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Susan Charnesky

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PROTECTION FOR UNDOCUMENTED WORKERS UNDER THE FLSA: AN EVALUATION IN LIGHT OF IRCA

In Sure-Tan v. NLRB, the United States Supreme Court held that undocumented workers are protected under the National Labor Relations Act. This Comment argues that protection should be extended under the Fair Labor Standards Act. This Comment also looks at the Immigration Reform and Control Act of 1986 (IRCA), and argues that the passage of IRCA should not affect the right of undocumented workers to be protected and receive remedies under the labor laws.

INTRODUCTION

The number of undocumented aliens in the United States is difficult to measure; however, most scholars agree that the number has reached at least three million and perhaps six million. These un-
documented aliens have entered the labor market\(^3\) and become invaluable employees.\(^4\) But the fact is that many of these invaluable employees are being subjected to adverse wage and working conditions.\(^5\) The Immigration and Naturalization Service (INS) estimates that thirty percent of the undocumented workers are paid less than the minimum wage.\(^6\) Many people feel this percentage is unreliable and could be higher.\(^7\) Moreover, the percentage of undocumented workers subject to overtime without compensation has been found to be even higher.\(^8\)

In 1938 the Fair Labor Standards Act (FLSA)\(^9\) was enacted to prevent inhumane treatment of employees by setting up minimum wage\(^10\) and overtime provisions.\(^11\) However, many employers feel the FLSA does not apply to undocumented workers because of the workers' illegality. Thus, many undocumented workers have not benefited from the law. And most undocumented workers have been too fearful of deportation to attempt to remedy this situation and assert their rights.

This Comment suggests that undocumented workers should be protected under the FLSA. Granting undocumented workers this protection would help to control the undocumented alien population. If undocumented alien workers received the same labor protections as citizens, the employers' motivation for hiring the workers would
be diminished. More importantly, allowing undocumented workers protection under the FLSA would promote the humanitarian values that this country cherishes.

This Comment also considers fair labor standards in light of the Immigration Reform and Control Act of 1986 (IRCA). IRCA states that it is illegal for an employer to hire an undocumented worker, whereas the Immigration and Nationality Act (INA) had not been so explicit. Employers who are found to be knowingly employing undocumented workers now can be punished with sanctions. The effectiveness of sanctions, however, is questionable. Economic forecasts indicate that employer sanctions will reduce the employment of undocumented workers by fifteen to twenty-five percent. Therefore, other methods for reducing the immigration of undocumented workers must be utilized if this nation is serious about controlling its immigration problem.

One such method would be protecting undocumented workers under labor laws such as the FLSA. Yet a recent federal district court decision, Patel v. Sumani Corp., held that undocumented workers are not protected by the FLSA. The court reasoned that protection of undocumented workers would contravene the mandate of Congress in enacting IRCA.

The United States Supreme Court has not yet addressed the relevance of IRCA when considering undocumented workers' labor rights. Nor has the Court addressed the superseding issue of whether

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13. See IRCA § 101, 100 Stat. at 3360 (codified at 8 U.S.C. § 1324a (1986)). This section states that it is unlawful to hire an alien knowing the alien is undocumented. It is also unlawful to continue employing an alien after the employer has discovered the alien's illegality.
15. Id. § 1324(a). This section made it a felony to willfully import, transport, or harbor an undocumented alien, but specifically provided that employment is not harboring.
16. IRCA § 101(a), 100 Stat. at 3367-68 (codified at 8 U.S.C. § 1324a). The sanctions impose civil money penalties in different amounts depending on the "size of the business of the employer being charged, the good faith of the employer, the seriousness of the violation, whether or not the individual was an unauthorized alien and the history of previous violations." Criminal penalties also can be imposed if the situation warrants such action.
17. ECON. REV., supra note 2, at 2.
19. Id. at 1534.
undocumented workers are protected under the FLSA at all.\textsuperscript{20} The Court, however, has held that undocumented workers are protected under the National Labor Relations Act (NLRA).\textsuperscript{21} Therefore, a look at undocumented workers' rights under the NLRA is necessary for determining their rights under the FLSA. After an analysis of the cases that have come before the courts, this Comment will provide reasons why undocumented workers should be protected under the FLSA. Finally, this Comment will explain why protecting undocumented workers under the FLSA is consistent with the policy of IRCA.

\section*{Background of FLSA}

The FLSA, commonly referred to as the wage and hour law,\textsuperscript{22} applies to employers, or employees employed by an enterprise, engaged in commerce or in the production of goods for commerce.\textsuperscript{23} The Wage and Hour Division of the Labor Department has been charged with the enforcement of the FLSA.\textsuperscript{24}

When an employee has a complaint under the FLSA, the employee can bring suit in either federal or state court of competent jurisdiction.\textsuperscript{25} Also, the Secretary of Labor can file an action for civil liability\textsuperscript{26} or for an injunction\textsuperscript{27} against the employer in a federal district court.\textsuperscript{28}

Although empowering the Administrator to seek out and investigate violations of the FLSA, Congress did not seek 'compliance with the FLSA merely through "continuing detailed federal supervision or inspection of payrolls."'\textsuperscript{29} It chose to rely on employees' complaints as well. Therefore, critical for the enforcement of the FLSA is the knowledge by employees that they will not be penalized or discrimi-
uated against for filing their complaint.30

The FLSA defines an employee as “any individual employed by an employer.”31 None of the exemptions given include undocumented workers. With the increase of undocumented workers in the work force, it was only a matter of time before some aliens sought to exercise their labor rights under the FLSA. Yet little case law exists on this subject, most likely because undocumented workers fear being deported.32 This fear compels them to accept lower wages rather than complain to the authorities of their employers’ abuses. However, the rights of undocumented workers under the NLRA have been developed more fully. Thus, a look at that development is helpful for understanding undocumented workers’ rights under the FLSA.

NATIONAL LABOR RELATIONS ACT

The NLRA was adopted in 1935 to protect the free flow of commerce by encouraging the practice of collective bargaining.33 Whether or not a person is an employee protected by the NLRA is determined by the National Labor Relations Board (NLRB).34 The NLRB consistently has held that undocumented workers are “employees” included in and protected by the NLRA.35 Both the courts

30. Section 215(a)(3) of the FLSA makes it unlawful for any person covered by the Act to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceedings under or related to the Act. 29 U.S.C. § 215(a)(3). In the case of undocumented workers, however, this has not been sufficient. Many undocumented workers are unsure if they even are covered by the FLSA, and thus are unwilling to take the risk of deportation.
32. See REPORT, supra note 5, at 47.
34. See NLRB v. Hearst Publications, Inc., 322 U.S. 111, 130 (1944). The definition of employee is broadly defined and has required much interpretation by the NLRB. An employee is defined in the statute as:
any employee, and shall not be limited to the employees of a particular employer, . . . and shall include any individual whose work has ceased as a consequence of . . . any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment.
29 U.S.C. § 152(3). Several exemptions also are listed, yet none includes undocumented workers.
35. Amay’s Bakery & Noodle Co., 94 L.R.R.M. (BNA) 1165, 1166 (1976). This decision is a result of a 1943 decision in which the NLRB stated that national policy prohibits discrimination on the basis of race, creed, color or national origin. See In re United States Bedding Co., 13 L.R.R.M. (BNA) 10, 11 (1943). This case paved the way to include undocumented workers as employees.
of appeals and the Supreme Court have upheld this inclusion, and have given policy reasons as to why undocumented workers should be afforded labor protections. The following cases illustrate their position.

Sure-Tan, Inc. v. NLRB

In Sure-Tan, a union was elected as the collective bargaining representative of employees of Sure-Tan. Sure-Tan filed an objection with the NLRB, asserting that several of the employees who voted were undocumented workers. When the NLRB overruled the objection, Sure-Tan notified the INS of the employees’ presence, and the employees subsequently left the United States. The NLRB found that the employer violated section 8(a)(3) of the NLRA because the report was in retaliation for the employees’ union activities. The NLRB also found that the undocumented workers were protected under the NLRA. The Supreme Court agreed with the NLRB. The Court stated that the task of defining employee “has been assigned primarily to the agency created by Congress to administer the Act,” and the NLRB’s construction was entitled to “considerable deference.” Thus, the Court agreed that the statutory definition of employee is strikingly broad, and the only limitations are specific exemptions. The Court also reasoned that extending the NLRA to undocumented workers is consistent with the NLRA’s policy, and recognized some important specific policy reasons for allowing undocumented workers full protection under the NLRA.

The remedy granted in Sure-Tan has received extensive debate.

36. Before the Supreme Court heard Sure-Tan, three cases had come before the court of appeals: first, NLRB v. Sure-Tan, Inc., 583 F.2d 355 (7th Cir. 1978); second, NLRB v. Apollo Tire Co., Inc., 604 F.2d 1180 (9th Cir. 1979); and finally, the case that was appealed to the Supreme Court, NLRB v. Sure-Tan, Inc., 672 F.2d 592 (7th Cir. 1982). All three cases affirmed the NLRB holding that undocumented workers are protected under the NLRA.

37. See Sure-Tan, 467 U.S. 883.

38. 467 U.S. 883.

39. Section 8(a)(3) of the NLRA makes it an “unfair labor practice” for an employer “by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.” 29 U.S.C. § 158(a)(3).

40. Sure-Tan, 467 U.S. at 888.

41. Id. at 891 (citation omitted).

42. Id.

43. Id. at 891-92.

44. The Court stated that “[a]pplication of the NLRA helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment.” Id. at 893. The Court further stated that the employer’s incentive to hire the aliens would be diminished, leaving fewer incentives for aliens to enter illegally. Id.

45. See Comment, Remedies for Undocumented Workers Following a Retaliatory Discharge, 24 SAN DIEGO L. REV. 573 (1987) (discussing what effective remedies
The Court held that the aliens could not receive reinstatement until they were legally readmitted to the United States. The backpay award was conditioned on the employees' availability for work. The Court stated the employees “must be deemed ‘unavailable’ for work . . . during any period when they were not lawfully entitled to be present and employed in the United States.” Debate has centered on whether this phrase meant either that no undocumented workers could receive backpay awards because they are “illegal,” or whether the phrase referred to the specific facts of the case, in which the undocumented workers had already been deported, and thus had to reenter the United States to receive their backpay.

If the Supreme Court meant that no undocumented workers can receive backpay, undocumented workers would be in the position of being protected by the NLRA, yet having no effective remedy because of their illegality. This could be possible, because the cease and desist provisions of the NLRA would still apply. However, it seems more logical, and more equitable, that the Court, while going through the lengthy discussion of including undocumented workers as “employees” under the NLRA, intended that the workers receive a remedy. Since Sure-Tan, several Ninth Circuit cases have reasoned that the Court intended that undocumented workers receive a remedy if they are within the United States.

The Felbro Decision

The court in NLRB v. Felbro, Inc. agreed with the premise that undocumented workers were entitled to receive a remedy, and held that any conditioning of the backpay award would be inconsistent

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46. *Sure-Tan*, 467 U.S. at 902-03.
47. *Id.* at 903.
48. *See supra* note 44.
50. *See NLRB v. Felbro, Inc.*, 795 F.2d 705 (9th Cir. 1986); *see also infra* notes 50-55 and accompanying text. For other cases following *Sure-Tan*, see Comment, *supra* note 44, at 580-86.
51. 795 F.2d 705 (9th Cir. 1986). The court consolidated the case of Local 512, Warehouse & Office Workers' Union v. NLRB with NLRB v. Felbro, Inc.
with both the NLRA and the INA. In *Felbro*, Felbro, Inc. had violated the NLRA by laying off certain workers and refusing to execute a collective bargaining agreement. The NLRB had conditioned the backpay order on proof that the workers were legally entitled to work in the United States. The Court of Appeals for the Ninth Circuit disagreed with the NLRB's conditional remedy. Such a remedy, the court reasoned, would only encourage employers to hire more undocumented workers, and then violate the NLRA with the knowledge that the workers have no effective remedy. Also, undocumented workers would not be likely to vindicate their rights before the NLRB if they faced a possible deportation.

Therefore, as the law stands today, the NLRB and the appellate courts should be free to include undocumented workers as employees under the NLRA, and to provide them with effective remedies. Providing undocumented workers protection under the FLSA would be consistent with this policy and achieve the same goal of controlling undocumented immigration.

**Undocumented Workers' Suits Under The FLSA**

*Brennan v. El Sun Trading Corp.*

The Secretary of Labor brought suit against El Sun Trading Co. for withholding minimum and overtime wages from certain employees. The defendant was engaged in the business of selling used clothing at wholesale. The defendant employed an average of ten undocumented workers, who were paid about $5 a day for twelve hours of work. The federal district court ruled that these unidentified illegal alien employees were due approximately $114,400.

*El Sun Trading Co.* was reported only in the labor reports. The court apparently assumed undocumented workers were protected under the FLSA. In fact, the case was cited in *Felbro* for the proposition that "undocumented workers are entitled to backpay for violations of the Fair Labor Standards Act."
Alvarez v. Sanchez

In *Alvarez*, a Mexican national brought suit in a New York state court for underpayment and nonpayment of wages under the FLSA. The plaintiff had worked as a domestic service employee for the defendant. The defendant claimed as an affirmative defense plaintiff's illegal status. The New York Supreme Court, Appellate Division, affirmed the lower court's dismissal of the defense, saying that “since the Fair Labor Standards Act does not define the term ‘employee’ to expressly exclude illegal aliens, plaintiff’s status does not preclude her from recovering under the statute.” The court cited *Sure-Tan* as supporting its decision.

In re Reyes

In *In re Reyes*, migrant farm workers sought a writ of mandamus to withdraw a discovery order requiring them to disclose their immigration status. The Court of Appeals for the Fifth Circuit granted the writ. The farmworkers had brought suit under both the Migrant and Seasonal Agricultural Worker Protection Act (AWPC) and the FLSA. The defendant sought to establish the workers' illegality, claiming that the workers were not protected under the acts because they were undocumented.

According to the Fifth Circuit, the applicability of the FLSA to aliens is well established, and whether they are "documented or undocumented is irrelevant." The discovery ordered by the trial court was unnecessary, and if allowed could have inhibited the workers in pursuing their rights by opening issues for litigation not relevant to the case. Thus the Fifth Circuit recognized the need for undocumented workers to bring suits without the fear of a possible deportation.

60. Id. at 1114, 482 N.Y.S.2d at 185.
61. Id.
62. 814 F.2d 168 (5th Cir. 1987).
63. Id. at 171.
64. 29 U.S.C. §§ 1801-72.
65. *In re Reyes*, 814 F.2d at 170.
66. Id.
Patel v. Sumani Corp.67

The most recent case to discuss this issue is the only one which has not granted protection to undocumented workers. In Patel, the district court held that undocumented workers are not “individuals” under the definition of employee, and therefore are not protected by the FLSA.68

Rajni Patel, a lawyer from India, came to the United States on a six-week visitor’s visa around May 12, 1982. Patel admitted that he remained in the states illegally after his visa expired. He claimed that he worked for the defendant at the Quality Inn South in Birmingham, Alabama for over two years. He sought enforcement of the FLSA for that period of time, alleging unpaid minimum wages and unpaid overtime compensation.69

Sumani Corporation claimed that Patel worked as an independent contractor while he was living at the hotel. Thus, Sumani denied the claim on its merits, and asserted that Patel had no claim under the FLSA because of his status as an undocumented worker.70

The United States Department of Labor (DOL) filed a statement of position supporting Patel’s claim. During a phone conversation between the DOL and the district court’s law clerk, the DOL referred the clerk to In re Reyes as supporting Patel’s position.71

The Patel court agreed with the dissent in In re Reyes, which argued the court was taking a position without precedent.72 The court stated that no cases on point existed because “no illegal alien ever entertained the thought [that] he was entitled to invoke the FLSA until the recent era of amnesty.”73

The court relied on Mathews v. Diaz74 in holding that the FLSA is for the benefit of citizens, and not aliens. In Diaz, the Supreme Court held that a provision of the Social Security Act which denied eligibility to aliens until certain requirements were met was constitutional. The Diaz Court said there is a “legitimate distinction between citizens and aliens [that] may justify attributes and benefits

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68. Id. at 1531.
69. Id. at 1528.
70. Id. at 1528-29.
71. Id. at 1529. The Department of Labor consistently has taken the position that undocumented alien workers are protected by the FLSA’s minimum wage and overtime provisions. The Department presented these views to the district court in Patel. Appellant’s Brief, supra note 49, at 17.
72. Patel, 660 F. Supp. at 1529 (citing In re Reyes, 815 F.2d at 171 (Jones, J., dissenting)). This reliance, however, was unjustified. Judge Jones merely stated that she disagreed the information was “without a shred of relevancy.” Therefore, she felt mandamus could not be issued.
73. Id. at 1530.
for one class not accorded to the other.” The Court pointed out that many constitutional and statutory provisions rest on this premise. The Patel court thought that the FLSA is one such provision.

However, the Patel court still had to deal with the Supreme Court’s holding in Sure-Tan. In distinguishing Sure-Tan, Judge Acker pointed out that Patel concerned the FLSA, not the NLRA. Acker also heavily emphasized that the INA had not, at the time of Sure-Tan, made it illegal to employ undocumented workers, but that currently, with the change in the immigration laws, employing such workers clearly is against the law. Therefore, he felt the court’s holding was “mandated by Congress.”

The Patel court stated that the new immigration law, IRCA, clearly goes against a policy of allowing undocumented workers protection under the FLSA because while enforcing the FLSA in favor of undocumented workers “encourages their illegal entry,” denying undocumented workers the protection of the FLSA “discourages...”

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75. Id. at 78.
76. Id.
77. Mathews v. Diaz is easily distinguished from Patel. In Diaz the aliens attempted to receive Medicare. Unlike wages, welfare benefits are provided to the public by the “conscientious sovereign”; they are not earned. If the federal government were to expand the benefits to all aliens, the nation’s immigration policy would be inhibited. The United States would not feel so comfortable in allowing thousands of refugees to enter the states. Diaz, 426 U.S. at 80-81.

A claim for wages earned is quite different. It is the property of the undocumented worker that is being taken away when the worker is denied the minimum wage and overtime. The alien in fact earned that wage. And the immigration policy is not hampered by this allowance. In fact, the policy is enhanced because employers are further deterred from hiring undocumented workers.

78. Patel, 660 F. Supp. at 1532. This action by the judge merely was an attempt to avoid the precedent confronting him. In the decisions which dealt with the NLRA, the courts often stated that undocumented workers were included as employees so that the “wages and employment conditions” of citizens would not be affected. Sure-Tan, 467 U.S. at 893 (emphasis added).

Obviously the courts intended that undocumented workers would receive the minimum wage. But the Patel court refused to acknowledge the impact of the NLRA in interpreting the FLSA, ignoring Felbros, which in a footnote states that undocumented workers are protected under the FLSA. Felbro, 795 F.2d at 718 n.12.

The judge’s reasoning points out the need for the Supreme Court to resolve whether undocumented workers are protected under the FLSA. Although many people may believe the Court’s decisions regarding the NLRA should apply analogously to the FLSA, some courts may continue to hold otherwise.

81. Patel, 660 F. Supp. at 1534. Judge Acker, however, failed to come up with any legislative history which supported this mandate.
82. Id. at 1535.
their entry and recognizes the policy and goals of the INA." The court applied the rule of statutory construction that new legislation which relates to the subject matter of prior legislation sheds light on the prior legislation. Judge Acker felt IRCA’s enactment showed that Congress never intended undocumented workers to have protection under the FLSA; if the aliens did have the protection, "there would have been much less of a reason for the IRCA, if any reason at all." Later, however, discussing IRCA, the judge said: "The IRCA was intended to remove an economic incentive for illegal entry into the United States for the purpose of engaging in unlawful employment and to correct a policy in the past of allowing illegal aliens the full protection of all laws designed to protect workers legally within this country." Thus, the court seemed to be admitting that undocumented workers had received labor protections in the past, and saying at the same time that Congress never intended undocumented workers to have these protections, which is why they enacted IRCA. Yet legislative history shows the opposite to be true. Congress intended to continue undocumented workers’ coverage under the FLSA and other labor laws, in order to discourage employers from hiring these workers. The next sections of this Comment offer reasons why undocumented workers should be protected under the FLSA, and why doing so is consistent with IRCA.

"EMPLOYEE" UNDER THE FLSA INCLUDES UNDOCUMENTED WORKERS

Several arguments can be advanced that undocumented workers are employees under the FLSA. First, the Supreme Court already has determined that undocumented workers are protected under the NLRA; thus it would be logical to protect them under the FLSA also. Secondly, protecting undocumented workers under the FLSA would be consistent with the Act’s policy, because not only would unfair competition be eliminated, but the humanitarian goal of the FLSA would be upheld. Finally, Congress intended “employee” to be interpreted broadly.

83. Id. Yet this is highly unlikely. Many aliens enter this country because of the high unemployment in their own countries and the opportunities for employment in this country. If the workers were protected under the FLSA, immigration would be deterred, because employers would be less motivated to hire them. On the other hand, if no protections were afforded, employers would be more eager to hire undocumented workers to exploit them. Thus more immigration would occur.
84. Id. at 1530.
85. Id.
86. Id. at 1534 (emphasis added).
87. See infra notes 139-141 and accompanying text (legislative history of IRCA).
Application of the FLSA Should Be the Same as that of NLRA

As stated above, the Supreme Court has confirmed the position that undocumented workers are employees under the NLRA.\(^8\) Consistent with this holding would be the determination that undocumented workers also are protected under the FLSA.\(^9\) As the Supreme Court stated in *Rutherford Food Corp. v. McComp:*\(^9\) "The [FLSA] of 1938 . . . is part of the social legislation of the 1930's of the same general character as the [NLRA] . . . . Decisions that define the coverage of the employer-employee relationship under the Labor . . . Ac[t] are persuasive in the consideration of a similar coverage under the [FLSA]."\(^81\)

The NLRA defines an employee as "any employee."\(^82\) The definition has several exemptions. The FLSA's definition of employee is similar in that it also is very broad. An employee under the FLSA is "any individual employed by an employer."\(^83\)

Logically, the legislature and public would perceive "employee" as having the same meaning under the two acts.\(^94\) Both acts are part of our labor law and address the protections afforded employees, attempting to undo wrongs which have occurred to them. The policy statements of the two acts sound very similar.\(^95\) Both were enacted to enhance the "free flow of goods in commerce."\(^96\) Probably the strongest argument that "employee" means the same thing under these two acts, however, is that they were enacted less than three years apart\(^97\) at a time when there was heightened interest in regulating the relations between labor and management, and the standards of employment. Because of these similarities, the courts should use the interpretation of "employee" under the NLRA in determining the scope of "employee" under the FLSA.\(^98\)

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88. *Sure-Tan*, 467 U.S. at 883; see supra notes 38-47 and accompanying text.
89. As stated earlier, some courts seem to have assumed this premise. See supra notes 56-66 and accompanying text.
90. 331 U.S. 722 (1947).
91. *Id.* at 723.
92. 29 U.S.C. § 152(3). For the complete text of the definition, see supra note 34.
93. *Id.* § 202(e)(1).
94. With the exception that the exemptions listed in each act are different.
95. See 29 U.S.C. § 202 (for the FLSA); 29 U.S.C. § 151 (for the NLRA); see infra note 98.
96. See 29 U.S.C. § 202 (for the FLSA); 29 U.S.C. § 151 (for the NLRA); see infra note 98.
97. The NLRA was enacted in 1935. The FLSA was enacted in 1938.
98. Courts often use other statutes when interpreting a doubtful phrase or word. See 2A *Sutherland Statutory Construction* § 51.03 (4th ed. 1984). In discussing the use of related statutes, or *pari materia*, one commentator states:
When the Supreme Court in *Sure-Tan* held that undocumented workers are protected under the NLRA, the Court was deferring to the NLRB.\textsuperscript{99} Similarly, in considering the scope of employee under the FLSA, courts should defer to the administrative agency that has been charged with the Act's enforcement — the Labor Department. And the Labor Department, in *Patel*, submitted a statement of position claiming that undocumented workers are protected under the FLSA.\textsuperscript{100}

A refusal to defer to that agency would leave the law in a state of confusion. The FLSA and NLRA should be applied in a consistent manner. In fact, the Court of Appeals for the Fifth Circuit has specifically stated that the FLSA and NLRA are "parts of harmonious legislation."\textsuperscript{101} Since the FLSA and NLRA are parts of harmonious legislation and integral parts of this nation's labor policy, to allow undocumented workers protection under the NLRA and not under the FLSA would be contradictory.

The guiding principle . . . is that if it is natural and reasonable to think that the understanding of members of the legislature or persons to be affected by a statute will be influenced by another statute, then a court called upon to construe the act in question should also allow its understanding to be similarly influenced.\textsuperscript{Id.} Determining whether statutes are in *pari materia* generally revolves around whether they relate to the same person(s) or thing(s), or whether they have the same purpose or object. \textsuperscript{Id.}

The question of whether the NLRA and FLSA have the same purpose is not easily answered. There are obviously some similarities, yet there are key differences. The NLRA deals primarily with collective bargaining, the FLSA with enhancing working conditions. Yet both acts have the same effect of providing liberties to employees, thus it seems courts could find them in *pari materia* because of these similar policy goals.

Courts also use statutes by analogy, even if they are not in *pari materia*. \textsuperscript{2A SUTHERLAND STATUTORY CONSTRUCTION at § 53.03.} See also Stribling v. United States, 419 F.2d 1350, 1353 (8th Cir. 1969) (quoting 3 SUTHERLAND STATUTORY CONSTRUCTION § 6102 (3d ed. 1943)), explaining the public policy justifying the use of statutes by analogy:

`By referring to other similar legislation the court is able to learn the purpose and course of legislation in general, and by transposing the clear intent expressed in one or several statutes to a similar statute of doubtful meaning, the court not only is able to give effect to the probable intent of the legislature, but also to establish a more uniform and logical system of law. [footnote omitted.]`

In *Overstreet v. North Shore*, 318 U.S. 125 (1943), the Federal Employers' Liability Act (FELA) was used by the Court in interpreting the scope of the phrase "engaged in commerce." The Court was determining liability under the FLSA, yet felt free to use the FELA because "[b]oth are aimed at protecting commerce from injury through adjustment of the master-servant relationship..." \textsuperscript{Id. at 131.}

\textsuperscript{99. *Sure-Tan*, 467 U.S. at 891. See also supra text accompanying notes 41-42.}
\textsuperscript{100. *Patel*, 660 F. Supp. at 1529. See also supra note 71 and accompanying text.}
\textsuperscript{101. NLRB v. Stewart, 207 F.2d 8, 10 (5th Cir. 1953). The NLRB had found that the defendants coerced their employees into signing individual contracts, thus violating section 8(a)(1) of the NLRA. The defendants argued the individual contracts were provided to satisfy the government's Wage and Hour Investigators, and to comply with the FLSA. The court held the employers could not insist on individual contracts, and the FLSA and NLRA, when read harmoniously, provided for collective bargaining.}

392
Policy of FLSA

When the FLSA was enacted "the country was struggling out of the throes of the Great Depression." President Roosevelt, in his second inaugural address in 1937, had said, "I see one third of a nation ill housed, ill clad, ill nourished." Thus the FLSA was a response to these conditions, a cry for "certain minimum labor standards" for all employees who fell under the protection of the Act.

Yet the FLSA also had an economic motivation behind it. It was designed to eliminate the unfair methods of competition that required employees to work long hours for only a few cents an hour. Supporters of the law felt it would increase efficiency in production methods. And many smaller businesses appreciated the relief the FLSA gave them from destructive competition.

Thus, behind the FLSA actually were two strong policy goals: one, that an opportunity for better living and working conditions would be provided to the workers; and two, that unfair competition, consisting of low wages and long working hours, would be reduced. The inclusion of undocumented workers under the FLSA would be consistent with both of these goals.

Providing Certain Minimum Standards

In interpreting the FLSA, courts frequently have quoted *Fleming v. Hawkeye Pearl Button Co.*, which stated: "The manifest declared purpose of the statute was to eradicate from interstate commerce the evils attendant upon low wages and long hours of service and industry . . . . The statute is remedial, with a humanitarian end in view. It is therefore entitled to a liberal construction." The FLSA has been praised for insuring that all working men and women receive a "fair day's pay for a fair day's work." Because of its remedial nature, any exemptions from the FLSA must be "narrowly construed."

103. Tyson, *supra* note 22, at 278.
106. *Id.*
107. 113 F.2d 52 (8th Cir. 1940).
110. *Id.* at 493.
If the courts exclude undocumented workers from the protection of the FLSA, they will be placing the aliens in the position of becoming the "ill housed, ill clad, ill nourished" — conditions that Congress has tried to eliminate. Most citizens of this country know they do not want such a status for themselves, and are grateful for the minimum wage laws and other such labor protections. The question we must ask is, should we condone such a situation for undocumented workers, simply because they are "illegal?"

The United States has placed itself in the forefront in promoting humanitarian values and establishing broad human rights laws. Yet, ironically, it is international law that has announced a policy of protecting the labor rights of all human beings.111 The United Nations Universal Declaration of Human Rights states that "[e]veryone is entitled to the rights and freedoms set forth in this declaration, without distinction of any kind."112 The human rights listed include the right to favorable conditions of work, the right to equal pay for equal work, the right to just and favorable remuneration ensuring an existence worthy of human dignity, and the right to form and join trade unions.113 The United States would do justice in following international law and providing these rights to undocumented workers. To do otherwise would be to encourage substandard living conditions for certain human beings, while portraying ourselves as a humanitarian country.

Another view as to how this country can recognize the human rights of undocumented workers is through the participation model.114 Under this model, aliens' rights are not determined by whether the alien is a citizen or not. Rather the alien retains more rights "as he increases his identity with our society."115 The recent Supreme Court case of Plyler v. Doe116 can be seen as an example of this theory. In Plyler, the Supreme Court dealt with the issue of whether a Texas statute that denied undocumented aliens access to public schools was constitutional.117 In its analysis, the Court noted

112. Id. at 1731.
113. Id. at 1731-32.
115. Id. at 1304 (quoting Johnson v. Eisentrager, 339 U.S. 763, 770 (1950)).
117. Id. By this time, the courts already had determined that undocumented aliens are protected by the Constitution when fundamental rights are at issue. This is because the aliens are within the borders of the United States. See Wong Wing v. United States, 163 U.S. 228, 238 (1896). Also the right of aliens to bring suit had been firmly established. See Moreau v. Oppenheim, 663 F.2d 1300 (5th Cir.), cert. denied, 458 U.S. 1107 (1981) (undocumented aliens bringing suit for breach of contract); Martinez v. Fox Valley Bus Lines, 17 F. Supp. 576 (D.C. Ill. 1936) (undocumented workers bringing suit for negligence).
that the school children were not to blame for their presence in the United States\textsuperscript{118} and that education of its children is a matter of "supreme importance"\textsuperscript{119} to the public.

The Court was concerned with the quality of life experienced by school children. The children were living in a community that also consisted of citizens. Failure to provide education to the children would be detrimental to the society as a whole. There simply was no purpose in denying them these rights,\textsuperscript{120} and thus the statute was held unconstitutional.

This same analysis seems appropriate in considering the FLSA. The policy behind the act is humanitarian, a policy that seeks a decent standard of living for all human beings. Denying undocumented aliens protection will force them to continue living at poverty levels. Their children, through no fault of their own, will be brought up in the same conditions. Thus, the aliens will be living and working in the United States, probably going to school and to church, yet forced to live in an atmosphere not conducive to American life. The living and working conditions of these aliens would be in conflict with the goals and standards that this country endeavors to maintain. This could only have a harmful effect on the rest of society.

Preventing Unfair Competition

The other goal of the FLSA is the prevention of unfair competition. No longer can employers hire workers at substandard wages, impose long working hours on them, and then reap the benefits.\textsuperscript{121} Yet when employers can circumvent the law, many do. Because undocumented workers are unsure of their protection under the FLSA, they are fearful to complain of violations. Thus, employers continue to exploit these workers.

Most undocumented workers come from poor countries, which may not even have a minimum wage.\textsuperscript{122} The aliens are able to earn higher wages in the United States than they could earn in their own

\textsuperscript{118} Plyler v. Doe, 457 U.S. at 219-20.

\textsuperscript{119} Id. at 221 (quoting Meyer v. Nebraska, 262 U.S. 390, 400 (1923)).

\textsuperscript{120} The Court felt that the state did not adequately show that the law supported "any substantial interest" of the state, although several possibilities were discussed. Id. at 227-30.

\textsuperscript{121} See generally Tyson, supra note 22 (description of the living and working conditions before the FLSA was passed). Although it has long been illegal to exploit workers in this manner, we would be naive to believe there is complete compliance.

\textsuperscript{122} See Report, supra note 5, at 47 (documenting that undocumented workers tend to come from countries with high population and few employment opportunities).
country, even if their wage is below the minimum. They are eager to
find jobs here, and will accept the lower paid jobs with little com-
plaint.\textsuperscript{129} Therefore the undocumented workers' vulnerability to ex-
ploitation is obvious. Those employers who feel they have a moral
responsibility to all human beings could be placed in the dilemma of
deciding between profits or a satisfied conscience.

Manifest throughout the NLRA decisions, which have included
undocumented workers within the protected employee class, is the
argument that without these protections, employers would exploit
the undocumented workers in order to produce a cheaper product.\textsuperscript{124}
As the Ninth Circuit in \textit{Felbro} appropriately stated, "[u]nscrupulous
employers would be encouraged to hire undocumented workers for
the \textit{competitive advantage} that an environment relatively free of la-
bor safeguards may offer."	extsuperscript{125} This in turn could affect American
workers, who could be placed out of the job market for those partic-
ular jobs.\textsuperscript{126} Therefore, clearly the inclusion of undocumented work-
ers as employees under the FLSA would be in harmony with the
Act's policy of preventing unfair competition.

\textit{Congress Intended "Employee" To Be Interpreted Broadly}

Congress could not have been more clear when it defined employee
as "any individual employed by an employer."\textsuperscript{127} In order to be per-
fectly clear, Congress included exemptions,\textsuperscript{128} none of which in-
cluded undocumented workers.

This broad definition of employee is a result of the importance of
the Act itself. Congress wanted to be certain that the policies re-
ferred to in the section above would extend to everyone possible. Senator Hugo Black admitted the definition was "the broadest defi-

\begin{itemize}
\item \textsuperscript{123} The cause of undocumented immigration commonly has been called the
Push/Pull theory. \textit{See Developments, supra} note 114, at 1438. Push factors are those
aspects of life in the alien's country that push him away, such as a poor economy and
high unemployment. Pull factors are the benefits in the country the alien is entering,
which "pull" him in. In the United States, the "pull" factors would be numerous jobs at
an attractive (to the undocumented workers) wage. A third factor sometimes mentioned
is barriers. These are hindrances that prevent the alien from immigrating, such as na-
natural barriers, political ties, or the risk of entering.
\item \textsuperscript{124} \textit{See supra} notes 39-55 and accompanying text.
\item \textsuperscript{125} \textit{Felbro}, 795 F.2d at 719 (emphasis added).
\item \textsuperscript{126} \textit{Id.} There are several theories on the impact that undocumented workers have
had on American workers. Do these workers take wanted jobs, or are they only filling
unwanted jobs and thus beneficial to our economy? \textit{See Comment, supra} note 44, at 574;
\textit{Comment, The Alienation of American Labor: The National Labor Relations Act and
accepted argument, however, is that many minorities are adversely affected by the influx
of undocumented workers who take the lower paying jobs for which many minorities
qualify. \textit{See Report, supra} note 5, at 47.
\item \textsuperscript{127} 29 U.S.C. § 203(e)(1).
\item \textsuperscript{128} 29 U.S.C. § 213.
\end{itemize}
tion that has ever been included in any one act.”

The courts have followed this reasoning in determining the scope of employee under the FLSA. In *United States v. Rosenwasser*, the Supreme Court said there was “no doubt as to the congressional intention to include all employees within the scope of the Act unless specifically excluded.” Thus, because Congress did state several exemptions, the courts have concluded that all employees not specifically exempted are within the FLSA. Following this logic, undocumented workers should be protected under the FLSA, for in doing so, not only would the public policy of the Act be furthered, but the intent of the Act’s adopters’ would be followed.

**IRCA AND FLSA**

**Policy of IRCA**

Without a doubt, when Congress enacted IRCA, it was concerned with the enormous increase in illegal immigration over the last ten years. The Border Patrol had reported over one million apprehensions in six of the last nine years, and had estimated 1.8 million apprehensions for 1986. And Congress was concerned with the effect this immigration would have on the American labor market.

IRCA contains three main provisions: (1) employer sanctions, to prevent employers from continuous hiring of undocumented workers; (2) amnesty, to allow many undocumented workers residency as a humanitarian side to the law, and (3) increased enforce-

129. 81 CONG. REC. 7656-57 (1937).
130. 323 U.S. 360 (1945).
131. Id. at 363.
132. REPORT, supra note 5, at 47.
133. Id.
135. IRCA §§ 201-204, 100 Stat. at 3394-411 (codified at scattered titles and sections). For discussion of the rationale for legalization, see generally Comment, supra note 2.
136. Other valid reasons for amnesty exist. If amnesty were not included in IRCA, many employers would be economically hurt if required to dismiss these workers because of their illegality.
ment, by providing more resources for the INS to control the borders and enforce the sanctions.

Support for continued protection of undocumented workers can be found in IRCA, both in the Act and in the legislative history. Section III of IRCA, the increased enforcement section, contains a specific provision appropriating funds to the Department of Labor for enforcement of the FLSA. This appropriation is provided “to deter the employment of unauthorized aliens and remove the economic incentive for employers to exploit and use such aliens.”

This section makes it clear that Congress (1) considered undocumented workers to have labor protections and (2) intended these labor protections to remain. Congress was well aware that continued protection would help deter undocumented immigration, by minimizing the incentives for hiring undocumented workers.

Legislative history also sheds light on what Congress had in mind when it enacted IRCA. According to the House Report on bill Congress did not intend the new legislation “to undermine or diminish in any way labor protections in existing law” or “to limit in any way the scope of the term ‘employee’ in section 2(3)” of the NLRA. This report clearly states Congress’ intent that labor protections are not to be taken away by IRCA. Congress agreed that preserving labor protections to undocumented workers helps to discourage employers from hiring the workers.

138. Id. § 111(d), 100 Stat. at 3381 (codified at 8 U.S.C. § 1101).
139. Id. The full section reads as follows:
(d) SUPPLEMENTAL AUTHORIZATION APPROPRIATIONS FOR WAGE AND HOUR ENFORCEMENT — There are authorized to be appropriated in addition to such sums as may be available for such purposes, such sums as may be necessary to the Department of Labor for enforcement activities of the Wage and Hour Division and the Office of Federal Compliance Programs within the Employment Standards Administration of the Department in order to deter the employment of unauthorized aliens and remove the economic incentive for employers to exploit and use such aliens.

141. The House Report states:
It is not the intention of the Committee that the employer sanctions provisions of the bill be used to undermine or diminish in any way labor protections in existing law, or to limit the powers of federal or state labor relations boards, labor standards agencies, or labor arbitrators to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies. ... In particular, the employer sanctions provisions are not intended [sic] to limit in any way the scope of the term “employee” in section 2(3) of the [NLRA]. ... As the Supreme Court observed in Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984), application of the NLRA “helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment.

REPORT, supra note 5, at 58. (quoting Sure-Tan, 467 U.S. at 893) (emphasis added).
142. Additional legislative history also indicates that Congress realized the benefit
IRCA Effectiveness

The effect of employer sanctions in controlling undocumented immigration is questionable. If labor protections are granted to undocumented workers, the courts will have a second method by which to control undocumented immigration. And if the workers are denied labor protections, IRCA possibly may have the undesirable effect of increasing immigration, because employers will be eager to hire workers who can be exploited.

Even Congress admits that employer sanctions will not completely eliminate undocumented immigration.148 This position is not without merit. The effect of sanctions in other countries still is a questionable issue. Some reports indicate they are effective,144 others that they are not.146

An economic report compiled by the Federal Reserve Bank of Dallas to analyze the effect of sanctions concluded that enforcement of sanctions will be selective, focusing on work sites with numerous jobs that can be filled by undocumented workers.146 The vast majority of these jobs will be in manufacturing.147

The penalty structure is likely to encourage compliance among employers who expect they are being monitored. However, “employers in sectors where monitoring costs are high will continue to employ illegals”148 because they are willing to take a calculated risk. The report also concluded that about fifty percent of the workers

...
displaced by sanctions will find employment in industries where “enforcement is negligible.”

Overall, a fifteen to twenty-five percent reduction of undocumented workers was predicted. This forecast was expected to apply a year or so after sanctions had been enforced. Thus, sanctions could be more effective the first year, before employers became familiar with the enforcement patterns.

This report supports the view that sanctions will not be a completely effective tool for controlling undocumented immigration. In July 1987, Border Patrol agents in the San Diego, California sector arrested a record 63,061 aliens. This was the first month the number had gone up since the signing of IRCA. The INS stated the number had increased because employers “ignored [IRCA], hiring undocumented aliens and thus luring others over the border with the prospect of employment.”

Thus, apparently employers are willing to take a calculated risk. Although the undocumented immigration may go down once the INS begins to enforce sanctions, once the pattern is established employers most likely will take the calculated risk again and hire undocumented workers.

Another factor in determining the reliability of sanctions is that employers must have knowingly hired the undocumented alien. This raises the issue of falsification; presumably many aliens will attempt to obtain employment by falsifying documentation. Thus, even if the INS is successful in later detaining some of these aliens, the employer cannot be sanctioned if he or she hired the undocumented worker in “good faith.”

Finally, if undocumented workers are denied labor protections, then IRCA conceivably could cause more uncontrolled immigration because the employee protections that have been established to this date would be lost. Employers soon would realize this and

149. Id. at 11 (economic analysis of this theory is found at 8-11).
150. Id.
151. See Developments, supra note 114, at 1458; Kutchins & Tweedy, supra note 134, at 363-66 (arguing that sanctions are unenforceable because the INS does not have sufficient resources).
152. San Diego Tribune, Aug. 4, 1987, at B-1. As a result of this record, the INS announced that it would immediately begin the imposition of sanctions.
153. Id.
154. IRC section 101(a) states: “It is unlawful for a person or other entity to hire, or to recruit or refer for a fee, for employment in the United States — ‘(A) an alien knowing the alien is an unauthorized alien . . . .’ IRC § 101(a), 100 Stat. at 3360 (codified at 8 U.S.C. § 1124a) (emphasis added).
155. Id. IRC section 101(a) provides that “[a] person or entity that establishes that it has complied in good faith with the requirements . . . with respect to the hiring, recruiting, or referral for employment of an alien in the United States has established an affirmative defense . . . .” Id. (emphasis added).
156. See Kutchins & Tweedy, supra note 134, at 366.
therefore be motivated to hire more undocumented workers, despite the risks of sanctions.\textsuperscript{157}

Apparently IRCA may not be effective unless undocumented workers are protected by the labor laws. Enforcing the FLSA would operate as a second stimulus to deter employers from hiring undocumented workers. Some authorities, however, have argued these two acts cannot be applied consistently together because IRCA makes it illegal to employ an undocumented worker.\textsuperscript{158}

\textit{Operation of IRCA and FLSA Together}\textsuperscript{159}

IRCA makes it unlawful to hire undocumented workers. At first glance it seems contrary to IRCA to order an employer to reinstate an undocumented worker, because the employer would be violating the law in doing so.\textsuperscript{160} Yet Congress specifically made it clear that IRCA should not affect existing labor rights of undocumented workers.\textsuperscript{161} Therefore, the courts must adopt a method by which an undocumented worker can bring suit for violations of the labor laws. The following methods could be used by the courts and legislature to protect the labor rights of undocumented workers.

First, the evidence of the complainant’s immigration status could be deemed legally irrelevant. This was the method utilized by the court in \textit{In re Reyes}.\textsuperscript{162} Because the employer already has hired the worker, it must be presumed that the worker is legal. The only method for finding otherwise would be through detection by the INS. In this manner, undocumented workers would be able to bring suit and recover for underpaid wages. If the employees had been dismissed as a result of the suit, they would be reinstated.\textsuperscript{163}

\begin{itemize}
  \item \textsuperscript{157} See \textit{supra} note 143 and accompanying text.
  \item \textsuperscript{158} See generally Kutchins & Tweedy, \textit{supra} note 134.
  \item \textsuperscript{159} Analysis for the NLRA would be similar; however, this Comment has chosen to focus on the FLSA in light of the recent case of \textit{Patel}, 660 F. Supp. 1528.
  \item \textsuperscript{160} See Comment, \textit{supra} note 45. The author suggests that three types of workers emerge as a result of IRCA: post-enactment workers, qualifying workers, and grandfathered workers (workers who arrived before the enactment of IRCA yet are unable to qualify for amnesty). Post-enactment workers should not be given reinstatement since it is against the law for employers to knowingly hire them. Qualifying workers should be applicable for reinstatement barring any exclusionary factors. Grandfathered workers should be reinstated if they come to the attention of the court as a result of claims asserting protecting labor rights. The author suggests that all three classes of workers should be provided back pay, in order to effectively detain employers from violating the law. \textit{Id.} at 589-94.
  \item \textsuperscript{161} See \textit{supra} notes 138-142 and accompanying text.
  \item \textsuperscript{162} 814 F.2d 168. See \textit{supra} notes 62-66 and accompanying text.
  \item \textsuperscript{163} Some authors argue that the employees cannot be reinstated because it would
\end{itemize}
The corollary issue that will face the courts is retaliatory discharge.164 The employer is obligated to report any undocumented worker to the INS.165 Thus, the employer could defend his action on the basis that it is required by law, even though he reported the undocumented worker in retaliation. This is quite a dilemma, because while the employer would be violating the FLSA, by discharging the worker in retaliation, the employer would be complying with IRCA. And if the employer is successful in this action, undocumented workers would be deterred from bringing suits.

This problem can be dealt with in several ways. The courts could state outright that the reporting requirement of IRCA must be subordinated in this instance in order to promote the overall immigration policy and to comply with the FLSA.166 Thus, the employee, if able to submit proof that the employer's report was retaliatory, would be able to continue employment. The undocumented worker still could be deported if detected by the INS, or if a subsequent employer made a report to the INS.

A more successful method of dealing with this problem, without subverting IRCA, would be to impose a severe penalty against the employer for such a report. This penalty could be justified on the basis that the employer knew all along that the alien was undocumented, yet hired the alien for the competitive advantage. Thus, the penalty would be a sanction imposed regardless of the fact that the employer eventually reported the alien.167 Utilizing this method will be a violation of IRCA. Even if this view were followed, the employees still should be able to recover for lost wages. More importantly, the Labor Department should have the authority to enjoin the employer from further violation.

Allowing reinstatement, however, may not violate IRCA. Because the immigration status is irrelevant, the issue should not be raised. Therefore, the courts should be free to determine the employee's rights and provide the appropriate remedy. If this method were utilized, undocumented workers would be much more motivated to report violations of the FLSA. Then, the employers would become aware that further exploitation of the workers will not be tolerated.

164. See supra note 30.
166. This method seems the least likely to be chosen by the courts, because it would require a violation of IRCA. Because IRCA is the newer statute, the courts most likely would prefer to defer to it. Thus this solution probably would have to come from the legislature.

167. This, in fact, would comply with IRCA. But in order for it to be effective in promoting the immigration policy argued for in this Comment, severe penalties must be utilized.

Section 101(a) of IRCA provides for an employment verification system. IRCA § 101(a), 100 Stat. at 3361-63 (codified at 8 U.S.C. § 1324a). All employers must verify that the individual being hired is not an unauthorized alien. This can be done by obtaining from the employee either (1) a document establishing both employment authorization and identity (United States passport; certificate of United States citizenship; certificate of naturalization; unexpired foreign passport authorizing employment in United States; resident alien card) or (2) a document evidencing employment authorization (social security card; United States birth certificate; or other) and a document establishing
not protect the undocumented workers who are reported in retaliation. In order to comply with IRCA, they could not be reinstated and most likely would have to be deported. But a severe penalty, perhaps consisting of criminal as well as civil sanctions, would deter many employers from taking the same action.

A final solution would be for Congress to intervene and clarify its position concerning undocumented workers' labor rights. Although Congress has made it clear these rights should continue, without an effective remedy they will become a nullity. Also, employers will be less willing to exploit the workers whose rights are clearly spelled out in law.

**CONCLUSION**

The "certain minimum labor standards" which the FLSA is designed to protect should be available to all workers in this country. Undocumented workers are also persons who deserve to be paid for the work they have performed.

The protection of undocumented workers under the FLSA will guarantee these fair standards to all workers, and, at the same time, help control our immigration problem. IRCA will not be the end to all of our immigration problems. If labor protections can be provided to the workers along with the enforcement of IRCA, the country should seize this opportunity to have two enforcement schemes.

This Comment has argued that the FLSA and IRCA can be applied together. For this to be accomplished, it is critical that all undocumented workers know that they will not be deported if they report their employers' violations. The workers must be able to assert their rights without their legal status becoming an issue. Employees also must be assured that they subsequently will not be reported to the INS. The courts or Congress must take a step to assure these rights.

An amendment to the INA would be an effective solution to this problem and one that would preserve the law in this area in one identity (driver's license, or other). All employers must retain this verification form for inspection by the INS or Department of Labor. See IRCA § 101(a), 100 Stat. at 3362 (codified at 8 U.S.C. § 1324a). IRCA also provides for civil or criminal penalties for violations. Id., 100 Stat. at 3367 (codified at 8 U.S.C. § 1324a). If an employer reports an undocumented worker without having a verification form for the worker, he would be risking potential liability. Thus, it seems likely many employers will not report these workers to avoid sanctions.

168. See supra notes 138-142 and accompanying text.

comprehensive statute. IRCA has made it clear that labor protections are to be provided to the workers, yet IRCA has not been clear in defining how the labor protections will continue. Even if this is not done, the courts should take a step towards solving the problem by continuing to declare undocumented workers as employees under the labor laws, and providing them with effective remedies.

SUSAN CHARNESKY