



February 2014

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Recommended Citation

Elisabeth J. Yu, *Addressing the Economic Impact of Undocumented Immigration on the American Worker: Private Rico Litigation and Public Policy*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 909 (2006).

Available at: <http://scholarship.law.nd.edu/ndjlepp/vol20/iss2/17>

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ADDRESSING THE ECONOMIC IMPACT OF UNDOCUMENTED IMMIGRATION ON THE AMERICAN WORKER: PRIVATE RICO LITIGATION AND PUBLIC POLICY

ELISABETH J. SWEENEY YU*

As a nation that values immigration, and depends on immigration, we should have immigration laws that work and make us proud. Yet today we do not.

—President George W. Bush¹

President Bush and members of Congress have discussed recently the merits of guest worker programs to deal with the flow of foreign-born laborers into the United States.² In considering the “value” of immigrants in American society, an important question is whether undocumented workers in the United States hurt the American worker or help the economy by taking “unwanted” but necessary jobs. This Note discusses a judicial tool four circuit courts of appeal have accepted that has similar goals as these policy proposals. The Second, Sixth, Ninth, and Eleventh Circuits have approved of suits in which citizen attorneys general act through the Racketeer Influenced Corrupt Organizations Act (RICO)³ to enforce public policy that protects American labor from the negative impact of undocumented workers. The Seventh Circuit has not approved this same

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1. Press Release, Office of the Press Secretary, President Bush Proposes New Temporary Worker Program (Jan. 7, 2004), <http://www.whitehouse.gov/news/releases/2004/01/20040107-3.html>.

2. See Stuart Rothenburg, *Many Republicans Look Ready to Gamble on Immigration Reform*, ROLL CALL, Oct. 24, 2005, at 8; Richard W. Stevenson, *President Renews Effort to Overhaul Immigration Policy*, N.Y. TIMES, Nov. 29, 2005, at A18.

3. Racketeer Influenced Corrupt Organizations Act, Pub. L. No. 91-452, 84 Stat. 941 (1970) (codified as amended at 18 U.S.C. §§ 1961–68 (2000)).

method of dealing with this important public policy problem. This circuit split will come before the Supreme Court this term when it considers *Williams v. Mohawk Industries, Inc.*⁴

Part I of this Note introduces this RICO theory of labor law enforcement in the undocumented worker context. Part II summarizes the impact of undocumented migration on the United States, and particularly on the American worker, taking into account the current United States labor market and immigration regime. Part III analyzes the policy proposals, including guest worker programs that attempt to address this situation. Part IV presents the judicial alternative, which has been used by employees (both documented and undocumented), competitors, and local government. The Note concludes by suggesting that this controversial judicial mechanism can succeed in remedying some of the same problems that public policy programs confront, but must be a compliment to a broader immigration policy that considers the ethical considerations and realities of undocumented migration.

I. THE RICO THEORY OF LABOR LAW ENFORCEMENT IN IMMIGRATION

As immigrants and immigration are increasingly controversial in American politics, the President and the Congress have proposed major initiatives to deal with the perceived problems accompanying the flow of new workers, while at the same time appealing to the country's historical roots as a welcomer of the oppressed and downtrodden.⁵ Balancing these two goals—protecting domestic workers from the wage pressures brought on by surges of foreign-born persons and still being a beacon of hope to the poor of second and third-world nations—is, obviously, difficult. President Bush's dramatic and broad guest worker program and a variety of Congressional alternatives attempt to

4. *Williams v. Mohawk Indus., Inc.*, 411 F.3d 1252 (11th Cir. 2005), *cert. granted*, 126 S. Ct. 830 (2005).

5. These programs included the President's initiative; the Secure America and Orderly Immigration Act, S. 1033, H.R. 2330, 109th Cong. (2005) (known as the Kennedy-McCain proposal); the Comprehensive Enforcement and Immigration Reform Act of 2005, S. 1438, 109th Cong. (2005) (known as the Cornyn-Kyl Proposal); the REAL GUEST Act, H.R. 3333, 109th Cong. (2005) (sponsored by Rep. Tom Tancredo); and the Save America Comprehensive Immigration Act of 2005, H.R. 2092, 109th Cong. (2005) (sponsored by Rep. Sheila Jackson-Lee) (this bill does not include a new guest worker proposal, but complements the Secure America and Orderly Immigration Act). The Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2005) (sponsored by Rep. Sensenbrenner), discussed *infra* Part III, does not contain a guest worker provision.

cherry-pick the aspects of foreign-born labor most appealing to the American economy and the American worker without letting the increased labor supply deteriorate employees' paychecks or employment conditions. These guest worker programs target the flow of migrant labor to select domestic industries, such as agriculture, in need of substantially more unskilled laborers.⁶ This balancing strives for fairness and equity between those workers already living in the United States and those workers wishing to join them.

Proactive policy proposals, such as the guest worker option, are just one way of approaching this issue. The political route is not the only tool Americans have; the Second, Sixth, Ninth, and Eleventh Circuits have approved a tool for private citizen attorneys general to enforce immigration laws. Through the use of RICO to sue employers for "lost property" when those employers are engaged in systematic schemes to hire foreign-born workers illegally, these private citizens can protect themselves from the negative influence of undocumented labor while enforcing policy to protect such laborers from exploitation.

The "property" in these cases is the wages the legal workers would have received had the employers not broken the law by hiring undocumented workers. These lost wages, the injury to the American worker, could come because the legal workers were fired to make room for less costly undocumented labor, or more subtly through depressed wages caused by the illegally increased labor supply. Demonstrating its appeal and wide reach, this mechanism has been used by competitors,⁷ legal employees,⁸ undocumented employees,⁹ and local county government officials.¹⁰

The Seventh Circuit has declined to allow this private cause of action, despite the RICO suits' ability to do what the President and congressmen championing guest worker programs propose. That is, this private cause of action targets the flow of foreign-

6. See *infra* Part III for a discussion of current guest worker proposals.

7. *Commercial Cleaning Serv., LLC v. Colin Serv. Sys., Inc.*, 271 F.3d 374, 379 (2d Cir. 2001).

8. *Baker v. IBP, Inc.*, 357 F.3d 685 (7th Cir. 2004).

9. *Zavala v. Wal-Mart Stores, Inc.*, 393 F. Supp. 2d 295 (D.N.J. 2005).

10. A Canyon County, Idaho Commissioner filed a RICO suit against agricultural companies, alleging participation in an "illegal immigrant hiring scheme." The Commissioner became "the first government entity to use RICO to demand damages from businesses for the costs of allegedly illegal employees." Rebecca Boone, *Idaho County Sues Companies Over Illegals*, BOSTON GLOBE, July 28, 2005, available at http://www.boston.com/news/nation/articles/2005/07/28/idaho_county_sues_companies_over_illegals/?rss_id=Boston.com+%2F+News.

born labor toward those American industries in actual need of such supply while prosecuting those industries that are simply pursuing lower payrolls at the expense of the legally documented worker. Since RICO-theory plaintiffs must demonstrate lost wages,¹¹ suits by classes of legal workers would only be successful in cases where employers are exploiting undocumented workers and using these workers merely to suppress wages. Suits would be unsuccessful in the other category of cases, where employers are using the increased labor supply to survive, such as in the agriculture industry, where the market for the resulting goods would not support higher wages. In these cases, it would not be possible to show lost wages due to the influx of undocumented workers (and thus, not possible to show the injury required by RICO). Therefore, RICO could not be used in these latter situations, but there would also be no injury to documented workers of which to complain.

Legislation specifically designed with this targeted solution in mind, namely the guest worker proposals, may well have advantages over using the broad-based RICO statute. Through such legislation, lawmakers can fine-tune an approach to the undocumented worker issue and incorporate a broader vision for understanding the problem. Unlike the use of RICO, targeted legislation can also deal with ancillary problems and address underlying causes of undocumented migration. However, the judicial avenue is already available and accomplishes at least part of what the political proposals desire. The judicial approach, in granting this private cause of action would utilize the vast array of private citizens, disgruntled over and injured by the failure of immigration policy to check the flow of undocumented workers, to enforce the nation's labor laws.

This discussion is complex, as it involves political, social, ethical, and economic considerations, as well as a soon-to-be-decided circuit split. For background, the next section of this Note will examine the various ways in which undocumented migration¹² affects American society and the ethical issues surrounding migration to the United States.

11. In cases where the plaintiff is the government, the injury need not be a loss of jobs or wages, but rather, could be the cost to taxpayers of undocumented persons living in the community.

12. The word "immigration" in legal terminology implies intent to stay in a new country permanently, but this may not be the case with the undocumented persons who are the focus of this Note. For clarity, this Note will refer to those who come to the United States to work without the proper legal documentation as "undocumented persons" or "undocumented migrants."

II. BACKGROUND: IMPACT OF MIGRATION ON THE UNITED STATES

Immigration¹³ has been an integral part of American society since before the nation's founding. This continues today, as one in five residents is an immigrant or has at least one immigrant parent.¹⁴ While migration to the United States has had a tremendous impact for social and political reasons, the most contentious aspect is its economic impact.¹⁵ The economic effect of *undocumented*¹⁶ migration is particularly charged and is felt in a number of socio-economic ways.

Undocumented migration galvanizes public opinion, with some decrying the perceived undercutting of wages and others believing the acceptance of work by undocumented persons is vital to the operation and health of the United States economy. Whether one believes that the presence of undocumented persons has a negative or positive effect will depend on what they perceive as the number of undocumented persons who come to the United States, how long they remain undocumented, how many children they have, and what kind of services they use. While this Note focuses on the economic impact of migration

13. Immigration is the movement of people from one country to another with the aim of permanent settlement. To be clear, while the legal term of art "immigrant" implies an intent to stay in a new country permanently, the word is used often to refer generally to foreign-born persons, regardless of whether the intent to stay is temporary or permanent.

14. See Cragg Hines, *Some Mean to Give Thanks for Drawbridge They'd Raised*, HOUS. CHRON., Nov. 24, 2004, at B9 ("Some of the biggest advocates of pulling up the drawbridge come from groups that have crossed it most recently.").

15. The globalization of capital and labor has brought the concerns over the effect of the undocumented worker on the American labor force to the forefront of any discussion on immigration. There are many ethical questions when a proudly diverse, immigrant-based nation begins questioning how many more foreign-born persons, particularly those wishing to work and earn an honest living, should be allowed in. The country's policy toward these people will not only affect our economic well-being, but will convey a message about how and to what degree American society values foreigners. From a Judeo-Christian point of view, the Catholic Church does not believe that people are ever foreigners or aliens. See generally POPE JOHN XXIII, ENCYCLICAL LETTER MATER ET MAGISTRA (1961).

16. An undocumented worker is one without any government records to verify his or her existence. Undocumented workers must avoid such records, since their illegal entry into the United States might subject them to deportation. These persons enter the United States by avoiding official inspection, passing through inspection with fraudulent documents, entering legally but overstaying the terms of their visas, or violating the terms of their visas. Under the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified as amended in scattered sections of 8 U.S.C.), about 2.7 million unauthorized migrants were legalized.

(specifically, undocumented migration) on the American labor force, the other dimensions are important in understanding the larger context of current immigration policy.

A. *The Costs and Benefits of a Foreign-Born Population*

The population of the United States is now near 300 million,¹⁷ and Hispanics comprise the fastest-growing and largest minority group.¹⁸ The Hispanic population is now 41.3 million.¹⁹ In 2004, the undocumented population rose to 8.5 million persons, a net increase each year of 500,000.²⁰ Of these 500,000, an estimated 200,000 to 300,000 will leave the United States, die, or become legal immigrants each year.²¹ As of March 2005, the nation's foreign-born population (both legal and illegal) reached a new record of 35 million.²² Of these, between 9 and 10 million are undocumented.²³

This increasing undocumented population corresponds with a dramatic increase in human smuggling and also an increase in the number of people who die attempting to cross the border. From 1998 to 2003, at least 1896 people died trying to cross the southwestern United States border.²⁴ In 2004, a record 460 migrants died trying to cross this border area.²⁵

17. See Press Release, U.S. Census Bureau, Nevada Edges Out Arizona as the Fastest-Growing State (Dec. 22, 2005), *available at* <http://www.census.gov/Press-Release/www/releases/archives/population/006142.html>; *see also* Associated Press, 2 Minorities Spur Rapid U.S. Growth, N.Y. TIMES, June 15, 2004, at A16.

18. See Press Release, U.S. Census Bureau, Hispanic Population Passes 40 Million (June 9, 2005), *available at* <http://www.census.gov/Press-Release/www/releases/archives/population/005164.html>.

19. *Id.*

20. Ctr. for Immigration Studies, Current Numbers, <http://www.cis.org/topics/currentnumbers.html> (last visited Mar. 10, 2006). "Net increase" represents all new illegal immigration minus deaths, legalizations, and out-migration of illegal immigrants. J. GREGORY ROBINSON, U.S. CENSUS BUREAU, ESCAP II: DEMOGRAPHIC ANALYSIS RESULTS 20 (2001), *available at* <http://www.census.gov/dmd/www/pdf/Report1.PDF>.

21. VAN HOOK ET AL., UNAUTHORIZED MIGRANTS LIVING IN THE UNITED STATES: A MID-DECADE PORTRAIT, MIGRATION INFORMATION SOURCE (2005), <http://www.migrationinformation.org/feature/print.cfm?ID=329>.

22. STEVEN A. CAMAROTA, CTR. FOR IMMIGRATION STUDIES, IMMIGRANTS AT MID-DECADE: A SNAPSHOT OF AMERICA'S FOREIGN-BORN POPULATION IN 2005, at 1 (2005), *available at* <http://www.cis.org/articles/2005/back1405.pdf>.

23. *Id.* at 23.

24. WALTER A. EWING, AMER. IMMIGRATION LAW FOUND., THE COST OF DOING NOTHING: THE NEED FOR COMPREHENSIVE IMMIGRATION REFORM (2004), *available at* http://www.aifl.org/ipc/policy_reports_2004_CostOfDoingNothing.asp.

25. Richard Marosi, *Border Crossing Deaths Set a 12-Month Record*, L.A. TIMES, Oct. 1, 2005, at A1.

Despite increased border enforcement and travel risks, the migration continues as undocumented persons come to this country to fill millions of jobs in the American economy.²⁶

Mexico is the largest source for unauthorized migration, with over five million undocumented persons and seventy percent of the undocumented population coming from the United States' southern neighbor.²⁷ California, Arizona, and Texas are the three states with the highest undocumented populations.²⁸ In fact, more than eighth percent of California's population is composed of undocumented persons.²⁹ Arizona and Texas each follow with approximately seven percent and six percent, respectively.³⁰

Undocumented migration has many important economic and fiscal effects. Two main issues bring immigrants to the United States: family and jobs. Two thirds of *documented* migrants are admitted not because of needed skills, but because of familial relations.³¹ Most *undocumented* persons are here seeking work, and if they could not find it, they would not come. They come to fill a rising demand for low-skilled labor, which has been met with a shrinking supply of workers. The Department of Labor estimates short-term immigrants (documented and undocumented) increase the labor supply in low-level jobs.³² They con-

26. Regina Germain, *Perspectives on the Bush Administration's New Immigrant Guestworker Proposal: The Time for Immigration Reform is Now*, 32 DENV. J. INT'L L. & POL'Y 747, 749 (2004).

27. OFFICE OF POLICY AND PLANNING, U.S. IMMIGRATION & NATURALIZATION SERV., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: 1990 TO 2000, at 1 (2003), http://uscis.gov/graphics/shared/aboutus/statistics/III_Report_1211.pdf. The current growth rate of the Hispanic population is 13%, almost four times that of the total population. With an undocumented Mexican population growth of at least 7% (twice that of the overall United States population growth) these figures would make undocumented Mexicans responsible for 5.6% of the overall population growth in the nation. Press Release, U.S. Census Bureau, Hispanic and Asian Americans Increasing Faster Than Overall Population (June 14, 2004), *available at* <http://www.census.gov/Press-Release/www/releases/archives/race/001839.html> (stating that the total population growth is 3.3%).

28. OFFICE OF POLICY AND PLANNING, *supra* note 27, at 6–8.

29. *Id.* at 8.

30. *Id.*

31. U.S. IMMIGRATION & NATURALIZATION SERV., U.S. DEP'T OF JUSTICE, THE TRIENNIAL COMPREHENSIVE REPORT ON IMMIGRATION 12 (2002), <http://uscis.gov/graphics/aboutus/repstudies/tri3.pdf>.

32. *Prospects for American Workers: Immigration's Impact: Hearing Before the Subcomm. on Immigration, Border Security, and Claims of the H. Comm. on the Judiciary*, 108th Cong. 27 (2003) [hereinafter *Prospects for American Workers*], *available at* <http://judiciary.house.gov/media/pdfs/printers/108th/90126.pdf> (prepared statement of Daniel T. Griswold, CATO Inst.).

centrate in large population areas: New York, Los Angeles, and Chicago, which account for 34.5% of the immigrant population.³³ Nevertheless, the huge volume of goods and services exchanged between cities across the country creates pressure toward the equalization of the price of labor.³⁴

Significantly, nearly seventy-five percent of undocumented persons lack a high school degree.³⁵ In 1997, the National Research Council concluded that immigration (by both documented and undocumented persons) had a significant negative impact on the wages of high school dropouts: the income of those who lack a high school degree, eleven million of whom are natives, was reduced by up to thirteen billion dollars a year.³⁶ In fact, the influx of foreign-born persons affected wages on the top as well as the bottom: in 2000, the typical native man without a high school diploma earned \$25,000, and his reduction in wages was \$1800; the typical male college graduate earned \$73,000, and his wages were reduced by approximately \$2600.³⁷ The Supreme Court recognized this, stating that "illegal aliens . . . [taking] substandard . . . wages . . . can seriously depress wage scales . . . [for] citizens and legally admitted aliens"³⁸

The kind of jobs undocumented workers fill is directly related to relative education levels. Among the native population, 12.5% of adults age twenty-five and older in 2003 lacked a high school diploma, as compared to 32.8% of the foreign-born (including both documented and undocumented) population.³⁹ Given these numbers, it is only logical that a large number of less-skilled jobs will be filled by foreign-born persons, and it might appear that foreign-born workers displace their native-born counterparts. However, this argument is not supported by the performance of the United States economy in the 1990s, dur-

33. GEORGE J. BORJAS, CTR. FOR IMMIGRATION STUDIES, INCREASING THE SUPPLY OF LABOR THROUGH IMMIGRATION: MEASURING THE IMPACT ON NATIVE-BORN WORKERS 2 (2004), available at <http://www.cis.org/articles/2004/back504.pdf>.

34. *Id.*

35. *Prospects for American Workers*, *supra* note 32.

36. NATIONAL RESEARCH COUNCIL, THE NEW AMERICANS: ECONOMIC, DEMOGRAPHIC, AND FISCAL EFFECTS OF IMMIGRATION 7 (James P. Smith & Barry Edmonston eds., 1997). This figure is roughly equal to combined federal expenditures on subsidized school lunches, low-income energy assistance, and the Women, Infants, and Children Program. *Id.*

37. BORJAS, *supra* note 33, at 5-6.

38. *DeCanas v. Bica*, 424 U.S. 351, 356-57 (1976).

39. Rob Paral, *No Way In: U.S. Immigration Policy Leaves Few Legal Options for Mexican Workers*, IMMIGRATION POL'Y IN FOCUS, July 2005, at 2, available at <http://www.aifl.org/ipc/nowayin.asp>.

ing which time the unemployment and poverty rates in the United States among the native-born population fell substantially⁴⁰ while the United States was receiving the largest number of foreign-born persons in its history.⁴¹

Undocumented persons benefit the economy by filling a demand and providing needed services. Employment in one-third of all job categories would have tapered during the 1990s in the absence of newly arrived workers, even if all United States-born workers with recent experience in those categories had been re-hired.⁴² There is still a need for foreign labor, as the median age of United States workers is expected to rise from thirty-six to forty years old between 1990 and 2010, and economists estimate there will be an employment gap that the domestic labor force is unlikely to fill.⁴³ When coupled with the expectation that the number of essential worker jobs will grow by more than 700,000 per year, foreign nationals provide a ready and willing source of labor.⁴⁴

Migration also has an important impact on taxes. The National Research Council estimated in 2003 that the fiscal cost for foreign-born households—service use minus tax payments—could be as high as twenty-two billion dollars.⁴⁵ If approximately twenty-seven percent of the total immigrant population is undocumented, the burden would be approximately \$5.9 billion. Moreover, surveys indicate up to one half of employers do not even deduct taxes from the pay of undocumented workers.⁴⁶

40. JOSEPH DALAKER, U.S. CENSUS BUREAU, POVERTY IN THE UNITED STATES: 2000, at 7 (2001), <http://www.census.gov/prod/2001pubs/p60-214.pdf>.

41. NOLAN MALONE ET AL., U.S. CENSUS BUREAU, THE FOREIGN-BORN POPULATION: 2000, at 2 (2003), *available at* <http://www.census.gov/prod/2003pubs/c2kbr-34.pdf>.

42. ROB PARAL, AM. IMMIGRATION LAW FOUND., ESSENTIAL WORKERS: IMMIGRANTS ARE A NEEDED SUPPLEMENT TO THE NATIVE-BORN LABOR FORCE (2005), *available at* http://www.aifl.org/ipc/policy_reports_2005_essentialworkers.asp. According to this study, "data from the 2000 census indicate that even if native workers could readily have moved to any part of the country in which jobs were available during the 1990s, and even if they had been willing to accept any job offered, there would not have been nearly enough unemployed native-born workers to fill all available jobs." *Id.*

43. DANIEL T. GRISWOLD, CATO INST., WILLING WORKERS: FIXING THE PROBLEM OF ILLEGAL MEXICAN MIGRATION TO THE UNITED STATES 9 (2002), *available at* <http://www.freetrade.org/pubs/pas/tpa-019.pdf>.

44. *Id.*

45. See Ctr. for Immigration Studies, Costs, <http://www.cis.org/topics/costs.html> (last visited Mar. 10, 2006).

46. DONALD L. HUDDLE, IMMIGRATION AND JOBS: THE PROCESS OF DISPLACEMENT (1995), *available at* http://www.npg.org/forum_series/imm&jobs.htm.

Typically, undocumented persons receive a tax-free wage that is around twenty to thirty percent lower than the going wage in a given occupation; thus employers gain excess profits of at least seventeen of the undocumented employee's wage.⁴⁷

While the above statistics speak to the economic detriment caused by undocumented persons, there is much to support the economic value of immigrants, generally, and the undocumented worker population, specifically. A study by the CATO Institute contends that, after taking into account the jobs that undocumented persons take and the new employment they create, "immigrants do not increase the rate of native unemployment in the aggregate."⁴⁸ Migrants also are a significant source of tax revenue; some estimate that over the next seven years, they will pay close to two trillion dollars more in social security tax than they receive in social security payments.⁴⁹ The Social Security Administration found that nearly seventy-five percent of undocumented workers pay payroll taxes.⁵⁰ An Urban Institute study also found that "undocumented immigrants contributed a national total of \$2.7 billion⁵¹ to Social Security and another \$168 million to unemployment insurance taxes, both programs they will be unable to access because of their illegal status."⁵²

Migrants (documented and undocumented) expand the demand for goods and services by becoming consumers themselves.⁵³ There are an estimated 220,000 undocumented persons living in the Chicago metro area, with the consumer expenditures by this group generating more than 31,000 jobs in the local economy and contributing \$5.45 billion annually to the gross

47. *Id.*

48. JULIAN A. SIMON, CATO INST., IMMIGRATION: THE DEMOGRAPHIC & ECONOMIC FACTS pt. 4 (1995), available at http://www.cato.org/pubs/policy_report/pr-immnative.html. In this report, Simon questions the scientific merit of Huddle's argument that immigrants displace native workers.

49. AM. IMMIGRATION LAWYERS ASS'N, MYTHS AND FACTS IN THE IMMIGRATION DEBATE 2 (2003), available at <http://www.immigrationlinks.com/news/AILA%20Backgrounder-Myths%20and%20Facts.pdf> [hereinafter MYTHS AND FACTS]

50. RANDY CAPPS & MICHAEL FIX, THE URBAN INST., UNDOCUMENTED IMMIGRANTS: MYTHS AND REALITIES 1 (2005), available at http://www.urban.org/UploadedPDF/900898_undocumented_immigrants.pdf.

51. The Social Security Administration estimates that undocumented persons pay six to seven million dollars in Social Security taxes. *Id.*

52. AM. IMMIGRATION LAW FOUND., THE VALUE OF UNDOCUMENTED WORKERS (2002), available at http://www.aifl.org/ipc/policy_reports_2002_value.asp.

53. *Id.* at 1.

regional product.⁵⁴ A 2002 Economic Report of the President estimates that migrants raise the net income of Americans by one billion dollars to fourteen billion dollars a year, while a similar study by the National Research Council also found that immigration delivers a “significant positive gain” to the nation’s workforce of one billion dollars to ten billion dollars a year.⁵⁵

United States immigration law has yet to fully acknowledge the economic importance of immigration to the United States. One policy advocate assessed:

Without the more than 12 million immigrants who arrived in the 1990s—including some 5 million illegal aliens—the U.S. would have created fewer jobs, experienced slower economic growth and maintained a lower standard of living for everyone. Large segments of agriculture, the poultry and beef industry, certain manufacturers, and other employers faced with labor shortages or skyrocketing wages would have been forced out of business or moved their production abroad.⁵⁶

Of particular importance to this Note is that foreign-born persons, whether documented or not, also frequently “fill vital niches in the low and high skilled ends of the labor market, thus creating subsidiary job opportunities for Americans.”⁵⁷

The United States has long depended on immigrants to compensate for shortfalls in the native-born labor force. The agricultural industry has recognized this fact for decades and relied upon foreign-born workers to make up for the shortage of native workers in the fields.⁵⁸ Organized labor also has accepted the United States economy’s need for foreign-born workers, as exemplified by the AFL-CIO’s shift to a pro-immigrant stance

54. AM. IMMIGRATION LAW FOUND., IMMIGRANTS HELP SUSTAIN CHICAGO’S ECONOMY (2002), available at http://www.aifl.org/ipc/policy_reports_2002_chicago.asp.

55. GRISWOLD, *supra* note 43, at 9.

56. Linda Chavez, *Increase Legal Immigration*, GOPUSA (May 5, 2005), http://www.gopusa.com/commentary/lchavez/2005/lc_0505p.shtml.

57. MYTHS AND FACTS, *supra* note 49, at 1. For example, the presence of undocumented persons has created opportunities for businesses and professionals that provide goods and services to these populations, not only directly (such as a waiter who will receive more tips because he is waiting on more people) but also indirectly (such as the company that provides the waiters’ uniforms).

58. The Immigration Reform and Control Act of 1986 created the Special Agricultural Worker program for this purpose. See Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 303, 100 Stat. 3359 (codified as amended at 8 U.S.C. § 1160 (1996)).

during the 1990s.⁵⁹ This shift can be explained in the collective nature of labor rights. The migrants that are the focus of this Note are found in service, manufacturing, construction, food-processing, and agriculture industries. When an occupation becomes over-represented by these low-tier workers, conditions worsen for all workers in the occupation. Therefore, the emergence of more of these "brown collar"⁶⁰ workers and their impact on wages and conditions in the workplace has implications not just for the well-being of these workers, an ever-growing minority, but for the entire American workforce.⁶¹

Closely connected to taxes are the direct costs of the foreign-born population. The health, welfare, and educational costs of undocumented immigrant populations are an important and growing part of public expenditures. Less than half of undocumented employees are covered by medical insurance or worker's compensation plans.⁶² If they are injured, they are replaced, not treated, and they usually do not even receive their last paycheck.⁶³ Medicaid, however, provides health care coverage for everyone, including undocumented persons, in emergency care facilities.⁶⁴

In a study of ten states, more than two billion dollars was spent in 2002 for emergency Medicaid expenditures, though not divided by citizenship status.⁶⁵ Nevertheless, five of the ten states studied reported data that points to the likelihood that at least

59. See James B. Parks, *Recognizing Our Common Bonds*, AMERICA@WORK, May 2000, available at http://www.aflcio.org/aboutaflcio/magazine/common_bonds.fm. In 1999, the AFL-CIO adopted a policy that called for better regulation of legal immigration. "Once here, all workers, documented or undocumented, should have full workplace rights to protect their own interests and the rights of all American workers." *Id.* The previous policy, adopted in 1985, "endorsed the creation of the current system of immigration enforcement, which includes employer sanctions for hiring undocumented workers." *Id.*

60. Social scientists use the term "brown collar" worker to refer to a recent (arrived in the United States within the past five years) Latino migrant who works in an occupation in which Latinos are concentrated or over-represented. Leticia M. Saucedo, *The Browning of the American Workplace: Protecting Workers in Increasingly Latino-ized Occupations*, 80 NOTRE DAME L. REV. 303, 304 (2004).

61. *Id.*

62. HUDDLE, *supra* note 46.

63. *Id.*

64. U.S. GEN. ACCOUNTING OFFICE, GAO-04-472, UNDOCUMENTED ALIENS: QUESTIONS PERSIST ABOUT THEIR IMPACT ON HOSPITALS' UNCOMPENSATED CARE COSTS 9 (2004).

65. *Id.* at 10.

half of the emergency expenditures were for labor services for undocumented pregnant women.⁶⁶

In addition, in fiscal year 1995, approximately \$1.1 billion in Aid to Families with Dependent Children (AFDC) and food stamps were provided to households with an illegal undocumented parent.⁶⁷ Any child, regardless of immigration status, is also eligible for free primary and secondary education under *Plyer v. Doe*.⁶⁸ The cost of admitting the 1.1 million school-aged undocumented persons to primary and secondary schools in the United States is about \$7.6 billion.⁶⁹ Thus, the health, welfare, and educational costs of undocumented immigrant populations are an important and growing part of public expenditures. Still, Professor Ronald Lee, economist and principle author of the National Academy of Science's fiscal analysis of immigration, imparts that it would be misleading to calculate the school-aged, native-born children as costs, but not to include the taxes paid by those children when they enter the workforce.⁷⁰

The above data illustrate an unsettled debate on the costs and benefits of the undocumented population. While it is difficult to assess the actual economic benefit or detriment of this population, there must also be consideration of the tremendous idealistic value in having a dynamic migrant population. Many proponents of a more liberalized immigration policy favor an approach that is more accepting of the foreign-born as an affirmation of American ideals: inclusiveness, opportunities for self-made success, and diversity. Under this approach, given that many come to the United States believing in the American Dream and with a desire to improve the lives of their families,⁷¹ it would be hypocritical and cruel to deny them the opportunity to do so. There is a moral imperative to account for these values in immigration policy. These value-based considerations will be examined in this Note's conclusion.

This debate on undocumented migration is charged not only because it involves the ability of Americans to work and earn

66. *Id.*

67. U.S. GEN. ACCOUNTING OFFICE, GAO/HEHS-98-30, ILLEGAL ALIENS: EXTENT OF WELFARE BENEFITS RECEIVED ON BEHALF OF U.S. CITIZEN CHILDREN 6 (1997).

68. *Plyer v. Doe*, 457 U.S. 202 (1982).

69. According to the U.S. Department of Education, in 1999–2000 the average cost per student for the United States was \$6911. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., DIGEST OF EDUCATION STATISTICS 2002, at 198 tbl.169 (2003), available at <http://nces.ed.gov/programs/digest/d02/tables/PDF/table169.pdf>.

70. MYTHS AND FACTS, *supra* note 49, at 1–2.

71. *Id.* at 5.

an honest wage, but also because this value is seemingly pitted against the ability of others to pursue the American Dream. Recognizing that the existing immigration system is not meeting many of these policy goals, Congress and the White House have proposed policies that aim to provide benefits for all parties involved. The next section will detail why the current immigration regime has not succeeded in achieving these multi-faceted goals.

B. *The United States Immigration System and the United States Labor Market*

For those undocumented persons who come to the United States and remain illegally, this "decision" to be undocumented must be understood in the context of a United States immigration system that provides few legal avenues for the admission of workers to fulfill the demand in the United States economy for less-skilled jobs.⁷² The failure of legal American labor to respond to this demand creates an incentive for undocumented migration to the United States.

Under the United States immigration regime, there are very few employment-based visas for foreign-born workers in the less-skilled categories. Of the five preference categories of visas for permanent (as opposed to temporary or non-immigrant) status, only one is for workers in less-skilled jobs. The relevant "third preference" category allots only five thousand⁷³ visas each year to workers in occupations that require less than two years of higher education, training, or experience. About seventy-one percent of Mexicans receiving an employment-based visa for permanent immigration to the United States used this preference category in 2001.⁷⁴

There is a similar numerical obstacle for those who seek to work in low-skilled positions under a temporary employment-based visa. Of the sixteen temporary visa categories, only two, the H-2A and the H-2B are available to workers in fields that

72. Nearly a quarter of the undocumented population arrived in the United States in the past five years, suggesting that the United States economy has demanded workers during a period of rapid growth. See AMER. IMMIGRATION LAW FOUND., IMMIGRATION POLICY REPORT: THE VALUE OF UNDOCUMENTED WORKERS, THE NUMBERS BEHIND THE U.S.-MEXICO IMMIGRATION DEBATE (2002), http://www.aifl.org/ipc/policy_reports_2002_value.asp.

73. Paral, *supra* note 39, at 4. The cap is set at ten thousand, but five thousand visas are reserved each year for beneficiaries of the Nicaraguan Adjustment and Central American Relief Act (NACARA), Pub. L. No. 105-110, tit. II, 111 Stat. 2160, 2193 (1997). Paral, *supra* note 39, at 4 n.7.

74. Paral, *supra* note 39, at 4.

require little or no training. Workers in less-skilled jobs received only sixteen percent of all temporary employment and training visas awarded in 2002.⁷⁵ Seventy-six percent of Mexicans receiving temporary work visas in 2002 were recipients of only H-2A or H-2B visas, showing that Mexican workers have been squeezed into visa categories in which there are few visas available.⁷⁶

In addition to the employment-based visas discussed above, the family-based immigration system presents a potential avenue for those wanting to work in the United States. Unfortunately, the family-based allotment system is inefficient, set to arbitrary numbers, and governed by the complex "family preference" system, which is characterized by lengthy waiting times depending on what kind of relationship (spouse, unmarried child, etc.) the petitioner has to either a United States citizen or a legal permanent resident (LPR). The wait time in the case of a Mexican national is currently seven to twelve years. Therefore, the family-based immigration system is an ineffective means of supplying labor that is currently in demand, and it comes as no surprise that foreign nationals coming to the United States in response to the strong economic demand for less-skilled labor come and remain in the country without proper documentation.

The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996⁷⁷ added another level of complication. In an effort to discourage people from entering the United States illegally or overstaying their visas, the new law instituted a set of "bars" that, once triggered, prevent a person from entering the United States again for another three or ten years. Those who have been "unlawfully present"⁷⁸ in the United States for 180 days or for one year are inadmissible for three years or ten years, respectively. This law effectively discouraged people who would otherwise travel back to their country of origin from doing so, and encouraged them to remain, without legal status, in the United States, for fear of triggering one of these bars upon their return to the United States.⁷⁹

75. *Id.*

76. *Id.*

77. Pub. L. No. 104-208, 110 Stat. 3009 (codified in scattered sections of 8 U.S.C.).

78. A person is defined as "unlawfully present" if he or she "is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled." Immigration and Nationality Act § 212(a)(9)(B)(ii) (codified at 8 U.S.C. § 1182 (2005)).

79. In most cases, a return to the United States is inevitable, as this migration is cyclical, with migrants staying and working in the United States for a discrete period, returning to their home country, and then returning to the

The immigration system attempts to address some of these complex labor issues while protecting American workers and, at least in theory, discouraging the exploitation of undocumented workers. In order for an unskilled worker to receive an employment-based⁸⁰ (permanent) immigrant visa, under Immigration and Nationality Act (INA) § 212(a)(5)(A), the employer must obtain a labor certification from the Secretary of Labor, stating that the immigrant's employment will neither displace nor otherwise disadvantage American workers.⁸¹

The temporary, nonimmigrant H-2 visa scheme likewise required certification by the Secretary of Labor that "qualified persons in the United States are not available" and that "the employment of foreign workers will not adversely affect the wages and working conditions of workers in the United States similarly employed."⁸²

United States again for more work. Eighty percent of Mexican migrants report that they made no more than three trips to the United States. Three-quarters stayed less than two years. See Douglas S. Massey, *Five Myths About Immigration: Common Misconceptions Underlying U.S. Border-Enforcement Policy*, IMMIGRATION POL'Y IN FOCUS, Aug. 2005, available at http://www.aifl.org/ipc/infocus/2005_fivemyths.pdf. The growth of enforcement efforts has also had the perplexing effect of both *not* reducing the inflow of people from Mexico and also reducing the outflow of such persons. Increased border enforcement efforts have pushed migration flows through more remote regions, tripling the death rate at the border, increasing the cost to United States taxpayers and encouraging undocumented persons to remain in the United States longer to recoup the costs of entering. See DOUGLAS S. MASSEY, CATO INST., *BACKFIRE AT THE BORDER: WHY ENFORCEMENT WITHOUT LEGALIZATION CANNOT STOP ILLEGAL IMMIGRATION* 1 (2005), available at <http://www.freetrade.org/pubs/pas/tpa-029.pdf>.

80. There are four employment-based "preferences" in the United States immigration system, with unskilled workers qualifying under the third preference. Within that preference, unskilled workers comprise one of three sub-prongs of persons that can compete for no more than ten thousand employment-based visas.

81. Under INA § 212(a)(5)(A) (codified at 8 U.S.C. § 1182 (2005)), the Secretary of Labor must certify that

- (i) (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
- (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

Id.

82. Pub. L. No. 82-141, 66 Stat. 163 (codified at 8 U.S.C. § 1011(a)(15)(H)(ii) (2000)). The relevant language reads:

- [An H-2 nonimmigrant comes to the United States] (a) . . . to perform agricultural labor or services . . . of a temporary or seasonal nature, or
- (b) . . . to perform other temporary service or labor if unemployed

The Immigration Reform and Control Act (IRCA)⁸³ of 1986 attempted to reduce the number of undocumented workers in the United States. It divided the H-2 program into two sections: the H2-A visa for agricultural workers and the H2-B for non-agricultural labor. In addition to prohibiting the employment of undocumented workers, the IRCA contains penalties for employers who knowingly employ individuals who are not authorized to work in the United States, and provides sanctions to deter the surreptitious entry of undocumented persons and overstay.⁸⁴ The Act is easily circumvented. Data from the Immigration and Naturalization Service (INS)⁸⁵ database showed that over a twenty-month period (October 1996 to May 1998), the INS identified about fifty thousand unauthorized aliens who had used seventy-eight thousand fraudulent documents to obtain employment.⁸⁶ The INS is stretching its resources to cover its responsibilities. Since 1994, it has devoted only two percent of its enforcement resources to worksite enforcement.⁸⁷ The results of the investigations are as might be expected. In fiscal year 1998, for example, the INS completed about 6,500 employer investigations of about three percent of the country's estimated number of employers of undocumented workers.⁸⁸ More than eight out of ten investigations completed during the period we reviewed did not result in a penalty.⁸⁹ The INS instituted criminal proceedings in only two percent of the investigations.⁹⁰ The wide-

persons capable of performing such service or labor cannot be found in this country [except for foreign medical school graduates coming to perform professional medical services].

Id.

83. Immigration Reform and Control Act, Pub. L. No. 99-603, 100 Stat. 3359 (1986).

84. *Baker v. IBP, Inc.*, 357 F.3d 685, 686 (7th Cir. 2004).

85. Lawful and unlawful immigration is largely out of the effective control of the United States Citizen and Immigration Services (USCIS, formerly the INS). As of March 1, 2003, the INS was transferred to the Department of Homeland Security. See Homeland Security Act of 2002, § 441, 116 Stat. 2192 (2003) (codified at 6 U.S.C. § 251 (Supp. 2003)). For convenience, the older usage is employed here. The Department is still overwhelmed with work. See Nina Bernstein, *A Longer Wait for Citizenship and the Ballot*, N.Y. TIMES, June 11, 2004, at A1 (reporting a backlog of one hundred thousand petitions for citizenship in New York City).

86. U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-99-33, ILLEGAL ALIENS: SIGNIFICANT OBSTACLES TO REDUCING UNAUTHORIZED ALIEN EMPLOYMENT EXIST 12 (1999), available at <http://www.gao.gov/archive/1999/gg99033.pdf>.

87. *Id.* at 3.

88. *Id.*

89. *Id.*

90. *Illegal Aliens: Significant Obstacles to Reducing Unauthorized Alien Employment Exist Before the H. Comm. on the Judiciary*, 106th Cong. 5 (1999) (statement of

spread use of fraudulent documentation makes it difficult to prove the required knowledge beyond a reasonable doubt on the part of the offending employers.⁹¹ In fact, the INS was only able to collect one half of the criminal penalties it assessed, principally because of employer bankruptcy.⁹² In short, the government alone through the INS, even supplemented by the FBI, cannot do the job of curtailing undocumented migration, much less meet its increased responsibilities since September 11th.

The IRCA also contained two one-time amnesty provisions that allowed undocumented workers to apply for permanent resident status if they could demonstrate either that they had been present in the United States since 1982, or had at least ninety days experience in qualifying agricultural work.⁹³ The controversy of the amnesties and dissatisfaction with the status quo⁹⁴ has led many to push for a change in immigration policy.

III. POLITICAL PROPOSALS FOR THE IMMIGRATION/ LABOR DILEMMA

In order to mollify the costs associated with undocumented migration, while at the same time harnessing the benefits of foreign-born workers to fill a need, the President and members of Congress have announced policy proposals to reconcile these priorities. Many of these policies deal specifically with how to handle the demand for foreign low-skilled labor without hindering the American workforce.

President Bush called for a temporary guest worker scheme in November 2005.⁹⁵ The program would allow undocumented

Richard M. Stana, Assoc. Dir., Admin. of Justice Issues, Gen. Gov't Div.), *available at* <http://archive.gao.gov/f0902b/162392.pdf>.

91. *Id.*

92. *Id.*

93. William M. Ross, Note, *The Road to H-2A and Beyond: An Analysis of Migrant Worker Legislation in Agribusiness*, 5 DRAKE J. AGRIC. L. 267, 275-76 (2000).

94. For example, enforcement of immigration laws at agricultural work-sites, in particular, has been practically nonexistent. *Baker v. IBP, Inc.*, 357 F.3d 685, 695 (7th Cir. 2004); see discussion *supra* notes 83-89.

95. In January 2004, President Bush had proposed creating a large temporary worker program to legalize present undocumented migrants and accommodate future entrants. Under that proposal, foreign-born persons willing to work in jobs for which United States workers are scarce may be granted a three-year work visa, which could be renewed for an additional three years. After those six years, the workers would have to return home. Undocumented persons currently in the United States would have to pay a registration fee to be eligible. Congress responded with a number of alternatives, but none was implemented. See Press Release, White House Office of the Press Secretary, Fact Sheet: Fair and Secure Immigration Reform (Jan. 7, 2004), <http://www>.

workers with jobs within the United States to obtain temporary legal status, allowing United States employers with unfilled jobs to hire foreign workers. After paying a one-time registration fee, undocumented workers now in the United States would be able to join the program. Those wanting to be part of the program from abroad would not have to pay the fee. The program would last for three years and be renewable, but the workers are expected to return home once the program has ended, since there is no path to citizenship, and there would be economic incentives for the workers to return home. The Bush plan also called for an annual increase in the number of legal immigrants as well as increased enforcement against companies that hire undocumented persons illegally.⁹⁶ Of the ten million undocumented persons in the United States, perhaps forty percent would be eligible for these green cards.⁹⁷ The Bush proposal includes many enforcement provisions, including increased resources toward worksite enforcement, interior repatriation and increasing the number of beds in detention facilities as a mean of avoiding the "catch and release" of undocumented persons.

The President's proposal did not receive wide popular support,⁹⁸ with some viewing it as providing amnesty to those who had violated the law. Competing versions in Congress include the Kennedy-McCain and Cornyn-Kyl proposals. The Kennedy-McCain proposal embraces the "three-legged stool" approach of the 1986 IRCA: enforcement, employer sanctions, and legalization. Under Kennedy-McCain, undocumented persons living in the United States would have to pay a fine, and then could apply

whitehouse.gov/news/releases/2004/01/20040107-1.html. The President announced a new proposal in November 2005. Press Release, White House Office of the Press Secretary, White House Outlines President's Immigration Reform Proposal (Nov. 29, 2005), <http://usinfo.state.gov/gi/Archive/2005/Nov/29-920905.html>.

96. Press Release, White House Office of the Press Secretary, Fact Sheet: Securing America Through Immigration Reform (Nov. 28, 2005), <http://www.whitehouse.gov/news/releases/2005/11/20051128-3.html>.

97. Paul Magnusson, *Mi Casa Es Su Casa? Get Real*, *BUS. WK.*, Jan. 10, 2005, at 39.

98. In a November 2005 Gallup poll, sixty-five percent of the participants disapproved of the President's handling of immigration issues, while twenty-six percent approved. In a Gallup poll from June 2005, sixty-one percent of respondents said that immigration is good for the country with thirty-four percent saying that it is not. Forty-six percent said they would like to see immigration decreased and forty-nine percent said the presence of recent immigrants holds down wages for American workers. See *Poll: Bush Immigration Stance Unpopular*, UNITED PRESS INT'L, Dec. 6, 2005, available at <http://www.sciencedaily.com/upi/?feed=TopNews&article=UPI-1-20051206-12300500-bc-us-gallup-immigration.xml>.

for status under a new temporary non-immigrant category, H-B5, during which the applicant could not change status for six years. After that period, he would be allowed to adjust to a legal permanent residence from within the United States. The Kennedy-McCain proposal also provides an increased number of employment-based visas and exempts immediate relatives of United States citizens from the annual cap on family-based visas.⁹⁹

The Cornyn-Kyl bill does not have a direct path to citizenship and has a greater emphasis on enforcement, both along the border and in the workplace. This proposal would create incentives for foreign-born workers to return home and would increase the cap on employment-based and family-based visas.¹⁰⁰ Most recently, the Senate Judiciary has introduced a bill that incorporates a guest worker program into the impending immigration reforms. While the bill Senator Arlen Specter introduced initially kept several of the enforcement mechanisms articulated in the House bill, the compromise that came out of the Judiciary Committee contains provisions that allow undocumented persons to legalize their status if certain conditions are met.¹⁰¹

These guest worker proposals share a common goal of easing the ability of foreign laborers to work in the United States while at the same time attempting to check the amount of damage this presence does to the American worker by limiting how long such workers are able to remain working in the United States.

There are many critics of these proposals, with some alluding to the failed Bracero program¹⁰² and the IRCA amnesties,¹⁰³ which were followed by increased illegal migration to the United

99. S. 1033 was introduced on May 12, 2005, and has been referred to the Senate Judiciary Committee. Secure America and Orderly Immigration Act, S. 1033, 109th Cong. (2005). *See also* AM. IMMIGRATION LAWYERS ASS'N, SIDE BY SIDE ANALYSIS OF SENATE IMMIGRATION REFORM BILLS (2006), available at <http://www.nclr.org/content/resources/detail/36304/>.

100. *See id.*

101. *See discussion infra* CONCLUSION.

102. The United States has used foreign labor to fill a demand since before World War II. Concerns about labor shortages, primarily in the agricultural sector, were the impetus for the Emergency Farm Labor (Bracero) Program in 1942. This bilateral agreement between the United States and Mexico brought Mexican workers to the United States to perform seasonal agricultural labor, and then return to Mexico. This program included protections, such as payment at the prevailing rate, guaranteed work for at least seventy-five percent of the contract period, protection against discriminatory acts, guaranteed transportation, housing, food, repatriation, and exemption from American military service. However, before admittance to the United States, the War Manpower Commission would certify both the existence of a labor shortage and the pre-

States. This history has led to claims that any guest worker program would not only be seen as an amnesty for those who have migrated illegally, but would encourage further migration of undocumented persons into the United States.

Opponents of guest worker programs may contend that the presence of foreigners willing to do work for low wages always hurts Americans and that wages would increase if only there were no undocumented workers willing to do the jobs for less. This is economically flawed, however, as industries that could not sustain a higher wage would simply move overseas or dissolve entirely.¹⁰⁴

vailing wage rate. See Alice J. Baker, *Agricultural Guestworker Programs in the United States*, 10 TEX. HISP. J.L. & POL'Y 79, 83 (2004).

The Bracero Program continued even after the end of World War II, despite having been nominally instituted in response to wartime labor shortages. In 1947, the program ceased to be a bilateral agreement between governments and became a private matter between the worker and grower. See Maria Elena Bickerton, Note, *Prospects for a Bilateral Immigration Agreement with Mexico: Lessons from the Bracero Program*, 79 TEX. L. REV. 895, 897 (2001). The corresponding reduced oversight was accompanied by worsening foreign contract worker exploitation. See MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 131 (2004). The program was amended in 1949 in an attempt to stem illegal immigration by giving a hiring preference to undocumented workers already in the United States. In 1951, the program returned to government administration, with the provision that the Labor Secretary needed to certify that a shortage of domestic workers existed and that the use of foreign workers would not adversely affect wages and working conditions of similarly situated domestic workers, and that the employer had tried to hire domestic laborers. During its existence, the Bracero was criticized for displacing domestic workers, attracting illegal immigration and for promulgating the exploitation of foreign workers. See Bickerton, *supra*, at 907–08. Consequently, the Bracero Program was allowed to expire in 1964. *Id.* at 897.

103. Within eighteen months of the IRCA becoming effective, 1.3 million undocumented farm workers applied for amnesty under the Act's Special Agricultural Workers Program. See B. LINDSAY LOWELL & ROBERT SURO, HOW MANY UNDOCUMENTED: THE NUMBERS BEHIND THE U.S.-MEXICO MIGRATION TALKS 4 (2002), available at <http://pewhispanic.org/files/reports/6.pdf>.

104. One recent *New York Times* analysis suggested that, by raising farm worker wages forty percent, the farming industry could bring its workers above the poverty line. John M. Broder, *Immigrants and the Economics of Hard Work*, N.Y. TIMES, Apr. 2, 2006, at 3. This analysis is flawed; raising the wage would add a cost to doing business for the farm owners who could likely see their foreign competition as too cheap to compete at reduced profit margins. The result would be no farm and no farm workers (American or otherwise). See also Daniel B. Wood, *A Drought of Farm Labor*, CHRISTIAN SCIENCE MONITOR, Dec. 2, 2005, at 1 (describing how the lack of temporary farm labor has resulted in losses of tens of millions of dollars to California and Arizona farmers: "I lost \$250,000 because of [being short of workers] last year. This year I am concerned I could go under completely. If I miss making my contracts with some

Undocumented migration to the United States will occur as long as there is demand for the kind of labor Americans seem unwilling or unable to do.¹⁰⁵ As long as it is inexpensive and easy to find, employers will use and depend on foreign labor.¹⁰⁶ This is a good thing, both for foreign laborers who desire any job and for Americans who do not want to compete with wage-lowering foreign labor for their jobs.

The guest worker proposals are not the only political options that pundits have suggested to protect American labor from the economic effects of undocumented immigration. The United States could shut its borders, but this presents many moral dilemmas for a nation that celebrates immigrants and diversity. A complete shut down of the borders would also be an

of the big stores, they could look to China, Canada, Mexico and elsewhere, and even if I recover my labor later, it may be too late.") *Id.* at 10. See also Lisa Takeuchi et al., *What it Means for Your Wallet*, TIME, Apr. 10, 2006, at 43 ("By taking the least desirable jobs, says [economist] John Kasarda. . . '[immigrants] have kept some industries competitive that would have gone to Mexico and China.'"). *Id.*

105. The belief that there are jobs that "Americans are unwilling to do" generates much debate. A piece in the *New York Times* recently called this idea a "myth" and produced statistics that show that in the jobs where undocumented persons are highly concentrated (that is, more than 4.9 percent of the overall workforce), they still make up the vast majority. According to these statistics, undocumented persons make up only twenty-four percent of the farming, fishing, and forestry industry; fifteen percent of the cleaning industry; fourteen percent of the construction industry; twelve percent of food preparers; nine percent of the manufacturing industry, and seven percent of transportation workers, while the rest of American workers. Broder, *supra* note 104, at 3. These numbers do not suggest that undocumented persons taking "unwanted" jobs is a myth; rather, the economic reality is that undocumented persons take the jobs in industries in which the supply of American workers does not meet the demand. For the purposes of the analysis here, and also for the analysis that is relevant to the ongoing debate about legalizing undocumented workers, it is of little, if any, economic importance whether Americans make up a majority or minority of workers in an industry; if American workers are not supplying what is demanded, undocumented workers will be used to make up the difference.

106. Some commentators suggest that it is unrealistic to discuss completely eliminating undocumented workers from the American workplace. See Howard Goldfarb, *The Undocumented Worker: Fuller, Holmes, and the Bush Proposal Within Immigration and Labor Law Jurisprudence*, 16 U. FLA. J.L. & PUB. POL'Y 179, 189 (2005).

Some observers have conceded that the United States will always have some level of undocumented workers so long as neighboring countries allow many of their citizens to live in poverty. It is also widely thought that tracking down all current undocumented workers and deporting them to their respective homeland would prove too costly and arduous, and is thus not a realistic solution. (citations omitted).

Id.

obstacle for businesses in the service and agricultural industries that benefit from the use of undocumented, foreign-born labor, and therefore is not a very practical proposal.¹⁰⁷

A long-term solution might involve restructuring United States foreign aid to promoting sustainable agriculture, development, and foreign assistance, but that would be costly, both politically and financially, and the results would not be seen for at least a few generations. Moreover, it is not undeveloped countries that are a large source of the influx of foreign-born, but rather, developing countries are the largest source of emigration.¹⁰⁸ Therefore, thoughtful foreign assistance will be part of a comprehensive approach, but would not be effective in addressing the issues articulated here.

Stronger and/or more penalties imposed on employers may curb future employment of undocumented persons. However, this would impose a heavy burden on employers to determine prospective workers' immigration status and may be too costly for employers. In addition, it is probably unrealistic to expect employers, competing in the global marketplace, to adhere to such labor regulations.¹⁰⁹ Further, such actions would be impractical in the context of often consensual (even if illegal) employer and migrant relationships.

Another drastic option is that with greater funding and resources, the INS/USCIS could conduct raids on undocumented workers, fine them, and send them back to their countries of origin. This approach would be difficult, given the complexity of determining who is entitled to a particular immigration status, time consuming, ineffective, and unpopular both with industry representatives and with voters in historically immigrant-friendly areas.¹¹⁰

107. *Id.*

108. Massey, *supra* note 79, at 3–4.

109. Don Villarejo, *Are Migration and Free Trade Appropriate Forms of Economic Development? The Case of Mexico and U.S. Agriculture*, 9 U.C. DAVIS J. INT'L L. & POL'Y 175, 189–95 (2003) (describing how employers evade “knowingly” employing undocumented workers by not scrutinizing their employees’ fraudulent identification documents).

110. In 1999, the INS implemented Operation Vanguard, in which meat-packing plants in all of Nebraska and three counties in Iowa were the site of a systematic effort to enforce employer sanctions, that section of the 1986 Immigration Reform and Control Act that prohibits employers from hiring undocumented workers. Using Social Security records, the operation compared employment records with the national database. In all, the INS sifted out 4762 names out of 24,310 workers for interviews regarding their questionable records. Of the 1000 who showed up to interview, only 34 were deported for lacking the correct legal papers. The INS declared success, estimating that the

A blanket amnesty allowing all undocumented persons in the United States to gain citizenship would be the most effective means of moving people from the undocumented to the documented category. Many critics decry such a concept as rewarding illegal behavior.¹¹¹ An amnesty also raises fairness issues, as there are many people who have patiently waited in line while pursuing available legal channels, who may ultimately be denied admittance to the United States.

Some commentators suggest that the United States should make more visas available for those who want to work on a temporary or permanent basis. The current limit of permanent resident visas available to Mexicans is twenty thousand.¹¹² Given that Mexico is so geographically and historically close to the United States, and so economically integrated with the American economy, this limit has yielded long waiting times, even for those who are legally qualified, practically guaranteeing undocumented migration.

One specific legislative proposal that has recently gained inertia by passing the House of Representatives is Judiciary Committee Chairman Sensenbrenner's H.R. 4437¹¹³ Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005.¹¹⁴ Considered a victory for proponents of stricter enforcement, this bill criminalizes undocumented immigration status, limits the federal judiciary's ability to review immigration decisions and turns many minor crimes into aggravated felonies,

other 3000 or so who failed to appear left their jobs out of fear. Following the operation, industry representatives set up meetings with the INS to discuss the labor shortages caused by Operation Vanguard. One observer from United Food and Commercial Workers (UFCW) said of the operation, "The disruption from Operation Vanguard is certainly fuel for the political fire supporting guestworker [sic]. We know the employers really want this. It's a very serious and immediate threat." David Bacon, *INS Declares War on Labor*, THE NATION, Oct. 25, 1999, at 19, 23.

111. Peter Prengaman, *Senate Majority Leader Against Amnesty Program for Illegals*, NCTIMES (San Diego), Feb. 22, 2006, http://www.nctimes.com/articles/2006/02/22/news/state/13_33_352_21_06.txt (quoting Senate Majority Leader Bill Frist as stating, "I oppose amnesty. Immigrants are important to our history, our economy, and are greatly valued by our country, but at the same time, our focus will be on the rule of law.").

112. One commentator suggests increasing the number of permanent resident visas available to Mexican residents to one hundred thousand per year. Massey, *supra* note 79, at 11.

113. The Senate will next consider its own version of the bill in March 2006. Senate Judiciary Chairman Arlen Specter's draft version includes a provision for a guest worker program.

114. H.R. 4437 was passed by the House of Representatives on December 16, 2005. H.R. 4437 109th Cong. (2005).

which, for undocumented persons, triggers the worst punishments, including removal. Bill provisions would create a new "dangerous alien" detention ground, permitting indefinite detention of aliens who cannot be removed. Another controversial amendment gives local authorities the ability to apprehend and detain illegal migrants. Including a provision to eliminate the visa lottery, this bill marks the first time since 1924 that either chamber has voted to reduce the amount of legal immigration.¹¹⁵ This bill would also include increased penalties on employers for hiring undocumented workers and would require employers to electronically verify employees' work eligibility. The bill did not contain a guest worker provision.¹¹⁶

The Sensenbrenner bill was not welcomed by immigration advocates, who view the legislation as draconian, unnecessary, and detrimentally harsh on both good faith would-be legal residents and their advocates. Under the bill's provisions to criminalize individuals and organizations assisting undocumented persons, social workers, counselors, and lawyers supporting or representing undocumented persons, for example, under the Violence Against Women Act of 1994 (VAWA),¹¹⁷ would be prosecutable as criminals.¹¹⁸

The Senate bills, which will be discussed in the Conclusion, have taken a very different approach to the issue by incorporating guest worker programs in its immigration reform proposals. Additionally, the Cornyn-Kyl and Specter Senate proposals do not contain the strict enforcement and punitive provisions of the Sensenbrenner bill.

Any policy must address the ethical issues involving the nearly ten million undocumented persons currently in the

115. The visa diversity lottery provides fifty thousand visas to qualified persons. The purpose of the lottery, created in 1990, is to ensure that new immigrants to the United States reflect the broad spectrum of nationalities interested in immigrating to the United States.

116. H.R. 4437.

117. Under Violence Against Women Act (VAWA) of 1994, Pub. L. 103-322, tit. IV, 108 Stat. 1902 (1994), an individual can self-petition for legal status in the United States. This ability to self-petition enables a person who, because of the existence of an abusive relationship with the would-be petitioner (usually a spouse or an ex-spouse, who is a legal permanent resident or a United States citizen), to not have to depend on that abusive relationship to gain legal status. Often, while going through the steps of filing and waiting for a VAWA petition to be decided, the petitioner is out of status.

118. Several large protests have taken place around the country since the Sensenbrenner bill was passed. In April 2006, hundreds of thousands of people participated in protests against the tough punitive provisions of the Sensenbrenner bill. See Dan Baltz & Darryl Fears, *Pro-Immigration Rallies are Held Across Country*, WASH. POST, Apr. 11, 2006, at A1.

United States. While these persons are in the United States illegally, often deciding to come to improve their and their families' welfare by taking jobs that Americans are not willing to fill, they have committed a civil infraction, not a criminal act. Amnesty may not be fair, but neither is summary removal. This is further complicated when such undocumented persons have had children in the United States, who would face abandonment (or an involuntary relinquishment of their American livelihood) if the parent were removed.

There are many considerations behind these proposals, which are difficult to evaluate given the relatively undetermined nature of the undocumented population. One way of balancing policy objectives would call for limiting the jobs available for short-term, foreign-born migrants to just the jobs that Americans and legal residents are not willing to do at economically sustainable wages. As will be discussed in the following section, the RICO cause of action against those who hire undocumented workers strives for this balance.¹¹⁹

IV. USING RICO TO PROTECT AMERICAN WORKERS

This Note will argue that a judicial tool, the RICO statute, is an available and effective mechanism that can achieve some of the aims of political policy proposals regarding undocumented workers. This section will describe how the statute works generally and then apply it to the undocumented worker context and the underlying circuit split, recently taken up by the Supreme Court. This Note will then analyze the implications of these federal court decisions and the use of RICO in this context by a broad base of workers, competitors, and local government.

A. *RICO Background*

In 1970, Congress enacted RICO to deal with "enterprise criminality."¹²⁰ To plead a RICO claim, a plaintiff must allege: (1) conduct; (2) of an enterprise; (3) through a pattern; (4) of

119. The economic analysis of the RICO cause of action is different when it is the government acting as the plaintiff. In that case, the injury is the cost to the taxpayers of supporting undocumented persons, whereas in suits by private entities, the damage is the loss of wages.

120. *United States v. Cauble*, 706 F.2d 1322, 1330 (5th Cir. 1983) ("enterprise criminality" consists of "all types of organized criminal behavior [ranging] from simple political corruption to sophisticated white-collar schemes to traditional Mafia-type endeavors.") (citations omitted).

racketeering activity.¹²¹ RICO makes it unlawful to conduct or conspire to conduct an enterprise related to interstate commerce during which racketeering activities are agreed to or committed. All criminal and civil RICO cases require allegations and proof of a RICO enterprise.¹²² The federal courts' interpretation of the RICO enterprise requirement, therefore, has enormous significance for RICO's usefulness to both private and government plaintiffs.

Congress used in RICO "a generality and adaptability [of language] comparable to that found to be desirable in constitutional provisions."¹²³ Congress "drafted RICO broadly enough to encompass a wide range of criminal activity, taking many different forms and likely to attract a broad array of perpetrators operating in many different ways."¹²⁴

The Supreme Court has recognized that RICO applies to a broad spectrum of criminal enterprises.¹²⁵ "The occasion for Congress' action was the perceived need to combat organized crime. But Congress[,] for cogent reasons[,] chose to enact a more general statute"¹²⁶ RICO creates "a private enforcement mechanism that . . . deter[s] violators and deprive[s] them of the fruits of their illegal actions, and . . . provide[s] ample compensation to the victims of [RICO] violations."¹²⁷ Congress wanted private citizens to use the law to obtain the relief that the

121. *Lum v. Bank of Am.*, 361 F.3d 217, 223 (3d Cir. 2004). *See also* G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237 n.150 (1982).

122. *See* 18 U.S.C. § 1962 (2006); *Williams v. Mohawk Indus.*, 411 F.3d 1252, 1256 (2005) ("These requirements apply whether the RICO claim is civil or criminal in nature.").

123. *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 360 (1933).

124. *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 248–49 (1989).

125. Defendants in RICO litigation often question whether RICO applies beyond "organized crime" in the Mafia sense of the word, as if "white-collar crime" were not sometimes "organized." To be sure, a "purpose of RICO" was to combat "organized crime," but that specific purpose was not its "only" purpose. "[A]lthough the legislative history of RICO vividly demonstrates that it was primarily enacted to combat organized crime, nothing in that history, or in the language of the statute itself, expressly limits RICO's use to members of organized crime." *Owl Constr. Co. v. Ronald Adams Contractor, Inc.*, 727 F.2d 540, 542 (5th Cir. 1984) (quoting *United States v. Uni Oil, Inc.*, 646 F.2d 946, 953 (5th Cir. 1981)). "[C]ommentators have persuasively and exhaustively explained why the RICO statute [does] not require [such a showing]." *Id.* (citations omitted). Accordingly, RICO fits well into the typical pattern of federal legislation aimed at a particular problem, but drafted in all-purpose language.

126. *Nat'l Org. of Women, Inc. v. Scheidler*, 510 U.S. 249, 260 (1994).

127. *Blue Shield v. McCready*, 457 U.S. 465, 472 (1982) (citing *Pfizer, Inc. v. India*, 434 U.S. 308, 313–14 (1978)); *Rotella v. Wood*, 528 U.S. 549, 557–58 (2000) ("[P]rivate attorneys general' dedicated to eliminating racke-

Justice Department and the INS, given their limited resources, cannot be expected to provide.¹²⁸ Moreover, like the anti-trust statutes, "RICO is to be read broadly."¹²⁹ Indeed, RICO makes its principle of liberal construction a matter of express statutory language,¹³⁰ rendering it applicable not only in the immigration context, but in an array of labor disputes.

RICO has been used in various types of labor-management disputes,¹³¹ including strike and union litigation. In 1996, Congress added immigration predicates to RICO, including transporting or harboring undocumented persons, aiding such persons to illegally enter the United States, or fraudulently using visas, permits, and other immigration documents. These predicates were added to aid law enforcement by energizing the enforcement of provisions of the immigration statutes by the suit of private attorneys general.

The federal courts have heard cases trying to use these predicates in actions against employers that use undocumented foreign labor to the detriment of their legal workforce. The Second, Sixth, Ninth, and Eleventh Circuits have handed down decisions that follow the law as written by Congress, allowing legal workers to sue for wages lost when employers engage in certain systematic hiring of undocumented workers. The Seventh Circuit's decision in *Baker v. IBP*, which was denied review by the Supreme Court, threatens this movement towards holding employers accountable for the use of undocumented foreign labor through its decision on enterprise liability and "exclusive right" to sue.¹³² A subsequent Eleventh Circuit decision in *Williams v. Mohawk* followed the earlier cases and conflicts with the Seventh Circuit's enterprise holding in rejecting Mohawk's argument that a corporation and its agents are not sufficiently distinct

teering activity"; "The provision for treble damages is accordingly justified by the expected benefit of suppressing racketeering.").

128. See *Agency Holding Corp. v. Malley-Duff & Assoc.*, 483 U.S. 143, 151 (1987) ("Both [RICO and the anti-trust statutes] bring to bear the pressure of 'private attorneys general' on a serious national problem for which public prosecutorial resources are deemed inadequate . . .").

129. *Sedima, S.P.R.L. v. Imrex, Co.*, 473 U.S. 479, 497 (1985). See also *Am. Society of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 568-69 (1982).

130. Racketeer Influenced Corrupt Organizations Act, Pub. L. No. 91-452, 84 Stat. 941 (1970) (codified as amended at 18 U.S.C. §§ 1961-68 (2000)).

131. One scholar suggests that Congress remove the ability of private parties to bring RICO suits in labor-management disputes because it is disruptive of the labor-management relationship. Raymond P. Green, *The Application of RICO to Labor-Management and Employment Disputes*, 7 ST. THOMAS L. REV. 309 (1995).

132. *Baker v. IBP, Inc.*, 357 F.3d 685 (7th Cir. 2004).

to form an enterprise and that a corporation's "routine business conduct" cannot constitute participation in the enterprise; the Supreme Court has granted *certiorari* to review these questions in *Mohawk*.¹³³ The analysis that follows will explain why the Seventh Circuit was incorrect in its holding and how it threatens the development of this use of the law to protect workers (both documented and undocumented).

B. *The Circuit Split*

In 2004, a meat-packing company, IBP, Inc. (IBP), used third party organizations to help it find illegal aliens to work in its plants.¹³⁴ Former employees brought a class action lawsuit on behalf of all persons legally authorized to be employed in the United States and hired as hourly wage earners at that particular facility in the past several years. The plaintiffs were employed lawfully as hourly-paid employees of IBP's Joslin, Illinois, meat-packing facility. The workers were unionized, and their wages were set by a collective bargaining agreement between IBP and the union. The collective bargaining agreement was silent as to the question of employing undocumented workers.¹³⁵ This putative class action was brought under RICO for injury to their property¹³⁶ because their wage rates were depressed as a result of IBP's scheme for the employment of an unlawful workforce. The plaintiffs argued that IBP had been engaged in a policy of knowingly employing undocumented, illegal immigrants for unskilled positions in an effort to reduce labor costs by driving down employee wages.

The essence of the complaint was that the plaintiffs' wages would have been higher had IBP not engaged in a scheme to employ unauthorized employees; that is, had IBP not illegally expanded the labor market to include unauthorized workers who were willing to work at depressed wages and benefits, labor supply would have been lower and equilibrium wages higher.¹³⁷

133. *Williams v. Mohawk Indus.*, 411 F.3d 1252 (11th Cir. 2005), *cert. granted*, 126 S.Ct. 830 (2005).

134. This is not IBP's first run-in with the law with regards to its hiring of undocumented workers. IBP's meat-packing plants were the site of the INS's Operation Vanguard, an attempt by the INS to crack down on the hiring of illegal aliens. *See supra* note 108.

135. *Baker*, 357 F.3d at 689 ("[T]o hire illegal aliens is not a . . . subject of collective bargaining . . .").

136. "Lost wages" are "property" under RICO. *Jund v. Town of Hempstead*, 941 F.2d 1271, 1286 (2d Cir. 1991).

137. *See supra* Part II for data on the effect of the employment of illegal immigrants.

IBP's "illegal immigrant hiring scheme" violated RICO, which makes certain violations of Section 274 of the INA predicate offenses.¹³⁸ The plaintiffs alleged that: (1) the IBP scheme violated Section 274 of the INA and RICO,¹³⁹ and (2) they were proximately injured by receiving wages that were depressed, that is, below what they would have been in a lawful labor market. The plaintiffs "allege[d] that IBP . . . expanded the pool of available labor and thus depressed the price that labor can command. When supply rises and demand is constant, price falls."¹⁴⁰ "[W]ages . . . [were] depressed by about \$4 per hour"¹⁴¹ The Seventh Circuit decided that this argument failed.

The Seventh Circuit's decision in *Baker* is in conflict with "enterprise" decisions in other circuits in several other litigation scenarios, two of which will be discussed here: (1) illegal immigration and (2) organized crime. Because this is an important question of statutory interpretation at the heart of the employer-employee relationship in the context of undocumented migration, this split in the circuits has important implications for the future of immigration policy.

1. Illegal Immigration Litigation

The Seventh Circuit's decision clashes with the Second Circuit in *Commercial Cleaning Services, LLC v. Colin Service Systems, Inc.*¹⁴² In *Commercial*, a group of office cleaning companies sued competitor Colin under RICO for commercial injury caused by

138. Section 274 of the INA is codified at 8 U.S.C. § 1324 (2006). In 1996, Congress enacted § 203 of the Illegal Immigration Reform and Immigrant Responsibility Act, 104 Pub. L. No. 208, 110 Stat. 3009 (1996) (codified at 8 U.S.C. § 1324(a)(3)(A)) (2006), which amended § 274 of the INA to prohibit the employment of illegal aliens. Later that year, Congress enacted the Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, § 433, 110 Stat. 1274 (1996), which, *inter alia*, added the amended § 274 to RICO. These predicates were added "to help Federal law enforcement officials" because groups "in this country, with ties to others abroad, . . . [had] developed to prey upon illegal immigrants who want to come to the United States." 141 CONG. REC. H1588 (daily ed. Feb. 10, 1995) (statement of Rep. McCollum). Concern was also expressed over the high costs imposed by illegal immigration on the State and federal welfare and corrections systems. For remarks of the various Members of Congress on this issue, see *id.*

139. The Seventh Circuit expressed skepticism about the "accuracy" of the allegations in the Complaint. *Baker*, 357 F.3d at 687 (commenting that if the allegations were "true, managers at IBP . . . [had] committed hundreds of felonies," and wondered, if they were true, why the "United States . . . [had] not commenced a criminal prosecution."). *Id.*

140. *Baker*, 357 F.3d at 689-90.

141. *Id.* at 687.

142. 271 F.3d 374 (2d Cir. 2001).

Colin's alleged illegal immigrant hiring scheme. The plaintiffs alleged that this scheme allowed the defendant company to reduce costs and underbid the plaintiffs on new contracts. The Second Circuit found no reason to object to an association-in-fact enterprise described, in relevant part, as:

Colin is part of an enterprise composed of entities associated-in-fact that includes employment placement services [. . .] and "various immigrant networks that assist fellow illegal immigrants in obtaining employment, housing and illegal work permits." [. . .] It alleges that Colin's participation in the affairs of the enterprise through the illegal immigrant hiring scheme violates 8 U.S.C. § 1324(a), which prohibits hiring certain undocumented aliens, and which is a RICO predicate offense if committed for financial gain.¹⁴³

The enterprise in *Baker* is indistinguishable from that one alleged in *Commercial Cleaning*, i.e., the defendant and others that assist it in recruiting illegal workers.¹⁴⁴

The Second Circuit found only one defect in the RICO claim, a failure to plead the required state of mind in the commission of the predicate offenses.¹⁴⁵ Yet, as in *Baker*, defendant Colin, presumably

want[ed] to pay lower wages; the recruiters [that is, the employment placement services] want[ed] to be paid more for services rendered (though . . . [Colin] would [have] lik[ed] to pay them less); the . . . [various immigrant networks that assisted fellow illegal immigrants] want[ed] to assist members of . . . [their] ethnic group[s]. These . . . [were] divergent goals.¹⁴⁶

143. *Id.*

144. The *Commercial Cleaning Service, LLC* enterprise contained other entities, but they were, in the words of *Baker*, "agents and employees" in the illegal scheme that composed the enterprise, which it believed came "perilously close" to violating the holding of *Bucklew v. Hawkins, Ash, Baptie & Co.*, 329 F.3d 923, 934 (7th Cir. 2003) (citing *Fitzgerald v. Chrysler Corp.*, 116 F.3d 225, 226–28 (7th Cir. 1997) that "a large, reputable manufacturer . . . plus its dealers and other agents (or any subset of the members of the corporate family) do not constitute an enterprise . . ."). The differences, therefore, are not material.

145. *Commercial Cleaning Serv.*, 271 F.3d at 387. The court noted that the complaint was deficient in that it failed to plead "that Colin had actual knowledge that the illegal aliens it hired were brought into the county in violation of the [immigration] statute."

146. *Baker*, 357 F.3d at 691.

If *Baker's* analysis is required by RICO, and it is not, *Commercial Cleaning* was wrongly decided, and it is not.¹⁴⁷

The *Baker* decision is further called into question in light of the Eleventh Circuit's decision in *Williams v. Mohawk Industries*.¹⁴⁸ In *Mohawk*,¹⁴⁹ employees sued their employer for allegedly violating the immigration laws in a scheme to hire and harbor illegal workers to a Georgia carpet mill in order to suppress the wages of legal workers. The complaint alleges, as in *Baker*, that Mohawk committed this conduct as a member of an "association-in-fact" enterprise consisting of Mohawk and third-party recruiting firms that provide Mohawk with illegal, undocumented workers.

Under 18 U.S.C. § 1962(c), the plaintiff, or prosecutor, in criminal cases, must demonstrate that the defendant participated in an enterprise through a pattern of racketeering activity. Both the language of the statute and the Supreme Court have required allegations and proof of two distinct entities: (1) the RICO person and (2) the enterprise.¹⁵⁰ In *Mohawk*, the plaintiffs named Mohawk as the defendant person and alleged that Mohawk had participated in an association-in-fact enterprise consisting of Mohawk and third-party recruiters who supplied the defendant company with illegal workers. Mohawk in its defense argued that there is an agency relationship between a corporation named as the RICO person and the other members of the enterprise, which defeats the statute's distinctness requirement. Further, Mohawk argued that its alleged participation in such an enterprise amounted to nothing more than its own "ordinary business activity," rather than participation in a separate enterprise.

147. For that matter, *Baker's* analysis does not reflect general organizational theory. The *Baker* opinion mistakenly confuses the goals of *members* of an organization (personal goals) with the goals of the *organization* (collective goals). EDWARD GROSS & AMITAI ETZOINI, *ORGANIZATIONS IN SOCIETY* 8-13 (1985). If *Baker's* analysis were correct, "divergent [personal] goals" among members of a putative organization would preclude the existence of *any* organizations in society (under RICO or otherwise), since they could not have any common or collective goals.

148. 411 F.3d 1252 (11th Cir. 2005). The Supreme Court granted Mohawk's petition for *certiorari* on December 12, 2005. *Williams v. Mohawk Indus.*, 126 S.Ct. 830 (2005).

149. Although in earlier cases, such as *Tyson Foods, Inc. v. Gutzman*, 116 S.W.2d 233 (Fla. Dist. Ct. App. 2003), and *Commercial Cleaning Serv.*, the plaintiffs initially lost motions to dismiss and obtained reversals on appeal, the plaintiffs in *Mohawk* are the first to have survived a preliminary motion to dismiss at the trial court level, affirmed in the Eleventh Circuit.

150. See *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161-62 (2001).

It is well established that an association-in-fact enterprise may consist entirely of either a group of corporations and other legal entities or a group of corporations and individuals. Mohawk, seeking a *Baker*-like result, argued that its relationship with recruiting firms was nothing more than "ordinary business activity." However, Mohawk's argument and attempt to limit the statute's provisions is inconsistent with the language of the statute, as neither the terms nor the concept of agency appears in the relevant RICO provisions and, more meaningfully, is directly at odds with the statute's basic purposes. These imperatives led the Court in *Cedric Kushner* to reject a similar attempt to limit section 1962(c) based on the very same arguments concerning the inability of corporations to act through their agents.¹⁵¹

2. Organized Crime

The Seventh Circuit's *Baker* decision also conflicts with RICO litigation involving organized crime. RICO's "legislative history clearly demonstrates that . . . [it] was intended to provide new weapons of unprecedented scope for an assault upon organized crime . . ."¹⁵² Any construction of RICO that jeopardizes its core purpose cannot be correct. Yet, if the Seventh Circuit's *Baker* decision, in holding that an internal dispute signifies the end of the necessary enterprise, is *uniformly* applied across association-in-fact enterprises,¹⁵³ then organized crime prosecutions are in serious jeopardy. For example, the Second Circuit in *United States v. Orena*¹⁵⁴ faced a RICO prosecution in the context of an internal war between opposing factions of the Colombo Family of the Cosa Nostra.

Orena challenged his RICO convictions, arguing that the enterprise allegation was "schizophrenic."¹⁵⁵ The indictment alleged: "The members and associates of the Colombo Organized Crime Family of La Cosa Nostra ('Colombo family') constituted an 'enterprise' as that term is described in Title 18, United States Code, Sections 1961 (4) . . . , that is, a group of individuals

151. *Id.* at 165–66.

152. *Russello v. United States*, 464 U.S. 16, 26 (1983).

153. RICO's crucial concepts *are* to be uniformly applied. *See, e.g.,* *Reves v. Ernst & Young*, 507 U.S. 170, 177–86 (1993) (reading "conduct" identically in its verb and noun form in RICO); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 239 (1987) ("a 'pattern' for civil purposes is a 'pattern' for criminal purposes" under RICO) (citation omitted). *Cf. Northern Sec. Co. v. United States*, 193 U.S. 197, 401 (1904) (anti-trust) (Holmes, J., dissenting) ("The words cannot be read one way in a suit which is to end in fine and imprisonment and another way in one which seeks an injunction.").

154. 32 F.3d 704 (2d Cir. 1994).

155. *Id.* at 709.

associated in fact.”¹⁵⁶ The Circuit rejected Orena’s arguments, stating: “The existence of an internal dispute does not signal the end of the enterprise”¹⁵⁷

The conflict between *Baker* and organized crime prosecutions is not limited to association-in-fact enterprises that reflect internal disputes. The Seventh Circuit also believed that the person IBP was not “distinct” from the enterprise IBP and its recruiters. Under the person-enterprise rule, a distinction must exist between the “person” and the “enterprise.” If no distinction can be drawn, the two concepts collapse, and the pleading is improper for a failure to plead distinct entities. The Seventh Circuit held that no distinctness is present between a corporation and its subsidiaries and employees.¹⁵⁸ Thus, the *Baker* court thought that the enterprise alleged here was such a family of corporations under common ownership.¹⁵⁹ But in any conspiracy, its members are bound by the common purpose of the conspiracy. This makes the conspirators “partners” of each other.¹⁶⁰ If the Seventh Circuit’s analysis were correct, then no association-in-fact enterprise could ever exist, because they would all be swallowed up by the “distinctness” requirement. Hence, *Baker* is in conflict with the legion of organized crime prosecutions from other circuits in which the association-in-fact enterprise was an organized crime family, having divergent, personal goals, though held together as a collectivity by a common purpose.

The Eleventh Circuit’s reading of the RICO statute in *Mohawk* allows it to observe just the kind of enterprise that the Seventh Circuit rejected in *Baker*. If the Supreme Court were to reverse *Mohawk*, then the *Baker* line of argument would stand and would have detrimental consequences for the prosecution of crimes and civil violations.

156. *Id.*

157. *Id.* at 710 (citing *United States v. Coonan*, 938 F.2d 1553, 1560–61 (2d Cir. 1991) (finding that violent infighting in “Westies,” an Irish gang, did not negate existence of RICO enterprise)).

158. *See, e.g.,* *Bachman v. Bear Stearns & Co.*, 178 F.3d 930, 932 (7th Cir. 1999) (“A firm and its employees, or a parent and its subsidiaries, are not an enterprise separate from the firm itself.”).

159. *Baker v. IBP, Inc.*, 357 F.3d 685, 691 (7th Cir. 2004) (“a large, reputable manufacturer . . . plus its dealers [, independently owned or otherwise,] and other agents (or any subset of the members of the corporate family) do not constitute an enterprise”) (citing *Bucklew v. Hawkins, Ash, Baptie & Co.*, 329 F.3d 923, 934 (7th Cir. 2003)).

160. *Salinas v. United States*, 522 U.S. 52, 63–64 (1997) (stating that a RICO conspiracy is to be evaluated under traditional standards: “The partners in the criminal plan must agree to pursue the same criminal objective and may divide up the work, yet each is responsible for the acts of each other.”) (citing *Pinkerton v. United States*, 328 U.S. 640, 646 (1946)).

The *Baker* decision is in conflict with other circuits on another question. The Seventh Circuit's holding that employees cannot bind together to sue their employer for damages to their "property" (albeit measured by lost wages) under a statute that is (1) not part of the labor laws, and (2) does not raise a matter under the collective bargaining agreement, is in conflict with the decision of the Sixth Circuit in *Trollinger v. Tyson Foods, Inc.*¹⁶¹ In *Trollinger*, as in *Baker*, the plaintiffs brought a "wage-related dispute between [themselves and] Tyson Foods, Inc."¹⁶² As in *Baker*, they alleged "that Tyson violated RICO by engaging in a scheme with several employment agencies to depress the wages of Tyson's hourly employees by hiring illegal immigrants."¹⁶³ Relying upon *Baker*, Tyson urged the Sixth Circuit to concur in the Seventh Circuit's analysis and dismiss the case because the National Labor Relations Act (NLRA) gives the union, not the individual employees, the exclusive right to prosecute it.¹⁶⁴

The Sixth Circuit rejected "*Baker's* suggestion" of an "exclusive" right to sue in the union as "[in]correct."¹⁶⁵ The Sixth Circuit's holding that the workers could sue over wage claims was evident from a series of cases interpreting both the Act and the subsequently enacted Section 301 of the Labor Management Relations Act (29 U.S.C. § 185). These cases indicate that Congress *did not* intend to preclude all worker lawsuits arising from the mandatory bargaining issues.¹⁶⁶ Hence, the union was not the "exclusive" party to bring a claim for relief arising from other statutory rights not contemplated by Congress in enacting the Act. The case for wage depression was an example of an area *not* foreclosed by the Act.¹⁶⁷ Thus, the Seventh Circuit's claim in

161. 370 F.3d 602 (6th Cir. 2004).

162. *Id.* at 605.

163. *Id.*

164. *Id.* at 620.

165. *Id.* at 621.

166. See *Office & Prof'l Employees Int'l Union, Local 2 v. FIDC*, 962 F.2d 63, 66 (D.C. Cir. 1992) (R. Ginsburg, J.) ("[W]hen a claim derives from a collective bargaining agreement—an arrangement negotiated by a union to which it is a signatory—the labor organization is *an* appropriate (although not *the only* appropriate party) to vindicate employees' rights.") (citation omitted). See also *Trollinger*, 370 F.3d at 621.

167. The principle involved is basic: one statutory right is not to be denigrated by another unless Congress expressly or implicitly so intends. See, e.g., *FCC v. Next Wave Personal Comm'n, Inc.*, 537 U.S. 293, 304 (2003) ("When two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.").

Baker, that “[i]ndividual workers may step into the union’s shoes only if it has violated its duty of fair representation,” is wrong.¹⁶⁸

The Court’s interpretation of the RICO statute in these cases will have tremendous public policy consequences, as will be considered below.

C. *The Legal Impact of the Seventh Circuit’s Decision*

If the Eleventh Circuit’s *Mohawk* decision is reversed and the *Baker* decision applied across the board, then many criminal RICO prosecutions will be vulnerable to motions to dismiss. Most RICO prosecutions allege association-in-fact enterprises, and any competent defense counsel will cite *Baker*’s “divergent goals” holding. District judges following *Mohawk* and *Baker* may have no alternative but to dismiss indictments. Therefore, not only would the *Baker* ruling undermine criminal prosecutions, it would also take from employees an ability to sanction employers who undermine the wages of legal workers by employing undocumented workers en masse.

Mohawk’s argument undermines the use of RICO as a prosecutorial tool by converting proof of the elements of a RICO violation into an absolute defense to prosecution. Establishing the enterprise requires proof of “association in fact” and the defendant’s employment by or association with the enterprise.¹⁶⁹ The facts necessary to prove the existence of an “association-in-fact” enterprise, which requires (1) that the members of the enterprise “associate[] together for a common purpose of engaging in a course of conduct”,¹⁷⁰ and (2) the defendant’s association with that enterprise will also demonstrate agency. Therefore, the more clearly established the structure of the association-in-fact enterprise, the more certain that the existence of agency relationships will collapse every defendant into that enterprise. Accordingly, proof of the statute’s required elements of association and employment will render the defendant indistinct from the enterprise and will doom any conviction as a matter of law. This would render the statute only effective in prosecution of enterprise members who are so tenuously linked as to constitute mere association, and not agency.

168. *Trollinger*, 370 F.3d at 621 (“The historical context in which these statutes were enacted . . . suggests that when Congress made unions the exclusive representative of employees for purposes of collective bargaining, it did not mean to establish unions as the exclusive representative of employees for purposes of all wage-related litigation.”).

169. See 18 U.S.C. §§ 1961(4), 1962(c) (2006).

170. *United States v. Turkette*, 452 U.S. 576, 583 (1981).

The split also has significant meaning for the effective administration of the federal immigration statutes and of RICO. Allowing these conflicts to continue on these key issues of "exclusive" representation and "common goals" in association-in-fact enterprises is not fair to workers seeking fair treatment in different circuits, and it undermines RICO's effectiveness, criminally and civilly, for example, as a guarantor of general integrity¹⁷¹ of the country's national marketplace. The circuit split poses a hurdle to American labor insofar as the Seventh Circuit's decision restricts one of its tools to insure fair wages. Indeed, RICO is the *only* statute that permits private citizens to sue to enforce the immigration statutes; it steps in to provide a private action where justice is not met.

If the immigration statutes are to be undermined, or RICO is to be significantly limited, as attempted by the Seventh Circuit in *Baker* and by *Mohawk*, that reform ought to come, if at all, from Congress itself.¹⁷² Congress has deliberately enlarged RICO's scope to bring the private enforcement mechanism to bear on the general issue of undocumented persons in the work place. That ought to end the matter judicially, absent constitutional considerations not implicated here.¹⁷³

Through *Mohawk* the Court can affirm the RICO tool in its use against those corporations and other entities that exploit its laborers to the detriment of both American workers and their undocumented counterparts.

D. RICO: A Tool for a Wide Plaintiff Base

In *Trollinger*, *Baker*, and *Mohawk*, the RICO plaintiffs were legal employees who had been injured by the use of undocumented workers in a way that resulted in the plaintiffs either los-

171. "There are three possible kinds of force which a firm can resort to: violence (or threat of it), deception, or market power." CARL KAYSEN & DONALD F. TURNER, *ANTITRUST POLICY* 17 (1959). Antitrust law focuses on the third, "scheme to defraud" focuses on the second, and RICO focuses on the first and second. Together, they seek a marketplace characterized by integrity, fiscal and physical. Indeed, the litany of major company names in the news for illegal conduct is dizzying. See, e.g., *Pigs, Pay, and Power*, *THE ECONOMIST*, June 28, 2003, at 7 (discussing Enron, WorldCom, Tyco, Adelphia, HealthSouth, Imclone, Global Crossing, etc.) ("[T]he basic task is to insure that existing laws are vigorously enforced and that any loopholes in them are closed . . .").

172. *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 249 (1989) ("[R]ewriting [RICO] . . . it is a job for Congress, if it is so inclined, and not for this Court.").

173. *Turkette*, 452 U.S. at 587 ("There is no argument that Congress acted beyond its power That being the case, the courts are without authority to restrict the application of [RICO].").

ing their jobs or having their wages lowered. The *Commercial* plaintiffs were not employees of the defendant company, but rather employees of a competitor company whose RICO claim was based on their wages being undercut by the illegally hired undocumented workers. This RICO mechanism has also been used by undocumented workers to enforce existing labor laws that protect them from exploitation, as seen in *Zavala v. Wal-Mart Stores, Inc.*¹⁷⁴

In *Zavala*, Wal-Mart contractors allegedly hired undocumented persons to perform janitorial services. While conceding in the complaint that they were without legal immigration status, the plaintiffs asserted a right to pay owed for work performed that approximates that which an employee with legal status would merit. Even though IRCA prohibits employment of unknown undocumented persons, the Fair Labor Standards Act (FLSA) does not prohibit backpay claims by *any* person in the United States, regardless of immigration status.¹⁷⁵ The workers

174. 393 F. Supp. 2d 295 (D.N.J. 2005).

175. Related to the discussion of injury to "property" throughout this Note is personal and tort injury incurred during the course of employment. In *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), the Supreme Court ruled that an undocumented worker may not seek back pay under the National Labor Relations Act. Because *Hoffman* only applies to money that one *would have earned* (and not what one actually did earn), it would not apply to the determination of damages for tort or workman's compensation injuries (based on past earnings). The question of whether this federal interpretation preempts state law will turn on state public policy goals until Congress or the Supreme Court specifically mandates federal preemption. See *Safeharbor Employer Serv. I, Inc. v. Velaquez*, 860 So.2d 984, 985–86 (Fla. Dist. Ct. App. 2003) (holding that *Hoffman* does not preempt state law precluding the awarding of worker compensation claims). See also *Design Kitchen & Bath v. Lagos*, 882 A.2d 817 (Md. Ct. App. 2005); *Cont'l PET Techs v. Palacias*, 604 S.E.2d 627, 630 (Ga. Ct. App. 2005); *Rosa v. Partner in Progress, Inc.*, 868 A.2d 994, 1000 (N.H. 2005); *Tyson Foods, Inc. v. Gutzman*, 116 S.W.2d 233, 244 (Fla. Dist. Ct. App. 2003).

As *Hoffman* does not control other state laws on labor enforcement and compensation, other policy considerations, such as fairness, will influence how the states approach the issue of undocumented workers. The states are universally against applying *Hoffman* in workman's compensation suits by undocumented persons. See cases *supra*.

Facially, workman's compensation claims can be distinguished from back pay in that the former has already been earned, while the latter is prospective pay. The state statutes and state court decisions have invoked *quantum meruit* and equitable estoppel to find that undocumented persons may still be entitled to prospective payments. Under a *quantum meruit* theory, a person ought to receive just compensation for work that was performed. States have used this principle, along with equitable estoppel, to justify the award of workman's compensation even to those who are unauthorized to work legally. Under Florida law, for example, an employer who hires an undocumented person is estopped

alleged a criminal enterprise with a common goal of systematically violating immigration and labor and employment laws for profit at the expense of undocumented workers. These workers were then used to facilitate the employer's failure to comply with minimum wage and hour laws. Wal-Mart's motion to dismiss was granted on the RICO charges, as the plaintiffs failed to allege sufficient facts to state a claim that Wal-Mart conspired to commit, or aided and abetted, the particular predicate acts of transporting, harboring, or encouraging undocumented aliens.¹⁷⁶

The motion was denied on the plaintiffs' FLSA argument, with the court stating that it "joins the growing chorus acknowledging the right of undocumented workers to seek relief for work already performed under the FLSA."¹⁷⁷ Even though *Zavala* was dismissed on its RICO enterprise and conspiracy claims, employers must now give serious consideration to the possibility of a RICO suit in calculating the benefits and drawbacks of exploiting undocumented workers.

This RICO tool can also be used by the government. In July 2005, a Canyon County, Idaho Commissioner used RICO to sue in United States District Court four businesses and one non-profit organization that had allegedly hired undocumented workers. The defendants were accused of knowingly hiring hundreds of undocumented migrants, partly through agreements with worker recruiting companies. The injury complained of in this case was the cost to the county of providing medical care, jails, and schools. This was the first time a government entity has used RICO to demand damages from businesses for the costs of allegedly illegal employees.¹⁷⁸ This demonstrates that not only

from asserting that the employee is undocumented when he knew or should have known of the true status of the person. See *Cenvill Dev. Corp. v. Candello*, 478 So.2d 1168, 1170 (Fla. Dist. Ct. App. 1985) ("This holding prevents unauthorized aliens from suffering at the hands of an employer who would knowingly hire the alien and then conveniently use the unauthorized alien status to avoid paying wage loss benefits."). A New Hampshire court has used similar principles to suggest that undocumented workers are entitled to tort recovery based on both past and future earnings. See *infra* note 180.

176. *Zavala*, 393 F. Supp. 2d at 304–09. The court also found that plaintiffs failed to allege the RICO predicate act of involuntary servitude, since they could not allege that they did not have any way to avoid "continued service or confinement" as required under *United States v. Shackney*, 333 F.2d 475, 487 (2d Cir. 1964): "While a credible threat of deportation may come close to the line, it still leaves the employee with a choice, and we do not see how we could fairly bring it within § 1584 [(the federal statute prohibiting involuntary servitude)]" *Zavala*, 393 F. Supp. 2d at 310.

177. *Zavala*, 393 F. Supp. 2d at 323.

178. Rebecca Boone, *Vasquez's Latest Tactic Could Set Trend*, IDAHO STATESMAN, July 11, 2005, at A1, available at <http://www.idahostatesman.com/apps/>

can private entities use this tool to address some of the costs of the undocumented worker population, it can also be used to prevent the exploitation of such workers and to recoup public losses.

C. *The Law and Economics of RICO and Immigration*

As demonstrated above, RICO provides a judicial tool for the protection of workers from the detrimental impact of undocumented workers. This tool is not only compelled by the statute itself, but it can also help accomplish what targeted guest worker programs aim to do in addressing the public's concerns over undocumented labor injuring American workers. Here, the four circuits have approved a tool that meets the policy goals of guest worker programs. This section will further explain how RICO meets these goals and it will address remaining ancillary issues.

Under the Second, Sixth, Ninth, and Eleventh Circuits, legal workers would have a cause of action only when they can show they have been injured. There would be no cause of action in industries where the American economy would benefit and American workers would not be hurt.¹⁷⁹ There would be no RICO cause of action because, in these industries, undocumented workers are sought not because they are cheaper, exploitable labor (which would result in the movement of jobs from American workers to exploited undocumented persons), but because they are the *only* labor available to keep an industry in the United States from going out of business, and the working presence of such persons is not a detriment to Americans, who would not accept these jobs.¹⁸⁰ Therefore, the need for guest worker programs can be partially avoided by using this judicial

pbcs.dll/article?AID=/20050711/NEWS01/507110308/1001/NEWS. A district court judge dismissed the Commissioner's complaint in December 2005, ruling that the county's claimed higher social expenditures were simply the costs of a government entity. The Commission voted 2-1 to appeal to the Ninth Circuit. See Rebecca Boone, *Canyon Will Appeal RICO Decision*, IDAHO STATESMAN, Jan. 7, 2006, at A1, available at <http://www.idahostatesman.com/apps/pbcs.dll/article?AID=/20060107/NEWS01/601070317/1001/NEWS>.

179. This might not be the case (i.e., there would still be a cause of action under this theory), as stated *supra* note 9, where the government is the plaintiff. However, the government could still have a cause of action if the loss of undocumented workers poses a greater cost on the community than was borne by the local government without the presence of the undocumented persons. Such cost reversal could come if, for example, the business and job creation of an undocumented population outweighs the costs created by such a population through public expenditures.

180. Goldfarb, *supra* note 106, at 188.

model, but more realistically, used as a complement to a broader policy.

Of course, the use of RICO in this manner does not solve all of the problems associated with undocumented foreign-born labor. Even with this private cause of action that can protect American workers from the impact of undocumented labor in industries where there is a supply of American labor, problems remain with industries in which there is little or no competition between undocumented persons and legal workers for jobs (such as the agriculture industry). When it comes to these jobs, the government would miss out on the tax benefits of employing workers legally. More urgently, from the workers' perspective, undocumented persons in these industries would have to fend for themselves, as they would lack many of the guarantees and protections that legal workers have.

CONCLUSION

The presence of undocumented workers in the United States presents many concerns for Americans. The effect on the American laborer is particularly alarming, as it pits the poor against the poor; impoverished foreigners arriving on American shores seeking prosperity end up competing with many of the least educated and poorest Americans for low-paying jobs.¹⁸¹ Such a scenario is at odds with an ethic that values all humans and seeks for people to be treated in a way that befits the common good, not the narrow interests of corporations or private enterprises. The legislature and the judiciary are then left with finding a way to deal with this dilemma.

Embedded in these political and judicial proposals is the complex reality that muddles immigration, economics, and ethics. *Hoffman*, in holding that undocumented workers are not entitled to back pay under the NLRA,¹⁸² was decried as emboldening employers to argue that undocumented persons have no workplace rights. Such laws can empower unscrupulous employers to exploit undocumented workers, either to their detriment, the detriment of other workers, or the detriment of competitors. Certainly, employers should not be given incentives by the law to treat undocumented persons as commodities.¹⁸³

181. Paral, *supra* note 39.

182. See discussion *supra* note 175.

183. In *Rosa v. Partners in Progress, Inc.*, 868 A.2d 994, 1000-01 (N.H. 2005), the Supreme Court of New Hampshire observed:

[T]ort deterrence principles provide a compelling reason to allow an award of such damages against a person responsible for an illegal

The exploitative nature of the employer and undocumented employee relationship is different in the service industry than it is in the agricultural industry. In the latter, workers are employed in jobs that would not otherwise exist if there was a higher wage. In this situation, it is difficult to say that workers are being exploited when the employer has no choice but to pay a low wage or go out of business. The former situation is different in that the employer perceives the vulnerable position an undocumented person is in and takes advantage of that bad position.

There are other long-term ethical considerations involved with employing undocumented persons in jobs that Americans seemingly do not want. Allowing farmers to pay less to their undocumented agricultural workers in the United States, as the RICO mechanism would allow, is a subsidy in disguise—and one that, while it might help on the micro level of putting more money into a worker's hands than he would otherwise have, will not help the developing nations that send willing workers to the United States.¹⁸⁴

alien's employment when that person knew or should have known of that illegal alien's status. The threat of tort liability acts as an incentive to reduce the risk of injuries To refuse to allow recovery against a person responsible for an illegal alien's employment who knew or should have known of the illegal alien's status would provide an incentive for such persons to target illegal aliens for employment in the most dangerous jobs or to provide illegal aliens with substandard working conditions. It would allow such persons to treat illegal aliens as disposable commodities who may be replaced the moment they are damaged. Such a result is incompatible with tort deterrence principles.

.....

We recognize that defendants . . . , as general contractors, are not direct employers of the plaintiff. Yet, [federal law] does not excuse general contractors who knowingly employ an illegal alien. 8 U.S.C. § 124a(a)(4). ('[A] person or other entity who uses a contract, sub-contract, or exchange . . . to obtain the labor of an alien in the United States knowing that the alien is an unauthorized alien . . . shall be considered to have hired the alien for employment in the United States in violation of [federal law].'). Nor shall a contractor be excused from compensating an illegal alien for lost United States earnings when the general contractor knew or should have known of that illegal alien's status. We choose to hold a general contractor to a standard based upon constructive knowledge because to hold otherwise would provide a general contractor with a convenient device to insulate itself from damages, because it would be all too easy to claim ignorance.

184. Foreign workers in the United States benefit the workers' countries of origin insofar as the workers send back money (remittances) that helps support the local economy in the country of origin. Over twenty billion dollars

This Note showed that the judiciary already possesses a tool to broach at least part of this complicated topic. The circuit split highlights a very important issue: how private mechanisms can be employed to sanction companies that attempt to undercut American wages through the employment of undocumented workers. There are problems that remain to be addressed. The mere existence of a private cause of action does not mean that workers will go through the steps to organize a suit and pursue it. As mentioned, this does not solve the problem of illegal hiring in industries where there is no oversupply of American labor. Still, this Note clarified that at least part of what public policy proposals seek to do is already achievable under the Second, Sixth, Ninth, and most recently, the Eleventh Circuits' rulings. Still, this judicial tool must be only a part of a more comprehensive immigration policy.

One way for the legislature to address this problem is through the creation of a guest worker program that gives everyone the same wage, social security tax, workman's compensation, and protections for the same job. This would not only account for the economic reality of demand for labor, but by putting laborers "on the books," would help ensure that they are not exploited and that they pay taxes. Unfortunately, current legislation in the United States House of Representatives does not include the guest worker proposals. The Sensenbrenner bill was purposefully enforcement-only, but its provisions will do little to relieve the problems of backlogs and inefficiency in the immigration system and will do much harm to undocumented persons, their families, and their advocates. Bill proponents were successful in removing a proposed amendment by Representative Flake that would have included a guest worker program.¹⁸⁵ Represen-

flows from the United States to Mexico in remittances. See *Legislators Go After Remittance Monies*, FRONTERA NORTE SUR, June–Aug. 2005, available at <http://www.nmsu.edu/~frontera/immi.html>. In Mexico, this is the third largest source of revenue, behind taxes and oil. *Id.*

185. Though a guest worker program went unmentioned in the version of the House bill that passed, it remains on the minds of many Congressmen, especially those that represent agriculture constituencies. One news source reported:

Only agricultural growers, whose industry relies heavily on foreign workers, many of them undocumented, have consistently asked lawmakers for a workable guest worker program that would give them access to legal workers, Putnam said. "The other guys woke up three days ago and hit the panic button."

In the past year, Putnam said "only a handful" of lawmakers who represent agricultural districts, including himself, have been "screaming at the top of our lungs" that any new immigration plan must include guest worker provisions.

tative Flake's non-binding sense of the Congress would have stated that "a necessary part" of securing the border "entails the creation of a secure legal channel by which the foreign workers needed to keep the United States economy going may enter and leave the country."¹⁸⁶ Supporters of the House bill will likely encounter stiff opposition when the Senate takes up the issue.

In late February, Senator Arlen Specter circulated a bill in the Senate that calls for a vast guest worker program that would legalize millions of illegal aliens and import an unlimited number of additional workers from abroad, in addition to unprecedented increases in legal immigration. It would lighten some of the burdens on employers by requiring them only to verify the status of prospective employees, not ones that are currently employed, as the House version would. Senator Specter's proposal would also provide a limited legalization that would require sponsorship by an employer and the beneficiary would first have to leave and re-enter the United States. Significantly, the proposal would lower the income requirements of a sponsoring family member from one-hundred to one-hundred twenty five percent of the federal poverty guidelines, thereby making legal family reunification more accessible.

A guest worker proposal would need to consider lessons from the past, including the Bracero program, to do more than just supply employers with a stream of vulnerable workers. The Specter bill, like President Bush's proposal, would require workers to return to their home countries after a three-year period (with one three-year extension). While this may alleviate some fears about a permanent migration, the failure to include a path to permanent residency is short-sighted. Bringing in people solely for work purposes, and asking them to leave their families behind, is too much to ask and too much to expect. On that

Putnam said there has been little enthusiasm when other "aggies" have raised the issue at Republican conference meetings. "Nobody would clap. Nobody would say anything. Then the other guys would get up and say, 'Secure the border' and stuff, and the whole place would go wild like the Rolling Stones had just come to town."

But the situation changed after the business community weighed in right before the floor debate, Putnam said. "As the more mainstream business has become engaged, then the rest of the [Republican] conference has said, 'Well I guess we do need comprehensive legislation.'"

Fawn Johnson, *House Passes Immigration Enforcement Bill Without Nonbinding Guestworker Language*, BNA DAILY REPORT FOR EXECUTIVES, Dec. 17, 2005, <http://subscript.bna.com/pic2/derupdat.nsf/id/BNAP-6K6QUE?OpenDocument> (quoting Rep. Adam Putnam (R-FL)).

186. *Id.*

note, the Specter bill's increase in the cap of family-based, as well as employment-based, immigration is an important element that was missing from the House bill.

In early April 2006, the Senate reached an agreement on the thorny issue of guest workers. This agreement would provide a path to citizenship for the undocumented who have lived in the United States for at least five years, which would be approximately seven million people. To qualify for this path, these persons would need to continue working, pass background checks, pay fines and back taxes, and learn English.¹⁸⁷ The agreement provides stricter provisions for those who have been in the United States for a shorter period of time. The provisions of this agreement are necessary steps for a policy that does justice to the economic reality of the American workforce without exploiting foreign-born labor. Still, as of the spring recess, the Senate agreement was stalled due to procedural and political clashes over amendments. Even with a Senate agreement finalized, Senate leaders will have to reconcile this controversial agreement with the equally controversial enforcement only bill from the House. Although President Bush has come out in support of guest worker programs (he made it a priority at the beginning of his first term, but it fell from his priorities after September 11th), he is not willing, or able, to pressure the Republicans to act on it. With the House conservatives poised to reject the Senate compromise,¹⁸⁸ these much needed guest worker provisions, and the Americans and immigrants they benefit, may continue to flounder.

The proposals discussed do not go far enough in merely suggesting a guest worker program. An earned legalization would take care of the ten million undocumented persons in the country right now, and it would help the United States. It would stabilize the workforce and push all wages up. It also is a pro-security policy, in that it allows the government to identify and have records of everyone who is here. There would also need to be a right to bargain and to change employers, to prevent the abuses of previous programs and allow the people in the program to maintain their human dignity. Congress should consider reforming family-based immigration, if family unity really is a priority, so that the waiting times for family members are not so long. A comprehensive policy must also address the "push" factors that encourage people to seek work abroad.

187. Rachel L. Swarns, *Senate Deal Set For Immigration, But Then Falters*, N.Y. TIMES, Apr. 7, 2006, at A1.

188. *Id.*

As long as foreign-born persons, with or without legal documentation, flock to this country—and they will be coming for the foreseeable future—there must be a practical policy that does the most to benefit American workers while at the same time preventing the exploitation of those who risk death and spend life savings to come here willing to work at very low wages. Guest worker programs propose to protect American workers while providing opportunities for foreign workers in the United States. Part of this goal can be achieved through a private cause of action under RICO in industries where there is a demand for American labor. While these proposals resolve all of the problems associated with this complicated issue, they are part of a system that can provide an honest and dignified opportunity to live the American Dream.