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Closing the Back Door on Illegal Immigration: Over Two Decades of Ineffective Provisions While Solutions Are Just a Few Words Away

*Phi Mai Nguyen**

INTRODUCTION

Americans have a history of disdaining both documented and undocumented immigrants,¹ who are deemed to have created a cultural threat and economic burden for the United States.² Indeed, “[d]eliberate race-based exclusion has existed in America since its inception.”³ This negative mentality has translated into nearly a century of hostile immigration policies. Congress first responded to the anti-immigrant sentiment with the 1882

* J.D. Candidate 2011, Chapman University School of Law; B.A. 2007, California State University, Fullerton. This Comment is dedicated to my parents Nguyen Dinh Thong and Tran Thi Mai Phuong as well as my one and only sister Khanh Nguyen, without whose support I would not be where I am today. I am very grateful to Michelle Q. Nguyen for her great mentorship and encouragement throughout my law review endeavors. Special thank to Professor Marisa S. Cianciarulo and the Chapman Law Review staff for their unprecedented dedication to the publication of this Comment.

¹ This Comment adopts the view of Professor Beth Lyon and uses the term “undocumented immigrants” to refer to non-U.S. citizens who presently possess no proof of any right to be present in the United States, the vast majority of which have not been declared deportable by the U.S. government. Beth Lyon, *When More “Security” Equals Less Workplace Safety: Reconsidering U.S. Laws that Disadvantage Unauthorized Workers*, 6 U. PA. J. LAB. & EMP. L. 571, 576 (2004). The term “illegal aliens” is “racially loaded, ambiguous, imprecise, and pejorative.” *Id.* The term “unauthorized workers” is used to describe people “who are forbidden under the immigration laws to work for pay.” Francine J. Lipman, *The Taxation of Undocumented Immigrants: Separate, Unequal, and Without Representation*, 9 HARV. LATINO L. REV. 1, 2 n.2 (2006). In reality, commentators and authors have used the terms “illegal immigrants” and “illegal aliens” interchangeably. To respect these authors’ choices of words, this Comment will retain the term “illegal immigrants” where necessary. However, the use of “illegal immigration” is unaffected by this view because it simply characterizes a form of immigration that is against the law.

² Richard A. Johnson, Note, *Twenty Years of the IRCA: The Urgent Need for an Updated Legislative Response to the Current Undocumented Immigrant Situation in the United States*, 21 GEO. IMMIGR. L.J. 239, 240 (2007).

³ Francine J. Lipman, *Bearing Witness to Economic Injustices of Undocumented Immigrant Families: A New Class of “Undeserving” Poor*, 7 NEV. L.J. 736, 738 (2007). See also The CQ Researcher, *Immigration Policy: A Historical Overview*, in IMMIGRATION POLICY 11, 12 (Bruno Leone et al. eds., 1995) (describing the “nativist” sentiments of the Protestant Anglo-Saxon population—some of the first to settle in the United States—toward the influx of European immigrants in the 1800s, which often resulted in violence, such as the three-day riot that took place in Philadelphia in 1844).

Immigration Act, which defined U.S. immigration policy for the first time.⁴ Within the same year, Congress passed the first Chinese exclusion law, which created an annual quota on the number of Chinese immigrants allowed into the United States.⁵ Subsequently, in 1917, Congress passed another Immigration Act that not only restated all the exclusions previously legislated, but also barred most Asians and Pacific Islanders from entering the country.⁶ Then came, among others, the 1921 and 1924 Quota Limit Laws,⁷ the 1940 Alien Registration Act,⁸ and the Bracero Program,⁹ all of which aimed at restricting immigrants to the United States.

As the nation expanded, U.S. immigration policy gradually became more liberal and evolved to accept more documented immigrants while placing tougher restrictions on those who were undocumented. The highlight of this trend was the Immigration Reform and Control Act (IRCA) of 1986,¹⁰ which attacked the illegal immigration problem from a new front: the demand side.¹¹ The IRCA makes it unlawful for employers “to hire, or to recruit or refer for a fee . . . an alien knowing the alien is an unauthorized alien”¹² and it imposes sanctions on employers who *knowingly* do so.¹³ Since opportunities for employment in the United States have by far been the primary motivation for immigrants to risk their lives to enter this country without proper documentation,¹⁴ Congress believed that eliminating employment opportunities—the demand side—would effectively deter undocumented immigrants—the supply side—from

⁴ The CQ Researcher, *supra* note 3, at 12.

⁵ *Id.*

⁶ *Id.* at 13.

⁷ LISA MAGAÑA, STRADDLING THE BORDER: IMMIGRATION POLICY AND THE INS 16 (2003) (indicating that Congress enacted the Quota Limit Laws to set “specific restrictions on the entry of certain groups into the United States, among them Eastern Europeans, Africans, Australians, and Asians”).

⁸ *Id.* at 17 (stating that Congress passed the Alien Registration Act to require that the then INS—the equivalent of the current U.S. Citizenship and Immigration Services—register and fingerprint all immigrants considered “government subversives”—such as the Japanese, when World War II intensified and public sentiment against Japanese immigrants grew more severe).

⁹ *See infra* note 65 and accompanying text.

¹⁰ *See generally* The Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a (2006). It should be noted that the purpose of the IRCA was to modify the legal immigration provisions of the Immigration and Nationality Act in several aspects. Unless otherwise noted, section 274A of the Immigration and Nationality Act should be understood to mean the unmodified version of the statute (8 U.S.C.S. § 1324a). For further information, see H.R. REP. NO. 99-682, pt. 2, at 49 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5757, 5757.

¹¹ The CQ Researcher, *supra* note 3, at 15.

¹² 8 U.S.C. § 1324a(a)(1)(A).

¹³ § 1324a(a)(1)(A).

¹⁴ *See infra* Part II.B.

entering this country. Under the IRCA, employers are required to verify their workers' eligibility for employment, and a violation of this requirement results in fines and sanctions.¹⁵ The IRCA holds employers criminally and civilly liable for hiring undocumented immigrants so long as they have knowledge of the legal status of their prospective employees.¹⁶ The IRCA sought to create a sweeping effect of eliminating undocumented immigrants; it purported to close the back door on illegal immigration while opening the front door to legal immigration.¹⁷

However, to date, the IRCA is far from achieving its goals. Although it attempted to eliminate opportunities for illegal immigration, the IRCA has failed because, "[t]he inward flow of undocumented immigrants grew exponentially in the years following its passage."¹⁸ It is estimated that there were approximately twelve million undocumented immigrants in the United States by the end of 2008; nearly four times the amount that existed when the IRCA was first enacted in 1986.¹⁹ As scholars have noted, "[the IRCA] has failed to achieve its goals . . . [the] IRCA has caused our nation more harm than good . . . [the] IRCA increased the flow of undocumented workers and created an underclass of workers that have no rights."²⁰ The IRCA's employer sanction provisions created little adverse impact upon employers. It thus failed to discourage them from hiring undocumented immigrants, who were already eager and willing to work, despite the lack of protection from U.S. laws.²¹ Furthermore, the courts have indirectly encouraged illegal immigration by conveniently refusing a number of remedies for unauthorized workers.²² As a result, employers face few, if any, repercussions should things go wrong during their employment

¹⁵ See *infra* Part I.D.

¹⁶ See *infra* Part II.

¹⁷ See generally *id.*

¹⁸ Tyler Grimm, Note, *Using Employer Sanctions to Open the Border and End Undocumented Immigration*, 12 J. GENDER RACE & JUST. 415, 425 (2009) (explaining that inadequate enforcement and the serious labor shortage in the United States resulted in an increase in the entry rate of undocumented immigrants for almost two decades following the passage of the IRCA). Worse yet, in recent years, "enforcement of the IRCA has been almost completely abandoned." *Id.*

¹⁹ Johnson, *supra* note 2, at 246; JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CENTER, A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES i (2009).

²⁰ JUDITH P. MILLER & DAVID TANNENBAUM, WORKERS RIGHTS PROJECT, REPEALING IRCA LEGISLATIVE PACKAGE 1 (2005), available at http://www.nmass.org/nmass/breakthechains/Repealing_IRCA_LegislativePackage.pdf (discrediting the IRCA in general and clearly demonstrating that the IRCA works contrary to its goals). Among other things, the authors argued that the IRCA has "inherited slave-like characteristics from the laws of slavery and involuntary servitude" and that the U.S. Supreme Court relied on the IRCA to limit all workers' rights. *Id.* at 5.

²¹ See *infra* Part II.A.

²² See *infra* Part II.C.

relationship with undocumented immigrants.²³ Finally, the IRCA's knowledge standard is quite unavailing, as employers can easily produce evidence showing their lack of knowledge regarding the unauthorized status of their prospective employees, simply based on the reasonable validity of documents presented to them.²⁴

This Comment advocates for an amendment to the IRCA that would hold employers strictly liable for employing undocumented immigrants. Employers should not be afforded an opportunity to absolve themselves from penalties and sanctions under the IRCA simply because of their purported lack of knowledge. The moment they hire an undocumented immigrant, for whatever reason, they have violated the IRCA and should be severely penalized. Employers, however, will not be left stranded with such a high standard. A number of employment verification tools are available to them, often at no cost. To effectively avoid the proposed strict liability, employers would be forced to utilize those effective mechanisms to detect the undocumented status of prospective employees instead of solely relying on the face value of the documents that are provided by those employees. Adopting a strict liability standard would inevitably lead to an increased penalty for employers should they violate the IRCA.²⁵

This Comment is composed of three parts. Part I provides the background surrounding undocumented immigrants—the history of the IRCA and its effectiveness, or lack thereof, in the battle against illegal immigration. This section will also acknowledge the importance of “E-Verify,” one of the most effective employment verification tools. Part II provides an in-depth analysis as to why the IRCA has failed to reduce illegal immigration. This analysis suggests that (1) the employer

²³ See *infra* Part II.A.

²⁴ See *infra* Part II.D.

²⁵ Increased penalties, however, are outside the scope of this Comment as many commentators have discussed the successes and failures of employer sanctions, some arguing for more severe penalties, and others for eliminating them altogether. See, e.g., Jennifer K. Danburg, *Strengthening Employer Sanctions Through Worker Identification Cards and a National Data Base: Effective Barriers to Illegal Immigration?*, 9 GEO. IMMIGR. L.J. 525, 525–27 (1995) (discrediting Congress for imposing ineffective employer sanctions and proposing that those sanctions should be eliminated altogether because they will never be able to solve the fact that undocumented workers will always find employment opportunities); Grimm, *supra* note 18, at 436–37 (emphasizing that different sanctions should be implemented for different sectors since different parts of the economy will react differently to undocumented immigrant employment regulations); John B. Kaiser, *IRCA's Employer Sanctions Provisions Under Mester v. INS: Constructing a Constructive Knowledge Standard*, 4 GEO. IMMIGR. L.J. 681, 686–691 (1990) (asserting that sanction provisions under the IRCA are vague and open to subjective judicial determinations, and therefore ineffective in permanently alleviating the problems associated with illegal immigration).

sanction provisions of the IRCA are entirely ineffective, (2) the courts' interpretations of the IRCA and their controversial decisions that withhold employee remedies have in fact encouraged illegal immigration, (3) undocumented immigrants will continue to work despite the lack of legal protection within the United States, and, most importantly, (4) the knowledge standard of the IRCA is unavailing. Based on this analysis, Part III provides a viable solution—amending the knowledge standard of the IRCA to a stricter standard that holds employers strictly liable for the employment of undocumented immigrants.

I. ILLEGAL IMMIGRATION BEFORE AND AFTER THE IRCA

Since its colonization, the United States has welcomed millions of immigrants.²⁶ After over three hundred years, people still travel to this country to seek employment and better opportunities for their families.²⁷ Because immigration is an inherent component of this country, it is important to consider the existing attitudes of American citizens toward illegal immigration in order to at least partially explain why the IRCA was enacted, and also why it has failed.

Many Americans are dissatisfied with undocumented immigrants because they view immigrants as people who take jobs away from U.S. citizens, and who create financial and social burdens for American society.²⁸ Economists and commentators have called for comprehensive immigration reform to reduce, if not eliminate, illegal immigration, the persistence of which is considered to be the root of major problems in the United

²⁶ IMMIGRATION AND ILLEGAL ALIENS: BURDEN OR BLESSING? 2 (Alison Landes et al. eds., 1995) (summarizing over 380 years of American history of immigration, in which the author indicates that immigrants had come to America since the founding of Jamestown in Virginia in 1607). In 1790, the United States had a Caucasian population of over three million, comprised entirely of immigrants or descendants of earlier seventeenth and eighteenth century settlers. *Id.* The population consisted of “75 percent British of Protestant origin (including Scottish immigrants), about 8 percent German, 4 percent Irish Catholic, and the rest mainly of Dutch, French, or Spanish descent. In addition, approximately 500,000 Black slaves and perhaps an equal number of Native Americans lived within the borders of [the United States].” *Id.* Therefore, whether descendants of early eighteenth and nineteenth century immigrants, or first-generation immigrants from the twentieth and twenty-first centuries, the United States is almost entirely made up of immigrants.

²⁷ Lipman, *supra* note 3, at 736–37. Professor Lipman uses the turn of the twentieth century as a marking point. This Comment, however, takes the year of the Declaration of Independence (1776) as the earmark of immigration, but the idea remains the same—after hundreds of years, immigrants still come to the United States for a better life.

²⁸ See, e.g., Adam M. Zaretsky, *A Burden to America? Immigration and the Economy*, REGIONAL ECONOMIST, Oct. 1997, at 5; Spencer S. Hsu, *Cleaning Firm Used Illegal Workers at Chertoff Home*, WASH. POST, Dec. 11, 2008, at A1.

States.²⁹ Despite such pressure, undocumented immigrants continue to play a vital role in the economy, as well as in the development and success of this country.³⁰ Together with documented immigrants, undocumented immigrants have long been an indispensable part of the U.S. labor force.³¹ Their presence compensates for shortfalls in a number of industries and occupations.³² Because of this demand for workers, undocumented immigrants continue to find employment in the U.S. labor force.³³

Despite such positive statistics, American hostility toward undocumented immigrants is not entirely unfounded. Undocumented workers represent one out of every twenty workers in the U.S. labor force.³⁴ In addition, they tend to be under the age of forty and therefore are less likely to be disabled or retired, indicating that they will remain in the unauthorized workforce³⁵ for quite some time,³⁶ and thus perpetuate the

²⁹ See generally IMMIGRATION POLICY CENTER, SPECIAL REPORT: BREAKING DOWN THE PROBLEMS: WHAT'S WRONG WITH OUR IMMIGRATION SYSTEM? 3 (2009), available at http://www.immigrationpolicy.org/sites/default/files/docs/Problem_Paper_FINAL_102109.pdf; Richard A. Boswell, *Crafting True Immigration Reform*, 35 WM. MITCHELL L. REV. 7 (2008).

³⁰ Lipman, *supra* note 1, at 4–5 (indicating that “[e]ighty-five percent of eminent economists surveyed have concluded that undocumented immigrants have had a positive (seventy-four percent) or neutral (eleven percent) impact on the U.S. economy”). Additionally, Professor Lipman lists a number of sources that support the position that undocumented immigrants contribute to payroll and income taxes, social security, and employment insurance. *Id.* at 5 n.15.

³¹ In his research on immigrant workers, Rob Paral reported that “employers still cannot find sufficient workers in the housing, retail, and service industries,” despite the increase in the unemployment rate in June 2002. Paral further found that

[f]or American employers, Mexican immigration plays a critical role in efforts to maintain a sufficiently large pool of workers in part because of the close match between the needs of employers and the job readiness of Mexican immigrant workers, especially in ‘essential worker’ categories which are considered both unskilled and semi-skilled workers.

Rob Paral, *Mexican Immigrant Workers and the U.S. Economy: An Increasingly Vital Role*, 1 IMMIGR. POLY FOCUS 1, 5–6 (2002), available at <http://www.americanimmigrationcouncil.org/sites/default/files/docs/Mex%20Imm%20Workers%20&%20US%20Economy.pdf>.

³² *Id.* at 4.

³³ Lipman, *supra* note 1, at 12–13.

³⁴ *Id.*

³⁵ The terms “unauthorized worker” or “unauthorized workforce” are used to describe people who are forbidden under the immigration laws to work for pay. Lyon, *supra* note 1, at 576 (discussing appropriate terminology for non-U.S. citizens and their immigration status).

³⁶ URBAN INSTITUTE, CROSSING BORDERS: THE IMPACT OF IMMIGRATION (2004), <http://www.urban.org/publications/900680.html> (quoting Jeffrey Passel of the Urban Institute: “[Undocumented workers] tend to be young; there are very few over age 40 statistically”). In a report issued by the Pew Hispanic Center, Passel reported that while workers who are between the ages of forty-five and sixty-four are more likely to be retired or disabled and thus not in the labor force, very few undocumented workers fall in this age range, and thus are more likely to be working. JEFFREY S. PASSEL, PEW HISPANIC

unauthorized employment problem within the United States, which interferes with the job market of otherwise authorized workers. In addition, by virtue of their presence, undocumented workers cost Americans millions of dollars every year in added costs to public education, health care, welfare services, and the criminal justice system.³⁷ As such, they are viewed as a burden on citizen taxpayers and a drain on state and local government resources.³⁸ Indeed, in a 1995 report, the Government Accountability Office (GAO) examined three national studies of the benefits and costs associated with undocumented aliens and concluded that the costs outweighed the benefits to the U.S. economy.³⁹ Such a controversial⁴⁰ conclusion is supported by the number of experts that the GAO consulted while gathering information for the report,⁴¹ thus further stoking the sentiment that, as one U.S. Senator opined, “Illegal immigration is wrong—plain and simple.”⁴²

Despite the existence of the IRCA, the number of undocumented aliens continues to rise.⁴³ The IRCA has been the

CENTER, UNAUTHORIZED MIGRANTS: NUMBERS AND CHARACTERISTICS 25 (2005), <http://pewhispanic.org/files/reports/46.pdf>. Passel contends that if undocumented workers become disabled or retire, they are much more likely than others to leave the country. *Id.* Based on these facts, he argues it is reasonable to assume that most undocumented workers will remain in the United States for quite some time, given that most of them are under the age of forty. *Id.*

³⁷ MICHAEL C. LEMAY, *ILLEGAL IMMIGRATION: A REFERENCE HANDBOOK* 56 (2007).

³⁸ *Id.*

³⁹ U.S. GOV'T. ACCOUNTABILITY OFFICE, *ILLEGAL ALIENS: NATIONAL NET COST ESTIMATES VARY WIDELY 2–3* (1995) [hereinafter *GAO'S NET COST ESTIMATES*], available at <http://www.gao.gov/archive/1995/he95133.pdf> (examining three national studies: (1) Donald Huddle's initial study of 1992 net costs, *The Costs of Immigration*; (2) the Urban Institute's critique of that study, *How Much Do Immigrants Really Cost? A Reappraisal of Huddle's "The Cost of Immigrants"*; and (3) Huddle's updated study, *The Net National Costs of Immigration in 1993*).

⁴⁰ In the same year that GAO issued its report, Professor Alan O. Sykes, now the James and Patricia Kowal Professor of Law at Stanford Law School stated, “[T]here is no clear evidence that undocumented aliens as a group are a net drain on the public treasury once their contribution to tax revenues are taken into account.” Alan O. Sykes, *The Welfare Economics of Immigration Law: A Theoretical Survey with an Analysis of U.S. Policy*, in *JUSTICE IN IMMIGRATION* 158, 191 (Warren F. Schwartz ed., 1995). See also JULIAN L. SIMON, *THE ECONOMIC CONSEQUENCES OF IMMIGRATION* 296 (1989) (indicating that “[o]n balance . . . natives exploit illegal immigrants through the public coffers by taking much more from the illegals in taxes than is spent on them in public expenditures”).

⁴¹ The GAO consulted various experts in the field of immigration about issues that arose in assessing estimates of the fiscal impact of undocumented aliens, including Jeffrey Passel, the Urban Institute's Director of Program for Research of Immigration Policy—whose statistics and opinions are relied upon for various parts of this article—and Donald Huddle, an economist who once concluded that undocumented workers had cost the United States billions of dollars. See *GAO'S NET COST ESTIMATES*, *supra* note 39, at 34–55.

⁴² Spencer S. Hsu, *Senate Democrats Address Immigration*, WASH. POST, Jun. 25, 2009, at A3 (quoting Sen. Charles E. Schumer).

⁴³ See *infra* Part II.C.

subject of endless debates and criticisms over the past two decades. Many blame the employer sanctions provisions for the failure of the IRCA.⁴⁴ Others urge the U.S. judicial system to use reason and fairness to guide the resolution of the current immigration situation.⁴⁵ Still others advocate for complete immigration reform.⁴⁶ While these are valuable suggestions to solve the problem of illegal immigration, they overlook the roles of perhaps the most important soldiers in the battle against illegal immigration—U.S. employers—who are entirely capable of meeting the most desirable need of undocumented aliens: employment.⁴⁷ Giving undocumented workers opportunities to make a living in the United States directly encourages them to enter the country unlawfully and remain undocumented once they find a way to earn a living. This activity fosters more illegal immigration, despite the nation's outcry for stricter regulation. Therefore, U.S. employers should be the focal point of the battle against illegal immigration.

A. Undocumented Aliens: Who Are They and Why Are They Here?

The number of undocumented immigrants in the United States amounted to nearly twelve million at the end of 2008.⁴⁸ Over time, four main categories of undocumented immigrants have arisen. The first group includes those who come into the country without proper paperwork or authorization, typically crossing the southern border that the United States shares with

⁴⁴ In her evaluation of the IRCA, Cecelia Espenoza argues that while the Act has failed to eliminate the push or pull to undocumented immigrants, it has created additional forms of discrimination against Hispanic and Asian citizens as well as other legal residents who are fully authorized to work. Cecelia M. Espenoza, *The Illusory Provisions of Sanctions: The Immigration Reform and Control Act of 1986*, 8 GEO. IMMIGR. L.J. 343, 347 (1995). Espenoza advocates for the complete elimination of employer sanctions, which have resulted in discrimination while leaving the increase in illegal immigration unattended. *Id.* She further maintains that the sanctions provided under the IRCA are ineffective in alleviating the problem of illegal immigration. *Id.* See also Danburg, *supra* note 255, at 525.

⁴⁵ See Marisa S. Cianciarulo, *Can't Live With 'Em, Can't Deport 'Em: Why Recent Immigration Reform Efforts Have Failed*, 13 NEXUS 13, 28 (2008) (asserting that decisions which lead to harsh punishments of undocumented workers only "perpetuate the misconception that undocumented workers have solely created and are solely responsible for the current immigration situation"); Nhan T. Vu & Jeff Schwartz, *Workplace Rights and Illegal Immigration: How Implied Repeal Analysis Cuts Through the Haze of Hoffman Plastic, its Predecessors and its Progeny*, 29 BERKELEY J. EMP. & LAB. L. 1, 1–2 (2008) (arguing that the U.S. Supreme Court reached the wrong result in *Hoffman Compounds, Inc. v. National Labor Relations Board* and thus further encouraged illegal immigration when it denied backpay as a remedy for undocumented immigrants who had been terminated for their involvement in union activities).

⁴⁶ See Lyon, *supra* note 1.

⁴⁷ See *infra* Part II.A.

⁴⁸ PASSEL & COHN, *supra* note 19, at i.

Mexico.⁴⁹ The second includes those who enter the country with valid paperwork but stay beyond the time allowed on their visas—these are also called “the visa overstayers.”⁵⁰ The third category includes those who enter the country with fraudulent documents.⁵¹ The final category is comprised of legal permanent residents who commit crimes that render them deportable.⁵²

Undocumented immigrants choose the United States as their destination country for a number of reasons, many of which pertain to the socio-economic conditions of the source countries. Economic hardship or political instability often induces immigrants to escape their home countries despite the risks associated with becoming undocumented in the United States.⁵³ For those who are eligible to obtain immigrant visas, the wait times are so long that they significantly discourage many eligible aliens.⁵⁴ In addition to significant backlogs on application processing, the United States has statutory ceilings that limit the number of immigrant visas issued each year, prompting aliens to risk residing with their family members without legal status while waiting for their petitions to be processed.⁵⁵ Most undocumented immigrants, however, do not have the luxury of waiting for such a long period of time to obtain immigrant visas because they do not have family members or employers whose sponsorship may permit them to apply for immigrant visas.⁵⁶

⁴⁹ LEMAY, *supra* note 37, at 1.

⁵⁰ *Id.* at 1–2.

⁵¹ *Id.* at 2.

⁵² *Id.*

⁵³ RUTH ELLEN WASEM, CONG. RESEARCH SERV., UNAUTHORIZED ALIENS IN THE UNITED STATES: ESTIMATES SINCE 1986 CRS-5 (2004), <http://fpc.state.gov/documents/organization/39561.pdf> (listing a number of factors that contribute to unauthorized immigration and explaining that “unauthorized migration is generally attributed to the ‘push-pull’ of prosperity-fueled job opportunities in the United States”).

⁵⁴ *Id.* at CRS-6. As of October 31, 2009, the wait times for a Petition for Alien Relative application (I-130) ranged from five months for a spouse, parent or child under twenty-one, to nine years for a brother or sister. While the wait times vary from jurisdiction to jurisdiction—for example, the Nebraska or Vermont Service Centers may have different processing wait times—it is generally accepted that the wait times for relatives of U.S. citizens to become lawful aliens can be considerable, depending on the relationship between the aliens seeking to obtain legal status and their U.S. citizen family members. See U.S. Citizenship and Immigration Services, <http://www.uscis.gov> (follow “Check Processing Times” hyperlink; select “CSC - California Service Center” and click “Service Center Processing Dates”) (last visited Jan. 7, 2010) (detailing processing times for immigrant petitions and visas).

⁵⁵ WASEM, *supra* note 533, at CRS-6 (explaining that, of the pending cases, reportedly almost two million are immediate relative and family preference petitions, and, as such, these family members sometimes risk residing without legal status to be with their families while waiting for their files to be processed).

⁵⁶ Even when they have family members or employers to sponsor them, or when they give birth to U.S. citizens, once they cross the border illegally, they are statutorily required to return to their home countries for up to ten years before being eligible for readmission via approved petitions. See *Illegal Immigration Reform and Immigrant*

The most significant enticement to immigrate without proper documentation, however, is the possibility of employment, “which like a ‘magnet’ pulls illegal immigrants toward the United States.”⁵⁷ Undocumented immigrants are motivated by the “prosperity-fueled job opportunities in the United States in contrast to limited or nonexistent job opportunities in the sending countries.”⁵⁸ As such, they are willing to work for substantially less than what lawfully present U.S. workers would require, although in many situations that is still substantially more than what they would otherwise have earned at home.⁵⁹

Surprisingly, protection of U.S. law is not the key motivation of undocumented immigrants. In fact, they are barred from almost all governmental benefits, including food stamps, Medicaid, federal housing programs, and social security income, to name a few, as a consequence of residing in the United States without proper documentation.⁶⁰

B. The Immigration Reform and Control Act of 1986: History and Development

Under pressure for immigration reform, Congress enacted the IRCA, which significantly altered the then existing immigration policy and programs.⁶¹ The IRCA purported to reduce illegal immigration by preventing undocumented immigrants from being lawfully employed in the United States.⁶² The IRCA’s employer sanction provisions, which sought to

Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546 (partially codified in scattered sections of 8 U.S.C.). Essentially, any previously undocumented presence in the United States does not count, even when undocumented immigrants are sponsored for immigrant visas. See MARK KRIKORIAN, CTR. FOR IMMIGR. STUD., DOWNSIZING ILLEGAL IMMIGRATION: A STRATEGY OF ATTRITION THROUGH ENFORCEMENT 3 (2005), <http://www.cis.org/articles/2005/back605.pdf> (indicating that the IIRIRA of 1996 effectively punished long-term illegal residence by barring undocumented immigrants from future re-entry for three or ten years depending on the length of their initial unlawful stay).

⁵⁷ Hoffman Plastic Compounds, Inc. v. Nat’l Labor Relations Bd., 535 U.S. 137, 155 (2002) (Breyer, J., dissenting).

⁵⁸ WASEM, *supra* note 53.

⁵⁹ KAREN D. JOHNSON-WEBB, RECRUITING HISPANIC LABOR: IMMIGRANTS IN NON-TRADITIONAL AREAS 9–12 (Steven J. Gold & Rubén G. Rumbaut eds., 2003).

⁶⁰ The only benefits that are federally required for undocumented immigrants are emergency medical care and elementary and secondary public education. Nevertheless, many undocumented immigrants do not even have access to these few government services because of their constant fear of being deported. As a result, some benefits are voluntarily given up in the hope of successfully remaining in the United States. Lipman, *supra* note 1, at 5–6.

⁶¹ Camille J. Bosworth, Note, *Guest Worker Policy: A Critical Analysis of President Bush’s Proposed Reform*, 56 HASTINGS L.J. 1095, 1104 (2005).

⁶² See *infra* Part I.B.1.

penalize U.S. employers who knowingly hired unauthorized workers, were notably the most controversial part of the Act.

i. The Origins of the IRCA

In 1942, faced with severe labor shortages in agriculture during World War II, a temporary-worker program was established to allow employers to hire workers from Mexico, on a temporary basis, for up to nine months per year.⁶³ Congress subsequently enacted the Agricultural Act of 1949,⁶⁴ which essentially expanded the previous temporary-worker program to the Bracero Program,⁶⁵ which lasted until 1964.⁶⁶ During this period, more than five million Mexicans came to the United States as temporary workers.⁶⁷ The Bracero Program workers were paid low wages,⁶⁸ enabling their employers to make much larger profits.⁶⁹ When the program was officially ended in 1964, employers were left with a few options—moving their operation overseas, replacing human labor with machines, hiring undocumented immigrants, or simply going out of business.⁷⁰ Among these options, hiring undocumented immigrants appeared to be the least expensive solution, since hundreds of thousands of immigrants who continued to stay or came to the United States

⁶³ Bosworth, *supra* note 61, at 1097.

⁶⁴ Agricultural Act of 1949, S. Rep. No. 1130, 81st Cong. (1st Sess. 1949).

⁶⁵ The Bracero was an agreement between the United States and Mexico to develop a plan for the importation of farm workers from Mexico to the United States. The program allowed agricultural farm-workers to work in the United States for up to nine months each year. “Braceros,” translated roughly as “farmhands,” were employed to meet the temporary labor needs, not to displace domestic workers. The United States paid recruitment and transportation costs for workers to come to the United States. There was a formal contract between the worker and employer with respect to the work conditions, and ten percent of the worker’s salary was to be deposited in a savings account and reimbursed upon return to Mexico. *Id.* at 1097–98.

⁶⁶ *Id.* at 1099.

⁶⁷ *Id.*

⁶⁸ It was uncertain whether the wages paid to Mexican workers from the Bracero Program were lower than what farmers would have paid otherwise equivalent U.S. workers, mainly because the United States was undergoing a shortage of manual labor. Farmworkers.org, U.S. Need Farm Workers, <http://www.farmworkers.org/usneedbp.html> (last visited June 6, 2010). The Bracero agreement was silent on the issue of comparative compensation. Farmworkers.org, The Official Bracero Agreement, <http://www.farmworkers.org/bpaccord.html> (last visited June 6, 2010). However, the record indicates that wages paid to these Mexican farm workers were low enough that they benefited farmers. See Rural Migration News, Braceros: History, Compensation, Apr. 2006, http://migration.ucdavis.edu/RMN/more.php?id=1112_0_4_0 (indicating that some economists in the 1920s had implied that farm workers were paid with low wages partially because farmers wanted to capitalize “on the basis of . . . cheap labor”).

⁶⁹ See Rural Migration News, *supra* note 68 (indicating that, due to low wages paid to Mexican workers, “continued availability of Mexican labor” from the Bracero Program could help maintain high land prices).

⁷⁰ See, e.g., Carolyn Dimitri & Anne Effland, *Milestones in U.S. Farming and Farm Policy*, AMBER WAVES, June 2005, at 10, 11, available at <http://www.ers.usda.gov/AmberWaves/June05/>.

without authorization were in dire need of jobs.⁷¹ From the moment the Bracero Program ended in 1964 until the enactment of the IRCA in 1986, hiring undocumented immigrants was common practice.⁷² Moreover, although it was illegal for individuals to come to the United States without authorization, it was not illegal for employers to hire them.⁷³ This led to a dramatic influx of illegal immigrants in the 1970s.⁷⁴ At the conclusion of the Bracero Program, employers not only hired Mexican undocumented immigrants that were left unemployed from the program, but also other individuals in the undocumented immigrant pool.⁷⁵

Throughout the 1970s, the number of illegal immigrants continued to rise, and by the 1980s the United States harbored millions of undocumented immigrants.⁷⁶ Such an alarming number of undocumented aliens prompted Congress to find a solution, and the IRCA was born as a result.⁷⁷ The IRCA makes it unlawful for employers “to hire, or to recruit or refer for a fee . . . an alien knowing the alien is an unauthorized alien,”⁷⁸ and it imposes sanctions on employers who *knowingly* violate this provision.⁷⁹

ii. Employer Sanction Provisions

Under the sanction provisions of the IRCA, employers who knowingly hire, recruit, or refer unauthorized aliens are subject to penalties ranging from \$250- \$10,000 per employed alien.⁸⁰ It also imposes criminal penalties on those who engage in “pattern or practice violations.”⁸¹ These are typically fines of not more than \$3,000 per alien, or imprisonment of not more than six months, or both.⁸² These provisions seek to prevent two types of

⁷¹ Bosworth, *supra* note 61, at 1103.

⁷² *Id.*

⁷³ *Id.* at 1104.

⁷⁴ Rural Migration News, *supra* note 68.

⁷⁵ *Id.* (indicating that even before the Bracero Program ended, employers had hired both legal Braceros—Mexican farm workers from the Bracero Program—and undocumented Mexican immigrants who came to the United States with the hope of finding jobs as a result of the labor shortage after World War II). *See also* The Bracero Program: 1942–1964, at 20, 21, 40, http://www.unco.edu/cohtmlp/pdfs/Bracero_Program_PowerPoint.pdf (indicating that throughout the duration of the program, from 1942 to 1967, the number of Mexican undocumented immigrants rose to the point that it might have surpassed the number of Bracero workers).

⁷⁶ Maria Isabel Medina, *The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud*, 5 GEO. MASON L. REV. 669, 689 (1997).

⁷⁷ *See generally* 8 U.S.C. § 1324a (2006).

⁷⁸ § 1324a(a)(1).

⁷⁹ § 1324a(a)(1).

⁸⁰ § 1324a(e)(4).

⁸¹ § 1324a(f)(1).

⁸² § 1324a(f)(1).

proscribed activities by employers. First, they prohibit employers from hiring or continuing to employ an individual if the employer knows the individual is not authorized to obtain employment in the United States.⁸³ Second, they provide for criminal penalties if the employer engages in a more egregious “pattern or practice” of hiring or continuing to employ such aliens.⁸⁴ Criminal penalties were designed to discourage employers from continuing unlawful hiring practice with the mentality that they could simply pay for the civil fines as a regular cost of “doing business.”⁸⁵

C. The Landscape of Illegal Immigration in the Post-IRCA Era

Immediately after the passage of the IRCA in 1986, the number of undocumented immigrants dropped significantly, though artificially, from 1986 to 1989.⁸⁶ Prospective undocumented immigrants employed a wait-and-see approach to determine whether the United States was serious about enforcing its policies.⁸⁷ When it became apparent that the United States was “not serious about enforcement and that the system could be easily evaded through the use of inexpensive phony documents,” undocumented immigration began to increase again.⁸⁸ The number of undocumented immigrants, 3.2 million prior to the enactment of the IRCA, nearly doubled in the next ten years,⁸⁹ and it continued to spiral upward to reach approximately twelve million at the end of 2008.⁹⁰ Both Congress and President George W. Bush proposed new programs to set forth certain measures, since then-current immigration programs had failed to deliver the intended result.⁹¹ Congress began to spend more money to strengthen the border, only to

⁸³ § 1324a(f)(1). The legislative history of the IRCA indicates that criminal penalties were for “those employers who are unrepentant and make it in a general practice to knowingly hire undocumented aliens rather than follow the elementary provision of the [IRCA].” H.R. REP. NO. 99-682, *supra* note 10, at 50.

⁸⁴ § 1324(f)(1).

⁸⁵ H.R. REP. NO. 99-682, *supra* note 10, at 50.

⁸⁶ KRİKORIAN, *supra* note 56, at 4.

⁸⁷ Mark Krikorian of the Center for Immigration Studies explains that “[a]pprehensions of aliens by the Border Patrol—an imperfect measure but the only one available—fell from more than 1.7 million in 1986 to under a million in 1989. But then the flow began to increase again as the deterrent effect of the hiring ban dissipated . . .” *Id.*

⁸⁸ *Id.*

⁸⁹ Johnson, *supra* note 2, at 251.

⁹⁰ PASSEL & COHN, *supra* note 19, at 1.

⁹¹ Emily B. White, *How We Treat Our Guests: Mobilizing Employment Discrimination Protections in a Guest Worker Program*, 28 BERKELEY J. EMP. & LAB. L. 269, 280–81 (2007).

realize that the demand for human smugglers had dramatically increased.⁹²

In 2004, President Bush proposed a temporary worker program in an attempt to reform and mend existing American immigration policy.⁹³ This proposed new program purported to expand the guest worker visa and provide new guidelines for U.S. employers in hiring foreign workers.⁹⁴ The program was to operate like the Bracero Program⁹⁵ to meet labor shortages. As such, jobs would only be open to foreign workers when no U.S. worker was available.⁹⁶ Like the Braceros, foreign workers participating in guest worker programs would be dependent upon their employers to maintain their visas.⁹⁷

However, Bush's temporary worker program was only a temporary solution.⁹⁸ Among other things, it did not provide incentives for foreign workers to obtain temporary visas, and it provided no wage or labor protections.⁹⁹ Furthermore, at the conclusion of their visa durations, workers would still be required to return to their home countries, as the proposed program did not offer an amnesty provision or priority for permanent residency processing.¹⁰⁰ In effect, the proposed program would likely have had little, if any, influence on the number of undocumented immigrants entering the country because it was incapable of meeting the demands of the agricultural industry in America and was not comprehensive enough to satisfy the employment needs of immigrants.¹⁰¹

⁹² Amanda E. Schreyer, *Human Smuggling Across the U.S.-Mexico Border: U.S. Laws Are Not Stopping It*, 39 SUFFOLK U. L. REV. 795, 796 (2006).

⁹³ Bosworth, *supra* note 61, at 1110; White, *supra* note 91, at 280–81.

⁹⁴ Bosworth, *supra* note 61, at 1110–11.

⁹⁵ Kristi L. Morgan, *Evaluating Guest Worker Programs in the U.S.: A Comparison of the Bracero Program and President Bush's Proposed Immigration Reform Plan*, 15 BERKELEY LA RAZA L.J. 125, 134–36 (2004). See also *supra* notes 61–67 and accompanying text.

⁹⁶ Morgan, *supra* note 95, at 136.

⁹⁷ Fwjustice.org, *Guestworker Programs*, http://www.fwjustice.org/Immigration_Labor/GuestworkerBASICS.htm (last visited Jan. 2, 2010).

⁹⁸ Bosworth, *supra* note 61, at 1111. Because the Bracero Program has been widely criticized, any new program that purports to create a temporary worker program will likely engender more criticism while leaving the issue of unauthorized employment of undocumented workers unsolved. See generally JORGE DURAND, *THE BRACERO PROGRAM 1942–1964: A CRITICAL APPRAISAL* (2007), <http://meme.phpwebhosting.com/~migracion/rimd/revistas/rev9/e2.pdf>.

⁹⁹ Bosworth, *supra* note 61, at 1111–15.

¹⁰⁰ *Id.* at 1114–15.

¹⁰¹ *Id.* at 1115.

D. An Important Tool for Employment Verification: “E-Verify”¹⁰²

Since the passage of the IRCA, employers must verify that every new-hire, citizen and noncitizen alike, is authorized to be employed in the United States.¹⁰³ Some employers must collect employees’ documents based on the guidelines provided in the Employment Eligibility Verification Form I-9 from the U.S. Citizenship and Immigration Services (USCIS) (one of the successors to the former Immigration and Naturalization Service (INS)).¹⁰⁴ The IRCA requires employers to verify documents submitted by prospective employees, and the risk of civil and criminal sanctions as provided in the IRCA urges employers to adopt measures to ensure the authenticity of those documents.¹⁰⁵ To reduce fraudulent documents designed to evade the process of employment verification, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).¹⁰⁶ Initially, the IIRIRA established three pilot programs: the basic pilot program, the citizen attestation pilot

¹⁰² Department of Homeland Security, E-Verify, http://www.dhs.gov/xprevprot/programs/gc_1185221678150.shtm (last visited June 2, 2010) [hereinafter Department of Homeland Security E-Verify].

¹⁰³ Immigration Reform and Control Act of 1986, 8 U.S.C. §§ 1324a(a)(1)(B), (b)(1)(A)(i)–(ii) (2006). The Department of Homeland Security has enforced this rule by requiring employers to ensure that employees fill out Form I-9 and provide appropriate documents to prove their eligibility to work. See Department of Homeland Security, Form I-9: Employment Eligibility Verification, <http://www.uscis.gov/files/form/i-9.pdf> (last visited June 2, 2010).

¹⁰⁴ Department of Homeland Security, Form I-9, Employment Eligibility Verification, <http://www.uscis.gov/files/form/i-9.pdf> (last visited June 2, 2010) (providing employers with guidelines about the types of documents required for employment verification. Certain documents provided by prospective employees could be used to establish their identity, or for employment authorization, or both.). See also 8 U.S.C. § 1324a(b)(1)(B)–(D), indicating that documents establishing employment authorization and/or identity include:

[1] United States passport; [2] resident alien card, alien registration card, or other document designated by the Attorney General . . . [3] social security account number card; [4] other documentation evidencing authorization of employment in the United States which the Attorney General finds, by regulation, to be acceptable for the purposes of this section[.] . . . [5] driver’s license or similar document issued for the purpose of identification by a State, if it contains a photograph of the individual[; and] . . . [6] in the case of individuals under 16 years of age . . . documentation of personal identity of such other type as the Attorney General finds, by regulation, provides a reliable means of identification.

8 U.S.C. § 1324a(b)(1)(B)–(D).

¹⁰⁵ William A. Smith, Jr., *Employers’ Obligations Under the Immigration Reform and Control Act of 1986*, 61 N.Y. St. B.J. 36, 37 (1989).

¹⁰⁶ IIRIRA, Pub. L. No. 104-208. See also 142 CONG. REC. H10841, H10841–H10842 (daily ed. Sept. 24, 1996) (statement of Rep. Smith), available at <http://frwebgate5.access.gpo.gov/cgi-bin/PDFgate.cgi?WAISdocID=763532451496+5+2+0&WAISaction=retrieve> (calling for changes in existing immigration policy “by increasing penalties for alien smuggling and for document fraud”).

program, and the machine-readable document pilot program.¹⁰⁷ Today, only the basic pilot program, commonly known as “E-Verify,” is still in existence.¹⁰⁸

E-Verify is an online system operated by both the Department of Homeland Security (DHS) and the Social Security Administration (SSA).¹⁰⁹ It facilitates the process of employment eligibility verification by allowing employers to enter information from an employee’s I-9 form into an Internet-based government database within three working days of hiring.¹¹⁰ Such information is then crosschecked against the databases of the DHS and the SSA, and E-Verify immediately gives a tentative confirmation, or non-confirmation, of employment eligibility.¹¹¹ Tentative non-confirmation is the basis for further investigations by the government and a final decree is given to the employer within ten business days, thus allowing employers to know the eligibility of prospective employees within a very short amount of time.¹¹² E-Verify is currently fully effective and available in all fifty states and some U.S. territories.¹¹³

The use of E-Verify has become increasingly popular. Although Congress makes the use of E-Verify optional, as of August 2010, fourteen out of fifty states, pioneered by Arizona, have mandated the use of E-Verify by all or some employers.¹¹⁴ In addition, Executive Order 12989, as amended by President George W. Bush in 2008, mandated the use of E-Verify for all employees working on any federal contracts¹¹⁵ and required that

¹⁰⁷ IIRIRA, Pub. L. No. 104-208, § 403(a)–(c).

¹⁰⁸ MICHAEL FIX ET AL., *MIGRATION POLICY INSTITUTE, MANDATORY VERIFICATION IN THE STATES: A POLICY RESEARCH AGENDA 6* (2008), <http://www.uscis.gov/files/natedocuments/e-verify-mandatory-impl-evaluation.pdf>.

¹⁰⁹ *Id.* at 4.

¹¹⁰ IIRIRA, Pub. L. No. 104-208, § 403(a)(3)(A).

¹¹¹ *Id.* at § 403(a)(4)(A)–(B).

¹¹² *Id.* at § 404(c).

¹¹³ Rachel Feller, Comment, *Preempting State E-Verify Regulations: A Case Study of Arizona’s Improper Legislation in the Field of “Immigration-Related Employment Practices,”* 84 WASH. L. REV. 289, 300 (2009).

¹¹⁴ FIX ET AL., *supra* note 108, at 53–54. *See also* NumbersUSA, Map of States with Mandatory E-Verify Laws, <http://www.numbersusa.com/content/learn/enforcement/workplace-verification/map-states-with-mandatory-e-verify-laws.html> (last visited Aug. 11, 2010) (indicating that Arizona, Mississippi, South Carolina, and Utah have made the use of E-Verify mandatory to all employers while Colorado, Georgia, Idaho, Minnesota, Missouri, Nebraska, North Carolina, Oklahoma, Rhode Island, and Virginia do so to only state agencies and/or contractors).

¹¹⁵ The government will refuse to procure goods and services from contractors who have not complied with immigration laws. Exec. Order No. 13465, 73 Fed. Reg. 33285 (June 6, 2008) (positing that that “[a] contractor whose work force is less stable will be less likely to produce goods and services economically and efficiently than a contractor whose work force is more stable,” this Executive Order mandates that all government contractors utilize an employment verification tool to comply with immigration laws). *See*

all federal contractors and subcontractors begin using E-Verify starting September 8, 2009.¹¹⁶ As of January 2010, more than 180,000 employers were enrolled in the program,¹¹⁷ thus demonstrating its effectiveness in assisting employers in screening out prospective employees who are unauthorized to work. E-Verify, like most other electronic databases, has produced occasional “false negatives”—those who appear ineligible to work but are in fact fully authorized to work—or “false positives”—those who appear to be eligible but are in fact not authorized to work.¹¹⁸ However, since the USCIS has spent the last twelve years cleaning, revising, and perfecting the database,¹¹⁹ it may be the best system currently in use for employment verification.

The increasing ease and popularity of the E-Verify system has an important implication: employers now have the necessary tool to verify the legal status of their workers and thus have “no excuse” for hiring undocumented immigrants.¹²⁰ E-Verify assists employers in two important ways: it reduces the burden on employers for immigration enforcement and it aids them in distinguishing between counterfeit and legitimate documents offered by prospective employees.¹²¹ It is free to all employers at the expense of Congress, which spent nearly \$100 million on the program.¹²² Although the use of this system is optional, employers are adequately equipped with an important and effective tool to preclude the hiring of undocumented immigrants, and therefore should use E-Verify at all possible times.

also Lindsay L. Chichester & Gregory P. Adams, *The State of E-Verify: What Every Employer Should Know*, 56 FED. LAW. 50, 52 (2009).

¹¹⁶ 73 Fed. Reg. 33285. See also DEPT. OF HOMELAND SECURITY, USER MANUAL FOR FEDERAL CONTRACTORS 4 (2009), http://www.uscis.gov/USCIS/E-Verify/Federal%20Contractors/FEDK%20Employer%20Manual%209.3.09_FINAL.pdf.

¹¹⁷ DEPT. HOMELAND SECURITY, WESTAT EVALUATION OF THE E-VERIFY PROGRAM: USCIS SYNOPSIS OF KEY FINDINGS AND PROGRAM IMPLICATIONS 1 (2010), <http://www.uscis.gov/USCIS/Native%20Docs/Westat%20Evaluation%20of%20the%20E-Verify%20Program.pdf>.

¹¹⁸ FIX ET AL., *supra* note 108, at 10.

¹¹⁹ *Id.* at 56.

¹²⁰ President George W. Bush, State of the Union Address, 43 WEEKLY COMP. PRES. DOC. 57, 59 (Jan. 23, 2007), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2007_presidential_documents&docid=pd29ja07_txt-6.pdf (asserting that while we need to uphold our tradition of the melting pot that welcomes and assimilates new arrivals, we also need to enforce our immigration laws by giving employers the tools to verify the legal status of their workers).

¹²¹ Stephen A. Brown, Comment, *Illegal Immigrants in the Workplace: Why Electronic Verification Benefits Employers*, 8 N.C. J. L. & TECH. 349, 354 (2007).

¹²² Department of Homeland Security E-Verify, *supra* note 102; FIX ET AL., *supra* note 108, at 6.

II. THE IRCA HAS PROGRESSIVELY ENCOURAGED ILLEGAL IMMIGRATION

Like the issue it seeks to resolve—illegal immigration—the IRCA has been the topic of heated debate since its inception. Statistics have proven that the IRCA is not a successful strategy to decrease, let alone eliminate, illegal immigration.¹²³ Countless factors have contributed to this failure. Experts have long exhausted the topic of employer sanctions and their diminished role in deterring illegal immigration.¹²⁴ The failures of employer sanctions have paved the way for increased employment opportunities for undocumented immigrants, which directly explains why they continue to make this country their second home, despite living outside the protection of U.S. laws. While the battle against illegal immigration is not yet successful, courts have given a helping hand to employers who have violated the IRCA through a number of irresponsible decisions that send a dangerous message to employers—the “illegal treatment of undocumented workers will go virtually unpunished.”¹²⁵ Furthermore, embedded within the IRCA is a loosely-drafted knowledge standard which holds employers liable only if, they know of their employee’s undocumented status.¹²⁶ Knowledge, however, is quite a subjective standard, and employers can satisfy it with certain internal control procedures, however ineffective they may be.¹²⁷ All of these loopholes enable illegal

¹²³ See *supra* Part I.C (indicating that the number of undocumented immigrants increased almost four-fold, from 3.2 million in 1986 to 12 million by the end of 2008; and, if Congress intended for the IRCA to decrease employment opportunities of undocumented immigrants as a way of reducing the number of undocumented immigrants, the IRCA has proven to be a failure, at least statistically).

¹²⁴ See *infra* Part II.A (noting that numerous scholars have written about the complete failure of the employer sanction provisions of the IRCA, that many have advocated for the provisions to be eliminated altogether, and others have suggest amendments, as cited in *infra* notes 132–134). See also *supra* note 25 and accompanying text.

¹²⁵ Cianciarulo, *supra* note 45, at 27.

¹²⁶ The current relevant provision of the IRCA states, “It is unlawful for a person or other entity . . . to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien.” 8 U.S.C. § 1324a(1)(A) (2006). “Knowledge” includes constructive knowledge. See *infra* note 139.

¹²⁷ See *infra* notes 185–187. Further, since the term “knowledge” or “knowingly” is subject to interpretation, employers can create certain internal control procedures to purportedly ensure that their prospective employees are authorized to work in the United States. Since the use of an electronic verification system, such as E-Verify, is not mandatory for all employers, these procedures can be entirely manual, such as making copies of two different types of identification cards, verifying employees’ previous employment, requiring prospective employees to answer affirmatively as to whether they are authorized to work in the United States, to name just a few. These procedures, while appearing to show employers’ good-faith efforts, are ineffective because they will inevitably fail to detect fraudulent documents and they allow for the possibility of human error.

immigration to escalate and leave the IRCA outdated and highly criticized.

A. Employer Sanctions Provisions Do Not Effectively Deter the Practice of Hiring Undocumented Workers

The effectiveness of the sanction provisions in the IRCA has been seriously questioned.¹²⁸ In fact, ten years after the IRCA was first enacted, government agencies have asserted that the employer sanctions provided in the IRCA have failed to achieve their goals.¹²⁹ While the provisions were created to discourage the practice of hiring undocumented immigrants, they instead operated to encourage substantial discrimination.¹³⁰ There was evidence that employers were less likely to hire “foreign-appearing” or “foreign-sounding” individuals who were otherwise fully qualified for the jobs available.¹³¹ Although there were provisions that allowed the possible repeal of employer sanctions in the case of widespread discrimination, the sanctions have not been repealed.¹³²

Minimal civil penalties have not deterred employers from hiring illegal immigrants. Because each undocumented worker hired only costs an employer from \$250-\$10,000 in fines or penalties,¹³³ underpaying these individuals during the course of their employment exceeds any expenses employers could incur from sanctions should they be caught. In addition, employers have another means of getting around the sanctions provision—changing their hiring methods. There is growing evidence that employers use subcontractors, or recruiting agents.¹³⁴ By doing so, employers avoid the requirements of the IRCA because

¹²⁸ Danburg, *supra* note 25, at 530.

¹²⁹ *Employer Sanctions: Hearings Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 104th Cong., 1st Sess. (Mar. 3, 1995), available in LEXIS Legis Library, Cngtst File (highlighting that Maria Echaveste, the then Administrator of the Wage and Hour Division of the U.S. Dept. of Labor, testified that “there is now a broad-based consensus that employer sanctions as currently implemented have not worked,” and that some suggest that sanctions be repealed, while others call for reforms to strengthen the effectiveness of employer sanctions).

¹³⁰ See generally U.S. GOV’T. ACCOUNTABILITY OFFICE, IMMIGRATION REFORM: EMPLOYER SANCTIONS AND THE QUESTION OF DISCRIMINATION: REPORT TO THE CHAIRMAN, COMMITTEE ON THE JUDICIARY, 101ST CONG. 5 (1990) [hereinafter GAO Report], available at <http://archive.gao.gov/d38t12/141005.pdf>.

¹³¹ *Id.* at 6. While the GAO acknowledged that its surveys were subject to certain limitations, it could not rule out the possibility that differences in hiring outcomes were attributed to “national origin discrimination.” *Id.*

¹³² See National Immigration Law Center, AFL-CIO Calls for Repeal of Employer Sanctions and Enactment of a New Legalization Program (Apr. 11, 2000), <http://www.nilc.org/immsemplymnt/ircaempverif/irca018.htm>.

¹³³ See *supra* note 80 and accompanying text.

¹³⁴ Julie A. Phillips & Douglas S. Massey, *The New Labor Market: Immigrants and Wages after IRCA*, 36 DEMOGRAPHY 233, 234 (May 1999).

subcontractors and their workers are not technically employees of the employer.¹³⁵ Employers, therefore, do not have to bear the burden of employment verification, and take the employees as eligible to work so long as their subcontractors vouch for their valid employment authorization. Through these methods, employers can absolve themselves from any potential liability and conveniently shift the blame to their subcontractors, even if the workers happen to be undocumented immigrants.¹³⁶

In addition to its civil sanctions, the IRCA criminal sanction provision aims at preventing employers from engaging in a pattern of hiring undocumented workers.¹³⁷ The criminal sanction provision provides that employers are subject to imprisonment for “not more than six months” and a fine of up to \$3,000 per employed alien.¹³⁸ On its face, the criminal liability provision seems to preclude employers from treating civil penalties as a cost of “doing business,” or using recruiting agencies to absolve their own liabilities. Nevertheless, employers who engage in the pattern of hiring undocumented workers have recognized that the “knowledge” requirement in the IRCA is subject to judicial interpretation.¹³⁹ As such, some employers have chosen to take some calculated risks and continue to hire undocumented workers because the financial benefits of doing so substantially outweigh the risks of getting caught or being forced to pay civil or criminal penalties under the IRCA.¹⁴⁰

As a result, the struggle with illegal immigration continues. As the 1990 GAO report indicated, employer sanctions have led to widespread discrimination, and it is disputed whether they actually met the goal of decreasing illegal immigration.¹⁴¹ Some studies show that, despite the initial result of decreased illegal immigration, employer sanctions under the IRCA fail to provide a long-term solution.¹⁴² Sanctions have not deterred employers

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ 8 U.S.C. § 1324a(f)(1).

¹³⁸ § 1324a(f)(1).

¹³⁹ In the case of *Mester Mfg. Co. v. I.N.S.* the defendant argued that as a matter of law, it did not have knowledge of the status of the aliens. The defendant also advanced its argument as far as requiring the government to notify it that its employee’s green card was invalid, which serves as a helpful illustration to the point above that employers try to manipulate the meaning of “knowledge” in the IRCA to avoid liability. *Mester Mfg. Co. v. I.N.S.*, 879 F.2d 561, 566 (9th Cir. 1989). See also *U.S. v. Fragale*, 1999 U.S. Dist. LEXIS 12616 (over a decade after the enactment of the IRCA, this employer still advanced, though unsuccessfully, the argument surrounding the uncertainty of the term “knowledge”).

¹⁴⁰ Jeffrey L. Ehrenpreis, *Controlling Our Borders Through Enhanced Employer Sanctions*, 79 S. CAL. L. REV. 1203, 1206 (2006).

¹⁴¹ GAO Report, *supra* note 130, at 3; Danburg, *supra* note 25, at 530–31.

¹⁴² Danburg, *supra* note 25, at 531.

from hiring undocumented workers.¹⁴³ This is demonstrated by the progressively increasing population of undocumented immigrants reported by the Pew Hispanic Center after the passage of the IRCA in 1986.¹⁴⁴

B. The Lack of Protection of U.S. Laws Does Not Deter Undocumented Immigrants from Seeking Employment

The legislative history of the IRCA indicates that Congress believed employment to be the main factor that draws undocumented aliens to the United States.¹⁴⁵ Indeed, undocumented immigrants come to the United States in the hope of obtaining jobs, not for protection under U.S. labor laws.¹⁴⁶ In doing so, they are willing to work at below-market wage rates as long as they are employed.¹⁴⁷ The harsh working conditions offered by U.S. employers, despite being illegal per American standards, are quite acceptable to those who have risked their own lives to come to this country in search of a better future.¹⁴⁸ After all, working in harsh and unsafe conditions is much better for many than losing lives in political unrest or living in poverty in their home countries.

As members of the “secondary labor market,” undocumented workers “gravitate toward jobs involving irregular employment, low wages, and poor working conditions,” all of which U.S. employees either refuse to tolerate without substantial warranty of safety.¹⁴⁹ Undocumented immigrants have worked for brutally long hours at wages below the legal limit, with high rates of

¹⁴³ Espenoza, *supra* note 44, at 347.

¹⁴⁴ PASSEL & COHN, *supra* note 48, at 36 (estimating the unauthorized immigrant population as in thousands 3,525 in 1990, 8,375 in 2000, 11,100 in 2005, and 11,900 in 2008).

¹⁴⁵ H.R. REP. NO. 99-682, *supra* note 10, at 46 (showing Congress was convinced that the opportunity to secure employment illegally in the United States not only drew aliens to the country but it also encouraged nonimmigrant aliens to work unlawfully).

¹⁴⁶ Patel v. Quality Inn South, 846 F.2d 700, 704 (11th Cir. 1988).

¹⁴⁷ *Id.* See also U.S. Immigration and Customs Enforcement, Public Information: Worksite Enforcement, <http://www.ice.gov/pi/worksite/index.htm> (last visited June 16, 2010) (finding “[i]llegal workers frequently lack the employment protections afforded those with legal status and are less likely to report workplace safety violations and other concerns,” such as being paid substandard wages).

¹⁴⁸ See, e.g., Boatpeople.org, A True Story, http://www.boatpeople.org/a_true_story.htm (last visited January 2, 2010) (depicting horror stories of Vietnamese refugees trying to escape Communism by traveling by boat to America, during which they were plundered, sexually assaulted, and even killed by Thai pirates); *130 Are Said To Die in Pirate Attack on Vietnamese Refugees*, N.Y. TIMES, May 7, 1989, at 11 (reporting that “[t]he attackers, armed with shotguns and hammers, shot and bludgeoned refugees to death after raping several of the women aboard . . . The seven pirates then set the refugee boat ablaze . . . Other refugees died of exhaustion after floating in the sea clinging to dead bodies of fellow refugees”).

¹⁴⁹ Espenoza, *supra* note 44, at 350.

injuries and deaths.¹⁵⁰ In addition, these individuals often do not report such harsh working conditions for fear of deportation.¹⁵¹ Horror stories about the mistreatment of undocumented workers in the workplace are not new to the public. Out of the one hundred eleven people who died on the job in New York City in 2000, seventy-four were immigrant workers.¹⁵² Chinese undocumented immigrants, for example, are forced to work at least one hundred hours per week in the New York garment district.¹⁵³

Undocumented workers' willingness to work under harsh conditions and for less than adequate compensation encourages employers to hire these individuals for unskilled positions.¹⁵⁴ Essentially, these employers and their unauthorized employees have an interlocking relationship from which mutual benefits derive. The employers can lower the workers' wages, and workers in turn can make a living while remaining in the United States without proper documentation.

Numerous organizations have advocated for the rights of undocumented immigrant workers.¹⁵⁵ The Asian American Legal Defense and Education Fund, for example, promotes the rights of Asian American immigrants. It has noted that "[e]mployer sanctions have undercut working conditions for all American workers by creating an underclass of undocumented workers who have no rights and are forced to work under slave-like conditions, for pay that no American worker can survive on."¹⁵⁶

C. Withholding Employees' Remedies Does Not Solve, but Rather Encourages, Illegal Immigration

Despite the passage of the IRCA, undocumented immigrants, once employed, are still recognized as "employees" under the National Labor Relations Act¹⁵⁷ (NLRA) and Fair Labor

¹⁵⁰ JENNIFER GORDON, *SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS 2* (2005).

¹⁵¹ Thomas Maier, *Blood, Sweat, Tears: Chinese Sweatshop Workers are Among Most Exploited*, *NEWSDAY*, July 26, 2001, at A6, available at <http://www.newsday.com/news/death-on-the-job-immigrants-at-risk-blood-sweat-tears-chinese-sweatshop-workers-are-among-most-exploited-1.797602>.

¹⁵² GORDON, *supra* note 150, at 2.

¹⁵³ Maier, *supra* note 151, at A6.

¹⁵⁴ Espenosa, *supra* note 44, at 350–51.

¹⁵⁵ Press Release, The Asian American Legal Defense and Education Fund, Call to Repeal IRCA Employer Sanctions Provisions, (Sept. 22, 2005), available at http://www.aaldef.org/article.php?article_id=63.

¹⁵⁶ *Id.* (quoting Nancy Eng from the Chinese Staff & Workers Association).

¹⁵⁷ The Act requires employers to reinstate the employee and to make him whole for any wages or benefits lost as a result of the discharge. National Labor Relations Act, 29 U.S.C.A. § 158(a)(3) (West 2007) (providing that "[i]t shall be an unfair labor practice for

Standards Act¹⁵⁸ (FLSA).¹⁵⁹ Although Congress could have excluded undocumented immigrants from NLRA and FLSA protection, it did not do so according to the plain language of the IRCA.¹⁶⁰ In fact, the legislative history of the IRCA indicates a strong Congressional intent to preserve protection for undocumented immigrants as “employees” under the NLRA and FLSA.¹⁶¹ Court decisions in the years after the passage of the IRCA have reflected such an understanding. In *Patel v. Quality Inn South*, the Eleventh Circuit concluded that the word “employee” should be construed broadly to include all workers not specifically exempted.¹⁶² The court reasoned that the provisions of the FLSA allowed employees to bring an action against their employer to recover any unpaid wages and overtime, where the term “employee” means “any individual employed by an employer,” which includes undocumented immigrant employees.¹⁶³ The court further asserted that this interpretation went hand in hand with the IRCA because the IRCA was not intended to limit the rights of undocumented aliens under the FLSA.¹⁶⁴ Undocumented aliens enter the United States without proper documentation to seek employment at any wage, not protection of the U.S labor laws.¹⁶⁵ Allowing these individuals to seek appropriate remedies from employers’ wrongdoing would discourage employers from hiring undocumented immigrants with the intent of exploiting them.¹⁶⁶ The *Patel* decision was, therefore, consistent with Congressional intent.

an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .”).

¹⁵⁸ Fair Labor Standards Act (FLSA), 29 U.S.C.A. § 206 (West 2007) (setting mandatory minimum wages for employees as well as other protections against wage loss and discrimination).

¹⁵⁹ See Myrna A. Mylius Shuster, Note, *Undocumented Does Not Equal Unprotected: The Status of Undocumented Aliens Under the NLRA Since the Passage of the IRCA*, 39 CASE W. RES. L. REV. 609, 618–19 (1989). See also *Patel*, 846 F.2d at 706 (holding that “undocumented workers are ‘employees’ within the meaning of the FLSA”).

¹⁶⁰ Nowhere in its statutory language does the IRCA negate the rights of undocumented workers in the workplace. Although the Act governs the hiring of these individuals, it does not strip them of protection during their employment. 8 U.S.C. § 1324 (2006).

¹⁶¹ See *Patel*, 846 F.2d at 702 (noting that Congress intended the term “employee” to be broadly defined).

¹⁶² *Id.*

¹⁶³ *Id.* (quoting 29 U.S.C.S. § 203(e)(1)).

¹⁶⁴ *Id.* at 704.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 704–05.

Nevertheless, the U.S. Supreme Court unjustifiably decided to depart from Congressional intent.¹⁶⁷ The Court, in a five-to-four decision in *Hoffman Plastic Compounds v. National Labor Relations Board*, concluded that whenever there is a potential conflict between the remedies provided in the NLRA and federal immigration policy, such as the IRCA, the NLRA may be required to yield.¹⁶⁸ In *Hoffman*, Jose Castro was an undocumented immigrant who presented false documents to obtain employment with Hoffman, a manufacturer of custom-formulated chemical compounds.¹⁶⁹ During the course of his employment, Castro supported a union-organizing campaign on his employer's premises and was subsequently laid off due to such involvement.¹⁷⁰ The National Labor Relations Board found that Hoffman violated the NLRA by laying-off Castro to rid itself of known union supporters and ordered the company to, among other things, offer backpay to the employee.¹⁷¹ The U.S. Supreme Court reversed this order and held that an undocumented employee could not claim backpay under the NLRA.¹⁷² The Court reasoned that, because granting undocumented immigrants the right to backpay as a remedy under the NLRA would essentially encourage violation of the IRCA, providing such an award "to illegal aliens runs counter to policies underlying IRCA, policies the [National Labor Relations] Board has no authority to enforce or administer."¹⁷³

The *Hoffman* Court based its conclusion on the premise that the employee could not lawfully have earned those wages because he was not authorized to work in the United States in the first

¹⁶⁷ See generally *Hoffman Plastic Compounds v. Nat'l Labor Relations Bd.*, 535 U.S. 137 (2002) (refusing to grant backpay to an undocumented worker who was unlawfully terminated for his involvement in union activities). *Hoffman* created confusion among lower courts and perpetuated inconsistent applications. The following cases support the proposition that undocumented workers are "often" denied legal remedies. See, e.g., *Crespo v. Evergo Corp.*, 841 A.2d 471, 477 (N.J. Super. Ct. App. Div. 2004) (holding that undocumented workers were not allowed to recover economic damages including backpay); *Escobar v. Spartan Security Service*, 281 F. Supp. 2d 895, 897 (S.D. Tex. 2003) (holding that unclean hands prevented recovery). But see *De La Rosa v. Northern Harvest Furniture*, 210 F.R.D. 237, 238-39 (C.D. Ill. 2002) (finding that the Supreme Court's holding in *Hoffman* did not apply because the present case did not involve backpay).

¹⁶⁸ *Hoffman*, 535 U.S. at 147. Accord. *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942) (holding that the Court "has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives").

¹⁶⁹ *Hoffman*, 535 U.S. at 140.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 140-41.

¹⁷² *Id.* at 146-47.

¹⁷³ *Id.* at 149.

place.¹⁷⁴ This premise is problematic. The Court ignored the simple fact that it takes *two* to create an employment relationship. Castro could not have obtained employment had it not been for Hoffman's acceptance of his documentation. Had Hoffman performed its due diligence by ensuring the legitimacy of the documentation, it would have discovered the undocumented status of Castro. If an employer does not use a verification device, like E-Verify, the employer is equally culpable for the employment of an undocumented worker.¹⁷⁵ The Court conveniently ignored the employer's participation in the unlawful hiring of Castro and made a one-sided, pro-employer conclusion that awarding backpay ran counter to the policies of the IRCA. In reality, withholding backpay condones illegal immigration because opportunistic employers like Hoffman recognize the benefits of hiring undocumented immigrants, and will capitalize on such illegitimate economic advantages that result from their unlawful conduct.¹⁷⁶

Since *Hoffman* was decided in 2002, lower courts have been confused about the application of the IRCA and to what extent it should overrule other federal statutes, such as the NLRA.¹⁷⁷ Some courts have interpreted *Hoffman* narrowly and only applied its rationale to cases of disputed backpay under the NLRA.¹⁷⁸ Others have interpreted *Hoffman* broadly as a blanket approval for denying other remedies, not just backpay, to undocumented workers.¹⁷⁹ Such a situation is entirely contrary to the congressional intent that was explicitly articulated in the House Report during the consideration and passage of the IRCA:

It is not the intention of the Committee that . . . the [IRCA] . . . be used to undermine or diminish in any way labor protections in

¹⁷⁴ *Id.*

¹⁷⁵ The facts of *Hoffman* indicated that "Castro presented documents that *appeared* to verify his authorization to work in the United States." *Id.* at 140 (emphasis added).

¹⁷⁶ Brief for Am. Fed'n of Labor & Cong. of Indus. Orgs. as Amici Curiae Supporting Respondents, at 13, *Hoffman Plastic Compound v. Nat'l Labor Relations Bd.*, 535 U.S. 137 (2002) (No. 00-1595).

¹⁷⁷ María Pabón López, *The Place of the Undocumented Worker in the United States Legal System After Hoffman Plastic Compounds: An Assessment and Comparison with Argentina's Legal System*, 15 *IND. INT'L & COMP. L. REV.* 301, 323-24 (2005).

¹⁷⁸ See, e.g., *Madeira v. Affordable Hous. Found. Inc.*, 315 F. Supp. 2d 504, 507 (S.D.N.Y. 2004) (adopting a more limited view of *Hoffman* by holding that an injured subcontractor's employee's legal status did not deprive the employee of his right to lost wages).

¹⁷⁹ See, e.g., *Veliz v. Rental Serv. Corp. USA Inc.*, 313 F. Supp. 2d 1317, 1337 (M.D. Fla. 2003) (denying an award of lost wages to the estate of an undocumented worker who died from injuries sustained in a forklift accident at a construction site and equating backpay and lost wages, indicating a broad application of *Hoffman*); *Sanchez v. Eagle Alloy, Inc.*, 684 N.W.2d 342, 344 (Mich. 2004) (Markman, J., dissenting) (stating that workers should not collect worker's compensation benefits upon employer being notified of undocumented status, because such a contract would be void as against public policy).

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 for exercising their rights before such agencies or for engaging in activities protected by existing law. In particular, the employer sanctions provisions are not inten[d]ed [sic] to limit in any way the scope of the term 'employee' in . . . [the NLRA].¹⁸⁰

The *Hoffman* Court's failure to provide remedies for undocumented workers encourages employers to continue their current practice of hiring undocumented workers, despite the risk of violating the IRCA. Decisions like *Hoffman* "enable and validate the perpetuation of an exploitable subclass of workers."¹⁸¹ Instead of punishing employers who routinely offer employment to undocumented immigrants, courts have shifted the punishment to undocumented workers. Since the IRCA sanctions have been proven to be ineffective, and few, if any, remedies are afforded for undocumented alien workers, employers continue to benefit from the practice of hiring, underpaying, and refusing to reinstate backpay for these individuals. *Hoffman* essentially signals to employers that they can continue their practices, which effectively condones illegal immigration.

D. The IRCA's Knowledge Standard Is Unavailing

The IRCA provides that employers commit unlawful employment of unauthorized aliens when they hire, or continue to employ, an alien "knowing the alien is an unauthorized alien."¹⁸² In addition, the government bears the burden of proving that the employer "knowingly employed an unauthorized alien."¹⁸³ The plain language of the statute makes it clear that, absent the element of knowledge, no violation can be found. Nevertheless, prior to the amendment of the Code of Federal Regulations in 2007, neither the final version of the IRCA nor its corresponding regulations contained a definition of the word "knowingly."¹⁸⁴ Consequently, from 1986 to 2007, while the government carried an enormous burden of proof, employers took the liberty of manipulating the term "knowingly" to their

¹⁸⁰ H.R. REP. NO. 99-682, *supra* note 10, at 58.

¹⁸¹ Cianciarulo, *supra* note 45, at 28.

¹⁸² 8 U.S.C. § 1324a(a)(1)–(2) (2006).

¹⁸³ § 1324a(e)(3)(C) (indicating that the standard of proof for an administrative law judge to determine whether an employer has violated subsection (a), *i.e.* unlawfully employing unauthorized aliens, is by a preponderance of the evidence).

¹⁸⁴ Kaiser, *supra* note 25, at 695. On August 15, 2007, almost twenty-one years after the enactment of the IRCA, a number of safe-harbor procedures for employers were codified at 8 C.F.R. § 274a.1 (2010). For more information see *infra* note 189.

advantage.¹⁸⁵ Courts have expressed concern that the knowledge requirement of the IRCA is vague and confusing, and have pointed out the absence of any useful guidance in legislative history.¹⁸⁶

Absent useful guidance and definitions for the terms “knowingly” and “knowledge,” commentators have restlessly sought to apply the knowledge standard. Some argue that “knowingly” requires employers to have “actual” knowledge of an alien’s unauthorized status.¹⁸⁷ Others, including the Ninth Circuit in *Mester Mfg. Co. v. I.N.S.*, have adopted the constructive knowledge standard,¹⁸⁸ which was later adopted in the Code of Federal Regulations.¹⁸⁹ While the constructive knowledge standard seems to be the predominant view, commentators have criticized it, stating that “[c]onstructive knowledge is not knowledge.”¹⁹⁰ Even the “reckless and wanton disregard”¹⁹¹ standard seems to be too loose because it only imposes on employers a duty to investigate that which a reasonable person would investigate, and absolves them from liability when employers act in a non-reckless manner.¹⁹² Whether it is actual knowledge, constructive knowledge, or reckless disregard, the standard is still too loose to effectively deter illegal immigration because it creates many loopholes for employers to freely employ unauthorized workers as long as the

¹⁸⁵ *Mester Mfg. Co. v. I.N.S.*, 879 F.2d 561, 566 (9th Cir. 1989).

¹⁸⁶ *Id.* at 567–68 (indicating that the statute does not provide a definite answer for the question: “[w]hen must an employer terminate an employee upon learning that he or she is unauthorized to work in the United States?”). In a footnote, the court commented, “Nor does the legislative history provide useful guidance.” *Id.* at 567 n.8.

¹⁸⁷ Mary L. Sfasciotti, *Employer Sanctions Under the Immigration Reform and Control Act of 1986*, 76 ILL. B.J. 384, 386 (1988) (explaining that the lack of actual knowledge of an employee’s undocumented status should be a defense to employer liability when the employer relied on fraudulent documents); Nancy-Jo Merritt, *The Immigration Reform and Control Act of 1986: What Employers Need to Know*, 22 ARIZ. B.J. 6, 8 (1987) (indicating that employers will not be sanctioned unless they have actual knowledge of an employee’s lack of employment authorization).

¹⁸⁸ *Mester Mfg. Co.*, 879 F.2d at 567; Kaiser, *supra* note 25, at 683.

¹⁸⁹ 8 C.F.R. § 274a.1(l)(1) (2010) (providing that constructive knowledge is “knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition”). The Code also lists a number of examples of employer actions where constructive knowledge may be imputed when the employer

[f]ails to complete or improperly completes the Employment Eligibility Verification Form, I-9; [h]as information available to it that would indicate that the alien is not authorized to work . . . or [a]cts with reckless and wanton disregard for the legal consequence of permitting another individual to introduce an unauthorized alien into its work force or to act on its behalf.

Id.

¹⁹⁰ Kaiser, *supra* note 25, at 697.

¹⁹¹ 8 C.F.R. § 274a.1(l)(1)(iii).

¹⁹² Kaiser, *supra* note 25, at 702.

government cannot prove a guilty intent. This partly explains why there has been so much litigation surrounding employers' knowledge since the IRCA went into effect in 1986, while leaving the battle against illegal immigration unsuccessful. The next section will provide a practical and viable solution to ensure that employers think twice before making a hiring decision.

III. EMPLOYERS SHOULD TAKE A MORE PROACTIVE APPROACH IN THE BATTLE AGAINST ILLEGAL IMMIGRATION

Although the IRCA created employer sanctions to hold employers responsible for making a preliminary determination of an employee's legal status before hiring,¹⁹³ there is overwhelming evidence that employer sanctions have done little to deter employers from hiring undocumented immigrants. So long as employers can show their lack of knowledge of an employee's undocumented status, they are effectively absolved from liability. The knowledge standard is too vague to provide adequate guidelines for courts and law enforcement to impose sanctions on employers. Because decreasing employment opportunities for undocumented immigrants is, by far, the most practical way of discouraging illegal immigration, employers must be held to a strict liability standard.

Since employers now have everything they need to prevent the unlawful practice of hiring undocumented immigrants, and undocumented immigrants have few, if any, available remedies should things go wrong during the course of their employment, employers should carry the burden of ensuring that none of their employees are undocumented immigrants. Congress should amend the IRCA to impose sanctions on employers regardless of their actual knowledge, constructive knowledge, or reckless disregard of their employees' unauthorized status. The current relevant provision of the IRCA states, "It is unlawful for a person or other entity . . . to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien."¹⁹⁴ Congress should eliminate the term "knowing" in section 1324a and revise the statute as follows:

It is unlawful for a person or other entity . . . to hire, or to recruit or refer for a fee, for employment in the United States an **unauthorized**

¹⁹³ 8 C.F.R. § 274a.10. With the passage of the IRCA in 1986, Congress essentially placed a burden on employers to make a preliminary determination regarding the legal status of an employee before hiring him or her. The employer sanctions provisions in the IRCA impose a duty on employers to refrain from knowingly employing undocumented aliens.

¹⁹⁴ 8 U.S.C. § 1324a(1)(A) (2006).

alien ***regardless of the person or entity's knowledge that the alien is an unauthorized alien.***

This proposed amendment essentially imposes strict liability on employers and requires them to take charge of their hiring processes by utilizing all the verification tools available to them to prevent the hiring of undocumented immigrants.

At common law, strict liability makes people liable for their actions regardless of fault or intent.¹⁹⁵ The strict liability standard is not overly rigid. Employers are still afforded plenty of reasonable mechanisms to detect an unauthorized worker. The Ninth Circuit has provided that the “inability to speak English is a factor, among others, which may be considered in determining [an employers'] knowledge that a person is in the United States illegally.”¹⁹⁶ While employers often raise the objection that “it is unreasonable to expect businesspeople to distinguish between fake and real driver's licenses and Social Security cards,”¹⁹⁷ there is nothing unreasonable about it. Although employers may be able to rely on the facially reasonable validity of prospective employees' documents, they are not obligated to do so. In fact, they should not rely solely on the documents presented by prospective employees in making hiring decisions precisely because there is always the possibility of human error in addition to fraud on the part of the prospective employees. With free access to E-Verify,¹⁹⁸ a highly efficient system that grants employers instant access to determine the legal status of prospective employees, employers are equipped with an adequate tool to screen out unauthorized workers.¹⁹⁹ E-Verify will help to ensure that the information provided in such documents is reliable and that a prospective employee is eligible

¹⁹⁵ BLACK'S LAW DICTIONARY 998 (9th ed. 2009).

¹⁹⁶ *Hernandez v. Balakian*, 480 F. Supp. 2d 1198, 1208 (E.D. Cal. 2007) (citing *United States v. Holley*, 493 F.2d 581, 582–83 (9th Cir. 1974)).

¹⁹⁷ Hsu, *supra* note 28, at A8.

¹⁹⁸ *See supra* Part I.D.

¹⁹⁹ E-Verify is not a magical tool, however. It has its fair share of flaws and defects, which require continuous improvement. *See* FoxNews.com, E-Verify Misses Half of Illegal Workers, Report Finds, <http://www.foxnews.com/politics/2010/02/25/e-verify-misses-half-illegal-workers-report-finds> (last visited June 14, 2010) (criticizing E-Verify for rendering false flags against U.S. citizens and legal immigrants). This report provides contradictory findings that E-Verify correctly identifies authorized workers ninety percent of the time, while pointing out that even the Department of Homeland Security admits that E-Verify is accurate only nearly half of the time. *Id.* Nevertheless, Congress budgeted about \$100 million for the improvement of this system in 2010, which signals a potentially substantial improvement of E-Verify in the next few years. Given that E-Verify dominates the employment verification market, it appears to currently be the best alternative to Form I-9 for the purpose of determining employees' eligibility to work. *See supra* notes 115–119.

to work in the United States²⁰⁰ Even if workers intentionally lie or present counterfeit documents to obtain employment, E-Verify will coordinate with both the Department of Homeland Security and the Social Security Administration to assist employers in detecting fraud.

After all, if employers find that hiring an undocumented employee elicits severe consequences, they will be discouraged from doing so. Strict liability is the only solution that will close the loopholes in the IRCA and ensure that employers seriously comply with the employment verification requirements. Mandatory use of E-Verify is not necessary at this point. Once employers recognize how important E-Verify is to avoid strict liability, it will be more widely used on a voluntary basis.

CONCLUSION

This Comment has examined the most important reason why the IRCA has failed to achieve its goals—the knowledge standard is too loose to discourage violation—and has provided an exhaustive analysis as to why a strict liability standard will work much better in deterring the hiring of undocumented immigrants, which will in turn reduce illegal immigration. Strict liability requires employers to adhere to a higher standard and penalizes them for any incidents of hiring undocumented immigrants without regard to knowledge or fault. The IRCA, if amended as proposed, is capable of putting an end to many of the circular debates about illegal immigration.

If employment opportunities are the single greatest factor in influencing the number of undocumented immigrants in this country, the lack thereof will discourage millions of these workers from entering the United States unlawfully. As legislators have hypothesized, an effective way to reduce illegal immigration would be to eliminate one of the “pull” factors—job opportunities.²⁰¹ If newly arrived undocumented immigrants realize that they cannot find employment, they will eventually inform others in their countries of origin, who will then be inclined not to come to the United States illegally.²⁰² As such, implementing a strict liability standard where employers are penalized for hiring undocumented immigrants without regard to knowledge will heighten the level of scrutiny and will certainly decrease illegal immigration in the long run.

²⁰⁰ See *supra* Part I.D (highlighting the processes of tentative confirmation and non-confirmation after the employer has entered prospective employee's I-9 into E-Verify).

²⁰¹ MAGAÑA, *supra* note 7, at 37.

²⁰² *Id.*