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STRANGER AND AFRAID: UNDOCUMENTED WORKERS AND FEDERAL EMPLOYMENT LAW

Peter Margulies*

INTRODUCTION

Immigration has historically engendered profound ambivalence in the United States. A familiar truism holds that the United States is a nation of immigrants. Yet, residents of the United States have often viewed immigrants with distrust. The status of undocumented workers under federal labor and employment statutes embodies this tension.

The experience of undocumented workers underscores the ambivalence inspired by immigration. Certain segments of American society, particularly employers, have historically welcomed undocumented labor. Other elements

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* Associate Clinical Professor, Hofstra University School of Law; B.A., Colgate University, 1978; J.D., Columbia University, 1981. The author thanks Bernie Jacob, Steve Legomsky, Jerry Lynch, Michael Perlin, Jean Koh Peters, Ellen Saideman, Andy Schepard, Marjorie Silver, and Ron Silverman for their comments on drafts of this Article.

1. See J. KENNEDY, A NATION OF IMMIGRANTS (Harper Torchbooks ed. 1964) (discussing history of immigration to America). Emma Lazarus' glowing words promoting the construction of the Statue of Liberty, "Give me your tired, your poor, Your huddled masses yearning to breathe free," are perhaps the best known expression of the United States' role as a haven for the oppressed. See The Poems of Emma Lazarus (1889), cited in J. HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925 23 (Atheneum ed. 1977). Interestingly, after the publication of Lazarus' poem, attention to the Statue of Liberty, judging by the sentiments articulated at the dedication of the monument, focused on the Statue of Liberty's role as a symbol of the United State's exporting of democratic values, rather than on the nation as a place of refuge. See J. HIGHAM, at 63. The Statue of Liberty, therefore, reflects the oscillation in American attitudes toward immigration.

2. See, e.g., T. ALENIKOFF & D. MARTIN, IMMIGRATION: PROCESS AND POLICY 37-61 (1985) (discussing classical schizophrenia of United States immigration law; United States has accepted more refugees for permanent settlement than any other country and yet many of its laws have been blatantly racist); J. HIGHAM, supra note 1, at 23-27 (same); Schuck, The Transformation of Immigration Law, 84 COLUM. L. REV. 1, 5-34 (1984) (same). The first part of this Article's title is from A.E. HOUSMAN, LAST POEMS 28 (1922): "I, a stranger and afraid/In a world I never made."

3. This Article uses the terms "undocumented worker" and "undocumented person" rather than the term "illegal alien" because the latter term is so loaded with negative connotations that it obscures issues of policy. Cf. Fogel, Illegal Aliens: Economic Aspects and Public Policy Alternatives, 15 SAN DIEGO L. REV. 63, 63 n.1 (1977) (expressing preference for term "illegal alien" because this term expressly refers to the illegality of such persons' actions). For thorough discussions of the problems caused by illegal immigration, see T. ALENIKOFF & D. MARTIN, supra note 2, at 744-98; Note, Developments in the Law—Immigration Policy and the Rights of Aliens, 96 HARV. L. REV. 1286, 1433-65 (1983) [hereinafter Note, Developments in the Law].

have viewed undocumented workers as a source of ruinous competition. This disparity has hindered clarification of the rights and remedies of undocumented workers under federal employment law.

These rights and remedies require clarification for two reasons. First, Congress has recently entered the field of employment relationships involving domestic employers and undocumented workers by enacting the Immigration Reform and Control Act ("IRCA"). The IRCA prohibits the hiring of undocumented workers and establishes sanctions for employers who disregard that prohibition. Any interpretation of federal employment law regarding undocumented workers must therefore be consistent with the mandates of the IRCA. Second, employers' treatment of undocumented workers has a significant impact on employment policy. Undocumented workers are vulnerable. Employers can, and do, exploit undocumented workers by paying them substandard or illegally low wages and blocking their attempts at concerted activity to improve conditions in the workplace. These abuses worsen the lot of all employees. Making the complete panoply of employment law protections and remedies available to undocumented workers would help deter employers from engaging in such exploitation.

Although allowing employers to exploit labor inherently conflicts with policies underlying employment law, one view of immigration policy favors such exploitation. This view stems from the reward theory of opposition to employment law remedies for undocumented workers. The reward theory of immigration policy in effect favors the exploitation of undocumented workers by holding that allowing undocumented workers to seek the same employment law remedies as lawful residents—such as back pay and reinstatement—rewards illegal immigration. Permitting exploitation without recourse eliminates this reward. If exploitation makes the undocumented worker's lot a bitter one, that worker is more likely to leave the United States. Moreover, prospective undocumented workers who are considering whether to enter the United States illegally are less likely to emigrate. These results are consistent with immigration policy.

5. See J. HIGHAM, supra note 1, at 70-72.
6. 8 U.S.C. §§ 1324a, b, 1255a (Supp. IV 1986).
7. One who enters the United States without inspection by immigration officers commits a crime. 8 U.S.C. § 1325 (Supp. IV 1986). One who enters without inspection is also subject to deportation. 8 U.S.C. § 1251(a)(2) (1982). Persons who overstay the time allowed in the United States by a particular visa, such as a tourist or a student visa, are also subject to deportation. 8 U.S.C. § 1251(a)(9)(A) (Supp. IV 1986).
10. "Employment law" refers here to the entire panoply of federal legislation regarding the relationship between employers and employees. For examples of statutes concerning employment, see infra notes 31-34 and accompanying text.
The analysis articulated above is intuitively appealing if one is alarmed at the “reward” for illegal immigration which a comprehensive set of remedies for undocumented workers might imply. However, there is a major flaw in the logic of this perspective. By focusing on undocumented workers, the reward theory neglects the role of domestic employer demand in promoting illegal immigration. Instead, the effect of employment law remedies on employer demand for undocumented labor should shape the interaction of immigration policy and employment law.

This Article argues that granting undocumented workers access to comprehensive remedies for employment law violations curbs employer demand for those workers. Employers hire undocumented workers precisely because they are susceptible to exploitation. The availability of employment law remedies, along with strong guarantees that complaints from undocumented workers will be kept confidential at all levels of dispute resolution, would give undocumented workers practical recourse against exploitative employers. Under this regime, employers would have much less incentive to hire undocumented employees.

Comprehensive employment law remedies would also promote a secondary goal of immigration policy: reducing transfers of resources from United States taxpayers to undocumented workers. When employers exploit undocumented workers by not paying them for work performed, by summarily discharging them for unlawful reasons such as their union involvement, or by denying them health benefits, undocumented workers may seek assistance from the government in obtaining these basic needs. Assistance may take the form of emergency health care or other services that are typically available in the United States without regard to immigration status. Taxpayers fund these services. This subsidy of the undocumented population diverts resources and strains service delivery systems which already deal with staggering problems among needy citizens and lawful residents. In contrast, remedies which encourage domestic employers to comply with non-exploitative employment law norms in such areas as minimum wages, overtime, and pregnancy benefits will reduce the public’s burden.

Besides yielding policy advantages, comprehensive employment law rights and remedies for undocumented workers promote the institutional values of courts and agencies. Courts and agencies are not politically accountable to the same extent as Congress. Because they lack accountability, these non-political entities function best with clear guidance from the more accountable legislative branch. Congress, however, has been coy about the interaction between immigration law and employment rights and remedies. In coping with such coyness, courts and agencies, due to their relative unaccountability, are on firmest institutional ground when they harmonize statutes by giving

12. See supra notes 8-9 and accompanying text.
13. See infra notes 102-12 and accompanying text (discussing impact of undocumented workers on government agencies and programs).
each the maximum force and effect.\textsuperscript{14} Implying exceptions to the broad language of a statute is appropriate for courts and agencies only when broad operation of the statute would clearly frustrate policies underlying other legislation.

These institutional concerns highlight the tension between employment and immigration law policies. Generally, the text of employment statutes does not preclude undocumented workers from coverage. Broad coverage protects all employees from an erosion of workplace standards. This result obviously serves employment law values. Moreover, broad coverage does not unequivocally frustrate, and might even promote, immigration policy. Under the circumstances, deference to the broad language of employment statutes is most consistent with the institutional role of courts and agencies.

Comprehensive remedies preserve not only institutional legitimacy, but also institutional resources. If courts or agencies had to treat undocumented workers differently, such treatment would involve additional factfinding. A court or agency would first have to determine an employee's immigration status, even if it is not trained for the task. The court's time inefficiently spent on this task reduces the time it has available for dealing with other employment problems. Finally, the Immigration and Naturalization Service ("INS") might, in any case, have to make an independent status determination.

This strain on resources compares unfavorably with the streamlined character of the comprehensive remedial approach. Comprehensive remedies require much less factfinding, because in most cases an undocumented worker's immigration status would be irrelevant. Under the comprehensive approach, a violation by an employer would typically trigger the full range of remedies, including reinstatement and back pay. Subsequent factfinding would therefore be unnecessary.\textsuperscript{15}

The analysis presented in this Article develops both institutional and policy perspectives in arguing for the comprehensive approach. Previous commentary has displayed more modest aspirations. Much of the literature accords some

\textsuperscript{14} See infra notes 113-39 and accompanying text (discussing problems with Congress' responses to undocumented workers and need for coordination by the judiciary).

\textsuperscript{15} There are two exceptions to this reduced need for fact-finding: first, when an undocumented person has already left the United States; and, second, when an employer hired an undocumented worker after November 6, 1986, the effective date of the IRCA, and that worker presented false proof of citizenship or lawful residence to his employer. See infra notes 149-74 and accompanying text for a complete discussion of this point. In addition, the court or agency may engage in some fact-finding in order to dispose of issues such as mitigation of damages, which may affect the size of a back pay award. In National Labor Relations Board ("NLRB") proceedings, the decision-maker usually resolves mitigation issues in the second stage of the proceeding, which concerns bringing a culpable employer into compliance with the National Labor Relations Act ("NLRA"), and not in the first stage, which treats matters of culpability and policy. See Note, Retaliatory Reporting of Illegal Alien Employees: Remedy ing the Labor—Immigration Conflict, 80 Colum. L. Rev. 1295, 1306-07 (1980) [hereinafter Note, Retaliatory Reporting].
credence to the notion that comprehensive relief will usually reward and encourage illegal immigration, or violate some tenet of immigration policy expressed in the employer sanctions provisions of the IRCA.16 The existing commentary, however, does not discuss the question of taxpayer transfers to undocumented workers, and largely neglects institutional values. Commentators have also focused on the status of undocumented workers under specific statutes, such as the National Labor Relations Act ("NLRA"),17 instead of


17. See authorities cited supra notes 15-16. For more commentary on the NLRA and immigration policy, see Bracamonte, The National Labor Relations Act and Undocumented Workers: The De-Alienation of American Labor, 21 SAN DIEGO L. REV. 29 (1983); Comment, Illegal Aliens' Rights Under the NLRA, 1983 WIS. L. REV. 1525. For a discussion of the application of the NLRA to undocumented persons which focuses on administrative law issues concerning the ambit of the NLRB's discretion in fashioning remedies for unfair labor practices, see Mendez, One Step Forward, Two Steps Back: The Court and the Scope of Board Discretion in Sure-Tan, Inc. v. NLRB, 134 U. PA. L. REV. 703 (1986).


Commentary on the NLRA and the FLSA, however, is not very instructive when one is considering other employment statutes, such as Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1982), which bars discrimination by employers on the basis of race, gender, religion, or national origin, because an employer who violates such statutes will not always realize a straightforward pecuniary advantage by doing so. When an employer does not derive direct pecuniary advantage from violating a statute, it is more difficult to explain why giving an undocumented worker rights and remedies under that statute will decrease employer demand for undocumented labor and thereby promote immigration policy. See infra notes 85-89 and accom-
examining the full spectrum of employment legislation. This Article cultivates a broader view.

The Article consists of five sections. Section I introduces the problem of undocumented workers' status under federal employment law. This section discusses judicial and administrative interpretations of undocumented workers' employment rights to date and the impact of the IRCA on the analysis.

Section II considers the effectiveness of various remedies, such as cease and desist orders, back pay, and reinstatement, with respect to labor and employment law. This section concludes that a full range of remedies contributes to stronger employment law enforcement than imposing a single remedy. A system which provides undocumented labor with comprehensive relief enhances two elements vital to enforcement: 1) the magnitude of sanctions against employers, and, 2) the extent of victim cooperation.

Section III demonstrates that these factors also favor imposing comprehensive employment law remedies as a supplement to immigration policy. This section includes a discussion of how broad remedies will ease taxpayer transfers to the undocumented population and promote institutional values.

Section IV outlines key features of the comprehensive remedial approach, including confidentiality, and the range of remedies available. This section also discusses two situations which require modifications of the comprehensive approach. In the first situation, the undocumented worker is absent from the United States; in the second situation, the employer has complied with the IRCA.

Section V discusses three objections to the comprehensive approach: first, that judicial reinstatement of undocumented workers invariably conflicts with the IRCA by reducing the employment opportunities of lawful residents; second, that the approach offends equity by rewarding the crime of illegal immigration; and, third, that the comprehensive approach damages the lawful resident's sense of sovereignty by obliging her to share the benefits of American law with uninvited guests.

I. INTRODUCING THE PROBLEM

Congress has recently been very active in creating a framework for the regulation of employment relationships involving undocumented workers. For years, the word "employment" was exempt from the provision of the Immigration and Nationality Act ("INA") which made it a crime to "willfully or knowingly concea[l], harbo[r], or shiel[d] from detection" any undocumented worker.18 In 1986, however, Congress enacted the IRCA.19 The IRCA

panying text. Nonetheless, this Article's approach is also useful in construing statutes other than the NLRA or FLSA because it articulates a framework through which a court or agency may consider such employment statutes in spite of these inherent differences.

19. See id. §§ 1324a, b, 1255a (Supp. IV 1986). For an account of the passage of the IRCA by one of its sponsors, see Mazzoli, Immigration Reform: The Path to Passage and Beyond, 14 J. of LEGIS. 41 (1987).
replicates the historical conflict between American instincts of distrust and invitation of immigrants. It has three main components:

1) it imposes sanctions on employers who knowingly, or without seeking appropriate documentation, hire or recruit an employee who is not authorized to work in the United States;\(^{20}\)

2) it prohibits employers from discriminating against employees or applicants for employment who are not "unauthorized alien[s]" based on that individual's national origin or citizenship status (the latter term refers to lawful permanent resident workers who timely apply for citizenship);\(^{21}\) and,

3) it grants amnesty to those individuals who can establish that they entered the United States before January 1, 1982, and have resided in the United States unlawfully since that time.\(^{22}\)

The IRCA represents a classic case of legislative compromise.\(^{23}\) Its provisions—employer sanctions, amnesty, and nondiscrimination—cater to two opposing forces: inclusionists, who favor greater receptivity to immigrants; and exclusionists, who distrust any increase in population from abroad.\(^{24}\) The exclusionist impulse provided the initial impetus for the latest bout of immigration reform.\(^{25}\) Those who support exclusionism seem concerned with one overriding goal: to "preserve jobs in America for United States citizens.\(^{26}\)


\(^{21}\) Id. § 1324b.

\(^{22}\) Id. § 1255a.

\(^{23}\) The Supreme Court has often recognized that legislation develops from a legislature's accommodation of competing interests. The Court has on occasion declined to consider arguments beyond the text of a statute because such a venture may result in one party getting more than it bargained for. See, e.g., Mohasco Corp. v. Silver, 447 U.S. 807, 818-26 (1980) (declining to adopt longer limitations period for filing charge of employment discrimination with administrative agency); Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 623-26 (declining to authorize damages for "loss of society" under the Death on the High Seas Act where statute authorizes recovery only for "pecuniary loss"), reh'g denied, 439 U.S. 884 (1978). For an evocative account of compromise in the enactment of a specific statute, see E. REDMAN, TIH DANCE OF LEGISLATION (1973) (describing passage of National Health Service Act). For more theoretical accounts of the legislative process, see Farber & Frickey, The Jurisprudence of Public Choice, 65 Tex. L. Rev. 873 (1987); Macey, Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model, 86 Colum. L. Rev. 223 (1986); Posner, Economics, Politics, and the Reading of Statutes and the Constitution, 49 U. Chi. L. Rev. 263, 269-80 (1982).

\(^{24}\) Cf. Schuck, supra note 2, at 8-33 (discussing opposing sentiments about immigration with reference to a larger dialogue between individualist and communal impulses in American legal culture).

\(^{25}\) See T. Aleinkoff & D. Martin, supra note 2, at 787-94; Mazzoli, supra note 19, at 41-42 (describing history of enactment); Comment, Illegal Immigration: Employer Sanctions and Related Proposals, 19 San Diego L. Rev. 149, 160-66 (1981) (discussing antecedent of IRCA). One should, however, avoid oversimplifying the design of the IRCA's supporters. Many advocates of employer sanctions distinguish legal immigration, which they endorse, from illegal immigration. Indeed, one rationale for employer sanctions was that, without effective control of illegal immigration, support for legal immigration would erode. See Mazzoli, supra note 19, at 41. Cf. Schuck, supra note 2, at 85-90 (arguing that judicial solicitude for undocumented persons may precipitate divisions in American society).

The rationale behind the exclusionist theory in immigration reform is that undocumented workers take jobs in America away from "Americans." The employer sanctions provisions are a direct product of this sentiment. Because an employer who hires undocumented workers is subject to sanction, that employer has an increased incentive to employ lawful residents of the United States. An employer sanctions statute would have satisfied exclusionists. However, inclusionists were troubled by the harshness of unadorned sanctions and received some concessions in return for supporting the legislation.27

This dynamic of compromise even permeates the very employer sanctions provisions in the IRCA which seem to favor the exclusionists. Although the employer sanctions provisions seem at first blush like a categorical bar on the employment of undocumented workers, the statute mitigates the harshness of such a broad rule in that it:

1) exempts those employees hired, recruited or referred prior to the effective date of the Act, November 6, 1986;28
2) exempts continued employment of persons hired before November 6, 1986;29 and,
3) permits the Attorney General to authorize employment of an undocumented person who presents a prima facie case for amnesty.30

Although the broader implications of these exemptions for the ambit of federal law governing labor and employment are not clear, the effect of the exemptions on the employer sanction provisions is straightforward. A hypothetical fact situation may help delineate the areas of clarity and uncertainty. Suppose an employer has hired an undocumented worker to work as, for instance, a garment presser. The employer hired the presser on June 6, 1986, and he still works for the company. He has worked for the company continuously since his hiring. Is the employer subject to sanctions under the IRCA? The answer is, "No." Because the employee was hired before November 6, 1986, the effective date of the IRCA, his hiring and continued employment after November 6, 1986, is legal under the IRCA.

Let us alter the hypothetical scenario somewhat. Suppose an employer hires an undocumented worker in February, 1987. The worker, however, had submitted a prima facie application for amnesty to the Attorney General, who provided the worker with papers authorizing his employment. Such employment also explicitly complies with the terms of the employer sanctions provisions.

A different wrinkle may provide a more challenging problem. An employer hired an undocumented person to work as a dress presser on February 1, 1987. This worker entered the country illegally, resided here illegally, and did

27. See Mazzoli, supra note 19, at 42 (discussing need for coupling employer sanctions with legalization of undocumented workers living in the United States for period of time).
29. Id. § 101(a)(3)(B) (codified as a note at 8 U.S.C. § 1324a (Supp. IV 1986)).
not apply for amnesty because he did not meet the relevant criteria. Is the employer subject to sanctions under the IRCA? The answer is, "Yes." Because the employer hired the dress presser after the effective date of the statute, and the presser is not authorized to work by the Attorney General, the IRCA makes this employment relationship illegal.

Analyzing the above fact situations yields three different categories of undocumented workers:

1) Grandfathered workers. This group consists of those hired before November 6, 1986, the effective date of the IRCA. The employer sanctions provisions do not apply to grandfathered workers.

2) Amnesty candidates. This group consists of workers who have made a prima facie case for amnesty and have received authorization to work from the Attorney General. Here, too, the employer sanctions provisions do not apply.

3) Non-grandfathered workers. Undocumented workers who do not fall within either of the above two groups—those hired on or after November 6, 1986, and who are not amnesty candidates—make up this group. The employer sanctions provisions apply to this group of workers.

This analysis, however, becomes more complicated when one considers the IRCA in connection with other federal employment and labor legislation. For example, the NLRA\(^31\) bars retaliation and discrimination against, and interference with, employees seeking to form or join a labor union; the Fair Labor Standards Act ("FLSA")\(^32\) provides a minimum wage requirement and a maximum hours limitation for employees; and Title VII of the Civil Rights Act of 1964 ("Title VII")\(^33\) bars discrimination in employment based on race, sex, religion, or national origin.\(^34\) These statutes embody strong national policies favoring humane working conditions and opposing employer overreaching and the reliance on invidious criteria in making employment decisions. Do these protections extend to the undocumented workers that the employer hired before November 6, 1986 (the grandfathered employee)? Do these laws protect the prima facie amnesty applicant? Finally, does federal employment legislation protect the non-grandfathered worker, who is not grandfathered in under the IRCA and also has not submitted a prima facie amnesty application? Before seeking to answer these questions, it is helpful to briefly examine how the Congress, courts, and agencies have handled the issues involved thus far.

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32. Id. § 201-19.
The interplay of these statutes and the IRCA gives rise to two issues. The first issue is whether undocumented workers are protected at all under federal employment statutes. The second issue is what remedies are available if they are protected. Potential remedies include cease and desist orders, back pay, and reinstatement. The following paragraphs discuss these issues in turn.

Although Congress failed to include undocumented workers expressly as within the class protected by federal employment laws, the legislative history of the IRCA persuasively indicates that Congress considered undocumented workers as generally protected by federal employment laws. In addition, one IRCA provision authorizes appropriations to the Department of Labor for enforcement of the FLSA against employers who "exploit" undocumented workers. Finally, several lower courts and the National Labor Relations Board ("NLRB") have held that federal employment law does protect undocumented workers.

The second issue, involving remedies for employment law violations, eludes a definite answer. Congress has said only that the IRCA does not restrict remedies available under "existing law." Existing law prior to the enactment of the IRCA included a pronouncement by the Supreme Court that under the NLRA, undocumented workers are not entitled to either reinstatement or back pay. The Court suggested that, for undocumented workers, a cease

35. See H.R. REP. No. 682(I), 99th Cong., 2d Sess. 58 (1986), reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 5649. The committee cited Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 893 (1984), stating that the 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." 1986 U.S. CODE CONG. & ADMIN. NEWS 5662. See also H.R. REP. No. 682(II), 99th Cong., 2d Sess. 8-9 (1986), reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 5757, 5758 (application of labor laws tends to limit both "the hiring of undocumented employees and the depressing effect on working conditions caused by their employment").

36. See IRCA, § 111(d), 100 Stat. 3381 (codified at 8 U.S.C. § 1101 (Supp. IV 1986)).

37. For cases finding no conflict with immigration policy where undocumented workers are granted employment law protections, see Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984); Patel v. Quality Inn South, 846 F.2d 700 (11th Cir. 1988); In re Reyes, 814 F.2d 168, 170 (5th Cir. 1987), cert. denied, 108 S. Ct. 2901 (1988); Local 512, Warehouse and Office Workers' Union v. NLRB, 795 F.2d 705 (9th Cir. 1986); NLRB v. Apollo Tire Co., 604 F.2d 1180 (9th Cir. 1979); Alvarez v. Sanchez, 105 A.D.2d 1114, 482 N.Y.S.2d 184 (4th Dept. 1984); Amay's Bakery & Noodle Co., 227 N.L.R.B. 214, 94 L.R.R.M. 1165 (1976). But cf. Sure-Tan, 467 U.S. at 913 (Powell, J., dissenting) ("[i]t is unlikely that Congress intended the term 'employee' to include—for purposes of being accorded the benefits of that protective statute—persons wanted by the United States for the violation of our criminal laws"); In re Reyes, 814 F.2d at 171-72 (Jones, J., dissenting) (allowing undocumented workers to recover for violations of the AWPA undercutts purpose of prohibiting employers from hiring undocumented workers).


39. See Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 903 (1984) (reinstatement and back pay contingent on employees' lawful presence in United States). But cf. id. at 912 (Brennan, J., dissenting) (by denying back pay to undocumented workers, Court is actually providing incentive
and desist order requiring employers to stop the offending conduct is the only appropriate relief. 40 The NLRB has followed this language of the Supreme Court. 41 However, the federal circuit courts which have considered the issue have, in contrast to the NLRB, sought to distinguish the Supreme Court’s decision. 42 Neither the Supreme Court nor Congress has resolved this apparent conflict between the Court and the NLRB on the one hand, and lower federal courts on the other.

Authority on both issues—the issue of employment law protections for undocumented workers and the issue of remedies if undocumented workers are covered—yields more confusion than certainty. Much of the confusion stems from disagreement about how employment and immigration law interact. Because of this current confusion, this Article will not focus on these

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The General Counsel of the NLRB issued a memorandum on September 1, 1988, which made the Board’s position more generous toward undocumented workers. See Memorandum 88-89, 129 L.R.R.M. (BNA) (1988). In this memorandum, the General Counsel announced that a grandfathered employee would be entitled to reinstatement unless the INS had made a final determination that the employee was not lawfully present and entitled to work in the United States. Back pay would be allowed for the period before the INS order. Non-grandfathered employees, however, would not be entitled to reinstatement, and could receive only limited, if any, back pay. See also 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, 139-43 (1987-88) (discussing General Counsel’s position).

42. See Patel v. Quality Inn South, 846 F.2d 700 (11th Cir. 1988) (distinguishing Sure-Tan on ground that complainant in Sure-Tan sought back pay for loss of a job, while plaintiff in Patel sought back pay only for work already performed); Local 512, Warehouse and Office Workers’ Union v. NLRB, 795 F.2d 705, 715-20 (9th Cir. 1986) (distinguishing Sure-Tan on ground that Supreme Court dealt only with remedies available to persons no longer in the United States); Rios v. Enterprise Ass’n Steamfitters, Local 638 of U.A., 860 F.2d 1168, 1172-73 (2d Cir. 1988) (same). See also Bevles Co. v. Teamsters Local 986, 791 F.2d 1391 (9th Cir. 1986) (declining to set aside as contrary to public policy arbitrator’s award of reinstatement and back pay to undocumented workers), cert. denied, 108 S. Ct. 500 (1987). But cf. Local 512, 795 F.2d at 723-27 (Beezer, J., dissenting) (majority’s view is inconsistent with Supreme Court’s decision in Sure-Tan); Bevles, 791 F.2d at 1394 (Sneed, J., dissenting) (awarding reinstatement and back pay to undocumented workers conflicts with immigration law and policy); Patel v. Sumani Corp., 660 F. Supp. 1528, 1531-35 (N.D. Ala. 1987) (enforcement of FLSA against employers of undocumented workers contravenes immigration policy), rev’d sub nom. Patel v. Quality Inn South, 846 F.2d 700 (11th Cir. 1988).
recent pronouncements in the case law and attempt to reconcile them. Instead, it will focus on the root of the problem, attempting to discern the true cause for the confusion and to suggest a resolution. Much of the confusion stems from disagreements about how employment and immigration law interact. Before analyzing this interaction as it affects employment law coverage and remedies, it is worthwhile to consider the role of remedies in the enforcement of employment law. The next section considers this topic.

II. THE ROLE OF REMEDIES IN EMPLOYMENT LAW

Remedies for violations of employment law generally have two principal purposes: deterring wrongdoing and compensating victims.\(^4\) These two purposes often converge. Remedies such as back pay and reinstatement serve both goals. However, a remedy which purports to deter wrongdoing without compensating victims, such as a cease and desist order, may ultimately accomplish neither end. Reliance solely on such remedies is therefore misplaced.\(^4\)

A hypothetical situation illustrates this point. Suppose an employer hires employee X, an undocumented worker who is neither "grandfathered" in under the IRCA employer sanctions provision, nor a prima facie amnesty candidate. X is willing to work for less than the minimum wage, at least initially. The employer, Slimy, Inc., a small garment manufacturing concern, agrees to hire employee X, without engaging in the employment verification process set out in the IRCA. Specifically, Slimy fails to request a visa, passport, or any other documentation of X's immigration status. Slimy pays X in cash at a rate below the minimum wage without accounting for the transaction in its records. This procedure violates the FLSA. When X talks one day with a friend, an American citizen, the friend tells X that compensation below the minimum wage is illegal. X complains to his boss and is fired immediately. What are X's rights and remedies?

If one considers only the policies behind the labor laws, the answer is clear. The labor laws are designed to promote effective employee organization, facilitate collective bargaining and industrial peace, and create a "floor" for compensation, working hours, and conditions of employment.\(^4\) When an employer, like Slimy, Inc., violates provisions which serve these goals, the wronged employee should be entitled to redress.\(^4\) Such redress would typically

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\(^4\) See Albemarle Paper Co. v. Moody, 422 U.S. 405, 413-23 (1975) (discussing purposes of awarding back pay).
\(^4\) See infra notes 45-59 and accompanying text.
\(^4\) See, e.g., Mendez, supra note 17, at 722 (discussing purposes of NLRA).
include an equitable recovery representing the difference between the amount of compensation the employee actually received and what he should have received. This award of back pay makes whole the victim of labor law violations. It also deters future wrongdoing by the employer. An employer who knows that violations will, if detected, cost him the money that he sought to save by paying illegally low wages will accordingly have less incentive to engage in this kind of "frugality." Thus, affording some measure of monetary recovery to victims of violations encourages compliance with the objectives of labor legislation.

Of course, compensatory remedies may not be the only way to secure employer compliance with employment law norms. An injunction or a cease and desist order barring future violations could also serve the compliance goal, although it would not compensate victims. An injunction carries with it the threat of penalties for contempt, including fines, if the enjoined party violates the terms of the order. A purely injunctive remedy clearly has some deterrent effect. But is an additional increment of deterrence added by the prospect of a monetary recovery by the victim?

The answer to this question turns on the resolution of two variables: 1) the remedy's deterrent value for violators or potential violators of the relevant statute; and, 2) the prospect that the remedy will encourage employees to come forward with reports of violations. Measured against these variables, a monetary recovery is superior to a purely injunctive remedy.

Analysis of the effect of injunctive and monetary remedies supports this conclusion. A hypothetical set of facts again illustrates the point. Suppose Slimy, Inc. pays some of its employees at a rate one dollar below the minimum wage. This violation of the FLSA continues undetected. If injunctive relief is the only remedy available, Slimy, from a cost-benefit perspective, has little

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47. See Albemarle Paper Co. v. Moody, 422 U.S. 405, 413-23 (1975) (authorizing back pay as presumptive remedy for violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1982)); Mitchell v. DeMario Jewelry, Inc., 361 U.S. 288 (1960) (back pay available as remedy for discrimination based on employee's filing complaint under FLSA). If the recovery is greater than what a purely make-whole measure of relief would mandate—if, as the FLSA requires, an offending employer must pay double the amount the employee should have received—the court or agency more effectively reduces the incentive for illegal conduct. See FLSA, 29 U.S.C. § 216(b) (1982). Commentators suggest that a greater than compensatory measure of relief would enhance compliance with other legal norms, such as those governing the law of contracts. See Farber, Reassessing the Economic Efficiency of Compensatory Damages for Breach of Contract, 66 Va. L. Rev. 1443 (1980) (analyzing compensatory damages and their effect on contract law).
reason to reform its practices voluntarily. While Slimy maintains its illegal compensation policy, it saves money. When and if Slimy is "caught" and found to have violated the FLSA, under a regime providing only for injunctive relief it is merely told to refrain from further violations of the statute. Slimy is still ahead the money it saved initially due to its illegal conduct.

The foregoing analysis matters little if one believes that people and organizations obey the law because it is the "right" thing to do. Another view is possible, however. Holmes, for example, believed that people assessing whether to conduct themselves in accordance with legal norms consider not only whether a given norm is "right," but also assess the potential "downside" of their non-conforming behavior. Under this view, the difference in out of pocket costs between monetary and injunctive relief becomes a significant factor. If Slimy faces only the prospect of injunctive relief, it may take its chances with initiating and continuing illegal conduct. But if Slimy knows that it risks paying out money equal to or representing some multiple of the "saving" it realized by paying illegally low wages, it may seriously reconsider the allure of noncompliance.


49. See Ford Motor Co. v. Equal Employment Opportunity Comm'n, 458 U.S. 219, 228-29 (1982) (holding that defendant-employer's unconditional job offer to civil rights plaintiff tolls accrual of back pay liability, relying in part on rationale that this rule will promote job offers); Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975) (availability of back pay encourages timely compliance). See also Mendez, supra note 17, at 730-31 (cease and desist orders ineffective in promoting goals of NLRA); Weiler, Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA, 96 Harv. L. Rev. 1769, 1788 n.67 (1983) ("I know of no one who claims that [a cease-and-desist order] by itself materially aids in the preservation of [the group right to a free choice regarding collective bargaining].").

50. The prospect of monetary relief entails a greater magnitude of loss for the employer than a cease and desist order which involves no out-of-pocket loss. Under Judge Learned Hand's analysis, an actor faced with the potential for a greater magnitude of loss will or should, all other things being equal, take greater steps to prevent the loss' occurrence. See United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947). See also Posner, A Theory of Negligence, 1 J. Legal Stud. 29, 32-33 (1972) (discussing Judge Hand's formulation). An employer facing the greater out-of-pocket loss of a back pay award as compared with a cease and desist order, therefore, has a greater incentive to comply with the law. See also infra notes 51-56 and accompanying text (discussing other elements of Hand's analysis). On rare occasions, the magnitude of a defendant's potential loss incurred through an award of monetary relief may persuade a court to decline to order such relief, provided the court also believes that the defendant will conform to the legal standard even without a compensatory remedy. See Arizona Governing Comm'n v. Norris, 463 U.S. 1073, 1110 (1983) (O'Connor, J., concurring) (cost of awarding compensatory relief to victims of systemic gender discrimination in pension plans militated against providing such relief, given defendants' apparent willingness to comply with Court's holdings); City of Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702, 720-21 (1978) (same). But see P. Margules, Reliance, Relief, and Cost Avoidance: The Problem of Remedies for Gender Discrimination in Pension and Benefit Plans 34-36 (1987) (unpublished manuscript on file with author) (Manhart Court's rationale encourages abuse by defendants).
Mention of "risk" brings to the surface the second element of our analysis of deterrence: the incentive which a given remedy affords victims of labor law violations to complain about their treatment. Cease and desist orders offer no incentive to victims beyond the knowledge that they have done the "right" thing. Without incentives for victimized employees to come forward, Slimy's FLSA violations will probably go undetected. As a rational economic actor, Slimy considers the likelihood of detection as well as the severity of sanctions for detected wrongdoing. Slimy will grow bolder as the likelihood of detection decreases.

Calibrating remedies to provide incentives for victims to come forward is particularly critical when one deals with victims who, like undocumented workers, fear detection of their own illegal conduct. Undocumented workers face deportation if their presence becomes known to the Immigration and Naturalization Service ("INS"). Undocumented workers are reluctant to report labor law violations because they fear their reporting of employer misconduct will immediately bring them to the attention of the INS and result in their deportation.

The addition of two features to the cadre of currently available labor law rights and remedies can ease this fear and thereby increase deterrence. The first feature is confidentiality. Under the FLSA, for example, agencies and tribunals which process claims of substandard wages, wage discrimination or retaliatory action by employers against undocumented workers who report such illegality should be instructed to refrain from sharing these reports and their sources with immigration authorities. If authorities cannot ensure confidentiality, reports will not be forthcoming.

Confidentiality alone, however, will not assure the free flow of information. Undocumented workers may believe that authorities' promises of confidentiality, reports will not be forthcoming.

Confidentiality alone, however, will not assure the free flow of information. Undocumented workers may believe that authorities' promises of confiden-


52. Cf. United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (prospective tort defendant should consider both magnitude of loss, and probability of loss' occurrence). In the context of remedies for violations of employment law, the probability of one having to comply with a back pay award corresponds closely to the likelihood that one's wrongdoing will be detected and brought to the attention of courts and agencies. See supra note 50 (discussing back pay).


54. See supra notes 7-9. See also Note, Developments in the Law, supra note 3, at 1437 ("fear of deportation makes complaints unlikely"). Undocumented persons' fear of the INS has also contributed to the lower-than-expected participation in the amnesty program established by the IRCA. See, e.g., Tolchin, Amnesty for Aliens Might Be Extended, N.Y. Times, Jan. 23, 1988, at A7, col. 1 (quoting Rep. Charles E. Schumer (D-N.Y.) as indicating that "fear of the immigration agency had scared many illegal aliens out of applying for amnesty").
tiality are merely strategic moves to entice complainants out of anonymity. When undocumented workers perceive that agencies eliciting their complaints are acting strategically, they, too, will alter their behavior by refusing to come forward. Eliciting victim cooperation requires more than merely an enforcement authority's promise to forego the stick of INS notification; it also requires a carrot.

The carrot extended in remedies for labor law violations committed against undocumented workers should at least entail back pay or damages. The potential for a cash return is partial consideration for the risk incurred by undocumented workers who report labor law violations. While the availability of monetary relief likely will not outweigh the perceived risk of deportation for all undocumented workers, it should make a significant difference at the margins. Marginal increases in the willingness of this population to report violations will soon have an impact on Slimy and its ilk. Increases in the rate of reporting will enhance the likelihood that enforcement authorities will detect Slimy's violations. This heightened probability of detection will help deter Slimy.

The compensation for and deterrence of labor law violations afforded by both a prohibitory injunction, which instructs the offending employer to refrain from future violative conduct, and an award of monetary relief, which obliges the employer to pay for his wrongdoing, also leave room for one other basic remedy: reinstatement of the victims of labor law violations. From the standpoint of compensation, reinstatement is vital. An employee who, like the employee in our hypothetical situation, has been discharged because he complained about violations of the FLSA should be restored to the position he would have been in had the employer conformed his conduct to legal norms. A monetary award certainly helps accomplish this goal; however, the employee is only made truly whole if he is reinstated.

55. See generally D. MUELLER, PUBLIC CHOICE 11-18 (1979) (discussing difficulties for collective action posed by strategic behavior). This reluctance may not evaporate even if undocumented persons are persuaded of the government's sincerity. Sincerity does not rule out inadvertent disclosure or disclosure by third parties such as the press. This risk might also deter a complainant from volunteering information.

56. The margins are the starting point for implementation of any policy. See Easterbrook, Foreword: The Court and the Economic System, 98 HARV. L. REV. 4, 12-14 (1984) (discussing how marginal changes in incentives will affect behavior if people are free to modify their conduct to take advantage of incentives).


58. One may argue that providing both reinstatement and monetary relief to the non-grandfathered employee in our hypothetical scenario does not so much compensate the undocumented worker as reward him for his own illegal conduct in breaking the immigration laws. The author discusses this issue later in this Article. See infra notes 183-98 and accompanying text. If, however, one puts aside the immigration question temporarily in order to clarify the analysis of labor law interests and issues, it should be clear that compensation is only complete when a court or agency offers reinstatement to a discharged victim of labor law violations.
Reinstatement is as essential as compensation to deterrence. Consider again the two primary factors: 1) the impact on potential labor law violators; and, 2) the additional incentive for victims to complain. An employer confronting a “troublemaking” employee who complains about labor law violations has incentives to discharge that victim absent a guarantee of reinstatement. With the troublemaker out of the way, the employer can hire a more compliant worker and continue his wrongdoing.

The threat of a possible monetary award alone is insufficient to deter employers. This is because the monetary award is limited to the amount of compensation lost by the victim, or to some low multiple, usually two times this amount. Moreover, the employer’s potential liability does not include any elements of an unpredictable magnitude, such as punitive damages. An employer, therefore, may view a monetary award of predictable size, measured by an employee’s lost wages, as a cost of doing business—a license fee for continuing illegality. Because the initial complainant is gone, the previous source of detection is no longer a problem. Other workers remain, but their colleague’s departure will certainly not promote their initiative in contacting enforcement agencies.

The two key elements of deterrence analysis—the gravity of harm to the wrongdoer weighed against the benefits of his wrongdoing, and the presence of incentives for victims to come forward—underscore the importance of the reinstatement remedy. As the previous analysis demonstrates, the lack of a reinstatement remedy clearly encourages employers to avoid complying with labor law norms. Reinstatement, therefore, complements back pay as a vital remedy for employment law violations.

III. Employment Law Remedies And Immigration Policy

A. Deterring Illegal Immigration

Immigration law and policy complicate the analysis of employment law remedies for undocumented workers. The previous section established that enforcement agencies must provide a full range of remedies—prohibitory injunctions, monetary relief, and reinstatement—as well as a guarantee of confidentiality, in order to secure optimal employer compliance with federal labor and employment law mandates. Effective enforcement of employment laws requires making all of the above remedies available to undocumented workers in the three classes outlined above—grandfathered employees, amnesty candidates, and non-grandfathered employees—just as such remedies are available to lawful employees. That prescription, however, presumes that undocumented workers’ immigration status is irrelevant to their rights under

59. *Cf.* Calfee & Craswell, supra note 53, at 989-94 (compensatory measure of damages prevalent in contract law encourages undercompliance); Farber, *supra* note 47, at 1443 (under purely compensatory measure of damages, “parties have an incentive to breach if the profits from breach exceed the plaintiff’s damages”).
American labor law. This section examines the soundness of that presumption.

Two related policy rationales support the presumption that immigration status is irrelevant to employment law rights and remedies. First, applying the NLRA to undocumented workers minimizes the detrimental impact of competition from those employees on the wages and employment conditions of lawful residents.60 Second, the extension of employment law remedies to undocumented workers would lessen the competitive advantage that such employees currently have over lawful residents, and thereby reduce the market in the United States for undocumented labor. When domestic employer demand for undocumented labor is low, the economic incentives which make immigration an appealing option for undocumented persons are also reduced.61 This phenomenon tends to reduce illegal immigration.

A hypothetical scenario demonstrates the plausibility of these justifications for extending coverage of the NLRA to undocumented workers. Suppose an employer, such as Slimy, Inc., can hire an undocumented person at $2.00 per hour. This amount is below the current minimum wage62 and, thus, compensation at this level violates the FLSA. What happens if the undocumented worker has no recourse to FLSA enforcement machinery? The consequence of this condition is that the employer has little economic incentive to comply with the FLSA in dealing with the undocumented worker. However, substantial economic reasons compel Slimy, Inc. to comply with the FLSA in dealing with lawful residents, who are covered by its provisions. All other things being equal, if Slimy can freely pay illegally low wages to one group—undocumented workers—but faces obstacles in effecting similar illegal economies with the other group—lawful residents—whom is Slimy most likely to hire?

Under this hypothesis, lawful residents are less marketable than undocumented persons in the eyes of employers. However, if the standing of both groups under the FLSA is equalized, employers would have less reason to prefer undocumented workers. This result eases downward pressure on employment opportunities, conditions, and compensation for lawful residents of the United States.

Illegal immigration should decrease because of this scheme. As people of countries in Latin America and Asia, whose residents frequently enter the United States illegally,63 receive information about reduced employment op-

60. See supra note 35.
63. As of 1983, the 15 major source countries contributing to illegal immigration were Mexico, the Dominican Republic, Haiti, Jamaica, Guatemala, Columbia, Peru, Ecuador, the Philippines, Korea, Thailand, Greece, India, Iran, and Nigeria. See Note, Developments in the Law, supra note 3, at 1436 n.16.
opportunities here, they should become at least marginally less likely to emigrate.\textsuperscript{64} Undocumented persons enter this country illegally because the benefits of doing so outweigh the costs. The primary benefit is a job.\textsuperscript{65} Diminishing the likelihood of attaining a job renders the time, effort, expense and danger of illegal entry a more significant deterrent to illegal immigration.

This Article suggests that employment law measures will not positively affect immigration policy as long as these measures continue to focus on avoiding any possibility of a reward for undocumented workers. Employment law enforcement efforts will promote immigration policy when they focus on punishing United States employers for violating the law. Changes in employer attitudes and behavior regarding the hiring of undocumented labor are the most effective means of implementing immigration policy because such changes will effectively influence potential undocumented persons' immigration decisions.

This distinction in whom the employment law should focus on assumes that one can target legal and remedial norms to maximize deterrence of illegal conduct. The premise which supports this notion is that a targeted group has three basic attributes: 1) the capacity to acquire knowledge about the type of conduct which society forbids and what sanctions attach upon proof that a party has engaged in such behavior;\textsuperscript{66} 2) the capacity to shape its conduct to

\textsuperscript{64} See Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 893-94 (1984) ("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"); Local 512, Warehouse and Office Workers' Union v. NLRB, 795 F.2d 705, 720 (9th Cir. 1986) ("equalizing the back pay liability for unlawful acts against undocumented and American workers could deter employers from hiring undocumented workers and thus marginally reduce illegal entry to the United States"); Note, After the IRCA, supra note 16, at 610 (labor law protections would act together with the IRCA's employer sanctions provisions to further immigration concerns).

There is some empirical basis for this theory, if one extrapolates from data involving legal immigration. Legal immigration decreases when United States employer demand slackens for a protracted period. See T. ALEINIKOFF & D. MARTIN, supra note 2, at 52 ("at the height of the Great Depression . . . 35,576 entered the country, over 100,000 [including temporary immigrants] left").

It seems likely that some information about economic opportunity is available in nations where illegal immigration originates. Correspondence flows from compatriots, friends, and relatives already in the United States. Those who do not directly receive correspondence can still glean information from contact with recipients, from the media within their country, and from the pungent mill of rumor. Assuming, therefore, that employment opportunities in fact decrease appreciably, news of this decrease should be disseminated to those living in other countries to the extent that such information pushes illegal immigration downward.

\textsuperscript{65} See H. REP. No. 682 (I), 99th Cong., 2d Sess. 45-46, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 5649-50 (prospect of employment is "magnet that lures [undocumented workers] to this country"); D. NORTH & M. HOUSTOUN, supra note 4, at 66 ("almost three-quarters (74.2\%) of all respondents in the study group [of apprehended undocumented workers] reported that they came to the United States in order to find a job"); Fogel, supra note 3, at 76 ("incentive [for illegal immigration] is a job").

avoid the illegality and sanctions; and, 3) the existence of a sufficient "fit" between the behavior which triggers sanctions and the behavior which the sanctions are designed to deter. Targeting a group which lacks any of these features will only frustrate deterrence.

The interaction of immigration and labor law highlights the importance of these three basic attributes. The activities Congress seeks to deter are: 1) illegal immigration; and, 2) the hiring of undocumented workers by domestic employers. The following subsections analyze how control of those activities fares under the three criteria just outlined. Discussion will focus on the imposition of two alternative and mutually exclusive sanctions on two distinct groups. The first strategy involves subjecting employers who violate the labor laws in their treatment of undocumented workers to liability under the full spectrum of remedies available under current federal labor and employment law. The second strategy—and the current approach—involves subjecting undocumented workers to the risk of employer violations of otherwise applicable federal labor law without giving these employees full recourse to rights and remedies. Under this Article's hypothesis, the first strategy should deter employers from hiring undocumented workers, and thereby reduce illegal immigration.

1. Capacity to Acquire Knowledge

The first factor to consider is the employer's, as compared with the undocumented worker's, capacity to acquire knowledge about prohibited conduct and applicable sanctions. This capacity is important because sanctions have virtually no impact as a deterrent if a given party does not know of their existence. This does not mean that all parties who lack knowledge of sanctions will engage in behavior which the sanctions aim to deter. However, a party who lacks knowledge of sanctions cannot be affected by them before he acts and, therefore, will not be deterred from acting. Sanctions which fail to deter are virtually useless.

Employers' capacity to acquire knowledge is typically superior to the capacity of undocumented workers. First, employers are often, although not

67. This second sanction may seem less direct than the first: no out-of-pocket expenditures are required, and the subject of the sanction—the undocumented worker—loses nothing which he had not lost previously. These points reflect the weakness of the sanction, which this Article discusses in greater detail infra notes 94-99 and accompanying text. One's denial of employment law remedies for undocumented workers is a sanction, however, regardless of its effectiveness.

68. Sanctions which are not useful as effective deterrents before the fact may still serve a symbolic purpose after the fact by demonstrating to the rest of society that legal standards have been upheld. This is one justification for the death penalty. See Perlin, The Supreme Court, The Mentally Disabled Criminal Defendant, and Symbolic Values: Random Decisions, Hidden Rationales, or "Doctrinal Abyss?," 29 ARIZ. L. REV. 1, 3 n.9 (1987). The appropriateness of this justification is subject to intense debate. Id. See also infra notes 203-15 and accompanying text (discussing symbolic dimension of employment law remedies for undocumented workers).
always, entities or organizations. As such, they enjoy actual or potential economies of scale that permit specialization and division of labor.\footnote{69} Organizations typically have some research capability which allows them to ascertain the current state of the law. Organizations also typically have access to legal advice, either from in-house or retained counsel. Attorneys hired by employer clients to dispense advice on labor and immigration matters could inform their clients of the full range of sanctions and remedies available to undocumented workers under federal employment law as advocated in this Article. Conveying this information should discourage employers from hiring undocumented workers.

A second factor which enhances employers' access to information about undocumented workers' employment rights and remedies is the local availability of such information. Even if some employers are too small to enjoy organizational benefits such as specialization, they have access to the popular media, which reports regularly on immigration and labor matters.\footnote{70} Moreover, employers, because of their work-related interest, are more likely than the public at large to spot and retain such information.\footnote{71}

Undocumented workers, on the other hand, have considerably fewer sources of information. They are typically poor, isolated, and relatively lacking in education.\footnote{72} Because of their isolation, they do not have the same capacity to gather data that is enjoyed by more organized actors, including many employers.\footnote{73}

The relative disadvantage of undocumented workers is exacerbated by their geographic situation at the time when the information would have the most impact, i.e., while they are still in their countries of origin, considering
whether or not to attempt illegal entry into the United States. At this critical juncture, potential undocumented workers have virtually no access to media generated in the United States except through second-hand reports in indigenous news sources about United States developments. While some news about employer sanctions and the IRCA generally may filter through, news about developments regarding rights and remedies under United States employment law will not be readily available in undocumented workers' countries of origin. If one assumes that information about the exclusion of undocumented workers from labor law protections would deter potential undocumented workers from emigrating, then this deterrence is surely limited by the reduced capacity of such persons to acquire that information.

2. Capacity to Conform Conduct

Having established that employers are likely to have greater access to information than undocumented workers, the next factor to consider is the actors' capacity to conform their conduct so as to avoid sanctions arising from the employment of undocumented workers. One's capacity to conform

74. It is possible that reports about the employment situation generally, or the situation specifically pertaining to undocumented workers, will penetrate these foreign markets. Rumor and correspondence will also play a role. The pervasiveness of rumor and the rarity of correspondence will generally increase when the potential undocumented population is illiterate. Rumor, because it comes from persons second-hand or even more remote, is inherently less precise than first-hand correspondence. Information of greater sophistication and complexity, such as information about employment law remedies, will tend to get lost in the jumble.

75. Potential immigrants' knowledge of a lack of employment law protections in the United States might not deter illegal immigration if the fit is loose between the absence of employment law protections and the potential immigrants' main motivation for immigrating illegally. Since the principal motivation for illegal entry is finding a job—any job, see supra note 65 and accompanying text—the fact that a job comes without employment law protections may not make a difference to undocumented persons. See infra notes 94-99 and accompanying text.

76. Cf. Dan-Cohen, Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law, 97 Harv. L. Rev. 625, 630-34, 637-39 (1984) (making the complementary point that high visibility of exceptions to general rule of liability or culpability, such as exception as a result of duress, weakens deterrence by fostering impression that one may "get away with" violations of norms); Fletcher, Paradoxes in Legal Thought, 85 Colum. L. Rev. 1263, 1280-84 (1985) (same).

Undocumented persons' lack of access to information also punctures the reward theory, which holds that a system which makes remedies available to undocumented workers rewards illegal immigration. See supra notes 10-11 and accompanying text (discussing reward theory). For example, individuals often post a reward to achieve an objective, such as the apprehension of a suspected criminal. But widespread knowledge of the reward is vital to accomplishing the goal. If people know about the reward, they have an incentive to contribute information. If no one knows about the reward, the reward fails to serve as an incentive. Absent knowledge, the only role of the reward is the role of an after-the-fact windfall. Similarly, in immigration decisions, if people do not know about employment law protections in the United States before they emigrate, such protections are not a reward for illegal immigration in the instrumental sense. Employment protections which workers did not anticipate before their illegal entry into the United States are not a reward, but a serendipitous occurrence.
to the legal standard is important because sanctions cannot effectively deter behavior which an individual or entity is unable to change.\textsuperscript{77}

When considering the capacity of others to conform their conduct, it is useful to distinguish between physical and mental capacity, on the one hand, and economic capacity, on the other. Employers may have superior resources which enhance their capacity to conform in this area. The comparison between employers and undocumented workers here, however, admittedly produces more ambiguity than does the same comparison under the access-to-information factor.

Most employers clearly have the physical and mental ability to take basic steps to guard against employing undocumented workers. One may assume that employers are, as a group, at least as cognitively sound as the rest of the population. Employers, therefore, should not suffer from the lack of cognition or responsibility which may serve to excuse illegal acts under the criminal law.\textsuperscript{78} An employer may conform its conduct to existing law by instituting the procedures mandated by the IRCA: she can verify the employee's residence or citizenship by requiring the employee or prospective employee to produce a passport, a green card, or another document which adequately serves the purpose of verification.

The ambiguity in this apparently precise rendering derives from economic, not mental or physical, factors. A hypothetical scenario depicts the extent of the difficulty in this area. Let us assume first that, as seems likely, the employer sanctions of the IRCA lose some impact because of government officials' less than total enforcement.\textsuperscript{79} Larger corporations may still obey the law. These firms may have sufficient cash flow and profit margins to employ organized labor, even if it diverts profits from shareholders to unions. Such

\textsuperscript{77} The classic case of being unable to conform conduct is the case in which a criminal defendant is found not responsible for a criminal act because she suffered from a mental disease or defect which prevented her from appreciating the wrongfulness of her acts. \textit{See American Bar Association Statement on the Insanity Defense}, \textit{7 Mental Disability L. Rep.} 136, 138 (1983) (discussing rationale for insanity defense).

\textsuperscript{78} \textit{See supra} note 77.

\textsuperscript{79} The INS has cited and sought to fine employers when a court or agency found that they have violated the IRCA. \textit{See, e.g.}, Filkins, \textit{Businessman Faces Fine for Hiring Illegals}, The Miami Herald, Jan. 7, 1988, at 1, col. 1. Statistics regarding detected wrongdoing can be invidious. The numbers of detected and apprehended wrongdoers may be large in an absolute sense. This also is true of the number of undocumented persons apprehended by the INS. \textit{See J. Crewdson, The Tarnished Door: The New Immigrants and the Transformation of America} 98-106 (1983) (\textit{cited in T. Aleinkoff} & D. Martin, \textit{supra} note 2, at 756, 758 (number of INS apprehensions of undocumented persons hovers around 1,000,000 annually)). The apprehension statistics do not reflect the INS' enforcement success, however. The statistics suggest instead that prospective undocumented persons think so little of the enforcement machinery which is currently in place that they continue to attempt to best it in massive numbers. By all accounts, they succeed. \textit{See T. Aleinkoff} & D. Martin, \textit{supra} note 2, at 760 (INS agents' estimates of ratio of apprehended to unapprehended undocumented persons range from 1:2 to 1:10). The same phenomenon may therefore occur with respect to government enforcement of the IRCA.
corporations may also be able to pay all employees at a rate equal to or above the minimum wage. In addition, the bigness of the corporation may make it more visible, and heighten its chances of being targeted for enforcement by IRCA authorities even under an imperfect enforcement regime. Thus, for the big corporation, the combination of some level of IRCA enforcement and some degree of labor law protection for undocumented workers makes it economically worthwhile to hire only American citizens or lawful residents.

Smaller firms applying this economic calculus may reach quite a different result. A small business owner may confront a choice between risking sanctions through labor law and IRCA violations, and surrendering her shop to creditors. Many firms with, for instance, less than 100 employees (an admittedly arbitrary boundary of smallness) now employ undocumented workers. These businesses typically include textile and garment manufacturers, retail establishments, and restaurants. Such businesses have limited cash flow and tight profit margins. Without the advantages of docile, low-wage undocumented labor, their cash flow may trickle down to a few drops and their profit margins may shrink to nothing. Because these businesses are relatively small, they are less prominent on the enforcement horizon and accordingly they have less reason to fear detection. Many small businesses, therefore, will assume the slight risk of sanctions.

The reaction of these small businesses to possible sanctions under federal labor law and the IRCA may result in these businesses doing one or more of the following: 1) hiring even more ignorant and raw undocumented workers than was previously the case in order to minimize the chance that employees will assert their rights under federal law; 2) paying these employees even less to compensate for the risks which they as employers run; or, 3) footing the bill for ersatz residence or citizenship documentation because they can arrange for forged papers cheaper than the cost of paying the minimum wage or dealing with labor unions. Under this scenario, such employers lack the economic capacity to conform their conduct. The threat of government imposed sanctions does not significantly curb employment of undocumented workers in this realm. Illegal immigration, which correlates with job availability, persists.

As one considers economic factors as one element of employers’ capacity to stop hiring undocumented workers, the analysis indicates that the effectiveness of sanctions may vary with the size and resources of the employer. In some cases, sanctions will not be effective. This does not mean that we should, as a matter of immigration policy, decline to sanction employers for conduct which would otherwise violate federal employment law.

80. Cf. Applebome, Aliens Who Are Still Illegal Find Life Is Getting Tougher, N.Y. Times, July 6, 1988, at A1, A12, col. 1 (“the work that aliens find is often the most marginal, low-paying work to be found”).

81. Cf. Schuck, supra note 2, at 77 & n.434 (discussing ease with which one may obtain fraudulent documents); Applebome, supra note 80, at 12 (same).
The alternative to imposing liability upon employers for employment law violations is to make undocumented workers bear the risk of employer violations of employment law. This alternative, however, becomes feasible only if undocumented workers as a group are better able than employers to conform their behavior so as to reduce illegal immigration. If undocumented workers are not better situated than employers in this respect, the effectiveness of targeting undocumented workers erodes proportionately.

Some judges and commentators view undocumented persons as possessing a formidable capacity to conform their conduct.\(^\text{82}\) As is the case with employers, undocumented workers presumably possess the physical and mental abilities to control their actions. It seems doubtful that persons inadvertently move to the United States because they are unsure of the exact location of, say, the Mexican-American border. Persons come to live in the United States primarily for two reasons: 1) economic betterment, and, 2) political freedom. Identifying these concerns, however, does not in and of itself demonstrate that prospective illegal immigrants have the capacity to conform their conduct to avoid sanctions. Prudence counsels a more searching analysis before embracing this conclusion.

Persons who choose to immigrate to the United States in pursuit of political freedom pose the greatest challenge to the notion that undocumented persons can conform their conduct. This is particularly true when one considers those fitting into the political asylum category. These immigrants have, by definition, suffered and risk continued suffering from governmental persecution directed at them and their families. Faced with death, torture, or unjust imprisonment in their countries of origin, they choose flight. Their choice to immigrate does not evidence any notable capacity to calibrate choices based upon incentives. The incentive of life itself overshadows any other risks and benefits. Such a motivation leads to but one outcome: immigration to the

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82. See Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 913, 913 n.* (1984) (Powell, J., dissenting) (curbing employment law remedies for undocumented workers "provides less incentive for aliens to enter and reenter the United States illegally"); In re Reyes, 814 F.2d 168, 171, 172 (5th Cir. 1987) (Jones, J., dissenting) ("[t]o the extent [that] the . . . prohibition [in AWPA, 29 U.S.C. §§ 1801, 1816 (1982)] on hiring undocumented aliens is intended to discourage illegal migration of farm workers from other countries, that purpose is undercut by allowing those farm workers to sue and recover benefits on a par with legally employed workers"); cert. denied, 108 S. Ct. 2901 (1988); Bevies Co. v. Teamsters Local 986, 791 F.2d 1391, 1394 (9th Cir. 1986) (Sneed, J., dissenting) (extending employment law remedies to undocumented workers conflicts with policy of discouraging illegal immigration which underlies immigration laws); Patel v. Sumani Corp., Inc., 660 F. Supp. 1528, 1534-35 (N.D. Ala. 1987) (curbing remedies curbs illegal immigration), rev'd sub nom. Patel v. Quality Inn South, 846 F.2d 700 (11th Cir. 1988); Schuck, supra note 2, at 76-77 ("Immigration law deals with private activity that is quintessentially deliberate and calculating, activity therefore in which incentives are highly and directly salient to motivation."). But see Comment, Human Rights, supra note 16, at 1742 (since prime motivation for those entering United States illegally is opportunity to enjoy general economic conditions which are superior to those of the persons' countries of origin, "declining to enforce employment standards for illegal aliens simply does not reduce illegal immigration").
United States. Persons in this category, therefore, will not conform their conduct.

There is also some question regarding undocumented persons' economic motivations for illegal immigration. For the most part, undocumented workers, assuming they have access to information, should react in a manner similar to domestic employers. If the potential economic advantage is great and detection of wrongdoing, once here, is not definite, the temptation for them to enter or stay in the United States illegally is very strong. Yet, this situation does not mean that undocumented workers have no capacity to avoid illegal immigration. In theory, at least, the situation demands only the design and implementation of sanctions strong enough to alter a prospective undocumented worker's positive assessment of the economic advantage yielded by illegal immigration. Imposing sanctions which sufficiently shrink that advantage will alleviate the problem. This point leads to the third component of our analysis.

3. The Fit Between Sanctions and Prohibited Conduct

The focus of the third component is on the fit between the proposed sanction and the conduct one wishes to curb. A close relation between sanctions and prohibited conduct is vital to deterrence. Deterrence results only when sanctions neutralize the benefits of prohibited behavior for the sanctions' targeted group. If an activity which triggers sanctions is unrelated to the behavior which one wishes to deter, such sanctions will not deter the targeted behavior.83

The shaping of effective sanctions to curb illegal immigration is particularly challenging. Illegal immigration results from a network of economic, social, and political factors which do not recognize the boundaries of nations. This section examines the question of fit, first as it applies to employers and second, as it applies to undocumented workers.

Imposing sanctions on employers by fully extending the reach of employment law to undocumented workers fits Congress' express goal of curbing undocumented workers' employment opportunities. Certain statutes, such as the NLRA, the FLSA, and the Occupational Safety and Health Act ("OSHA"), feature an almost perfect fit. Our old hypothetical scenario about Slimy, Inc. and the exploitation of undocumented labor demonstrates this point. Slimy has little incentive to hire undocumented workers if it knows that it will not be able to save money by pressuring these employees not to organize, paying them less, working them more, and exposing them to dangerous working

83. For example, suppose one wanted to deter murder. The government's placing of a tax on the manufacture of shoelaces would have no effect on the incidence of intentional homicides. One's manufacture of shoelaces has nothing to do with homicide, even though many killers probably wear shoelaces. Regulation of the manufacture and sale of firearms might be a better bet. Cf. G. CALABRESI, supra note 66, at 133, 140-43 (causal relationship between activities of entity bearing costs of accidents and accidents' occurrence is necessary to promote deterrence).
conditions which cost money to correct. If courts and agencies made full labor law remedies available to undocumented workers, these employees would have an incentive to inform the relevant authorities of Slimy's illegal conduct. This increase in the likelihood of Slimy's conduct being detected should lessen its interest in hiring undocumented workers.

Under other statutes, however, the fit between making remedies for employment law violations available to undocumented workers and reducing employer demand for such labor may be more tenuous. Title VII of the Civil Rights Act is one such statute. A hypothetical situation again illustrates this point.

Suppose that Slimy employs twenty undocumented workers in its textile factory, along with twenty legal resident employees. Slimy pays the legal residents $6.00 per hour. It pays the undocumented workers $5.00 per hour. Under this regime, for each undocumented worker it hires Slimy realizes a saving of $1.00 per hour. The undocumented employees' competitive edge induces employers to hire more from this population. This result frustrates the goals of the IRCA.

However, while Slimy violates the IRCA employer sanctions provisions, it probably does not violate federal employment law. Title VII, which bars discrimination on the basis of race, gender, religion, or national origin, may not reach this conduct. If one assumes that all of the undocumented workers are of the same nationality, for instance, Burmese, it will be difficult for those employees to demonstrate that the employers discriminated against them because they are Burmese and not because they are undocumented workers. An employer who discriminates against undocumented workers solely on the basis of alienage with respect to wages does not violate Title VII.44

However, these employees could recover under Title VII if they could prove that they were part of a larger group of Asians, including lawful residents or citizens, whom Slimy paid less. But suppose that Slimy paid all lawful residents and citizens at the same rate regardless of their race, religion, gender, and national origin, and reserved the lower rate for undocumented workers. Slimy would most likely not be liable under Title VII. In this case, Title VII does not diminish employer incentives to hire from the undocumented population.

There are other scenarios in which the fit between Title VII protections and curbing illegal immigration seems less tenuous. In these situations, an employer engages in conduct which is discriminatory under the statute, but which results in no direct pecuniary advantage to the employer. This lack of pecuniary advantage is a problem if one posits that employers tend to hire undocumented workers because they want to save money. Providing remedies for behavior which may be illegal, but which results in no cost savings to the employer, may not further the goals of immigration law. Another hypothetical situation demonstrates this point.

Suppose Slimy employs ten undocumented workers of Hispanic origin, as well as ten lawful resident workers with the same ethnic background. Although all twenty employees are capable and diligent, Slimy refuses to consider them for promotion. Slimy promotes only white employees. This practice clearly violates Title VII. However, the practice seems to be neutral in its effect on immigration policy because it does not appear to save the employer money. The employer's lack of a pecuniary rationale sets the no-promotion policy apart from cost-cutting strategies like avoiding union organizing through intimidation, which violates the NLRA, and refusing to pay overtime to undocumented workers, which should violate the FLSA. Providing remedies for undocumented workers victimized by the no-promotion policy may help eradicate discrimination. But will it help curb illegal immigration by making employers less willing to hire undocumented workers? The answer is "yes," although the rationale behind the answer is less obvious than it is for the NLRA and the FLSA violations.

The rationale for finding a fit between employment law remedies and immigration policy in this kind of situation stems from the psychology of the employer. An employer may view discriminatory job practices subjectively as premised on pecuniary factors. For example, an employer may believe that nondiscriminatory promotion practices would hurt his business because such practices would force greater contact between white customers and non-white employees whom he promoted into positions with more customer contact. This contact may offend white customers who themselves hold discriminatory attitudes. These customers might go elsewhere, rather than deal with non-white employees. An employer who knew he could implement his discriminatory hiring plan by hiring undocumented workers outside of Title VII's ambit might therefore tend to hire members of that population.

An employer might also have interests beyond strictly pecuniary advantage which he could serve by employing undocumented workers who lacked recourse through employment law. For instance, an employer might be inclined toward sexual harassment of employees. If the employer has a captive workforce of undocumented workers, the employer may indulge his whims without legal accountability.

85. Cf. City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (rejecting argument that neighbors who opposed others' establishment of group home for mentally retarded persons would fear residents of such home when argument was unaccompanied by proof of reasonable basis for such fear); Palmore v. Sidoti, 466 U.S. 429 (1984) (rejecting argument that society generally disfavored children from racially mixed households as a valid basis for state to remove child from custody of white mother who was cohabiting with black male).


87. In Freudian terms, this employer would be giving in to his id, rather than heeding to the rational counsel of his ego. See S. Freud, The Ego and the Id 15 (Norton ed. 1962) ("the pleasure principle . . . reigns unrestrictedly in the id"). Cf. F. Nietzsche, The Birth of Tragedy and The Genealogy of Morals 196 (Anchor ed. 1956) ("pleasure is induced by . . . being able to exercise . . . power freely upon one who is powerless . . . the pleasure of rape").
Another nonpecuniary interest which the employer may act to preserve is her freedom to discriminate. Such freedom is, after all, of noble pedigree; noted scholars vigorously defended one's right to discriminate in the face of judicial movement toward integration.\footnote{See Wechsler, \textit{Toward Neutral Principles of Constitutional Law}, 73 \textsc{Harv. L. Rev.} 1, 31-34 (1959) (discussing constitutional status of racial integration in light of, \textit{inter alia}, associational rights of people who favor segregation).} Protecting the freedom to discriminate is also convenient. In order to eschew discrimination one must exercise self-restraint and tolerate cultural and social differences. One must also strive to acquire knowledge in an attempt to overcome stereotypes and misperceptions.\footnote{See Donahue, \textit{Further Thoughts on Employment Discrimination Legislation: A Reply to Judge Posner}, 136 \textsc{U. Pa. L. Rev.} 523, 527-28 (1987) (discussing "psychic costs" borne by discriminatory employer when law forces him to associate with employees he dislikes because of employees' race). \textit{See also} Posner, \textit{The Efficiency and the Efficacy of Title VII}, 136 \textsc{U. Pa. L. Rev.} 513, 516 (1987) (asserting that efficiency might justify lower standard of compensation for black employees, who may, due to their past exclusion from equal education opportunities, be less productive on average than white workers).} This is strenuous work. Employers may also resent the demands of outside authorities that they educate themselves. If an employer could hire undocumented workers and thereby preserve her own authority and save herself the tedium of enlightenment, she might take advantage of such an opportunity. Extending the protections of discrimination law to undocumented workers would discourage such behavior. Therefore, such action fits well with immigration policy, even when direct pecuniary advantage for the employer is not present.

Before one concludes that making employment law remedies available to undocumented workers is worthwhile as a matter of immigration policy, however, one must consider the fit between immigration policy and the opposite approach—subjecting undocumented employees to the risk of irremediable employer illegality. What effect would leaving undocumented workers remediless have on illegal immigration? Because there is only a very loose fit between the sanction of subjecting such workers to irremediable employment law violations and their individual decisions to enter or stay in the United States illegally, this sanction will not be an effective deterrent.

The question of fit between employment and immigration law as it relates to undocumented workers is a challenging one because it is not clear what type of direct sanction against undocumented workers would deter persons from entering the United States illegally. The tightest fit would result if one made the act of work for pay in the United States a crime for undocumented workers. Under such a scheme, an undocumented worker whom authorities found to have worked in the United States would be subject to a fine, imprisonment, or both. However, there are fundamental problems with such a strategy.

The problem with the system allowing punishment for the undocumented person who works in the United States is twofold. First, sanctions of this
type are surplusage: the INA makes mere illegal entry into the United States a crime and a deportable offense.\textsuperscript{90} Efforts to enforce this provision currently center on the workplace.\textsuperscript{91} Congress has not solved the problem through these efforts, which is why it enacted the IRCA. Second, if we imprison undocumented persons in the United States, taxpayers consequently subsidize rather expensive, if not posh, accommodations for those persons.\textsuperscript{92} Immigration policy should prevent or minimize such transfers of resources.\textsuperscript{93} These two cavils demonstrate the futility of close fitting sanctions against undocumented persons for working in this country.

Sanctions with a looser fit are equally ineffective. The looser fitting sanction that this Article focuses on at this point involves subjecting undocumented workers to the risk of working in the United States without employment law protections. This risk might dissuade a foreign national from illegally immigrating if her key motivation for immigrating was to avail herself of these legal protections. A foreign national whose prime aim in entering this country illegally is to bask under the umbrella of the NLRA, the FLSA, or Title VII might well hesitate if Congress or the courts took away any portion of the umbrella. For most, if not all, undocumented workers, however, this umbrella is irrelevant. People enter the United States to work.\textsuperscript{94} As long as work in the United States is available and more remunerative than work in the worker's country of origin, the exodus will continue.\textsuperscript{95}

Denying undocumented workers all employment rights and remedies would not modify either of the factors which presently encourage illegal immigration, nor would it reduce employment opportunities for this population. In fact, the opposite is the case. By freeing employers from the worrisome mandates of minimum wages, maximum hours, unionization, and non-discrimination, we simply encourage employers to hire undocumented workers. Additionally, employment law mandates do not account for the superiority of American compensation levels over positions in countries of origin. Even without employment law protections, American jobs—and the most undesirable Amer-

\textsuperscript{90} See supra note 7 and accompanying text for a summary of the statutes which make certain forms of immigration illegal.

\textsuperscript{91} The INS has concentrated much of its efforts on investigating factories and staging raids at those and other workplaces in order to apprehend undocumented workers. See Bracamonte, supra note 17, at 39-43.

\textsuperscript{92} See Zaldivar, INS Parole Papers Won't Guarantee All Cubans Will Get Speedy Releases, The Miami Herald, Jan. 10, 1988, at 7A ("the cost of keeping the Cubans incarcerated is much higher than the cost of placing them in halfway houses or with sponsors"). Indeed, even the cost of apprehending and deporting all undocumented persons in the United States is prohibitive. This cost was one factor favoring the amnesty program, which ultimately reduces the number of people that the INS must apprehend. See Mazzoli, supra note 19, at 42.

\textsuperscript{93} See infra notes 102-12 and accompanying text.

\textsuperscript{94} See Plyler v. Doe, 457 U.S. 202, 228 (1982); supra note 65 and accompanying text.

\textsuperscript{95} This conclusion comports with fundamental economic theory. See generally D. Mueller, supra note 55, at 125-42 (discussing how people tend to vote with their feet by moving to communities where "goods" such as employment opportunities are widely available).
American jobs at that—offer compensation substantially superior to jobs which a prospective illegal immigrant would typically attain in her country of origin.\(^\text{96}\) This simple fact is sufficient to motivate most undocumented persons to immigrate. The availability of United States employment law protections, like the availability of United States public education for noncitizen children of undocumented persons, is merely gravy.\(^\text{97}\) Even if the pool of prospective undocumented workers knows about these protections,\(^\text{98}\) the availability of employment law protections only supplements the other factors which make jobs in the United States more appealing.\(^\text{99}\) Removing these protections will not appreciably reduce illegal immigration as long as the disparity in compensation levels remains so great.

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96. See D. North & M. Houston, supra note 4, at 55-64. The authors note, for example, that "the minimum weekly wage in Colombia is almost identical to the minimum wage for an hour of work in the U.S." Id. at 61. In other words, an undocumented worker in the United States making less than the hourly minimum wage would still probably make far more than he could make at an average wage, above the minimum, in source countries such as Mexico, El Salvador, or Colombia. See id. at 62 (presenting chart depicting average and minimum wages in United States and selected countries of origin).

97. See Plyler v. Doe, 457 U.S. 202, 228 (1982) ("[t]he dominant incentive for illegal entry . . . is the availability of employment; few if any illegal immigrants come to this country . . . in order to avail themselves of a free education."). But see Schuck, supra note 2, at 56-57 (observing that Plyler Court's scrutiny of efficacy of means (barring undocumented persons' children from public education) to accomplish end (reduction of illegal immigration) is inconsistent with deference Court usually accords regulatory statutes). Professor Schuck's point may, however, be less applicable when one is interpreting an ambiguous or silent statute, such as every example of federal employment legislation, rather than determining whether a clear statute like the Texas education law in Plyler violates the Constitution. The Texas statute expressly excluded undocumented alien children while there is no such express exclusion anywhere in federal employment legislation. Plyler, 457 U.S. at 205. The efficacy of such an exclusion in reducing illegal immigration is one factor which should govern imputing to Congress the purpose of creating such an exclusion. If an implied exception to general statutory language does not clearly serve the purpose of that or any other statute, the Court would be best advised to leave the question to Congress' future consideration. See infra notes 113-39 and accompanying text (discussing limits placed on courts' authority to read exceptions into broad statutory language based on institutional factors such as courts' non-accountability).

98. It is doubtful that most people in their countries of origin have significant knowledge of United States employment law. See supra notes 72-76 and accompanying text for a discussion of the information sources in these countries.

99. It is possible that the availability of labor law protections to all persons employed in the United States would exert a marginal influence on potential undocumented persons' decisions to illegally enter the United States. Such activity at the margins is not insignificant, as a general matter. See supra note 56 and accompanying text. Here, however, the marginal effect should be minuscule because the possibility that one may get a job in the United States which does not carry with it the protection of employment law is still very attractive to illegal immigrants, who are typically accustomed to a radically lower standard of living. See supra note 96 and accompanying text.

The question of fit between sanction and disfavored conduct for undocumented workers and domestic employers may be closer if one examines an aspect of employment law which is tangential to this Article: the limits of unemployment insurance. Unemployment insurance, which pays benefits to workers involuntarily out of a job, is a cooperative federal-state program.
This analysis demonstrates that sanctions directed at employers will more effectively reduce illegal immigration than will sanctions which directly target employers. Employees contribute to the program, as do employers, who pay a tax based on the employer's total payroll and the number of former employees collecting unemployment insurance. See The Federal Unemployment Tax Act ("FUTA"), 26 U.S.C. §§ 3301-11 (1982 & Supp. IV 1986). The greater the number of employees collecting benefits, the greater the employer's tax. See 26 U.S.C. § 3303(a)(1) (1982). Employees who leave a job as a result of substandard working conditions are viewed by courts as having been constructively discharged and they are therefore eligible for benefits. E.g., Industrial Comm'n v. Arteaga, 735 P.2d 473, 481 (Colo. 1987).

The FUTA prohibits the government from distributing benefits to undocumented persons. 26 U.S.C. § 3304(a)(14)(A) (1982). This prohibition disposes of the issue of undocumented persons' eligibility under current law, but leaves open the question of the desirability of this rule as a matter of immigration policy. The fit factor helps in the analysis of this issue.

Many undocumented persons have intimate knowledge of the unemployment situation in their country of origin. See D. North & M. Houston, supra note 4, at 62 (chart showing, for example, that unemployment in Mexico totals 40%). The prospect of their receiving benefits to tide them over during periods of unemployment would seem to be highly appealing to potential undocumented persons. If undocumented persons were eligible for unemployment insurance and potential undocumented persons knew this,—a big "if," given undocumented persons' frequent lack of knowledge, see supra notes 72-76 and accompanying text—eligibility may motivate illegal entry in a certain cohort of cases.

Risk-averse individuals, i.e., those with a low tolerance for uncertainty, may only be willing to venture illegal entry if they knew that the availability of unemployment insurance would cushion them when jobs were scarce in the United States. From this perspective, one's barring of undocumented workers from receiving unemployment benefits is a meaningful, albeit still marginal, deterrent to illegal immigration. Compare Ayala v. California Unemployment Ins. Bd., 54 Cal. App. 3d 676, 126 Cal. Rptr. 210 (2d Dist. 1976) (approving eligibility for disability benefits conditioned on medical disability, which undocumented person cannot predict and which therefore could not furnish basis for decisions to enter United States illegally) with Alonso v. California, 50 Cal. App. 3d 242, 123 Cal. Rptr. 536 (2d Dist. 1975) (disallowing unemployment insurance for undocumented workers in part on ground that allowing benefits would encourage illegal immigration).

The fit between sanction and disfavored conduct of employers may be less close than the fit for undocumented workers in the unemployment insurance realm. Employers benefit when undocumented workers are ineligible for unemployment insurance, although this benefit to employers is more attenuated than the benefits which accrue when undocumented workers are barred from employment law remedies. In the case of unemployment insurance, employers benefit because the departure of undocumented workers from the payroll will not be added to the employer's total tax liability under the federal unemployment insurance tax program. The termination of other employees increases the employer's tax liability. This difference in tax consequences provides employers with an unintended incentive to hire undocumented workers. See Arteaga, 735 P.2d at 481.

Nonetheless, the incentive has less of an impact than the incentive yielded by the system's elimination of employment law remedies. Eliminating employment law remedies directly assists employers who wish to exploit undocumented labor by making it easier for employers to pay undocumented employees less, work them more, and fire them if they complain. The system's barring of undocumented workers from eligibility for unemployment insurance affects the employer only if the employer terminates an undocumented worker. The advantage to such employer who hires undocumented labor is purely contingent—it hinges on the undocumented worker's ultimate termination. Even at the point of the employee's termination, the savings resulting from the employer's avoidance of tax liability does not equal the savings derived from the employer's avoidance of a potential back pay obligation when the undocumented worker has
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undocumented workers. One question may linger. Why should one consider employment law remedies for undocumented workers important, given the sanctions against employers already built into the IRCA?

The importance of providing employment law remedies for undocumented workers lies in the incentives these remedies create for private supplementation of government enforcement efforts. If we reward private individuals with remedies such as reinstatement and monetary relief, the potential reward encourages individuals to take unilateral action to secure their respective rights or to cooperate with governmental authorities. The results of this private involvement are better than the results yielded by the government, with its limited resources, acting alone. The IRCA employer sanctions provisions contain no mechanism which encourages private cooperation with enforcement efforts. Making employment law remedies available to undocumented workers would therefore supplement the IRCA scheme.

no access to employment law remedies.

Moreover, unlike a reinstatement remedy, one's eligibility for unemployment insurance does not trump the employer's ability to discharge workers illegally. The employer remains free to terminate an employee—he merely experiences a modest increase in tax liability as a result. Thus, a system which prevents this increase of tax liability by denying eligibility to undocumented workers does not, by itself, promote wholesale hiring of undocumented workers. Cf. Arteaga, 735 P.2d at 486 (Rovira, J., dissenting) (criticizing majority for "stretching far afield" with "novel" view that unemployment insurance has significant role as deterrent of exploitation in workplace).

The ineligibility of undocumented workers for unemployment insurance should not substantially enhance the attractiveness of one's hiring undocumented labor, even assuming that employers tend to have knowledge of such relatively arcane issues. However, it is impossible to discount the influence of this factor on the margins. See supra note 56 and accompanying text. Accordingly, to confirm fully the undesirability of unemployment insurance for undocumented workers, analysis must shift to a secondary goal of immigration policy: minimizing transfers of resources from taxpayers to the undocumented population. See Alonso, 50 Cal. App. 3d at 253, 123 Cal. Rptr. at 543 (making undocumented workers eligible for unemployment insurance would amount to "subsidizing" undocumented population). See also infra notes 92-112 and accompanying text (discussing interaction of employment law remedies and avoidance of taxpayer transfers to undocumented persons).

100. See supra notes 43-59 and accompanying text.

101. There are no provisions in the IRCA which, for example, allow the government to seek back pay awards against offending employers. Moreover, it is far from clear who would be in a position to receive a back pay award if indeed back pay was a possible remedy under the IRCA. Employers who hire undocumented workers hurt domestic workers indirectly by depressing the general labor market. See D. North & M. Houstoun, supra note 4, at 153-55; Fogel, supra note 3, at 67-68; Wachter, The Labor Market and Illegal Immigration: The Outlook for the 1980's, 33 INDUS. & LAB. REL. REV. 342, 350-52 (1980). But see Borjas, Immigrants, Minorities, and Labor Market Competition, 40 INDUS. & LAB. REL. REV. 382 (1987) (increases in supply of immigrant labor have only slight effects on earnings of native-born men). Attempts to find specific victims who can prove that they were damaged because a particular employer hired undocumented workers present distinctively difficult problems of causation. See generally Chavez v. Freshpict Foods, Inc., 456 F.2d 890, 895 (10th Cir.) (declining to imply private right of action under INA for domestic workers allegedly injured by domestic employers' hiring of undocumented workers on ground, inter alia, that implying such a right would constitute deciding a "political
Establishing these remedies would help accomplish one of the prime goals of immigration policy: the reduction of illegal immigration. We may indeed be able to modify economic forces to affect the before-the-fact calculations of potential illegal immigrants who are still in their countries of origin. However, different issues arise in coping after-the-fact with undocumented persons in the United States. The next subsection discusses how the act of providing employment law remedies for undocumented workers would affect these issues.

B. Reducing Transfers of Resources from Taxpayers to Undocumented Persons

While a primary objective of Congress' immigration policy is to reduce illegal immigration, a secondary goal also exists: to minimize the transfer of resources from taxpayers to undocumented workers and their families. This goal follows from the rationale behind the first objective. It would add insult to injury if the congressional immigration scheme allowed for the diversion of taxpayer resources\textsuperscript{102} to undocumented workers who arguably place United States workers at a competitive disadvantage.\textsuperscript{103} Therefore, any theory regarding employment law remedies and undocumented workers which provides for greater governmental subsidies of such persons suffers from fundamental flaws. The premise of this section is that a remedial scheme which maximizes undocumented workers' recourse against employers will minimize the burden on the taxpaying public.

The rationale for this view of complete employment law protections for undocumented workers lies in the link between taxpayer transfers and private market transactions, rights, and remedies. The government provides services of last resort. As one's private options narrow, one must turn to the govern-

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\textsuperscript{102} Even legal immigration is governed in part by the government's desire to prevent immigrants from creating a drain on the United States Treasury. The provision in the INA which excludes from admission to the United States those "likely . . . to become public charges" illustrates this concern. See 8 U.S.C. § 1182(a)(15) (1982). Other components of immigration law seek to promote the same end. See, e.g., Pear, \textit{Immigration Rules Require New Proof From Job Seekers}, N.Y. Times, Jan. 20, 1987, at A1, col. 1, A16, col. 3 (INS officials quoted as justifying proposed $100.00 application fee for those seeking legalization of status under IRCA as consistent with provision excluding those likely to become public charges). Legislation which has the effect of barring undocumented workers from receiving unemployment insurance benefits has a similar rationale. Unemployment insurance is financed by contributions from domestic employers and employees which are placed in a general fund. See \textit{supra} note 99. A system which permits undocumented persons to tap into the fund would drain its resources.

\textsuperscript{103} See \textit{supra} note 101 (citing sources on impact of undocumented workers in United States labor market).
ment for assistance. When private options expand, the government's role contracts. This contraction reduces taxpayer transfers.

A hypothetical scenario demonstrates the point. Suppose Slimy, Inc., which provides various health benefits to its employees, refused to provide pregnancy benefits for its female workers. Slimy is in violation of Title VII. At least one undocumented worker is a member of the class of female employees against whom Slimy discriminated. Let us suppose, however, that the undocumented worker is without a remedy under Title VII by virtue of her undocumented status. Therefore, unlike her colleagues, she has no way of securing benefits from Slimy. Like her colleagues, however, she needs prenatal care. As a responsible expectant mother, she knows that this care is important to the well-being of her baby. But, without benefits from Slimy, she cannot pay for the care herself. Who will provide the money? If our hypothetical victim of discrimination is an amnesty candidate, she may be eligible for Medicaid. If she is a grandfathered or non-grandfathered employee, she may not be eligible. She then has two options: 1) she can attempt to obtain care from a municipal or county hospital, which must absorb the full cost of this care without federal assistance; or, 2) she can go without prenatal care.

In each of the above situations, the taxpayer subsidizes the remediless victim. If the government provides the care, financing comes from a varying mixture of federal, state, county, and city dollars. If the government does not provide prenatal care, the ultimate cost to taxpayers is much greater. A baby born without adequate prenatal care is far more likely to develop birth defects. A child suffering from birth defects may require long term care, special education services, or even institutionalization as he or she develops. The taxpayers will foot the bill for many of these services. The result is a


105. A lawsuit challenging denial of pregnancy benefits to an undocumented person, who was also an amnesty candidate, is pending in federal district court in California. See Bishop, *U.S. Lawsuit May Determine Protections for Illegal Aliens*, N.Y. Times, Nov. 2, 1987, at A17, col. 1.

106. See 8 U.S.C. § 1255a(h)(3)(B)(i)(II) (Supp. IV 1986). Our hypothetical employee may not even be eligible for Medicaid as an amnesty candidate since the above-cited provision applies by its terms only to persons who have actually been granted legalized status. Id. at § 1255a(h)(i).

107. Hospitals which participate in the Medicare program may not withhold emergency care from any individual. "Denial of eligibility for Medicaid will not—and should not—result in a denial of needed medical services. Instead it will merely shift the cost of those medical services from the Federal and State governments to the provider, which in many cases is the local public hospital or clinic." H.R. Rep. No. 682 (IV), 99th Cong., 2d Sess. 13 (1986), reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 5824. New York City municipal hospitals alone spend at least $18 million each year on health care for undocumented persons, over half of which are pregnant women who failed to receive adequate prenatal care. Id.

transfer of resources from taxpayers to undocumented persons and their families. 109

The most simple and effective way to reduce such transfers is to afford the victim of discrimination a range of remedies against her employer. The victim may then secure benefits from her employer and this, in turn, may even deter the employer from seeking to deny those benefits for others. 110

Governmental transfers of resources are not necessary to pick up the slack otherwise created by employers maneuvering for competitive advantage. In this situation, taxpayers do not later become the underwriters of health care, at greater cost.

The above analysis assumes that the misery employers impose on undocumented workers is itself not an effective deterrent to illegal immigration. 111

Indeed, the premise is that, as long as employment is available, harsh results have little effect on the decisions of prospective undocumented persons to enter the United States illegally. If one accepts this premise, the prospect of alleviating some of the harsh results imposed upon undocumented workers through illegal conduct of employers is no longer troubling. Mitigating harsh outcomes will not frustrate immigration policy. The only goal left to consider is minimizing leakage from the public fisc. Giving undocumented workers employment rights and remedies accomplishes this objective. The institution of broad employment law rights and remedies would therefore be consistent with immigration concerns.

The opposing view holds that imposing a standard of living upon undocumented workers which endangers their families' health will encourage them to leave the United States and return to their country of origin. This hypo-

109. The pregnancy situation is just one example of this phenomenon. Poor people, including exploited undocumented persons, are more vulnerable to disease. The larger community, which includes citizens and lawful residents, is vulnerable to the spread of disease. See H.R. Rep. No. 682(IV), 99th Cong., 2d Sess. 6-7 (1986), reprinted in 1986 U.S. Code Cong. & Admin. News 5817-18 (noting importance of meeting public health and medical needs of undocumented persons). The state's interest in curbing health problems among exploited workers and their families was one justification for enactment of minimum wage and maximum hour legislation near the turn of the century. See Lochner v. New York, 198 U.S. 45 (1905) (rejecting this justification as strained, and striking down maximum hours legislation). But the Lochner Court's disdain for this broad view of states' police power is now almost "universally" in disrepute. See J. Ely, Democracy and Distrust: A Theory of Judicial Review 14-15 (1980). But see R. Epstein, Takings: Private Property and the Power of Eminent Domain 279-80 (1985) (asserting that minimum wage and maximum hour legislation is, as the Lochner Court asserted, an unconstitutional abridgment of employers' and employees' rights to contract freely for pay and services). Taxpayer transfers are also significant in tort law. When the victim of a tort is not compensated, or is undercompensated for her loss, the public often ends up paying for her health care and services. See G. Calabresi, supra note 66, at 147-48.


111. See supra notes 94-97 and accompanying text.
Theoretical result clearly promotes immigration policy. However, the result is not plausible in practice. To translate this hypothesis into reality, a given outcome in the United States must not only be harsh, but also must be more harsh than what the undocumented person may reasonably expect in his country of origin. Only then would the undocumented person have a sufficient reason to leave the United States. For better or worse, however, the undocumented person's access to health care, safe and clean accommodations, and education in the United States will almost invariably exceed his access to such goods and services elsewhere.\textsuperscript{112}

In these circumstances, harsh outcomes spawned by a lack of employment rights in the United States will not promote the exodus of undocumented workers. Such outcomes will only enhance government's role as the provider of services of last resort. As we increase governmental services, taxpayers must transfer more resources to the undocumented population.

The above discussion demonstrates that the extension of employment rights to undocumented workers would promote immigration policy by curbing the demand for undocumented labor and limiting the transfer of public resources to undocumented persons. In addition to promoting immigration policy, the expansive approach to undocumented workers' rights and remedies under federal employment law also serves institutional values. The next subsection discusses this issue.

\textbf{C. Institutional Concerns}

A significant virtue of the broad approach to remedies which this Article recommends is the minimal strain it would impose upon courts' and agencies' legitimacy and resources. It is of course true that the institutional advantages which the broad approach yields may not, by themselves, be dispositive on the issue. Nonetheless, these advantages do provide further support for the adoption of the expansive approach.

This Article will initially consider the issue of legitimacy. Is it legitimate for a court or agency to conclude that remedies, which are otherwise presumptively available under federal employment law, are unavailable to undocumented workers because of the underlying policies of immigration law? If Congress had set out, either in the text of the IRCA or in amendments to labor and employment laws, the remedial regime which courts and agencies should apply to undocumented workers, the issue would not arise.\textsuperscript{113} However,  


\textsuperscript{113} Courts and agencies would simply follow congressional instructions. Given the absence of constitutional concerns, all congressional commands would be dispositive. Congress could exclude undocumented workers from coverage under labor laws altogether. It could also restrict the availability of prohibitory injunctions, monetary relief, and reinstatement. In the alternative, Congress could embrace the full spectrum remedial model. If Congress provided explicit directives in the text of legislation it would minimize uncertainty. Unfortunately, Congress is coy. See \textit{infra} notes 128-29 and accompanying text (discussing institutional shortcomings of Congress).
the problem for courts and agencies confronting this issue is congressional silence.\textsuperscript{114}

Congress created institutional problems for courts and agencies when it enacted the current cadre of employment-related legislation. In establishing the reach of federal employment statutes, Congress used very general terms such as "employee"\textsuperscript{115} and "individual."\textsuperscript{116} Accordingly, courts would seem to be on firm ground by interpreting such terms broadly in order to encompass a wide range of situations.\textsuperscript{117} However, uncertainties arise if the facts which a court faces in a particular case were apparently not contemplated by Congress when it drafted the general language. In such instances, courts and agencies have experienced the temptation to read exceptions into such statutes in an attempt to cope with the unforeseen situation.\textsuperscript{118}

\begin{itemize}
\item\textsuperscript{114} The Supreme Court has observed: "[i]t is too often the pursuit of a mirage." Scripps-Howard Radio, Inc. v. Federal Communications Comm'n, 316 U.S. 4, 11 (1942). For a discussion of treatments of congressional silence, see Tribe, Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence, 57 IND. L.J. 515 (1982).
\item\textsuperscript{117} See, e.g., Patel v. Quality Inn South, 846 F.2d 700, 704 (11th Cir. 1988) (construing term "employee" in FLSA to include undocumented workers).
\item\textsuperscript{118} Courts do not always bow to this temptation. See Tennessee Valley Auth. v. Hill, 37 U.S. 153 (1978) (snail darter case rejecting view that Endangered Species Act (currently codified at 16 U.S.C. §§ 1531-43 (1982), which required federal agencies to "insure" that public works projects and other activities did not "jeopardize the continued existence" of endangered species, did not apply to projects in progress at time of Act's enactment). But cf. Church of the Holy Trinity v. United States, 143 U.S. 457 (1892) (construing broad language in law barring immigration to permit exception for Judeo-Christian clerics); Riggs v. Palmer, 115 N.Y. 506, 22 N.E. 188 (1889) (reading New York wills statute which established rule that property should duly pass from testator to heir as containing implicit exception in case where heir murdered testator).
\end{itemize}


A seminal commentator attacked Riggs as resting on an unconvincing, fictional model of legislative purpose. See Pound, Spurious Interpretation, 7 COLUM. L. REV. 379, 382 (1907). Modern commentators, however, have found the decision much more palatable. See R. Dworkin, Law's Empire, supra, at 15-20 (invoking principle that no person should profit from her own wrong); R. Dworkin, Taking Rights Seriously 37 (1977) (same); H.M. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 97-102 (1958) (discussing negative implications of Dean Pound's arguments); Moore, supra, at 277-78; Wellington, Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication, 83 YALE L.J. 221, 222-23 (1973) (discussing analogous case construing life insurance policy when
Courts and agencies that read exceptions into broad statutory language pose a problem in that such institutions are not as accountable to the electorate as is Congress.\textsuperscript{119} The courts and agencies that carve out exceptions to broad statutory language thus risk making decisions reserved for the electorate's direct representatives. This judicial intrusion into legislative territory exposes courts and agencies to attacks on their legitimacy.\textsuperscript{120}

The threat to legitimacy is greatest when the temptation to read exceptions into broad language occurs in areas such as immigration, where the force of symbolism\textsuperscript{121} is strong.\textsuperscript{122} The influence of symbolism enhances the risk that
exceptions to broad statutory terms such as "employee" or "individual" will flow from the particular biases of decisionmakers. Institutional legitimacy requires instead that judicially created exceptions to statutory terms derive from the policies underlying the legislation.

This caveat is important when the need to consider exceptions to the broad language of one statute derives from the force of another statute. A court may consider, for example, whether a fugitive from the law is entitled to federal employment law protections. Must employers pay the minimum wage to Jake Shotwell, an accused multiple murderer on the run? This particular example may be frivolous, of course, because fugitives responsible for murder rarely seek the intervention of government agencies. Other groups, however, share this shyness syndrome, including undocumented persons.

Both the fugitive murderer, Jake, who comes within the ambit of the criminal law, and the undocumented person, who is within the ambit of the immigration law, create in some the urge to write exceptions into the general language of employment legislation. No one wants to reward or encourage a fugitive from justice, just as no one wants to reward an undocumented person. In each case, a statutory exception seems intuitively plausible, even compelling. In each case, however, one is faced with two troubling questions: 1) does a conflict exist between employment legislation and another statutory scheme?; and, 2) if a conflict does exist, how must the decision-maker resolve it?

Courts and agencies must face the first question. Under a system which grants the legislature the last word on statutory interpretation, courts and agencies cannot ignore the possibility that judicial or administrative decisions

123. The pragmatists and legal realists long ago unveiled the role of bias in decision-making. See, e.g., J. FRANK, LAW AND THE MODERN MIND (1930); O. W. HOLMES, THE COMMON LAW (1881) (citing the "prejudices which judges share with their fellow-men"); W. JAMES, supra note 48, at 19-23 (discussing covert role of "temperament" in making ostensibly principled choices); Llewellyn, Some Realism About Realism—Responding to Dean Pound, 44 HARV. L. REV. 1222 (1931); Posner, Book Review, 53 GEO. WASH. L. REV. 870 (1985) (discussing Holmes' contribution). See generally Posner, The Jurisprudence of Skepticism, 86 MICH. L. REV. 827 (1988) [hereinafter Posner, Skepticism] (discussing role of social, political and economic views in judicial decision-making). More recently, critical legal scholars have raised this point. See, e.g., Kennedy, Freedom and Constraint in Adjudication: A Critical Phenomenology, 36 J. LEGAL EDUC. 518 (1986); Kennedy, Form and Substance in Private Law Adjudication, 89 HARV. L. REV. 1685 (1976); Singer, The Player and the Cards: Nihilism and Legal Theory, 94 YALE L.J. 1 (1984). Justice Stevens has been more candid than most judges about the effect of social or political bias on adjudication. While dissenting from the Court's recent decision which narrows the scope of the federal mail fraud statute, he raised questions about "why a Court that has not been particularly receptive to the rights of criminal defendants in recent years acted so dramatically to protect the elite class of powerful individuals who will benefit from this decision." McNally v. United States, 483 U.S. 350 (1987) (Stevens, J., dissenting).

124. See Diver, Statutory Interpretation in the Administrative State, 133 U. PA. L. REV. 549, 555 (1985) ("[w]hatsoever its own policy view may be, the Court's job is to discover and effectuate the legislative will as expressed in the text of the enacted statute.").

125. See Diver, supra note 124, at 555.
UNDOCUMENTED WORKERS

aimed at implementing one statute, such as the NLRA, will frustrate the objectives of another statute, such as the IRCA. If these decisionmaking bodies ignore this potential conflict, they may also disregard the very purpose of the legislature which enacted the statute. Courts and agencies have no such authority.

Courts and agencies also have a distinct institutional advantage over Congress in coping with statutory conflicts. Courts and agencies deal with enactments on a practical level, through lawsuits, complaints, and rulemaking. Conflicts surface at the practical level, during the implementation of legislation rather than before its enactment.

This practical perspective on legislation is less accessible to Congress. Congress considers statutes at the drafting and investigative stages, when implementation is merely the product of hypothesis and conjecture. After Congress enacts a statute, it typically moves on to other problems. The crush of issues and interests is so heavy in the legislative branch that implementation questions, such as coordination with existing statutes, receive only cursory review. If we force Congress to focus on anomalies among different statutes, it must painstakingly develop the voting majority necessary for legislative action. That is a cumbersome and thankless task. It is therefore generally more sensible and more realistic for courts and agencies to confront such anomalies and seek their resolution. The employment and labor realm is no different than any other in this respect.

However, conflicts among statutes do not always exist. Finding a conflict in every legal problem would require a court or agency to constantly choose among competing statutes. In the labor/immigration area, the need to choose might even result in the judicial or administrative "repeal" of employment law rights for one portion of society. Our constitutional concern for maintaining the separation of powers, however, dictates that courts and agencies

128. See Margulies, After Marek the Deluge: Harmonizing the Interaction Under Rule 68 of Statutes Which Do and Don't Classify Attorney's Fees as "Costs," 73 Iowa L. Rev. 413, 424-25 & n.76 (1988) (discussing Congress' lack of interest in coordinating definition of attorney's fees in scores of statutes providing for fee awards to prevailing plaintiffs); Mikva, Reading and Writing Statutes, 28 S. Tex. L. Rev. 181, 184 (1986) ("[m]embers of Congress do not even closely follow cases directly involving or interpreting statutes that they have sponsored or in which they have an interest.").
129. See Mikva, supra note 128, at 187 ("it is not easy to get 535 prima donnas to agree on anything"). See also supra note 23 (citing materials discussing compromise and legislative process). See generally D. Mueller, supra note 55 (discussing difficulties inherent in any form of collective decision-making).

The problems of group decision-making plague courts as well as legislatures. See Easterbrook, Ways of Criticizing the Court, 95 Harv. L. Rev. 802 (1982); Kornhauser & Sager, Unpacking the Court, 96 Yale L.J. 82 (1986).
should normally leave to Congress the job of repealing a statute.\textsuperscript{130}

Nonetheless, in many instances, courts and agencies can interpret statutes to eliminate or reduce contradictions. This harmonizing function protects the legitimacy of courts and agencies. When courts and agencies harmonize statutes, each enactment ends up having the maximum possible force and effect. Such action also stifles a court’s or an agency’s urge to nullify legislation because of personal biases.\textsuperscript{131}


The apparent conflict between immigration and employment law is susceptible to such harmonization. The main sources of conflict dissolve if one focuses on the policies underlying the legislation rather than the lure of symbolism. If courts would simply focus on these policies it would become clear that affording employment law protections to fugitives and undocumented workers does not clash with criminal or immigration law norms. In fact, if we deprive undocumented workers and fugitives of such protections,

Lewis v. Gross, 663 F. Supp. 1164 (E.D.N.Y. 1986)). Professor Schuck has criticized the Court's decision in Hampton on the ground that the Court should have viewed the President's and Congress' inaction in the face of the Civil Service Commission's regulation as an overwhelming indication that the regulation enjoyed presidential and congressional approval. Under this view, judicial insistence on an executive order which bars aliens from the federal civil service represents a needless attachment to legal formalities. See Schuck, supra note 2, at 65 & n.361; Schuck, Organization Theory and the Teaching of Administrative Law, 33 J. LEGAL EDUC. 13, 17 (1983). On formality in the separation of powers generally, see Bruff, Legislative Formality, Administrative Rationality, 63 TEX. L. REV. 207 (1984); Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch, 84 COLUM. L. REV. 573 (1984). One can turn around Schuck's argument, however. The counterargument is that subsequent action by a more accountable branch of government, be it Congress or the President, demonstrates that the Court was, because of its lack of accountability, at an institutional disadvantage. Insistence on formality copes with this institutional disadvantage by remanding such a decision to a more accountable branch of government. See Farber, supra note 118, at 517-19 (discussing Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978)).

This institutional analysis supports the availability of employment law remedies for undocumented workers. Even if Congress may be more likely to disallow such remedies, it should nevertheless state clearly that it wishes to alter the broad language of employment statutes, given its history of excluding both documented and undocumented aliens from entitlements and social goods such as employment. See Wellington & Albert, Statutory Interpretation and the Political Process: A Comment on Sinclair v. Atkinson, 72 YALE L.J. 1547 (1963) (urging that courts remain cautious in reading exceptions into the Norris-LaGuardia Act). See also Schuck, supra note 2, at 84 (approving "clear statement" approaches to statutory interpretations which affect "life and liberty interests"). The need for clear statements by Congress supporting exceptions to employment statutes is especially compelling because the IRCA's text and legislative history manifest a discernible if not resounding preference against reading undocumented workers out of federal employment law. See supra notes 35-36 and accompanying text. These legislative materials do not, however, resolve issues regarding available remedies for undocumented workers under law existing prior to enactment of the IRCA. Id. An institutional as well as policy rationale for why courts or agencies should not read exceptions into employment statutes is therefore vital.

132. See supra text accompanying notes 132-33 (discussing hypothetical fugitive-from-justice situation). The fugitive-from-justice situation is offered merely as an illustration of the frequent divergence of intuitive responses—e.g., we should never "reward" fugitives—and measures which further sound policies—e.g., rewarding fugitives when the only other choice is rewarding employers who knowingly harbor fugitives.

The reasoning adopted here would not necessarily support adoption of the entire approach of this Article to fugitives' employment rights. The analysis of confidentiality, for example, would have to be different. Fugitives may commit other criminal acts. Undocumented persons are much less likely to engage in criminal behavior. Public safety concerns would dictate making every effort to apprehend fugitives before they commit additional crimes. The government's promise of confidentiality would be difficult to justify in light of this mandate.
we impede rather than promote the ends of immigration policy and criminal law. Employers will have an incentive to hire these groups if they are not protected by employment laws. The availability of employment will spur immigration and subsidize the fugitive’s flight. If we include such persons in the class protected by such laws, we reduce these phenomena. In contrast, if decisionmakers completely eliminate undocumented workers from the protected class or limit their remedies to cease and desist orders, those decisionmakers frustrate employment law goals. Further, the resulting benefits under this scenario for immigration policy are, at best, speculative and symbolic.

If we wish to vindicate both employment law and immigration law concerns, we must maintain employment law rights and remedies for undocumented workers. Institutional legitimacy is most compatible with this approach.

Legitimacy, however, is not the only factor which affects the soundness of institutions. The conservation of institutional resources is also important. Thus, an approach which minimizes the cost of decisions is, all other things being equal, superior to an approach which contemplates the profligate expenditure of time and resources. The broad approach to rights and remedies advanced in this Article passes that test.

Court and agency determinations of immigration status tax the decision-making capacity of such institutions which were not established for that purpose. Furthermore, such determinations require the decision-maker to exercise a degree of discretion because consideration of certain equitable factors, such as the presence of undocumented persons’ children, will sometimes result in stays of deportation. The administrative weighing of these equitable elements is admittedly feasible; the INS does it on a regular basis. Courts and other agencies, however, lack the requisite training. They will spend an inordinate amount of time balancing immigration equities, which will likely result in their making mistakes. Further, correcting such mistakes will require even more time.

133. See supra notes 45-59 and accompanying text.
134. See supra notes 68-101 and accompanying text; infra notes 199-215 and accompanying text.
135. Certain situations call for the government’s curtailing of employment law remedies as a price for avoiding conflict with immigration policy. See infra notes 149-74 and accompanying text. These situations are exceptions to the presumed availability of comprehensive relief for undocumented victims of employment law violations.
Such efforts may also result in duplicative factfinding. One cannot be sure that the unskilled court or agency's assessment of immigration status will spare the INS from treading over the same ground. The INS proceedings provide procedural safeguards which a court or other agency cannot extend to plaintiffs and complainants in employment matters without incurring substantial decision costs.\textsuperscript{138} If a court or an agency fails to provide these procedural safeguards, its immigration decision will not have a binding effect for immigration purposes.\textsuperscript{139} The INS will have to expend its own resources in making a second determination of immigration status. This scenario wastes time, paper, and expertise. It also restricts access for complainants whose claims do not have an immigration dimension.

The broad approach to employment law rights and remedies advanced in this Article dispenses with most of these problems. In most cases, a court or agency may simply decline to hear, let alone evaluate, any evidence on complainants' immigration status. This outcome will conserve court and agency resources, and leave investigation of immigration matters to the INS, which was created for that purpose.

IV. ENFORCING EMPLOYMENT RIGHTS FOR UNDOCUMENTED WORKERS

As Part III of this Article has demonstrated, three underlying goals should govern enforcement of employment rights for undocumented workers: 1) deterring illegal immigration; 2) avoiding taxpayer transfers to the undocumented population; and, 3) conserving institutional resources and legitimacy. Taken together, these three goals support an approach that would encourage undocumented workers to file administrative complaints and institute court actions in all cases where their employers have violated employment law.

Two features are vital to this agenda. First, the range of remedies available should be comprehensive, including prohibitory injunctions which require employers to cease and desist from committing future violations, back pay awards, supercompensatory monetary relief,\textsuperscript{140} and to grant reinstatement. Second, all complaints and subsequent proceedings must be subject to a high

\textsuperscript{138} *Local* 512, 795 F.2d at 722.

\textsuperscript{139} *Id.* (asserting that NLRB decision on immigration status reached without adequate procedural safeguards, including application of "clear . . . and convincing evidence" standard of proof, would be vulnerable to due process attack).

\textsuperscript{140} Supercompensatory relief would include the double damages provisions of the FLSA. See 29 U.S.C. § 216(b) (1982).

Another type of approach, brought to my attention by Ron Silverman, involves offering substantial bounties of $10,000 or more to anyone who conveyed information about exploitative employers to enforcement agencies such as the NLRB. Since such a bounty would exceed the size of most back pay awards, it would offer greater incentive to undocumented workers to come forward. *Cf. supra* notes 47, 59 and accompanying text (discussing inadequacy of strictly compensatory measure of relief as incentive for revealing information about violations). The disadvantage of the bounty proposal is that the public might view it as a windfall for undocumented workers. *Cf. supra* notes 183-216 and accompanying text (discussing symbolism behind public suspicion of undocumented persons).
degree of confidentiality. An approach that embraces these features will promote immigration policy. In certain individual cases, however, such features will operate to reward individual illegal immigrants and shield them from deportation. But such counterintuitive results for undocumented workers already in the United States are tolerable, indeed necessary, to effectively discourage employment of other undocumented workers and thereby reduce incentives for future illegal immigration. Thus, one should not consider the counterintuitive character of this approach as a bar to the regime's deployment. One should limit the scope of the regime proposed here only in situations which present a clear conflict with immigration law or policy.

A. Confidentiality

Confidentiality is a prerequisite for any enforcement efforts which involve the cooperation of undocumented workers. Confidentiality is crucial when one seeks the cooperation of parties who fear disclosure of their status, identity, and location. This fear permeates underground populations such as undocumented workers in the United States. Without confidentiality, the INS could treat undocumented complainants as persons informing on themselves for immigration purposes. The risk of apprehension by the INS would negate the appeal for undocumented workers of even the most enticing package of remedies for their employers' violation of employment law. However, reducing the risk run by complainants, i.e., ensuring to the extent possible that complainants will not be in a worse position because of their cooperation, will enhance enforcement efforts.

While confidentiality facilitates enforcement of employment rights and therefore helps promote immigration policy, it is clothed with the counterintuitive quality which colors this Article's approach. A hypothetical situation illustrates the anomaly. Suppose an employer discharged an undocumented worker for complaining to the NLRB about the employer's FLSA violations. After a hearing, the NLRB ordered the employer to reinstate the employee. Let us suppose further that the employee is a grandfathered employee under the IRCA. The employee, therefore, is not covered by the employer sanctions provisions of the IRCA, but he is still eminently deportable. If the NLRB discloses the complainant's identity and status, it would allow the INS to apprehend an illegal immigrant and arrange for his departure from the

141. One judge has endorsed the notion of a protective order barring disclosure of immigration-related information about complainants. See In re Reyes, 814 F.2d 168, 172 (5th Cir. 1987) (Jones, J., dissenting), cert. denied, 108 S. Ct. 2901 (1988). See also Local 512, 795 F.2d at 710 (Administrative Law Judge in NLRB proceeding “permitted [complainants] to testify under assumed names . . . ”). Others have agreed that confidentiality is vital in this area. See, e.g., Comment, Remedies for Undocumented Workers, supra note 16, at 592 (“immigration status [of victims of retaliatory discharges] should not come to the notice of the INS”). The justification for confidentiality here—promoting the flow of information which would otherwise not be disseminated—is much the same as the justification for confidentiality regarding the identity of any valuable informant.
country. Confidentiality mechanisms in this instance frustrate that core activity of United States immigration policy and practice. Does confidentiality, therefore, command too high a price?

The answer is "no." Confidentiality is worth the price, given our premises. This is true even though an after-the-fact perspective describes confidentiality as a nettlesome obstacle to immigration enforcement. Why not take advantage of an opportunity to rid ourselves of someone who clearly entered the United States illegally? The answer to this query lies in comparing before-the-fact and after-the-fact perspectives.\(^ \text{142} \)

Before and after-the-fact perspectives produce radically different views on the importance of confidentiality. Viewed after-the-fact, the INS's apprehension of an undocumented worker following a breach of confidentiality would seem to produce the best of both worlds: information about exploitative employers and departure of illegal immigrants. A before-the-fact perspective demonstrates, however, that this optimal result is inherently short-lived. Other exploited undocumented workers will quickly learn of such tactics, which will only confirm their fears about the perils of coming forward. Virtually no undocumented workers will follow the first hapless complainant.\(^ \text{143} \) Employers would learn of this reluctance of undocumented workers to complain and would thereby consider them as an even more attractive source of captive labor. This result impairs immigration policy.

Thus, while confidentiality for undocumented workers may seem counterintuitive, one should not be deceived by appearances. Confidentiality actually promotes immigration law objectives by curbing employer demand for undocumented labor.

**B. A Range of Remedies**

Courts and agencies should have the discretion to provide remedies for undocumented workers which, like the confidentiality guarantees, will en-

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142. The distinction between before-the-fact and after-the-fact vantage points is also described, for devotees of Latin, as the difference between *ex ante* and *ex post* perspectives. For further discussion of how the selection of one or the other perspective, or the mixture of both viewpoints, influences decision-making, see Easterbrook, *supra* note 56, at 10-12 (asserting that *ex ante*, or before-the-fact, perspective is superior tool for policy formulation); Fletcher, *supra* note 76, at 1284-92 (analyzing how combining both perspectives creates anomalies).

143. A useful analogy is the rationale for copyright and patent law. After the fact, it seems a pity to restrict one's access to a fine novel or a handy new invention. From this perspective, the benefits of, for instance, a new widget-making process are most widely distributed if copyright and patent systems do not exist.

However, a before-the-fact perspective tells another story. An invention requires one to expend time, effort, money and creativity. Incentives for such commitments of resources would vanish if those who committed resources had no right to prevent others' uncompensated use of the invention. The availability of patents to inventors provides such incentives for innovation. See Easterbrook, *supra* note 56, at 21-29. Similarly, an undocumented worker who takes the time to complain about exploitative compensation and working conditions will not encourage others to emulate his actions if that worker cannot protect his identity and status from discovery by the INS because of his complaint.
courage cooperation with enforcement efforts. A comprehensive range of remedies will elicit more participation from victims than a narrow view of permissible relief. The following chart depicts the remedial regime which this Article suggests, broken down according to each of the three subgroups of undocumented persons: grandfathered workers, non-grandfathered workers and amnesty candidates.

<table>
<thead>
<tr>
<th>GRANDFATHERED WORKERS</th>
<th>NON-GRANDFATHERED WORKERS</th>
<th>AMNESTY CANDIDATES</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cease and Desist Orders</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Back pay and Other Monetary Relief</td>
<td>X (Modified for persons currently outside the United States)supra 144</td>
<td>X (modified for persons currently outside the United States and workers who have submitted fraudulent documentation of lawful residence to employers)supra 146</td>
</tr>
<tr>
<td>Reinstatement</td>
<td>X (Unavailable for persons outside the United States)supra 145</td>
<td>X (Unavailable for persons outside the United States; also unavailable for non-grandfathered workers who submitted fraudulent documentation of lawful residence to employers)supra 147</td>
</tr>
</tbody>
</table>

In this chart, "X"s signify available remedies. Each remedy which the Article lists in the chart—cease and desist orders, back pay and other monetary relief, and reinstatement—should be potentially available to each group of undocumented workers. This Article proposes that this wide availability of remedies would enhance victim cooperation, deter employers from employment law violations and, ultimately, reduce employer demand for undocumented labor. Broad access to remedies against employers should also minimize the transfer of resources to the undocumented population and preserve courts' and agencies' resources and institutional legitimacy. supra 148 Even if these broad principles are accepted, however, one may question whether any exceptions

144. The calculation of a back pay award when an undocumented worker has physically departed from the United States is discussed infra notes 149-58 and accompanying text.

145. Reinstatement should not be available to an undocumented worker who has physically left the United States. See infra notes 159-62 and accompanying text.

146. See infra notes 149-74 and accompanying text.

147. Id.

148. Institutional values such as the preservation of resources and legitimacy are discussed supra notes 113-39 and accompanying text.
to the proposed general regime of broadly available remedies are appropriate. The following subsection discusses this issue.

C. Application of the Model in Exceptional Situations

While the comprehensive approach to remedies for undocumented workers derives from a refusal to allow undocumented workers to be denied relief available to other groups, the approach cannot operate without exceptions. There are primarily two situations in which an exception should be applied. In the first situation, the undocumented person is no longer physically present in the United States. In the second situation, an employer commits an employment law violation, but complies with the IRCA’s mandate that he request and inspect each employee’s documentation of proof of lawful residence. The following subsections analyze the availability of monetary relief and reinstatement in each situation.

1. The Undocumented Person’s Physical Absence from the United States

Determining how to treat an undocumented person physically absent from the United States creates problems under the comprehensive model of employment law remedies advanced in this Article. Undocumented workers are constantly at some risk of being apprehended and forced to leave the country by the INS either because their employer has informed on them or because they have otherwise come to the attention of the INS. It is difficult to predict at what point apprehension would have occurred without employer intervention. Therefore, the application of monetary relief in this situation presents problems. Reinstatement also presents problems by encouraging undesirable behavior. The problems are soluble with regard to monetary relief. Reinstatement, however, poses insurmountable difficulties.

The question of monetary relief is challenging because it contains an element of speculation in this context. When a worker is not physically available for work, determining how long she might have been available is subject to uncertainty. The court and agency nevertheless must calculate the likely duration of her availability for work if it is to award monetary relief.

One solution to this dilemma is to decline to award monetary relief for any period during which the victim was not physically present in the United States and was therefore unavailable for work. The Supreme Court may have opted for this solution. The problem with this approach is that in instances where the employer’s illegal act consisted of informing the INS of the undocumented status of a vocal or pro-union employee, a court’s bar of a back pay award permits the employer to profit from his misdeed. Deterrence requires a remedy which imposes some type of cost on the employer.

The court or agency may easily compute back pay under traditional methods. The following hypothetical situation demonstrates the simplicity of the

150. See supra notes 45-59 and accompanying text.
calculation. Suppose an undocumented worker earned $10,000 in his United States job. His employer, our stand-by Slimy, Inc., informed the INS of his location, and the employee returned voluntarily to, say, Mexico. In Mexico, the employee, after heroic efforts, secured a job at an annual salary of $2,000. If one assumes that the employee found this new job immediately, and arranged for his colleagues in the United States to complain to the NLRB about Slimy's unfair labor practice, then the employee's measure of relief for one year is $10,000 minus $2,000 or $8,000. This represents the difference between what employee X could have made in the United States—$10,000—and the fruits of his mitigating damages by obtaining another job in Mexico—$2,000. The result is quite straightforward.

The problem in this analysis is the uncertainty inherent in one's estimate of the amount of time which employee X could have remained in the United States undetected by the INS, if his employer, Slimy, had not committed an unfair labor practice by informing on him. The hypothetical situation set out above assumes a period of one year. In NLRB v. Sure-Tan, Inc., the Seventh Circuit Court of Appeals opined that six months might be the minimum period necessary to vindicate the remedial purposes of the NLRA. The Seventh Circuit acknowledged that this assessment was "conjectural." The Supreme Court agreed and reversed the Court of Appeals.

Conjecture infiltrates the Seventh Circuit's and the hypothetical situation's assessment because neither considers that the INS could, independent of the employer's unfair labor practice, have apprehended the employee before the time which the accounts specify. Suppose that two months after the employer's unfair labor practice the INS made a routine check at the employer's workplace. The employee would, in any case, have been deported at this time. Yet, under the facts given, this departure would have had nothing to do with the employer's illegal conduct. The court's grant to the employee of a six-month or one-year award of back pay under these circumstances would result in an injustice to the employer and a windfall to the employee. Such an award would effectively render the employer a kind of insurer of his employee's immigration status. This consequence is clearly inconsistent with the goals of the IRCA. Accordingly, any approach that attempts to compute back pay for persons who are outside of the United States must carefully avoid such thickets.

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152. 672 F.2d at 606.
153. The Court noted that the district court had failed to seek evidence on this admittedly vexing issue. Sure-Tan, Inc., 467 U.S. at 902 n.11. One may narrow the Court's holding to facts revealing lack of physical presence. Local 512, Warehouse and Office Workers' Union v. NLRB, 795 F.2d 705, 716-17 (9th Cir. 1986). The Court's discussion of legal presence as a criterion for the award of back pay becomes dicta under this analysis.
154. The Supreme Court has held that the NLRA bars awards which are oppressive or punitive. See NLRB v. Seven-Up Bottling Co., 344 U.S. 344 (1953); Republic Steel Corp. v. NLRB, 311 U.S. 7 (1940). See also Note, Retaliatory Reporting, supra note 15, at 1313 & n.94, 1314 n.107 (discussing cases).
Some element of conjecture is, however, inevitable in this type of assessment. Back pay determinations based upon the loss of a job opportunity seek to measure the opportunities for gainful employment which an undocumented worker lost because his employer engineered his deportation. The measurement of opportunity costs often requires a contingent prediction of future events. In this process, the predictor seeks to formulate an alternative future which would have occurred if the events which prevented the person from realizing that opportunity had not taken place. Any prediction of the future is perilous. Back pay determinations are no exception.

The undocumented worker context presents problems which are particularly difficult, but which are ultimately amenable to resolution. The context admittedly involves somewhat more speculation than the norm because it encompasses not only the actions of employer and employee, but also the course of conduct of the INS. However, even actions by this third party are traceable.

For example, it is possible to reduce uncertainty by inquiring into INS raids on the defendant employer that occurred after the unlawful discharge of the complainant. It is reasonable to assume that the INS would have apprehended the complainant during a subsequent raid if he had not been discharged unlawfully before the raid occurred. The court could then use the date of the INS raid as an outer boundary for a back pay award. Suppose that the wages of the employee here and in his country of origin are those of our previous hypothetical situation: $10,000 and $2,000 per year, respectively. If an INS raid occurred three months after the employee's unlawful discharge, a rough back pay computation would be: 3/12 ($10,000 - $2,000) = $2,000.


156. At a minimum, a back pay award for a given period implies or assumes that a wrongfully discharged employee would not have been discharged for good cause during the period which the award covers.


158. The court should require the employer to produce evidence on this issue because he is in the best position to gather data on INS action regarding his plant. One may verify the employer's information with the INS because the employer may have some incentive to claim that a raid took place earlier rather than later in order to minimize the amount he would pay out to the complainant. Contact with the INS may not violate any confidentiality guarantee since the complainant has left the country and the INS therefore no longer has jurisdiction over him. A court or agency may, however, be concerned about other employees with complaints pending against the same employer, whose claims would be compromised by INS intervention. In this event, the court or agency could also seek information on INS raids from other employees. Employees do not have an interest in establishing an early date—or any date—for INS action. Their testimony may therefore be most reliable.
This approach to measuring back pay for employees who are no longer in
the United States because of their employer's unfair labor practices is ad-
mittedly imperfect. All back pay determinations are to some extent creatures
of speculation and conjecture. But the approach proposed here is less arbitrary
than the Seventh Circuit's solution in Sure-Tan. At the same time, this
approach fills the need for enforcement of employment law mandates. With-
out some approach of this type, the remedy of back pay would join rein-
statement as a forbidden remedy for employees no longer in the United States.
If we dispense with back pay and reinstatement, we markedly reduce deter-
rence of employers' illegal activity. The approach outlined above preserves
deterrence.

The reinstatement of an undocumented person who is absent from the
United States creates problems of a different order. These problems, more-
over, resist solution. Consequently, reinstatement should not be available to
complainants in this group.

The central problem is that offering reinstatement to a victim absent from
the United States encourages the victim to reenter the United States illegally.
Indeed, such an offer is consistent with the two main criteria critical to an
effective scheme of sanctions. First, the undocumented worker would have
access to information about the offer, since the NLRB or the employer would
be required to attempt to notify him. Second, the sanction (or, here, the
reward) would be closely linked with the conduct—illegal re-entry into the
United States—which one wishes to deter. Undocumented persons come to
the United States primarily to seek employment. A court's offer of a job,
under this analysis, would certainly trigger illegal immigration. Barring
reinstatement, however, would remove that impetus.

Another policy rationale also supports barring reinstatement for persons
who have left the United States. Reinstatement, if it encouraged illegal re-
entry, would set the stage for possible added costs to taxpayers. These costs
would, at a minimum, involve educating the children of the undocumented
person. If, on the other hand, the family of the undocumented person, along
with the undocumented person herself, is no longer physically present in the
United States, costs in education, other services, or government benefits will
not arise. Thus, barring reinstatement for an undocumented person who lives
outside of the United States diminishes the likelihood that the victim and the
family will return to the United States. This effect tends to reduce costs to
taxpayers.

159. See supra notes 66-101 and accompanying text.
672 F.2d 592, 603-04 (7th Cir. 1982) (reinstatement conditioned on legal re-entry is not incentive
for illegal re-entry), rev'd on other grounds, 467 U.S. 883 (1984); Note, Retaliatory Reporting,
supra note 15, at 1310 (same). Conditioning reinstatement on legal re-entry is of dubious utility,
however, because the person will most likely not be able to meet the test for legal admittance
Both crucial policy elements, deterring illegal immigration and minimizing taxpayer transfers to undocumented persons, support the barring of reinstatement for undocumented workers who have left the United States. The deterrent effect on employment law violations may weaken slightly. The employer’s capacity to violate employment law with regard to undocumented workers may also, as usual, tend to frustrate immigration policy by enhancing employer demand for undocumented labor. On balance, however, immigration policy counsels the elimination of reinstatement as a remedy for absent victims.

Another, more legalistic, way of viewing this exception is to say that a conflict exists between immigration and employment policy on this issue. Since Congress enacted immigration legislation which is more recent and specific, its policies underlying immigration law should prevail. Reinstatement, therefore, should not be available to victims who are absent from the United States.

2. The Employer’s Compliance with the IRCA

The second exceptional situation involves an employer who has complied with the IRCA, but who has also violated a non-grandfathered undocumented

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161. See supra notes 8-9 and accompanying text. An employer whose undocumented labor force is organizing might be sorely tempted to notify the INS of his employees’ status, even if this conduct constitutes an unfair labor practice. Lightening the sanctions for such illegal conduct would encourage the behavior. Employees would be intimidated by the prospect of deportation. They would tolerate other illegal employer practices, such as substandard wages, illegally long hours, and unsafe working conditions for the same reason. This perpetuation of inadequate terms of employment would encourage employers to hire more undocumented workers and ultimately trigger more illegal immigration.

This is a powerful argument. Two factors, however, make the scenario outlined above less plausible. First, under the model proposed in this Article, back pay would still be available. Back pay awards oblige an employer to surrender much, if not all, of the gain derived from this kind of unlawful behavior. Some gain lingers, nevertheless, since employees might well prefer a job in the United States to receipt of back pay in another country. An employer’s threat to notify the INS might still intimidate these employees. This is where the second factor emerges. Under the IRCA, an employer must document his efforts to verify a non-grandfathered employee’s legal presence in the United States. An employer who cannot document these efforts violates the law. Presumably, many employers who know that some of their employees are undocumented fall under this rubric. If those employers inform the INS about their employees’ status, they are also informing on themselves. Most employers will not want to run that risk. They may therefore be less willing to commit this unfair labor practice than one would at first suppose. Reducing the incidence of the violation will, as usual, ultimately tend to reduce the number of employers who frustrate immigration policy.

worker's employment rights. This situation also precipitates a potential clash of immigration and employment concerns. The resolution of this conflict is similar: bar reinstatement and modify the calculation of back pay.

The situation in which an employer complies with the IRCA but still hires an undocumented worker may seem anomalous. Congress, after all, designed the IRCA to stop employers from hiring undocumented workers. However, employer compliance with the IRCA will not always accomplish that goal.

A hypothetical situation illustrates this point. Suppose an employer, call it Sleazy, Inc., hires an undocumented worker after November 6, 1986. The employer, however, does not know that the employee is undocumented, because the employer complied with the IRCA by asking for documentation of the employee's lawful residence in the United States and the employee's documentation appeared to be in order. In fact, the employee forged the documents. Later, but immediately before a union election in which Sleazy's workforce would determine whether a union had the right to act as its collective bargaining agent, the company fires the incognito undocumented employee. The employee had become known as a key advocate of unionization. Sleazy's manager tells the fired worker, "You do good work, but you're a union person and we just can't afford to have your kind around." The discharged employee complains to the NLRB, which brings an unfair labor practice proceeding against Sleazy.

Sleazy's conduct offends employment law values more than it offends immigration policy. Sleazy has in fact committed an unfair labor practice. To prove that Sleazy has committed an unfair labor practice in this context, the NLRB must demonstrate that the company acted with an anti-union animus. Sleazy's anti-union animus was clear. The company cannot advance any other reason to account plausibly for the employee's discharge, in light of his concededly "good work."

From an immigration perspective, however, Sleazy's behavior is more benign. The main immigration policy rationale for according undocumented employees the same remedies as other workers is the notion that comprehensive relief for both documented and undocumented workers reduces employers' demand for vulnerable, easily exploited, undocumented labor. Sleazy complied with the IRCA. It did not consciously exploit the special vulnerability of undocumented workers. Under these circumstances, the immigration policy rationale evaporates.

The lack of a positive immigration policy rationale in this situation is fatal to any argument for a reinstatement remedy. The situation under discussion embodies this shift. Sleazy was apparently pleased to hire lawful residents. It inadvertently hired an undocumented worker. Sleazy's discharge of the undocumented worker creates a job opening which Sleazy could fill with a lawful resident. If a court or agency deprives lawful residents of this oppor-

tunity, the result frustrates immigration policy. Reinstatement is therefore inappropriate.\footnote{165}

Notwithstanding the difficulties with reinstatement, court awarded back pay does not precipitate comparable conflicts with immigration policy. Job seekers who are lawful residents do not suffer when a court renders a decision granting monetary relief against an employer. In contrast, if we deny undocumented employees monetary relief, such a result frustrates employment law values.

When employers intimidate employees, they frustrate a central policy underlying the NLRA: the promotion of industrial peace through the channelling of employer/employee disputes through the collective bargaining process.\footnote{166} Employers' intimidation strategies create pent-up employee resentment. This employee resentment eventually expresses itself in disruption, sabotage and violence. Negotiation is impossible in such a climate. In order to promote negotiation, employee resentment must be minimized. Employers must be deterred from intimidating employees in order to reach this goal.

In the hypothetical situation, deterring Sleazy's conduct is of the utmost importance. Equally important is the effect of the company's actions on employees who are still working for Sleazy. The company sends a message to these employees that their participation in union activity is a risky business which may cost them their jobs. The employees' diminished ardor for labor organizing is the likely and intended consequence of Sleazy's conduct.

Remedies play a vital role in countering this effect. A mere prohibitory injunction or cease and desist order will not deter Sleazy from taking similar illegal action the next time employees' organizing activities threaten its perceived prerogatives. Court issued cease and desist orders alone will also not be sufficient to restore employees' confidence in their ability to organize without fear of management reprisals.\footnote{167} A system attempting to promote


A broader view of employment policy might also support denying reinstatement to non-grandfathered workers who presented false documentation to their employers. Under this analysis, such employees would be deceiving their employers, as well as placing them at risk of investigation by the INS for violating the IRCA. Employment relations are damaged, in this view, when they do not take place in an atmosphere of trust. Freeing the employer from an obligation to reinstate employees in this context would promote cooperation and trust between management and labor. Establishing a cooperative framework is one goal of national employment policy. \textit{See also} Posner, \textit{Skepticism, supra} note 123, at 852-53 (discussing case of heir murdering testator, \textit{see supra} note 118, where court barred murderous heir from taking under will, as a product of broader interpretation of wills statute, embodying common sense assumption that testator would not have wished his murderer to inherit).

\footnote{166. See Mendez, \textit{supra} note 17, at 722.}

\footnote{167. The need for a back pay remedy is even more compelling when, under the above circumstances, other documented employees initially react to the discharge of undocumented colleagues not with demoralization, but with support. Suppose that Sleazy also fires these}
deterrence and employee confidence must make the remedy of back pay available to employee victims.\textsuperscript{168} The mention of back pay raises the next issue: How should an employer's knowledge of an employee's undocumented status subsequent to accrual of the employee's cause of action under federal employment law affect the court's computation of a monetary award? Should Sleazy, if it discovered a complainant's undocumented status three months after discharging that employee, owe less back pay than if it discovered the employee's status one year after his discharge? Suppose Sleazy informed the INS about the complainant's status when it learned of this status, after Sleazy received notice of the employee's complaint. If the INS spends six months, instead of a week, adjudicating the complainant's status and engineering his departure from the United States, should Sleazy owe more because of the time differential?\textsuperscript{169}

The simple answer this Article proposes to this series of questions is that neither the timing of the employer's knowledge nor the length of time necessary for an INS decision precipitated by a tip from the employer should be dispositive for purposes of a court's computation of a back pay award. Rather, the amount of back pay should be contingent on five factors: 1) the timing of INS action independent of any tip from the employer; 2) the timing of an employer's offer of reinstatement, provided that the employee receives the offer before the employer actually discovers the employee's status; 3) in cases where the employer has already learned of the employee's illegal status, the timing of an employer's offer of back pay without its offering reinstatement; 4) the timing of the employee's commencement of work at another, comparable, job; and, 5) the timing of an NLRB order finding that the

employees. This action is clearly an illegal retaliation if undocumented workers are protected by the NLRA. If, however, undocumented employees are not covered by the statute, the documented employees may be required to prove that they did not know that the first discharged employees were undocumented. Proving a negative is always difficult. It might be especially burdensome here, where the factfinder might be inclined to think that co-workers share confidences, even when management is not privy to employee secrets such as immigration status. If undocumented employees do not receive NLRA protections, employees who stick up for them but cannot convincingly demonstrate that they were ignorant of their colleagues' undocumented status run the risk of also being left out in the cold. This risk encourages two reactions by employees: 1) do not protest management actions which appear to be designed to intimidate union-minded workers; or, 2) seek to discover one's colleagues' immigration status before supporting them. Both reactions stifle pro-union activity. The second reaction might promote employees snooping on each other or coercing colleagues into disclosing information. This result divides the labor force and gives a single-minded employer a substantial advantage in neutralizing effective employee organizing. Employees who snoop on each other with respect to immigration issues will be less likely to trust one another in dealing collectively with management. Avoiding these undesirable phenomena requires that the NLRA both cover undocumented workers and afford them relief beyond cease and desist orders.

168. See supra notes 43-56 and accompanying text.

169. The Comment, \textit{Illegal Aliens}, supra note 16, appears to recommend that back pay be measured from the date of discharge to the date of "official determination of the aliens' immigration status." \textit{Id}. at 855.
employer committed an unfair labor practice by initially discharging the employee.

All of these factors are not likely to be present in any single case. But at least one factor will typically be available to help a court shape a fair back pay award. In cases where the court is presented with more than one factor, the factor perfected first in time should cut off the accrual of back pay. The following paragraphs explain the operation of these variables.

Factor one, INS action which is independent of the employer, has already been thoroughly discussed. To restate briefly, an employer should not have to pay for time during which an employee, because of INS action unrelated to the employer, is unavailable for work. Suppose an employer unlawfully discharged an employee making $1,000 per month on May 1, 1988. The INS raided the employee's former workplace on June 1, 1988. Sleazy should only be liable for one month's back pay, or $1,000. Factor one, therefore, eliminates excessive and overly speculative awards against employers.

Factor two operates to push employers and employees toward settlement. Under factor two, an employer's offer of reinstatement tolls back pay. Using the salary and discharge dates set out above as a constant throughout this discussion of computing back pay, suppose that Sleazy makes a reinstatement offer on June 1, 1988. The employee rejects the offer. Sleazy is again liable only for one month's back pay—$1,000.

Factor three continues the system's emphasis on settlement. Under factor three, when the employer discovers the employee's non-grandfathered status, the employer is barred from offering to reinstate the employee. However, the employer may still offer back pay. The relevant period the court must consider for back pay purposes extends from the date of the employee's discharge to the date on which the employee receives the employer's offer. This feature, like the provision allowing for a reinstatement offer which tolls back pay in factor two, gives Sleazy an incentive to make an offer quickly. Factor three works in the following manner: Sleazy discovered the employee's non-grandfathered status on July 1, 1988. Thus far Sleazy owes the employee two months back pay, or $2,000. However, the company does not offer the employee this amount until August 1, 1988. The employee, under factor three, is also entitled to back pay for the month of July. This results in the

170. See supra notes 151-58 and accompanying text.
171. For a discussion of legal devices designed to encourage settlement in another area, see Margulies, supra note 128 (analyzing settlement devices in area of statutory attorney's fee awards for prevailing plaintiffs).
173. If, however, an employee accepts reinstatement and an employer subsequently discovers the employee is a non-grandfathered worker with forged papers, the employer should be permitted to discharge the employee. This second discharge should not be considered an unfair labor practice, since its primary motivation is compliance with the employer sanctions provisions of the IRCA. The employer, in offering reinstatement, has sought to remedy his previous unfair labor practice.
employee's maximum award of $2,000 plus $1,000 = $3,000. An earlier offer would have reduced Sleazy's liability.

Factor four similarly encourages the parties to help themselves. This factor requires an employee to seek other comparable work, and tolls back pay at the point an employee accepts another job. The fact that this factor requires an employee to mitigate her damages removes the incentive for a discharged employee to remain idle. As a result, factor four also helps reduce the impact of employee idleness on her family members. Such family members may go without necessities if the employee fails to promptly obtain a new source of income. When the system reduces the adverse impact of the employee's discharge on the health of the employee's family, it minimizes taxpayer transfers to undocumented persons. Suppose that the employee, according to the NLRB, could have found a new job at the same salary by July 1, 1988. However, the employee failed to look for a position. Sleazy would be liable for two months back pay, or $2,000. The same result would obtain if, on July 1, the employee in fact found a new job at the same salary. This outcome encourages productive use of human resources.

Finally, factor five, the timing of the NLRB's final order, is helpful both in the promotion of settlement and in allowing a court to set a date for the employer's maximum back pay exposure. An employer should not be held responsible for paying a discharged employee indefinitely. The system should allow the employer to discern clearly the costs of his foregoing settlement. Suppose Sleazy makes no offer to the employee. The employee stays in this country, available for work. Although he tries to find a job, he does not succeed. The NLRB reaches a decision on May 1, 1989. Sleazy, under factor five, owes the employee the equivalent of one year of his salary—$12,000. If the employer made an offer prior to the NLRB decision, the court would reduce this amount, as factors two and three provide. By establishing a point of maximum exposure contingent on the timing of the NLRB's decision, factor five encourages employers to settle before reaching that point.

The five factors this Article discussed above accommodate both employment law and immigration values. A decision-maker's use of these factors would preserve a back pay remedy and, consequently, deter employers from violating employment law. At the same time, barring the employer from making a reinstatement offer once he learns of the employee's undocumented status satisfies the immigration objective of promoting employment opportunities for lawful residents. The balance which these factors build into the proposed approach makes it a worthwhile solution to a difficult problem.

3. Summary

The previous subsections of this Article modify the model of comprehensive relief for particular situations. Cease and desist orders would still be available

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174. Extending the employer's obligation for back pay indefinitely would soak up the employer's resources and inhibit the employer from hiring lawful residents and citizens. This result would clash with immigration policy.
as remedies to all employees in all situations. However, certain circumstances must limit the ability of a given court to award back pay and reinstatement even under the comprehensive approach.

Circumstances require a court to limit back pay in two contexts. In the first context, the undocumented worker has left the United States for reasons unrelated to any action taken by the employer. In the second context, the employer complied with the employee verification provisions of the IRCA. However, after the employer committed an unfair labor practice, it discovered that the victim of the practice is undocumented and the employer either offered the victim reinstatement before it discovered the employee's undocumented status, or offered accrued back pay after it discovered the employee's status.

Circumstances also require limitations on the remedy of reinstatement. Reinstatement is inappropriate: 1) when the undocumented worker has left the United States; or, 2) when the undocumented worker is a non-grandfathered employee under the IRCA who presented forged documentation of lawful residence or citizenship to his employer. In all other contexts, reinstatement should be available.

The foregoing modifications attempt to reconcile employment law remedies and immigration concerns. However, one may still have visceral objections to the model of comprehensive relief. The next section of this Article discusses these objections.

V. THREE THRESHOLD OBJECTIONS TO THE MODEL

There are three principal objections to the broad availability of remedies approach as it relates to undocumented workers. The first objection is that a reinstatement remedy conflicts with the IRCA in all situations, not just the exceptional situations discussed in Part IV of this Article. The second objection is that a system which provides an undocumented worker with comprehensive remedies compensates that person to a greater extent than any equitable measure of make-whole relief because it restores the undocumented worker to a position which he occupied only through his own illegal conduct. The third objection is that regardless of the result permitted under a fair account of the IRCA and remedial theory, granting undocumented workers make-whole relief damages lawful residents' and citizens' sense of United States sovereignty. Each of these objections merits separate consideration.

A. The IRCA and Reinstatement

Awarding reinstatement to a non-grandfathered employee seems to carry the counterintuitive character of this Article's approach to a peculiar extreme.175 After all, Congress specifically prohibits employers from hiring non-

grandfathered workers.176 By ordering reinstatement of non-grandfathered employees, courts and agencies would thus appear to sanction the performance of an illegal act. A court awarded remedy should never be contrary to the law, no matter how benign its purpose.177

The effects of court awarded reinstatement reinforce this anomaly. Such awards would seem to clash fundamentally with immigration policy. That policy clearly seeks to promote jobs for United States citizens and lawful residents. When an employer discharges an undocumented worker, the employer creates a job opening, despite the fact that the discharge constituted a violation of federal employment law. A United States citizen or lawful resident could fill this opening. If one precludes this possibility by ordering the employer to reinstate the undocumented worker, such an order seems to undermine a key goal of immigration policy by reducing the number of positions available for United States citizens and residents.

The appearance of conflict between reinstatement and the IRCA sometimes reflects reality, but in other situations, it is a mirage. A crucial element one must consider is whether the employer has complied with the employment verification procedures set out in the IRCA.178 If the employer complied with the IRCA, reinstatement does not serve, and may actually damage, immigration policy.179 Indeed, under the modifications of the comprehensive model proposed in this Article, reinstatement would not be appropriate. In other situations, however, the outcome is different.

When the employer has failed to comply with IRCA procedures, reinstatement is an appropriate remedy. The presence of economic factors illuminates this distinction. Employers who are backed into a corner due to economic pressures are least likely to comply with a documentation verification process. They are most likely to knowingly hire exploitable undocumented employees. These employers will resist hiring the more demanding United States citizens or lawful residents. This is true even if, as in this case, the employer has an opening as a result of the discharge of an undocumented employee who has asserted federal employment rights. Other undocumented workers are the most probable candidates for this position.

If the law does not insist on reinstatement of the complainant, it in effect permits the employer to hire another undocumented worker who is ripe for exploitation. The reinstated employee will at least gain the benefit of the

176. A non-grandfathered worker is one without proper authorization from the Attorney General, hired after November 6, 1986, the effective date of the IRCA. See supra text between notes 30-31 (discussing categories of undocumented persons). The IRCA prohibits employers from hiring individuals who fall within the non-grandfathered worker category. See 8 U.S.C. § 1324a (Supp. IV 1986).
179. See supra notes 163-65 and accompanying text.
terms and conditions mandated by federal employment law.\textsuperscript{180} No comparable guarantees are realistic for the new undocumented hire.

Viewed in this light, the issue shifts back to a now familiar query: which situation is better for immigration policy generally, judicial enforcement or neglect of federal employment law standards? Under this Article’s approach, the judicial enforcement of employment law option is considered superior. Thus, in situations where the employer has violated the IRCA, reinstatement is consistent with immigration policy.

One may make the counterargument that policy does not necessarily constitute law. If the text of the IRCA clearly barred reinstatement for undocumented workers, the faulty policy underpinnings of this statutory language would not detract from the language's legal force. However, the text of the IRCA is silent on this point. Other guidance is therefore necessary.

Legislative history lends definition to the IRCA’s language. While legislative history is not as authoritative as the text of a statute, it is a valuable guide to interpretation when the text is silent or unclear.\textsuperscript{181} Because the text of the IRCA is silent with respect to undocumented workers and employment law remedies, the legislative history is the best resource available to discover Congress’ collective opinion on this topic.

The legislative history of the IRCA argues for judicial imposition of comprehensive employment law remedies, including reinstatement, for undocumented workers. Congress included as part of the IRCA’s legislative history a disavowal of intent to “in any way” limit courts’ or agencies’ remedial choices in enforcing federal employment law.\textsuperscript{182} This disclaimer demonstrates that Congress perceived no contradiction between effective

\textsuperscript{180} Awarding reinstatement would not affect the IRCA’s enforcement mechanism. That is, an employer—say, our friend Slimy, Inc.—whom a court or agency had ordered to reinstate an undocumented worker would still have to report his failure to verify the non-grandfathered worker’s citizenship status to the INS. In addition, the INS on its own, either through a spot raid or acting on a tip, could inspect Slimy’s records and premises, apprehend the reinstated employee, and cite Slimy for a violation of the IRCA’s employer sanctions provisions.

This result may seem harsh to Slimy, which is being made to pay twice: first, for an employment law violation, and, second, for a violation of the IRCA. However, this perception neglects Slimy’s role. Slimy, Inc., lived up to its name by knowingly hiring undocumented workers or failing to verify their status with the intention of exploiting this source of captive labor. Under the circumstances, a double dose of sanctions seems fitting. Slimy could have avoided either sanction by simply following the IRCA’s mandate on verification procedures. The procedures are straightforward. If Slimy does not follow them because it wishes to break the law, it should not complain too strenuously about the consequences.

\textsuperscript{181} See United States v. American Trucking Ass’ns, 310 U.S. 534, 546-52 (1940). For differing views on the legitimacy and utility of legislative history, compare Hirschy v. Federal Energy Regulatory Comm’n, 777 F.2d 1, 7-8 (D.C. Cir. 1985) (Scalia, J., concurring) (members of Congress do not read or write committee reports); Posner, Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution, 37 CASE W. RES. L. REV. 179, 196 (1986) (legislators are unaware of legislative history), with Posner, supra note 23, at 274-75 (legislative history may accurately reflect deal between special interests which triggered enactment of statute).

immigration policy and undocumented workers' access to strong employment law remedies.

A court or agency which minimizes the import of this legislative history when considering the issue of reinstatement should be prepared to go beyond an explanation of why its ordering of reinstatement is counterintuitive. The counterintuitive nature of reinstatement in this context is obvious. The court or agency must also explain why the analysis which equates full and effective employment law remedies with immigration policy is incorrect. If the court or agency is unable to demonstrate the flaw in this analysis, it should not bar reinstatement.

B. The Undocumented Worker and Make-Whole Relief

The counterintuitive nature of comprehensive relief for undocumented workers affects not only the issue of compliance with the IRCA, but also the issue of consistency with equitable principles. A central principle of equity holds that only the petitioner with "clean hands" need apply. The undoc-

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183. See D. Dobbs, A Handbook on the Law of Remedies § 2.4, at 45-46 (1973); Plater, supra note 118, at 537.

Equity has a myriad of meanings. One such meaning encompasses general principles of justice, morality, and fairness, and can be articulated as: "No person should profit from her own wrong." Sometimes the law, as written, neglects even these principles when it is confronted with a case comprised of compelling facts. In this situation, equity acts as a residual source of morality. See ARISTOTLE, supra note 46, at 141-42. Equity can also be a source of values for interpreting statutes so as to avoid unfair or absurd results. See, e.g., Riggs v. Palmer, 115 N.Y. 506, 22 N.E. 188 (1889) (discussed supra note 118); Blatt, The History of Statutory Interpretation: A Study in Form and Substance, 6 CARDOZO L. REV. 799, 802-35 (1985); Marcin, Epeikeia: Equitable Lawmaking in the Construction of Statutes, 10 CONN. L. REV. 377 (1978); Moore, A Natural Law Theory of Interpretation, 58 S. CAL. L. REV. 279 (1985). This role of equity has developed an institutional character in the legal system. Equity courts existed in English law to consider individual circumstances and shape remedies accordingly; this was in contrast with the strict legal interpretation to which the court of law was bound. In America, after equity and law courts merged, courts retained wide discretion in granting equitable relief. As the Supreme Court has stated, equity permits the court to "mould each decree to the necessities of the particular case." Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944). See also Lemon v. Kurtzman, 411 U.S. 192, 200 (1973) ("in constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary, what is fair, and what is workable") (quotations omitted). The flexibility characteristic of equitable determinations, however, can collide with federal courts' insistence on "judicially . . . manageable standards." Baker v. Carr, 369 U.S. 186, 217 (1962) (outlining criteria which, if satisfied, qualify issue as "political question" outside judicial competence). See also Tennessee Valley Auth. v. Hill, 437 U.S. 153, 187 (1978) (rejecting immersion in "fine utilitarian calculations" regarding whether completion of dam was more important than preserving species of snail darter). Cf. Fuller, The Forms and Limits of Adjudication, 92 HARV. L. REV. 353, 394-404 (1978) (discussing disadvantages of judicial process for coping with multi-variable or "polycentric" problems such as setting of prices). The area of remedies has been fertile ground for debate about manageable standards and the scope of judicial discretion in fashioning relief. Compare Farber, supra note 118 (seeking to articulate limits on judicial discretion in declining to issue injunctions); Plater, supra note 118 (same); Shreve, Federal Injunctions and the Public Interest, 51 GEO. WASH. L. REV. 382 (1983)
 undocumented person has rights in the United States merely as a result of his illegal act-entering or remaining in this country without proper authorization. It thus seems inappropriate that a court or agency of the United States should invoke its remedial power for the benefit of individuals who would be absolutely without right of recourse if they had not acted illegally in the first instance. It can therefore be argued that an undocumented person has unclean hands and should not be heard to ask a court for equitable relief.

This unclean hands view is consistent with the argument behind the "reward" rationale for opposing employment law remedies for undocumented workers. Under this view, a court or agency which awards monetary relief or reinstatement to an undocumented worker seems to allow that individual to profit from his own wrong. As a general matter, American law views such bounty as offensive. Why should courts and agencies allow undocumented workers to enjoy relief which contradicts this bedrock principle?

Answering that question requires one to scrutinize undocumented persons' level of knowledge and motivation. Undocumented persons know that their presence in the United States violates United States law. They are furtive, isolated and vulnerable precisely as a result of this knowledge. They are motivated by the prospect of a higher standard of living. Undocumented persons, therefore, lack the "good will," defined as the absence of self-interest, which ideally prompts all human activity.

(same); with Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281 (1976) (expressing confidence in court's ability to act as broker for different interests in context of reforming institutions such as prisons, psychiatric hospitals, and school systems); Schoenbrod, supra note 118 (arguing for courts having maximum discretion to deny injunctive relief). For purposes of this Article, any use of "equity" will do.

184. This is especially true under statutes like Title VII, which make remedies a matter for the court's equitable discretion. 42 U.S.C. § 2000e-5(g) (1982); Albemarle Paper Co. v. Moody, 422 U.S. 405, 415-25 (1975).

185. See supra notes 10-11 and accompanying text.

186. See Riggs v. Palmer, 115 N.Y. 506, 22 N.E. 188 (1889) (reading inheritance statute as precluding inheritance by heir who had murdered testator). See also supra note 118 for a complete discussion of Riggs.

187. See I. Kant, Foundations of the Metaphysics of Morals 9-22 (Library of Liberal Arts ed. 1959) (arguing that nothing is wholly good, regardless of its effect, except a good will). Cf. J. Rawls, supra note 46, at 136-42 (positing "original position" in which "veil of ignorance" cloaks knowledge of individual interests and circumstances, thereby facilitating disinterested colloquy on principles of justice).

188. But see Comment, Human Rights, supra note 16 (arguing that one's ability to seek employment in another country is a fundamental human right). Public distrust of one who acts out of self-interest does not prevent the legal system from rewarding people like personal injury plaintiffs, their lawyers, or informants who expose criminal behavior. These people act out of self-interest. Cf. Coffee, Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions, 86 Colum. L. Rev. 669, 669-73 & nn.1-10 (1986) (discussing view of plaintiff's attorney as opportunist sacrificing public good for private gain). Similarly, informants may also have acted illegally. These compromises of the ideal of acting without self-interest are acceptable because instrumental objectives such as detecting and deterring tortfeasors and criminals justify departure from the ideal of
The undocumented worker's self-interest and knowledge of the illegality of her conduct raises the possibility that she will act strategically, by manipulating legal rules for her own advantage. In theory, one rule which is susceptible

selfless will and conduct. Cf. id. (discussing benefits of plaintiff's attorney involvement in legal system). See generally W. JAMES, supra note 48, at 61 (pragmatic view considers only "what works best in the way of leading us").

189. The law's treatment of states of mind reflects this possibility of abuse. The insanity defense, for example, might seem much less compelling in a given case if a jury heard evidence that the defendant, who had no previous psychiatric history, had attended a lecture on the insanity defense the day before she committed the act for which she was charged. See Margulies, supra note 155, at 806 n.85 (discussing fear that defendants will "fake" insanity defense to escape punishment). See also Dan-Cohen, supra note 76, at 638 ("defense of necessity, when based on self-interest, may be allowed most confidently in situations in which the actor did not know of its availability at the time of his criminal conduct"). The military's treatment of "section 8" discharges for mental illness reveals a similar concern. Fictional accounts of war ascribe to the military the view that a soldier who did something "crazy" and then asked for a § 8 discharge on grounds of mental illness could not possess the state of mind required by § 8. That soldier merely wanted to escape from the war. Because getting out of the war is an eminently sane objective, the soldier could not possibly be crazy. See J. HELLER, CATCH-22 (1955). Corporal Klinger, of M*A*S*H, repeatedly tried the same tactic. He never persuaded his superiors.

Another related example involves a defendant's knowledge of his Miranda rights. See Miranda v. Arizona, 384 U.S. 436 (1966) (announcing incantation of rights which arresting officers could recite to all suspects to defeat claims of coerced confessions). A defendant with extensive experience with police officers and the criminal justice system may be held to know his rights to remain silent and to consult with a lawyer. Even the failure of the interrogating officers to recite the Miranda warnings may not render a statement from such a knowing defendant involuntary. See, e.g., Johnson v. Hall, 605 F.2d 577, 581-82 (1st Cir. 1979) ("record indicates that appellant was no stranger to police stations or to police questioning"). When courts consider the defendant's level of knowledge, they prevent manipulation of the voluntariness standard and abuse of the logic of Miranda warnings. The Miranda warnings are designed to convey knowledge to a defendant who is in the intimidating and confusing environment of custodial interrogation. It would be incongruous for a court to permit a knowing defendant to take advantage of the lack of warnings and suppress incriminating statements when the defendant's level of knowledge rendered the warnings unnecessary in his case.

The doctrine of reliance in contract law, as well as the doctrine of duress in contract and in criminal law, is susceptible to similar effects. Suppose an individual feels pressure from others to perform an illegal act. Suppose he is also aware of the exculpating effect of duress. Under these circumstances, he may perform the act even if he does not truly feel the mortal threat which the duress doctrine contemplates. This individual, if he is later successful in pleading duress, has manipulated the system. See supra note 76 (citing literature on how parties' awareness of doctrine distorts outcomes). Cf. O.W. HOLS, supra note 123 (deriding law's traditional emphasis on subjective tests examining individual states of mind and intentions, and tracing progress in law as function of shift to objective standards); Holmes, supra note 48, at 463-64 (same); Posner, Skepticism, supra note 123, at 866-71 (urging utility of economic analysis over subjective inquiries about states of mind).

One commentator has argued cogently that fear of pervasive manipulation accounts for the historic absence of doctrines like duress from statutes and their presence, instead, in the more arcane reaches of case law. See Dan-Cohen, supra note 76, at 630-39. Under this view, because statutes are more readily available and accessible to the general public, doctrines which excuse otherwise culpable conduct should not be included in statutes. Inclusion would publicize the doctrines and promote manipulation. Because case law is often available only to specialized audiences, restricting mention of doctrines like duress to judicial decisions does not pose the
to this type of manipulation is a rule which permits undocumented workers to recover for employment law violations. Manipulation would assume the following form: the undocumented person would illegally enter the United States in search of a job, knowing that his entry violated the law. This person would also know that, regardless of his illegal conduct, he would be entitled to employment law rights and remedies. The availability of such rights and remedies in this context could encourage illegal immigration, a result that is condemned by the reward theory. Conversely, it can be argued that if we eliminated employment law rights and remedies for undocumented workers, we would remove this potential reward.

Two factors, however, render employment law remedies for undocumented workers more palatable and less a reward for wrongdoing. First, undocumented workers typically lack specific knowledge of their rights; hence, the culpability that is characteristic of actors who are most likely to act strategically is missing. This level of guilty knowledge often involves awareness of legal rules. With knowledge of legal rules, strategic actors may manipulate the system.\textsuperscript{190}

A classic example of attempted manipulation is the case in which the heir murders the testator.\textsuperscript{191} The heir, one may assume, did his deed knowing that the law of wills provided for passing of the testator’s estate to him, with no stated exception based on the manner of the testator’s demise. The heir relied on this rule. Only the judicial creation of an exception under such lurid circumstances spoiled his plans.

Manipulation of the legal system, in contrast, is an unlikely scenario for undocumented workers. Undocumented workers are usually unfamiliar with United States employment law.\textsuperscript{192} Their criminal act—illegal entry—therefore cannot flow from a plan to secure employment rights and remedies. Viewed from this perspective, employment law remedies for undocumented workers are a fortuitous consequence of illegal behavior, not a true reward.\textsuperscript{193}

\textsuperscript{190} See supra note 189.
\textsuperscript{191} See supra note 118.
\textsuperscript{192} See supra notes 72-76 and accompanying text.
\textsuperscript{193} See supra note 76.
The second factor which renders employment law remedies for undocumented workers more palatable is that economic forces affect this population in a way that they cannot control. These economic forces stem from domestic employer demand for exploitable labor. It is employer demand that triggers illegal immigration. The murderous heir, by comparison, was master of his own fate.

The involvement of employers in illegal immigration alters the balance of equities. A court that deprives the heir of his ill-gotten legacy affects only the heir. However, a court that disallows make-whole relief for the victimized undocumented worker does not affect the worker alone. Such disallowance also fails to eliminate the profit gained by the employer through the person's illegal entry into the United States. When the court denies the employee make-whole relief, it simply redistributes that profit from the employee to the employer. The employer may generate savings by paying an illegally low wage or discouraging union membership through the discharge of union activists. Equity must concern itself with depriving the employer of this reward. Providing make-whole relief to undocumented workers accomplishes that goal.

Some disquiet may linger about invoking such an instrumental view of law, based on a system which designs means to fulfill ends, as a justification for "rewarding" a wrongdoer like the undocumented worker. A temptation arises to remove any possible reward for both employers and employees. One way to accomplish this design is to bar all remedies for undocumented workers, while imposing fines on employers, payable to the Treasury, equal to the

194. See supra note 183.
195. Cf. Coase, The Problem of Social Cost, 3 J.L. & Econ. 1, 34 (1960) ("the problem is to devise practical arrangements which will correct defects in one part of the system without causing more serious harm in other parts").
196. This concern with deterring wrongdoing by those who deal with undocumented persons helps to account for state court decisions holding that undocumented persons have the right to recover for civil wrongs. See, e.g., Montoya v. Gateway Ins. Co., 168 N.J. Super. 100, 401 A.2d 1102 (App. Div. 1979) (undocumented person can sue to enforce contract for automobile insurance). See also Note, Developments in the Law, supra note 3, at 1446 n.69, 1454-55 & nn.107-12 (citing cases). See generally Comment, The Right of an Illegal Alien to Maintain a Civil Action, 63 Calif. L. Rev. 762 (1975) (discussing constitutional basis of undocumented persons' right to sue). The fact that the employer is at least as much to blame as the undocumented worker for the conduct which results in the violation of employment law disposes of the principal concern of commentators who emphasize justice over utility. These commentators have expressed the fear that deciding cases based on utilitarian factors like superior knowledge of applicable law and fit between sanctions and undesirable conduct, see supra notes 68-101 and accompanying text, would impose injustice in particular cases where the party which would prevail using utilitarian factors—in the instant situation, the employee—is nevertheless more at fault. See Fletcher, Fairness and Utility in Tort Theory, 85 Harv. L. Rev. 537, 547 n.40 (1972) (criticizing Calabresi's view of tort law, which holds that party generally better able to avoid accidents should always absorb accidents' costs). An employer who has committed an employment law violation is in no position to complain about his victim's violation of the immigration laws. Society can still complain, however, before "rewarding" the undocumented employee.
savings realized by the violating employer. Unfortunately, the strength of this approach is illusory.

The allure and ultimate failure of the above model flows from the difference between the after-the-fact and before-the-fact perspectives. After the fact, the model using only fines against the employer is indeed optimal. The model ensures that neither employer nor employee receive any reward for wrongdoing. Before the fact, however, the model is problematic. A regime of fines which are payable to the Treasury provides no incentive for victims to volunteer information. This lack of incentive undermines enforcement ef-

197. See supra notes 141-43 and accompanying text (discussing after-the-fact (ex post) and before-the-fact (ex ante) perspectives on importance of confidentiality). After the fact, it seems jarring to reward an undocumented worker with back pay and reinstatement instead of apprehending and deporting her when she comes forward, thereby making her illegal stay in the United States as difficult as possible. From a policy-oriented, before-the-fact perspective, however, employment law remedies for undocumented workers are a useful means of reducing employer demand for undocumented labor and thereby minimizing taxpayer transfers to the undocumented population.

A worthwhile parallel may be New York City's plan to provide clean needles to heroin addicts with the hope of reducing the spread of AIDS, the deadly disease which can be transmitted through dirty needles. See Kerr, Weighing of 2 Perils Led to Needles-for-Addicts Plan, N.Y. Times, Feb. 1, 1988, at B1, col. 2. From an after-the-fact perspective, giving needles to heroin addicts seems to constitute official endorsement of drug addiction. In contrast, a before-the-fact perspective reveals that the prospect of clean needles should not trigger a surge of interest in heroin. People who have not yet tried the drug have decades of knowledge about why they should not start. See id. at B4 (citing slackening of interest in heroin among those not already addicted). Even if knowledge of heroin's dangers is not an effective deterrent to use of the drug, see supra note 73 (discussing how individuals tend to underassess degree of risk facing them and therefore underinsure), clean needles do not fit well as an incentive to begin using heroin. A meaningful incentive should yield more immediate gratification. See supra notes 83-101 and accompanying text (discussing fit between sanctions and undesirable conduct as element of deterrence). For this reason, a more effective incentive would be a cut in the price of heroin. A price cut is obvious even to people without the knowledge, patience, or insight to assess the lesser health risk posed by a clean needle. New York City, however, did not seek to lower the price of heroin as part of its plan.

Just as there is little evidence that clean needles would promote increased use of heroin, there is little indication that fear of dirty needles would dissuade many current heroin users from continuing their drug use. All three factors governing the success of sanctions against undesirable activity—here, heroin consumption—gravitate against the effectiveness of a fear of dirty needles as a "cure" for heroin addiction. First, the relevant population—heroin addicts—may not know about the heightened risk of AIDS created by using dirty needles. Second, the requisite fit may be absent if addicts believe that their needle is the "clean" one, or that many punctures, not just the one needed for today's fix, are necessary for the spread of AIDS. Third, addicts by definition do not have a substantial capacity to rationally conform their conduct. They will tend to continue their addiction, regardless of the human or financial cost.

Despite the lurid image created after-the-fact, the before-the-fact ramifications for drug use of a clean needles program do not seem alarming. The "up" side, however, in terms of decreasing the spread of AIDS, could be considerable. Given the "down" side presented by unchecked spread of AIDS through dirty needles, the gamble is worth the risk. The same assessment of policy versus after-the-fact appearances holds true with employment law remedies for undocumented workers.

198. See supra notes 51-56 and accompanying text.
forts and dilutes deterrence of employers' exploitation of undocumented workers. As the exploitation of the workers continues, so does the employers' reward.

This analysis suggests that the real choice is not between conferring and eliminating rewards for wrongdoing, but between symbol and policy. The model of fines functions as a symbol of society's reluctance to reward wrongdoing by either employer or employee. However, because the model reduces deterrence of employers' exploitative practices, it fails to actually eliminate all rewards. As a result, the model of fines reflects poor policy. The comprehensive remedies approach, on the other hand, makes a miserable symbol, but fulfills policy goals. On balance, the approach which favors sound policy over symbolism should prevail.

C. Employment Law Remedies and the Symbolism of Sovereignty

The gap between symbolism and policy also explains the sentiment that if we allow undocumented workers to assert employment rights and remedies for unlawful employer conduct, we damage the sense of sovereignty enjoyed by citizens of the United States. Congress, in enacting the IRCA, viewed maintenance of secure borders as an indispensable attribute of a sovereign power. Congress considered undocumented workers a threat to the workforce which lawfully enjoys the benefits of United States sovereignty. This

199. I use the expression "sense of sovereignty" to convey the subjective, psychological character of notions of sovereignty. Sovereignty is a concept prone to inflame the passions. The concept of a nation incorporates many of the feelings of possessiveness which color views about neighborhood, home, and property. Uncontrolled immigration seems in a visceral way to provoke that possessiveness. The result is insecurity about our collective future. See J. HIgham, supra note 1; S. Legomsky, Immigration and the Judiciary 241-53 (1987); Schuck, supra note 2, at 85-90 (maintaining sense of community within "liberal welfare state" requires some ability to exclude others from membership in community). These insecurities may be predicated upon one's fear of people of different races and national origins. See Church of the Holy Trinity v. United States, 143 U.S. 457 (1892) (explaining and approving of United States immigration laws as means of preventing influx of foreigners, particularly Asians, with allegedly different cultural values; Court nonetheless excepted "Christian" ministers from statutory bar on assisting immigration of persons "to perform labor or service of any kind"); J. Hiostam, supra note 1, at 159-75 (discussing ethnocentric basis of fears about immigration). Racial and ethnocentricism almost certainly play some role in our antipathy toward undocumented persons. See Note, Developments in the Law, supra note 3, at 1443-44 (asserting that fear of undocumented persons bears "traces of racism reminiscent of nineteenth century paranoia about the 'yellow tide' of Asian immigrants").


Article does not challenge either of those views. The approach which this Article advances, instead, presumes the need to slow the pace of illegal immigration. Heightened enforcement of employment laws would contribute to that goal. Yet, a familiar disquiet lingers about the effect on our sense of sovereignty when we extend employment rights and remedies to undocumented workers.

This disquiet stems from our "symbolic" possessiveness toward the badges of United States citizenship and legal residency. Sovereignty is a potent symbol. The attributes of sovereignty are the attributes of home and property. From this perspective, an uninvited intruder into a nation—an undocumented person—is like an intruder upon private property. Intruders have the ability to wreck our home and eat our lunch. The fear of a national version of such a domestic disaster runs deep. This fear explains the more than a century of concern and occasional hysteria about the flood of ignorance, crime and disease which uncontrolled immigration could release upon our shores.

The polity may minimize the risk of such a disaster by regulating access to the benefits of citizenship and legal residence through immigration tests and quotas. These devices limit legal immigration. Some people will circumvent immigration restrictions and establish physical presence within the borders of the United States. However, if we allow mere physical presence in this country to trigger the receipt of the attributes of lawful residence, we dilute our faith in our capacity to control distribution of these attributes. This could make it seem less worthwhile for Americans to exert themselves in order to enhance their standard of living and community well-being.

202. This Article also does not seek to resolve the question of whether controls on immigration have a basis in morality. For differing views on that issue, compare Schuck, supra note 2, at 73-90 (uncontrolled immigration threatens ideal of community within United States), with Comment, Human Rights, supra note 16 (stressing roots of illegal immigration in political and economic oppression). See also T. Aleinikoff & D. Martin, supra note 2, at 61-80 (excerpting analyses by other commentators). This Article does suggest, however, that our views about immigration and undocumented persons are shaped in part by feelings of racism, ethnocentricism, and xenophobia. See supra note 199.

203. See Schuck, supra note 2, at 27. For another example of the role of symbolism, see supra note 197 (discussing problem of providing clean needles to heroin addicts in order to impede spread of AIDS). See also Perlin, supra note 68, at 88-98 (describing a symbol in Jungian sense as "the best possible expression for a complex fact not yet clearly . . . [apprehended] by consciousness") (quoting Jung, On Physic Energy, in 8 COLLECTED WORKS OF C.G. JUNG THE STRUCTURE AND DYNAMICS OF THE PSYCHE 75 (Hull trans. 2d ed. 1972)).

204. See supra note 199.

205. See Schuck, supra note 2, at 27. See also id. at 27 n.147 (drawing parallel between summary immigration proceeding and traditionally available summary property or debtor-creditor remedies, such as "ex parte replevin, attachment and execution, or eviction").

206. Schuck suggests something like this process when he avers that government cannot provide a minimum level of economic security for lawful residents of a nation and undocumented persons. See Schuck, supra note 2, at 85-90.

The effects of a loss of faith or morale on productive capacity have been most comprehensively described by property theorists. See, e.g., Michelman, Property, Utility, and Fairness: Comments
resulting loss of morale would create a smaller pie of resources for everyone, including undocumented persons.\(^\text{207}\)

The preservation of faith in our ability to control access to the benefits of sovereignty is a compelling goal. This goal was no doubt instrumental in the Supreme Court's refusal to extend protections from government intrusion, such as the exclusionary rule, to undocumented persons.\(^\text{208}\) If we extend these safeguards we hinder our ability to summarily rid this country of individuals who have ignored immigration law requirements.\(^\text{209}\) Without this ability, the physical presence factor would replace the rule requiring compliance with immigration law as the criterion governing a given group's access to the benefits of lawful residency in the United States.

A similar interest in controlling the benefits produced by the citizenry of the United States accounts for the polity's unwillingness to extend need-based entitlements such as welfare or Medicaid to undocumented persons. This reluctance applies to both the documented and undocumented population.\(^\text{210}\) The rationale for the restriction is that undocumented persons would take a free ride on benefits programs if they were available. The availability of entitlements would encourage immigration by persons who are unable or unwilling to contribute to national wealth through productive work.

This rationale is even more compelling when one considers undocumented persons. They enter the country without the polity's consent. In theory, if the government provided unlimited entitlements to undocumented persons who arrive in limitless numbers, it would bankrupt the nation. Anxiety caused by this scenario\(^\text{211}\) could produce either a violent reaction against all immi-

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\(^{207}\) See Michelman, supra note 206, at 1242-45. However, one could also hypothesize that all immigration—legal or not—expands the economic pie, by increasing the number of motivated, productive workers. See D. North & M. Houstoun, supra note 4, at 134 (describing undocumented workers as hardworking and productive). But see supra note 101 (citing commentators' views that undocumented labor tends to depress labor market). Any expanding pie effect caused by undocumented labor would only hold true, however, if undocumented persons' contributions to the fisc in taxes exceeded taxpayer transfers to the undocumented population. See D. North & M. Houstoun, supra note 4, at 155 (asserting that undocumented persons tend to pay more in taxes than they receive in governmental benefits and services).


\(^{209}\) See Schuck, supra note 2, at 27.


\(^{211}\) The scenario of ruinous immigration is a durable one in American culture. See supra note 199 and accompanying text. See generally R. Nisbett & L. Ross, supra note 122, at 32-35 (discussing importance of scripts and schema to human reasoning).
grants and immigration, or a malaise that reduces overall productivity. If we deny entitlements to undocumented persons, we obviate both risks.

Employment law rights and remedies have a degree of symbolic affinity with both one’s right to freedom from government searches and seizures and one’s eligibility for entitlement programs. Like fourth amendment protections and entitlements, the enforcement of employment law rights and remedies requires the participation and authority of United States courts or administrative agencies. It seems incongruous, on a purely symbolic level, for the government, which is charged with apprehending and removing undocumented persons, to also assist this group by granting them remedies which include monetary relief. Monetary relief seems to resemble an award of welfare or some other entitlement because it involves the conveyance of cash to the undocumented person. The system’s inclusion of undocumented persons in this largess could spark a loss of morale among lawful residents.

The symbolic affront evoked by providing employment law remedies for undocumented workers, however, is tempered by two palliatives. The first palliative flows from the degree of public awareness of employment law rights and remedies. The second palliative flows from the substantive distinctions between those rights and remedies, and other rights reserved for lawful residents.

Public awareness of employment law rights and remedies is low. Members of the public at large may have a higher awareness of the area than do undocumented persons. However, members of the public do not typically specialize in employment law. They therefore may not have knowledge of employment law remedies which are available to undocumented workers. This lack of knowledge dulls the impact of the symbolic affront.

Substantive distinctions also exist between employment law rights and remedies and other rights not granted to the undocumented population. Employment rights and remedies are substantially different from constitutional protections such as the exclusionary rule because the availability of employment law rights and remedies does not reduce the INS’s capacity to detect and deport undocumented persons. Employment law protections do not limit the INS’s ability to collect evidence on undocumented persons’ status. Such remedies also do not hinder the INS’ ability, upon presentation of that evidence, to arrange for the speedy departure of illegal immigrants. Employment protections extend rights of employees against employers, not against the INS. Indeed, a system which instills employment protections simplifies INS enforcement policies by limiting employer demand for undocumented labor.

Government provisions for employment law rights and remedies are also different from need-based entitlements. Employment law protections do not require taxpayer transfers to the undocumented population. Indeed, employment law protections for undocumented workers are desirable, in part, because they tend to reduce such transfers.212

212. See supra notes 102-12 and accompanying text.
Courts must consider the force of symbolism in light of these substantive arguments. In general, the population is not well-versed in employment law or immigration policy. For those who do not take the time to comprehend fully the policies underlying these laws, these substantive arguments will have no impact on symbolic concerns.\textsuperscript{213} However, honoring symbolism over substance in this area does not mesh with the courts’ insistence in other areas of the law that classifications be based upon rationality and not reflex.\textsuperscript{214}

Congress has greater flexibility to dispense with diligence and defer to symbolism in the immigration area. However, Congress has not exercised that flexibility with regard to employment law rights and remedies. Courts and agencies should not take textual silence in statutes such as the IRCA as a license for symbolism’s triumph.

Where the statute’s text is silent, courts and agencies should look beyond the residue of symbolism and toward policy consequences.\textsuperscript{215} Immigration and employment policy support employment law protections for undocumented workers. Courts and agencies should enforce those protections in a form that would provide such persons with comprehensive relief.

\section*{VI. Conclusion}

Finding a place for undocumented workers in the scheme of employment law presents a difficult challenge for judicial and agency decision-makers. Making employment law rights and remedies available to undocumented workers is admittedly counterintuitive.\textsuperscript{216} Affording undocumented workers protection under federal employment law seems at first blush like a reward for illegal immigration. It is clear that a key goal of federal immigration...
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policy is to reduce illegal immigration. Providing rewards for illegal immigration frustrates that goal. Sound policy in an imperfect world suggests, however, that surrendering to intuition in the treatment of undocumented workers under federal employment law actually promotes the outcome which we wish to avoid.

On the other hand, a system which provides a full panoply of employment law rights and remedies helps discourage illegal immigration. This regime targets sanctions against domestic employers who hire undocumented workers for the purpose of exploiting their vulnerability. If we structure sanctions against employers of undocumented labor; this robs employers of their incentive to hire from this captive population. Congress, in enacting the IRCA, confirmed this view. Supplementing the IRCA's employer sanctions provisions with private employment law rights and remedies will deter the hiring of undocumented workers. Without the prospect of employment, illegal immigration should decrease.

Deterrence of illegal immigration is not the only goal of immigration policy served when a court or agency grants employment law protections to undocumented workers. A secondary objective of immigration policy which employment law protections promote is the avoidance of taxpayer transfers to undocumented persons. While employment law protections will discourage future illegal immigration by retracting employer demand, these protections will also reduce employers' harsh treatment of those who previously entered the United States illegally. Undocumented workers who are protected from employer forfeitures and exploitation will have less need to turn to the government for help.

Institutional concerns for preserving the legitimacy and resources of courts and agencies supplement the policy arguments for allowing broad employment law protections. Courts and agencies, unlike Congress, are relatively unaccountable. Their decision-making capacity is spread over legions of matters requiring timely attention. If the system excepts undocumented workers as a group from employment rights and remedies, then the result would qualify broad statutory language in the service of uncertain policy. This gambit is inconsistent with courts' and agencies' lack of accountability. Such exceptions would also require duplicative determinations of immigration status by courts and agencies which lack expertise in immigration matters. This result further taxes decision-making capacity. The system which provides for broad availability of employment rights and relief avoids these institutional costs.

Despite its advantages, the comprehensive approach to rights and relief for undocumented workers triggers objections. The objections are threefold: first, the concept of reinstating undocumented workers violates the IRCA, by compelling one to employ unauthorized workers; second, the concept of "rewarding" an undocumented worker with such protections and remedies enables the worker to, in effect, profit from the crime of illegal entry into the United States, which therefore violates principles of equity; and third, this reward somehow compromises our ability, and our belief in our ability, to control our borders and restrict the size and membership of our polity.
Although these counterarguments have some symbolic force, one must heavily discount their impact.

Discounting these objections is appropriate because rights which we deny undocumented workers do not politely exit from calculations of equity and immigration policy. Instead, the absence of employment rights reappears on the other side of the equation as an inequitable advantage for exploitative employers. Such a result serves neither equity nor policy.

In a sense, all of the objections to the comprehensive remedial approach recapitulate the United States' traditional dialogue between instincts of invitation on the one hand and distrust of immigration on the other. Granting comprehensive employment rights to undocumented workers does not constitute an invitation. In fact, this Article advocates the approach as a deterrent to illegal immigration. However, the approach recognizes that undocumented persons currently living in the United States may serve a useful function in strengthening this deterrent. By pursuing employment law remedies, they can reduce employer demand for undocumented labor as a group.

An approach which uses undocumented workers to reduce employer demand for undocumented labor triggers instincts of distrust because employment law remedies improve undocumented workers' situations in the short term. This improvement seems like a reward for illegal immigration. Offering such a bounty to undocumented persons is especially offensive because it points up the inadequacy of governmental enforcement efforts. United States residents may become anxious if the federal government tacitly concedes that it must deputize undocumented persons in order to help cope with the causes of illegal immigration. Isolating undocumented persons from American law may make legal residents feel more secure.

Adoption of the comprehensive approach which this Article recommends will not banish misgivings based on a symbolic sense of equity or sovereignty. These misgivings will linger. However, the system which permits these misgivings to prevail forfeits the advantages of the broad approach to employment law rights and remedies for deterrence of illegal immigration, reduction of taxpayer transfers to the undocumented population, and preservation of institutional resources and legitimacy. Courts and agencies should acknowledge their misgivings, but nonetheless opt for the advantages created by comprehensive employment law protections for undocumented workers.