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# UNDOCUMENTED WORKERS IN THE UNITED STATES: LEGAL, POLITICAL, AND SOCIAL EFFECTS

*Rachel Feltman*

## I. INTRODUCTION

Immigration law is a hotly contested topic these days. Not only does it have important implications in numerous legal fields, including labor law and tort law, but it also has social, political, and economic effects that ripple throughout our society. Immigrants, especially those who remain undocumented, have the potential to affect the lives of people in almost every walk of life, from politicians to entrepreneurs, and even to teenagers seeking their first jobs. After analyzing the legal impact of current legislation on the field of labor law, it becomes apparent that the employment of undocumented aliens does not have the negative economic and political effects that critics would like to assert.

## II. WORKERS' COMPENSATION LAW

Workers' compensation law originated in Germany as a response to the ponderous common law tort system then used to handle injured employees' claims against employers' negligence.<sup>1</sup> Previously, employees faced the difficult task of proving that employer negligence caused the injury, while employers had an impressive arsenal of affirmative defenses, including contributory negligence and assumption of risk.<sup>2</sup> Litigation caused long delays and was undertaken at great expense to both the injured party and the employer, complications modern workers' compensation laws seek to overcome.<sup>3</sup> The resulting statutory and social policies eliminate the waste of resources generated by excess litigation, requiring the wealthier industry to bear the

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<sup>1</sup> See Lawrence D. Tarr, *Workers' Compensation Practice in Virginia*, VA. L. FOUND. ¶¶ 1.101, 1.102 (5th ed. 1998); see also *Guy v. Arthur H. Thomas Co.*, 378 N.E.2d 488, 490 (Ohio 1978).

<sup>2</sup> See Tarr, *supra* note 1, ¶ 1.102.

<sup>3</sup> *Zundell v. Dade County Sch. Bd.*, 636 So.2d 8, 11 (Fla. 1994) ("The entire policy of worker's compensation is to ensure that workers are swiftly and fairly compensated for work-related injuries."); see also *Red Rover Copper Co. v. Indus. Comm'n*, 118 P.2d 1102 (Ariz. 1941); *Bussear v. Workers' Comp. Appeals Bd.*, 226 Cal. Rptr. 242 (Cal. Ct. App. 1986); *Frohlick Crane Serv., Inc. v. Mack*, 510 P.2d 891 (Colo. 1973); *O'Brien v. Chicago City Ry. Co.*, 137 N.E. 214 (Ill. 1922); *Cline v. Avery Abrasives, Inc.*, 409 N.Y.S.2d 91 (N.Y. Sup. Ct. 1978).

cost of injury, rather than the injured employee.<sup>4</sup> Because the cost associated with workers' compensation is foreseeable, it is translated into a cost of production that is passed on to consumers.<sup>5</sup> Employers also benefit, as workers' compensation laws shield them from tort liability for injuries that could result in large and unpredictable judgments.<sup>6</sup>

With few exceptions, the federal government permits the states to administer their own workers' compensation laws.<sup>7</sup> Regarding undocumented aliens, the result is a remarkable schism between jurisdictions permitting workers' compensation recovery and those severely limiting ability to recover.<sup>8</sup> Due to the complexity of this issue, determining if undocumented aliens qualify as employees so that they can recover under workers' compensation laws requires consideration of immigration law, labor law, and civil rights legislation.

The first issue to consider is that of terminology. In most jurisdictions the definition of employee includes "any person who has entered into or works under any contract of service or apprenticeship

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<sup>4</sup> See *Cudahy Packing Co. v. Parramore*, 263 U.S. 418, 423 (1923) (stating that workers' compensation is based on status, not an implied contract); *Bowen v. Hockley*, 71 F.2d 781, 782 (4th Cir. 1934) (stating that workers' compensation is not a debt, judgment, or liability resulting from an implied contract, but is a statutory obligation arising "out of the status or relationship existing between employer and employee"); see also *Alaska Packers Ass'n v. Indus. Accident Comm'n*, 294 U.S. 532 (1935); *Ford v. Revlon, Inc.*, 734 P.2d 580 (Ariz. 1987); *Williams v. State Comp. Ins. Fund*, 123 Ca. Rptr. 812 (Cal. Ct. App. 1975); *Lindsay v. Great N. Paper Co.*, 532 A.2d 151 (Me. 1987); *Wood v. J. P. Stevens & Co.*, 256 S.E.2d 692 (N.C. 1979); *Tedars v. Savannah River Veneer Co.*, 25 S.E.2d 235 (S.C. 1943).

<sup>5</sup> See *Zundell v. Dade County Sch. Bd.*, 636 So.2d 8, 11 (Fla. 1994).

<sup>6</sup> See *S. G. Borello & Sons, Inc. v. Dep't. of Indus. Relations*, 769 P.2d 399, 405 (Cal. 1989).

<sup>7</sup> *Nat'l Labor Relations Bd. v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50, 56 (2d Cir. 1997) (holding that the IRCA does not "reduce the legal protections and remedies for undocumented workers under other laws"); *Dowling v. Slotnik*, 712 A.2d 396, 403 (Conn. 1998) (holding that states are preempted by U.S.C. § 1324(a)(h)(2) only from imposing civil sanctions on an employer just for employing an undocumented alien, but that states are not preempted in other respects); *Tarango v. State Indus. Ins. Sys.*, 25 P.3d 175, 186-87 (Nev. 2001) (holding that the IRCA does not preempt the Nevada state laws, the NIIA).

<sup>8</sup> Compare *Tarango*, 25 P.3d at 185 (holding that illegal aliens are employees and are entitled to recover workers' compensation benefits) with *Granados v. Windson Dev. Corp.*, 509 S.E.2d 290, 293 (Va. 1999) (holding that illegal aliens are not employees for the purposes of workers' compensation laws).

with an employer.”<sup>9</sup> This includes aliens of any nationality or legal status.<sup>10</sup> Furthermore, under civil rights legislation:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.<sup>11</sup>

The diverse interpretations by various jurisdictions may be indicative of political and social trends in different parts of the country,<sup>12</sup> as certain areas are more attractive to immigrants due to social and economic incentives.<sup>13</sup>

The majority of state courts have held that workers' compensation benefits apply equally to undocumented workers and documented workers.<sup>14</sup> These courts reasoned that, although an employer is for-

<sup>9</sup> 99 C.J.S. *Workers' Compensation* § 160 (2005); see *Reinforced Earth Co. v. Workers' Comp. Appeal Bd.*, 749 A.2d 1036, 1037 (Pa. 2000) (“Employee’ as defined by the Act includes any natural person who performs services for another for a valuable consideration.”); see also *Earth First Grading v. Gutierrez*, 606 S.E.2d 332 (Ga. Ct. App. 2004).

<sup>10</sup> See *Martinez v. Fox Valley Bus Lines, Inc.*, 17 F.Supp. 576, 578 (Ill. 1936) (holding that an illegal alien citizen of a friendly country is entitled to sue and recover judgment because Congress made no statement about barring an undocumented immigrant's ability to recover when it made illegal entry a misdemeanor); *Janusis v. Long*, 188 N.E. 228, 232 (Mass. 1933) (holding that illegal aliens can sue and recover judgment for personal injuries resulting from defendant's negligence); see also *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948).

<sup>11</sup> 42 U.S.C. § 1981(a) (1996).

<sup>12</sup> Compare the socially and politically conservative Virginia decision in *Granados v. Windson Dev. Corp.*, 509 S.E.2d 290, 293 (Va. 1999), with the more socially and politically liberal Pennsylvania decision in *Reinforced Earth Co. v. Workers' Comp. Appeal Bd.*, 749 A.2d 1036, 1037 (Pa. 2000).

<sup>13</sup> Jennifer Gordon, *Symposium: Economic Justice in America's Cities: Visions and Revisions of a Movement: We Make the Road By Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407, 410-11 (1995) (asserting that, in New York, immigrants prefer a suburban or exurban area such as Long Island to New York City because it is “safe and less expensive”).

<sup>14</sup> See, e.g., *Champion Auto Body v. Indus. Claim Appeals Office*, 950 P.2d 671, 673 (Colo. Ct. App. 1997); *Dowling*, 712 A.2d at 412; *Safeharbor Employer Servs. I, Inc. v. Velazquez*, 860 So.2d 984 (Fla. Dist. Ct. App. 2003); *Cenvill Dev. Corp. v. Candelo*, 478 So.2d 1168 (Fla. Dist. Ct. App. 1985); *Wet Walls, Inc. v. Ledezma*, 598 S.E.2d 60 (Ga. Ct. App. 2004); *Dynasty Sample Co. v. Beltran*, 479 S.E.2d 773 (Ga. Ct. App. 1996); *Doe v. Kansas Dep't. of Human Res.*, 90 P.3d 940 (Kan. 2004);

bidden from hiring illegal aliens under the Immigration Reform and Control Act of 1986 ("IRCA"),<sup>15</sup> no legal disability can preclude the claimant from obtaining benefits because there is no prohibition of undocumented immigrants entering into contracts.<sup>16</sup> These courts have also held that workers' compensation for illegal immigrants is not to be used as a sanction on employers for hiring them, but rather that workers' compensation is designed to compensate the injured worker, regardless of fault.<sup>17</sup> This stance is in keeping with the original purpose for imposing workers' compensation for any worker: to eliminate tort law claims and to implement a no-fault system of recovery.<sup>18</sup> Most of these states have held that, because there was no express exclusion of

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Artiga v. M.A. Patout and Son, Ltd., 671 So.2d 1138 (La. Ct. App. 1996); Correa v. Waymouth Farms, Inc., 664 N.W.2d 324, 331 (Minn. 2003); Crespo v. Evergo Corp., 841 A.2d 471 (N.J. Super. App. Div. 2004); Fernandez-Lopez v. Jose Cervino, Inc., 671 A.2d 1051 (N.J. Super. App. Div. 1996); Mendoza v. Monmouth Recycling Corp., 672 A.2d 221 (N.J. Super. App. Div. 1996); Gayton v. Gage Carolina Metals Inc., 560 S.E.2d 870 (N.C. App. 2002); Ruiz v. Belk Masonry Co., Inc., 559 S.E.2d 249 (N.C. App. 2002); Rivera v. Trapp, 519 S.E.2d 777 (N.C. App. 1999); Lang v. Landeros, 918 P.2d 404 (Okla. Ct. App. 1996); Hernandez v. SAIF Corp., 35 P.3d 1099 (Or. Ct. App. 2001); Mora v. Workers' Comp. Appeal Bd., 845 A.2d 950 (Pa. Commw. Ct. 2004); Morris Painting v. Workers' Comp. Appeal Bd., 814 A.2d 879 (Pa. Commw. Ct. 2003); Tyson Foods, Inc. v. Guzman, 116 S.W.3d 233 (Tex. App. 2003); Commercial Standard Fire & Marine Co. v. Galindo, 484 S.W.2d 635 (Tex. Civ. App. 1972); Silva v. Martin Lumber Co., No. M2003-00490-WC-R3-CV, 2003 WL 22496233 (Tenn. Workers' Comp. Panel 2003).

<sup>15</sup> Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a(a-h) (1986).

<sup>16</sup> See *Champion Auto Body*, 950 P.2d at 673; *Dowling*, 712 A.2d at 412 (holding that the IRCA does not reduce legal remedies or protections for undocumented alien workers under other laws, such as workers' compensation); *Crespo*, 841 A.2d at 475 (holding that the IRCA does not preclude undocumented workers from obtaining workers' compensation benefits); *Ruiz*, 559 S.E.2d at 252 (holding that just because the IRCA prohibits the hiring of undocumented workers, they are not prevented from obtaining benefit from state workers' compensation laws).

<sup>17</sup> See *Dowling*, 712 A.2d at 799.

<sup>18</sup> *Cudahy Packing Co.*, 263 U.S. at 423; (stating that workers' compensation is based on status, not an implied contract); *Bowen*, 71 F.2d at 782 (stating that workers' compensation is not a debt, judgment, or liability resulting from an implied contract, but is a statutory obligation arising "out of the status or relationship existing between employer and employee"); *Zundell*, 636 So.2d at 11 ("The entire policy of workers' compensation is to ensure that workers are swiftly and fairly compensated for work-related injuries."); see also *Alaska Packers Ass'n*, 294 U.S. at 532; *Ford*, 734 P.2d at 580; *Red Rover Copper Co.*, 118 P.2d at 1102; *Bussear*, 226 Cal. Rptr. at 242; *Williams*, 123 Cal. Rptr. at 812; *Frohlick Crane Serv., Inc.*, 510 P.2d at 891; *O'Brien*, 137 N.E. at 214; *Cline*, 409 N.Y.S.2d at 91; *Wood*, 256 S.E.2d at 692; *Tedars*, 25 S.E.2d at 235.

illegal aliens, they were entitled to benefits just as if they were documented.<sup>19</sup>

A second set of state courts recognizes a limited right to recover workers' compensation benefits. In Florida, for example, workers' compensation awards may be restricted, depending on whether there is proof of a clear connection between an injury and the alleged wage loss, such as where there is a good faith search for new employment.<sup>20</sup> This is not a rule specifically designed to target undocumented workers. However, it necessarily affects them, as they are not legally permitted to look for work, but also are not permitted to recover if they fail to do so. This rule, then, effectively prohibits undocumented workers in a situation of temporary partial disability from recovering benefits during the applicable period. In other words, in a situation where the injured employee's status changes from total to partial disability, weekly wage payments can be suspended by an employer because, at that point, the immigrant's status as undocumented is what prevents him from obtaining work, not his injury.<sup>21</sup> Similarly, in Pennsylvania, wage loss benefits may be denied because an undocumented worker is not legally entitled to obtain employment. However, necessary medical benefits still apply.<sup>22</sup> Likewise, California courts award workers' compensation benefits, with the exception of vocational rehabilitation.<sup>23</sup>

Additionally, there has recently been a legislative trend toward extending benefits to undocumented workers where previously such coverage had been denied. In Hawaii, for example, courts previously denied benefits, but this has since been changed by an amendment to the statutes governing workers' compensation.<sup>24</sup> In Virginia, formerly a bastion of refusal to provide workers' compensation benefits to undocumented workers,<sup>25</sup> a 2000 amendment to the Virginia Code per-

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<sup>19</sup> See, e.g., *Lang*, 918 P.2d at 404; *Tyson Foods*, 116 S.W.3d at 233; *Silva*, No. M2003-00490-WC-R3-CV, 2003 WL 22496233 (Tenn. Workers' Comp. Panel 2003).

<sup>20</sup> *Cenvill Dev. Corp. v. Candelo*, 478 So.2d 1168 (Fla. Dist. Ct. App. 1985).

<sup>21</sup> *Mora*, 845 A.2d at 950.

<sup>22</sup> *Morris Painting*, 814 A.2d at 879.

<sup>23</sup> California courts have held that an award of vocational rehabilitation benefits would violate employers' rights under the Equal Protection Clause. See, e.g., *Del Taco v. Workers' Comp. Appeals Bd.*, 94 Cal. Rptr. 2d 825 (Cal. Ct. App. 2000).

<sup>24</sup> See *Gambalan v. Kekaha Sugar Co.*, 39 Haw. 258 (1952) (basing its holding on former HAW. REV. STAT. § 4412 (1945)).

<sup>25</sup> See, e.g., *Rios v. Ryan Inc. Cent.*, 542 S.E.2d 790 (Va. Ct. App. 2001); *Granados v. Windson Dev. Corp.*, 509 S.E.2d 290, 293 (Va. Ct. App. 1999) (holding that illegal aliens are not employees for the purposes of workers' compensation laws); *Alvarado v. Krajewski*, No. 0981-00-4, 2001 WL 15827 (Va. Ct. App. 2001); *Mendoza-Garcia v. Cho Yeon HWI/Best Cleaners*, No. 1257-00-4, 2001 WL 292316 (Va. Ct. App. 2001).

mits the inclusion of undocumented aliens for workers' compensation benefits, excepting temporary partial disability benefits, effectively replicating the Florida and Pennsylvania restrictions.<sup>26</sup>

A final small group of states persists in denying benefits to illegal workers. In Nevada, for example, the Supreme Court of Nevada has held that, once an employer knows of an employee's illegal status, the employer is no longer bound to follow other statutory requirements to provide an injured employee with modified employment opportunities as they are also no longer able to legally employ such a person.<sup>27</sup> The Supreme Court of Wyoming has also held that, because an alien is not authorized to work in the United States, such a person does not meet the definition of "employee."<sup>28</sup>

### III. UNIONS

One thing upon which all jurisdictions can agree is that undocumented workers are not entitled to back pay. In 2002, the Supreme Court held that, pursuant to the IRCA, a person who was never legally able to be employed in the United States is not eligible for an award of back pay.<sup>29</sup> This, however, has not been held to preempt state workers' compensation laws.<sup>30</sup> It has remained up to the states to enact their own laws, some of which have emerged as harsher than others, and to enforce such laws accordingly. As it has not been further expanded, it is important to note that the *Hoffman Plastics* decision applies only to violations of the National Labor Relations Act.<sup>31</sup> It is striking to note that Congress has not yet enacted any legislation altering this conclusion.<sup>32</sup> This inaction seems to contradict state legislative trends, which demonstrate increased tolerance and coverage for undocumented alien workers, while Congress seems increasingly resistant to immigrant rights.

One questionable result of the *Hoffman Plastics* decision is its residual effect on the workplace. Union laws and freedoms in the United States

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<sup>26</sup> VA. CODE ANN. § 65.2-101(1)(a) (2000) (defining "employee" as "[e]very person, including aliens and minors, in the service of another under any contract of hire or apprenticeship, written or implied, whether lawfully or unlawfully employed") (emphasis added).

<sup>27</sup> See *Tarango v. State Indus. Ins. Sys.*, 25 P.3d 175 (Nev. 2001).

<sup>28</sup> See, e.g., *Felix v. State*, 986 P.2d 161 (Wyo. 1999) (applying WYO. STAT. ANN. § 27-14-102(a)(vii)).

<sup>29</sup> *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137 (2002).

<sup>30</sup> See, e.g., *Safeharbor Employer Servs.*, 860 So.2d at 984.

<sup>31</sup> See *Tyson Foods, Inc.*, 116 S.W.3d at 243-244.

<sup>32</sup> This may change in the near future, as the political composition of Congress recently changed. HUMAN RIGHTS WATCH, BLOOD, SWEAT, AND FEAR: VIII. THE IMPACT OF HOFFMAN PLASTIC ON WORKER'S RIGHTS, (2006), <http://hrw.org/reports/2005/usa0105/8.htm> [hereinafter "BLOOD, SWEAT, AND FEAR"].

are directly affected because the *Hoffman Plastics* decision dealt specifically with the question of back pay for undocumented migrants illegally dismissed for union activity.<sup>33</sup> It is not difficult to extrapolate reactions to such a change. If undocumented workers can be fired for unionization without any sanction for employers, employers have greater incentive to hire undocumented aliens, as they are unable to unionize. This is likely to increase some of the problems often complained of in reference to immigrants, such as their “stealing” of low wage positions.<sup>34</sup> Undocumented immigrants are already subject to terrible conditions and little pay.<sup>35</sup> With the *Hoffman Plastics* decision barring the main avenue for improving these conditions, undocumented aliens can be subject to even worse conditions and lower pay because employers can thwart efforts to seek assistance from unions. Immigrants, documented and undocumented alike, can no longer rely jointly on union protection. As a result, they will be split up. The documented aliens can turn to their unions for protection in front of the National Labor Relations Board if illegally dismissed, while their undocumented compatriots have no remedy at all.<sup>36</sup> Clearly, this will cause strife, fear, and division among workers.<sup>37</sup>

The IRCA imposes specific responsibilities upon employers.<sup>38</sup> In the original draft regulations, unions would have been required to comply with strict employment verification requirements, including Form I-9 certification.<sup>39</sup> Union reaction was mixed. Some unions responded by instituting programs to assist undocumented workers in gaining amnesty.<sup>40</sup> Most, however, strongly opposed the new regulations, arguing that because they are not “commercial ventures” they should not be bound by the same requirements as the employers.<sup>41</sup> Congress yielded to the powerful lobby, resulting in an exclusion of employer requirements for the unions, claiming that “[u]nions using

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<sup>33</sup> See *Hoffman Plastics*, 535 U.S. at 137.

<sup>34</sup> See *infra* Part VI.

<sup>35</sup> See, e.g., EXECUTIVE COUNCIL, AMERICAN FEDERATION OF LABOR – CONGRESS OF INDUSTRIAL ORGANIZATIONS, RESPONSIBLE REFORM OF IMMIGRATION LAWS MUST PROTECT WORKING CONDITIONS FOR ALL WORKERS IN THE U.S. (2006), available at <http://www.aflcio.org/aboutus/thisistheaficio/ecouncil/ec02272006e.cfm> [hereinafter “RESPONSIBLE REFORM”].

<sup>36</sup> See BLOOD, SWEAT, AND FEAR, *supra* note 32.

<sup>37</sup> See *id.*

<sup>38</sup> Gerard Morales & Rebecca Winterscheidt, *Immigration Reform and Control Act of 1986 – An Overview*, 3 LAB. LAW. 717, 717 (1987).

<sup>39</sup> 52 Fed. Reg. 8740, 8763-64; see also Morales & Winterscheidt, *supra* note 38, at 723-24.

<sup>40</sup> See Morales & Winterscheidt, *supra* note 38, at 724 (citing 26 DAILY LAB. REP. C-1 (Feb. 10, 1987)).

<sup>41</sup> See *id.* at 717 (citing 27 DAILY LAB. REP. A-5, D-1 (Feb. 11, 1987)).



hiring halls to refer members or dues-paying nonunion individuals to employers are not considered to be recruiters or referrers for a fee."<sup>42</sup> Fortunately for unions, the onus is on employers to verify employee eligibility.<sup>43</sup> Section 102 of the IRCA prohibits discrimination based on national origin,<sup>44</sup> meaning unions are not liable for sanctions for racial or ethnic discrimination imposed on employers under the IRCA.<sup>45</sup>

Unions are not just bound by the IRCA, but also by the Labor Management Relations Act ("LMRA"), which also contains an anti-discrimination clause.<sup>46</sup> The LMRA protects employees who were unfairly discharged as a result of union activities. In *Sure-Tan, Inc. v. NLRB*, the Supreme Court held that an employer who reports an undocumented alien employee to Immigration and Naturalization Services ("INS") in retaliation for participation in union activities engages in unfair labor practice under LMRA section 8(a)(3).<sup>47</sup> Thus, the LMRA provides another avenue for employees when retaliatory action is taken against them for union activities.

Unions refusing to supply information to employers regarding qualifications of applicants in hiring halls can be held to be in violation of the LMRA.<sup>48</sup> Thus, the documentation that the unions laboriously fought to avoid under the IRCA must still be collected and managed so that employers are fully informed. Unions will also be held accountable under LMRA if they fail to keep members in their hiring hall apprised of matters critical to their employment status.<sup>49</sup> Therefore, it is important for labor unions to keep meticulous track of an alien's employee status, even if not expressly required by the IRCA.

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<sup>42</sup> GENERAL ACCOUNTING OFFICE, IMMIGRATION REFORM: STATUS OF IMPLEMENTING EMPLOYER SANCTIONS AFTER ONE YEAR 13 (Nov. 5, 1987) (GAO Report).

<sup>43</sup> Morales & Winterscheidt, *supra* note 38, at 726 (quoting 124 LAB. REL. REP. (BNA) 268 (Apr. 27, 1987)).

<sup>44</sup> Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324A (1986).

<sup>45</sup> See, e.g., *Guerra v. Manchester Terminal Corp.*, 498 F.2d 641 (5th Cir. 1974) (holding that union hiring hall system gave United States citizens preferential treatment over aliens).

<sup>46</sup> *Id.*

<sup>47</sup> *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883 (1984).

<sup>48</sup> See, e.g., *N.L.R.B. v. Local Union 497, Int'l Brotherhood of Electrical Workers, AFL-CIO*, 795 F.2d 836 (9th Cir. 1986); *Int'l Ass'n of Heat & Frost Insulators & Asbestos Workers, Local No. 80, AFL-CIO*, 248 NLRB 143 (1980); *Oakland Press Co.*, 233 NLRB 994 (1977).

<sup>49</sup> See, e.g., *Jacobs/Weisel*, 268 NLRB 1312 (1984); *Ford Bacon & Davis*, 262 NLRB 50 (1982).

## IV. EMPLOYER RESPONSIBILITIES

Prior to the implementation of the IRCA, employers had much more freedom in their hiring practices.<sup>50</sup> IRCA's most significant impact was the prohibition on "knowingly" hiring, recruiting, referring for a fee, or continuing to employ any alien not authorized to work in the United States.<sup>51</sup> This applies equally to contractors and subcontractors.<sup>52</sup> The civil penalties escalate according to the number of violations an employer has had. An employer may be fined as little as \$250 per undocumented worker for a first offense, but as much as \$10,000 per undocumented alien for a third offense.<sup>53</sup> If the employer is found to be a repeat offender, he may even face imprisonment.<sup>54</sup>

Hispanic groups voiced concerns that this provision would encourage racial and ethnic discrimination by overly cautious employers.<sup>55</sup> In response, Congress added section 102, making it illegal to discriminate on the basis of national origin in employment, recruitment, or referral for a fee.<sup>56</sup> Section 102 calls on other legislative documents for inspiration,<sup>57</sup> specifically, Title VII of the Civil Rights Act of 1964<sup>58</sup> and the National Labor Relations Act.<sup>59</sup>

Despite good intentions and attempts to satisfy all possible groups affected, section 102 has caused its fair share of controversy. The majority of this controversy revolves around Congress's failure to

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<sup>50</sup> Morales & Winterscheidt, *supra* note 38, at 717.

<sup>51</sup> Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a(a)(1)-(3) (1986) forth the parameters for who is to be considered acceptable for hire, including:

- A) a citizen or national of the United States, or
- B) an alien who
  - 1) is lawfully admitted for permanent residence; or
  - 2) is lawfully admitted for temporary residence under § 245(A)(a)(1); or
  - 3) is admitted as a refugee under § 207; or
  - 4) is granted asylum status under § 208; and
  - 5) evidences an intention to become a citizen of the United States through completing a declaration of intention to become a citizen.

<sup>52</sup> *Id.* at § 1324a(a)(4).

<sup>53</sup> *Id.* at § 1324a(e)(4)(A)(i)-(iii).

<sup>54</sup> *Id.* at § 1324a(f)(1).

<sup>55</sup> Donald R. Stacy, *The Standard for Providing an Unfair Immigration-Related Employment Practice Under IRCA: Disparate Impact or Intent?*, 4 LAB. LAW. 271, 271-272 (1988).

<sup>56</sup> *See id.* at 271; *see also* Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324b) (1986).

<sup>57</sup> Stacy, *supra* note 55, at 273-274;

<sup>58</sup> Civil Rights Act of 1964 Title VII, 42 U.S.C. § 2000e-2000e-17. (2000).

<sup>59</sup> National Labor Relations Act, 29 U.S.C. §§ 151-169 (2000).

include any explicit intent requirement on the part of employers. Not surprisingly, employers seek to avoid IRCA violations by imposing hiring criteria that immediately cull the majority of aliens, such as requiring a certain level of fluency in English.<sup>60</sup> Because of this practice, the question swiftly arose as to whether section 102, like Title VII of the Civil Rights Act, permitted a prima facie case based on the disproportionate number of members of the protected group disparately affected.<sup>61</sup> In response, courts held that “facially neutral employment practices, which have a disparate impact on members of protected classes” may be invalidated.<sup>62</sup> The Justice Department published Notice of Proposed Rulemaking that requires actionable discrimination under section 102 of IRCA to be “knowing and intentional.”<sup>63</sup> In short, although ignorance of the law is no excuse, ignorance of undocumented alien status is.<sup>64</sup>

In order to be liable for sanctions under ICRA, a company has to “knowingly” hire, recruit, or refer for a fee any unauthorized alien in order to be liable for penalties.<sup>65</sup> Employers can avoid these sanctions by complying with the Employment Eligibility Verification Form, “Form I-9.”<sup>66</sup> Form I-9 requires that employers verify documentation establishing both the worker’s employment authorization (via valid social security card, for example) and identity (e.g., a driver’s license).<sup>67</sup> Thus, if an undocumented immigrant provides false documentation or documentation that belongs to another person, the employer is not liable. Employers do have a duty to attempt to verify the validity of the documentation, but they are not required to do an in-depth investigation.<sup>68</sup> Employers are required to maintain documentation records for three years from the date of hire or one year from employee termination, whichever is later.<sup>69</sup> Because the documentation requirements

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<sup>60</sup> See, e.g., Morales & Winterscheidt, *supra* note 39, at 720-21.

<sup>61</sup> Stacy, *supra* note 55, at 274; cf. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

<sup>62</sup> E.g., League of Latin Am. Citizens v. Pasadena Indep. Sch. Dist., 662 F.Supp. 443 (S.D. Tex. 1987).

<sup>63</sup> DOJ Unfair Immigration-Related Employment Practices, 28 C.F.R. § 44.200(a)(1) (2007).

<sup>64</sup> See, e.g., Mester Mfg. Co. v. I.N.S., 879 F.2d 561 (9th Cir. 1989).

<sup>65</sup> Employer Requirements, 8 C.F.R. § 274a.10 (2007)

<sup>66</sup> Immigration Regulations, 8 C.F.R. § 274a.2 (2007).

<sup>67</sup> Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a(b) (1986).

<sup>68</sup> See, e.g., Noah Adams, *NPR: Immigration's Effect on Business in Yuma, Ariz.* (National Public Radio broadcast May 18, 2006), available at <http://www.npr.org/templates/story/story.php?storyId=5415058> (discussing the hardships caused to employers by documentation requirements); see also 8 U.S.C. § 1324(a) (2000).

<sup>69</sup> Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a(b) (1986).

are so clear-cut, handling disputes as to whether a law has been violated is fairly swift and simple.<sup>70</sup>

## V. UNANSWERED QUESTIONS

Despite the *Hoffman Plastics* decision, there is a substantial amount of evidence suggesting that undocumented workers are becoming more valued – or at least more accepted – in the United States. This is exemplified by current state and federal legislation.<sup>71</sup> The vast majority of states recognize undocumented workers as eligible to receive workers' compensation benefits, and do not impose restrictions on how benefits are received. Finally, recent changes in state legislation (such as the 2000 changes to the Virginia Code) liberalize treatment of undocumented workers.<sup>72</sup>

Since the IRCA, there has been no major amnesty for undocumented aliens. A bill recently passed in the Senate<sup>73</sup> included not only a guest worker program, but also a "path to citizenship for most of the estimated 12 million illegal immigrants."<sup>74</sup> In contrast, the bill approved by the House of Representatives in December 2005<sup>75</sup> includes a provision that would make it a felony to be in the country illegally.<sup>76</sup>

All of this turmoil and confusion – states' disagreement on the application of workers' compensation laws and disagreement in the House and Senate on how to best deal with immigrants currently residing in the United States – leads one to question the different social forces at work. Illegal immigrants indubitably influence not only the United States economy, but other world economies as well. The question remains whether such influence is positive or negative.

## VI. THE CASE AGAINST UNDOCUMENTED WORKERS

The prevailing xenophobes assert that immigrants are bad for American employment and the economy. To a certain extent, they are correct. The increase in the supply of low-wage laborers causes em-

<sup>70</sup> See Morales & Winterscheidt, *supra* note 38, at 719.

<sup>71</sup> Carolyn Lockhead, *With Give and Take, Senate Approves Immigration Bill*, S.F. CHRON., May 26, 2006, <http://sfgate.com/cgi-bin/article.cgi?file=/c/a/2006/05/26/MNGETJ2Q0V1.DTL&type=politics>.

<sup>72</sup> See, e.g., VA. CODE ANN. § 65.2-101 (2007) (defining "employee" as "[e]very person, including aliens and minors, in the service of another under any contract of hire or apprenticeship, written or implied, whether lawfully or unlawfully employed") (emphasis added).

<sup>73</sup> Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2006).

<sup>74</sup> Lockhead, *supra* note 71.

<sup>75</sup> Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2005).

<sup>76</sup> Lockhead, *supra* note 71.

ployers to decrease the amount of wages they are willing to pay.<sup>77</sup> Consequently, immigrants, who are often willing to work for less money than Americans, are more likely to get the job.<sup>78</sup> Between 1980 and 2000, there was a four percent drop in annual income for American men attributable to the influx of immigrants and resulting increase in the labor supply.<sup>79</sup> Thus, since 1987, average annual earnings of U.S.-born men have decreased by an estimated \$1,700.<sup>80</sup> The hardest hit groups are minorities, legal immigrants, teenagers, and other unskilled citizens.<sup>81</sup> Traditionally poorer socioeconomic groups, such as African Americans and Hispanics, are among the most impoverished members of America's population<sup>82</sup> and it is they who often directly compete with immigrants for jobs.<sup>83</sup> High school drop-outs face tough competition from immigrants as well. The wages for this sector of the population decreased by 7.4 percent nationwide.<sup>84</sup> In certain areas the decrease is even more stark – in California the wage drop was 17 percent, and in Ohio, there was a 31 percent decrease.<sup>85</sup> The sector of the population most affected by the increase in illegal immigrant employment are the neediest Americans.

Public opinion in the United States must also be considered. Surely, in a democracy, the voice of the people should carry weight. A Gallup Poll, taken March 27, 2006, showed that 80 percent of the public supports a federal government crackdown on illegal immigration.<sup>86</sup> Another poll, conducted by *TIME* Magazine in January 2006, also showed the public expressing displeasure with illegal immigrants.<sup>87</sup> Seventy percent of those polled believe undocumented entrants “in-

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<sup>77</sup> See Adam Davidson, *NPR: Q&A: Illegal Immigrants and the U.S. Economy*, National Public Radio, May 22, 2006, <http://www.npr.org/templates/story/story.php?storyId=5312900>.

<sup>78</sup> *See id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *See id.*

<sup>82</sup> See Richard Wolf, *1.1 Million Americans Joined Ranks of the Poor in 2004*, USA TODAY, Aug. 30, 2005, available at [http://www.usatoday.com/news/washington/2005-08-30-census-poverty\\_x.htm](http://www.usatoday.com/news/washington/2005-08-30-census-poverty_x.htm).

<sup>83</sup> See Davidson, *supra* note 77.

<sup>84</sup> *See id.*

<sup>85</sup> *Economic Impacts*, AAD PROJECT, 2006, <http://aad.english.ucsb.edu/econimpacts.html>.

<sup>86</sup> See Tony Blankley, Op-Ed, *Mexican Illegals vs. American Voters*, WASH. TIMES, Mar 29, 2006, available at [http://www.realclearpolitics.com/articles/2006/03/mexican\\_illegals\\_vs\\_american\\_v.html](http://www.realclearpolitics.com/articles/2006/03/mexican_illegals_vs_american_v.html).

<sup>87</sup> *See id.*

crease the likelihood of terrorism.”<sup>88</sup> Fifty-seven percent thought the military should be used to regulate the Mexican-American border.<sup>89</sup>

Two major public concerns are guest worker laws and amnesty.<sup>90</sup> With a large amount of people in other countries waiting years for an opportunity to obtain a visa, it makes little sense to hand visas out to immigrants who entered the United States (or remained in the United States) illegally. To speak in psychological terms, this would positively reinforce negative behavior. It sends a mixed message – tell people that if they break the law, they will be rewarded, but at the same time to threaten those who did not make it across the border quickly enough with increasingly harsh punishments. The difficulty of obtaining a visa encourages immigrants to enter the country illegally. Granting amnesty to illegal immigrants provides further encouragement to circumvent the process.<sup>91</sup>

Furthermore, in the event that a mass deportation were to occur, it is unlikely that the United States economy would suffer severely.<sup>92</sup> The average consumer in the United States spends only seven dollars a week on fresh fruit and vegetables.<sup>93</sup> For every one dollar head of lettuce, the farm worker gets about six or seven cents, roughly one fifteenth of the retail price.<sup>94</sup> Even a big run-up in the cost of labor will not hit the consumer very hard.<sup>95</sup> In fact, for the average American family, a forty percent wage increase for farm workers would likely only add about ten dollars to the annual bill for fruit and vegetables.<sup>96</sup> For the average high-school dropout, who competes directly with illegal immigrants, a sudden lack of competition would mean a raise of about \$25 per week.<sup>97</sup> Even with taxes taken out, this would be more than enough to cover the increase in the cost of fresh fruit and vegetables.

Industries would of course be affected by a dramatic alteration of their labor pool, but for any business to survive it must adapt, and most industries are good at this. Some industries would undoubtedly

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<sup>88</sup> *Id.*

<sup>89</sup> *See id.*

<sup>90</sup> *See generally Don't Fence Us In*, THE ECONOMIST, Oct. 19, 2006, available at [http://economist.com/world/na/displaystory.cfm?story\\_id=8058048](http://economist.com/world/na/displaystory.cfm?story_id=8058048) (discussing proposed amnesty programs prior to the U.S. midterm election of 2006).

<sup>91</sup> *See Better Than Nothing*, THE ECONOMIST, May 24, 2007, available at [http://economist.com/opinion/displaystory.cfm?story\\_id=9226964](http://economist.com/opinion/displaystory.cfm?story_id=9226964).

<sup>92</sup> *See Rich Lowry, Jobs Americans Won't Do?*, NAT'L REV. ONLINE, Mar. 14, 2006, <http://www.nationalreview.com/lowry/lowry200603140822.asp>.

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

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *See id.*

<sup>97</sup> *See Davidson, supra note 77.*

move abroad—a marvel of globalization.<sup>98</sup> Others would create or implement new technology for which there is not currently enough incentive.<sup>99</sup> In many industries, technology and machinery are available but expensive and not worth the investment as long as cheap labor abounds. As labor disappears, incentives to modernize come to light. Though this will not directly help poor Americans get jobs, it will not necessarily hinder job growth. We need people to build the machines, maintain them, and operate them. Jobs will indeed open up. Presently, one reason there appears to be too few workers for certain jobs is that people will move to areas with high immigrant populations.<sup>100</sup> National Public Radio correspondent Adam Davidson made the following remarks about the impact of illegal immigrants:

If there weren't illegal immigrants working in construction in places like Chicago and Miami, then demand for legal workers would go up, which would mean wages would rise. But very quickly, legal workers from other parts of the country would move to those cities, and wages would go back down. The net impact on wages would be relatively modest.<sup>101</sup>

Thus, for the average consumer, the additional cost passed on by the industry would be so miniscule that most purchasers would not notice or worry about an increase in cost.

Illegal immigrants are problematic for American society. According to Jim Kouri, the vice-president of the National Association of Chiefs of Police, immigrants “comprise upwards of 27 percent of the US prison and jail population.”<sup>102</sup> Additionally, two agencies within the Department of Homeland Security – Immigration and Customs Enforcement, and Customs and Border Protection – report apprehension of over 100,000 criminal aliens, not including those whose only violations were immigration-related.<sup>103</sup> These statistics, however, beg the question of whether illegal aliens are really more prone to criminal activity than any other group, or whether they just happen to end up in jail more often.

Illegal immigrants also burden essential services that Americans need on a regular basis, such as health care. Annually, illegal

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<sup>98</sup> See Lowry, *supra* note 92.

<sup>99</sup> See *Id.*

<sup>100</sup> See Davidson, *supra* note 77.

<sup>101</sup> *Id.*

<sup>102</sup> Jim Kouri, *The Big Lie: Illegal Aliens Benefits Americans*, OPINIONEDITORIALS.COM, Mar. 21, 2006, [http://www.opinioneditorials.com/freedomwriters/jcpp\\_20060321.html](http://www.opinioneditorials.com/freedomwriters/jcpp_20060321.html).

<sup>103</sup> *Id.*

aliens cost emergency health care providers \$1.45 billion.<sup>104</sup> U.S. Senator Jon Kyl cites one poignant example; due to the cost of emergency labor and delivery services for illegal immigrants, Copper Queen Hospital in Bisbee, Arizona had to close its obstetrics and gynecology department for several months.<sup>105</sup> On the other hand, the immigrant “problem” creates jobs. Esperanza Rojas, a nurse coordinator at the Alviso Health Center in California, lamented what would happen if the vast majority of undocumented aliens disappeared.<sup>106</sup> She noted that staff would be reduced (for example, instead of two clerks, only one would be necessary) and some patients would be sent elsewhere for certain services because, without the additional demand, it would no longer be efficient to provide in-house lab services.<sup>107</sup> Although it may seem strange that more undocumented workers create additional jobs for legal American workers, that is precisely the case.

The exact effect immigrants, legal and illegal alike, have on unemployment of native-born Americans is in hot dispute. Steven Camarota, Director of Research at the Center for Immigration Studies, insists that his analysis of U.S. Census data reveals “that from March 2000 to March 2004, unemployment among native-born workers grew by 2.3 million – and employment among immigrant workers increased by the same amount.”<sup>108</sup> This is substantiated by a 2004 study done at Northeastern University in Boston.<sup>109</sup> Mr. Camarota further notes that 61 percent of the net increase of the working-age population in America between March 2000 and March 2005 was comprised of native born Americans, whereas only nine percent of the net increase in jobs went to people born in the United States.<sup>110</sup>

In contrast, according to a study of unemployment and immigration trends done by the Affirmative Action and Diversity Project, “the unemployment rate over the last twenty-five years has moved in cycles that demonstrate a comparatively lower unemployment rate during the most recent (2000-2005) influx of undocumented work-

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<sup>104</sup> Jon Kyl, *Illegal Aliens and the Cost to Arizona's Hospitals*, PHXNEWS.COM, May 23, 2005, <http://www.phxnews.com/fullstory.php?article=21492>.

<sup>105</sup> *See id.*

<sup>106</sup> *See* Patrick May, *Imagine if They Vanished*, MERCURY NEWS, Apr. 30, 2006, available at <http://www.workingeastbay.org/article.php?id=70>.

<sup>107</sup> *See id.*

<sup>108</sup> *See* Mason Stockstill, *Working the Problem: It's Not as Simple as Immigrants vs. Natives*, DAILYBULLETIN.COM, Oct. 30, 2005, [http://lang.dailybulletin.com/social/beyondborders/part\\_3/p3\\_day1\\_main.asp](http://lang.dailybulletin.com/social/beyondborders/part_3/p3_day1_main.asp).

<sup>109</sup> *See id.*

<sup>110</sup> Ron Scherer, *Immigration Debate Cruc: Jobs Impact*, CHRISTIAN SCI. MONITOR, Mar. 30, 2006, available at <http://www.csmonitor.com/2006/0330/p01s01-ussc.html>.



ers.”<sup>111</sup> Indeed, undocumented immigration has been rising significantly over the last ten years.<sup>112</sup> However, starting in 1995, just as immigration was beginning to increase, unemployment began to decrease and continued to decrease steadily until 2001.<sup>113</sup> Even in the subsequent five years, immigration has continued to increase, while unemployment peaked in 2003 and has decreased steadily since then.<sup>114</sup> In 2005, on average, 5.08 percent of the United States population was unemployed,<sup>115</sup> whereas by February 2006, this declined to 4.8 percent.<sup>116</sup> Furthermore, Department of Labor economist Howard Hayghe notes that even though Mr. Camarota’s figures are correct in regard to the finding of employment by native born Americans, he failed to take into account that in 2005 there were more jobs being produced, so that “the percentage of native-born residents finding jobs rose to 41 percent.”<sup>117</sup> This means that job availability increased for a wide spectrum of the population – more CFOs were needed, but more janitors were needed as well.<sup>118</sup>

## VII. THE CASE FOR UNDOCUMENTED WORKERS

In spite of these socioeconomic concerns, it is important to avoid the wanton floccinaucinihilipilification of undocumented immigrants. They perform important services in our society which have important effects, regardless of the negative connotations associated with their illegal status. There are more than eleven million undocumented aliens living in the United States who perform tasks ranging from despicable meatpacking work to construction work, all of which carry huge risks of injury in exchange for low wages.<sup>119</sup> The willingness of

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<sup>111</sup> *Economic Impacts*, *supra* note 85.

<sup>112</sup> *Id.*

<sup>113</sup> See THE UNITED STATES UNEMPLOYMENT RATE BY YEAR (2006), <http://miseryindex.us/URbyyear>.

<sup>114</sup> See *id.*

<sup>115</sup> See *id.*

<sup>116</sup> See Scherer, *supra* note 110.

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

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

<sup>119</sup> NPR: *The Immigration Debate*, National Public Radio, <http://www.npr.org/templates/story/story.php?storyId=5310549> (last visited Oct. 5, 2007); Davidson, *supra* note 77 (stating illegal immigrants do often take some of the country’s least attractive jobs, such as meatpacking and agriculture); Scherer, *supra* note 110 (stating that estimates of the number of undocumented workers ranges from 9 million to 20 million, but that the conventional estimate is 11 million); see also May, *supra* note 106; MICHELE NORRIS, NPR: *Chertoff: Guard Won’t Arrest Illegal Immigrants* (National Public Radio broadcast May 16, 2006), available at <http://www.npr.org/templates/story/story.php?storyId=5409107> (estimating that there are 12 million immigrants living in the United States).

the immigrant population to work long hours for little pay results in lower prices for all Americans. This price cut ranges from groceries to nannies.<sup>120</sup> Furthermore, many immigrants bring with them skills that most Americans do not have. This is why immigrants are so important in fields like construction; they are skilled carpenters and roofers. The result is a better quality product in exchange for a lower price. In our capitalist society, this sort of trade-off is certainly nothing to scoff at and surely should be appreciated.

Immigrants also serve an important function by filling employment positions that Americans not only do not want to fill, but could not adequately fill even if all the immigrants disappeared.<sup>121</sup> Even President George W. Bush acknowledges this key aspect of immigrant labor, noting that “[t]here are people doing jobs Americans will not do. Many people who have come into our country are helping our economy grow. That’s just a fact of life.”<sup>122</sup> A recent study proposes that “most Americans don’t directly compete with illegal immigrants for jobs.”<sup>123</sup> In other words, there are more jobs than Americans with proper skills could fill. In fact, a study by the American Immigration Law Foundation notes that “[e]ven if all unemployed U.S.-born workers who had experience in the agriculture, garment, housekeeping, maintenance and construction industries were hired into jobs in those fields that were filled by immigrants in 2000, the industries would still have faced a shortfall of 412,000 workers.”<sup>124</sup>

But what about those immigrant-fueled wage decreases? It is unclear that there is any conclusive evidence linking immigration to a decrease in income for Native Americans. For instance, the 31 percent drop in wages for high school dropouts in Ohio does not appear to be linked to immigration, as Ohio continues to be one of the states with the fewest illegal immigrants.<sup>125</sup> But some studies fail to take into account additional income-governing factors, such as the existence of certain industries.<sup>126</sup> Without immigrants, some businesses would fail and the United States would be forced to import more.<sup>127</sup> It is difficult to forecast the impact on the United States economy that

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<sup>120</sup> See generally Davidson, *supra* note 77.

<sup>121</sup> Stockstill, *supra* note 108.

<sup>122</sup> About.com, *Illegal Aliens: Helpful or Harmful To America?*, <http://usconservatives.about.com/od/theeconomy/a/illegalaliens.htm> (last visited Oct. 4, 2007).

<sup>123</sup> Davidson, *supra* note 77.

<sup>124</sup> Stockstill, *supra* note 108.

<sup>125</sup> Eduardo Porter, *Cost of Illegal Immigration May Be Less Than Meets the Eye*, N.Y. TIMES, Apr. 16, 2006, available at <http://www.nytimes.com/2006/04/16/business/yourmoney/16view.html?ex=1302840000&en=37239528fc85a76c&ei=5090>.

<sup>126</sup> *Id.*

<sup>127</sup> Scherer, *supra* note 110.

would arise if undocumented workers were not here and available.<sup>128</sup> The ultimate result of this is a rise in income for top income earners.<sup>129</sup> This may not provide much consolation for people at the bottom whose wages have decreased, but it does mean that the wage decrease at the bottom is balanced out by a wage increase at the top. Lawyers, doctors, and businesspeople certainly have no reason to complain.

Certain industries rely on immigrant labor. In the construction and grounds maintenance industries, a quarter of laborers are illegal aliens.<sup>130</sup> Evelyn Sanchez, a Project Coordinator with the Instituto Laboral de la Raza which provides legal advocacy and labor educational services to local Hispanics, estimates that in California “[n]inety percent of all hotel workers, housekeeping, catering and maintenance, are all immigrant labor.”<sup>131</sup> Nationwide, this number drops to 22 percent, still a striking number.<sup>132</sup> According to Valerie Lapin, leader of the UNITE HERE! hotel workers’ union, “[i]f there were no immigrants working in the hotels, hotels would come to a standstill.”<sup>133</sup> Jeanine Rhea, general manager of the Hampton Inn and Suites in Yuma, Arizona, laments the fact that immigrants must be documented in order for her to hire them.<sup>134</sup> She complains that although there are plenty of people seeking work, their lack of documentation means that she is still short-staffed.<sup>135</sup> She attests to the economic harm that a mass deportation without a guest worker program would do from her perspective as a businessperson.<sup>136</sup> Other areas would be hard-hit as well, particularly in the agricultural sector, where 29 percent of agricultural workers are undocumented aliens.<sup>137</sup> Their plants would go to seed without workers to harvest crops. “The farmer would lose money; his quarter would be shot. Eventually, the bank could foreclose on his house, his truck loan, his equipment.”<sup>138</sup> This trickle-down effect shows the striking effect a loss of immigrants would have on the United States economy and society.

Economic benefits do not stop with actual employment of immigrants, industries benefit from illegal aliens in other ways, too. Illegal immigrants often smuggle other things across the border, from liquor

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<sup>128</sup> *Id.*

<sup>129</sup> See Stockstill, *supra* note 108.

<sup>130</sup> Scherer, *supra* note 110.

<sup>131</sup> May, *supra* note 106.

<sup>132</sup> Scherer, *supra* note 110.

<sup>133</sup> May, *supra* note 106.

<sup>134</sup> ADAMS, *supra* note 68; see also 8 U.S.C. § 1324(a)(3)(A)(B) (2000).

<sup>135</sup> ADAMS, *supra* note 68; see also 8 U.S.C. § 1324(a)(3)(A)(B) (2000).

<sup>136</sup> ADAMS, *supra* note 68; see also 8 U.S.C. § 1324(a)(3)(A)(B) (2000).

<sup>137</sup> Scherer, *supra* note 110.

<sup>138</sup> May, *supra* note 106.

to parrots to organs.<sup>139</sup> Even the illegal black market can benefit the economy. While taxes will not necessarily flow from such trade, it gets money moving, which can be hugely beneficial when the United States is stuck in the economic doldrums. On top of that, trade in certain items, such as organs, stand to directly benefit individual American citizens. While this author certainly would not wish to encourage the illegal trade in organs, it is difficult to argue that from a purely American-centric point of view that saving American lives is a bad thing. To consider such trade from a purely economic standpoint reveals that the American legal trade in organs certainly will not be harmed by the influx of additional organs.<sup>140</sup>

Immigrants get a lot of criticism for sending a portion of their earnings back to their home country. But immigrant spending often works the other way around, too. Sometimes immigrants cross the border and spend money they already have here. During the May 1, 2006 immigrant strike, Mexican citizens of border towns did not cross the border to shop. According to the Mayor of Douglas, Arizona, a border town adjacent to a booming Mexican tourist city ten times its size, this caused numerous shops to close due to lack of traffic.<sup>141</sup> Additionally, immigrant workers spend money they earn in the United States in the United States. Rent and food have to be bought first, before any money can be sent home. Critics would be fooling themselves to think that immigrant spending stops there. Immigrants purchase clothing, cellular phones, and cars. Even as immigrants are criticized by xenophobes for their prolific procreation, having babies in the United States means diapers, formula, and toys will be bought here as well. These children are also criticized for being a drag on our economy (they cost California alone almost eight billion dollars per year), but it cannot be overlooked that many of them are born in the United States and are therefore United States citizens.<sup>142</sup>

Border control can also bring economic benefits. Building fences along borders employs Americans, as does hiring border patrol agents to keep illegal immigrants out. In Douglas, Arizona alone there are about 550 border patrol agents<sup>143</sup> – nearly 3.5 percent of the Doug-

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<sup>139</sup> TED ROBBINS, *NPR: Douglas, Ariz., a Boomtown on the Border* (National Public Radio broadcast May 28, 2006), available at <http://www.npr.org/templates/story/story.php?storyId=5436289>.

<sup>140</sup> See generally, *DIRTY PRETTY THINGS* (Miramax Films 2003).

<sup>141</sup> ROBBINS, *supra* note 140.

<sup>142</sup> *Education Taxed By Non-English Speaking Kids* (FOX News television broadcast Mar. 19, 2005).

<sup>143</sup> ROBBINS, *supra* note 140.

las population!<sup>144</sup> According to Albert Varela, a Douglas realtor and developer, “60-90% of his sales are to border patrol agents.”<sup>145</sup> That means more jobs for Americans, which has a rippling effect. More people employed in border control means more discretionary money to spend. It also means that new demands for services, such as realtors, are created as these individuals earn more money that needs to be spent.

Of course, border control is only one piece of the immigration puzzle. It has been estimated that forty percent of undocumented workers entered the United States legally then proceeded to stay past the expiration date of their visa.<sup>146</sup> That means there are almost five million illegal immigrants whose entry would not have been impeded at all by greater border security.<sup>147</sup> Perhaps future reforms will create yet more jobs by providing money for enforcement of immigration laws for those who overstay their visas.

Finally, undocumented immigrant workers help fund one of the country’s biggest economic sinkholes: Social Security. Contrary to popular belief, those without documents are not just paid under the table. Immigrants often present employers with falsified documents, which include fake social security numbers. Undocumented workers are not entitled to tax refunds or retirement pension benefits.<sup>148</sup> Therefore, money paid into Social Security out of these workers’ wages is not drawn back out by the illegal immigrants when they reach retirement. In fact, up to ten percent of the 2005 surplus was paid by illegal immigrants.<sup>149</sup> The economic benefit to Americans of an additional seven billion dollars per year paid into Social Security tax revenue is undeniable.<sup>150</sup> So far, the total unclaimed revenue for this

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<sup>144</sup> *Sperling’s Best Places: Douglas, Arizona (AZ) Detailed Profile*, [http://www.bestplaces.net/city/Douglas\\_AZ-50420050010.aspx](http://www.bestplaces.net/city/Douglas_AZ-50420050010.aspx), (stating that as of Oct. 2007, the city’s population is 17,016).

<sup>145</sup> *Southeast Arizona Association of Realtors, Inc.: Office Page*, <http://www.seazrealtor.com/office.html>.

<sup>146</sup> Rick Klein, *Border Initiatives Miss Huge Group; Millions Overstay; Security Risk Seen*, BOSTON GLOBE, May 20, 2006, at A1, available at [http://www.boston.com/news/nation/washington/articles/2006/05/20/border\\_initiatives\\_miss\\_huge\\_group/](http://www.boston.com/news/nation/washington/articles/2006/05/20/border_initiatives_miss_huge_group/).

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

<sup>148</sup> Eduardo Porter, *Illegal Immigrants Are Bolstering Social Security with Billions*, N.Y. TIMES, Apr. 5, 2005, at A1, available at <http://www.nytimes.com/2005/04/05/business/05immigration.html?ex=1270353600&en=78c87ac4641dc383&ei=5090&partner=kmarx>.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

group is over \$500 billion<sup>151</sup> and continues to grow at ever-increasing rates of \$50 billion per year or more.<sup>152</sup> This makes the under five billion dollars spent on immigration enforcement activities in 2002<sup>153</sup> seem like peanuts. Even taking into account the cost of providing services to undocumented aliens and the decrease in wages their presence causes – and weighing everything possible against them – there is still an incremental net economic gain.<sup>154</sup> Even on a smaller scale the positive economic impacts of undocumented immigrants is felt. In Texas, for example, a study conducted by the Lyndon B. Johnson School of Public Affairs confirmed that the state of Texas receives more in taxes from undocumented immigrants than it expends in services, including health care, education, and welfare.<sup>155</sup>

Some immigrants also help the United States economy in ways that are often overlooked.<sup>156</sup> If necessity is the mother of invention, then immigrants, both legal and illegal, should be considered the inventors of this nation, for nobody has more need for innovation than those who come to this country in the face of great adversity.<sup>157</sup> By 1990, a quarter of the Silicon Valley workforce was foreign-born and 30 percent were both foreign-born and employed in the high technology sector.<sup>158</sup>

One example of an influential immigrant innovation is the Intel Corporation, which was founded by Andrew Grove, a Hungarian immigrant, in 1968.<sup>159</sup> Intel employs more than 90,000 people and

<sup>151</sup> Greg Simmons, *Immigration's Effect on Economy is Murky*, FOX NEWS, Mar. 30, 2006, <http://www.foxnews.com/story/0,2933,189792,00.html>.

<sup>152</sup> Porter, *supra* note 149.

<sup>153</sup> Simmons, *supra* note 152.

<sup>154</sup> Davidson, *supra* note 77.

<sup>155</sup> Sidney Weintraub, *Illegal Immigrants in Texas: Impact on Social Services and Related Considerations*, 18 INT'L MIGRATION REV. 733, 733-747 (Autumn, 1984) available at <http://links.jstor.org/sici?sici=0197-9183%28198423%2918%3A3%3C733%3AIIITIO%3E2.0.CO%3B2-Q>.

<sup>156</sup> See generally KEVIN F. MCCARTHY & GEORGES VERNEZ, IMMIGRATION IN A CHANGING ECONOMY: CALIFORNIA'S EXPERIENCE (Rand. 1997); George J. Borjas, *The Economics of Immigration*, 32 J. OF ECO. LIT. 1667, (1994); George J. Borjas, *The Economic Benefits from Immigration*, 9 JOURNAL OF ECON. PERSP. 3, (1995); *The New Americans: Economic, Demographic and Fiscal Effects of Immigration*, (James P. Smith & Barry Edmonston, eds., NAT'L ACAD. PRESS 1997).

<sup>157</sup> See generally Jean M. Johnson & Mark C. Regets, *International Mobility of Scientists and Engineers to the United States – Brain Drain or Brain Circulation?*, NATIONAL SCIENCE FOUNDATION ISSUE BRIEF, June 22, 1998, at 98-316.

<sup>158</sup> AnnaLee Saxenian, *Silicon Valley's New Immigrant Entrepreneurs* iii-iv (Cnt. for Comparative Immigration Studies, Uni. of Cal., San Diego, Paper No. 15, May 2000); see also, Rafael Alarcon, *Recruitment Processes Among Foreign-Born Engineers and Scientists in Silicon Valley*, 42 AM. BEHAV. SCIENTIST 1381, 1385 (1999).

<sup>159</sup> Stockstill, *supra* note 108.

generates more than \$34 billion in revenue annually.<sup>160</sup> This immigrant's positive impact on the economy and on employment should be enough to outweigh any negative impacts of other documented and undocumented immigrants. The National Academy of Science estimates that immigrants are responsible for between one and ten billion dollars worth of economic benefit, far less than the economic benefit produced by just one immigrant-created company.<sup>161</sup> Andrew Grove is not the only immigrant who has entrepreneurial success. Sergey Brin of Google fame is a Russian immigrant; Vinod Khosia, founder of Sun Microsystems, hails from India; and Jerry Yang, co-founder of Yahoo!, immigrated to the United States from Taiwan in 1979.<sup>162</sup> These are just examples of company names the average American household is likely to know of and appreciate. Countless other immigrants start and maintain small businesses in all sorts of communities across the country.<sup>163</sup> The impact of legal and illegal immigrants, while clearly quite difficult to quantify, is easily underestimated.

#### VIII. CONCLUSION

Immigrants, especially undocumented immigrants, hold America in their grasps. They influence laws at the federal, state, and local levels. They impact legislation in a variety of fields, most notably immigration and labor law. For better or for worse, they hold sway over the economy, levels of unemployment, and wages. Perhaps most importantly, immigrants in the United States command the attention of the American people. They are a source of heated debate and controversy. In the end, no matter which side of the debate or the law one happens to agree with, the immigration debate will always have the inherent ability to make people think and speak. That is precisely what keeps a democratic country like America running smoothly.

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<sup>160</sup> *See id.*

<sup>161</sup> *See id.*

<sup>162</sup> *See id.*

<sup>163</sup> *See generally* ROGER WALDINGER, HOWARD ALDRICH, ROBIN WARD, & ASSOCIATES, *ETHNIC ENTREPRENEURS: IMMIGRANT BUSINESS IN INDUSTRIAL SOCIETIES* (SAGE 1990). *C.E.O. Women Honors 35 Immigrant Women at Graduation Ceremony*, <http://www.ceowomen.org> (follow "Press, What's New" hyperlink; then follow "News Archives" hyperlink; then follow "News from 2005" hyperlink).