Labor Standards Enforcement and the Realities of Labor Migration: Protecting Undocumented Workers after *Sure-Tan*, the IRCA, and *Patel*

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NOTE

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INTRODUCTION

No one knows exactly how many undocumented aliens[1] live and work in the United States and how many come each year for seasonal employment, but the number is at least three million and probably more.[2] In one of the most frequently cited studies on undocumented aliens in this country,[3] almost a quarter of those undocumented aliens interviewed were paid less than the minimum wage while working in the United States.[4]

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[1] "Undocumented aliens" will be used throughout this Note to mean noncitizens who either have entered the United States without inspection or have violated the terms of their visas.

[2] See Passel & Woodrow, Change in the Undocumented Alien Population in the United States, 1979-1983, 21 Int'l Migration Rev. 1304 (1985) (finding approximately 2.1 million undocumented aliens included in the 1980 census and using 1983 survey data to estimate annual growth rate of 200,000 in the undocumented population since 1980); Passel, Estimating the Number of Undocumented Aliens, 109 Monthly Lab. Rev. 33, 33 (Sept. 1986) (same); cf. Corwin, The Numbers Game: Estimates of Illegal Aliens in the United States 1970-1981, 45 Law & Contemp. Probs., 223, 248-49 (1982) (outlining methodological shortcomings of various estimates and noting that 1980 census-based estimates of 3.5 to 6 million understate number of undocumented aliens in United States).

[3] See D. North & M. Houstoun, The Characteristics and Role of Illegal Aliens in the U.S. Labor Market: An Exploratory Study (1976).

[4] Id. at 128. According to a March 1988 General Accounting Office Report, Immigration and Naturalization Service (INS) data on 1985 apprehensions of employed undocumented aliens indicate that about 14% earned subminimum wages, although the Report observes that this figure may be exaggerated because apprehended aliens are likely to have been in the country for a shorter time than those who escape apprehension and are therefore less likely to have achieved as much earning power. General Accounting Office, Illegal Aliens: Influence of Illegal Workers on Wages and Working Conditions of Legal Workers 16-19 (Mar. 10, 1988) [hereinafter 1988 GAO Report]. The Report also reviewed fourteen empirical studies conducted from 1975 to 1983, of which eight reported that some illegal workers earned subminimum wages. Id. Four of these studies provided information on the number of undocumented aliens paid subminimum wages. The numbers in those studies ranged from 7% to 48% of each group studied. Id. For figures indicating the degree of violations of miminum wage laws by employers of undocumented aliens, see D. North, Government Records: What They Tell Us About the Role of Illegal Immigrants in the Labor Market and in Income Transfer Programs 35-37 (1981) (analyzing Labor Department statistics on minimum wage enforce-

Before 1984, there was no doubt that such workers were entitled to the full protection of the minimum wage[5] and overtime provisions[6] of the Fair Labor Standards Act (FLSA),[7] including the statutory backpay remedy.[8] However, in *Sure-Tan Inc. v. NLRB*,[9] a case concerning the rights of undocumented workers under the National Labor Relations Act (NLRA),[10] the Supreme Court generated confusion and controversy over the rights and remedies available to undocumented workers under United States labor statutes.

In *Sure-Tan*, the Supreme Court held that undocumented alien employees are covered by the protections of the NLRA,[11] but then limited the availability of the backpay remedy normally awarded to employees discharged in violation of that Act.[12] Although the *Sure-Tan* decision involved only unlawful discharges under the NLRA where the undocumented workers had left the country, it remained unclear, following *Sure-Tan*, whether the limitations it imposed on relief would be applied broadly to legally or factually distinct settings such as cases brought under other labor statutes. In particular, it was uncertain whether courts would find themselves obliged to deter illegal immigration by limiting the

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ment against suspected employers of undocumented aliens). For the Department of Labor's figures on the first years of minimum wage and overtime ("wage and hour") enforcement targeted against suspected employers of undocumented aliens, see United States Dep't of Labor, Minimum Wage and Maximum Hours Standards Under the Fair Labor Standards Act: An Economic Effects Study Submitted to Congress 24-25 (1981) [hereinafter 1981 Economic Effects Study] (reporting that targeted wage and hour enforcement in fiscal year 1980 resulted in finding over $12.5 million due 116,333 workers and over $4.5 million due over 13,000 employees from special concentrated enforcement focusing on geographic areas and industries where large numbers of undocumented workers are employed); United States Dep't of Labor, Minimum Wage and Maximum Hours Standards Under the Fair Labor Standards Act: An Economic Effects Study Submitted to Congress 22-23 (1980) [hereinafter 1980 Economic Effects Study] (reporting that targeted enforcement in fiscal year 1979 resulted in finding over $24 million due 161,089 employees); United States Dep't of Labor, Minimum Wage and Maximum Hours Standards Under the Fair Labor Standards Act: An Economic Effects Study Submitted to Congress 33-35 (1979) [hereinafter 1979 Economic Effects Study] (reporting that targeted enforcement in the fourth quarter of fiscal year 1978 resulted in finding over $1.2 million due 7,246 employees).

In any case, if even a small percentage of the several million undocumented aliens in the United States earn less than the minimum wage, the number of employees in question would still be in the tens of thousands.

[5] 29 U.S.C. § 206 (1982).

[6] Id. § 207(a).

[7] 29 U.S.C.A. §§ 201-217 (West 1965, 1978, 1985 & Supp. 1988); see text accompanying notes 19-32 infra (explaining relevant coverage and enforcement provisions of FLSA).

[8] 29 U.S.C. §§ 216-217 (1982); see text accompanying notes 28-32 infra (discussing remedial provisions of FLSA).

[9] 467 U.S. 883 (1984).

[10] 29 U.S.C. §§ 151-169 (1982 & Supp. IV 1986); see text accompanying notes 58-86 infra (discussing holding and dissent in *Sure-Tan*).

[11] *Sure-Tan*, 467 U.S. at 891-94.

[12] Id. at 903.

availability of relief for labor law violations where the employees involved were undocumented aliens.

Such a broad reading of the *Sure-Tan* limitation would be mistaken in at least two respects. First, it would demonstrate a misunderstanding of the implications of employer sanction provisions enacted into law through the Immigration Reform and Control Act of 1986 (IRCA).[13] Second, it would display a fundamental misconception about deterring illegal immigration—that denying undocumented aliens the protections and remedies normally available under United States labor statutes will deter undocumented aliens from seeking employment here.

Despite the confusion generated by *Sure-Tan*, courts have not read its limitations on relief broadly. Recently, in *Patel v. Quality Inn South*,[14] the first decision to address the effect of the IRCA and of *Sure-Tan* on remedies under the FLSA,[15] the Eleventh Circuit held that neither the *Sure-Tan* decision nor the enactment of the IRCA limits the remedies available to undocumented workers for violations of federal minimum wage or overtime laws.[16]

This Note will demonstrate that a broad reading of the rationale of the *Sure-Tan* decision runs counter to congressional intent and in particular against the legislative history of the IRCA. Such a reading also misunderstands the reasons for employment of undocumented aliens in the United States. Courts should not rewrite the FLSA to deny undocumented aliens the protections and remedies necessary to maintain minimum standards of decency in the workplace. While the *Patel* decision fully supported this position, it distinguished *Sure-Tan* on narrow grounds, holding that limitations on remedies for unlawful discharges are inapplicable to remedies for lost wages for time when the employee actually worked.[17] The *Patel* decision did not fully explore the legal background of FLSA enforcement against employers of undocumented aliens

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[13] Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified in scattered sections of 8 U.S.C. (Supp. IV 1986)), amending Immigration and Nationality Act (INA), 8 U.S.C. §§ 1101-1525 (1982 & Supp. IV 1986). The employer sanction provisions of the IRCA, 8 U.S.C. § 1324a (Supp. IV 1986), establish penalties against employers who hire "unauthorized aliens" after November 6, 1986. The IRCA was enacted after the *Sure-Tan* decision and is commonly known as the Simpson-Rodino Act.

[14] 846 F.2d 700 (11th Cir. 1988).

[15] Although the *Patel* case was brought before the IRCA was passed, the IRCA was mistakenly applied.

[16] For narrow readings of the *Sure-Tan* remedy limitations under the NLRA before the IRCA, see Local 512, Warehouse & Office Workers' Union v. NLRB, 795 F.2d 705 (9th Cir. 1986); Bevles v. Teamsters Local 986, 791 F.2d 1391 (9th Cir. 1986); see also note 83 infra (discussing both decisions). For a case applying the reasoning of *Local 512* to a pre-IRCA case under Title VII of the Civil Rights Act (Title VII), 42 U.S.C. §§ 2000e-2000e17 (1982) (prohibiting discrimination in employment on the basis of race, color, religion, sex, or national origin), see Rios v. Enterprise Ass'n Steamfitters, Local 638, 860 F.2d 1168 (2d Cir. 1988).

[17] *Patel*, 846 F.2d at 705-06.

or the role that FLSA enforcement played in the debate over employer sanctions. Nor did it provide an explanation of why it would be wrong to conclude that enforcement of United States labor statutes against such employers encourages illegal immigration. This Note will explore both of these issues in detail.[18]

Part I of this Note will outline the policies of the FLSA and the protections and remedies available to employees under it, focusing on the coverage and enforcement mechanisms of the statute, particularly the backpay provisions. It will also discuss other protections available to undocumented aliens. Part II will compare and contrast the *Sure-Tan* decision with *Patel* and other post-*Sure-Tan* FLSA decisions, focusing on the availability of the backpay remedy to undocumented aliens under the FLSA. Part III will review the recent congressional debate on immigration reform, particularly the role of wage and hour enforcement against employers of undocumented aliens. It will demonstrate that both Congress and the executive branch consistently have regarded undocumented workers as covered by the FLSA and as entitled to its remedies—both prior to and since the passage of the IRCA. Part IV will argue that the *Patel* decision was correct in its understanding of the implications of employer sanctions and of appropriate strategies for deterring illegal immigration. Specifically, this Part will discuss the variety of factors which "push" undocumented aliens from their home countries and which "pull" them to the United States, as well as the complex familial and labor market structures through which undocumented migration occurs. Given these factors, Part IV concludes that a strategy of deterrence based on making employment in this country less attractive, as opposed to making it less available, ignores the realities of international labor markets.

I

FLSA Coverage and Enforcement and the Rights of Undocumented Workers

The Fair Labor Standards Act is the principal federal labor statute prescribing minimum standards for working conditions in the United

[18] For other criticisms of the district court opinion later reversed by the Eleventh Circuit in *Patel*, see Note, Conflict or Double Deterrence? FLSA Protection of Illegal Aliens and the Immigration Reform and Control Act, 72 Minn. L. Rev. 900 (1988) (arguing that continuing FLSA enforcement against employers of undocumented aliens augments IRCA by deterring employment of such workers and protecting wage sandards for all workers); Comment, Protection for Undocumented Workers Under the FLSA: An Evaluation in Light of IRCA, 25 San Diego L. Rev. 379 (1988) (arguing that protecting undocumented workers under FLSA is consistent with IRCA and promotes humanitarian values, and proposing tht Congress amend INA to protect undocumented employees who report labor standards violations).

States. The FLSA is designed to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."[19] To address these concerns the statute provides for a minimum wage[20] and for a specified overtime rate[21] to be paid to employees within its scope.[22]

The FLSA defines "employee" broadly as "any individual employed by an employer,"[23] and "employ" as including "to suffer or permit to work."[24] Neither definition contains an alienage exclusion nor any requirement that employment be lawful to be within the scope of protection. The statute "was made applicable to all employees, not specifically exempted, who were engaged in commerce or in the production of goods for commerce."[25] As the Supreme Court held in *United States v. Rosenwasser*,[26] "The use of the words 'each' and 'any' to modify 'employee,' . . . leaves no doubt as to the Congressional intention to include *all* employees within the scope of the Act unless specifically excluded."[27]

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[19] 29 U.S.C. § 202 (1982). Among the reasons given for this policy was the congressional finding that the existence of such conditions "constitutes an unfair method of competition in commerce." Id. This concern with unfair competition reappears in arguments for enforcement of labor statutes against employers of undocumented aliens. See, e.g., Sure-Tan v. NLRB, 467 U.S. 883, 892-93 (1984); id. at 911-12 (Brennan, J., concurring in part and dissenting in part); Alien Adjustment and Employment Act of 1977: Hearings on S.2252 Before the Senate Judiciary Comm., 95th Cong., 2d Sess. 202, 203 [hereinafter Hearings] (statement of Ray F. Marshall, Secretary of Labor); H.R. Rep. No. 682, pt. 1, 99th Cong., 2d Sess. 49 (1986) [hereinafter H.R. Rep. No. 682, pt. 1], reprinted in 1986 U.S. Code Cong. & Admin. News 5649, 5662 (citing *Sure-Tan*, 467 U.S. at 893); Brief for the Secretary of Labor as Amicus Curiae at 6, 17-20, Patel v. Quality Inn South, 846 F.2d 700 (11th Cir. 1988) (No. 87-7411) [hereinafter Secretary's Brief].

[20] 29 U.S.C. § 206(a) (1982).

[21] Id. § 207(a).

[22] The FLSA makes it unlawful for an employer to violate its minimum wage and overtime provisions. Id. § 215(a)(2).

[23] 29 U.S.C. § 203(e)(1) (Supp. IV 1986).

[24] 29 U.S.C. § 203(g) (1982).

[25] H.R. Rep. No. 913, 93d Cong., 2d Sess. 4 (1974), reprinted in 1974 U.S. Code Cong. & Admin. News 3201, 3204.

None of the categories of employees specifically excluded from its coverage bears any connection to alienage or lawfulness of employment. See 29 U.S.C. § 213 (1982). Exemptions from minimum wage and overtime coverage include certain administrative or professional employees, id. § 213(a)(1), employees of local retail or service establishments, id. § 213(a)(2), employees of certain recreational establishments, id. § 213(a)(3), employees of small local newspapers, id. § 213(a)(8), and babysitters, id. § 213(a)(15). Also excluded are certain agricultural employees, including those employed by small farms, family members, piece-rate workers, and those principally involved with livestock. Id. § 213(a)(6). The Supreme Court has held that the exemptions in the FLSA are to be construed narrowly. See Citicorp Indus. Credit, Inc. v. Brock, 107 S. Ct. 2694, 2699-70 (1987); A. H. Phillips, Inc. v. Walling, 324 U.S. 490, 493 (1945).

[26] 323 U.S. 360 (1945).

[27] Id. at 363 (emphasis added). In general, courts have held that the FLSA is to be construed liberally. See Donovan v. Sabine Irrigation Co., 695 F.2d 190, 194 (5th Cir.), cert. denied, 463 U.S. 1207 (1983); Donovan v. I-20 Motels, Inc., 664 F.2d 957, 959 (5th Cir. 1981);

The FLSA provides remedies for violations of its minimum wage and overtime provisions, making employers liable for the amount of wages the employees should have received as well as an equal amount in liquidated damages.[28] This remedy serves both the compensatory and deterrence functions of the statute;[29] it makes the employee whole and also removes the economic advantage gained by the statutory violation. Wage suits by and on behalf of employees,[30] together with injunctive ac-

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Marshall v. Western Union Tel. Co., 621 F.2d 1246, 1253 (3d Cir. 1980); United States Dep't of Labor v. Ellese, 614 F.2d 247, 251 (10th Cir. 1980); Real v. Driscoll Strawberry Assocs., 603 F.2d 748, 758 (9th Cir. 1979). The Supreme Court has held that an economic reality test—as opposed to a formalistic status test—is to be applied in FLSA cases to determine if a plaintiff qualifies as an "employee" under the Act. See Rutherford Food Corp. v. McComb, 331 U.S. 722, 730 (1947); Castillo v. Givens, 704 F.2d 181, 188-93 (5th Cir.) (applying economic realities test to determine if plaintiffs were employees), cert. denied, 464 U.S. 850 (1983); see also Donovan v. New Floridian Hotel, Inc., 676 F.2d 468, 470-71 (11th Cir. 1982) (same); Weisel v. Singapore Joint Venture, Inc., 602 F.2d 1185, 1188-90 (5th Cir. 1979) (same); Dunlop v. Dr. Pepper-Pepsi Cola Bottling Co., 529 F.2d 298, 300-02 (6th Cir. 1976) (same). For comparisons of the scope of the FLSA and of the NLRA, see text accompanying note 65 infra.

Congress has explicitly limited the eligibility of undocumented aliens for certain government benefits programs. See, e.g., Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 121, 100 Stat. 3359, 3384-94 (amending Social Security Act, Housing and Community Development Act, Higher Education Act, and Food Stamps Act to require immigration status verification for beneficiaries of six programs); see also 26 U.S.C. § 3304(a)(14) (1982) (limiting eligibility of undocumented aliens for unemployment compensation); 42 U.S.C. § 1382c(a)(1)(B) (1982) (similarly limiting eligibility for supplemental security income for disabled persons); id. § 602(3) (similarly limiting eligibility for Aid to Families with Dependent Children); 42 U.S.C. § 1396b(v) (Supp. IV 1986) (similarly limiting eligibility for Medicaid benefits); 42 U.S.C. § 1436a (1982) (similarly limiting eligibility for federally financed housing). As a federal district court has stated, "[W]here Congress has demonstrated on several occasions that it knows how to include an alienage requirement when it intends to and it has omitted the requirement in one program while simultaneously incorporating it into another, such omissions should be viewed as intentional." Lewis v. Gross, 663 F. Supp. 1164, 1183 (E.D.N.Y. 1986).

[28] Section 216 of the FLSA makes any employer who violates its wage and hour provisions "liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, . . . and in an additional equal amount as liquidated damages." 29 U.S.C. § 216(b) (1982).

[29] Several courts, emphasizing deterrence, have found a public interest in ordering backpay regardless of the interest of the employee. See Hodgson v. Hotard, 436 F.2d 1110 (5th Cir. 1971); Wirtz v. Malthor Inc., 391 F.2d 1 (9th Cir. 1968); Brennan v. Orzano Inc., 75 Lab. Cas. (CCH) ¶ 33,193 (D. Md. 1974).

[30] Employees who have been underpaid in violation of the statute may bring wage suits. 29 U.S.C. § 216(b) (1982). The Secretary of Labor may also bring wage suits on their behalf. Id. § 216(c). However, the Secretary is authorized to bring a wage action only *on behalf of employees*; if the employee cannot be located for three years, the money recovered goes into the United States Treasury. Id. Thus, employers are sanctioned even when employees cannot be found. This procedure allows administrative recoveries of backpay on behalf of undocumented workers, who more often than other groups cannot be located by the Department of Labor (DOL). Without it, the money would be returned to the employer, removing the deterrence of backpay liability. See notes 167, 169 infra.

An employee's right to sue terminates when the Secretary brings either an injunctive ac-

tions by the Secretary of Labor,[31] are the statute's main enforcement mechanisms.[32]

Few cases have addressed the issue of whether undocumented workers are in any way disabled from bringing wage suits under the FLSA or from receiving the normal statutory remedy of back wages plus liquidated damages. Most cases involving FLSA violations are settled out of court.[33] Only *Patel* has addressed the effect of the IRCA on this question.[34] There are, however, several pre-IRCA decisions in which the immigration status of employees was either mentioned but otherwise ignored, or found to be irrelevant to their ability to sue for back wages under the FLSA.[35] In *Alvarez v. Sanchez*,[36] for example, the court found

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tion to restrain any further delay in the payment of the employee's back wages, 29 U.S.C. § 216(b) (1982), or an action to recover back wages on behalf of the employee. Id. § 216(c).

[31] The Secretary of Labor is authorized to seek backpay together with an injunction restraining present and future violations, 29 U.S.C. § 216(b) (1982), and to restrain the transporting, shipping, delivering, or selling of any goods in the production of which any employee was employed in violation of minimum wage and overtime laws. Id. §§ 215(a)(1), 217. Section 217 of the FLSA grants the district courts jurisdiction to restrain minimum wage and overtime violations. Id. § 217. If an employer under an injunction restraining violations of wage and hour laws is found to be in contempt for further violations, the court can order the company to pay damages equal to the unpaid minimum wages and overtime due employees. McComb v. Jacksonville Paper Co., 336 U.S. 187 (1949). In addition, a company violating an injunction may have to pay punitive and compensatory fines to the DOL. McComb v. Tang, 17 Lab. Cas. (CCH) ¶ 65,310 (C.D. Cal. 1949); see also Wage & Hour Manual (BNA) 98:158.

[32] Telephone interview with attorney, Office of the Solicitor, Region 2, Department of Labor (Dec. 14, 1987). The FLSA also provides for criminal prosecutions for *willful* wage and hour violations with fines of not more than $10,000 and/or imprisonment for no more than six months. 29 U.S.C. § 216(a) (1982). Criminal prosecutions are rarely employed. Wage & Hour Manual (BNA) 98:171; telephone interview with attorney, Office of the Solicitor, Region 2, Department of Labor (Dec. 14, 1987).

[33] Comptroller General of the United States, Administrative Changes Needed to Reduce Employment of Illegal Aliens 24 (Jan. 30, 1981) [hereinafter 1981 GAO Report].

[34] The IRCA, among other things, makes employing undocumented aliens illegal and imposes sanctions against employers who do so. 8 U.S.C. § 1324a (Supp. IV 1986).

[35] See In re Reyes, 814 F.2d 168 (5th Cir. 1987), cert. denied, 108 S. Ct. 2901 (1988); Donovan v. Burgett Greenhouses, Inc., 759 F.2d 1483 (6th Cir. 1983); Donovan v. MFC, Inc., 100 Lab. Cas. (CCH) ¶ 34,519 (N.D. Tex. 1983); Brennan v. El San Trading Corp., 73 Lab. Cas. (CCH) ¶ 33,032 (W.D. Tex. 1973); Alvarez v. Sanchez, 105 A.D.2d 1114, 482 N.Y.S.2d 184 (1984); see also Lopez v. Rodriguez, 668 F.2d 1376, 1378 n.4 (D.C. Cir. 1981) (rejecting view that employment contract void and therefore unenforceable if in violation of visa and finding that enforcing FLSA would not undermine immigration laws); Marshall v. Presidio Valley Farms, 512 F. Supp. 1195, 1197 (W.D. Tex. 1981) (back wages in FLSA suit ordered although employees may have been undocumented at time of employment).

In NLRB v. Apollo Tire Co., 604 F.2d 1180 (9th Cir. 1979), a case brought under the NLRA in which undocumented aliens challenged a discharge based on complaints about labor standards violations to the Wage and Hour Division, the division of the DOL responsible for wage and hour law enforcement, the court assumed that the labor standards protections applied to undocumented employees. Id. at 1182-83. Then Judge, now Justice, Kennedy noted in his concurrence that "[i]f 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 . . . ." Id. at 1184. In American Waste Removal Co. v. Donovan, 748 F.2d 1406

no express exclusion of undocumented aliens in the FLSA and therefore refused to deny relief to the undocumented employees who had been paid less than the minimum wage.[37] Similarly, in *In re Reyes*,[38] the Fifth Circuit, noting the breadth of the FLSA definition of "employee," found the immigration status of employees to be irrelevant in a FLSA wage suit.[39]

Courts have also addressed employee protection of undocumented alien workers in other contexts.[40] Courts have upheld damage awards that compensated undocumented aliens for lost wages under state tort laws.[41] Undocumented aliens have also prevailed in constitutional[42] and federal civil rights actions.[43]

(10th Cir. 1984), the court affirmed an award of back wages to the Secretary of Labor for minimum wage and benefits violations under the Service Contract Act, 41 U.S.C. §§ 351-358 (1982) (Act regulating labor standards for employees under service contracts entered into by the United States or District of Columbia), where the employer did not rebut the claim that it had employed undocumented aliens. *American Waste*, 748 F.2d at 1409-10.

[36] 105 A.D.2d 1114, 482 N.Y.S.2d 184 (1984).

[37] Id. at 1115; 482 N.Y.S.2d at 185.

[38] 814 F.2d 168 (5th Cir. 1987).

[39] Id. at 170. In *Reyes*, the court also held that undocumented aliens are protected under the Migrant and Seasonal Agricultural Worker Protection Act (AWPA), 29 U.S.C.A. §§ 1801-1872 (West 1985 & Supp. 1988), under which labor contractors were prohibited, even before the IRCA, from employing undocumented workers, 29 U.S.C. § 1816(a) (1982) (repealed 1986). In Montelongo v. Meese, 803 F.2d 1341 (5th Cir. 1986), the court approved a class certification including undocumented workers in a wage suit under the predecessor statute to the AWPA, the Farm Labor Contractor Registration Act, Pub. L. No. 88-582, § 2, 78 Stat. 920 (1964) (repealed 1983).

[40] For example, before Congress enacted the IRCA, the Supreme Court held that states were not preempted from imposing some limitations on the ability of employers to hire undocumented aliens. See De Canas v. Bica, 424 U.S. 351, 365 (1976) (California statute penalizing agricultural employers from knowingly hiring undocumented aliens not preempted by INA under supremacy clause, U.S. Const., art. VI, cl. 2).

[41] See, e.g., Hagl v. Jacob Stern & Sons, Inc., 396 F. Supp. 779, 784-85 (E.D. Pa. 1975) (in personal injury action, status as undocumented alien would not justify jury's reduction of damage award for loss of future earnings); Peterson v. Neme, 222 Va. 477, 482, 281 S.E.2d 869, 872 (1981) (in negligence action, status as undocumented alien irrelevant and immaterial to right to recover damages for lost wages). The *Peterson* court noted that Congress had not criminalized the acceptance of employment by an undocumented alien nor had it declared such employment contracts void. Id. at 481, 281 S.E.2d at 871. The court rejected an argument that allowing damage awards would encourage other undocumented aliens to accept employment in contravention of public policy. Id. at 482, 281 S.E.2d at 872. Presumably, "a person seeks a job because he needs to earn a living, not because he wants to become legally eligible to recover wage losses occasioned by tortious injury." Id. Both of these arguments call attention to the limited role that legal rules concerning immigration have on decisions to immigrate illegally.

[42] See, e.g., Plyler v. Doe, 457 U.S. 202, 215 (1982) (undocumented alien is a "person" for purposes of equal protection analysis).

[43] Rios v. Enterprise Ass'n Steamfitters, Local 638, 860 F.2d 1168 (2d Cir. 1988) (reversing denial of Title VII backpay to victims of discrimination who were undocumented at time of discrimination); United States v. Otherson, 637 F.2d 1276 (9th Cir. 1980) (undocumented aliens are "inhabitants" under federal civil rights statutes).

Two state law decisions, *Nizamuddowlah v. Bengal Cabaret*[44] and *Gates v. Rivers Construction Co.*,[45] involved issues paralleling those of wage suits brought under the FLSA. In *Nizamuddowlah* and *Gates*, state courts found no basis to deprive undocumented aliens of the normal protections[46] and remedies[47] available to employees under state law without a clear signal from the legislature.[48] Noting that the Immigration and Nationality Act (INA),[49] the federal immigration statute, contains specific penalties for aliens who violate its employment provisions,[50] the courts in these two cases were unwilling to read additional penalties into the relevant statutes.[51] In *Gates* the court found no reason to void an employment contract on the basis of the employee's immigration status.[52] The *Nizamuddowlah* court found that enforcement of the state minimum wage statute was necessary "to prevent the unjust enrichment" of the employer.[53]

The rationales in both of these state law decisions are equally applicable to wage and hour suits under the FLSA. There is no express provision in either the FLSA[54] or the INA[55] denying undocumented alien employees the opportunity to sue for back wages for wage and hour violations under the FLSA. Nor is there an explicit statutory directive to deny enforcement when an employment relationship is legally void. Such a nonenforcement policy would unfairly benefit an employer for "the practice of hiring [undocumented] aliens, using their services and disclaiming any obligation to pay wages because the contracts are ille-

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[44] 69 A.D.2d 875, 876, 415 N.Y.S.2d 685, 685-86 (1979) ("Plaintiff's status as an illegal alien for part of the period of his employment does not preclude him from recovery [of unpaid wages] under the [state] Minimum Wage Act.").

[45] 515 P.2d 1020 (Alaska 1973) (employment contract enforceable in suit for unpaid wages although former employee was undocumented alien at time of employment).

[46] Id. at 1022.

[47] *Nizamuddowlah*, 69 A.D.2d at 876, 415 N.Y.S.2d at 686.

[48] *Gates*, 515 P.2d at 1022; *Nizamuddowlah*, 69 A.D.2d at 876, 415 N.Y.S.2d at 686.

[49] 8 U.S.C. §§ 1101-1525 (1982 & Supp. IV 1986).

[50] See 8 U.S.C. §§ 1251(a)(1)-(2), 1325 (1982).

[51] *Gates*, 515 P.2d at 1022; *Nizamuddowlah*, 69 A.D.2d at 876, 415 N.Y.S.2d at 686.

[52] *Gates*, 515 P.2d at 1022-24. In *Gates*, the court noted that the INA repealed prior law which had made contracts between United States employers and aliens abroad " 'void and of no effect.' " *Gates*, 515 P.2d at 1022-23 (quoting Act of Feb. 26, 1885, ch. 164, § 2, 23 Stat. 332 (formerly 8 U.S.C. § 141) (repealed 1952)); see also Note, Employment Rights of Undocumented Aliens: Will Congress Clarify or Confuse an Already Troublesome Issue?, 14 Cap. U. L. Rev. 431 (1985) (urging that proposed legislation to introduce employer sanction provisions into the immigration laws should not be interpreted as voiding employment relationships between undocumented aliens and their employers, thereby leaving aliens unprotected by United States labor statutes).

[53] *Nizamuddowlah*, 69 A.D.2d at 876, 415 N.Y.S.2d at 686.

[54] See note 25 and accompanying text supra.

[55] See note 125 and accompanying text infra.

gal."[56] It would also encourage employers to continue to hire undocumented workers, in direct conflict with the policies motivating the INA.[57]

II

RECENT COURT DECISIONS: AVERTING THE THREAT TO RELIEF

Until 1984, judicial support for the claims of undocumented aliens, particularly their employment-related claims, was well established. A pre-IRCA Supreme Court decision, however, set a more ambivalent precedent for undocumented aliens seeking remedies for violations of federal labor laws. In *Sure-Tan, Inc. v. NLRB*,[58] the Supreme Court held that undocumented aliens working illegally in the United States are "employees" under the NLRA[59] and that reporting such employees to the INS in retaliation for union-organizing activity constituted an "unfair labor practice" in violation of the NLRA.[60] However, the Court also severely limited the availability of backpay to those undocumented alien workers, a traditional unfair labor practice remedy.[61] The Court held that those undocumented alien employees "must be deemed 'unavailable' for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States."[62] *Sure-Tan* thus conditioned the availability of the backpay

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[56] *Nizamuddowlah*, 69 A.D.2d at 876, 415 N.Y.S.2d at 686.

[57] See notes 122-23 and accompanying text infra.

[58] 467 U.S. 883 (1984).

[59] Id. at 891-94. The NLRA, 29 U.S.C. §§ 151-169 (1982 & Supp. III 1985), like the FLSA, is one of the country's principal labor statutes. Unlike the FLSA, however, the NLRA does not dictate labor standards or working conditions. Rather, it establishes procedures and protections for union organizing, collective bargaining, and other concerted activities by workers.

[60] *Sure-Tan*, 467 U.S. at 894-98.

[61] Id. at 903. The NLRA grants the National Labor Relations Board (NLRB) the power to order an employer to reinstate discharged employees with backpay for violations of the NLRA. 29 U.S.C. § 160(c) (1982). Backpay is the conventional remedy for Title VII and NLRA violations and is not denied without good reason. Albemarle Paper Co. v. Moody, 422 U.S. 405, 419-20 (1974).

[62] *Sure Tan*, 467 U.S. at 903. Backpay in an unlawful discharge case is calculated as the amount an employee would have earned had she worked during the period after an unlawful discharge. An employee is not entitled to backpay for any period following discharge if she is "unavailable" for work. See, e.g., NLRB v. Carolina Mills, 190 F.2d 675 (4th Cir. 1951) (backpay does not cover period when employee would have been laid off for economic reasons); Harvest Queen Mill, 90 N.L.R.B. 320 (1950) (backpay does not cover period of sickness when employer has no sick leave policy). Otherwise, the award of backpay would go beyond compensating the victim. Unavailability has no relevance under the FLSA provisions discussed in this Note, since backpay under the FLSA is calculated as the amount an employee should have earned during a period when she actually did work. This difference between the case brought under the NLRA in *Sure-Tan* and those brought under the FLSA suggests,

remedy for the unfairly discharged employees on their immigration status, raising questions about the availability of the backpay remedy for undocumented alien workers who are victims of other labor law violations.

The Court began its opinion in *Sure-Tan* by addressing the threshold question of whether undocumented workers are "employees" within the meaning of the NLRA.[63] The Court found that the language and policies of the NLRA fully supported the interpretation that undocumented workers are covered.[64] Commenting on the breadth of the statutory definition, the Court noted that the only limitations on the definition of "employee" are specific exemptions. Since undocumented alien workers are not expressly exempted, they must come within the broad statutory definition of "employee."[65]

The Court also found that coverage of undocumented aliens was consistent not only with the purposes of the NLRA, but also with the policies of the INA.[66] The Court noted that a "primary purpose in restricting immigration is to preserve jobs for American workers."[67] In addition, the Court was concerned that if undocumented aliens were not protected by the NLRA, they would have to accept low wages and poor working conditions which would compete with those of unionized

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therefore, that the specific limitation applied to the availability of remedial backpay in *Sure-Tan* should not apply in FLSA cases. The Eleventh Circuit noted this distinction in Patel v. Quality Inn South, 846 F.2d 700, 706 (11th Cir. 1988). See text accompanying note 117 infra. The General Counsel of the NLRB has recognized this distinction with respect to NLRA violations involving forms of discrimination such as reduced wages where remedial backpay applies to periods when the employee actually worked. For the position of the General Counsel of the NLRB, see Memorandum from R. Collyer, General Counsel of NLRB, Reinstatement and Backpay Remedies for Discriminatees Who Are "Undocumented Aliens," (Memorandum GC 88-9, Sept. 1, 1988) [hereinafter Collyer Memo]. After announcing limitations on the ability of undocumented aliens to recover backpay for unlawful discharges, the Memo, citing the Eleventh Circuit decision in Patel v. Quality Inn South, 846 F.2d 700 (11th Cir. 1988), notes that backpay may be available even if the employee is adjudicated to be undocumented, if the case involves other forms of discrimination such as reduction in pay or reassignment. Collyer Memo, supra, at 7 n.15. As with wage and hour cases under the FLSA, such NLRA cases involve pay for periods during which the employee actually worked. The problem of "unavailability" addressed in *Sure-Tan* is therefore inapplicable.

[63] 29 U.S.C. § 152(3) (1982). The statute provides, in relevant part, that "the term 'employee' shall include *any* employee . . . ." Id. (emphasis added).

[64] *Sure-Tan*, 467 U.S. at 891.

[65] Id. at 892. This reasoning is analogous to that in the FLSA cases discussed above. See note 27 and accompanying text supra. For comparisons between the coverage of the NLRA and that of the FLSA, see Rutherford Food Corp. v. McComb, 331 U.S. 722, 723-24 (1947) (decisions defining coverage of employer-employee relationship under NLRA persuasive when considering similar coverage under FLSA); Dunlop v. Carriage Carpet Co., 548 F.2d 139, 142-43 (6th Cir. 1977) (court guided by decisions defining boundaries of "employee" under NLRA in deciding on coverage of term "employee" under FLSA).

[66] *Sure-Tan*, 467 U.S. at 893.

[67] Id. (citing § 212(a)(14) of the INA, 8 U.S.C. § 1182(a)(14) (1982)).

United States workers.[68] Enforcement of the NLRA on behalf of undocumented workers, the Court reasoned, would help to assure that the competition of undocumented alien employees would not adversely affect the wages and employment conditions of lawful residents.[69]

As additional support for its holding that undocumented aliens are covered under the NLRA, the Court found that the INA is principally concerned with terms of admission to the United States, and not with employment.[70] The Court observed that Congress did not make it unlawful for an employer to hire undocumented aliens, nor did it create a separate criminal offense for an alien to accept employment without authorization.[71] Therefore, the Court found that coverage of undocumented workers under the NLRA would not conflict with the INA.[72]

After determining coverage under the NLRA,[73] and finding that the employer had committed an unfair labor practice,[74] the Court severely limited the remedies available to the undocumented workers in *Sure-Tan* by making eligibility for backpay dependent on their immigration status.[75] When devising remedies for unfair labor practices, the Court stated, the National Labor Relations Board (NLRB) is "obliged" to take into account the congressional objective of deterring unauthorized immigration embodied in the INA.[76]

In its coverage analysis, the Court compared the policies of the NLRA with those of the INA. It found that inclusion of undocumented aliens within the meaning of "employee" served the mutual policy of the two statutes to protect the wages and employment conditions of American workers.[77] With respect to the backpay remedy, however, the Court implied, with little explanation of its reasoning, that awarding backpay to undocumented victims of unfair labor practices would somehow encourage illegal entry into the United States in violation of the policies of the INA.[78]

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[68] See id. at 892.

[69] Id.

[70] Id.

[71] Id. at 892-93.

[72] Id. at 893. This position suggests that the Court would have been more reluctant to include aliens within the statutory meaning of "employee" if the INA had contained employer sanctions then, as it does after the enactment of the IRCA. See 8 U.S.C. § 1324a (Supp. IV 1986) (employer sanction provisions). For arguments that this reasoning is backward, see text accompanying notes 197-204 infra.

[73] *Sure-Tan*, 467 U.S. at 891-94.

[74] Id. at 894-98.

[75] Id. at 903.

[76] Id.

[77] Id. at 891-94.

[78] Id. at 903.

Justice Brennan, dissenting with respect to the remedy limitations,[79] protested that by holding that undocumented aliens are entitled to the protections of the NLRA but then effectively depriving them of any remedy despite a clear violation of the Act, the Court had created an anomalous result.[80] Not only did the decision deny a remedy to employees it found to be victims of an unfair labor practice, it also removed the deterrent intended to prevent the employer from repeating the violation.[81] This had the effect of undermining the objectives of congressional labor and immigration policies.[82] The majority indicated in its discussion of the coverage question that the purpose of covering undocumented aliens is to ensure that they do not create adverse competition with the wages and working conditions of lawful workers.[83] The dissent observed that it was inconsistent with that purpose to remove the cost to the employer that serves as a deterrent both to future employment of undocumented aliens and to future unfair labor practices.[84] Not requiring employers to compensate unfairly discharged undocumented employees with backpay only increases the incentive to hire such aliens,[85] thereby undermining, rather than furthering, the purposes of both the NLRA and the INA.[86]

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[79] Id. at 906 (Brennan, J., concurring in part and dissenting in part). The *Sure-Tan* decision was bifurcated in a way that reflects the contradictory nature of the majority opinion. Justice O'Connor wrote the Opinion of the Court, joined by Chief Justice Burger and Justice White. Id. at 886. However, Justices Brennan, Marshall, Blackmun, and Stevens, the Justices who had joined the majority on the issues of coverage and whether an unfair labor practice had been committed, broke with the majority on the question of remedy. Id. at 906 (Brennan, J., joined by Marshall, Blackmun & Stevens, JJ., concurring in part and dissenting in part). Justices Powell and Rehnquist dissented from the coverage and unfair labor practice holdings, arguing that undocumented aliens should not be covered by the NLRA, but joined with the majority's limitation on the remedies available to the undocumented workers. Id. at 913 (Powell, J., joined by Rehnquist, J., concurring in part and dissenting in part).

[80] Id. at 910-13 (Brennan, J., concurring in part and dissenting in part). For criticisms of the *Sure-Tan* decision for providing undocumented aliens with a right without an effective remedy, see Note, Rights Without a Remedy—Illegal Aliens Under the National Labor Relations Act, 27 B.C.L. Rev. 407 (1986); Note, Providing Illegal Alien Employees a Remedy for Discriminatory Discharge: Sure-Tan, Inc. v. NLRB, 1985 B.Y.U. L. Rev. 827.

[81] *Sure-Tan*, 467 U.S. at 912 (Brennan, J., concurring in part and dissenting in part).

[82] Id. (Brennan, J., concurring in part and dissenting in part).

[83] Id. at 892.

[84] See id. at 912 (Brennan, J., concurring in part and dissenting in part).

[85] Id. (Brennan, J., concurring in part and dissenting in part).

[86] Id. at 912 (Brennan, J., concurring in part and dissenting in part). As noted before, see note 16 supra, two circuit courts have read the *Sure-Tan* limits on remedial backpay narrowly. See Local 512, Warehouse and Office Workers' Union v. NLRB, 795 F.2d 705 (9th Cir. 1986) (distinguishing *Sure-Tan* by awarding reinstatement with backpay to undocumented workers who had not been made to leave country by INS because they were in fact "available to work") (case also known as *Felbro*); Bevles Co. v. Teamsters Local 986, 791 F.2d 1391 (9th Cir. 1986) (upholding arbitrator's award of reinstatement with backpay for violation of collective bargaining agreement where employees in question were undocumented aliens), cert. denied, 108 S. Ct. 500 (1987); Rios v. Enterprise Ass'n Steamfitters Local 638, 860 F.2d 1168 (2d Cir. 1988) (applying position of *Local 512* to pre-IRCA Title VII case); see also NLRB v.

A broad reading of the *Sure-Tan* opinion suggests that awarding remedial backpay to undocumented workers victimized by unfair labor practices might encourage unauthorized immigration, presumably by sending a message to potential undocumented alien workers that they will be protected by American labor laws, and that working conditions in this country will therefore be more attractive. While the *Sure-Tan* holding applies only to the coverage and remedies of unlawfully discharged employees under the NLRA,[87] and while it has been held to apply only to undocumented aliens who have been forced to leave the country by the INS,[88] a broad interpretation of its reasoning could have been applied to FLSA cases as well. If this reasoning had been extended, the availability of remedial backpay under the FLSA could similarly have been at risk.

The *Sure-Tan* decision therefore threatened to undermine the ability of undocumented aliens to bring wage suits under the FLSA, particularly since the enactment of the IRCA. If the *Sure-Tan* Court were found to have believed that remedial backpay under the NLRA would encourage illegal immigration, other courts could extend this reasoning to remedial backpay under the FLSA. In addition, if the employer sanction provisions of the IRCA were read as implying a repeal of labor law protections for undocumented aliens, as the Court in *Sure-Tan* suggested they

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Ashkenazy Property Management Corp., 817 F.2d 74 (9th Cir. 1987) (ordering NLRB to comply with *Local 512*). In *Local 512*, the Ninth Circuit read the *Sure-Tan* limitations as directed primarily at the speculative nature of awarding backpay to aliens who have been made to leave the country, 795 F.2d at 717, a concern not implicated in an FLSA wage or hour suit. See note 62 supra. The court also found that the *Sure-Tan* decision was concerned primarily with the INA's prohibition against illegal entry. 795 F.2d at 719. The court found that making remedial backpay unavailable to undocumented workers who have remained in the United States would not encourage illegal entry or reentry. Id. at 720. Rather, noting the inadequacies of enforcing the NLRA without remedial backpay, id. at 718-19, the court observed that equalizing backpay liability for labor law violations could deter employers from hiring undocumented workers, marginally reducing illegal entry to the United States. Id. at 720. This Note does not disagree with this narrow reading of *Sure-Tan*. Rather, it argues: (1) that *Sure-Tan* should not limit recovery of backpay under the FLSA regardless of the specific holdings in *Local 512* and *Sure-Tan*; and (2) that the Ninth Circuit's general understanding of deterrence should be endorsed and the *Sure-Tan* remedial limitations narrowly construed in any event—specifically but not exclusively with respect to wage and hour suits—precisely to avoid the errors implicit in a broad reading of the language limiting backpay relief.

[87] For arguments that the right of undocumented workers to reinstatement and backpay under the NLRA has not diminished since the IRCA and that the IRCA provides protection to some workers and for a criticism of the position of the General Counsel of the NLRB, note 62 supra, see Alexander, The Right of Undocumented Workers to Reinstatement and Back Pay in Light of Sure-Tan, Felbro, and the Immigration Reform and Control Act of 1986, 16 N.Y.U. Rev. L. & Soc. Change 125 (1987-1988) (undocumented workers entitled to reinstatement with backpay when discharged in violation of NLRA); see also Note, Remedies for Undocumented Workers Following a Retaliatory Discharge, 24 San Diego L. Rev. 573 (1987) (undocumented workers discharged in violation of NLRA entitled to reinstatement with backpay if grandfathered or applying for amnesty; otherwise entitled only to backpay).

[88] See Alexander, supra note 87; note 86 supra.

would be,[89] the IRCA would disable undocumented aliens from bringing FLSA wage suits.

Courts, however, have not been misled into reading the *Sure-Tan* decision broadly. Three decisions following *Sure-Tan* have addressed the extent of FLSA protections available to undocumented aliens before and after the IRCA: *Alvarez v. Sanchez*,[90] *In re Reyes*,[91] and *Patel v. Quality Inn South*.[92] All three have upheld the right of undocumented workers to the full protection of wage and hour laws. In *Alvarez*, a New York state court held that an undocumented alien is not barred from recovering backpay in a FLSA wage suit.[93] Without reference to *Sure-Tan*, the court held that since the FLSA "does not define the term 'employee' to expressly exclude illegal aliens, plaintiff's status does not preclude her from recovering under the statute."[94]

In *Reyes*, a district court had issued a discovery order requiring the plaintiff-employees in a FLSA wage suit to respond to an interrogatory concerning their immigration status.[95] The Fifth Circuit issued a writ of mandamus directing the district court to withdraw the order.[96] Citing the broad definition of "employee" under the FLSA, but without mentioning *Sure-Tan*, the Fifth Circuit stated "it is well established that the protections of the Fair Labor Standards Act are applicable to citizens and aliens alike and whether the alien is documented or undocumented is irrelevant."[97]

Following *Reyes*, in *Patel v. Sumani Corp.*[98]—a decision subsequently reversed by the Eleventh Circuit—an Alabama district court dismissed an FLSA back wage suit because the plaintiffs were undocumented aliens.[99] In the unprecedented view of the court,[100] aliens were without standing to sue under the FLSA as they were not "employees" within the meaning of the FLSA,[101] and were not entitled to recover for

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89 See notes 70-72 and accompanying text supra.

90 105 A.D.2d 1114, 482 N.Y.S.2d 184 (1984).

91 814 F.2d 168 (5th Cir. 1987), cert. denied, 108 S. Ct. 2901 (1988).

92 846 F.2d 700 (11th Cir. 1988).

93 *Alvarez*, 105 A.D.2d at 1115, 482 N.Y.S.2d at 185.

94 Id. (citations omitted).

95 *Reyes*, 814 F.2d at 170.

96 Id. at 170-71.

97 Id. at 170. Judge Jones voiced strong dissent, stating that the FLSA does distinguish between citizens and illegal alien employees, adding incorrectly that no court had previously "explicitly permitted an undocumented alien to recover the damages and penalties provided for in the [FLSA]." Id. at 171 (Jones, J., dissenting).

98 660 F. Supp. 1528 (N.D. Ala. 1987), rev'd sub nom. Patel v. Quality Inn South, 846 F.2d 700 (11th Cir. 1988).

99 Id. at 1535.

100 See note 35 supra.

101 *Patel*, 660 F. Supp. at 1531. On appeal, the United States Secretary of Labor filed a brief as amicus curiae supporting the plaintiff's view that undocumented aliens are protected by the

any alleged violation of the FLSA.[102] The court based this interpretation of the FLSA in part on the perceived policies of the IRCA,[103] although the suit was brought before the IRCA was passed. The court held that the new immigration law's concern with the employment of illegal aliens meant that enforcement of the minimum wage and overtime provisions of the FLSA in favor of undocumented aliens working in the United States would be in "direct and unquestionable conflict" with the policies of the amended INA.[104] Enforcement of FLSA provisions, the court stated, would frustrate the policy of discouraging undocumented aliens from entering the United States to seek work.[105]

Although the *Patel* court claimed to disagree with the Supreme Court's position on coverage in *Sure-Tan*,[106] its policy arguments paralleled the reasoning behind a broad reading of the denial of backpay in *Sure-Tan*. In both cases, the courts may have been responding to a fear that too much protection of undocumented workers will encourage illegal immigration. In addition, both decisions suggest that employer sanction provisions imply a congressional intent to deny undocumented workers the protection of this country's labor statutes.

In reversing this misguided extension of *Sure-Tan*, the Eleventh Cir-

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FLSA. Secretary's Brief, supra note 19, at 1-2. The Secretary's brief argued that the plain meaning and purposes of the FLSA demonstrate that Congress extended wage and hour protections regardless of legal status, id. at 6, 10-12, and that the longstanding interpretation of the Secretary of Labor is entitled to deference, id. at 6-7, 14-17. The Secretary also argued that coverage of undocumented aliens is necessary to effectuate the FLSA and INA policies of eliminating "the unfair competitive advantage accruing to employers that maintain substandard working conditions," id. at 6, 17-20, and that nothing in the IRCA or its legislative history indicates that illegal aliens are exempted from FLSA coverage. Id. at 7, 20-25. For a more detailed discussion of the Secretary of Labor's interpretation of the FLSA and the legislative history of the IRCA, see notes 131-92 and accompanying text infra.

The Secretary of Labor also submitted a statement of position to the district court in *Patel* maintaining the right of undocumented employees to sue for back wages under the FLSA. Secretary of Labor's Statement of Position at 3, Patel v. Sumani Corp., 660 F. Supp. 1528 (N.D. Ala. 1987) (No. 86-AR-1536-S) [hereinafter Secretary's Position]. Citing Local 512, Warehouse and Office Workers v. NLRB, 795 F.2d 705 (9th Cir. 1986), the Secretary distinguished the limitation on remedy in *Sure-Tan*, stating that the limitation was necessary because backpay would have been awarded speculatively. Secretary's Position, supra, at 4. Retrospective awards, like those in *Patel*, may be awarded. Id.

The Supreme Court has held that deference should be granted to the construction of a statute by the agency charged with administering it. See, e.g., Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969); Udall v. Tallman, 380 U.S. 1, 16 (1965). In particular, the Court has held that the Secretary of Labor's longstanding interpretation of the FLSA is entitled to "considerable" judicial deference. Tony & Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290, 297 (1985); see Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

[102] *Patel*, 660 F. Supp. at 1535.

[103] Id. at 1533-35.

[104] Id. at 1535.

[105] Id.

[106] Id. at 1534.

cuit first noted the breadth of the definition of "employee" in the FSLA[107] and took notice of both the legislative history of the FLSA[108] and the position of the Department of Labor.[109] The court found that the defendant employer's position (a position shared by the district court) was contrary to the "overwhelming weight of authority."[110] The court then went on to counter the arguments that undocumented aliens are no longer entitled to the protections of the FLSA because of the IRCA and that the *Sure-Tan* decision precludes such employees from recovering backpay or liquidated damages under the FLSA.

First, the court rejected the contention of the district court that the IRCA in any way limits the rights of undocumented aliens under the FLSA. The court found that the legislative history,[111] as well as the text of the IRCA itself,[112] indicate that Congress intended for undocumented aliens to remain protected by the FLSA. In addition, the court found FLSA coverage to be consistent with the policies behind the IRCA. Specifically, the court observed that both employer sanctions and enforcement of wage and hour standards served the objective of eliminating employers' economic incentives to hire undocumented aliens.[113] The court also expressed its doubt that many undocumented aliens come to the United States to gain the protection of its labor laws, recognizing that they come in order to get jobs at any wage.[114] By reducing the incentive to hire undocumented workers, wage and hour protections are consistent with the objectives of the IRCA.[115] In short, the Eleventh Circuit realized that labor law coverage serves the goal of deterrence by affecting the supply of jobs, whereas denial of coverage does nothing to deter the migrant workers themselves and only gives employers a reason to hire them.

Finally, the court criticized the argument that the *Sure-Tan* decision precludes the awarding of backpay to undocumented aliens who have been underpaid in violation of the FLSA. First, the court found nothing in the FLSA to suggest that backpay relief should be limited as it was in *Sure-Tan*.[116] Second, the court observed that FLSA plaintiffs are not trying to recover pay for time they were unlawfully deprived of work, but

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107 Patel v. Quality Inn South, 846 F.2d 700, 702-03 (11th Cir. 1988); see notes 23-25 and accompanying text supra.

108 *Patel*, 846 F.2d at 702; see note 27 and accompanying text supra.

109 *Patel*, 846 F.2d at 703; see note 101 supra.

110 *Patel*, 846 F.2d at 703.

111 Id. at 704.

112 Id.

113 Id.

114 Id.

115 Id. at 704-05.

116 Id. at 705.

rather are seeking to recover wages for work already performed. As the court noted, "[i]t would make little sense to consider . . . [an employee] 'unavailable' for work during a period of time when he was actually working."[117] Concluding that decisions under the NLRA are not helpful in interpreting the FLSA on the question at hand, and that nothing in the FLSA itself suggests otherwise,[118] the Eleventh Circuit held that Patel, the undocumented worker who brought the case, was "entitled to the full range of available remedies under the FLSA without regard to his immigration status."[119]

The Eleventh Circuit's *Patel* decision brought welcome clarity to an area confused both by the *Sure-Tan* decision and by the subsequent enactment of the IRCA. It correctly found the unavailability limitation in *Sure-Tan* inapplicable to FLSA wage and hour suits and accurately identified the intent and implications of the IRCA. However, the *Patel* decision gave only cursory treatment to both questions, and in doing so failed to expose the folly of attempting to extend the *Sure-Tan* limitations beyond that case, and, in particular, to wage and hour cases brought under the FLSA. The following section of the Note will review the history of FLSA enforcement against employers of undocumented workers in the context of the congressional debate over immigration reform and will demonstrate that Congress did not intend for the IRCA to eliminate or limit such enforcement. In fact, the IRCA and its legislative history explicitly authorize continuation of the policy of targeting employers of undocumented workers for wage and hour enforcement. The last section will develop the *Patel* court's brief observations concerning the reasons why workers immigrate to the United States with or without permission to come or to work. It will demonstrate why a broad reading of the *Sure-Tan* limitations on remedial backpay would completely misinterpret the realities of undocumented labor migration into the United States.

III

HISTORY OF IMMIGRATION REFORM: IMMIGRATION AND LABOR ENFORCEMENT

The Immigration and Nationality Act[120] establishes grounds for limiting aliens from entering and working in the United States.[121] The INA provides that aliens seeking to enter the United States to work are

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[117] Id. at 706; see note 62 supra.

[118] *Patel*, 846 F.2d at 706.

[119] Id. The court chose to express no opinion on the question of the availability of backpay under the NLRB, as interpreted in the *Local 512* decision. Id. at 705 n.6; see note 86 supra.

[120] 8 U.S.C. §§ 1101-1525 (1982 & Supp. IV 1986).

[121] 8 U.S.C. § 1182(a)(14) (1982).

ineligible to receive entrance visas unless the Secretary of Labor certifies that there are not sufficient able and qualified workers already available and that "the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed."[122] The purpose of this provision is to protect American labor from an influx of aliens seeking work where local economies cannot absorb them.[123] If an alien enters the United States without labor certification, and then proceeds to work, she is subject to deportation.[124]

The focus of the INA before the IRCA was on legal and illegal entry, not employment,[125] as the *Sure-Tan* Court observed.[126] While the statute set up mechanisms for legal entry to work, it did not make employment of undocumented aliens illegal per se.

The following discussion will demonstrate that Congress and the Nixon,[127] Ford,[128] Carter,[129] and Reagan[130] Administrations—all proponents of employer sanction provisions—consistently supported the enforcement of wage and hour laws against employers of undocumented aliens in order to deter illegal immigration. It will also demonstrate that, contrary to the reasoning of the *Sure-Tan* decision, Congress did not intend that undocumented aliens be disabled from bringing wage suits under the FLSA when it enacted the employer sanction provisions of the IRCA. Rather, it intended to continue the policy of enforcing the FLSA against employers of undocumented workers.

Out of dissatisfaction with the labor certification program,[131] Con-

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[122] Id. The INA repealed the Contract Labor Law of 1885, which declared void all contracts to work in the United States made with aliens abroad. Act of Feb. 26, 1885, ch. 164, § 2, 23 Stat. 332 (repealed 1952).

Under the original version of the INA, the initiative rested with the Labor Secretary to block entry to uncertified aliens, and he rarely did so. See A. Aleinikoff & D. Martin, Immigration Process and Policy 155 (1985). The 1965 amendments to the INA changed the law to a presumption that foreign workers are not needed until the Secretary certifies them. Pub. L. No. 89-236, § 10, 79 Stat. 917, 919 (1965) (codified as amended at 8 U.S.C. § 1182(a)(14) (1982)).

[123] H.R. Rep. No. 1365, 82d Cong., 2d Sess. 51, reprinted in 1952 U.S. Code Cong. & Admin. News 1653, 1705.

[124] 8 U.S.C. § 1251(a)(1)-(2) (1982). An alien can also be prosecuted for illegal entry. 8 U.S.C. § 1325 (Supp. IV 1986).

[125] Although the statute made it unlawful to harbor undocumented aliens, 8 U.S.C. § 1324 (1982), it expressly stated that employment of such aliens was not to be considered harboring (the "Texas Proviso"). Id. § 1324(b). Thus, before the IRCA there were no penalties in the INA for employing unauthorized aliens.

[126] See Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 892-93 (1984).

[127] See text accompanying note 136 infra.

[128] See text accompanying notes 136-40 infra.

[129] See text accompanying notes 141-65 infra.

[130] See text accompanying notes 178-84 infra.

[131] See Rodino, The Impact of Immigration on the American Labor Market, 27 Rutgers L. Rev. 245 (1974).

gressman Rodino introduced a bill in 1972 to make it unlawful knowingly to hire aliens not authorized to work and to impose sanctions against employers who hire such aliens.[132] The House passed the bill that year,[133] and passed a similar bill in the following Congress.[134] However, no similar bills were introduced in the Senate at that time. The purpose of these measures was to remove "the economic incentive which draws such aliens to the United States as well as the incentive for employers to exploit this source of labor."[135]

Both the Nixon and Ford Administrations endorsed the House immigration legislation.[136] In 1975, President Ford established a committee to study the problem of illegal immigration[137] which recommended employer sanctions,[138] a revision of immigrant labor certification provisions,[139] and a pilot project targeting enforcement of wage and hour laws against employers in a metropolitan area with substantial numbers of undocumented aliens.[140] Although these proposals expired when President Ford left office, the policies of the two succeeding administrations reflected similar concerns about the proper way to curb illegal immigration.

In 1977, President Carter introduced a comprehensive immigration reform proposal to Congress.[141] It recommended civil penalties against employers who knowingly hired illegal aliens and provided for targeted enforcement of the FLSA against employers of undocumented aliens.[142] Although Congress did not pass the Carter immigration reform bills, it did pass an appropriations bill[143] designating 260 additional positions in the Wage and Hour Division of the Department of Labor "to strengthen enforcement of the Fair Labor Standards Act, including minimum wage and overtime provisions."[144] The compliance officers within this group were to conduct investigations into industries with a high incidence of

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132 H.R. 16188, 92d Cong., 2d Sess. (1972).

133 See S. Rep. No. 132, 99th Cong., 1st Sess. 19 (1985) [hereinafter S. Rep. No. 132].

134 H.R. 982, 93d Cong., 1st Sess. (1973); see S. Rep. No. 132, supra note 133, at 19.

135 H.R. Rep. No. 506, 94th Cong., lst Sess. 6 (1975).

136 See S. Rep. No. 132, supra note 133, at 19.

137 United States Domestic Council Committee on Illegal Aliens, Preliminary Report 106 (Dec. 1976) [hereinafter Preliminary Report].

138 Id. at 241.

139 Id. at 241-43.

140 Id. at 106.

141 H.R. 9531, 95th Cong., 1st Sess. (1977); S. 2252, 95th Cong., 1st Sess. (1977); see President's Message to Congress on Undocumented Aliens, 13 Weekly Comp. Pres. Doc. 1170 (Aug. 4, 1977).

142 See H.R. 9531, 95th Cong., 1st Sess. (1977); S. 2252, 95th Cong., 1st Sess. (1977); President's Message to Congress on Undocumented Aliens, 13 Weekly Comp. Pres. Doc. 1170 (Aug. 4, 1977).

143 Pub. L. No. 95-240, 92 Stat. 107, 111 (1978).

144 S. Rep. No. 564, 95th Cong., 1st Sess. 35 (1977).

undocumented workers.[145] Congress believed that stricter enforcement of wage and hour laws in those industries would "substantially remove the economic incentive for employers to hire undocumented workers."[146] This targeted enforcement became known as the Employers of Undocumented Workers (EUW) Program.[147]

The Carter Administration endorsed targeted enforcement of wage and hour laws for several reasons. First, it believed that undocumented workers are one of the most exploitable groups in the United States workforce and therefore wished to protect them from unfair labor practices.[148] Second, the Carter Administration wanted to encourage respect for labor laws.[149] It felt that the ease with which employers could exploit workers too afraid of the authorities to complain undermined respect for labor laws.[150] Third, the Carter Administration was concerned with protecting the wages and working conditions of lawful workers from the depressive effects of the unlawfully low compensation received by undocumented competitors.[151]

The Carter Administration saw the EUW Program as an essential

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145 See id.

146 H.R. Rep. No. 644, 95th Cong., 1st Sess. 26 (1977).

147 See 65 United States Dep't of Labor Ann. Rep. Fiscal Year 1977, at 60; 66 United States Dep't of Labor Ann. Rep. Fiscal Year 1978, at 59; 67 United States Dep't of Labor Ann. Rep. Fiscal Year 1979, at 53; 68 United States Dep't of Labor Ann. Rep. Fiscal Year 1980, at 47-48.

Under the Reagan Administration, the Program was called the Special Targeted Enforcement Program (STEP). See 71 United States Dep't of Labor Ann. Rep. Fiscal Year 1983, at 45; 72 United States Dep't of Labor Ann. Rep. Fiscal Year 1984, at 45-46; 73 United States Dep't Labor Ann. Rep. Fiscal Year 1985, at 50; 74 United States Dep't of Labor Ann. Rep. Fiscal Year 1986, at 50. The Senate Appropriations Committee indicated that the increased funding appropriated for the targeted enforcement program in 1983 reflected the "annualization" of the program. S. Rep. No. 680, 97th Cong., 2d Sess. 12 (1982); see also Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriations for 1983: Hearings Before a Subcomm. of the House Comm. on Appropriations, 97th Cong., 2d Sess. 369, 372, 380-81, 389-90, 399 (1982) (testimony of R. Collyer, Deputy Undersecretary for Employment Standards) (money appropriated for "annualization" of STEP).

In 1980, the Comptroller General approved the Labor Department's use of funds to enforce the FLSA on behalf of undocumented workers, Op. Comptroller Gen. No. B-198205 (May 20, 1980) (on file at New York University Law Review), despite a spending restriction Congress had imposed on the Department prohibiting the use of appropriated funds "to carry out any activity for or on behalf of an [undocumented] alien." Pub. L. No. 95-480, § 102, 92 Stat. 1567, 1571 (1978). The Comptroller General concluded that the program was not "on behalf" of undocumented aliens, even though they might profit in the short run from stepped up FLSA enforcement. He noted that the program was designed to reduce an employer's incentive to hire undocumented aliens and that it did not enhance their position relative to the legal rights of United States workers or confer on them any benefit to which they would otherwise not be entitled. Op. Comptroller Gen. No. B-198205 (May 20, 1980) (on file at New York University Law Review).

148 Hearings, supra note 19, at 202 (statement of Ray F. Marshall, Secretary of Labor).

149 Id.

150 Id.

151 Id. at 203.

part of immigration control.[152] Labor Secretary Ray Marshall argued that enforcement of the FLSA wage and hour standards would help remove the economic incentive for hiring undocumented aliens, since it would force employers to provide those workers with the same wages as lawful employees.[153] However, Marshall predicted that targeted enforcement efforts alone would not be sufficient to reduce substantially the employment of undocumented workers.[154] He therefore endorsed the Carter Administration's proposal to impose sanctions on employers who recruited or hired undocumented workers.[155] Consistent with the view later taken in *Patel v. Quality Inn South*,[156] the Carter Administration saw employer sanctions and targeted labor law enforcement as complementary, not contradictory, aspects of the same immigration reform policy.

President Carter also created the Interagency Task Force on Immigration Policy to assess the effectiveness of existing immigration laws in stemming illegal immigration and to develop recommendations for future immigration legislation.[157] The Task Force's resulting Interagency Staff Report surveyed the rights of aliens, including the employment rights of undocumented aliens, and stated that an illegal immigrant is "entitled to the minimum wage, and to other employment-related protections, notwithstanding that he or she has no right to be here working."[158] Echoing the deterrence policy articulated by Secretary Marshall,[159] the report explains that

> [i]t would be anomalous to allow an employer to benefit from violations of protective labor laws on the basis that his employee lacked the right to employment. That would encourage the hiring of illegal employees, for the employers would realize a financial advantage by hiring illegal migrants, while being immune from prosecution. This double advantage would provide employers with a substantial incentive to prefer illegal migrants over legal workers.[160]

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[152] Id.

[153] Id. at 204.

[154] Id.

[155] Id.

[156] 846 F.2d 700 (11th Cir. 1988); see text accompanying notes 111-15 supra.

[157] Interagency Task Force on Immigration Policy, Staff Report iii (1979) [hereinafter Interagency Staff Report]. The Task Force's mission was subsequently scaled down to that of providing background research for a Select Commission on Immigration and Refugee Policy, which was established by Congress. Id. Prepared by the Departments of Justice, Labor, and State, the Interagency Staff Report provides an overview of illegal immigration and its impact on the American economy.

[158] Id. at 362.

[159] See text accompanying note 153 supra.

[160] Interagency Staff Report, supra note 157, at 362. Justice Brennan's dissent in Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 912 (1984) (Brennan, J., dissenting), and the concern with unjust enrichment in some of the court decisions discussed earlier, see text accompanying note 53

Throughout its tenure, the Carter Administration's policy was to enforce minimum wage and overtime laws against employers of undocumented workers. Congress explicitly supported this policy by earmarking funds for targeted FLSA enforcement.[161] The compliance officers conducting investigations under the EUW Program were not permitted to ask employees their immigration status.[162] The investigations were conducted, enforcement actions brought, and remedial backpay distributed without regard to alienage.[163] Neither Congress nor the Executive thought that undocumented aliens should be subject to the whims of their employers simply because they were working in the United States illegally.

The unequivocal position of the Carter Administration was that nonenforcement would benefit firms which exploit illegal labor and would thereby create an inducement to use such labor.[164] The government's position indicates that it found availability of jobs to be a factor behind illegal immigration.[165] By penalizing employers who exploited undocumented alien workers, the government sought to eliminate this "pull" factor. The Carter Administration thus took the view that targeted enforcement of the FLSA against employers of undocumented workers served the purposes of both the labor statute itself and the immigration law.

In January 1981, the Comptroller General of the United States issued a report to Congress reviewing the EUW Program and criticizing it as ineffective in deterring employment of undocumented aliens.[166] The report recommended changes in the DOL's enforcement procedures,[167] as well as additional deterrents such as employer sanctions.[168] Significantly, the report never questioned the propriety of wage and hour enforcement against employers of undocumented workers, nor did it question the awarding of back wages to undocumented employees upon a finding of employer liability.[169] The DOL disagreed with several of the

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supra, also reflect these concerns.

[161] See notes 143-44 and accompanying text supra.

[162] 1981 GAO Report, supra note 33, at 9.

[163] Id.

[164] See Hearings, supra note 19, at 202-05.

[165] See id.

[166] 1981 GAO Report, supra note 33.

[167] Id. at 36. The GAO Report criticized the DOL for, among other things, permitting employers to retain backpay owed to undocumented workers who could not be found. This procedure undermined the efficacy of the program since many undocumented workers owed backpay cannot be located. Id. at 24; see note 30 supra.

[168] 1981 GAO Report, supra note 33, at 17.

[169] The GAO Report found that the DOL had taken steps to improve the EUW Program during the GAO review. These steps included the use of the leads and records of the INS, the establishment of strike forces to uncover wage exploitation, the establishment of procedures for

findings in the GAO Report.[170] However, the debate between the Comptroller General and the Labor Department concerned the efficacy of minimum wage and overtime enforcement in deterring employment of undocumented aliens. The debate, however, did not address whether such enforcement, including the awarding of remedial backpay to undocumented workers, was legally justified.[171]

The Select Commission on Immigration and Refugee Policy (SCIRP) was established by Congress in 1978 to review immigration laws, policies, and procedures.[172] In 1981, SCIRP issued its Final and Staff Reports which analyzed illegal immigration into the United States

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using Mexican consulates to distribute backpay to Mexican nationals who had left the United States, and the testing of a procedure in which employers would agree to deposit into the United States Treasury back wages which were due employees who could not be located. Id. at iii-iv. The Comptroller General recommended that Congress enact legislation "to require that, when employees cannot be located and are due back wages from FLSA violations, the wages be deposited in the U.S. Treasury as miscellaneous receipts." Id. at 26. The report explained that such legislation would help deter employers from paying undocumented alien employees less than the FLSA minimums in the hope they could retain the excess amounts due to employees they believed would not be located. Id.; see notes 30, 164 supra.

The GAO's concern about employer retention of back wages due employees reinforces the view that the deterrent force of the FLSA lies in the backpay remedy. Employers who do not have to pay for violations when employees cannot be located will have little incentive to obey the labor standards required by the FLSA if the employees are undocumented aliens. Undocumented aliens deliberately avoid being located by governmental authorities. Because the GAO saw labor standard enforcement through backpay as a deterrent to employment of undocumented aliens, the GAO was unwilling to allow employers to escape enforcement of the FLSA standards even where the undocumented workers could not be located.

[170] 1981 GAO Report, supra note 33, at 40-47. The DOL asserted that the EUW Program was much more effective than the GAO Report suggested and protested that there was a "lack of sound data for gauging the impact of the program." Id. at 46; see United States Commission on Civil Rights, The Tarnished Golden Door: Civil Rights Issues in Immigration 57, 57-73 (1980) (criticizing employer sanction proposals and recommending vigorous enforcement of FLSA and other labor laws to prevent exploitation of undocumented workers and to minimize job displacement); see also Pandya (Institute for Public Representation), Illegal Immigration: An Alternative Perspective (1981) (criticizing findings of GAO Report and calling for increased enforcement of labor laws as best means to control employment of undocumented workers); Kutchins & Tweedy, No Two Ways About It: Employer Sanctions Versus Labor Law Protections for Undocumented Workers, 5 Indus. Rel. L.J. 339 (1983) (arguing that employer sanctions would undercut both labor and immigration policies); Note, Immigration Reform: Solving the "Problem" of the Illegal Alien in the American Workforce, 7 Cardozo L. Rev. 223, 249 (1985) (Congress "should center its energies on appropriations to enforce the labor laws rather than wasting its energies on working out an employer sanctions scheme"); cf. National Council of La Raza, Effectiveness of Labor Law Enforcement in Deterring Illegal Immigration (1984) (labor law enforcement would be more effective at deterring illegal immigration than the then proposed employer sanctions).

[171] The discussion of what to do with the wages owed aliens who could not be located and the use of Mexican consulates to distribute back wages indicate that both the DOL and the GAO understood the FLSA to require payment of back wages to underpaid workers regardless of immigration status.

[172] Pub. L. No. 95-412, 92 Stat. 907 (1978).

and recommended methods for its control.[173] Like President Carter's Interagency Task Force, SCIRP found employment to be the primary goal of the undocumented immigrant.[174] The SCIRP Reports recommended the implementation of employer sanctions.[175] SCIRP noted modest successes on the part of the DOL's Wage and Hour Division,[176] and recommended "that the enforcement of existing wage and working standards legislation be increased in conjunction with the enforcement of employer responsibility legislation."[177]

The Reagan Administration followed the targeted wage and hour enforcement policies of the Carter Administration and adopted the SCIRP proposals. Following the issuance of the SCIRP Reports, the Reagan Administration presented its proposals for immigration reform,[178] which included employer sanctions[179] and increased resources for enforcement of then-existing labor laws.[180] In explaining to Congress the need for employer sanctions, Robert Searby, the DOL's Deputy Undersecretary for International Affairs, noted that employers were required only to pay back wages for violating labor standards.[181] He criticized enforcement of the FLSA through remedial backpay as insufficient to deter illegal immigration.[182] More importantly, however, he understood it to be an appropriate legal remedy to wage and overtime

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173 Select Commission on Immigration and Refugee Policy, U.S. Immigration Policy and the National Interest, Final Report (Mar. 1, 1981) [hereinafter SCIRP Final Report]; Select Commission on Immigration and Refugee Policy, U.S. Immigration Policy and the National Interest, Staff Report (Apr. 30, 1981) [hereinafter SCIRP Staff Report]. The SCIRP Reports laid the foundation for subsequent immigration proposals. See S. Rep. No. 132, supra note 133, at 21-26 (chronicling history of immigration reform).

174 SCIRP Staff Report, supra note 173, at 491.

175 SCIRP Final Report, supra note 173, at 61-69; SCRIP Staff Report, supra note 173, at 564.

176 SCIRP Staff Report, supra note 173, at 562.

177 SCIRP Final Report, supra note 173, at 70. The SCIRP Staff Report also provides charts of laws against the employers of undocumented aliens in effect at the time of the Report. SCIRP Staff Report, supra note 173, Attachment A, at 625-29. The first of these charts outlines the purpose, coverage, and enforcement of the FLSA. Id., Attachment A, at 625. Listing the specific exemptions to "enterprises" under the Act, the chart notes that there is no distinction on the basis of citizenship status in the definitions of "employer," "employee," or "enterprises."

178 See Administration's Proposals on Immigration and Refugee Policy, Joint Hearing Before the Subcomm. on Immigration, Refugees, and International Law of the House Judiciary Comm. and the Subcomm. on Immigration and Refugee Policy of the Senate Judiciary Comm., 97th Cong., lst Sess. (1981).

179 Id. at 23.

180 Id. at 24.

181 Immigration Reform, Part I: Hearings Before the Subcomm. on Immigration, Refugees, and International Law of the House Judiciary Comm., 97th Cong., 1st Sess. 230 (1981) (testimony of Robert Searby, Deputy Undersecretary, International Affairs, Dep't of Labor).

182 Id.

violations and therefore endorsed it as part of a package of deterrents.[183]

After the SCIRP Reports and the Reagan proposals were issued, both houses of Congress began to consider another round of immigration reform bills with employer sanction provisions. Two of the Senate bills allocated resources for enforcement of wage and hour laws by the Department of Labor.[184]

After several years of debate and amendment, Congress passed the IRCA in 1986.[185] The IRCA makes it unlawful to hire "unauthorized aliens" knowingly or in violation of specified procedures,[186] and establishes sanctions against employers who violate its prohibitions.[187] The IRCA did not establish any new penalties against undocumented alien workers.

In addition to establishing employer sanction provisions, the IRCA authorized the appropriation of funds to the Wage and Hour Division of the DOL "to deter the employment of unauthorized aliens and remove the economic incentive for employers to exploit and use such aliens."[188] As this provision of the IRCA demonstrates, the policy of targeted FLSA enforcement, introduced by the Carter Administration with con-

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[183] Id. at 229-31.

[184] S. 1200, § 101(d), 99th Cong., 1st Sess. (1985); S. 529, § 404(b), 98th Cong., 1st Sess. (1983); see S. Rep. No. 62, 98th Cong., 1st Sess. (1983). The House Education and Labor Committee Report on H.R. 1510 stated that it did not intend the employer sanctions provisions of the bill to limit the ability of labor standards agencies to enforce existing law. H.R. Rep. No. 115, pt. 4, 98th Cong., 1st Sess. 17 (1983).

[185] Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified in scattered sections of 8 U.S.C. (Supp. IV 1986) (amending the Immigration and Nationality Act, 8 U.S.C. §§ 1101-1525 (1982)).

[186] 8 U.S.C. § 1324a(a)(1) (Supp. IV 1986). The IRCA defines "unauthorized alien" as one who is neither "(A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this Chapter or by the Attorney General." Id. § 1324a(h)(3).

[187] Id. § 1324a(a), (e)-(g). The employer sanction provisions of the IRCA apply only to the employment of unauthorized aliens after November 6, 1986, the date of enactment. IRCA, Pub. L. No. 99-603, § 101(a)(3)(A)-(B), 100 Stat. 3359, 3372 (1986). As a result, undocumented aliens employed before the passage of the IRCA became more dependent on their employers, as no new employer could hire them without the threat of sanctions. Such "grandfathered" employees might be particularly vulnerable to labor standards abuse, given their dependence.

[188] Supplemental Authorization of Appropriations for Wage and Hour Enforcement, Pub. L. No. 99-603, § 111(d), 100 Stat. 3359, 3381 (1986). The IRCA also provides for the legalization of undocumented aliens who have resided continuously and unlawfully in the United States since before January 1, 1982. 8 U.S.C. § 1255a (Supp. IV 1986). Congress created this amnesty provision to address the problem of the "underclass" of undocumented aliens which had developed over time. In particular, Congress expressed concern that these aliens are subject to victimization by employers and others because they are afraid to seek help. See H.R. Rep. No. 682, pt. 1, supra note 19, at 49, 1986 U.S. Code Cong. & Admin. News at 5653. Enforcement of the FLSA by the Labor Department against employers of undocumented aliens implicates the same concern with perpetuating an underclass of people within the United States who are outside the basic protections of the law. See Hearings, supra note 19, at 202 (statement of Ray F. Marshall, Secretary of Labor).

gressional support and subsequently endorsed by SCIRP and the Reagan Administration, became an integral part of the comprehensive immigration reform law enacted in 1986.

The legislative history of the IRCA confirms that it was not the intention of Congress "that the employer sanctions provisions of the bill be used to undermine or diminish in any way labor protections in existing law . . . ."[189] Congress did "not intend that *any* provision of th[e] Act would limit the powers of State or Federal labor standards agencies such as the . . . Wage and Hour Division of the Department of Labor, . . . to remedy unfair practices committed against undocumented employees . . . ."[190] Limiting the enforcement powers of labor standards agencies would be "counter-productive" to Congress's intent to limit the employment of undocumented aliens, and could exacerbate the depressive effects on working conditions in the United States caused by their employment.[191]

The reasoning of *Sure-Tan*[192] and the district court in *Patel*[193] notwithstanding, the wage and hour enforcement activities funded by the IRCA include suits on behalf of undocumented workers with the goal of securing back wages as a remedy for minimum wage and overtime viola-

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189 H.R. Rep. No. 682, pt. 1, supra note 19, at 58, 1986 U.S. Code Cong. & Admin. News at 5662. The House Judiciary Committee stated that "the employer sanctions provisions [we]re not intended to limit in any way the scope of the term 'employee' in . . . the National Labor Relations Act." Id. Citing Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984), the Committee noted that applying the NLRA to undocumented employees protects the wages and working conditions of lawful residents from the competition of undocumented workers subject to substandard terms of employment. H.R. Rep. No. 682, pt. 1, supra note 19, at 58, 1986 U.S. Code Cong. & Admin. News at 5662. This explicit refusal to undo the holding of *Sure-Tan* with respect to coverage contrasts sharply with the dictum in the district court's decision in *Patel* stating that the *Sure-Tan* coverage holding was not only mistaken at the time of the decision but is clearly reversed by the IRCA. Patel v. Sumani Corp., 660 F. Supp. 1528, 1533 (N.D. Ala. 1987), rev'd sub nom. Patel v. Quality Inn South, 846 F.2d 700 (11th Cir. 1988).

190 H.R. Rep. No. 682, pt. 2, 99th Cong., 2nd Sess. 8-9 (1986), reprinted in 1986 U.S. Code Cong. & Admin. News 5757, 5758 (emphasis added) [hereinafter H.R. Rep. No. 682, pt.2]. In general, the Supreme Court has stated that "repeals by implication are not favored," Rodriguez v. United States, 107 S. Ct. 1391, 1392 (1987), and are found only when "an intent to repeal is ' "clear and manifest." ' " Id. (quoting United States v. Borden Co., 308 U.S. 188, 198 (1939) (quoting Red Rock v. Henry, 106 U.S. 596, 602 (1883))). Rather, the Court presumes that Congress is aware of administrative interpretations of existing statutes and that it adopts those views when, without a contrary indication, it enacts a new law intended to expand the programs of prior laws, as it did in the IRCA by appropriating funds for targeted wage and hour enforcement. See, e.g., Lorillard v. Pons, 434 U.S. 575, 580-81 (1978).

191 H.R. Rep. No. 682, pt. 2, supra note 190, at 9, 1986 U.S. Code Cong. & Admin. News at 5758.

192 Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984); see notes 70-72 and accompanying text supra.

193 Patel v. Sumani Corp., 660 F. Supp. 1528 (N.D. Ala. 1987), rev'd sub nom. Patel v. Quality Inn South, 846 F.2d 700 (11th Cir. 1988); see text accompanying notes 98-105 supra.

tions.[194] It is the backpay remedy which the DOL used under the EUW Program to deter employment of undocumented workers.[195] By bringing actions for back wages, the DOL removed the economic advantage of exploiting such workers and thereby removed the economic incentive to employ them, precisely the policy articulated in the IRCA.[196] Given the history of FLSA enforcement by the Labor Department, the IRCA cannot legitimately be interpreted as eliminating the availability to undocumented workers of backpay as a remedy for minimum wage and overtime violations.

IV

LABOR MARKET REALITIES AND DETERRENCE OF ILLEGAL IMMIGRATION

The history of the Labor Department's targeted enforcement program and the legislative history of the IRCA demonstrate that the Eleventh Circuit correctly interpreted the significance of employer sanctions in *Patel v. Quality Inn South*.[197] While the court recognized that the enactment of legislation sanctioning employers signified congressional concern with deterring employment of undocumented aliens, it rejected the district court's attempt to discern from this an intent to remove undocumented aliens from the coverage of the nation's labor statutes and thereby to discourage them from seeking work in the United States.[198] As the Eleventh Circuit found, the district court's position, as based on dictum in *Sure-Tan, Inc. v. NLRB*,[199] was backward. Although the enactment of employer sanction provisions indicates a congressional concern with deterring employers from hiring undocumented workers, enforcement of wage and hour laws is also one of the means Congress and the Executive have chosen to deter such employment.[200]

Employer responsibility is precisely what is new in the new immigration law.[201] Undocumented workers, who by definition have violated the immigration laws, are still subject to the same penalties as they were during the pre-IRCA years of targeted wage and hour enforcement. During that time no court denied FLSA back wages to them.[202] In en-

[194] See 1981 Economic Effects Studies, supra note 4, at 24-25; 1980 Economic Effects Study, supra note 4, at 22-23; 1979 Economic Effects Study, supra note 4, at 33-35.

[195] See 1981 Economic Effects Studies, supra note 4, at 24-25; 1980 Economic Effects Study, supra note 4, at 22-23; 1979 Economic Effects Study, supra note 4, at 33-35.

[196] See text accompanying note 188 supra.

[197] 846 F.2d 700 (11th Cir. 1988).

[198] See text accompanying notes 111-15 supra.

[199] 467 U.S. 883 (1984); see notes 70-72 and accompanying text supra.

[200] See notes 143-91 supra.

[201] See note 125 supra.

[202] See text accompanying notes 35-39 supra.

acting the IRCA, Congress indicated that it sought to deter illegal immigration by penalizing employers. Removing labor protections from undocumented workers would be inconsistent with that strategy because it would make them effectively cheaper to employ.

If anything, the enactment of the employer sanction provisions strengthens the argument that nonenforcement of wage and hour laws would unjustly enrich employers who violate the new prohibitions by absolving them of liability.[203] The irony of denying liability is that the employers in question would most likely be those who have sought out undocumented employees precisely because they can be paid substandard wages.[204] Such employers have already calculated that the costs of violating the new prohibitions are outweighed by the benefits of exploitation. Removing labor protections from their employees would tell these employers that it is better to have violated two laws than one. While the immigration law would punish employers who hire undocumented workers, the labor laws essentially would be read to reward these same employers for doing so.

In *Patel v. Quality Inn South*,[205] the Eleventh Circuit recognized that the district court's attempt to limit relief in FLSA cases stemmed from a fundamental misconception about deterring undocumented labor. While Congress and the Executive have focused on deterring employers from hiring undocumented workers, the decision of the district court in *Patel* focused attention on deterring employees themselves from taking available jobs by making these jobs less attractive. This approach erroneously assumes that United States labor law can be used to counter the myriad and complex "push" and "pull" factors which affect decisions to migrate illegally to the United States. Yet it utterly ignores the far more predictable and straightforward ways in which labor law enforcement affects the decisions of employers in this country.

This simplistic approach ignores the many different factors which "push" aliens from their native countries and/or "pull" them to the United States.[206] The long-term "push" factors most often identified are

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[203] See text accompanying note 53 supra.

[204] See Chishti, Workshop on Unions and the New Immigration Law, text of talk at Colloquium, Immigration Reform: Rights for America's Undocumented, 16 N.Y.U. Rev. L. & Soc. Change 102-03 (1987-88); Kleinman, The Impact of the Immigration Reform and Control Act on Farmworkers: Pyrrhic Reform and the Reregulation of Exploitation, unpublished text of talk at Colloquium, Immigration Reform: Rights for America's Undocumented, New York University, Mar. 7, 1987, at 7-8 (on file at New York University Law Review).

[205] 846 F.2d 700 (11th Cir. 1988).

[206] See, e.g., W. Cornelius, The Role of Mexican Labor in the North American Economy of the 1990's, at 1-3 (unpublished paper presented at Fourth Annual Emerging Issues Program for State Legislative Leaders: "The North American Economy in the 1990's," University of California, San Diego, December 7-10, 1988) (on file at New York University Law Review); D. Papademetriou & N. DiMarzio, Undocumented Aliens in the New York Metropolitan Area:

high unemployment, pervasive underemployment, population growth rates outpacing the rate of job creation, extreme inequality of income distribution, and lack of means to achieve upward mobility.[207] Short-term factors include inflation, currency devaluation,[208] and the hardships resulting from austerity programs demanded by the International Monetary Fund and foreign banks as a condition for rescheduling foreign debt.[209] There are also non-economic "push" factors, such as war and persecution, which make employment conditions even more irrelevant to the decision to emigrate.[210]

Complementing these complex and interwoven "push" factors is the "pull" of employment opportunities in the United States, particularly for

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An Exploration into Their Social and Labor Market Incorporation 63-65 (1986); Cornelius, Mexican Immigration: Causes and Consequences for Mexico, in Sourcebook on the New Immigration 69 (R. Bryce-Laport ed. 1980). For literature emphasizing "push" factors in the immigrant's country of origin which lead to emigration, see V. Briggs, Immigration Policy and the American Labor Force 144-48, 153 (1984); S. Pedraza-Bailey, Political and Economic Migrants in America 73-74, 145 (1985); D. Reimers, Still the Golden Door 132-33, 138 (1985); Jenkins, Push/Pull in Recent Mexican Migration to the U.S., 11 Int'l Migration Rev. 178 (1977).

For literature emphasizing how the United States system of production "pulls" in illegal immigrants, see Bustamante, Commodity-Migrants: Structural Analysis of Mexican Immigration to the United States, in Views Across the Border 183 (S. Ross ed. 1975); Piore, The Economic Role of Migrants in the U.S. Labor Market, in Sourcebook on the New Immigration 427 (R. Bryce-Laport ed. 1980) [hereinafter Piore, Role of Migrants]; Piore, The 'Illegal Aliens' Debate Misses the Boat, in Working Papers for a New Society 60 (Mar./Apr. 1978) [hereinafter Piore, Debate].

For a discussion of the social and economic networks which link source communities for undocumented immigration with employers in the United States, see W. Cornelius, supra, at 1-3. For a discussion emphasizing the role of social networks and the expansion of the international capitalist economy in labor migration, particularly from Mexico to the United States, with an analysis of the inadequacies of "push/pull" theories, see A. Portes & R. Bach, Latin Journey 3-10, 11-20, 125-39, 240-68, 299-333, 334-47 (1985).

[207] See, e.g., V. Briggs, supra note 206, at 144-48, 153; S. Pedraza-Bailey, supra note 206, at 73-74, 145; D. Reimers, supra note 206, at 132-33, 138, 153; Cornelius, supra note 206, at 69, 74-78; Jenkins, supra note 206, at 186-87, 204. Some point to the strategies of capitalist development in Mexico, which favor the upper and middle classes to the detriment of the poor, to explain much of the economic dislocation and pressure for emigration in recent years in that country. See S. Pedraza-Bailey, supra note 206, at 73-74, 145 (citing theories of Alejandro Portes and Francisco Alba). Some note the role that United States capital played in forming these strategies and causing labor displacement in Mexico. See W. Cornelius, supra note 206, at 71-72.

[208] For a discussion of the effects of currency devaluation in Mexico, see Rohter, Mexico's Tough Economic Crisis, N.Y. Times, Dec. 16, 1987, at D1; Rohter, Mexico Cuts Peso by 22% in Effort to Help Economy, N.Y. Times, Dec. 15, 1987, at A1.

[209] V. Briggs, supra note 206, at 148-49; Cornelius, supra note 206, at 72-73; see also Bailey & Watkins, Mexico's Dilemma, N.Y. Times, Dec. 29, 1987, at A19 (Mexico must choose between economic growth and servicing its debt).

[210] A cable from the American Embassy in El Salvador, a country in the midst of a lengthy and often brutal civil war, indicated that the employer sanction provisions had failed to reduce undocumented immigration from that country. Pear, Law on Aliens Fails to Halt Salvadorans, N.Y. Times, Dec. 21, 1987, at A3.

Mexican workers.[211] Commentators point to the role of what they term a secondary labor market in the United States economy and explain how that market depends in part on illegal immigration from less developed countries.[212] The secondary market includes the less secure, menial jobs filled by a more transitory, exploited workforce.[213] These jobs are often held by undocumented aliens, sometimes at rates violating the wage and hour laws.[214] Currency devaluation and inflation in a worker's country of origin can make even subminimum wages in the United States relatively desirable.[215] Thus, immigrant workers, and particularly undocumented aliens, are often willing to provide the kind of cheap labor which maintains this secondary market, or which maintains it as a secondary market.[216] No government agency has suggested that undocumented aliens are any less available to work under substandard conditions because the wages offered them are uncompetitive with those of the primary labor market.

Furthermore, research shows that households in undocumented immigrants' countries of origin often "'diversify the family portfolio' through emigration" as a survival strategy.[217] The enormous buying power of the United States dollar in the immigrants' countries of origin[218] and the difference between wages in that country and even subminimum wages in the United States[219] mean that even subminimum wages earned in the United States and sent home can substantially help household members left behind. This research suggests that, contrary to the implicit assumption of the district court in *Patel*, decisions by aliens to migrate to the United States without documentation will be unaffected

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211 See V. Briggs, supra note 206, at 162-65; Bustamante, supra note 206, at 183; Piore, Role of Migrants, supra note 206, at 427; Piore, Debate, supra note 206, at 60.

212 See V. Briggs, supra note 206, at 162-65; Bustamante, supra note 206, at 183; Piore, Role of Migrants, supra note 206, at 427; Piore, Debate, supra note 206, at 60.

213 Piore describes this market as made up of those jobs that "full-time, native-born workers either reject out of hand or accept only when times are especially hard." Piore, Debate, supra note 206, at 60. He lists "[f]arm labor, low-level service positions . . ., and heavy, dirty unskilled industrial work" as examples of types of work in this market. Id.

214 D. North & M. Houstoun, supra note 3, at 33-34; S. Pedraza-Bailey, supra note 206, at 139-42; Marshall, Economic Factors Influencing the International Migration of Workers, in Views Across the Border 163, 167-70 (S. Ross ed. 1975). One commentator even distinguishes a third "substandard" market with even worse employment conditions than those of the secondary market. See V. Briggs, supra note 206, at 160-62.

215 See note 208 supra. For an international comparison of wages, see Int'l Labour Office Yearbook of Labour Statistics 725-825 (1987). Robert Searby, the DOL's Deputy Undersecretary for International Affairs, estimated that immigrants earn ten times more in the United States than in their countries of origin. H.R. Rep. No. 115, pt. 1, 98th Cong., 1st Sess. 17 (1983) (testimony of Robert Searby).

216 See S. Pedraza-Bailey, supra note 206, at 139-42.

217 D. Papademetriou & N. DiMarzio, supra note 206, at 53-54.

218 See note 208 supra.

219 See id.

by the ability or inability to receive the minimum wage or overtime compensation.

Much discussion of illegal migration focuses on undocumented Mexican workers, probably the poorest paid group in the United States on the whole.[220] In addition to the general economic factors noted earlier,[221] researchers have found that a history of American use of cheap Mexican "guest" labor,[222] established patterns of legal and illegal migration which continue to this day.[223] These patterns are perpetuated by the regional economic dependence the earlier programs created.[224] They are also perpetuated by networks of Mexican families and villagers residing in the United States who originally came to the United States through those programs and who now facilitate migration from Mexico and employment of the next generation of immigrants.[225]

The combination of a market demand for cheap, exploitable labor in the United States and economic and political realities abroad make it difficult to imagine that labor law enforcement against employers of undocumented aliens has any effect on the decision by alien laborers to migrate.[226] Every day, Mexican laborers take frightening risks at enormous

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220 D. North & M. Houstoun, supra note 3, at 32.

221 See text accompanying notes 206-19 supra.

222 In particular, during World War II, the governments of the United States and Mexico entered agreements to permit the entry of temporary workers in agriculture and services essential to the war effort. Under this program, known as the Bracero Program, between four and five million temporary workers were admitted between 1942 and 1964, when the United States ended the program. SCIRP Staff Report, supra note 173, at 469. See generally R. Craig, The Bracero Program (1971); E. Galarza, Merchants of Labor: The Mexican Bracero Story (1964).

223 W. Cornelius, Mexican Migration to the United States: The Limits of Government Intervention (1981); S. Pedraza-Bailey, supra note 206, at 70-73; A. Portes & R. Bach, supra note 206, at 76-83; J. Samora, Los Mojados 44-45 (1971); see also Cardenas, United States Immigration Policy Toward Mexico: An Historical Perspective, 2 Chicano L. Rev. 66, 68 (1975) (assigning responsibility for illegal immigration to past practices of United States); Fogel, Illegal Alien Workers in the United States, 16 Indus. Rel. 243 (1977) (de facto United States policy toward Mexican labor is "bring them in when they are needed, send them back when they aren't").

224 V. Briggs, supra note 206, at 151; Cornelius, supra note 206, at 71.

225 Researchers have diagrammed the principal patterns of illegal Mexican migration, demonstrating how young male residents from certain villages, many of them in the interior Mexican states, migrate each year to particular locations in the United States where they have ties in order to perform certain types of work. The economies of these villages are linked to these jobs in the United States, depending on them for the survival of the community. W. Cornelius, Working Papers in U.S. Mexican Studies 5 (1981); Jones, Macro-Patterns of Undocumented Migration Betweeen Mexico and the U.S., in Patterns of Undocumented Migration 33 (R. Jones ed. 1984); see also W. Cornelius, supra note 206, at 1-2.

For a discussion of the institutionalization of undocumented migration to the United States from Paraguay, see Riding, People Leave and the Dollars Arrive, N.Y. Times, Feb. 20, 1988, at A5.

226 One commentator has found circumstantial evidence that economic conditions, including job opportunities and wage levels, and a legal climate which allows for stronger unions are

expense to cross the United States border with the sometimes fatal "assistance" of "coyotes."[227] Wages in Mexico are several times lower than the lowest wage rates in the United States.[228] The repeated devaluations of the peso have multiplied these already significant differentials.[229] Even the worst secondary market jobs available draw workers to the United States.

It is unlikely that the Labor Department's targeted enforcement program provided much incentive to migrant workers to enter the United States illegally, particularly given their fear of contact with governmental authorities. It is also unlikely that more vigilant enforcement of wage and hour laws would induce many potential immigrants to come to this country when they otherwise would not. Furthermore, nonenforcement of the FLSA probably would not discourage potential illegal migrant laborers from seeking employment here. Few, if any, potential undocumented immigrants would be motivated to come to the United States by the possibility of bringing a wage suit if they are underpaid.

On the other hand, the availability of jobs in the secondary market to undocumented aliens depends on the continuing desirability of hiring such workers under conditions below those of lawful workers. As Congress and the Carter and Reagan Administrations have found, uniform enforcement of wage and hour laws removes the economic advantage which exists for employers who pay undocumented workers less than the mandated minimum wage for lawful workers.[230] By contrast, nonenforcement encourages employers to continue hiring undocumented aliens because the risks of unlawfully employing unauthorized aliens are outweighed by the savings of paying those employees subminimum wages. As long as employing undocumented labor remains profitable, some employers will seek to hire undocumented aliens in violation of the new IRCA prohibitions. As long as those jobs are offered to undocumented aliens, they will be filled by them.

Neither Congress, the Carter Administration, nor the Reagan Administration was troubled by supplying the most basic labor protections

among the factors influencing migration patterns of undocumented aliens within the United States. See Jones, supra note 225, at 53-54.

227 See D. Reimers, supra note 206, at 208-10; J. Samora, supra note 223, at 109. A "coyote" is a professional smuggler of undocumented aliens into the United States across the Mexican border. Bustamante, after being a participant-observer, found that the average alien "is placed in a position where he endangers his physical well-being, his human dignity, and even his life for a pittance." Bustamante, supra note 206, at 127. For an account of the increasing number of undocumented aliens entering the United States by extremely hazardous rail trips, see Aliens' Rail Trips Grow More Perilous, N.Y. Times, Nov. 2, 1988, at A16.

228 V. Briggs, supra note 206, at 149; D. North & M. Houstoun, supra note 3, at 38; Cornelius, supra note 206, at 74.

229 See note 208 supra.

230 See notes 120-96 and accompanying text supra.

to undocumented aliens. It is hard to see how the *Sure-Tan* Court could have found this issue problematic. It is even harder to understand the willingness of the district court in *Patel* to rewrite the express provisions of a federal labor statute to remove those protections.

CONCLUSION

Courts should continue to uphold the right of undocumented workers to backpay for wage and hour violations. Liability for underpayment of such workers is necessary not only to compensate these workers but also to raise the cost of unlawful exploitation. There is little danger that such protection will encourage illegal immigration.

Congress has provided laws to deter illegal immigration and has designated penalties for those who violate those laws. It has not chosen to exclude undocumented aliens from enforcement of the labor standards it established to protect workers in the United States. Rather, it has recognized that the interests of lawful workers are best protected by uniform enforcement of minimum labor standards for all workers.

Those concerned that wrongdoers will be rewarded if backpay is awarded to undocumented aliens should look at the benefits that accrue to employers who violate the new immigration law and wage and hour laws as well. They should note that the IRCA places responsibility for the employment of undocumented aliens squarely on the shoulders of United States employers. They should also examine the reasons that motivate people to come to the United States illegally and the degree of American reponsibility for their migration. Undocumented aliens working in low-paying, insecure, and often unsafe jobs have come to the United States because of the strong economic incentives for them to do so. They have been able to do so because it serves the interests of United States employers.

Congress and the Executive have sent clear signals on the need for full enforcement of wage and hour laws against employers of undocumented aliens. No other policy makes sense. There is no legal or policy basis on which to deny undocumented workers the minimum standards of decency we have established for the workplace.

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