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NORTH CAROLINA JOURNAL OF INTERNATIONAL LAW AND COMMERCIAL REGULATION

Volume 27 | Number 3

Article 5

Spring 2002

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Recommended Citation

Lenni B. Benson, *The Invisible Worker*, 27 N.C. J. INT'L L. & COM. REG. 483 (2001).

Available at: <http://scholarship.law.unc.edu/ncilj/vol27/iss3/5>

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The Invisible Worker

Cover Page Footnote

International Law; Commercial Law; Law

The Invisible Worker

*Lenni B. Benson**

I am an invisible man. No, I am not a spook like those who haunted Edgar Allan Poe; nor am I one of your Hollywood-movie ectoplasms. I am a man of substance, of flesh and bone, fiber and liquids—and I might even be said to possess a mind. I am invisible, understand, simply because people refuse to see me. . . . That invisibility to which I refer occurs because of a peculiar disposition of the eyes of those with whom I come in contact. A matter of the construction of their inner eyes, those eyes with which they look through their physical eyes upon reality.¹

Immigration law and policy are frequently discussed in political terms. In the United States our debate focuses on concepts of rights and membership in the American polity. We ask ourselves who should be admitted into our state and who should be allowed to remain. In part, we define our nation by setting boundaries that determine “who is in” and “who is out” of the nation. Far too often this debate ignores the invisible workers who reside in our country without formal immigration status.

Let us begin to think about the issues of immigration policy in another way. Let us, for a change, address the reality of how immigration law affects millions of this nation’s residents, rather than assume the law’s fair application. While the debate about immigration policy may seem particularly important at this moment, it is my contention that until we learn to understand the reality of the life of the undocumented person, we cannot develop nor implement our earnest reforms. As the quote above informs us, we must examine the “peculiar disposition” of our “inner eyes”

* Professor of Law and Executive Director, Justice Action Center, New York Law School. J.D., 1983, Arizona State University; B.S., 1980, Arizona State University. This paper is the text of remarks prepared for the Symposium “Work, Migration & Identity.” I appreciate the comments of Professor Margaret Taylor, Judge Evan Wallach, and the assistance of Alice Youngbar and Brenda Cooke.

¹ RALPH ELLISON, *THE INVISIBLE MAN* 3 (Modern Library, 1994) (1952) (emphasis in original).

if we hope to make the invisible seen.

Our existing immigration laws create a legal structure that in turn shapes and defines many essential social relationships. Legal definitions not only define who is a legal immigrant but also, by necessity, create the converse—the “illegal” or undocumented worker. These legal definitions go far beyond being mere labels, and instead become the building blocks of legal status, creating intentional and unintentional interactions with other laws such as criminal law, family law, tax law, and labor and employment law. These labels, and the power law conveys to labels, give rise to a class of invisible people: People who do not *fit* within the legal system (or who erroneously believe they do not fit within it), existing in an underground world—a world of invisible workers.²

The invisibility comprises two factors. First, it is difficult to see and measure people who do not want to be known to the government. Our legal concepts and structures contribute to that aspect of invisibility. Second, more abstract but equally powerful, we choose not to see these workers; they hide in plain sight. Let me explore both components of invisibility.

Counting the Invisible

First, let me examine the empirical or demographic problem. One of the enduring difficulties of forging immigration policy is gathering accurate or reliable empirical evidence of the numbers of foreign people in the United States. Even when people can be counted, accurately characterizing their status requires legal sophistication. We have a wide variety of legal status categories in the United States with complex rules and frequently altered criteria. It is not uncommon to find that an individual may not be able to fully articulate his or her own status.

More often, the potential of removal or deportation creates the incentive to hide and to avoid being counted or measured. While

² The dual identity of undocumented workers is poignantly discussed by Professor Linda Bosniak as a “clash between membership and exclusion.” Linda Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955, 1007 (1988); see also Kevin R. Johnson, *Los Olvidados: Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement*, 1993 BYU L. REV. 1139, 1221 (1993) (discussing the undocumented’s unusual situation as “outsiders in this country unlawfully and, at the same time, present in society”).

lawyers may understand that a census questionnaire will not lead to arrest by the Immigration and Naturalization Service (INS), the ordinary person may not distinguish one branch of government from another. Moreover, the false identity and document industry has grown rapidly since the 1986 statutory requirement that people prove they are authorized to work in the United States when they seek employment. Thus, distinguishing between the *documented* and the *falsely documented* adds an additional layer of complexity to the issue of counting people present in the United States.³

Let us assume that the economists, demographers, and other scientists who attempt to measure those present in our society without legal status have appropriate empirical methodology and can accurately measure the numbers of these people.⁴ How many undocumented people are there? INS estimates range from four to six million people residing without legal status in the United States.⁵ Using the high end of that estimate, approximately six

³ See GENERAL ACCOUNTING OFFICE, COMPTROLLER GENERAL OF THE UNITED STATES, *SMUGGLERS, ILLICIT DOCUMENTS, AND SCHEMES ARE UNDERMINING UNITED STATES CONTROLS OVER IMMIGRATION* GGD-76-83 (1976).

⁴ These empirical problems are fiercely debated. The inability to adequately account for the illegal migrant population is even a subject of the upcoming Population Association of America 2002 Annual Meeting Program, hosted by the Office of Population Research at Princeton University. See Population Association of America 2002 Meeting Program, 2002 Meeting Program Summary, <http://paa2002.princeton.edu/programSummary.asp> (last visited May 8, 2002); see also THE NEW AMERICANS: ECONOMIC, DEMOGRAPHIC, AND FISCAL EFFECTS OF IMMIGRATION 80-82 (James P. Smith & Barry Edmonston eds., 1997). The United States Census Bureau states unequivocally in a working paper discussing its estimates of undocumented people that "[r]esearchers have not agreed on how many unauthorized migrants were missed in the census." KEVIN E. DEARDORFF & LISA M. BLUMERMAN, *EVALUATING COMPONENTS OF INTERNATIONAL MIGRATION: ESTIMATES OF THE FOREIGN-BORN POPULATION BY MIGRANT STATUS IN 2000*, at 3 (U.S. Census Bureau Population Division, Working Paper No. 58, 2001), available at <http://www.census.gov/population/www/documentation/twps0058.html>. It is also important to know that the Census Bureau is not making specific inquiries about immigration status but is working with the number of "foreign born" and then using INS and Department of State estimates to determine who among these foreign born might be undocumented. U.S. Census Bureau, Immigration, <http://www.census.gov/population/www/socdemo/immigration.html> (last updated Dec. 28, 2001) (on file with the North Carolina Journal of International Law and Commercial Regulation).

⁵ INS, *Illegal Alien Resident Population (Estimates of Undocumented Immigrant Population Residing in the United States: Oct. 1996)*, at <http://www.ins.usdoj.gov/graphics/aboutins/statistics/illegalalien/illegal.pdf> (last updated Dec. 2001) (estimating as of October 1996 that five million illegal aliens were in the United States, and given yearly growth rates in illegal immigration, this figure should have exceeded six million

million of the 285 million people in this country are undocumented,⁶ representing approximately two percent of the population. That percentage seems small to me, but it represents people in addition to the approximate one million immigrants per year we have chosen to admit, and the more than one million temporary workers and students to whom we have also granted temporary legal admission.⁷ So the number of undocumented, or "illegal," immigrants may be seen as very large relative to the actual limits we have set in the legal admission system.⁸

The reaction that "illegal" is too large in proportion to "legal" does not answer the question of whether there are distinctions among the undocumented population. Asked another way, do we really believe all undocumented people are alike? Our value judgment that the number is too high depends in part upon our view of the quality and nature of the ties these people have with our society. For some of us, one of the critical issues is whether these people are likely to one day obtain legal status. Our judgment may depend on the reasons why they have not previously obtained legal status.

Many of the six million undocumented people are close relatives of those admitted legally, although it is difficult to know exactly how many undocumented people are relatives. For example, the wife of a computer scientist from India may have come to this country on a tourist visa under which she was authorized to remain for six months. The scientist, a lawful permanent resident, then sponsors his wife for immigration, and the couple learns that the backlog for immigration ranges from six to eight years. This is because Congress has only assigned

in 2000).

⁶ The U.S. Census Bureau estimated the current U.S. population to be 284,796,887 on July 1, 2001. U.S. Census Bureau, Population Estimates, at <http://eire.census.gov/popest/data/national.php> (last updated Apr. 11, 2002).

⁷ Statistical Yearbook of the Immigration and Naturalization Service, 1999, at http://www.ins.gov/graphics/aboutins/statistics/TempExcel99/Table_38.xls (last visited May 8, 2002).

⁸ Of course, the six million undocumented immigrants did not enter in a single year. The INS estimates the undocumented population may increase by 275,000 people annually. While this number is potentially unreliable, this is the figure that should be compared to the annual permanent immigration rates. *Illegal Alien Resident Population*, *supra* note 5.

114,200 annual visas to this high demand immigrant category.⁹ Choosing between waiting apart in separate countries or continuing their lives together in the United States, many choose to overstay their visitor visas and thus become one of those illegally present.

While recent statutory reforms have lessened the hardship of the long delay by allowing a temporary visa category and admitting those spouses and children who have been waiting more than three years, these changes are not yet widely known or understood in immigrant communities.¹⁰ Contributing to these delays is the failure of the INS to adjudicate the family-based petitions. In November 2001, the Department of State was asked if it had found all of the people eligible for this new special nonimmigrant category. The official answer was that the Department knew it did not have a clear picture, but recent electronic database information transmitted from the INS revealed that the INS reported more than 122,000 [!] unadjudicated spouse petitions which had been pending at the INS for more than three years.¹¹ We must acknowledge that these types of delays are some of the “pull factors” that lead people to self-help or law violation. Such delays must also contribute to a loss of respect for the INS, which in turn can contribute to the perception that the visa laws themselves are unimportant.

There are other provisions of the immigration laws that make it

⁹ Immigration and Nationality Act (INA) § 203(a)(2), 8 U.S.C. § 1153(a)(2) (2001).

¹⁰ INA § 101(a)(15)(v), 8 U.S.C. § 1101(a)(15)(V) (2001) (providing a temporary visa for a lawful permanent resident's spouse and minor children who have been waiting at least three years for admission as immigrants if they filed petitions on or before December 21, 2001); see also Janice Luo et al., *The V Visa: A New Life Form*, in *SELECTED FUNDAMENTALS OF IMMIGRATION LAW AND PRACTICE* 117 (2001–2002).

¹¹ *Questions and Answers for American Immigration Lawyers Association Liaison Meeting with the Visa Office of the Department of State, October 26, 2001*, 21 *IMMIGRATION LAW TODAY* 59, 62 (Jan./Feb. 2002). Given that the quota for this category is 74,000 people per year, the delay in adjudication means that the current backlog of six to eight years is undercounted by nearly two years. The erratic and delayed adjudication merely contributes to the difficulty of understanding and predicting movement of our quota numbers. In a forthcoming article, I explore at length the structural and organizational problems in three federal agencies: the INS, the Department of State, and the Department of Labor, that combine and interrelate to create many of the process failures. See Lenni B. Benson, *Breaking Bureaucratic Borders: A Necessary Step to Immigration Law Reform*, 54 *ADMIN. L. REV.* 203 (forthcoming Winter 2002).

difficult to move from undocumented status to legal status. In 1996, Congress sought to create an incentive for people to comply with our immigration laws by creating a new penalty or ground of inadmissibility for people who have remained illegally in the United States.¹² Basically, the statute sought to prevent the reentry of those people who had overstayed or entered illegally and remained for six months or more. Unlawful presence triggered statutory exclusion for three years, and, if one remained unlawfully for more than one year, the bar increased to ten years. While the bar contains a potential waiver for the spouse and children of permanent residents and citizens, it is unclear how generously the waivers will be granted. Perhaps equally disturbing, it is impossible to know how long the INS will take to adjudicate a waiver application.¹³

In what was probably an inadvertent drafting error, the new ground of exclusion only applies to those people who have *departed* the United States.¹⁴ Technically then, and as the INS applies the statute, if one does not depart the United States, regardless of the length of the overstay, one is not subject to this exclusion provision. Perversely, the statutory provision meant to encourage compliance with the law may have encouraged the opposite: People wait in the United States hoping for a method of legalizing or adjusting status rather than leaving the United States and triggering the bar. These hopes are not as irrational as they

¹² INA § 212(a)(9)(B), 8 U.S.C. § 1181(a)(9)(B) (2001).

¹³ The unlawful presence bars are particularly difficult to understand because the INS has not yet issued any regulations interpreting the statutory provision or setting guidelines for the adjudication of the waivers. While there have been some interpretive policy memos from the INS General Counsel's office, this is an area that attorneys and immigrants alike find very confusing. GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 63.10[2][b] (2001).

¹⁴ INA § 212(a)(9)(B)(i), 8 U.S.C. § 1181(a)(9)(B)(i) (2001):

Aliens unlawfully present. (i) Any alien . . . who—(I) was unlawfully present in the United States for a period of 180 days but less than 1 year, voluntarily departed the United States . . . prior to the commencement of proceedings under section 235(b)(1) . . . and again seeks admission within 3 years of the date of such alien's departure or removal, or (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

Id.

may appear. Since the mid-1980s we have had at least five different statutory reforms that sought to regularize the status of millions of people.¹⁵ The most recent program, named after its statutory reference, 245(i), allowed people who had a method of immigrating through a family or employer sponsor to pay a fine of \$1,000 in order for the INS to overlook the period of unauthorized status, illegal entry, or unauthorized work which normally bars the adjustment of status for most classes of noncitizens.¹⁶

The last revival of the 245(i) program allowed anyone who filed an application for a visa petition or a labor certification (the necessary prerequisite measuring the availability of U.S. workers for a specific job offer required in most employment categories) to qualify for the benefits of the fine-based waiver. The Department of Labor alone received nearly 230,000 applications for labor certification during a four-month period.¹⁷ The normal application rate for labor certification is approximately 65,000 to 80,000.¹⁸ Surely this surge of applications is evidence of the hundreds of thousands of people who seek to regularize their status, and it suggests that for many of these people the obstacle was not the lack of a sponsor but the problem of prior illegal entry or overstay which would make them subject to the three or ten year bars.

Thus, we get glimpses of our invisible neighbors when our laws create opportunities for them to come out of the shadows. Some neighbors are family members; some are workers who employers would sponsor through our system. Not all “illegal aliens” are alike. Trying to measure the percentage and type of undocumented people in our country is extremely difficult because

¹⁵ For example, in 1986 we had two major legalization programs, one for people unlawfully present since 1982 (note that people lawfully present did not qualify) and one for those who demonstrated at least ninety days of labor in agriculture. INA § 210(a)(B)(i), 8 U.S.C. § 1160 (2001); *see* INA § 245, 8 U.S.C. § 1255 (2001). At this time Congress also moved the “registry” date from 1948 to 1972. Thus, people who entered the United States prior to 1972 are also allowed to apply for permanent residence under relaxed rules. INA § 249, 8 U.S.C. § 1259 (2001).

¹⁶ INA § 245(i), 8 U.S.C. § 1255(i) (2001).

¹⁷ Dale Ziegler, Director of the Alien Labor Certification Program of the Office of Workplace Security of the Department of Labor, Remarks at the 2001 Annual Conference of the American Immigration Lawyers Association (June 20, 2001) (notes on file with the author).

¹⁸ *See* Benson, *supra* note 11 (discussing the workload and processing times for alien labor certification from 1990 to 2001).

of these distinctions. Making evaluative judgments about the scope and magnitude of the problem requires assumptions built upon speculations that ultimately frustrate our vision.

Refusing to See the Invisible Worker

There is, importantly, a second type of invisibility. As Ralph Ellison reminds us, there are people we see, but *see through*.¹⁹ Let us examine one industry where recent INS and congressional attention has focused on measuring labor shortages and the percentage of undocumented workers. Again, I wonder about the accuracy of such estimates,²⁰ but let us work with the information the government has provided. In 2000, the Department of Agriculture prepared a detailed report and announced that fifty-two percent of all agricultural workers in the United States were present without legal status.²¹ I repeat, fifty-two percent. Now let us go back and consider what that means in terms of the large numbers. We estimate that less than two percent of our population are undocumented noncitizens. That number suggests it is difficult to find these people. But more than half of the workers in the agriculture industry are undocumented. Undocumented agricultural workers must be easy to see and easy to find and their impact on the economics of agriculture surely must be understood. Or is it? How visible is any agricultural worker? In your mind's eye can you see the hands and faces and laboring muscles of any agricultural worker? Do you even know what agricultural work is or are your impressions built solely upon *The Grapes of Wrath*²² or the occasional trip to an apple farm or pumpkin field in the fall?²³

¹⁹ ELLISON, *supra* note 1, at 3.

²⁰ See *supra* note 4.

²¹ U.S. DEP'T OF LABOR, RESEARCH REPORT NO. 8, FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY (NAWS) 1997-1998: A DEMOGRAPHIC AND EMPLOYMENT PROFILE OF UNITED STATES FARMWORKERS 22 (2000), available at http://www.dol.gov/asp/programs/agworker/report_8.pdf.

²² JOHN STEINBECK, *THE GRAPES OF WRATH* (Viking Press, 1939).

²³ I grew up in rural Arizona on a citrus farm. We had a small farm of around fifteen acres and my family did most of the labor. Occasionally my parents hired teenagers from the local high school as part of a vocational education program for young farmers. Yet all around me were the large industrial citrus farms whose crops were contracted to large fruit corporations. Surely I saw the workers who cleared those crops or I saw their children. I cannot remember. I do not think I saw them. I did not live in town. We lived on our farm, but I assure you I did not know or truly see these workers.

So what do we do about this undocumented population and this agriculture industry, which is apparently so reliant on these workers? There are many congressionally proposed solutions.²⁴ Some focus on creating worker registries that will help farmers and agribusinesses find domestic workers; others focus on streamlining the temporary worker petitioning process for foreign workers. All of these proposed solutions are controversial for a number of reasons. Some people fear that the increase of guest-worker programs will lead to new permanent immigrants.²⁵ Others fear the impact on the impoverished domestic farm workers in the United States.²⁶ Still others appropriately worry about the abuse and suffering of the guest workers due to inadequate protection from unscrupulous labor contractors and employers.

Of course, invisibility of the worker is not a new problem and it is not limited to agriculture alone. That, in turn, adds to the complexity. What creates visibility and fairness in one industry may not be appropriate in another. These are complex problems for which solutions need to be found. However, today I am asking a different question: Can we really provide solutions when our understanding of the problem is limited by our vision of the reality of these people and their working conditions?

While several scholars, journalists, and advocates have tried to make visible the lives of both agricultural workers and other hidden workers in our society, in truth, most of us know very little about the invisible workers or the jobs they fill.²⁷ I practiced immigration law for twelve years. It was amazingly common for

I do not think it was my youthful blindness or my ignorance; perhaps I was surrounded by the children of these workers as we rode the bus to school. Instead, I suspect that even in what was a relatively small town at the time, the world of the agricultural worker and my world were segregated in many ways. Our lives did not intersect.

²⁴ See Rain Levy Minns, Note, *Registry Systems for Foreign and Domestic Farmworkers in the United States: Theory vs. Reality*, 15 GEO. IMMIGR. L.J. 663 (2001).

²⁵ See Philip Martin, *Guest Worker Programs for the 21st Century* (Apr. 2001), at <http://www.cis.org/articles/2000/back400.html> (on file with the North Carolina Journal of International Law and Commercial Regulation).

²⁶ See Andrew Scott Kosegi, *The H-2A Program: How the Weight of Agricultural Employer Subsidies is Breaking the Backs of Domestic Migrant Farm Workers*, 35 IND. L. REV. 269 (2001).

²⁷ See, e.g., PETER KWONG, *FORBIDDEN WORKERS: ILLEGAL CHINESE IMMIGRANTS AND AMERICAN LABOR* (1997); ALEC WILKINSON, *BIG SUGAR: SEASONS IN THE CANE FIELDS OF FLORIDA* (1989).

an employer to contact me, and be it manufacturer, storeowner, rancher, or a family looking to hire a domestic worker; over and over I heard the same story:

“Generally, I think we have too many immigrants and too many illegals in this country, but Henry . . . Gen Li . . . Juan . . . is different. I can’t manage without him.”

“When she told me that she needed help with her immigration papers, why I thought of course I would help her. This is the kind of person who built this country.”

It also was not uncommon for the employer to have worked with a particular employee for a number of years before learning that the worker lacked documents. Even more frequently, if the worker was white and from an English-speaking country, the employers assumed that immigration papers were “easy to obtain” or “no big deal” for their employee. This experience strongly suggests to me that most people in our country have little understanding of the immigration laws. Perhaps because we are used to meeting people from other countries, we assume all foreigners are legal immigrants. Of course, far too often, especially where the person is not white, the assumption is the person must be an immigrant and must prove legal status. For example, when employer sanctions were first established and employers had to verify the citizenship or work authorization of new hires, Puerto Ricans, United States citizens at birth, were frequently refused employment because they lacked a “green card.”²⁸ A congressionally mandated study found that national origin and racial discrimination in the arena of employment increased by nineteen percent.²⁹

Similarly, in my eight years of teaching, students repeatedly seem astonished as they begin to look around them and recognize that so many of the people they come across in everyday life may lack documents. I teach in New York City, a metropolitan area with a high percentage of immigrants. Even within this context, many of the students have never considered whether the workers they see in restaurants, delis, grocery stores, delivery trucks,

²⁸ See *United States v. Marcel Watch Corp.*, 1 OCAHO 988 (A.L.J. Morse, 1990).

²⁹ United States General Accounting Office, *Immigration Reform—Employer Sanctions and the Question of Discrimination: Hearing Before the Senate Committee on the Judiciary*, 101st Cong. (1990), available at <http://161.203.16.4/d24t8/140974.pdf>.

cleaning services, or commuting in the subway are documented or undocumented. While I am glad my students are not trying to label workers by appearance or job title, my point is that we have largely chosen to ignore the issue of immigration status.

Let me give you a very poignant example. In the horrible months after the destruction of the World Trade Center, we would all agree that our media and government officials provided a tremendous amount of information about the dismantling of the rubble and the attempts to recover the bodies of those who perished. Volunteers came from all over the country, and residents and tourists flocked to try to observe the large machinery and workers at the site. Every day *The New York Times* published numerous stories about the recovery efforts at the site. In early January, a story broke that the potential pollution at the site and in the nearby buildings was much higher than had previously been reported by government officials.³⁰ Suddenly, people working near Ground Zero learned that they might have been exposed to lead, PCBs, asbestos, and other toxins.³¹ Contractors had hired itinerant workers to clean the surrounding buildings and to remove debris from the site. Thus, when the city mobilized health care vans to come down to the site to start testing the blood and health of the workers, officials acknowledged that for the most part, they had no formal method of contacting and finding these workers because of their status. Here they are: invisible workers in the midst of one of the most public disasters in this country.

Why do we have this peculiar disposition not to see the people living and working among us? As I have suggested, in part it is because our social fabric conditions us not to “see” workers, and, especially for those of us with higher education or service industry jobs, we may be insulated from recognizing those who do a wide variety of work in our society. But I also think that part of the invisibility comes because we do not want to see. There is a basic tension in most of us that, although we treasure our sense of being Americans who treat all equally, and may feel comfortable applying legal labels in the abstract, when we are face-to-face with

³⁰ See Kirk Johnson, *Studies Will Take Sept. 11's Measure In Health Effects*, N.Y. TIMES, Jan. 11, 2002, at B1.

³¹ See Paul H.B. Shin, *Migrant Cleanup Hires Ripped*, DAILY NEWS (New York), Jan. 12, 2002, at 7; Ralph R. Ortega, *Free Exams Offered to WTC-Area Laborers*, DAILY NEWS (New York), Jan. 15, 2002, at 8.

a human, at times we struggle and seek solace in determining that this person is a “good illegal” or a “worthy immigrant” or “doing a job no one else wants to do.” I am not advocating that you reject your willingness to see that humanity; please don’t mistake me. Instead, I am asking us to examine why we don’t try harder to shape immigration laws and the *critical operation* of these laws to guarantee equal treatment and humanity.

Increased Visibility \approx Increased Justice

As I have already suggested, I think a critical and under-recognized contributor to the visibility problem is the inability of the agencies charged with regulating immigration to function efficiently and in a transparent fashion. Both Congress and the executive branch are trying harder to reduce backlogs and achieve some of these goals. Recently, the House has proposed a large increase to the INS’s budget to adjudicate backlogged petitions, and the INS has taken preliminary steps to improve customer service and set up an ombuds’ office to try to resolve problems.³² While I remain skeptical based on many years of observation of the problem, these are welcome steps in the right direction.

Equally important is a serious examination of how all workers are protected in our society and how under enforcement of our labor and safety laws contributes to the problem of undocumented workers in our society. This is not a novel idea. Many people who seek to find ways to protect the domestic workforce and lessen the incentives for employers to rely on undocumented labor have called for greater enforcement of our laws.³³ In a recent law review article exploring wage and hour enforcement in the agricultural industry, Rain Levy Minns reported that in the years she examined, about 0.108% of all farms had inspections, but the violation rate found where inspections were conducted was sixty-three percent.³⁴ However, it is obvious that we lack the political will to increase enforcement of our laws. There are several recent

³² INS, Fact Sheet: INS Restructuring Plan (Nov. 14, 2001), at <http://www.ins.gov/graphics/publicaffairs/factsheets/restruct.htm> (on file with the North Carolina Journal of International Law and Commercial Regulation).

³³ Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 HARV. C.R.-C.L. L. REV. 345 (2001).

³⁴ Minns, *supra* note 24, at 688.

examples where the Department of Labor or the INS tried to increase enforcement in an industry and the political outcry quickly led to a slow down or stoppage of the investigations.

In my view, we cannot try to use the removal of aliens and employer sanctions to approach this problem. Instead, we should increase wage and hour and safety and health enforcement to ensure the safety of all workers.³⁵ We also have to couple these investigations with a guarantee that the information uncovered by the Department of Labor, the Occupational Safety and Health Administration, or other state agencies will not be turned over to the INS as fodder for large numbers of removals and deportations. I am not suggesting a moratorium on removals, but the INS has more than enough work effectuating the removals of the people already in its custody, many of whom are convicted of crimes or are apprehended through other enforcement mechanisms. In the past, these agencies have sometimes worked under Memoranda of Understanding that the investigations would not subject people to border enforcement.³⁶ In a number of states, the state attorneys general have used their offices to enforce wage and hour laws and obtain back pay for undocumented workers.³⁷ These types of investigations have also led industry organizations to try to provide greater education and guidance to employers about the requirements of our wage and hour laws. But these types of programs cannot be successful if the main witnesses are afraid of

³⁵ Unfortunately, as this article goes to press, the Supreme Court held that the National Labor Relations Board (NLRB) improperly awarded backpay to an undocumented alien who had been terminated by his employer for union organizing activity. *See Hoffman Plastic Compounds, Inc. v. NLRB*, 122 S. Ct. 1275 (2002) (5-4 decision). The NLRB had originally ordered the backpay in the belief that allowing an employer to escape this sanction because the worker was undocumented would seriously undermine the labor laws of the United States. The narrow majority of the Supreme Court concluded instead that awarding back pay would frustrate U.S. immigration policy. Obviously this problem requires congressional attention and I would urge Congress to think about the larger harm to all U.S. workers because this case and others like it may actually encourage the employment of undocumented workers.

³⁶ *See, e.g.*, INS, Memorandum of Understanding to Enhance Worksite Enforcement Sanctions and Labor Standards (Nov. 23, 1998), <http://www.ins.usdoj.gov/graphics/publicaffairs/backgrounds/laborbg.htm> (on file with the North Carolina Journal of International Law and Commercial Regulation).

³⁷ Greg Wilson, *Back Pay For Grocery Workers*, DAILY NEWS (New York), Nov. 21, 2001, at 69 (New York Attorney General); Ralph Ranali, *AG Aids Foreign Workers, Not INS*, THE BOSTON GLOBE, Apr. 1, 2001, at A1 (Massachusetts Attorney General).

immediate detention or removal from the United States.³⁸

I am not naive enough to believe that federal or state prosecutions and investigations can really solve the economic and social conditions that lead employers to seek out or rely upon undocumented workers. An increase in these efforts to a reasonable level, a level that indicates our commitment to the labor and employment laws, will have a side benefit of helping us gather information about the real lives of the workers. It may also have the side benefits of reducing some of the incentives to hire undocumented people or increasing the opportunity to educate employers about using existing law to sponsor foreign workers.

In addition, we need to examine the complex mesh of our labor and employment laws and dismantle the obstacles for the undocumented to recover adequate remedies under the laws. We also need to recognize that government enforcement alone will never be sufficient, and thus we should create adequate incentives, such as attorneys' fees, to encourage private rights of action and litigation by those victimized.

I am not offering a silver bullet that will solve our "illegal immigration" problem. In fact, my premise is that there is no single solution and that our willful blindness coupled with the invisibility of the workers' lives make it impossible to fashion perfect political and legal solutions. Still, I urge that we remember that behind every legal label is a person. Let us do the humane thing. How must it feel to labor hard, to work without any safety net, to always be subject to the nightmare of the employer who refuses to pay, who may call the border patrol? When will we see this as demeaning and immoral treatment of people? So long as we seek comfort in the labels, we will have the invisible worker within our society. Of course, the invisible worker does not pay the cost alone. There are also costs to the children born to the undocumented, costs to the employer who tries to comply with the law and cannot compete with unscrupulous employers, and costs to the health and freedom of workers throughout our country. We all suffer when we support a legal regime where justice is blind because our society refuses to see.

³⁸ See Nessel, *supra* note 33, at 393 (suggesting legal status for undocumented workers who testify against employers who violate wage and hour laws).