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No Two Ways about It: Employer Sanctions versus Labor Law Protections for Undocumented Workers

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*Legislation that would impose civil or criminal sanctions on those who employ undocumented workers has been proposed to every Congress since the early 1970's. No session, however, has come as close to enacting employer sanctions as the 97th Congress did in December of 1982. In this article, the authors discuss why such employer sanctions would undercut both national labor policy and the stated goals of our immigration laws. The authors explain that employer sanctions would have these negative, perhaps disastrous effects precisely because they insulate from legal attack the "obvious exploitation of illegal aliens who are afraid to complain to authorities when they are abused or underpaid."

**Immigration Reform**

THE SIMPSON-MAZZOLI bill, which would have brought about major reform of the nation's immigration laws, died tumultuously, at least for now, in the House of Representatives Saturday night. But it will be back.

The measure was tabled because more than 300 amendments must be acted upon and both time and temper were short for the lame duck session.

Few recent legal proposals have raised the emotional level of Congress quite so high. The bill calls for civil and criminal punishment of employers who knowingly hire illegal aliens. This has aroused opposition of Hispanics who believe it will exacerbate discrimination in employment against persons of Spanish descent who are either American citi-
zens or legal residents entitled to employment. The bill's advocates say that there will be no discrimination because all citizens and legally-resident aliens will be required to prove that they are qualified for employment. And they say that the law will end instances of obvious exploitation of illegal aliens who are afraid to complain to authorities when they are abused or underpaid.

I

INTRODUCTION

In the last decade, the influx of undocumented workers into the American labor market has become a major dilemma for American immigration policy. With unemployment in the United States topping ten percent, the clamor for an economic scapegoat has subjected official policy to increased scrutiny. Despite a plethora of articles, official hearings, academic reports and legislative proposals, however, no consensus has emerged as to the nature of, let alone solutions to, this problem.

A few think it sufficient and possible to seal the border. Most others, believing the flow of undocumented workers into the United States inexorable, focus on reducing the attraction of this country to foreign workers. Some seek to make American jobs inaccessible to undocumented workers by penalizing employers who hire them. Others want to see the often low-paying, semi-underground market which employs these workers integrated into the mainstream of the labor market, thus eradicating the demand for these workers and reducing the problems created by their illegal status.

Thus far, official government policy has concentrated on apprehending undocumented workers at the border and at the workplace. Recently, however, two circuit courts of appeals and the National Labor Relations Board (the Board) have addressed the labor law side of the problem. In a series of cases, undocumented workers have been declared "employees" under the National Labor Relations Act (Labor

2. We have chosen the term "undocumented workers" as opposed to the more common phrase "illegal aliens."
4. See, e.g., S. Lewis, SLAVE TRADE TODAY 202-22 (1979) (newspaper articles); Controversy over Proposed Amnesty for Illegal Aliens, 56 CONG. DIS. 225 (1977) (views of congressional leaders); D. Reavis, WITHOUT DOCUMENTS 11 (1978) (scholarly works); S. 2222, 97th Cong., 2d Sess., 128 CONG. REC. S10,618 (daily ed. Aug. 17, 1982) (proposed legislation). See also PROCEEDINGS OF THE THIRTEENTH CONSTITUTIONAL CONVENTION OF THE AFL-CIO 415-17 (1979) (resolution by the ILGWU opposing employer sanctions; tabled because it conflicted with "Executive Council positions on a number of matters related to undocumented workers").

Prominent among the scholars supporting employer sanctions are David North and Professor Walter Fogel; opposing sanctions are Professors Michael Piore and Wayne Cornelius. Their works are cited throughout this paper.

See also SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, REPORT OF CONCLUSIONS AND RECOMMENDATIONS (1981) [hereinafter cited as SELECT COMMISSION REPORT].
Act)\(^5\) and have been granted remedies for violations of their labor law rights. Thus workers who lack papers may nevertheless form and join unions, elect bargaining representatives, and enforce minimum wage, hour, and occupational safety and health statutes.\(^6\) Courts assert that extending these protections serves both to implement the policies of the Labor Act and to prevent substitution of undocumented workers for legal workers by removing the incentives that lead employers to prefer hiring "cheaper" illegal workers.\(^7\)

At the same time, Congress has debated the establishment of legal deterrents to the employment of the undocumented. The Senate recently passed S. 2222, a general immigration reform act which includes employer sanctions. Known as the Simpson-Mazzoli bill, it authorizes first-time penalties of $1000 for employers who "knowingly" hire undocumented workers.\(^8\) The House of Representatives adjourned before taking action on the bill; however, it is expected to reappear before the 98th Congress in a similar form.

At first blush, these developments appear to complement each other. Both are designed to discourage employment of undocumented workers—one by removing the incentive which causes employers to prefer undocumented workers, the other by penalizing employers who hire them.

As we shall argue, however, these policies are mutually exclusive. Employer sanctions would prevent undocumented workers from enforcing wage and standards laws and from forming unions. The Board would have no effective remedy against employers who discharge or threaten undocumented employees for exercising their rights under the Labor Act. In fact, the federal appellate opinions which have upheld the Board's extension of labor protections to illegal workers depend on the fact that no existing legislation prohibits employing such workers. Thus no federal law preempted the Board's action. A federal employer sanction law, however, would remove this key legal basis from the courts' holdings.

That these conflicting developments—employer sanctions and labor law protections for the undocumented—have arisen concurrently emphasizes the lack of a coherent immigration-labor policy. While the magnitude of the labor problems created by illegal immigration demands a unified solution, the relative importance of these recent developments and their potential impact on each other has been little explored.

6. These decisions are discussed at length in section II. C. of this article, infra.
7. Id.
8. S. 2222, supra note 4, 128 CONG. REC. at S10,618.
Those debating whether to enact employer sanction legislation seem to have overlooked its effect on labor law enforcement. Legislators must realize that loss of statutory labor protection for undocumented workers is a hidden cost of employer sanctions, one that must be added into the calculus of policymaking.

The potential effects of sanctioning employers who hire undocumented workers are alarming. Adoption of employer sanctions would remove undocumented workers from the protection of the Labor Act, thus encouraging the growth of a supply of low-paid workers with no ability to unionize or remedy unfair labor practices by employers. The sanctions themselves would not deter the employment of such workers, as adequate funding to enforce the sanctions is neither proposed nor likely in these austere times. Hiring undocumented workers would therefore become more profitable under the new law, not less.

Our discussion is in three parts. First, we will report on the current employment status of undocumented workers and the coincident evolution of labor law protections for the undocumented and employer liability laws. Second, we will demonstrate why these two enforcement strategies are mutually exclusive. Finally, we will examine the probable effects of each strategy, and conclude that increased labor law protections will best benefit American society, and best effectuate immigration policy as well.

To provide a context for this discussion, we will first review briefly the characteristics of illegal immigration, and then examine employer sanctions and the development of labor protections for undocumented workers.

II

THE STATUS QUO

A. The Characteristics and Role of Undocumented Workers in the United States Labor Market

1. Characteristics

There is a paucity of hard data on illegal migration to the United States. No one knows with certainty how many people are in the

9. Select Commissioner Elizabeth Holtzman, discussing the Commission's employer sanctions recommendation, observed:

We still do not know with any certainty how many illegal aliens are in the United States, nor do we have any reliable information on their impact on the economy, or in what sectors. Similarly, we have been presented with no new data on the benefits which illegal aliens may provide in the form of increased productivity, additional tax payments or contributions to the social security system.

Statement of Commissioner Elizabeth Holtzman, SELECT COMMISSION REPORT, supra note 4, at 341.
United States without papers. A widely quoted guess is the estimate of three to six million persons that the Select Commission on Immigration and Refugee Policy adopted in its 1981 report to the President and Congress. The Census Bureau concurs: while warning that there are currently no reliable estimates, it cautiously speculates that the “total number of illegal residents in the United States for some recent year, such as 1978, is almost certainly below 6 million . . . possibly only 3.5 to 5 million.” It is clear that undocumented migration has grown considerably in the past two decades.

Somewhat more reliable information exists about who undocumented workers are and what they do. A 1976 survey of 793 undocumented aliens by Linton and Company, still considered the most comprehensive study available, produced a composite portrait of a young, poorly educated male who cannot speak English. While nearly three quarters of the undocumented workers studied came to the United States to find a job, most had considerable work experience in generally more sophisticated jobs in their own country. Although most were single, they supported an average of 4.6 dependents at home, to whom they sent almost one-fourth of their gross monthly pay. The Linton survey thus confirms other studies which report that most undocumented workers, particularly Mexicans, never seriously consider moving permanently to the United States.

Most workers surveyed took home considerably less pay than American workers in the same industries. “Respondents worked

13. Id. The Census Bureau also reports that the size of the Mexican population living illegally in the United States is probably less than half of the total “illegal” population. Id. Yet Mexicans are far more likely to be located than other nationals because the INS concentrates its efforts along the U.S.-Mexican border. In fiscal year 1977, reports one study, 92% of deportable persons seized by that agency were Mexicans. See Sengal & Viallet, Documenting the Undocumented, Monthly Lab. Rev., Oct. 1980, at 18.
14. Between 1964 and 1976, the number of INS apprehensions increased ten-fold from 85,597 to 875,915. National Commission for Manpower Policy, Manpower and Immigration Policies in the United States 120 (1978) [hereinafter cited as Manpower and Immigration]. The authors, David North and Allen LeBel, point out, though, that these figures count arrests, not people, and that a given undocumented worker may be arrested and thus counted several times.
16. Id. at 82-89.
17. Id. at 83.
longer hours but consistently earned significantly less per week than U.S. workers," notes the report.\(^9\) Almost 24\% were paid less than the minimum wage,\(^2\) compared to 6.2\% of American workers during roughly the same period.\(^2\)

Unexpectedly, Linton found that 16.4\% of the study group belonged to a union during their stay, a dramatic increase from earlier surveys. This minority received higher wages and enjoyed better employment conditions than undocumented workers as a whole.\(^2\)

2. **Role in United States Labor Market**

Undocumented workers rarely compete in the primary labor market occupied by American workers.\(^2\) Instead, there is a secondary labor market that is different, and separate, from the primary labor market. . . . The disadvantaged of the society have been forced into competing for jobs in the secondary labor market, and these jobs are marked by

—low wages;
—unattractive working conditions; and
—minimal opportunities for advancement.

While these jobs have been with us for a long time, traditionally the urban ones were filled by migrants from U.S. rural areas . . . and by legal immigrants . . . We have run out of this industrial reserve, and their children are unwilling to accept the secondary labor market jobs that attracted their parents a generation earlier. Illegal aliens have

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20. *Id.*
23. There is no evidence that undocumented workers take any significant number of jobs from American workers. It appears, in fact, that the vast majority of positions held by undocumented workers are low-paying, miserable, dead-end jobs, thoroughly unattractive to “legal” workers. In an oft-cited experiment:

. . . the perspective [sic] of jobs becoming available as a result of illegal aliens vacating job slots failed to materialize in Los Angeles when 2,154 illegal aliens were apprehended while on the job. In this case, the State Human Resources Development Agency identified the newly created job slots and attempted to fill the 2,154 vacancies with citizen residents living in the Los Angeles area. The effort failed. Some of the reasons for the failure were: (1) most employers paid less than the minimum wage rate (2) the job categories were not appealing to the local resident (a matter of prestige) and (3) applicants were discouraged by not only the low wages but also the difficulty of some jobs and the long hours demanded by the employers.

V. VILLALPANDO, *IMPACT OF ILLEGAL ALIENS ON THE COUNTY OF SAN DIEGO* 59 (1977). The same experiment was conducted in San Diego with similar results. *Id.* For a report of another experiment in Presidio, Texas, see *GOVERNMENT ACCOUNTING OFFICE, ILLEGAL ALIENS: ESTIMATING THEIR IMPACT ON THE UNITED STATES* 19 (1980) [hereinafter cited as *GAO REPORT*]. North and LeBel, the authors of *MANPOWER AND IMMIGRATION*, take issue with Villalpando’s conclusions. *Id.*, supra note 14, at 165-66.
stepped into this gap. . .

M.I.T. economist Michael Piore moreover has found that immigrants do not displace native-born marginal workers, who are usually young people and women with families. "Women and youths who take low-level jobs are typically willing to work only in certain places and during certain hours; many don’t want low-level jobs at all." Political scientist Wayne Cornelius has reached a similar conclusion:

The principal impact of illegal migration may be to depress wage scales—or maintain the status quo—for certain types of unskilled jobs, rather than to displace native Americans from them. Workers cannot be displaced if they are not there, and there is no evidence that disadvantaged native Americans have ever held, at least in recent decades, a significant proportion of the kinds of jobs for which illegals are hired.

Finally, Piore has found that secondary market immigrant jobs do not replace the jobs of native workers. Instead, migrant jobs appear to fit one of two categories. In the first, such jobs make possible the relatively well-paid jobs of legal workers in declining industries. Firms operating in those industries would likely close down or move abroad in the absence of a critical portion of undocumented low-wage labor in the workplace. He cites the shoe and textile industries of New England as examples.

The second category includes jobs that merely contribute to the standard of living of better-off groups, e.g., household workers, some restaurant workers, delivery people and janitors. While some legal workers share this type of secondary market job with undocumented labor, they are presumably on their way to better jobs. These two


25. MIT economist Michael Piore, in his numerous works on illegal immigration, argues that the nature of economic development in the industrialized countries is the real cause of migration. "The current undocumented migration from Mexico and the Caribbean began in this manner in the late 1960's. Reserves of labor in the black South were being depleted, and what labor remained there was increasingly being absorbed by southern industry. In the North, the black labor force had come to be dominated by a second generation of workers intolerant of the jobs their parents had held. So employers went looking for Mexicans, Puerto Ricans, and other Latin Americans." Piore follows this analysis one step further, and in doing so comes to a startling conclusion. While the conventional wisdom in this field holds that unsanctioned migration is chiefly caused by "push" factors—i.e., poverty and underdevelopment in the workers' home countries—Piore argues that the nature of economic development in the industrialized countries gives rise to the "pull" factors which, he says, are the real cause of the migrant flow. Piore, supra note 24, at 62. For a contrary view, see Fogel, United States Immigration Policy and Unsanctioned Migrants, 33 INDUS. & LAB. REL. REV. 295, 299-301 (1980).


28. Id. at 63.

29. Id. at 62.
categories make up the "secondary labor market" whose existence, Piore argues, accounts for the rising tide of illegal immigration that began in the 1960's.30

B. Official Policy on Hiring Undocumented Aliens

1. Federal Policy

Proponents of employer sanctions insist that sanctions are essential to any effort to restrict illegal immigration and they have pressed hard for federal penalties for hiring undocumented workers.31 Congress, however, has long shied away from taking this step. In 1952, Congress recodified the Immigration and Nationality Act, making it a felony to import, transport, or harbor an undocumented person. That Act, however, specifies that employing such a person (including the usual and normal practices incident to employment) is not to be deemed to constitute harboring.32 This exception was dubbed the "Texas proviso" after the southwestern agricultural interests whose diligent lobbying had forced the compromise.33

Confronted with the economic slump of the early 1970's, the Nixon administration and a bipartisan congressional coalition made serious efforts to repeal the Texas proviso.34 Since 1972, Judiciary Committee Chairman Peter Rodino has annually introduced similar amendments, proposing civil and criminal penalties for persons who "knowingly employ" undocumented workers. Each of these attempts to enact federal sanctions has been successfully opposed by a combination of agricultural and industrial employers and minority groups. In August of 1982, Congress again came close to adopting employer sanctions. Although the Simpson-Mazzoli bill was adopted by the Senate, the companion House bill was shelved at the close of the 97th Congress. Both bills forbade "knowing" employment of undocumented aliens, and provided $1000 penalties for first offenses.35

30. *Because of this wholly separate, secondary labor market, some economists postulate that undocumented workers do not directly bring down wages or standards for other workers. If anything, the low cost of employing undocumented workers may help subsidize the higher wages and better conditions enjoyed by skilled and/or unionized workers, often employed by the same companies. Id. at 63. Furthermore, "all illegals in the labor market must, to some extent, make contributions to full employment as consumers of goods and services."* MANPOWER AND IMMIGRATION, supra note 14, at 163.


33. GAO REPORT, supra note 23, at 43.


35. S. 2222 would add section 274A to the Immigration and Nationality Act, 8 U.S.C. § 1324A (1976), to make it illegal to hire, recruit, or refer for employment aliens not authorized to work in the United States, "knowing" the person lacks work authorization. The proposed section also forbids hiring employees without attesting under penalty of perjury that the employer has
As we go to press, the only federal legislation making it illegal to employ undocumented workers applies to farm labor contractors. The Farm Labor Contractor Registration Act of 1963\textsuperscript{36} (the FLCRA) authorizes the Secretary of Labor to refuse to issue, or renew, or to suspend or revoke the registration certificate of any farm labor contractor who knowingly employs or recruits undocumented workers. In addition, since 1974, unregistered contractors have faced potential civil causes of action and criminal penalties, including fines of up to $10,000 and prison terms of up to three years.\textsuperscript{37}

Although these sanctions appear severe, they are too limited in scope to appreciably affect the undocumented workforce.\textsuperscript{38} First, the FLCRA applies only to farm labor: only 16\% of the aliens surveyed by the Linton and Company study, however, worked in agriculture.\textsuperscript{39} Second (and more importantly), the Act defines “contractor” narrowly: it excludes any “farmer, processor, canner, ginner, packing shed operator, or nurseryman” who knowingly recruits or employs undocumented workers for its own operation.\textsuperscript{40} Congress clearly wanted to affect only those who engage labor to hire out to others, and thus exempted all primary employers. Finally, it is the consensus both of unions that represent labor contractor employees and of scholarly observers that the FLCRA employer sanctions are simply not enforced.\textsuperscript{41}

2. \textit{State Laws}

In the 1970’s, several state legislatures considered bills establishing employer sanctions. Although many of these bills were defeated when employers joined Latino groups in opposing them,\textsuperscript{42} at least 12 states have adopted statutory penalties for hiring undocumented workers.\textsuperscript{43}

verified that the employee is eligible for employment. Section 274A(b)(1)(B) lists eight different forms of possible documentation that an employer may examine to verify the employee’s status. The employer need only conclude that the “document reasonably appears on its face to be genuine.”

Civil penalties for illegal hiring begin at $1000 per unauthorized employee, and rise to $2000 for second offenses. An employer exhibiting a pattern or practice of illegal employment may be fined $1000 and/or imprisoned for six months for each violation. Failure to comply with attesting provisions warrants a $500 fine per violation. The bill also provides $3000 fines for fraud and misuse of visas, permits, and other immigration documents.

\begin{itemize}
  \item 37. 7 U.S.C. §§ 2048(a), 2050(a) (1976).
  \item 41. \textit{See Vause, Farm Labor Contractor Registration Act, 11 STETSON L. REV. 185 (Winter 1982).}
  \item 42. \textit{Lewis, supra} note 4, at 168 (1979).
  \item 43. CAL. LAB. CODE § 2805 (West Supp. 1982); 31 CONN. GEN. STAT. ANN. § 51k (West Supp. 1982); DEL. CODE ANN. tit. 19, § 705 (1976); FLA. STAT. ANN. § 448.09 (West 1981); 21
Most of the state laws emulate California Labor Code section 2805, enacted in 1971. That section provides:

(a) No employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers.

(b) A person found guilty of a violation of subdivision (a) is punishable by a fine of not less than . . . ($200) nor more than . . . ($500) for each offense.

(c) The foregoing provisions shall not be a bar to civil action against the employer based upon violation of subdivision (a).\(^44\)

Two cases in the California courts have tested the law's constitutionality. In *Dolores Canning Co. v. Howard*,\(^45\) a group of employers requested a judgment declaring the statute unconstitutional and enjoining its enforcement. In *DeCanas v. Bica*,\(^46\) documented workers brought an action for damages and injunctive relief under subsections 2805(a) and (c) against employers who had allegedly hired undocumented workers.

In each case, a division of the California Court of Appeal held section 2805 unconstitutional and granted a permanent injunction against its enforcement. The divisions however gave different reasons for their decisions. In *DeCanas*, the court held that federal law preempts section 2805, reasoning that immigration law is a matter of exclusive federal jurisdiction.\(^47\) The *Dolores Canning* court agreed, but also held section 2805 invalid for conflicting with existing federal statutes.\(^48\) The California Supreme Court reviewed neither case.\(^49\)

The United States Supreme Court, however, granted *certiorari* in *DeCanas*,\(^50\) and unanimously reversed the California Court of Appeal.\(^51\) The Court agreed that immigration is a matter of exclusive federal regulation, but held that section 2805 does not seek to regulate immigration. Immigration law, the Court declared, is "a determination of who should or should not be admitted to the country, and the conditions under which a legal entrant may remain."\(^52\) Section 2805 on the other hand concerns the activities of aliens once they are in the country. As the regulation of alien activities is not a field over which Congress
has demanded exclusive control, and as the regulation of the employment relationship is a matter of substantial state interest, the Court held that state employee sanctions are not per se preempted by federal law.53

The Court, however, did not finally decide whether section 2805 passes constitutional muster. Read literally, the statute would forbid hiring a non-resident authorized to work in the United States.54 Read in this fashion, it would conflict with federal law and thus be invalid.55 Construction of California statutes, however, is a matter for the courts of that state. The Court therefore remanded the case to the California Court of Appeal to decide "whether and to what extent . . . § 2805 as construed would conflict with the INA or other federal laws or regulations."56

DeCanas remains in this posture. No new judicial proceedings have considered the validity of California's employer sanction law; nor, apparently, have the DeCanas plaintiffs pursued their claim. In the meantime, the Dolores Canning decision remains unchallenged, and thus good law: section 2805 may not be enforced.57

The situation in California is not unique. A report by the Government Accounting Office (GAO) found that enforcement of state employer sanction laws "has been virtually nonexistent."58 As of March 1980, there was only one successful prosecution under a state sanction law, an employer in Garden City, Kansas, who was fined $250 for knowingly employing undocumented workers.59

The GAO report presents several explanations for this lack of enforcement. First, the report suggests that "the illegal alien problem is not significant in States" having virtually unenforced employer sanction laws.60 This explanation is belied by the fact that all of those states perceived the problem to be sufficiently grave to warrant sanctions, and by the fact that California, which may well have the highest undocumented population in the country,61 has not enforced its employer sanctions for almost ten years.

The GAO report further suggests that the states may be awaiting a comprehensive federal scheme which will replace and preempt state laws. The states, however, instituted employer sanctions because they
perceived that "the federal government had failed to adequately deal with a pressing state problem." Thus, it seems unlikely that the states failed to enforce their laws in the hope that the federal government would enact its own. More credible reasons for this lack of enforcement are that it is an expensive undertaking for which funds are seldom allocated, and that it is a low priority for overburdened law enforcement officials.

Despite the promises of legislators, it is clear that state employer sanction laws have had no appreciable effect on either the number of undocumented workers or on the number of unemployed citizens. Moreover, the unwillingness or inability of the states to enforce existing employer sanction laws cannot provide encouragement to those who view federal sanction legislation as a workable solution to the problem of undocumented migration. As we shall discuss, there is no reason to believe that the federal government is prepared to take the steps necessary to succeed where the states have failed.

C. Labor Law Protections

1. Introduction

The adoption of employer sanctions in several states in the early 1970's challenged the Board's general policy of treating aliens without papers like other workers. In resolving the problem created by state employer sanctions, the Board took a firm stance, extending greater Labor Act protection to undocumented workers and adding significant new remedies for employer violations. Since then, this policy has won approval in three federal appellate decisions. Both recognition of unfair labor practices against undocumented workers and orders to remedy these practices, however, depend on the absence of valid employer sanction laws. The circuit court decisions themselves reveal precisely how crucial this connection is.

2. Undocumented Workers as "Employees" Under the Labor Act

Since the early 1940's the Board has consistently stated that aliens enjoy most of the same labor rights as citizens. The Board has functioned in a statutory vacuum on this issue as the Act excludes from its

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62. See generally Catz, supra note 38, at 762.
63. GAO REPORT, supra note 23, at 47.
64. For example, the state legislator who sponsored the Virginia employer sanctions bill claimed that it would "open up at least thirty thousand new jobs in his district alone." Lewis, supra note 4, at 168.
coverage a variety of employees but makes no mention of nationality or immigration status. In 1943, however, the Board concluded that aliens in general may be "employees" within the meaning of the Act, as national policy prohibits discrimination on the basis of race, creed, color, or national origin. Since then the Board has held consistently that illegal aliens are employees within the meaning of the Act and are entitled to protection of the Act. Aliens without working papers have been permitted to vote and have been accorded protections in the exercise of section 7 rights.

Under the accommodation doctrine enunciated in the *Southern Steamship* case, however, the Board is precluded from issuing orders that would contradict a valid federal statute in another area of law. Thus it was inevitable that the Board would face the issues raised by

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67. For example, section 2(3) of the National Labor Relations Act (NLRA) excludes from its definition as an employee domestic workers, spouses and children of employers, railway workers, agricultural workers, supervisors, and independent contractors. 29 U.S.C. § 152(3) (1976). Therefore, the discussion of labor law protection for undocumented workers does not include agricultural workers. As we have seen, however, they constitute only 16% of undocumented migrants. See supra Section II.B.1. In those states which have passed agricultural labor relations acts, however, farmworkers have the rights discussed here, insofar as the state laws track the wording of the NLRA. See, e.g., California Agricultural Labor Relations Act, Cal. Lab. Code §§ 1140-1166.3 (1975). Discussion of those acts is beyond the scope of this article. Clearly, the concerns we discuss here apply to agricultural workers to the same extent that the labor relations laws mirror the NLRA.


70. Amay's Bakery & Noodle Co., 227 N.L.R.B. at 214, 94 L.R.R.M. at 1166. Section 7 rights include the right to organize, to join unions, and to act and bargain collectively.

71. Southern Steamship Co. v. NLRB, 316 U.S. 31 (1942). In that case, the steamship company's unfair labor practices provoked a strike by merchant seamen. The company fired the strikers, but the Board ordered them reinstated. On review the company contended that because the strikers' conduct was mutiny under federal criminal law, 18 U.S.C. §§ 2192-2193 (1969), the Board had exceeded its authority by ordering reinstatement. The Board responded first, that the strikers' action was not mutiny, and second, that the Labor Act gave the Board discretion to reinstate the strikers in any case. 316 U.S. at 40. The Supreme Court disagreed, five to four, on both counts: the strikers had mutinied, and the Board had abused its discretion. Id. at 40-48. According to the Court, [T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.

Id. at 47.

The Court's opinion makes no attempt to explain how the Board is to discern the purpose and scope of federal statutes with which it is thoroughly unfamiliar. Nor is it clear whether the Board's duty to accommodate arises only when Congress has enacted a specific prohibitory statute (like the mutiny laws), or if the Board is also charged with divining the policy underlying an entire statutory strategy, even when the law contains no specific conflicting provisions, the Immigration Act being an obvious example. Finally, assuming *arguendo* that the Board is competent to discern the purpose and application of federal laws other than the Labor Act, the Court gives the Board very little information about how to effect the necessary accommodation.
immigration law generally, as well as the difficulties specifically posed by state employer sanction laws.

Those issues finally arose in *Amay’s Bakery and Noodle Co.* That case was significant for two reasons. It was the first time the Board had to confront an employer sanction law, and it was the first time undocumented employees prosecuted unfair labor practices and received conventional remedies for them.

The facts in *Amay’s Bakery* reveal classic unfair labor practices. A majority of the workers at Amay’s Bakery and Noodle Company in Los Angeles signed cards authorizing Teamsters Local 630 to act as their collective bargaining agent. Soon afterwards, the company fired two fortune cookie makers for their involvement in “the Union Movement,” and later discharged several others for signing authorization cards.

The union charged that the company had violated Labor Act section 8(a)(3) by firing workers for engaging in union activity. An administrative law judge (ALJ) ruled for the union, ordering the employer to cease its anti-union practices. As the fired employees were undocumented workers, however, the ALJ refused to order the usual remedy for discriminatory discharge—reinstatement with back pay—reasoning that such a remedy would force the employer to violate California Labor Code section 2805. The ALJ concluded that the Supreme Court’s decision in *DeCanas v. Bica* “precluded him from granting reinstatement will full back pay to aliens without working papers.”

On review, the Board examined the history of both section 2805 and *DeCanas*, and noted that the statute is invalid under *Dolores Canning*. Asserting that a “conventional reinstatement order thus would not place the Respondent in clear violation of a valid state statute,” the Board modified the ALJ’s order to include reinstatement with backpay for all the discharged workers.

Since its decision in *Amay’s Bakery*, the Board has extended Labor Act protections and remedies to undocumented workers in a variety of

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73. *Id.* at 216, 94 L.R.R.M. at 1165.
74. *Id.* at 217.
75. Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3) (1976), provides, *inter alia*, that it shall be an unfair labor practice to discriminate “in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization.”
76. CAL. LAB. CODE § 2805 (West Supp. 1982).
78. 227 N.L.R.B. at 214, 94 L.R.R.M. at 1166.
80. 227 N.L.R.B. at 214, 94 L.R.R.M. at 1166.
contexts. In the Sure-Tan cases, a single fact situation yielded three Board opinions and the first federal appellate court review of the Board’s policy on undocumented workers.

3. Undocumented Workers and Labor Act Remedies: Bargaining Orders to Enforce Valid Union Elections (Sure-Tan I)

Sure-Tan, Inc., operated a tannery in Chicago, owned and managed by the Surak brothers. Most of the employees of the company were undocumented workers from Mexico. In August, 1976, an Amalgamated Meat Cutters local petitioned the Board for certification as the collective bargaining representative of the tanner employees. The Board scheduled an election for December.

The Suraks attempted to discourage their employees from voting for the Union through promises and threats coupled with racial abuse. Despite the Suraks’ efforts, the Union won the ballots of six out of the seven employees eligible to vote. The Suraks then asked the INS to check the immigration status of their employees, knowing full well that most of their workers were undocumented. INS agents “raided” the employer’s premises and rounded up six employees, who “were promptly put aboard a bus and deported to Mexico.” When the Suraks subsequently refused to bargain with the Union, it filed unfair labor practice charges with the Board.

In Sure-Tan I, the Board found that the Suraks violated the Labor Act by refusing to bargain with their employees’ authorized representative. The Suraks, however, refused to obey the Board’s order to bargain in good faith. The Board was thus compelled to petition the federal court of appeals to enforce its bargaining order. In NLRB v. Sure-Tan, Inc., the Seventh Circuit upheld the Board’s decision, and enforced the order.

In the enforcement proceedings, the Suraks argued that the Board’s certification of the Union was improper, as most of the voters in the representation election had been “illegal aliens.” In its decision,

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82. 672 F.2d at 595.
83. In full: Chicago Leather Workers Union, Local 431, United Food and Commercial Workers Union, AFL-CIO [hereinafter the Union].
84. 672 F.2d at 595.
85. Id. at 596.
86. 583 F.2d at 357.
87. 234 N.L.R.B. at 1189-90.
88. 231 N.L.R.B. at 140.
89. 583 F.2d 355 (7th Cir. 1978).
the Board cited Amay's Bakery and reiterated that undocumented workers are "employees" within the meaning of section 2(3) of the Labor Act. The Seventh Circuit agreed, concluding that "aliens are employees and are eligible to vote under the Act."

The court also considered the Suraks' contention that to allow undocumented workers to vote in representation elections would undermine federal immigration policy. It pointed out that the Board's order did not contradict immigration law:

Just as it is true, . . . that no federal immigration statute actually prohibits an employer from hiring an illegal alien [citing DeCanas] . . . , it is also true that no immigration statute prohibits an illegal alien from working and voting in a Board election.

The court then noted that the determination of what comports with federal immigration policy is "speculation" best "left to immigration officials rather than to the Board. . . ." The court nonetheless made two policy points. First, it noted that the benefit of the Board's action "goes not to the law-breaker—the aliens—but rather to the union, which is not accused of wrongdoing." Second, the court pointed out that:

If a company can avoid certification merely by hiring aliens, undoubtedly some companies will choose to hire such aliens in order to gain immunity from labor unions . . . Thus by refusing to certify unions with a majority of alien members we would be giving employers an extra incentive to hire aliens and thus would be defeating the goals of the immigration laws.

Finding no conflict with federal law or policy, the court considered whether the Board's bargaining order was an appropriate remedy. As most of the workers had been deported, the court recognized that the Union might no longer represent a majority of the workers in the bargaining unit. Under the rule enunciated in Brooks v. NLRB, however, absent "unusual circumstances" a union is irrefutably presumed to represent a majority of the bargaining unit employees for one year after winning certification. Holding that deportation of most of the bargaining unit members does not constitute such "unusual circumstances," the Sure-Tan I court concluded that:

The fact that the aliens have departed therefore does not prove that the Union has lost the majority status given to it by the aliens . . . In view of our conclusion that the Union's certification was valid, the Board's

90. See supra note 70 and accompanying text.
91. 583 F.2d at 359.
92. Id.
93. Id.
94. Id. at 360.
95. Id.
order will be enforced.97

4. Undocumented Workers and Labor Act Remedies: Reinstatement with Back Pay (Sure-Tan II)

Sure-Tan II,98 though a separate proceeding, grew out of the same fact situation. The Union charged that the Suraks discriminated against the deported workers, and thus committed an unfair labor practice under section 8(a)(3) of the Labor Act. The ALJ held, and the Board agreed, that the Suraks “constructively discharged” the workers by reporting their undocumented status to the INS.99 As these discharges were made in retaliation for the workers’ union activities, the employer was found to have committed an 8(a)(3) violation. As in Amay's Bakery, the ALJ had not ordered the employer to offer reinstatement and backpay to the deported workers. Once again, the Board found that the ALJ “erred in failing to grant the conventional remedy of reinstatement with backpay” and ordered the Suraks to make such an offer.100

Six months later, the Board’s General Counsel filed a motion to clarify the Sure-Tan II reinstatement order,101 contending that it “encouraged deported discriminatees to return as quickly as possible to claim their jobs and backpay rather than wait until an uncertain date when they might be able to reenter the United States legally.”102 This result, the General Counsel argued, would be “contrary to national immigration law and policy.” He suggested that the Board should instead order the Suraks to offer reinstatement and backpay “only to those discriminatees . . . . able to enter the United States lawfully.”103

With two members dissenting, the Board denied the General Counsel’s motion. The discriminatees were to be contacted and offered “unconditional reinstatement,” regardless of their location or immigration status. The Board held, moreover, that “the backpay period runs from the discriminatory loss of employment to the bona fide reinstatement offer.”104

To the suggestion that their decision contravened immigration law and policy, the majority responded:

97. 583 F.2d at 361. Judge Wood dissented on two grounds. First, he thought that the Board’s order conflicted with the Immigration Act. Second, he felt that the fact that a majority of the workers was deported was an unusual enough circumstance to rebut the Brooks presumption. Id. at 361-62.
98. 234 N.L.R.B. at 1187, 97 L.R.R.M. at 1439.
99. Id.
100. Id. at 1187-88, 97 L.R.R.M. at 1440.
101. 246 N.L.R.B. at 788, 103 L.R.R.M. at 1008.
102. Id.
103. Id.
104. Id.
We do not regard it as within our authority to alter the obligations imposed by the Act in a manner which might assist in reaching whatever may be the current goals of immigration policies, and would be uncertain of how to do so even if we considered it proper.103

On appeal, the Seventh Circuit106 found ample evidence of an unfair labor practice, and agreed that summoning the INS amounted to constructive discharge in retaliation for union activity. The court endorsed the conventional remedy of reinstatement, awarding six months’ backpay as “a minimum amount for purposes of effectuating the policies of the Act” and “the minimum (time) during which the discriminatees might reasonably have remained employed without apprehension by INS, but for the employer’s unfair labor practice.”107 Thus the court found that there is no inherent conflict between immigration policy and labor law.

Moreover, the Seventh Circuit rejected Sure-Tan’s claim that it was legally obligated to disclose the presence of the alien employees to the INS on the ground that no law forbade employing such workers. The court viewed Sure-Tan’s “moral” obligation to make such disclosure insufficient “to sanctify an otherwise unjustifiable violation of section 8(a)(3).”108 The court warned that “a contrary holding would encourage employers to hire illegal aliens, who would for all practical purposes be stripped of NLRA (National Labor Relations Act) protection and who could be fired with impunity at the first hint of union sympathy.”109

The court went on to explain the policy reasons for its decision:
It would be anomalous to encourage the honest toil of illegal aliens, accepting it with the understanding that these workers had the rights of employees under the Act, but then, when violations occur, to deny them such rights by refusing effective remedies. Indeed, the rights of both alien and non-alien employees under the Act are flouted if employers are free to discriminate against alien employees who exercise their right to form and join unions.110

Finally, the court explicitly conditioned the reinstatement remedy on the lack of an employer sanction law. “Because an employer does not violate the immigration laws by employing an illegal alien, these discriminatees could not subject Sure-Tan to any legal liability by app-

105. Id., 103 L.R.R.M. at 1008-09. Members Murphy and Penello dissented, based on the accommodation doctrine.
106. 672 F.2d 592 (7th Cir. 1982).
107. Id. at 602.
108. Id. at 606.
109. Id. As the Seventh Circuit’s holding was predicated on the absence of a law prohibiting the employment of undocumented workers the existence of an employer sanctions law would have compelled this contrary holding.
110. Id. at 604.
ploying for, or receiving, reinstatement." The court, however, modified the Board’s remedial order to "require reinstatement only if the discriminatees are legally present and legally free to be employed in this country when they offer themselves for reinstatement." In recognition of the length of time it might take to arrange to work in the U.S. legally, the court made the Board’s order effective for four years (rather than six months), holding this to be "a reasonable time to consider the offer and make arrangements for legally entering the U.S."

5. Undocumented Workers and the Enforcement of Wage and Hour Protections (Apollo Tire)

A final case considering the rights of undocumented workers is Apollo Tire Co. The case is of special interest for two reasons. First, it confirmed the right of undocumented workers to seek minimum wage and hour protections. Second, it resulted in the approval of the Board’s undocumented workers policy by another federal appellate court.

The Apollo Tire Co., a non-union shop, manufactured "retread" tires in Los Angeles. In March, 1977, Hilda Niz, mother of one Apollo Tire worker and wife of another, complained to Apollo Tire’s General Manager that her son had not received overtime pay due him under the law. She informed the General Manager that if he did not pay her son the wages he was due, she would go to the "Labor Commission." Some weeks later, the General Manager told Mrs. Niz’s husband that if Mrs. Niz complained to authorities, he would have her killed.

Mrs. Niz responded by consulting the Wage and Hour Division of the Department of Labor (DOL). She received a stack of complaint forms in Spanish which she distributed to a number of Apollo Tire workers. Seven workers then filed the forms with the DOL, alleging that they had not been paid for overtime.

Apollo Tire promptly "laid off" six of the seven workers, informing five of them that they were being fired because they filed complaints with the "Labor Commission." The discharged workers then filed unfair labor practice charges with the Board, which found that Apollo Tire had violated sections 8(a)(1) and 8(a)(4) of the Labor Act. The Board

111. Id. at 605.
112. Id. at 606.
113. Id.
114. 236 N.L.R.B. 1627, 99 L.R.R.M. 1138 (1978), enforced sub nom. NLRB v. Apollo Tire Co., 604 F.2d 1180 (9th Cir. 1979). Again, the facts are taken from the opinions of the Board and the court.
115. Section 8(a)(4) provides that "It shall be an unfair labor practice for an employer to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Subchapter." 29 U.S.C. § 158(a)(4) (1976).
ordered Apollo Tire to reinstate the laid-off workers, to cease threatening them and their families and to desist from otherwise interfering with their rights under section 7 of the Act.\textsuperscript{116}

The Ninth Circuit enforced the Board's order. It cited, with approval, the Seventh Circuit's \textit{Sure-Tan I} opinion: "We agree with the \textit{Sure-Tan} majority that the Board's interpretation best furthers the policies underlying the immigration laws."\textsuperscript{117} Furthermore, the Ninth Circuit arguably went beyond \textit{Sure-Tan I}, stating: "[W]e hesitate to require the Board to delve into immigration matters, out of its field of expertise."\textsuperscript{118} The court thus strongly suggested that the Board avoid addressing policies underlying other federal statutes unless there is a clear conflict of law.

The employer raised a second substantive defense to enforcement of the Board's order: it claimed that its obedience would constitute a violation of California Labor Code section 2805. The court rejected this claim, essentially adopting the Board's \textit{Amay Bakery} position,\textsuperscript{119} but also going on to hold that: "[i]n the event that § 2805(a) is found to be enforceable, and if the state authorities attempt to enforce the section based on a reinstatement order, the company may petition for modification of the order."\textsuperscript{120} This statement suggests that enactment of employer sanctions would not mandate modification of a Board order compelling reinstatement of undocumented workers. To secure such modification, the employer must show that it in fact would face prosecution under state or federal law for obeying the order.

In sum, the Board and the appellate courts have agreed that undocumented workers employed in this country are guaranteed the same rights as other workers. Employers of undocumented workers committing wage and health violations or unfair labor practices must suffer the same penalties that are used against other employers. These remedies obviously serve to protect both the abused workers and the rest of the workforce by preventing employers from violating labor laws. Moreover, extending Labor Act coverage to undocumented workers serves immigration policy by removing the incentives which encourage employers to prefer undocumented workers to other workers. Congressional enactment of employer sanctions, however, would preempt the Board's ability to offer Labor Act protections to undocumented workers, and to that extent would disserve both labor and immigration policy.

\textsuperscript{116} Section 7 of the Labor Act ensures employers the right, \textit{inter alia}, to "engage in . . . concerted activities for the purpose of . . . mutual aid or protection." 29 U.S.C. § 157 (1976).
\textsuperscript{117} 604 F.2d at 1183.
\textsuperscript{118} Id.
\textsuperscript{119} Id. at 1184.
\textsuperscript{120} Id.
In the following sections, we argue that protection of undocumented workers under the Labor Act not only serves immigration policy, but that it serves that policy better than would employer sanction laws.

III

EXTENDING LABOR LAW PROTECTION TO UNDOCUMENTED WORKERS FURTHERS IMMIGRATION POLICY

The Board’s critics charge that the Board has contravened the congressional policy underlying the Immigration Act by extending Labor Act coverage to undocumented workers.121 They claim that the Board has thus neglected its duty to accommodate “other and equally important congressional purposes in its attempt to effectuate the policies of the [Labor Act].”122 This reproach is mistaken, for the Board’s decisions will serve immigration policy better than would denying illegal workers any rights. Nonetheless, the argument supporting the reproach illuminates how federal employer sanctions will destroy both labor law and fair labor standards protections for undocumented workers.

The criticisms of the Board spring from the notion that the extension of Labor Act coverage to undocumented workers encourages violation of the Immigration Act. The Board’s decisions, however, do not thwart any specific provision of the Immigration Act. Currently, no federal law bars either the employment of undocumented workers or working without papers. Thus, when the Board orders an employer to reinstate an undocumented worker, it does not require or encourage the violation of any specific immigration law provision. Critics of the Board, however, contend that reinstatement orders encourage defiance of provisions of the Immigration Act which make it a felony to enter the United States without authorization,123 and which give the federal government the right to exclude alien workers.124 These contentions assume that the reinstatement orders encourage aliens to reenter the country illegally to reclaim their jobs. The court in Sure-Tan II, however, took care to condition its reinstatement order on the ability of the reinstated worker to claim the job legally, and specifically left open the rehiring period for four years to allow the worker to fulfill that condi-

121. See, e.g., Sure-Tan I, 583 F.2d 355, 361 (7th Cir. 1978) (Wood, J., dissenting); Sure-Tan II, 246 N.L.R.B. at 789 (Member Penello dissenting); Id. at 790 (Member Murphy dissenting); Fernandez, Illegal Aliens as “Employees” under the National Labor Relations Act, 68 GEO. L.J. 851 (1980); Scheindlin, Illegal Aliens Are Employees Under 29 U.S.C. § 152(3) (1976) And May Vote in Union Certification Elections, 10 RUT.-CAM. L. REV. 747 (1979).
122. Fernandez, supra note 121, at 859.
123. 8 U.S.C. §§ 1325-1326 (1952); Sure-Tan II, 246 N.L.R.B. at 789 (Member Penello dissenting).
tion. While a four year rehiring period might not protect some workers, the deterrent effect on employer unfair labor practices is great, as an employer cannot be sure that any particular employee will not be able to secure legal re-entry to the U.S. within that period.

Board critics also contend that Board reinstatement orders contravene the purpose of the Immigration Act: to keep undocumented workers out of the American labor force. When enforced, however, labor law protection of undocumented workers will further this goal: if workers without papers are no longer exceptionally cheap labor fodder, the demand for such workers will decrease. This will both slow illegal migration to the U.S. directly and alleviate the chief problem presumably caused by that migration, i.e., the reduction of wages and work standards in undocumented worker-dominated labor markets. The Board’s stance thus perfectly accommodates stated immigration policy.

Finally, Board critics ask the Board to adjudicate out of its depth when they urge the Board to accommodate congressional policy underlying laws other than the Labor Act. The Board has managed to enforce the Labor Act without violating the letter or spirit of current immigration law, not through blind application of the accommodation doctrine, but by refusing “to alter the obligations imposed by the (Labor) Act in a manner which might assist in reaching whatever may be the current goals of immigration policies.”

Had the Board attempted to accommodate labor law and immigration policy by subordinating the former to the latter, it would have done violence to both the Labor Act and immigration policy.

We have argued that allowing undocumented workers to claim labor law rights furthers the purposes of both labor and immigration law. Such rights will not be enjoyed, however, unless undocumented workers exercise them by forming unions or by seeking relief from appropriate authorities when legal standards are violated. Undocumented workers obviously will not take these measures without the assurance that they will secure reinstatement if they are harassed or discharged in reprisal for protected activity. The Board, therefore, must retain the power to order employers violating employee rights to reinstate and make whole discharged workers, irrespective of immigration status.

Employer sanctions would eviscerate that power. As the Board must, under Southern Steamship, accommodate other federal statutes


126. Thus the worst possible strategy would be to create employer sanctions and legal sanctions against undocumented workers, and give partial responsibility for enforcing these laws to wage and hour inspectors. This is the problem proposed by David North and Allen LeBel. See MANPOWER AND IMMIGRATION, supra note 14, at 216-21.

127. 316 U.S. 31 (1942).
in issuing remedial orders, it clearly may not order a party to violate federal law. Reinstatement orders would be the first casualties of employer sanction legislation.

Board critics suggest that the Board fashion remedies for employer violations that do not require reinstatement of undocumented workers, suggesting backpay awards as an adequate disincentive to employer violation of undocumented worker labor rights.¹²⁸ The nature of the backpay remedy, however, makes this proposal unworkable. First, "[t]he backpay remedy runs from the date of the unlawful discharge or refusal by the employer of an unconditional offer to return to work to the date reinstatement is offered."¹²⁹ Obviously, if the Board cannot order reinstatement, resort may not be had to the usual backpay computation system. Second, the Board may not order backpay for an employee who could not have been reinstated during the backpay period: backpay is a "make whole" remedy, designed to restore the employee to her position but for the employer’s unlawful conduct.¹³⁰ As an illegally-employed worker might well have lost her job absent such conduct, the position to which she ought to be restored is unascertainable. Thus, use of the backpay remedy by the Board would be punitive in nature, and the Board is forbidden to take punitive action.¹³¹ Alternatively, an undocumented worker might be held entitled to backpay from the time of her discharge to the moment the employer discovers her undocumented status and hence her ineligibility for reinstatement. That period, presumably, would be quite short. Such a minimal remedy would hardly discourage employers from violating the rights of undocumented workers.

A more fundamental problem is that these proposals ignore the main purpose of Board remedies: to assure workers that they can pursue their legal rights without being punished for doing so. Even if adequate backpay remedies were available to undocumented workers, if discovery and termination were the certain result of exercising labor law rights, such rights would not be exercised.

It is thus clear that the reinstatement remedy is crucial to any enforcement of labor law rights. Without such enforcement, undocumented workers become vulnerable to exploitation, and thus are less expensive and more desirable to employ. Assuming that illegal migra-

¹²⁸. Fernandez, supra note 121, at 862-66. The other remedy generally available—ordering the employer to cease and desist from engaging in further unlawful practices—is generally conceded to hold little promise in this situation. See Sure-Tan II, 246 N.L.R.B. at 788, 104 L.R.R.M. at 1514.


¹³⁰. Id. at 81.

¹³¹. Id. passim.
tion harms American society, and that American immigration policy seeks to halt such migration, labor law protection of the undocumented clearly furthers that policy.

In theory, the major motivation for hiring undocumented workers is that they provide cheap labor and are easy to intimidate. To the extent, however, that these workers are able to force their employers to respect minimum wage, hour, and working standards statutes, the labor they provide costs more. And when undocumented workers form or join unions, and are covered by collective bargaining agreements, they are presumably both more expensive and far less susceptible to employer intimidation. In short, the more that undocumented workers have to be treated like other employees, the less impetus employers will have to hire them instead of hiring their more skilled, better educated, English-speaking "legal" counterparts.

The same conclusions obtain on a more sophisticated level of analysis. Most undocumented workers do not come to the United States to settle permanently; rather, they come because they believe that jobs await them here. The jobs available are mostly in the secondary labor market, which depends on migrant workers. To the extent that the secondary labor market is eliminated through application of labor laws or unionization, there is less demand for migrants and hence fewer job opportunities for undocumented workers.

This argument is reiterated throughout the Board and court opinions upholding labor law protection for undocumented workers. Such protection is essential to decreasing the demand for undocumented employees. Immigration and labor policy coincide: by enforcing labor laws, the demand for undocumented workers will decrease.

IV
EMPLOYER SANCTIONS: A SOLUTION CERTAIN TO BACKFIRE

Employer sanction legislation, on the other hand, will not accomplish its intended purpose. It could, if enforced, succeed in weakening the "pull" that some scholars claim is the main cause of illegal migra-

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132. Some commentators suggest that an additional attraction for employers is that undocumented workers are more motivated, and thus work harder than natives. There is probably some merit to this contention. We would suggest, however, that this factor is largely balanced by the fact that most undocumented workers are ill-educated and do not speak English. Litton & Co. Survey, supra note 15, at 85. In that sense they may be less attractive than native workers. Another vitiating factor is the employer's interest in reputation, so strongly emphasized by the arbitrator in Young's Market Co., 61 Lab. Arb. (BNA) 1063, 1065, 73-2 Lab. Arb. Awards (CCH) ¶ 8462 at p. 4705 (1973) (Edelman, Arb.).

tion, i.e., the demand for cheap exploitable labor. Yet, as we shall explain below, such a law is unenforceable for both practical and political reasons. If unenforced, but still on the books, the law will not discourage unauthorized employment. Instead it will remove undocumented employees from the ambit of the Labor Act, making them more readily exploited and more desirable to employers. This in turn will result in the open flouting of labor and immigration laws and in increased discrimination against legal workers.

A. Employer Sanctions are Unenforceable

Many critics complain that employer sanctions are unenforceable; some proponents of sanctions concede as much. Adherents support employer sanctions out of a sense of fairness: if undocumented workers are to be penalized for working in the United States illegally, then their employers should also be sanctioned. But even those who propose employer sanctions in the sincere hope of eliminating undocumented immigration acknowledge that without allocating sufficient resources to enforce sanctions, adoption of sanctions would prove a futile gesture. They acknowledge that “in the past, when new laws [have been] enacted, the Service manpower budget [has not been] increased.” The INS, moreover, does not have the resources to enforce existing immigration laws: “in F.Y. [fiscal year] 1977 Congress authorized the employment of 1,140 Capitol Hill policemen to guard its buildings,” while authorizing only “1007 INS investigators [to] handle all of that agency’s enforcement work away from the nation’s borders [and to carry out many nonenforcement functions].”

As a result, according to one influential member of Congress, the Immigration and Naturalization Service (INS) is “the worst agency in government—an embarrassment,” unable to carry out its legal mandate. Yet the INS would bear primary responsibility for enforcing federal employer sanctions. Given the current demand to trim the federal budget, it is unlikely that INS will receive sufficient funds to carry

135. Select Commission Report, supra note 4, at 336; (statement of Theodore M. Hesburgh, Chairman). See also id. at 357 (statement of Edward Kennedy) and id. at 363 (statement of Ray Marshall).
137. Id.
139. Manpower and Immigration, supra note 14, at 69.
out its present responsibilities, let alone to take on the added burden of enforcing employer sanctions.\textsuperscript{141}

Some proponents suggest that merely \textit{enacting} employer sanctions will lead many employers to stop hiring undocumented workers.\textsuperscript{142} This reliance on the “shame” factor is an expression of faith, unsupported by any available evidence. The experience with state sanctions demonstrates that employers disregard prohibitions on employing illegal workers unless they fear that employer sanctions will be effectively enforced.\textsuperscript{143} Professor Vernon Briggs, a respected authority and proponent of employer sanctions, has acknowledged that “candidly speaking, one must say that the enactment of a law against employment of illegal aliens will not accomplish much.”\textsuperscript{144} Finally, enforcement of employer sanction legislation is not feasible. Current proposals are either ineffective or economically or politically unpalatable. A cornerstone of these proposals is that an employer can only be sanctioned for “knowingly” hiring an undocumented worker. This presumes a ready means by which an employer can ascertain the immigration status of a potential employee. No such means now exists.\textsuperscript{145}

Without such a means of determining a potential employee’s status, the most likely scenario would be increased job discrimination against national minorities. Civil rights groups claim that many prudent employers, to protect themselves from sanctions, would simply “refuse to hire anyone distinguished by their skin color or accent as possibly being of foreign origin . . . . And some employers, who harbor prejudices against Mexicans Americans and other ethnic Americans, would use the provision as justification for their discriminatory hiring practices.”\textsuperscript{146}

\textsuperscript{141} The Reagan Administration unsuccessfully proposed cutting the number of INS personnel authorized for 1981 by 15%. \textit{Id.} The House Judiciary Committee, however, felt that the budget for fiscal 1983, which contained no increase over the 1982 budget, was not enough to permit the service to carry out its responsibilities. House Judiciary Committee Report accompanying H.R. 6514, the Simpson-Mazzoli bill, \textit{supra} note 134, at 46. The same report cites Department of Justice estimates of the cost of the Simpson-Mazzoli bill’s enforcement at $100 million in 1983, $44 million in 1984, $66 million in 1985, and $36 million in 1986, a total of $246 million over four years. \textit{Id.} However, no authorizations are included in the bill itself, apart from a “sense of Congress” to authorize funds to strengthen the INS’ Enforcement Division. The Senate version does provide for $10 million in fiscal 1983 for presidential monitoring of the bill’s implementation, including beginning development of a national identification system within three years. S. 2222, 97th Cong., 2d Sess., § 101 (1982). Another $10 million is specifically mandated for disseminating forms and education the public, unions and employers about the new law. S. 2222, 97th Cong., 2d Sess., § 101(2)(c) (1982). Such figures indicate that actual enforcement costs will run quite high.

\textsuperscript{142} \textit{See} Fogel, \textit{supra} note 25, at 310.

\textsuperscript{143} \textit{Staff Report to the Select Commission, The Half Open Door} 84 (1978); \textit{Lewis, supra} note 4, at 169.

\textsuperscript{144} Briggs, \textit{The Quest for an Enforceable Immigration Policy} 393 (1979).

\textsuperscript{145} \textit{See Lewis, supra} note 4, at 169.

\textsuperscript{146} Mexican American Legal Defense Educational Fund, \textit{Statement of Position Regarding
The most commonly proposed alternative is the creation of a national identification system. This has fatal fiscal and political weaknesses. First, it would require eliminating the market in false documents, which are currently relatively easy and inexpensive to obtain.\(^1\) This in itself would be an ambitious law enforcement undertaking. More importantly, civil libertarians oppose a national identification system because it is contrary to the traditional American values of privacy and independence from government. They are not assuaged by assurances that identification cards would not be used by any other agencies, and warn that the cards could become “a kind of ‘work permit’ [which] the government could withdraw for political or simply arbitrary reasons.”\(^4\) Even the GAO report concludes that a national work card or its equivalent “is unlikely to be acceptable to the public.”\(^5\)

Finally, a national identification system would prove enormously expensive. Employer sanctions legislation considered by the 97th Congress allocated $10 million for the development of a “secure” identification system.\(^5\) The Select Commission Staff report estimates the development cost of such a system at $40 million, and the annual operation cost of the system at $10 million.\(^6\) As the likelihood that Congress will appropriate adequate funds to enforce employer sanctions is nil, it is inconceivable that Congress would allocate funds to create a national identification bureaucracy. Finally, the Select Commission notes that “[e]ven if only one-tenth of the American work force . . . were to seek such documentation in a given year, it would place an incredible strain on the records office of federal, state, and local governments.”\(^6\)

If enacted, employer sanctions will be difficult to enforce. The amount of money necessary to enforce them will not be forthcoming,


\(^{149}\) GAO Report, supra note 23, at 92.

\(^{150}\) See supra note 141.

\(^{151}\) See supra note 143.

\(^{152}\) Id. at 61. These problems led to the Select Commission’s shaky endorsement of its most controversial proposal: a “secure” identity system which would involve every worker in the United States. Most versions of this proposal involve either making some current form of identification (usually the social security card) “counterfeit-proof,” or developing a national workcard. See Statement of Commissioner Edward Kennedy, Select Commission Report, supra note 4, at 357. See also MANPOWER AND IMMIGRATION, supra note 14, at 258. Ray Marshall, among others, has expressed doubts that any ID card system could escape abuse. He is, therefore, pressing the most Orwellian version of the national identifier proposal: a call-in data bank in which everyone in the United States labor market would be enrolled. Statement of Commissioner Ray Marshall, Select Commission Report, supra note 4, at 364.
and the "shame factor" will not suffice to make up for lack of enforcement. Identification cards would produce political opposition and legal attacks on the constitutionality of an identification card system.\textsuperscript{153}

Proponents of employer sanction legislation respond that employer sanctions are necessary, can be made to work without causing discrimination or loss of privacy, and are worth the price.\textsuperscript{154} They have not, however, considered the other, vital problem threatened by employer sanctions: the evisceration of the Labor Act, wage and hour laws, and other labor protections in places where undocumented workers are employed.

\textbf{B. Employer Sanctions Will Encourage Illegal Immigration by Eliminating Labor Law Coverage of the Undocumented}

As we have explained, federal employer sanction legislation would substantially—if not completely—vitiates labor law protection for the undocumented. We have also argued that employer sanctions, if adopted, would have little practical effect on the flow of illegal migrants into this country. It follows that the principal result of employer sanctions would be to remove undocumented workers from the ambit of the laws regulating the employment relationship. We now examine the consequences of denying labor law rights to undocumented workers.

Employer sanctions, enacted to stop illegal migration, would in fact encourage such migration. If adopted yet ineffectively enforced, the principal effect of employer sanctions would be to increase the attractiveness of undocumented workers to employers, by removing the legal protection enjoyed by undocumented workers prior to the passage of the law. This would result in increased exploitation of undocumented workers. Both Piore and the Linton study note that most employers pay undocumented workers the minimum wage, and make contributions for social security and unemployment insurance.\textsuperscript{155} If hiring undocumented workers were illegal but effectively unsanctioned, many employers would continue to employ such workers but would desist in meeting these statutory minima as their employees would be unable to compel them to do so. As a result, undocumented employees would become less expensive and more vulnerable than legal workers. This in turn would increase the incentive for employers to hire undocumented aliens. Thus, "[l]egal obstacles to state social welfare benefits and the courts should not be imposed on the undocumented alien be-

\textsuperscript{154} See \textit{MANPOWER AND IMMIGRATION}, supra note 14, at 214, 221-22.
cause this would reward employers who hire these workers to take advantage of lower labor costs."

Equally distressing is the probable effect of employer sanctions on illegal aliens in unions which maintain collective bargaining agreements with employers. Employer sanctions would render collective protections unavailable to undocumented employees any time an employer chose to make an issue of a grieving employee's immigration status. Unions would have little incentive to organize undocumented employees, for such helpless workers could hardly be relied upon to stand up for the union or the agreement. Undocumented workers, moreover, would have little reason to join a union that could not protect them against their employers.

Currently unions representing bargaining units with documented and undocumented workers can seek collective bargaining agreements containing provisions protecting undocumented workers, e.g., requiring employers to warn employees of INS raids, to refuse admittance to INS agents without valid warrants, and to decline to reveal employees' names or immigration statuses unless required to do so by law. If employer sanction legislation were adopted, such provisions could not be legal subjects of collective bargaining.

If employer sanctions were to eliminate the Labor Act protections afforded undocumented workers, the workers would be unable to organize or support a union at their workplace. As neither the union nor the Board could assure them of Labor Act rights, even joining an existing workplace union would be a futile act. The inability of undocumented workers to form unions, and the "dampening" effect that the presence of a fair number of "illegal aliens" would have on organizing efforts among citizens and "legal aliens" in shops employing both sorts of workers, would increase the desirability of undocumented workers to employers. Again, the very purpose of employer sanctions would be thwarted by their adoption.

As Apollo Tire demonstrated, Labor Act protections are essential to the exercise of employee rights under federal and state wage and hour laws. As the agencies which enforce these laws have neither the


157. Currently unions seeking to organize worksites with documented and undocumented workers can include in collective bargaining agreements with employers specific provisions to protect undocumented workers, i.e., to warn in case of INS raids, to refuse admittance to INS agents without valid warrants, and not to reveal employees' names or immigration status to federal agents unless required to do so by law. In Los Angeles, the International Ladies' Garment Workers' Union has negotiated a series of labor contracts containing extraordinary provisions with affirmative safeguards for undocumented workers. See Garment Union Wins Protection Against Immigration Service Raids, Lab. Notes, Mar. 25, 1980, at 1, 14.

legal nor the economic resources to initiate employer compliance investigations,\textsuperscript{159} they depend almost entirely on employee complaints to locate culpable employers and remedy violations.\textsuperscript{160} Thus, if undocumented workers were unable to contact authorities for fear of retaliatory discharge, these labor standards would go virtually unenforced. By making fair labor standards practically unenforceable, employer sanctions would create incentives for hiring undocumented workers.

In short, there are two ways of shrinking the secondary labor market. One is indirect: severing that market from the supply of illegal immigrant labor which staffs it by increasing border enforcement and adopting employer sanctions. There is no evidence that this strategy, though apparently sensible, can work successfully.

A more direct approach entails making secondary market employers respect the standards of the primary market. The goals of this approach are the conversion of secondary market jobs into regular, "primary" positions, and the elimination of those jobs which cannot be so converted.\textsuperscript{161} Essential to these goals are labor standards enforcement and union organization. Union organization, in particular, has traditionally proven a successful means of lifting occupational groups from the secondary labor market to the primary market.\textsuperscript{162}

Thus providing labor law protection for undocumented workers is the best means of stemming the tide of illegal migration to the United States. Extending labor law protection to undocumented workers, moreover, ameliorates the problems allegedly caused by the employment of undocumented workers in the United States and thus fulfills the purpose underlying the policy of excluding illegal workers from the American labor market.

In Piore's view, undocumented workers create a social rather than an economic problem for American society. We agree that an underclass, composed largely of ethnic minorities and permanently deprived of legal rights and protections, is antithetical to an egalitarian society. By extending legal rights to undocumented aliens in their most vulner-


\textsuperscript{160} For example, the Department of Labor's Wage and Hour Division, which is charged with enforcing the federal minimums, spends almost 90\% of its time investigating complaints, chiefly those of employees. It does not have time to investigate all complaints; and only 3\% of covered establishments are investigated each year. \textit{FLSA Report}, \textit{supra} note 159, at 58; \textsc{Levitan \& Belous, supra} note 21, at 47-49.

\textsuperscript{161} \textsc{Piore, supra} note 3, at 184-86 (1979); \textit{Manpower and Immigration, supra} note 14, at 159-61.

\textsuperscript{162} \textit{Id.} at 161.
able sphere of activity—the workplace—we greatly reduce the extent to which they are an exploitable underclass which divides society.

Even if undocumented workers do depress the domestic labor market and displace native workers, however, they do so because they are less expensive to employ than native workers, and will work under worse conditions than native workers will tolerate. To the extent that undocumented workers obtain wages and working conditions equivalent to those enjoyed in the primary labor market, they will neither depress labor market standards nor unfairly compete for jobs—directly or indirectly—with Americans. To obtain comparable wages and conditions, undocumented workers must have comparable legal rights and protections.

Labor law protection of undocumented workers thus effects the goals of American immigration policy and simultaneously ameliorates the problems that theoretically necessitated that policy. Without such protection, both unsanctioned migration and the problems it entails would be exacerbated.

Any serious attempt to curb unsanctioned migration therefore should include an aggressive program emphasizing the substantive legal rights of undocumented workers and the procedural remedies necessary to give life to those rights. If protection of undocumented workers is to be an effective tool of immigration policy, moreover, those workers must be informed that they possess such substantive rights, and must be given credible assurances that they may exercise those rights without fear of reprisal.

Federal employer sanctions, however, would make it difficult or impossible for the Board and other agencies to protect the exercise of substantive labor law rights by undocumented workers. Employers of undocumented workers would be immunized from labor law enforcement. The results would be disastrous for both national labor and immigration policy.

V

CONCLUSION

Most experts—both scholars and politicians—perceive the continued immigration of undocumented workers to the United States as a significant political problem. The reasons given for this view vary, as do the strategies proposed for solving the problem.

Two such strategies—the enforcement of undocumented workers’ rights under existing labor laws and the adoption of employer sanctions—have been the subject of this article. Many authorities, including the Select Commission, recommend both of these approaches as part of a comprehensive program to eliminate, or at least reduce, the
unsanctioned migration of workers into the United States.\textsuperscript{163}

These two approaches are not compatible. In fact, they are mutually exclusive. The enactment of federal employer sanctions would render labor and working standards laws unenforceable. This simple fact has not been recognized in the current debate over employer sanctions proposals. Yet the efficacy of employer sanctions cannot be intelligently evaluated without considering the loss of labor law protection such a policy would entail. Given that a choice must be made, moreover, illegal immigration will be more effectively reduced, and the perceived problems caused by illegal immigration will be better addressed, by retaining and increasing labor law protection for undocumented workers in lieu of enacting employer sanctions.

The purpose of enacting employer sanctions is to make undocumented workers less desirable as employees. Affording labor law protections to undocumented workers would also further that goal, and perhaps more effectively. Extending labor law protection would also reduce the problems presumably caused by the presence of undocumented aliens in the workforce. To the extent that undocumented workers are protected by adequate labor standards, or are organized by unions, they will not help perpetuate a labor market which depresses wages and drives American workers out of the workforce. To the extent that they enjoy these rights, undocumented workers will not form a powerless underclass, inimical to a democratic society. By contrast, denying legal protections to undocumented workers would exacerbate the worst inequities in the current system.

Thus labor law protections have an advantage over employer sanctions as an enforcement strategy: they not only serve the stated goal of immigration policy—getting undocumented aliens out of the workforce—they also address the reasons why that goal has been set. Extending labor law protection, moreover, does not cause the harmful collateral effects ascribed to employer sanctions. It does not exacerbate racial discrimination, nor does it require a national identification system. Even an aggressive enforcement program would not entail creating agencies; the cost would be far less than the enormous price tag placed on employer sanctions with or without a “secure” identification system.

We recognize the superficial appeal of a law that would punish employers who attempt to subvert national policy by knowingly employing undocumented workers. Furthermore, we cannot deny the

\textsuperscript{163} SELECT COMMISSION REPORT, supra note 4, at 59-71. The Select Commission Report never specifically addresses protection under the Labor Act; it expresses support, however, for increased enforcement of “existing wage and working standards legislation.” \textit{Id}. at 70. We hope, however, that we have demonstrated the connection.
 ironic—even counterintuitive—nature of our postulate: the best way to staunch the flow of undocumented workers into this country may be to protect the legal rights of those who are here; the worst method for depriving employers of this supply of cheap labor may be to enact penalties against those employers. Yet, as we have stressed, there is a choice to be made between the two approaches, and that choice should be made intelligently.

In 1978, North and LeBel warned of the danger, inherent in the strong interest in the now highly politicized issue of illegal immigration. The danger is that, as so often has happened in our history, immigration policy will be made on the basis of hasty decisions (often reached in times of economic troubles), in which anti-alien hysteria plays an all too important role; complex issues may be approached from simplistic bases; and too little thought may be given to the direct and indirect consequences of the proposed legislation.6

Once again there is strong interest in the issue of illegal immigration. The Select Commission’s Report and the Simpson-Mazzoli Bill demonstrate that all the dangers cited by North and LeBel are still very much with us. The consequences—direct and indirect—of adopting employer sanctions would be disastrous for both labor and immigration policy.

As the editorial quoted at the beginning of the article predicts, employer sanction proposals will be back. We sincerely hope that the problem of unsanctioned migration and the possible solutions to that problem will be researched and analyzed more thoroughly, before the Simpson-Mazzoli Bill or similar legislation is enacted. Despite all that has been written, such little hard information or convincing analysis is available on the subject that it seems absurd to take legislative action of the scope proposed by the Bill. At the least Congress should consider whether we can afford to deny undocumented workers protection under the labor laws, before it enacts employer sanction legislation.

164. MANPOWER AND IMMIGRATION, supra note 14, at 9. The authors proceeded to propose a harsh program which would have, we think, disastrous “indirect consequences” for both labor and immigration policy.