When More “Security” Equals Less Workplace Safety: Reconsidering U.S. Laws that Disadvantage Unauthorized Workers

Beth Lyon†

I. INTRODUCTION

In the search for security, the United States is obscuring rights for low-income immigrant workers, and in so doing is sacrificing its own workplace safety. Poverty and unemployment all over the world drive millions of people to the United States in search of jobs, meeting strong employer demand for low-wage labor. As a result, the United States is home to roughly 5.5 million unauthorized workers. Public policy regarding this population is ill-informed, beginning with the simple fact that there is no settled or coherent terminology to refer to it. Confused, pejorative, and racist terminology facilitates punitive laws and differential treatment. The immigration and tax law framework that maintains the large unauthorized population leaves a wide discretionary gap within which legislators and adjudicators selectively assign lesser employment and labor rights to unauthorized workers. This is based on varying perceptions of the lawbreaking nature of people who violate immigration law in order to work, and the deserving nature of people who perform difficult jobs and use the money to support families abroad. The recent injection of the national security rationale into U.S. policy has impacted this ongoing balance, sparking a wave of restrictions against immigrants that has driven the workplace rights of unauthorized workers further downward. Differential treatment is increasing in the United States with a broad range of policy shifts and a line of cases sparked by the 2002 U.S. Supreme Court’s decision in *Hoffman Plastic Compounds v. NLRB* [*Hoffman*].¹

The result is significantly lesser workplace protections for

† Assistant Professor of Law and founding Director of the Farmworker Legal Aid Clinic at Villanova University School of Law. This article is an expansion of remarks delivered at the University of Pennsylvania Law School Journal of Labor and Employment Law conference “Workers on the Fringe: Exploring the Legal Status of America’s Most Marginalized Workers.” For their support and companionship I thank my family, Villanova colleagues, Inter-American Court co-amici, and research assistants Gisselle Guerrero, Alex Isbell, and George Iwu. I also thank the Journal of Labor and Employment Law editors and staff for their assistance and their interest in marginalized workers.

unauthorized workers as compared with their U.S. national and work-authorized counterparts. In *Hoffman*, unauthorized workers lost the right to backpay as a remedy when their labor rights are violated. The reasoning in the case also stripped the backpay remedy from unauthorized workers who suffer on-the-job discrimination. Another important area of restriction is workers' compensation insurance, a key benefit for the working poor. Employment injuries benefits were already differentially applied or limited for unauthorized workers in many states, but now in the wake of the *Hoffman* decision, workers' compensation is being further scaled back or eliminated. Growing exclusion of undocumented immigrants from access to drivers' licenses negatively effects their ability to access their jobs. Legal Service Corporation restrictions, created in 1996, cut off unauthorized workers from legal representation to enforce these rights and do not allow them to engage in the high level policy debates that are shaping the many changes in the law.

The recent downward changes in unauthorized workers' rights have been heavily influenced by the widespread attention to national security in the U.S. national and state governments. However, these differential standards do not make the United States safer from terrorism, and indeed, by cutting off the information available to the government about millions of residents, differential treatment arguably makes the United States more vulnerable to terrorism. Differential treatment of workers disserves federal immigration policy goals. Differential treatment of injured unauthorized workers creates reverse incentives for workplace safety and accommodation of disabled workers. Additionally, exclusion of unauthorized workers from state drivers' license regimes makes the highways less safe.

These instrumental arguments about safety and immigration policy should be a compelling basis for U.S. nationals to favor equal treatment for unauthorized workers. However, the discussion should not stop short with a debate about safety. Employment protections must be equally accorded to workers for a host of other reasons; including the fact that they further immigration policy, because the United States is obliged under international law to provide these protections for moral and humanitarian reasons.

The following article, based on remarks at the University of Pennsylvania Journal of Labor and Employment Law conference on Marginalized Workers, addresses these points as follows. In section II, the article demonstrates the confused state of terminology in referring both to people whose presence in the United States violates immigration law and

2. The conference took place in early 2003. The issue of unauthorized workers is a volatile issue in the current policy debate. This article is current through the end of 2003.
people whose remunerated employment in the United States violates immigration law. The article argues for settled terminology, and adopts the terms "undocumented immigrant" and "unauthorized worker" to refer to these populations. In Section III, the article surveys the demographic literature on unauthorized workers and explains how it arrived at the figure of 5.5 million unauthorized workers. In Section IV, the article explains how the law feeds the United States' addiction to foreign manual labor. Section V explains how fear of deportation, differential employment rights, drivers' license laws, and legal service corporation restrictions exclude unauthorized workers from key employment protections. Section VI argues that these differential policies threaten the workplace safety of U.S. nationals, and Section VII concludes the article by placing safety concerns within the various arguments currently in play around unauthorized worker rights.

II. ADOPTING SETTLED TERMINOLOGY THAT DISTINGUISHES BETWEEN EMPLOYMENT AND PRESENCE AUTHORIZATION

Public policy contradictions about this population begin at a fundamental level: there is no consensus on what to call people who work in the United States in contravention of immigration laws. Various terms are used interchangeably in the United States, with an overlapping but different set of English-language terms found outside the United States. While a detailed etymology is beyond the scope of this article, the following overview of frequently used terms seeks to underscore major themes in policymaking about unauthorized workers. This section demonstrates that the sources of law relating directly to this population—the Immigration and Nationality Act (INA)—define a number of terms that are not commonly used, or not used as defined by law, because they are imprecise, pejorative, or have been overtaken by colloquial meanings. This mixed usage begins with the agency primarily concerned with enforcing these laws, the Department of Homeland Security (DHS) and extends into public policy and the media. As a result, there is no fixed term to describe this population, which unnecessarily complicates research and communication about the important public policy issues the group raises, including workplace safety.

This section argues that a set terminology needs to be established. The article follows previous scholarship seeking to define a term for undocumented immigrants, and seeks to extend the discussion to find a terminology for immigrants who are unauthorized to work, defining two terms for use within this article: "undocumented immigrants" and "unauthorized workers." These two terms are selected to express the distinction between people who are present in the United States without
proof of lawful immigration status (undocumented immigrants) and people who simply are not authorized under immigration law to work (unauthorized workers). The unauthorized workers group includes both people who are unlawfully present and people who are lawfully present. This distinction is worth capturing because the two groups differ in significant ways. Most importantly, unauthorized workers by definition have a significant daily interaction with U.S. nationals, and protections afforded to unauthorized workers offer a distinct and specialized realm within which to address the safety, security, and dignity of immigrants and U.S. nationals alike. Unlike undocumented immigrants, unauthorized workers are not by definition illegally present in the United States, and a significant percentage of them did not enter the country illegally.

A. Unsettled Terminology: Statutory Definitions That Do Not Reflect Government Usage

U.S. policymakers, academics, and commentators use a broad range of terms to describe people whose remunerated employment or whose presence violates immigration laws. In the current terminology these two concepts are often overlapping. The Immigration and Nationality Act uses the term "alien" to refer to non-citizens and the phrase "illegal alien" to refer to a person convicted of a felony and "unlawfully present" in the United States through entry without inspection, visa overstay, or prior awareness of the government. The Act defines an "unauthorized alien" as a non-citizen who is employed and is not "lawfully admitted for permanent residence, or authorized to be so employed by [the Act] or by the Attorney General." The DHS, which now performs the functions of the former INS, echoes the phrase "unauthorized alien" in its regulations, but in day-to-day practice sometimes uses the term "unauthorized worker." Most frequently, the DHS uses the terms "alien" and "illegal alien," though its

usage of the phrase "illegal alien" simply refers to people whose presence violates immigration law, and does not match the statutory definition of people who are unlawfully present and who have a felony conviction.


In its 2002 term decision in Hoffman, a case dealing with labor rights for unauthorized workers, the U.S. Supreme Court used similarly diverse terminology. For example, the Hoffman majority interchangeably used the terms "undocumented workers," "illegal aliens," and "unauthorized alien," while the Hoffman dissent used the phrase "illegal-alien employees."

B. "Illegal," "Clandestine," and "Alien"

Each of the terms found in these examples represents a different emphasis on two major characteristics of this population: foreignness and failure to comply with immigration law. The phrase "illegal alien" finds wide use in the United States. In the workplace setting, the word "illegal" emphasizes the fact that undocumented people without current visas or employment authorization break the law in order to remain in the country and to obtain work. Most such workers have perpetrated some type of fraud in order to obtain employment: many of them have entered the country covertly and many others have violated the terms of their original entry visas. A non-U.S. term that similarly emphasizes the act of breaching immigration law is "clandestine [entrants, migrants, workers]." As noted above, the word "alien" is a term of art enshrined in the INA, referring to

12. Id. at 144.
13. Id. at 151.
14. Id. at 148.
15. Id. at 155 (Breyer, J. dissenting).
any person who is not a U.S. citizen. "Alien" is derived from customary international law and its legal usage matches the formal lay definition of the word "alien." The first two dictionary definitions of "alien" as a noun include: "1) a person of another family, race, or nation; 2) a foreign-born resident who has not been naturalized and is still a subject or citizen of a foreign country; broadly: a foreign-born citizen." 17

Scholarly and popular concerns about the phrase "illegal alien" abound, pointing out that the phrase is racially loaded, ambiguous, imprecise, and pejorative. Applying the phrase to the general population of people who are unlawfully present in the United States greatly broadens the statutory definition described above, which delimits the term to unlawfully present convicted felons. Moreover, even if it is used only to describe an immigration violation, the word "illegal" does not reflect the fact that the government bears the burden of proof to demonstrate that anyone in the United States is "deportable," or not legally present. Thus, to ascribe immigration "illegality" to people who have not received a final order declaring them deportable might be compared in the criminal law setting with labeling a suspect who has not yet been tried in court a "convicted criminal." The word "illegal" also obscures many other non-immigration aspects of an illegally present or illegally employed worker's legal status. All residents in the United States do possess some rights under a variety of legal regimes, including employee protection schemes. Both employment-unauthorized and undocumented (presence-unauthorized) workers undeniably have an identity—a complex and contradictory identity, but an identity nonetheless—under U.S. laws.

A frequently noted concern with the term "alien" relates to its third dictionary definition: "extraterrestrial." Given this popular understanding of the term, it is a patently dehumanizing word to utilize. A South African

20. Id. at 288-292.
activist articulated this argument in 1998:

A new vocabulary is developing in South Africa. Words such as aliens, illegals and *amakwerewere* (referring to persons with strange accents) are being used to refer to people who are not South African citizens. These terms . . . form part of a consistent discourse about immigrants contributing to crime, unemployment and other social problems . . . . The image of an “other”—foreign nationals, who are illegal, criminal, exploitative and devious—is created. It is implied that they can only be dealt with by stricter security and control measures. Language and discourse have direct, physical effects. Words like the above dehumanize foreigners in much the same way that the apartheid regime dehumanized black South Africans.25

C. “Undocumented,” “Unauthorized,” and “in an Irregular Situation”

Other terms, arguably less pejorative than “illegal,” “clandestine,” and “alien,” can be found in U.S. literature. One example is the phrase “undocumented worker.”26 The term “undocumented” neither appears in the INA nor in the regulations in relation to immigrants.27 This phrase avoids some of the problems connected with the words “alien” and “illegal.” Basing the reference on the concept of “documents” highlights the technical, legally constructed nature of this status and de-emphasizes the concept of willful lawbreaking. De-emphasizing the lawbreaking intent of this population better accounts for the economic forces that drive workers from their homelands to the United States. De-emphasizing the illegality of the workers’ status also reflects the fact that immigration laws sanctioning illegal employment are rarely enforced. The term “undocumented worker” has greater legitimacy because the common term used by the Spanish-speaking immigrant community itself is an exact translation: “indocumentado [undocumented],” “trabajador indocumentado


Another example of a less pejorative word in the employment context is "unauthorized." As noted above, the term "unauthorized alien" is established in the INA and "unauthorized worker" is sometimes used by the government. The word "unauthorized" avoids the overbroad and criminal connotations associated with the word "illegal" by tying directly to the specific immigration violation committed: the law limits the right to work to people who possess "employment authorization." Non-U.S. English-language literature also often adopt terms that avoid a strongly pejorative tone. For example, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families uses "documented" and "in a regular situation" to refer to people who are "authorized to enter, to stay and to engage in a remunerated activity in the State of employment pursuant to the law of that State and to international agreements to which that State is a party." The treaty uses "non-documented" and "in an irregular situation" to reference people who are not authorized to enter, stay, and work. These terms again highlight the passive or involuntary aspects of an immigrant's lawbreaking behavior. In the case of the Migrant Worker treaty, these terms are defined to describe a worker who lacks both employment authorization and presence authorization; no distinction is made between the two categories.

28. See, e.g., Nativo Vigil Lopez, Licencias de Conducir en California; Davis vuelve a las andadas [Driver's Licenses in California; Davis Returns to the Old Ways], LA OPINIÓN, June 13, 2003, at 9A (using the term "sin documentos"); Pilar Verdes, Cuenta Regresiva [A Story of Going Backwards], MUNDO HISPANICO, Apr. 3, 2003, at 4 (using the word "indocumentado"); Dos Leyes Benefician a Indocumentados: Obtendrán Licencia de Conducir e Hijos Podrán ir a Universidad [Two Laws Benefit the Undocumented: They Will Be Able to Obtain a Driver's License and Children Will Be Able to Go to University], LA VOZ DE HOUSTON, May 30, 2001, at 1 (using the term "indocumentado"). Most partner advocates and clients of the Villanova Farmworker Clinic use variations on the term "indocumentado" as well (to date all adult clients have been Mexican nationals). Occasionally users use the term "illegal" or refer to their "situación migratoria."


D. "Immigrant" and "Migrant"

Two additional terms used interchangeably in this context are "immigrant" and "migrant." These terms are best defined in relation to a third term, "emigrant." Typically, emigrants are individuals who are defined by the act of leaving their countries of nationality. For example, because they are still engaged in the departure process at the moment of description, immigrants are defined by the act of entering a country that is not their country of nationality. A migrant can fall into either of these categories, which also have other less international connotations. For example, in the United States, the legal classification of a "migrant" farmworker turns on whether the worker spends the night away from his place of residence in order to work and has nothing to do with whether the place of residence is in another country. Despite these differences, one finds "migrant" and "immigrant" used interchangeably to refer to non-national residents.

E. Some Narrower Settled Concepts and the Need for Broader Settled Terms

As discussed above, the words and phrases that currently refer to people living and working in contravention of immigration laws are quite broad and the terminology for these two populations is unsettled. However, some narrower immigrant groups that significantly overlap with these populations have found a settled terminology. For example, "trafficked persons" are so designated because they experience "force, coercion[,] and/or deception throughout or at some stage" of their migration experience. Most trafficked persons are likely working in contravention of immigration laws, but certainly not all of them are. Immigrant workers can be legally present, and even be authorized to work, yet experience force, coercion, or deception in the course of their migration experience. Another example of more or less settled terminology is the categorization of "skilled" versus "unskilled" immigrant workers. Likely
the percentage of people working in contravention of immigration law who are skilled is smaller than the percentage who are unskilled, but certainly there are workers of both types within that group.

Each of these settled terms covers only a portion of the people working in contravention of immigration law. A settled vocabulary would facilitate information exchange and research about these workers. For example, in performing research about the employment rights of these workers, the author has found that matters as fundamental as searching treatise indices, databases, and the internet have been unduly complicated by the need to run and clarify nearly a dozen terms for one population group. The need for settled terminology is particularly important in the employment law context since many relevant areas of the law are handled at the state level, thus multiplying the number of jurisdictions struggling with unclear terminology. The recent surge of attention to unauthorized workers in the international law realm compounds the multijurisdictional possibilities and the need for settled English language terms.

F. Other Population Characteristics That a Settled Terminology Could Convey

The many general terms now in use convey surprisingly little about this heterogeneous group. Through the conflation, interchangeability, and inclusion of pejorative words described above, the current terminology does little other than convey, to varying degrees and often with unproductive provocativeness, the foreignness and extralegality of people who live and work in contravention of immigration law. Referring to this population with terms that convey only these two concepts is a rhetorical choice that immigration and employment specialists alike should examine critically. Certainly terminology could be shaped to highlight many different legally significant characteristics of the group. Most importantly


for the purposes of the present article, the current terminology conflates the concepts of presence-authorization and employment-authorization.

Additional concepts that terminology could be selected to reflect include both notions of degrees or types of illegality based on laws that are not related to immigration, and also temporal notions that reflect an immigrant’s place in the work cycle. For example, there is a significant difference between the rights of immigrants working illegally in legal trades, such as agriculture, versus those who are working in trades that are themselves considered “illegal” through criminal sanction, such as sex work. The terminology could further distinguish between immigrants who are illegal to work only because of their immigration status and immigrants who are illegal to work because of other bars to work in employment law, for example by virtue of being underage, too young, or otherwise physically vulnerable for work deemed hazardous. Another distinction is between people who are unauthorized to work but have not yet sought employment, who currently have employment, or who are no longer employed. In addition to the differential criminal, employment protection, and immigration law consequences attached to each of these characteristics, each of these differences involves distinct politics.

The present article attempts neither to canvass all the politics nor to propose a complete hierarchy of terms. Because the focus of the author’s remarks in the symposium is on employment distinctions related to immigration status, the present article adopts just two terms: 1) “undocumented immigrants,” to describe people living in the United States in contravention of immigration law, and 2) “unauthorized workers” to describe people working in the United States in contravention of immigration law.

G. The Distinction Between “Undocumented Immigrants” and “Unauthorized Workers” and Why It Is Important

I select this term for the reasons cited above favoring the term “undocumented” and disfavoring the word “alien.”

For the purposes of the article, “undocumented immigrants” are people who presently possess no proof of any right to be present in the United States, whether or not they have been declared deportable by the U.S. government(and the vast majority have not). About one-third of all undocumented immigrants entered the country legally on some sort of visa, but remained in the country past the expiration of their visas.39 The rest

made their way into the country illegally, either by presenting purchased or borrowed documents for inspection at a port of entry, or by entering the country without presenting themselves for inspection. Thus, undocumented immigrants are people who are “presence unauthorized.” Undocumented immigrants have no right to work for remuneration in the United States, but not all of them seek employment.

“Unauthorized worker” refers to anyone whom immigration laws forbid to work for pay. As discussed above, someone who cannot work for pay under immigration law is often, but not necessarily, illegally present within the country. Some unauthorized workers are in fact legally present, but the terms of their status do not allow for remunerated work. Examples of otherwise legally present migrants who are unauthorized for employment purposes include most asylum seekers, holders of visitor-for-pleasure visas, and the accompanying family members of various work-enabled visa-holders. For the purposes of this article, unauthorized workers are working in otherwise-legal industries (e.g., agriculture, not sex work).

The distinction between undocumented immigrants and unauthorized workers is important because although the two groups overlap numerically, personally, and politically, they are not co-terminous and the policy considerations present are distinct. As discussed above, immigrants who are unauthorized to work are not all undocumented and those who are undocumented did not all enter the country illegally. Moreover, immigration policy has a fundamentally distinct character in the realm of worker rights.

The welter of terminology by which U.S. law, officials, academics, and the public refer to most undocumented immigrants and unauthorized workers should be settled to better facilitate research and information exchange. The terms “undocumented immigrants” and “unauthorized workers” are preferable because many sectors already use them, they are relatively uncontroversial, they tie into common understandings to accurately convey the legal situation of the groups described, and they create a distinction that is politically and morally significant.

---

40. Id. at 3.
42. Asylum seekers are not generally permitted to work while their asylum claims are pending. 8 U.S.C. § 1158(d)(2) (2000). A small category of asylum seekers whose initial hearings have moved too slowly are permitted to work. 8 C.F.R. §§ 208.7(a)(1), 274a.12(c)(8) (2003). But the caseflow operates to move asylum seekers through the initial hearings quickly. 8 U.S.C. §§ 1158(d)(5)(A)(ii)-(iv) (2000). Nor is work authorization initially granted in the appeal stages. 8 C.F.R. § 208.7(a)(1) (2003).
43. See 8 C.F.R. § 274a.12 (listing categories of persons authorized to work).
44. Id.
III. DEMOGRAPHICS AND OVERREPRESENTATION OF UNAUTHORIZED WORKERS IN DANGEROUS OCCUPATIONS

In addition to terminology, another fundamental uncertainty about unauthorized workers is how many exist. As explained in greater detail in this and other sections, this is a difficult population to count, so it is to be expected that there is no perfect number. What is perhaps more surprising is that there is no number. The government makes periodic estimates of the number of undocumented immigrants and posts a number for agriculture, but does not make public a figure of unauthorized workers. A thorough private study furnishes two figures—rural unauthorized workers and urban unauthorized workers, but stops short of giving a final figure because the two populations overlap to an uncertain extent. This article does not attempt to resolve this question, but lays out the estimates to facilitate an understanding of both the significant size of the population under discussion and also the significance of the information challenge presented. This information challenge is key to the article’s general proposition that safety and security are best served by inclusion of unauthorized workers under legal protections.

The DHS estimates that the undocumented population has grown by roughly 350,000 per year from 1990 to 1999.\textsuperscript{45} Recordkeeping about the size and characteristics of the undocumented work force in the United States is highly politicized, but mainstream estimates place the year 2000 undocumented population between 7 and 8.5 million.\textsuperscript{46} The industries with the highest concentration of unauthorized workers include low-wage industries such as agriculture, food processing, construction, garment manufacturing, food service, hotels, and landscaping.\textsuperscript{47} Construction, agriculture, and manufacturing have the first, third, and fifth highest number of fatalities respectively of all U.S. industries.\textsuperscript{48}

The United States is the top migrant-receiving nation in the world,\textsuperscript{49} and has by far the largest international migrant stock in the world: 34.988 million residents born abroad as compared with 13.259 million in the


\textsuperscript{46} Id., passim.

\textsuperscript{47} John Fraser, Preventing and Combating the Employment of Foreigners in an Irregular Situation in the United States, in COMBATING THE ILLEGAL EMPLOYMENT OF FOREIGN WORKERS 101, 101-02 (Org. for Econ. Co-Operation and Dev. ed., 2000).


The number of undocumented immigrants in the United States is estimated at more than double the entire undocumented population of Europe. Record-keeping about the size and characteristics of the unauthorized work force in the United States reflects the refraction of government mandates relating to this population and the practical difficulties of "[c]ounting the invisible." In the 1980s and 1990s, debates about measurement, size, and distribution of the undocumented population particularly centered on U.S. House of Representatives apportionment, further politicizing and complicating governmental record-keeping.

The latest estimates from the DHS and from private think tanks profit from the 2000 census process, which invested some resources in encouraging greater participation by undocumented immigrants. The Pew Hispanic Center, a non-partisan research organization, estimates what it terms the "[t]otal [i]llegal-[r]esident [p]opulation" at 7.8 million. The Migration Policy Institute tentatively places the 2000 undocumented

---

50. United Nations Population Division, Department of Economic and Social Affairs, International Migration 2002, http://www.un.org/esa/population/publications/ititmig2002/Migration2002.pdf (last visited May 5, 2004) (on file with author). Note, however, that while the United States receives the largest number of migrants, this country's per capita immigration rate is significantly lower than that of the other top migrant receiving countries. Papademetriou, supra note 49, at 965 tbl.2. For example, the United States receives 3.3 immigrants per thousand residents, compared with 29.1 per thousand received by Afghanistan and 7.2 per thousand received by Germany. Id.


54. See Jeffrey PasseL, Migration Policy Institute, New Estimates of the Undocumented Population in the United States (2002), at http://www.migrationinformation.org/feature/print.cfm?ID=19 (last visited May 5, 2004) (on file with author) (stating that the campaign "convinced many people to participate in the census who had not been covered in previous censuses and surveys").

population at 8.5 million.  

Estimates of the unauthorized worker population are even more scarce. The DHS does not make an estimate, and the Department of Labor does not keep statistics on the number of unauthorized workers other than to estimate the percentage of agricultural workers who are not authorized to work. The Pew Center also provides a somewhat equivocal estimate of the unauthorized urban labor force at 5.3 million and the unauthorized agricultural labor force at 1.2 million. The study notes that there is significant overlap between the urban and agricultural unauthorized work force, but declines to set a total number. For the purposes of this article, this study is interpreted as providing a conservative estimate of 5.5 million unauthorized workers. This conservative figure places the percentage of unauthorized workers in the U.S. civilian labor force at 4%.

56. MIGRATION POLICY INSTITUTE, supra note 54.


59. PEW HISPANIC CENTER STUDY, supra note 55, at 8.

60. Id.

61. Id. at 7. Based on a figure of 8.5 million undocumented immigrants, this number matches the Department of Labor’s estimate that two-thirds of all undocumented immigrants are economically active. Fraser, supra note 47, at 101.

IV. AN "[O]PEN [S]ECRET:" HOW THE LAW FEEDS AMERICA'S ADDICTION TO FOREIGN MANUAL LABOR

The United States is a very rich country\(^6^4\) endowed with a terrible temptation: a long land border\(^6^5\) with a poor country\(^6^6\) that is itself a road to an even poorer region.\(^6^7\) This section describes how the United States has succumbed to the temptation and describes the legal structures that brought the country to the point of having such a large unauthorized worker population. This description focuses on four phenomena: 1) the immigration law bottleneck that prevents laborers from gaining visas to enter the United States legally for work; 2) the "slap on the wrist" enforcement of immigration laws that fail to move most politically relevant groups to take any action to prevent or control the employment of unauthorized workers; and 3) the significant economic incentives that further contribute to the phenomenon; and the racist legacy and underpinnings of the immigration system.


66. Mexico's per capita GDP ranks about 52nd in the world: $9,145 in 2003. INSTITUT DE LA STATISTIQUE DU QUÉBEC, supra note 64, at 3; HUMAN DEVELOPMENT INDICATORS 2002, supra note 64, at 150 (placing Mexico 54th in the world using 2000 figures).

67. Latin America and the Caribbean as a region is listed as having a 2000 GDP per capita of $7,234, lower than Mexico's. See HUMAN DEVELOPMENT INDEX, supra note 64, at 152.
A. The Bottleneck: Excluding Laborers from the Legal Immigration System

The United States has in place an elaborate system of temporary and permanent visas available for people with close family ties to U.S. nationals and permanent residents and for people with job skills who, without the enticement of legal entry to the United States, might offer their abilities to some other country. Meanwhile, there is virtually no lawful immigration system in place for manual laborers. The number of visas made available to laborers is significantly smaller and leaves most laborers no way to emigrate legally to the United States.

Approximately 140,000 permanent visas are available annually for the permanent legal immigration of workers based on their employment. Among the various categories of employment-based immigration possibilities, there is one immigrant visa category for manual laborers, normally capped at 10,000 per year, but currently capped at 5,000, and only 1,767 green cards were issued in that category in 2001. The wait to receive an "unskilled worker" visa generally stands at ten years. Thus, close family relationship to a U.S. citizen or lawful permanent resident is virtually the only route to legal permanent status in the U.S. for laborers.

Temporary worker programs are another avenue for foreign nationals to legally gain entry to the United States for jobs as laborers. Such programs enable U.S. employers to recruit foreign workers to perform jobs that are classified as temporary. In 2002, the H2A and H2B programs permitted 102,615 laborers to enter the United States for temporary work in agriculture and other settings. These laborers enter the country under a

70. 8 U.S.C. §§ 1151(d), 1153(b)(1)-(3) (2000).
72. State Dept. Releases June Visa Numbers; 'Other Workers' Category Gains a Year, Will be Reduced Next Year, 78 INTERPRETER RELEASES 813, 813-14 (May 14, 2001).
74. Christine Alber, Employment-Based Immigration: The First Three Preferences, 2 IMMIGR. & NAT'LITY L. HANDBOOK 188, 197 (2003-04 ed.).
separate, limited worker rights regime which includes lower wage, working, and housing standards. Widespread allegations of abuse plague this program in its current iteration as with its historical forbear, the post-WWII "bracero" program. An additional group of 3,774 laborers were admitted to the United States in 2002 as "[a]ttendants, servants, or personal employees" of foreign government officials and representatives to international organizations.\(^7\) Severe cases of exploitation have also been reported in relation to these workers, who are made particularly vulnerable by isolation and the privileged position of their employers.\(^7\)

Meanwhile, non-laborers are permitted to enter the United States on temporary work visas in significantly higher numbers. In 2002, roughly 864,812 people were admitted to the United States as temporary employees in the private sector\(^7\) to perform professional and other specialty work.\(^8\) A further 171,368 people were permitted to enter based on their status as "[t]reaty traders" and investors.\(^8\) An additional 6,424,162 people were permitted to enter on visitor visas for brief stays to conduct business.\(^8\) Many of the people in these categories are permitted to seek a shift of status from temporary to permanent residence,\(^3\) whereas temporary laborers are not.\(^4\)

One immigration possibility is continuously on the horizon for unauthorized workers but rarely comes to pass. In 1986, Congress passed a one-time immigration amnesty granting green cards to undocumented immigrants who had been living and working in the United States for many years. Ultimately, around 2.5 million people received permanent residence status as a result of this process, making it an amnesty of unprecedented scope.\(^5\) Periodic attempts to pass a new immigration amnesty,

\(^7\) Id. at 118 tbl.26.
\(^9\) To the extent possible given the available statistics, public sector and government employees have been omitted from this figure. Omitted categories include ambassadors, representatives to international organizations, and NATO officials. However, a few categories may include some public sector workers, for example, workers in governmental research organizations in the H-1B category of specialty occupations. 8 U.S.C. § 1184(i) (2000).
\(^10\) 2002 YEARBOOK, supra note 76, at 118-120 tbl.26. Note that this figure does not include family members.
\(^11\) Id. at 118 tbl.26. Note that this figure does include family members (disaggregated figures are not made available by the government).
\(^12\) Id.
championed by the Mexican government, have failed. An amnesty will have significant impact on U.S. society, including helping to address the driver and workplace safety concerns raised in this article. However, even a successful legalization bill will not end the United States' addiction to unauthorized workers. Once the workers who arrived by the amnesty cut-off date have settled their status, new waves of unauthorized workers will continue to compete for entry level laborer jobs and the population will begin to grow anew.

Thus, as a matter of U.S. law, laborers enjoy significantly fewer legal immigration opportunities than do other foreign workers. The disparity in numbers is so great and the possibility of an immigration amnesty is so remote in any given moment that, as Professor Howard Chang notes: "employment-based immigration of unskilled workers into the United States has largely taken the form of illegal rather than legal immigration." 

B. Slap on the Wrist Enforcement Against Employers

Given the high number of unauthorized workers that the United States admits are present in the country, it is clear that existing enforcement efforts are not achieving the goal of preventing unauthorized employment. The following section describes the primary enforcement schemes in the United States—employer sanctions and social security no-match monitoring—and explains why they fail to curb unauthorized

86. See Farmworker Justice Fund Inc., Legislative Updates: Agricultural Immigration Legislation, available at http://www.fwjustice.org/LEGISLAT.HTM (last visited May 5, 2004)(providing a recent history of negotiations on an immigration amnesty). The AgJobs Bill, proposed in both houses of Congress in the 2003 fall term, included a legalization program for agricultural workers. S. 1645, 108th Cong.; H.R. 3142, 108th Cong. This bill represented a significant compromise between the agribusiness and farmworker lobbies around issues of farmworker retention and the expansion and worker protection provisions, and was widely predicted to pave the way for a general amnesty. The bill gained widespread bipartisan support in both houses, with 50 cosponsors in the Senate and 80 cosponsors in the House, evenly divided between Republicans and Democrats. S. 1645, 108th Cong.; H.R. 3142, 108th Cong. However, as of December 2003, the bill had been deferred and powerful members still sought to achieve the purposes of agribusiness (chiefly an expansion of the temporary laborer programs with fewer worker protections) without including an immigration amnesty. H.R. 3604, 108th Cong.; Farmworker Justice Fund Inc., supra.


88. The United States' border control and high seas interdiction policies also represent significant immigration enforcement efforts by the government. The cost, utility, and humanitarian impact of these programs are all matters of considerable debate, but lie beyond the scope of this article, which is focused on the treatment of unauthorized workers within U.S. borders.
employment.

The United States, like most industrialized countries, sanctions the knowing employment of unauthorized foreign nationals. Until 1986, the law was silent on the permissibility of hiring someone whose work would violate immigration laws. In that year, the United States established an employer sanctions regime intended to cut off employer demand for unauthorized workers. The U.S. sanctions regime operates by granting the DHS access to workplaces and the power to fine employers who fail to comply with documentation rules at the hiring stage and at various other points in the employment relationship. The employer sanctions regime also seeks to limit unauthorized worker supply by criminalizing the presentation of false documents in order to obtain employment.

As enforced, however, the employer sanctions regime is generally regarded as a paper tiger. The documentation rules require that the employer visually examine specific identity and employment eligibility documents presented by a hiree. The employer is permitted to make the hire if the documents only “reasonably appear on their face to be genuine and to relate to the person presenting them.” The employer is then permitted to continue the employment relationship until the pertinent documents expire or until the employer otherwise learns that the employee is unauthorized. Purchased or borrowed documents are easily obtained throughout the country and most employers simply look the other way. One former human resources manager told the author that the most difficult part of her job had been hiring children who presented their false documents giving birth dates that were clearly a decade off.

91. See Fraser, supra note 47, at 103 (describing enforcement of immigration laws regarding employment).
94. See, e.g., Espenoza, supra note 85, at 379-80 (noting that inconsistent enforcement encourages noncompliance).
In addition to this sizeable loophole in the substantive requirements, government enforcement of the employer sanctions regime is negligible. The INS apprehended 1,714,035 people in fiscal year 1999.\textsuperscript{99} Border Patrol arrests accounted for 1,579,010 of these arrests, of which 97\% took place on the southwest border.\textsuperscript{100} During the same period, the INS issued 383 warnings to employers nationwide, a figure that was 40\% lower than in fiscal year 1998.\textsuperscript{101} In 1999, the INS issued only 417 notices of intent to fine employers, representing a 59\% drop.\textsuperscript{102} Warnings to employers decreased another 26\% in the year 2000 and notices of intent to fine dropped an additional 57\%.\textsuperscript{103} A 1999 General Accounting Office study of the INS's worksite enforcement program concluded that more than eight out of ten investigations completed during the review period resulted in no penalty to the employer, mostly because the use of fraudulent documents had exonerated the employers.\textsuperscript{104} Thus, employers who comply with minimal paperwork requirements are effectively shielded from liability for hiring unauthorized workers, and most likely will never lose their unauthorized workers to enforcement action.\textsuperscript{105} According to a recently retired Immigration and Naturalization Service (INS) Commissioner, "neither Republicans or Democrats or a broad range of interest groups is prepared to support an employer sanctions program that actually would work."\textsuperscript{106}

Some recent actions by the Bush Administration raised the profile of the sanctions regime. The Social Security Administration has begun to notify employers in all cases in which the social security numbers used for reporting social security contributions do not match the name of the

\textsuperscript{100.} Id.
\textsuperscript{101.} Id. at 202.
\textsuperscript{102.} Id.
\textsuperscript{105.} See Linda S. Bosniak, Exclusion and Membership: The Dual Identity of the Undocumented Worker under United States Law, 1988 WIS. L. REV. 955, 1016-17 (1988) (discussing employer willingness only to comply minimally with sanction provisions).
employee.107 Roughly 800,000 U.S. employers received such letters in the first half of 2002.108 The letters initially sparked selective firings around the country.109 However, employers had assurances that the receipt of a "no-match letter" does not constitute proof of unauthorized employment,110 and in the absence of any more aggressive enforcement action, employers seem to have returned to the status quo ante. Nor has the Bush administration's well publicized investigation into Walmart's employment practices111 sparked any reports of changed hiring practices in other sectors. There is some speculation about future enforcement action by the Internal Revenue Service (IRS) in the form of social security mismatch investigations112 and "W-2 social security/name" penalties,113 but as of winter 2004 actions have not yet been confirmed.

In a policy climate that continues to accommodate the presence of a large unauthorized workforce, workers can admit that they lack the right to a valid social security number and still participate in a key government program. In 1996, the IRS began to issue Individual Tax Identification Numbers, or ITINs, to people who do not qualify for social security numbers. Work-authorized non-nationals are already entitled to social security numbers,114 so the ITIN system serves two primary purposes: to permit undocumented immigrants and people living abroad to be claimed as dependents and to facilitate tax payments by unauthorized workers.115 This policy and the employer sanctions loophole send a clear message to a

108. Id. By the end of 2002, the number had risen to 950,000. NATIONAL IMMIGRATION LAW CENTER, INFORMATION PACKET: SOCIAL SECURITY ADMINISTRATION "NO-MATCH" LETTERS C-14, at http://www.nilc.org/immsemploymnt/SSA-NM_Pack/SSA-NMPacket_Complete.pdf (last visited May 5, 2004).
110. See M. Mercedes Badia-Tavas, Employer Sanctions, 2 IMMIGR. & NAT'LITY L. HANDBOOK 288, 293-94 (2003-04 ed.) (noting that a no-match letter does not constitute actual or constructive notice that an employee is unauthorized to work).
114. 20 C.F.R. § 422.104(a)(2) (2003) (social security numbers assigned to non-U.S. citizens with lawful permanent residence, ("green cards"), "or under other authority of law permitting him or her to work in the United States").
115. See generally U.S. GEN. ACCOUNTING OFFICE, COMM. ON GOV'T REFORM, DECENNIAL CENSUS: LESSONS LEARNED FOR LOCATING & COUNTING MIGRANT & SEASONAL WORKERS GAO-03-605 (July 2003) (discussing the ITIN system's application to migrant and seasonal farm workers).
potential migrant: if you can make it past the border alive, you can have a job and pay your taxes.

C. **Employer Incentives to Look the Other Way**

Even employers of good will have every incentive to run the minimal risks described above by strictly interpreting their obligations under the statute. Employers who routinely hire unauthorized workers should be divided into two groups: "letter-of-the-law" employers, and "unscrupulous" employers. Employers in both categories realize cost savings by hiring unauthorized workers. Moreover, non-discrimination law prohibits employers from making excessive paperwork demands on immigrant applicants.

Letter-of-the-law employers comply with immigration laws by accepting fraudulent employment and identity documents that facially appear to be valid. These employers, who are honestly trying to comply with their legal obligations in the workplace, will realize cost savings by hiring unauthorized workers. Through the marketplace they get workers who accept lower wages, cheaper labor housing, and longer working hours, as well as workers who are more willing to work through an injury rather than take time away to seek medical attention. In states where unauthorized workers do not qualify for comparable workers' compensation benefits, employers who hire unauthorized workers will not be liable for as many payments to their injured workers. Thus, employers with a higher percentage of unauthorized workers will enjoy lower workers' compensation premiums.

Unscrupulous employers realize all these savings, and more, by paying less than minimum wage, providing substandard workplace and housing conditions, and by engaging in labor and discrimination violations without having to pay any real monetary damages if they are caught. Such employers can enter into an explicit quid pro quo with unauthorized workers, accepting them without documentation in exchange for paying significant lower wages. Unauthorized workers are less likely to pursue their employment rights for fear of deportation, and enjoy scant, if any, social welfare programming if they lose their jobs. Many of them are

---

116. See Peter Kwong, Forbidden Workers: Illegal Chinese Immigrants and American Labor 174 (The New Press ed., 1997)(concluding that employers using these practices are able to keep all workers wages down by hiring illegals).


118. Bosniak, supra note 105, at 993-94.
supporting large families in their countries and are highly motivated to work in adverse conditions. Injured unauthorized workers are more likely to "work hurt," or to continue working despite an injury, for fear of losing their jobs by enforcing their right to workers' compensation. The congressional report underlying the 1986 employer sanctions law affirmed that "out of desperation, immigrants will work in substandard conditions and for starvation wages," and urged that employment protection laws be enforced to protect this class of worker. Instead, protections have been scaled back.

Thus, employers of all types have an immediate economic incentive to employ unauthorized workers, one which outweighs the remote possibility of administrative sanctions that are rarely enforced. Indeed, non-discrimination laws prohibit employers from making too many inquiries into immigration status. Employers may not engage in "document abuse," by asking for more documents than are required by law, or by refusing to accept facially genuine documents. A finding of document abuse with discriminatory intent or "knowing discrimination" holds employers liable under the nationality discrimination prohibition first legislated in 1986. These restrictions on document inspection, conveyed to employers in the INS's longstanding "Employer Handbook," offer additional incentives to employers to engage in the "don't ask, don't tell" practices that gain them less costly, undemanding workers.

D. Racist Legacy and Effects of the Unauthorized Worker Legal Construct

America's racist legacy of slavery and race-based segregation is better known than the early history of immigration law, but the pictures are

119. See Migrants Did Dirty and Dangerous Work: WTC Cleanup Crews Not Protected, Often Not Paid, N.Y. DAILY NEWS, Jan. 11, 2002, at 3 (noting how undocumented workers swarmed for the opportunity to work in hazardous conditions).


122. Id.


similar. U.S. immigration history includes, for example, the Chinese exclusion laws of the late-nineteenth century that carried forward in various legal forms into the mid-twentieth century.\textsuperscript{125} Today the racial impact of substantive immigration law and enforcement is pronounced.\textsuperscript{126}

IV. EXCLUSION FROM WORKPLACE PROTECTIONS AND WORK-ESSENTIAL RIGHTS

Unauthorized workers are reluctant to enforce their legal rights because they fear deportation,\textsuperscript{127} on top of losing their jobs. Intensifying this reluctance is the fact that employee protections for unauthorized workers are substantively abridged, thus leaving less to gain from unauthorized workers stepping forward.\textsuperscript{128} At the federal level, unauthorized workers' remedies against collective bargaining violations and workplace discrimination are severely limited. In addition, agricultural workplace rights are broken down into a separate, less protective scheme.

Given the high percentage of unauthorized workers employed in agriculture, these lesser protections disproportionately affect unauthorized workers. Exclusion from Legal Services Corporation funded assistance undermines enforcement of the rights unauthorized workers do possess. In addition, increasing exclusion of undocumented residents from state drivers' license regimes negatively affects unauthorized workers' ability to access and perform their work.

A. Climate of Fear

Fear is a constant in the employee rights context, because workers who complain fear losing their job. Most unauthorized workers additionally fear deportation if they assert their rights. Deportation involves a series of significant deprivations incident to the deportation process itself. Many unauthorized workers, particularly those who were trafficked into the United States and who are working to repay their smuggling fees, also face the threat of violence to themselves or their families at home if they assert their rights.

The proposition that deportation is a serious sanction may seem so manifest that no elaboration is necessary, but it may not be as obvious that deportees suffer a good deal more than just the primary sanction of


\textsuperscript{126} Id.


\textsuperscript{128} As Peter Margulies notes, unauthorized workers, like other victims who fear exposure of their own unlawful acts, must have a meaningful incentive to come forward. \textit{Id}. 
involuntary removal from the United States. Firstly, for unauthorized workers, the deportation process generally means detention, often for significant periods of time. The DHS routinely detains people prior to charging them with deportability to initiate removal proceedings. The deportation process can also be costly. In addition to the work time immigrants lose while they are in detention, many detainees are not released on their own recognizance and must post a bond in order to gain freedom during the pendency of their removal proceedings. Immigration court bond amounts begin at $1,500, but are typically much higher. People who wish to keep a deportation order off their immigration record must pay for their flight home; for those who are detained, this involves purchasing a top price "open" ticket that the government can use at its convenience. Respondents who wish to be represented in removal proceedings must hire a private attorney, as the government does not provide counsel in removal hearings. Many people make the journey back to the United States after being deported, a dangerous and expensive undertaking that generally involves multiple attempts at crossing the border and substantial rise of violent death.

Many unauthorized workers experience an additional level of fear: the threat of retaliatory violence if they assert their labor and employment rights. For example, unauthorized workers who have incurred personal or family debt in order to gain passage to the United States frequently work for employers with ties to their creditors. In a 1994 town meeting, a group of Chinese workers testified about their working arrangements, which for many included wages at two dollars per hour. Many workers do not have the option to protest their work arrangements because they are literally being held prisoner.

This climate of fear directly limits workers' assertion of rights. During harvesting seasons, the author's students accompany local advocates to farm labor camps throughout the region. The main purpose of the exercise is for the students to learn how fear chills the assertion of rights. In farm labor camp presentations, even when supervisors are not

132. Johson, Open Borders?, supra note 125, at 221-14
133. Kwong, supra note 120, at 74-75.
134. Id. at 219-20.
135. Id. at 235-36.
136. See id. at 219-20.
137. The advocates represent several groups, including the Comité de Apoyo a los Trabajadores Agrícolas (CATA), Friends of Farmworkers, La Comunidad Hispana, and the Philadelphia Legal Assistance Farmworker Project.
138. In the farmworker context, advocates frequently note a hierarchy of incentives: workers living in execrable conditions in farm labor camps normally will not take action on
present, few potential cases emerge on the spot; workers report that everything is fine, passively accept business cards, then call days or months later, often after they have moved to a new job. As a result, workers with on-the-job injuries that did not necessitate immediate emergency room care often miss the statute of limitations to notify their employers about the injury. Immigrant worker advocates also know that the dollar figure of a settlement or award can be negatively affected if the client is unauthorized, because clients are anxious to stay out of court and limit their involvement with formal processes that might expose them to deportation.\footnote{9}

The INS made a commitment—through an operating instruction, not in a regulation—to stay out of employer-worker disputes,\footnote{4} but examples abound of raids and deportation actions against workers in obvious frustration of collective action or assertion of individual workplace rights.\footnote{4} One of the author's students spoke with a local workers' compensation attorney about a potential client who worked for a large food processing plant in a remote town. When the attorney learned the identity of the employer, she warned the student that it could be dangerous to pursue the case. The private attorney stated that this particular employer had convinced the INS to arrest one of her own clients after filing a workers' compensation claim, and that her client was subsequently deported.

B. Limited Legal Protection for Labor Rights Violations

As is described in detail in this Symposium issue, unauthorized workers are singled out for differential, lesser protection by U.S. labor rights laws. Laws protecting collective bargaining rights do not apply to all workers, and some industries have significantly lower coverage under these laws. Private sector industries with high concentrations of unauthorized workers include three of the five that also have the lowest coverage under collective bargaining rights laws: agriculture, domestic workers, and
construction. These industries also reflect the lowest actual unionization rates. Moreover, unauthorized workers have severely limited remedies for federal labor rights violations.

Unauthorized workers lost the right to full remedies for violations of their federal labor rights in 2002. The U.S. Supreme Court decision in *Hoffman Plastic Compounds v. NLRB* reversed longstanding NLRB policy that granted equal remedies to unauthorized workers. Under *Hoffman*, unauthorized workers are no longer entitled to backpay for work that would have been performed had the employee not been fired in contravention of the employee’s labor rights. In the case, Jose Castro, a Mexican worker, had been laid off while participating in an AFL-CIO union organizing campaign. His employer argued that, because of the employer sanctions regime established in 1986, Mr. Castro was not entitled to be reimbursed for wages he would have earned had he not been discharged in contravention of his labor rights. The employer’s reasoning was that Castro was not entitled to be paid for work he could not have legally performed.

The NLRB found that Mr. Castro and other workers had been fired in violation of their labor rights, and ordered reinstatement and backpay as remedies to the workers. In addition, the board issued a cease and desist order and required that the employer post a sign in the workplace about the order. With testimony before it about Castro’s undocumented status, the Administrative Law Judge (ALJ) lifted the reinstatement and backpay requirement. The board let stand the ALJ’s reinstatement decision but left the employer’s backpay obligation in place. The D.C. Circuit then reviewed the employer’s appeal from the backpay order in panel and en banc, upholding the board’s backpay order at both stages.

---

142. These industries, along with financial and real estate sectors, have below 70% coverage nationwide under collective bargaining laws. See U.S. Gen. Accounting Office, Report to Congressional Requesters, U.S. Senate: Collective Bargaining Rights: Information on the Number of Workers with and without Bargaining Rights 6, GAO-02-835 (Sept. 2002).
143. Id. at 6-7.
146. Id. at 141.
147. Id.
148. Id. at 140-141.
149. Id. at 140.
150. Id. at 141.
went to the U.S. Supreme Court.

The five-Justice *Hoffman* majority reversed the board and the D.C. Circuit, holding that employers no longer had to pay unauthorized workers for unperformed work they were not legally available to perform.\(^{153}\) The Court ruled that the National Labor Relations Act must be read in light of the 1986 Immigration Reform and Control Act (IRCA) employer sanctions provisions.\(^{154}\) The Court's decision turned on a key finding: that granting the backpay remedy to unauthorized workers would undermine IRCA's goal of eliminating unauthorized employment by providing an economic incentive for more immigrants to seek unauthorized work in the United States.\(^{155}\)

The four *Hoffman* dissenters took issue with this finding, arguing that full remedies would *further* the IRCA by lowering the economic incentive for employers to hire unauthorized workers.\(^{156}\) The dissent cited the intervention of the Attorney General speaking for the Department of Justice, which was at the time charged with enforcing the IRCA.\(^{157}\) The Department of Justice had supported the NLRB's interpretation and argued that full labor rights enforcement, even if it benefits unauthorized workers, also furthers the IRCA by discouraging illegal immigration.\(^{158}\)

The full effects of *Hoffman* on the labor rights of unauthorized workers remain to be seen. Many legal and practical questions will have to play themselves out. Following the decision, the NLRB's general counsel issued a directive to regional directors, in which the board both narrowed and expanded the scope of the Supreme Court's decision.\(^{159}\) The board


\(^{154}\) Id.

\(^{155}\) Id. at 151. An additional finding the Court made in support of its ruling was that the Board's remaining remedial powers in the case of unauthorized workers—cease and desist orders and sign posting requirements, enforceable against employers through contempt proceedings—would sufficiently accomplish the enforcement of the NLRA. Id. at 152.

\(^{156}\) Id. at 153-154 (Breyer, J. dissenting).

\(^{157}\) Id. at 153.

\(^{158}\) Id. at 161. For additional arguments supporting this position, see Bradly J. Condon & J. Brad McBride, *Do You Know the Way to San Jose? Resolving the Problem of Illegal Mexican Migration to the United States*, 17 GEO. IMMIGR. L.J. 251, 283-85 (2003) and Margulies, *supra* note 127, at 569-586. The majority and the dissent also quarreled about the level of deference due to the NLRB's interpretation of the IRCA. *See Hoffman Plastic Compounds*, 535 U.S. at 142-43, 161 (noting the majority ruling that the NLRB's discretion is not unlimited, while the dissent argues that the NLRB should be accorded deference). For further analysis of this issue, see Correales, *supra* note 144, at 143-146.

reaffirmed the general principle that unauthorized workers are covered by the NLRA and that immigration status is "irrelevant" for the purposes of determining employer liability. The memorandum addressed several key questions: 1) backpay orders against employers who knowingly hired unauthorized workers; 2) reinstatement remedies; 3) "non-discharge" wage differential compensation remedies; 4) non-backpay remedies; and 5) investigation into discriminatees' immigration status.

The board expansively interpreted Hoffman by finding that the case precludes any backpay for time during which the worker was unauthorized to work, whether or not the employer knew the worker was unauthorized at the time of hire. The majority did not address this distinction, and the record in Hoffman reflected that the employer did not know about José Castro's status when he was hired, so these facts were not before the court. Nonetheless, the board's memorandum stated that "the clear thrust of the majority opinion precludes backpay for all unlawfully discharged undocumented workers regardless of the circumstance of their hire." Therefore, the memorandum concluded, the board should not seek backpay remedies even when there is proof that the employer knowingly hired an employee in contravention of immigration laws. The distinction will play itself out in the lower courts, but there are strong policy reasons for making it and for offering greater protection to workers hired by employers proven to be knowingly violating immigration laws.

Despite this interpretation, the board decided to continue seeking "conditional" reinstatement orders against employers who "knowingly hired undocumented workers." Such orders will be conditioned on the employee's compliance, within a reasonable period, with the IRCA employment documentation procedures.

Other interpretations by the board narrow the scope of Hoffman. In addition to the question of employer knowledge, another common issue that did not present itself in the Hoffman facts was the situation of wage differentials that violate the NLRA. If, rather than firing an employee, an employer demotes or—on whatever pretext—lowers the pay of an

---

160. Id.
161. Id.
162. Id.
163. Id.
164. Id.
165. Id.
166. Memorandum from Arthur F. Rosenthal, supra note 159.
168. Correales, supra note 144, at 134-141.
employee in retaliation for union activity, can the board require the employer to pay compensation for the differential salary levels? The general counsel stated the holding in Hoffman might not preclude such "non-discharge" backpay awards, but left the question open. 170

The board also instructed its regional officials to proactively seek tailored "special remedies" to address the needs of individual unauthorized workers. 171 The memorandum encourages the use of formal settlements between unauthorized victims of unfair labor practices and employers, particularly when the employer knowingly hired the unauthorized worker. 172 Also, in unauthorized worker cases, the board will seek to require the notice be read to employees and to compel employers to continue any previous support for the employee's regularization of immigration status. 173

An additional post-Hoffman concern in the labor rights context is the permissibility of investigating the immigration status of a worker who seeks to enforce his labor rights. The board's general counsel memorandum sought to limit the scope of investigations by confirming that "questions concerning [immigration] status should be left for the compliance stage of the case." 174 The memorandum went on to give detailed instructions as to the board's role with regard to the immigration status question. For example, even at the compliance stage, board officials are instructed not to initiate investigations into immigration status, and only to make inquiries upon the employer's showing of "the existence of a genuine issue" with regard to immigration status. 175 Investigations will be conducted by asking for a response to the employer's evidence from the employee or employee's representative. 176

These limiting attempts notwithstanding, the fact remains that most unauthorized workers will not be receiving monetary remedies if they are fired for union activities. The General Accounting Office concluded that Hoffman, though nominally a case about remedies, will have a negative impact on the collective bargaining rights of the unauthorized. 177 The most significant practical effects of Hoffman will probably lie in the minds of employers rather than in the compliance stage of the labor cases that are actually heard. 178 For example, after Hoffman came down there were

170. Id.
171. Id.
172. Id.
173. Id.
174. Id.
175. Id.
176. Id.
widespread reports of employers mentioning the decision to workers as support for the proposition that unauthorized workers have no right to pay for time worked.

C. Exclusions from Immigrant Non-Discrimination Provisions and Limited Remedies for Other Forms of Discrimination

In addition to its practical effect on the power balance in the workplace, *Hoffman* is having a significant impact on unauthorized workers' legal workplace rights outside the field of labor law. The Court's endorsement of the concept that unauthorized workers are "legally unavailable for work" is having a ripple effect in other areas of employment law, such as employment discrimination. Moreover, unauthorized workers are subject to various other limitations in workplace discrimination protection, including a lack of protection from workplace discrimination on the basis of status as immigrants and, in one circuit, no protection from age discrimination.

In response to *Hoffman*, the U.S. Equal Employment Opportunity Commission (EEOC) has rescinded its previous policy guaranteeing equal remedies for unauthorized workers.179 Thus, unauthorized workers who are fired for discriminatory reasons can no longer collect lost wages remedies. Prior to *Hoffman*, the EEOC had maintained a policy of not inquiring into immigration status, and had limited discriminatory firing remedies only if a worker was outside the country or was unable to demonstrate proof of work eligibility within a reasonable period after reinstatement.180 The EEOC's new policy, issued in response to *Hoffman*, rescinds the earlier policy and leaves open the question of whether unauthorized workers can or cannot seek time loss remedies.181 The new policy focused on the importance of seeking other types of remedies, such as pain and suffering damages, in appropriate cases involving unauthorized workers.182 However, in practical terms, the inability to issue time-loss remedies undercuts the meaningfulness of employment discrimination as a protection for

---

182. Id.
Unauthorized workers.

In addition to this across-the-board limitation on time loss remedies, unauthorized workers are excluded outright from protection from certain types of employment discrimination. In the Fourth Circuit, unauthorized workers are excluded from protection under the Age Discrimination in Employment Act. Unauthorized workers also cannot claim protection against nationality and citizenship discrimination, although authorized immigrant workers do enjoy this protection.

D. Decreasing Workers’ Compensation Protections

Prior to Hoffman, several states restricted workers’ compensation coverage for unauthorized workers, and more states have joined this category since the Supreme Court issued its ruling. For example, in 2002, the Pennsylvania Supreme Court lowered the burden of proof for employers to suspend unauthorized workers with partial work-related disabilities. In 2003, a Michigan appeals court ruled that employers could cut off wage loss benefits to workers as of the date of discovery of unauthorized status. The issue of workers’ compensation benefits for unauthorized workers is now pending before a Massachusetts state review board.

In drawing the line between “illegal employments” that merit injury compensation and those that do not, workers’ compensation laws in many jurisdictions have distinguished between “employments in prohibited businesses,” for example narcotrafficking, and employments considered “illegal for other reasons.” One example of this reasoning is the employment of minors. In most states, minors whose employment is considered illegal because of their age are nonetheless covered under


workers' compensation schemes.\textsuperscript{190}

These cases cite various reasons for limiting benefits to unauthorized workers, primarily fairness to employers and administrative convenience. For example, the Pennsylvania Supreme Court noted that requiring an employer to prove job availability when seeking suspension of benefits for a partially disabled unauthorized worker would be "pointless and inconsistent with the [Workers' Compensation] Act's purpose"\textsuperscript{191} because "the claimant's loss of earning power is no longer caused by the work-related injury."\textsuperscript{192} The Michigan decision used similar reasoning, holding that unauthorized worker cases should fall under a state statute permitting an employer to suspend wage loss benefits when the employer has discovered that the injured worker has committed a crime that prevents further employment.\textsuperscript{193}

\textsuperscript{190} See id. at 96; Correales, supra note 144, at 151 (discussing the changing availability of workers' compensation benefits for undocumented workers).

\textsuperscript{191} Reinforced Earth, 810 A.2d at 107.

\textsuperscript{192} Id.

\textsuperscript{193} Sanchez v. Eagle Alloy, 658 N.W.2d 510, 521 (Mich. Ct. App. 2003). For a more extensive discussion of recent caselaw and attempts to reverse Sanchez through legislation, see National Employment Law Project, Low Pay, High Risk: State Models for Advancing Immigrant Workers' Rights, 44-48, 56 (2003) (on file with author). At first glance, this reasoning may seem compelling. Certainly an unauthorized worker cannot enter post-injury employment lawfully. The image of an employer seeking out job opportunities for someone who cannot legally accept any job may seem, as the Pennsylvania Supreme Court pointed out, pointless, or even unlawful. However, in practical application, ample mechanisms exist to allow employers to demonstrate job availability for someone who is unemployable. Workers' compensation regimes have developed these mechanisms to simplify the practical application of job availability requirements in a host of situations, including the situation of workers who cannot work because of subsequent injuries. For example, the use of labor market surveys is widely found in workers' compensation adjudication to evaluate wage loss and job availability in the abstract. Apportionment of earning capacity loss attributable to the work injury and the earning capacity loss attributable to other intervening factors is another commonly utilized mechanism. See, e.g., LITTLE ET AL., supra note 189, at 399-400.

Moreover, as discussed above, while it may be illegal for an unauthorized worker to seek and accept employment, it is perfectly legal for an employer to hire unauthorized workers, so long as the work papers presented are facially genuine and the employer can claim ignorance. The reality is that most unauthorized workers can readily find employment because of the type of work they are willing to do and the low pay they are willing to accept. An injured unauthorized worker's diminished earning capacity does not lie solely—or, in many cases, at all—in the worker's legal disability, but rather in other structural barriers such as language, training and education that bedevil many lawfully present immigrants and U.S. nationals alike.

The present argument focuses on workplace safety and a detailed analysis of apportioning earning capacity loss due to unauthorized status is beyond the scope of this paper. However, an analysis tying the IRCA requirements into labor market surveys, including a state level survey, could be useful for compensation regimes that wish to balance employers' logical objections to calculating earning capacity loss for unauthorized workers and the current reality of the hiring market.
VI. WHY DIFFERENTIAL STANDARDS ARE UNSAFE FOR ALL WORKERS

If America is deriving any economic benefit from the differential workplace treatment described in this article, then the benefit comes at a price: the safety of all U.S. workers. Subordinating employment protection and regulatory regimes to immigration concerns weakens the effectiveness of those regimes. Most directly, excluding unauthorized workers from workers' compensation regimes impacts workplace safety, but the other affected regimes described above—labor and collective bargaining and employment discrimination, can also have a negative impact on safety.

A. The Safety Implications of Excluding Unauthorized Workers from Workers' Compensation Regimes

Excluding unauthorized workers from workers' compensation coverage makes all workers more vulnerable to workplace injury and fatalities. Workplace injuries and fatalities are of serious concern in the United States, and workers' compensation is an important public policy tool in place to improve workplace safety. Workers' compensation enhances workplace safety both by providing a direct economic incentive for employers to prevent costly claims and by providing information for safety studies and initiatives.

Workplace injuries and fatalities are a serious public health issue in the United States. In 2002, there were roughly 5,000 workplace fatalities due to unintentional injury, and 3.7 million workers suffered disabling injuries. Moreover, most workplace injuries are attributed to "well-known work hazards that could have been prevented" by employers. According to the Centers for Disease Control, "[o]ccupational injuries should not be regarded as inherent in the workplace, nor should they be acceptable. Occupational injury is an enormous and costly problem. Most incidents resulting in worker injuries are preventable and could be averted if known prevention strategies were more widely implemented."


196. CENTERS FOR DISEASE CONTROL & PREVENTION, OCCUPATIONAL INJURY PANEL, OCCUPATIONAL INJURY PREVENTION, INJURY CONTROL IN THE 1990s: A NATIONAL PLAN FOR
claims place responsibility for workplace safety with “employer corporate culture and safety prevention strategies . . . .”\textsuperscript{197}

Workers’ compensation regimes contribute to workplace safety. The primary goal of workers’ compensation partially compensating injured workers for their wage and medical losses is remedial.\textsuperscript{198} But, prevention is a key secondary goal of workers’ compensation regimes.\textsuperscript{199} It is widely recognized that liability for workers’ compensation provides a direct economic incentive to employers to improve safety conditions—fewer and lower claims mean lower insurance premiums for employers.\textsuperscript{200} Moreover, recent state experience links expanded health and safety regulation and enforcement with lower workers’ compensation costs,\textsuperscript{201} thus providing an incentive for political acceptance of greater regulation for “primary prevention” to aid in limiting compensation costs.\textsuperscript{202}

\begin{footnotesize}
\begin{enumerate}
\item ACTION 329 (1992) quoted in Haas, supra note 195, at n.10.
\item 197. Haas, supra note 195, at 220.
\item 198. LITTLE ET AL., supra note 189, at 5.
\item 199. Id.
\item 201. Spieler, supra note 200, at 256-63.
\item 202. Id. at 259.
\end{enumerate}
\end{footnotesize}
Additionally, workers’ compensation regimes enhance safety by providing data for safety analyses and policymaking. The lack of information about workplace injuries hampers safety prevention. Failure to capture this information regarding unauthorized workers undermines prevention in these industries, thus endangering workers of any immigration status who occupy similar job categories.

Limiting unauthorized worker participation in workers’ compensation regimes undermines the safety impact of the regimes. The impact of this population arguably exceeds the impact the numbers might suggest. As of 1991, only two-thirds of all workers were covered by workers’ compensation. Further enhancing the importance of unauthorized worker participation in workers’ compensation is that “only a small portion” of those with workers’ compensation claims file them. For example, only an estimated 11 to 21% of compensable work-related upper extremity musculo-skeletal disorders, and an astonishing 60% or less of covered fatalities, are ever claimed. Tying the fact that unauthorized workers are over-represented in unsafe workplaces further heightens the importance of including this category of workers in workers’ compensation regimes. U.S. workers sharing workspace with unauthorized workers are exposed to greater risk to the extent that unauthorized workers are shut out of workers’ compensation systems.

VII. SAFETY ARGUMENTS IN PERSPECTIVE

Safety implications for U.S. nationals represent only one argument in favor of equal or targeted rights for unauthorized workers. In addition to a range of arguments deployed in favor of differential rights, many other...
arguments have been advanced in favor of equal treatment or heightened protection for unauthorized workers. A rich literature makes the case that equal employment rights for unauthorized workers' labor in conjunction with targeted enforcement conforms with the following goals: immigration enforcement (reducing employer incentives to hire unauthorized individuals), global and national economics, general notions of fairness and humanitarian imperative, effective enforcement of non-immigration policies such as the NLRA (the category of argument into which the present article falls), international human rights law, religious codes, 

207. See, e.g., Hoffman Plastic Compound v. NLRB, 535 U.S. 137, 156 (2002) (Breyer, J., dissenting) (arguing that denying the NLRB the power to award backpay increases employers incentives to hire illegal aliens); Margulies, supra note 127, at 569-586; Condon & McBride, supra note 158, at 283-285.


211. See, e.g., Joey Asher, How the United States is Violating Its International Agreements to Combat Slavery, 8 EMOY INT'L L. REV. 215 (1994) (arguing that the inclusion of the phrase "in all its forms" in slavery convention expanded the definition of slavery and involuntary servitude); Sarah H. Cleveland, Global Labor Rights and the Alien Tort Claims Act, 76 TEX. L. REV. 1533 (1998) (finding that the slavery convention commits states to eradicate forced labor for any nonpublic purpose); Sarah H. Cleveland, Inter-American Court of Human Rights Amicus Curiae Brief: The United States Violates International Law When Labor Law Remedies Are Restricted Based on Workers' Migrant Status, 1 SEATTLE J. SOC. JUST. 795 passim (2003); Nessel, supra note 209, at 397-404; Michael J. Wishnie, Immigrant Workers and the Domestic Enforcement of International Labor Rights, 4 U. PA. J. LAB. & EMP. L. 529 (2002); Friedman, supra note 209. Recently, two international bodies ruled that disadvantaging unauthorized workers violates
and democratic values.\textsuperscript{213}

Basing an argument for unauthorized worker parity on the safety for U.S. nationals’ argument falls into what Chang calls the “parochial perspective,”\textsuperscript{214} a political position that privileges the “self-interest of natives.”\textsuperscript{215} Many of the other arguments for parity listed in the above such as, for example, international human rights fall instead into the “cosmopolitan perspective,”\textsuperscript{216} which privileges “liberal ideals of equality”\textsuperscript{217} over mere self interest.

Arguments against unauthorized worker parity more often fall into the “parochial” category, including: immigration policy (equal rights for unauthorized workers increase immigrant incentive to enter the United States and seek work),\textsuperscript{218} economics,\textsuperscript{219} administrative convenience,\textsuperscript{220} and what Chang calls “intolerant preferences:” the desire to exclude particular national and ethnic groups and what others call racism.\textsuperscript{221} Ruben Garcia places Hoffman Plastic in the parochial category, stating that the Supreme Court failed to effectively integrate immigration and labor policies.\textsuperscript{222} He

\begin{footnotesize}
\textsuperscript{212} See Jennifer Reed-Bouley, Perspectives on Undocumented Workers: Catholic Social Teaching and the United Farm Workers, THEOLOGY: EXPANDING THE BORDERS (Maria Pilar Aquino & Roberto S. Gorzueta eds., Annual Publication of the College Theology Society, 1998)(explaining that Catholic social teaching regularly exhibits concerns for immigrants).
\textsuperscript{213} Nessel, \textit{supra} note 209, at 400-404.
\textsuperscript{214} Chang, \textit{supra} note 208, at 294.
\textsuperscript{215} Id. at 321.
\textsuperscript{216} Id. at 327.
\textsuperscript{217} Id. at 294.
\textsuperscript{219} See, \textit{e.g.}, STEVEN A. CAMAROTA, CENTER FOR IMMIGRATION STUDIES, IMMIGRATION FROM MEXICO: ASSESSING THE IMPACT ON THE UNITED STATES 22 (2001)(examining the characteristics of the Mexican-born population in the U.S. in order to shed light on the effect Mexican immigration has in the country and to provide insight into the likely impact of future immigration from Mexico).
\textsuperscript{220} E.g., Hoffman Plastic Compounds, 535 U.S. 137 at 140-41.
\textsuperscript{221} Chang, \textit{supra} note 208, at 320.
\textsuperscript{222} Ruben J. Garcia, \textit{Ghost Workers in an Inter-connected World: Going Beyond the of
noted that this failure reflected a broader inadequacy of both domestic labor law and national immigration law in an increasingly global environment. Interestingly, national security is invoked on both sides of the debate. It is beyond the scope of this article to address all of these arguments. The goals of this article are to show the extent to which unauthorized workers are improperly labeled and differentially treated in the law, to propose settled terminology and to flesh out the workplace safety implications of this differential treatment.

The questions of immigration legislation and workplace rights are gaining attention presently because debates around terrorism and the sheer unprecedented numbers of unauthorized workers in the country. The relative economic and political importance of these workplace-centered arguments may wax and wane as shifts in the broader immigration and border policies alter both the number of people in question and the extent of the humanitarian urgency involved. However, the need for coherent and principled policies toward this population of unauthorized workers, will never diminish. Even in European countries, where more serious attention has been given to addressing push factors through international development assistance and to addressing pull factors by restraining industry demands for pliant and low wage laborers, there still exists a core population of unauthorized workers.

VII. Conclusion

U.S. nationals are compromising their own workplace safety by offering decreased protection to unauthorized workers. Concerns about differential treatment should begin at the primary level, with the lack of settled terminology and the lack of population figures to describe the group; both may form building blocks for meaningful policy choices. A racially neutral, legally meaningful term should be selected and settled. This article chose to use "unauthorized worker" to refer to people who lack employment authorization, and "undocumented immigrant" to describe people who lack presence authorization.

The article sought to show that the position of unauthorized workers under U.S. law is disadvantaged and deteriorating. As a result of the U.S. Supreme Court's decision in Hoffman, unauthorized victims of federal labor and employment discrimination violations recently lost the right to lost wages remedies, creating a significant disincentive for employers to follow those laws, as well as intensifying the interrotem effect that official inquiries about immigration status have on workers who fear deportation.


223. Id. at 765.
Several states have recently reduced workers' compensation coverage of unauthorized workers.

This differential treatment harms American workers by decreasing safety. Exclusion of unauthorized workers from workers' compensation decreases employer incentives to improve safety in the workplace and removes important sectors from the information flow feeding safety studies. The debate about drivers' licenses for undocumented immigrants, which is to a great extent a concern of unauthorized workers, also impacts the safety of U.S. nationals on the roads. Labor and employment discrimination policies that weaken the position of unauthorized workers, by increasing their fear of speaking out at work and by freeing employers from legal incentives in order to address their concerns, further diminish the position of U.S. nationals working alongside the unauthorized. Characterizing Hoffman as an enticement for employers to hire unauthorized workers, the Charleston Gazette captured the concern that animates this article's proposals: "[t]he blow against illegal immigrant workers was, perhaps unwittingly, against all American workers as well."\(^{224}\)

---