TO HELP THOSE MOST IN NEED: UNDOCUMENTED WORKERS' RIGHTS AND REMEDIES UNDER TITLE VII

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Introduction 608
I. Title VII Protection Extends to Undocumented Workers 612
A. Immigration Reform and Control Act 612
B. Title VII Coverage 613
C. Focusing on Employer Conduct 616
II. Discrimination Against Undocumented Workers 617
III. The Remedial Scheme for Discrimination Against Undocumented Workers 623
A. Purposes of and Remedies under Title VII and IRCA 624
1. The Purposes of Title VII and IRCA 625
a. Purposes of Title VII 625
b. Purposes of IRCA 628
2. How the Remedies Serve the Purposes 628
B. Limited Availability of Remedies Under Title VII Doctrine .. 630
1. Reinstatement 631
2. Backpay 632
a. The Amount of Backpay: After-acquired Evidence ... 633
b. The Amount of Backpay: Availability 634
3. Frontpay 636
4. Compensatory and Punitive Damages 637
C. Proposed Statutory Interpretation and Legislative Changes ... 638
Conclusion 639

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> If [labor laws] were inapplicable to workers who are illegal aliens, we would leave helpless the very persons who most need protection from exploitative employer practices . . . . [1]

INTRODUCTION

Undocumented immigrants who live and work in the United States, often referred to as "illegal aliens," are under increasing attack as undeserving of legal rights and protection.[2] As of 1988, the Immigration Reform and Control Act (IRCA) has prohibited employers from hiring undocumented workers and subjected employers who violate the law to fines and imprisonment.[3] More recent proposals range from withholding medical care and driver's licenses from undocumented people to denying citizenship and education to their children born in the United States.[4] Despite the laws designed to keep them out, undocumented immigrants continue to live and work in the United States.[5] The exact number, though, is extremely difficult to determine.[6]

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1. Justice Kennedy, then Circuit Judge, *in* NLRB v. Apollo Tire Co., 604 F.2d 1180, 1184 (9th Cir. 1979) (Kennedy, J., concurring), discussed *infra* text accompanying note 199.

2. *See* Eric Bailey & Dan Morain, *Anti-immigration Bills Flood Legislature*, L.A. TIMES, May 3, 1993, at A3 (describing over 20 anti-immigrant bills introduced in the California legislature, including bills prohibiting driver's licenses for undocumented people, banning undocumented children in public schools, barring provision of medical care, and calling out the National Guard to patrol the California-Mexico border); Ronald Brownstein & Richard Simon, *California is Pulling in Welcome Mat*, L.A. TIMES, Nov. 14, 1993, at A1 (discussing the new wave of anti-immigration sentiment in California and Governor Pete Wilson's related proposal to deny benefits to illegal immigrants). Often the attack is on their presence, regardless of the rights or opportunities extended to them. *See* Michael Kinsley, *Gatecrashers*, NEW REPUBLIC, Dec. 28, 1992, at 6 (discussing arguments made to support anti-immigrant sentiment); *Polls Apart*, 24 NAT'L J. 648 (1992) (noting that Gallup polls have revealed substantial anti-immigrant sentiment); Deborah Sontag, *Calls to Restrict Immigration Come From Many Quarters*, N.Y. TIMES, Dec. 13, 1992, at E5 (documenting strong anti-immigrant sentiments of many Americans).

3. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended at 8 U.S.C. § 1324a (1988 & Supp. IV 1992)). IRCA became fully enforceable 18 months after its enactment. 8 U.S.C. § 1324a(i)(1)–(2) (1988).

4. *See* Susan Ferriss, *Wilson Plan Hits Kids of Immigrants*, S.F. EXAMINER, Aug. 15, 1993, at B1 (discussing Governor Wilson's public campaign urging "the federal government to stem the flow of illegal immigrants by barring American-born children from citizenship, education or healthcare."); Pat Karlak, *Cardinal Defends Immigrants*, SACRAMENTO BEE, Oct. 11, 1993, at B1, B5 (discussing California legislation that prohibits issuing driver's licenses to undocumented immigrants, requires proof of legal residency for state-funded job training, and prohibits local governments from enacting laws that bar police from sharing information with federal immigration officials).

5. *See* Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955, 1018-19 (describing Immigration and Naturalization Service (INS) border apprehension rates and interviews with undocumented workers that indicate that IRCA has not significantly deterred the hiring or influx of undocumented individuals); *cf.* Catherine L. Merino, *Compromising Immigration Reform: The Creation of a Vulnerable Subclass*, 98 YALE L.J. 409, 411-12, 420-23 (1988) (stating that IRCA has no impact on people hired before 1986 because their immigration status does not have to be documented by employers and concluding that a large number of undocumented workers are allowed to continue to work here).

Perhaps the best post-IRCA evidence of workplace trends comes from a study of the employment patterns of southern Californian businesses that are dependent on the use of undocumented workers.[7] Nearly half of the study participants stated that they thought they currently employed undocumented workers,[8] and 80 percent said that IRCA had not affected in any way the type of worker they were currently hiring.[9] Seventy-five percent anticipated no future changes in the way they hired workers.[10] Employers continue to use undocumented workers because of a perceived lack of enforcement,[11] low fines relative to the benefit of hiring these workers,[12] the possibility of technically following the law while still employing undocumented workers,[13] and the ability to discharge workers prior to INS inspections.[14]

Although undocumented people continue to work in the United States, the amount of workplace protection afforded to them has not yet been established. Other U.S. workers enjoy a variety of statutory protections against illegal employer practices. Their rights include reasonable hours and overtime pay;[15] the ability to organize into a union and bargain collectively;[16] safe and healthy work conditions;[17] job protected leave for military service,[18] jury

6. JULIAN L. SIMON, THE ECONOMIC CONSEQUENCES OF IMMIGRATION 279-85 (1989); Richard E. Blum, *Labor Standards Enforcement and the Realities of Labor Migration: Protecting Undocumented Workers After* Sure-Tan, *the IRCA, and* Patel, 63 N.Y.U. L. REV. 1342, 1342 n.2 (1988); Merino, *supra* note 5, at 411 n.14.

7. Kitty Calavita, *Employer Sanctions Violations: Toward a Dialectical Model of White-Collar Crime*, 24 LAW & SOC'Y REV. 1041 (1990). The research on such employers illustrates only the trends where the continued employment of undocumented workers is most likely. Other employers, who were not likely to hire undocumented workers in the first place, have reacted differently to IRCA. They have used the employer sanction provisions of IRCA as an excuse to discriminate against documented workers who have accents or look foreign. Mabel Aguilar, *The Discriminatory Impact of the Immigration Reform and Control Act of 1986*, 10 CHICANO L. REV. 14, 25-29 (1990).

8. Calavita, *supra* note 7, at 1050.

9. *Id.* at 1050-51.

10. *Id.* at 1051.

11. *Id.* at 1053 (describing records showing that the INS inspected less than one-fifth of one percent of U.S. employers).

12. *Id.* at 1051-55 (showing that employers pay undocumented workers less and believe they work harder).

13. *Id.* at 1055, 1062-64. Rather than actually prohibiting an employer from employing undocumented workers, IRCA simply requires that all employers verify the work status of new employees by inspecting certain documents. 8 U.S.C. § 1324a(b) (1988 & Supp. IV 1992). An employer need only have a good faith belief that the documents are genuine and fill out an I-9 form to be in compliance with the law. *Id.* § 1324a(a)(3). In fact, employers are specifically prohibited from questioning the authenticity of documents that on their face appear genuine. *Id.* 1324a(b)(1)(A). Calavita argues persuasively that this definition of "compliance" enabled the legislature to balance the conflicting goals of passing a law aimed at undocumented workers and accommodating those employers who depend on them. Calavita, *supra* note 7, at 1057-61.

14. Calavita, *supra* note 7, at 1062 (noting that employers are generally given three days notice before an inspection).

15. Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1988 & Supp. IV 1992).

16. National Labor Relations Act, 29 U.S.C. §§ 151-169 (1988).

17. Occupational Safety & Health Act, 29 U.S.C. §§ 651-678 (1988).

18. 38 U.S.C. § 2021(b)(3) (1988).

duty,[19] family responsibilities, and medical emergencies;[20] and freedom from discrimination based upon age,[21] disability,[22] gender, race, national origin, or religion.[23]

For undocumented workers, immigration status clearly affects their employment situation in one major way. Under IRCA, they may lawfully be refused employment because they lack documentation. An independent problem exists, however, when an undocumented worker becomes a victim of those employment practices that our laws seek to prohibit and remedy. This Article examines what happens when an undocumented worker is discriminated against, not because of her legal inability to be employed in the United States, but due to a protected characteristic, such as gender, age, or religion. Such discrimination against a *documented* worker would undoubtedly be illegal under Title VII of the Civil Rights Act of 1964 (Title VII).[24] Although a few courts and commentators have addressed the applicability of the National Labor Relations Act (NLRA)[25] and the Fair Labor Standards Act (FLSA)[26] to undocumented workers, very few have addressed the issue of discrimination.[27]

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19. 28 U.S.C. § 1875 (1988).

20. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (1993) (codified in scattered sections of 2 U.S.C., 5 U.S.C., and 29 U.S.C.) (implementing regulations codified at 29 C.F.R. §§ 825.100–.800 (1993)).

21. Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1988 & Supp. IV 1992).

22. Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (Supp. IV 1992).

23. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1988 & Supp. IV 1992).

24. *Id.*

25. 29 U.S.C. §§ 151-169 (1988 & Supp. IV 1992). The NLRA provides the right to organize a union and bargain collectively. Cases dealing with the rights of undocumented workers under the NLRA include Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1983); Del Rey Tortilleria, Inc. v. NLRB, 976 F.2d 1115 (7th Cir. 1992); Local 512, Warehouse & Office Workers' Union (Felbro) v. NLRB, 795 F.2d 705 (9th Cir. 1986); and NLRB v. Apollo Tire Co., 604 F.2d 1180 (9th Cir. 1979). Commentary includes Daniel R. Fjelstad, *The National Labor Relations Act and Undocumented Workers:* Local 512 v. NLRB *after the Immigration Reform and Control Act of 1986*, 62 WASH. L. REV. 595 (1987); Christine N. O'Brien, *Reinstatement and Back Pay for Undocumented Workers to Remedy Employer Unfair Labor Practices*, 40 LAB. L.J. 208 (1989); and Myrna A. Shuster, *Undocumented Does Not Equal Unprotected: The Status of Undocumented Aliens under the NLRA since the Passage of the IRCA*, 39 CASE W. RES. L. REV. 609 (1988-89).

26. 29 U.S.C. §§ 201-219 (1988 & Supp. IV 1992). The FLSA regulates minimum wage and overtime issues. The only case on point is Patel v. Quality Inn S., 846 F.2d 700 (11th Cir. 1988), *cert. denied*, 489 U.S. 1011 (1989). Articles include Blum, *supra* note 6; and L. Tracy Harris, *Conflict or Double Deterrence? FLSA Protection of Illegal Aliens and the Immigration Reform and Control Act*, 72 MINN. L. REV. 900 (1988).

27. Unless otherwise specified, *discrimination* throughout this Article refers to discrimination based upon a characteristic protected by Title VII and not discrimination based upon immigration status. No law review articles discuss in detail Title VII discrimination against undocumented workers. It is discussed briefly in Bosniak, *supra* note 5, at 1032-33 (focusing on IRCA's effect on the precarious mixture of exclusionary and membership oriented approaches to illegal aliens in American law); Peter Margulies, *Stranger and Afraid, Undocumented Workers and Federal Employment Law*, 38 DEPAUL L. REV. 553 (1989) (dealing with comprehensive remedy scheme for undocumented workers after IRCA, without focusing on Title VII or addressing current doctrine); Charles E. Mitchell, *Illegal Aliens, Employment Discrimination, and the 1986 Immigration Reform and Control Act*, 40 LAB. L.J. 177, 179-80 (1989) (discussing

Doctrine, statutory construction, and policy demonstrate that Title VII should cover undocumented workers and protect them against discrimination because Title VII protects employees by virtue of their status as employees, regardless of their immigration status.[28]

More complex questions surround the remedies available to undocumented workers who have been subjected to discrimination. Traditional Title VII remedies, designed for documented workers, include reinstatement, backpay, frontpay, and compensatory and punitive damages. Arguably, the purposes behind these remedies may not apply to undocumented workers. Additionally, many of these remedies might not be available to undocumented workers because of the poor fit between current legal doctrine and their status. Since they cannot legally work here, undocumented workers cannot be reinstated. Additionally, backpay and frontpay generally have been limited to people who are "available" for work. Undocumented workers may be considered de jure unavailable.[29] Further, the after-acquired evidence doctrine, which permits the introduction of evidence of an employee's misconduct, discovered after a discharge, to excuse the employer's wrongful acts connected with the discharge, may bar recovery for employees whose undocumented status is discovered after the discharge.[30]

Nonetheless, it is clear that the purposes underlying Title VII remedies apply equally to undocumented workers and can be achieved (in most cases) without undermining the purposes of IRCA. For this to happen, current doctrine must be liberally construed or additional remedies must be created.

The first part of this Article introduces IRCA and Title VII and discusses whether undocumented workers enjoy Title VII protection after the passage of IRCA. The second part illustrates the types of Title VII discrimination faced by undocumented workers. The third part addresses the issue of remedies. In doing so, it examines the purposes behind Title VII and IRCA, whether the

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IRCA provision prohibiting discrimination based on citizenship status); and Mack A. Player, *Citizenship, Alienage, and Ethnic Origin Discrimination in Employment Under the Law of the United States*, 20 GA. J. INT'L & COMP. L. 29, 40-41 (1990) (distinguishing between alienage discrimination, which is permitted by Title VII, and other forms of citizenship discrimination, like discrimination against U.S. citizens by foreign employers). Pre-IRCA cases brought under Title VII by undocumented workers include Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973) (discussed *infra* notes 37–39 and accompanying text); EEOC v. Hacienda Hotel, 881 F.2d 1504 (9th Cir. 1989) (discussed *infra* notes 84–85, 87-88, 114 and accompanying text); Rios v. Enterprise Ass'n Steamfitters Local 638, 860 F.2d 1168 (2d Cir. 1988) (discussed *infra* note 111 and accompanying text); and EEOC v. Switching Sys. Div. of Rockwell Int'l, 783 F. Supp. 369 (N.D. Ill. 1992) (discussed *infra* note 37). The only case decided in light of IRCA is EEOC v. Tortilleria La Mejor, 758 F. Supp. 585 (E.D. Cal. 1991) (discussed *infra* notes 51-54, 84, 113 and accompanying text).

28. Although I focus on Title VII, which prohibits discrimination based on race, sex, color, national origin, and religion, similar arguments apply to age discrimination under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1988 & Supp. IV 1992), and disability discrimination under the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (Supp. IV 1992).

29. *See infra* part III.B.2.b.

30. *See infra* part III.B.2.a.

purposes behind Title VII remedies apply to undocumented workers, how the application of those remedies affects the purposes behind IRCA, and the current availability of remedies for undocumented workers under Title VII. Part three concludes by suggesting changes in doctrinal interpretation and legislation needed to accomplish the purposes behind Title VII as they apply to undocumented workers.

I
TITLE VII PROTECTION EXTENDS TO UNDOCUMENTED WORKERS

After briefly introducing IRCA and Title VII, this section explores the doctrinal and policy reasons why undocumented workers should be covered by Title VII.

A. Immigration Reform and Control Act

IRCA changed immigration policy in two significant ways: it penalizes employers for hiring undocumented workers,[31] and it provides procedures for undocumented people who entered the country prior to 1982 to become legal residents or citizens.[32] The employer sanctions provisions, as the first change came to be known, are revolutionary because they are the first federal laws to make it illegal for employers to hire undocumented workers. These provisions do so by requiring employers to check work authorization for employees hired after 1986.[33] They focus upon employers, imposing fines and imprisonment for those who knowingly hire or employ undocumented workers or who do not check work authorization. They do not punish undocumented workers who seek or take employment.[34]

IRCA and its legislative history discuss discrimination in two ways. First, the legislative history briefly addresses discrimination under Title VII and specifically states that "the committee does not intend that any provision of this Act would limit the powers of State or Federal labor standards agencies such as the . . . Equal Employment Opportunity Commission . . . to remedy unfair practices committed against undocumented employees . . . ."[35] Since

31. 8 U.S.C. § 1324a (1988 & Supp. IV 1992).

32. To be eligible under these procedures, a person must show that she has been in continuous residence in the United States since January 1, 1982, as an unlawful immigrant, and that she satisfies the general grounds for immigrant admissibility. 8 U.S.C. § 1255a (1988 & Supp. IV 1992). These legalization procedures are not discussed further. Their only effect on the issue of discrimination is the extent to which their slow implementation and ambiguity have created a group of potential Title VII plaintiffs who become "legal" after they have been hired. *See, e.g.*, cases discussed *infra* note 113.

33. Employers do not have to check that employees hired before this date have a legal right to work in the United States. 8 U.S.C. § 1324a(i)(1) (1988).

34. The only employee or applicant activity that is criminalized is the fraudulent use of employment verification documents. 8 U.S.C. § 1324c (Supp. IV 1992).

35. H.R. REP. No. 682, 99th Cong., 2d Sess., pt. 2, at 8-9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5758.

the Equal Employment Opportunity Commission (EEOC) is the agency which enforces Title VII, this passage seems to leave undisturbed Title VII's applicability to undocumented workers. Second, IRCA prohibits discrimination based upon national origin or citizenship status (including citizens, intending citizens, permanent resident aliens, and legally admitted temporary aliens).[36]

B. Title VII Coverage

Title VII prohibits discrimination against employees on the basis of race, color, gender, national origin, and religion. The Supreme Court has held that discrimination based upon citizenship status is different from and not prohibited by the national origin protections of Title VII.[37] "Employees" are defined as "individuals" employed by an employer subject to the Act.[38] Prior to the passage of IRCA, the Supreme Court held in *Espinoza v. Farah Manufacturing Co.* that aliens were included in this class because of the breadth of the term "individual" and because of the Act's so-called alien exemption clause, which exempts aliens employed outside the United States from coverage.[39]

Although not articulated by the Court, the reliance on the terms "individual"[40] and "employee" implies that there are certain rights that attach to and grow out of the status of being an employee, separate from the rights and protections associated with citizenship. A special, protected status for employees is also suggested by the fact that most labor laws, including Title VII, cover employees but exclude other workers, such as independent contractors or volunteers.[41]

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36. 8 U.S.C. § 1324b (1988 & Supp. IV 1992). These provisions, which created a private right of action with the usual panoply of civil remedies for employees discriminated against, were enacted in response to widespread fear that employer sanctions could result in discrimination against people of color who look or sound foreign. H.R. REP. NO. 682, 99th Cong., 2d Sess., pt. 1, at 49 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5653.

As discussed previously, it is not the purpose of this Article to discuss this type of discrimination. *See supra* note 27.

37. Espinoza v. Farah Mfg. Co., 414 U.S. 86, 88 (1973); *see also* EEOC v. Switching Sys. Div. of Rockwell Int'l, 783 F. Supp. 369, 372-76 (N.D. Ill. 1992) (granting summary judgment to employer who dismissed undocumented workers on grounds that Title VII does not protect against discrimination based on citizenship status).

38. 42 U.S.C. § 2000e(f) (Supp. IV 1992).

39. *Espinoza*, 414 U.S. at 95 (citing 42 U.S.C. § 2000e-1).

40. Attorneys for plaintiffs in EEOC v. Tortilleria La Mejor, 758 F. Supp. 585 (E.D. Cal. 1991), argued that the use of the term "individual" meant that, if undocumented workers were not protected, "an entire class of people who were not 'individuals' in the eyes of the law [would be created]—an outcome that harkens back to an era when former slaves were not entitled to bring lawsuits because under U.S. law they 'had no rights which the white man was bound to respect.' " *Landmark Case Upholds Right of Undocumented Workers to Fight Discrimination*, EQUAL RTS. ADVOC. (Equal Rights Advocates, San Francisco, Cal.), June 1991, at 1, 6 (on file with author and the *New York University Review of Law & Social Change*) [hereinafter *Landmark Case*]; *see also* Neil A. Friedman, *A Human Rights Approach to the Labor Rights of Undocumented Workers*, 74 CAL. L. REV. 1715 (1986).

41. EEOC v. Zippo Mfg. Co., 713 F.2d 32, 36-38 (3d Cir. 1983) (holding that Title VII protection is not available for independent contractors, who control the means and manner of the work, and are not overly dependent economically on the employer); Schoenbaum v. Orange

Several possible rationales exist for recognizing employees as a special class and extending to them certain rights. First, an employee generally depends upon one employer for her job and occupies a relatively weak bargaining position in our market-based economy.[42] Additionally, employment provides for such crucial needs as material survival, social welfare benefits (including health care, disability insurance, and pensions),[43] political power,[44] and social status.[45] Finally, unlike other market exchanges, employment involves a contribution or exchange of human value, which makes the relationship between employers and employees unique.[46]

Most of these rationales apply equally to undocumented and documented workers because they reflect participation in the employment relationship, rather than citizenship. Undocumented workers are at least as dependent as documented workers on their employers and are in no better position to bargain with them. In fact, undocumented workers may be in a worse position because they fear being deported.

The rationales for giving employees access to social welfare benefits apply to both documented and undocumented workers. Access to social welfare benefits has generally not been tied to citizenship but to a workplace connection.[47] Since these benefits are necessary for survival and are given in return for market productivity, rather than citizenship, both documented and undocumented workers should have equal access to social welfare benefits. Finally, an undocumented worker makes the same human contribution as any other type of worker.

The *Espinoza* Court's second basis for holding that aliens are covered by

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County Ctr. for the Performing Arts, 677 F. Supp. 1036, 1039 (E.D. Cal. 1987) (holding that unpaid volunteers are not considered employees); Smith v. Berks Community Television, 657 F. Supp. 794, 796 (E.D. Pa. 1987) (denying Title VII protection for unpaid volunteers).

42. *See* 29 U.S.C. § 151 (1988) ("[The NLRA is necessary because of the] inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate or other forms of ownership associations."). An independent contractor, on the other hand, is not dependent upon one employer and makes arm's length transactions. *See* Harris, *supra* note 26, at 905-06 (discussing the FLSA).

43. Maria L. Ontiveros, *The Myths of Market Forces, Mothers and Private Employment: The Parental Leave Veto*, 1 CORNELL J.L. & PUB. POL'Y 25, 49-55 (1992).

44. CAROLE PATEMAN, THE DISORDER OF WOMEN 179-204 (1989) (arguing that paid employment has become the key to citizenship in "employment societies," that poverty stricken individuals are not full citizens, and that equal worth, self-respect, respect of others, independence, and property ownership—the things necessary for full social membership, participation, and citizenship in our society—depend on employment).

45. William B. Gould IV, *The Idea of the Job as Property in Contemporary America: The Legal and Collective Bargaining Framework*, 1986 B.Y.U. L. REV. 885, 892 ("[I]n a modern industrialized economy, employment is central to one's existence and dignity. One's job provides not only income essential to the acquisition of the necessities of life, but also the opportunity to shape the aspirations of one's family, aspirations which are both moral and educational.").

46. PAUL C. WEILER, GOVERNING THE WORKPLACE 142-43 (1990) (discussing aspects of employment that go beyond the economic, such as self-esteem and sense of accomplishment).

47. Ontiveros, *supra* note 43, at 49-55.

Title VII is the alien exemption clause, which states that Title VII does not apply to the employment of aliens outside the United States.[48] The Court used the negative inference of that clause to protect aliens employed within the United States.[49] This statutory argument is still applicable post-IRCA to undocumented workers.

Prior to IRCA, several lower courts adopted the Court's reasoning on both bases.[50] Only one case, *EEOC v. Tortilleria La Mejor*[51] (hereinafter *La Mejor*), has addressed the application of Title VII to undocumented workers since the passage of IRCA. After discussing with approval the pre-IRCA cases, which found that the definitions of "employee" and "individual" included undocumented workers,[52] the court asked whether IRCA altered the scope of Title VII and found that it did not. Referring to post-IRCA cases decided under other labor laws, the court stated that changes to statutes should generally not be implied.[53] In other words, Congress would have to demonstrate specifically its intent to revise Title VII before the court would alter its existing interpretation. The court noted that Congress not only failed to amend Title VII when passing IRCA, it specifically stated that IRCA should not be interpreted to limit labor standards enforcement, including the powers of the Equal Employment Opportunity Commission.[54] Thus, *La Mejor* concluded that Title VII protects undocumented workers against discrimination, even after the passage of IRCA.

Post-IRCA action by Congress also supports the right of undocumented workers to Title VII coverage. In the Civil Rights Act of 1991, Congress amended Title VII to clarify, among other things, the meaning of "employee" as applied to people working outside the United States. The new language limited the alien exemption: "With respect to employment in a foreign country, [employee] includes an individual who is a citizen of the United States."[55] In making this change, Congress sought to overrule *EEOC v. Arabian American Oil Co.*,[56] which interpreted the alien exemption clause to mean that Title VII did not protect United States citizens working abroad.[57] The Act did not,

48. Espinoza v. Farah Mfg. Co., 414 U.S. 86, 95 (1973) (citing 42 U.S.C. § 2000e-1).

49. *Id.*

50. EEOC v. Hacienda Hotel, 881 F.2d 1504, 1517 n.10 (9th Cir. 1989) (explaining the foundation for the district court's assumption that Title VII applies to undocumented workers because they fall within the broad category of "individuals" protected by the Act); Rios v. Enterprise Ass'n Steamfitters Local 638, 860 F.2d 1168, 1172 (2d Cir. 1988) (extending Title VII protection to aliens); EEOC v. Switching Sys. Div. of Rockwell Int'l, 783 F. Supp. 369, 374-75 (N.D. Ill. 1992) (holding that, although Title VII protection extends to legal and illegal aliens, plaintiffs were discriminated against because of citizenship status, not Title VII classification).

51. 758 F. Supp. 585 (E.D. Cal. 1991).

52. *Id.* at 587-90.

53. *Id.* at 590-92.

54. *Id.* at 592-93; *see also supra* note 35 and accompanying text (discussing IRCA's legislative history on this issue).

55. 42 U.S.C. § 2000e(f) (Supp. IV 1992).

56. 499 U.S. 244 (1991).

57. *Id.* at 246-47. In dicta, *Arabian* also reiterated the holding in Espinoza v. Farah Mfg.

however, change the wording of the alien exemption clause or challenge the Court's negative inference that undocumented workers within the United States were covered. Under recognized tenets of statutory interpretation, Congress is presumed to know judicial construction of law.[58] Therefore, since the Act did not seek to change the applicability of Title VII with regard to undocumented workers when it specifically dealt with the interpretation of the relevant section of Title VII,[59] congressional approval and adoption of the Court's interpretation can be inferred.[60]

C. Focusing on Employer Conduct

The focus of the judicial inquiry needs to be shifted away from the employee and her status as an illegal alien. An emphasis on the status of the victim of discrimination is both analytically incorrect and unduly prejudicial. Analytically, the law focuses on employer action, not employee status. The purpose of IRCA is to punish employers, not undocumented workers.[61] Title VII prohibits certain employer action.[62] An employer's discriminatory conduct cannot be transformed by an employee's status, and thus, the focus should remain on the employer.

Additionally, highlighting the undocumented status of the employee stresses the otherness of the victim,[63] thereby devaluing her and her harm. For example, the use of the label *illegal alien*, rather than *undocumented worker*, evidences this antipathy. The label stigmatizes the person.[64] Shifting the emphasis from the blameworthiness of the perpetrator to the blameworthi-

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Co., 414 U.S. 86 (1973), that aliens within the United States are protected through the term "individual" and the alien exemption clause. *Arabian Am. Oil Co.*, 499 U.S. at 254-55.

58. Lorillard v. Pons, 434 U.S. 575, 580-81 (1978).

59. 42 U.S.C. 2000e-1 (1988 & Supp. IV 1992) (exempting the employment of aliens outside the U.S. from Title VII requirements).

60. *Lorillard*, 434 U.S. at 580-81. The EEOC's administrative policy is that Title VII applies to undocumented aliens. 2 EEOC COMPLIANCE MANUAL, § 622.7 (1982). Congress can be assumed to have adopted this policy because it enacted both IRCA and the Civil Rights Act of 1991 without changing this interpretation. EEOC v. Tortilleria La Mejor, 758 F. Supp. 585, 593 (E.D. Cal. 1991).

61. Bosniak, *supra* note 5, at 1031 n.309; Harris, *supra* note 26, at 923; Margulies, *supra* note 27, at 571-86 (arguing that the only way to affect immigration is to focus on and punish employers for hiring undocumented workers); Mitchell, *supra* note 27, at 181-82; *cf.* Robert J. Gregory, *The Use of After-Acquired Evidence in Employment Discrimination Cases: Should the Guilty Employer Go Free?*, 9 LAB. LAW. 43, 65-66 (1993) (arguing that the after-acquired evidence doctrine, which allows employers to introduce evidence of employee misconduct discovered after discharge to evade liability or reduce damages, wrongly shifts focus to employee).

62. 42 U.S.C. § 2000e-2 (1988 & Supp. IV 1992).

63. Bosniak, *supra* note 5, at 987 (detailing how immigration laws create a class of outsiders living and working in the United States); Margulies, *supra* note 27, at 620-24 (arguing that immigration control and the restriction of noncitizens' access to the benefits of employment and entitlement programs are acts of national sovereignty).

64. *Compare* Margulies, *supra* note 27, at 553 n.3 (preferring *undocumented worker*) *with* Walter A. Fogel, *Illegal Aliens: Economic Aspects and Public Policy Alternatives*, 15 SAN DIEGO L. REV. 63, 63 n.1 (1977) (preferring *illegal alien*).

ness of the victim allows judges and juries to engage in a balancing process.[65] They can weigh the relative merits of the employer and employee. Unfortunately, when the otherness of the victim is stressed, this balancing process may include unstated, and perhaps even unconscious, racial biases.[66]

Such balancing of the interests of the employer, who can be seen as a productive member of society, and the illegal alien, who can be viewed as an outsider lucky to receive anything at all,[67] in some ways underlies our entire immigration system. As one immigration expert put it:

> The development of immigration law over the past century reflects an effort to reconcile the use of aliens to meet the country's economic and political needs with efforts to placate nativist sentiment. The law does not reflect the desire to prevent aliens from entering the country; rather, it reflects the desire to control and exploit them once they are here.[68]

Since society values the productivity and sameness of the employer, it strives to shift the critical focus away from her actions toward one whom it does not value—here, the illegal alien. The structure and spirit of Title VII and IRCA, however, require that this shift not be allowed to take place.

II
DISCRIMINATION AGAINST UNDOCUMENTED WORKERS

In analyzing employer discrimination against undocumented workers, this section places women of color at the center of the analysis for several

65. *Cf.* Gregory, *supra* note 61, at 66-68 (explaining that the after-acquired evidence doctrine is popular because courts balance and favor their institutional concerns about overcrowded dockets and employer concerns about ability to discharge bad employees against the concerns of discrimination victims); Neil Gotanda, Re-Reading *People v. Soon Ja Du*: An Interpretation of Judge Joyce A. Karlin's Sentencing Colloquy 13-19 (1992) (unpublished manuscript, on file with the *New York University Review of Law & Social Change*) (discussing the racial balancing of African American shooting victim and Korean shopkeeper in sentencing decision).

66. For a discussion of unconscious racism, consult Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987). An analogous situation, in which the judicial system devalues certain plaintiffs, is in the balancing process that occurs when women of color are victims of assault. Studies reveal that their assailants are punished less severely than assailants who attack white women. *See, e.g.*, Kimberle Crenshaw, *Race, Gender and Sexual Harassment*, 65 S. CAL. L. REV. 1467, 1470 (1992); Maria L. Ontiveros, *Three Perspectives on Workplace Harassment of Women of Color*, 23 GOLDEN GATE U. L. REV. 817, 825 (1993). Anecdotal evidence reveals that this outcome is based on assumptions that the victims are responsible for the attacks and are not as greatly affected by the abuse. *Id.* at 821-22.

67. *See infra* note 79.

68. Ira J. Kurzban, *A More Critical Analysis of Immigration Law*, 99 HARV. L. REV. 1681, 1688 (1986) (reviewing ELIZABETH HULL, WITHOUT JUSTICE FOR ALL: THE CONSTITUTIONAL RIGHTS OF ALIENS (1985)); *see also* Ferriss, *supra* note 4, at B5 (stating that California Governor Pete Wilson describes his position as antisettlement, as he wants to encourage Mexicans to come to California to work but does not want Mexican families to settle and use social services).

reasons. First, this sharpens the focus of the inquiry because illegal discrimination under Title VII, based on gender, is easily understood as something different from legal action taken under IRCA on the basis of documentation status. In contrast, the distinction between illegal discrimination based upon national origin and legal discrimination based upon citizenship status is not as obvious. Focusing on women of color also allows the analysis to become more complex, because it illustrates that discrimination does not always compartmentalize into a single basis, such as gender *or* national origin *or* citizenship status alone. Often, it occurs at the intersection of several different classifications.[69]

Emphasizing the experience of immigrant women also serves to stop the marginalization in legal analysis of women in general,[70] and women of color in particular.[71] Immigrant women are a significant subset of immigrants. Women account for the majority of non-Mexican undocumented immigrants and 43 percent of Mexican immigrants to the United States.[72] Furthermore, although all undocumented workers are vulnerable to discrimination because of their limited employment options, fear of deportation, limited English skills, and ignorance of legal rights, the burdens of discrimination fall hardest upon women. Immigrant women,[73] many of whom are undocumented, often work in conditions that are far worse than, and for wages that are below, those offered to immigrant men or nonimmigrants.[74]

Karen Hossfeld, who studied Third World immigrant women workers in Silicon Valley's semiconductor manufacturing industry, found that the employment of these women rose as the skill and pay level declined.[75] Hossfeld's

69. Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139.

70. *See, e.g.*, Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, *in* FEMINIST LEGAL THEORY 263, 263-64 (Katharine T. Bartlett & Rosanne Kennedy eds., 1991) (discussing feminist method and development of theory of sexual harassment as revealing the male bias of the law).

71. Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Judy Scales-Trent, *Intersection of Race and Gender-Title VII Law*, *in* EMPLOYMENT DISCRIMINATION LAW AND LITIGATION (Rick Rossein ed., forthcoming 1994).

72. Women's Rights Are Human Rights, Immigrant Women's Task Force of the Coalition for Immigrant and Refugee Rights and Services 4 (Mar. 8, 1993) (hearings sponsored by the Shaler Adams Foundation) [hereinafter Women's Rights Hearings] (on file with the *New York University Review of Law & Social Change*).

73. Documented and undocumented immigrant women face many of the same problems. The only real difference stems from the undocumented woman's fear of deportation. It is very difficult to divide the immigrant population into documented and undocumented groups. Most of the evidence discussed does not distinguish between the two of them. Therefore, in this section, *immigrant women* will include both documented and undocumented women.

74. Tom Abate, *Laboring in the Silicon Jungle*, S.F. EXAMINER, Apr. 25, 1993, at E1; Carla Marinucci, *Domestics Tell of Virtual Slavery: 7-day Weeks and Demand for Sexual Favors by Bosses*, S.F. EXAMINER, Jan. 11, 1993, at A1; Carla Marinucci, *Immigrant Abuse: 'Slavery—Pure and Simple,'* S.F. EXAMINER, Jan. 10, 1993, at A1 [hereinafter Marinucci, *Immigrant Abuse*].

75. Karen J. Hossfeld, *"Their Logic Against Them": Contradictions in Sex, Race and*

studies found that these workers' immigration status, ethnicity, gender, and class—independently and cumulatively—affected their mistreatment.[76] In addition, managers employ what Hossfeld terms *gender logic* (the use of patriarchal and sexist ideologies) to legitimate inequalities in the workforce.[77] This logic emphasizes the differences between men and women and translates those differences into lower pay and worse treatment for women.[78] Employers also use analogous *immigrant logic*[79] and *racial logic*[80] to subordinate these groups.

When these factors work together, the discrimination is based upon the intersection of ethnicity, gender, immigration status, and class.[81] Immigrant men and nonimmigrant women are both treated better than immigrant women, as, for example, when the first two groups are discouraged from applying for or are denied those entry level manufacturing jobs that have the worst conditions.[82] One factory owner expressed such discrimination in the following way: "Let's face it, when you have to expand and contract all the time, you need people who are more expendable. When I lay-off immigrant housewives, people don't get as upset as if you were laying off regular workers."[83]

Employers have subjected undocumented workers to various forms of discrimination prohibited by Title VII, ranging from pregnancy discrimination[84] to religious discrimination,[85] but perhaps the most prevalent form of

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Class in Silicon Valley, *in* WOMEN WORKERS AND GLOBAL RESTRUCTURING 148, 155 (Kathryn Ward ed., 1990). Her study drew upon more than 200 interviews with workers, their family members, managers, and community leaders conducted between 1982 and 1986. *Id.* at 150.

76. *Id.* at 156-69; *see also* Karen J. Hossfeld, *Hiring Immigrant Women: Silicon Valley's "Simple Formula," in* WOMEN OF COLOR IN U.S. SOCIETY (Maxine B. Zinn & Bonnie T. Dill eds., forthcoming 1994) (manuscript on file with author).

77. Hossfeld, *supra* note 75, at 157-58.

78. *Id.* at 161-62. For example, women are seen as possessing greater manual dexterity, hand-eye coordination, and patience; yet employers find it appropriate to pay the workers with these skills (women) less than those workers without them (men). *Id.* at 162. Women also suffer from the perception that they are not heads of households and that therefore their work is secondary and temporary. *Id.* at 162-69.

79. Hossfeld, *supra* note 76 (manuscript at 13-18). This spurious logic is used to justify treating immigrants worse than other workers because supposedly they can survive on less, they are "skilled at and 'used to' living on scant resources," they are supporting family members in foreign countries with very low costs of living, they are seen as lucky to have any job at all, and they are viewed as less valued in society in general. *Id.*

80. *Id.* (manuscript at 19-23). This "logic" leads to a defined hierarchy of preferred workers based upon stereotypical assumptions about racial groups. For example, 85 percent of the employers and 90 percent of the managers stated in interviews that they believe Asian women make the best assembly line workers in high-technology manufacturing. *Id.* (manuscript at 19).

81. *Id.* (manuscript at 29) (explaining how immigrant logic and gender logic intertwine); *see also* Hossfeld, *supra* note 75, at 171 (describing how a supervisor referred to his Hispanic workers as "mamacitas" or "little mothers" and told them to "work faster if you want your children to eat").

82. Hossfeld, *supra* note 76 (manuscript at 16-17). Unskilled men are often funneled into technical jobs, rather than assembly jobs. *Id.* (manuscript at 16). A majority of the hiring personnel interviewed claimed that most men and white women are not well-suited for assembly jobs. *Id.*

83. *Id.* (manuscript at 18).

84. In EEOC v. Hacienda Hotel, 881 F.2d 1504, 1507-08 (9th Cir. 1989), three of the

Title VII discrimination involves workplace harassment of immigrant women.[86] In *EEOC v. Hacienda Hotel*, where four of the five plaintiffs (all women) were undocumented workers, continuing employment for two plaintiffs depended upon submitting to sexual advances.[87] Supervisors also regularly subjected three plaintiffs to sexually offensive remarks.[88] Unfortunately, harassment of immigrant women is far from uncommon.[89] One District Attorney's office and a community group in a Northern California town concluded that such episodes happen quite often, based on their investigation into a local case of sexual abuse.[90] In that case, Maria de Jesus Ramos Hernandez traveled from Mexico to the United States to work for a chiropractor to raise money for an operation to cure her daughter's birth defect.[91] Almost immediately, her employer began to sexually abuse her.[92] She did not, however, immediately report the attacks or run away because she was alone and isolated, with no place else to go. She felt that she "could not deny him pleasure . . . because of what he paid for [her]."[93] Ramos Hernandez was afraid that the

undocumented plaintiffs were discharged because of their pregnancies. One plaintiff was told, "[T]hat's what you get for sleeping without your underwear," and that the defendant did not like "stupid women who have kids." *Id.* at 1507. Another plaintiff was told that "women get pregnant because they like to suck men's dicks." *Id.* at 1508. In EEOC v. Tortilleria La Mejor, 758 F. Supp. 585 (E.D. Cal. 1991), plaintiff Alicia Castrejon was not allowed to return to work after a pregnancy leave because, as her employer stated, "[s]he might get pregnant again." *Landmark Case*, *supra* note 40, at 1. Although the graphic recital of the facts of these cases may be offensive to some, they are included to clarify the abuse these plaintiffs will suffer without Title VII protection.

85. *Hacienda Hotel*, 881 F.2d at 1507-08 (finding that Jehovah's Witnesses were discharged for refusing to work on their Sabbath).

86. Sexual harassment is a form of gender discrimination. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986). Harassment based on race or national origin is also prohibited under Title VII. *See, e.g.*, Davis v. Monsanto Chem. Co., 858 F.2d 345, 350 (6th Cir. 1988) (holding that Title VII requires an employer to take prompt action to prevent bigots from expressing opinions offensive to coworkers). For women of color, it is extremely difficult to determine if workplace harassment is based on race, sex, or a combination of the two. Crenshaw, *supra* note 66; Ontiveros, *supra* note 66.

87. *Hacienda Hotel*, 881 F.2d at 1508. One plaintiff was told that she would be fired if she did not submit to sexual advances. Another plaintiff was regularly offered money, an apartment, and job security if she would "give [her] body." *Id.*

88. *Id.* at 1507-08, 1515. For example, one plaintiff was told: "You have such a fine ass. It's a nice ass to stick a nice dick into. How many dicks have you eaten?" *Id.* at 1508.

89. Hearings conducted to document human rights abuses against immigrant and refugee women in the United States for presentation to the United Nations June 1993 Conference on Human Rights in Vienna discussed the prevalence of sexual harassment directed toward undocumented immigrant women. Suzanne Espinosa, *Remembering the Pain: Female Immigrants Tell of Abuse*, S.F. CHRON., Mar. 9, 1993, at A11, A12; *see also* Joanne Lipman, *Dark Side of Child Care is How Poorly Workers are Sometimes Treated*, WALL ST. J., Apr. 14, 1993, at A1 (stating that "nannies" face extensive sexual harassment).

90. Carla Marinucci, *Despair Drove Her to Come Forward*, S.F. EXAMINER, Jan. 10, 1993, at A11. For the most part, anecdotal evidence of such discrimination is all that is available, and even that evidence is vastly underreported because of women's fear of being deported or worse. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

doctor would kill her; she had no money, identification, or knowledge of English; she did not think the police would believe her word against that of a doctor; and she felt that she would be blamed.[94]

This reality, as perceived by Maria de Jesus Ramos Hernandez, is similar in many respects to that experienced by other immigrant women facing workplace harassment and helps explain why they are often unable to act to end harassment.[95] To respond aggressively to the harassment, they must confront their learned cultural values, including self-blame[96] and passivity.[97] They also fear deportation and lack an understanding of their legal rights.[98] The inability to understand the situation is further complicated because other cultures have different views of sexuality, which may not include the concept of sexual harassment.[99] Finally, many victims will not report harassment because they fear an adverse community response to such reports.[100]

One of the most disturbing aspects of this kind of discrimination against immigrant women is that the victim's race and gender enhance and shape the harasser's actions.[101] Harassers choose these women because they lack power relative to other workplace participants and because they are often perceived as being passive and unable to complain.[102] Racism and sexism blend together

94. *Id.* In fact, when she returned to Mexico, her husband had already denounced her as a permanent shame to her family. *Id.*

95. Ontiveros, *supra* note 66, at 821-25.

96. *Id.* at 821-22 (discussing the Latina and Asian expectation of self-blame); *see also* Nancy Patterson, *No More Naki-Neiri? The State of Japanese Sexual Harassment Law*, 34 HARV. INT'L L.J. 206, 215 (1992) (discussing typical response to sexual harassment claims).

97. Some women of color have been raised to be passive, to defer to men, and not to bring attention to themselves. The Asian value system, for example, includes obedience, familial interest, fatalism, and self control, which tends to foster submissiveness, passivity, pessimism, timidness, inhibition, and adaptiveness. Esther Ngan-Ling Chow, *The Feminist Movement: Where Are All the Asian American Women?, in* MAKING WAVES: AN ANTHOLOGY OF WRITINGS BY AND ABOUT ASIAN AMERICAN WOMEN 362, 362-3, 368 (Asian Women United of California ed., 1989). Thus, sexual harassment in Japan has been called *Naki-Neiri* or "crying oneself to sleep" because that was how Japanese women were supposed to deal with harassment. Patterson, *supra* note 96, at 206 n.1 (describing societal belief that it was a sign of "female maturity" to respond to harassment by smiling and ignoring it). Similar barriers may affect Latinas, growing up in a macho culture. EARL SHORRIS, LATINOS: A BIOGRAPHY OF THE PEOPLE 433-38 (1991).

98. Ontiveros, *supra* note 66, at 822-23.

99. For example, white women working on a reproductive rights project found that Asian American women were much less open to discussing sex. Bisola Marignay, *Building Multicultural Alliances: A Practical Guide*, 3 HASTINGS WOMEN'S L.J. 245, 254 (1992). The Japanese language does not include a word for *sexual harassment*, except *seku hara*, a derivative of the English. Patterson, *supra* note 96, at 206 n.5. If a culture does not have a word to encompass a concept, members of the culture are likely to be confused and uncertain about how to respond when confronted with it. Surveys and interviews with Japanese managers revealed their confusion about the issue. *See id.* at 210.

100. Ontiveros, *supra* note 66, at 823-24. The African American backlash against Anita Hill for accusing Clarence Thomas of sexual harassment provides a classic example. *See, e.g.*, Barbara Smith, *Ain't Gonna Let Nobody Turn Me Around*, Ms., Jan.-Feb. 1992, at 37, 38.

101. Ontiveros, *supra* note 66, at 818-21.

102. Sexual harassment involves a power dynamic. Women of color lack status relative to white women, men of color, and white men because women of color are not privileged by either

in the mind of the harasser, so that the types of statements used and actions taken against the women incorporate the unique characteristics of their racially stereotyped sexuality.[103] Thus, in many ways, undocumented working women are targets of discriminatory harasssment because of their race.[104]

Although this section focuses on the discrimination immigrant women face, immigrant men also face discrimination because of their race and national origin. One typical story involves Adan Zuniga, who arrived in the United States at the age of fourteen, and went to work as a ranch hand.[105] His employer provided him no education, and Zuniga worked nine and a half hours a day, seven days a week, slept in a discarded horse trailer with no heat and no running water, and used the fields for a bathroom with an outdoor hose to bathe.[106] He was promised $125 a week in wages, but his boss charged him $200 a month rent and often kept the remainder of his wages as well.[107] While lack of documentation formed the basis for part of the mistreatment, the abuse that may have embarrassed Zuniga the most illustrates the importance of race in the treatment meted out by his employer. As Zuniga explained, "[My boss] made me embarrassed, too . . . . Sometimes, (in front of others) he'd yell, 'You dumb Mexican, come here.' It would make the people laugh."[108]

Despite the serious nature of this discrimination, some may suggest that, as a practical matter, the issue of Title VII applicability need not be addressed. Since undocumented workers are subject to deportation, undocumented workers arguably would never file discrimination claims for fear of deportation. Therefore, the applicability of Title VII to them is a moot issue.

This argument fails on two levels. First, its underlying premise is wrong. Given the severity of the abuse discussed above, the issue is important even if only a few workers come forward to vindicate their rights. Similarly, the deterrent value of Title VII will be realized only if there is a relatively certain threat to employers that their actions can be penalized.[109] Moreover, fighting

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their race or gender. As a result, both men of color and white men feel entitled to harass women of color. *Id.* at 818-19.

103. For example, harassment aimed against African American women has incorporated images of slavery, degradation, sexual availability, and natural lasciviousness. *Id.* at 819 (discussing Brooms v. Regal Tube Co., 881 F.2d 412 (7th Cir. 1989), and Continental Can v. Minnesota, 297 N.W.2d 241 (1980)). Asian Americans have been portrayed by the harasser as exotic, submissive, and naturally erotic. *Id.* at 819-20 (discussing cases, popular stereotypes, and hearings where a worker testified that she was "asked whether it was true that Asian women's vaginas were sideways"). Similarly, Latinas have been perceived as naturally sexual and sexually available. *Id.* at 820-21.

104. *See* Women's Rights Hearings, *supra* note 72.

105. Carla Marinucci, *Treated Like an Animal for Years*, S.F. EXAMINER, Sept. 26, 1993, at B1.

106. *Id.*

107. *Id.*

108. *Id.* at B3.

109. Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975) ("It is the relatively certain prospect of a backpay award that 'provides the spur or catalyst which causes employers . . . to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in

for the rights of undocumented workers, regardless of the potential difficulties of doing so, is an important part of the fight for human and civil rights in America.[110]

Second, there are several factual situations in which discrimination may occur while an employee is undocumented but not subject to deportation. In class actions, for example, the status of individual employees may not always be revealed.[111] Additionally, some employees become legal residents through marriage[112] or amnesty procedures[113] after they have been hired. Actual cases provide the final response to the argument: employees who were fired or even deported were still willing to bring Title VII claims.[114]

III
THE REMEDIAL SCHEME FOR DISCRIMINATION AGAINST UNDOCUMENTED WORKERS

This part examines three issues to resolve the questions raised about the remedies due undocumented victims of Title VII discrimination. Initially, this part underscores the purposes of available Title VII remedies and how these remedies serve the goals of both Title VII and IRCA. Then, this part turns to the limited availability, based on an objective reading of current doctrine, of

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this country's history.' ") (quoting United States v. N.L. Indus., Inc., 479 F.2d 354, 379 (8th Cir. 1973)); *see also infra* text accompanying notes 151-53.

110. Friedman, *supra* note 40; William R. Tamayo, *Defending the Rights of the Undocumented: A Challenge to the Civil Rights Movement and Local Governments*, 16 N.Y.U. REV. L. & SOC. CHANGE 145, 153-155 (1987-88).

111. *Albemarle Paper Co.*, 422 U.S. at 414 n.8; Pitre v. Western Elec. Co., 843 F.2d 1262, 1274 (10th Cir. 1988); Rios v. Enterprise Ass'n Steamfitters Local 638, 860 F.2d 1168, 1171-72 (2d Cir. 1988); *see also* Clyde Summers, *Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals*, 141 U. PA. L. REV. 457, 484-85 (1992) (explaining that class actions can provide remedies for employees who have not filed a complaint and that more than 25 percent of suits brought by the EEOC are class actions).

112. This was the case of plaintiff Campbell in *Rios*, 860 F.2d at 1172.

113. In EEOC v. Tortilleria La Mejor, 758 F. Supp. 585, 586 (E.D. Cal. 1991), plaintiff Castrejon sought legal residence through amnesty under 8 U.S.C. § 1255a (1988 & Supp. IV 1992). Even though the time period for applying for amnesty has passed, court decisions continue to clarify who will qualify for amnesty, allowing stays of deportation for new, large classes of people. *See, e.g.*, Legalization Assistance Project of L.A. County Fed'n of Labor v. INS, 976 F.2d 1198, 1208 (9th Cir. 1992) (invalidating INS regulations preventing undocumented residents from seeking legal residence through amnesty); Maitland Zane, *Court Says INS Unfair on Amnesty*, S.F. CHRON., Sept. 19, 1992, at A12 (reporting that the *Legalization Assistance Project* decision could give at least 10,000 people a stay of deportation); *see also* Steve Albert, *Salvadorans Win Another Reprieve from Deportation*, THE RECORDER (San Francisco), May 28, 1993, at 1 (explaining that the 18-month extension of temporary amnesty program could give permanent resident status to as many as 500,000 Salvadorans).

114. EEOC v. Hacienda Hotel, 811 F.2d 1504, 1507-08 (9th Cir. 1989) (describing Title VII claim filed by a documented female employee and four undocumented female employees for sexual discrimination and harassment); EEOC v. Switching Sys. Div. of Rockwell Int'l Corp., 783 F. Supp. 369, 370-71 (N.D. Ill. 1992) (apparently only one of the four plaintiffs had become a citizen by the time of the lawsuit); *see also* Sure-Tan v. NLRB, 467 U.S. 883, 887-88 (1983) (NLRA plaintiffs had been deported). For a recent newspaper article raising these issues, see Suzanne Espinosa, *Latino Workers Allege Bias at Avis Rent-A-Car*, S.F. CHRON., Nov. 19, 1993, at A21.

the four primary remedies under Title VII: reinstatement, backpay, frontpay, and damages, both compensatory and punitive. Finally, the Article explains how current doctrine falls short of providing what is necessary to accomplish the purposes of Title VII and IRCA. It concludes with an analysis of what could be accomplished through a liberal interpretation of case law and what could be accomplished only through legislative change.

A. Purposes of and Remedies Under Title VII and IRCA

Title VII explicitly provides for reinstatement, backpay (compensation for the period of time during which a person would have been employed absent discrimination), and injunctive relief for all types of discrimination cases.[115] Plaintiffs are "presumptively entitled" to backpay and reinstatement,[116] unless some exceptional reason exists to deny backpay.[117] Courts have also added the possibility of awarding frontpay—an award of compensation, usually in lieu of reinstatement, for a period of time into the future.[118]

In addition, under the Civil Rights Act of 1991, plaintiffs can receive compensatory and punitive damages in cases of intentional discrimination.[119] Compensatory damages may include future pecuniary losses as well as emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses.[120] By using mandatory caps, the statute limits the amount a plaintiff may recover for the combination of compensatory and punitive damages.[121]

Title VII creates a different remedial scheme for "mixed motive" cases, where a discriminatory factor (i.e., race, religion, or sex) was a motivating factor for an employment decision, even though other nondiscriminatory factors also motivated the decision.[122] If the employer demonstrates that she would have taken the same action, even without the illegal motive, the plaintiff may only receive declaratory relief and attorney's fees.[123] Reinstatement,

115. 42 U.S.C. § 2000e-5(g)(1) (Supp. IV 1992).

116. Shore v. Federal Express Corp., 777 F.2d 1155, 1159 (6th Cir. 1985).

117. Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975).

118. A frontpay award is usually appropriate when a plaintiff cannot be reinstated because of conditions in the specific employment situation, such as hostility toward the plaintiff. Frontpay compensates the plaintiff for future losses which will be incurred while looking for a similar job. *See, e.g.*, Green v. USX Corp., 843 F.2d 1511, 1531-32 (3d Cir. 1988); *Shore*, 777 F.2d at 1158-60; Anne C. Levy, *Righting the "Unrightable Wrong": A Renewed Call for Adequate Remedies Under Title VII*, 34 ST. LOUIS U. L.J. 567, 591-93 (1990). *But cf.* McKnight v. General Motors Corp., 908 F.2d 104, 116-17 (7th Cir. 1990) (questioning whether Title VII's remedial scheme, confined to equitable relief, includes the legal remedy of frontpay).

119. Civil Rights Act of 1991 § 102(b), 42 U.S.C. § 1981a(b)(1) (Supp. IV 1992).

120. *Id.* § 1981a(b)(3).

121. The caps vary depending upon the size of the defendant employer's workforce ($50,000 for employers with 15-100 employees, $100,000 for employers with 100-200 employees, $200,000 for employers with 200-500 employees, and $300,000 for employers with over 500 employees). *Id.* Backpay and other types of monetary relief are not included in these caps. *Id.* § 1981a(b)(2).

122. 42 U.S.C. § 2000e-2(m) (Supp. IV 1992).

123. *Id.* § 2000e-5(g)(2)(B)(i) (Supp. IV 1992).

backpay, and other damages are not allowed.[124]

1. *The Purposes of Title VII and IRCA*

a. *Purposes of Title VII*

The remedies available under Title VII seek to accomplish two purposes: deterrence of discrimination[125] and compensation of victims.[126] Although most cases discuss these goals separately, an efficient system of punishment and remedies incorporates the relationship between these two concepts. This section will discuss the purposes of Title VII remedies in general and as they apply to undocumented workers.

In *Albemarle Paper Co. v. Moody*,[127] the Supreme Court explained the deterrent purpose of Title VII. It stated that the primary objective of the statute was to deter discrimination, thereby achieving equality of employment opportunities.[128] The Court further argued that ignominious employment practices would only be deterred if there was a reasonable certainty of financial loss to the employer as a result of discrimination.[129]

The desirability of ending discrimination is not changed if the victims of the discrimination happen to be undocumented workers. The California Supreme Court discussed the public nature of the interest in ending discrimination as follows:

> The public policy against sex discrimination and sexual harassment in employment, moreover, is plainly one that 'inures to the benefit of the public at large rather than to a particular employer or employee.' No extensive discussion is needed to establish the fundamental *public* interest in a workplace free from the pernicious influence of sexism. So long as it exists, we are *all* demeaned.[130]

The deterrence function of Title VII, which clearly benefits society as a whole, is served regardless of the documentation status of any particular plaintiff.

The United States Supreme Court described Title VII's compensatory mandate as one to make the employee "whole" or to put her in the same place she would have been in had she never been discriminated against.[131] When an employee becomes a victim of discrimination, she suffers two distinct types of injury that require compensation in order to make her whole: economic and noneconomic. The economic injury includes quantifiable losses, such as lost

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124. *Id.*

125. Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975) (citing 118 CONG. REC. 7168 (1972), a section-by-section analysis introduced by Senator Williams to accompany the conference committee report on the 1972 Act).

126. *Id.* at 418.

127. 422 U.S. 405.

128. *Id.* at 417.

129. *Id.* at 417-18.

130. Rojo v. Kliger, 801 P.2d 373, 389 (Cal. 1990) (citing Foley v. Interactive Data Corp., 765 P.2d 373 (Cal. 1988)).

131. *Albemarle Paper Co.*, 422 U.S. at 418-21.

wages and benefits. It also includes nonquantifiable losses, such as the loss of contacts, training, and opportunities for advancement.

In *United States v. Burke*, the Supreme Court discussed the nature of the injury suffered by Title VII plaintiffs to determine whether the amount of money received for the injury was taxable.[132] Although the Court acknowledged noneconomic harm, it found that, prior to the passage of the Civil Rights Act of 1991, economic losses were the only ones recoverable through Title VII.[133] With the passage of the Civil Rights Act of 1991, the Court observed a "marked change in the conception of the injury redressable by Title VII."[134] With this statement, the Court implied that current law covers both noneconomic harm and economic harm.

Clearly, undocumented workers should be compenstated for the noneconomic harm they suffer. Employment discrimination inflicts noneconomic harm both through the nature of the assault and because it occurs within the employment relationship. Discrimination affects more than a person's pocketbook. Discrimination assaults the "dignity [of] a human being entitled to be judged on individual merit"[135] and is "a fundamental injury to the individual rights of a person."[136] Discrimination in *employment* intensifies the harm. Because employment carries with it important noneconomic entitlements,[137] the injury goes beyond the loss of wages and benefits. It also implicates one's dignity, aspirations, human value contributed at the workplace, and ability to participate fully in society.[138] These noneconomic harms focus on human dignity and the individual rights of all people. As human beings, undocumented workers feel such noneconomic pain to the same extent as documented workers and therefore deserve compensation.

It is less certain, however, that Title VII's compensatory mandate for economic losses fits undocumented workers as well as documented workers. It is not clear that economic losses should be compensated fully when the worker did not have the right to be a part of the economic relationship in the first place.[139]

Although not without problems, a credible argument can be made that undocumented workers are also entitled to at least some compensation for economic loss because Title VII is concerned with employees as employees, regardless of their documentation status. As long as employees have been

132. United States v. Burke, 112 S. Ct. 1867, 1873 (1992). Title VII damages were found not excludable from gross income for tax purposes, because Title VII only redressed economic injuries. If the statute had addressed personal, tort-like injuries, then the damages would not have been taxable as gross income. *Id.* at 1870-72.

133. *Id.* at 1873-74.

134. *Id.* at 1874 n.12.

135. *Id.* at 1877 (Souter, J., concurring).

136. *Id.* at 1878 (O'Connor, J., dissenting).

137. *See supra* notes 44-45.

138. *See supra* notes 44-45.

139. This tension is probably what underlies the doctrine that provides for incomplete recovery of Title VII remedies discussed *infra* part III.B.

adequate workers, their lack of citizenship should not affect their right to be compensated economically for their loss of work. Additionally, in the current Title VII scheme, which does not include fines, the amount of compensation given to an employee is the amount an employer must pay. Without a large compensatory award, there will be no large deterrent force.

The relationship between deterrent and compensatory purposes provides a key dimension in fashioning an efficient remedial scheme. Analysis from the field of law and economics on optimal penalties provides guidance on this relationship.[140] In the simplest model of a law enforcement system, the government could make the penalty for committing an offense slightly greater than the total cost that harm inflicts upon society.[141] Therefore, the only people violating the law will be those who, when caught, still receive a greater benefit from committing the offense than the cost of the offense to society. These violators would adequately compensate those harmed and would also have a net benefit to themselves.[142]

This situation is complicated because not all offenders will be caught. Thus, the optimal damage award or penalty should equal the harm caused by the act divided by the probability of getting caught.[143] In other words, the fine multiplied by the probability of getting caught should equal the harm caused by the act. As the probability of detection decreases, the penalty should increase to achieve the optimal result.

Remedying the rights of undocumented workers presents a unique case under this analysis because undocumented workers are less likely to report violations due to fear of deportation or ignorance of their rights than are documented workers.[144] Since undocumented workers are less likely to report discrimination and their employers are less likely to be caught,[145] the penalty assessed against their employers needs to be set *higher* to achieve optimal results.[146]

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140. *See, e.g.*, A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 76-84 (2d ed. 1989); RICHARD A. POSNER, ECONOMIC ANALYSIS OF THE LAW 204-10 (3d ed. 1986); A. Mitchell Polinsky & Steven Shavell, *The Optimal Tradeoff Between the Probability and Magnitude of Fines*, 69 AM. ECON. REV. 880 (1979); Richard A. Posner, *Optimal Sentences for White-Collar Criminals*, 17 AM. CRIM. L. REV. 409 (1980) (arguing a large fine is socially preferable because it provides a proper deterrent and costs less to administer).

141. POLINKSY, *supra* note 140, at 76.

142. *Cf.* DERRICK A. BELL, *The Racial Preference Licensing Act*, *in* FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM, 47, 47-60 (1992) (describing a system allowing those people who want to discriminate to buy a license and using the revenues generated by license purchases to advance the position of African Americans).

143. POSNER, *supra* note 140, at 204. To be more complete, the risk adversity of the actor and the costs associated with detection must also be considered. *See* POLINSKY, *supra* note 140, at 78-84. The actor's ability to pay the fine must also be incorporated. *See* POSNER, *supra* note 140, at 205. These clarifications are not essential to the analysis presented here.

144. Margulies, *supra* note 27, at 567.

145. *Id.*

146. California State Treasurer (and gubernatorial candidate) Kathleen Brown suggested a similar idea to curb immigration—increasing penalties under IRCA and raising fines for violating state and federal labor laws. Vlae Kershner, *Kathleen Brown Lays Out Immigration Plan*,

b. Purposes of IRCA

According to the legislative history, one purpose of IRCA is to limit the flow of illegal immigration to the United States.[147] To accomplish this, Congress decided to impose employer sanctions and consequently to limit the number of employment opportunities for undocumented workers.[148] As the *La Mejor* court said, "Congress enacted the IRCA to reduce illegal immigration by eliminating employers' economic incentive to hire undocumented aliens."[149] IRCA seeks to promote the employment of documented workers and prevents the employment of undocumented workers.[150]

2. How the Remedies Serve the Purposes

This section discusses why the full panoply of remedies is necessary to address the different purposes of Title VII and how these remedies can be made available while still serving the purposes of IRCA. For the Title VII deterrence function to be met, an employer must fear that her discriminatory conduct will be detected and that she will suffer a significant monetary loss when such detection happens.[151] The various monetary remedies—backpay, frontpay, attorney's fees, compensatory and punitive damages—can impose a significant monetary loss. The likelihood of detection turns, to a large extent, on employees having an incentive to report and prosecute the employer.[152] If the employer does not sufficiently fear a large monetary loss, the costs of foregoing discrimination may outweigh any potential liability and the employer's behavior will not be deterred.[153]

Title VII's remedies aim to compensate the various types of injuries suffered by victims of discrimination. To compensate economic injuries, backpay and frontpay replace lost earnings and benefits. Reinstatement provides other economically related, but nonquantifiable, benefits such as contacts, training, and opportunities for advancement. Reinstatement also provides nonpecuniary benefits, such as dignity and status. Finally, the compensatory and puni-

S.F. CHRON., Sept. 30, 1993, at A23. For a different approach to the issue of how the risk of being caught affects deterrence, see Margulies, *supra* note 27, at 567-69 (arguing that maintaining the confidentiality of undocumented workers and full enforcement of remedies would solve the problem that employers currently are not likely to be caught, without considering the alternative of higher penalties).

147. H.R. REP. No. 682, 99th Cong., 2d Sess., pt. 1, at 46 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5650; *see also* Margulies, *supra* note 27, at 572.

148. H.R. REP. No. 682, *supra* note 147, at 46-47, *reprinted in* 1986 U.S.C.C.A.N. at 5650–51. Employer sanctions are codified at 8 U.S.C. §§ 1324a(a)(1)(A), (e)(4)(A)-(B), and (F)(2) (1988 & Supp. IV 1992).

149. EEOC v. Tortilleria La Mejor, 758 F. Supp. 585, 591 (E.D. Cal. 1991).

150. Margulies, *supra* note 27, at 559-60.

151. Margulies, *supra* note 27, at 566-67; *see also supra* notes 140-43 and accompanying text.

152. Margulies, *supra* note 27, at 564-69 (compensation provides this incentive); *cf. supra* notes 129-31 and accompanying text.

153. Margulies, *supra* note 27, at 579-81.

tive damage provisions of the Civil Rights Act of 1991[154] also help compensate for noneconomic losses and injuries.[155] Without all of these options, the victim of discrimination will not truly be made whole.

When dealing with undocumented workers, the effect of the various Title VII remedies on the purposes of IRCA must be examined. The remedies can be divided into two categories: those that require a violation of IRCA and those that may affect (either serving or interfering with) the underlying purpose of IRCA.[156] Remedies in the first category should not be allowed. Those in the second category should be allowed if they serve the underlying purposes of IRCA.

Although some argue that undocumented workers should and can be helped with remedies that have been characterized as violations of IRCA,[157] this Article takes a different approach. Since most of the remedies actually serve the purposes of IRCA,[158] a politically easier and more analytically justified solution can be reached by awarding only those remedies that are consistent with IRCA.

The majority of Title VII remedies do not directly conflict with the terms of IRCA. In fact, they actually serve its purposes of decreasing illegal immigration and the number of undocumented workers employed in the United States.[159] The number of undocumented people entering the United States will not decline until their job opportunities decrease.[160] The only way to decrease these opportunities is to make undocumented workers more expensive to employ.[161] If employers do not have to follow the same costly and cumbersome rules and regulations that apply to documented workers, undocumented people become cheaper to employ, and therefore more attractive.[162] On the

154. 42 U.S.C. § 1981(a)-(b) (Supp. IV 1992).

155. United States v. Burke, 112 S. Ct. 1867, 1874 n.12 (1992).

156. *Cf.* Fjelstad, *supra* note 25, at 604 (suggesting that in determining remedies for undocumented workers, the NLRB should consider whether a remedy promotes NLRA objectives and whether it would compel a violation of another statutory scheme).

157. *Cf. id.* at 607-08 (arguing that the NLRB could order reinstatement because the employer may not be able to prove a lack of documentation and the Board should not be in position to decide issues of immigration status); Margulies, *supra* note 27, at 611-14 (illustrating how the policy of IRCA is not harmed by reinstatement where the employer did not comply with verification procedures because the employer is likely to hire another undocumented worker to fill the opening and because IRCA does not specifically prohibit reinstatement or other labor law penalties).

158. *See infra* notes 159-65 and accompanying text.

159. *See* Margulies, *supra* note 27, at 572.

160. *Id.* at 577-78, 582-83 (documenting job availability as the major force attracting undocumented people).

161. *Id.* at 578-86.

162. *See* Patel v. Quality Inn S., 846 F.2d 700, 704 (11th Cir. 1988), *cert. denied*, 489 U.S. 1101 (1989) (FLSA); Local 512 Warehouse & Office Workers' Union v. NLRB (Felbro), 795 F.2d 705, 719-20 (9th Cir. 1986) (NLRA); EEOC v. Tortilleria La Mejor, 758 F. Supp. 585, 591 (E.D. Cal. 1991) (Title VII); Blum, *supra* note 6, at 1370; Bosniak, *supra* note 5, at 1020-21; Fjelstad, *supra* note 25, at 610; Harris, *supra* note 26, at 923-25; Margulies, *supra* note 27, at 570-71, 579-81 (demonstrating labor law coverage is the only way to make jobs unavailable and to decrease immigration).

other hand, if violations of undocumented workers' rights are subjected to the same costly remedies and regulations, the undocumented workers become more expensive to employ, and therefore less desirable.[163] The best way to convince employers to stop hiring undocumented workers is to impose penalties, not to ban employment.[164] Assuming the country truly wants to stem the tide, fewer undocumented workers will be employed only if employers are punished fully for exploiting them.[165]

Although some argue that workplace protection encourages undocumented individuals to come to America and seek work,[166] most immigrants do not know their rights,[167] and are drawn by the possibility of a job or freedom.[168] Immigration and Naturalization Service (INS) Commissioner Doris Meissner recently summarized this point when she said, "I don't think we should trivialize the reasons that people come and somehow make them into sophisticated manipulators . . . . People come here illegally to work. Others come illegally to stay alive, physically."[169] The marginal addition of workplace protection alone is not sufficient to affect the migration incentives that currently exist. Based upon this analysis, subjecting discriminating employers to costly remedies serves the underlying purpose of IRCA because doing so reduces job opportunities for undocumented immigrants, and only that will ultimately curtail illegal immigration.

B. Limited Availability of Remedies Under Title VII Doctrine

This section surveys the remedies currently available to undocumented workers who have been victims of Title VII discrimination.

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163. Margulies, *supra* note 27, at 570-71.

164. *Id.* at 585-86. The IRCA ban suffers from enforcement problems because it relies on government action; the government obviously has limited resources. Allowing full recovery of remedies encourages employers to obey laws and eliminates some of the enforcement problems.

165. *Id.* at 571-78. Employers, not undocumented workers, are most able to acquire knowledge about forbidden conduct and its costs, as well as conform their conduct to avoid illegality and sanctions. These abilities are necessary if a law is to deter the targeted group.

166. The marginal addition of workplace protection alone is not sufficient to affect the migration incentives that currently exist. *Tortilleria Le Mejor*, 758 F. Supp. at 591; Blum, *supra* note 6, at 1348-49 (listing cases involving legal rights of undocumented people in various situations citing limited role of legal rules regarding recovery in decision to immigrate illegally); *id.* at 1370-74 (arguing that making jobs less attractive does not affect realities that drive illegal immigration, such as lower home country wages, currency devaluation, diversified family earning structure, political persecution, etc.); Margulies, *supra* note 27, at 570-71 (insisting that immigration will decrease only when jobs are unavailable, not if they are less desirable, and labor law coverage increases likelihood that jobs will become unavailable); *id.* at 582-83, 589 (highlighting the superiority of U.S. employment, even under bad working conditions, to opportunities in home country).

167. Marguiles, *supra* note 27, at 574.

168. *Id.* at 577-78.

169. Marc Sandalow, *INS Chief Says Illegals' Goal Isn't Welfare*, S.F. CHRON., Oct. 30, 1993, at A1.

1. Reinstatement

Reinstatement would require a company to rehire the victim and thus to employ an undocumented worker in violation of IRCA. Thus, the reinstatement remedy raises two issues. First, a court must consider whether it can fashion an illegal remedy.[170] The National Labor Relations Board takes the position that it has no authority to determine the immigration status of workers and therefore cannot withhold a remedy on the grounds of immigration status.[171] A court may not face the same limitation. Second, even if a court should fashion an illegal remedy, the court may choose not to if the employer had a legitimate reason for discharging the employee—her undocumented status.

Current doctrine analyzes cases where the employer has a legitimate reason for discharging the employee in one of two ways. First, if the employer in fact discharged the person for both a legitimate and an illegitimate reason, the case is treated as a mixed motive case. As previously discussed, mixed motive plaintiffs are not reinstated.[172] For example, if a plaintiff was discharged both because she was a Jehovah's Witness and because she was an undocumented worker, the court would deny reinstatement if the employer could prove that the employee would have been discharged for being undocumented, regardless of her religion.

Second, if the employer discovered the legitimate reason after the discharge, the case is analyzed using the after-acquired evidence doctrine.[173] These cases have held that, if the evidence acquired after the unlawful discharge would have caused the employer to legitimately discharge the employee anyway, the person may not be reinstated.[174] An alternative result

170. Bosniak, *supra* note 5, at 1032; Margulies, *supra* note 27, at 612 (citing Firefighters v. Stotts, 467 U.S. 561 (1984)); *supra* note 157 and accompanying text.

171. 88-9 NLRB Gen. Couns. Mem. 4, 6 (Sept. 1, 1988) (stating that, although NLRB will not order reinstatement of undocumented worker, to prove undocumented status, employers must provide final INS determination or evidence of employee's unwillingness to complete I-9 form); *cf.* Fjelstad, *supra* note 25, at 607-09 (discussing alternatives open to the Board when an undocumented worker seeks reinstatement).

172. *See supra* notes 122-24 and accompanying text.

173. Some after-acquired evidence cases suggest that, since no remedy exists, there is no injury, and therefore, no claim may even be brought. Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700, 704-08 (10th Cir. 1988); *see also* William S. Waldo & Rosemary A. Mahar, *Lost Cause and Found Defense: Using Evidence Discovered After an Employee's Discharge to Bar Discrimination Claims*, LAB. LAW., Winter 1993, at 31. The better view is that the evidence affects solely the remedies available, not the ability to bring a claim. *See* Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1181 (11th Cir. 1992); *see also* Robert J. Gregory, *The Use of After-Acquired Evidence in Employment Discrimination Cases: Should the Guilty Employer Go Free?*, LAB. LAW., Winter 1993, at 43. The Supreme Court had agreed to review issues raised by after-acquired evidence in Milligan-Jensen v. Michigan Technological Univ., 975 F.2d 302 (6th Cir. 1992), *cert. dismissed*, 114 S. Ct. 22 (1993), but the parties settled the case before it reached the Court.

174. *See Wallace*, 968 F.2d at 1181-82; EEOC, *EEOC: Revised Enforcement Guide on Recent Developments in Disparate Treatment Theory*, 405 Fair Emp. Prac. Man. (BNA) 6915 (1992) [hereinafter EEOC, *Revised Enforcement Guide*]; James A. Burstein & Steven L. Hamann, *Better Late than Never—After-Acquired Evidence in Employment Discrimination*

could require an employer to rehire an individual that is not qualified for the job. In the case of an undocumented worker, if the employer did not know that the person was undocumented *and* would have discharged the person upon discovering her status,[175] the employer will not have to reinstate her once her status comes to light. There is no requirement that the employer show that she would have discovered the evidence, because the existence of the evidence makes the employee unacceptable for rehire.

This discussion demonstrates that both the mixed motive and after-acquired evidence cases may bar reinstatement of undocumented victims of discrimination.

2. *Backpay*

To receive a complete backpay award, an undocumented worker must overcome two barriers: proving her right to backpay and proving that she is entitled to backpay for the full period of her unemployment. The doctrines of mixed motive and after-acquired evidence affect her right to receive backpay. Once she has established her right to the remedy, the amount of backpay is determined by the after-acquired evidence doctrine and the doctrine of availability.

In a true mixed motive case, the employee may not receive backpay.[176] The employee receives no money because she would have been fired even if the unlawful discrimination did not take place. Most after-acquired evidence cases, however, do not bar recovery entirely, but limit the period of time for which backpay may be recovered.[177] The EEOC also takes this position in its Enforcement Guide.[178] Some courts, however, deny backpay entirely where the employee would have been discharged for the misconduct.[179] This denial of backpay is based upon the idea that the employee was not legally injured because the employer would have discharged the employee if the employer knew of the evidence, regardless of what actually happened.[180] Both of these situations rely on the premise that an award should not go to undeserving individuals who have done something wrong.

Cases, 19 EMPLOYEE REL. L.J. 193, 201 (1993); *cf.* Mitchell H. Rubenstein, *The Use of Predischarge Misconduct Discovered after an Employee's Termination as a Defense in Employment Litigation*, 24 SUFFOLK U. L. REV. 1, 7 (1990) (stating that the NLRB will deny reinstatement for misconduct discovered after termination).

175. *See* John J. Egbert, *An Employer's Shield from Wrongful Termination Claims*, ARIZ. ATT'Y, Mar. 1993, at 10 (discussing materiality requirement for newly discovered evidence); *see also infra* notes 186-88 (discussing how an employer might not discharge an employee for undocumented status alone).

176. 42 U.S.C. 2000e-5(g)(2)(B) (Supp. IV 1992).

177. *See infra* notes 181-88 and accompanying text.

178. EEOC, *Revised Enforcement Guide*, *supra* note 174, at 6926.

179. Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700 (10th Cir. 1988); Gregory, *supra* note 61, at 55-57.

180. *Summers*, 864 F.2d at 707-08.

a. The Amount of Backpay: After-Acquired Evidence

Assuming that an undocumented worker can get backpay, the after-acquired evidence doctrine may restrict the amount of the award. The accrual of backpay stops at the time when the employer *would have discovered* the problem and *would have discharged* the employee.[181] The *EEOC Revised Enforcement Guide* requires proof that the violation would have led to discharge.[182] Since, even absent discrimination, the employee would not have been working during this period because she would have been discharged anyway, an award of backpay would overcompensate the employee. She, in effect, would be treated better than someone who committed a similar infraction but had not suffered discrimination. The burden of proving that the employer would have discovered the evidence and would have discharged the employee should rest on the employer.[183]

Some courts have taken the approach of limiting backpay to the time before the misconduct *actually surfaced*, usually during pretrial discovery, rather than when the employer would have discovered the problem on her own.[184] This approach violates a central tenet of Title VII remedy jurisprudence because such a limit puts the employee in a worse position then she would have been had she not filed a lawsuit.[185]

In the case of undocumented workers, if an employer knew that the worker was undocumented when hired, the after-acquired evidence doctrine provides no limitation on recovery because the employer would not have discharged the employee for that reason alone.[186] If the employee provided false information about her immigration status, the inquiry shifts to whether the employer has fired other employees upon discovering their undocumented status. If so, then the backpay period is limited to the period of time between the termination and when the employer would have discovered the employee's

181. Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1182 (11th Cir. 1992); Rubenstein, *supra* note 174, at 15-16.

182. EEOC, *Revised Enforcement Guide*, *supra* note 174, at 6927; *see* Burstein & Hamann, *supra* note 174, at 201 (stating that the limitation on damages may not be available if the employer does not have a specific rule providing for discharge as punishment for the offense).

183. Douglas L. Williams & Julia A. Davis, *Title VII Update— Skeletons and a Double-Edged Sword*, *in* ADVANCED EMPLOYMENT LAW AND LITIGATION 303, 311 (A.L.I.-A.B.A. ed., 1991); *cf. Wallace*, 968 F.2d at 1184 (noting that evidence of fraud in employee's application, discovered after she had filed suit, could not serve as legitimate cause for discharge).

184. *See, e.g.*, Smith v. General Scanning, Inc., 876 F.2d 1315, 1319 n.2 (7th Cir. 1989). Although the NLRB also takes this position, *see* Rubenstein, *supra*, note 174, at 7, 11, some courts have distinguished the remedial purposes of Title VII and the NLRA in addressing the issue. *See, e.g.*, Village of Oak Lawn v. Human Rights Comm'n, 478 N.E.2d 1115 (Ill. App. Ct. 1985); Keller v. Michigan Consol. Gas Co., No. 86-627712 (Wayne Co. Mich. 1989) (unpublished), *cited in* Morley Witus, *Defense of Wrongful Discharge Suits Based on an Employee's Misrepresentations*, MICH. B.J., Jan. 1990, at 50, 51; *see also* Rubenstein, *supra* note 174, at 13.

185. *Wallace*, 968 F.2d at 1182 (highlighting that the evidence would not have been discovered except for the discrimination and lawsuit); *see also supra* text accompanying note 131.

186. *See* Margulies, *supra* note 27, at 572 (reaching similar conclusion for those employers who do not check immigration status because status does not matter to them).

undocumented status.[187] The employer carries the burden of proving that she would have discovered the employee's undocumented status and discharged the employee.[188]

b. The Amount of Backpay: Availability

The doctrine of availability also affects the amount of backpay awarded. Backpay has traditionally been awarded only for the period of time when an employee was available for work. If, for instance, an employee returned to school full-time and could not have worked, she would not receive backpay for that period of time.[189] The only Supreme Court pronouncement on whether undocumented workers are available for work appeared in a NLRA case decided before the passage of IRCA. In *Sure-Tan, Inc. v. NLRB*,[190] the Court struck down a backpay award to undocumented workers who had already left the country, finding it speculative and not tailored to the actual injury.[191] The Court conditioned reinstatement on lawful reentry to the United States, and it tolled the backpay award for the deported workers "during any period when they were not lawfully entitled to be present and employed in the United States."[192] The Court has not, however, specifically dealt with the issue of backpay for undocumented workers who remain in the United States.[193]

Since the passage of IRCA, no Title VII case has discussed the availability of remedies to undocumented workers for determination of a backpay award.[194] Post-IRCA determinations of the issue under the NLRA have taken two different approaches.[195] Some cases award backpay, except for the period of time when the worker is *actually* unavailable for work (for example, when she was out of the country). Other cases refuse any backpay because the worker is *legally* unavailable for work under IRCA.

In *Local 512, Warehouse and Office Workers' Union v. NLRB* (hereinafter *Local 512*),[196] the Ninth Circuit held that undocumented employees were

187. *But see* Margulies, *supra* note 27, at 605 (arguing that to serve the purposes of IRCA, remedies should not be available to undocumented workers if the employer complied with IRCA's verification procedures).

188. Williams & Davis, *supra* note 183, at 308; *cf. Wallace*, 968 F.2d at 1184.

189. Miller v. Marsh, 766 F.2d 490, 492 (11th Cir. 1985); Taylor v. Safeway Stores, Inc., 524 F.2d 263, 268 (10th Cir. 1975).

190. 467 U.S. 883 (1983).

191. *Id.* at 901.

192. *Id.* at 903.

193. *Cf.* INS v. Lopez-Mendoza, 468 U.S. 1032, 1047 n.4 (1983) (limiting prospective sanctions, such as reinstatement and continued employment for undocumented workers, but authorizing retrospective sanctions).

194. In EEOC v. Tortilleria La Mejor, 758 F. Supp. 585, 594 n.5 (E.D. Cal. 1991), the defendant did not dispute entitlement to all remedies, and the issue was not discussed.

195. Cases involving the Fair Labor Standard Act, 29 U.S.C. §§ 201-219 (1988 & Supp. IV 1992) have awarded full damages. *See* Patel v. Quality Inn S., 846 F.2d 700 (11th Cir.), *cert. denied*, 489 U.S. 1011 (1988). However, the FLSA does not raise the same issues because its remedies focus on the time that an employee actually worked but received compensation less than the amount legally required.

196. 795 F.2d 705 (9th Cir. 1986).

entitled to backpay unless they were out of the country and actually unavailable for work, because awarding backpay promotes the underlying aims of the NLRA without detracting from the purposes of IRCA.[197] The Ninth Circuit cited many cases awarding backpay to undocumented workers because of their actual availability to work, regardless of their legal status.[198] The citations included one case decided in California when the employment of undocumented workers was prohibited by statute.[199]

The Ninth Circuit limited the holding of *Sure-Tan* to those undocumented workers no longer in the United States. The *Local 512* court argued that *Sure-Tan* does not apply to undocumented workers who remain in the United States and have not been subject to any INS deportation proceedings.[200] According to the court, *Sure-Tan* struck the backpay award because, in that case, it was speculative, since the Supreme Court was not able to determine precisely the actual injury to those workers who had left the country and had no plans to reenter legally.[201] The *Local 512* court found that the actual backpay period could be determined for undocumented workers who remained in the country and that awarding backpay served the purposes of the NLRA without offending national immigration policy.[202]

In *Del Rey Tortilleria, Inc. v. NLRB*,[203] the Seventh Circuit refused to allow backpay for undocumented workers who could not prove their legal availability for work.[204] The court reasoned that because undocumented employees have no right to employment, they could not be harmed by being denied pay to which they had no entitlement.[205] The court disagreed with *Local 512*'s narrow reading of *Sure-Tan*, because it believed the legal inability of the employees to work, and not the speculative nature of the damages, was the key to renouncing the backpay award.[206] Finally, the Seventh Circuit stated that

197. *Id.* at 722.

198. *Id.* at 717-19.

199. NLRB v. Apollo Tire Co., 604 F.2d 1180 (9th Cir. 1979). The introductory quote to this Article, from Justice Kennedy when he was a Circuit Judge, is from his concurring opinion in that case.

200. *Local 512*, 795 F.2d at 716-17; *see also* Bevles Co. v. Teamsters Local 986, 791 F.2d 1391, 1393-94 (9th Cir. 1986).

201. *Local 512*, 795 F.2d at 717.

202. *Id.* at 717-22 (finding that NLRA aims are served by awarding remedies because they deter future illegal activity, compensate victims, and also protect the jobs and work conditions of American citizens—the goals of immigration policy—because employers gain no economic advantage by hiring undocumented workers). *But see* Del Rey Tortilleria, Inc. v. NLRB, 976 F.2d 1115, 1120-21 (7th Cir. 1992) (stating that the Supreme Court had rejected these same arguments, which had been put forth by the *Sure-Tan* dissent, 467 U.S. 883, 906-13 (1984) (Brennan, J., dissenting)).

203. 976 F.2d 1115 (7th Cir. 1992).

204. *Id.* at 1119. The burden of proof was placed on the employee because it was seen as consistent with IRCA's requirements that individuals prove their ability to work in the United States before they are hired. *Id.* at 1122-23.

205. *Id.*

206. *Id.* at 1119-21 (discussing the speculative nature of the damages). The court also argued that the *Sure-Tan* dissent characterized the majority as authorizing the broad rule against backpay. *Id.* at 1120.

IRCA incorporated the *Sure-Tan* holding, which denied backpay, because Congress did not attempt to change the holding when it passed IRCA.[207]

NLRB policy also conditions reinstatement and backpay remedies upon the employee's being lawfully present and employed in the United States.[208] For those employees hired on or before November 6, 1986,[209] the employer has the burden of showing that the employee is not lawfully entitled to be in the United States by presenting a final INS determination. Although the employee may not be reinstated, she is entitled to backpay for the period prior to the final INS ruling, as long as she is in the United States and otherwise available for employment. For employees hired after November 6, 1986, an employer must reinstate an employee only if she is willing and able to complete an I-9 form showing that she is legally entitled to work in the United States. The employee may receive backpay for the period of time that she could have met the I-9 requirements, even if she no longer meets them and will not be reinstated.[210]

3. *Frontpay*

Courts developed the frontpay remedy to compensate victims when reinstatement could not be ordered. For instance, it has been used where reinstatement was impossible due to the lack of available positions.[211] Frontpay has also been ordered where hostility in the work environment made reinstatement inappropriate, for example, in cases of sexual harassment.[212] Frontpay is necessary to compensate fully an employee who was not reinstated for the future effects of discrimination so that she can be made whole.[213] The Supreme Court has approvingly cited, in dicta, the grant of frontpay for Title VII plaintiffs when reinstatement was not feasible.[214] One court has stated that, when rehiring the victim is impossible, the court should order frontpay.[215] Other courts have avoided such a per se rule.[216] Although no

207. *Id.* at 1121; *see also* 88-9 NLRB Gen. Couns. Mem. 6 (Sept. 1, 1988).

208. 88-9 NLRB Gen. Couns. Mem. 6 (Sept. 1, 1988).

209. The group is divided into pre- and post-November 6, 1986 hires because employers could continue to employ the earlier group, without checking their immigration status. IRCA requires employees hired after November 6, 1986 to complete an I-9 form verifying their ability to work in the United States before they can be hired. 8 U.S.C. § 1324a(b) (1988 & Supp. IV 1992).

210. 88-9 NLRB Gen. Couns. Mem. 6 (Sept. 1, 1988).

211. Green v. USX Corp., 843 F.2d 1511, 1531-32 (3d Cir. 1988) (discussing company where no new hiring would take place for seven or eight years); Pitre v. Western Elec. Co., 843 F.2d 1262, 1278-79 (10th Cir. 1988) (employing frontpay as a substitute for an immediate promotion that cannot occur because there are no positions currently available).

212. *See, e.g.*, Goss v. Exxon Office Sys. Co., 747 F.2d 885, 889 (3d Cir. 1984); Sowers v. Kemira, Inc., 701 F. Supp. 809, 827 (S.D. Ga. 1988); Pease v. Alford, 667 F. Supp. 1188, 1203 (W.D. Tenn. 1987); *see* Levy, *supra* note 118, at 591-93.

213. *Pitre*, 843 F.2d at 1278-79 (noting that frontpay is different from and supplementary to backpay).

214. United States v. Burke, 112 S. Ct. 1867, 1873 n.9 (1992).

215. *Green*, 843 F.2d at 1531 n.17.

216. *See, e.g.*, Shore v. Federal Express Corp., 777 F.2d 1155 (6th Cir. 1985).

cases have dealt with an award of frontpay to undocumented workers, the reasons for awarding frontpay—inability to reinstate, deterring illegal discrimination, and compensating the plaintiff[217]—apply to undocumented workers.

However, there are two main problems with the award of frontpay to undocumented workers.[218] First, courts have applied the doctrine of availability to frontpay.[219] Thus, the same issues of availability raised for backpay apply to frontpay as well.[220] Depending upon the definition of availability adopted by courts, undocumented workers could either receive limited or no frontpay. Second, even the most pro-plaintiff after-acquired evidence cases have denied frontpay to employees if the evidence would have led to the discharge of the employee.[221] They have ruled in this way because frontpay is the analytical substitute for reemployment, and once the employer has a legitimate motive to discharge the employee, the employer need not reemploy her.[222] Thus, it is unlikely that undocumented workers whose citizenship status was unknown, but would have led to discharge, will be able to receive frontpay.

4. Compensatory and Punitive Damages

Undocumented workers should be able to receive compensatory and punative damages in the same amount as other workers. For all workers, compensatory and punitive damages are available in cases of intentional discrimination, limited by statutory caps.[223] If a worker's discharge involved a mixed motive,[224] however, she may not receive damages.[225] The *EEOC Revised Enforcement Guide* states that after-acquired evidence does not bar recovery of punitive damages "if the employer's *sole* motivation was discriminatory and it acted 'with malice or with reckless indifference' to the victim's rights . . . ."[226] The only court to address the potential effects of after-acquired evidence on an employee's ability to receive damages suggested, in dicta, that damages would not be limited because they are awarded based on

217. *Id.* at 1159 (holding that, if reinstatement is not possible, an award of frontpay is appropriate if it will aid in ending illegal discrimination and rectifying the harm caused).

218. One court had suggested a third problem—the restriction of Title VII remedies to equitable relief. McKnight v. General Motors Corp., 908 F.2d 104, 116-17 (7th Cir. 1990). The Civil Rights Act of 1991, by adding legal damages and trial by juries, eliminated this concern. 42 U.S.C. § 1981a(b)-(c) (Supp. IV 1992).

219. *See, e.g.*, Floca v. Homecare Health Servs., Inc., 845 F.2d 108, 112-13 (5th Cir. 1988).

220. These issues are discussed *supra* part III.B.2.b.

221. *See, e.g.*, Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1181-82 (11th Cir. 1992). The court did require the employer to show that it would have discovered the evidence. *Id.* at 1182.

222. *Id.*

223. 42 U.S.C. § 1981 (Supp. IV 1992); *see supra* notes 119–21.

224. *See supra* notes 122-24 and accompanying text.

225. 42 U.S.C. § 2000e-5(g)(2)(B) (Supp. IV 1992) ("On a claim in which an individual proves a violation under 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court . . . shall not award damages.").

226. EEOC, *Revised Enforcement Guide*, *supra* note 174, at 6927 (quoting § 102 of the 1991 Civil Rights Act).

the employer's mental state as it existed at the time of the discharge and cannot be affected by evidence that later comes to light.[227] For all of these reasons, compensatory and punitive damages are generally available to undocumented workers.

C. *Proposed Statutory Interpretation and Legislative Changes*

There is a gulf between the remedies necessary to accomplish the purposes of Title VII and IRCA and the remedies that are presently available to undocumented workers. The purposes of both IRCA and Title VII are best served by providing all remedies. Even a judge acting under the most favorable interpretation of current law cannot fully provide these remedies. Thus, legislative changes, in addition to liberal interpretation of doctrine are necessary.

Reinstatement, a key part of the remedy package, is not available because courts cannot order an employer to do something illegal and because of the mixed motive and after-acquired evidence doctrines. Advocates could argue for reinstatement, however, if the worker becomes documented within a certain period of time after the discrimination. Nonetheless, if this crucial piece of the remedial package remains unavailable, it is even more important that the other remedies be awarded.

Backpay should and can be allowed if the case does not involve a mixed motive. After-acquired evidence of immigration status should affect only the amount of backpay received and not the ability to collect. The after-acquired evidence doctrine should be analyzed this way because actions at the time of discharge should determine liability, not evidence discovered later or the number of other remedies available.

Furthermore, the amount of backpay allowable should turn on the actual availability of the employee (rather than the legal availability) because the remedy focuses on compensating the actual harm. The person is actually harmed if she would have been working except for the discrimination. Such actual harm is not altered or diminished by the person's status under IRCA. Any reliance on legal availability denies the reality that undocumented people do work in the United States. Current doctrine supports this realistic interpretation.[228]

Finally, the after-acquired evidence doctrine should only limit backpay during the time after the employer can show it would have discovered the worker's status and discharged the employee. A contrary result puts the employee in a worse position than she would have been in had she not been

227. Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1183 n.14 (11th Cir. 1992). *But see* Williams & Davis, *supra* note 183, at 311 (claiming that after-acquired evidence of misrepresentation on employment application frequently defeats sexual harassment claims); *Wallace*, 968 F.2d at 1178 n.7 (citing sexual harassment cases where courts found that the victim suffered no injury because she lied on her application).

228. *See supra* notes 196–202.

discriminated against and filed a lawsuit. This conclusion fits within the liberal interpretation of the existing cases.

In evaluating frontpay, courts must balance two competing interests: the need for frontpay when reinstatement is not possible and the problems of legal unavailability and after-acquired evidence. When reinstatement is inappropriate, frontpay should and can be awarded if courts find that the need for monetary compensation outweighs the problems of legal unavailability and after-acquired evidence. The availability issue can be addressed by focusing on actual availability, but the after-acquired evidence doctrine will most likely bar frontpay where the worker's citizenship status was unknown but would have led to discharge. Because of the limitations on other remedies, courts should award frontpay in all but this narrow situation.

Compensatory and punitive damages need to be awarded and should be granted up to their maximum to compensate for the lack of reinstatement and other remedies. The after-acquired evidence doctrine should not bar recovery of these damages, although a true mixed-motive will prohibit this remedy.

Many of the recommendations above can be implemented by the courts. The only interpretive change needed centers around allowing punitive and compensatory damages for mixed motive cases. Finally, Congress should change the law to codify the following recommendations:

- *Reinstatement*—An undocumented victim of discrimination may be reinstated if she receives documentation within six months of the final outcome of her case.
- *Backpay*—Backpay may be awarded unless the victim is actually unavailable to work or the employer can show that it would have discovered the evidence and discharged the employee, even in the absence of the lawsuit.
- *Frontpay*—Frontpay may be awarded if the victim cannot be reinstated.
- *Compensatory and Punitive Damages*—Compensatory and punitive damages may be awarded at a rate higher than allowable for documented workers.[229]
- *After-acquired Evidence*—The after-acquired evidence doctrine does not bar undocumented workers from pursuing discrimination suits nor impair their ability to receive compensatory and punitive damages.

CONCLUSION

Discrimination against undocumented workers, not because of their immigration status, but because of their race, gender, and ethnicity is a tremendous problem today. Fortunately, these workers have the right to be free from

229. *See supra* note 146.

job discrimination because that right flows from their status as employees, rather than from their status as citizens. Unfortunately, the remedies available to them for discrimination are severely limited. Although undocumented workers may receive compensatory and punitive damages in certain situations, reinstatement is generally unavailable, and backpay and frontpay may be limited by courts. Because all of these remedies are necessary to accomplish the purposes of Title VII and IRCA, courts should interpret the laws as liberally as possible to grant remedies. If the laws are not so interpreted, then legislation is necessary to help these workers who are most in need.