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Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails

Michael J. Wishnie[†]

For a century before 1986,¹ federal law permitted employers to hire undocumented immigrants.² The Immigration Reform and Control Act of 1986 (“IRCA”) marked a sea change in immigration law by extending federal immigration regulation into the private workplace through the prohibition of employment of unauthorized immigrants. In the two decades since passage of this dramatic new ban, codified in the “employer sanctions” provisions of the Immigration and Nationality Act (“INA”), there has been almost no critical examination of its merits.³ Few commentators have

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¹ Federal immigration regulation began in earnest in the 1880s and did not bar the hiring of undocumented immigrants until passage of the Immigration Reform and Control Act of 1986 (“IRCA”), Pub L No 99-603, 100 Stat 3359.

² *Sure-Tan, Inc v NLRB*, 467 US 883, 893 (1984) (observing that it is not “a separate criminal offense for an alien to accept employment after entering this country illegally”); *De Canas v Bica*, 424 US 351, 360 (1976) (“at best,” federal immigration statutes displayed “peripheral concern with employment of illegal entrants”). Before IRCA, twelve states prohibited the “knowing” employment of undocumented immigrants, including California, the state with the largest undocumented population. See *De Canas*, 424 US at 360 (rejecting preemption challenge to California statute penalizing employment of unauthorized immigrants); U.S. Immigration Policy and the National Interest: Staff Report of the Select Commission on Immigration and Refugee Policy, 97th Cong, 1st Sess 565 n * (Apr 30, 1981) (“SCIRP Staff Report”). But there was no federal prohibition, and the states generally declined to enforce their own laws. SCIRP Staff Report at 565 n * (“As for the state laws, they have been enforced only in California and Kansas. In California, enforcement has been effectively suspended The sole case of successful prosecution occurred in Kansas in 1977 and resulted in a fine of \$250 against an employer.”).

³ One important exception is David Bacon, a longtime and forceful critic. See, for example, David Bacon, *Justice Deported*, Am Prospect (Dec 14, 2006), available at <http://www.prospect.org/cs/articles?article=justice_deported> (last visited August 6, 2007) (“Unions and immigrants both need a bill that would mandate what they’ve advocated since 1999—the repeal of employer sanctions [S]anctions deny basic labor rights to millions”). See also Muzaffar Chishti, *Employer Sanctions Against Immigrant Workers*, Working USA 74 (Mar-Apr, 2000), available at <<http://www.prospect.org/cs/>

analyzed whether sanctions achieve their twin purposes of deterring illegal immigration and protecting United States workers. Nevertheless, all serious proposals for immigration reform now under debate assume the continuation and even intensification of the prohibition on employment of unauthorized immigrants.

Congress's enactment of employer sanctions followed many years of study by a bipartisan congressional committee, academic researchers, and non-governmental organizations, as well as the production of several extensive sets of policy recommendations.⁴ Substantively, the employer sanctions provisions forbid an employer from "knowingly" hiring or employing any unauthorized worker. IRCA also created new paperwork requirements, obligating employers to examine an employee's work authorization documents and complete a Form I-9 within three days of hire. Congress established civil and criminal penalties for violations of either the substantive prohibition on employment or the paperwork requirements.⁵ Congress also repealed the "Texas proviso" that had shielded employers from criminal liability for employing unauthorized immigrants,⁶ and extended the criminal prohibition on the use of fraudulent documents in immigration matters to penalize their use in connection with private employment.⁷ In short, for the first time in our nation's history, IRCA made employment of undocumented immigrants unlawful across the country.⁸

articles?article=justice_deported> (last visited August 6, 2007) (stating that the employer-sanctions law "has, ironically, become a highly useful tool in the hands of unscrupulous employers in their ability to suppress workers' rights").

⁴ Most significant was the Select Commission on Immigration and Refugee Policy ("SCIRP"), established by Congress in 1978, which completed its work in 1981. See U.S. Immigration Policy and the National Interest: The Final Report and Recommendations of the Select Commission on Immigration and Refugee Policy with Supplemental Views by Commissioners, 97th Cong, 1st Sess (Mar 1, 1981) ("SCIRP Final Report"). See also Immigration Reform and Control Act of 1986, Conference Report, 132 Cong Rec S16611, 16614 (Oct 16, 1986) (statement of Senator Simpson) (IRCA was SCIRP's "basic work product").

⁵ IRCA § 101, codified at 8 USC § 1324a (2000) (prohibiting knowing employment of unauthorized workers and establishing criminal and civil penalties for violations).

⁶ As a result, employers are now criminally liable under the "harboring" statute, as well as the employer sanctions provisions, for employment of undocumented immigrants. See, for example, *United States v Kim*, 193 F3d 567, 573-74 (2d Cir 1999) (affirming criminal conviction of factory owner who knowingly employed undocumented workers for violation of harboring statute).

⁷ IRCA § 103, codified at 18 USC § 1546(b) (establishing criminal penalties for use of false documents to establish work authorization under § 1324a).

⁸ IRCA contained numerous other provisions as well, notably a one-time amnesty program that eventually resulted in allowing approximately three million people to obtain lawful permanent residence. IRCA § 201, codified at 8 USC § 1255a. IRCA also made

It is time to consider whether, and if so to what extent, the employer sanctions regime has deterred illegal immigration and protected U.S. labor markets. This article argues that the prohibition on employment has achieved neither of its purposes, and in fact has led to increased workplace exploitation of undocumented immigrants, strengthened the “jobs magnet” that sanctions aimed to weaken, encouraged illegal immigration, and eroded wages and working conditions for U.S. workers. Sanctions have also increased workplace discrimination and undermined public safety and homeland security by driving millions of undocumented immigrants and their families into the shadows of civic life, fearful that cooperation with ordinary law enforcement, public health, and other social programs may lead to their deportation.⁹ Furthermore, the prohibition on employment has operated to grant an unfair competitive advantage to outlaw firms that violate labor and immigration laws as against law-abiding firms that respect both. By delegating immigration enforcement powers to private employers, sanctions have created inherently exploitative conditions in the workplace. Employer sanctions have failed and should be abandoned.

The historical genesis of employer sanctions is not in dispute. In the 1980s, proponents of sanctions argued and some congressional and other research studies concluded,¹⁰ *first*, that the “jobs magnet” in the United States inexorably attracted undocumented immigrants, who entered the country illegally or failed to depart upon the expiration of a visa, and *second*, that their presence had significant negative effects for domestic workers, especially “low-income, low-skilled Americans, who are the most likely to face direct competition” from the undocumented.¹¹ IRCA sought to influence the incentives for employers inclined to hire undocumented immigrants by prohibiting and penalizing the practice, thereby diminishing the strength of the “jobs mag-

discrimination in the verification of immigration status an unlawful employment practice, 8 USC § 1342b, expressly preempted state employer sanctions law, 8 USC § 1324a(h)(2), and directed labor enforcement funds to immigrant-intensive industries, IRCA § 111(d). See Richard E. Blum, *Labor Standards Enforcement and the Results of Labor Migration: Protecting Undocumented Workers After Sure-Tan, The IRCA, and Patel*, 63 NYU L Rev 1342 (1988) (analyzing labor enforcement provisions of IRCA § 111(d)).

⁹ See President George W. Bush, *New Temporary Worker Program: Remarks by the President on Immigration Policy* (Jan 7, 2004), available at <<http://www.whitehouse.gov/news/releases/2004/01/20040107-3.html>> (last visited May 20, 2007). See also Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 NYU L Rev 667, 673–79 (2003).

¹⁰ See, for example, SCIRP Final Report at 11 (cited in note 4).

¹¹ Immigration Reform and Control Act of 1985, S Rep No 99-132, 99th Cong, 1st Sess 5 (1985).

net,” deterring unlawful immigration, and safeguarding wages and working conditions for U.S. workers.

There was also a political rationale for employer sanctions. The provisions were part of a grand bargain and the principal *quid pro quo* for the one-time amnesty provision that was the other major element of IRCA.¹² The AFL-CIO and NAACP supported employer sanctions, as did a variety of anti-immigrant and nativist organizations. Business groups, Latino organizations, and civil liberties groups, including the ACLU, U.S. Chamber of Commerce, and National Council of La Raza, opposed employer sanctions.¹³ But even opponents of employer sanctions recognized that the prohibition on employment might be a reasonable price to pay for the IRCA amnesty provision, which led to the eventual legalization of three million people. Many predicted that employer sanctions would burden business, encourage discrimination in hiring, fail adequately to protect U.S. workers, and do little to discourage illegal immigration. But all agreed that the nation’s immigration system was flawed and in need of reform, and IRCA promised both legalization and increased enforcement—politically, something for all sides.

Curiously, however, as Congress and the Administration struggled through complex and politically fraught negotiations in 2006 to enact comprehensive immigration reform, all major voices assumed that Congress would and should continue employer sanctions.¹⁴ The same has been true thus far in 2007.¹⁵

¹² See 8 USC § 1255a (2000). Although envisioned as a one-time measure in which persons present in the US since 1982 applied for amnesty within a one-year filing period, implementation of the amnesty prompted extensive litigation. See *Courts Approve Settlement Agreements in LULAC/Newman, CSS; Filing Instructions Expected at End of March*, 81 No 9 Interp Rel 275 (Mar 1, 2004).

¹³ Peter Brownell, *The Declining Enforcement of Employer Sanctions* 1 (Migration Policy Institute (“MPI”) Sept 1, 2005) (noting AFL-CIO and NAACP support for sanctions as early as 1970s), available at <<http://www.migrationinformation.org/Feature/display.cfm?id=332>> (last visited Feb 9, 2007). The U.S. Chamber of Commerce opposed sanctions from the beginning as “unworkable and costly.” Nancy Humel Montwieler, *The Immigration Reform Law of 1986: Analysis, Text, and Legislative History* 6 (BNA 1987). Over time, the Chamber “relented from its hardline opposition,” and by 1985, eventually offered “qualified support” for the grand compromise in IRCA: legalization in exchange for sanctions. *Id.* at 7, 10.

¹⁴ Notably, in the aftermath of Hurricane Katrina, President Bush announced that the Department of Homeland Security would temporarily suspend enforcement of employer sanctions in affected regions. Gregory Rodriguez, *La Nueva Orleans: Latino immigrants, many of them here illegally, will rebuild the Gulf Coast—and stay there*, Los Angeles Times M1 (Sept 25, 2005).

¹⁵ See, for instance, the lead House immigration reform bill, Security Through Regularized Immigration and a Vibrant Economy Act of 2007, HR 1645 (2007) (“STRIVE Act”), Title III, Sec 301, and the lead Senate bill, The Border Security, Economic Opportunity,

This is particularly odd given that, in the years since 1986, some major proponents of employer sanctions, including the AFL-CIO and African-American civil rights organizations, have switched their view and now formally oppose sanctions¹⁶—even as the original critics of sanctions, such as the business community, remain opposed. Instead, the discussions are shaped by the national security needs of a post-September 11 world, concerns about economic competition in the 21st century, and the determination of both political parties to secure the mythical “Latino vote.”

For example, in January 2004, President Bush offered a vague proposal for a mammoth new guest worker program;¹⁷ since then, several major immigration reform measures have been introduced in Congress, sponsored by many of the most powerful legislators of each party, and in 2006 both the House and the Senate passed major immigration legislation.¹⁸ But despite a consensus among business, labor, civil rights, Latino, and African American communities that employer sanctions should be abandoned,¹⁹ each one of the major proposals that preceded Senate and House action, as well as the bills passed by each chamber, assumes the continuation of employer sanctions, and most seek to make more efficient the present system of document verification.²⁰ Even centrist immigration researchers and advo-

and Immigration Reform Act of 2007, S 1639 (2007), Title III, Sec 302.

¹⁶ AFL-CIO, *Statement of the Executive Council* (Feb 16, 2000), available at <<http://www.aflcio.org/aboutus/thisistheafclcio/ecouncil/ec0216200b.cfm>> (last visited Feb 9, 2007); Brownell, *Declining Enforcement* at 6 (cited in note 13) (observing that NAACP reversed position in early 1990s to oppose sanctions).

¹⁷ See Bush, *New Temporary Worker Program* (cited in note 9).

¹⁸ Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, HR 4437, 109th Cong, 1st Sess (Dec 6, 2005); Comprehensive Immigration Reform Act of 2006, S 2611, 109th Cong, 2d Sess (Apr 7, 2006).

¹⁹ See note 16 (citing AFL-CIO Executive Council statement), note 13 (citing US Chamber of Commerce statements).

²⁰ See Secure America and Orderly Immigration Act, S 1033, 109th Cong, 1st Sess (May 12, 2005) (whose principal sponsors include Senators Ted Kennedy and John McCain); Secure America and Orderly Immigration Act, HR 2330, 109th Cong, 1st Sess (May 12, 2005); Comprehensive Enforcement and Immigration Reform Act of 2005, S 1438, 109th Cong, 1st Sess (July 20, 2005) (sponsored by Republican Senators John Cornyn and Jon Kyl); REAL GUEST Act of 2005, HR 3333, 109th Cong, 1st Sess (July 19, 2005) (sponsored by Representative Tom Tancredo); and Save America Comprehensive Immigration Act of 2005, HR 2092, 109th Cong, 1st Sess (May 4, 2005) (sponsored by Representative Jackson-Lee). See also Eliot Turner and Marc R. Rosenblum, *Solving the Unauthorized Migrant Problem: Proposed Legislation in the US* 2–3 (MPI Sept 1, 2005) (noting that all major legislation introduced in response to the President’s proposal for new guestworker program includes “new ways to penalize such employers”), available at <<http://www.migrationinformation.org/Feature/display.cfm?id=333>> (last visited Feb 9, 2007).

cates presume that any liberalization of the current immigration regime will depend on another political trade for increased penalties and enforcement, including expanded employer sanctions provisions.²¹

I. THE ORIGINS OF IRCA

During the first century of federal immigration regulation there was no prohibition on the employment of unauthorized immigrants, and as the Supreme Court observed, employment of immigrants was “at best” a “peripheral concern” of the INA.²² Nevertheless, labor market considerations frequently influenced immigration rules, at times favoring liberalization (as in the massive *braceros* programs of the 1940s–60s) and in other periods constriction (as in the anti-Asian laws of the late 19th and early 20th centuries).²³ One prominent immigration historian concluded, “[i]t would be in fact difficult to determine where immigration policy ends and labor policy begins, the two are so closely interrelated.”²⁴

Indeed, Congress was careful to protect employers of undocumented immigrants from criminal sanction. Pursuant to the “Texas proviso,” Congress specifically exempted such employers from the federal criminal penalties for “harboring” aliens when these penalties were enacted in 1952.²⁵ To be sure, undocumented immigrants could be arrested in the workplace and de-

²¹ See Spencer Abraham, et al, *Immigration and America's Future: A New Chapter: Report of the Independent Task Force on Immigration and America's Future* 45 (MPI Sept 2006) (“MPI Task Force”) (“Recommendation #3: The Task Force recommends that mandatory employer verification and workplace enforcement be at the center of more effective immigration enforcement reforms.”). The MPI Task Force was co-chaired by former Republican Senator and Bush cabinet member Spence Abraham and former Democratic Representative and 9-11 Commission co-chair Lee Hamilton. Its members included the leaders of immigration reform in both parties, such as Senators Edward Kennedy and John McCain, and its report is likely to prove influential in the continuing debate. See, for example, Editorial, *Looking Over the Wall*, NY Times A16 (Oct 9, 2006) (lauding recommendations of MPI Task Force).

²² *De Canas v Bica*, 424 US 351, 360 (1976).

²³ See Grounds for Exclusion of Aliens under the Immigration and Nationality Act: Historical Background and Analysis, 100th Cong, 2d Sess 8 (1988) (“The Chinese Exclusion Act . . . was enacted out of a concern for protecting domestic labor from foreign competition, combined with racial prejudice.”).

²⁴ E.P. Hutchinson, *Legislative History of American Immigration Policy 1789–1965* 492 (Penn 1981). See also *id.* at 502 (“Congress in designing immigration legislation has been responsive to considerations of the labor supply and the labor market.”).

²⁵ Harboring was criminalized in 1952, but employment was exempted from the start. 8 USC § 1324(a) (1952) (“*Provided, however,* That for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring.”).

ported,²⁶ as they could be arrested anywhere, but such workers faced no additional immigration or other penalties because of their employment. Nor was the employer acting unlawfully merely by employing such workers. Further, labor and employment laws generally applied to all covered firms and workers, without regard to the immigration status of employees,²⁷ with the principal exception that deported workers could not pursue certain remedies.²⁸

The earliest legislative proposals for federal penalties on employers who hire undocumented immigrants date to the 1950s,²⁹ but the first serious bill to accomplish this goal was introduced by Representative Peter Rodino in 1973, at the instigation of the AFL-CIO and NAACP.³⁰ The Rodino bill twice passed the House in the early 1970s and won some support from the Nixon and Ford Administrations, but it died in the Senate each time.³¹ A 1977 Carter Administration bill containing a sanctions provision directed at a “pattern or practice” of hiring undocumented workers, as well as legalization measures, also went nowhere.³² These proposals faced substantial and “spirited” opposi-

²⁶ See, for example, *INS v Lopez-Mendoza*, 468 US 1032 (1984) (rejecting challenge to INS worksite raid resulting in arrest and deportation of workers).

²⁷ See, for example, *NLRB v Apollo Tire Co, Inc*, 604 F2d 1180, 1884 (9th Cir 1979) (Kennedy concurring) (arguing that “if the NLRA were inapplicable to workers who are illegal aliens, we would leave helpless the very persons who most need protection from exploitative employer practices”).

²⁸ See *Sure-Tan, Inc v NLRB*, 467 US 883, 883 (1984) (noting that deported workers are ineligible for back pay or reinstatement under the National Labor Relations Act).

²⁹ See Betsy Cooper and Kevin O’Neil, *Lessons from the Immigration Reform and Control Act of 1986*, MPI Policy Brief No 3 (Aug 2005) (noting proposals by Senator Douglas in 1950s), available at <http://www.migrationpolicy.org/pubs/PolicyBrief_No3_Aug05.pdf> (last visited Feb 9, 2007); Michael Fix and Paul T. Hill, *Enforcing Employer Sanctions: Challenges and Strategies* 22 (RAND Corp/Urban Inst 1991) (same). The first formal proposal for sanctions may have been from the Truman Commission on Migratory Labor, which in 1951 recommended adopting sanctions to deter Mexican migration. Demetrios A. Papademetriou and B. Lindsay Lowell, *Employer Sanctions: Expectations and Early Outcomes*, in Michael Fix, ed, *The Paper Curtain: Employer Sanctions’ Implementation, Impact, and Reform* 215, 216 (RAND Corp/Urban Inst 1991). On occasion, Congress had responded to concerns about exploitation of immigrant workers, see, for example, Padrone Act, Act of June 23, 1874, 18 Stat 251 (criminalizing trafficking and exploitation of Italian children); *United States v Kozminski*, 487 US 931, 947 (1988) (“Congress enacted the Padrone statute in 1874 ‘to prevent [this] practice of enslaving, buying, selling, or using Italian children’”), but never by prohibiting the hire of undocumented immigrants.

³⁰ Brownell, *Declining Enforcement* at 1 (cited in note 13).

³¹ SCIRP Final Report, *The Immigration Reform Law of 1986* at 4 (cited in note 13); Papademetriou and Lowell, *Employer Sanctions* at 216–17 & n 3 (cited in note 29) (listing Nixon, Ford, Carter, and Reagan Administration recommendations to adopt sanctions).

³² Montwieler, *The Immigration Reform Law of 1986* at 4 (cited in note 13); SCIRP Final Report at 62 (cited in note 4). In 1974, Congress amended the Farm Labor Contrac-

tion, however, particularly from business groups and Latino organizations.³³

A desire to reform immigration policies persisted in some quarters, and in 1978 Congress established the Select Commission on Immigration and Refugee Policy (“SCIRP”). The Select Commission held public hearings around the country, commissioned numerous papers from social scientists, historians, and other scholars, reviewed mountains of data, and after extensive study issued its final report (complete with seven volumes of appendices) in 1981. As the final report explained: “In the hearings the Select Commission has held and in the letters it has received, one issue has emerged as most pressing—the problem of undocumented/illegal migration.”³⁴

The notion of prohibiting employers from hiring undocumented immigrants was controversial. The AFL-CIO endorsed sanctions in a 1980 Executive Council statement, and labor leaders testified at SCIRP hearings in support of the measure, as did the American Legion, the National Urban League, and environmental groups.³⁵ Many business groups declined to offer public testimony, but as the SCIRP staff noted, “[t]heir previous opposition to employer sanctions is well known, and it is likely that they will continue to espouse their old position.”³⁶ Those business groups that did testify emphasized the regulatory burdens of sanctions and the unfairness of deputizing the private sector to enforce public immigration laws.³⁷ Latino organizations, civil rights groups, and the U.S. Catholic Conference of Bishops also testified in opposition, emphasizing that sanctions would encourage employment discrimination by employers.³⁸

Despite the lack of public consensus, in 1981 the Select Commission proposed a host of detailed legislative reforms. At their core lay the suggestion of a grand bargain—legalization in exchange for employer sanctions and increased border enforcement—that formed the foundation for what became IRCA.³⁹ No-

tor Act of 1963 to prohibit the knowing employment of unauthorized workers. SCIRP Final Report at 61 n *. See Farm Labor Contractor Registration Act Amendments of 1974, Pub L No 93-518, 88 Stat 1652.

³³ Papademetriou and Lowell, *Employer Sanctions* at 217 (cited in note 29).

³⁴ SCIRP Final Report at 35 (cited in note 4).

³⁵ SCIRP Staff Report at App H 250–53 (cited in note 2) (summarizing AFL statement and testimony).

³⁶ *Id.* at 251.

³⁷ *Id.* at 251–52.

³⁸ *Id.* at 249, 253–54.

³⁹ SCIRP Final Report at xvi–xvii, xxvi–xxvii, 46–56, 59–71 (cited in note 4). The

tably, all eight members of Congress who served on the Select Commission voted to recommend adoption of employer sanctions.⁴⁰ SCIRP's rationale for sanctions was straightforward. Enormous wage disparities between the United States and many other nations attract undocumented immigrants to the U.S. labor market, and these disparities cannot likely be overcome by intensified U.S. penalties. Border and interior enforcement are inadequate to deter new illegal immigration or to locate and arrest persons already present in the United States. Employer incentives can be adjusted, however, through the imposition of penalties for hiring undocumented workers, especially when combined with enhanced labor standards enforcement. If fewer employers are willing to hire undocumented workers, Congress will achieve its twin goals of deterring illegal immigration and protecting U.S. workers.⁴¹

Following completion of its report, Senator Alan Simpson and Representative Romano Mazzoli held several days of hearings on the Select Commission's recommendations, and the next month, the Reagan Administration endorsed a similar package of reforms: increased border and interior enforcement, employer sanctions, and legalization, plus a temporary guestworker program.⁴² In 1982, Simpson and Mazzoli introduced legislation to codify this compromise package, and they continued to introduce the legislation annually until IRCA was passed in 1986.

The Simpson-Mazzoli legislation initially drew criticism from all directions. Business groups opposed sanctions as burdensome and inefficient, civil rights and Latino groups opposed sanctions as likely to spur employment discrimination, and Western agricultural interests and organized labor weighed in with various objections. Indeed, agribusiness interests were "frank about their dependence on undocumented labor and the severe financial problems that sanctions would impose."⁴³

Commission debated proposals for a new guestworker program as well, noting the experience of European countries and that of the U.S. during the notorious *braceros* program. In the end, the Commission did not recommend a large-scale temporary worker program, although it did suggest some reforms to the visa program for farmworkers. *Id.* at 45. The possibility of a special farmworker category, insisted upon by Western growers, would tie up Congress in its effort to enact broad reforms until a last-minute compromise in 1986.

⁴⁰ SCIRP Staff Report at 566 (cited in note 2).

⁴¹ SCIRP Final Report at 59–71 (cited in note 4). See also SCIRP Staff Report at 559–71 (cited in note 2). The Select Commission specifically rejected a proposal to increase penalties on undocumented workers beyond deportation itself. SCIRP Final Report at 66 (cited in note 4).

⁴² Montwieler, *The Immigration Reform Law of 1986* at 5 (cited in note 13).

⁴³ Fix and Hill, *Enforcing Employer Sanctions* at 28 (cited in note 29). Agribusiness

Proponents of sanctions responded with various arguments. Labor unions and the NAACP insisted that protection of U.S. workers, especially low-wage and African-American workers, demanded that employers be prohibited from hiring undocumented immigrants. Some “law-and-order” partisans emphasized the implications for the nation’s sovereignty of its failure to control the borders,⁴⁴ while other sanctions supporters lamented the impact on natural resources and worried about the fiscal consequences for welfare programs, public education, and other government services of continued large-scale migration.⁴⁵ Some warned, darkly, of the social and cultural implications of Latin American migration, legal and illegal.⁴⁶

In fall 1986, tortuous and prolonged congressional negotiations finally yielded a deal on an expanded agricultural guest-worker program. Both the U.S. Chamber of Commerce and the AFL-CIO had come to support the overall package, including the employer sanctions provisions that business interests had previously opposed,⁴⁷ notwithstanding continuing business objections to a regulatory policy that deputized the private sector to enforce public immigration laws.⁴⁸

A conference bill containing the principal elements of the blueprint set forth in the SCIRP Report emerged from committee, and passage was secured.⁴⁹ Major stakeholders were resigned to the compromise legislation that was, on the whole, likely to favor their interests.⁵⁰ “It isn’t the Sistine Chapel, but

remains candid about its dependency on immigrant labor to this day. See *Inmates Will Replace Wary Migrants in Colorado Fields*, NY Times A25 (Mar 4, 2007) (reporting that Colorado has expanded its prison labor program to replace immigrant agricultural workers deterred from working in state by new state penalties).

⁴⁴ See, for example, Fix and Hill, *Enforcing Employer Sanctions* at 22–23 (cited in note 29) (quoting Attorney General Edwin Meese’s statement that “We cannot fairly speak of ourselves as a sovereign nation if we cannot responsibly decide who may cross our borders”).

⁴⁵ *Id.* at 26–27.

⁴⁶ *Id.* at 25–26.

⁴⁷ Montwieler, *The Immigration Reform Law of 1986* at 10 (cited in note 13).

⁴⁸ See, for example, Editorial, *The Immigration Nightmare*, Wall St J 22 (Nov 10, 1986) (criticizing IRCA, especially sanctions provisions); William H. Miller, *Alive and kicking: immigration bill gains, could still pass in ‘86*, Industry Week (July 21, 1986) (noting “heavy opposition by business lobbyists” to employer sanctions); Annelise Anderson, *Employer Sanctions Don’t Work Elsewhere*, Wall St J 1 (Sept 9, 1986) (“the employer-sanctions approach is fundamentally flawed”).

⁴⁹ Montwieler, *The Immigration Reform Law of 1986* at 14–18 (cited in note 13).

⁵⁰ *Id.* at 6–14.

it's not a bad paint job," commented Representative Dan Lungren, one of the many central players in IRCA's passage.⁵¹

Congress, like SCIRP before it, described the primary purposes of IRCA as discouraging illegal immigration and protecting U.S. workers from wage competition with undocumented workers. Employer sanctions and legalization were the means to achieve these goals, frequently termed the "keystone" of IRCA.

The principal means of . . . curtailing future illegal immigration[] is through employer sanctions Employers will be deterred by the penalties in this legislation from hiring unauthorized aliens and this, in turn, will deter aliens from entering illegally or violating their status in search of employment.⁵²

Supporters of sanctions intended that over time IRCA would establish a new employment standard, one that would become a familiar, widely-accepted principle of the workplace, akin to minimum-wage laws and Title VII's anti-discrimination rules.⁵³

Consistent with the focus on altering employer incentives to hire and exploit immigrant workers, Congress also directed the U.S. Department of Labor to target its wage-and-hour enforcement activities so as to "deter the employment of unauthorized aliens and remove the economic incentive for employers to exploit and use such aliens."⁵⁴ Senator Simpson himself emphasized the importance of labor enforcement in achieving immigration goals: "We are all aware that the answer to illegal immigration rests with increased border enforcement, and increased labor law enforcement."⁵⁵ Senator Ted Kennedy made the same point in his supplemental statement in the SCIRP report.⁵⁶

⁵¹ *Id.* at 17.

⁵² Immigration Reform and Control Act of 1986, HR Rep No 99-682(I), 99th Cong, 2d Sess 46 (1986), reprinted in 1986 USCCAN 5649, 5650. See, for example, S Rep No 99-132 at 1 (cited in note 11) ("The primary incentive for illegal immigration is the availability of U.S. employment.").

⁵³ Robert Bach and Doris Meissner, *Employment and Immigration Reform: Employer Sanctions Four Years Later*, in Fix, ed, *The Paper Curtain* 281, 284-85 (cited in note 29).

⁵⁴ IRCA § 111(d). See also SCIRP Final Report at 70 (cited in note 4) ("[T]he Select Commission urges the increased enforcement of existing wage and working standards legislation."); SCIRP Staff Report at App H 261 (cited in note 2) (noting that in SCIRP public hearings, "[t]here was no disagreement on the proposal to more vigorously enforce wage and working standards legislation").

⁵⁵ Immigration Reform and Control Act of 1985, Hearings on S 1200 before the Subcommittee on Immigration and Refugee Policy of the Senate Committee on the Judiciary, 99th Cong, 1st Sess 27 (1985).

⁵⁶ SCIRP Final Report at 357 (cited in note 4) ("We must . . . intensify the enforce-

Congress also took pains to ensure that courts and executive branch agencies would not construe IRCA as excluding immigrants from mainstream labor protections, for the obvious reason that any such exclusion would increase employer incentives to prefer undocumented workers and therefore undermine IRCA's purposes. Thus, the House Judiciary Committee report accompanying IRCA stated:

It is not the intention of the Committee that the employer sanctions provisions of the bill be used to undermine or diminish in any way labor protections in existing law, or to limit the powers of federal or state labor relations boards, labor standards agencies, or labor arbitrators to remedy unfair practices committed against undocumented employees.⁵⁷

Likewise, the House Education and Labor Committee reported that to reduce labor protections for undocumented immigrants would "be counter-productive of [the] intent to limit the hiring of undocumented employees and the depressing effect on working conditions caused by their employment."⁵⁸

In short, IRCA's enactment followed years of bipartisan discussion, study, and debate and adhered remarkably closely to the core structure outlined by the Select Commission. The choice to use employer sanctions to alter employer hiring incentives, diminishing demand for undocumented workers and thereby deterring illegal immigration, was deliberate and explicit. Guided by the SCIRP recommendations, Congress chose not to penalize workers for accepting employment without authorization but instead to increase labor standards enforcement as a necessary feature of the broad effort to discourage employers from hiring unauthorized immigrants. Maintenance of all existing labor protections for undocumented immigrants furthered the goal of discouraging their employment.

At the time of IRCA's enactment, best estimates placed the undocumented population at approximately 4 million people.⁵⁹

ment of existing [labor] laws . . . Vigorous and effective enforcement of these laws will reduce the incentive for employers to hire undocumented workers."). Senator Kennedy introduced the amendment that became IRCA § 111(d). Immigration Reform and Control, S Rep No 98-62, 98th Cong, 1st Sess 29 (1983).

⁵⁷ HR Rep No 99-682(I) at 58 (cited in note 52).

⁵⁸ Immigration Reform and Control Act of 1986, HR Rep No 99-682(II), 99th Cong, 2d Sess 9 (1986), reprinted in 1986 USCCAN 5757, 5758.

⁵⁹ Jeffrey S. Passell, *Unauthorized Migrants: Numbers and Characteristics* 10 (Pew

II. THE CONSEQUENCES OF IRCA

In evaluating the results of employer sanctions, several aspects of twenty years' experience with IRCA stand out. First, after an initial dip caused by IRCA's legalization program, the undocumented population in this country has grown tremendously. Second, employer sanctions have caused substantial employment discrimination. Third, despite contrary legislative intent, courts have interpreted the employer sanctions provisions as excluding undocumented workers from the mainstream of federal and state labor and employment protections. These judicial interpretations have functioned to exempt employers who hire undocumented immigrants from ordinary liability for the violation of basic workplace rights. This functional immunity, in turn, has undermined the deterrent effects of sanctions on the hiring of undocumented employees. Fourth, although the numbers have varied somewhat over two decades, overall, INS and then ICE have deprioritized enforcing employer sanctions relative to other immigration enforcement responsibilities. Fifth, major proponents of employer sanctions from the 1970s and 1980s have changed positions, such that the AFL-CIO, business interests, civil rights groups, and Latino and African-American organizations now concur that sanctions have failed and should be abandoned. Finally, and most perniciously, the sanctions regime has granted to employers an enormous, coercive power over their non-citizen workers and over low-wage U.S. workers who compete with them. Nothing in this record indicates that the prohibition on employment of unauthorized immigrants has succeeded nor that it should be continued and intensified.

A. Growth in Undocumented Population

In the first few years after IRCA's enactment, most estimates held that the total undocumented population in the U.S.

Hispanic Trust June 14, 2005), available at <<http://pewhispanic.org/reports/report.php?ReportID=46>> (last visited Feb 9, 2007). Government estimates put the undocumented population at between 3.5 and 6 million in 1986. SCIRP Final Report at 36 (cited in note 4). Demographers estimated that approximately seven-hundred thousand new undocumented immigrants entered the U.S. or overstayed their visas each year (averaged between 2000 and March 2004), Passell, *Unauthorized Migrants* at 5 (cited in this note), while U.S. government estimates throughout the late 1980s and 1990s put the net annual increase in the undocumented population at nearly three-hundred thousand. See, for instance, 2000 Statistical Yearbook of the Immigration and Naturalization Service, at 271-72, available at <<http://www.dhs.gov/ximgtn/statistics/publications/archive.shtm>> (last visited May 30, 2007).

declined. This decline was principally due not to fewer illegal entries, but to the legalization of approximately three million persons.⁶⁰

Today there are approximately twelve million undocumented immigrants in the United States,⁶¹ with a net annual increase in the 1990s of approximately five-hundred thousand persons.⁶² This is a dramatic increase from the estimated four million undocumented persons present in the U.S. when IRCA was enacted. When one considers that nearly 3 million persons regularized their status pursuant to IRCA's legalization program, the two-decade increase becomes even more startling. Many factors have influenced the growth in the undocumented population, of course, and no reliable regression analysis exists to determine the precise causal role of any one factor, but at first glance, these figures do not suggest IRCA has been a success.⁶³

The overwhelming majority of the undocumented are from Latin America (78 percent), and more than half are from Mexico alone (56 percent).⁶⁴ Perhaps 25 to 40 percent have overstayed a visa; the balance crossed the border unlawfully.⁶⁵ Of the nearly 12 million undocumented persons, 1.8 million are children.⁶⁶ Most undocumented immigrants live in families.⁶⁷ Their labor

⁶⁰ Papademetriou and Lowell, *Employer Sanctions* at 225 (cited in note 29) (summarizing data regarding border apprehensions, and household surveys in sending communities, and concluding "to date, there has been relatively little reduction in illegal entries"); id at 226 (concluding data indicated that by 1988, number of visa overstayers "had basically returned to pre-IRCA levels").

⁶¹ Jeffrey S. Passell, *The Size and Characteristics of the Unauthorized Migrant Population in the U.S.* 1 (Pew Hispanic Center Mar 7, 2006) (estimating unauthorized population at 11.5–12 million in March 2006), available at <<http://pewhispanic.org/reports/report.php?ReportID=61>> (last visited Feb 9, 2007); Abraham, et al, *MPI Task Force* at 19–20 (cited in note 21).

⁶² Passell, *Unauthorized Migrants* at 1, 10 (cited in note 59). In the decade 1995–2004, between seven hundred and seven hundred and fifty thousand persons entered the U.S. unlawfully or overstayed a visa each year, id at 6, but approximately two hundred thousand died, departed, or regularized their status each year, yielding a net increase in the undocumented population of approximately one-half million persons annually. Jennifer Van Hook, Frank D. Bean, and Jeffrey Passel, *Unauthorized Migrants Living in the United States: A Mid-Decade Portrait* 2 (MPI 2005), available at <<http://www.migrationinformation.org/Feature/display.cfm?id=329>> (last visited Feb 9, 2007).

⁶³ In addition to IRCA's influence, if any, those factors surely include harsh amendments to the immigration laws in 1990 and 1996 that narrowed the opportunities for many unauthorized immigrants to regularize their status, shifting global economic conditions, and substantial backlogs in processing family- and employment-based visas and naturalization applications.

⁶⁴ Passell, *Size and Characteristics* at 4 (cited in note 61).

⁶⁵ Id at 9.

⁶⁶ Id at 7–8.

⁶⁷ Id at 18.

force participation rates, particularly for men, are high, although concentrated in low-wage, low-skilled positions.⁶⁸

B. Increased Employment Discrimination

In 1990, a Government Accountability Office (“GAO”) study concluded that employer sanctions had prompted significant discrimination in employment, as Latino and immigrant rights critics had warned.⁶⁹ In particular, in a national survey of 4.6 million employers, GAO determined that a startling *19 percent* had engaged in discriminatory behavior. The employer discrimination included not “hir[ing] job applicants whose foreign appearance or accent led [employers] to suspect that they might be unauthorized aliens,” “appl[ying] IRCA’s verification system only to persons who had a ‘foreign’ appearance or accent,” or “hiring only persons born in the United States or not hiring persons with temporary work eligibility documents.”⁷⁰

GAO attributed this widespread discrimination not to employer bias or anti-immigrant animus, however, but primarily to “employers’ lack of understanding of requirements, employers’ confusion about eligibility determinations, and the prevalence of fraudulent documents.”⁷¹ The Comptroller General summarized these findings to Congress: “GAO also found that there was widespread discrimination. But was there discrimination as a result of IRCA? That is the key question Congress directed GAO to answer. GAO’s answer is yes.”⁷²

In addition to its findings of widespread employment discrimination, the GAO suggested that sanctions appeared to have reduced illegal immigration for the reasons intended by Congress: employment of undocumented workers had declined and fewer persons were therefore making the dangerous border crossing.⁷³ The GAO did not undertake an extensive analysis of this key question, devoting three pages of its lengthy report to summarize research done primarily by other entities, including a report by the Urban Institute and preliminary findings by the

⁶⁸ Passell, *Size and Characteristics* at 25-30 (cited in note 61).

⁶⁹ United States General Accounting Office, *Immigration Reform: Employer Sanctions and the Question of Discrimination*, GAO/GGD-90-62 (GAO 1990), available at <<http://www.gao.gov/docdb/lite/summary.php?rptno=GGD-90-62>> (last visited Feb 9, 2007).

⁷⁰ *Id.* at 5-7.

⁷¹ *Id.* at 3.

⁷² *Id.*

⁷³ GAO, *Immigration Reform* at 103-06 (cited in note 69).

RAND Corporation. GAO itself reported on a small survey of immigrants arrested in worksite enforcement operations,⁷⁴ but several of the other studies noted by GAO failed to show that IRCA had reduced illegal immigration.⁷⁵

C. IRCA Proponents Now Oppose Sanctions

One important consequence of the 1990 GAO study was to prompt the NAACP to reverse course, abandoning its prior support for sanctions and instead declaring its opposition to the approach.⁷⁶ A decade later, the AFL-CIO also switched positions and declared its formal and public opposition to sanctions.⁷⁷ The labor movement's change was a product not only of the evidence that sanctions caused employment discrimination, but also of an internal struggle among unions embracing traditional protectionist impulses, "perhaps reflecting a residual nativism," and other unions that had successfully organized immigrant-intensive industries where employers used the sanctions provisions to retaliate against organizing employees.⁷⁸

Although business groups did moderate their long-standing opposition to sanctions in the run-up to IRCA's adoption, they have not generally embraced sanctions. Many employers found the paperwork requirements less onerous than feared, and in the absence of vigorous enforcement by INS, business was not "in the forefront of repeal efforts" in the late 1980s and early 1990s.⁷⁹ Nevertheless, business remains opposed on principle to sanctions as unnecessary regulation of the private workplace and as an

⁷⁴ This survey found that 16 percent of arrested workers reported having been refused a job because of IRCA's document verification requirements. *Id.* at 104.

⁷⁵ *Id.* at 105–06 (noting RAND found initial reduction in illegal immigration but observed that long-term effects were unclear; Current Population Survey of US Census Bureau concluded it was "not possible to make a determination" whether IRCA had affected illegal immigration; and a University of Chicago study found "no evidence" that IRCA had reduced illegal immigration).

⁷⁶ Brownell, *Declining Enforcement* at 6 (cited in note 13).

⁷⁷ See AFL-CIO, *Statement of the Executive Council* (cited in note 16). For a recent affirmation of this position, see, for example, Letter to Senator Kennedy from SEIU Leaders (Jan 16, 2007) ("We must replace the current regime of employer sanctions with vigorous labor and civil rights law enforcement."), available at <http://www.seiu.org/media/pressreleases.cfm?pr_id=1366> (last visited May 30, 2007).

⁷⁸ Catherine Fisk and Michael Wishnie, *The Story of Hoffman Plastic Compounds, Inc. v. NLRB: Labor Rights without Remedies for Undocumented Immigrants*, in Laura Cooper and Catherine Fisk, eds, *Labor Law Stories* 401 (Foundation Press 2005), available at <<http://eprints.law.duke.edu/archive/00001243/>> (last visited Feb 9, 2007).

⁷⁹ Bach and Meissner, *Employment and Immigration Reform* at 289 (cited in note 53).

unfair deputization of the private sector to conduct public law enforcement.⁸⁰

D. Low Government Enforcement

Another important trend of the 1990s was a significant decline in government enforcement of employer sanctions. Employer audits (inspection by INS or, now, ICE, of employer I-9 forms) have declined 77 percent since 1990, from nearly 10,000 to fewer than 2,200 in 2003.⁸¹ Warnings to employers found after audit to have violated I-9 verification or record-keeping requirements have declined 62 percent in the same period, from nearly 1,300 in 1990 to fewer than 500 in 2003.⁸² Final orders in fine proceedings against employers have declined 82 percent, from nearly 1,000 in 1990 to 124 in 2003.⁸³ The number of fines is certain to fall further still, as the government issued a total of only three “notices of intent to fine”—the document that commences a fine proceeding against an employer—in all of 2004.⁸⁴ Finally, with fewer resources devoted to investigating and prosecuting employers who violate IRCA, immigration authorities have made fewer worksite enforcement arrests of undocumented immigrants.⁸⁵ Even with a recent spike in worksite enforcement, at a time when the Bush Administration appears intent on demonstrating its commitment to immigration enforcement generally, these figures are unlikely to change dramatically in 2006 or 2007.

There are several reasons for the decline in government enforcement of employer sanctions. First, agency enforcement priorities have shifted over time.⁸⁶ By the mid-1980s, INS had begun to focus enforcement resources on deportation of persons with criminal convictions, a trend which has continued to this

⁸⁰ Id.

⁸¹ Brownell, *Declining Enforcement* at 3 fig 1 (cited in note 13).

⁸² Id at 3–4 fig 2.

⁸³ Id at 4–5 fig 3. Fines collected have also decreased at a similar rate. Id at fig 4. Years refer to fiscal years, not calendar years.

⁸⁴ United States General Accountability Office, *Immigration Enforcement: Preliminary Observations on Employment Verification and Worksite Enforcement*, GAO-05-822T at 14 & fig 3 (GAO 2005), available at <<http://www.gao.gov/docdb/lite/summary.php?rptno=GAO-05-822T>> (last visited Feb 9, 2007).

⁸⁵ In 2003, ICE worksite enforcement arrests totaled only 445 for the entire nation, down 84 percent from 1999. Id at 15 & fig 4.

⁸⁶ Id at 12 (“Worksite enforcement was a low priority for INS and continues to be a low priority for ICE.”).

day.⁸⁷ In 1994, INS launched a major enforcement operation along the southwest border, known as “Operation Gatekeeper,” and redeployed agents from sanctions enforcement to this mission.⁸⁸ In 1999, INS announced new interior enforcement priorities which emphasized anti-smuggling and criminal investigations and downplayed worksite operations.⁸⁹ After the terrorist attacks of September 11, worksite enforcement stopped almost completely, with the exception of targeted investigations of security-related locations such as airports and nuclear reactors.⁹⁰

Second, employer sanctions target *employers*, not undocumented immigrants, by obligating employers to verify status and to refuse to hire unauthorized workers. Federal immigration authorities have traditionally targeted *non-citizens*, however, and this reorientation may not be fully embraced within the immigration agency, which frequently “negotiate[s] down” fine amounts recommended by agents in subsequent discussions with employers or their counsel.⁹¹ Moreover, politicians of both parties regularly intervene when INS worksite enforcement disrupts important local industries.⁹²

Finally, amendments since 1986 have strengthened employer defenses, making it more difficult for the government to prove a substantive violation of the “knowing employment” requirements, and no doubt discouraging some prosecutions. The ready availability of false documents has “also made it difficult

⁸⁷ See Jason Juffras, *IRCA and the Enforcement Mission of the Immigration and Naturalization Service*, in Fix, ed, *The Paper Curtain* 33, 47–50 (cited in note 29) (describing GAO studies in the 1980s in addition to public concern about drug offenses and other crime contributing to congressional efforts to direct INS enforcement towards “criminal alien” problems).

⁸⁸ Brownell, *Declining Enforcement* at 6 (cited in note 13).

⁸⁹ INS, *Interior Enforcement Strategy*, (INS 1999), available at <<http://www.vkblaw.com/news/fiftyfour.htm>> (last visited May 30, 2007).

⁹⁰ GAO, *Immigration Enforcement* at 18 (cited in note 84) (“In keeping with the primary mission of DHS to combat terrorism, after September 11, 2001, INS and then ICE has focused its resources for worksite enforcement on identifying and removing unauthorized workers from critical infrastructure sites.”); Brownell, *Declining Enforcement* at 6 (cited in note 13).

⁹¹ GAO, *Immigration Enforcement* at 17 (cited in note 84).

⁹² David Bacon, *And the Winner Is . . . : Immigration Reform on the killing floor*, American Prospect A12-14 (Oct 23, 2005), available at <http://www.prospect.org/cs/articles?article=and_the_winner_is_> (last visited August 6, 2007) (Nebraska meatpacking industry); David Bacon, *Immigration Law – Bringing Back Sweatshop Conditions* (Oct 11, 1998), available at <<http://dbacon.igc.org/Imigrants/11sanctn.html>> (last visited August 6, 2007) (Georgia onion industry).

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for ICE agents to prove that employers knowingly hired unauthorized workers.”⁹³

E. Erosion of Labor Rights for the Undocumented

One of the most direct and corrosive effects of employer sanctions has been the undermining of labor and employment rights for undocumented immigrants who, notwithstanding IRCA’s prohibition, find work in this country. Before IRCA, courts and executive-branch agencies generally enforced labor and employment laws without regard for the immigration status of the employee.⁹⁴ This practice was sensible, as few federal or state workplace statutes included immigration status among their exemptions from coverage, and employment of undocumented immigrants was not unlawful in any event. The Supreme Court did carve out an exception for workers who were deported to another country, holding that such workers were ineligible for certain remedies under the National Labor Relations Act (“NLRA”),⁹⁵ but this exception affected relatively few workers. Even after IRCA’s enactment, most courts and agencies continued to enforce federal and state labor laws on behalf of all workers regardless of immigration status, including seeking all remedies but reinstatement, given that IRCA had prohibited the knowing employment of unauthorized workers.⁹⁶ Employers regularly argued that IRCA now exempted them from ordinary labor and employment liability, but courts and agencies rarely agreed.

⁹³ GAO, *Immigration Enforcement* at 16 (cited in note 84). See also United States General Accounting Office, *Illegal Aliens: Significant Obstacles to Reducing Unauthorized Alien Employment Exist*, GAO/GGD-99-33 at 2 (1999) (observing prevalence of false documents impairs INS capacity to prove employer knowingly hired undocumented workers), available at <<http://www.gao.gov/docdb/lite/summary.php?rptno=GGD-99-33>> (last visited Feb 9, 2007).

⁹⁴ See, for example, *Donovan v Burgett Greenhouses, Inc.*, 759 F2d 1483, 1485 (10th Cir 1985) (enforcing Fair Labor Standards Act against employer of undocumented workers); *NLRB v Apollo Tire Co.*, 604 F2d 1180 (9th Cir 1979) (undocumented worker covered by NLRA); *Nizamuddowlah v Bengal Cabaret, Inc.*, 415 NYS2d 685, 685–86 (App Div 1979) (undocumented worker covered by state minimum wage and overtime law).

⁹⁵ *Sure-Tan, Inc v NLRB*, 467 US 883 (1984). See also Michael J. Wishnie, *Emerging Issues for Undocumented Immigrants*, 6 U Pa J Lab & Emp L 497 (2004).

⁹⁶ See, for example, *NLRB v APRA Fuel Oil Buyers Group, Inc.*, 134 F3d 50 (2d Cir 1997) (after IRCA, NLRA still allows back pay award to undocumented worker); *Patel v Quality Inn*, 846 F2d 700, 704 (11th Cir 1988) (same, as to FLSA); *EEOC v Switching Sys Div of Rockwell Int’l Corp.*, 783 F Supp 369, 374 (N D Ill 1992) (same, as to Title VII); *Dowling v Slotnik*, 712 A2d 396, 405 (Conn 1998) (same, as to workers’ compensation). Consider Wishnie, *Emerging Issues for Undocumented Immigrants* at 499–508 (cited in note 95).

The legal landscape changed radically when the Supreme Court decided *Hoffman Plastic Compounds, Inc v NLRB*.⁹⁷ There the Court held that an employee who tendered false documents to his employer upon hire, and was later illegally discharged for union organizing, was eligible for neither back pay nor reinstatement.⁹⁸ Relying explicitly on the employer sanctions and document fraud provisions of IRCA,⁹⁹ the Supreme Court overturned decades of decisions by state and federal courts and agencies by exempting employers of undocumented workers from back pay liability. “We hold that [back pay under the NLRA] is foreclosed by federal immigration policy, as expressed by Congress in the Immigration Reform and Control Act of 1986 (IRCA),” declared Chief Justice Rehnquist for the Court.¹⁰⁰ The extensive legislative history demonstrating a congressional intent to preserve full labor protections for undocumented workers, lest employer incentives to hire them increase and the entire immigration-deterrent function of IRCA be undermined, did not trouble the *Hoffman* majority.¹⁰¹ Since the *Hoffman* decision, lower courts and state and federal agencies have generally conformed to the conclusion that IRCA renders employers exempt from ordinary labor or employment liability,¹⁰² albeit with some exceptions.¹⁰³

⁹⁷ 535 US 137 (2002).

⁹⁸ *Id.* at 142.

⁹⁹ *Id.* at 148 (“[IRCA] makes it a crime for an unauthorized alien . . . [to] tender[] fraudulent documents.”); *id.* at 149 (“What matters here . . . is that Congress has expressly made it criminally punishable for an alien to obtain employment with false documents.”); *id.* at 151 (“We therefore conclude that allowing the Board to award backpay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA.”).

¹⁰⁰ *Id.* at 140.

¹⁰¹ The majority dispensed with the legislative history in a footnote. See *Hoffman*, 535 US at 149 n 4.

¹⁰² See, for example, *Sanchez v Eagle Alloy Inc*, 658 NW2d 510 (Mich App 2003) (undocumented worker injured on job ineligible for wage-loss benefits under state worker compensation law); *Reinforced Earth Co v Workers’ Comp Appeal Board*, 810 A2d 99 (Pa 2002) (same); NLRB Office of the General Counsel, *Procedures and Remedies for Discriminatees Who May Be Undocumented Aliens after Hoffman Plastic Compounds, Inc.*, MEMORANDUM GC 02-06 § C(1)/3 (July 19, 2002) (NLRB General Counsel conclusion that, even where employer knowingly hires undocumented worker, employer is immune from back pay liability under NLRA), available at <http://www.nlr.gov/shared_files/GC%20Memos/2002/gc02-06.html> (last visited Feb 9, 2007).

¹⁰³ See, for example, *Rivera v NIBCO, Inc*, 364 F3d 1057 (9th Cir 2004) (*Hoffman* may not apply to Title VII cases); *Rosa v Partners in Progress, Inc*, 868 A2d 994 (NH 2005) (undocumented workers remain eligible for workers’ compensation benefits); *Balbuena v IDR Realty LLC*, 812 N.Y.S.2d 416 (NY 2006) (same as to benefits pursuant to state Scaffolding Law).

Apart from IRCA's formal exclusion of undocumented workers from the mainstream of labor and employment protections, as discerned by the Supreme Court in *Hoffman*, the decision and statute have deterred immigrants from communicating with labor and employment agencies about unlawful activity they have suffered or witnessed. IRCA has thus pushed more people deeper into the shadows, weakening or severing the civic ties that would otherwise connect millions of immigrants to agencies and officials whose public mission has nothing at all to do with immigration enforcement.¹⁰⁴ The social consequences of this phenomena reach more broadly than the undocumented immigrants themselves, extending to their families, co-workers, neighbors, unions, and other workers.¹⁰⁵

F. Unfair Business Competition

IRCA has also caused inevitable changes in business practices. In cost-sensitive, labor-intensive industries that rely on low-wage workers, employers who obey labor and immigration laws are at a competitive disadvantage with firms that hire undocumented workers and violate labor standards laws. Because the risk of being fined for an IRCA violation is slight and the cost-savings from employing and exploiting an undocumented worker potentially substantial (all the more so since *Hoffman*), unscrupulous employers have not hesitated to hire undocumented workers and to seize the unfair competitive advantage such a practice allows.¹⁰⁶

This unfair competition effect was foreseeable and evident even in the early years after IRCA's passage.¹⁰⁷ After the passage of IRCA, many agricultural employers swiftly increased the use of farm labor contractors, who would be responsible for "compliance" with employer sanctions. In reality, these contractors

¹⁰⁴ See, for example, Wishnie, *Right to Petition* at 673–79 (cited in note 9).

¹⁰⁵ *Id.* at 669, 673, 723, 736 (arguing that law enforcement policies that deter noncitizens from reporting crime and other illegal activities are unwise and may violate First Amendment right to petition the government for redress of grievances).

¹⁰⁶ See Brief *Amici Curiae* of Employers and Employer Organizations in Support of the NLRB, *Hoffman Plastic Compounds, Inc v NLRB*, No 00-1595, *7–9 (US filed Dec 10, 2001) (for 535 US 137) (available on Westlaw at 2001 WL 1631729) (demonstrating that outlaw businesses prefer to hire and exploit undocumented immigrants so as to obtain unfair competitive advantage over law-abiding employers).

¹⁰⁷ See, for example, Michael Fix, *Toward an Uncertain Future: The Repeal or Reform of Sanctions in the 1990s*, in Fix, ed, *The Paper Curtain* at 303, 318–19 (cited in note 29) ("in markets where law-abiding and law-evading firms compete with one another, the latter may come to enjoy an increased cost advantage").

would simply bear the risk of any sanctions enforcement action, while supplying a labor force of undocumented workers that the large employer was free to exploit.¹⁰⁸

In the years since IRCA, reliance on labor contractors, subcontractors, and contingent workers of various kinds has expanded significantly, not only in the agricultural sector, but in many other price-competitive, labor-intensive sectors, from building services to construction to retail sales to computer programming.¹⁰⁹ The logic is easy to understand. Large employers seek to insulate themselves from IRCA liability while reaping the cost-savings of using undocumented workers, who face greater practical and legal impediments to forming unions or enforcing overtime rules, health and safety regulations, and anti-discrimination requirements than do U.S. workers.¹¹⁰

In the resulting race to the bottom, law-abiding employers must hire undocumented workers, often indirectly through subcontractors, or else suffer the consequences of unfair competition with outlaw firms that hire and exploit undocumented workers. The *Hoffman* decision has intensified this dynamic, making it absolutely clear that employers of undocumented workers are in many instances immune from ordinary labor law liability. Thus the demand for undocumented workers continues, while the workers themselves now find employment opportunities concentrated with sweatshop employers or shadowy subcontractors whose entire raison d'être is to insulate mainstream firms from IRCA liability.

III. A DIFFERENT WAY

Not one immigration-reform proposal offered by the Bush Administration, Congress, or outside advocates presently con-

¹⁰⁸ Id at 318.

¹⁰⁹ Consider Catherine Ruckelshaus and Bruce Goldstein, *From Orchards to the Internet: Confronting Contingent Worker Abuse* (National Employment Law Project 2002), available at <<http://www.nelp.org/docUploads/pub120.pdf>> (last visited Feb 9, 2007); Jennifer Gordon, *Suburban Sweatshops: The Fight for Immigrant Rights* (Belknap 2005).

¹¹⁰ See, for example, Greg Schneider, *Grand Jury, Wal-Mart Probe Hiring of Workers; Investigation Focuses on What Executives Knew*, Wash Post E01 (Oct 25, 2003) (describing grand jury allegations that "Wal-Mart Stores Inc. executives knowingly hired cleaning-crew contractors that employed illegal immigrants" and noting "one of the ways some businesses hold down labor costs is to fill low-rung jobs—such as custodial positions—with undocumented immigrants, who are afraid to stand up for better wages"); *Commercial Cleaning Services, LLC v Colin Serv Sys*, 271 F3d 374 (2d Cir 2001) (holding an allegation by a cleaning service that a competitor hired undocumented workers to underbid competing firms states a claim under RICO).

templates repealing employer sanctions, and nearly all would increase penalties for sanctions violations, increase resources dedicated to sanctions enforcement, improve online document verification systems, or all of the above.¹¹¹ This makes no sense. The policy rationale for sanctions has proved mistaken, and there is now a labor/management/Latino/civil rights political consensus *opposed* to sanctions. As feared, sanctions have caused employment discrimination, unfair competition, and dramatic erosions of the labor rights of immigrants, while conferring a broad coercive power on employers, without deterring illegal immigration.¹¹² Together this has almost certainly contributed to the depression of wages and working conditions for U.S. workers.

As it turns out, however, the worst feature of IRCA was neither the widespread discrimination feared by civil rights opponents nor the creation of onerous paperwork requirements and corporate liability dreaded by business opponents. Rather, IRCA's most pernicious consequence has been to strengthen the coercive power exercised by exploitative employers over non-citizens in the workplace, overwhelming any disincentive based on the risk of civil penalty and making employment of undocumented workers irresistible in low-wage, labor-intensive industries.

First, IRCA has made private employers the instrument of immigration enforcement. Employers are empowered to, and by law must, inquire into the immigration status of their employees. If immigrant workers seek to form a union, demand overtime pay, resist sexual harassment, or otherwise defend their interests in the workplace, employers often insist on "re-verify" their documents¹¹³ or, more aggressively, request an immigration raid to target activist workers.¹¹⁴

¹¹¹ See notes 18–21 (describing Bush proposal, House bill, Senate bill, Kennedy-McCain, Cornyn-Kyl, Tancredo, Jackson-Lee, and MPI Task Force proposals).

¹¹² See Bach and Meissner, *Employment and Immigration Reform* at 291 (cited in note 53) (acknowledging uncertainty about impact of sanctions but speculating sanctions "may have slowed rate of increase of the flow" of illegal immigration).

¹¹³ See Annie Decker, Comment, *Suspending Employers' Immigration-Related Duties During Labor Disputes: A Statutory Proposal*, 115 *Yale L J* 2193, 2195 (2006) (arguing for legislative reform to prohibit re-verification during labor dispute).

¹¹⁴ See, for example, *Montero v INS*, 124 F 3d 381, 382 (2d Cir 1997) (employer, in response to union organizing campaign, threatened to contact INS and, through its counsel, a former INS official, did contact INS to request raid of its own employees); *In re Herrera-Priego*, USDOJ EOIR (Lamb, IJ, July 10, 2003) (describing employer's retaliatory call to INS to request raid of own factory to punish workers who have filed overtime complaints with state labor agency), available at <<http://www.lexisnexis.com/practiceareas/immigration/pdfs/web428.pdf>> (last visited Feb 9, 2007).

Second, after *Hoffman*, employers are now *de jure* exempt from ordinary labor liability in many circumstances (previously, employers were at best *de facto* exempt, in light of the reluctance of some undocumented workers to file labor complaints). Even legislative proposals to “fix” *Hoffman* by restoring immigrant eligibility for backpay under labor and employment laws are inadequate,¹¹⁵ because so long as immigration law forbids the employment of unauthorized immigrants, the traditional make-whole remedy of reinstatement will be unavailable.

Third, despite the negligible risk of a money penalty on employers who violate IRCA, sanctions have spurred an increasing reliance on subcontracted labor, beyond the agricultural sector where the practice first developed, thereby concentrating undocumented workers in underground cash economies and unregulated industries.

The coercive power of sanctions enables employers to claim a frighteningly sweeping control of the work-life of immigrants. Because of IRCA, a law-breaking employer may invoke the formidable powers of the government’s law enforcement apparatus to terrorize its workers and suppress worker dissent under threat of deportation. In this sense, sanctions recall in some respects the post-Civil War schemes of peonage and debt bondage, in which private landowners invoked the power of the state to enforce discriminatory and unconscionable labor agreements that perpetuated the enslavement of African-Americans after Emancipation. Indeed, some courts have even recognized that an employer who threatens deportation to control its workforce may be violating the Thirteenth Amendment’s prohibition on involuntary servitude,¹¹⁶ a prohibition that an earlier generation of labor advocates once invoked as the theoretical and rhetorical foundation for the union movement itself.¹¹⁷

¹¹⁵ See, for instance, Safe, Orderly, Legal Visas and Enforcement (SOLVE) Act of 2004, S 2381 (introduced May 2004), HR 4262 (introduced May 2004) sec 321 (backpay remedy, but not reinstatement, restored for undocumented immigrants).

¹¹⁶ See *United States v Kozminski*, 487 US 931, 948 (1988) (“it is possible that threatening . . . an immigrant with deportation could constitute the threat of legal coercion that induces involuntary servitude”); *Majlinger v Cassino Contracting Corp.*, 802 NYS 2d 56, 64 (App Div 2d Dept Sept 19, 2005) (concluding that to deny recovery under state law for undocumented worker injured in course of employment “may even implicate the constitutional prohibition of involuntary servitude”).

¹¹⁷ See James G. Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921–1957*, 102 Colum L Rev 1 (2002).

The remedy is to repeal sanctions and restore mainstream labor protections to all covered employees, including reinstatement, regardless of the immigration status of the employee. While the proposal may seem counterintuitive, eliminating employers' terrible coercive power over undocumented immigrants would immediately diminish the incentive to prefer undocumented immigrants over U.S. workers. It would allow undocumented workers to defend their workplace interests far more effectively, whether by joining unions or reporting labor violations to appropriate agencies—thereby raising rather than lowering terms and conditions for all workers. Mainstream firms would dispense with the shadowy subcontractors and labor contractors. The original concerns with sanctions—increased discrimination and burdensome paperwork for firms—would be ameliorated. Finally, federal immigration authorities would have greater resources to devote to their genuine enforcement priorities.¹¹⁸ And because the repeal of sanctions would deprive employers of their principal power over undocumented workers, employers would at long last have fewer incentives to prefer undocumented workers; the “jobs magnet” against which Congress sought to legislate in 1986 will be weakened, and there will be less illegal immigration.

The prohibition on employment of unauthorized immigrants may have endured largely because of its symbolic value¹¹⁹ and because it has offered political protection for officials seeking to reform immigration laws in other ways.¹²⁰ But the sanctions law has neither protected U.S. workers nor deterred illegal immigration. Instead, the sanctions law has undermined both purposes. It is time to take a new path.

¹¹⁸ As Secretary of Homeland Security Michael Chertoff recently observed on CNN, “Right now, I have got my Border Patrol agents and my immigration agents chasing maids and landscapers. I want them to focus on drug dealers and terrorists,” available at <<http://transcripts.cnn.com/TRANSCRIPTS/0705/17/pzn.01.html>> (last visited July 2, 2007).

¹¹⁹ See, for example, Peter Schuck, *The Great Immigration Debate*, Am Prospect (Sept 21, 1990), available at <<http://www.prospect.org/web/page.ww?section=root&name=ViewPrint&articleId=5313>> (last visited Feb 9, 2007) (discussing symbolic power of sanctions because “[i]mmigration threatens Americans’ sense of control by seeming to jeopardize three fundamental values: national autonomy, economic security, and the ‘social contract’ that secures the welfare state”).

¹²⁰ Fix, *Toward an Uncertain Future* at 323 (cited in note 107) (noting sanctions may supply “political ‘cover’ for liberalizing our immigration laws”).