

## Essay

# Labor Law After Legalization

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The most important labor or employment law reform in a generation came within a few votes of enactment last spring. With due respect to the Employee Free Choice Act of 2007,<sup>1</sup> which would have enacted numerous pro-worker amendments to the National Labor Relations Act,<sup>2</sup> I refer to the Comprehensive Immigration Reform Act of 2007,<sup>3</sup> a bill that the Bush administration and a bipartisan group of legislators negotiated in spring 2007,<sup>4</sup> but that the Senate ultimately failed to pass.<sup>5</sup>

The compromise immigration legislation was lengthy, but at its center were three elements: (1) a legalization program for many of the estimated twelve million undocumented immigrants in the United States;<sup>6</sup> (2) expansion of various forms of temporary worker programs to accommodate future arrivals;<sup>7</sup>

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1. H.R. 800, 110th Cong. (as passed by House of Representatives, Mar. 1, 2007); S. 1041, 110th Cong. (2007). The Senate vote to invoke cloture failed on June 26, 2007. *See* 153 CONG. REC. S8398 (daily ed. June 26, 2007).

2. *See* H.R. 800; S. 1041; *see also* National Labor Relations Act, 29 U.S.C. §§ 151–169 (2000).

3. S. 1348, 110th Cong. (as introduced in Senate, May 9, 2007).

4. *See Immigration Bill Dies in the Senate*, CHI. TRIB., June 29, 2007, at 18 (describing the bipartisan nature of the bill and President Bush's support for it).

5. *See* S. 1348 (reflecting the original bill as introduced in the Senate). A cloture vote on the original bill failed to pass on June 7, 2007. 153 CONG. REC. S7279 (daily ed. June 7, 2007). A compromise bill, S. 1639, 110th Cong. (2007), was reintroduced on June 18, 2007. *See also* 153 CONG. REC. S8528 (daily ed. June 27, 2007) (statement of Sen. Feinstein). A few senators filibustered the reintroduced bill when it was taken up on June 27, 2007. *See id.* at S8642–43 (daily ed. June 28, 2007) (statement of Sen. Specter) (discussing the use of Senate procedure by some senators to kill the bill); *see also id.* at S8526 (daily ed. June 27, 2007). A cloture vote to end the filibuster failed on June 28, 2007. *Id.* at S8650–51 (daily ed. June 28, 2007).

6. S. 1639, §§ 601–627 (defining the proposed legalization program).

7. *Id.* §§ 401–427 (reflecting the proposed temporary worker programs).

and (3) increased immigration law enforcement, including enhanced border security measures, expanded penalties for employers who knowingly hire or employ unauthorized workers, and an intensified system of employer online verification of the work-authorization status of all employees.<sup>8</sup> The terms of the legalization program were contested,<sup>9</sup> and varying views on the desirability, size, and scope of new temporary-worker programs remained.<sup>10</sup> Yet under any of the serious proposals then discussed, millions of undocumented workers would have become eligible to regularize their status, and hundreds of thousands of new temporary workers could have lived and worked lawfully in the United States.

Immigration reform may reasonably be characterized as the most significant labor reform in a generation.<sup>11</sup> The proposed legislation would have given millions of undocumented workers more robust labor and employment rights.<sup>12</sup> These

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8. *Id.* §§ 101–150 (outlining the proposed border security measures); *id.* §§ 201–229 (delineating the proposed increase in interior enforcement and penalties); *id.* §§ 301–310 (reflecting the proposed worksite enforcement, online verification amendments, and penalties).

9. The disputes included whether prior use of false papers would bar legalization, *see* 153 CONG. REC. S7113–14 (daily ed. June 6, 2007) (statement of Sen. Kennedy) (discussing the effect of a proposed amendment and false papers), whether persons would have to return to their country of origin to “touchback” before lawfully reentering the United States, *see id.* at S6601 (daily ed. May 24, 2007) (statement of Sen. Lincoln), and the length of time persons would have had to reside in the United States to become eligible for legalization, *see id.* at S7288–89 (daily ed. June 7, 2007) (statement of Sen. Webb).

10. *See id.* at S6941 (daily ed. May 25, 2007) (statement of Sen. Sessions) (discussing the duration of time persons would have to spend in temporary lawful status before becoming eligible to apply for permanent residence).

11. For instance, we know from experience with the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.), that wages rose significantly for newly legalized workers. *See* Sherrie A. Kossoudji & Deborah A. Cobb-Clark, *Coming out of the Shadows: Learning About Legal Status and Wages from the Legalized Population*, 20 J. LAB. ECON. 598, 622 (2002) (“Although they are not definitive, our results provide strong evidence that IRCA’s amnesty provisions improved the labor market opportunities for legalized workers.”); Francisco L. Rivera-Batiz, *Undocumented Workers in the Labor Market: An Analysis of the Earnings of Legal and Illegal Mexican Immigrants in the United States*, 12 J. POPULATION ECON. 91, 93 (1999) (noting the wage penalty attributable to lack of immigration status).

12. *Cf.* *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 140 (2002) (holding that an undocumented worker who tendered false documents and was illegally fired for union organizing activity was not eligible for back pay under the National Labor Relations Act); Catherine L. Fisk & Michael J. Wishnie, *The Story of Hoffman Plastic Compounds, Inc. v. NLRB: Labor Rights Without Remedies for Undocumented Immigrants*, in *LABOR LAW STO-*

workers would have also been able to assert the limited workplace rights they already had, even as undocumented workers,<sup>13</sup> with a vastly diminished risk of deportation.<sup>14</sup> Millions more U.S. workers also would have benefited from the increased protections arising from the enforcement of workplace rights by noncitizen workers.

These improvements were not realized in 2007. Nevertheless, the economic, political, security, and human imperatives fueling the effort to modernize our antiquated immigration system with twenty-first century market and migration realities make it likely that Congress will soon return to immigration legislation. Business demands for a more stable, reliable workforce in which it can sensibly invest continue. The post-September 11 security environment, as well as the everyday community-policing needs, require measures to promote police-civilian cooperation involving all residents of the country, regardless of immigration status.<sup>15</sup> The bipartisan competition for new Latino voters remains an electoral priority. And most of all, the moral claims of millions of immigrant households and the undeniable human reality of global migration, with its wide-ranging social impacts, together compel reform. The broad public consensus in favor of a legislative package that includes legalization, expanded temporary-worker programs, and increased enforcement makes ultimate passage likely.<sup>16</sup>

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RIES 399, 399–400 (Laura J. Cooper & Catherine L. Fisk eds., 2005) (discussing the comparatively weak legal rights of undocumented workers).

13. See, e.g., *Zeng Liu v. Donna Karan Int'l, Inc.*, 207 F. Supp. 2d 191, 191–93 (S.D.N.Y. 2002) (holding that a worker may recover unpaid minimum wages and overtime for work actually performed, regardless of immigration status); *Balbuena v. IDR Realty LLC*, 845 N.E.2d 1246, 1260 (N.Y. 2006) (holding that where an employer failed to verify an employee's work authorization, and the employee did not tender false documents, the undocumented worker was eligible for compensation under the state Scaffolding Law).

14. Cf. *Rivera v. Nibco, Inc.*, 364 F.3d 1057, 1064 (9th Cir. 2004) (noting that fear of deportation deters noncitizens from enforcing labor and employment rights they possess); Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667, 669–70 (2003) (same).

15. See, e.g., Int'l Ass'n of Chiefs of Police, *Enforcing Immigration Law: The Role of State, Tribal and Local Law Enforcement* 5 (2004) <http://www.theiacp.org/documents/pdfs/Publications/ImmigrationEnforcementconf%2Epdf>.

16. See, e.g., NAT'L IMMIGRATION FORUM, *WHILE DEBATE RAGES, THE PUBLIC CONTINUES TO SUPPORT REALISTIC IMMIGRATION REFORM* 1–7 (2007), <http://www.immigrationforum.org/documents/PressRoom/PublicOpinion/2007/PollingSummary0407.pdf>.

In this Essay, I wish to consider the shape of labor and employment law *after* congressional enactment of comprehensive immigration reform. In particular, I hope to identify the issues likely to be of greatest importance to low-wage immigrant workers in an era of legalization and expanded temporary worker programs. For this purpose, I will assume that Congress does in fact enact a legalization program that permits many, but not all, undocumented immigrants to participate; that expands temporary worker programs; and that mandates intensified immigration enforcement at the border, in the criminal justice system, in communities, and especially in the workplace.

This exercise is important for at least two reasons. First, it may illuminate, from a labor perspective, some of the shortcomings of the leading immigration reform proposals. An unintended benefit of the failure of immigration reform in 2006 and 2007 is the opportunity for the labor movement to find its voice and correct these deficiencies by introducing important pro-worker improvements in whatever legislation is ultimately enacted.<sup>17</sup> There also remains an opening for labor economists, advocates, law professors, and other academics and practitioners to contribute their expertise to the legislative discussion in a more serious and sustained manner. Second, regardless of the details of the final package, low-wage workers and their advocates have an interest in imagining the world we will soon inhabit, so as to prepare to seize new opportunities to promote labor organizing, and to address new dangers that may arise.

## I. LABOR LAW AFTER LEGALIZATION

Broadly speaking, there will be three distinct categories of low-wage immigrant workers in the United States after Congress enacts an immigration reform package such as I have outlined: (1) workers eligible to apply for legalization, (2) work-

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17. Internal divisions within the labor movement have decreased its effectiveness in the immigration debate. Compare AFL-CIO Executive Council Statement, Responsible Reform of Immigration Laws Must Protect Working Conditions for All Workers in the U.S. (Mar. 1, 2006), available at <http://www.calaborfed.org/pdfs/Legislative/AFL%20immpol.pdf> (opposing the expansion of temporary-worker programs), with Letter from Anna Burger, Chair, Change to Win, to Sen. Arlen Specter, Chairman, Senate Judiciary Comm. (Feb. 2, 2006), available at <http://www.changetowin.org/for-the-media/op-eds-articles-and-speeches/immigration-letter-from-anna-burger-to-arlen-specter.html> (recognizing a potential role for temporary-worker programs in a comprehensive reform package and urging specific terms).

ers participating in a temporary worker program, and (3) undocumented workers who are ineligible to legalize.<sup>18</sup> I will briefly consider the principal elements of the mainstream legislative proposals relating to each of these three groups of workers, and then offer some initial thoughts on the most important labor and employment issues that each group of workers will confront *post*-legalization.

#### A. LEGALIZATION OF UNDOCUMENTED WORKERS

There are approximately twelve million undocumented persons in the United States today,<sup>19</sup> a total that may be growing by a net annual increase exceeding five hundred thousand persons.<sup>20</sup> The undocumented participate in the labor force at high rates,<sup>21</sup> accounting for over seven million workers nationally, concentrated in low-skill positions.<sup>22</sup> Nearly all public officials, including the President and congressional leaders, acknowledge that no government program can or should arrest, detain, and deport these millions of people. Many undocumented immigrants have resided in this country for years while working, raising families, and serving as positive and productive members of society. Yet the presence of this enormous population living in the shadows, unable fully to participate in the economic, civic, religious, cultural, and political life of their communities, creates substantial social and fiscal costs, and

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18. There has been almost no public discussion whatsoever of the situation of undocumented workers after comprehensive immigration reform. This is understandable in political terms—proponents of reform must present any legislation as substantially addressing the current failures of our immigration system, and may not want to highlight the problems that will inevitably remain even were Congress to pass broad reforms.

19. JEFFREY S. PASSELL, *THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S.*, at i (Pew Hispanic Ctr. ed., 2006), available at <http://pewhispanic.org/files/reports/61.pdf> (estimating that the size of the unauthorized population in the United States stood between 11.5 and 12 million people in March 2006).

20. *Id.* at 2. Between 2000 and 2005, approximately 850,000 persons entered the United States unlawfully or overstayed a visa each year; but several hundred thousand died, departed, or regularized their status each year, yielding a net increase in the undocumented population of approximately 500,000 persons annually. *Id.* at 2–3; see also Jennifer Van Hook et al., *Unauthorized Migrants Living in the United States: A Mid-Decade Portrait*, MIGRATION INFO. SOURCE, Sept. 2005, <http://www.migrationinformation.org/Feature/display.cfm?id=329> (estimating that between 2000 and 2004, two hundred thousand to three hundred thousand undocumented immigrants annually “leave the United States, die, or become legal immigrants”).

21. PASSELL, *supra* note 19, at 9–14.

22. *Id.* at 10–14.

challenges our nation's basic commitment to a caste-free society. To address these intolerable conditions, the 2006–2007 bipartisan reform proposals contained legalization programs that would have allowed many of the current undocumented population to regularize their immigration status.<sup>23</sup>

At present, undocumented workers possess fewer labor and employment rights than U.S. workers, and face greater difficulties in asserting those rights they do retain.<sup>24</sup> From a labor rights perspective, therefore, securing the broadest feasible legalization program is critical to advancing the labor rights of these millions of workers.<sup>25</sup> The more workers allowed to regularize their status, the greater the expansion of labor rights; in contrast, the greater the number of workers excluded from any such program, the smaller the number of workers fully able to protect themselves in the workplace.

Accordingly, a pro-worker legalization program should include as few barriers to participation as feasible, consistent with the integrity of the program. Any legalization fees, for instance, should be affordable, and the timelines for progressing from temporary status to lawful permanent residence, and from there to citizenship, should be reasonable.<sup>26</sup> The legalization program should not include onerous or unrealistic eligibility criteria, such as the requirement proposed by some that all legalization applicants depart the country to “touch base” before lawfully reentering.<sup>27</sup> Exclusions of those who have ever worked under a false name or social security number must be rejected as well, along with other blanket exclusions.<sup>28</sup> Apart

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23. See, e.g., To Provide for Comprehensive Immigration Reform and for Other Purposes, S. 1639, 110th Cong. tit. VI (2007).

24. See Fisk & Wishnie, *supra* note 12.

25. Cf. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 151 (2002) (holding that the NLRB may not award back pay to illegal aliens because it “would unduly trench upon explicit statutory prohibitions critical to federal immigration policy”); Julie A. Phillips et al., *The New Labor Market: Immigrants and Wages After IRCA*, 36 *DEMOGRAPHY* 233, 244 (1999) (finding that immigration status is associated with a significant wage penalty); Rivera-Batiz, *supra* note 11, at 93 (concluding that undocumented status results in a wage penalty).

26. Legal permanent residents have long been eligible to apply for naturalization after five years as permanent residents. See 8 U.S.C. § 1427(a) (2000).

27. See *supra* note 9 (noting “touchback” proposals).

28. Two potential exclusions of special significance are those of persons with criminal history or an outstanding removal order. See S. 1639, § 601(d)(1)(B) (excluding any person “subject to the execution of an outstanding administratively final order of removal, deportation, or exclusion”); *id.* § 601(d)(1)(E), (F) (excluding persons convicted of certain criminal offenses).

from resisting efforts to narrow any legalization program, the labor movement also has an interest in insisting on capacious eligibility criteria, particularly regarding minimum residency requirements.<sup>29</sup>

In addition, some secondary issues related to legalization are of special concern to labor advocates. For instance, some legislative proposals would deny legalized workers the ability to recapture Social Security earnings they may have accrued while working under a false name or number—earnings that employers have already forwarded to the Social Security Administration (SSA).<sup>30</sup> These sums account for billions of unclaimed dollars in the SSA suspense account,<sup>31</sup> and in the future should not be denied to the retired workers who earned them.

Labor law issues for the second group, those workers eligible to participate in the new temporary worker program, are relatively straightforward. Workers who regularize their immigration status and thereby secure employment authorization<sup>32</sup> will generally receive the same protections available to U.S. citizens under federal, state, and local labor and employment law. In particular, such workers will have access to full labor and employment *remedies* for workplace violations.<sup>33</sup> At present,

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29. A 2007 Senate Bill would have established that all persons resident in the United States as of January 1, 2007, were eligible to apply for legalization. S. 1639, § 601(b). By contrast, the IRCA, enacted in November 2006, allowed only persons resident as of January 1, 1982, to seek legalization. See 8 U.S.C. § 1255a(a)(2)(A) (Supp. IV 2006).

30. See, e.g., S. Amend. 3985 (Sen. Ensign) to S. 2611, 109th Cong. (2006) (bipartisan comprehensive reform bill); cf. Jonathan Blazer & Josh Bernstein, *Confiscating Contributions*, IMMIGR. RTS. UPDATE (Nat'l Immigr. Law Ctr., L.A., Cal.) May 10, 2007, at 3, [http://www.nilc.org/immlawpolicy/CIR/socialsecurity\\_confcontrib\\_2007-05-01\\_iru.pdf](http://www.nilc.org/immlawpolicy/CIR/socialsecurity_confcontrib_2007-05-01_iru.pdf) (arguing against the Ensign Amendment restrictions on legalized immigrants reclaiming past social security earnings).

31. See, e.g., 152 CONG. REC. S4739–41 (daily ed. May 18, 2006) (statement of Sen. Ensign).

32. See 8 C.F.R. § 274a.12 (2007) (enumerating categories of foreign nationals eligible for employment).

33. See Andrew J. Elmore, *Egalitarianism and Exclusion: U.S. Guest Worker Programs and a Non-Subordination Approach to the Labor-Based Admission of Nonprofessional Foreign Nationals*, 21 GEO. IMMIGR. L.J. 521, 547–48 (2007) (noting the applicability of general labor and employment laws to most temporary workers under current law, but also indicating that “the effectiveness of these protections is substantially limited by statutory exemptions of guest workers and the occupations they work in”). Notwithstanding the general applicability of federal and state labor and employment laws to all covered workers regardless of immigration status, judicial opinions make

undocumented workers are ineligible for reinstatement, and in some circumstances back pay<sup>34</sup>—core remedies under nearly every federal or state labor and employment regime.<sup>35</sup>

Although the labor law issues may be uncomplicated for workers eligible to legalize, there will be a critical role for labor advocates in assisting individuals to assess eligibility for legalization and prepare applications if they qualify. In this work, the stakes will be high. Individuals who cannot satisfy the eligibility criteria Congress ultimately enacts, but who nonetheless apply for legalization, risk exposing themselves to arrest and removal.<sup>36</sup> To the extent that some persons will be eligible only if they obtain a discretionary waiver, for instance, of an old deportation order or, perhaps, minor criminal history, submission of a carefully prepared waiver application will be essential to the ability to regularize status.<sup>37</sup>

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plain that remedies for workplace violations are limited when the worker is undocumented. For instance, a wrongfully discharged undocumented worker will not be ordered reinstated, *see, e.g.*, *NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50, 57 (2d Cir. 1997) (holding that the reinstatement of an illegally discharged immigrant worker is mandatory only upon the employee's proof of work authorization), and is ineligible for back pay in some circumstances, *see Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 143–45 (2002).

34. *See* 8 U.S.C. § 1324a(a)(1) (2000) (prohibiting employment of unauthorized immigrants, thereby foreclosing reinstatement remedies); *Hoffman*, 535 U.S. at 148–49 (holding that back pay is inappropriate where the employee tenders false documents for employment and the employer is ignorant of the employee's unauthorized status).

35. *See, e.g.*, 29 U.S.C. § 216(b) (2000) (authorizing reinstatement and back pay for wrongful discharge in violation of the Fair Labor Standards Act), *invalidated by Alden v. Maine*, 527 U.S. 706 (1999) (holding that Congress may not “subject consenting states to private suits for damages in state court” through the FLSA); 29 U.S.C. § 160(c) (2000) (same, for violation of National Labor Relations Act); CONN. GEN. STAT. § 31-69b(b) (2003) (same, for violation of state wage-and-hour laws).

36. DHS reserves the right to refer, for removal proceedings, a person who makes an affirmative but unsuccessful application for an immigration benefit, such as asylum or naturalization. *See* IRA J. KURZBAN, *KURZBAN'S IMMIGRATION LAW SOURCEBOOK* 412 (10th ed. 2006). A failed legalization applicant would be at similar risk. *See, e.g.*, S. 1639, 110th Cong. § 603(b) (2007) (providing for the removal of applicants who apply for but are denied legalization).

37. In the 2007 Senate bill, for instance, persons with an old removal, deportation or exclusion order would have been eligible to legalize only if they could obtain a waiver based on proof that “departure from the United States would result in extreme hardship to the alien or the alien's spouse, parent or child.” S. 1639, § 601(d)(1)(I). U.S. Immigration and Customs Enforcement (ICE) estimates that as of September 2007, there were 632,000 persons in the United States with an outstanding order of removal—a nontrivial number of people. *See* News Release, U.S. Immigration and Customs Enforcement, ICE

Whether legalization enables ten million workers to secure full labor rights, or fewer than one million workers, will likely depend on the precise eligibility criteria enacted by Congress. The number will be affected as well by the availability of assistance to the millions of working persons who will seek help in evaluating their eligibility and preparing successful applications. For this reason, the labor movement has a deep interest in the details of any legalization program and in securing sufficient federal appropriations to support the massive counseling and legal assistance programs that will be required for the intended beneficiaries of any legalization program to realize the law's promise.

## B. TEMPORARY WORKER PROGRAMS

A significant shortcoming of the Immigration Reform and Control Act (IRCA),<sup>38</sup> the 1986 legislation that enacted a one-time amnesty measure, was the absence of any meaningful provision to manage future migration. In recent years, the United States has admitted well more than one million workers annually on temporary employment visas,<sup>39</sup> through an alphabet soup of programs<sup>40</sup> enacted over many years and often on an ad hoc basis. The current array of employment-based visa categories do not adequately protect workers in the programs nor serve the needs of the national economy. The categories also do not reflect the human reality of economic migration, in

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Arrests 15 Illegal Alien Fugitives in Lexington, Neb. (Sept. 13, 2007), <http://www.ice.gov/pi/news/newsreleases/articles/070913omaha.htm>.

38. Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (codified in scattered sections of 8 U.S.C.).

39. Precise figures are difficult to calculate because, as Deborah Waller Meyers has noted,

Labor Department certification data reflect the number of workers certified (employers do not necessary [sic] hire for all the approved slots), State Department data detail visas issued (not all of which are used or which may be used in the following fiscal year), and Department of Homeland Security (DHS) data reflect admissions, not people (an individual may enter the United States multiple times within one year and thus account for multiple admissions).

DEBORAH WALLER MEYERS, INDEP. TASK FORCE ON IMMIGR. AND AMERICA'S FUTURE, TEMPORARY WORKER PROGRAMS: A PATCHWORK POLICY RESPONSE 3 (2006), available at [http://www.migrationpolicy.org/ITFIAF/TFI\\_12\\_Meyers.pdf](http://www.migrationpolicy.org/ITFIAF/TFI_12_Meyers.pdf).

40. Temporary employment visas include the E, H, L, O, P, Q, R, and TN visas. See 8 U.S.C. § 1101(a)(15) (2000 & Supp. V 2007); see also Foreignborn.com, Visas for Temporary Workers, [http://www.foreignborn.com/visas\\_imm/other\\_visas/13temp\\_workers.htm](http://www.foreignborn.com/visas_imm/other_visas/13temp_workers.htm) (last visited Apr. 15, 2008).

which hundreds of thousands of persons each year risk their lives in perilous border crossings to seek opportunity, flee persecution, or join a loved one in the United States. Neither legalization of those already present nor ever-higher border fences will eliminate this migration. Yet the current debates regarding the creation of new or expanded temporary worker programs, which would admit more workers while creating incentives for many others to defer a dangerous, illegal entry, have been at least as contentious as those concerning legalization of the undocumented.<sup>41</sup> Labor economists and labor law scholars have especially important contributions to make to this debate.

From a labor rights perspective, the two most important elements of any temporary or provisional worker program are “portability”—that is, freedom to carry one’s visa to a new employer—and a path to permanent legal status.<sup>42</sup> Under current law, it is extremely difficult for many employment-based visa-holders to change jobs, because immigration status is frequently conditioned on continued employment by the sponsoring employer.<sup>43</sup> Even where available, the legal process for switching employers is cumbersome. As a result, many temporary workers in existing visa programs endure extreme exploitation and abuse by their employers rather than forfeiting their immigration status.

Yet labor scholars well understand the necessity of a genuine “right of exit” from an employment relationship, if individual liberty is to be preserved. This is the promise of the

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41. See, e.g., June Kronholz, *Guest-Worker Proposals Prove Divisive*, WALL ST. J., Nov. 9, 2005, at A4; Robert Pear, *Proposals from Both Sides Fail in Immigration Debate*, N.Y. TIMES, June 28, 2007, at A18; *supra* note 17.

42. See, e.g., Elmore, *supra* note 33, at 562 (“[R]emoving the restrictions preventing visa holders from leaving their employment would advance liberty, sovereignty, and equality interests.”); *id.* at 566 (emphasizing the importance of the opportunity for temporary workers to adjust status to permanent resident status).

43. This is true for nearly all current temporary worker programs. See, e.g., 8 C.F.R. § 214.2(h) (2007) (providing the regulations governing the H-1B, H-2A, and H-2B visa programs and limiting the visa to employment for sponsoring employer); Arthur N. Read, *Learning from the Past: Designing Effective Worker Protections for Comprehensive Immigration Reform*, 16 TEMP. POL. & CIV. RTS. L. REV. 423, 443 (2007) (acknowledging that lack of portability is “one of the most severe problems of the existing H-2A and H-2B programs”). The exception is the J-1 visa program, available for, inter alia, au pairs and international student summer work. See 22 C.F.R. § 62.41 (2007). Notably, even the 2007 bipartisan legalization program would have expressly authorized “portability” for legalized workers. See S. 1639, 110th Cong. § 601(m)(3) (2007).

Thirteenth Amendment, which itself secures a principle far older than the Civil War.<sup>44</sup> As the Supreme Court has explained,

in general the defense against oppressive hours, pay, working conditions, or treatment is the right to change employers. When the master can compel and the laborer cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work.<sup>45</sup>

Although temporary workers may have the formal option to leave exploitative and dangerous jobs, the reality is often that one cannot risk the termination of visa status and loss of costly investments in travel, visa fees, and other expenses, when work authorization is not portable.

It is true that temporary workers may, as a formal matter, quit exploitative work, but as in other employment relationships, the right of exit for a temporary worker will be “meaningless” if an employer may “answer[] the exit threat with overt coercion.”<sup>46</sup> And of course, the “[r]esulting depression of working conditions and living standards affects not only the laborer under the system, but every other with whom his labor comes in competition.”<sup>47</sup> Denying portability to temporary workers thus confers on employers a dramatic coercive power.<sup>48</sup> Preserving a genuine right of exit, by contrast, will be indispensable in allowing future temporary workers to exercise their rights to organize, to their certified wages, to a safe workplace,

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44. See U.S. CONST. amend. XIII. The conviction that a right to exit employment is fundamental to personal liberty dates at least to the writings of Adam Smith. Jedediah Purdy, *A Freedom-Promoting Approach to Property: A Renewed Tradition for New Debates*, 72 U. CHI. L. REV. 1237, 1251 (2005) (noting Smith’s argument that “each person’s labor is an intrinsic quantum of personal property, which she may freely alienate by agreement, provided such agreements are bounded by the right of exit”).

45. *Pollock v. Williams*, 322 U.S. 4, 18 (1944); see also James Gray Pope, *Labor and the Constitution: From Abolition to Deindustrialization*, 65 TEX. L. REV. 1071, 1104–09 (1987).

46. Jedediah Purdy, *People as Resources: Recruitment and Reciprocity in the Freedom-Promoting Approach to Property*, 56 DUKE L.J. 1047, 1070 (2007).

47. See *Pollock*, 322 U.S. at 18; Howard F. Chang, *Liberal Ideals and Political Feasibility: Guest-Worker Programs as Second-Best Policies*, 27 N.C. J. INT’L L. & COM. REG. 465, 470–71 (2002) (“Freedom to leave an employer and to take employment elsewhere would give workers greater power to assert their rights . . . and thus prevent abuses . . .”).

48. See Read, *supra* note 43, at 431 (“[P]ermitting a worker to retain her legally-authorized status, only so long as she remains employed by a particular employer, is inherently a form of compulsory servitude that should be unacceptable in this society.”).

to be free from unlawful discrimination, and to other legal rights.

Second, in any new program, labor rights advocates have a stake in ensuring that temporary workers be given some opportunity to apply to adjust their status to lawful permanent residence, and eventually to naturalize. Many foreign workers who enter on temporary employment visas will likely establish community and family ties in the United States. Some of these workers will not return to their country of origin upon the expiration of their visas. In this respect, the 2007 Senate legislation was not promising. It contained onerous and unrealistic conditions, including a requirement that temporary workers depart after two years, wait one year, then reenter for a second two years, depart for another year, and reenter a third time for a final two years.<sup>49</sup> The legislation lacked any path to permanence for temporary workers.<sup>50</sup>

Labor scholars have much to contribute to other aspects of the temporary worker debate as well. Current guest worker programs depend on various labor market tests defined in immigration statutes and regulations. These tests generally attempt to discern a local prevailing wage in a particular sector, require an employer to demonstrate its inability to hire U.S. workers, and then permit that employer to sponsor foreign nationals at the prevailing wage rate.<sup>51</sup> Employers complain that the labor certification process is slow and costly. Labor advocates object that the prevailing wage approved by the U.S. Department of Labor frequently bears little relation to actual wages in that sector and region, and is rarely enforced in any event. In light of the lack of portability in current programs, it is not surprising that temporary workers are often unable to enforce the certified wages themselves, for fear of discharge and loss of status.

There is an urgent need for fresh ideas from labor market experts as to how to calculate and enforce a realistic prevailing wage for temporary worker programs that does not undermine existing wage structures. If meaningful portability is indeed es-

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49. See S. 1639, 110th Cong. tit. IV (2007).

50. See *id.*

51. See, e.g., 8 U.S.C. § 1101(a)(15)(H)(i)(b) (2000 & Supp. V 2007) (H-1B visa for specialty occupation); *id.* § 1101(a)(15)(H)(ii)(a) (H-2A visas for temporary or seasonal agricultural worker); *id.* § 1101(a)(15)(H)(ii)(b) (H-2B visa for temporary or seasonal nonagricultural worker); 8 C.F.R. § 214.2(h) (2007) (implementing regulations for all H visas).

sential to protecting the labor rights of future temporary workers, then that portability must be reconciled with a prevailing wage requirement. Why even bother to calculate the prevailing wage for a carpenter in Connecticut, and require a sponsoring employer to pay that wage, if the same carpenter is truly free to leave his position upon arrival and move to Minneapolis?

For temporary workers, more than for the other classes of immigrant workers considered in this paper, the landscape of labor law after Congress enacts immigration reform will depend on the program's core principles. If a new temporary worker program lacks genuine portability, then there is a grave risk of replicating the exploitative conditions of the Bracero program of the 1940s–1960s,<sup>52</sup> which so often typify the current guest worker programs today.<sup>53</sup> If the new program lacks a path to permanence, there can be little doubt that it will eventually yield more undocumented workers—those who do not depart upon the expiration of their visas. On the other hand, a temporary worker program with both portability and a path to permanence should allow future workers to exercise the full range of labor and employment rights enjoyed by U.S. workers, including, critically, the right to exit abusive work environments.

### C. THE ENDURING UNDOCUMENTED POPULATION

Even if Congress enacts comprehensive immigration reform, including a legalization program and new or expanded temporary worker programs, there will be a significant undocumented population.<sup>54</sup> Some undocumented workers already in the United States will not qualify for legalization because they will not satisfy residency requirements, have an old removal order or past criminal history, or have run afoul of some

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52. See Cristina M. Rodriguez, *Guest Workers and Integration: Toward a Theory of What Immigrants and Americans Owe One Another*, 2007 U. CHI. LEGAL F. 219, 274 (noting that widespread violation of contract terms and extraordinarily poor working conditions characterized the Bracero program); ERNESTO GALARZA, *MERCHANTS OF LABOR: THE MEXICAN BRACERO STORY* 183–98 (1964) (noting that the Bracero program was typified by underemployment, extremely low earnings, illegal deductions from wages, poor food, substandard housing, and rampant exposure to workplace hazards).

53. See, e.g., Read, *supra* note 43, at 432–41 (providing an overview of the H-2B Temporary Non-Agricultural Worker Program and criticisms thereof).

54. *Id.* at 428 (noting that even were comprehensive immigration reform enacted, it “is critical to realize that undocumented workers will continue to be employed in some workplaces”).

other eligibility criteria.<sup>55</sup> In addition, foreign nationals who are unable to access the channels for legal migration will continue to enter the country unlawfully. Some persons who enter lawfully will fail to obtain visa extensions or adjust to permanent resident status, and thus will overstay their visas. Others who enter seeking asylum will be denied relief despite a bona fide fear of persecution, or will fail to file timely applications because of traumatization or other factors.<sup>56</sup> There has been almost no discussion of the labor rights of residual and future undocumented workers.

There has, of course, been extensive discussion and numerous legislative proposals to increase immigration enforcement against undocumented immigrants at the border, in the interior, and especially in the workplace. Of special note, in 1986, with the support of organized labor and over the opposition of Latino, civil rights, and business organizations, Congress prohibited the knowing employment of unauthorized immigrants, and established fines and criminal penalties for employers who violate this rule.<sup>57</sup> The consequences of this “employer sanctions” regime have been catastrophic for the labor rights of immigrant and U.S. workers,<sup>58</sup> and organized labor has reversed its prior support for the approach.<sup>59</sup>

Despite these political developments, no mainstream political figure has proposed limiting or repealing sanctions, and in

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55. The conditions of a future legalization measure are unknown but are likely to include certain conditions. *See, e.g.*, S. 1639, 110th Cong. § 601(b), (d) (2007) (conditioning eligibility for legalization on the satisfaction of a durational residency requirement and denying eligibility to persons with certain criminal history).

56. Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 372–74 (2007) (noting extraordinary asylum denial rates by some asylum officers and immigration judges).

57. Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.) (amending the Immigration and Nationality Act).

58. *See, e.g.*, *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 140 (2002) (denying back pay previously given to an undocumented unauthorized immigrant worker because such relief was denied by the IRCA); *see also* Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193, 205–08, 217 (arguing that employer sanctions have failed to deter illegal immigration or to protect U.S. workers, but have increased employment discrimination and eroded U.S. wages, and should be abandoned).

59. *See* Press Release, AFL-CIO, Immigration (Feb. 16, 2000), available at <http://www.aflcio.org/aboutus/thisistheafclcio/ecouncil/ec0216200b.cfm> (stating that immigrant workers should be afforded full employment rights).

fact, nearly all serious immigration reform proposals would intensify these penalties, add resources to their enforcement, and mandate online verification by employers of the work authorization status of their employees.<sup>60</sup> At most, there has been tentative discussion of a partial “*Hoffman* fix.”<sup>61</sup> Such a change would restore some back-pay eligibility (but not eligibility for reinstatement, which will be precluded so long as the prohibition on employment of unauthorized workers survives) to an undocumented worker fired because of her race or sex, because she joined a union organizing drive, or because she complained of unsafe conditions or minimum wage violations.<sup>62</sup> Even a partial restoration of back pay has not been included in the core legislative proposals, however.

For the undocumented, labor law *after* legalization appears disastrous. Immigration enforcement generally, and in the workplace in particular, is likely to increase, and in the current debate, continuation of “employer sanctions” is assumed. It is true that undocumented workers are statutory employees under nearly all federal and state labor and employment laws,<sup>63</sup> but because of the prohibition on knowing employment of the undocumented, reinstatement is not an available remedy for wrongful discharge. Pursuant to the Supreme Court’s decision in *Hoffman Plastics Compounds, Inc. v. NLRB*,<sup>64</sup> back pay is frequently not available either.<sup>65</sup> After legalization, then, one can expect that undocumented workers will face ever more onerous conditions, in ever more isolated circumstances, and

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60. See, e.g., S. 1639, 110th Cong. § 301 (2007) (describing the purposes of the Act as including continued prohibition of employing unauthorized immigrants, obtaining identifying records of such employees, and increasing penalties for violations).

61. María Pabón López, *The Place of the Undocumented Worker in the United States Legal System After Hoffman Plastics Compounds: An Assessment and Comparison with Argentina’s Legal System*, 15 IND. INT’L & COMP. L. REV., 301, 332 (2004) (noting California’s legislative attempt to “overcome the federal immigration policy’s untoward reach, based on the Supreme Court’s interpretation of the IRCA’s policy in *Hoffman*”).

62. See *id.*

63. See, e.g., *Agri Processor Co., Inc. v. NLRB*, 514 F.3d 1, 5–6 (D.C. Cir. 2008) (holding that undocumented workers are NLRA “employees”).

64. 535 U.S. 137 (2002).

65. See *id.* at 140. But see Michael J. Wishnie, *Emerging Issues for Undocumented Workers*, 6 U. PA. J. LAB. & EMP. L. 497, 509–11 (2004) (noting that back pay remains available under state labor and employment law where employers violate employer sanctions requirements and that other remedies such as punitive, compensatory, and statutory damages and attorney’s fees are available).

that the worst sweatshop employers will have an even deeper incentive to prefer such vulnerable workers over lawful U.S. workers, regardless of the possible civil penalty they may face. The labor movement has a powerful interest in ensuring that this scenario does not arise.

### CONCLUSION

In these early years of the twenty-first century, the nation's immigration laws play a significant role in regulating domestic labor markets. They also define and limit labor rights for millions of low-wage immigrant workers, often distorting the labor and employment schemes through which Congress intended to supply basic workplace protections for all workers. This corrosion undeniably affects U.S. workers as well, worsening the terms and conditions of their employment. New legalization and temporary worker programs could bring millions of workers into mainstream workplace law. As the immigration debate unfolds in Congress, the media, and the public, labor advocates and scholars have critical insights and expertise to contribute. It is hard to imagine a positive outcome for low-wage workers without labor's sustained engagement in the details of these proposals and unyielding insistence for fundamental worker protections.