Learning From RICO: Immigration Enforcement through Employer Accountability

By Joey Hipolito*

INTRODUCTION

Cleaning Corp. is a contractor that operates in Atlanta, Georgia, providing janitorial services to office buildings. Benjamin has been an employee of Cleaning Corp. for several years and has legal immigration status. Cleaning Corp. pays him above the minimum wage along with overtime. The management of Cleaning Corp., though, seeks to be more competitive when bidding on new projects. It focuses on cutting labor costs. Cleaning Corp. hires a subcontractor to locate workers, knowing that the subcontractor finds undocumented workers, who because of their immigration status, are vulnerable to illegal employer tactics. The subcontractor goes to Texas, recruits a number of undocumented workers, including Alicia, and returns to Georgia. Alicia enters into the United States illegally to work, without ever having been to Georgia, and is not fluent in English. Cleaning Corp. hires Alicia and, knowing that Alicia is an undocumented immigrant, pays her below the minimum wage and denies her other employment benefits. Having no other opportunities and fearful of being deported, Alicia accepts the work.

Downtown Cleaners, a competing firm that pays above the minimum wage to its employees, cleans a high-rise office building. The high-rise decides to put its cleaning contract to bid. Cleaning Corp. bases its bid on the labor costs of its lower-wage recruits and submits a lower bid price than Downtown Cleaners. Cleaning Corp. wins the bid and uses Alicia and other undocumented workers on the project. Cleaning Corp. offers a crew position to Benjamin, but only if he works for less than what he did before. Benjamin accepts, as he needs the income. Cleaning Corp. works its employees for long hours, denying Alicia overtime and other standard benefits. When she complains about her working conditions, Cleaning Corp. threatens to call immigration authorities.

Downtown Cleaners concludes that it must reduce its wages to compete with Cleaning Corp.'s lower labor costs and uses recruiters to find employees who will work for below the minimum wage. Cleaning Corp. recognizes that hiring undocumented workers is illegal, but gambles that it is unlikely that it will face investigation. Further, Cleaning Corp. calculates that even if an investigation occurs, it can afford the resulting penalties and replace the removed immigrants.

Benjamin and his documented peers are frustrated by Cleaning Corp.'s lower wages and would like to leave, but now the other cleaning employers, like Downtown Cleaners, also pay lower wages. Alicia talks to Benjamin about working together to counter Cleaning Corp.'s abusive conditions. Their employer hears about their conversations and immediately fires Alicia, recognizing that although Alicia

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may sue Cleaning Corp. for violating federal labor laws, Cleaning Corp. will not owe her costly back pay penalties for her subsequent unemployment. Current immigration law denies her this back pay because she is not permitted to work in the country. Here, immigration law ultimately trumps the employment laws designed to protect workers from abusive employer behavior. Cleaning Corp.'s targeting, hiring, and exploiting of the vulnerable status of undocumented workers ultimately results in foregone business for its competing firms, lost wages for the undocumented worker, and lowered earnings for documented employees.

This story is fictional, but reflects the experiences of newly arrived undocumented Latinos. Academics have described these workers as "brown collar" because they cluster into low-wage, low-level service industries, such as landscaping, farm work, and painting.[1] Businesses specifically hire undocumented workers because these workers fear deportation and thus are beholden to the employer.[2] To lower labor costs, employers subject these immigrants to employment violations and reduced wages, which ultimately degrades the job for documented workers as well.[3] These lower labor costs give the employer an unfair advantage when competing with employers who do not engage in similar exploitation.[4]

When discussing the topic of undocumented workers, immigration law weaves with employment law and must be addressed together. Federal immigration law is codified in the Immigration and Nationality Act (INA) which has twin goals of deterring unauthorized immigration[5] and protecting US jobs.[6] Rather than seeing the benefit of immigration and employment law working in conjunction, the Supreme Court faced a situation similar to Alicia's firing in *Hoffmann Plastic Compounds v. NLRB* and ruled that rewarding the employee with back pay would ultimately "trivialize" immigration laws by violating the goals of the INA.[7]

By prioritizing immigration violations at the expense of employment remedies, Congress and the courts ignore that employers, like the above Cleaning Corp., illegally hire undocumented immigrants primarily because they represent potentially lower labor costs than their counterparts.[8] Immigrants are more susceptible to substandard employment practices because of their social isolation and reduced ability to secure redress.[9] Immigration and employment law must work together productively to reflect this market reality.

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1. *See* Leticia M. Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 OHIO ST. L.J. 961, 964-66 (providing a definition and an overview of brown collar workers).

2. *Id.*

3. *Id.*

4. *Id.*

5. *See* Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 903 (1984) ("In devising remedies for unfair labor practices, the [NLRB] is obliged to take into account [the] . . . 'Congressional objective' of deterring unauthorized immigration." (quoting *Southern S. S. Co. v. NLRB*, 316 U.S. 31, 47 (1942)); Hoffman Plastic Compounds v. NLRB, 535 U.S. 137 (2002).

6. Sure-Tan, 467 U.S. at 893 ("A primary purpose in restricting immigration is to preserve jobs for American workers . . . .").

7. Hoffmann Plastic 535 U.S. at 150.

8. *See* Mendoza v. Zirkle Fruit Co., 301 F.3d 1163, 1666 (9th Cir. 2002) (undocumented workers, "due to their economic situation and fear of asserting their rights due to their illegal status, can be easily exploited and . . . are therefore willing to work for depressed wages."). *See also* Commercial Cleaning Servs., L.L.C. v. Colin Serv. Sys., Inc., 271 F.3d 374 (2d Cir. 2001).

9. *See id.*

Stronger employment rights for undocumented workers would permit undocumented workers to equalize their labor costs compared to their documented counterparts. If the labor costs between documented and undocumented workers were equalized, employers would have less incentive to hire undocumented workers, and thus there would be less demand for undocumented workers overall. Therefore, ensuring that employers are accountable for the hiring and mistreatment of undocumented employees, the government furthers immigration policies by protecting the job degradation of legal employees, while reducing the incentive for employers to seek undocumented workers.[10] Justice Breyer, writing the dissent in *Hoffman*, explains that: "the same back pay award that compensates an [undocumented] employee . . . . *also* requires an employer who has violated the labor laws to make a meaningful monetary payment."[11]

I suggest that recent cases where civil litigants use the Racketeer Influence and Corrupt Organizations Act (RICO) to recover against employers who illegally hired immigrants highlight an enforcement framework where immigration and employment concerns interact more productively.[12] Rather than envisioning immigration violations and employment recoveries as competing concerns, RICO connects the two.[13] Certain immigration violations serve as underlying crimes for RICO, which calculates damages beyond the underlying crime to restore the injured party to complete recovery.[14] In these cases, legal workers alleged that their employers illegally hired immigrants to lower labor costs which injured them in the form of depressed wages, which they sought to recover.[15] In a similar action with a different injured party, a business alleged that a competitor illegally hired immigrants to gain a labor cost advantage, which injured the plaintiff in the form of diminished revenue, which it sought to recover.[16] Although RICO is triggered by the initial immigration violation, the damages flow from the employer's mistreatment of the undocumented worker, which leads to overall job devaluation and an unfair competitive advantage.[17]

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10. *See also* Shahid Haque, *Beyond Hoffman Plastic: Reforming National Labor Relations Policy to Conform to the Immigration Reform and Control Act*, 79 CHI.-KENT L. REV. 1357, 1380 (2004) (discussing the invitation to exploit undocumented workers after *Hoffman* removed backpay remedies).

11. Hoffman, 535 U.S. at 160 (emphasis in original).

12. *See* Commer. Cleaning., 271 F.3d at 374 (involving a company suing a competing company). For cases involving former and current legal workers suing their employer, *see* Williams v. Mohawk Indus., 465 F.3d 1277 (11th Cir. 2006), *cert. denied*, 127 S. Ct. 1381 (2007); Trollinger v. Tyson Foods, 370 F.3d 602 (6th Cir. 2004); Mendoza 301 F.3d at 1163; Baker v. IBP, Inc., 357 F.3d 685 (7th Cir. 2004); Cunningham v. Offshore Specialty Fabrications, 543 F. Supp 2d 614 (E.D. Tex. 2008); Hager v. ABX Air, 2008 U.S. Dist. LEXIS 23486 (S.D. Ohio 2008); Brewer v. Sayler, 2007 U.S. Dist. LEXIS 36156 (E.D. Cal. 2007). For cases involving undocumented workers suing their employer, *see* Zavala v. Wal-Mart Stores, Inc., 447 F. Supp. 2d 379 (D.N.J. 2006).

13. Few authors have substantively discussed the impact of RICO lawsuits on employees and undocumented workers. *See* Elisabeth J. Sweeney Yu, *Addressing the Economic Impact of Undocumented Immigration on the American Worker: Private Rico Litigation and Public Policy*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 909 (discussing primarily the importance of using private RICO litigation to enforce immigration laws, rather than the impact on workers); Adam J. Homicz, *Private Enforcement of Immigration Law: Expanded Definitions Under RICO and the Immigration and Nationality Act*, 38 SUFFOLK U. L. REV. 621 (2005).

14. *See* 18 U.S.C.A. §§ 1961, 1964(c) (West 2009).

15. *See* Mohawk, 465 F.3d at 1277; Trollinger, 370 F.3d at 602; Mendoza, 301 F.3d at 1163.

16. *See* Commer. Cleaning, 271 F.3d at 374.

17. *See* Mohawk, 465 F.3d at 1277; Trollinger, 370 F.3d at 602; Mendoza, 301 F.3d at 1163; Commer. Cleaning, 271 F.3d at 374.

The narrow applicability of the RICO statute makes it flawed as a singular tool to enforce immigration, but features of the civil RICO action provide a framework where immigration and employment remedies interact more productively.[18] Rather than envisioning immigration violations and employment remedies as competing concerns, RICO connects the two.

A civil RICO action focuses on the employer, making it accountable for the totality of its monetary harms.[19] RICO recoveries focus not on the illegal act of hiring immigrants, which has no corresponding civil recovery, but rather on the substantive damages that flow from the core harm—the employer's mistreatment of undocumented workers.[20] Further, the RICO action focuses not only on the employer and the undocumented worker, but provides recoveries for other injured parties, such as documented workers and competing businesses.[21] By disgorging the wage advantages that an employer gains from mistreating undocumented workers, a RICO remedy better achieves the immigration policy goals of protecting job quality for legal employees, while discouraging employers from hiring undocumented workers.

I. HISTORICAL APPLICATION OF EMPLOYMENT REMEDIES TO UNDOCUMENTED WORKERS

The immigration status of undocumented workers who are subject to abuse prevents their ability to exercise a full range of remedies.[22] The federal Immigration and Nationality Act (INA) governs United States immigration and citizenship and was originally passed in 1952, although it has been repeatedly amended including in 1986. Prior to 1986, employers could legally hire undocumented workers, although the INA penalized immigrant workers for illegal entry or unauthorized presence.[23] In 1986, Congress passed and the President signed the Immigration Control and Reform Act of 1986 (IRCA) which amended the INA to deny employment to immigrants who either are not legally present or authorized to work in the United States, by mandating that employers verify the eligibility of new hires by examining specified documents.[24] This continues to be in effect today.[25] Under IRCA, an

18. Leticia Saucedo has discussed in-depth the context of RICO and brown collar workforces, particularly in *The Browning of the American Workplace: Protecting Workers in Increasingly Latino-ized Occupations*, 80 NOTRE DAME L. REV. 303 (2004). She disagrees with the use of a RICO theory to address brown collar workplaces because it divides the workplace into legal versus undocumented employees. However, she advocates using the evidence of the RICO lawsuits—the market share impact data—for pursuing discrimination claims.

19. *See* Mohawk, 465 F.3d at 1277; Trollinger, 370 F.3d at 602; Mendoza, 301 F.3d at 1163; Commer. Cleaning, 271 F.3d at 374.

20. *Id.*

21. *Id.*

22. *See* Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984); Hoffman Plastic Compounds v. NLRB, 535 U.S. 137 (2002).

23. *See* Sure-Tan, Inc., 467 U.S. at 893-94.

24. 8 U.S.C.A. § 1324a(b) (West 2009). If an alien applicant is unable to present the required documentation, the unauthorized alien cannot be hired. § 1324a(a)(1). Similarly, if an employer unknowingly hires an unauthorized alien, or if the alien becomes unauthorized while employed, the employer is compelled to discharge the worker upon discovery of the worker's undocumented status. § 1324a(a)(2). Employers who violate IRCA are punished by civil fines, § 1324a(e)(4)(A), and may be subject to criminal prosecution, § 1324a(f)(1).

25. *Id.*

undocumented worker cannot legally obtain employment because either the undocumented alien provides fraudulent identification[26] or the employer knowingly hires the undocumented alien illegally.[27]

The Supreme Court has twice answered whether an employee's undocumented immigration status prevented him from recovering a back pay remedy against an employer who fired him in violation of the National Labor Relations Act (NLRA) (which governs labor law), which also requires that the employee be available to work during the period that he seeks back pay.[28]

a. Sure-Tan

The first holding, *Sure-Tan*, occurred in 1984 before the passage of IRCA and the Court held that although labor law protections were important to preserve the bargaining power of documented workers, immigration laws limited employment remedies such that undocumented workers could only receive back pay for the times that they were present in the United States and available to work.[29] The Court in *Sure-Tan* highlighted the need for labor law to protect undocumented workers to achieve its purpose of encouraging the collective bargaining process.[30] If undocumented workers were excluded from the protections of unions, collective bargaining would be impeded because the undocumented workers would be a subclass of workers without a comparable stake in the collective goals of their documented peers.[31] When undocumented workers accept substandard wages and working conditions, documented workers are harmed with lower wages and labor unions have less bargaining power.[32]

The Court further held that enforcement of the NLRA on behalf of undocumented workers was consistent with the INA purpose because such enforcement would ensure that the competition of undocumented employees would not harm the working conditions of documented workers.[33] Because the government restricts immigration to preserve jobs for American workers, immigrant aliens can legally work only if they "will not adversely affect the wages and working conditions of the workers in the United States similarly employed."[34]

The Court recognized that employers intentionally hire undocumented workers; if an employer realizes that there will be no advantage under labor law in preferring undocumented aliens to legal resident workers, any incentive to hire such undocumented aliens is correspondingly lessened.[35] In turn, if the demand for undocumented aliens declines, there may be fewer incentives for aliens themselves

26. IRCA prohibits an unauthorized alien to use fraudulent documents to obtain employment. § 1324c(a). Aliens who use or attempt to use such documents are subject to fines and criminal prosecution. 18 U.S.C.A. § 1546(b) (West 2009).

27. § 1324a(a)(1).

28. *See* Sure-Tan, 467 U.S. 883; Hoffman Plastic, 535 U.S. 137.

29. *See* Sure-Tan, 467 U.S. at 892-94.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 893.

35. *Id.*

to immigrate in violation of immigration laws.[36]

Despite highlighting the need for worker protections, the Court held that the immigration status of undocumented workers limited their available remedies under the NLRA, compared to documented workers.[37] The Court held that the NLRA entitled workers to back pay only for the period when they were legally present and available within the United States, leaving undocumented workers unlikely to receive recompense.[38]

b. Hoffman Plastic Compounds

The Court's second holding on similar facts, *Hoffman*, occurred in 2003 after the passage of IRCA.[39] In denying back pay, the Court forcefully prioritized immigration law over employment law.[40] The Court held that providing any back pay would violate the INA, which after IRCA, prohibits undocumented immigrants from obtaining legal employment.[41] Unlike in *Sure-Tan*, which recognized that employer sanctions served immigration policy goals, the Court found that such a remedy would "encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations."[42]

Courts have been extending the strict logic of *Hoffman* beyond the NLRA, further excluding undocumented workers from other types of employment remedies that would be due to them, save their immigration status. Citing *Hoffman*, courts have denied undocumented workers back pay remedies in a variety of other contexts such as for discrimination, wage and hour violations, unemployment insurance, and worker's compensation rewards.[43] These denials provide undocumented workers less rights and remedies than documented workers, making undocumented workers more vulnerable to exploitation while giving employers an incentive to hire undocumented workers who are comparably cheaper than documented employers.[44]

II. THE INTERACTION OF EMPLOYMENT AND IMMIGRATION: EMPLOYERS

36. *Id.*

37. *Id.*

38. *Id.*

39. 535 U.S. 137 (2002).

40. *Id.*

41. *Id.* at 151.

42. *Id.* at 151.

43. *See* Lance Compa, HUMAN RIGHTS WATCH, BLOOD, SWEAT, AND FEAR: WORKERS' RIGHTS IN U.S. MEATS AND POULTRY PLANTS 72-75 (Jamie Fellner, ed., Human Rights Watch 2005) (2005) (providing examples of court decisions post-*Hoffman*). For example, a New York court decided that an undocumented worker who did ten days of landscaping work could not recover the agreed upon $1,000, but could only obtain minimum wage for his labor. The judge explained that although New York historically permitted the recovery of lost wages for undocumented aliens, *Hoffman* "would appear to require this court to conclude that plaintiff should not be permitted to recover for lost wages given his inability to prove he is legally authorized to work in this country." Another example includes a pregnancy discrimination case in New Jersey where a state court denied a victim economic, punitive, and emotional distress damages. "We agree that [*Hoffman*] bars plaintiff's economic damages . . . we see no basis for distinguishing her related non-economic damages and conclude that they, too, are barred."

44. *See* Robert I. Correales, *Did Hoffman Plastic Compounds, Inc., Produce Disposable Workers?*, 14 BERKELEY LA RAZA L.J. 103 (2003) (discussing how *Hoffman* disempowers workers while increasing their exploitation).

TARGETING UNDOCUMENTED HIRES

By focusing on the undocumented worker, courts ignore that many employers intentionally hire undocumented immigrants to exploit their vulnerabilities stemming from their immigration status. Immigration and employment law should not be depicted in competition, but rather immigration and employment law should be linked, interacting to affect employers, immigrants, documented employees, and market competitors.[45] Immigrants, both documented and undocumented, are lured to the United States primarily to work. Employers of undocumented workers recognize this demand and structure employment opportunities that target undocumented immigrants and take advantage of their reduced rights.[46] After hiring, employers subject undocumented workers to employment violations.[47] Immigration violations, from both immigrants and employers, lead to employment violations.[48] The combination of these violations result in reduced job quality and leverage for documented peers.[49] This overall lowering of labor costs gives a firm that intentionally hires undocumented workers an advantage against competitors who do not similarly hire and exploit.

This interaction between employers, undocumented workers, and documented workers is highlighted with newly arrived Latinos who are the fastest growing segment of the labor force.[50] Many of these recent immigrants are employed in low-wage, low-level service industries where minorities are overrepresented compared to the general population, such as in construction, agriculture, manufacturing, or janitorial services, as in the introductory fictional example.[51] Academics have described these workers as "brown collar"— newly arrived Latinos who are employed in occupations with unusually high concentrations of Latinos.[52]

A large portion of the brown collar labor pool is presumed to be undocumented. Some estimate that eighty-five percent of the recently arrived immigrants are undocumented. The vast majority of those who entered the United

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45. *See* Linda Bosniak, *Citizenship and Work*, 27 N.C.J. INT'L L. & COM. REG. 497 (2002) (discussing the interaction between workplace rights and citizenship rights); Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955 (1988); Jennifer Gordon and R.A. Lenhardt, *Rethinking Work and Citizenship*, 55 UCLA L. REV. 1161 (2008) (discussing the need for citizenship and employment rights to match the reality of globalization).

46. *See* Leticia M. Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 OHIO ST. L.J. 961, 964-966 (2006).

47. *Id.*

48. *See also* Robert I. Correales, *Did Hoffman Plastic Compounds, Inc., Produce Disposable Workers?*, 14 BERKELEY LA RAZA L.J. 103 (2003).

49. Lisa Catanzarite has been doing in depth research into the effects that brown collar workers have on peer workers in different industries. *See* Lisa Catanzarite, *Immigration, Union Density, and Brown-Collar Wage Penalties*, 2004 ST. CAL. LAB. 107, 107-10 (2004) (providing an overview of past research into the impacts of undocumented worker wages on native employees and documented immigrants).

50. *See* Leticia M. Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 OHIO ST. L.J. 961, 964-966 (providing a definition and an overview of brown collar workers).

51. Catanzarite, *supra* note 49.

52. Saucedo, *supra* note 50, at 966.

States within the past two years have no U.S. government-issued identification, thus indicating presumptive undocumented status.[53] Their undocumented status leads brown collar workers to fear not just job loss, but also deportation for themselves or their family members.[54] This deep concern creates an atmosphere of fear among undocumented workers as well as documented workers who have undocumented family members and friends.[55]

Immigration law restricts the availability of visas for unskilled workers, which makes it nearly impossible for newly arrived brown collar workers to acquire legal status.[56] Someone who entered or worked in the United States without authorization is inadmissible for visas and ineligible for adjustment to legal permanent resident status.[57] Moreover, immigration law imposes harsh consequences on workers who enter illegally and who are unlawfully present.[58]

The fear of deportation increases the susceptibility of brown collar workers to labor exploitation.[59] Deportation would affect themselves, their family members in the United States, and potentially families in their home countries who depend on their support.[60] In addition, compared to native born workers, newly arrived Latino workers tend to be less formally educated and know less about the workplace culture or their rights.[61]

Language deficiencies may exist, which further isolate brown collar workers—creating an outsider status.[62] They are less able to leave their current jobs and often are working in jobs that do not require English fluency.[63] Language barriers may make it more difficult to learn about or exercise their rights.[64] Because of their immigration status, they are disenfranchised from politics and are less likely to be involved informally in civic affairs.[65] Ultimately, these factors combine to create a vulnerable workforce, particularly compared to native employees.[66]

Rather than being passive, employers intentionally assemble these brown collar workforces.[67] Brown collar employers intend to hire undocumented immigrants who, because of their vulnerable status, are more likely to be subservient than native citizens.[68] These jobs thus are characterized as being low wage, unstable, and demanding.[69] Employers seek to reduce labor costs and ultimately structure the occupation to be undesirable by offering menial wages and long hours while

53. *Id.* at 968.
54. *Id.* at 966-69.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. Lisa Catanzarite, *Immigration, Union Density, and Brown-Collar Wage Penalties*, 2004 ST. CAL. LAB. 107, 107-10 (2004).
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. Leticia M. Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 OHIO ST. L.J. 961, 973.
68. *Id.* at 981.
69. *Id.* at 966-970.

oftentimes violating wage and hour laws.[70] By exploiting undocumented workers' vulnerabilities, employers can reduce their labor costs significantly, therefore putting them at an advantage compared to companies that do not hire undocumented workers.[71]

As immigrants become more highly concentrated in the occupation, the job status deteriorates, and ultimately the job becomes popularly viewed as "an immigrant job."[72] These brown collar positions cluster in the secondary market, which is characterized by unstable employment.[73] The job remains devalued by a steady stream of brown collar workers.

The employers' use of alternative hiring methods manifests their preference for these workers.[74] These include the use of labor recruiters, intermediary employment agencies, and day labor pools.[75] Some employers even recruit directly in foreign countries.

The employer can exploit the undocumented worker by paying wages lower than market rates.[76] In addition, the employer can skip payments on key benefits such as workers' compensation and unemployment insurance.[77] The employer can further exploit workers through wage theft. The result is that brown collar workers face routine segregation, wage penalties, and harassment.[78]

This devalued job status negatively affects all workers. Wages deteriorate not only for undocumented employees but also for similarly situated documented immigrants and native-born workers.[79] The slide in wages is created by the active devaluation of the occupation by employers and the lack of employee leverage.[80] These wage penalties are significant. For example, in San Francisco, in an occupation in which fifteen percent of incumbents were recent Latino male immigrants, the average worker earned approximately twenty percent less than a comparable worker in an occupation with no brown collar workers.[81] Latinos, both immigrants and native-born, ultimately become segregated into low-status occupations with little room for advancement.[82]

III. IMMIGRATION LAW AND EMPLOYMENT REMEDIES WORKING TOGETHER

The experiences of brown-collar workers highlight the need for immigration policy to effectively incorporate employment remedies. By prosecuting only

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70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 989-90 (explaining Michael Piore's dual labor market theory where in the stratified secondary labor market is a "buyer's market" where employer's can impose their needs on the supply of labor, but requires seeking of new employees).

74. *Id.*

75. *Id.* at 976-77 (describing common ways of hiring brown collar workers).

76. Lisa Catanzarite, *Immigration, Union Density, and Brown-Collar Wage Penalties*, 2004 ST. CAL. LAB. 107, 107-10.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

immigration violations against the employer and employee, the government fails to make the business accountable for its totality of harms. The undocumented workers fail to recover their lost wages, legal workers fail to recover their wage devaluation, and competitors fail to recover revenue lost to firms that maintain illegal hiring practices. The business pays the violation but substantially retains the rewards of its illegal cost-saving efforts, while the undocumented workers face possible deportation.

These economic harms stem not from the hiring but rather from the employer's exploitation of the worker on the basis of his or her immigration status. To reduce the incentive of employers to hire undocumented workers, undocumented workers should have the same access to employment remedies that documented workers have. Employers have an incentive to hire undocumented workers because unlike documented workers, they can be exploited based on immigration status.[83] If undocumented workers were treated the same as legal employees, this incentive would diminish.[84]

Requiring employers to pay the same employment penalties to documented and undocumented workers furthers the goals of immigration policy.[85] First, it would deter unauthorized immigration. The demand for undocumented workers would likely drop if employers were held accountable not just for hiring undocumented workers, but also for the subsequent mistreatment of both documented and undocumented workers.[86] The dissent in *Sure-Tan* explains that once employers realize that they can violate their undocumented employees' labor rights "without fear of having to recompense those workers for lost backpay, their 'incentive to hire such illegal aliens' will not decline, it will increase."[87] Justice Breyer, in his dissent in *Hoffman*, expressed a similar view that denying back pay awards would lower the costs to employers of labor law violations, increase the employers' incentive to find and hire undocumented workers, and possibly encourage undocumented workers to come to the United States.[88] This "perverse economic incentive .... runs directly contrary to the immigration statute's basic objective."[89] Conversely, the possibility of more equitable back pay would not realistically be the deciding factor for an immigrant to enter the United States illegally.[90]

Stronger employment protections for undocumented employees would also further the INA's goal of protecting legal employees. If employers were held accountable for their mistreatment of undocumented workers, labor standards would rise, improving working conditions for both legal and undocumented workers. These employment remedies would ultimately reduce the competitive advantage gained from illegal hiring, relieving pressure on other firms to hire their own undocumented workers and mistreat them. This would similarly mitigate the economic harms that

83. *See* Mendoza v. Zirkle Fruit Co., 301 F. 3d 1163, 1166 (9th Cir. 2002).

84. *See* Hoffman Plastic Compounds, Inc. v. N.R.L.B., 535 U.S. 137, 160 (2002) (dissent, J. Breyer).

85. Sure-Tan Inc. v. NLRB, 467 U.S. 883, 893 (1984).

86. *See* Hoffman Plastic, 535 U.S. at 160 (dissent, J. Breyer).

87. Sure-Tan, 467 U.S. at 912 (dissent, J. Brennan).

88. *See* Hoffman Plastic, 535 U.S. at 155 (dissent, J. Breyer).

89. *Id.*

90. *See* Patel v. Quality Inn S., 846 F. 2d 700, 704 (9th Cir. 1988) (explaining that aliens enter the country in the hopes of getting a job, rather than gaining the protection of our labor laws).

legal employees suffer when their employers hire and exploit undocumented workers.

In fact, when undocumented workers are given legally enforceable rights, they are better able to defend their wages and working conditions and not harm their documented counterparts. The economist Francisco Rivera-Batiz analyzed the wages of thousands of Mexican immigrants who were undocumented workers, but later attained legal status after the passage of IRCA, and found that all workers earned significantly more money once they had attained legal working status, even after controlling for factors such as English proficiency, education, and duration of United States residency.[91]

Ultimately, employment protections and immigration law should interact flexibly to achieve both employment and immigration goals. Workers are the site of interaction between two laws: immigration law, which deems them illegal, and employment law, which is supposed to provide them basic protection in the workplace.[92] Undocumented workers are not denied all rights of citizenship; the State includes undocumented workers in some ways and denies them in others.[93] For example, when their status is revealed, undocumented workers are not required to forfeit all wages.[94] The rigid *Hoffman* solution of not providing back pay to undocumented workers not only failed to achieve immigration goals, but it also deprived the NLRB of its discretion to fashion effective remedies that discourage undocumented workers while respecting the desire for the government to maintain control of its borders.[95]

Given that the role of undocumented workers may vary based on the labor market, agencies should have greater discretion to tailor remedies. The remedial goal should be to equalize treatment of undocumented and documented workers.[96] Companies must be made fully accountable for the harms that flow from their hiring and subsequent mistreatment of undocumented workers. Conversely, undocumented workers, rather than being depicted solely as violators, must also be recognized as workers and victims of employers who exploit their immigration status. Immigration enforcement should also address wage degradation for documented employees who are affected by employers' illegal hiring.

IV. THE UNIQUE REMEDIAL STRUCTURE OF RICO CIVIL ACTIONS

The RICO cases are important because RICO, as a statute, connects immigration violations and employment remedies rather than envisioning them as competing concerns. Under RICO, an employer's criminal immigration violation

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91. *See* Amy M. Traub, Drum Major Institute for Public Policy, *Principles for an Immigration Policy to Strengthen & Expand the American Middle Class* 16 (2009) (citing Francisco L. Rivera-Batiz, *Undocumented Workers in the Labor Market: An Analysis of the Earning of Legal and Illegal Mexican Immigrants in the United States*, J. OF POPULATION ECON. 12 (1999)), http://www.drummajorinstitute.org/immigration.

92. *See* Bosniak, *supra* note 45, at 992.

93. *See id.* at 978.

94. *See* Hoffman Plastic Compounds, Inc. v. N.R.L.B., 535 U.S. 137, 159 (2002) (dissent, J. Breyer).

95. *See id.*

96. *See* Traub, *supra* note 91, at 17 (discussing how the middle class suffers when a two-tiered labor market exists).

leads to recovery of actual lost wages for documented employees or compensation for market competitors whose business has been diminished.[97] The statute is unique because, while it is triggered by the initial immigration violation, the monetary damages flow from the employer's labor exploitation of the undocumented worker, which ultimately leads to wage devaluation for documented workers and an unfair competitive wage advantage for the employer.[98]

RICO is imperfect as a tool to enforce immigration; in addition to having narrow applicability, courts are still reluctant to provide undocumented workers standing under the statute.[99] However, RICO represents a more productive interaction of immigration and employment law because it recognizes that an immigration violation leads to labor exploitation that hurts all workers and competing businesses. Attacking the labor exploitation with a strong and directed penalty not only provides restitution to harmed parties, but achieves the goals of the INA—to protect the quality of current jobs and to deter illegal immigration.

a. RICO Statute

Congress enacted the Racketeer Influence and Corrupt Organizations Act (RICO) in 1970. Although the original impetus was to counter organized crime, Congress gave the statute an expansive scope by employing the concept of "enterprise criminality."[100] RICO prohibits racketeering conduct in 18 U.S.C. § 1962(c).[101] The subsection requires plaintiffs to show that the defendant was part of and controlled an enterprise that committed at least two distinct but related predicate acts within ten years of each other.[102] The underlying predicate acts include a range of violations, from mail fraud to murder. In 1986, Congress added to this list certain immigration-related violations if they are committed for the purpose of financial gain. These include knowingly hiring undocumented workers, harboring undocumented aliens, and encouraging aliens to reside in the country.

RICO has recently been used as a method to recover wage damages from employers who work with labor recruiters to hire undocumented workers to lower their labor costs. These lawsuits have featured three classes of plaintiffs: legal employees who have experienced wage declines;[103] competitors who allege they

97. *See* Commercial Cleaning Servs. v. Colin Serv. Sys., Inc., 271 F. 3d 374 (2d Cir. 2001); Mendoza v. Zirkle Fruit Co., 301 F. 3d 1163 (9th Cir. 2002).

98. *See* Commercial Cleaning Servs., 271 F. 3d 374; Mendoza, 301 F. 3d 1163.

99. *See* Zavala v. Wal-Mart Stores, Inc., 447 F. Supp. 2d 379 (D.N.J. 2005).

100. William H. Kaiser, *Extortion in the Workplace: Using Civil RICO to Combat Sexual Harassment in Employment*, 61 BROOK. L. REV. 965, 972-73 (1995).

101. Williams v. Mohawk, 465 F. 3d 1277, 1282 (11th Cir. 2006); 18 U.S.C.A. § 1962(c) (West 2009). Section 1962(c) makes it illegal "for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity...."

102. Mohawk, 465 F. 3d at 1282–83. Plaintiffs must demonstrate conduct of an enterprise through a pattern of racketeering activity. To satisfy the "conduct of an enterprise" element, a plaintiff must establish that the defendant was part of and controlled an enterprise of distinct entities that shared a common goal. A RICO enterprise "includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." *Id.* at 1284 (quoting 18 U.S.C.A. § 1961(4) (West 2009)). The predicate acts are listed in 18 U.S.C.A. § 1961.

103. *See* Mohawk, 465 F. 3d 1277; Trollinger v. Tyson Foods, Inc., 370 F. 3d 602 (6th Cir. 2004); Mendoza v. Zirkle Fruit Co., 301 F. 3d 1163 (9th Cir. 2002).

have been undercut by a company's illegal hiring practices;[104] and undocumented workers themselves.[105] For RICO immigration cases, plaintiffs generally claim that the employer formed an enterprise with labor recruiters, committing at least two predicate acts of illegally hiring, harboring, or enticing undocumented aliens for purposes of employment. While courts have permitted legal employees and competitors to advance their claims, undocumented workers have yet to successfully plead a claim.

RICO is unique because it involves civil enforcement, significant damages, a long statute of limitations, and potentially broad coverage.[106] A properly pled RICO claim creates enormous pressure for defendants to settle in order to avoid expansive damages and stigmatization by a statute that is synonymous with organized crime.[107] Unlike other criminal statutes, RICO permits civil enforcement to recover business or property damages.[108] Civil plaintiffs may be able to recover significantly, including treble damages, counsel fees, and equitable relief.[109] Damages are calculated broadly to restore the plaintiff to complete recovery.[110] Recovery is not limited to the underlying statutory predicate act, which is often criminal and lacks a damage component.[111]

For example, a legal employee who sues his employer under RICO for the predicate act of illegally hiring undocumented workers may attempt recovery of three times his wage devaluation associated with the employer's predicate acts. The criminal act of knowingly hiring an alien does not, in and of itself, have a damage component. However, the employee may claim that the hiring of undocumented workers caused his wages to decline because the undocumented workers earned less than the plaintiff. In his RICO claim, the plaintiff may claim damages equal to three times his wage devaluation associated with the hiring of undocumented workers.

In addition to proving the enterprise and predicate acts, a plaintiff must show standing—that the predicate acts (the immigration violations) directly caused the plaintiff business or property damages.[112] Standing has become the primary hurdle for plaintiffs pleading RICO claims based on predicate immigration acts because parties whose damages are merely derivative are not allowed to recover.[113] The Supreme Court has explained that RICO requires an injury to have a direct and substantial relation to the predicate act and not be merely speculative.[114] To establish standing, the plaintiffs must demonstrate injury to their business or property that was caused "but for" and proximately by the predicate RICO act.[115]

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104. *See* Commercial Cleaning Servs. v. Colin Serv. Sys., Inc., 271 F. 3d 374 (2d Cir. 2001).

105. *See* Zavala v. Wal-Mart Stores, Inc., 447 F. Supp. 2d 379 (D.N.J. 2005).

106. Kaiser, *supra* note 100, at 965.

107. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 485 (1985).

108. 18 U.S.C.A. § 1964(c) (West 2009).

109. Kaiser, *supra* note 100, at 979–82.

110. *Id.*

111. *Id.*

112. *Mohawk*, 465 F.3d at 1286.

113. *See* Zavala v. Wal-Mart Stores, Inc., 447 F. Supp. 2d at 385–88 (D.N.J. 2005) (rejecting the complaint for lack of proximate causation).

114. *See* Holmes v. S.I.P.C., 503 U.S. 258, 269 (1992) (rejecting a stockbroker's claim of injury by executives who had made false statements about the prospects of their company); Anza v. Ideal Steel Supply Corp., 547 U.S. 451 (2006) (rejecting as too remote a company's RICO claim that a competitor who filed false tax reports harmed it because the most direct victim was the IRS).

115. Holmes, 503 U.S. 258 at 269.

While it did not provide a rigid rule, the Supreme Court offered policy considerations to evaluate the directness of proximate cause.[116] First, the more indirect an injury is to a violation, the harder it is to attribute damages to the RICO violation as opposed to other, independent factors.[117] Second, direct causation helps prevent multiple recoveries for the same injury.[118] Third, the judicial purpose of RICO is served best when those victims who are most directly affected are able to recover.[119]

By permitting plaintiffs to sue employers who hire undocumented workers under RICO, courts recognize that the injuries caused by an employer's illegal hiring flow not from the hiring, but rather from the employer's subsequent mistreatment of the undocumented worker, which directly results in harm to employees and market competitors. By permitting a cause of action against employers who hire undocumented workers, RICO bridges the divide between immigration and employment law by linking the illegal hiring of undocumented immigrants—the RICO predicate act—to an employment remedy—restitution of wage degradation. In the following cases involving RICO, courts highlight this linkage.

The Second Circuit has permitted companies to use RICO to recover lost income from a company that achieved lower labor costs by hiring undocumented workers with the aid of labor recruiters.[120] In *Commercial Cleaning Servs., L.L.C. v. Colin Serv. Sys., Inc.*, several janitorial companies sued Colin, a competitor, claiming that the defendant gained a competitive advantage when bidding on contracts by committing the RICO predicate act of knowingly hiring undocumented workers.[121] The court identified that the defendant illegally hired immigrants specifically "to take advantage of their diminished bargaining position, so as to employ a cheaper labor force and compete unfairly on the basis of lower costs."[122] Colin had comparably lower labor costs because it paid below the prevailing wage, failed to withhold payroll taxes, or furnish worker compensation insurance fees.[123] These lower costs permitted Colin to underbid competing firms resulting in the plaintiff companies losing possible contracts.[124] Commercial's injures were sufficiently proximate because Commercial could possibly prove that in the highly competitive janitorial market, the difference between Colin's winning bid and the second highest bid was the difference in the wage rates.[125]

Courts have recognized that documented employees are directly affected by employers' illegal hiring and exploitation of undocumented workers and are therefore entitled to property damages. In *Mendoza v. Zirkle*, the Ninth Circuit permitted documented workers of two Washington state apple orchards to sue their employer, who allegedly knowingly hired undocumented immigrants in order to

116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.* at 270.
120. *See* 271 F. 3d 374 (2d Cir. 2001). The plaintiffs alleged that Colin formed an enterprise with labor recruiters, agencies, and immigrant networks, which provided housing and illegal documents. *Id.* at 379.
121. *Id.* at 378-79.
122. *Id.* at 383.
123. *Id.*
124. *Id.*
125. *Id.* at 382-83.

lower employee wages below the rate of a market comprised of only legal workers.[126] The court permitted the plaintiffs' reasoning that undocumented workers, "due to their economic situation and fear of asserting their rights due to their undocumented status, can be easily exploited and . . . . are therefore willing to work for depressed wages."[127] The court found the employees to be direct victims of this alleged scheme to gain disproportionate bargaining power in order to depress their wages.[128] The documented workers could recover the depressed wages because they had "a legal entitlement to business relations unhampered by schemes prohibited by the RICO predicate statutes."[129]

In *Trollinger v. Tyson Foods, Inc.*, the Sixth Circuit permitted former hourly employees of Tyson Foods to proceed with a civil RICO action that alleged that Tyson conspired to depress employee wages by knowingly hiring undocumented immigrants who were willing to work for below-market rates.[130] The plaintiffs claimed that over half of the workers at the facility were undocumented, causing the wages of legal employees to drop below the wages paid to area unskilled labor.[131] The court explained that plaintiffs properly alleged that Tyson was a substantial cause in the wage decline and could recover lost wages.[132]

The court detailed a possible chain of events:[133]

(1)that Tyson hired sufficient numbers of illegal aliens to impact the legal employees' wages;

(2)that each additional illegal worker hired into the [union] bargaining unit by Tyson has a measurable impact on the bargained-for wage-scale;

(3)that the illegal immigrants allegedly brought into this country through Tyson's efforts allowed Tyson not to compete with other businesses for unskilled labor; and

(4)that Tyson's legal workers did not "choose" to remain at Tyson for less money than other businesses offered, but had no choice in the matter given the hiring needs of the other businesses in the area and the influx of illegal immigrants at Tyson's facilities.

In *Williams v. Mohawk Industries*, current and former legal employees of Mohawk Industries, the second largest carpet and rug manufacturer in the nation, sued the employer for conspiring with recruiting agencies to employ undocumented workers to reduce wage costs.[134] The legal employees alleged that their wages were depressed because they competed with lower-wage undocumented workers who were more "beholden" to Mohawk and unable to file for worker's compensation claims.[135] Further, Mohawk's hiring of undocumented workers reduced the number of legal workers that Mohawk had to hire, which increased the labor pool of

126. 301 F.3d 1163, 1166-67 (9th Cir. 2002).

127. *Id.* at 1166.

128. *Id.* at 1169-71.

129. *Id.* at 1168.

130. 370 F.3d 602, 605-07 (6th Cir. 2004). The plaintiffs claimed that a network of recruiters and temporary employment agencies assisted Tyson by transporting and housing undocumented workers.

131. *Id.* at 606.

132. *Id.* at 607-12.

133. *Id.* at 619.

134. 465 F.3d 1277, 1281-84 (11th Cir. 2006).

135. *Id.* at 1282.

available legal workers, which ultimately depressed the wages of legal employees.[136] The court held that plaintiffs properly pled that they were the direct victims of the hiring scheme, which interfered with their business relationship, and therefore they had standing.[137]

In contrast to competing businesses and legal employees, undocumented workers have yet to successfully plead a RICO cause of action case to recover damages from employers that illegally hire them. Courts still reflect the uneasy interaction between employment law and immigration law when it comes to undocumented workers asserting their rights.[138] The District Court of New Jersey rejected with prejudice the only RICO case involving undocumented workers as plaintiffs, holding that they failed to properly plead an enterprise and, more notably, proximate cause.[139] The court appeared to apply a causation standard stricter than those in other circuits.

In *Zavala v. Wal-Mart*, undocumented janitors who were transported and hired by Wal-Mart claimed that the company, which had just been raided by ICE, worked with labor recruiters to violate immigration laws, leading to their exploitation.[140] Plaintiffs had pleaded that Wal-Mart and labor contractors together engaged in predicate immigration acts and should be considered "persons" under the RICO statute.[141] The plaintiffs sought property damages.[142]

The court rejected the plaintiffs' complaint primarily because plaintiffs failed to properly allege an enterprise distinct from Wal-Mart.[143] The court further held that the workers lacked standing because they failed to show causation—the workers were harmed directly by the underpaying of wages, not by the violation of the immigration acts.[144] The violation of immigration acts merely played the indirect role of increasing the conditions of exploitation. The court did distinguish that unlike in other successful RICO immigration pleadings, the janitors did not plead that Wal-Mart hired them knowing their immigration status, but only claimed that Wal-Mart violated predicate acts of harboring and transporting aliens.[145] Including the knowing hiring of undocumented workers claim in the pleading may lead to a causal inference that directly links the lost wages to the predicate act.[146]

The court was reluctant to unpack what it considered to be a complex and speculative causal chain. In particular, it deemed the employer's offering a job at a particular wage and the employee's subsequent acceptance as "independent and

136. *Id.*

137. *Id.* at 1288.

138. *See* Zavala v. Wal-Mart Stores, Inc., 447 F. Supp. 2d 379, 383-84 (D.N.J. 2006).

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 386-89.

143. *Id.* at 383-84.

144. *Id.* at 386-89.

145. *Id.* In its original complaint, the plaintiffs did plead that Wal-Mart knowingly hired undocumented workers; however, the court dismissed the count for failure to state a claim. Ultimately, the RICO count was dismissed for failure to plead sufficient facts to state a claim that Wal-Mart violated the predicate immigration acts. The plaintiffs did not re-plead this predicate act in its amended complaint.

146. *Id.* at 388 ("A causal inference that links hiring of illegal immigrants to wage levels might be reasonable and direct, but Plaintiffs cannot rely here on any such inference because they have not alleged hiring as a predicate violation.").

intervening causes in the causal chain."[147] This reluctance to permit causation stands in contrast to the cases in which RICO plaintiffs were documented workers or market competitors.[148] *Commercial Cleaning* rejected the argument that the more direct cause of damages to the company was underpayment, explaining that "the hiring of illegal alien workers was to take advantage of their diminished bargaining position."[149] *Mohawk* rejected the argument that wage rates were an intervening factor to recovery—the legal workers' agreement to the wages did not interrupt the fact that the employer hired undocumented immigrants to reduce the bargaining power of legal workers, resulting in a lowering of wages.[150] Similarly, in *Trollinger,* the wage relationship between the employer and employee substantiated the direct causation, rather than interrupting it.[151]

b. RICO as an Enforcement Mechanism

Features of the RICO civil action highlight how immigration law and employment remedies could interact more productively to achieve the aims of both immigration and employment policy. By disgorging the wage advantages that the employer gains from mistreating undocumented workers, RICO better achieves the immigration policy goals of protecting the quality of jobs for legal employees, while discouraging employers from hiring undocumented workers.[152] RICO highlights that an employer's exploitation of undocumented workers is essentially anti-competitive behavior, which distorts both the competitive labor and business market.[153] The focus is not on the act of hiring undocumented immigrants, but rather on the subsequent harm—the employer's mistreatment of these workers.[154] Documented employees, undocumented employees, and competing businesses ultimately share a common target—an employer that abuses its workers.[155] The damages are calculated broadly to disgorge the employer's gains of reduced wages and illegally obtained business.[156] The structure of RICO, with versatile recoveries and standing, better tracks recoveries for these injured parties.

However, RICO civil actions as currently implemented do not constitute practical or adequate immigration enforcement strategy because they have narrow applicability and prevent undocumented workers from filing actions. Although parties such as competitors and documented employees may be able to show

147. *Id.* at 386.

148. *See* Williams v. Mohawk Indus., 465 F.3d 1277 (11th Cir. 2006).; Trollinger v. Tyson Foods, Inc., 370 F.3d 602 (6th Cir. 2004); Mendoza v. Zirkle Fruit Co., 301 F.3d 1163 (9th Cir. 2002); and Commer. Cleaning Servs. v. Colin Serv. Sys., Inc., 271 F.3d 374 (2nd Cir. 2001). In all these cases the chain of causation was held to be permissible at the pleading stage.

149. Commer. Cleaning, 271 F.3d at 383.

150. *See* Mohawk, 465 F.3d at 1288-91.

151. Trollinger, 370 F.3d at 616-19.

152. *See* Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 903 (1984) ("In devising remedies for unfair labor practices, the [NLRB] is obliged to take into account [the] . . . . Congressional objective . . . . of deterring unauthorized immigration."); *See* Hoffman Plastic Compounds v. NLRB, 535 U.S. 137 (2002).

153. *See* Commer. Cleaning, 271 F.3d at 381-82; *See also* Mendoza, 301 F.3d at 1169-71.

154. Commer. Cleaning, 271 F.3d at 381-82.

155. *See* Mohawk, 465 F.3d at 1277; Trollinger v. Tyson Foods, Inc., 370 F.3d 602 (6th Cir. 2004); Mendoza, 301 F.3d at 1163; Commer. Cleaning, 271 F.3d at 378-79.

156. William H. Kaiser, *Extortion in the Workplace: Using Civil RICO to Combat Sexual Harassment in Employment*, 61 BROOK. L. REV. 965, 979 (1995).

damages, they may not have sufficient evidence to show a direct enough causation to the company's hiring of undocumented workers.[157]

Additionally, RICO fails to provide standing for the undocumented workers who suffer the brunt of the employer's exploitation. Like *Hoffman*, the court in *Zavala* expressed a reluctance to look beyond the undocumented status of the worker, and to recognize undocumented workers as entitled to labor and employment protections.[158] *Zavala* suggested that the undocumented workers consented to Wal-Mart's abusive conditions, once again disregarding the imbalance in workplace power between undocumented workers and their employers.[159] By providing legal employees standing while denying it to undocumented counterparts, the court reaffirmed that undocumented workers are second-class because of their status.[160] As long as this inequity between workers exists, employers will have increased incentive to hire undocumented workers and exploit them.[161]

Providing standing to undocumented workers may in fact serve immigration policy goals by potentially reducing an employer's desire to hire an undocumented worker. The potential cost of a RICO penalty would offset the competitive gains of exploiting undocumented immigrants. Further, the threat of a RICO penalty serves as a counterweight against an employer's maltreatment of workers, thus weakening an employer's ability to exploit undocumented immigrants, resulting in an employer's weakened desire to hire them. For example, in *Zavala*, the worker's RICO lawsuit was defensive, after having been discovered, they sought recovery from Wal-Mart.[162] Moreover, the undocumented workers themselves are in the best situation to sue unscrupulous employers because they most likely know whether the employer committed the predicate act of knowingly hiring an undocumented worker. After proving this element, other parties may then assess whether they too can sue.

By permitting documented workers to take action while denying undocumented workers the same right, RICO highlights the tension between the interests of documented and undocumented workers. Legal employees have self-interest in maintaining their jobs at current or higher wage rates. These RICO actions involving documented workers suing their employers appear to demonstrate legal workers blaming undocumented workers for their job loss and lower wages.[163] Although it is true that the presence of undocumented workers may negatively affect

157. *See* Zavala, 447 F. Supp. 2d at 385-88 (rejecting the complaint because of lack of proximate causation); *See* Holmes v. SIPC, 503 U.S. 258, 269 (1992) (rejecting stockbrokers' claim that they were injured by executives who had made false statements about the prospects of their company); *See* Anza v. Ideal Steel Supply Corp., 547 U.S. 451 (2006) (rejecting as too remote a company's RICO claim that a competitor who filed false tax reports harmed it because the most direct victim was the IRS).

158. *See* Zavala, 447 F. Supp. 2d at 386-89; Hoffman Plastic Compounds v. NLRB, 535 U.S. 137, 160 (2002).

159. *See* Zavala, 447 F. Supp. 2d at 387.

160. *See* Bosniak, *Exclusion and Membership*, *supra* note 45, at 1040-42.

161. *Id.*

162. M. Isabel Medina, *Wal-Mart, Immigrant Workers and the U.S. Government – A Case of Split Personality?*, 39 CONN. L. REV. 1443 (2007) (discussing Wal-Mart's immigration policy and the unsuccessful Zavala case).

163. *See* Brian Grow, *A Body Blow to Illegal Labor?*, BUS. WK., March 27, 2006, at 86 (discussing the *Mohawk* case and describing that the town of Calhoun, Georgia, where the rug plant is located, is increasingly hostile to the Latino newcomers and coworkers. "[W]hite Mohawk workers . . . say Latinos' willingness to accept low pay depresses overall pay rates. 'If a lot of them weren't here, our wages would be higher.'").

documented workers,[164] importantly, the RICO civil action blames not the documented workers but rather the employer for hiring and mistreating the workers. Although the undocumented workers may have consented to the hiring, the documented workers recover from the employer. Further, if an employer paid market wage rates to both documented and undocumented employees and treated them equally, undocumented employees would face no harm and documented employees could not seek damages.[165] Wage rates and employment conditions would remain upheld.

Undocumented workers potentially have a more complicated interest. Feasibly, undocumented workers have an interest in acquiring and maintaining employment, albeit illegally, at the highest possible wage rates. In industries where there is a wage difference between undocumented and legal workers, undocumented employees lose their potential hiring advantage — their comparatively lower labor cost — by reducing this wage gap. However, providing strong labor protections to undocumented workers would never fully equalize them to documented workers. The undocumented status of workers creates a persistent possibility of deportation and limited mobility between jobs.[166] This uncertainty is seen with legal guest workers who are immigrants permitted to work but subject to lower wages and the fear of revocation of their visas.[167] Legal workers do not experience this fear and employment law does not cure this risk. Ultimately, undocumented workers appear to be in a better scenario if they have the discretion to waive their employment rights, rather than being forced to check them at the workplace door.[168]

c. Looking forward

Immigration enforcement policy should be more tailored to the injuries caused by the hiring of undocumented workers. It should more specifically address the anti-competitive behavior of employers of undocumented immigrants, which distorts both the business and labor markets. A primary focus of immigration enforcement should be to stem degradation of American job quality that occurs because of employers' exploitation of undocumented workers. The government's immigration policy should include private civil actions that provide recovery to parties that have been harmed by the hiring of undocumented workers, including to undocumented workers themselves. Such remedies would be more flexible than fixed penalties because an employer's liability for damages would reflect how its employment practices compares to the industry norm. Further, an employer would

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164. *See* Lisa Catanzarite, *Immigration, Union Density, and Brown-Collar Wage Penalties*, 2004 ST. CAL. LAB. 107, 107-10.

165. Under RICO, some legal employees who were fired could feasibly argue that the hiring of an undocumented employee crowded them out of a job or as well that the rise of unemployed legal workers reduced the wages of employed legal workers. *See* Trollinger v. Tyson Foods, Inc., 370 F.3d 602, 619 (6th Cir. 2004) (arguing this point). However, note that this impact is probably less severe than an employer's direct devaluation of the wages through the exploitation of co-workers.

166. *See id.*

167. *See* Laura Wides-Munoz, *Migrants See Abuse in Guest Worker Program*, Wash. Post, June 2, 2007, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/06/02/AR2007060200049.html. (detailing rampant wage theft and abuse amongst companies and contractors that hire guest workers).

168. *See* Robert I. Correales, *Did Hoffman Plastic Compounds, Inc., Produce Disposable Workers?*, 14 BERKELEY LA RAZA L.J. 103, 108 (2003).

be less likely to escape a civil action than an investigation because, ideally, all parties injured by the employer's exploitation of undocumented workers would have a civil action available to them.

The best method of counteracting an employer's incentive to hire undocumented workers would be to give undocumented workers the ability to individually and collectively advocate for and enjoy strong protections.[169] This would remove employers' ability to exploit undocumented workers, thereby reducing the incentive to hire them. A key to this would be to repeal *Hoffman*'s effects and permit undocumented immigrants to recover the same employment and labor awards to which documented workers have access.

Businesses should be permitted to sue and recover damages from competitors who gain unfair advantages from hiring and exploiting undocumented immigrants. Although private civil actions face the common problems of the high cost of litigation and the difficulty of assessing damages, the realistic threat of a lawsuit would reduce the incentive of employers to hire and exploit undocumented workers, as their competitive advantages may be offset by damages awarded to competitors. Because all firms in a particular industry would have the ability to hold another firm accountable for unscrupulous practices, each firm's incentive to violate labor laws would be reduced. Thus, rather than experiencing a "race to the bottom," the industry would be able to regulate its hiring practices. This regulatory function, however, would not apply in industries where the hiring and exploiting of undocumented workers is already the industry norm.

Stronger cooperation between undocumented and documented workers to hold employers accountable aids in defending the working conditions of legal workers, protecting undocumented workers, and reducing employers' incentives to hire undocumented workers. In the RICO context, for example, although undocumented workers do not have standing to sue, the actions of documented workers may ultimately improve working conditions for all employees.[170] In addition to using civil actions similar to RICO to recover damages from the employer, documented and undocumented workers should work collectively to build trust around common interests and permanently improve wage and job standards. Labor unions can serve as an institutional counterweight against harmful employer practices. Unions recognize the importance of cooperation between undocumented and documented workers, since "[i]f undocumented workers have no practical choice but to accept substandard pay and working conditions, their U.S. counterparts will eventually be forced to accept such conditions as well."[171]

However, weak labor laws and the denial of equal labor rights to undocumented workers reduce the ability of all workers to maintain their working conditions. Employers routinely harass union supporters and delay union elections, which ultimately disrupts collective action.[172] With such control, employers can

169. *See Unity Blueprint for Immigration Reform* 6 (2007) (explaining the need for immigration enforcement to complement rather than undermine the enforcement of labor and employment laws), http://www.unityblueprint.org/_documents/3-29-07UnityBlueprintForImmigrationReform.pdf.

170. Similar situations may occur in, for example, class-action lawsuits, where legal and undocumented workers together make their employer accountable.

171. AFL-CIO President John Sweeney, U.S.–Mexico Migration Discussions—A Historic Opportunity, http://www.aflcio.org/mediacenter/prsptm/tm09072001.cfm (last visited Sept. 7, 2001).

172. *See* Kate Bronfenbrenner, *No Holds Barred: The Intensification of Employer Opposition to Organizing*, ECONOMIC POLICY INSTITUTE (2009), *available at*

manage their workplaces through isolation, coercion, and fear, leading to lowered job standards and unscrupulous business practices.[173] To keep companies accountable for their employment practices and achieve the goals of the INA, Congress should strengthen labor law that protects the organizing and bargaining rights of both documented and undocumented workers.[174]

These initial proposals highlight that parties adversely affected by employers that hire undocumented workers have a common interest to keep such employers accountable for their treatment of their employees. Enforcement policy should not see immigration law as trumping employment remedies for undocumented workers. Rather, to deter employers from further hiring and exploiting undocumented workers, employment and labor laws must be strengthened in order to keep employers who hire and exploit undocumented workers accountable. Although far from adequate as a remedy, these RICO cases are important because they place central emphasis on the intent and actions of the employer and provide meaningful recoveries to injured parties. Going forward, immigration-related policies and laws must permit undocumented workers, documented workers, and competitors to act upon their common interest and recover from unscrupulous employers.

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http://epi.3cdn.net/edc3b3dc172dd1094f_0ym6ii96d.pdf.

173. *Id.*

174. For example, the Employee Free Choice Act (HR.1409 /S.560) proposed in the 111th Congress attempts to address some of these issues by providing stronger penalties for violations while employees are attempting to organize or obtain a first contract and allowing for mandatory mediation and arbitration when negotiating the first contract.