BE OUR GUEST: A REVIEW OF THE LEGAL AND REGULATORY HISTORY OF U.S. IMMIGRATION POLICY TOWARD MEXICO AND RECOMMENDATIONS FOR COMBATING EMPLOYER EXPLOITATION OF NONIMMIGRANT AND UNDOCUMENTED WORKERS

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TABLE OF CONTENTS

I. INTRODUCTION 190
II. THE FOREIGN LABOR FORCE: WHO THEY ARE, WHY THEY COME, AND WHAT THEY FACE 191
III. THE HISTORY OF MEXICAN-AMERICAN IMMIGRATION 196
A. The 1942 Bracero Agreement 196
B. The H-2 Guestworker Program and Problems with its Expansion 202
IV. THE CURRENT DEADLOCK IN IMMIGRATION POLICY: THE IMMIGRATION REFORM AND CONTROL ACT AND ITS EFFECTS ON EMPLOYEE REMEDIES UNDER THE NATIONAL LABOR RELATIONS ACT 206
A. Why the Immigration Reform and Control Act Fails to Prevent Employers from Hiring Undocumented Workers 206
B. Why the National Labor Relations Act Fails to Prevent Employer Exploitation of Undocumented Workers 208
V. REMEDIES AND RECOMMENDATIONS 210
A. Distinguishing Employee Claims from Those Barred by *Hoffman Plastic* 210

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B. Direct Damage Claims Under the Thirteenth Amendment 211
VI. CONCLUDING REMARKS 213

I. Introduction

The importation of foreign workers into the United States provides a ready solution to the perceived shortage of cheap, unskilled labor within the domestic labor market.[1] This solution, however, results in an influx of alien laborers who are left vulnerable to employer oppression and exploitation either because these workers do not have proper documentation or because their employers are responsible for their legal status.[2] Many unscrupulous employers lure these workers from worksite to worksite with promises of opportunity and high wages and then trap them in hellish living and working conditions.[3]

This note begins by identifying the constituent elements of the nonimmigrant and undocumented workforces.[4] It then discusses the impact these workers have on U.S. industries and the civil rights violations they face.[5] Part III recounts and analyzes the history of Mexican-American temporary work agreements.[6] The note contends that these agreements have contributed to an increase of illegal Mexican immigration and the unemployment and under-employment of domestic workers.[7] Part IV analyzes how the deadlock between the Immigration Reform and Control Act and the National Labor Relations Act ultimately allows employers to

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[1] Mark J. Russo, Note, *The Tension Between the Need and Exploitation of Migrant Workers: Using the MSAWPA's Legislative Intent to Find a Balanced Remedy*, 7 MICH. J. RACE & L. 195, 200-01 (2001).

[2] *See* discussion *infra* Part III.

[3] Ronnie Greene, *Fields of Despair*, MIAMI HERALD, Aug. 31, 2003, at 1A. For example, farmworkers in Florida recounted how middlemen recruited them from soup kitchens, homeless shelters, and parks and told them that they would receive good pay and $15 to travel to the worksite. *Id.* When they reached the worksite, employers placed them in slum housing. *Id.* The workers received little pay and had to pay nearly one hundred percent interest on the $15 they received. *Id.*

[4] *See* discussion *infra* Part II.

[5] *See* discussion *infra* Part II.

[6] *See* discussion *infra* Part III.

[7] *See* discussion *infra* Part III.

continue to hire and exploit undocumented workers.[8] Part V examines proposed remedies to this deadlock.[9] The note concludes with the recognition that Congress bears the ultimate responsibility for creating a coherent immigration policy capable of enforcing sanctions against employers for hiring and exploiting undocumented workers.[10]

II. The Foreign Labor Force: Who They Are, Why They Come, and What They Face

Nonimmigrant[11] and undocumented workers are an integral part of the U.S. economy.[12] American industries rely on these laborers in order to benefit from reduced costs and increased flexibility.[13] Employers seeking to hire foreign workers have two available courses of action: they can either apply for nonimmigrant labor through governmental channels[14] or they can illegally hire undocumented workers not authorized to live in the United

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[8] *See* discussion *infra* Part IV.

[9] *See* discussion *infra* Part V.

[10] *See* discussion *infra* Part VI.

[11] *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b) (2000). The Immigration and Nationality Act ("INA") defines a "nonimmigrant" as an alien who comes "temporarily to the United States to perform temporary services or labor, if unemployed persons capable of performing such service of labor cannot be found in this country." *Id.*

[12] *See* REBECCA SMITH ET AL., NAT'L EMPLOYMENT LAW PROJECT, LOW PAY, HIGH RISK: STATE MODELS FOR ADVANCING IMMIGRANT WORKERS' RIGHTS 10 (2003), *available at* http://www.nelp.org/docUploads/Low%20Pay%20High%20Risk%20120903.pdf. Between eighteen and twenty million immigrants live in the United States, and ninety percent are of working age. *Id.*; *see also* NAT'L EMPLOYMENT LAW PROJECT ("NELP"), DAY LABORERS, TEMPORARY WORKERS AND THE DAY LABORER FAIRNESS AND PROTECTION ACT, FACT SHEET FOR WORKERS, *available at* http://www.nelp.org/docUploads/day%20labor%20question%20and%20answer%2Epdf.

[13] *See* MICHAEL E. FIX & JEFFREY S. PASSEL, URBAN INST., IMMIGRATION AND IMMIGRANTS: SETTING THE RECORD STRAIGHT 60 (1994), *available at* http://www.urban.org/UploadedPDF/setting.pdf. Nonimmigrant workers offer industries undergoing transition, such as relocation, the flexibility to hire and fire low-wage workers. *Id.* It is also cheaper for employers to hire these workers in industries where only brief, informal training is necessary to perform the job. *Id.*

[14] HUMAN RIGHTS WATCH, HIDDEN IN THE HOME: ABUSE OF DOMESTIC WORKERS WITH SPECIAL VISAS IN THE UNITED STATES 1 (2001), *available at* http://www.hrw.org/reports/2001/usadom/usadom0501.pdf [hereinafter ABUSE OF DOMESTIC WORKERS]. Workers employed by diplomats receive A-3 visas. *Id.* Workers employed by other foreigners within the United States or individual U.S. citizens receive B-1 visas. *Id.* Larger agricultural and non-agricultural employers can request workers through the H-2 guestworker program. *See* discussion *infra* Part III.B.

States. Though typically associated with the agricultural sector, nonimmigrant and undocumented laborers also comprise a substantial part of the workforce in other industries, such as manufacturing and construction.[15]

The Immigration and Nationality Act ("INA") permits the temporary admission of foreign workers into the United States if domestic workers are not available.[16] In addition to workers entering the United States via programs established under INA, over five million undocumented immigrants also work in the country and contribute to the domestic economy.[17] The single largest supplier of undocumented workers to the United States is Mexico, which contributes more than half of all illegal aliens.[18] Historically, undocumented Mexican immigrants settled in certain concentrated areas within the United States, such as California, Texas, Illinois, and Arizona.[19] Recent trends, however, indicate that undocumented Mexican laborers are migrating across the United

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[15] B. LINDSAY LOWELL & ROBERTO SURO, PEW HISPANIC CTR., HOW MANY UNDOCUMENTED: THE NUMBERS BEHIND THE U.S.-MEXICO MIGRATION TALKS 7 (2002), *available at* http://pewhispanic.org/files/reports/6.pdf. The Pew Center reports the following breakdown of undocumented workers: manufacturing (1.2 million); services (1.2 million); agriculture (1 million); construction (600,000); restaurant services (700,000). *Id.*

[16] 8 U.S.C. § 1101(a)(15)(H) (2000). Tension underlies this policy, as an employer's interest in obtaining cheap and easily manipulated labor competes with the interests of American workers in receiving higher wages and working under better employment conditions. FIX & PASSEL, *supra* note 13, at 13. "The economic goal of meeting the nation's labor force needs requires maneuvering among three potentially conflicting objectives: (1) promoting the nation's competitiveness in the global economy, (2) minimizing the burden placed on employers, and (3) protecting the wages and employment conditions of U.S. workers." *Id.*

[17] Jeffrey Passel, *Mexican Immigration to the U.S.: The Latest Estimates*, MIGRATION INFO. SOURCE (Migration Policy Inst., Wash., D.C.), Mar. 1, 2004, *available at* http://www.migrationinformation.org/USfocus/display.cfm?ID=208. According to a March 2002 Current Population Survey, there are approximately 5.3 million undocumented Mexican workers in the United States. *Id.* Undocumented Mexican immigration constitutes fifty-seven percent of all illegal immigration in the United States. *Id.*

[18] *Id.*

[19] *Id.* In 1996, eighty-three percent of all undocumented workers lived in either California (2,000,000 workers), Texas (700,000), New York (540,000), Florida (350,000), Illinois (290,000), New Jersey (135,000), or Arizona (115,000). U.S. DEP'T OF JUSTICE, IMMIGRATION & NATURALIZATION SERV., OFFICE OF POLICY & PLANNING, ESTIMATED RESIDENT UNDOCUMENTED POPULATION BY STATE OF RESIDENCE, OCT. 1992 AND OCT. 1996, *available at* http://uscis.gov/graphics/shared/statistics/archives/illegal.pdf.

States.[20] According to one report, between 1990 and 2002, the total Mexican immigrant population outside the four previously mentioned states increased from 500,000 to 2.7 million, and analysts surmise that undocumented immigrants comprise a significant percentage of this population.[21]

Once in the United States, undocumented and nonimmigrant workers often earn less in wages than their counterparts. A case review conducted by Human Rights Watch found that nonimmigrants who work as domestics earn a median hourly income of $2.14, which is significantly lower than the federal minimum wage.[22] In the agricultural industry, many workers earn less than minimum wage and generally live below the national poverty line.[23] Employers and employment agencies also deduct money from workers' paychecks without alerting them as to the nature of these deductions.[24] In addition, workplace injury and fatality rates are noticeably higher for Hispanic nonimmigrant workers than for other workers in similar positions.[25] Within the agricultural, service, manufacturing, and construction industries, the reliance on temporary workers poses significant problems to both legal non-

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[20] Passel, *supra* note 17. In 2002, only seventy-two percent of Mexican immigrants lived in California, Texas, Illinois, and Arizona, down from eighty-nine percent in 1990. *Id.*

[21] *Id.*

[22] ABUSE OF DOMESTIC WORKERS, *supra* note 14, at 1.

[23] U.S. DEP'T OF LABOR, FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY 1997-1998 39 (2000). The survey found that in 1997-98 the average annual earnings of farm workers were below the poverty line. *Id.* In addition, twelve percent of workers earned income below the minimum wage. *Id.* at 33.

[24] *See, e.g.*, Greene, *supra* note 3. One farmworker reported that he should have earned $300 for sorting and packing potatoes, but his pay stub reflected earnings of only $154.51, and the worker received only $35. *Id.*

[25] SMITH ET AL., *supra* note 12, at 11. Foreign-born Latino men are two-and-one-half times more likely than American workers to be killed on the job. *Id.* In 2000, construction-related fatalities for Hispanic workers increased twenty-four percent even though Hispanic employment increased only six percent. *Id.* A 2004 Associated Press report indicated that Mexican workers in the United States are eighty percent more likely to die at work than workers born in the United States. HUMAN RIGHTS WATCH, BLOOD, SWEAT, AND FEAR: WORKERS' RIGHTS IN U.S. MEAT AND POULTRY PLANTS 104 (2004), *available at* http://www.hrw.org/reports/2005/usa0105/usa0105.pdf [hereinafter BLOOD, SWEAT, AND FEAR]. Ten years earlier, Mexican workers were only thirty percent more likely to die at work, demonstrating a dramatic increase in the rate of Mexican workers' jobsite deaths. *Id.*; *see also* Justin Prichard, *Mexican Worker Deaths Rise Sharply,* CHATTANOOGA TIMES FREE PRESS (Tenn.), Mar. 14, 2004, at G1.

citizen laborers and undocumented workers with respect to wage and hour abuses and dangerous worksite conditions.[26]

Nonimmigrant and undocumented workers contribute to the domestic economy not only through their labor, but also through the creation of new, ethnically derived markets.[27] As with U.S. citizens, foreign workers spend money on domestic goods and services and must pay all necessary taxes.[28] But while workers contribute significant portions of their wages to fund government programs (such as welfare), many workers are either ineligible for benefits, or do not participate in the programs because they are unaware or not in need of them.[29]

Many workers choose to enter the United States because they are incapable of finding work or because they are unable to earn a

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[26] *See* Day Laborer Fairness and Protection Act, H.R. 2870, 108th Cong. § 2 (2003) [hereinafter DLFPA]. Day laborers are subject to a range of abuses including wage and hour abuses, civil rights violations, substandard conditions, and dangerous working environments. *Id.* The reliance on contingent labor "has resulted in a significant decrease in the number of workers with health insurance coverage, included in retirement and pension plans, and receiving other employment benefits such as long-term disability coverage." *Id.* § 2(2). A 2000 survey conducted by the U.S. Department of Labor ("DOL") found that no poultry processing plants complied with federal wage and hour laws. SMITH ET AL., *supra* note 12, at 11. A 1996 DOL survey found fifty percent of New York City's garment manufacturers were classifiable as sweatshops. *Id.* A separate DOL survey on agriculture found unacceptably low compliance with federal labor and employment laws among cucumber, lettuce, and onion growers. *Id.*

[27] FIX & PASSEL, *supra* note 13, at 53-54.

> The positive economic contributions of immigrants are attested to by the substantial business literature on opportunities in the large and growing ethnic markets. Newspapers, magazines, and radio and TV stations serving immigrant communities are thriving in many parts of the country. In cities throughout the United States, immigrants are credited with reviving once-abandoned commercial areas and with revitalizing entire neighborhoods.

Id.

[28] *Id.* For example, a 1993 study estimated that immigrants arriving after 1979 paid $20.2 billion in taxes. *Id.* at 60-61. Some argue this number reflects an underestimation of the true amount paid, which they place at $70.3 billion. *Id.* at 61.

[29] *See id.* at 62-64. Among working-age immigrants who entered the United States during the 1980s, only two percent reported welfare income. *Id.* at 63. Undocumented immigrants are ineligible for the majority of public assistance programs with the exception of Medicaid emergency medical care and the Women, Infants and Children ("WIC") nutrition program. *Id.* at 62. The agencies that offer these benefits screen all non-citizen applicants to ensure the legal immigration status of the recipients. *Id.* at 63.

living wage in their home country.[30] In the worst instances, individuals come to the United States not by their own volition, but through coercion or direct force.[31] Persons who enter the country through these channels either answered advertisements or were lured by employers promising higher paying jobs. Once in the United States, the workers are then held captive by their employers.[32] These immigrants fill the unsavory demands within the United States for sweatshop labor, household servants, and sex workers.[33] In many instances, the relationship between employer and employee is analogous to that of master and slave.[34] The em-

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[30] *See* Farmworker Health Services, About Migrant and Seasonal Farmworkers, http://www.farmworkerhealth.org/migrant.jsp (last visited Feb. 24, 2006). For example, a Guatemalan farmworker employed at a New Jersey farm picking blueberries stated that he came to the United States after Hurricane Mitch ravaged parts of Central America in order to earn enough money to make necessary repairs on his house in Mexico. *Id.*

[31] Baher Azmy, *Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda*, 71 FORDHAM L. REV. 981, 991 (2002). In 1998, a government report estimated that approximately 50,000 women and children were trafficked into the United States. *Id.* Federal law provides special protections to foreigners subject to "severe forms of trafficking," defined as follows:

> [S]ex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

22 U.S.C. § 7102(8) (2000).

[32] *See, e.g.*, Greene, *supra* note 3. An investigation in Florida revealed that farm labor contractors routinely prey on laborers in homeless shelters by bringing beer and food to the workers and offering them work. *Id.* Another case of exploitation involved two brothers who met and courted girls in Mexico and, after gaining a girl's trust, would arrange for her illegal transport to the United States, telling the girl she was to work for the man's sister until finances could be sent. Ronald Smothers, *Six Are Accused of Forcing Girls from Mexico into Prostitution*, N.Y. TIMES, Mar. 26, 2002, at B5. Once in the United States, the girls were forced to perform sexual acts on as many as seven men per day. *Id.*

[33] Azmy, *supra* note 31, at 991; *see also* FRANCIS T. MIKO, TRAFFICKING IN WOMEN AND CHILDREN: THE U.S. AND INTERNATIONAL RESPONSE 2 (Congressional Research Serv., CRS Report for Congress, Order Code RL 30545, Mar. 26, 2004), *available at* http://fpc.state.gov/documents/organization/31990.pdf (reporting an increase in the demand for sweatshop, domestic, and sex workers).

[34] Azmy, *supra* note 31, at 995. Similar to antebellum slavery, the "master" of the modern undocumented employee has the ability to "deny those facets of life that constitute essential attributes of personhood and thereby transform persons into little more than property." *Id.*

ployee's very subsistence becomes entirely dependent on his or her employer; the employer has the power to dictate where his employees will live, when they will work, and in which activities they can participate.[35]

Employees often fail to expose their exploitation for a number of reasons. In some cases, undocumented workers are either unaware that an employer's actions are illegal or are unable to report workplace abuses because they cannot speak English.[36] In other instances, employers dismiss employees outright or initiate deportation proceedings against them in order to deter them from reporting violations.[37] Workers who do seek to enforce the existing workplace protection laws face the prospect of employer retaliation, including the possibility of having their citizenship called into question.[38]

III. The History of Mexican-American Immigration

A. *The 1942 Bracero Agreement*

The United States has a long history of reliance upon foreign laborers to sustain an adequate workforce.[39] As the country's

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[35] *Id.* at 995-96. Under such circumstances, employers often require their employees to work long hours, perform all household and child-related chores, or perform sexual services at the will of their employers. *Id.* at 995. In addition, individuals are often forbidden to practice their religions, denied medical treatment, and subjected to other forms of physical and psychological abuse. *Id.* at 996-97.

[36] *See, e.g.*, ABUSE OF DOMESTIC WORKERS, *supra* note 14, at 2.

[37] *See* DLFPA, *supra* note 26. "Day laborers and contingent workers seeking to enforce the employment and labor laws are frequently subject to intimidating retaliatory acts by the employer. Absent stronger anti-retaliation protections, day laborers will continue to endure dangerous and unjust working conditions without recourse." *Id.* § 2(6).

[38] *See id.*; *see also* Barry Yeoman, *Silence in the Fields*, MOTHER JONES, Jan.-Feb. 2001, at 40, *available at* http://www.barryyeoman.com/articles/silencefields.html. For example, the North Carolina Growers' Association, which imports more than 10,000 Mexican immigrants per year under the H-2A temporary agricultural worker program, warns workers that they risk deportation if they complain or speak out about their treatment. *Id.*

[39] *See* Russo, *supra* note 1, at 201. An influx of Chinese laborers arrived in the United States during the nineteenth century to help build the country's railway system, but in 1882 Congress passed the Chinese Exclusion Act, which suspended immigration of Chinese laborers. *Id.* Employers then began soliciting Mexican workers as an alternative source of cheap labor. *Id.*

commercial agrarian economy expanded, the need arose for a pool of cheap, unskilled labor to promote production and keep costs low.[40] In 1942, the United States laid the groundwork for its current policy toward foreign-born labor when it entered into the Bracero Agreement ("the Agreement") with Mexico in an effort to take formal steps to satisfy the need for labor caused by World War II ("WWII").[41]

Between 1942 and 1964, the two governments arranged for the acceptance of approximately four million temporary Mexican workers into the United States.[42] Under the Agreement, U.S. employers estimated the number of Mexican workers they would need and the length of time these temporary employees would work.[43] Once the U.S. Department of Labor ("DOL") certified an employer's estimates of number, duration, type of work, wage requests, and housing requirements, it requested laborers from the Mexican government.[44] The Mexican government then selected workers and transferred them to the United States, where the

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[40] *Id.* at 199.

> In the first seventy-five years of U.S. political history . . . the "Southern-Western" model of an agrarian economy, which promoted the production of "cash crops for distant markets," depended upon cheap labor for its competitive edge. Slave labor and the recently land-stripped migrant workers from Mexico provided that edge . . . . The continued presence of the Mexican migrant worker in the West/South-West region and the tenant-farmer in the South kept the system afloat [following abolition of slavery and reapportionment].

Id.

[41] Louie Gilot, *Braceros' Fight*, EL PASO TIMES, Mar. 17, 2004, at 1A. The Agreement lasted from 1942 to 1964 and supplied the United States with Mexican field workers and manual laborers. *Id.* The United States and Mexico agreed to five basic tenets in constructing the Agreement. Lorenzo Alvarado, Comment, *A Lesson from My Grandfather, The Bracero*, 22 CHICANO-LATINO L. REV. 55, 58 (2001). First, recruitment would require written labor contracts. *Id.* Second, both countries would assume responsibility for enforcing these contracts. *Id.* Third, "recruitment would be based on need for laborers" and would not have the effect of displacing American workers or lowering wages. *Id.* Fourth, the U.S. government or U.S. employers would pay all transportation and living costs of the workers before their arrival. *Id.* Lastly, the Mexican workers would return to Mexico upon expiration of their contracts. *Id.*

[42] NAT'L FARMWORKER MINISTRY, BACKGROUND ON THE H2A PROGRAM (2004), *available at* http://nfwm.org/pdf/boycotts/H2A.pdf.

[43] Alvarado, *supra* note 41, at 59-60.

[44] *Id.* at 60.

DOL inspected them and placed them with employers.[45]

The Mexican government, however, had reservations about the Agreement from its inception,[46] doubting the existence of a labor shortage in the United States and fearing that the program would create the opportunity for employers to exploit cheap labor.[47] The Mexican government's doubts about the shortage of domestic labor proved true: unemployment and wage depression among American workers increased significantly during the implementation of the Agreement.[48] Within the agricultural sector, the influx of immigrant labor grew more rapidly than employer need.[49] Employers preferred hiring illegal, undocumented workers rather than their higher-priced domestic counterparts.[50] Agricultural employers in particular, seeking to use the Agreement to hire cheaper and more easily exploitable foreign-born workers, advertised for labor at wages impossible for American workers to accept.[51] The Agreement ultimately failed when Mexico withdrew its participation due to the exploitation of nonimmigrant workers by employers participating in the program.[52]

Illegal immigration actually increased following the Agreement.[53] The United States adopted a policy of passive acceptance,

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[45] *Id.*

[46] *See id.* at 59. For instance, at the inception of the Agreement, the Mexican government used its bargaining leverage to get the United States to agree to exclude Texas from the program because of that state's discriminatory history toward Mexican natives. *Id.*

[47] Marjorie Zatz, *Using and Abusing Mexican Farmworkers: The Bracero Program and the INS*, 27 LAW & SOC'Y REV. 851, 859 (1993).

[48] Alvarado, *supra* note 41, at 64-65. "Despite contractual guarantees that Braceros would not be allowed into areas where their presence would depress the prevailing wage, DOL officials consistently failed to detect Bracero-induced wage depression." *Id.*

[49] *See id.* at 65.

[50] Zatz, *supra* note 47, at 854.

[51] *See* Alvarado, *supra* note 41, at 65.

[52] *See* Russo, *supra* note 1, at 202. For example, Jose Jesus de Anda, a Bracero worker, remembers "backbreaking work, 10-minute lunch breaks, cramped living quarters and harsh temperatures." Stephen Wall, *United States, Mexico Work on Health Care Deal*, SAN BERNARDINO COUNTY SUN (Cal.), Feb. 17, 2004, *available at* 2004 WLNR 18101150. Manuela Herrara, another Bracero worker, called her experience "humiliating," saying that her employer rented and then returned her when there was no longer a use for her. Juliana Barbassa, *'We Suffered a Lot'; Former Bracero Workers Recall Hardship, Injustice*, BRANDENTON HERALD (Fla.), Jan. 14, 2004, at 1.

[53] Fred L. Koestler, *Operation Wetback*, *in* THE HANDBOOK OF TEXAS ONLINE (1999),

allowing modest lawful immigration while ignoring the massive entry of undocumented workers into the country.[54] Widespread illegal immigration worsened[55] when the United States enacted an open-border policy in response to Mexico's withdrawal from the Agreement.[56] Under this policy, the United States opened its borders, rounded up Mexican immigrants, arrested them, and then turned them over to the Texas Employment Commission, which delivered the immigrants to farmers and growers as a means of cheap labor.[57] To counter the effects of the 1951 open-border policy, the Immigration and Naturalization Service ("INS") attempted widespread repatriation of Mexican immigrants by creating and executing "Operation Wetback," a systematic search and seizure of illegal Mexican immigrants.[58] The INS, in collaboration with other law enforcement agencies, such as the U.S. border patrol, took harsh measures to round up and deport illegal residents, sometimes frightening undocumented aliens into returning to Mexico.[59]

During the Agreement, the United States acted to ensure that the workers would return to Mexico at the end of their employ-

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http://www.tsha.utexas.edu/handbook/online/articles/view/OO/pqo1.html. Between 1944 and 1954, illegal immigration to the United States from Mexico increased by 6000 percent. *Id.*

[54] Jorge Durand et al., *The New Era of Mexican Migration to the United States*, 86 J. OF AM. HIST. 518 (1999), *available at* http://www.historycooperative.org/journals/jah/86.2/durand.html. The number of legal immigrants from Mexico rose from 38,000 to 67,000 per year between 1963 and 1986, while undocumented migration rose from 87,000 to 3.8 million entries per year. *Id.*

[55] *Id.* Increasing grievances from Mexican officials in the United States concerning the exploitation of Bracero workers and disregard for stipulations imposed as part of the Agreement itself motivated Mexico to rescind its participation. *Id.*

[56] Koestler, *supra* note 53.

[57] *Id.*

[58] CHARLES B. KEELY, AMERICANS ALL, AMERICAN IMMIGRATION: THE CONTINUING TRADITION 1-2 (2000), *available at* http://www.americansall.com/PDFs/02americansall/10.10.pdf. The United States initiated "Operation Wetback" during 1953 and 1954. *Id.* at 1. Operation Wetback was a massive repatriation effort that resulted in the deportation of two million Mexican nationals—an amount greater than the number of immigrants who legally entered the United States from the beginning of the Agreement to the end of Wetback initiative. *Id.* at 1-2. Operation Wetback was a quasi-military operation that enlisted the participation of the U.S. Border Patrol and other federal, state, and county authorities. Koestler, *supra* note 53. Officials apprehended 4800 immigrants on the first day of the program alone. *Id.* Thereafter, law enforcement seized and deported an average of 1100 immigrants daily. *Id.*

[59] Koestler, *supra* note 53.

ment contracts.[60] Employers set aside ten percent of each worker's earnings and placed the money into bank accounts retrievable only after the worker returned to Mexico.[61] The employers placed the money in various American banks, which then transferred it to state-run banks in Mexico.[62] The U.S. government did not provide for monitored disbursement of the withheld money, and some of the $34 million deducted was not returned to the Bracero workers.[63] Neither government can account for the unpaid wages.[64]

In 2001 and 2002, aging Bracero workers filed complaints in the U.S. District Court for the Northern District of California against the Mexican government, certain Mexican banks, the U.S. government, and Wells Fargo Bank, seeking both compensatory damages for their unpaid wages and punitive damages.[65] In that case, *Cruz v. United States,* the plaintiffs argued that their claims against the Mexican defendants could proceed under the commercial activities exception to the Foreign Sovereign Immunity Act ("FSIA").[66] The district court disagreed with the plaintiffs' in-

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[60] Alvarado, *supra* note 41, at 58-60. As part of the Agreement, the United States agreed that it would return the workers upon expiration of their contracts, which lasted from one to six months. *Id.* at 58. The contracts required workers to return to Mexico and await new employment contracts. *Id.* at 60. If a U.S. employer desired to renew an employment contract with a worker, that worker would have to return to Mexico before signing a new contract. *See id.*

[61] Wall, *supra* note 52.

[62] *H2A, Braceros,* RURAL MIGRATION NEWS (2003), *available at* http://migration.ucdavis.edu/rmn/comments.php?id=823_0_4_0_C [hereinafter *H2A, Braceros*]. Between 1942 and 1946, the employers forwarded the deducted earnings to Wells Fargo Bank and Union Trust Company of San Francisco, who later forwarded the money to the Bank of Mexico and then to Banco de Credito Agricola in Mexico. *Id.* In 1976, various rural banks consolidated to become Banrural, a Mexican rural development bank. *Id.* Banrural has no record of this money. *Id.*

[63] *Id.*

[64] *Id.*

[65] Cruz v. United States, 219 F. Supp. 2d 1027, 1031-32 (N.D. Cal. 2002). Mexican nationals who worked in the United States under the Agreement during and after WWII brought four actions claiming that the defendants unlawfully withheld their wages. *Id.* at 1032. The Mexican government offered former Bracero workers who had not received their wages $5000 or $10,000 if they registered between April 7, 2003 and October 15, 2003. *H2A, Braceros, supra* note 62. Many workers rejected the offer as too low. *Id.* The class of claimants sought $50 million to $100 million in compensatory damages and an additional $500 billion in punitive damages. *Id.*

[66] *Cruz,* 219 F. Supp. 2d at 1033. The plaintiffs claimed that the Mexican defendants' activities fell within the commercial activities exception to sovereign immunity under FSIA and thus made them amenable to suit in a U.S. court. *Id.* at 1033 n.2.

terpretation of FSIA and concluded that the Mexican defendants were immune from suit in United States' courts because neither FSIA nor its predecessor were in force at the time of the alleged wrongdoing, and the more restrictive principles of sovereign immunity reflected in those policies did not apply retroactively.[67]

Since the district court's decision in *Cruz*, the Supreme Court of the United States has concluded that FSIA applies to conduct that occurred prior to its enactment and the federal government's adoption in 1952 of a more restrictive theory of sovereign immunity.[68] In 2005, the U.S. District Court for the Northern District of California reconsidered its decision in light of the Supreme Court's opinion.[69] The district court held that the Mexican government's failure to safeguard the monies in the savings accounts fell within FSIA's commercial activities exception because there was a sufficient nexus between the Mexican government's administration of a savings plan for Braceros and the United States.[70]

The district court's conclusion, however, does not guarantee protection to plaintiffs working under future financial arrangements between the United States and a foreign nation.[71] A claim of sovereign immunity raises only a jurisdictional defense;[72] even if

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The commercial activities exception provides for no immunity where the action is based upon:

> [A] commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2) (2000).

[67] *Cruz*, 219 F. Supp. 2d at 1033-35. The district court refused to apply FSIA because Mexico's actions occurred prior to 1952, when the U.S. State Department replaced absolute sovereign immunity with a more restrictive policy of sovereign immunity, outlined in a document known as the Tate Letter. *Id.*

[68] Republic of Austria v. Altmann, 541 U.S. 677, 697-99 (2004).

[69] Cruz v. United States, 387 F. Supp. 2d 1057, 1060 (N.D. Cal. 2005).

[70] *Id.* at 1064-66.

[71] *See Altmann*, 541 U.S. at 696, 701-02. The Court stressed that it traditionally defers to the decisions of political branches on whether to take jurisdiction over individual actions against foreign sovereigns. *Id.* at 696. The Court then stated that nothing in *Altmann* prevents the State Department from filing statements suggesting that a court decline jurisdiction based upon FSIA in particular cases. *Id.* at 701-02.

[72] *Id.* at 700-01. The Court specified that a foreign nation may also be able to raise sovereign immunity as a substantive defense, such as by asserting the "act-of-

a plaintiff is successful in stripping the foreign government of sovereign immunity, he or she must still clear any additional jurisdictional hurdles and succeed on the merits of the case.[73]

B. *The H-2 Guestworker Program and Problems with its Expansion*

The United States imports unskilled, foreign-born labor for both agricultural and non-agricultural industries under the current H-2 guestworker program ("H-2 Program").[74] The H-2 Program attempts to juggle the interests of employers who need labor, domestic employees worried about unemployment and under-employment, and nonimmigrants concerned about their health and safety.[75] Under the H-2 Program, a U.S. employer who wishes to import foreign labor from Mexico must petition the DOL for nonimmigrant workers to fill temporary positions.[76] According to the program's guidelines, an agricultural employer must comply with federal and state labor laws, provide housing and transportation, and pay foreign workers a set minimum wage.[77]

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state doctrine." *Id.*

[73] *See id.*

[74] *See generally* EMPLOYMENT & TRAINING ADMIN., U.S. DEP'T OF LABOR, H-2A CERTIFICATION, *available at* http://workforcesecurity.doleta.gov/foreign/h-2a.asp [hereinafter H-2A CERTIFICATION]; U.S. EMPLOYMENT & TRAINING ADMIN., DEP'T OF LABOR, H-2B CERTIFICATION FOR TEMPORARY NONAGRICULTURAL WORK, *available at* http://workforcesecurity.doleta.gov/foreign/h-2b.asp [hereinafter H-2B CERTIFICATION].

[75] *See* H-2A CERTIFICATION, *supra* note 74. In order to strike a proper balance, the H-2A program (which governs requests for foreign agricultural workers) requires employers to actively engage in the recruitment of domestic labor, including use of newspaper and radio advertising in areas likely to produce a domestic workforce. 20 C.F.R. § 655.103(d) (2005). If such efforts do not result in an adequate supply of labor, employers may then become eligible for foreign-born temporary workers. *Id.*; *see also id.* § 655.3 (providing that the agency should only approve applications for H-2B (non-agricultural) workers if "persons in the United States are not available and . . . the terms of employment will not adversely affect the wages and working conditions of workers in the United States similarly employed").

[76] *See* 20 C.F.R. §§ 655.2, 655.100. "The jobs filled by H-2A and H-2B workers must be temporary . . . . The industries in which H-2B workers are most often employed, landscaping, forestry, house keeping, stable attending and construction, have developed employment structures that involve temporary jobs." *H2A, H2B, Braceros,* RURAL MIGRATION NEWS (2003), *available at* http://migration.ucdavis.edu/rmn/more.php?id=779_0_4_0.

[77] 20 C.F.R. § 655.102. Once the DOL certifies an H-2A application, the petitioning employer offers the H-2A worker a temporary position in the United States pursuant to the specific requirements of the regulation. *Id.* When an H-2A worker is

H-2 Program workers are under contract to perform a specific job for a specific employer.[78] Once in the United States, the worker depends on his or her employer for continued employment under the contract and is therefore unlikely to take measures to destabilize this relationship.[79] Employers prefer hiring H-2 Program workers rather than domestic workers because it is unlikely that foreign-born workers will risk deportation to contest any unfair treatment.[80] In turn, the burden of providing a minimum standard of living to employees participating in the H-2 Program shifts from the employer to the broader community, which is often unequipped to handle such a burden.[81]

Since the 1970s, many analysts and lawmakers have proposed reformation and expansion of the H-2 Program as a possible remedy for the country's illegal immigration problems.[82] Recent proposals to afford workers temporary legal status mimic H-2 Program expansion in that they offer otherwise illegal aliens employment in the United States for a specific length of time and under specific employment circumstances.[83] In 2004, the Bush Administration announced its support for a proposed guestworker program that would grant temporary legal status to undocumented immigrants.[84] Domestic employees, as well as advocates

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fired by an employer, he is required to return to his home country. *See* Yeoman, *supra* note 38, at 40.

[78] *See* 20 C.F.R. § 655.102; VERNON BRIGGS, CTR. FOR IMMIGRATION STUDIES, GUESTWORKER PROGRAMS, LESSONS FROM THE PAST AND WARNINGS FOR THE FUTURE 4 (2004), *available at* http://www.cis.org/articles/2004/back304.pdf.

[79] BRIGGS, *supra* note 78, at 4.

[80] *Id.*

[81] U.S. COMM'N ON IMMIGRATION REFORM, BECOMING AN AMERICAN: IMMIGRATION & IMMIGRANT POLICY 94-95 (1997), *available at* http://www.utexas.edu/lbj/uscir/becoming/full-report.pdf. Though the employer receives the benefits of guestworkers' labor, the broader community must bear the responsibility for the housing, healthcare, and schooling costs of guestworkers. *Id.* at 95. In many such instances, rural communities in agricultural localities simply do not have the resources to fund and care for the workers. *See id.*

[82] BRIGGS, *supra* note 78, at 4-6.

[83] *See, e.g.*, Ted Barrett & Steve Turnham, *Bush Immigration Plan Could Pass Cogress, Aides Predict*, CNN.com, (Jan. 8, 2004), http://www.cnn.com/2004/ALLPOLITICS/01/07/immigration.congress. Workers under the Bush Administration's plan would receive only temporary employment contracts and would still have to apply for permanent residency. *Id.* The Administration is asking Congress to increase the number of "green-cards" available to foreigners wishing to migrate into the country. *Id.*

[84] Elizabeth Bumiller, *Bush Would Give Illegal Workers Broad New Rights*, N.Y. TIMES,

for foreign workers, criticize the proposal's potentially negative impact on domestic labor and the possibility of nonimmigrant exploitation.[85] In December, 2005, the U.S. House of Representatives passed the Border Protection, Antiterrorism and Illegal Immigration Control Act of 2005 ("Border Protection Act"), sponsored by Representative James Sensenbrenner, Jr. (R-WI).[86] The main provisions of the bill block states from issuing standard drivers' licenses to illegal immigrants and facilitate deportation of asylum seekers.[87] The National Governors' Association criticizes the bill on the grounds that it places an undue burden on states to standardize their licensing procedures,[88] while human rights organizations fear that the bill will result in the deportation of legitimate asylum seekers.[89] The Border Protection Act, however, does not address the controversial issue of instituting a newly reformed guestworker program to curb illegal immigration.[90]

Critics of H-2 Program expansion express serious doubts that a shortage of domestic labor actually exists.[91] The DOL certifies

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Jan. 7, 2004, at A1. The proposed program would grant temporary worker status to undocumented workers currently in the United States. *Id.* The workers would pay a registration fee and be required to return to their home countries after the registration period expires. *Id.* The program would also create financial incentives, such as retirement benefits based on income earned in the United States, to motivate workers to return to their native countries. *Id.*

[85] *See* Mike Allen, *Bush Proposes Legal Status for Immigrant Labor; Workers Could Stay Six Years or More*, WASH. POST, Jan. 8, 2004, at A01.

[86] Border Protection, Antiterrorism and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2005).

[87] David D. Kirkpatrick, *House Passes Tightening of Laws on Immigration*, N.Y. TIMES, Feb. 11, 2006, at A13. Proponents of the bill anticipate an uphill battle in the Senate. *Id.*

[88] *Id.*

[89] AMNESTY INT'L, HOUSE PASSES BROAD ANTI-IMMIGRANT, ANTI-REFUGEE LEGISLATION (2005), *available at* http://www.amnestyusa.org/refugee/sensenbrenner_bill.html; HUMAN RIGHTS WATCH, OPPOSE THE BORDER PROTECTION, ANTI-TERRORISM AND ILLEGAL IMMIGRATION CONTROL ACT (2005), *available at* http://hrw.org/english/docs/2005/12/09/usdom12188.htm.

[90] *See* Kirkpatrick, *supra* note 87. Prior to passage of the Border Protection Act, Senator John McCain (R-Ariz.) and Representative Jim Kolbe (R-Ariz.) both introduced legislation that would provide for comprehensive reform of current U.S. nonimmigrant worker policy. *See* Secure America and Orderly Immigration Act, S. 1033, 109th Cong. (2005); H.R. 2330, 109th Cong. (2005).

[91] *See generally* U.S. GEN. ACCOUNTING OFFICE, H-2A AGRICULTURAL GUESTWORKER PROGRAM, CHANGES COULD IMPROVE SERVICES TO EMPLOYERS AND BETTER PROTECT WORKERS 24-37 (1997), *available at* http://www.gao.gov/archive/1998/he98020.pdf.

virtually all of the applications for foreign labor it receives,[92] and critics argue that the resulting influx of cheap, unskilled workers into an already bursting labor market creates lower wages, higher rates of unemployment, and substandard conditions for workers.[93] These critics also argue that increased availability of labor dilutes domestic workers' collective bargaining power by providing employers with a ready and willing alternative labor force in the form of immigrant workers.[94]

Furthermore, the H-2 Program and other temporary worker proposals that would allow foreign-born workers into the United States for only a specified term do not adequately provide for the return of these workers at the end of their terms.[95] Granting a greater number of workers temporary legal status without addressing this issue ensures that an increase in illegal immigration will take place.[96] As Congress has recognized, possible employment is the "'magnet' [that] pulls illegal immigrants towards the United States,"[97] and the promise of continued employment entices workers brought into the country via the H-2 Program to remain in the

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There has been much controversy over how the government should determine labor availability and appropriate wage rates. BRIGGS, *supra* note 78, at 4.

[92] *See* U.S. GEN. ACCOUNTING OFFICE, *supra* note 91, at 8. From 1995-97 the DOL authorized ninety-nine percent of the 3,689 H-2A applications filed. *Id.*

[93] *See* U.S. COMM'N ON IMMIGRATION REFORM, *supra* note 81, at 94-95. The most affected wage class is "unskilled American workers . . . who can be displaced by newly entering guestworkers." *Id.* "Immigrants may reduce the employment opportunities of low-skill workers . . . especially in areas where the local economy is weak and immigrants are concentrated." FIX & PASSEL, *supra* note 13, at 47.

[94] *See* Numbers U.S.A., Unions Weakened During High Immigration, http://www.numbersusa.com/interests/unions.html (last visited Feb. 25, 2006). As immigration rises, union membership falls. *Id.* For example, from 1990 to 1998 the number of immigrants who had arrived in the United States during the previous ten years rose from approximately seven million to almost eleven million. *Id.* During the same period, union membership dropped from approximately five million to approximately four million. *Id.*

[95] *See* BRIGGS, *supra* note 78, at 6-7.

[96] *Id.* Guestworker programs are ineffective in stopping illegal immigration and do nothing to address the oversupply of illegal immigrants already in the United States. *Id.* at 7. Instead, these programs stimulate an influx of temporary workers resulting in the eventual hiring of more illegal immigrants. *Id.* at 6. Six out of ten undocumented workers first entered the country legally and then chose to stay in the country illegally after their visas expired. FIX & PASSEL, *supra* note 13, at 25.

[97] Hoffman Plastic Compounds v. NLRB, 535 U.S. 137, 155 (2002) (Breyer, J., dissenting) (quoting H.R. REP. NO. 99-682, pt. 1, at 45 (1986)).

country following the expiration of their visas.[98]

IV. The Current Deadlock in Immigration Policy: The Immigration Reform and Control Act and Its Effects on Employee Remedies Under the National Labor Relations Act

The overarching problem posed by temporary worker programs is that they perpetuate employer exploitation due to the significant lack of rights and protections afforded to temporary workers.[99] The federal government has not adequately addressed the problem of employer exploitation and has devoted more of its attention to the enforcement of existing employer prohibitions against the hiring of illegal immigrants, which has, so far, not succeeded.[100] As a result, federal law offers virtually no protections against unsafe working conditions and wage abuses to employees who either enter the country as undocumented workers or who choose to remain in the United States after the expiration of their visas.[101]

A. *Why the Immigration Reform and Control Act Fails to Prevent Employers from Hiring Undocumented Workers*

The United States, in enforcing its immigration policy, has thus far focused its attention on preventing the initial hiring of undocumented labor.[102] In 1986, Congress amended INA by enact-

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[98] *See id.* at 150-52.

[99] Alice J. Baker, *Agricultural Guestworker Programs in the United States*, 10 TEX. HISP. J.L. & POL'Y 79, 100-03 (2004). For example, H-2A workers are unable to negotiate with their employers for better wages or working conditions and do not see their work contracts until they reach the United States. *Id.* at 100-01.

[100] *See* BRIGGS, *supra* note 78, at 6. In the absence of strict enforcement of employer prohibition against hiring illegal workers, temporary worker programs will stimulate illegal immigration. *See id.* at 6-7. An example of the federal government's failure to adequately sanction employers that break the law occurred following a 1986 farmworker amnesty program, during which the government received between 250,000 and 650,000 fraudulent applications from workers requesting residency. Roberto Suro, *Migrants' False Claims: Fraud on a Huge Scale*, N.Y. TIMES, Nov. 12, 1989, at 1. The INS positively identified 398,000 such cases but could not prosecute many of the applicants due to a lack of manpower and funding. *Id.*

[101] *See* Shahid Haque, Note and Comment, *Beyond* Hoffman Plastic*: Reforming National Labor Relations Policy to Conform to the Immigration Reform and Control Act*, 79 CHI.-KENT L. REV. 1357, 1357-59 (2004).

[102] *See supra* notes 99-101 and accompanying text.

ing the Immigration Reform and Control Act ("IRCA")[103] to address growing concerns that the employment of undocumented workers had resulted in both a loss of jobs and decreased wages for domestic workers.[104] IRCA makes it illegal for an employer to knowingly hire an illegal alien or to continue employing a worker found to be an illegal alien.[105] IRCA requires a mandatory employment verification system, which makes an employer ascertain an employee's legal status and right to employment.[106] An employer's failure to comply with this policy may result in civil and criminal sanctions.[107]

IRCA, does not, however, deter employers from continuing to profit from hiring undocumented workers, nor does it end the pattern of immigrant exploitation.[108] Employer sanctions for IRCA violations are not substantial enough to motivate employers to abandon the practice of passing over American workers for cheaper alternatives.[109] IRCA has failed to strip employers of the

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[103] Immigration Reform and Control Act of 1986 ("IRCA"), Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

[104] *See* H.R. REP. NO. 99-682, pt. 1, at 47 (1986). The report indicates that in 1986 the United States faced high unemployment rates and could not absorb undocumented workers who were unable to find employment. *Id.* The legislature also feared that undocumented workers would take away jobs from domestic workers. *Id.*

[105] 8 U.S.C. § 1324a(a)(1)-(2) (2000).

[106] *Id.* § 1324a(b). An employer can prove the legal status of an employee in one of two ways: (1) he may use a document that proves both identity and employment authorization, such as a passport; or (2) he may use a document that proves identity, such as a driver's license in conjunction with a document that proves employment authorization, such as a social security card. *Id.* §§ 1324a(b)(1)(B)-(D).

[107] *Id.* §§ 1324a(e)(4)-(5), (f). An initial offense warrants a penalty between $250 and $2000 per undocumented worker. *Id.* § 1324a(e)(4)(A)(i). A second violation subjects an employer to a fine of $2000 to $5000 per worker. *Id.* § 1324a(e)(4)(A)(ii). If violations persist, the fines may increase to $3000 to $10,000 per worker. *Id.* § 1324a(e)(4)(A)(iii).

[108] FIX & PASSEL, *supra* note 13, at 32. Illegal entries into the United States decreased sharply shortly after the inception of IRCA, due mostly to the simultaneous blanket amnesty offered to undocumented farmworkers. *Id.* at 24. By October 1992, however, six years after Congress passed IRCA, illegal immigration entries grew between 200,000 and 300,000 each year. *Id.*

[109] *See* Hoffman Plastic Compounds v. NLRB, 535 U.S. 137, 154-55 (2002) (Breyer, J., dissenting). Justice Breyer concluded that employers would continue to violate IRCA in the absence of an obligation to award back pay to undocumented employees. *Id.* Moreover, enforcement of IRCA primarily focuses on only the most serious offenses, such as those involving alien smuggling and human rights violations. U.S. Immigration & Customs Enforcement, Human Rights Violations Branch, Office of Investigations: Smuggling/Public Safety Division (2005), http://www.ice.gov/

financial benefits of hiring undocumented workers, and thus has proven itself incapable of deterring illegal immigration on its own.[110]

B. *Why the National Labor Relations Act Fails to Prevent Employer Exploitation of Undocumented Workers*

In 1935, Congress passed the National Labor Relations Act ("NLRA" or the "Act") to end retaliatory acts by employers against workers attempting to unionize.[111] The NLRA defines those "employees" protected by the Act and lists certain enumerated exceptions.[112] For example, "any individual employed as an agricultural laborer" is excluded from the definition of "employee" under the Act.[113] As previously noted, the agricultural sector employs a large percentage of undocumented workers.[114] As a result, while the NLRA affords protection to some undocumented workers, it is not a blanket statutory protection for all such workers.[115]

Additionally, the Supreme Court's decision in *Hoffman Plastic Compounds v. NLRB* greatly limits the scope of claims available to undocumented workers with standing to file suit under the NLRA.[116] The plaintiff employer in *Hoffman Plastic* brought suit

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graphics/investigations/publicsafety/humanrights.htm [hereinafter U.S. Immigration & Customs Enforcement].

[110] *See* FIX & PASSEL, *supra* note 13, at 24.

[111] 29 U.S.C. § 151 (2000).

[112] *Id.* § 152.

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

Id.

[113] *Id.* § 152(3).

[114] *See supra* note 15.

[115] *See supra* notes 111-113 and accompanying text.

[116] *See* Hoffman Plastic Compounds v. NLRB, 535 U.S. 137, 151-52 (2002); Eric

against the National Labor Relations Board ("NLRB") challenging its decision to award Jose Castro back pay after the plaintiff dismissed him for participating in unionizing activities despite the fact that Mr. Castro was living and working in the United States illegally.[117] The Court overruled the NLRB's decision, concluding that "allowing the [NLRB] to award back pay to illegal aliens would unduly trench upon explicitly statutory prohibitions critical to federal immigration policy."[118] The Court determined that the NLRB's decision to award back pay to an illegal alien would compensate him for work not performed and reward him for his unlawful and fraudulent employment.[119]

The Court's decision in *Hoffman Plastic* struck a blow at attempts to expose and punish employer violations of immigrant employees' labor, employment, and civil rights because it took away the awarding of back pay as a remedy available to undocumented workers under the NLRA and other labor laws.[120] The Court concluded that other non-compensatory remedies were suf-

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Schnapper, *Righting Wrongs Against Immigrant Workers: A Recent Supreme Court Decision Raises Difficult Questions About What Remedies Are Available to Immigrants Who Lack Work Authorization When Their Federal or State Rights Are Violated*, TRIAL, Mar. 2003, at 46-47. The Court did not announce a broad rule categorically denying undocumented workers back pay, leaving lower courts to interpret the ruling with respect to claims against employers who knowingly hired the undocumented worker and claims brought by illegal aliens under other statutes. *Id.* at 47-54.

[117] *Hoffman Plastic*, 535 U.S. at 140. Jose Castro, an employee of Hoffman Plastic, faced discharge when he began participating in unionizing activities at the plant. *Id.* Upon investigation, the NLRB determined that Hoffman Plastic's decision to dismiss Castro violated the NRLA and ordered Hoffman Plastic to offer Castro reinstatement and back pay. *Id.* at 141-42. At a subsequent compliance hearing, Castro informed the NLRB that he was in the country illegally. *Id.* at 141. The NLRB then denied him relief on the grounds that he was an illegal alien. *Id.* It later changed this determination and awarded Castro back pay dating from the time he was fired to the time he admitted his illegal status. *Id.* at 141-42. The NLRB reasoned that this outcome furthers federal immigration policy because it deprives employers of an incentive to hire illegal aliens by denying employers greater opportunity to suppress unionization. *Id.* at 142. The U.S. Supreme Court reversed the NLRB's decision and rescinded the award of back pay, concluding that the remedial decision of the NRLB actually contradicted immigration policy. *Id.* at 140.

[118] *Id.* at 151.

[119] *Id.* at 148-49.

[120] Haque, *supra* note 101, at 1358. "By limiting remedies allowed to undocumented workers and thus limiting the punishment issued for wrongful conduct by an employer, the law indirectly encourages employer abuses and generates a greater incentive for employers to hire undocumented workers." *Id.*

ficient deterrents against employer violations and that back pay would only encourage further immigration violations.[121] These non-compensatory remedies, however, do little to deter future employer violations because employers remain able to derive significant economic benefit from undocumented workers.[122]

Furthermore, the Court's decision in *Hoffman Plastic* discourages foreign-born workers from bringing claims against their employers because of the potential onslaught of retaliatory acts by employers.[123] For example, following *Hoffman Plastic*, employers are more likely to contact the INS about the immigration status of workers who bring claims against them.[124] Not surprisingly, employers involved in litigation are more adamantly pursuing discovery requests for the legal status of the claimants.[125]

V. Remedies and Recommendations

A. *Distinguishing Employee Claims from Those Barred by* Hoffman Plastic

The Court in *Hoffman Plastic* did not explicitly address whether the NLRA requires employers who *knowingly* hired undocumented workers to award them back pay following an unlawful discharge.[126] The NLRB interprets the Court's decision in

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[121] *Hoffman Plastic*, 535 U.S. at 151-52. Other remedies, such as requiring the employer to discontinue his unlawful conduct or to educate other workers through posted notices, may be acceptable under the Court's decision. *See generally* NAT'L EMPLOYMENT LAW PROJECT, USED AND ABUSED: THE TREATMENT OF UNDOCUMENTED VICTIMS OF LABOR LAW VIOLATIONS SINCE *HOFFMAN PLASTIC COMPOUNDS V. NLRB* 2 (2003), *available at* http://www.maldef.org/publications/pdf/Hoffman_11403.pdf.

[122] *See supra* note 13 and accompanying text.

[123] *See infra* notes 124-125 and accompanying text.

[124] *See* SMITH ET AL., *supra* note 12, at 46-47; *see also* Centeno-Bernuy v. Becker Farms, 219 F.R.D. 59 (W.D.N.Y. 2003). After four Peruvian farmworkers filed a lawsuit alleging wage and human rights violations, the defendant's father contacted the INS, claiming that the workers were undocumented and requesting the agency to take action. *Id.* at 60-61.

[125] *See, e.g.*, Zeng Lui v. Donna Karan Int'l, Inc., 207 F. Supp. 2d 191, 192 (S.D.N.Y. 2002) (denying defendant corporation's discovery requests for immigration status of plaintiffs after they sued for unpaid wages); Flores v. Albertson's, Inc., No. CV0100515AHM(SHX), 2002 WL 1163623, at *5 (C.D. Cal. Apr. 9, 2002) (upholding magistrate's denial of defendant's motion to force discovery of the plaintiffs' immigration status, after the plaintiff brought suit for unpaid wages).

[126] *See* Schnapper, *supra* note 116, at 46-47.

Hoffman Plastic as categorically precluding awards of back pay to wrongfully-discharged undocumented workers for labor never performed, but not foreclosing the availability of back pay to undocumented laborers for work actually performed.[127] Many lower courts are turning against a restrictive interpretation of *Hoffman Plastic* to grant remedies to undocumented workers who claim employer violations.[128] Not all lower courts, however, have interpreted *Hoffman Plastic* in a way favorable to undocumented workers.[129]

B. *Direct Damage Claims Under the Thirteenth Amendment*

For the most severe cases of worker exploitation by private employers,[130] scholars have suggested the creation of a direct damage claim for violations of the Thirteenth Amendment's prohibi-

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[127] Memorandum GC 02-06 from Arthur F. Rosenfeld, Office of the General Counsel, NLRB to all Regional Directors, Officers-in-Charge and Resident Officers (July 19, 2002), *available at* http://www.nlrb.gov/nlrb/shared_files/gcmemo/gcmemo/gc02-06.asp.

[128] *See, e.g.*, Martinez v. Mecca Farms, Inc., 213 F.R.D. 601, 604-05 (S.D. Fla. 2002) (interpreting *Hoffman Plastic* as not precluding an undocumented worker's claims against an employer for uncompensated labor); Singh v. Jutla, 214 F. Supp. 2d 1056, 1060-62 (N.D. Cal. 2002) (awarding the plaintiff, an undocumented alien, three years of unpaid wages because his employer knew of his illegal status at the time of his hiring and because the plaintiff was only requesting compensation for labor actually performed); Reinforced Earth Co. v. Workers' Comp. Appeal Bd., 810 A.2d 99, 105 n.7 (Pa. 2002) (declining to extend *Hoffman Plastic* and holding that a "public policy exception" does not exclude illegal workers from protection under state workers' compensation laws).

[129] *See, e.g.*, Veliz v. Rental Serv. Corp. USA, Inc., 313 F. Supp. 2d 1317, 1320-21, 1334-37 (M.D. Fla. 2003) (holding that *Hoffman Plastic* limits an illegal worker's recovery for lost wages in products liability cases brought under Florida law); Hernandez-Cortez v. Hernandez, No. Civ.A. 01-1241-JTM, 2003 WL 22519678, at *7 (D. Kan. Nov. 4, 2003) (interpreting *Hoffman Plastic* as barring an undocumented worker from seeking damages for lost wages in a personal injury action against a non-employer); Rosa v. Partners in Progress, Inc., 868 A.2d 994, 999-1001 (N.H. 2005) (holding that illegal workers might not be able to recover lost wages they would have earned in a suit against the owner of an equipment company); Sanango v. 200 E. 16th St. Hous. Corp., 788 N.Y.S.2d 314, 316, 321 (N.Y. App. Div. 2004) (holding that in workplace injury actions, *Hoffman Plastic* bars an award of lost wages that an illegal immigrant would have earned).

[130] For purposes of this argument I define a severe case of exploitation as one in which: (1) an employer has either forced a worker into the United States through false pretenses or direct force; or (2) an employer has physically or financially entrapped a worker already within the United States.

tion on slavery.[131] Presently, an individual may bring a claim for damages for a constitutional violation by state actors either under 42 U.S.C. § 1983[132] or under the common-law remedy established by the Supreme Court in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics.*[133] In *Bivens*, the Court held that "a direct damages remedy was available for constitutional violations in the absence of congressional authorization and where some state tort remedy was available but not adequate."[134] Since *Bivens*, the Supreme Court has recognized direct causes of action under the First,[135] Fifth,[136] and Eighth Amendments.[137]

Federal courts have rejected both the argument that courts can extend the *Bivens* doctrine to private actors[138] and that the Thirteenth Amendment grants positive substantive rights.[139] In *Turner v. Unification Church*, the District Court for the District of Rhode Island confronted the possibility of a *Bivens* action against private actors for violations of the Thirteenth Amendment.[140] In *Turner*, the court declined to recognize a direct Thirteenth Amendment claim brought by a plaintiff who alleged the Unification Church brainwashed and enslaved her, concluding that the *Bivens* doctrine only extends causes of action to individuals suing

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[131] U.S. CONST. amend. XIII, §§ 1-2. "Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Section 2. Congress shall have power to enforce this article by appropriate legislation." *Id.*

[132] 42 U.S.C. § 1983 (2000).

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

Id.

[133] 403 U.S. 388 (1971).

[134] Azmy, *supra* note 31, at 1050 (citing *Bivens*, 403 U.S. at 397).

[135] *Id.* at 1055 (citing Bush v. Lucas, 462 U.S. 367 (1983)).

[136] *Id.* (citing Davis v. Passman, 442 U.S. 228, 234 (1979)).

[137] *Id.* (citing Carlson v. Green, 446 U.S. 14 (1980)).

[138] *Id.* at 1057-58.

[139] *See* Palmer v. Thompson, 403 U.S. 217, 226, 227 (1971); *see also* Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. L. REV. 1, 28 (1995).

[140] Turner v. Unification Church, 473 F. Supp. 367, 371 (D.R.I. 1978).

government actors.[141]

A claim under the Thirteenth Amendment functions similarly to an ordinary tort claim.[142] Both actions are concerned with the prohibition of undesirable conduct and the desire to compensate injured persons.[143] A constitutional claim for damages under the Thirteenth Amendment is an appropriate action in the case of forced labor because it analogizes an employer's actions to involuntary servitude, debt bondage, or slavery.[144] Therefore, the availability of a constitutional remedy would contain a certain degree of moral significance and would validate the worth and importance of the undocumented worker bringing the claim.[145]

VI. Concluding Remarks

In his 2006 State of the Union Address, President George W. Bush called for "a rational, humane guest-worker program that rejects amnesty, allows temporary jobs for people who seek them legally and reduces smuggling and crime at the border."[146] His proposed program, however, does nothing to deter individuals from entering the country illegally, or to protect undocumented workers already in the country.

A successful solution to curb the influx and exploitation of immigrant workers must discourage continued illegal immigration and provide stronger sanctions against employers who hire and abuse these workers.[147] To these ends, commentators suggest fin-

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[141] *Id.* at 374.

[142] John C. Jeffries, *Damages for Constitutional Violations: The Relation of Risk to Injury in Constitutional Torts*, 75 VA. L. REV. 1461, 1466-67 (1989). As with an ordinary tort claim, a constitutional tort relies on a private claimant, seeks compensatory remedies, and its success turns on the fault of the defendant. *Id.*

[143] *Id.* at 1462.

[144] *See id.* at 1469-70. A case for compensation rests not only on the defendant's infliction of injury, but also on the defendant's infliction of injury in violation of the plaintiff's constitutional rights. *Id.*

[145] Azmy, *supra* note 31, at 1053-54. "Recognizing such a right would also validate the humanity of individual victims and would help transform them from a commodified labor resource into three-dimensional persons deserving of equal dignity and respect." *Id.* at 1054.

[146] President George W. Bush, State of the Union Address (Jan. 31, 2006), *in* N.Y. TIMES, Feb. 1, 2006, at A18.

[147] *See* Durand et. al., *supra* note 54. Under IRCA, an employer does not need to verify the authenticity of authorization documents and is free from sanction after ac-

ing employers "the same amount as the remedies that would be owed to the employee"[148] or an amount equal to the economic benefit they have derived from their illegal behavior.[149] But while the proposed solution of larger monetary sanctions would act as a stronger financial deterrent to employers seeking to hire undocumented workers,[150] such changes would be inadequate in that they overlook the infrequency in which individual victims will bring such claims without the likelihood of financial benefit.[151] As previously noted, many foreign-born workers, even those in the country legally, do not bring claims against their employers due to fears of retaliation or inquiry into their legal status.[152] Additionally, the United States Immigration and Customs Enforcement has proven ill-equipped to investigate employer violations by its own initiative.[153]

By shifting its attention from prohibiting or regulating the initial hiring of foreign-born labor to creating legislation that affirmatively protects the workers themselves, Congress will provide employees with a greater incentive to bring actions against their employers.[154] Establishing stricter sanctions against employers who

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quiring these documents, even if they prove to be false. *Id.* The prevailing law therefore encourages employers to avoid sanctions by fabricating documentation. *Id.*

[148] Haque, *supra* note 101, at 1379. Under such a sanction, the employer in *Hoffman Plastic* would have to pay the government the amount of back pay owed to Mr. Castro plus interest, or $66,951. *Id.*

[149] *Id.* at 1379-80. This differs from a fine based on an employee's damages because it takes into account illegal practices that benefited the employer but did not necessarily result in direct financial loss to the employee. *Id.* For example, an employer may forego safety training for an undocumented worker; in such an instance, the employer benefits from the saved costs of training, but the only remedy available to an undocumented worker aggrieved by the policy would be injunctive relief. *Id.* at 1380.

[150] *See id.*

[151] *See* NAT'L EMPLOYMENT LAW PROJECT, *supra* note 121, at 2. Immigrant workers are reluctant to complain about violations of their labor rights because of the threat of employer retaliation or the possibility of having to disclose their immigration status. *Id.*

[152] *See generally* Yeoman, *supra* note 38.

[153] *See* U.S. Immigration & Customs Enforcement, *supra* note 109.

[154] *See, e.g.*, DLFPA, *supra* note 26, §§ 5-6. With respect to wages, the DLFPA would equalize the pay rates for full-time and part-time employees, require agencies and employers to pay for employee wait time, and prohibit certain deductions for food and transportation costs. *Id.* It would also require employers to maintain a safe working environment and provide onsite equipment and training at no cost to workers. *Id.* § 7. The DLFPA would create incentives for workers to bring suits because it

hire illegal workers, while simultaneously forcing these employers to pay substantial fines and damage claims when these workers are injured, will provide an economic disincentive for continued employment of illegal workers while protecting undocumented workers already in the United States.

I wholeheartedly disagree with the unwillingness of federal courts to extend the *Bivens* doctrine to private actors and create a cause of action for severe employer exploitation under the Thirteenth Amendment. The distinction between government and private actors drawn by the court "is a manifestly illegitimate distinction since the relevant constitutional actors under the Thirteenth Amendment are in most cases private persons or entities."[155] Congress should take action to address the problems of involuntary servitude and severe employer exploitation by creating a civil remedy pursuant to its authority under Section 2 of the Thirteenth Amendment, thereby negating the need for a judicially-created cause of action.[156]

Congress possesses the ultimate authority to create legislation that holds employers accountable for the injuries they inflict upon workers.[157] Presently, Congress has failed to create a comprehensive plan to address both increased immigration and employer exploitation.[158] With the effects of foreign labor changing from a local problem to a national concern, Congress must create a uniform immigration policy that both protects American workers and provides safeguards to undocumented laborers already within the United States.[159]

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would prohibit employer retaliatory acts against workers bringing claims. *Id.* § 10.

[155] Azmy, *supra* note 31, at 1058.

[156] *Id.* at 1049.

[157] *See* U.S. CONST. art. I, § 8. The Constitution grants Congress the authority to pass laws with respect to immigration and naturalization. *See id.*

[158] *See* FIX & PASSEL, *supra* note 13, at 16. The United States does not have a coherent immigrant policy and, consequently, public responsibility for controlling and protecting the immigrant population has fallen by default to state and local governments. *Id.*

[159] *See* Russo, *supra* note 1, at 196. Since nonimmigrant and undocumented workers are prone to interstate travel, federal legislation would better provide uniform application of measures to protect workers than would state legislation, which could differ in the scope and degree of its protections. *See id.*