preparing a white paper report on national immigration policy and the rights of immigrant workers). It has been reported that UNITE now negotiates contracts that recognize the illegal status of some workers and afford them some protection from the INS. Recent contracts negotiated by UNITE have included clauses requiring the employer to bar an INS raid unless the agents have a search warrant, obligating the company to notify the union if it learns of an upcoming raid, and specifying that former employees who are rehired with new papers (or new names) after their original documents are found to be false, retain their seniority and resume their old pay levels. See Uchitelle, *supra* note 59. However, in a recent case in which an employer attempted to shield an undocumented worker from the INS the Second Circuit upheld the employer's conviction for harboring an illegal alien as prohibited by section 274(a)(1)(A)(iii) of the INA. See *United States v. Kim*, 193 F.3d 567 (2d Cir. 1999) (holding that an employer is illegally harboring an alien if he knowingly or recklessly disregards an employee's status as an undocumented worker or helps her remain in his employ undetected by the INS). But see *Sys. Mgmt., Inc.*, 91 F. Supp. at 401 (holding that RICO claims could not be premised on employer's hiring of undocumented workers absent actual knowledge by the employer that workers were brought into the country in violation of section 247(a)(3)(B) of the INA). Similarly, in a recent class action lawsuit, workers with lawful immigration status charged two packing houses as well as an employment agency that refers workers to the fruit firms with violating RICO and a state anti-conspiracy law by "knowingly employing illegal aliens," in an effort to depress hourly wages for all workers. *Mendoza v. Zirkle Fruit Co.*, No. CS-00-3024-FVS, 2000 WL 33225470, at \*1, \*4 (E.D. Wash. Sept. 27, 2000). While the district court dismissed the lawsuit, finding the damages alleged to be too speculative, the court found that the workers properly alleged a violation of federal immigration laws actionable under RICO. *Id.* at \*1.

<sup>238</sup> See *Immigration: For the First Time, Teamsters Call for New Direction on Immigration Policy*, DAILY LAB. REP., Aug. 24, 2000, at A-10. According to Teamsters president James P. Hoffa, immigrant workers are "easy pickings for exploitation. . . . Under the current system, workers who want to join a union are intimidated with the threat of investigation by the [INS]." *Id.*

<sup>239</sup> See Richard A. Boswell, *Restrictions on Non-Citizens' Access to Public Benefits: Flawed Premise, Unnecessary Response*, 42 UCLA L. REV. 1475, 1475-76 (1995) ("An additional and overarching question that punctuates this discussion is the degree to which important moral issues have been left out of these debates on United States immigration

the country gives rise to a presumption of belonging and creates an obligation on the part of the community. In the words of Professor Gerald Lopez,

It is not possible . . . to have persons live, work, and participate in a community over many years without creating in them a sense of entitlement to some benefits of community membership and a moral obligation based on their reasonable expectations. No matter how strongly our formal laws deny it, our conduct creates the obligation.<sup>240</sup>

At present, immigration policies regulating the workplace reflect an ambiguous morality. Given the strong economy, the INS has retreated from workplace raids. However, as discussed above, workplace raids have been replaced with "friendly compliance."<sup>241</sup> The INS now identifies illegal workers through payroll audits and then instructs employers either to obtain proper documentation from workers or to fire them.<sup>242</sup> The INS does not, however, make any effort to deport the workers.<sup>243</sup>

This new system clearly benefits employers.<sup>244</sup> In the short term, undocumented workers benefit as well.<sup>245</sup> However, undocumented workers continue to be subject to exploitation and are vulnerable to a shift in INS enforcement policy should the economy decline. Similarly, legislative efforts relating to immigrant workers are aimed primarily at increasing the number of skilled temporary workers.<sup>246</sup> While there have been recent

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policy."). As expressed by Professor Boswell:

The manner in which immigration policy is discussed and defined determines the very nature of who we are as a nation. It demonstrates whether we are compassionate or punitive, and whether we are swayed by appeals to passion and prejudice, or susceptible to a more reasoned decisionmaking. It is only fitting then that questions involving immigration be addressed in moral terms.

*Id.* at 1478; *see also* Bosniak, *supra* note 143 (questioning why progressives have voiced such little concern over the plight of the undocumented members of American society).

<sup>240</sup> Gerald P. López, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 UCLA L. REV. 615, 696 (1981).

<sup>241</sup> *See* Lynda V. Mapes, *Illegal, but Needed, Workers Gaining Ground*, SEATTLE TIMES, June 18, 2000, at A1. Mapes describes how most apple growers in Washington State glance at workers' immigration papers and merely nod. "Then, in the dead of winter, they ship their payroll forms to the Social Security Administration. Long after the harvest is over, the letters come flooding back" instructing the growers to recheck the workers' immigration documents. *Id.*

<sup>242</sup> *See id.*

<sup>243</sup> *See id.*

<sup>244</sup> *See id.*

<sup>245</sup> It has been reported that undocumented workers are no longer fearful of being deported and are comfortable asserting their workplace rights. According to a Latino organizer for a carpenter's union, "A lot of immigrants are saying if they are [going to] get deported, at least they are going to get deported with dignity." *Id.*

<sup>246</sup> For example, President Clinton signed into law the American Competitiveness in

proposals in both the House and Senate to provide permanent residency for migrant farmworkers, these proposals have never been enacted.<sup>247</sup> Moreover, attempts to amend the immigration laws to provide lawful status for the largely undocumented farmworker population have been characterized by some as fostering indentured servitude.<sup>248</sup>

The view of work embodied in current immigration policy is premised on a narrow focus on economics that ignores the role that work plays in creating community membership. Immigration scholars largely agree that the existence of a large undocumented population undermines any sense of national community.<sup>249</sup> However, there is little agreement as to

the 21st Century Act, Pub. L. No. 106-313, § 102, 114 Stat. 1251, 1251-52 (2000). The legislation increases the number of temporary employment-based visas available per year.

<sup>247</sup> See, e.g., Agricultural Job Opportunity Benefits and Security Act, S. 1814, 106th Cong. (1999); Agricultural Opportunities Act, H.R. 4548, 106th Cong. (1999). It has been estimated that over one million of the estimated six million undocumented workers in the United States are employed in agriculture. E.g., 145 CONG. REC. S13,543 (daily ed. Oct. 29, 1999) (statement of Sen. Smith); 146 CONG. REC. S710, S711 (daily ed. Feb. 23, 2000) (statement of Sen. Smith); see also Helen Jung, *Fruit Firms Sued over Illegal Aliens*, WALL ST. J. (Northwest), Mar. 29, 2000, at 1 (reporting that "many employers in the fruit belt acknowledge that much of their work force probably isn't legal"). Sharon Hughes, Executive Vice President of the National Council of Agricultural Employers in Washington, D.C., reports incidents in which more than fifty percent of agricultural workers in a number of states are undocumented. *Id.*

<sup>248</sup> For example, Title I of the Agricultural Job Opportunity Benefits and Security Act, S. 1814, 106th Cong. (1999), proposed allowing undocumented workers to gain legal status in certain circumstances. The bill sought to enable undocumented workers who worked at least 150 days as agricultural workers within the past year to gain temporary status as nonimmigrant workers. *Id.* § 101(a)(1)(A). In order to maintain this temporary status and to be eligible for adjustment to permanent resident status after five years, the farmworkers were required to work at least 180 workdays in each of those years. *Id.* § 101(b)(1). In order to be eligible for adjustment to permanent residency, the bill also required that workers remain outside the United States for at least two months per year during the temporary residence period (with an exception for those with United States citizen children). See *id.* § 101(a)(2).

As pointed out by Cecilia Muñoz, Vice President of the National Council of La Raza ("NCLR"), when the bill was under consideration:

The lack of available work shown by recent surveys means that many "adjustment" guestworkers would never acquire enough work in each of 5 years to qualify to apply for immigration status. The proposal would give employers extraordinary control over workers' economic status and immigration status. Workers would be desperate to comply with the difficult tasks of securing and proving 180 days of farmwork each year to remain in the program. Consequently, many will be too afraid of being fired and other employer reprisals to demand higher wages or better working conditions, or seek to enforce the law.

*Senate Conducts Hearing on Proposed Overhaul of Farmworker Program*, 77 INTERPRETER RELEASES 599, 600 (2000). For an overview of the plight of migrant farmworkers, see Lori Nessel & Kevin Ryan, *Migrant Farmworkers, Homeless and Runaway Youth: Challenging the Barriers to Inclusion*, 13 LAW & INEQ. 99 (1994).

<sup>249</sup> See, e.g., PETER H. SCHUCK & ROGERS M. SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* (1985); see also Johnson, *supra* note 22. Johnson argues that

the noncitizen population in the United States is composed of people who live and

what an appropriate immigration policy for building community would look like. At one end of the spectrum lie arguments to abolish birthright citizenship for the undocumented,<sup>250</sup> at the other end are calls for open immigration.<sup>251</sup> As explained by Professor Linda Bosniak:

Recognizing that the existence of a class of non-membered persons in the national community threatens the cohesion of the community itself and may even serve to promote violations of the community's borders, many observers have suggested that the appropriate policy solution is to expand further undocumented immigrants' sphere of membership.<sup>252</sup>

In response to the traditional notion that equates citizenship with membership, various scholars have deconstructed membership and defined it as a matter of degree, with citizens being considered full members, but aliens being entitled only to some membership rights.<sup>253</sup> Recognizing

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work on the margins. While contributing to the economy, they are blamed by some for a litany of society's woes. Barred by law from the political process, non-citizens have limited ability to resist the attacks, protect their interests, and improve their lives.

*Id.* at 1181. Johnson further warns that "[t]he continued disenfranchisement of so large a group of persons physically present" and subject to the nation's laws threatens "anything approaching an idealistic conception of democracy." *Id.* at 1220.

<sup>250</sup> See SCHUCK & SMITH, *supra* note 249, at 5 (arguing for "a reinterpretation of the Fourteenth Amendment's Citizenship Clause to make birthright citizenship for the children of illegal and temporary visitor aliens a matter of congressional choice rather than of constitutional prescription").

<sup>251</sup> Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. POL. 251 (1987) (rejecting sovereignty as a basis for excluding foreigners and relying upon Rawlsian, Nozickian, and utilitarian political theory to construct arguments for open borders); Roger Nett, *The Civil Right We Are Not Ready for: The Right of Free Movement of People on the Face of the Earth*, 81 ETHICS 212 (1971). Nett argues that the functional set of rights recognized by law ought to be expanded to include the historically accepted de facto right to free movement. This right to free movement would encompass both material dimensions ("the right of people who are trapped in overcrowded areas . . . to go where resources are [available]") and political dimensions ("the right of people to move away from oppression, persecution, unfair restriction, or even disagreeable social environments and social orders"). *Id.* at 218-19; see also R. George Wright, *Federal Immigration Law and the Case for Open Entry*, 27 LOY. L.A. L. REV. 1265 (1994).

<sup>252</sup> Bosniak, *supra* note 22, at 1004-05. But see T. Alexander Aleinikoff, *Aliens, Due Process and "Community Ties": A Response to Martin*, 44 U. PITT L. REV. 237 (1983) (arguing that a reliance theory focusing on the stake the alien has created and been permitted to create may be a plausible basis for distinguishing among aliens for due process purposes, but would not be an appropriate measure of membership). Aleinikoff advances a procedural due process test based on community ties: "[W]hat we 'owe' persons in terms of process is better understood as a function of what we are taking from them (community ties) than our relationship to them (membership in a national community)." *Id.* at 244.

<sup>253</sup> See, e.g., Gerald L. Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 UCLA L. REV. 1425 (1995). In examining the ways in which undocumented immigrants are reduced to non-persons, or "outlaw[s] outside the protection of the legal system," Professor Neuman explains that the pejorative term "illegal alien" implies that "the alien's presence can give rise to no legal

those who live and work within the nation as members of the community is essential if dignity is to accompany work.<sup>254</sup> Until this reconceptualization of the immigrant laborer permeates immigration law, the NLRA's promises of the dignity of work will remain illusory.<sup>255</sup>

## VII. CONCLUSION

In this Article, I have examined the tensions and contradictions between workplace protection statutes and INS enforcement policies. Congressional enactment of the IRCA in 1986 criminalized the employment relationship between an undocumented worker and an employer<sup>256</sup> and signaled a new approach to immigration law enforcement, allowing border enforcement to permeate the workplace. Moreover, the INS, by its implementation of the IRCA, has effectively deputized employers as enforcers of immigration law, resulting in the punishment of low-wage workers, rather than their employers. The power to enforce immigration laws has enabled unscrupulous employers to circumvent labor laws with impunity. The courts have interpreted the intersection of labor and immigration laws as allowing for limited remedies for violations of guaranteed employment rights. Moreover, because courts are unwilling to recognize the punitive nature of deportation and the criminalization of immigration law, undocumented workers who assert workplace rights remain vulnerable to deportation. At the same time, the IRCA has been ineffectual in

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duties toward him because he should not be here in the first place. Like an illegal contract that creates no obligation, duties toward the alien are void or voidable." *Id.* at 1441 (citations omitted).

<sup>254</sup> See Johnson, *supra* note 22, at 1220 (articulating reasons why the undocumented should be represented in the political process, including that most undocumented persons are contributing members of the community who work and pay taxes). According to Johnson, undocumented persons make up a part of society and should have input into the political process, "just as they influence the economy through their labors and consumption." *Id.* at 1220. Johnson also suggests that empowerment of the invisible "illegal alien" population might lead to greater congressional and bureaucratic accountability. *Id.*

<sup>255</sup> In *Forbidden Workers: Illegal Chinese Immigrants and American Labor*, Peter Kwong documents the myriad ways in which the employer sanctions legislation has devastated labor rights for all workers. He concludes that linking immigration with labor enforcement does not work and calls for an end to INS enforcement in the workplace. According to Kwong:

Immigration policy, then, deals with stopping aliens from entering the country illegally and should be limited to that. The punitive response of hunting down illegals once they are already in the country only forces them to retreat further underground, where they are even more vulnerable to unscrupulous employers and subjected to even stronger control by . . . organized crime. The end result is the further degrading of the value of American labor.

KWONG, *supra* note 62, at 181.

<sup>256</sup> Criminalizing the immigrant and her dreams has been described as a four-step process: "problematize, demonize, dehumanize, then criminalize." Hing, *supra* note 123, at 85.



impacting the size of the undocumented immigrant population in the United States.

Because the current interpretation of immigration law by the INS renders labor law protections a nullity, I have explored various enforcement alternatives. Even absent legislative change, the INS could better utilize its prosecutorial discretion to enforce immigration law so as to further national labor policy goals. For example, the INS could make a policy decision not to act upon information provided by employers about their own workers. Because an employer has few legitimate reasons to report its own workers to the INS, the INS should assume that such information is being provided in an attempt to undermine labor or employment laws. The shortcoming of such an approach is that it offers no legal status to the aggrieved workers. Undocumented workers remain vulnerable to threats of deportation, subject to future exploitation, and unable to obtain full remedies for violations of their rights. A better solution would be for the INS to grant deferred action status to undocumented workers seeking to vindicate labor rights. Such a proposal accords with the INS's policy toward self-petitioning battered spouses of lawful permanent residents. However, this shift in immigration policy is unlikely to occur absent a reconceptualization of the immigrant worker's role in society. As a legislative matter, Congress could create a new visa category similar to the existing "S" and "T" visa categories and thereby provide status in exchange for assistance in the prosecution of unscrupulous employers. While a new visa category would allow some undocumented workers to gain legal status, the majority of workers would be unlikely to benefit due to limits on the number of visas available under similar legislation.

In the final section of this Article, I have looked beyond the realm of the practical and explored the moral underpinnings of labor and immigration policies. By examining labor policy and goals and the meaning of work, I have questioned why immigration laws continue to rely on nebulous fictions rather than accord membership rights to those who live and work among us. The myth of ending undocumented immigration stands in stark contrast to the reality of an ever-growing class of residents who, while not recognized by immigration laws, are very much a part of the fabric of U.S. society. Rather than focus on broader border issues, I have concentrated on dignity in the workplace and argued against the criminalization of work, and for affording legal status to undocumented workers, so that those already here may work with dignity.<sup>257</sup>

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<sup>257</sup> See *id.* at 96 ("Recognizing that the overzealous exercise of sovereign border powers results in a system that punishes people for moving, for dreaming, and for following historical patterns of recruitment, demands reflection.").

